

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 438 OF 1985

BETWEEN:

L. G. M'MANGA (MALE) PLAINTIFF

- AND -

L. MUSSA (FEMALE) DEFENDANT

Coram: MBALAME, J.

Kumange of Counsel for the Plaintiff
Saidi of Counsel for the Defendant
Nkhoma, Official Interpreter
Gausi (Mrs), Court Reporter

J U D G M E N T

By writ of summons specially endorsed dated 18th July, 1985, the plaintiff claims from the defendant the return of a motor vehicle, Peugeot 404, BB 9761 either in a repaired and road-worthy state or its value which is put at K5,000.00 and the costs of this action. He has, to support this claim, filed a statement of claim composed of a litany of paragraphs which tell in every detail the history of his claim. The defendant denies the claim and puts the plaintiff to strict proof of all the allegations made therein.

This is a civil case. The standard proof is well set and established and is on the balance of probabilities.

It is pertinent to note that most of the facts are not in dispute and I shall, therefore, proceed to narrate these before I examine the bone of contention. It is the plaintiff's story that in 1978 the engine of his motor vehicle, Peugeot 404, BB9761, developed some fault through a broken sliced washer which necessitated overhauling the engine. He took it to Mussa's Garage in Zomba in June, 1978 which was then being operated by the defendant's husband, Mr. Mussa, now deceased, who removed the engine and advised the plaintiff to take it to Mike Appel and Gatto for overhauling. This was done and the plaintiff paid for the work and parts therein fitted. The engine was then taken back to Mr. Mussa at Mussa's Garage. At that time the garage had shifted from its original business premises on the airport road to Mr. Mussa's house.

It is said that Mr. Mussa fell ill in that very year and had to be hospitalised. The car has not been repaired to date hence these proceedings. So far these facts are not disputed. Both the plaintiff and defendant gave evidence in this case. The plaintiff was the only witness for his case while the defendant called an official from the Department of the Registrar General in addition to her evidence

In his evidence the plaintiff further said that he dealt with the defendant's late husband up to the time he got the engine back from Mike Appel and Gatto. He said he personally took the engine to Mussa's Garage, then at the Mussa's house. He personally handed it to the late Mr. Mussa who assured him the engine would be remounted into the car. He said he, in 1981, thereafter called at the garage to check on the progress of the repairs and was informed that the engine could not be remounted because Mr. Mussa was in and out of hospital. He was concerned and decided to move the vehicle to another garage when the defendant stopped him from doing so and assured him that she was now going to repair it herself. He said she told him to buy some parts, and was given a list of these, to enable her complete the work. He went and bought these from Stansfield Motors on two occasions. On the first occasion the parts he brought were personally handed to the defendant by him. He gave the second lot to her mechanic as he did not find her on the second occasion. Despite these parts the car was still not repaired and he could not find the defendant until 1984 when he heard that her husband had left this world. He said he was convinced that the defendant would repair the car because her husband was ill.

Having failed to find her in person on several occasions he took to telephoning. He said she told him to come and collect his vehicle and that when he asked her whether it was mechanically ready she said she knew nothing. He then went to the house/garage and found that the vehicle was a scrap. The defendant was not there. He next met her at his filling station in the company of one Dr. Chawinga and later saw an advertisement in the Daily Times of 3rd October, 1984, which was in the following terms:

" NOTICE

BB 9761 and BC 3124.

Notice is hereby given to the owners of the above cars, that the above cars must be collected before seven days as from today or else will be sold to cover storage fees. MUSSA'S GARAGE. "

This notice was exhibited as exhibit P.7. It was further his testimony that the defendant was then in control of the garage as she never introduced him to any administrator or

personal representative of her husband's estate. This concluded his evidence in chief.

The defendant also gave evidence. It was her story that she knew of Mussa's Garage because it was her husband's business and they at that time lived just behind the garage. There were times she would park her car at the garage and walk behind to her house. She said at the time her husband run the garage she was running bars. It was her testimony that she was never involved in the garage business nor was she a partner therein. She said that when her husband fell ill he sold Mussa's Garage and took with him to the house some of his customer's cars to repair at the new house. These he used to repair peace meal when he felt well and had time and the plaintiff's was one of them. It was further said that her husband was from time to time hospitalised in various hospitals and she used to go and wait on him on those occasions. In his absence nobody did the husband's work and the only person to look after the vehicles was a watchman. She said there were no mechanics at the house. When it became apparent that the husband was getting too sick to repair the vehicles, some of his customers came to collect their vehicles and she gave them the vehicle's keys. Her husband died on 4th March, 1983. She said she knew the plaintiff as a person and came to know him for the first time that he was the owner of BB 9761 when his car was one of the two left at the house premises. She said she then put the notice, Exhibit P.7, in the Daily Times as she wanted the two vehicles removed from her premises. The owner of BC 3124 came to collect his car but the plaintiff did not. She said in the Notice she signed as Mussa's Garage because if she put her name the owners would not have known her as she had no business connections with them since they left their cars at Mussa's Garage. She was emphatic that she had no business transactions with the plaintiff and never told him that she was going to repair his vehicle. She received no spare parts from him and never put herself up as a mechanic as she knew nothing about mechanics. She denied speaking to the plaintiff on the phone and said after Exhibit P7 she met him at his filling station and brought it to his attention. He said he would come to collect his car but never did.

Both counsel addressed me. Mr. Kumange, who appears for the plaintiff has submitted that by June, 1981, Mussa's Garage was no longer at its original place on the Airport Road but at the defendants' new premises near the 3rd mile on the Zomba/Blantyre road. Her husband was then bed-ridden and she had control of the garage as an owner. This is why, he argues, when the plaintiff wanted to remove his car to another garage she assured him that she would effect the repairs herself if only she brought the other required spare parts. He said from that day the contract to repair the car between the plaintiff and late Mr. Mussa was put to an end and a new one entered into between the plaintiff and the defendant.

He further submitted that it is immaterial that the defendant was not herself a mechanic as she had several mechanics who worked under her and whom she supervised. It was her duty to produce these mechanics at the trial to support her case and not the plaintiff's, he submitted. He further contended that this was a case of bailment for reward and that the defendant did not deny possession of the vehicle. He said this was why she put the advertisement in the Daily Times. Developing his argument he said the defendant and or her agents converted some parts from the said car for her or their own use. He invited this court to consider her a gratuitous bailee if it found she was not a bailee for reward.

On the other hand, Mr. Saidi who appears for the defendant has attacked the pleadings. He contends that although the evidence adduced by the plaintiff tends to show that the defendant is sued in her own right, the pleadings on the other hand, show that she is sued in her capacity trading as Mussa's Garage. He submits that the evidence on record shows that Mussa's Garage was owned by the defendant's husband and that the vehicle was delivered to him and not to the defendant. Further he contends that if the defendant did run the garage then the burden lies on the plaintiff to prove that allegation and that she indeed did employ mechanics. He has further argued that for the defendant to be held an involuntary bailee the plaintiff must prove that he delivered the car to her and thereafter prove negligence on her part which led to the destruction and or loss of the car.

I have no doubt on the evidence before me that the plaintiff took his vehicle, BB 9761, to Mussa's Garage for repairs. The proprietor of the garage was the defendant's husband. The pleadings show that it was taken there in 1980. I, however, find from the evidence before me that it was taken there in June, 1978. I also find, as a fact, that the vehicle was personally handed to the late Mr. Mussa and so was the reconditioned engine in 1980. I have no doubt either that by 1985, when these proceedings were being instituted, the vehicle had been rendered a scrap and that the defendant had since removed it from her former house, which she has since sold, to her late husband's former garage, now being operated by some other person.

What I now have to decide is whether there was any contract between the two parties for the defendant to repair the vehicle. With respect, I pause here to comment on the writ. The defendant is addressed to as "L. Mussa (Female) T/A Mussa's Garage, P.O. Box 161, Zomba". I have examined Exhibit 1, the Certificate of Registration of Mussa's Garage under the Business Names Registration Act (Cap.46:02) of the Laws of Malawi. It is in the name of Mussa Abdul Gani, the defendant's late husband. It is dated the 24th August, 1979. It is then alleged that if the defendant did not run Mussa's Garage then she must have run Zomba Garage. There is another certificate of registration in respect of the same garage dated the 9th of April,

1982, with an endorsement thereon which reads as follows:

"ENDORSEMENT NO. 1

As from the 1st day of July, 1982, Mr. Abdul Kader Ahmed Tayub sold the business to Mr. Faruk Abdul Gani.

Signed of Business Names : Assistant Registrar"

There is no evidence before me showing that the business was ever owned before by the defendant and this was the testimony of DW2; a witness from the Department of the Registrar General. I, therefore, find as a fact that the defendant neither traded under the style of Mussa's Garage or Zomba Garage and that she therefore cannot be sued as such.

A close look at the statement of claim attached to the writ, the defence filed by the defendant, and all the subsequent pleadings shows that the defendant is sued as "L. Mussa (Female)". I am mindful of the fact that the plaintiff never sought to amend the writ, nevertheless, the proceedings relate to the same defendant and I think I would have thought otherwise were Mussa's Garage to be limited company. In any case the defendant cannot be said to have been put at a disadvantage nor can it be said that she was not aware of the nature of the suit. Indeed paragraph 2 of the statement of claim is in the following terms:

- "2) The defendant is sued in her own right and as a mechanic or one professing to be and carrying on business as such".

What I now have to decide is whether the defendant is a mechanic or if not one then at least whether she did profess at the material time to be carrying on business as such. I would wish to think that she need not be a mechanic to carry on that business as she could very well do so by employing competent people to do it for her. I have further to decide whether she contracted with the defendant to repair the vehicle in question.

The plaintiff alleges that the defendant is a mechanic. Other than his word of mouth he has brought no other evidence to support this allegation. Both parties lived in Zomba and had known each other as early as the 1960s, surely the plaintiff should be able to produce one or two witnesses who have seen her work as a mechanic, in the absence of any documentary evidence. He did not do so. The defendant has emphatically denied being one or having any mechanical knowledge. All she can do is to drive a motor vehicle, she said. I would believe her. I find as a fact that she is not a mechanic.

The plaintiff claims that she undertook to repair his vehicle. He produced Exhibit P4 as a list of parts she asked him to buy. It is dated 23/1/80 and yet the plaintiff says his contract with the defendant was entered in 1981. Exhibit P4 must have been written before the alleged contract and the author is not known and no evidence was led to show that it was the defendant who wrote it. It is further alleged that when he brought the first batch of spareparts he personally handed them to the defendant. Again other than his word of mouth he did not adduce any other evidence to prove this. He produced receipts from Stansfield Motors but no document from the defendant, not even an eye witness. The same applies to the second lot which he says he gave to the defendant's mechanic. He may very well have bought these and delivered them to the late husband's business but there is no evidence that they were brought to the defendant or any of her agents if at all. I do not believe he gave these to the defendant. There is a further allegation that he telephoned the defendant on several occasions and that he did not find her and when he did she told him "come and collect your car". Again, with respect, this is a Cock and Bull story best suited for the mariners. The plaintiff is an educated man, an ex-civil servant who impressed me as a man of business. Surely, he could have easily written to the defendant reminding her of her obligations when he saw that things were not going well and she was trying to evade him, if at all.

Emphasis has been laid on the advertisement of 3rd October, 1984, Exhibit P7. The defendant does not deny making that advertisement. It is said that this was proof enough to show that she was running Mussa's Garage. With respect although the plaintiff said Mr. Mussa died in 1984 the defendant vividly remembered that he died on 4th March, 1983. She said it was a day after Martyrs Day in 1983. I am inclined to believe her. By the 3rd of October, 1984 therefore Mr. Mussa was no longer with us in this world and there is no evidence to show that the defendant was registered as Mussa's Garage. Explaining why she used that business name on the advertisement the defendant said that since the owners of the two vehicles had, in the first place, left their vehicles with Mussa's Garage, she could not put her personal name as they would not know her. They would easily remember when they saw the Garage's name, she said.

On the evidence before me, therefore, I find as a fact that the defendant is not a mechanic and that she never, at any time, professed to be carrying on business as such at the material time. It is further my finding that the defendant did not at any time offer or agree to repair the plaintiff's vehicle and that she neither gave him a list of spare parts nor did she receive any of those parts from him. I am, on the other hand, satisfied that she put the advertisement in the paper to have the two vehicles removed from her matrimonial house as she was selling the same.

There is then the question of bailment. From my findings above there can be no question of bailment for reward since I have held that there was no contract to repair the vehicle and there is no evidence that the defendant was keeping the vehicle for the plaintiff for reward. It is not disputed, however, that the plaintiff's vehicle was transferred to the defendant's house when her husband fell sick and sold his business, Mussa's Garage. This was in 1980. The husband died in March 1983 and in view of what I have held above the plaintiff's vehicle was in his bailment up to that date. It is to be noted that the plaintiff did nothing to remove his vehicle after the death. The defendant does not deny remaining in the matrimonial house within which yard the vehicle was. Indeed, it cannot be disputed that she was in-charge of the house and premises after the husband's death. In other words, the vehicle came into her possession on the 4th of March, 1983. Generally, she cannot without her consent be considered a bailee of the car. (See Neuwith vs Over Darwen Industrial Co-operative Society (1894) 63 LJ QB. 290). It was her evidence that she had nothing to do with the car although she knew of its presence. However, she was the sole proprietor of the house at that time. Indeed, there are circumstances, as was in the case of Heugh vs LNW Ry (1870) LR. 5EX51, where a person finds that, without consent on his part, he has another's chattel in his control or on his premises. In the instant case she became an involuntary bailee. In a case like this one gross negligence or deliberate injury to the property will make the defendant liable but not mere negligence. I do not see any of the three in this case. It is in evidence that before the death of Mr. Mussa the plaintiff's car was already a scrap. Indeed, it lay there from 1978 to March, 1983, when the defendant's husband died and the defendant became an involuntary bailee. There is no evidence to show that there was any further damage after the death of Mr. Mussa. In the following year the defendant advertised to have the vehicle removed and since the owner did not turn up she removed it to the former Mussa's Garage premises where it had come from. In my judgment, she discharged her bailment from the dead line given in the papers through Exhibit P7. In the instant case the defendant, in my judgment, did everything reasonable as an involuntary bailee and cannot be held to be liable to pay any damages especially when there are none proved to have been occasioned after 4th March, 1983.

Counsel for the plaintiff has also submitted that the defendant must also be held liable in conversion. With respect this aspect of the law was not pleaded and can, therefore, not be entertained. Even if it were pleaded there is not a scintilla of evidence to support it as none has been advanced.

In the end result, therefore, the plaintiff's claim must fail in its entirety with costs to the defendant.

~~PRONOUNCED~~ in open Court this 12th day of August,
1987, at Blantyre.

A handwritten signature in dark ink, consisting of a large, stylized loop followed by a diagonal stroke.

R. P. Mbalame
JUDGE