IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY
CIVIL CAUSE NO. 932 OF 2002

BETWEEN:

I.I. LORGAT…………………………………………………………………………………………..IST PLAINTIFF

MIDWAY SERVICE STATION (Pvt) LIMITED………………………….2ND PLAINTIFF

and

FINANCE BANK OF MALAWI LIMITED………………………………………….DEFENDANT

CORAM: HON. JUSTICE F.E. KAPANDA
Tembenu, of Counsel for the Plaintiff
Salima, of Counsel for the Defendant
Mdala, Official Interpreter
Pindani (Mrs), Court Reporter

Place and Date of hearing : Blantyre 11th March 2004, 2nd November2004,8th December 2004

Date of judgment : 13th May, 2005

Editorial Note

There is essentially one question that arises to be decided by this Court viz whether, the Defendant breached the contract of the sale of land that was entered into between the Plaintiff and the Defendant. This main question will have to be considered together with the following additional questions:

(a) whether on executing the agreement for sale of land of 9th December 2002 the Plaintiff thereby became the owner of property known as Title No. Chichiri 52.

(b) whether, inspite of incomplete payment of the purchase price, the Defendant was not entitled to re-sell the said property.

(c) Whether time was of essence of the contract in so far as the formal transfer of the property was concerned; further or in the alternative.

(d) Whether the obtaining of consent from government to transfer of the land was of essence, and failure to obtain such consent, entitled the Plaintiff to treat the contract as

having been repudiated by the Defendant.

If the determination by this Court be that the Defendant breached the said contract then the Court will also have to consider the following matters:

(a) whether to award the Plaintiff general damages.

(b) whether, in terms of the Plaintiff and the Defendant, the Plaintiff is entitled to a refund of the purchase price found to have been paid by him.

(c) Whether interest is payable on the said purchase price.

JUDGMENT

Kapanda,J:

Introduction

The heading of the action herein shows that there are two Plaintiffs viz I.I. Lorgat being the First Plaintiff and Midway Service

Station Ltd the Second Plaintiff, but the statement of claim apparently indicates that it is the First Plaintiff who is seeking relief from this Court. Indeed, the main body pleadings do not make any reference to the Second Plaintiff. Accordingly, this Court will treat this action as having been commenced by the First Plaintiff and that it is him who wants damages for an alleged breach of contract for sale of land known as Title No, Chichiri 52. In point of fact it is him who entered into a contract of sale of land with the Defendant. It is also observed that there is a claim by the Plaintiff for a refund of all monies allegedly paid to the Defendant together with interest thereon.

The Defendant denies being liable to pay the Plaintiff any damages or at all for the said breach of contract of sale of the said land. Actually, the Defendant has pleaded the defence of a set-off. Further, the Defendant counterclaims from the Plaintiff the sum of K14,066,703.37 which it claims arises from a loan account the Plaintiff has failed to service.

The Plaintiff’s claim and the Defendant’s response

At this juncture the Court would wish to set out the particulars of the claim by the Plaintiff and the Defendant’s response. The complaint by the Plaintiff and the response of the Defendant are to be found in the pleadings that were exchanged between the Plaintiff and the Defendant. These are the Plaintiff’s Amended Statement of Claim and, the Defendant’s Amended Defence and Amended Counterclaim.

The Court proposes to only give a sketch of what each one of the parties has alleged. As regards the full pleadings those will be set out as footnotes.

The Claim by the 1st Plaintiff

In his amendment statement of claim[1] the First Plaintiff alleges that he entered into an agreement with the Defendant to buy land. The agreed price was K20,000,000.00 of which K15, 000,000.00

[1] "AMENDED STATEMENT OF CLAIM

1. By a contract made orally and evidenced by an exchange of correspondence between the 1st Plaintiff and the Defendant, the Plaintiff agreed to buy freehold property known as title No. Chichiri 52 at the price of K20,000,000.00.

2. In terms of the said contract, the Plaintiffs agreed to pay the sum of K15,000,000.00 to the Defendant.

3. The balance of K5,000,000.000 was to be paid to the 2nd Defendant by instalments stipulated in an agreement executed by both parties dated 9th December, 2002.

4. It was a further implied and/or express term of the said contract, that on payment of the said sum of K15,000,000.00 to the Defendant, the property would be transferred to the 1st Plaintiff.

5. In pursuance of the said contract, the Plaintiff executed a Transfer of Land in or about December, 2002.

Particulars

Invitation for tenders to purchase plot number CC 42 (being Title No. Chichiri 52 which appeared in the Daily Times of 31st March, 2003

6. In breach of the said agreement, the Defendant has failed to execute the said Transfer of Land and has now advertised the said property for sale to other persons.

7. By offering the said property for sale, the defendant has thereby breached its contract with the plaintiff.

8. By its letter to the defendant dated the 9th April 2002, the plaintiff communicated its acceptance of the breach to the defendant.

9. In the premises, the plaintiff the claims that the purchase price paid by him, namely, the sum of K15,000.000.00 be refunded.

10. By reason of the said breach, the plaintiff further claims interest at comparable bank lending rates for money due and owing on commercial debts, in accordance with Section 11(a)(v) of the Courts Act.

was to be paid to the Defendant and the balance of K5,000,000.00 was to be paid to a Gullam Kharodia. He further alleges that he paid the said sum of K15,000,000.00. The First Plaintiff further contends that it was the implied and/or express term of the said contract of sale that on payment of the said sum of K15,000,000.00 to the Defendant the said land would be transferred to him. It is the further allegation of the Plaintiff that he did cause to be executed a transfer of the land but the Defendant has not honoured its part of the bargain by failing to execute the transfer documents and proceeded to advertise the sale of the said property to other persons.

The Plaintiff further asserts that by offering the said property for sale the Defendant has breached the contract with him. Accordingly, the Plaintiff accepted the breach of the agreement on the part of the Defendant.

The Plaintiff, therefore, claims that by reason of the breach there must be paid to him by the Defendant the following:

(a) Tthe purchase price allegedly paid by him in the sum of K15,000,000.00.

(b) Interest at comparable bank lending rates for money due

AND the plaintiff claims:-

(1) the said sum of K15.0m
(2) interest as pleaded herein
(3) such further or other relief as the Court deems fit
(4) costs of this action."

and owing in commercial debts in accordance with Section 11(a)(v) of the Courts Act.

(c) Further or other relief this Court may deem fit.

(d) Costs of, and occasioned by, the action.

The Defendant's response to the claim by the Plaintiff

The Defendant's response to the claim by the Plaintiff are contained in the Amended of Defence and Amended Counterclaim[2]

[2] "AMENDED DEFENCE

1. The 1st Defendant deny that any grounds have occurred to entitled the Plaintiff's to rescind the Contract of Sale for Chichiri 52 and will on the trial seek specific particulars and proof thereof.

2. The 1st Defendant denies that the Plaintiff is entitled to a refund of the K15,000,000.00.

3. The 1st and 2nd Defendants aver that:-

   (a) The 1st Plaintiff and the 1st Defendant agreed to buy and sell respectively, property on Title Number Chichiri 52 in the sum of K20,000,000.00.
   (b) As part payment for the said purchase, the 1st Plaintiff paid K10,000,000.00 by paying K4,200,000.00 from the 1st Plaintiff's own sources and K6,000,000.00 through a loan from the 1st Defendant
   (c) It was an agreement between the 1st Plaintiff and the 1st Defendant that the Chichiri 52 would act as security for the said loan.
   (d) Later on, the Plaintiffs made further payments on the property which, together with the initial deposit amounted to K16,200,000.00.
   (e) Therefore, the 1st Plaintiff's rightful claim from the Defendant herein would amount to K10,200,000.00 since the remaining K6,000,000.00 was paid out of a loan from the 1st Defendant which loan the Plaintiff has failed to pay.

4. The Defendant further contends herein that due to non-payment, the 1st Plaintiff's loan account has risen from K6,000,000.00 to K14,226,145.73 as at 15th April 2003 and

which is dated 21st April 2003 and appear to have been served on the Plaintiff's Legal Practitioners on the 21st of May 2003.

Essentially the Defendant denies that there are any grounds that would entitle the Plaintiff to rescind the contract of sale of the land the subject-matter of this action. Further, the Defendant denies that the Plaintiff is entitled to a refund of the said sum of K15,000,000.00 or any other sum or at all.

The Defendant goes on to allege that the Plaintiff failed to repay a loan of K6,000,000.00 which he obtained from the Defendant and used as part payment of the purchase price of the land in question. It is further alleged by the Defendant that as a result of this default the Plaintiff's loan account has risen from the said sum of K6,000,000.00 to

continues to grow at Bank lending rate.

5. Further, the 1st Plaintiff has another loan account on Karibu Food Products and from the Defendants which also remains unpaid and has risen to K10,039,557.64 as at 15th April 2003.

6. From the foregoing, the Defendant pleads a set-off from the Plaintiff's claim and contends herein even after a complete set-off a balance of K14,065,703.37 remains due unpaid from the Plaintiff's to the Defendant which continue to grow with interest.

7. Save as herein admitted the Defendants deny each and every allegation of fact as if each one of them is herein set out and traversed seriatim.

AMENDED COUNTER-CLAIM

1. The Defendant repeats contents of paragraphs 3,4,5,6, and 7 and Counterclaims for the sum of K14,065,703.37.

2. The Defendant further claims the following:-

   (a) Interest on the amount in paragraph 1 above at prevailing bank rate.
   (b) 15% Collection Fees.
   (c) 20% Surtax on the Collection Fees.

Cost of this Counter-Claim."

K14,226,145.73 as at 15th April 2003 and continues to grow at bank lending. The Defendant further avers that the 1st Plaintiff has another loan account which was obtained in the name of Karibu Food Products and also remains unpaid and has rised to K10,039,557.64 as at 15th April 2003. The Plaintiff, therefore, pleads a set off from the Plaintiff's claim. It further contends that after this set-off there still remains a balance of K14,065,703.37 which remains due to it from the Plaintiff.

Moreover, the Defendant counterclaims from the Plaintiff the said sum of K14,065,703.37 and interest on it at prevailing bank rate. Additionally, the Defendant is also claiming 15% collection fees on the said sum of K14,069,703.37 which it is alleged is the balance that still remains due after the said set-off. The Defendant also claims 20% surtax on the said collection fees. Finally, the Defendant prays for costs of the counter-claim mentioned above.

Pausing here I wish to make an observation regarding the claim for 15% collection fees. Insert observation in **Kankhwangwa or Thomson vs Leyland Daf (Mw) Ltd**

The Plaintiff's reply to the Defendant's Defence and Defence to the Counter Claim

The Plaintiff has joined issues with the Defendant on its Amended defence and has also put up a Defence to the Counter Claim[3]. Further, as will be observed from the reply to the Amended Defence and the Defence to the Counter Claim, the Plaintiff has made some admissions.

[3] "**AMENDED REPLY TO DEFENCE AND DEFENCE TO COUNTER-CLAIM**

1. The Plaintiff joins issue with the Defendant in its defence.

2. The Plaintiff denies paragraph 3 (e), 4 and 5 of the Defence but admits paragraph 3 (a)-(d) of the Amended Defence.

3. The Plaintiff refers to paragraphs 4 and 6 of the Amended Defence and states that a bulk of the Defendant's counter-claim comprises interest charged on interest. Consequently, the same is oppressive and extortionate calling for the intervention of this Court under Loans Recovery Act.

PARTICULARS

- The Original loan amounts – K6,000,000.00
- Current arrears – K14,065,703.37

4. The Plaintiff refers to paragraph 5 of the Amended Defence and states that the sum of K14,065,703.37 relates to a totally different transaction secured by other property and the Defendant has no right whatsoever to consolidate that loan with the present transaction.

5. The Plaintiff refers to paragraph 1 of the Counter-Claim and states that the Defendant induced the Plaintiff to stop payment of the cheques referred to in the said paragraph.

6. The said cheques were stopped by reason of the Defendant's failure to complete the transfer of property known as Title No. Chichiri 52 which transfer was a condition precedent to creation of a charge of the same property in favour of the Defendant.

7. The Plaintiff repeats the foregoing and further states that the existence of the overdraft out of which the Plaintiff's alleged indebtedness arises, was unilaterally maintained and continued by the Defendant without the sanction and authority of the Plaintiff.

8. In the premises, the Plaintiff denies owing the Defendant the monies claimed by the Defendant by reason of the unauthorized overdraft facilities.

DEFENCE TO COUNTER-CLAIM

9. The Plaintiff refers to paragraph 2 of the Counter-Claim and denies owing the Defendant the sums of money particularized thereunder.

10. The Plaintiff refers to paragraphs 1-8 hereof inclusive and denies that the Defendant is entitled to the monies claimed in the Counter-Claim and puts the Defendant to strict proof

Moreover, the Plaintiff charges that the Defendant's counterclaim comprises interest charged on interest which it alleges is oppressive and extortionate. It was further contended by the Plaintiff that the counter claim in the said sum of K14,065,703.73 relates to a totally different transaction secured by other property and therefore the Defendant has no right to consolidate that loan with the transaction the subject-matter of the action that he commenced against the Defendant.

In sum, the Plaintiff denies owing the Defendant the monies claimed by the later. It is alleged by the Plaintiff that his alleged indebtedness to the Defendant arises from an unauthorized overdraft facility. As regards the alleged admissions by the Plaintiff, the following need to be put in this judgment: The Plaintiff admits that as part payment for the purchase of the property in question he obtained a K6,000,000.00 loan from the Defendant. Further, the Plaintiff does not deny the allegation by the Defendant that the property on Title No. Chichiri 52 was to act as a security for the said loan. Moreover, the Plaintiff agreed with the averment by the Defendant that there were further payments made by the Plaintiff which, together with the initial deposit, amounted to K16,200,000.00.

The essence of the Plaintiff's defence to the counter claim is that he denies owing the Defendant the sums of money set out in the counter claim. Indeed, the Plaintiff prays that the Defendant's counter claim dismissed with costs.

The above is a summary of what the pleadings are in this matter.

thereof.

11. The particulars of claim set out under paragraph 2 of the Counter- Claim are denied in their entirety.

12. Save as herein admitted, the Plaintiff denies all the allegations of fact set out in the Defendant's Counter-Claim and prays that the same be dismissed with costs."

It is now necessary that the issues for determination arising from the said pleadings should be set out in this judgment.

Question for Determination

As I understand it, from the pleadings that were exchanged between the Plaintiff and the Defendant, there is principally one question that arises to be decided by this Court. The problem that must be determined is whether, on the facts of this case, the Defendant breached the contract of sale of land that was entered into between the Plaintiff and the Defendant. The main question posed above, in my view, will have to be considered together with the following additional questions:

(a) whether on executing the agreement for sale of land, of 9th December 2002, the Plaintiff thereby became the owner of property know as Title No. Chichiri 52.

(b) whether, inspite of incomplete payment of the purchase price, the Defendant was not entitled to re-sell the said property.

(c) Whether time was of essence of the contract in so far as the formal transfer of the property was concerned; further or in the alternative.

(d) Whether, the obtaining of consent from government to transfer of the land, was of essence and failure to obtain such consent entitled the Plaintiff to treat the contract as

having been repudiated by the Defendant.

If the determination by this Court be that the Defendant breached the said contract then I must also consider the following further matters:

(a) whether to award the Plaintiff general damages.

(b) whether, in terms of the agreement between the Plaintiff and the Defendant, the Plaintiff is entitled to a refund of the purchase price found to have been paid by him.

(c) Whether interest is payable on the said purchase price.

It is now important, before I make any determination on the facts in issue enumerated above, that I say something about the evidence that was offered by the parties in this matter. Thereafter, the Court will narrate the facts that were disclosed from the said testimony that was adduced by both the Plaintiff and the Defendant.

The testimony of the parties and facts from the evidence

The testimony of the Parties

The parties in this matter offered witness statements, with exhibits attached, to support their contentions in their respective pleadings. The Plaintiff filed two witness statements and the Defendant put on record with the Court one witness statement. The two authors of these written statements adopted them during trial and were cross-examined on the contents of same. Further, the writers of these statements were re-examined. Thus, the evidence that was offered by these two witnesses was in the form of written statements, with exhibits attached, and oral testimony. It is from these written witness statements, and the viva voce evidence, that the facts of this case are to be gathered. Additionally, in view of some admissions in the pleadings, some facts are not in issue.

I will now set out the facts that the Court has drawn from the evidence that was offered by both the Plaintiff and the Defendant.

The facts of the case

As stated earlier, the facts of this case are to be gathered from the testimony of the two witnesses who tendered their evidence. Further, the Court has also found that there are admitted facts in the pleadings exchanged herein between the parties. The Court shall now, as far as practicable, proceed to give a summary of the facts in

this matter. In some chronological order, what follows immediately herein are the said facts which this Court has understood as being the said facts of this case:

Relationship between 1st and 2nd Plaintiff with the Defendant Bank

Both the 1st and 2nd Plaintiffs have had dealings with the Defendant bank. From the evidence on record the 1st Plaintiff dealt with the Defendant bank on the question of purchase of the property the subject-matter of this action. The 2nd Plaintiff came into the picture because there was an account that it had with the Defendant bank. The 1st and 2nd Plaintiff's dealings with the Defendant will be discussed in greater detail later in this judgment. Suffice to put it here that the account that the 2nd Plaintiff had with the Defendant appears to have been used in respect of the transaction for the purchase of the property mentioned above.

Contract for sale of land

It is a fact that the Defendant had freehold property known as Title No. Chichiri 52 situated at Maselema in the City of Blantyre of the Republic of Malawi. The property was developed and on which there was filling station operating under the name of Midway Filling Station.

On 9th December 2002 the Defendant bank agreed to sell, and the 1st Plaintiff agreed to buy, the said property at a price of K20,000,000.00 (twenty million kwacha). The said agreement was reduced in writing and signed by both parties. I hereby reproduce the said agreement which was as follows:

"AGREEMENT FOR SALE OF LAND

This agreement is made the 9th day of 9th day of December 2002 between **FINANCE BANK OF MALAWI LIMITED** of Post Office Box 421, Blantyre, Malawi, (the Vendor) and **ISMAIL IBRABIM LORGAT** of Post Office Box 51168, Limbe, Malawi aforesaid (the Purchaser).

WHEREAS

A. The Vendor is proprietor of developed freehold land known as Title Number Chichiri 52 situate at Maselema in the City of Blantyre.

B. The Vendor has agreed to sell and the Purchaser has agreed to buy the said property at the price of K20,000,000.00 **(TWENTY MILLION KWACHA)** (the Purchase price).

C. The Purchaser has paid the sum of K15,850,000.00 (**FIFTEEN MILLION EIGHT HUNDERED AND FIFTY THOUSAND KWACHA**) to the Vendor (the receipt whereof the Vendor hereby acknowledges).

NOW THIS AGREEMENT witnesseth as follows:-

1. In pursuance of the said agreement the Purchaser has agreed to pay and the Vendor has accepted to receive payment of the balance of **K4,150,000.00 (FOUR MILLION ONE HUNDRED AND FIFTY THOUSAND KWACHA)** by instalments as follows:-

   (a) Four monthly instalments of K1,000,000.00 (**ONE MILLION KWACHA**) commencing on the 30th May 2002.

   (b) The last of such instalments shall be for the sum of **K1,150,000.00 (ONE MILLION ONE HUNDRED AND FIFTY THOUSAND KWACHA**).

   (c) The said balance shall attract interest at the rate of 40% per annum and such interest shall be paid together with each instalment as herein provided.

2. In addition to the covenants herein contained the Purchaser has agreed to regularize the overdraft account maintained by Midway Filling Station with the Vendor by paying all overdue interest immediately and to continue to operate the said account on a fluctuating basis within

the limits sanctioned by the Vendor.

3. The Vendor shall not unless and until this agreement shall cease to have effect, and the purchase price repaid to the purchaser transfer, assign, mortgage Charge let or part with possession of the scheduled lands or her interest therein or any part thereof respectively.

4. The Purchaser has already taken possession of the property sold and as from the date hereof the property shall be at sole risk of the Purchaser as regards all or any kind of loss or damage.

5. The Vendor will sell as absolute legal owner of the property subject to the exceptions reservations and conditions contained in original Conveyance where the same may still be applicable.

6. In the even of the Transfer of Land not taking place for any reason the Vendor shall refund the purchase price paid by the Purchaser in full less all sums as may be lawfully due to the Vendor.

7. All costs disbursements and expenses of and incidental to this agreement (except those of the Vendor) including all legal costs shall be borne by the Purchaser".

According to the said agreement, it acknowledged that the 1st Plaintiff had paid the sum of MK15,850,000.00 (fifteen million eight hundred and fifty thousand kwacha) up-front. The parties also agreed that the

balance of the purchase price was to be paid by some stated four instalments commencing on 30th May 2002 and that the last of such instalments was to be in the sum of K1,150,000.00 (one million one hundred and fifty thousand kwach). It was further agreed between the parties to the agreement that the said balance of the purchase price was to attract interest at the rate of 40% per annum. The interest was to be paid together with the agreed instalments.

It would appear that the written agreement of 9th December 2002 was reduced in writing after some arrangement had been made regarding the payment of the balance of the purchase price. This comes out clearly from a letter dated 29th May 2002. It is from the Defendant bank to the 1st Plaintiff the relevant parts of which are as follows:

"Mr I.I. Lorgat

Midway Filling Station
P.O. Box 51168
LIMBE

Dear Mr Lorgat

PLOT NO. CHICHIRI 552

I thank you for calling on us yesterday for a meeting in the presence of Mr N.A. Qureshi, Mr B.K. Sundar and Mr Dick Chagwamnjira. The following salient points were agreed upon in the meeting after detailed deliberations regarding your purchase of the above property.

1. It was clarified to you that Finance Bank is the absolute owner of the said property, and is selling you the property for K20

million.

2. You have already paid K15.0 million to Finance Bank and K850,000,00 to Mr Kharodia towards the said purchase price. The Bank will recover the said K850,000.00 from Mr Kharodia and you still owe the Bank K4,150,000.00.

3. The said K4,150,000.00 will be paid by you to us in four monthly instalments of K1,000,000.00 (the last one will be for K1,150,000) starting from 30th May 2002, by way of four post dated cheques.

4. These dues of K4,150,000.00 shall attract interest @ 40% per annum and the interest amount shall be settled along with each instalment. A detailed list of the instalments payable are attached.

5. You shall regularize the overdraft account of Midway Filling Station by paying up immediately the overdue interest of about K3,000,000 and start operating the account on a fluctuating basis within the sanctioned limit of K6,000,000.

6. Mr Dick Chagwamnjira confirmed having the Government consent for sale of the above property, which he will pass on to your Mr Chagwamnjira and the undersigned have agreed to meet your Lawyer to facilitate the drafting of the sale deed etc.

I am sure that the matter has now been sorted out amicably and you will therefore withdraw the legal case.

I look forward to your confirmation of the above.

Assuring you of our best services at all times.

Yours sincerely

A S PILLAI

MANAGING DIRECTOR

cc: Deputy Managing Director, Finance Bank

Chief Manager, Finance Bank, Blantyre Branch

Mr Dick Chagwamnjira, Messrs Chagwamnjira & Co."

While as the above quoted letter, and the attached schedule, gives the date of commencement of payment of the balance of the purchase price as 30th June 2002 the agreement of 9th December 2002 shows that the commencement date is 30th May 2002. Further, the agreement of 9th December 2002 does not indicate the date the said balance must finally be paid yet the schedule attached to the letter of 29th May 2002 indicates the date the last instalment was to

be made. I take it that at the time the agreement between the parties was reduced in writing the parties never agreed on the time within which the balance was to be finally made. Indeed, there is evidence to show that at some point, due to some disagreements the 1st Plaintiff stopped payment of some instalments. Accordingly, the time within which the last instalment was to be paid was affected.

Further, it is common place that the purchase price for the property consisted of the following: Plaintiff's own sources and a loan (an overdraft) that the 1st Plaintiff obtained from the Defendant bank. But liquidation of the overdraft, which was agreed at a figure of K6,000,000(six million Malawi kwacha), was to be through an account in the name of the 2nd Plaintiff. As observed, the 1st Plaintiff is only, a nominal Plaintiff of the main body of the pleadings is anything to go by.

Disagreement: stopped payments and non-transfer of land

There is no denying of the fact that the agreement for the sale of land fell through. The parties are blaming each other for this. The

evidence shows that the 1st Plaintiff wanted a transfer of the land to be effected but same could not be done. Hence the 1st Plaintiff stopped making the payments of two instalments. The Plaintiff says the transfer of the land could not be done because the Defendant's lawyers had not obtained consent from Government. However, the Defendant has put it before this Court that it did not effect the transfer on the ground that the 1st Plaintiff had not finished paying the purchase price of the land.

Offer to sell, and eventual sale to, a third party

The land, the subject-matter of the agreement between the 1st Plaintiff and the Defendant, was advertised for sale in one of the local dailies. It had been advertised by the Defendant's lawyers M/S Chagwamnjira and Co. The property was eventually sold to a Mr Upindi – a third party.

Karibu Food Products issue

The Court has observed that the Defendant has brought up the question of a loan that it gave to Karibu Food Products to counter the Plaintiff's contention that he must be refunded the money he paid for the purchase of the land in issue in this matter.

It is in evidence that the Karibu Food Products loan was secured

by other two properties of the 1st Plaintiff. Further, it has not been disputed by the Defendant that it has since sold one of the properties and is still holding on to one of the properties that was offered as security for the Karibu Food Products loan.

As I see it, from the record of these proceedings, the above are the salient facts of this matter. The Court must now proceed to consider the issues in dispute in this case.

Law and consideration of the issues

I have already set out the principle issue that arises, and fall, to be decided. Further, it will be recollected that there are also other minor issues that require to be determined as the main one is being considered. It is proposed that, as part of the process of addressing both the major and ancillary issues, the Court should highlight and address topical matters that will go a long way in addressing the facts in dispute in this action. Here are the said topical issues and the Court's view on them.

Effect of Agreement between the 1st Plaintiff and the Defendant bank

The starting point in resolving the issues in this matter is to look at the effect of the agreement that was entered into between the 1st Plaintiff and the Defendant bank. The agreement being referred to is the one for the sale of land at Maselema, vz Title No. Chichiri 52.

The law, as I understand it, is that where there is a binding contract for sale of land the purchaser acquires an equitable interest in the land and the vendor becomes a trustee for the purchaser[4]. Further, it is a well settled principle of law that if there be a balance of the purchase price then the vendor has a lien in the land and would enforce it by the usual methods for the payment of a debt[5]. Moreover, the position at law is that a vendor would be deemed to be in breach of trust if he tried to sell the land to a third party where time of making the payment of the balance was not an essential term of the contract and not provision was given as to what the legal position of the parties would be if the purchaser defaulted to make the payment at that time[6].

As regards the question whether time is of essence in a contract for the sale of land the position at law is that in such type of contracts time is generally not of essence unless the contracting parties [contract itself] clearly and expressly stipulates it to be so[7]. Further, the following dictum of Denning L.J. in **Williams vs Greatrex** [1957]1 WLR 31 @ 35 is illuminating:

[4] *B. Kamwana vs G. Chimphonda* Civil Cause No. 925 of 1992 High Court decision of 2nd day of June 1997 (unreported) citing with approval the principle of law stated in *Lysaught vs Edwards* (1876)2 Ch. D. 499, see also *Nellie Nankhuni vs R.T.D. Chaponda* C.C. No. 1330 of 1996 [High Court decision of 20th April 2001].

[5] Ibid; *Taumbe Phiri vs The Registered Trustees of Banja La Mtsogolo* Civil Cause No. 2339 of 1994 [High Court decision of 11th April 1995] [unreported].

[6] Ibid.

[7] *E.E. Matewere vs Malawi Housing Corporation* Civil Cause No. 820 of 1997 [High Court decision of 23.06.98][unreported] citing with approval the English case of Williams vs Greatrex [1957]1 WLR 31.

> "It is said by Mr Meurig Evans that time was of the essence of the contract of May1946, and that if the purchase of any plots was not completed within the two years then stated, there could be no further claim in respect of any such plots. He said that it was a commercial transaction and that therefore time should be considered of the essence. I cannot agree to that argument. It seems to me that this was a contract for the purchase of land, in which the parties, through their own common solicitor, put forward the period of two years as their target for completion; but that was, as is usual in cases of the sale of land, only a target: it was not something which was of the essence of the matter. Our legal procedure is well adapted to meet such a situation. If either side wanted to bring the other up to the mark, all he had to do was to give him reasonable notice requiring him to complete. Neither side did so, and, therefore, time is not by itself a bar to the action." [underlining supplied by me]

I adopt this statement and observe that it does represent the position at law currently obtaining in Malawi[8].

Finally, this Court understands the law to be that the vendor's lien for the unpaid purchase price arises as soon as the contract for the sale of land is signed or agreed and still exists until actual payment is made[9].

[8] B. Kamwana vs G. Chimphonda cited @ footnote1.
[9] *Taumbe Phiri vs The Registered Trustees of Banja La Mtsogolo*, cited @ footnote 2.

Did any of the parties breach the Agreement for the sale of land?

As stated earlier, the agreement that was entered into between the 1st Plaintiff and the Defendant for the sale of land bank fell through. Neither party accepts the blame for the failure of the said agreement. Indeed, the 1st Plaintiff has contended that the Defendant breached the agreement by selling the land to a third party while the Defendant bank says it cannot be faulted because the 1st Plaintiff failed to pay the balance of the purchase price. Who is to blame then? In this Court's judgment the Defendant bank breached the agreement for the sale of the land. Why do I say so? For starters, time was not of essence of the contract for the sale of the land in question. If it were of essence surely the parties would have clearly and expressly provided in the contract that in the event of the 1st Plaintiff's failure to pay the balance the Defendant was going to sell the land to somebody else[10]. This they did not do. Further, the Court has observed that the sale agreement did not expressly state that time was of essence for making the payments of the instalments towards the purchase of the land. In such situations, where the agreement does not so expressly state, the Court has held that it should be

[10] *B. Kamwana vs G. Chimphonda* Civil Cause No. 925 of 1992.

presumed that time for the payments of the agreed instalments was not of the essence[11]. Actually, this Court finds that the facts of the present case are on all fours with the Humphrey's case[12]. Accordinly, the Defendant was wrong in proceeding to sell the land to a thirty party on the ground that the 1st Plaintiff had failed to pay the balance of the purchase price. Further, it is well to remember that the Defendant bank's remedy, when it could not get the balance of the purchase price, was to resort to enforcement of its rights to the purchase price by way of an order of specific performance or indeed by the usual method of claiming the money through the Court as a debt due to it[13]. By proceeding to sell the land to a third party the Defendant bank breached the contract of sale of land it entered with the 1st Plaintiff. Indeed, the Defendant bank breached its obligation as a trustee for the 1st Plaintiff since there was a binding contract for the sale of the land where no provision was made that it could sell the land if the 1st Plaintiff defaulted to make payment of the balance of the purchase price.

In sum, this Court finds, and concludes, that the Defendant breached the contract for sale of the land the subject-matter of this

[11] *Taumbe Phiri vs The Registered Trustees of Banja La Mtsogolo* Civil Cause No. 2339 of 1994; B. *Kamwana vs G. Chimphonda* Civil Cause No. 925 of 1992.

[12] *Humphreys vs Fried lander and Hassen* 7 MLR 185 @ 188.

[13] Ibid,

action. Put in another way, the Defendant was in the wrong by selling the land to another person when it should have resorted to having the balance of the purchase price or indeed seek the remedy of specific performance.

What remedy is available to the 1st Plaintiff?

The Court has found that the Defendant breached the contract for sale of land made between it and the 1st Plaintiff. However, this does not in anyway completely dispose of the matter. I must proceed to decide on what remedy, if any, is available to the 1st Plaintiff as an innocent party.

The 1st Plaintiff contends that he is entitled to damages for breach of contract. He further prays that he be refunded the deposit he paid to the Defendant bank as part payment of the purchase price in the sum of K15,000,000 (fifteen million kwacha) with interest. The 1st Plaintiff's statement of claim also shows that he wants this Court to give him such further or other appropriate relief.

With regard to the claim for a refund of the said deposit of the purchase price the Defendant bank's response is that the figure put by the 1st Plaintiff is not entirely correct. This comes out clearly in the

Defendant banks' Amended Defence where it avers that part of the money used by the Plaintiff was its money in the sum of K6,000,000 (six million kwacha). It is the view of the Defendant that this sum of K6,000,000 plus interest must be deducted from the total payments that were made by the 1st Plaintiff towards the purchase of the land.

As I understand it, the Defendant bank is not denying that the 1st Plaintiff would be entitled to a refund but that the refund must take into account the fact that the bank partly financed the purchase of the land. Thus, so the contention by the bank goes, from whatever refund is made there must be deducted the said sum of K6,000,000 plus interest at bank lending rate.

I wish to pause here and make some observations. Firstly, the argument of the Defendant ignores the fact that the said K6,000,000 was given to the 2nd Plaintiff as an overdraft facility. Further, it would appear that the Defendant has chosen to overlook a term of the agreement of 9th December to the effect that the overdraft was meant to regularize the overdraft that was being maintained by the 2nd Plaintiff with the Defendant. In its latter of 29th May 2002 the

Defendant, inter alia, advised the 1st Plaintiff at paragraph 5 of the letter that "you shall regularize the overdraft account of the Midway Filling Station (2nd Plaintiff) by paying up immediately the over due interest of about K3,000,000 and start operating the account on a fluctuating basis within the sanctioned limit of K6,000,000. further, under Clause 2 of the Agreement the parties covenanted that the 1st Plaintiff shall regularize the overdraft account maintained by Midway Filling Station (2nd Plaintiff) by paying all over due interest and to continue to operate the said account on a fluctuating basis within the limits sanctioned by the Defendant bank. Moreover, the Defendant bank seems to be giving a blind eye to the piece of evidence before this Court to the effect that the overdraft was given to the 2nd Plaintiff who is not one and the same person as the 1st Plaintiff. Accordingly, it is important that the deposit that was paid by the 1st Plaintiff as part of the purchase price must be treated differently from the overdraft facility that was accorded to the 2nd Plaintiff.

Turning back to the instant case this Court has not been left in doubt that, at law, the 1st Plaintiff would be entitled to a refund of

whatever he paid towards the purchasing of the land.[14] Further, the Court is fortified in this view considering what the party agreed on 9th December 2002. Pursuant to Clause 6 of contract for sale of land dated the said 9th of December 2002 the 1st Plaintiff and the Defendant agreed, inter alia, that:

> "In the event of the transfer of land not taking place for any reason the vendor (the Defendant bank) shall refund the purchase price paid by the Purchaser (the 1st Plaintiff) in full less all sums as may be lawfully due to the vendor (the Defendant)"

The essence of this clause is that Defendant agreed to refund the purchase price should the transfer not take place for any reason. In terms of the Defendant bank's own letter of 29th May 2002, which is further acknowledged in the said agreement dated 9th December 2002, the 1st Plaintiff paid a deposit in the sum of K15,850,000 (fifteen million eight hundred and fifty thousand kwacha) to the Defendant. The Court has found and concluded that there are no sums that are lawfully due to the Defendant from the 1st Plaintiff. The Court shall soon demonstrate why it is saying that there no are no monies lawfully

[14] *Chikonde vs Kassam* 10 MLR 234

due to the Defendant. It follows, therefore, that this sum of K15,850,000 must be refunded to the 1st Plaintiff. It is so ordered .

Is interest payable on refund of the deposit?

The 1st Plaintiff has asked this Court that it orders that the money he paid as deposit for the purchase of the land should be refunded with interest at a comparable bank lending rates for money due and owing on commercial rates. However, the 1st Plaintiff has not indicated the date from which the said interest should be payable. In the opinion of this Court, if indeed the interest be payable, it should be payable from the date the 1st Plaintiff accepted the breach on the part of the Defendant bank and demanded a refund of the deposit paid by him. The date in question is the 9th day of April 2003 when the 1st Plaintiff wrote the Defendant in the following terms:

"SBT/801/01/08 M

9th April, 2003

Messrs Chagwamnjira & Company

P.O. Box 51865

LIMBE

Dear Sirs,

RE: BREACH OF CONTRACT BY FINANCE BANK OF MALAWI LIMITED – TITLE NUMBER CHICHIR 52 (PLOT NO. CC 42)

We refer to the above matter.

It has come to our client's attention that the above property which was sold to him has now been put up for sale through an advertisement in the paper. The advertisement appeared in the Daily Times edition of the 31st March, 2003.

Our client considers the action taken by you client to be in breach of the contract of sale dated 9th December, 2002. Our client accepts the breach and now considers the contract of sale of land to be at an end. We therefore formally demand a refund of the purchase price paid by him, in accordance with clause 6 of the Agreement for Sale.

Yours faithfully,

Samuel Tembenu

FOR: TEMBENU, MASUMBU & COMPANY

cc: Mr I.I. Lorgat

P.O. Box 51168

LIMBE"

We will assume that this letter was brought to the attention of the

Defendant although it was addressed to its lawyers. Further, it will be safe to presume that the demand bank seven(7) days from the date of the letter. Accordingly, the interest, if payable, must be from the 16th day of April 2003.

On whether interest is payable this Court holds the view that as a matter of law it is payable where a purchase price for land is refunded due to a beach of contract by the vendor.[15] Indeed, my understanding of the law is that the interest is payable because it is presumed that the party in breach benefited from the money paid as deposit for which the wrongdoer must compensate the wronged party by paying interest.[16] Further, it appears to be settled law that a purchaser who rescinds a contract following the vendor's repudiatory breach of a contract is entitled to recover the deposit paid together with interest.[17]

It is well to observe that this Court has found that the Defendant breached the contract of sale of the land. Further, the Court has ordered that the remedy for that breach is that the Defendant should refund the money that was paid as part of the purchase price of the land. Additionally, this Court finds and concludes that the Defendant was in a repudiatory breach of the contract for the sale of the said

[15] *Chikonde vs Kassam* 10 MLR 234 @ 240.
[16] *Taumbe Phiri vs The Registered Trustees of Banja La Mtsogolo* Civil Cause No. 2339 of 114.
[17] *Mc. Gregor on Damages* paras 911-915.

land. In my judgment, indeed from the discussion of the law above, the refund of the money which this Court has ordered must be with interest. It is so ordered that the Defendant shall refund the said sum of K15,850,000 with interest from the 16th day of April 2003.

As regards the rate of interest the 1st Plaintiff wants that Commercial bank lending rates should apply. The position taken by the 1st Plaintiff is acceptable at law.[18] This Court accepts this plea and orders that the bank lending rate in operation from time to time since 16th April 2003 will apply. Consequently, the Defendant bank shall refund the said sum of K15,850,000 together with interest and the rate of interest shall be the bank lending rates that have been applying from 16th April 2003 to date of refund of part of the purchase price paid herein.

Set off/Counterclaim

The Defendant bank's pleadings show that it has sought to put up a defence of set-off and the Defendant is counter claiming from the 1st Plaintiff some liquidated sums of money. Indeed, the Defendant bank has contended that from whatever is found to be due to the 1st Plaintiff there must be set-off some sums of money. The said money is

[18] *Wallersteiner vs Moir* (No. 2)[1975]1AUER 849 @ 865 where Lord Justice Buckley stated the following, which this Court has adopted and applied:

> *"In earlier days when interest rates were more stable than they are at present, the rate of interest used in such a case was five per cent per annum. In conditions of the present time it would be right to award interest at one per cent per annum above the official bank rate or in minimum lending rate in operation from time to time."*

in respect of some overdraft facilities and/or loans that were given to Karibu Food Products and Midway Filling Station (Pvt) Ltd. According to the Defendant's calculation the two overdraft facilities together with interest amount to the sum of K14,065,703.37 which the 1st Plaintiff ought to pay to it. It is in evidence that the two loan accounts for Karibu Food Products and Midway Filling Station Limited were consolidated without the sanction of the two entities. Moreover, the record of these proceedings show that the facility that was accorded to Karibu Food Products was secured by the 1st Plaintiff's two properties. Additionally, the Defendant bank has not disputed the fact that it has since sold one of the said two properties that it and is still holding on to one of the properties.

As noted above the Defendant is essentially raising up the defence of set-off. Now the question as to what is a set-off is to be determined as a matter of law and is not in any way governed by the language used by the parties in their pleadings.[19] It is for this reason that, notwithstanding the Defendant bank's use of the word counter claim in its pleadings, the Court has found that the Defendant bank has basically raised the defence of set-off.

Further, it is a settled principle of law, which needs no citation of authority, that the defence of set-off is only available in respect of debts or liquidated demands due between the same parties in the

[19] *Hanak vs Green* [1958]2 QB 99 @ 126 per Lord Justice Morris

same right. Further, this Court is a live to the law that the defence of set off by the Defendant bank can only arise against a claim arising out of the same transaction between the same parties whether sounding in debt or unliquidated damages.[20] In the present case no evidence was offered by the Defendant to show that Midway Filling Station (Pvt) Ltd and Karibu Food Products are the same persons as the 1st Plaintiff Mr Ismail Ibrabim Lorgat. It is trite law that a limited liability has a personality of its own independent from its shareholders or promoters. Further, with regard to Karibu Food Products it is important to note that the overdraft facility that was extended to it was a secured one and it was a different transaction not in any way connected with the purchase of the land the subject-matter of this action. Therefore, it would be wrong in principle to seek to raise the defence of set-off where the transaction between Karibu Food Products and the Defendant is a different transaction altogether. Moreover, it is well to observe that the overdraft facility to Midway Filling Station (Pvt)Ltd was a separate transaction that ought not have been mixed up with the overdraft facility to Karibu Food Products.

Finally, this Court understands the position at law to be that the sum that a party wishes to be set-off, like the Defendant wants, must have accrued at the commencement of an action.[21] But in the instant matter, commenced on 15th March 2002, it has not been pleaded that the sum the Defendant wants to be set-off had accrued. All there is to it is that by 15th April 2003 the so called loans by Midway Filling Station (Pvt)Ltd and Karibu Food Products had arisen to certain sums. There is no allegation of fact that at the time when the 1st Plaintiff or the 2nd Plaintiff commenced their action there was a demand made for either Midway Filling Station Limited or Karibu Food Products to

[20] Ibid and see also *Morgan & Sons Ltd vs Martin Johnson Ltd* [1949]1 KB 107

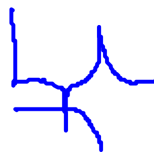
[21] *Richards vs James* [1848]2 Ex 471.

liquidate or settle or make good the overdraft facilities that were given to the latter. Further, there is no evidence adduced by the Defendant that they previously made such a demand for settlement of the overdraft facilities which Midway Filling Service Stations (Pvt)Ltd/or Karibu Food Products failed to do. If they had failed then surely one would say an action would have accrued entitling the Defendant to raise the defence of set-off. In the absence of the evidence of such demand the defence of set-off raised by the Defendant must fail. Accordingly, this Court finds and concludes that the Defendant's counter claim, which is for intents and purposes a set-off, is dismissed. It is dismissed with costs.

Conclusion

The Plaintiff's action has succeeded. The action succeeds with costs to be taxed by the Registrar if not agreed between the parties.

Pronounced in open Court this 13th day of May 2005 at the Principal Registry, Blantyre.



F.E. Kapanda

JUDGE