



**IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE NUMBER 2132 OF 1999**

**BETWEEN**

G. B. S. MKANDAWIRE  
PLAINTIFF

AND

THE NEW BUILDING SOCIETY  
DEFENDANT

**CORAM: Hon. Justice Katsala**

Mwangomba, of counsel for the Plaintiff

P. Chirwa, of counsel for the Defendant

M. Katunga (Mrs), official interpreter

**JUDGMENT**

***Katsala, J.***

Goodwin Baldwin Sam Mkandawire, the plaintiff herein, prays to this court for an order for specific performance of a contract of sale of property known as Plot Number BL 26/37/10 Kanjedza, or in lieu thereof damages for breach of contract, damages for loss of rentals and interest thereon at commercial rates, and costs of the action.

On the other hand the New Building Society, the defendant herein, denies

breaching the alleged contract of sale and avers that it is the plaintiff who breached the same. The defendant also counter claims from the plaintiff rentals collected by the plaintiff in respect of the said property.

Only the plaintiff testified in support of his case. He told the Court that on 20<sup>th</sup> July 1998 he attended a public auction organised by Messrs Trust Auctioneers & Estate Agents, acting on instructions from the defendant, where various properties were put up for sale. The plaintiff won the bid for property known as Plot Number BL 26/37/10 Kanjedza (hereinafter referred to as the property). His bid was for the sum of K520, 000.00. He said the sale was subject to the condition that the successful bidder should pay a deposit of 25% of the bid price within 2 days from the date of sale if a bidder intended to be considered for a loan by the defendant and make an acceptable arrangement in respect of the balance of the price within 30 days. The plaintiff paid the sum of K130, 000.00 being the required deposit and submitted to the defendant an application for a loan of K150, 000.00. He said that he was required to make a further payment of the sum of K240, 000.00, the shortfall. He said that the terms of the auction did not state when this sum would be payable as such it was his intention to pay it upon being so advised by the defendant. He told the court that the defendant advised that the shortfall must be paid but did not say when, thereby giving him the impression that the time of payment was not of the essence. By cover of his letter dated 8<sup>th</sup> March 1999, he paid the shortfall through two cheques. He said that but despite so paying, on 9<sup>th</sup> March 1999 the defendant cancelled the sale on the ground that he had failed to pay the shortfall.

The defendant called Weston Duncan Kusani as its witness. Mr Kusani was the Manager in the defendant's Mortgages Department at the material time. He told the court that the plaintiff won a bid for the purchase of the property at a public auction held by the defendant on 20<sup>th</sup> July 1998. Among the conditions of the sale were that the plaintiff would pay a deposit of 25% of the purchase price of K520, 000.00 within 2 days of the auction and that the balance of the price would be paid within 30 days of the auction. He said it was a further condition of the sale that if the plaintiff fails to pay the balance as stipulated then the defendant would be entitled to cancel the sale and the plaintiff would forfeit to the defendant an amount equal to 5% of the purchase price plus the defendants expenses incurred in conducting the auction. He said it was a further condition of the sale that the plaintiff would not enjoy

possession or rents profits from the property before the full purchase price is paid. He said the plaintiff, fully aware of these conditions and having paid only K130, 000.00 and requiring a loan of K150, 000.00 from the defendant, he (the plaintiff) failed to pay the balance of K240, 000.00 within the agreed time. He said further, the plaintiff collected rentals on the property which he refused to surrender to the defendant.

The facts of the case as I can make them out from the evidence before me are that the defendant conducted a public auction of various properties on 20<sup>th</sup> July 1999. Trust Auctioneers & Estate Agents were the auctioneers. The plaintiff won a bid for property known as Plot Number BL 26/37/10 Kanjedza at a price of K520, 000.00. The sale was subject to inter alia the following conditions which the plaintiff signed in agreement with. That a plaintiff would pay a deposit of 25% of the bid price within two days of the sale. The evidence shows that the plaintiff paid the sum of K130, 000.00 on 30<sup>th</sup> July 1999 which was outside the stipulated time period. It would appear that the defendant did not make an issue out of this delay in payment of the deposit. It is also a fact that it was a condition of the sale that the balance of the purchase price would be paid within 30 days of the sale or over any extended period agreed to in writing by the parties. It was a further condition of the sale that a purchaser intending to finance the purchase from sources other than the defendant would pay a deposit of 50% of the purchase price within 2 days of the sale. The plaintiff indicated that he wanted to finance the purchase with a loan from the defendant. On 17<sup>th</sup> August 1999 (27 days from the sale date), he submitted to the defendant an application for a loan of K150, 000.00. On the loan application form the plaintiff indicated that he would manage to pay a sum of K240, 000.00 which was the balance of the purchase price after deducting the deposit he paid and the loan he was applying for.

By letter dated 18<sup>th</sup> January 1999 the defendant demanded the payment of the balance. The plaintiff did not pay. And on 8<sup>th</sup> March 1999 and in response to this demand, he sent to the defendant by post two cheques for the total sum of K240, 000.00. One cheque for the sum of K120, 000.00 was dated 30<sup>th</sup> March 1999, that is, it was post dated. By its letter dated 9<sup>th</sup> March 1999 the defendant cancelled the sale on the ground that the plaintiff had failed to pay the balance of the purchase price. They enclosed a cheque for the sum of K80, 076.17 which was net balance from the deposit paid by the plaintiff after

deducting advertising and administration costs. The plaintiff did not accept the cancellation and returned the refund cheque to the defendant. The defendant maintained their position and returned the cheque together with the plaintiff's post dated cheque and another cheque for K86, 446.02 (after they deducted the sum of K36, 000.00 being six months rentals collected by the plaintiff in respect of the property – net of withholding tax).

I have seriously considered the evidence before me and the submissions made by the parties. The main issue before the court is whether the defendant breached the contract of sale when it cancelled the sale.

The starting point is a consideration of the conditions governing the sale of the property. Exhibit D1 contains these conditions. It was duly signed by the plaintiff on 20<sup>th</sup> July 1999 acknowledging the existence and applicability of the conditions to him. I therefore do not think that it lies with the plaintiff to turn round and say that he was not made aware of the conditions before he signed the contract. Or that he dealt with the defendant unaware of the applicable conditions. There is no evidence before me which suggests that the plaintiff was fraudulently made to sign this contract. The evidence shows that he is a reasonably enlightened person and that he voluntarily signed the contract and that he knew what and why he was signing.

As I have already stated above one of the conditions was that a purchaser pays a deposit of 25% if he intended to apply for a mortgage loan from New Building Society or 50% if he intended to finance the purchase from sources other than a loan from the defendant. The deposit was to be paid within 2 days of the sale and that the balance was to be paid within 30 days from the sale or over an extended period agreed to in writing by the parties. The evidence shows that the deposit was paid on 30<sup>th</sup> July 1998 which was ten days after the sale. The evidence also shows that the defendant did not make an issue out of this delay. In other words they did not consider this failure to comply with the condition so fundamental as to warrant a repudiation of the sale. And in my judgment the defendant is estopped from raising in its defence this non-compliance as one of the reasons for repudiation of the contract.

The plaintiff applied to the defendant for a mortgage loan for K150, 000.00 which meant that he would pay the balance of K240, 000.00. In fact he indicated on the mortgage loan application form that he would manage to pay this balance. In his testimony before the court he said he had the money

readily available and that he did not pay it earlier because he was waiting for the approval of his application for the mortgage loan. As already stated in this judgment the defendant by its letter dated 18<sup>th</sup> January 1999 asked the plaintiff to pay the balance of K240, 000.00. The relevant parts of the letter read as follows:

“Thank you for your letter of 30<sup>th</sup> December, 1998 in respect of the above subject matter and the bank statements submitted to enable us process your application.

Please note that the deposit of K240, 000 representing the balance of the purchase price must be paid to New Building Society.

We further request if you could send us the deposit slips of the sums of money you have so far paid towards the purchase of the above property for us to continue processing your application.”

By his letter dated 8<sup>th</sup> March 1999 the plaintiff sent to defendant two cheques for the total sum of K240, 000.00. The relevant parts of the letter read as follows:

Further to your letter dated 18/01/1999, please find enclosed herewith my cheque No. BC (N)/B 203807/8 for a total sum of MK240, 000.00 being the balance to be paid to you.

I hope you will be able to speed up the matter.”

In its letter dated 9<sup>th</sup> March 1999 the defendant advised the plaintiff as follows:

“We refer to the above property which you successfully bid and paid a deposit of K130, 000.00.

We note with regret that todate we have not received your final cheque of purchase price. We therefore advise that the sale has been cancelled.

Enclosed find a refund of deposit you made n our cheque No. 043159 for K80, 076.17 amired at as follows: -

Deposit made	K130,000.00
Less advertising costs	K23, 923.00
Less NBS administration costs	K26, 000.00



commercial practice.

It would appear that the plaintiff intended to delay the payment of the balance for as long as was possible. He told the court that he so delayed because he wanted to make a few Kwachas in form of interest on the balance. He said he had put the money in a fixed deposit so that it could earn interest. In my view this only signifies how greedy the plaintiff was. He invested the balance of the purchase price and earned returns on it and at the same time collected rentals on the property he had not paid for in full.

The evidence before me also shows that the plaintiff split the balance into two. He issued two cheques for K120, 000.00 one of which was post-dated. The defendant could only have accessed the money on or after 30<sup>th</sup> March 1999. In other words the plaintiff wanted to pay the balance of the purchase price by instalments. He made this decision unilaterally. This was contrary to the express provisions of the sale. It was a further breach of the sale agreement. In my view it would be erroneous for this court to hold that the plaintiff was acting within the terms of the sale in so doing.

The plaintiff relied on the case of *Kajombo v Malawi Housing Corporation*, civil cause number 224 of 1996 (unreported) to support his submission that time for the payment of the balance of the purchase price was not of the essence of the sale agreement. Briefly, the facts of *Kajombo case* are that on 1<sup>st</sup> October 1991 the applicant was offered to purchase the respondent's house at a price of K11, 611.50. He was required to accept the offer and pay the full purchase price within 90 days from the date of the offer. However if he intended to finance the purchase with a mortgage loan then he was required to pay an acceptance deposit of K1, 636.50 within 30 days from the date of the offer. He accepted the offer and paid the deposit since he opted to seek a mortgage loan from the New Building Society. The loan was not processed in good time and on 2<sup>nd</sup> February 1996 the respondent re-offered the same house for sale to him at a price of K41, 142.72. The respondent argued that the time for payment of the balance of the purchase price was of the essence and as such the earlier agreement had lapsed due to non-payment of the balance within the stipulated 90 day period. On this point the court said:

“The respondent's main argument is that there has been no consideration and further that even if there was such consideration the same might have been

furnished well far out of the 90 day period stipulated in the offer letter of 1<sup>st</sup> October 1991.... I do not agree that the stipulation of 90 day period applied to a situation where a prospective purchaser wanted to avail himself to loan facilities from lending institutions. What applied was the 30 day period for the initial deposit. This is logical because the respondent acknowledges that an applicant for a loan would have no control over the process of the loan by the financier.”

I entirely agree with the reasoning in this case. However, it cannot be applied to the present case. It would have applied if, having paid the deposit of K130, 000.00, the plaintiff had applied for a mortgage loan for the whole balance of the purchase price, that is K390, 000.00. But as things were, having applied for a loan for only K150, 000.00, the plaintiff herein was required to pay the balance of the purchase price, that is, K240, 000.00 within 30 days from the date of the sale.

On the foregoing it is my Judgment that the defendant was entitled to cancel the sale. The defendant had gone out of its way to accommodate the plaintiff who in turn wanted to abuse the defendant’s generosity and or liberalism. I do not think that the plaintiff has any reason for complaining. If anything he should blame himself for having decided to practice his greed. The plaintiff has failed to prove his case, which I dismiss in its entirety.

I now turn to the defendant’s counterclaim. The defendant counterclaims the sum of K45, 000.00 being the rentals the plaintiff collected from the tenants on the property and interest at bank rates. The defendant also claims 5% of the purchase price as agreed and liquidated damages.

As I have earlier stated in this judgment one of the conditions of the sale was that the plaintiff would not enjoy possession or rents and profits from the property before the full purchase price was paid. The plaintiff was fully aware of this condition but he went ahead to collect the rent from the tenant on the property. This was clearly wrongful and the defendant would be entitled to judgment on this claim. However, the evidence before the court clearly shows that the defendant deducted the sum of K36, 000.00 (which was the rentals collected by the plaintiff net of withholding tax) from the sums due to the plaintiff on the cancellation of the sale. Having so been already paid by the plaintiff, as it were, it is frivolous for the defendant to make the claim for the same rentals. This claim fails. Automatically the claim for interest on the rentals fails as well.

I now come to the defendant’s claim for a sum equivalent to 5% of the



purchase price as liquidated damages for the cancellation of the sale. No specific amount was pleaded under this head and no evidence was adduced to support it. The claim was not even mentioned during the entire hearing of the case. To all intents and purposes the defendant abandoned this claim. And even if you look at the heads of deductions the defendant made from the money due to the plaintiff on the cancellation of the sale, this head of claim is not included. In these circumstances one would be entitled to hold that the defendant waived its right to these damages and or abandoned the claim for such damages. And so I hold.

The defendant's counterclaim therefore fails in its entirety and it is dismissed.

I now come to the issue of costs. These, as we have repeatedly said, are at the discretion of the court. Ordinarily costs follow the event. The defendant has succeeded on its defence but failed on its counterclaim. In the circumstances I order that each party must bear its own costs.

Pronounced in open court at Blantyre this 27<sup>th</sup> day of April 2006.

J. KATSALA  
**JUDGE**