

**IN THE HIGH COURT OF MALAWI**  
**PRINCIPAL REGISTRY**  
**CIVIL CAUSE NO. 2783 OF 2005**

**BETWEEN:**

MARYLINDA CHIKHO.....PLAINTIFF

- and -

STANBIC BANK LIMITED.....DEFENDANT

**CORAM: CHIMASULA PHIRI J.**

Mpaka of Counsel for the plaintiff

Bandawe of Counsel for the defendant

Nsomba – official interpreter.

**RULING**

***Chimasula Phiri J,***

By this summons which is issued on the application of the plaintiff, Mrs Marylinda c/o Susan Chikho of P. O. Box 2, Chileka the said plaintiff seeks the determination of the court that on the true construction of the Bank Guarantee by the defendant to Air Malawi Limited at the request of Airlink Travel Bureau Limited dated 4th June 2002 and the letters of credit facilities dated 13th September 2001 and 8th March 2002 no charge exists over titles number Michiru 10/22, Lumbadzi 53/70 and Alimaunde 25/10019 in respect of the overdraft facility or at all.

Further, the plaintiff claims against the defendant the following declarations and orders:

- (i) A declaration that the guarantee herein having expired no charge whatsoever exists over titles number Michiru 10/22, Lumbadzi 53/70 and Alimaunde 25/1019.
- (ii) A declaration that the guarantee herein having expired, the continued detention of the original title deeds to Michiru 10/22, Lumbadzi 53/70 and Alimaunde 25/1019 and/or the failure to discharge the charge thereon is wrongful.
- (iii) An order discharging the charges over titles number Michiru 10/22, Lumbadzi 53/70 and Alimaunde 25/1019.
- (iv) A permanent order of injunction restraining the defendant by itself, servants or agents howsoever from selling any or all of the properties being titles number Michiru 10/22, Lumbadzi 53/70 and Alimaunde 25/1019.
- (v) A mandatory order of injunction compelling the defendant to release to the plaintiff the original title deeds for each of the properties being titles number Michiru 10/22, Lumbadzi 53/70 and Alimaunde 25/1019.
- (vi) General damages to be assessed for the wrongful detention of the title deeds and the failure or neglect to discharge the charges to the properties herein.
- (vii) Costs of this action.

The summons is supported by an affidavit sworn by the plaintiff. She depones that in the year 2000 she registered a travel and tourism company known as Airline Travel Bureau Limited. A certificate of incorporation is exhibited. At all the material times, the plaintiff was the Managing Director for the said company. On or around 13th September 2001 the defendant offered an overdraft credit facility to the company for the sum of K400,000.00. No security was taken for this action. An exhibit for this accommodation has been produced.

It was in the nature of an overdraft on the current account of the Managing Director of fluctuating amounts and expiring on 28th February 2002. The said credit facility was renewed on or around 8th March 2002 and no security was introduced at this stage. Its expiry date was 30th June 2002. The requirements and the nature of the company's business, it became necessary to have a guarantee between the company and Messrs Air Malawi Limited. In or around June 2002, the defendant provided a guarantee to the said Air Malawi Limited in the sum of K2,000,000.00 at the request of the company. The purpose of the Bank Guarantee was to ensure that in case of the company being declared in default under IATA Passenger Sales Agency Rules the defendant would pay all amounts due to Air Malawi Limited and claim reimbursement from the company under the guarantee.

The plaintiff has exhibited the Bank Guarantee to Air Malawi, which reads as follows: -

*At the request of Airlink Travel Bureau Limited, we hereby guarantee as surety and co-principal debtor, renouncing all legal exceptions and objections, payment of amounts owing or that may become owing to Air Malawi Limited to other members of IATA which have or will appoint the Agent.*

*Payment of all amounts due hereunder will be made to Air Malawi Limited on its written demand accompanied by a statement signed by it specifying that the Agent has been declared in default under the IATA Passenger Sales Agency Rules and specifying the total amount due and owing by the Agent to Air Malawi Limited in respect to amounts specified as due and owing to such airlines Members of IATA shall be paid to Air Malawi Limited as Agent for each such airline Member of IATA.*

*Notwithstanding the above, if the Agent provides a separate bank guarantee in favour of an IATA Member, in terms of which payment is guaranteed to such Member of all amounts that may become due and payable by the Agent, the Member which is beneficiary of such separate guarantee shall not be entitled to any payment under the present industry bank guarantee until all outstanding indebtedness of the Agent to other Members of IATA hereunder have been discharged.*

*Our total liability under this guarantee is limited to and shall in no circumstances exceed the sum of K2,000,000 (two million kwacha only).*

*This guarantee will continue in effect until withdrawn by us upon three months written notice given to Air Malawi Limited.*

*This guarantee shall be null and void after 2.00 p.m. Wednesday 07 May 2003.*

As security for the Bank Guarantee, the defendant registered charges over plaintiff's properties known as titles number Lumbadzi 53/70, Alimaunde 25/1019 and plot number 10/22 Michiru. The total security was in the sum of K3,146,000.00. After completing all the legal process for registration of the charges, the defendant wrote the plaintiff a letter evidencing these facts which letter is exhibited,.

Although the guarantee expired way back in May 2003, with no default registered under the relevant rules, the defendant has held on to the securities and failed or neglected or refused to discharge the charges.

On or around 9th September 2003 way after the expiry of the guarantee, the plaintiff sold the company as a going concern to one Jane Maureen Dzanjalimodzi at the purchase price of K1,000,000.00 payable in two equal instalments. A copy of the sale agreement is exhibited. On the same day the aforesaid purchaser paid the first instalment under cheque number 0357264 copy of which is exhibited.

At all material times the defendant had full knowledge of the sale and change of management, the plaintiff having verbally as well as in writing informed the defendant of the sale. Exhibit MC 7 is a copy of the plaintiff's letter to the defendant passing this information. Nevertheless, the defendant allowed the purchaser to open another account for the said company in the same branch ignoring the account with the overdraft.

At the date of the sale, the overdraft facility created for the company had not been cleared and it was arranged between the plaintiff and the aforesaid purchaser to the knowledge of the defendant that the second instalment would clear off the liability of the company under the overdraft facility and of course leave some balance.

When the aforesaid purchaser presented the 2nd cheque it was referred to drawer by reason which the overdraft facility with the bank has remained uncleared. The plaintiff has since sued the purchaser for the non-payment and the matter was set to be heard on 11th October 2005 at the Lilongwe District Registry of this court under Civil Cause Number 244 of 2004.

The essence of the plaintiff's application in the Lilongwe District Registry in the Civil Cause Number 244 of 2004 is that had the purchaser's 2nd cheque not been referred to drawer the company would have had a credit balance of K54,710.00 with defendant and the overdraft would have been cleared way back and would not have accumulated interest.

A copy of a bank statement dated 30th September 2003 to 17th October 2003 in support of this contention has been exhibited.

Having sold the company and the secured bank guarantee having expired with no registered default, the plaintiff has on several occasions requested the defendant to discharge her properties title number Lumbadzi 53/70 (being plot No. 53/1/12 Lumbadzi commercial centre), Alimaunde 25/1019 (being plot No. 25/1435?B Alimaunde Area 25 and plot number 10/22 Michiru, Blantyre.

A copy of her letter making one of such request reads as follows:-

***WITHDRAWAL OF SECURITIES FOR AIRLINK TRAVEL BUREAU LIMITED***

*Please refer to our several verbal discussion and some correspondence regarding the above named company which has now been taken by new management and I would like to advise that I wish to withdraw the securities entrusted thereupon with immediate effect.*

*The securities said above in a form of properties namely:-*

*Lot 10/22 Michiru, Blantyre*

*Lot 53/12 Lumbadzi commercial centre*

*Plot 25/1435/B Alimaunde Area 25.*

*Grateful for your kind assistance on this matter.*

The plaintiff alleges that the defendant has remained silent to her written request and has failed or neglected to deliver the deeds and discharge her properties.

On the other hand, the defendant has since March 2005 threatened to commence sale proceedings on the plaintiff's titles number Lumbadzi 53/70, Alimaunde 25/1019 and plot number 10/22 Michiru to recover the sum of K1,242,063.81 and accumulated interest in respect of the overdraft facility for the company.

A copy of a letter from the defendant in support of these facts is exhibited by the plaintiff and reads as follows: -

*We have instructions from our Capital City Branch to demand from as we hereby do, the immediate payment of the sum of K1,106,421.65 together with interest thereon and K135,642.16 being legal collection charges.*

*Kindly be advised that if the total sum of K1,242,063.81 plus interest accruing thereon on a daily basis is not paid to us within 120 days of the date of this letter, we will commence sale proceedings on titles number Lumbadzi 53/70, Alimaunde 25/1019 and plot number 10/22 Michiru.*

It is the contention of the plaintiff that she never instructed the defendant to use the securities for the Bank Guarantee as security for the unsecured overdraft facility enjoyed by the company.

Furthermore, she is no longer the Managing Director of the company and the security for the guarantee expired in 2003. It is the concern of the plaintiff that unless restrained by an order of this court, the defendant may wrongfully realise security on her properties and she undertakes to pay any damages the defendant may suffer for any wrongful restraint on the defendant.

The defendant opposes the summons. There is an affidavit in opposition sworn by Welkam Phiri, who is the defendant's Customer Relationship Manager. He has agreed that on or about 13th September 2001 the plaintiff was granted an overdraft facility with a limit of K400,000.00 expiring on 28th February 2002. That this facility was renewed with the same limit on or about 8th March 2002.

Considering that the plaintiff was getting a further facility and that the exposure of the Bank would increase once the guarantee to Air Malawi Limited was availed to her, the defendant reviewed conditions of its lending to the plaintiff and demanded that both facilities should now be secured by legal charges/mortgage over the plaintiff's realty.

The defendant has exhibited a letter dated 4th June 2002 providing Airlink Travel Bureau with two banking facilities namely letters of guarantee for K2 million and overdraft of K400,000.00. The security provided for these are legal charges totalling K2,474,000.00. The expiry date is 30th May 2003. The defendant states that a duly signed acceptance copy has been misplaced. It is the defendant's argument that this credit facility superseded the earlier credit facilities, which had no security. The defendant states that the two charges and mortgage registered in favour of the Bank secured both the guarantee and the overdraft.

The defendant has contended as follows:-

***That** it is clear from the affidavit of Marylinda Chikho herein that the plaintiff does not deny owing the defendant on the overdraft and as at 29th July 2005 the outstanding balance thereof was MK1,286,538.24.*

*That the charge over Lumbadzi 53/70 is a surety charge by the plaintiff to the defendant for the money advanced to a sole proprietorship. Therefore, it cannot be discharged by mere fact that the business was sold.*

*That the charge on Alimaunde 25/1019 was executed by the plaintiff as a personal borrower and again, it cannot be discharged by the mere fact that the business was sold.*

*That the mortgage on the plot at Michiru, Blantyre was not given by the plaintiff but one Grenald Harold Chikho as surety for the sums advanced to Airlink Travel Bureau Limited and cannot be reconveyed by mere reason that the business was sold.*

*That it is clear from the nature of the securities herein that they can only be discharged once payment has been made.*

The defendant counter-claims the sum of K1,286,538.24 plus interest accrued to date. The defendant further seeks a declaration that in view of the foregoing the properties can only be discharged once the plaintiff pays off the outstanding balance on the overdraft. The defendant would like the court to dismiss the plaintiff's action with costs.

The plaintiff made an Affidavit in Reply. She stated that until now she had never seen or had any discussion with any officer of the defendant to do with the exhibited letter of 4th June 2002. The plaintiff states that she neither signed that letter nor have a copy thereof. The plaintiff argues that it is not correct that she accepted the contents of that letter or that it superseded the prior credit facilities.

The plaintiff contends that the securities related to the bank guarantee which expired in May 2003. The plaintiff states that in July 2005 she and her son went to meet Mr Bandawe who is alleged to have conceded that the security on the bank guarantee was not at all linked to the overdraft facility enjoyed by the company. The plaintiff challenges the Affidavit in Opposition as being based on limited knowledge of the deponent.



The plaintiff filed a Supplementary Affidavit in Support of the summons. However, that was not done with leave of the court or consent of the other party. Consequently, it will not form the process to be considered in this ruling.

I am greatly indebted to both counsel for their written submissions. The issue under consideration is not complex. In my view it is simply whether or not the bank guarantee and overdraft facility were ever consolidated by agreement of both parties. There is something unique about the credit facilities offered to the plaintiff by the defendant on 13th September 2001 and 8th March 2002. Both documents were prepared by the defendant. A provision is made for acceptance by the plaintiff of the conditions set out in the credit facilities. There is no doubt and it is the finding of this court that as at 13th September 2001 and 8th March 2002, the credit facility offered by the defendant to the plaintiff had no collateral security. The bone of contention relates to the letter of 4th June 2002, which indicated that it was a facility for both letters of Guarantee and Overdraft and having collateral security. The plaintiff disputes the existence of this letter. The defendant has not been able to produce a duly signed copy of this letter to prove that the plaintiff agreed to the changed terms of the overdraft facility. The burden is on the defendant to prove this aspect by producing such duly signed copy. The document produced by the defendant is not signed by the plaintiff to signify acceptance of consolidation. The logical consequence of this is that the overdraft facility and the bank guarantee remain distinct. It is only the bank guarantee, which was secured with a collateral undertaking. The overdraft facility remained unsecured and the defendant cannot enforce a repayment through realisation of collateral that did not apply to the credit facility.

I therefore, grant the plaintiff the declaratory orders sought with costs. However, I refuse to order general damages for wrongful detention of the title deeds and the failure or neglect to discharge the properties. It is admitted by the plaintiff that her indebtedness to the defendant in respect of the overdraft facility still subsists. There was a mistaken belief on the part of the defendant that the overdraft was secured by those title documents, which it kept. Awarding damages to the plaintiff would be like rewarding the plaintiff for defaulting on repayment of the overdraft facility. It would not be a positive signal for commercial dealings.

**MADE** in chambers this 1st day of March 2006 at Blantyre.

Chimasula Phiri

**JUDGE**