

**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NO. 281 OF 2006**

BETWEEN

A.B. KALENGA PLAINTIFF

AND

NATIONAL BANK OF MALAWI DEFENDANT

CORAM : CHOMBO, J.

: Mr. Kumange, Counsel for the Plaintiff
: Mr. Khonyongwa, Counsel for the Defendant – Absent
: Mr. Njirayafa, Court Interpreter

JUDGMENT

There is evidence, and the same was submitted in court, that the defendant's counsel was duly served with the Notice of Adjournment specifying that the case would be heard on 21st July 2008 at 9.00 am in the morning. The same was signed for by Mr. Gilbert Khonyongwa. However, on the said 21st July 2008 defense counsel was absent with no reason. The court therefore proceeded in the absence of the defendant and its counsel.

The plaintiff's claim is for K659,700 being amount of money lost in Traveler's and K100,000 being communication expenses incurred in following up the matter. The same, according to the plaintiff's claim, should be calculated with interest at current bank rate effective 23rd July 2004 to the date of Judgment. The plaintiff

also claims what he has stated as K133,955 at 15% costs and 17.5% VAT there one of K19,942.13.

According to the facts thereof the plaintiff has submitted that on 23rd July 2004 he bought traveler's cheques amounting to US\$ 6,000.00 at National Bank of Malawi, Kasungu Branch as evidenced by exhibit A B K I and was travelling to South Africa. He left Kasungu on the same day intending to board a bus in Blantyre for South Africa. As he was boarding the bus for Blantyre in Lilongwe he discovered that his pocket was torn and all the contents therein, including the travelers' cheques stolen. He got off the bus and immediately reported the matter to National Bank – Lilongwe Branch and by telephone to Kasungu Branch where the plaintiff had purchased the travelers' cheques. He was also told to report the matter to Inter-payment Services but since he made the report on a Sunday he was told to make the report to Inter-payment Services on the next working day – Monday 26th July. It eventually came to light that the said traveler's cheques were encashed by somebody on 25th July – Sunday – at Victoria Forex Bureau in Blantyre.

National Bank of Malawi acts as agents of Inter-payment Services and when he reported the matter to National Bank he was given telephone numbers for them and on the Monday he reported the matter to the principal. He was given claims forms to complete and he faxed the completed claim forms to the principal marked in this court as exhibit ABK3. The principal wrote back asking for more information and the plaintiff supplied the required information. According to the plaintiff some of the communication was telephonic and it cost him about K100,000.00 in communications he was told to wait for further investigations.

Finally, the plaintiff received a letter from Inter-payment Services advising him that the information received with the claim for refund was not adequate to entitle the plaintiff get a refund and so they closed the chapter, as evidenced by exhibit ABK6. When the plaintiff made a claim for refund he also sent a report to Police and he got, exhibit ABK2A as Police report after he had paid for the production of the report – the receipt is marked ABK2B.

After the receipt of exhibit ABK6 the plaintiff wrote the agents, National Bank of Malawi expressing his dissatisfaction with the response of Inter-payment Services. National Bank wrote back advising the plaintiff that National Bank would consult their principals and get back to him. Since that letter, exhibit ABK8, there has been no other communication from Inter-payment Services or their agents, National Bank of Malawi. This is what finally made the plaintiff seek justice from the courts.

The evidence of the plaintiff is that when he noticed that the travelers' cheques were either stolen or lost from his pocket on 23 July 2004 he reported the matter to Lilongwe Police the next day in the morning and National Bank Lilongwe and Kasungu Branches. The loss occurred around 19.00 hours. According to the conditions on the Travelers' Cheques Sales Advise (ABK1).

“In case of loss or theft of your cheques you MUST report the loss or theft in reasonable detail within 24 hours to the Issuer at NATIONAL BANK OF MALAWI, P.O. BOX 228, KASUNGU (NO. 265-253224).”

The loss occurred on Friday night and Saturday morning, according to the evidence of the plaintiff, he reported the matter to the two branches of National Bank. The evidence on record states that the plaintiff was advised that the principal does not work on Saturday and Sunday so the matter would have to be reported on the next working day which was Monday 26th July. When the plaintiff reported to the Bank, as submitted by him, on a Monday 26th July 2004, he was asked to fill in a claim form – exhibit ABK3. It will be necessary to point out that this form has no provision for showing the date or time when the application for refund was made. The said claim form merely asks the client to fill in the personal details, permanent and temporary address, telephone number and e-mail address, the details of the missing travelers' cheques, and name and address of the agent who sold the cheques to the client.

So, even if the said claim form was filled in after the required 24 hours, there would be no way of ascertaining the same; unless if the agent has a register or record of when the same was submitted. Suffice to say that the plaintiff did fill in all the details that the said form required of him and the form was sent to the principal. On 1st September 2004 the principal made their first response to the plaintiff's claim. It is apparent that the said form was received by the principal who referred to it in their correspondence. It is also evident, as the plaintiff stated, that there was verbal communication. Inter-payment services informed the plaintiff that they were "not satisfied with the circumstances of the loss as given" by the plaintiff and that the "claim for refund did not meet with the requirements to satisfy us, as the Issuer that the claim is valid for refund."

The plaintiff was informed that he could provide the principal with additional information. The said letter does not elaborate further on the grounds for rejecting the claim or what it was that the plaintiff needed to do to “meet with the requirements to satisfy” the Issuer “that the claim is valid for refund.”

At this point in time the plaintiff had already submitted the Police report and the said claim form. The question I asked myself was what was the plaintiff supposed to have done to meet the said requirements? Unfortunately it has not been disclosed to court what was discussed verbally between the plaintiff and the Issuer as indicated in ABK4. The said letter, however acknowledges that the author’s office thereof was responsible for lost or stolen travelers cheques. In the claim form and Police report the plaintiff had clearly indicated that the said Travelers’ cheques were stolen as he scrambled to board the bus to Blantyre on the night of 23 July 2004.

I have no doubt that it would have been only fair for the Issuer to disclose the grounds for rejecting the plaintiff’s claim other than just stating that the claim does not meet the requirements to satisfy the claim. It is evident that there were two other letters, and I assume that the plaintiff supplied the additional information that the Principal was looking for these, according to exhibits ABK5 and ABK6 were letters from the plaintiff dated 22nd November 2004 and 6 September 2004. It is unfortunate that the court has not been given copies of these letters to assist it in determining the issues now before court. Suffice to say that after these two letters the Principal came to the conclusion that:

“The content of your fax has failed to supply any further information to substantiate that a loss or theft has taken place. In the absence of any additional information we are unable to offer a refund and our original denial decision is upheld”

It is lamentable that the plaintiff decided not to provide the court with these two letters that seem to be equally important in assisting the court to appreciate the position taken by the Principal. I am afraid that I find that the evidence before me is insufficient for me to determine the issue fairly. In the circumstances I must dismiss the plaintiff's claim.

If the defendant had been mindful to attend court they would have been awarded costs. In the circumstances no order for costs is made.

MADE in court this 18th day of September 2008.

E.J. Chombo

J U D G E

