



IN THE HIGH COURT OF MALAWI
(COMMERCIAL DIVISION)
LILONGWE REGISTRY
COMMERCIAL CAUSE NO.55 OF 2022

BETWEEN:

GERALD SIKAIKE.....CLAIMANT
AND

FRANCIS KULIDZUWA.....DEFENDANT

Coram: Hon. Charlotte Wezi Mesikano Malonda

Mr. M'bwana, Counsel for the Claimant

Ms. Mthambi, Counsel for the Defendant

Ms. Sella Nyirenda, Court Clerk

RULING ON APPLICATION FOR AN ORDER OF INJUNCTION

INTRODUCTION AND BRIEF FACTS

1. On 7th and 14th January 2022 and several periods thereafter (the Claimant) obtained short term loans from the Mr Francis Kulidzuwa , which in his own admission , he was obtaining "*katapila*" which in English is termed usury . He obtained piecemeal loans which eventually amounted to MK14,000,000.00, but failed to service the debt due to financial hardships he was facing. Eventually the Claimant only managed to pay back MK6,000,000.00, and the Defendant imposed a penalty amounting to a total debt of MK34,000,000.00 or thereabouts. The Defendant now wishes to take over the Claimants family home on plot number 25/5/60 situated in Area 25 in the City of Lilongwe.
2. It is the Claimant's submission that the Defendant has been threatening and approaching the family with chains threatening the lock the house. He therefore is seeking for the Court protection from the eviction and the interest charges on the standing debt.
3. On the other hand, the defendant has presented a similar story, though distinctly, he submits that, it is the claimant who voluntarily submitted two title deeds for his houses as collateral for the loan, and that he was given liberty to transfer title for the properties in the event of default

of payment. However, the Claimant continues to default in paying back the money and has held on to both the property and the money owed.

4. In terms of some of the particulars of the agreement between the parties, it was mutually agreed that two million kwacha will be charged as interest on the borrowed sums every 30 days, in the event of default.
5. On 14th January 2022, the Claimant borrowed an additional sum of MK6,000,000.00, which would attract an interest of one million kwacha every 30 days, in the event of default.
6. Two houses were pledged as collateral on condition that if the loans are not repaid, the properties will be transferred into the defendant's name, subject to the claimant being given one-week notice.
7. The loans remained unpaid and at some point the parties consolidated the loans into one loan attracting an interest of over six million kwacha and a further agreed terms, giving the Defendant possession and title of the Claimant's house situated on Alimaunde Title deed 25/350 in Lilongwe.
8. The loan remains unpaid and the claimant wants an injunction refraining the Defendant from continuing to accrue interest to the loan and from taking possession of the house in question.
9. This court has benefitted from both written and oral submissions from both parties to have a better appreciation of the facts in this case. Both parties have also filed skeletal arguments to canvass their divergent legal positions, with citation of both statute and case law.

ISSUES IN DISPUTE

10. This is an application is to determine whether to continue the ex-parte injunction granted by the court or to vacate the said injunction.
11. The Claimant pleads for the injunction to continue based on the fact that the penalties imposed by the Defendant have been so heavy and cumbersome which has affected his ability to pay back the money. He asserts that he borrowed MK14,000,000.00 and paid back MK6,000,000.00, leaving a balance of MK8,000,000.00. He therefore enforces that he did not borrow MK26,679,687.00, which is now MK33,349,608.00, penalties inclusive.
12. The Defendant pleads for a vacation of the injunction based on suppression of material fact, and the fact being in simple words, the title deeds for the House Alimaunde 25/350 were given voluntarily by the Claimant and the understanding being that the Defendant will take over the house if there is default in repayment of the loan. The other alleged suppression of material fact is related to the actual amount owed by the Claimant and how it accrued. The Defendant has further submitted that he is prejudiced by the failure to recover the amount owed by the Claimant, who has clearly shown that he cannot pay back the amount he borrowed.

LAW

13. I have considered all arguments and case authorities filed by the parties. The Application was made under Order 10 rules 27 of the Courts (High Court) (Civil Procedure) Rules, 2017 (hereinafter referred to as the "Rules"), for an order of interlocutory injunction.

14. By **O.10, rr.1, and 27 of the Rules** the court may grant an order of interlocutory injunction upon satisfaction that:
- a. *there is a serious issue to be tried;*
 - b. *damages may not be an adequate remedy; and*
 - c. *it shall be just to do so.*
15. In terms of case and statute law, clearly the both parties are arguing more on factual issues. Whilst on the fringes of the case, advancing some legal arguments to gain some sympathy from the court.
16. At injunction stage, the court ought not to determine who is wrong or test the credibility of the evidence, see ***Mangulama and Four others vs Dematt, civil Cause No.93 of 1996.*** Nevertheless, it is still worth analyzing whether the claimant or the defendant is raising triable issues.
17. The principles set out in the case of ***Daniel Mkhumbwe v National Bank of Malawi civil Cause number 2702 of 2000.***
- "if a borrower fails to pay the lender, if there was security for the loan, justice demands that the lender recourse the security irrespective of the hardships on the borrower. Justice is never met by the borrower having the benefit of both the funds and the security."*
18. In the case, which relates to the continuation of an injunction, there will be a continuation of an injunction where:
- a. *There is a risk of doing injustice to the plaintiffs (claimants) if the injunction is to be vacated.*
 - b. *There will be irreparable damage to the plaintiffs (claimants) if the injunction is lifted.*
 - c. *There is no such risk of doing injustice to the defendants if the injunction is continued/sustained.*
- See- *Tembo and 2 others v Chakwamba and 3 others Civil Cause No.1750 of 2001***
19. I have taken note of the Claimant's statement of case and he is submitting illegality, unfairness and unreasonableness of the rate of interest applied by the Defendant. The Defence denies that the Defendant practices usury and counter-claims for breach of contract, seeking reliefs, ranging from specific performance and damages. The Defendant wants the Court to uphold the contract.

APPLICATION OF LAW TO THE FACTS

20. At this stage, it is not up to this court to attempt to decide on the merits of the Claimant's claim on sworn statement evidence that has not been tested. Much of the assertions cannot be adequately scrutinized at this stage as it requires further interrogation. I must avoid resolving complex factual and legal questions that can only be resolved through trial. It is enough for the Claimant to show that there is a serious question to be tried, - See ***Mwapasa and Another v***

Stanbic Bank Limited and another Misc Civ. Cause No. 110 of 2003 (unreported) and also Bowler Beverage Company Ltd v Trade Kings Ltd [2001-2007] MLR (Com) 358.

21. Upon consideration of the material before me, I come to the conclusion there is a risk of doing injustice to the plaintiffs (claimants) if the injunction is to be vacated. I am of the firm view that the Injunction should be extended for the following reasons, and I will subsequently make appropriate orders.

22. The law is that, where there is suppression of material facts by the plaintiff, the court has the power to discharge the injunction obtained on the defendant's prayer for a discharge. See **State v Macra, ex-parte Joy Radio. [2008] MWHC 100**, and **R V Kensington Income Tax Commissioners ex – parte Princes Edmond de Polignac [1917] KB 486**:

“It is perfectly well settled that a person who makes an ex – parte application to the court that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge and if he does not make the fullest possible disclosure, then he cannot obtain any advantage from the proceedings and he will be relieved of any advantage he may have already obtained by means of the order which has thus been wrongly obtained by him”.

23. In the current case, both parties have disclosed fully the nature of their agreement. There has been no suppression of material facts. It is admitted by the Claimant that he borrowed money and is failing to pay it back, however he does not want to lose his house which he pledged as collateral to the Defendant. On the other hand, the Defendant is admitting that he lent money at an interest rate agreed upon and the surrendering of the property was done to ensure that if the Claimant defaulted, the Defendant recovers through taking over the secured properties. The only dispute remaining is to determine to what extent the Claimant is indebted to the Defendant, and the legality of the interest sanctioned by the defendant.

24. In the present action, having defaulted on the loan repayment, it is my finding that there is a litany of admissions from both litigants. However, I have further exercised my mind on the aspect of usury and penalty interest (though not expressly termed penalty interest by the parties) which has been argued. It has become common practice in our Courts, to come across Usury, which is disguised as Sale agreements, in different shapes, sizes and colours. See **Samuel Kumambala v. Raphael Akim Phiri Civil Cause No. 399 Of 2020**.

25. Recourse has been had to the Loans Recovery Act to re-open such dubious transactions. The Act makes provisions relating to money-lending transactions and it contains one substantive section, namely, **section 3**. The section empowers the court to reopen money-lending transactions. The section provides as follows:

“(1) Where proceedings are taken for the recovery of any money lent after the commencement of this Act, or the enforcement of any agreement or security in

respect of money lent either before or after the commencement of this Act, and there is evidence which satisfies the court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium renewals or any other charges, are excessive, and that, in either case, the transaction is harsh and unconscionable, or is otherwise such that a court of equity would give relief, the court may reopen the transaction, and take an account between the lender and the person sued, and may, notwithstanding any statement or settlement of the account or any agreement purporting to close previous dealings and create new obligations, reopen any account already taken between them, and relieve the person sued from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of such principal, interest, and charges, as the court having regard to the risk and all the circumstances, may adjudge to be reasonable; and, if such excess has been paid, or allowed in account, by the debtor, may order the creditor to repay it; and may set aside, either wholly or in part, or revise, or alter, any security given or agreement made in respect of money lent by a lender, and if the lender has parted with the security may order him to indemnify the borrower or other person sued.

(2) Any court in which proceedings might be taken for the recovery of money lent by a lender shall have and may, at the instance of the borrower or surety or other person liable, exercise the like powers as may be exercised under this section where proceedings are taken for the recovery of money lent, and the court shall have power, notwithstanding any provision or agreement to the contrary, to entertain any application under this Act by the borrower or surety, or other person liable, notwithstanding that the time for repayment of the loan, or any instalments thereof, may not have arrived.

26. In light of the Law above, I am inclined to accept and extend the submission by the Claimant to determine the appropriateness of the interest. see **Mwalwanda v Sipedu [1990]13 MLR 278**, in which the Court reduced the amount to be paid as interest.

27. The agreement between the parties was no ordinary contract, it was an agreement based on exploitation of the situation that made the claimant desperate for access to cash. This is not the relationship of bank and customer, rather this is the relationship between a desperate person and a loan shark. To the effect that, even if one agrees to be charged penalty interest, in the event of default, the interest sanctioned must not offend the rules against penalties. See **Katsala J** as he was then, in **NBS Bank Ltd. v Modern Business Management Ltd. (Commercial Cause 81 of 2012) [2018] MWCommC 7 (13 July 2018)** :

*"I wish to adopt the reasoning in the case of **Harry Gunda t/a Halls Protective Clothing General Dealers v Indebank Limited (supra)** and the recent decision of this Court in **National Bank of Malawi Ltd v Lilongwe Gas Company Ltd Commercial Case***

Number 165 of 2016 (unreported). These decisions give a comprehensive discussion of the law on penalty interest and the applicability/non applicability of penalty interest in our jurisdiction. I do not wish to repeat what is said therein suffice to say that the views I expressed on the point in the latter case have not changed. So even if the parties herein had agreed that penalty interest would be charged on default, there would still have been the need for them to justify that that interest does not offend the rule against penalties”.

28. I have searched in the agreement and the law for any legitimate reason to permit the Defendant to lend money at such a high and penalty interest rate, creating fictitious charges over the borrowers property. I have tried to understand the legitimate reasons for imposition of such heavy penalties and I find none. For the purposes of clarity, the claimant borrowed MK6,000,000.00 and is being charged MK1,500,000.00 every thirty days, for as long as the payment is in default, in the second transaction, the claimant borrowed MK8,000,000.00 and is being charged MK2,000,000.00 every thirty days, for as long as the payment is in default.
29. Much as the Defendant has tried to create an impression that he is a business man and this was a commercial transaction. This Court is aware of the fact that the Defendant is not a money lending institution. This Contract has no redeeming elements at all. It is harsh, without conscious and exploitative. There is no legal basis for the Defendant to collect compound interest for the money he is owed as this will have the effect of making usury '*katapila*' beneficial to the money lenders.
30. The issue of interest has been covered vastly in decided cases see ***NBS Bank Ltd. v Modern Business Management Ltd. (Commercial Cause 81 of 2012) [2018] MWCommC 7 (13 July 2018)*** , ***Harry Gunda t/a Halls Protective Clothing General Dealers v Indebank Limited COMMERCIAL CASE NO. 186 OF 2015.***
31. I observe that this practice of usury is not sanctioned or protected by any legislation. It is still restricted within the law of contract, and it has all the hallmarks of an unfair and exploitative contract. Despite the conduct of the Defendant, the Claimant is also not without blame. He over-borrowed and has defaulted in paying back even the principal sum. This cannot only be attributed to the obscene interest charges. Clearly, I can see that he is hoping that he can borrow and pretend to agree to terms just to have access to the money, then turn around and refuse to pay back the money. That is deceitful and slowly gravitating towards fraud. This Court will not condone such dishonesty. It will not be the case. The Defendant is still entitled to his money, though limited to what is permitted by law.
32. I am inclined and persuaded that there are limits to the rights of each party, as decided in other previous cases, See ***Katsala J in NBS Bank Ltd. v Modern Business Management Ltd. (Commercial Cause 81 of 2012) [2018] MWCommC 7 (13 July 2018):***

“The plaintiff is entitled to be paid the balance of the loan plus interest less all the penalty interest that was charged. This also means that the 1st defendant’s counter claim succeeds only to this limited extent. The Assistant Registrar will assess the amount

payable if the parties fail to agree. Debt collection charges will be payable in respect of the amount that will be found due."

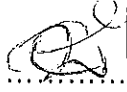
DECISION

33. Having considered all the information before me, it is my finding that there is merit in sustaining the injunction as prayed for until further order of this Court.

ORDER

- 34. The Application for an interlocutory order of injunction is granted and each party to pay its own costs.
- 35. The matter shall proceed for mediation within 30 days to allow the parties to reach an agreement on how much should be paid back and within what period.
- 36. Should the parties not agree during mediation, the Court will proceed to reopen the transaction to determine the amounts due.
- 37. Should any of the parties fail to comply by the Order of the Court moving forward, normal enforcement proceedings shall ensue before this Court for attachment of property or any relevant order.

Made in Chambers in Lilongwe this 10th of January, 2022



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CHARLOTTE WEZI MESIKANO MALONDA

Judge