

**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2018/HP/0300

BETWEEN:

MWILA MUTALE

AND

BEN MWANZA**PLAINTIFF****DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 31st DAY OF
JANUARY, 2020**

For the Plaintiff : Ms K. Sakajila, Tembo Ngulube & Associates

For the Defendant : Mr M. Sampa, Frank Tembo & Partners

J U D G M E N T

CASES REFERRED TO:

1. *Printing and Numerical Registering Company v Simpson* 1872 L.R. 19 EQ 62
2. *Gibbs v Guild* (1881) 8 QBD 206
3. *Khalid Mohamed v The Attorney-General* 1982 ZR 49
4. *Brian Royle Maggs T/A BM Builders (A firm) v Guy Anthony Stayner Marsh* [2006] EWCA Civ 1058
5. *Attorney General v Roy Clarke* 2008 Vol 1 ZR 38
6. *Luke Phiri v David Tembo* 2011 Vol 3 ZR

LEGISLATION REFERRED TO:

1. *The Limitation Act, 1939*

OTHER WORKS REFERRED TO:

1. *Chitty on Contracts, Volume 1*

The plaintiff commenced this action on 12th February, 2018, by writ of summons claiming;

1. *Payment of K41, 000.00 being the money due and outstanding in respect of a debt.*
2. *Interest.*
3. *Costs.*
4. *Any other relief the court may deem fit.*

The statement of claim shows that sometime in August 2010, the defendant obtained a loan of K41, 000.00 from the plaintiff, which amount was to be paid back the following month at an interest rate of thirty (30) percent. The plaintiff further states that the defendant handed over a jaguar vehicle registration number ABV 7771 as collateral.

That despite several reminders, the defendant has refused, neglected or ignored to liquidate the said sum, resulting in the plaintiff suffering loss and damage.

The defendant entered appearance and filed a defence on 1st March, 2018. The gist of that defence is that the defendant did not borrow the amount of K41, 000.00 being claimed by the plaintiff, as he did not enter into any agreement with him. He further denies having neglected to pay the amount claimed.

At the trial, the plaintiff testified and he called no witnesses, and the defendant testified as the only witness to his case. The testimony of the plaintiff was that the defendant is a husband to his former work mate at the Citizens and Economic Empowerment Commission (CEEC). He stated

that sometime in 2010, on a date he did not recall, Mrs Maureen Mwanza approached him stating that her husband Ben Mwanza, the defendant wanted to borrow K41, 000.00.

That is how the plaintiff met the defendant, who told him that as security for the loan, he would give him collateral in the form of a vehicle, namely Jaguar, registration number ABV 7771. The plaintiff testified that he gave the defendant the K41, 000.00, and many months passed, and he would remind either the defendant or his wife that amount was due to be paid after two months.

He told the court that he was not given any reasons for the default in paying back the money. Then he requested Mrs Mwanza to hand over the vehicle, and this was done on 16th February, 2011. The plaintiff told the court that he could not dispose of the vehicle without an order of the court.

In cross examination, the plaintiff testified that he accepted the vehicle as he waited to be paid. He agreed that he had no document to show that he lent the defendant K41, 000.00, and that if the defendant did not agree, he could have disputed the claim. The plaintiff further agreed that having been a Credit and Risk Manager at the CEEC, which gives out loans for three (3) years, he was familiar with the issue of loans.

He further agreed that he lent the money to the defendant in 2010, and that he got the vehicle on 16th February, 2011. The plaintiff also agreed that the vehicle is not in the same state that it was when it was given to him, but he denied that he damaged it, stating that vehicles depreciate naturally. He told the court that he had even suggested to the defendant that the vehicle be sold.

The plaintiff also testified that he did not have a money lender's certificate when he lent the defendant the money, but denied that he was before court to enforce an illegal agreement. His position was that he wanted to help, and that is why he had lent the defendant the money.

In re-examination, the plaintiff testified that the vehicle was given as security for the money which was lent. He also told the court that employees of CEEC and their spouses were not eligible to obtain loans from it. That marked the close of the case for the plaintiff.

The defendant in his defence stated that he denied owing the plaintiff the amount of money claimed. His evidence was that he did not recall getting K41, 000.00, but K15, 000.00 from the defendant, and he got that money together his business partner in 2011. The defendant further testified that interest on the amount was due at thirty (30) percent after thirty (30) days. He further testified that he was asked to provide collateral for the loan by the plaintiff, who is still a money lender.

Still in his testimony, the plaintiff stated that he gave his wife the Jaguar, registration number ABV 1775, valued at US\$20, 000 as collateral for the loan. The defendant stated that they had challenges with business, and could not pay back the amount within the thirty (30) days. He asked for more time, and they were given another thirty (30) days to pay, but six (6) months elapsed, and they still had not paid back. The defendant continued with his testimony stating that he tried to sit down with the plaintiff, but he refused to extend time, and he got the collateral for the loan.

It was stated that the plaintiff started using the vehicle which was pledged as collateral, and it was involved in an accident, and had lost

value. He told the court that the plaintiff sued after seven (7) years, and the defendant who was shocked at the claim, asked the plaintiff to sell the vehicle to recover the money. The defendant also testified that when he gave the vehicle to the plaintiff, it had mileage of less than 20, 000 kilometres, and that he had been divorced because of the plaintiff.

When cross examined, the defendant stated that his business partner is Tamara Tembo. He agreed that the plaintiff used to be his wife's work mate, but he did not know if the plaintiff had set up a money lending business. On why he had stated in his defence that he did not enter into any agreement with the plaintiff, the defendant testified that it was because he did not know which agreement he was referring to, as there were two (2).

He agreed that the vehicle that was pledged as collateral was registered in Katai Chola's name, and he stated that he used to do business with Katai Chola. It was also the defendant's evidence in cross examination that when the vehicle was handed over to the plaintiff, it was in the custody of the defendant and his business partner, but he asked his wife to hand it over to the plaintiff.

The defendant stated that they had borrowed money from Katai Chola and that they had paid him back. However, Katai Chola had not changed the ownership of the vehicle back into their names. He agreed that after six (6) months, interest was due on the amount borrowed, but he would have to calculate it. The defendant further stated that they opted to lose out as opposed to continuing to accrue interest, and that Katai Chola should still have title to the vehicle.

When cross examined further, the defendant agreed that one could not sell a vehicle that they did not own. He also stated that he had seen the plaintiff driving the vehicle, adding that it is the only vehicle that he has right now. The defendant denied that he had failed to pay due to the marital issues, but that the plaintiff had destroyed his marriage. His evidence was that he did not pay the plaintiff storage fees when he got the vehicle, as there was no such agreement.

It was further his testimony that he had told the lawyers that he could change ownership of the vehicle into the plaintiff's names, but he had received no response.

In re-examination, the defendant stated that he had borrowed money twice from the plaintiff, payable with interest, and that with regard to the claim before court, he had borrowed K15, 000.00. That when he saw the plaintiff driving the vehicle, he had sent him a text message stating "nice car", and the plaintiff had responded stating that he was following him, and wanted to kill him. He concluded by testifying that he was willing to have the matter settled, by changing ownership into the plaintiff's name.

I have considered the evidence and the submissions. It is not in contention that the plaintiff lent the defendant some amount of money which was repayable with interest thereon. It is common cause that the defendant pledged a motor vehicle being a Jaguar, registration number ABV 7771, as security for the money lent, which is registered in Katai Chola's name. The question is whether the plaintiff is entitled to be paid the amount claimed?

In this matter, the agreement between the parties was not reduced into writing, and the question is what the terms of the agreement were?

In the case of **Brian Royle Maggs t/a BM Builders (A firm) v Guy Anthony Stayner Marsh** ⁽⁵⁾, the Court held that:

"Determining the terms of an oral contract is a question of fact. Establishing the facts will usually as here, depend upon the recollections of the parties and other witnesses ... "

As to what a debt is, the plaintiff relied on **Chitty on Contracts, Volume 1** at page 1257 which is defined as;

"A debt is a definite sum of money fixed by the agreement of the parties and payable by one party in return for the performance of a specified obligation by the other party or on the occurrence of some specified event or condition.....the claimant who claims payment of a debt need not prove anything more than his performance or the occurrence of the event or condition, there is no need for him to prove any actual loss suffered by him as a result of the defendant's failure to pay...."

The plaintiff testified that he lent the defendant the amount of K41, 000.00 sometime in 2010, which was to be repaid after two (2) months. The defendant on the other hand denied that he borrowed K41, 000.00, but rather that he borrowed K15, 000.00 to be repaid after thirty (30) days, with interest thereon at thirty (30) percent.

The defendant further told the court that he could not repay the money after thirty (30) days, and the plaintiff gave him an extension of a further (30) days. It is trite that he who alleges must prove, and it was held in the case of **Khalid Mohamed v The Attorney-General** ⁽³⁾ that;

“A plaintiff cannot automatically succeed whenever a defence has failed; he must prove his case”

While the plaintiff in his evidence testified that the defendant borrowed K41, 000.00 which was to be paid back after two (2) months, in paragraph 4 of his statement of claim, he states that the K41, 000.00 was to be paid back after thirty (30) days with interest at thirty (30) percent after 30 days. Further, the plaintiff did not demonstrate how the claim for K41, 000.00 came about in light of the defendant's denial that he had borrowed the money.

The defendant's evidence in his defence, which was not supported by his defence, and which was not objected to by the plaintiff was that he borrowed K15, 000.00 with interest at thirty (30) percent after thirty (30) days. That after the defendant could not pay back the money after thirty (30) days, the plaintiff granted him an extension of thirty (30) days. However, six months passed, and he did not pay, and the plaintiff got the Jaguar vehicle as collateral. This evidence was not challenged in cross examination.

In the case of *Attorney General v Roy Clarke* ⁽⁵⁾ it was held that;

“A party cannot rely on unpleaded matters except where evidence on the unpleaded matter has been adduced in evidence without objections from the opposing party”.

Therefore, the plaintiff not having objected to the evidence that was led by the defendant, which was not pleaded, and which was to the effect that he had borrowed K15, 000.00 payable with interest thereon at thirty (30) percent after a month, and which repayment was extended by

another thirty (30) days, entails that I am not precluded from considering that evidence.

Thirty (30) percent of K15, 000.00 is K4, 500.00, and that is the interest that was due on the amount after thirty (30) days. When the repayment period was extended by another thirty (30) days, another K4, 500.00 accrued as interest on the amount, bring the total amount due to K24, 000.00. The defendant's evidence which was not challenged was that six (6) months thereafter elapsed, and he had not paid the money, and that is how the plaintiff got the Jaguar, which was pledged as collateral for the vehicle.

There is no evidence on record to show whether the interest at thirty (30) percent per month, continued accruing on the amount, even after the extension period, but as seen at page 1 of the plaintiff's bundle of documents, and page 1 of the defendant's bundle of documents, the vehicle was handed over to the plaintiff on 16th February, 2011.

The defendant argued that the plaintiff is not a registered money lender who therefore could not lend him money, and charge him interest thereon. In the case of **Luke Phiri v David Tembo** ⁽⁶⁾, the respondent deposited with the applicant his certificate of title for property known as Stand No. 24727, Lusaka, as security for repayment of a loan advanced to him of K160,000,000.00.

The respondent pledged to liquidate the debt by paying the sum of K60,000,000.00, on 7th May, 2010, and the balance of K100,000,000.00 on 7th June, 2010, and in default whereof, the respondent would forfeit his property, Stand No. 24727. Following default by the respondent, the

applicant proceeded to register the assignment of the property to himself and obtained title to the property.

The court in that matter cited the case of ***Printing and Numerical Registering Company v Simpson*** ⁽¹⁾ where it was held that;

“If there is one thing more than another which public policy requires it is that men of full age and competent understanding shall have the utmost liberty in contracting and that their contract when entered into freely and voluntarily shall be enforced by Courts of justice.”

The defendant’s allegation that the plaintiff is a money lender was not substantiated. If indeed the plaintiff is a money lender who is registered under the Money Lenders Act, Chapter 398 of the Laws of Zambia, the money lending would have been regulated by that Act.

What the transaction in this matter shows, is that the defendant borrowed money to be paid back with interest. These are men of full age who entered into an agreement, and going by the decision in the case of ***Luke Phiri v David Tembo*** ⁽⁶⁾ seen above, the court should give effect to the agreement.

The plaintiff testified that he lent the money to the defendant in 2010 in a month that is not known. It was to be repaid back after thirty (30) days with interest. The evidence as given by the defendant, which was not discredited in any way as already seen, was that after thirty (30) days he did not pay, and an extension of another thirty (30) days was given.

There was default and consequently, breach of the agreement. The plaintiff in cross examination testified that he was given the vehicle on 16th February, 2011, and the agreements at page 1 of the parties bundles

of documents reflects so. The plaintiff stated that he could however not dispose of the vehicle as he needed a court order. He sued on 12th February, 2018, almost six years after he got the collateral, being the motor vehicle.

This action arises from a simple contract. Section 2 of the **Limitation Act, 1939** provides for limitation of actions. It states that;

“That the following shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:—

a) Actions founded in simple contract”.

As to when a cause of action accrues in contract, it was stated in the case of **Gibbs v Guild** ⁽²⁾ by Field J, that with regard to the date on which a cause of action accrues, in the case of actions founded in contract, is that time runs from breach.

The evidence in this matter shows that after the initial thirty (30) days for repayment came up, sometime in 2010, the plaintiff extended time to pay by another thirty (30) days, six (6) months elapsed after that, and there was still no payment, and at that time, the plaintiff got the Jaguar vehicle which was pledged as security on 16th February, 2010.

In my view, the breach occurred after the thirty (30) day period that was given by the extension sometime in 2010, and not when the plaintiff was given the Jaguar. The giving of the Jaguar to the plaintiff was just to secure the payment, as the breach had already occurred. The action was commenced on 12th February, 2018, definitely after the expiration of six (6) years in 2010, when the money was due to be paid.

This claim is therefore statute barred. It therefore follows that the plaintiff is not entitled to any relief from the court. On that basis, I dismiss the action, and as the defendant has indicated that he is willing to change ownership of the vehicle into the plaintiff's name, that is an option that the parties can pursue with the involvement of Chola Katai, the registered owner of the vehicle, outside the court.

Costs of the action go to the defendant to be taxed in default of agreement. Leave to appeal is granted.

DATED AT LUSAKA THIS 31st DAY OF JANUARY, 2020

S. Kaunda

**S. KAUNDA NEWA
HIGH COURT JUDGE**