IN THE HIGH COURT OF MALAWI
COMMERCIAL DIVISION
LILONGWE DISTRICT REGISTRY
COMMERCIAL CAUSE NO. 32 OF 2022

BETWEEN:

ROMBANI LONDWA
t/a KAIZWANGA INVESTMENT AND GENERAL DEALERS.....CLAIMANT

-AND-

STANDARD BANK plc.....DEFENDANT

CORAM: HON. JUSTICE DR. C.J. KACHALE, *Judge*
Agagi, of Counsel for the Claimant
Soko, of Counsel for the Defendant
Ndhlazi, Court Clerk

RULING ON APPLICATION TO STRIKE OUT ACTION FOR BEING FRIVOLOUS AND VEXATIOUS

1. On 7th February 2022 *Rombani Londwa* who carries on business under the style *Kaizwanga Investment and General Dealers* obtained an injunction stopping Standard Bank plc from selling property described as Katoto 31/557 in Mzuzu City which had been charged as security for loans obtained by the Claimant from the bank. The order further sought to compel the bank to accept deposits from the Claimant aimed at reducing his indebtedness to them. The main action claims damages for breach of contract, for arbitrary deprivation of property as well as loss the of use his property. The bank filed its defence opposing the action and praying for the injunction to be vacated. Thereafter, the present application was made by the bank: it has been argued that the present action cannot be sustained and should be dismissed for being frivolous and vexatious.

2. Despite the protestations of the Claimant suggesting that in the absence of an express rule of procedure, there is no basis to support the present process, this Court has been persuaded otherwise based on recent jurisprudence within our jurisdiction. As the learned *Justice Tembo* observed in **The State (on the application of Esther Kathumba & Others)-v-The President, Judicial Review Cause No. 22 of 2020** as follows:

> The doctrine of inherent jurisdiction helps the Court to achieve justice where it would not have been possible to do so....'The inherent jurisdiction of the court may be defined as being the reserve or fund of power, residual source of powers, which the court may draw upon as necessary whenever it is just and equitable to do so and in particular to ensure the observance of the due process of law, to prevent improper vexation and oppression, to do justice between the parties and to secure a fair trial between them.' Another way of putting it is that inherent jurisdiction authority remains the means by which Courts deal with circumstances not prescribed or specifically addressed by rule or statute, but which must be addressed to promote the just, speedy and inexpensive determination of every action....'Inherent jurisdiction cannot, of course, be exercised so as to conflict with statute or rule. Moreover, because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case.' Three principles emerge from the foregoing, namely, the so called inherent jurisdiction (a) is equitable in nature, (b) is solely intended to ensure justice, and (c) has to be exercised with restraint and discretion..."

3. Thus we have felt emboldened to consider the application on the clear understanding that if the arguments of the Defendant carry merit, then there would no justification to prolong this action in our courts. This approach is further rooted in the wisdom of *Justice Katsala* (as he then was) in **BMK Mhango-v-NBS Bank Ltd, Commercial Cause No. 182 of 2013** where he urged counsel to appreciate the overriding objective of the new procedural regime which aims to achieve justice with minimal cost to the parties. With similar candor, the learned judge echoed those sentiments in **Mike's Trading Group Ltd-v-NBS Bank Ltd and AG, Commercial Cause No. 64 of 2018** when he noted that access to justice comports a recognition that clogging the court system with needless

causes of action deprives other litigants of access to the limited judicial resources available within the jurisdiction. Accordingly, this Court would not countenance a scenario where a frivolous claim is entertained without any real prospect at trial, when a process of this nature could well and competently dispose of the same.

4. In determining the issue whether the present action is frivolous the Court has paid close attention to the chronology of events surrounding the entire process. As earlier observed, the interlocutory injunction was actually obtained on 7th February 2022. At the time the Claimant testified (through his sworn statement) that the bank had exercised their right of sale in a manner that lacked good faith and which deprived him of his property arbitrarily. Since then the bank has provided evidence (which has not been controverted) to demonstrate that it acted with utmost good faith; not only did it give notice to the Claimant in January 2021 of its intention to realize its security in the charged property, but it never took any steps to advertise the property until sometime in July 2021. Even prior to concluding the sale to the highest bidder, there was further communication made to the Claimant (as chargor).

5. Indeed, even after the injunction of 7th February 2022, compelling the bank to accept payments from the Claimant, he quickly withdrew the funds instead of allowing the bank to apply the same to reduce his (purported) debt. Even more poignant is the fact that at the time he obtained the injunction the sale had been concluded and the proceeds of sale applied to clear the bank loans, with the surplus held to the benefit of the Claimant, awaiting his instructions.

6. It is very significant to observe that section 68(2) of the Registered Land Act provides a chargee the right to exercise the right of sale, in the event that a chargor fails to settle an outstanding debt. Section 71(3) of the Registered Land Act further provides that a transfer by a charge in exercise of his power of shall be made in the prescribed form, and the Registrar may accept it as sufficient evidence that the power has been

duly exercised, and any person suffering damage by an irregular exercise of the power shall have his remedy in damages only against the person exercising the power.

7. The Malawi Supreme Court has had occasion to consider these matters in **New Building Society-v- Henry Mumba [2006] MLR 328**. In that decision *Tambala, JA* cited with approval the dictum of *Mtambo, JA* in **New Building Society-v-Mumba, [2001-2007] MLR (Com) 243** at 249:

> The next question is whether the equitable remedy of injunction restraining the appellant from completing the sale was available to the chargor after the chargee has exercised the power of sale. We will consider this issue as if the question is whether the remedy of injunction is available to a chargor at all, as it does not seem to make any difference to us whether the remedy is sought before or after the chargee has exercised the power of sale....Therefore, provided the power of sale is exercised in good faith, we are ourselves disposed to think that a mortgagor having voluntarily agreed with a mortgagee on what should happen when certain specified events take place should not be allowed to run to the courts to prevent the mortgagee from exercising the power of sale merely because, as will usually be the case, it is contrary to his interests....What this means is that the equitable remedy of injunction restraining the appellant from completing the sale should not have been available to the respondent....What was available to the respondent was the remedy in damages, which the statute envisages would be sufficient remedy....We think that the questions the appeal raised were purely of law, and we would say of benefit to both parties and the industry....

8. On the basis of the jurisprudential doctrine of precedent, these decisions express the correct and binding legal position applicable in scenarios like the present: this Court is obligated to analyze this case in light of the legal principles enunciated therein. Thus, the Claimant's allegations of arbitrary deprivation of property cannot be sustained on the evidence on the record. He obtained loans from the bank and his property was charged as security for that finance.

9. According to the terms of those loans, he was clearly in default and the bank exercised its right of sale. Prior to so doing, appropriate statutory

notice was issued to the chargor and public adverts were placed to seek a buyer. There is no material on record to substantiate the allegation of bad faith raised by the Claimant; if anything, it is the Claimant who acted with bad faith in that he suppressed so many material facts at the time he obtained the injunction on 7th February 2022. That suppression would entitle the court to vacate the equitable remedy of injunction forthwith.

10. For present purposes, these matters only go to demonstrate how flimsy and untenable the present cause of action is, bearing in mind the specific factual context as well as the applicable legal principles governing the relationship that existed between the Claimant and the bank. In **the Mumba Cases (above)** the chargor had engaged the bank to seek a restructuring of his loans; eventually the bank resolved that he lacked the means to honor his obligations.

11. In this case, though he was notified of his breach of the loan agreement, the Claimant never sought such accommodation and was kept fully abreast of all steps taken to realize the security by the bank. In our judgment, it would be quite inimical to commercial banking if the Court were to intervene and prevent the chargee from exercising its statutory rights as claimed in the cause of action. The law as discussed in the above-cited decisions does not offer such remedies to a person in the position of the Claimant. Put differently, there are no prospects of the present cause of action succeeding even if it proceeds to trial because the factual scenario analyzed in the context of the pertinent law would not yield such an outcome.

12. Before we close, it is important to express our position about the sworn statement of the Claimant dated 28th November 2022 which has been challenged by the Defendant for containing legal arguments as opposed to matters of fact. While it is correct (as pointed out by the Claimant) that Order 18 rule 6(2) CPR provides that a sworn statement may contain a statement of information and belief provide the sources of information or basis for the belief are also disclosed; the Claimant's sworn statement does not fall within that purview. Decisions of **Master**

Gadama-v-Mark Sprout Secure Finance Ltd, Commercial Case No. 207 of 2017 as well as **The State (on the application of Kezzie Msukwa and another)-v-The Director of ACB, JR Case No, 24 of 2021** cannot save this statement.

13. Quite clearly, the document discusses the law as opposed to outlining factual matters. By merely attributing those views to his lawyer, it does not change the substance of the content. The failure of counsel to make that basic distinction (and insistence on the validity of their sworn statement even when it was challenged) is a matter of considerable judicial concern, bearing in mind the critical role of counsel in the conduct of litigation in our judicial system. If such basic matters can be so easily confused, it begs the question whether one is even able to provide cogent legal advice to the client in the first place. The Court strikes out the sworn statement for being irregular, see the case of **Malawi College of Health Sciences Board of Governors-v-Blantyre City Council, Revenue Case No. 59 0f 2021**.

14. In conclusion, therefore, this Court has concluded that the present action has no legal merit and warrants immediate dismissal. It is calculated to vex the Defendant and to prevent the bank from exercising its statutory rights which arise from a sound loan agreement between Rombani Londwa and Standard Bank plc. There is nothing to substantiate the allegation of bad faith in the manner the right of sale was exercised by the bank.

15. This Court finds that there is proof of due compliance with the relevant notices and other obligations in seeking to realize its security. Thus, there is no legal basis on which there could be any legitimate controversy about the rightful consequences of the default which arose on the loan instruments executed between the two parties. Litigation should be about genuine controversy and not mere academic or frivolous or contrived disputes with no cloak of legality.

16. If there was any loss occasioned to the Claimant as chargor, the remedy lies in damages and not in this remedy of injunction or indeed the misconceived effort to actually require the bank to indemnify him for imaginary losses. Allowing this action to remain on the docket will continue to occasion considerable commercial loss to the bank. That was never the intention of the law in creating access to justice; not only the chargor, but the chargee and many other court users are expecting the same judicial services which would be unfairly occupied if we entertain such flimsy cases on our court registers. According to the wisdom of learned *Justice Katsala* (as he then was) referenced earlier on, we have a responsibility to rationalize use of our limited judicial resources to be able to effectuate the right of access to justice for all court users, besides the Claimant herein.

17. By this order, the injunction of 7th February 2022 is hereby vacated forthwith. Any proceeds of sale held to the account of the Claimant should be remitted accordingly, as per the relevant communication from the bank following the sale. Furthermore, due to the clear lack of merit in the substantive action and the clear factual misrepresentations upon which the interlocutory injunction was obtained, the Claimant is condemned in costs of this court process on an indemnity basis.

Order accordingly.

Made in Chambers this 20th day of April 2023 at Lilongwe.

***C.J.Kachale*, PhD**

JUDGE