JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

CIVIL CAUSE NO. 364 OF 2016 BETWEEN

MATINDI PRIVATE ACADEMY ..... **PLAINTIFF**

AND

LEASING FINANCE COMPANY ..... **DEFENDANT**

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Chagwamnjira, of Counsel, for the Plaintiff

Mr. Mpaka, of Counsel, for the Defendant

Mr. O. Chitatu, Court Clerk

ORDER

Kenyatta Nyirenda, J

This is an application brought under Order 29 of the Rules of the Supreme Court (RSC) whereby the Plaintiff seeks an order restraining the Defendant from selling and/or advertising for sale property which is being held as security under a loan with the Defendant, namely, Title Number Chigumula 1/396 [hereinafter referred to as the "Plaintiff's property"], or in any way interfering with the Plaintiff's peaceful enjoyment of the Plaintiff's property pending the determination of the main action herein.

The application came before me on 22nd September 2016, by way of an ex-parte summons, and there was filed along with the ex-parte summons an affidavit, sworn by the Plaintiff s Managing Director, Mr. Elvis Nserebo [Hereinafter referred to as the "Plaintiff's Affidavit". I granted an interlocutory injunction subject to an inter-partes hearing on 30th September 2016. The Defendant is opposed to sustaining the interlocutory injunction.

The Plaintiff obtained a loan from the Defendant and he used the Plaintiff s property as collateral. Due to the problem of liquidity, the Plaintiff falls in arrears. When the Defendant sought to execute, the Plaintiff commenced an action in the Commercial Division seeking various reliefs. The action was struck out.

After the case was struck-out, the Plaintiff negotiated with the Defendant on the way forward and an agreement was reached, whereby the Plaintiff was allowed to pay MK10, 000,000.00 in April 2016 and MK 10, 000,000.00 in September 2016. The Defendant wrote a letter dated 25th April 2016 confirming the new arrangement. As the agreement was made on 25th April 2016, the Plaintiff only managed to pay MK2, 500,000.00 in April 2016 and it was agreed that the balance would be paid in September 2016.

On 19th September 2016, the Plaintiff went to the Defendant's Credit Control Officer, Ms. S. Sisya, with MK 15, 000,000.00 but she asked the Plaintiff to hold onto the money until the following day, that is, 20th September 2016. When the Plaintiff went to see Ms. Sisya on 20th September 2016, she told him that the Plaintiff s property had been offered to someone else who had paid a deposit in the sum of K9, 000,000.00 on the previous day, that is, 19th September 2016.

The case of the Plaintiff is that the sale of the property does not comply with the provisions of the Registered Lands Act (RLA) in three respects:

(a) After reaching a new agreement with the Defendant, no notice was ever written to the Plaintiff that the property was to be sold;

(b) The property was not advertised for sale, either by tender or public auction; and

(c) No reserve price had been set by the Registrar of Lands for the sale of the property.

Application for an Interlocutory Injunction

The main issue for determination with respect to the Plaintiff s application for interlocutory injunction is whether this Court should order continuation of the order of interlocutory injunction, as was argued by the Plaintiff through its Counsel, or dismiss the instant summons, as was argued by Counsel for the Defendant.

An interlocutory injunction is a temporary and exceptional remedy which is available before the rights of the parties have been finally determined: see 0. 29, r. 1(2) of the RSC, Series 5 Software Ltd v. Clarke & Others [1996] 1 ALL ER 853 and Ian Kanyuka v. Thom Chumia & Others, PR Civil Cause No. 58 of 2003. In the latter case, Justice Tembo, as he then was, observed as follows-

> *"The usual purpose of an interlocutory injunction is to preserve the status quo until the rights of the parties have been determined in the action. The injunction will almost always be negative in form, thus to restrain the defendant from doing some act. The principles to be applied in applications for injunction have been authoritatively explained by Lord Diplock in*
> *American Cyanamid Co. v. Ethicon Limited /1975] A.C. 396 ".*

Is there a serious question to be tried?

In any application for an interlocutory injunction, the first issue before the court has to be *"Is there a serious issue to be tried?".* Indeed this must be so because it would be quite wrong that a plaintiff should obtain relief on the basis of a claim which was groundless. It is, therefore, important that a party seeking an interlocutory injunction has to show that there is a serious case to be tried. If he or she can establish that, then he or she has, so to speak, crossed the threshold; and the court can then address itself to the question whether it is just or convenient to grant an injunction: R v. Secretary of State for Transport, Ex-parte Factortame Ltd & Others (No.2), supra. If the answer to the question whether there is a serious issue to be tried is *"no",* the application fails in *limine* (see C.B.S. Songs v. Amstrad [1988] AC 1013.

In the present case, the Plaintiff is questioning whether the Defendant could sell the Plaintiff's property (a) without first issuing to the Plaintiff a written notice of its intention to sell the property, (b) without having it advertised for sale, either by tender or public auction, and (c) prior to a reserve price being set by the Registrar of Lands for the sale of the property. On the other hand, the Defendant maintains its position that that there is no serious issue to go for trial since (a) there was now new arrangement after the action in the Commercial Division had been struck-out to trigger the given of a new statutory notice and (b) there is no requirement for a reserve price unless the sale is by public auction. In short, the Defendant contends that it fully complied with the law, including the provisions of the RLA, in the process of seeking to sell the Plaintiff's property. In his response, Counsel Chagwamnjira insisted that insofar as private sale of land is concerned, the Registrar of Lands is enjoined to exercise supervisory role on the selling price.

I have carefully read and considered the affidavit evidence and the submissions by Counsel. It is clear to me that the facts in the present case are very much disputed. The Plaintiff's Affidavit was followed by the Defendant's Affidavit in Opposition.

Thereafter, the Plaintiff challenged the averments in the Defendant's Affidavit in opposition by filing an Affidavit in Response. In light of the contestation on both factual matters and the legal questions arising therefrom, I really doubt, and I do not think that Counsel expects, that this case can be resolved at an interlocutory stage before the factual landscape of the case unfolds during the hearing of the substantive case: see **John Albert v. Sona Thomas (Nee Singh), Sukhdev Singh, Samsher Singh and Hellen Singh, MSCA Civil Appeal No. 46 of 2006 (unreported).** As was aptly put in **Mwapasa and Another v. Stanbic Bank Limited and Another, HC/PR Misc. Civ. Cause No. 110 of 2003 (unreported),** *"a court must at this stage avoid resolving complex legal questions appreciated through factual and legal issues only trial can avoid and unravel".*

In the circumstances, there can be no question of the present application being decided at the first stage of Lord Diplock's approach and it is necessary to proceed at once to the second stage.

Are damages an adequate remedy?

I now tum to compensability, that is, the extent to which damages are likely to be adequate remedy for each party and the ability of the other party to pay.

Order 29/1/3 of the RSC is to the effect that damages will seldom be a sufficient remedy if (a) the wrongdoer is unlikely to pay them, (b) the wrong is irreparable or outside the scope of pecuniary compensation, or (c) damages would be difficult to assess. This Order has been applied with approval in a numerous cases: see, for example, **Cane Products Limited** v. S. **E. Kaonga t/a E and E Engineering** & **Attorney General, HC/PR Civil Cause 609 of 2005 (unreported).**

Counsel Mpaka submitted that damages would be an adequate remedy and that the Defendant has capacity to pay the same:

> *"Finally, nothing in evidence suggest that LFC will be unable to pay up damages to Plaintiff. It is an established financial institution whose liquidity is a matter of prescription and regulation under financial service laws. And the law says damages will always be an adequate remedy to any person affected in case of irregular exercise of power and sale. On the other hand Plaintiff by its default on the loans and several admissions in the affidavit, has already proved it is unlikely to pay damages to LFC should its main case fail at trial.* " - Emphasis by underlining supplied

It is important to bear in mind the fact that the present case relates to a specific piece of property, namely, Title Number Chigumula 1/396. Every piece of land is of particular and unique value to the owner and damages are an inadequate remedy

and, in any case, damages would be difficult to assess. The clearest and fullest statement of the principle regarding inadequacy of damages with respect to land is contained in Chitty on Contract – General Principles, 26th ed., Sweet and Maxwell at paragraph 1868:

> *"Land: The law takes the view that the purchaser of a particular piece of land or of a particular house (however ordinary) cannot, on the vendor's breach, obtain a satisfactory substitute, so that specific performance is available to him. A vendor of land, too, can get specific performance, for damages will not adequately compensate him if he cannot easily find another purchaser or if he is anxious to rid himself of burden attached to the land. It seems to make no difference that the land is readily saleable to a third party, or that after contract but before completion a compulsory purchase order is made in respect of it ... Yet in such cases damages (based on the difference between the contract price and the resale price, or the compensation pay able on compulsory acquisition) would seem normally to be adequate remedy.".*

The legal position taken by the learned authors of *Chitty on Contract - General Principles* has been fully endorsed by courts in Malawi: see the recent decision by the Supreme Court of Appeal in **Village Headman Kungwa Kapinya and Others v. Chasato Estates Ltd, MSCA Civil Appeal No. 75 of 2016 (unreported)** and the cases of **Sikawa v. Bamusi, HC/PR Land Civil Cause No. 53 of 2013 (unreported)** and **Mleva v. Simon, HC/PR Land Civil Cause No. 53 of 2013 (unreported)** referred to therein.

Before resting on this issue, a word or two on the assertion by Counsel Mpaka that *"And the law says damages will always be an adequate remedy to any person affected in case of irregular exercise of power and sale".* I reckon that Counsel Mpaka has in mind s. 71(3) of the RLA, which reads:

> *"A transfer by a chargee in exercise of his power of sale shall be made in the prescribed form, and the Registrar may accept it as sufficient evidence that the power has been duly exercised, any person suffering damage by an irregular exercise of the power shall have his remedy in damages only against the person exercising the power.*"

Clearly, s. 71 (3) of the RLA comes into play after a transfer has occurred. It is only after a transfer by a chargee in exercise of his or her power of sale has taken place that remedies are in damages only against the person exercising the power. The legislature in its wisdom has not placed any limitations on the remedies available at a pre-transfer stage. To my mind, the rationale behind s. 73(3) of the RLA can easily be discerned. For starters, fairness to the bonafide purchaser of the property for value dictates that the sale to such a purchaser should not be nullified or vitiated. In the present case, a transfer, as envisaged under s. 71(3) of the RLA, has yet to take place. I cannot, therefore, understand why the Court would on

account of s. 71(3) of the RLA confine the Plaintiff to the remedy of damages only: see also Train Africa Holdings Limited v. Malawi Savings Ba n k Limited, HC/PR Civil Cause No 88 of 2014 wherein the Court dealt with a similar question at page 10:

> *"For the sake of completeness, I hasten to add that the present case is also distinguishable from the Leasing and Finance Company of Malawi Ltd v Sadiki, which is also often cited for the proposition that "once a chargee exercises its power of sale, a chargor's only remedies are in damages against the charge". In Leasing and Finance Company of Malawi Ltd v Sadiki, the facts, in a nutshell, were as follows:*
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> > *"The defendant pledged his property as security for a loan from plaintiff The defendant defaulted on repayment instalments and the property was eventually sold by private treaty. The defendant refused to deliver variant possession of the property to the plaintiff This led the plaintiff to bring an application under Order 88 of Rules of Supreme Court and sect ions 68 and 71 of the Registered land Act seeking an order of the court compelling the defendant to deliver up possession of the property. The defendant argued, among other things, that the sale was illegal and unenforceable. According to the learned editors of Malawi law Reports (com Series) the court, held, among other things, that 'where a sale is irregular the chargor's remedy is in damages only against the charge'"*
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> *In my decision in the case of Kulinji Mafunga v Litto Phiri t/a Eagle Contractors, HC/PR Civil Appeal 498 of 2012 (Unreported:l3' 11 February 2014), I have cautioned against placing too much reliance on head notes of cases. The relevant dicta in Leasing and Finance Company of Malawi Ltd v Sadiki, supra, is to befound at page 36 and it reads as follows:*
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> > *"The sale in the instant case can therefore not be faulted. If anything the defendant could only have a claim in damages against the Plaintiff He cannot be allowed to continue to cling to the possession of the charged property , which has lawji1lly been sold to the buyer by the Plaintiff, pursuant to the exercise of its power of sale.*
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> > *It is, however, the considered view of the Court that there would be cases where the sale would indeed be vitiated by some form of illegality. I dare say that one of those cases, of which instant case is not one, would be where the chargee insists on selling the charged property in the face of chargor's expressed willingness to pay off the debt in full and in fact where the charger tenders money for the full payment of principal, interest and expenses prior to the contract for sale, be it by public auction or by private treaty. In such a case, if the chargee insists on exercising his or her power of sale, the sale would not be held to have been effected in good faith and with due regard to the interest of the chargor. In such a case the remedy prescribed under section 71 (3) of the RLA would not be appropriate one and the contract would be null and void. The other situation is if the sale is conducted not in compliance with sections 60 (2) and 68 (2) of the RLA, thus where the right to exercise the power of sale has not arisen in that the sale is purportedly effected prior to the expiration of the three months period following the issuance of the demand notice. There is in my view another situation where the sale would be null and void. This would be where the sale is effected in circumstances where the charge and the buyer would be guilty of fraud. This situation would readily come within the provisions of section 71 (I) of the RLA, thus where the charge has not done so in good faith and without regard to the interest of the charger.* " - [Emphasis by underlining supplied]
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> *To my mind, the defendant in Leasing and Finance Company of Malawi Ltd v. Sadiki, supra, was confined to only a claim of damages because the sale in that case could not be faulted. That case affords no guidance to the present case. As already mentioned, I*

cannot at this stage determine whether or not the Defendant is acting in good faith in seeking to realize the securities in the Plaintiff's properties when there is an alternative source of financing that can be used to clear the arrears. That is the very question that has to be determined at the trial of the head case. "

The Court's observations in **Train Africa Holdings Limited v. Malawi Savings Bank Limited,** supra, apply to the present case with equal force. The facts herein have not matured enough (or reached a stage) to trigger the application of s.71(3) of the RLA. In the circumstances, it is my finding, and I so hold, that damages would be an inadequate remedy in the application before me.

Balance of Convenience

In terms of the guidelines in the **American Cyanamid Case,** it is where there is doubt as to the adequacy of the respective remedies in damages that the question of balance of convenience arises. In the words of Lord Diplock at 408F and G:

"It would be unwise to attempt to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached them. These will vary from case to case. Where other factor s appear to be evenly balanced it is counsel of prudence to take such measures as are calculated to preserve the status quo. "

The rationale is that if the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark upon a course of action which he has not previously found it necessary to undertake. On the other hand to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial.

The important question to ask is what would happen if the interlocutory injunction is removed? The Defendant would proceed to realize the securities in the Plaintiff s property and have it sold. Thus, in the event of the main action succeeding, the Plaintiff will have suffered irreparable damage and the assessment of their loss would be very difficult. In the circumstances, justice demands that the Plaintiff s property must remain intact until the main action is determined one way or the other. The interlocutory injunction will, therefore, remain in force until the main action is determined.

Pronounced in Chambers this 29th day of November 2016 at Blantyre in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE