110590

AAA

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.995 OF 1989

BETWEEN:

KENNEDY Y. MSONDA ..... PLAINTIFF

AND

THE NEW BUILDING SOCIETY ..... DEFENDANT

CORAM: UNYOLO, J.

Mhango, Counsel for the Plaintiff
Chirwa, Counsel for the Defendant
Manondo (Mrs), Court Clerk

JUDGMENT

This is an application by Originating Summons made under the provisions of O.88 R.S.C.

The following facts are common ground. By a mortgage deed dated 22nd October, 1981 the plaintiff assigned to the defendant the residue unexpired of a term of 99 years created in the leasehold premises known as plot BW 493 situated at Sunnyside in the City of Blantyre in consideration of an advance in the sum of K30,000 granted by the defendants to the plaintiff. The mortgage contained provisions giving the plaintiff the right to redeem the mortgaged property at any time. On 19th May, 1982 the plaintiff wrote to the defendant giving three months notice of his intention to redeem the mortgage. The defendant responded on 4th June, 1982, advising that the sum of K31,742.80 was required to redeem the mortgage account on or before 1st September, 1982, after which date the plaintiff had to apply for a new redemption figure.

As things turned out, not only did the plaintiff fail to redeem the account, he also failed to service the actual monthly repayments due under the mortgage. A large number of letters were written bringing the plaintiff's attention to this state of affairs but to no avail. The account was perpetually in arrears during the period January, 1983 to 6th May, 1988. The plaintiff's explanation on this aspect was that he was saddled with misfortunes during the period in question. Be that as it may, on 16th April, 1988 the defendant instructed Messrs. Trust Auctioneers to sell the property by public auction, giving a reserve price of K76,000. Perhaps I should mention here that earlier on the defendant had instructed a firm of architects, Messrs. Fitzsimmons, Northcrofts Associates, to advise as to the market value of the property and the figure herein was the value advised by the said architects. The auctioneers arranged for the auction sale to take place on 30th May, 1988 and relevant

notices were accordingly put up in the local papers. In the interim the plaintiff, on 24th May, 1988, paid the sum of K5,398.00 to the defendant apparently being the arrears due on the mortgage account as at date and on 27th May the plaintiff's legal practitioners wrote a letter to the defendant advising of the payment herein and pleading that the intended sale of the property on 30th May, aforementioned, should not be proceeded with in the circumstances. Although it is not quite clear what the defendant's reaction to this request was, it can safely be inferred that the defendant turned a deaf ear, for the auction sale went ahead on 30th May, 1988 as scheduled and the property was sold for K95,000. Then on 16th June, 1988 the plaintiff, upon learning of the sale, wrote to the defendant saying that he had no objection to the property being sold and asked that the K5,398.00 he had paid in respect of instalment arrears, as indicated above, be refunded to him. This the defendant proceeded to do on 22nd June, 1988. Subsequently, on 11th July, 1988, the plaintiff wrote requesting the defendant to send to him the net proceeds of the sale so that the matter should be brought to a finality.

I will back-pedal a little at this point. It appears that every year the defendant does communicate to all its mortgage clients advising them of the annual rates of interest applicable during the particular year on outstanding loans and the monthly instalments payable in the result. Such a communication, R4, was addressed by the defendant to its clients on 23rd May, 1988. In that communication the plaintiff was advised that the rate of interest charged to his account as from 1st June, 1988 would be 13.75% and that he could choose to slightly reduce the term of the mortgage by repayments of K481.00 per month as hitherto or repay the mortgage within the original term which would mean reducing his monthly repayments to K463.00. Significantly, this communication came after the defendant had already instructed the Auctioneers to sell the plaintiff's property herein and this was just about a week before the date fixed for the auction sale. It is not clear whether the plaintiff reacted to this communication. Be that as it may, in the following year, the defendant again sent out a similar notification, R5, on 13th March 1989, advising of further reductions in both the rate of interest and the rate of repayments. The plaintiff responded to this by his letter of 13th April, 1989, R6, where he advised the defendant that he had opted to reduce the mortgage term slightly by paying K463.00 per month. He then caused the sum of K2,160.00 to be sent to the defendant on 25th April, 1989. The defendant received the money and brought it on charge on a receipt, R8, dated 28th April, 1989. And on 3rd July, 1989 the plaintiff paid a further sum of K2,160.00 to the defendant. This series of events culminated in the plaintiff writing a letter, KYM1, to the defendant on 15th August, 1989 which was as follows:

"Dear Sir,

MORTGAGE A/C NO. 31370 - DISCHARGE

I refer to your December, 1988 Mortgage account statement in which an amount of K35,870.00 was showing as balance to be paid.

I am enclosing herewith a cheque for K35,870.00 discharging the mortgage. Please arrange to re-assign the property to me.

Thanking you in advance for your usual cooperation".

Three days later, on 18th August, 1989, the defendant wrote a letter, JAC 12, to the plaintiff which was as follows:

"Dear Sir,

MORTGAGE A/C 31370 PLOT BW 493

SUNNYSIDE, BLANTYRE

We have pleasure in advising that the sale is almost complete and we have today paid the sum of K23,710.16 to Messrs Saidi & Co. being the net proceeds from the sale due to you after discharging your mortgage account.

The amount that was required to redeem the account as at 17th August, 1989 is K36,674.34.

We enclose the final statement to your account."

On receipt of this letter the plaintiff instructed his lawyers to forward to the defendant a further sum of K804.06 over and above the K35,870.00 sent earlier, on 15th August, thereby making a total payment of K36,674.34 i.e. the amount indicated by the defendant in its above-mentioned letter as being the amount that was required to redeem the mortgage account as at 17th August, 1989. On 24th August, 1989 the plaintiff's lawyers sent the K804.06 by cheque to the defendant as instructed and went on to request that the defendant send the legal mortgage and other title documents so that the property could be reassigned to the plaintiff since, to use the said lawyers own words; "the account has been fully paid and the mortgage redeemed". The defendant referred the matter to its lawyers who, on 20th September, 1989 wrote to the plaintiff's lawyers advising that the plaintiff had no right to redeem the mortgage and returning the two cheques, above-mentioned. And, finally, on 9th November, 1989 two cheques in the total sum of K45,810.16 were sent to the plaintiff being net proceeds from the sale of the property. The plaintiff returned the cheques saying that his lawyers had instituted the court proceedings herein.

Such are the facts of this case. I have deliberately related them in extenso if only to put the matter in its chronological order and right perspective. By his application herein the plaintiff asks the court to make orders

(i) declaring that the plaintiff has the right of redemption of the mortgaged property;

(ii) that the defendant re-assign the said property to the plaintiff upon payment by the plaintiff of the redemption money, on the ground that the right of redemption has not been lost; and

(iii) that the sale of the said property be set aside.

AND in the alternative that -

(i) the defendant render a true and full account of the mortgage account and that in taking the account, the defendant should not be allowed interest after the date of the loss of the right of redemption; and

(ii) the defendant be ordered forthwith to pay the sum found due on taking such account with interest or the rate and from the date to be determined by the court.

The defendant strongly opposes the application.

It is trite that incident to every mortgage is the right of the mortgagor to redeem, a right which is called his "equity of redemption." Referring to the present case, we have seen earlier that the plaintiff did in May, 1982 intimate to the defendant his intention to redeem the mortgage but as indicated he not only failed to do so but also failed even to service the repayments due under the mortgage. We have seen that his account was perpetually in arrears from 1983 to May, 1988.

The gravamen of the plaintiff's case relates to the validity or otherwise of the sale of the property. He contends that the sale herein was not valid. Several points were taken. First, it was contended that the defendant's exercise of its power of sale was a nullity. Learned Counsel for the plaintiff referred the court to the draft advertisement sent by the defendant to the auctioneers where it was indicated that the property was to be auctioned under the powers of sale contained in section 57(3) of the Building Societies Act. Learned counsel submitted that this was misconceived in that the said section does not confer any power of sale whatsoever. With respect, I cannot agree more. The section here simply sets out what a society, like the defendant, must do where it has exercised its powers of sale of property mortgaged to it. But the said draft and also the actual advert which appeared in the Daily Times read:

> "On instructions from the New Building Society who have received permission to exercise the Society's powers of sale as spelt out Cap.32:01 Section 57(3) of the Laws of Malawi, we shall sell by public auction the following properties: (Here the notice then listed the properties to be sold, including the plaintiff's property)."

It appears to me that the author of the advertisement herein was confused about the purport of the section. Learned Counsel for the defendant submitted that the defendant actually exercised its powers of sale as contained in the mortgage as read with the U.K. Conveyancing Acts of 1881 and 1911, both of which are applicable to Malawi. I have examined the said mortgage and it is to be noted that clause 27(4) thereof does indeed confer upon the defendant power to sell the property herein. It cannot therefore be said that the defendant didn't have any power at all. It is also significant that in the formal notices which the defendant sent to the plaintiff later on (vide Exhibits JAC 16A and R11) it was there indicated that the property had been sold in exercise of the power of sale contained in the mortgage. All in all I find on the total facts that the defendant used this power.

Secondly, it was argued that even if the sale proceeded under the power contained in the said mortgage and the two Conveyancing Acts, above-mentioned, the defendant could not properly sell the property unless (a) it had given the plaintiff notice requiring him to pay the money due and default had been made in payment for three months after the service of such notice; (b) interest under the mortgage deed was in arrears and unpaid for two months after becoming due or (c) there had been a breach of some provision contained in the mortgage deed. Counsel referred the court on this aspect to section 20 of the Conveyancing Act, 1881, already mentioned, and said that none of these conditions was satisfied.

Much as I sympathise with the plaintiff, and I really do, there can be no doubt on the facts before me that he was given ample time to put things right in terms of his repayments under the mortgage. As already indicated, the defendant was patient enough from end 1982 to April, 1986. In the meantime the plaintiff was continually reminded his account was in arrears and requested to pay what was due. And starting from May, 1986 to March, 1988 the defendant's lawyers also continually wrote to him concerning such arrears and warned him that the defendant would consider exercising its power to sell the property. In short I am satisfied that the defendant did substantially satisfy the requirement at (a) above and there can be no doubt on the available facts that the requirement at (b) was also satisfied since clearly the arrears advised included interest and the same remained unpaid for a period over two months. As I understand it, breach of any one of the said conditions entitled the defendant to exercise its power of sale under the mortgage. Indeed it is to be observed in passing that clause 27 of the

mortgage deed conferred wide powers on the defendant to sell the property even without giving the plaintiff notice. I very much appreciate the respective positions of the parties. However the terms here were agreed and it is, in my judgment, too late in the day for the plaintiff now to complain on this subject.

The next point taken by the plaintiff was that the sale was illegal in that the defendant did not give notice of its intention to sell the property as required by section 24A of the Land Act. Under this section any person who intends to offer for sale any private land is required to give not less than 30 days notice in writing to the Minister responsible for land of his intention to sell the property and failure to give such notice is an offence. There are exceptions which do not apply in this case. The defendant sought to rely on the Licence and Consent, JMC1, issued by the Acting Commissioner of Lands on 7th November, 1989, authorising the defendant to assign the property herein to one Aslam Abdul Gaffar. With respect this cannot in my view be evidence of the notice required under the section herein as such notice must be given to the Minister before the sale. Indeed there is no evidence to show that the said JCM1 was issued in response to the requisite notice. I find, therefore, that the defendant failed to give the required notice. It was then argued by counsel for the defendant that the section does not apply to the type of private land as that involved in the present case. I cannot accept this view. The section refers to "any private land" and to my mind this means any private land without distinction. Now the live question is what is the effect of the breach here. There is little or no problem where a statute expressly declares that a contract is illegal or void on the happening of an event. In such a case the intention of the legislature is clear. Such a contract cannot be enforced. Such was the case in Gordon v. Chief Commissioner of Metropolitan Police (1910) 2 K.B.1030, a case cited by counsel for the plaintiff. But a statute may, as in the present case, simply impose a penalty without declaring the contract illegal or void. The effect in such a case depends on the proper construction of the particular statute to ascertain whether the object of the legislature implicitly is to forbid the contract. In every case the purpose of the legislature must be considered in the light of all the relevant facts and circumstances. In answering the question here several tests have been applied. For example, if the sole purpose of the statute is to increase national revenue the contract that may have been made is not itself tainted with illegality. See Learoyd v. Bracken (1894) 1 Q.B.114. There are also some statutes which do not by imposing a penalty renfer the contract illegal or void in the event of breach of the statutory provision(s) but mean the enforcement of the penalty to be the only remedy for the breach for example in Shaw v. Groom (1970) 1 All E.R.702, a landlord sued his tenant for arrears of rent due in respect of a weekly tenancy. The tenant contended that the action must fail, since the rent book issued to him by the plaintiff did not contain all the information required by the Landlord and Tenant Act, 1962. Such a default was punishable by a fine not exceeding £50.00. The Court of Appeal dismissed this contention, saying

the contract was not to be stigmatized as illegal in its performance and that the intention of the legislature was that the non-compliance with the statutory requirement should render the landlord liable to a fine, not that it should deny him access to the courts.

On the other hand, if the object or one of the objects is the protection of the public or the furtherance of some aspect of public policy, a contract that fails to comply with the statute is implicitly prohibited. See Victorian Doylesford Syndicate v. Dott (1905) 2 Ch.624.

Reverting to the present case I take the view that the effect of the statute here is simply to render non-compliance with the provisions thereof an offence and the offender liable for the prescribed penalty, not to make the contract illegal or void.

It was next contended that the sale was vitiated by omissions on the part of the auctioneers to follow the express conditions of sale given them by the defendant. The defendant's instructions as per its letter, JAC4, were that the auctioneers would advertise the sale of the properties allowing, in that respect, for three insertions in the local papers; further that the auctioneers would allow a time span of four weeks between the first advertisement and the date of the auction; and that the property would be sold strictly for cash or bank certified cheques. It was submitted that the auctioneers did not strictly comply with any of these requirements. It appears that there were less than three adverts and a time span of some three weeks only. Further, as already indicated, the purchaser did not pay the full purchase price of the property in cash or bank certified cheque on the day of the auction; only paid a deposit. I will deal first with the first two points raised, namely the deficiency in the number of adverts and time span allowed. The duty of a mortgagee in conducting sale has been spelt out in a number of cases. For example in Tomlin v. Luce (1890) 43 Ch.D. 191, it was held that a mortgagee must not act carelessly, or improvidently, and may be liable if he sells on absurdly short notice, and at a very low price or if he causes a loss by reason of a mistake in the particulars of sale. See also Marriot v. Anchor Reversionary Co. Ltd. 66 E.R.191 and Kennedy v. De Trafford (1897) A.C.180. Referring to the present case I am unable, with respect, to say that the notice given was absurdly short or that the price fetched was very low. The undisputed facts are that the property was earlier valued by professional valuers at K76,000.00. It however fetched K95,000.00 at the auction, which was some K19,000.00 more than the market value given by the said valuers. Indeed as I understand it, even if a mortagee was in breach of his duty on this aspect, that would only make him liable to the mortgagor in damages; otherwise such breach would not invalidate the contract of sale itself.

I now turn to the other argument relating to the manner the payment of the purchase price of the property was effected. As already indicated, the purchaser only paid a deposit on the day of the auction. Several documents, JAC16A among them, show

that he paid a deposit of 10% of the purchase price on that occasion. Several points were taken by the plaintiff on this aspect. First it was contended that since the sale was subject to the purchaser being subsequently granted, or considered for a grant of, mortgage advance, the contract was only a conditional contract and therefore no sale was concluded on the day of the auction. With respect I am unable to accept this submission. The contract of sale here was, in accordance with well established norms, concluded at the fall of the auctioneer's hammer. In my view the granting or consideration for granting of a mortgage advance was not a condition precedent to the making of the contract of sale herein. In my judgment this circumstance was not so much concerned with the validity of the contract of sale as with the performance of the mortgagee's and the purchaser's obligations leading up to completion of the conveyance. It is also to be observed, as was stated in Soper v. Arnold (1889) 14 A.C. 429, that it is almost universal custom at auction sales to require part of the purchase money to be paid down as a guarantee for the fulfilment of the contract, and also, if the contract is completed, as part-payment of the purchase money.

It was further contended that by allowing the purchaser option to buy the property through a mortgage advance the transaction was void as it tantamounted to the defendant buying its own property. On the authority of Martinson v. Clowes (1882) 21 Ch.D.857, there can be no doubt that a mortgagee exercising his power of sale cannot buy the property on his own account unless the mortgagor consents. Referring to the present case I am unable to accept the view put up by the plaintiff. I do not think that the defendant can properly be said to be buying the property for itself in all the circumstances. It must be appreciated that houses are a very expensive commodity to buy for cash and in allowing purchasers option to apply for consideration for a mortgage advance the defendant was just being realistic and down to earth considering that even a down payment of 10% of the purchase money would in most cases mean a substantial amount indeed. Indeed in Thurlow v. Mackeson (1868) L.R. 4 Q.B.97, it was held that so long as the sale is valid and bona fide between the mortgagee and the purchaser, it is immaterial that the contract of purchase was carried out by a mortgage. It is also to be observed that under section 30 of the Building Societies Act a society which is a mortgagee, as in the present case, has power to make further advances on property which is the subject of a prior mortgage. All in all the argument here must fail.

It was next contended that the transaction amounted to a balloting which is prohibited under section 55 of the Building Societies Act in that it tended to prefer those purchasers who would opt to buy the properties through a mortgage advance. With due deference, for the reasons I have just given above, this argument too must fail.

It was then argued that the contract of sale was void for mistake. On the one hand it appears the auctioneers believed the purchaser to be a Mrs. A. Gaffar. On the other

hand the Licence and Consent signed by the Government shows the purchaser as a Mr. Aslam Abdul Gaffar. It was forcefully argued that the auctioneer having been mistaken as to the identity of the purchaser, the contract of sale was void ab initio and that no title passed to Mr. Gaffar in the circumstances. Pausing here I would agree that sometimes, and for special reasons, the identity of the person one is dealing or contracting with is material and in such an eventuality there may be no contract if a mistake has been made. Such was the case in Cundy v. Lindsay (1878) 3 A.C.459 where the sellers intended to deal, and believed they were dealing, with a specific firm but by means of a fraud the goods went to the wrong person. Where, however, there are no special reasons, the identity of the person with whom one is contracting is often immaterial. In Dennant v. Skinner (1948) 2 K.B.164, it was observed, correctly in my view, that it is usually without importance to an auctioneer who accepts a bid at a public auction as such auction is not normally concerned with the identity of the person who makes the bid. See also Smith v. Wheatcroft (1878) 9 Ch.D.223. Indeed I do not think it can positively be said on the prevailing facts that the auctioneer in the present case intended to deal exclusively with Mrs. Gaffar and not Mr. Gaffar. I would therefore reject the submission on this aspect.

Finally, it was contended that the defendant cannot be heard to say there was a valid contract of sale in the light of the acknowledgements it made subsequently confirming the subsistence of the mortgage herein. Learned Counsel for the plaintiff referred the court to several documents, R5 - R9 and NBS 2A - NBS 2C, where the parties in this case dealt with each other and with third parties on the footing that the mortgage continued to exist. Several observations can be made here. First, it appears to me that there was some misunderstanding on this aspect. For example, on 18th August, 1989 the defendant wrote to the National Insurance Company, NICO, with whom it had insured the property herein, advising that the mortgage account had been redeemed, and requesting a refund of the insurance premium. NICO understood this to mean that the plaintiff had redeemed the mortgage account in the sense that he had paid the amount due in full. Yet what the defendant meant was that the property had been sold after, as we have seen, exercising its power of sale under the mortgage deed. In my judgment there can be no doubt that NICO wrote the letter, PIC 1, on 1st September, 1989 to the plaintiff under a total misapprehension of the facts, as I have just shown. Secondly, it appears to me that there was what I might call "lack of coordination" in the defendant's office. It was as if one hand did not know what the other hand was doing. For example, the defendant sent the notice, R4, to the plaintiff on 23rd May, 1988 advising the new rates of interest to be charged on mortgage accounts that year. Significantly, the defendant had by this date already instructed the auctioneers to sell the plaintiff's property. Again, as I have pointed out earlier a similar notice, R5, was sent out to the plaintiff by the defendant on 13th March, 1989 yet by that date the property had already been auctioned and the defendant must have been aware of this fact because the auctioneers did write to the

defendant on 8th June, 1988 confirming the sale of the property. JAC4A refers. It is also to be noted that the defendant did, on 4th July, 1988, write to the plaintiff's lawyers (see JAC10) confirming that the property had been sold.

All in all I find that the defendant did properly exercise its powers of sale which, as I have endeavoured to show, had become exercisable. Indeed it is to be noted that even if, for argument's sake, the defendant had exercised the powers improperly the plaintiff's remedy would have been in damages only claimable by means of a common law action. Section 21(2) of the UK Conveyancing Act, 1881, applicable to Malawi, refers. See also Bailey v. Barnes (1894) 1 Ch.25. I find further that the contract of sale itself was valid and that it did effectively extinguish the plaintiff's right to redeem the mortgage. Accordingly, the plaintiff's application in so far as the orders at (i), (ii) and (iii) above are concerned must fail and it is dismissed.

I now turn to the two other orders sought in the alternative. The law, I think, is clear. The consequences of a sale by a mortgagee as in the instant case are that the mortgagee becomes a trustee of the surplus proceeds of sale and further that such sale stops the running of interest so that a mortgagee cannot charge a mortgagor with additional interest after the sale of the property. See West v. Diprose (1900) 1 Ch.337. Indeed I was informed that the defendant is ready and willing to furnish the plaintiff with the requisite account and even to allow him examine all the relevant records kept by the defendant and ask any questions he might have relating thereto. I order therefore that the defendant render such an account to the plaintiff. In this respect it is to be noted that the defendant did on 9th November, 1989 forward to the plaintiff two cheques in the sum of K45,810.16 as net proceeds of the sale but as earlier indicated the plaintiff returned the said cheques. Should it be found, after taking the account, that the amount due to the plaintiff in this regard is in excess of the K45,810.16 tendered, it is ordered that the defendant also pay interest on such excess amount at the rate of 13.75% per annum from the date the sale (conveyance) was completed, namely 18th August, 1989.

Finally, I turn to costs. It is the defendant who has almost wholly succeeded in these proceedings. Although the court has a discretion in the matter, normally costs follow the event and considering the total facts I can find no reason to deprive the defendant of its costs. Accordingly, it is ordered that the defendant have the costs of the proceedings.

DELIVERED in Chambers this 11th day of May, 1990, at Blantyre.

L.E. Unyolo
JUDGE