

29 Jun 1990

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.1050 OF 1989

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BETWEEN:

S. MKWAMBA .....

PLAINTIFF

- and -

INDEFUND LIMITED .....

DEFENDANT

CORAM: MKANDAWIRE, J.

Mzunda, Counsel for the Applicant  
Kaliwo, Counsel for the Respondent  
Kadyakale, Law Clerk

R U L I N G

This is an application by the plaintiff for an order that the defendant by himself, his servants or agents be restrained by an interlocutory injunction from entering his registered land known as Alimaunde Plot No.51/9 and from selling the same.

An interim injunction was granted on an ex parte application. This is now to seek an order that the interim injunction be continued until the determination of the action the plaintiff has brought against the defendant. The amended writ of summons prays for a declaration that he is and was at all material times the sole legal and beneficial owner of the registered land and premises situate at and known as Alimaunde Plot 51/9. He also seeks a declaration that the charge dated 12th day of September, 1988, between the parties is invalid and unenforceable. Finally, he prays for a permanent injunction to restrain the defendant from selling or in any way dealing with the said property without complying with the Registered Land Act and/or without the written consent of the plaintiff.

The defendant is a financial institution whose business it is to lend money at interest. It is common case that the plaintiff borrowed the sum of K42,000.00 from the defendant to enable him go into poultry farming. As a security for the loan the plaintiff created a second charge on his land known as Alimaunde Plot No.51/9. The principal sum together with interest was to be repaid in eighty four (84) equal consecutive monthly instalments the first such instalment to be made

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thirteen months next following the date after the date of the first disbursement. It is not clear when the first disbursement was made and when the first instalment was due. What is not in dispute, however, is that the plaintiff has so far made only five payments of K500.00 each and the last such instalment was made on 30th March, 1987. Since then the plaintiff has been in continuous default so that as at 19th January, 1989, there was due from the plaintiff to the defendant the sum of K66,488.13. The plaintiff was notified of this state of affairs and was accordingly requested to remedy the situation. Since the plaintiff did nothing to correct the situation the defendant proceeded to exercise its right of sale and advertised that the property would be put on auction sale. It is this proposed sale that the plaintiff is trying to prevent.

In support of the present application to continue the interim injunction until the determination of the action commenced herein, the plaintiff filed three affidavits. There is an affidavit in reply from the General Manager of the defendant company. Dr. Mzunda, Counsel for the plaintiff, has advanced a number of grounds in his submission. The first point he has taken is that the proposed sale does not comply with the Registered Land Act. It is deposed in the supplementary affidavit that the land which is the subject of the charge issued to the defendant is within the Lilongwe Land Control Division by virtue of the Orders which the Minister made under Section 3 of the Local Land Boards Act. This being the case, the charge that was created must have been made with the consent of the Local Land Board or the general consent of the Minister in terms of Section 6 of the Local Land Boards Act. The plaintiff's contention according to the supplementary affidavit is that when creating the charge under consideration the consent of the Local Land Board was not obtained and neither was there the Minister's general consent. As such the said charge is unenforceable and the moneys that passed under it are recoverable as a civil debt.

The next point taken by the plaintiff is that Clause 4 of the charge is invalid as it purports to create a mortgage when, in fact, what was created was a mere charge. It is contended that at all material times the plaintiff was the legal owner and was in actual possession. It is said that a charge is intended to be a security and not a transfer. It is further contended that the notice which the defendant gave was not a valid one in that it did not comply with Section 68 of the Registered Land Act which provides that there be 3 months notice. It is said that the notice herein was only about a month. The final point taken by the plaintiff is that the proposed sale is invalid in that it does not comply with Section 71 of the Registered Land Act because there was no



reserve price and the conditions of sale were not approved by the Registrar.

Mr. Kaliwo acting for the defendant has referred me to the case of American Cynamid v. Ethicon Ltd. (1975) 2 WLR 316. He has also referred me to the case of H.E.A. Mzungu v. John Loga Civil Cause No.14 of 1989. He says that the real question is whether or not the injunction should be granted. He says the affidavits are conflicting but what I must do is weigh the interests of the parties and in his view the balance of convenience is in favour of refusing the injunction. Mr. Kaliwo has referred to the fact that the plaintiff has been in default since March, 1987 and since that time interest is accumulating. It is his contention that if the plaintiff succeeds in his action, he can be adequately compensated in damages and the defendant is capable of paying the damages.

The American Cynamid case does lay down important principles which should guide a Court when considering an application for an interlocutory injunction. To begin with the grant of an injunction is a remedy which is both temporary and discretionary. In considering whether or not to grant an injunction the Court must not embark on anything resembling a trial. In other words the case should not be decided on affidavits. As it was put in that case at page 323:

"It is no part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature consideration. These are matters to be dealt with at the trial."

This is perfectly correct for the legal rights of the parties depend upon the facts that are in dispute but the evidence available at this stage is incomplete. What is before the Court now is affidavits which have not been tested by cross-examination. In his submissions, Dr. Mzungu went into some detail but it would be wrong for me at this stage to go into the complexities of those legal provisions as that would mean embarking upon a trial. It is enough if it is shown that there are serious issues to go to trial. Unless the facts are such that there is no real chance of the action succeeding or in the view of the Court the claim is frivolous or vexatious the Court must then proceed to consider whether on a balance of convenience the interlocutory injunction should be granted or not.



Looking at the affidavits I am not so sure whether the plaintiff has any real chance of success. As for the consent which the plaintiff has canvassed vigorously, it appears to me that there was such consent on behalf of the Minister, but the plaintiff's contention is that this does not suffice. Turning to the notices it again appears that the plaintiff was given ample time in which to remedy the situation. It cannot be doubted that under the Registered Land Act, the defendant has the power to sell the charged property. Whether the proposed sale complied with the relevant provisions is a matter for trial. I find it difficult for me to say whether or not the plaintiff's case is frivolous or vexatious for to make such a pronouncement might suggest that I have embarked upon a trial. I must now consider whether on the available facts the balance of convenience lies in favour or against the granting of the injunction.

It is not in dispute that the plaintiff has been in default since March, 1987. Interest is piling up and as deposed in the defendant's affidavit in reply as at 19th January, 1989, the sum owing was K66,488.13. That was principal and interest put together. The plaintiff was aware of this default and the defendant brought to his attention this state of affairs. He failed to remedy the situation. The trial commenced herein may take something like 2 years to be complete and the period may be more if one takes into account the possibility of appeals. In that period the amount due will be so large that I very much doubt if the plaintiff will be able to pay it under the undertaking to pay damages should the action fail. There would have to be such an undertaking if the injunction is granted. On the other hand if the charged property is sold and the plaintiff succeeds in his action then the defendant will be liable in damages. Every decision to grant or refuse an interlocutory injunction is likely to cause some disadvantages to either party. In considering the balance of convenience a Court will no doubt address its mind to the possible disadvantages to be caused to each party. I have already mentioned that if this application succeeds and the property is not sold, but at the end of the day the action fails, the amount due will be so staggering that the plaintiff will not be able to pay it. On the other hand, if the property is sold and the action succeeds the plaintiff will have to be compensated in damages. Such damages will be the value of the property plus other considerations, if any. The next question is whether such damages would be adequate and whether the defendant would be able to pay. In my judgment, the plaintiff would be adequately compensated and the defendant would be able to pay such damages. In the American Cyanamid case it was said at page 323 that:-


"If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at the time."

I think that this passage puts the matter squarely. The scale is heavily tilted in favour of the defendant. I do not think that the plaintiff has laid sufficient ground to topple it.

Having carefully considered all the facts before me, it appears to me that the balance of convenience lies in favour of refusing to grant the injunction.

This application is therefore dismissed with costs.

MADE in Chambers this 29th day of June, 1990, at ~~Blantyre~~.



M.P. MKANDAWIRE  
JUDGE