Civil Procedure — ~~injunction~~ — vacating
Land Law — charge - registration
Equity — part performance - "regards as done"!.

# IN THE HIGH COURT OF MALAWI

## PRINCIPAL REGISTRY

## CIVIL CAUSE NO. 1716 OF 2000

**BETWEEN**

FINANCE BANK MALAWI LTD. .....APPELLANT

- VERSUS -

PHILIP ADAM GRIESSEL .....~~RESPONDENTS~~

AND

LINDA ANN GRIESSEL AND TITUS MVALO .. RESPONDENTS

**CORAM:** TWEA, J.
Chagwamnjira, of Counsel for the Plaintiff
Kasambala, of Counsel for the Defendant
Matekenya (Mrs), Official interpreter

## RULING

The defendant by summons filed on 7th June 2000, applied to this court to set aside an injunction granted to the plaintiff on 25th May 2000. This summons is supported by an affidavit sworn

by Mr Kasambala of counsel for the defendant. The plaintiff opposes this summons and filed two affidavits: by Mr Peter White of the plaintiff bank and Mr Chagwamnjira of counsel.

The facts of this case, as deponed are as follows:

The first and second defendants are owners of a company called LPG Roof to Floor Specialist Ltd. In about July 1999, they approached the plaintiff with a view to obtaining an overdraft facility to run the affairs of their company. They offered as security for this overdraft facility their interest in property on plot No Alimaunde 43/325 in Lilongwe. On 12th May, 2000 the plaintiff and the 1st and 2nd defendant executed a formal charge, which purported to be a second charge on the said property : the first charge being in favour of the New Building Society.

It transpired that when the plaintiff went to register this charge, they discovered that the 1st and second defendants had executed powers of Attorney in favour of the 3rd defendant on their interest over the property in issue on 8th May, 2000. Further that the 3rd defendant had sold the property to a third party: Stancom tobacco Company Ltd and that the Lands Registry had an application for Government consent to transfer title to the property to the purchaser. The plaintiff, it appears did not register this purported second charge, as the property as per Lands Registry records, had already been "sold". The defendant filed an action for recovery of the K5,000,000.00 overdraft and a permanent injunction against the defendants not to sale the property. Because of the application for Government consent that was pending at the Lands Registrar the plaintiff obtained an

injunction ex - parte, which the defendants now seek to have discharged.

The defendant seek to have the injunction discharged, and by their summons they have alleged that there is no triable issue between the plaintiff and the 3rd defendant and that the injunction was granted without following the rules of practice and procedure - in their evidence the defendant alleged that there was material non-disclosure and that the plaintiff is trying to gain security as an unsecured creditor through an injunction. On their part, the plaintiff alleged fraud on the part of the 1st and 2nd defendants and that since the 3rd defendant is their legal representative he is tainted with the fraud, in fact in their submission, they allege that 3rd defendant schemed this fraud to frustrate the plaintiff charge as security.

I wish to make three observations before I go into the issues raised in this case.

First, I wish to point out that the plaintiff have not adduced any evidence of the acceptance of the 1st and 2nd defendant request for the overdraft facilities except Exhibit 1, the purported second charge. This document however, only reflects that the 1st and 2nd defendant shall have access to an overdraft facility on behalf of messrs LPG roof to Floor Specialist Ltd to the amount not exceeding K5,000,000.00. The letters exhibited to the plaintiff affidavit in opposition Ex PW1, PW2 and PW3 are on the request for overdraft and offer of security. There is no letter exhibited on the acceptance. Not only this, there is no document to show since when and how much mones the plaintiff's have been

advancing to the defendants in respect of the agreement. Section 31(2) of the Registered Land Act states that:

> *"Nothing in this section shall be construed as preventing any unregistered instrument from operating as a contract, but no action may be brought upon any contract for the disposition of any interest in land unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some other person thereunto by him lawfully authorised".*

This sub-section has a provision, but I need not refer to it now. What I wish to point out is that the requirement is that the contract must be evidenced in writing at the time the action is brought **Lucas Vs Dixon** (1889)22 Q,B.D. 357. What this section is saying is that a contract can be made earlier than the memorandum. In the case of **Barkworth Vs Young** (18.56) 4 Drew 2, a memorandum made 14 years after an oral contract was held to be sufficient evidence of the contract. However, in the present case, when was the contract made? In the absence of the letter of acceptance by the plaintiff, evidence of advancement of monies on the agreement would have sufficed as evidence of acceptance and performance, but there no such evidence. On the evidence before me the conclusion any reasonable person would come to is that the agreement was reached on the day the purported charge was signed : 12th May, 2000. The only other interpretation would be that the plaintiff were advancing money to the 1st and 2nd defendants before they came to an agreement

on the security; a very casual way of doing such kind business on the part of the plaintiff if this was so.

The second point is on non-registration. It is not clear, from the evidence before me what happened for the plaintiff not to register the purported second charge. Section 35(1) of the Registered Land Act States :

> *"Subject to subsection (3), interests appearing in the register shall have priority according to the order in which the instruments which led to their registration were presented to the registry, irrespective of the dates of the instruments and notwithstanding that the actual entry in the register may have been delayed."*

This subsection too has a proviso which I need not refer to here. It is quite obvious that the sale is not completed until Government consent is granted and if they have an interest in the property which needs to be secured then they can and should register it. That interest will take priority after the other interests registered before them.

The third point is that the plaintiff has not, on the evidence, made any call on their money. They however, allege fraud on the part of the defendants. The basis for the alleged fraud is that the 1st and 2nd defendant, created powers of attorney in favour of the 3rd defendant. One fails to see the connection here. What is charged is the interest in the property. The allegation of fraud canonly be tenable if the contract was made after 8th May, 2000:

after the powers of attorney were executed, and not if the contract was made before then. This would be so because, then the execution of the charge on 12th May, 2000 is only evidence of the contract and the date when it was made would be immaterial. It would appear that there was no meeting of minds between the plaintiff and the 1st and 2nd defendants when this issue arose and that the plaintiff have presumed bad faith on the part of the defendants.

Let me now look at the case presented by both parties. Let me begin with section 60(3) of the Registered Land Act which states :

> *"The charge shall be completed by its registration as an encumbrance and the registration of the person in whose favour it is created as its proprietor and by filing the instrument".*

Obviously, the plaintiff's charge is not registered and therefore not complete at law. If this court were to accept the position as is said by the plaintiff and not disputed by the 1st and 2nd defendant that money was advanced on the security of the property in issue, there there was part performance on the part of the plaintiff referable to the agreement. The plaintiffs claim therefore would be enforceable against the two defendants notwithstanding the lack of registration. Be this as it may, lack of registration has profound legal implications. Section 28 of the Registered Land Act stipulates that :

> *"Every proprietor acquiring any land, lease or*

*charge shall be deemed to have had notice of every entry in the register relating to the land, lease or charge".*

The 1st and 2nd defendant signed a memorandum of agreement See : **Steadman Vs Steadman** (1974) 3 WLR, 56 of sale with the third party on 28th April 2000 and the conveyance was to be free of all encumbrances. The consent order was issued on 25th April, 2000 three days before the 1st and 2nd defendant signed the memorandum. The powers of attorney were executed 13 days after the consent order and 10 days after the signing of the memorandum. The defendant in support of this summons, paragraphs 5 and 8, aver that the property in issue was sold to pay off all creditors after paying the New Building Society who, then, had a charge over the property, and that the powers of attorney were executed in order to ensure that there is no diversion from this scheme. It is my view that although the 1st and 2nd defendant acted contrary to the consent judgment of 25th April 2000, by signing the memorandum of sale before executing the powers of attorney to 3rd defendant, there is nothing to suggest that they set out to defeat the scheme. If the agreement with the plaintiff's was to secure the overdraft by the same property, then their execution of the purported second charge, in effect, strengthened the position of the plaintiff as an unsecured creditor.

As I said earlier, looking at this case from the eyes of the parties, that an overdraft was obtained, long before a charge was executed, my view is that the 1st and 2nd defendant cannot now deny that there was a charge intended. Be this as it may, by the operation of section 28 and section 60(3) of the Registered Land

Act, the third party rights cannot be defeated by the claim of the plaintiff. They purchased the property without notice of the plaintiff's claim and they did so bona fide. This, however, is not the end of the matter.

It is already said in this judgment that the charge was on the property and, in my view, the sale not having been completed it is still registrable. "Equity looks on that as done which ought to be done". Equity will treat an enforceable contract to create a legal mortgage as an actual mortgage as long as it is sufficiently evidenced in writing or by a sufficient act of part performance, or indeed performance, see **Ex parte Wright** (1812) 19 Ves 255. It was also heard in **Re Owen** (1894) 3 ch 220, that an enforceable contract to create a legal charge presumably creates an equitable charge. Between the 1st and 2nd defendants and the plaintiff therefore, there is an equitable charge created in favour of the plaintiff. I therefore find that the plaintiff is a secured creditor on this property in equity.

I therefore discharge the injunction granted to the plaintiff with costs.

**Pronounced** in Chambers this 29th day of June 2000 at Blantyre.

E.B. Twea
JUDGE