

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CIVIL CAUSE NO. 3213 OF 2000**

**BETWEEN:**

JUSTIN WILSON CHIKUMBANJE.....PLAINTIFF

and

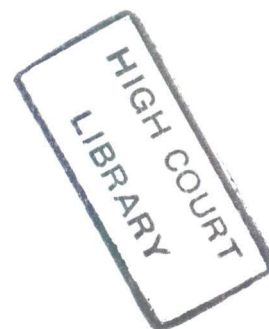
INDEFUND LIMITED.....DEFENDANT

**CORAM: KAPANDA, J.**

Mr Kainja, of Counsel for the Plaintiff

Mr Tembenu, of Counsel for the Defendant

Mrs Matekenya, Official Interpreter



**RULING**

The Plaintiff, on 13th October 2000, took out an inter-partes summons for an injunction under Order 29 of the Rules of the Supreme Court where he prayed for an order of an injunction restraining the Defendant by itself or its agents from selling Title No. Michiru 13/1 Blantyre. Although the summons and the prayer in the summons appear as if the Plaintiff is seeking a permanent injunction this is an application for an interlocutory injunction. There is an affidavit sworn by Counsel for the Plaintiff, in support of this application for an interlocutory injunction filed on 13th October, 2000. The application is opposed by the Defendant and to that end there is an affidavit of Counsel for the Defendant in opposition to the plaintiff's application.

The main thrust of the Plaintiff's application is that the threatened sale of the land situated on Title No. Michiru 13/1 Blantyre is illegal null and void because same is in breach of the provisions of the Registered Land Act with regard to the Notice period that ought to have been given to the Plaintiff before sale of the property. It is further contended by the Plaintiff that the requirements of the Registered Land Act as to a reserve price of the property have not been complied with in that the approval of the Lands Registrar with regard to this reserve price was not obtained.

On the other hand the Defendant has argued that the Notice Requirement was varied by the charge created over the property by the Plaintiff in favour of the Defendant and also that the said Notice Requirement was varied by the loan agreement entered into between the Plaintiff and the Defendant. It has further been submitted by the Defendant that the said Notice Requirement is a mere formality and that same is not intended to fetter a chargees right to realize his security. As regards the issue of a reserve price it is contended by the Defendant that the section that provides for such reserve price is not mandatory. Thus it is argued on behalf of the Defendant that the Plaintiff has not raised triable issues in this case and for that reason it is being prayed by the Defendant that this application should be dismissed.

It is clear from the facts of this case, as disclosed in the affidavits of both parties and also from the arguments of Counsel for both parties, that the only issue for determination in this matter is whether an interlocutory injunction should issue in favour of the Plaintiff. The principles of law to be observed in applications for an interlocutory injunction are trite and I need not restate them here but it will suffice to say that I have had the occasion to read them and I will apply them in this case - American Cyanamid Company -vs- Ethicon Ltd (1975)A.C. 396; (1975)1 All. E.R. 504.

In my judgment, after looking at the decision of the Malawi Supreme Court of Appeal in the case of **New Building Society -vs- Gondwe MSCA Civil Appeal No. 21 of 1994**, the Plaintiff has shown that there is a serious question of law to be decided in so far as it is evident, from the affidavit of the Plaintiff that the Plaintiff will seek to have the provisions of the Registered Land Act construed in relation to the facts obtaining in this case. Further, it is my view that the Plaintiff has demonstrated that he has a good arguable claim to the right that he is seeking to protect as prayed for in his originating summons issued on 13th October, 2000.

Be that as it may be it must be realized that the above findings alone are not, at law, sufficient to entitle the Plaintiff to the interlocutory injunction he is seeking. This is the case because the remedy of an interlocutory injunction is a discretionary one which is granted or refused on a balance of convenience and it must be shown that the Plaintiff will suffer irreparable damage if the interlocutory injunction prayed for is not granted. It is the trite principle of law, and it needs no case authority to be cited, that if damages would be a sufficient remedy an interlocutory injunction will not be granted however strong the Plaintiff's claim appears to be at the interlocutory stage.

Now the question that must be answered is where does the balance of convenience lie in this matter? Is the balance tilted in favour of the granting of the remedy that is being sought by the Plaintiff? In answering this question regard should be had to what the parties have shown in their affidavits. Even though I am obliged not to attempt at deciding the issue before me basing on the said affidavits it is still necessary that I look at them so that an informed decision can be made in this matter.

In this case it is rather unfortunate that the Plaintiff's affidavit does not show that damages would not adequately compensate him in the

event that he succeeds in his action against the Defendant for the declarations he is requesting in the originating summons filed on 13th October, 2000. It is not enough for the Plaintiff to just depone in his affidavit or argue in submissions that the threatened sale is illegal in terms of the Registered Land Act. The court can not be left to speculate as to whether a party seeking an interlocutory injunction will suffer irreparable damage if an injunction is not granted. The person seeking the remedy of an interlocutory injunction must demonstrate by evidence that he will suffer irreparable damage or that damages will not be enough to compensate him for the wrong done to him.

Further, this court has observed, from the affidavit evidence and the arguments of both Counsel, that it is an undisputed fact that the Plaintiff has been defaulting in the repayment of the loan and/or the payment of the instalments despite the so many promises and undertakings he made to make good the repayment and payments. The Plaintiff has failed to honour his promises in the charge as well as in the loan agreement and he now rushes to this court for assistance and protection. It is clear that the Plaintiff has been in perpetual breach of the agreement he entered into with the Defendant. In my view there will be more harm to either parties in that the arrears will keep on accumulating to astronomical levels if the default in the repayment of this loan, as shown in the affidavit of the Defendant, is anything to go by.

Should this court assist the Plaintiff by granting him the relief he is seeking in the instant application? The answer to this question is in the negative. At law the remedy of an injunction is an equitable one and those who come to equity must come with clean hands. The Plaintiff's hands, in my judgment, are not clean in view of the observations that I have made above.

To make a long story it is my finding that the Plaintiff has failed to satisfy the principles which this court must follow when granting an

interlocutory injunction. For the reasons I have outlined above this application must fail. I dismiss it with costs to the Defendant.

**Pronounced** in Chambers at the Principal Registry Blantyre this 23rd day of October, 2000.

  
F.E. Kapanda  
**JUDGE**