

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 597 OF 1999



BETWEEN:

NYEMBA WALES MBEKEANI.....PLAINTIFF

- and-

NEW BUILDING SOCIETY.....DEFENDANT

CORAM:

TEMBO, J.

Chirwa, of Counsel, for the Plaintiff

Mbvundula, of Counsel, for the Defendant

Katunga (Mrs.), Official Interpreter

RULING

EDITORIAL NOTE

Application for injunction by the mortgagor to restrain the mortgagee and a purchaser from completing a contract of sale, respecting the mortgagor's property comprised in a mortgage, following the mortgagee's exercise of its power of sale through public auction sale. The mortgagor thereafter tendered an amount of money to the mortgagee for the principal with interest and costs in order to redeem the charged property.

Sections 66(1) and 71(1) of the Registered Land Act construed and applied. Also applied, case of, WARING(LORD) -V- LONDON AND MANCHESTER ASSURANCE LIMITED AND OTHERS (1935) CH. D. 310.



HELD:

- (1) *that regard being had to sections 66(1) and 71(1) of the Act, the mortgagor's right of redemption was lost upon the mortgagee selling the property comprised in the mortgage, in particular, at the moment a bid of the purchaser had been accepted at the public auction sale, thereafter, the mortgagor could not, without more, establish that he had a good arguable claim to the right he sought to protect thereby. In the circumstances, an injunction ought not to be granted.*

- (2) *that if, before the contract of sale, the mortgagor had tendered the principal with interest and costs to the mortgagee for the redemption of his property, then, if the mortgagee had continued to take steps to enter into a contract for sale the mortgagor would have been entitled to an injunction restraining the mortgagee from doing so. However, the principal with interest and costs having been tendered after the contract for sale had already been concluded, the mortgagee can be restrained from completing the sale only on the ground that the mortgagee has not acted in good faith and that in such a case the sale is liable to be set aside.*

- (3) *that the mortgagee's power of sale is given to the mortgagee for its benefit to enable it the better to realise its debt. If it exercises it bona fide for that purpose, without corruption or collusion with the purchaser, the court will not interfere even though the sale be very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud. There being no proof of fraud, in the instant case, no injunction was granted.*

Tembo, J. This is an *inter partes* application by the defendant for the court to order that the injunction obtained by the plaintiff against the defendant be dissolved on the ground that it was erroneously obtained; and further that the defendant do recover possession of Plot No. LK 118 located in the City of Blantyre on the ground that the defendant is entitled to possession, the defendant having exercised its power of sale as chargee. The application is supported and opposed by



affidavits of parties hereto. I have also heard legal arguments of both counsel for and against the application.

On 25th February, 1999, the court, on the ex parte application of the plaintiff, ordered and directed that the defendant by itself, its servants or agents or otherwise howsoever be restrained from completing the sale of the plaintiff's dwelling house on Plot No. LK 118, Namiwawa in the City of Blantyre until the determination of an inter partes application relative thereto. Let me mention the fact that the plaintiff has, since the order under review, commenced a substantive action before this court by which he seeks a permanent injunction to restrain the defendant from completing the sale of the house in question or an account of the monies received by the defendant in respect of the house in question.

In obtaining an interlocutory injunction, it is sufficient that the plaintiff proves to the satisfaction of the court on a balance of probabilities, by way of affidavit evidence, that he has a good arguable claim to the right he seeks to protect. Besides, he must show that there is a serious question to be tried in his substantive action then pending the determination of the court. In its determination of those two factors, the court must not attempt to decide the substantive action or claim of the parties on the basis of their affidavit evidence in support of, or opposition to, the instant application. Where the court is satisfied that the foregoing factors are established, the grant or refusal of an injunction is a matter for the exercise of the court's discretion on balance of convenience. Further, if damages would be a sufficient remedy, an injunction should not be granted. However, in a case where a wrong doer is unlikely to be able to pay the damages in question, the court should not consider damages as a sufficient remedy. An injunction should be granted in that case. For the foregoing legal propositions, the judgment of Lord Diplock in the case of *American*

Cyanamid Co. -v- Ethicon Ltd (1975) 1 All ER 504, is the authority.

On the other hand, it is trite law that an interlocutory injunction obtained *ex parte* may be discharged or dissolved if it can be proved that it was irregularly obtained by the suppression of facts or that it was founded on a decision which was wrong in law. In its instant application, the defendant seeks an order of the court to dissolve the *ex parte* injunction under review on the ground that it was founded on a decision which was wrong in law. Thus, that it was erroneously obtained. Mr. Mbvundula has strongly argued in support of that view, by citing numerous case authorities therefor. As it can be expected, on his part, Mr. Chirwa has likewise forcefully argued in favour of the plaintiff's case that the injunction should be maintained. Thus, that the court should come to the conclusion that the plaintiff had established the legal factors outlined by Lord Diplock in the *Cyanamid* case for and in obtaining an interlocutory injunction under review. I will revert to the relevant legal arguments of both counsel after briefly outlining the facts relative to the instant application.

In all five affidavits have been deponed and filed in respect of this application, thus, two for the defendants and three for the plaintiff, including the affidavit which the plaintiff relied upon in support of his *ex parte* application for the order now under review. The following facts emerge from those affidavits.

Parties are in agreement that the plaintiff was the owner of house LK 118, at Namiwawa, in the City of Blantyre; that it was offered to the defendant by the plaintiff as security under a mortgage arrangement between them; that, thereunder, the plaintiff had a duty to honour his loan repayment obligations. The defendant had a power of sale to be exercised when and where the plaintiff would be in default

of his loan repayment obligations. That in fact the plaintiff had suffered from default in his loan repayment obligations, when, in accordance with the mortgage agreement, the defendant gave due notice of its intention to sell the house by public auction. By the date of the notice the plaintiff had suffered from arrears on his mortgage instalments amounting to K415,628.12. This represented arrears for a period well in excess of three consecutive months, following the service on the plaintiff of the defendant's notice in writing, urging the plaintiff to pay the money owing, in compliance with the mortgage agreement.

By such notice the plaintiff was informed of the defendant's intention to take measures for the realisation of its security, if the plaintiff were to continue being in default. The last notice was issued to the plaintiff on 1st October, 1997, and the premises were sold by public auction on 17th February, 1999, at a price of K2.45 million. Prior to the sale, the intended sale was advertised in newspapers having wide circulation in the country.

It is also not in dispute that a few days prior to the date of the public auction sale, more precisely on 12th February, 1999, and upon receipt by the plaintiff of defendant's letter dated 27th January, 1999, the plaintiff had a meeting with the defendant's General Manager at which occasion the plaintiff pleaded with the General Manager not to proceed with the intended sale. The plaintiff then made proposals as to how he would settle his arrears. In its letter dated 27th January, 1999, the defendant had informed the plaintiff of its decision to sell the house by public auction due to the level of the arrears on the plaintiff's mortgage account, then in the amount of K415,628.12.

It is further apparent from the affidavits, that agreement not having been reached on the proposals of the plaintiff, on how he intended to settle the arrears, the defendant proceeded with the auction sale on 17th February, 1999. Consequently, the plaintiff sought and obtained the injunction under review on 25th February, 1999.

Besides the foregoing, the following further facts emerge from the affidavits: the plaintiff, thereafter, contacted his bankers, the Finance Corporation of Malawi (FINCOM) Ltd to assist him settle his entire debt due on his mortgage account with the defendant. FINCOM on 1st June, 1999, wrote to the defendant offering to pay on behalf of the plaintiff the debt due on his mortgage account. On 22nd June, 1999, the defendant replied accepting the offer. It is expedient that the operative paragraphs of both letters are set out hereunder as follows-

“FAO: The Head of Mortgages

Dear, Sir,

Mr. N.W. MBEKEANI - MORTGAGE ACCOUNT
NO. 070-0288501-10-01: K984,443.08T

We have been approached by Mr. Nyemba W. Mbekeani to pay to you, on his behalf, the sum of K984,443.08 (nine hundred and eighty four thousand four hundred and forty three Kwacha eight Tambala) being the amount owed to you.

FINCOM hereby undertakes to pay direct to you the said sum in order to discharge his liability in your books. It is expected that the cheque will be forwarded to you within the

next two weeks upon finalization of transfer of title documents.

Please revert with your confirmation that this arrangement is in order.

Yours faithfully

*Mary C. Nkosi
Chief Executive*

*Jimmy Kayuni
Corporate Credit Manager*

“Dear Madam,

*MR. N. W. MBEKEANI- MORTGAGE ACCOUNT
NO. 070-0288501-10-01: K984,443.08*

Thank you for your letter 1st June, 1999.

We are pleased to confirm that New Building Society has no objection to the arrangement reached between FINCOM and Mr. N. W. Mbekeani.

We therefore look forward to receiving your cheque for K984,443.08 not in a too distant future.

Yours faithfully

Weston D.Kusani
Head of Mortgages

Subsequently, FINCOM sent the cheque in question which was received by the defendant. However, upon receipt, the cheque was under cover of a letter dated 25th June, 1999, returned to FINCOM by the defendant in that the letter of its head of mortgages purportedly accepting the cheque had been written and issued in error, on account of an oversight on his part that the plaintiff's property had already been auctioned by then. The full text of the letter was as follows-

"Dear Sir,

Mr. N. W. Mbekeani: Mortgage Account No. 070-0288501-10-01

We refer to our letter WDK/cgk dated 2nd June, 1999, on the above subject.

We wish to advise that the contents thereof should be ignored, because at the time of writing that letter Mr. Mbekeani's property in question had already been sold by virtue of powers conferred on the Society by Mr. N. W. Mbekeani in favour of the Society, and the buyer had already complied with his obligations under the contract of sale.

We deeply regret any inconvenience this may cause.

Weston D. Kusani
For Head of Mortgages"

The foregoing are the facts surrounding the instant application. Before I state and consider the relevant legal arguments of counsel, let me make one observation as to the affidavit evidence which the court ought to consider in determining the instant application. In *King Flower Limited -v- Lingadzi Farm Limited*, Civil Cause No. 951 of 1996 (unreported) Tambala, J., as he then was, stated that ex parte applications for injunction are granted upon evidence of one party; that when both parties subsequently appear, the court must hear evidence relating to all relevant issues; that to do otherwise would offend against one of the principles of natural justice that no one should be condemned unheard (*audi alteram partem* rule). In *Ninemia Corp. -v- Trave Schiffahrts* (1984) 1 All ER 422, Lord Justice Kerr said that a judge who hears the proceedings inter partes must decide on all the evidence laid before him. Such ought to be the approach whether the inter partes hearing takes the form of an application by the defendant to discharge or dissolve the injunction or whether the injunction in question was earlier only granted for a limited time and the hearing now is once more at the instance of the plaintiff in regard to whether or not it should be continued. The judge must consider the whole evidence as it then stands in deciding whether to maintain or discharge the order of injunction previously made.

In the main, Mr. Mbvundula argues that the plaintiff admittedly having been in default of his mortgage loan repayment obligations, for a very long period, resulting in a huge amount of arrears, the defendant was entitled to exercise its power of sale to realise its security, as it in fact did by selling the plaintiff's property by public auction. Further,

Mr. Mbvundula argues that upon the defendant so doing, the plaintiff lost his right of redemption. That in terms of section 66 of the *Registered Land Act*, the plaintiff's right of redemption was lost at the moment a bid of the buyer had been accepted at the public auction sale on 17th February, 1999. It was further argued that the plaintiff's lost right of redemption could not be revived on the mere assertion by the plaintiff that the auction sale of his property had not been completed or on account of the defendant's failure to provide to the plaintiff a statement of the proceeds of sale, under and in accordance with section 57 of the *Building Societies Act*. In the submission of Mr. Mbvundula, those matters have nothing to do with the revival of the plaintiff's right of redemption, and less still the validity of the sale in question.

At the time the order of injunction was first granted and issued in February, 1999, the plaintiff had in fact admitted having been in default of his repayment obligations, in particular, in the amount of K415,628.12. However, the only grounds upon which he challenged the action of the defendant and for which he sought and obtained the injunction under review, were that on 12th February, 1999, he had a meeting with the defendant's General Manager at which occasion he pleaded with the General Manager not to proceed with the intended sale, and that he made proposals for the settlement of his arrears. Further, that although his house had been offered for sale by public auction on 17th February, 1999, at K2.45 million, the sale had not been completed in that the buyer had not yet paid the required deposit of 25% and that the notice in terms of section 24A of the *Land Act* had not been given to the Minister of the Malawi Government responsible for land matters. Finally, it was contended that the sale of the plaintiff's property in respect of the arrears of K415,628.12 greatly infringed the plaintiff's constitutional right to own property which he must not be deprived of arbitrarily.

So, as of the time and the date when the order under review was granted, there was no agreement between the plaintiff and the defendant that the defendant would not exercise its power of sale following the meeting of the 12th February, 1999. That being the case, and the plaintiff, then, admittedly having been in default of his repayment obligations, the defendant was entitled to exercise its power of sale. Regard being had to the provisions of section 66(1) of the *Registered Land Act*, namely, that the plaintiff's right of redemption was lost upon the defendant selling his property, in particular, at the moment a bid of the buyer had been accepted at the auction sale on 17th February, 1999, the plaintiff could not without more establish that he had a good arguable claim to the right which he sought to protect for which the order of injunction had to be granted.

In discharging an *ex parte* order of injunction in the case of *Mkwanda -v- New Building Society* Civil Cause No. 1806 of 1997, in part, I said the following-

“The reconciliation statement in question had confirmed the balance of the plaintiff's loan account as at 31st September, 1996, to have been K570,208.86. A perusal of the mortgage gives only one correct impression as to the status of the plaintiff's right of redemption. The plaintiff would definitely redeem his mortgage upon payment of the principal, interest, and costs. Regard being had to the affidavit evidence of the defendant that the plaintiff has been, or that he is, in default for at least 51 months, can only be taken to mean that the plaintiff has not so far demonstrated his resolve to redeem his mortgage. By the same act, the plaintiff has created conditions for the defendant to exercise its power of sale under the mortgage, in order to realise the security for the loan provided to the plaintiff.”

In the circumstances, it cannot be said, on the evidence now before the court that, on 25th February, 1999, the plaintiff had a good arguable claim to the right he sought to protect. The order, therefore, ought not to have been granted.

Does the position change following the plaintiff's offer to settle the entire debt after the auction sale on 17th February, 1999? Mr. Chirwa has cited the case of *Truman & Co. -v- Redgrave* vol. xviii CH. D 547 for the proposition that where sufficient grounds for relief are shown, the court may interfere to restrain mortgagee's exercise of its power of sale. He submits that it is not enough for the defendant merely to contend that it had been granted power of sale. The court remains vested with power to interfere in an appropriate case. A perusal of that case does not give me that impression. To the contrary, that case stands for the principle clearly outlined in the headnote, thus, that a legal mortgagee of business premises who is prevented by the mortgagor from taking possession under a mortgage, may obtain, upon an interlocutory application an injunction restraining the mortgagor from interfering with the management of the business and the possession of the premises.

Mr. Mbvundula has cited to me a case of *Waring (Lord) -v- London and Manchester Assurance Company, Limited and Others* (1935) CH. D 310, which appears to be a relevant persuasive authority. This must be so although the case directly deals with the interpretation and application of the provisions of sections 89, 101, and 104 of the *Law of Property Act 1925*, a statute which does not apply to Malawi. This was a motion in an action by a mortgagor, as in the instant case, for an injunction restraining the mortgagee and an intending purchaser from completing by conveyance a contract which had been entered into for sale of the property comprised in the mortgage. The motion raised the question whether a mortgagor, on

tendering the principal and interest due under the mortgage, is entitled to an injunction restraining completion by conveyance of a contract already entered into by the mortgagee, as mortgagee, for the sale of the property comprised in the mortgage, and to redemption of the property.

To begin with, the court held that *if, before the contract, the plaintiff had tendered the principal with interest and costs, or had paid it into court in proceedings, then, if the company had continued to take steps to enter into a contract for sale, or had purported to do so, the plaintiff would have been entitled to an injunction restraining the company from doing so. After a contract has been entered into, however, it is, perfectly clear that the mortgagee can be restrained from completing only on the ground that he has not acted in good faith and that the sale is therefore liable to be set aside.* That position is on all fours with the provisions of sections 66(1) and 71(1) of our *Registered Land Act*. By section 66(1) the plaintiff could have redeemed its charged property at any time before the defendant had exercised its power of sale under section 71(1). He did not do so. The letter to the defendant from FINCOM by which the defendant had been asked to accept a cheque to be issued by FINCOM, on behalf of the plaintiff, came too late in the day to save the plaintiff's right of redemption, in terms of section 66(1). This was on 1st June, 1999, several months after the plaintiff had lost his right of redemption. It is interesting also to note that by the date the order of injunction was issued, on 25th February, 1999, the plaintiff had not yet tendered any money for the settlement of the debt.

The position is not made any better by the defendant's erroneous acceptance of FINCOM's offer. By that time the defendant had been bound to a contract of sale to the buyer. There was nothing they could have done to revive the plaintiff's right of redemption without being in breach of the contract of sale. In the circumstances, the principle

of estoppel could not be invoked against the defendant and in favour of the plaintiff. To do so would be to assist the defendant to act illegally, and in contravention of section 66(1). In the circumstances, the plaintiff cannot be entitled to an injunction by reason only that FINCOM had tendered to the defendant on behalf of the plaintiff money in respect of the principal, interest and costs due under the mortgage. This was too late in the day for the tendered money to serve the purpose for which the tender was intended, it being the clear position that by then the property comprised in the mortgage had already been sold by public auction.

Yes, the only basis upon which the injunction could be maintained then would be on the ground that the defendant in effecting the sale had not done so in good faith. Section 71(1) of the *Registered Land Act* require the defendant to act in good faith, in exercising its power of sale. It is a question of fact if in any particular case the mortgagee has not acted in good faith. In the instant case an attempt to show bad faith has been made by contending that the price obtained at the auction sale for the plaintiff's property was undervalued. Besides, that the defendant in effecting the sale of the plaintiff property had in fact violated plaintiff's constitutional right to property. A glance at the affidavit evidence outlined above does not show that the defendant is guilty of not acting in good faith in the exercise of its power of sale. The plaintiff's private valuation of his property was K3 Million whereas the price obtained for it at the auction sale was K2.45 Million.

In *Warner -v- Jacob* 20 CH. D.220,224 , Justice *Kay* stated that *a mortgagee is strictly speaking not a trustee of the power of sale. It is a power given to him for his benefit, to enable him the better to realise his debt. If he exercises it bona fide for that purpose, without corruption or collusion with the purchaser, the court will not interfere even though the sale be very*

disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud. In the Waring case, the mortgagor had arranged to obtain a loan of 200,000 British Pounds on the security of his charged property which the mortgagee had sold at a price of 186,000 British Pounds, after numerous efforts had been made, to no avail, to sell the property at a higher price. The court on this point held that in my judgment it is impossible on the facts of this case to conclude that the price is so low as in itself to be evidence of fraud. It is true that there is some suggestion that the Yorkshire company is willing to advance on mortgage an amount larger than that of the purchase money, which implies, presumably, that the value which the Yorkshire company puts upon the property must also be considerably larger. I do not consider, however, that that in itself is evidence of fraud. In my judgment there must be something far beyond the mere fact of under-value.

A careful consideration of the private valuation of the plaintiff and the price obtained at the auction sale gives an irresistible impression that there was no fraud in the sale.

Besides, it cannot be said that the plaintiff's constitutional right to property had been infringed by the defendant. There has been no arbitrary deprivation of the plaintiff's right to property, in that the mortgage arrangement was entered into by mutual consent of the plaintiff and the defendant, and further, the exercise by the defendant of its power of sale was a lawful act arising from the mortgage agreement between them.

In the circumstances, the plaintiff has not shown that he has a good arguable claim to the right which he seeks to protect. The injunction must therefore be dissolved in that when granted, it was so granted on a basis of a decision which was wrong in law. By section 71(3) of the *Registered Land Act*, the plaintiff has a remedy in

damages only against the defendant. Besides, and in consequence of this decision, the defendant should now recover vacant possession of the Plot No. LK118 located in the City of Blantyre on the ground that the defendant is entitled to possession having validly exercised its power of sale as chargee. It is so ordered. Costs for this application are for the defendant.

Made in Chambers this Monday, 28th February, 2000, at Blantyre.



A. K. TEMBO

JUDGE