Leasing and Finance Company of Malawi Ltd v Sadiki

HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

TEMBO J

Date of Judgment: 20 September 2001

Civil Cause No. 1525/2001

Land law – Charge – Demand notice – Section 68 (1) of the Registered Land Act – Intended to ensure that a chargee issues demand notice where a chargor is in default and continues to be in default

Land law – Charge – Demand notice – Section 68 (1) of the Registered Land Act – Not intended to give a chargor grace period within which to remedy default

Land law – Charge – Demand notice – Sections 60 (2), 68 (1)and 68 (2) of the Registered Land Act – Chargee not required to state in the demand notice a period within which the chargor must remedy default

Land law – Charge – Demand notice – Power of sale - Sections 60 (2), 68 (1)and 68 (2) of the Registered Land Act – Chargee to exercise power of sale only after expiry of a period of three months from date of service of demand notice on the chargor

Land law – Charge - Power of sale by chargee – Section 71(1) of the Registered Land Act – Does not require that in exercising power of sale the chargee must sell only by public auction but requires that in exercising power of sale, the chargee must do so in good faith and must have regard for the interests of the chargor

Land law – Charge - Power of sale by chargee – Section 71(1) of the Registered Land Act – Sale of charged property – intention of the Legislature that sale should not be by public auction only

Land law – Charge - Power of sale by chargee – Section 71(1) of the Registered Land Act – Failure to have approval of the reserve price by the Land Registrar does not constitute an illegality rendering the contract of sale null and void

Land law – Charge – Power of sale by chargee – Section 71(3) of the Registered Land Act – After the exercise of the power of sale the chargor's remedies are only in damages against the chargee

Editor's Summary

In September 1999 the defendant obtained a loan of K2 million from the plaintiff to be repaid in 24 equal monthly instalments. He pledged his property, Title No. NY795 which in 1999 was valued at K5.5 million as security for the loan. He defaulted on the repayment instalments and on 17th October 2000 the plaintiff gave him written notice to pay up at least half of the arrears or else it would proceed to sell the property. The defendant failed to pay and the plaintiff instructed auctioneers to sell the property. In January 2001 the auctioneers valued the property at K2 million and put this as the reserve price. The property failed to fetch a bid at an auction but was later sold by private treaty at the price of K2.2 million. This was in April 2001. The defendant was notified of the sale and requested to move out of the property. He refused to deliver vacant possession of the property to the plaintiff.

The plaintiff brought this application under RSC O. 18, r.1(1)(d) as read with sections 68 and 71 of the Registered Land Act (Cap 58:01) seeking an order of the court compelling the defendant to deliver up possession of the property. The defendant argued, inter alia, that the sale contravened sections 68 and 71 of the Registered Land Act in that the price of K2.2 million was not approved by the Land Registrar nor was the sale by public auction thereby compromising his interests as a chargor. The sale was therefore illegal and unenforceable.

Held – Allowing the plaintiff's application with costs:

(1) That section 68 (1) of the Registered Land Act is intended to ensure that demand notices are issued by a chargee only where it is certain that a chargor is in default or where a chargor has defaulted once clearly continues to be in default. The section is not intended to give a chargor grace period.

(2) That it was evident that by 17 October, 2000 the defendant had been in arrears for a continuous period of well over three months as such the demand notice dated 17 October 2000 which clearly called upon the defendant to pay up the arrears failing which the plaintiff would sell the charged property complied with section 68 (1) of the Registered Land Act and could not be faulted.

(3) That sections 60 (2), 68 (1) and 68 (2) of the Registered Land Act do not require a chargee to stipulate in the demand notice the period within which a chargor ought to pay up or to perform or observe the agreement after which a chargee would exercise his power of sale. The chargee can only exercise his power of sale after the expiry of three months from the service of the demand notice on the chargor.

(4) That the sale of the charged property by private contract could not be faulted because it was conducted outside three months from 17 October, 2000 when the demand notice was served on the defendant.

(5) That failure to sell property by public auction or to obtain the Land Registrar's approval of the reserve price under section 71 (1) of the Act does not constitute an illegality which renders the contract of sale null and void.

(6) That section 71 (1) of the Act requires a chargee to act in good faith and to have regard to the interests of a chargor.

(7) That where a sale is irregular the chargor's remedy is in damages only against the chargee.

(8) The defendant could not be allowed to cling to possession of the property which had been lawfully sold by the plaintiff in exercise of its power of sale under the charge. The defendant ordered to deliver vacant possession of the property within seven days.

Cases cited

Bazuka & Co. v Blantyre Land and Estate Agency Ltd 10 MLR 173 – **referred to**

Mkhumbwe v National Bank of Malawi [2000 – 2001] MLR 261 – **applied**

Mobil Oil (Malawi) Ltd v Sacranie Civil Cause No. 106/2000 (unreported) – **referred to**

New Building Society v Fremont Gondwe MSCA Civil Appeal No. 21/1994 (unreported) – **distinguished**

Nyemba Mbekeani v New Building Society Civil Cause No. 597/1999 (unreported) - **applied**

South Eastern Railway Co. v Railway Commissioners (1880) 5 QBD 217 – **referred to**

Welham v Director of Public Prosecutions [1960] 1 All ER 805 – **referred to**

Young & Co. v Leamington Spa Corp. (1883) 8 App. Cas. 517 – **referred to**

For the plaintiff:

Tembenu

For the defendant:

Masiku

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

CIVIL CAUSE NO. 1525 OF 2001

BETWEEN:

THE LEASING AND FINANCE COMPANY OF MALAWI LIMITED.....PLAINTIFF

-and-

GEORGE WADI SADIKI.....DEFENDANT

CORAM: TEMBO, J

Tembenu, of Counsel for the Plaintiff
Masiku, of Counsel for the Defendant
Kaphale, Court Clerk

JUDGMENT

Tembo, J. This is an application of the Leasing and Finance Company of Malawi Limited, the plaintiff, by which it is seeking an order of the Court that George Wadi Sadiki, the defendant, be required to deliver up possession of premises known as Title Number Nyambandwe 795. The application has been made consequent upon the plaintiff's exercise of power of sale, under a charge, and pursuant to Order 88 r. 1(1)(d) of the Rules of the Supreme Court (RSC)

as read together with sections 68 and 71 of the Registered Land Act (Cap.58:01) (RLA). There is affidavit evidence both in support of and opposition to the application. The Court has also heard legal arguments of counsel in that regard.

As can be gleaned from the affidavits, the facts of this case are as follows: In September, 1999, the defendant had obtained from the plaintiff a loan in the amount of two Million Kwacha. This loan had to be repaid in 24 equal monthly instalments of K131,041.24, commencing from 1st December, 1999. The defendant gave his property, title No. 795, as security for the loan. Repayment of the loan appears to have gone on very well until September, 2000 when the defendant defaulted. Consequently, the plaintiff on 17th October, 2000 gave written notice to the defendant that if the defendant did not pay at least half of the arrears which he had accumulated on his loan account, being an amount of K750,000.00 by then, the plaintiff would proceed to dispose off the house which was pledged as security against the loan.

Following that written notice, the defendant did not pay off the arrears of instalments on his loan account. The plaintiff, through its counsel, on 23rd October, 2000, instructed Messrs Trust Auctioneers and Estate Agents to arrange to advertise Plot No. NY 795 - Nyambandwe for sale by public auction.

Besides the foregoing, it is also important to note the fact that in instructing, Messrs Trust Auctioneers and Estate Agents to sell the property in question, Tembenu, Masumbu and Company asked them to bear in mind the prevailing market prices for properties of that nature in that particular locality. It was also pointed out that the property in question had been valued in July, 1999, at K5,500,000.00.

It is expedient that more be said about that valuation report. It is Exhibit GWS 3 to Mr. Sadiki's affidavit in opposition. The valuation was done and the valuation report was prepared and issued by Landed Property Agents Limited, in July, 1999:

The purpose of the report was to assess and advise on the, then, present day open market capital value of subject property in support of a loan application. The basis of the valuation was 'open market' reflecting conditions of the market as they existed at the time of inspection.

Respecting the situation and description of the property in question, the report provides the following: *The property is situated at Nyambandwe a low-density residential suburb of the City of Blantyre. It comprises a single storey dwelling house and an office block set on 0.5006 ha (1.24 acres) of residential land fairly flat and rectangular in shape and fully enclosed in a brick wall fence with steel sliding gates.*

The improvements are constructed of IBR roofing sheets resting on treated sawn timber trusses and supported by burnt brick walls plastered and painted both internally and externally. Floors are concreted finished in plain cement screed and covered with ceramic floor tiles.

Accommodation for the house consists of a front Khonde, lounge, dining room, kitchen with a walls-in pantry, WC, bathroom and three bedrooms with master bedroom having ensuite sanitary facilities.

Office block has accommodation comprising three offices and WC.

Respecting tenure; *the subject property is held freehold under File No. Nyambandwe 795 in favour of G.W. Sadiki.* The valuation was made and the report issued, among other things, *subject to the condition that the purpose of this valuation is as indicated earlier on in this report and may not be adopted for any other purposes without full consultation with the Valuers.*

Concerning opinion of value: *I certify that I have inspected the subject property and that I have examined recent evidence of transactions involving similar type of properties in the locality of the subject property and that I am of the opinion that the present day open market capital value for plot No. NY 695 is in the sum of K5,500,000.00.*

Signed
G.M. Wawanya Bsc ASVA, MCIH, MSIM
Valuation Surveyor
Landed Property Agents Ltd.

Messrs Trust Auctioneers and Estate Agents were requested, by Tembenu, Masumbu and Company to revalue the property in question if they wished to do so for purposes of sale. On 5th January, 2001, Messrs Trust Auctioneers and Estate Agents (the Auctioneers) notified Tembenu, Masumbu and Company that they inspected Plot No. Nyambandwe 795 and that in their opinion, based on transactions involving similar properties in the locality and elsewhere, the fair current value of the property was in the sum of K2,000,000.00. It was, therefore, the Auctioneers' view that that was to be the starting point regarding the price to be offered during the public auction sale. The property was advertised for sale and a public auction sale was conducted on 12th January, 2001. Attempts to sell the property in question did not produce a buyer. No offer was received at all. Consequently, on or about April 2001, the house in question was sold to Honourable Dumbo Lemani at the price of K2.2 million by a private contract.

On 23rd April, 2001, the defendant was notified of the fact of the sale. He was then asked to make arrangements to move out of the house and deliver vacant possession to the plaintiff, thus in order to enable the plaintiff to deliver the house to the buyer, Honourable Dumbo Lemani, who has already fully paid up the purchase price of K2.2 million. The defendant has until now not done so, hence this action by the plaintiff, seeking an order of the court requiring the defendant to deliver up possession of the house in question.

In support of the application, Mr. Tembenu has made the following legal arguments: To begin with, that this is an application for an order of the court requiring delivery of possession to the mortgagee by the mortgagor after mortgagee's exercise of its power of sale. The application is

made under Ord. 88 r.1 para. 1 (d) of the R.S.C. as read together with sections 68 and 71 of the RLA.

It is the submission of Mr. Tembenu that the plaintiff has exercised its power to sale the property in question under the charge. That the right to sell the property arose due to defendant's default in servicing his loan account with the plaintiff. That consequent upon defendant's default, the plaintiff gave written notice to the defendant, pursuant to section 68 (1)(2) of the RLA, that the plaintiff would exercise its power of sale, if the defendant would following that notice continue to fail to pay up the arrears of instalments then outstanding. Indeed, that following the issuance of that notice, a considerable time had elapsed thus a period beyond three months, prior to the actual sale, without the defendant paying up the arrears of instalment.

Mr. Tembenu pointed out that as a matter of fact the defendant admits that he was or that he is in default, despite the fact that he nonetheless continues to cling to the possession of the property in question. In the view of Mr. Tembenu, if the defendant has any claims against the plaintiff, at all, respecting the manner in which the plaintiff exercised its power of sale, under section 71 (3) of RLA such claims would only be made for damages to be paid and not for an order of the court justifying the defendant's continued possession of the property in question.

The defendant has deponed, in paragraph 11 of his affidavit in opposition, that the price at which the property was sold, K2.2 million, is manifestly very low and therefore unfair and inequitable and that the sale was, therefore, not made in good faith and without regard to the interest of the defendant, as required by Section 71 (1) of the RLA.

Mr. Masiku has laid a lot of emphasis on the fact that prior to the loan being granted to the defendant, the charged property had been valued in July, 1999 by a reputable land surveyor/valuer, Messrs Landed Property Agents Limited, at K5.5 million, for the purpose of the defendant's loan application. That the valuation was then accepted by the plaintiff and that based thereupon the defendant was granted the loan. In the light of these facts, submits Mr. Masiku, the value in the valuation report by Landed Property Agents Limited was not an exaggeration at all.

Besides that, Mr. Masiku submits that the price of K2.2 million was not approved by the Land Registrar. It is the argument of Mr. Masiku that Section 71 (1) of the RLA requires that the reserved price be approved by the Land Registrar. The idea being that the interest of the chargor be protected. Further, and in reliance on the Supreme Court of Appeal decision in **New Building Society -v- Fremont E.K. Gondwe** M.S.C.A. Civil Appeal No. 21 of 1994 (unreported) Mr. Masiku submits that Sections 68 and 71 of the RLA require that the sale be by public auction and that the price ought to have been approved by the Land Registrar. And to the extent that the sale was by private contract in the instant case, and that the price was not approved by the Land Registrar, the sale is unenforceable by action before the court.

Besides the foregoing, it is also the view of the defendant that he ought to have been given a grace period of one month to repay the loan as required by Section 68 (1) of RLA. In that respect it was pointed out that the plaintiff threatened to sell the house on 24th November, 2000. It was further the view of the defendant that the plaintiff's notice of 17th October, 2000 was illegal in that it contravened Section 62 (2) of the RLA, in that the plaintiff

did not firstly give to the defendant one month notice and did not serve a notice in writing requiring the defendant to pay the money owing or to perform and observe the agreement.

It is the further view of the defendant that the plaintiff's notice of 17th October, 2000 is illegal in that it was not made in compliance with Section 68 (1) of the RLA which requires that the plaintiff should have given a three months notice of sale. By that letter, dated 17th October, 2000, the plaintiff threatened to sell the property on 24th November, 2000. In that respect, it was finally submitted for the defendant that, the purported notice did not comply with the law and it is, therefore, illegal.

To the foregoing legal arguments for the defendant, in opposition to the application, Mr. Tembenu has the following responses: that the court should not accept the submission of the defendant made in paragraph 11 of his affidavit. Mr. Tembenu submits that the court ought to have due regard to the elaborate steps, outlined in his affidavit, which the plaintiff had taken before effecting the sale to the buyer by private contract. That those steps had in fact been taken in order to safeguard the interests of the defendant. Thus, in instructing the auctioneers to advertise for sale and to sell the charged property by public auction, Tembenu, Masumbu and Company had expressly drew the attention of the auctioneers to the fact of the valuation report of July 1999 which was issued by Messrs Landed Property Agents Limited and had further expressly requested the auctioneers to inspect the charged property and revalue it if they so wished for purposes of the intended sale. Auctioneers were also expressly asked to take into account the, then, current trend in the market prices for similar properties situated in that locality. The auctioneers precisely did just that. At the end of the day, the

auctioneers reported to the plaintiff, through Tembenu, Masumbu and Company, that they had inspected the property and that, taking into account all the foregoing factors, the current market price for the charged property, then, would be K2 million. To that end, they advised the plaintiff, through its lawyers, that K2 million would be the starting point in the purchase price to be offered at the public auction sale. A public auction sale was conducted, after the charged property had first been advertised therefor. No offer or bid was received for it. Further attempts were to no avail. Hence the property was sold to the buyer, Honourable Dumbo Lemani by private contract at K2.2 million. Mr. Tembenu submits that the court ought to have regard to these steps in order to have the impression that, indeed, the plaintiff had exercised its power of sale in good faith and that, in doing so, the plaintiff had regard to the interest of the defendant, as required by Section 71 (1) of the RLA.

It is the further submission of Mr. Tembenu in that regard that given the elaborate steps which the plaintiff had taken and the express fact that no bid could be received for the charged property at and during the public auction sale held for the purpose by the auctioneers, and further regard being had to the fact that by a private contract, only made thereafter, a price of K2.2 million was reached, such a price reflected the actual market price of the charged property then. In those circumstances, it is submitted, that the valuation of July, 1999 of K5.5 million ought to be and must indeed have been, an exaggeration of the value of the charged property.

Further, Mr. Tembenu argues that due regard being had to the express provisions of the RLA, and in particular Section 71 (1), there is no statutory or legislative mandatory requirement that in exercising its power of sale, the plaintiff

ought only to have done so by public auction. To the contrary, it was submitted that Section 71 (1) only makes provision for a mandatory requirement that in exercising its power of sale the chargee, herein the plaintiff, ought to do so in good faith and ought to have regard to the interests of the chargor, the defendant. The mode of sale is left to the choice of the parties, they may in fact agree to a sale by public action or by a private contract. The expression used in that regard is "may". For that proposition, Mr. Tembenu cited the decision of Justice Mwaungulu in **Bishop Daniel Mkhumbwe -v- National Bank of Malawi** Civil Cause No. 2702 of 2000 (unreported). In the circumstances, it is submitted that to maintain that a power of sale should only be exercised by public auction (and not also by private contract) would be creating or imposing unnecessary felter on the chargee's exercise of his/her or its power of sale, being one which is not expressed or implied by the statute in question.

It was further contended by Mr. Tembenu that the statute does not make provision for a grace period. That the demand notice required under Sections 60 (2) and 68 (1) and (2) of the RLA are expressly intended for giving opportunity to the chargor to remedy the breach or his failure to pay up the debt or howsoever to comply with what the notice require of him to do. Thus, if the chargor fails to do so within three months of the date of service of the notice, the chargee's right to exercise his or her or its power of sale is triggered. So, herein, only if the plaintiff had sold the charged property before the expiry of three months period following its demand notice, would the sale in question have been faulted. Such is and was not the position in the instant case, it being the submission of Mr. Tembenu that the sale was concluded after the expiry of that period, hence in compliance with the law in that regard. The alleged illegality is, therefore, unfounded,

submits Mr. Tembenu; and that, therefore, the instant application for delivering up of possession cannot be faulted in that regard.

Finally, Mr. Tembenu submits that failure to have approval of the Land Registrar for the reserved price, under Section 71 (1) of the RLA does not vitiate the sale. Failure to consult the Land Registrar, in that regard, does not constitute an illegality which renders the contract of sale null and void. In that respect, Mr. Tembenu submits that the decision by the Supreme Court in the case of **New Building Society -v- Fremont E.K. Gondwe** cited by Mr. Masiku for the proposition that where there was failure to seek approval of the Land Registrar, does not invalidate the sale in the instant case. The operative and applicable provision is Section 71 (1) of the RLA which does not bear out such a result.

What is important and required of the chargee to do by that section is that the chargee ought to act in good faith and also ought to have regard to the interest of the chargor. If upon posing a question as to whether the plaintiff herein in fact did so, and if the response be in the affirmative, the sale ought not to be attacked and, therefore, cannot be vitiated for any reason whatsoever in that regard.

Mr. Tembenu rests his submission by contending that even if the court were to disagree with him in that view, where the sale is irregular, Section 71 (3) of the RLA provides that the remedy of the chargor against the chargee is in damages only.

To begin with let me mention that the relevant law in the instant case is the RLA, in particular its Sections 60 (2), 68 (2), and 71 (1) (2) (3). These Sections do not make provision for any grace period as contended by Mr. Masiku

for the defendant. What Section 68 (1) provides is that the chargee in attempting to recover his debt may only issue a demand letter or notice to the chargor requiring the chargor to pay the money owing or to perform and observe the agreement if the chargor is in default thereby for a continuous period of one month. Once the chargor defaults as such, his default is a condition precedent to any action being taken by the chargee by way of the issuance of a demand notice in writing, urging the chargor to pay up or perform the agreement in question. This of itself is not a grace period. Looked at sincerely, this provision is intended to ensure that demand notices are issued by the chargee only in a situation where it is certain that the chargor is in default or where the chargor having defaulted once clearly continues to be in default. Prior to such a period, any demand notice would not evidence the fact that the chargor is in default.

Reverting to the facts in this case, by the time the plaintiff issued the demand notice dated 17th October, 2000, the defendant loan account was in heavy arrears. It is therein pointed out that K750,000.00 was half of the arrears then outstanding. That means that the total arrears then stood at double that amount. To the extent that the monthly instalment payable under the charge was K131,041.24, it is evident that by 17th October, 2000, the defendant had been in arrears for a continuous period of well over three months. Therefore, the demand notice dated 17th October, 2000 was, in terms of Section 68 (1) of the RLA, issued in compliance with that section and, therefore, cannot be faulted. What is important to note hereby is that by 17th October, 2000, the defendant had clearly been in default for a period of well over three months. If the plaintiff had so elected, that notice could equally have validly been issued in the month of August or September, 2000.

A further observation to be made on the demand notice to be issued under Section 68 (1) and as that section is read with Sections 60 (2) and 68 (2) is that the demand notice ought merely to require the chargor, defendant, to pay the money owing or to perform and observe the agreement, as the case may be. There is no duty placed on the chargee, plaintiff, to therein stipulate the period during which the chargor ought to pay up or to perform and observe the agreement, after which the plaintiff would have recourse to the exercise of his or her power of sale. By Section 60 (2) and 68 (2), it is expressly provided that the chargee would, and can only validly have recourse to the exercise of his power of sale after the expiry of three months of the date of service of the demand notice under Section 68 (1). This is expressly regulated by those statutory provisions. There is no need or requirement on the part of the chargee that in serving a demand notice he or she also expressly or impliedly ought to state that fact. Even if the demand notice purports to require the chargor to pay up within a period shorter than the statutory stipulated three months period, the chargee's right to exercise the power of sale would only arise after the expiry of three months following the date of the demand notice. And the fact that the chargee so required the chargor to pay, would not, and does not, of itself render the notice invalid. That demand notice is nonetheless good notice.

Reverting to the facts of the instant case, it is apparent that the October 17, 2000 demand notice is good notice in that it clearly called on the defendant to pay up the arrears, failing which the plaintiff would sell the charged property.

In terms of Sections 60 (2) and 68 (2) of the RLA, as these are read together with Order 3 r.2 paras. (2) and (3) of the Rules of the Supreme Court (RSC), the plaintiff would only be allowed to have recourse to the exercise of its power

of sale on or about 16th January, 2001, that being a date which falls due after the expiry of three months of the date of service of the demand notice of 17th October, 2000. Any purported exercise of the chargee's power of sale prior to that date would be faulted. The facts show that the sale by private contract was effected on or about April, 2001, and that the defendant was notified thereof on 23rd April, 2001. There is no contention about that fact. In the circumstances, the exercise of the power of sale was done in compliance with the provisions of Sections 60 (2) and 68 (2) in that the sale was effected on a date falling due outside the three months period, immediately following the date on which the demand notice was served, thus 17th October, 2000. The chargor's failure to pay up or to comply with the agreement within three months after the date of the demand notice triggers the chargee's right to have recourse to the exercise of his/her or its power of sale. The private contract was concluded several months after the expiry of that period. And the chargor had by then not paid up the arrears of which he had notice to pay up. Such a sale cannot be faulted on the mere ground that it was effected on the date it was effected.

Finally, and may be more importantly, on the submissions that the sale under Section 71 (1) of the RLA ought only to be by way of public auction that the instant sale ought to be faulted as it was by way of a private contract, the court fully accepts the position maintained by Mr. Tembenu on that point. And would fully concur with the views expressed and the stand taken by Justice Mwaungulu, in that respect, in the case of **Bishop Daniel Mkhumbwe**. Similarly, on the effect of non-compliance with the requirement for the approval of the reserve price by the Land Registrar, I share fully the views and position expressed by Mr. Tembenu on the authority of Justice Mwaungulu's decision in the **Bishop Daniel Mkhumbwe's**

case. Those points are succinctly covered by Justice Mwaungulu in that decision at pages 14 to 17, and in part as follows:

> "Section 71 is not mandatory as to the mode of sale. It is a clear section. It uses the word 'may.' There is no ambiguity. If there was ambiguity the interpretation should have gleaned the common law, previous legislation or practice ***(Young & Co. v Royal Leamington Spa Corp.*** (1883) 8 App. Ca. 517, 565; ***South Easter Railway Co. v Railway Commissioners***, (1880) 5 QBD 217, 240 and ***Welham v Director of Public Executions,*** (1960) 1 All ER 805, 807). The common law and practice and previous statutes show the chargee can sell by private contract or public auction. Section 3 of the Registered Land Act provides:
>
> *"Except as otherwise provided in this Act, no other written law and no practice or procedure relating to land shall apply to land registered under this Act so far as it is inconsistent with this Act...."*
>
> Selling by private contract subject to agreement to sell by public auction has been the practice at law and equity. This practice is not inconsistent with Section 71 (1) of the Registered Land Act which provides that the chargee may, not shall, sell or concur to sell by auction. Section 71 (1) was meant to

forestall an omission in the common law by giving the statutory right to the chargee to sell the property by public auction. At common law the chargee had a right to sell by private contract. Other modes were only permitted by agreement between the chargee and the chargor. The chargor could restrict the chargee's right to sell by private contract by agreeing to sell by public auction. The conveyancing Act 1881, the Law of Property Act, 1925 and our Registered Land Act meant to allow the chargee by statute to sell by public auction. I am bound by the Supreme Court's interpretation of Section 71 (1) of the Act. That interpretation leaves less protection to the mortgagor than the Supreme Court assumed. The Supreme Court, however, never interpreted the section the way it should. The first approach is to look at the wording and the statute. This the Supreme Court did not do. Instead the Supreme Court started with the mischief rule. The wording and the section is very clear and supported by the Common Law and Statutes provisions to the Act. Sale by private treaty some times gives better protection than a public auction. The construction that gives the chargee a choice to sell by private treaty and public auction and freedom to concur to sell by public auction with any person, including agreeing with the chargor, is more generous to the chargor than

thought. That interpretation is supported by the wording of the section and the mischief the legislature wanted to forestall in the section.

The next question is whether failure to comply with Section 71 (1) **in not** having the reserve price and conditions of the sale approved by the Lands Registrar nullifies the contract. The Supreme Court decided that the contract is null and void. The Supreme Court accepted the submission that such a contract is illegal. The grounds for counsel's submissions for illegality are not apparent from the record. The Supreme Court decided the Registered Land Act prohibits the contract. The question then and now is whether from reading the Act as a whole the legislature intended to proscribe sales not complying with Section 71 (1) requiring the Land Registrar to approve the reserve price and conditions of sale.

The approach is one the Supreme Court of Appeal laid in **Bazuka and Company -v- Blantyre and Estate Agency Limited** (1981-83) 10 M.L.R. 173. This Court approached the matter similarly in **Mobil Oil (Malawi) Limited -v- Sacranie,** Civ. Case No. 106 of 2000, unreported. Does the statue expressly or impliedly prohibit the contract? The Registered Land Act never expressly prohibits the sale.

One first looks at the statute itself. The statute must expressly or impliedly proscribe the contract from the generality of the Act. The Registered Land Act never proscribes the sale. It does not by implication. Neither does it exclude the chargor's civil remedies. On the contrary Section 71 (3) specifically emphasises the chargor's remedies in case of irregularity: the remedy redounds in damages against the person exercising the power. The intention was not to vitiate the sale. In **New Building Society -v- Gondwe** the Supreme Court never considered the subsection. Subsection 3 provides:

"A transfer by a chargee in exercise of his power of sale shall be made in the prescribed form, and the Registrar may accept it as sufficient evidence that the power has been dully exercised, any person suffering damage by an irregular exercise of the power shall have his remedy in damages only against the person exercising the power."

The legislature never intended irregularities vitiate the sale. There is no canon of public policy that I can think of that would require non-enforcement of such a contract".

I also so held in **Nyemba Wales Mbekeani -v- New Building Society** Civil Cause No. 597 of 1999 (unreported).

It is, however, the considered view of the court that there would be cases where the sale would indeed be vitiated by some form of illegality. I dare say that one of those cases, of which the instant case is not one, would be where the chargee insists on selling the charged property in the face of chargor's expressed willingness to pay off the debt in full and in fact where the chargor tenders money for the full payment of principal, interest and expenses prior to the contract for sale, be it by public auction or by private treaty. In such a case, if the chargee insists on exercising his or her or its power of sale, the sale would not be held to have been effected in good faith and with due regard to the interest of the chargor. In such a case the remedy prescribed under Section 71 (3) of the RLA would not be the appropriate one and the contract would be null and void. The other situation is if the sale is conducted not in compliance with Sections 60 (2) and 68 (2) of the RLA; thus where the right to exercise the power of sale has not arisen in that the sale is purportedly effected prior to the expiration of the three months period following the issuance of the demand notice. There is, in my view, another situation where the sale would be null and void. This would be where the sale is effected in circumstances where the chargee and the buyer would be guilty of fraud. This situation would readily come within the provisions of Section 71 (1) of the RLA, thus where the chargee has not done so in good faith and without regard to the interest of the chargor.

For all the reasons I have given above, I would grant the

prayer of the plaintiff. It is, therefore, ordered that the defendant delivers up vacant possession to the plaintiff within 7 days of the date of this judgment.

Costs for the hearing of this action are for the plaintiff.

MADE in Chambers this 20th day of September, 2001, at Blantyre.

A. K. Tembo
JUDGE

The sale in the instant case can, therefore, not be faulted. If anything, the defendant could only have a claim in damages against the plaintiff. He cannot be allowed to continue to cling to the possession of the charged property, which has lawfully been sold to the buyer by the plaintiff, pursuant to the exercise of its power of sale.

It is, however, the considered view of the court that there would be cases where the sale would indeed be vitiated by some form of illegality. I dare say that one of those cases, of which the instant case is not one, would be where the chargee insists on selling the charged property in the face of chargor's expressed willingness to pay off the debt in full and in fact where the chargor tenders money for the full payment of principal, interest and expenses prior to the contract for sale, be it by public auction or by private treaty. In such a case, if the chargee insists on exercising his or her or its power of sale, the sale would not be held to have been effected in good faith and with due regard to the interest of the chargor. In such a case the remedy prescribed under Section 71 (3) of the RLA would not be the appropriate one and the contract would be null and void. The other situation is if the sale is conducted not in compliance with Sections 60 (2) and 68 (2) of the RLA; thus where the right to exercise the power of sale has not arisen in that the sale is purportedly effected prior to the expiration of the three months period following the issuance of the demand notice. There is, in my view, another situation where the sale would be null and void. This would be where the sale is effected in circumstances where the chargee and the buyer would be guilty of fraud. This situation would readily come within the provisions of Section 71 (1) of the RLA, thus where the chargee has not done so in good faith and without regard to the interest of the chargor.

For all the reasons I have given above, I would grant the