

**IN THE HIGH COURT OF MALAWI**  
**PRINCIPAL REGISTRY**  
CIVIL CAUSE NO. 2299 OF 2001

**BETWEEN**

B M KASEMA

PLAINTIFF

**AND**

NATIONAL BANK OF MALAWI

DEFENDANT

**CORAM:MWAUNGULU (JUDGE)**

Mitole, Legal Practitioner for Applicant

Makhalira Legal Practitioner for Respondent

Chaika, Official Interpreter

**Mwaungulu, J**

**ORDER**

The defendant, National Bank of Malawi Limited wants this Court to vacate an injunction the plaintiff, Mr. Kasema, obtained in this court on 6<sup>th</sup> September 2001. The order should have been ex parte in the first place to allow the Court grant the interim injunction the plaintiff sought inter partes. The defendant would have waited for the inter partes hearing or apply to this Court to set aside the injunction obtained ex parte. The plaintiff however obtained an interlocutory injunction. Consequently, the National Bank of Malawi Limited applies to vacate the injunction. That would have been unnecessary if the plaintiff obtained an ex parte injunction. The court would have heard inter partes a summons to determine whether to continue the injunction.

In this Court counsel cited two decisions of this Court: Mkhumbwe v National Bank of Malawi Limited, Civ. Cas. No. 2702 of 2000, unreported, and Tsoka v Commercial Bank of Malawi, Civ Cas No.2797 of 2000 unreported. The decisions seem to differ. I go a bit into detailed facts and events, very significant in themselves, which resulted into this action and eventually the interim injunction the plaintiff sought and obtained in this court. This is important for two other reasons. First, on the principles in American Cyanamid

Co. v Ethicon Ltd., [1974] All R. 504, as explained succinctly in Katsonga v Candlex Limited, Civ. Cas. No 680 of 2000, unreported; Mobil Oil Malawi Limited v Sacranie, Civ. Cas. No 106 of 2000, unreported; Bata Shoe Company (Malawi) Ltd. v Shore Rubber (Lilongwe) Ltd., Civ. Cas. No. 3816 of 1999, unreported; and Dairy Board Limited v Suncrest Malawi Limited, Civ. Cas. No. 2501 of 2001, unreported, the court will grant an interim injunction if the plaintiff raises a triable issue. This Court must determine whether the plaintiff raises a triable issue. Secondly, if the point of departure is, as it is, a simple one, this Court can invoke the summary procedure under Ord. 14 A of the Rules of the Supreme Court and resolve the matter if it appears that deciding that legal issue resolves the matter of dispute between the parties. It is important therefore to get a bit of detail of the facts.

The plaintiff, a businessman, runs Kasema wholesalers, a wholesale outlet. He maintains a current account at National Bank Malawi Ltd. The National Bank of Malawi Ltd. lent the plaintiff money. On 17<sup>th</sup> September 1998 the plaintiff owed K242, 962.09. The lending rate was 42% per annum. The plaintiff secured that loan on a charge on the property subject of this action. The plaintiff was in arrears by 29<sup>th</sup> September 1998.

On 29<sup>th</sup> September 1998 Mr. Puwapuwa, the credit manager designate, wrote Mr. Kasema that the debt was K242, 962.09. The base rate was at 35%. Banks charged 7% above the base rate. The bank requested Mr. Kasema to pay within 14 days lest the bank commences legal proceedings. Mr. Kasema never responded to that letter. Mr. Kasema never paid. The bank itself made the next step. On 21<sup>st</sup> January 1999 Mr. Chiligo, the bank's legal officer, now deceased, may his soul rest in peace, invited Mr. Kasema to discuss the debt soonest or, at the latest, by 31<sup>st</sup> January 1999. Mr. Chiligo informed Mr. Kasema that because of the size of the debt and that the plaintiff was not paying the best was to sell the charged property. Mr. Chiligo informed Mr. Kasema to treat that letter as a notice under the Registered Land Act for sale of the charged property. Again, the plaintiff never responded. By September 1999 the plaintiff made no payments to the bank.

In an internal memo between the Chichiri Branch of the National Bank Malawi Ltd. and the Legal Department of the bank dated 21<sup>st</sup> September 1999, the Chichiri Branch informed the legal department the plaintiff's overdraft and loan were K405, 934.00. He never paid for the loan or overdraft. On 15<sup>th</sup> October 1999 the legal department wrote Trust Auctioneers and Estate Agents to sell the charged property by auction. In that letter the legal department reminded Mr. Kasema of their notice to him of 1st January 1999, approximately nine months before. On this letter there is indorsed that Mr. Kasema's son visited the bank upon learning of the intended public auction and offered to make some deposits. The bank did not decide because Mr. Credman, to whom the matter was referred, never came to the legal department.

The proposed sale by public auction, for the first time since 1st January 1999, stirred the plaintiff. He contacted Messrs. Makhaira and Company, legal practitioners. On 29<sup>th</sup> October, 1999 Mr. Makhaira wrote the bank. Neither the bank nor the plaintiff exhibited this letter. The bank exhibited its reply to it of 22<sup>nd</sup> November 1999. The bank refused the plaintiff's offers to pay by instalments because the matter stood outstanding for long, the interest was growing and the plaintiff never acted on previous requests. In the letter of

29<sup>th</sup> October 1999 the plaintiff complained he only received the bank's letter of 15<sup>th</sup> October on the 29<sup>th</sup> October. The bank thought that unimportant on the sale. Their letter only wanted the plaintiff to cooperate with Trust Auctioneers Estates Agencies because their notice under the Registered Lands Act was a letter of 21<sup>st</sup> January 1999 informing the plaintiff the bank would exercise its power of sale. On 23<sup>rd</sup> November 1999 Makhalira and Company informed the bank that he informed the plaintiff of the contents of the letter the defendant wrote in response to his. On 24<sup>th</sup> November, 1999 the legal department instructed Trust Auctioneers Limited to suspend the sale because the plaintiff paid part of the debt. They informed the plaintiff that if the plaintiff never honoured his obligations by December 1999 they would instruct Trust Auctioneers Estates Limited to sell. The bank in fact referred to the plaintiff's K50, 000 payment of 17<sup>th</sup> of November 1999. The plaintiff made no payment in December.

In fact he only made three payments in the year 2000. The first payment is for the 23<sup>rd</sup> of February for K20, 000. The other two, each for K10, 000, are for 7<sup>th</sup> September and 3<sup>rd</sup> October. In that year there is only Messrs. Makhalira and Company's letter of 25<sup>th</sup> of April 2000 apparently responding to the bank's letter of 24<sup>th</sup> November 1999 to Trust Auctioneers referred to earlier. In the April letter, despite the November promise, the plaintiff still asks the bank to forbear because he will resume paying the arrears. There was, therefore, no movement on the overall debt in 2000.

Trust Auctioneers Limited must have sold the property somewhere at the beginning of the year certainly before 17<sup>th</sup> of May 2001. On 17<sup>th</sup> May 2001 the Blantyre City Assembly consented to the transfer of the land from National Bank Malawi to Mr. Khuzo. The charge's transfer is dated 20<sup>th</sup> June 2001. On 7<sup>th</sup> June 2001 the Registrar General certified the sale. Before that the plaintiff only made four payments: on 3<sup>rd</sup> January 2001 for K10, 000; on 14<sup>th</sup> February 2001 for K543.15; on 14<sup>th</sup> February 2001 for K9500; and the other on 10<sup>th</sup> April for K10, 000. The bank regarded, and I accept, those payments inadequate to pay the principal and interest ( which, I suppose, run at times at 50% ) on the principal.

On 23<sup>rd</sup> August 2001 the plaintiff issued a writ of summons. The plaintiff wants an injunction restraining the defendants selling the charged property. In the statement of claim the plaintiff claimed three other reliefs not, unfortunately, included in the writ of summons: claims for an account, damages and any other reliefs the court deems fit. When the defendants received the writ they immediately wrote to Makhalira and company on 15<sup>th</sup> August 2001 informing him to withdraw the action because the property was sold and the Registrar's certificate was in place. On the 9<sup>th</sup> September the plaintiff obtained an interim injunction restraining the defendants from selling the property. The defendant wants this injunction vacated.

This court has wide powers, particularly with ex parte interlocutory injunctions, to discharge, vary or vacate an interlocutory injunction. This magnanimity does not extend to interlocutory injunctions obtained inter partes: the defendant should appeal. London

Underground Ltd. v National Union of Railwaymen [1989] I.R.L.R 341 is the authority, if that is necessary. This Court will vary, waive or vacate injunctions obtained ex parte. It does so on several grounds, some raised by the defendant's counsel. Generally, the court dissolves ex parte injunctions obtained when facts are suppressed to the court. This Court has done so often following *Boyce v Gill* (1891) 64 LT 824. Courts also discharge or waive ex parte injunction if, according to *Regent Oil Company Limited v J. T. Leavesley (Inchfield) Ltd.* [1966] 2 All E.R. 454, the injunction was founded on a decision wrong in law. The authors of *The Supreme Court Practice*, Sweet & Maxwell 1995 ed., suggest circumstances where a court might discharge an ex parte injunction.

"Examples of such circumstances are where the injunction has been obtained ex parte, or ex parte on notice, the defendant not having filed any evidence, where the sole or main basis of the application for discharge is that there has been material change of circumstances since the injunction was first granted, or where, after the injunction has been granted, it has become apparent that it is founded on an erroneous view of the law. The foregoing list of examples is not exhaustive ..."

A court may discharge an ex parte injunction if, unknown to the plaintiff, the matter the plaintiff wants to enjoin the defendant has occurred. A court should discharge an ex parte injunction. It will not serve any purpose, if, for example, to restrain a defendant to pursue a course of action that has occurred and concluded. Consequently, if unknown to the plaintiff, the substratum of the application is affected in this way, on notice of the fact, the plaintiff should withdraw the injunction if that fact was not known to the applicant until at the hearing of the inter partes application. A court will on application vacate the injunction.

One ground on which the bank wants this ex parte injunction discharged is that the sale cannot be enjoined because it is concluded. In the bank's affidavit of 7<sup>th</sup> September 2001, served on the plaintiff, the defendant depones the sale of the property and transfer of title according to the registered Land Act. The plaintiff actually knew this development. In the opposing affidavit, the plaintiff avers that the sale does not affect their legal right to challenge the sale in a court of law under section 68 of Registered Land Act. The plaintiff is right only if on the facts the defendant never complied with section 68 of the Registered Land Act or indeed some pertinent provisions in the Act. If, as the plaintiff contends, on the facts the defendants never complied with the Registered Land Act, the next question is what is the effect of this in law on the sale? It is important to start with the factual aspect.

The factual complexion raises some practical considerations. Normally, the practice, if the defendant, as happened here, files affidavit evidence against an interlocutory injunction, is to stand over the summons up to the end of the trial. This, as decided in *Societe Francaise d'Applications Commerciales Industrielles SARL v Electronic Concepts Ltd., & Others* [1975] All ER 425 explaining *Pictograph Ltd. v Lee-Smith Photomechanics Ltd.* 1964 1 All ER 1968 should be where the court thinks it necessary to decide the facts and cannot do so on affidavit evidence alone. This is because, as the House of Lords explained in *American Cyanamid Co. v Ethicon Ltd.*, at this stage the court cannot delve the complicated legal and factual arguments which trial should appropriately decide. Megarry, V.-C approved this statement in *Simons Records Ltd. v WEA Record*

Ltd. [1980 FSR Page 35] despite Walton, J.'s, comments in *Simon Jeffrey Ltd. v Shelana Fashions Ltd.* [1976] FSR 54. In my judgement, it may be unnecessary to stand over the injunction where, like here, the issues are simple and the Court can resolve them on affidavit evidence and the defendant applies to vacate the injunction. The defendant in the supporting affidavit depones and the plaintiff in the opposing affidavit denies sending the appropriate notice to the plaintiff. The plaintiff's denial is ununderstandable. In his supporting affidavit the plaintiff deponed:

“That the defendant's notice of the plaintiff's indebtedness to the defendant was first addressed to the Plaintiff by their legal officer, a Mr. Andrew Chiligo in its letter dated 21<sup>st</sup> January 1999, copy of which is produced herewith as an exhibit marked 'BNK2'. That acting on the contents of 'BNK2' I called on the said Mr. Andrew Chiligo in January 1999 when we agreed on the mode of payments by instalments as required by the mortgage signed herein between the defendant and myself.”

In the letter the plaintiff mentions Mr. Chiligo wrote:

“Please treat this letter as sufficient notice in terms of the Register Land Act (Cap 58:01 of the Laws of Malawi) and that we shall sell the property on title No. Chilomoni 5/4 without further reference to you whatsoever in the event we do not have satisfactory prepayment arrangements by 31<sup>st</sup> January 1999.”

On this crucial question it is clear from the plaintiff's own affidavit the defendant gave the appropriate notice under the Registered Land Act. As we have seen, the plaintiff never paid anything within three months of the January 21, 1999 notice. He only paid when the defendant exercised the right to sale and, on 15<sup>th</sup> October, 1999, instructed Trust Auctioneers and Estate Agents to auction the property. The defendant was within full rights to sell the property based on the prior notice. The right under the Registered Land Act to sell the charged property was, in my judgement, unaffected by fruitless negotiations and sporadic meagre payments made thereafter. The plaintiff's failure to honour his own promises to pay to the bank, if they waived or suspended the notice, and they did not, revived the notice whenever they occurred. This Court, as Mrs. Mitole recalled, fully considered this aspect in *Mkhumbwe v National Bank of Malawi Ltd.* following *Pooley's Trustee v Whethan*, (1886) 33 Ch. D. 111, a case Mrs. Mitole cited.

This case differs from *Tsoka v Commercial of Bank of Malawi Ltd.* Civ. Cas No 2797 of 2000, unreported, the case the plaintiff's legal practitioner cited. First, it differs on the facts. In *Tsoka v Commercial Bank of Malawi Ltd.*, unlike here, the bank, the chargee, conceded not giving the chargor the necessary notice under the Act. The chargee there sold by private treaty. The land registrar never approved the reserve price. Here the defendant notified the plaintiff and sold by public auction. The plaintiff never suggested the land registrar never approved the price of sale. There is no evidence that the registrar never approved the reserve price. Even if he did not, in my judgement, the consequences would not be those the Judge suggests at page 3 of the unreported judgement.

First, however one reads section 71(1) the Judge considered, although cursorily, the chargee must not, as the judge suggests, sell by public auction. The section permits a sale by auction. The law and practice on charges at common law and statute, all conveyancers know this, are that a chargee can sell by private treaty or public auction. More

importantly, as this Court said in *Mkhumbwe v National Bank of Malawi Ltd.*, the word 'may' in section 71 (1) never comports compulsion to sell by public auction. This Court considered the matter at length in *Nkhumbwe v National Bank of Malawi Ltd.* It is unnecessary to detail the reasoning there. Moreover that situation does not arise here, the defendant sold by public auction.

Other aspects in *Tsoka v Commercial Bank of Malawi Ltd.*, as indicated, do not arise here. The plaintiff never suggests the defendant never had the land registrar's approval for the reserve price. Even if the defendant never had the land registrar's approval or the plaintiff never complied with the section 68 notice is the sale illegal and therefore null and void as *Tsoka v Commercial Bank of Malawi Limited Ltd.* suggests? This Court considered the matter fully in *Nkhumbwe v National Bank of Malawi Ltd.* On the wording in section 71(3), this Court concluded, despite the Supreme Court of Appeal decision in *New Building Society v Gondwe*, the case the judge cited for different reasons in *Tsoka v Commercial Bank of Malawi Ltd.*, that the legislature never intended irregularities in the exercise of the power to sell to vitiate the sale. An appropriate transfer the land registrar approves covers irregularities and the chargor's remedies are in damages against the chargee exercising the power irregularly. This Court in *Tsoka v Commercial Bank of Malawi Ltd.*, like the Supreme Court of Appeal in *New Building Society v Gondwe*, never considered section 71 (3) of the Registered Land Act.

Justice Tembo followed *Nkhumbwe v National Bank of Malawi Ltd.* in *Leasing and Finance Company of Malawi Ltd. v Sadiki*, Civ. Cas. No. 1525 of 2001, unreported. In that action the plaintiff, the chargee, applied for possession under Ord. 88, r. 1 of the Rules of the Supreme Court. That is surprising. Order 88 covers mortgage actions. The action in *Leasing and Finance Company of Malawi Ltd. v Sadiki* was definitely under a charge. A chargee has no right to possession. A chargee's powers are to sell or appoint a receiver. Tembo, J., followed *Nkhumbwe v National Bank of Malawi Ltd.* and his earlier decision to the same effect in *Mbekeani v New Building Society*, Civ. Cas. No. 597 of 1999, unreported.

This allows me to consider the second difference between this case and *Tsoka v Commercial Bank of Malawi Ltd.* In *Tsoka v Commercial Bank Malawi Ltd.* the plaintiff thought this Court by injunction could stop the sale. Alternately, he sought damages. The judge did not grant the injunction. He awarded damages. I assume the judge dealt with a permanent injunction. He could not award damages at an interlocutory stage. Here the defendants apply to vacate an interim injunction. This makes all difference.

The Court should vacate an interim injunction if, known or unknown to the plaintiff, the injunction cannot be carried out. This will be where the matter the injunction wants to prohibit has substantially been altered or affected before or after the interim injunction. A court should vacate an interim injunction to restrain a certain course of action if that course of action has been set in motion and is concluded. A court will vacate an interim injunction, for example, to abstain from an action if the action has been done before or after the court grants the interim injunction. A transfer approved under section 71 (3) of the Registered Land Act conceals irregularities and leaves the chargor's rights to an action for damages against the chargee for exercising the power of sale irregularly. If, as the plaintiff claims, the chargor wrongly exercised the power, his rights can only be in damages. The land registrar's certificate bars the plaintiff's injunction. The question is

whether the interim injunction was in law properly granted. On the principles in *American Cyanamid v Ethicon Ltd.*, as adumbrated in this Court's decisions, this Court should not have granted the ex parte interlocutory injunction. The interim injunction cannot as a matter of law be continued.

Under *American Cyanamid v Ethicon Ltd.*, the applicant must establish a triable issue. On the evidence I do not think the plaintiff establishes a triable issue. The plaintiff was in arrears. He failed to honour his own promises by substantially paying toward the interest and the principal. The defendant notified him under section 68 of the Registered Lands Act. The defendant sold the property almost two years after the notice. In between the defendant forbore taking the steps taken eventually. The bank did all that a reasonable chargee would do in the circumstances. I see no evidence of fraud in the bank's dealing. Even without this finding, this Court must, as this Court pointed out in *Bata Shoe Company (Malawi) Ltd. v Shore Rubber (Lilongwe) Limited Civ. Cas. No 3816 of 1999*, decide whether the court, at the end of trial, would grant the injunction sought. The court may not grant an interim injunction if damages are an adequate remedy and the parties can pay them.

The whole processual aspect in *American Cyanamid v Ethicon Ltd.* is a balancing activity. First, the court considers whether from the applicant's perspective, were she to succeed, damages are an adequate remedy if the defendant is not restrained. The sequel question at this stage is whether, if damages are an adequate remedy for the plaintiff, the defendant can pay. If damages are an adequate remedy and the defendant can pay the court may refuse the interlocutory injunction. The court will therefore allow the interlocutory injunction even if damages are an adequate remedy if at the end the defendant cannot compensate the successful plaintiff. In this matter damages are an adequate remedy, otherwise the legislature could not have provided for them in section 71(3) of the Registered Lands Act. The National bank Ltd. can pay the damages if the plaintiff is proved right at the end of the trial.

The court must also consider the matter from a successful defendant's perspective. The considerations are the same. The court has to consider if the defendant succeeds damages would be an adequate remedy to her. Again the sequel question is if they are adequate remedy the plaintiff would pay the defendant. The court may not grant the injunction if damages are an inadequate remedy to the defendant. Even if damages are an adequate remedy the court may refuse the interlocutory relief if the plaintiff cannot pay the successful defendant. In this matter damages are an adequate remedy for the defendant should the plaintiff succeed at the end of the trial. I really doubt if the plaintiff can compensate the defendant if the defendant succeeds.

Damages are an adequate remedy for the plaintiff and the defendant can pay them. The defendant has a defence to the plaintiff's action. Conversely, damages are an adequate remedy for the defendant. The plaintiff cannot pay them if the defendant succeeds. The plaintiff has but just a chance of a defence. On all these aspects I would vacate the interim injunction. The way is open to the plaintiff to pursue his claim in damages, if he wants to. Definitely the interim injunction must be vacated. I do not think that it should be stood over to the trial.

Made in open Court this 3<sup>rd</sup> day of October 2001 at Blantyre.

D F Mwaungulu

**JUDGE**