IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 3917 OF 2002

BETWEEN

FIRST MERCAHNT BANK PLAINTIFF

AND

ISHMAIL IBRAHIM LORGAT DEFENDANT

CORAM: D F MWAUNGULU (Judge)

Chagwamjira, a legal practitioner, for the plaintiff

Kamkwasi, a legal practitioner, for the defendant

Machila, an official interpreter

Mwaungulu, J

ORDER

This is an application, possible under Order …, rule … of the Rules of the Supreme Court (Part … of the Civil Procedure Rules), by the defendant, Mr. Lorgat, for an interlocutory injunction. It is important to state that this is the defendant's application. At some stage, Mr Chagwamnjira, appearing for the plaintiff, proceeded as if the plaintiff, First Merchant Bank, applies to dissolve an injunction. The defendant on 13th January, 2002 obtained ex parte an injunction essentially preventing the plaintiff, a chargee, from exercising a power of sale under a charge on property Limbe West KJ 23/63. Today's hearing is inter partes. This Court has to decide whether this injunction should continue. The question resolves itself to deciding whether on the evidence this Court should grant the defendant the interlocutory injunction he requests. On the face of it and on this

Court's decisions Mr. Chagwamnjira cited, the defendant, whose application this is, has a difficult problem in his hands. Mr. Kamkwasi, appearing for the defendant, argues, however, and ingenuosly, I must say, that the defendant must have the interlocutory relief, the plaintiff having waived the right to exercise the power of sale by bringing this action in the first place. Mr. Chagwamnjira argues there was no waiver and this Court should refuse the order on the principles in the cases cited before this Court. This action arises in the following circumstances.

The defendant, a businessman, and the plaintiff, a bank, it so appears, had until this situation, long business dealings. On 30th January 2002 the defendant applied for an overdraft for an amount not exceeding K17, 610, 000. On 8th February, 2002, the defendant charged Limbe West KJ 23/63 for a loan of K14, 000, 000, outstanding at the time. The defendant was in arrears on his payments. On 1st August, 2002 the bank informed the defendant of the arrears, demanded immediate payment and warned him the bank would exercise the power of sale.

On 7th September, the bank took sued for arrears of K9, 528, 721.34. The defendant on 30th September, 2002 filed a defense denying ever dealing with the bank or charging the property. The plaintiff on 28th November, 2002 applied for summary judgment under Order 14 of the Rules of the Supreme Court (Part 24 of the Civil Procedure Rules). The Court has not determined the application. On 13th January, 2003, the defendant obtained the ex parte injunction mentioned earlier. This Court must determine whether the ex parte injunction should continue.

In this jurisdiction the law on interlocutory injunctions develops along the House of Lords decision in American Cynamid Co. Ltd. v Ethicon Ltd [1975] 1 All E.R. 504, approved in this Court's many decisions, including Mlotha v New Building Society Civil Cause No. 2539 (unreported) Mr. Chagwamnjira cited.

Interfering with rights before trial may cause injustice to either party. One prevented from pursuing a certain course of action may feel inconvenienced and delayed. She will feel injustice if, after trial, it turns out she has the right. Equally, if one pursues a certain course of action on an erroneous understanding of some right, the other will feel injustice that the other was not prevented. Justice is, in these circumstances, difficult to achieve and American Cynamid Co. Ltd vs Ethicon Ltd nears balancing a situation susceptible to injustice.

The defendant's application fails on the first two principles in American Cynamid Co. Ltd v Ethicon Ltd. The plaintiff must show first that the court would give an injunction at the end of the trial and secondly that there is a triable issue justifying the interim relief she seeks. The court will not grant an interlocutory injunction if it would not grant a permanent injunction at the trial. This is clear from Lord Diplock's statement:

“As to that, the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant’s continuing to do what was sought to be enjoined between the time of the application and the time of the trial.”

The question is whether at the end of the trial the court would prevent the bank exercising the power of sale. The defendant has paid neither to the plaintiff nor into court arrears the defendant now admits. Yet, a court would only grant an injunction restraining the power of sale, where there is no contract of sale in exercise of the power, if the chargor or mortgagor pays the arrears to the chargee or mortgagee or into court. The cases of Trustees of the Estate of Isaac Leo Douglas Kaunda v New Building Society, Lilongwe District Registry, Civil Cause No. 609 of 1999 (unreported), Mkhumbwe v National Bank of Malawi, Civil Cause No. 2702 of 2000 (unreported) and Mlotha v New Building Society, can be distinguished. that in all these cases the chargee or mortgagee exrcised the power of sale and there were contracts of sale of the property with third parties. The question is whether where there is no such sale in this matter makes any difference.

Lord Justices Dancwert’s comments in Property and Bloodstock Ltd v Emerton [1967] 3 All E.R. 321. on a statement by Crossman, J., in Waring v London and Manchester Co. Ltd [1935] Ch. 310, I consider in a moment, suggests that lack of an agreement makes a difference:

“The actual decision of CROSSMAN, J., in Lord Waring’s case (4) was: (I) that a mortgagee’s exercise of has power under s. 101 (1) (I) of the Law Property Act, 1925, to sell the mortgaged property by public auction or private contract is binding on the mortgagor before completion unless it is proved that he exercised it in bad faith; and (ii) that the fact that a contract for sale was entered into at an undervalue is not by itself enough to prove bad faith. Counsel for the borrower contended in his initial argument that this case was wrongly decided and that we should overrule it. The decision has stood for thirty-two years without (so far as I know) any criticism. This, I would suppose, is a discouraging start for counsel’s arguments, but counsel is certainly entitled to distinguish the case from the present one, because CROSSMAN, J., expressly stated at the beginning of his judgment that the contract was (5) “an absolute contract, not conditional in any way,” always supposing that the contract in the present case is really a conditional contract, and that, if it is, the fact that it is subject to a condition makes any difference, having regard to the express terms of s. 101 (1) (I) of the Law Property Act, 1925.”

Lord Justice Dancwert’s suggests that the principle Crossman, J., lays in Waring v London and Manchester Co. Ltd would not apply to a conditional contract. I do not think

however that Dancwerts, L.J., suggests that a court would, where there is no sale in fact, restrain by injunction a chargee's or mortgagee's exercise of power of sale where the chargor or mortgagor defaults and never pays arrears to the chargee or mortgagee or into court. If it were so, the chargee or mortgagee may never easily or at all exercise the power of sale for it is the default that triggers the power in the first place.

In my judgment, a court, once there is default, should only restrain the power where before any sale the mortgagor or charger pays the money to the charger or mortgagor or into court. In Waring v London and Manchester Co. Ltd Crossman, J., said:

"The contract is an absolute contract, not conditional in any way, and the sale is expressed to be made by the company as mortgagee. If, before the date of the contract, the plaintiff had tendered the principal with interest and costs, or had paid it into Court 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, in my opinion, have been entitled to an injunction restraining it from doing so. After a contract has been entered into, however, it is, in my judgement, perfectly clear (subject to what has been said to me to-day) that the mortgagee (in the present case, the company) 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."

A chargor or mortgagor has, therefore, up to the date of the contract in all other contracts or at the fall of the hammer on an auction, to pay arrears and restrain the mortgagor or charger from exercising the power of sale. If the mortgagor or mortgagor does not pay before a contract of sale to the mortgagee or chargee or into court, a court will not restrain by injunction the lawful exercise of the power of sale. Crossman, J., states the reason for the rule:

"In my judgment, s. 101 of that Act, which gives to a mortgagee power to sell the mortgaged property, is perfectly clear, and means that the mortgagee has power to sell out and out, by private contract or by auction, and subsequently to complete by conveyance; and the power to sell is, I think, a power by selling to bind the mortgagor. If that were not so, the extra-ordinary result would follow that every purchaser from a mortgagee would, in effect, be getting a conditional contract liable at any time to be set aside by the mortgagor's coming in and paying the principal, interest, and costs. Such a result would make it impossible for a mortgagee, in the ordinary course of events, to sell unless he was in a position to promise that completion should take place immediately or on the day after the contract, and there would have to be a rush for completion in order to defeat a possible claim by the mortgagor."

Originally, Mr. Lorgat's defense was he never dealt with the bank at all and never charged the property. He now concedes he is in arrears of up to K3, 000, 000. He has not paid the bank or into court. He argues that the court should enter judgment for this sum. This, he argues, is just because by taking this action, the bank has waived its power of sale under the charge.

This is a nice argument. It does not avail the chargor. I have extreme difficulty thinking a mortgagee or chargee or mortgagee taking an action for principal and interest thereby loses remedies under the charge or mortgage. In one instance the rule yields injustice: when the principal and interest exceed the security's value. The mortgagee or chargee would only pursue the mortgaged property by execution. Yet, nothing would prevent her first getting principal and interest from the mortgaged property and sue and execute for the balance by other means. Moreover, a mortgagee or chargee who sues for the principal and interest does not, as is suggested for the defendant, thereby wave any remedies under the charge or mortgage. The mortgagee or chargee can pursue remedies concurrently subject, of course, only to agreement or statute. Consequently, a mortgagee can at the same time take sue for payment on the charger's covenant to pay the principal and interest, possession of the mortgaged property and foreclosure: Lockhart v Hardy (1846) 9 Beav. 349; Palmer v Hendrie (1859) 27 Beav. 349, 351; and Barker v Smark (1841) 3 Beav 64, 65, per Lord Langdale, MR. Moreover, the mortgagee can include all these claims in one action: Greenough v Littler (180 15 Ch. D. 93: and Farrer v Lacy, Hartland & Co. (1885) 31 Ch. D 42. The chargee, therefore, does not waive the right to exercise her power of sale by commencing an action to recover the principal and interest.

The defendant, therefore, is not entitled to a permanent injunction at the end of the trial. On the facts there is no triable issue entitling the defendant to an interlocutory injunction. I, therefore, dismiss the application for interlocutory injunction and set aside the ex parte injunction. The plaintiff will have costs.

Made in Chambers this 28th Day of April 2003.

D. F. Mwaungulu

JUDGE

The court refuses if damages are an adequate remedy for the interim losses. The court will not grant an interlocutory injunction if on another principle it would not grant the injunction at the trial.

There is a principle on which this court would not have granted the injunction at the end of the trial. The judge granted the injunction because, though there was a sale of the property, the sale was not consummated. It is unclear what consummation was. It probably meant a conveyance. This position is unsustainable in principle and on clear authority. An agreement to sale real property immediately creates an equitable title to the purchaser. A bona fide purchaser of property without notice of a defect in the title has an immediate right at the conclusion of the agreement to sell. It is curious that a court would grant an injunction, an equitable remedy, when it can also grant specific performance, another equitable remedy, to a purchaser that can also be enforced by an injunction against the mortgagee or chargee. As a matter of principle courts have not granted injunctions after sale. They have done so before sale when the chargeor or mortgagor pays. This sound principle accords with good judgement.

The matter is however covered by authorities. There is this Court's decision in Mkhumbwe v National Bank. The starting point is a passage in Halsbury Laws of England, 4th ed. Butterworth, 1980, para. 725:

"The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagee has begun a redemption action, or because the mortgagee objects to the manner in which the sale is arranged."

The case cited is Anon, (1821) 6 Madd. 10. An injunction to stop the sale on want of notice was refused by Leach, V-C. The Vice Chancellor thought that the sale should not be stopped because "considering that if the ex parte case was true, the Plaintiff might relieve himself by giving notice to the purchaser."

There are other decisions of later import. There is a Queens Bench decision of Crossman, J., in Lord Waring v London and Manchester Assurance Co Ltd, [1935] Ch 310 approved by the Court of Appeal in Property and Bloodstock Ltd v Emerton, [1967] 3 All ER 321.Lord Waring v London and Manchester Co. Ltd is four walls with this case.

A company entered as mortgagee into a contract for the sale of mortgaged property. The mortgagee gave many opportunities to pay money due under the mortgage. At the mortgagor's request and undertaking to put the property up for sale by auction, the company refused a good purchase offer. When the mortgagor put the property up for sale by auction (when the period within which he had undertaken to do so was past) no acceptable bid was received. After a long period during which he was to the company's knowledge negotiating with a third party for a fresh loan on the security of the mortgaged property, and during which the company, to help him as much as possible, postponed selling, the company ultimately contracted to sell the property for an amount less than that it refused at his request and upon his undertaking.

On a motion by the mortgagor for an injunction to restrain completion because there was no sale until conveyance and that the contract had been entered bad faith at a gross undervalues, and for leave to redeem the property upon paying into Court, as he claimed to be able to do, the moneys due under the mortgage the court held, that a mortgagee's exercise of his power under s. 101, sub-s. 1, para. (I), of the Law Property Act, 1925, to sell the mortgaged property by public auction or private contract is binding on the mortgagor before completion unless it is proved that the mortgagee exercised it in bad faith. Crossman, J., said:

"The contract is an absolute contract, not conditional in any way, and the sale is expressed to be made by the company as mortgagee. If, before the date of the contract, the plaintiff had tendered the principal with interest and costs, or had paid it into Court 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, in my opinion, have been entitled to an injunction restraining it from doing so. After a contract has been entered into, however, it is, in my judgement, perfectly clear (subject to what has been said to me to-day) that the mortgagee (in the present case, the company) 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."

He expressed the reason for the rule:

"In my judgement, s. 101 of that Act, which gives to a mortgagee power to sell the mortgaged property, is perfectly clear, and means that the mortgagee has power to sell out and out, by private contract or by auction, and subsequently to complete by conveyance; and the power to sell is, I think, a power by selling to bind the mortgagor. If that were not so, the extra-ordinary result would follow that every purchaser from a mortgagee would, in effect, be getting a conditional contract liable at any time to be set aside by the mortgagor's coming in and paying the principal, interest, and costs. Such a result would

make it impossible for a mortgagee, in the ordinary course of events, to sell unless he was in a position to promise that completion should take place immediately or on the day after the contract, and there would have to be a rush for completion in order to defeat a possible claim by the mortgagor."

In the Court of Appeal in Property and Bloodstock Ltd v Emerton Dancwerts, L.J., Sachs and Sellers L.J.J., agreeing, said:

"The actual decision of CROSSMAN, J., in Lord Waring's case (4) was: (I) that a mortgagee's exercise of has power under s. 101 (1) (I) of the Law Property Act, 1925, to sell the mortgaged property by public auction or private contract is binding on the mortgagor before completion unless it is proved that he exercised it in bad faith; and (ii) that the fact that a contract for sale was entered into at an undervalue is not by itself enough to prove bad faith. Counsel for the borrower contended in his initial argument that this case was wrongly decided and that we should overrule it. The decision has stood for thirty-two years without (so far as I know) any criticism. This, I would suppose, is a discouraging start for counsel's arguments, but counsel is certainly entitled to distinguish the case from the present one, because CROSSMAN, J., expressly stated at the beginning of his judgement that the contract was (5) "an absolute contract, not conditional in any way," always supposing that the contract in the present case is really a conditional contract, and that, if it is, the fact that it is subject to a condition makes any difference, having regard to the express terms of s. 101 (1) (I) of the Law Property Act, 1925."

Section 71 (3) has the same effect as section 101 of the Law of Property Act, 1925 in England. It has the same effect as a conveyance to transfer the legal title to the purchaser. It is independent from the power of the mortgagee or chargee to sell. Where there is a an absolute contract to sell between the mortgagee and a purchaser the court cannot stop the sale. Just as it cannot stop the chargee from placing the transfer for the approval of the land registrar. As the authorities show once there is a sale, the Court will not stop the sale, even if the chargeor tenders the money and costs except of course where there is collusion or fraud. Moreover, irregularities in the exercise of the power to sell the property only affect a purchaser who has notice of the defects in the exercise of power.

In my judgement, the plaintiff failed to raise a triable issue or, which is the same thing, to establish his right to an injunction at the end of the trial. A court cannot restrain by injunction a mortgagee's or chargee's sale if the mortgagee acted in good faith. Mr. Nyimba cited Birmingham Citizens Permanent Building Society v Count and Royal Trust of Canada v Markham. The cases can be distinguished. They did not deal with a mortgagee or chargee who sold the mortgaged or charged property. There the mortgagee

or chargee claimed possession of a dwelling house.

In both these cases the extensions are based on statutory interventions in England and Wales. As Sir Pennycuick V. -C observed there was section 36 of the Administration of Justice Act 1970, superseded by section 8 of the Administration of Justice Act 1973. These statutes do not apply to us. There is no similar provision in our Registered Land Act. The position before these statutes obtains in this country. It is found in the Vice Chancellor's statement at 1419:

"I will endeavour to deal with the points raised by the notice of appeal in the same order as they are there raised. I propose first to refer to the law as it stood before the enactment of those Acts, it had been established by a series of decisions that a mortgagee was entitled as of right to immediate possession of the mortgaged premises, subject only to the possibility of an adjournment for a short time to give the mortgagor an opportunity of paying off the mortgage."

The Court of Appeal approved the statement of the principle by Russell J in the case Mr. Nyimba cited Birmingham Citizens Permanent Building Society vs Caunt, at page 912:

"Accordingly, in my judgment, where (as here) the legal mortgagee under an instalment mortgagee under which by reason of default the whole money has become payable, is entitled to possession, the court has no jurisdiction to decline the order or to adjourn the hearing whether on terms of keeping up payments or paying arrears, if the mortgagee cannot be persuaded to agree to this course. To this the sole exception is that the application may be adjourned for a short time to afford to the mortgagor a chance of paying off the mortgagee in full or otherwise satisfying him; but this should not be done if there is no reasonable prospect of this occurring. When I say the sole exception, I do not, of course, intend to exclude adjournments which in the ordinary course of procedure may be desirable in circumstances such as temporary inability of a party to attend, and so forth."

This is the law in Malawi but only where the mortgagee or chargee seeks possession of the premises. The principle does not apply where, like here, the mortgagee or chargee exercises the power to sale. In the latter case the principles in Mkhumbwe vs National Bank of Malawi apply. Moreover, while besides the power of sale and appointment of a receiver a mortgagor has the right of foreclosure and possession, the chargee does not have a right to possess the property. The court cannot, therefore, grant an injunction where the mortgagee or chargee sells the mortgaged or charged property in proper exercise of the power to sell under the mortgage or charge. The decisions Mr. Nyimba relies on do not apply to this case where the plaintiff seeks an injunction to prevent a sale that has actually taken place.

This injunction is equally unsustainable on the other American Cyanamid Co. Ltd vs Ethicon Co. Ltd principles. The court must consider whether damages are an adequate remedy for the plaintiff if the injunction is wrongly refused. Here they are. The society, which already sold the property will repay the balance. It is not suggested the society sold the property under value. If it did, her remedy is in damages. The other consideration is whether the defendant can repay the damages if the injunction is erroneously refused. The society can pay from the purchase price or other resources. There is little to justify granting the injunction.

The court must still consider the reverse side. This is whether damages would be adequate compensation to the plaintiff if the court refuses the injunction. It is the case. The court must however still consider whether the plaintiff can pay the damages if an injunction is erroneously granted. The defendant here can recover from the purchase price. I doubt whether, if damages exceed the price the property fetched, the plaintiff would pay the defendant.

With these conclusions, it is unnecessary to consider the balance of convenience. If it is necessary, the balance of convenience favours refusing the injunction. On the authorities referred to, the society's case is relatively stronger. A court will not grant an interim injunction after sale of property. Moreover, the arrears, with these prohibitive inflationary interests, could escalate to where the value of the property would be surpassed. That will make it harder for the charge or to pay. I dissolve the injunction.

Made this 16th Day of February 2001

D F Mwaungulu

JUDGE