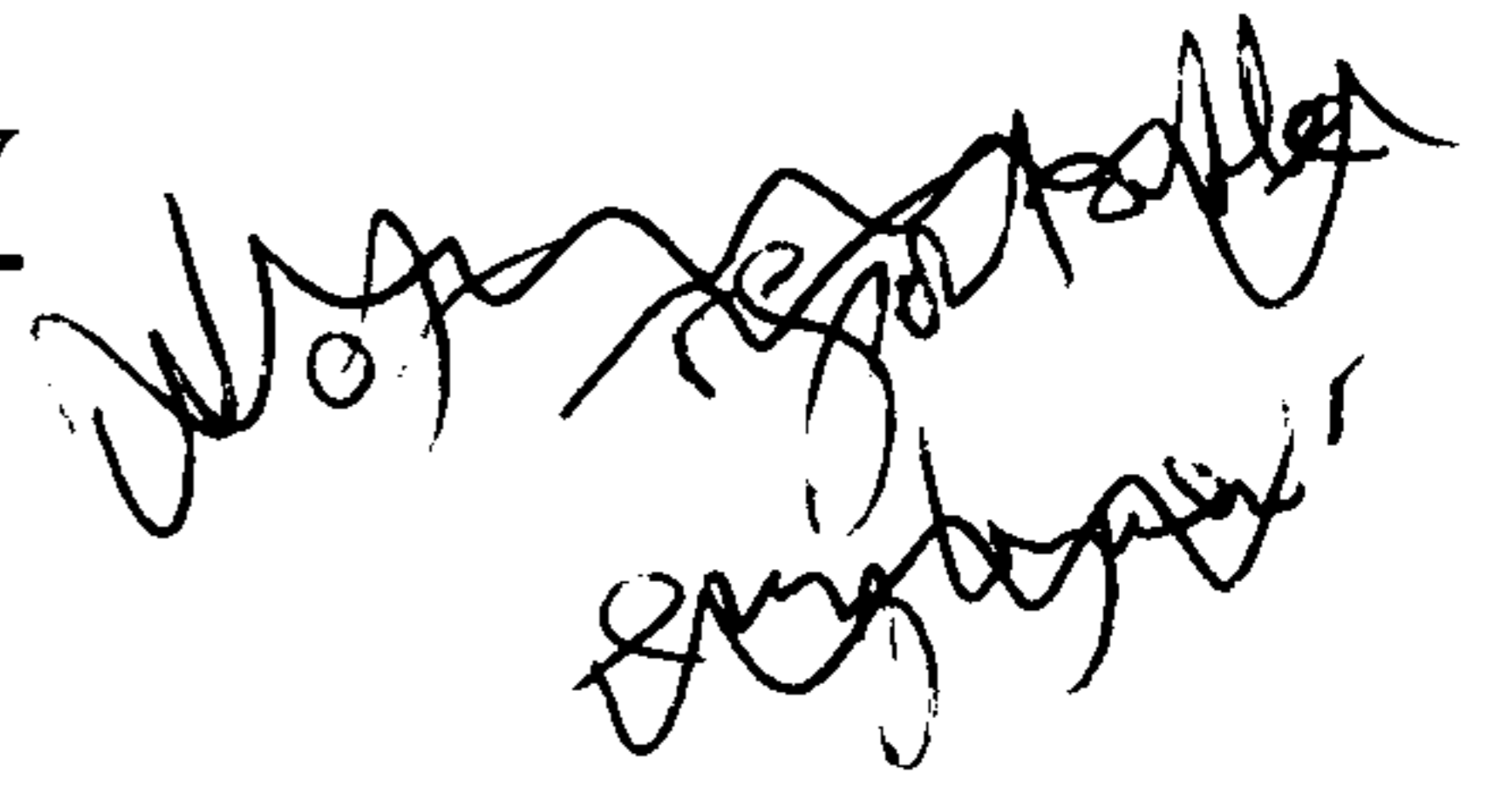


IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL CAUSE NO. 131 OF 2000



BETWEEN:

LEO CHILEMBA PLAINTIFF

AND

THE NEW BUILDING

SOCIETY DEFENDANT

CORAM: MTAMBO, SC, J.

Makono, of counsel, for the Plaintiff

→ Mbvundula, of counsel, for the Defendant

R U L I N G

This is an application brought under Order 29 of the Rules of the Supreme Court 1965 whereby the plaintiff seeks an order restraining the defendant from selling the property known as Title No. Bwaila 21/442 in the City of Lilongwe until the determination of the action which the plaintiff has commenced against the defendant for wrongful termination of employment.

The facts, as can be gathered from the Affidavits, can be narrated very briefly. The plaintiff has a mortgage loan with the defendant, his employer up until in or about January 2000. It was a term of the mortgage agreement that the plaintiff would continually repay the loan by monthly instalments until full settlement thereof. The plaintiff has not effected any repayment since ^{the} date of the termination of his employment. The defendant, therefore, now intends to exercise the express power of sale reserved under the mortgage agreement. Hence the present application.

The principles upon which an injunction will either be granted or refused have been ably outlined in the oft-cited case of *American Cyanamid Company V. Ethicon Limited*, (1975) AC 396; 1 ALL ER 504. They are: (a) that the plaintiff must show that he has a good arguable claim to the right he seeks to protect; (b) that the court must not attempt to decide this claim on the affidavits; (c) that if the plaintiff satisfies these tests, the grant or refusal of the injunction then becomes a matter for the exercise of the court's discretion on the balance of convenience. And in exercising the discretion, the court, among other things, will consider whether damages will be a sufficient remedy for the act complained of and indeed whether the defendant shall be able to pay such damages; if the answers to these questions are in the affirmative the court will usually refuse to grant the injunction.

The right the plaintiff seeks to protect by the injunction order sought is in respect of Title No. Bwaila 21/442 over which property the loan was secured by a legal charge whose terms entitle the defendant to, among other things, sell the charged property. In the case of ***G.M.C. Banda V. INDEFUND Limited***, Civil Cause No. 962 of 1999, (unreported) where the application sought to vacate an injunction for suppression of material facts, I was of the view that the injunction would not have been granted if the plaintiff had disclosed, in his application, the existence of a legal charge and that the defendant intended to exercise the power of sale reserved thereunder. I was of the view that if these facts had been disclosed to the court, it would have refused the injunction because, provided the power of sale is exercised in good faith, a person having voluntarily agreed with another person on what should happen when certain specified event takes place should not be allowed to run to the courts to prevent the other from exercising such power merely because it will be contrary to one's wishes or interests. I am of the same view here; the plaintiff should not be allowed to come to court to prevent the defendant from exercising the power of sale reserved under the agreement which the parties voluntarily entered into. In the circumstances, I conclude that the plaintiff does not have a good arguable claim to the right he seek to protect and, therefore, that the application fails.

I think that puts the matter to rest and I need not consider it any further as to so would be for academic consumption only. The defendant will have costs of the application.

MADE in Chambers this 09th day of November,
2001 at Lilongwe.

I.J. Mtambo, SC
J U D G E