

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 3774 OF 2001**

BETWEEN:

R.I. HAMDANI.....PLAINTIFF

-and-

FINANCE CORPORATION OF MALAWI.....DEFENDANT

CORAM: THE HON. MR JUSTICE F.E. KAPANDA

Mr Bazuka Mhango, of Counsel for the Plaintiff

Mr Makiyi, of Counsel for the Defendant

Miss Vokhiwa, Official Interpreter/Recording Officer

Date of hearing : 22nd February 2002

Date of order : 22nd March 2002

Kapanda, J

ORDER

Introduction

The Plaintiff, on 24th December 2001, commenced a legal suit against the Defendant. The institution of the proceedings was by way of a writ of summons and under it the Plaintiff is seeking an order giving him an equitable right to redeem his property which he put on Charge in order to secure a loan from the Defendant. Of particular importance, to this ruling, was a prayer for an injunction restraining the Defendant from selling the property.

On the same day the Plaintiff instituted the said proceedings, against the Defendant, the court granted him an ex-parte interlocutory injunction. The court ordered that the injunction was to be valid for 14 days within which the claimant was to cause to be heard an inter-partes summons for an interlocutory injunction. Moreover, the injunction was to last for 14 days or until a further order was made.

This order of injunction, of 24th December 2001, is now the subject of the present

applications. The Defendant wants the injunction discharged while the Plaintiff would like the injunction to continue until the determination of the action that was commenced by him.

Facts of the Case

The full facts of this case are contained in the affidavits of the Plaintiff (Rashid Ishmael Hamdani) and the Defendant's Head of Credit Management (Mr Jimmy Kayuni). I do not intend to set out, in toto, the contents of the said affidavits but it will suffice to put here that it is not disputed that on or about the 2nd day of March 2000 the Plaintiff obtained a loan from the Defendant in the amount of MK4,500,000.00 and the Plaintiff gave his property on Title No. Nyambadwe 158 as a security for the loan. The said loan was secured by a charge created over the above mentioned property. The Defendant further advanced, to the Plaintiff a credit facility in the sum of MK4,500,000.00 and the security for this loan was the same property on Title No. Nyambadwe 158. The loan and/or the sums of money advanced to the Plaintiff were to be repaid by the Plaintiff by making twelve (12) equal monthly instalments. It would appear that the repayments were going on well until or before August 2001 when there was default, on repayment, by the Plaintiff. Thus on 17th August 2001 the Defendant gave the Plaintiff a written notice that unless full payment of the debt was made within a period of seven (7) days the Defendant was going to proceed to realise its security at the expiry of the said notice period of seven (7) days. It is obvious, from the affidavit, that the Plaintiff did not make full payment as demanded. The Defendant, through its agents, then proceeded to advertise the property, the security of the loan, for sale. The advertisement was done on 28th August 2001 and sale was expected to be on 1st September 2001. The sale never took place for it is apparent that the Plaintiff and the Defendant entered into an arrangement whereby the debt was to be liquidated by the 31st day of December 2001. This is reflected in a letter dated 9th November 2001, from the Defendant to the Plaintiff, which has been annexed to the affidavit of Mr Jimmy Kayuni. The following are the relevant parts of the letter of 9th November 2001:-

"Our Ref: RIH/2001

9th November 2001

Mr R I Hamdani

P.O. Box 367

Blantyre

Dear Sir

OUTSTANDING DEBT-K4,495,185.62 AS AT 9.11.2001

We note with concern that your account reflects arrears of K2,585,935.44 inclusive of legal fees of K821,411.00 despite payment of K400.000.00 of even date.

We wish to reiterate that full liquidation of the debt must be achieved by 31st December 2001 as per our agreement contained on our letter dated 3rd September 2001 which please acknowledge and return to us by Thursday 15th November 2001.

In addition arrange to regularize the position by paying the sum of K2,585,935.44 by 14th November 2001 failing which we shall reinstate legal action with specific instructions to realise our security.

Please note that when this becomes necessary, no further negotiations shall be entertained as you will have reneged on your undertaking.

We trust that you accord the matter the seriousness it deserves.

Yours faithfully

(signed)

JIMMY KAYUNI

HEAD OF CREDIT MANAGEMENT”

It is evident that the Defendant had enough of the Plaintiff's failure to honour the undertaking he made and it was not prepared to re-negotiate with the Plaintiff. Thus on 11th December 2001 the Defendant, through its Executive Director, instructed its legal practitioner to proceed to auction the property the subject matter of this action. The instructions are contained in exhibit annexed to the Plaintiff's affidavit filed with the court on 2nd January 2002. The exhibit is marked as RIH4. This letter, which was copied to the Plaintiff, finally made the claimant to come to court to seek redress by way of this injunction the subject of the present applications by the parties herein.

The above are, in a nutshell, the salient facts of this case as disclosed by the affidavits that were filed with the court. Further facts will appear later in this ruling. I will now move on to set out the issue(s) for determination in this matter.

Issues for Determination

As I see it, the main question that must be answered in this application is whether or not the order of an interlocutory injunction, which this court made on 24th December 2001, should be vacated. There are of course other attendant issues which will also be dealt with when I am considering the substantive issue set out above.

Before embarking on the exercise of adjudicating upon the said issues let me point out that both Counsel addressed the court at length during oral submissions in support of their respective positions regarding the applications they have made. I am so indebted to them for their instructive arguments of the law they have invited me to apply to this matter. It will not, however, be possible to refer to each and every argument put forward by both Counsel but I will make reference to some of the arguments that I have found particularly relevant to the issues arising in the applications herein.

At this juncture I will now move on to consider the issues for determination in this matter.

Consideration of the Issues

default and notice demand

It is an undeniable fact that the Plaintiff defaulted on the repayment of the loan facility granted to him by the Defendant. Actually, he has defaulted twice viz prior to Notice of Demand of 17th August 2001 and immediately before the Notice of Demand of 9th November 2001. Moreover, the Plaintiff has failed to honour an undertaking which he made regarding the repayment of the loan by monthly instalments of MK1,100,000.00 effective 29th of September 2001.

In view of the defaults mentioned above there was nothing wrong in the Defendant issuing a notice that it wanted to realise its security over the loan. The Plaintiff has submitted that the notice of 9th November 2001 was premature because of the so called agreement of 2nd February 2001. Consequently, it was further argued by Counsel that the Plaintiff was right in applying for an interim injunction. It was the further argument of the Plaintiff, through his Counsel, that the demand was not in keeping with the provisions of Section 68 of the Registered Land Act (Cap 58:01) of the Laws of Malawi in that the notice given was for a period of less than three (3) months. I do not agree. The Plaintiff and the Defendant agreed to exclude the applicability of the provisions of Section 68 of the said Registered Land Act to the Charge that was created in respect of the Plaintiff's property. It is so clear that, in terms of Clause 4.D of the Charge (exhibit JKI), the parties unequivocally agreed that the restriction in respect of the exercise of power of sale will not apply to the charge. The relevant part of said Clause 4.O, of the Charge annexed to the affidavit of Mr Jimmy Kayuni, is as follows:-

“The statutory power of --- sale conferred on chargees by Section 68 of the Act shall be exercisable at any time after the monies owing under this Charge have become payable and Section 68 of the Act (restricting the exercise of such power and the power to sue) shall not apply to this charge.”

This Clause clearly shows that the Plaintiff's contention that the Defendant prematurely wanted to realise security is misplaced. It was expressly agreed by the parties that the power of sale could be exercised at anytime when money owing under the charge has become payable. I wish to point out that the alleged agreement of 2nd February 2001 did not, and could not, change or undo what the parties agreed in the said Clause 4.O of the charge viz that the debt would be payable on demand and that there would be no restriction as to the power of sale. This means that there was no need for the said three (3) months to expire before the Defendant could proceed to sale the house in order to realise its security.

Variation of agreement

Moreover, there was no agreement to vary what the parties agreed in Clause 4.O of the charge. Indeed, the so called agreement of 2nd February 2001, if there was any, was without consideration. There is no suggestion, in the affidavits of the Plaintiff, that he gave any consideration or suffered any detriment as a result of the so called new arrangements allegedly made after the letter of 31st August 2001 (exhibit JK4). To this

end the notice of demand of 17th August 2001, as a result of the default on the part of the Plaintiff, remained unaffected by the subsequent arrangements of September 2001: Bishop Danies Nkhumbwe -vs- National Bank of Malawi Civil Cause No. 2702 of 2000 (High Court) (unreported). It therefore follows, in this light of these observations, that the notice of 17th August 2001 was revived and the Defendant was perfectly entitled to proceed to realise security on the loan facility granted to the Plaintiff. The bottom line is that the Plaintiff is in default and he now rushes to the court to seek protection. This court will not accord him such protection for that would be tantamount to creating a situation where the Defendant will lose both the security for the loan and the money that it lent to the Plaintiff. The courts should be slow in allowing such situations to arise. The long and short of it is that the arguments of the Plaintiff can not be sustained having regard to the decision of this court in Bishop Daniel Nkhumbwe's case cited above. I see no reason why the injunction herein should be continued when it is so clear that it will be wrong at law to allow its continuation.

Conclusion

The injunction should be, and is hereby, discharged because its continuation will amount to allowing a secured debt being turned into an unsecured debt because the Plaintiff essentially wants to be allowed to repay the debt within a reasonable time by making reasonable payments. This is not what the Plaintiff agreed with the Defendant when the former was given the credit facility by the latter. The Plaintiff wants to enter into another agreement with the Defendant but unfortunately there is no consideration for such agreement. The debt must remain a secured one as provided for in the charge.

The Plaintiff shall bear the costs of, and occasioned by, the applications herein. It is so ordered.

Made in Chambers this 22nd day of March 2002 at the Principal Registry, Blantyre.

F.E. Kapanda

JUDGE