IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 681 OF 2001

BETWEEN:

M.D. MWAKAMOGHO..PLAINTIFF

- and -

NATIONAL BANK OF MALAWI LIMITED.....................DEFENDANT

CORAM: TWEA, J

Kasambara, of Counsel for the Plaintiff

Z.E. Mitole (Mrs), of Counsel for the Defendant

Absent, Recording Officer

JUDGMENT

This application was brought by the plaintiff who applied to court to determine that the sale of his house by the defendant was illegal, that the defendant had wrongfully and unlawfully sold his house, that he was entitled to compensation for the wrongful and unlawful sale of the house and lastly that the defendant pay costs for this action.

This application was supported by an affidavit of the plaintiff. The action was opposed and Mrs Mitole of Counsel, for the defendant, swore an affidavit in opposition.

The facts that emerge from this case are that the plaintiff was the owner of property of plot No. Kambiri 11/9 at Karonga Trading Centre in Karonga District. The defendant is a commercial bank.

The plaintiff as a customer of the defendant obtained a loan facility from the defendant in the sum of K300,000.00. The nature of this facility has not been disclosed in any of the affidavits or the arguments by the parties. Further, the date on which this facility was obtained is unknown. It is common knowledge, however, that this loan facility was

secured by a charge over the property of the plaintiff on plot No. 11/9 Kambiri. I must mention at the outset that this charge was neither disclosed nor exhibited in this court.

The plaintiff defaulted on repayments on the loan facility. It is not disputed that he was informed and warned of the consequences of default. Further, it is deponed that the defendant gave notice to sell the property to the plaintiff in 1998 and again in 1999. The property was sold in December, 1999. In March 2000 the plaintiff contended that he had personal problems which affected his business and requested the defendant not to sell the property as he was in a position to make up for the default. He had by then made payments to the defendants through one of their branches on 3rd December, 1999 in the sum of K50,000.00 and deposited a further K60,000.00. He promised to repay the loan by instalments not later than 31st July, 2000.

It transpired from the defendant latter Exhibit Z.E.M1 that the plaintiff had been to the defendant before 9th March and had been told that the property had been sold. Further, it is clear that at the time he paid in the K60,000.00 into the defendant's bank branch he was well aware of this and that he did so without the authority, ostensible or actual of the defendant.

The plaintiff then caused a search and found out that the sale of the property was done by Messrs Kesale Auctioneers and Estate Agency of Mzuzu. He contended that Messrs Kesale were not registered as auctioneers and estate agents under the Land Economy Surveyors Valuers, Estate Agents and Auctioneers Act. The plaintiff contended that Messrs Kesale were acting in contravention of Section 3 of the said Act and therefore they had committed an offence under Section 12 thereof. This is the basis of the unlawful sale of the property and the illegality.

Further the plaintiff contended that the defendant act of sale was wrongful since he had made payments after notice of sale in 1998 and 1999. I should mention however, that these payments were being made without reference to the defendant. The plaintiff contends that the defendant contravened Section 71 of the Registered Land Act among other things.

Let me deal with the notice of sale first.

I have not been furnished with particulars of the charge or the obligations thereunder, I will therefore, go by the evidence as deponed. Clearly the defendant gave notice of default and sale in 1998. The plaintiff did nothing but pay in K80,000.00 in April, 1999. The affidavit evidence shows that the plaintiff had earlier defaulted after rescheduling of the payments. He paid in nothing until the next notice to sale in August, 1999. He did nothing and in December paid in K50,000.00. As earlier all the payments were being made into the defendant banks without prior reference to the defendant. Exhibit ZEM3 is clear on this as the money paid in April, 1999 and December, 1999 was held in a

suspense account after the defendant had exercised their right to sale. It is clear to my mind that the plaintiff knew his position and was making a desperate effort to save his property. Be this as it may I find that there was no meeting of minds in this case. Unilateral action by the plaintiff cannot alter the position of the defendant. I find no merit in his argument on lack of notice, he was well aware of the notice and the implications and he failed to pay up. The sale therefore was not wrongful.

I now come to the unlawfulness and illegality of the sale.

It is a well know principle of law that:

"**Ex dolo malo non oritur actio**. No Court will lend its aid to a man who founds his cause of action up an immoral or illegal act."

See **Holman vs Johnson** (1775) 1 Cowp. 341, at page 343 also quoted in **Berg vs Sadler and Moore**, (1937) 2K.B. 158 at page 167 from the judgment of Buckley J in **Gordon vs Chief Commissioner of Metro Politan Police** (1910) 2K.B. 1080. In that case a tobacco seller who was on a stop-list by his association ordered tobacco through a third party. When the wholesaler refused to return the purchase money or deliver, he sued for money had and received. The Court held that he could not recover the money nor the tobacco because he was trying to get it by false pretences.

Again in the cause of **Stirling vs John (1923) 1 K.B. 557** a money-lender who took "security for money lent" on post-dated cheques drawn to third parties was unable to recover the money on a suit for the illegality under the "Money Lenders Act, 1900", which prohibited securities being payable to third parties.

The principle in Holman's case (Supra) is founded on public policy. A plaintiff who has to rely on an illegal transaction to establish his cause of action must fail. Nonetheless the court is obliged to look at who is suing and where the illegality is.

In the present case the illegality, if there is any, would be with Messrs Kesale who sold the property. The one suing is the plaintiff whose property was sold. There is no illegality on the part of the defendant who were selling the property or the purchaser. I find no reason for holding the defendant act illegal so as to nullify the sale. In my view, if there was illegality, it is Messrs Kesale who would have been disabled from recovering on a suit in court. I therefore find that this principle does not apply in this case and I dismiss the plaintiff's contention on this point.

For the above reason I find that the plaintiff is not entitled to any compensation.

This action therefore must fail with costs to the defendant.

Pronounced in open court this 11th day of July, 2002 at Blantyre.

E.B. Twea

JUDGE