

Finance Corporation of Malawi Ltd v New Building Society and others

Principal Registry

Tembo J

Date of Ruling: 18 September 2002

Civil Cause No. 3455/2001

Land law – Registered Land Act – Caution – Legal effect of caution – Forbidding of registration of dispositions and making of entries in the property's register and to entitle cautioner to a notice when there is an application to remove the caution

Land law – Registered Land Act - Caution – Registration of caution without a charge – No power of sale granted

Land law – Registered Land Act – Caution – Removal of caution without notice to cautioner – Inconsistent with caution - Registration of dealings contrary to provisions of the Act – Registration can be removed and caution restored

Land law – Registered Land Act- Charge – Failure to register a charge – Charge not perfected and incomplete – No power of sale can be exercised

Land Law – Registered Land Act – Charge – Power of sale – Failure to comply with conditions precedent – sale of property illegal and void

Editorial Summary

The third defendant was a customer for both the plaintiff and first defendant, New Building Society who were financial institutions providing financial services in Malawi. The third defendant obtained a loan from the New Building Society and pledged his property known as Title No. Soche West CM2/26 as security. The New Building Society registered a caution in the property register at the Lands Registry forbidding any dealings in the property and making of entries in the Register without the consent of New Building Society. It prepared a charge but did not register it. After a period of more than five years the third defendant obtained a loan from the plaintiff and offered the same property as security. The plaintiff presented a charge to the Land Registrar for registration in terms of section 128 (2) of the Registered Land Act. The Land Registrar removed the caution and registered the charge without notice to the New Building Society as was required by law. However, the New

Building Society sold the property purportedly in the exercise of its power of sale under the unregistered charge.

The plaintiff took out this action seeking a number of reliefs including, an order that the first defendant's sale of the property was illegal, an order that the first defendant was holding the proceeds of the sale of the property on trust for the plaintiff, a declaration that its charge was validly registered, and the payment over of the proceeds of the sale of the property. The New Building Society on its part counterclaimed for a number of reliefs, including, an order that the plaintiff's charge be deregistered, an order reinstating its caution to the property's register, and an order that the second defendant, the Attorney General and the third defendant should indemnify it for any loss suffered or it may suffer. The Attorney General contended that the plaintiff's charge had been registered by mistake and prayed for an order rectifying the register in terms of section 139 of the Registered Land Act. The third defendant contended that he was wrongly joined as a party to the proceedings, that he was not liable to indemnify the first defendant for any loss or damage and that the sale of the property was null and void and should be set aside.

Held – Allowing in part the claims by all the parties with costs to the plaintiff and third defendant:

- (1) That the first defendant did not perfect and render complete its charge over the third defendant's property when it failed to register the charge as required by section 60 (3) of the Registered Land Act as such it could not invoke its power of sale under sections 68 and 71 of the Act.
- (2) That none of the conditions precedent to the exercise of a power of sale had been fulfilled by the first defendant consequently the purported sale of the third defendant's property was illegal and the sale was void *ab initio*.
- (3) That under sections 126, 127 and 128 (2) of the Registered Land Act the legal effect of a caution is to forbid the registration of dispositions and the making of entries in the property's register and to entitle the cautioner to a notice when there is an application to remove the caution and not to grant a power of sale.
- (4) That the third defendant acted lawfully when he created a second charge over the property in favour of the plaintiff.
- (5) That the registration of the plaintiff's charge without notice first being given to the first defendant as the cautioner was inconsistent with the caution which had expressly forbidden the registration of dealings and the making of entries in the

property's register. The charge was registered by mistake and contrary to the provisions of the Registered Land Act.

(6) That the register be rectified in terms of section 139 of the Registered Land Act by restoring unto the register the first defendant's caution and deleting there from the plaintiff's charge.

(7) That the parties should take measures to comply with all the relevant provisions of the Registered Land Act in order for their respective charges to be validly registered.

Cases cited

No cases were cited

For the plaintiff:

Tembenu

For the first defendant:

Nkhoma

For the second defendant:

Nkhata

For the third defendant:

Naphambo

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 3455 OF 2014

BETWEEN:

**FINANCE CORPORATION OF MALAWI
LIMITED PLAINTIFF**

- and -

**THE NEW BUILDING SOCIETY 1ST DEFENDANT
THE ATTORNEY GENERAL 2ND DEFENDANT
GREY JAMES JASU NIANG'ANDA 3RD DEFENDANT**

CORAM: TEMBO, J.

Tembenu, of Counsel for the Plaintiff
Nkhoma, of Counsel for the 1st Defendant
Nkhata, of Counsel for the 2nd Defendant
Naphambo, of Counsel for the 3rd Defendant
Mankhanamba, Court Clerk

R U L I N G

Tembo, J.: By its amended originating summons, the plaintiff is seeking a number of orders from the Court (a) declaring that the 1st defendant's sale of property known as Title No. 200he West CM2/26 "charged property" in purported exercise of power of sale was illegal in that there was no charge empowering the 1st defendant to exercise such power of sale in accordance with relevant provisions of the Registered Land Act (RLA); (b) declaring that the proceeds of the said sale amounting to about K480 000.00 are being held by the 1st defendant in trust for the plaintiff, in that the

plaintiff is the holder of a charge in respect of the charged property; (c) declaring that the charge, in respect of the charged property, which was registered by the plaintiff on 16th December 1993, was validly registered in accordance with the relevant provisions of the RLA; (d) in the event that the Court holds the view that the plaintiff's charge was improperly registered, declaring that the plaintiff is entitled to an indemnity in terms of Section 140 of the RLA; (e) requiring the payment over to the plaintiff, with interest, of the money received by the 1st defendant pursuant to the purported sale; and (f) requiring payment of costs of this action.

On its part the 1st defendant is seeking a number of orders from the Court, requiring that (a) the plaintiff's summons be dismissed in its entirety; (b) the plaintiff's charge be deregistered; (c) the 1st defendant's caution be reinstated on the register and that the parties be reinstated to their respective positions, in which they were, prior to the removal of the 1st defendant's caution; (d) the 2nd and 3rd defendants do indemnify the 1st defendant for any loss suffered or to be suffered by the 1st defendant as a result of the conduct of the 2nd and 3rd defendants relative to the circumstances of the instant case; (e) the 2nd and 3rd defendants do pay any damages which the 1st defendant has or may suffer as a consequence of the conduct of the 2nd and 3rd defendants in that regard; (f) the 2nd and 3rd defendants should pay costs of this action.

On its part, the 2nd defendant merely plays for the nullification of the register in terms of Section 139 of the RLA so that the plaintiff's charge had been registered by mistake.

On its part, the 3rd defendant is seeking the following orders of the Court that (a) the 3rd defendant has been wrongfully joined as a party to these proceedings; (b) the 3rd defendant is not obliged to indemnify the 1st defendant for any loss to be suffered by the 1st defendant, should the Court find in favour of the plaintiff; (c) the sale by the 1st defendant is null and void, therefore, to be set aside; (d)

the 1st defendant is not entitled to any indemnity from the 3rd defendant in that the 1st defendant had no power of sale in effecting the purported sale; (d) the plaintiff's charge be superceded in that the plaintiff had failed to exercise due care and further that the plaintiff do pay costs of this action.

The following facts clearly emerge from the affidavit evidence of the parties in this case: The plaintiff and 1st defendant are financial institutions which are engaged in the provision of financial services to their respective customers in the country. The services rendered include provision of loans. The 3rd defendant is a customer of both the plaintiff and the 1st defendant and he is the owner of the property Title No. Soche West CM 2/26.

On or about June 1993, the 3rd defendant obtained a loan from the 1st defendant for which the 3rd defendant had provided security in the form of a charge in respect of the 3rd defendant's Property Title No. Soche West CM 2/26, "the charged Property". The 1st defendant, thereafter, merely registered a caution on the register respecting the charged property without, at the same time, registering the charge in that regard. The caution was prepared and presented for registration on or about 8 June, 1993. To date, the 1st defendant has not yet registered the charge in that regard. The caution registered by the 1st defendant in regard to the charged property forbids the registration of dealings and the making of entries in the register in regard to the charged property without the consent of the 1st defendant. The caution was to be valid for an indefinite period until it was withdrawn by the 1st defendant or removed by order of the Court or the Registrar.

On or about November, 1998, the 3rd defendant had further charged the charged property as a continuing security to secure the repayment of a loan obtained by Airi-Trading Limited from the Plaintiff. When that charge was presented for registration, the plaintiff discovered that there was the above-mentioned caution on

the register. In the circumstances, the plaintiff, through its lawyers by a letter dated 19th August, 1999, Exh. SBT2, made representations to the Land Registrar aimed at having that charge registered, as follows:

"Our client has extended finance facilities to a company called Afri-Trading Limited and have been offered the above-mentioned property as security.

However, we have noted that there is a prior caution on the register. We now write in terms of S.182(2) of the RLA and apply for removal of the said Caution so that our client's charge is registered.

Alternatively, we submit that unless our client's charge is inconsistent with the said Caution, then you might as well register the Charge. We trust that either of the above mentioned alternatives will be in order."

Upon receipt of Exh. SBT2 the Land Registrar without complying with the requirement of S.128 (2) of RLA, as to the giving of notice to the cautioner warning the cautioner that his or her caution will be removed at the expiration of the time specified in the notice, removed the caution and then registered the plaintiff's charge in respect of the charged property. In February or March, 2000, the 1st defendant, without at any time prior thereto having registered the charge, sold the charged property purportedly in exercise of its power of sale under the unregistered charge. The buyer is a Mr. Wilson Kosam Chisani who has paid to the defendant a purchase price of K430,000.00 therefor.

The plaintiff had sought to claim from the 1st defendant payment to the plaintiff of that purchase price in that the 1st defendant, not having registered any charge in its favour regarding the charged property, was not entitled to that amount. However, the plaintiff maintained then and now that the plaintiff is entitled to that amount in that the plaintiff's charge was registered. The 1st defendant rejected the demand of the plaintiff in that regard and agreement not having been reached, therefore, the plaintiff commenced the instant action.

Besides the foregoing, it is expedient to point out that the 1st defendant had approached the 2nd defendant on the matter, that is soon after the caution had been removed and the plaintiff's charge registered. In response, the 2nd defendant had informed the 1st defendant that measures were then to be taken by the 2nd defendant to rectify the situation, thus to restore the caution onto the register and to cancel the registration of the plaintiff's charge from the register, in that the caution had been removed from the register and the plaintiff's charge had been registered in error.

In removing the caution, the 2nd defendant had thought that Exh SE 12 had been issued by or on behalf of the 1st defendant, then, requesting the 2nd defendant to remove the caution from the register and therefore, to thereafter permit the registration of the plaintiff's charge on the register. While the 2nd defendant was in the process of rectifying the register, that is, by taking measures for the restoration of the caution onto the register and cancelling the registration of the plaintiff's charge therefrom; and in fact before that process had been completed, the 1st defendant had sold the charged property purportedly in exercise of the 1st defendant's power of sale under the unregistered charge in that regard. The foregoing are the facts in the case.

To begin with, the Court must grant the prayer of the plaintiff for an order declaring that the 1st defendant's sale of the charged

property in purported exercise of power of sale was illegal in that the 1st defendant had in fact not acted in exercise of a power of sale under a charge and in accordance with Sections 60(3), 68 and 71 of the RLA. Thus by not registering its charge the 1st defendant had not perfected, and therefore rendered complete, its charge in respect of the charged property. S.60(3) of the RLA prescribes that a charge shall be completed by its registration as an encumbrance and the registration of the person in whose favour it is created as its proprietor and by filing the instrument. Upon the registration of a charge, the chargee's power of sale may only be invoked in accordance with SS. 68 and 71 of the RLA: thus, where default is made in payment of the principal sum or of any interest for a continuous period of one month; and, thereafter, a notice in writing to pay the money owing is given to the chargor, and that subsequent upon that notice, the chargor does not comply within three months of the date of that notice so to do. None of the foregoing conditions precedent to the exercise of a power of sale had been fulfilled in regard to the 1st defendant's purported exercise of its power of sale in the instant case.

Yes, all there was or were on the register, in favour of the 1st defendant, was a caution which is referred to above. Notwithstanding the fact that the caution had been removed in error at the time of the purported sale of the charged property, and even if it were restored, the caution does not grant a power of sale to the cautioner. The legal effect of a caution is prescribed under SS. 126, 127 and 128(2) of the RLA: thus to forbid the registration of dispositions and the making of entries altogether or to the extent therein expressed; and to entitle the cautioner to a notice upon application to remove a caution. In the circumstances, the 1st defendant only having lodged a caution without also registering a charge in regard to the charged property, the purported sale of the charged property by the 1st defendant was illegal. The Plaintiff's prayer for an order to that effect and in that regard is hereby granted. For the avoidance of doubt, the purported sale is void and

nitio and is hereby set aside.

Next, the Court must consider the plaintiff's prayer for an order: (i) to declare that the proceeds of the purported sale of the 1st defendant, thus an amount of K430,000.00, are being held by the 1st defendant in trust for the plaintiff in that the plaintiff is the holder of a charge in respect of the charged property; (ii) to declare that the plaintiff's charge was validly registered in accordance with the relevant provisions of the RLA. The Court ought first to determine the second prayer: was the plaintiff's charge in fact registered in accordance with relevant provisions of the RLA? Which are the relevant provisions in question? In the view of the Court, that prayer must be considered and then determined in the light of S. 60(3), 61, 126 (2), 127(2) and 128(1) (2) of the RLA.

To begin with, it is not disputed that the 1st defendant had held a first charge in respect of the charged property. However, the 1st defendant did not perfect or complete its charge by registration as required by S. 60(3) of the RLA. After several years had elapsed, in fact not less than 5 years, the 3rd defendant had created a second charge, in respect of the charged property, in favour of the plaintiff. In terms of Section 61 of the RLA, the 3rd defendant had perfectly acted within the authority of the law in having done so. The plaintiff had presented its charge for registration as required by S. 60(3) of the RLA. When that was done, the plaintiff, through its lawyers, were informed by the Land Registrar that there was a caution on the register forbidding the registration of the charge, except with prior consent of the cautioner, the 1st defendant. Subsequent thereto, upon representations being made to the Land Registrar, En. SBT2, pursuant to S. 128(2) of the RLA, the caution was removed, and the plaintiff's charge then registered. However, the removal of the caution was done without prior notice being given to the cautioner, 1st defendant, as required by S. 128 (2)(a) of the RLA. In that respect, it has been conceded by the 2nd defendant that the removal was due to a mistake. Thus, it was thought in error that En. SBT2

had been issued by the 1st defendant calling for the removal of the caution and the registration of the plaintiff's charge. The Court, in the circumstances of the instant case would not accept that position. The office of the Land Registrar was in the process of dealing with the plaintiff's lawyers and Exh. SBT2 was a letter from the plaintiff's lawyers subsequent upon an earlier letter which had been issued by the Land Registrar informing the plaintiff's lawyers that there was a caution on the register. Whatever happened, the position is that the Land Registrar, without giving notice to the cautioner, purported to remove the caution and then to register the plaintiff's charge. The removal of the caution and the registration of the plaintiff's charge, therefore, were done due to a mistake. In the view of the Court, the Land Registrar ought not to have done that without first giving notice to the cautioner. The view expressed by Teribenu and M. sumbu and Company for the plaintiff in Exh. SBT5 suggesting that the plaintiff's charge was not inconsistent with the caution is faulted. Indeed S. 127(2) of the RLA would have permitted the Land Registrar to register the charge had the registration of the charge not been inconsistent with the caution. In the instant case, however, the caution, as noted above, had expressly sought to forbid the registration of dealings and the making of entries in the register in regard to the charged property. So, registration of the plaintiff's charge without notice first being given to the cautioner, therefore, was an act which was clearly inconsistent with the caution. In the circumstances, it is the firm view of the Court that the removal of the caution and the registration of the plaintiff's charge were done due to a mistake. And applying the provisions of S. 130 of the RLA, it is only equitable and consistent with the maintenance of good conscience that the Court should make a finding that the charge of the plaintiff was not registered in accordance with the relevant provisions of the RLA. It is so ordered.

The Court having so decided on the question of the validity of the registration of the plaintiff's charge, it would be abundantly superfluous for the Court to embark on the consideration and

As to the further prayer of the plaintiff that, given the decision of the Court that the plaintiff's charge was improperly registered, the Court should make an order declaring that the plaintiff is entitled to an indemnity in terms of S. 140 of RLA, the Court has the following to say: To begin with it has to be conceded that the 3rd defendant had the authority of the law to grant a further charge subsequent upon the first charge to the 1st defendant. Be that as it may, it is equally the well considered view of the Court that the power of the 3rd defendant so to do, had to be exercised, or were in fact exercised, subject to the express provisions of S. 61 of the RLA:

"A proprietor whose land or lease or charge is subject to a charge may create a second or subsequent charge in the same manner as the first charge and the same provisions shall apply thereto, but any sale under the power expressed or implied in any such charge shall be expressed to be subject to all prior charges unless those charges have been discharged."

So, were the 1st defendant and the plaintiff's charges validly registered, the position would have been that the plaintiff's charge would have been subject to 1st defendant's prior charge. However, in the instant case both charges are, until now, not yet validly registered in terms of Section 60(3) of the RLA. So, given the decision of the Court that the plaintiff's charge was improperly registered, it is the considered view of the Court that rectification of the register would be and, that in fact it, is the only legally viable and

determination of the plaintiff's prayer for a declaration that the proceeds of the purported sale by the 1st defendant were held in trust for the plaintiff in that the plaintiff is a holder of a charge in respect of the charged property. That prayer is, therefore, rejected by the Court. It is so ordered.

As to the further prayer of the plaintiff that, given the decision of the Court that the plaintiff's charge was improperly registered, the Court should make an order declaring that the plaintiff is entitled to an indemnity in terms of S. 140 of RLA, the Court has the following to say: To begin with it has to be conceded that the 3rd defendant had the authority of the law to grant a further charge subsequent upon the first charge to the 1st defendant. Be that as it may, it is equally the well considered view of the Court that the power of the 3rd defendant so to do, had to be exercised, or were in fact exercised, subject to the express provisions of S. 61 of the RLA:

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So, were the 1st defendant and the plaintiff's charges validly registered, the position would have been that the plaintiff's charge would have been subject to 1st defendant's prior charge. However, in the instant case both charges are, until now, not yet validly registered in terms of Section 60(3) of the RLA. So, given the decision of the Court that the plaintiff's charge was improperly registered, it is the considered view of the Court that rectification of the register would be and, that in fact it, is the only legally viable and

best resolution of the prayers of the parties in the instant case. In that regard the court is, therefore, in complete agreement with the view of the 2nd defendant. There should be a rectification of the register in terms of S. 139 of the RLA: Such being the view of the Court, the Land Registrar is hereby ordered to restore onto the register the 1st defendant's caution which had been removed by error and also to cancel from the register the plaintiff's charge which had been registered in error. The parties concerned are further ordered to comply with all the relevant provisions of the RLA as to the required measures to be taken by each one of them in order for their respective charges to be validly registered.

As to costs, it is the well considered view of the Court that the plaintiff and the 3rd defendant must have the costs for this action. However, such costs must be paid by the 1st and 2nd defendants in equal proportions in that both of them had been guilty of wrongful conduct which gave raise to the institution of the instant case. It is so ordered.

MADE in Chambers this Wednesday, 18th day of September, 2002, at Blantyre.


A. K. Tembo
JUDGE