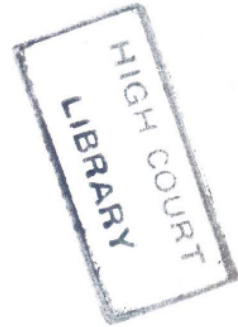


IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 568 of 2000



BETWEEN:

B. D. PHOYA PLAINTIFF

- and -

FINANCE BANK OF MALAWI DEFENDANT

CORAM: POTANI, REGISTRAR

Phoya, Counsel for the Plaintiff

Chagwamngira, Official Interpreter



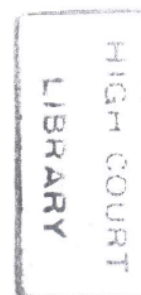
RULING

This is an application by the defendant to set aside a default judgment obtained by the plaintiff. The plaintiff commenced this action seeking a permanent injunction order restraining the defendant from selling the plaintiff's house on Plot Number NW 110/119/11 Ndirande in the City of Blantyre on the ground that the defendant has no power to do so. Subsequently, pursuant to Order 19 rule 7 of Rules of the Supreme Court, the plaintiff applied for judgment to be entered on his claim as the defendant was in default of service of defence. The court readily granted the plaintiff's application and judgment was accordingly entered. The present application by the defendant is supported by the affidavit of counsel for the defendant, Dick Chagwamnjira and also a supplementary one sworn by Peter White, Deputy Managing Director for the defendant.

Order 19 rule 9 of the Rules of the Supreme Court empowers the court to set aside or vary any judgment entered in default of service of defence as the one herein. The principles that guide the court in considering whether or not such a judgment should be set aside are the same as those applicable in an application to set aside a judgment entered in default of the giving of notice of intention to defend as set out in Order 13 rule 9 of Rules of the Supreme Court. It is admitted by the defendant that the judgment herein was regularly obtained. The law is that such a judgment can only be set aside if the defendant demonstrates, by affidavit evidence, that there is a defence on the merits to the plaintiff's claim and **Farden v. Richter** (1889) 23 QBD 124 is the case in point.

The defendant's proposed defence, as contained in exhibit 'HDC1' to the affidavit of Dick Chagwamnjira is essentially that it was entitled to sell the plaintiff's house because the plaintiff duly signed a legal charge in respect of the house but the charge could not be registered as the plaintiff wrongfully and fraudulently kept the lease certificate and only gave the defendant lease documents as security documents.

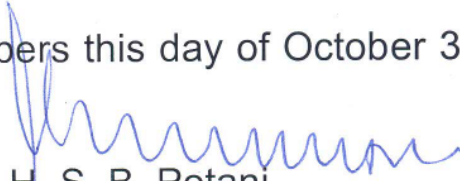
The judgment the plaintiff obtained is for a permanent injunction restraining the defendant from selling the plaintiff's house on the ground that the defendant had no power to do so as there was no charge registered in respect of the house. Counsel for the defendant argued that an injunction being an equitable remedy, it must be governed by equitable principles one of which being that a person seeking an equitable relief must come to court with clean hands and he cited the case of **Blakemore Glamorganshire Canal Navigations** (1832) 1 MY and K 154 at 168. Counsel then went on to submit that the plaintiff's hands in this case are not clean in that he signed a legal charge for him to get a loan facility but wrongfully and fraudulently withheld the land certificate in order to



prevent the defendant from registering the charge. It is my view that the assertion by the defendant that the charge was not registered because of the plaintiff's conduct, if prove at the trial, would likely be a successful defence to the plaintiff's claim. I have such a view because indeed as rightly observed by counsel for the defendant, the injunction the plaintiff secured by the judgment herein is an equitable remedy which can only be available if the person seeking such remedy comes to court with clean hands which would not be the case with the plaintiff if the allegations by the defendant were to be proved during the trial. Going further, it has to be observed that it is also stated in the defendant's exhibited defence that before selling the plaintiff's house, the defendant commenced a separate court action against the plaintiff being Civil Cause number 2181 of 1999 in which an order was made by the court for the sale of the house. One would then wonder why the plaintiff did not come forward to challenge the defendant's claim in that case which obviously included a claim for an order for the sell of the house. Again it was open to the plaintiff to apply to have the order of the court to be set aside on the same grounds that were advanced to obtain the injunction herein.

In conclusion, as already observed earlier, the defendant has demonstrated that it has a defence on the merits to the plaintiff's claim. I consequently order that the default judgment herein be set aside and that service of defence be dispensed with as defence was served together with the affidavit in support of this application. The judgment that has been set aside having been regularly entered, costs of this application shall be borne by the defendant.

MADE in Chambers this day of October 31, 2003, at Blantyre.



H. S. B. Potani
REGISTRAR