

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

CIVIL CAUSE 2671 OF 2003

BETWEEN:

**NATIONAL BANK OF
MALAWI.....PLAINTIFF**

- and -

**L. L. NAWENA.....
DEFENDANT**

CORAM: KATSALA J.

Mwala	-	of counsel for the plaintiff
Nkhono	-	of counsel for the defendant
Mdala	-	official interpreter

J. KATSALA

This matter was scheduled for hearing on 14th January 2004 but the defendant raised a preliminary issue for determination before the court could proceed to hear the matter. It is the defendant's submission that this matter, though begun by originating summons, should continue as if begun by writ because there are factual disputes in the affidavits in the affidavits filed by the parties which cannot be resolved on affidavit evidence. They can only be resolved after a full trial where witnesses will have been subjected to cross examination. The defendant highlights some disputes of facts in the affidavits to in support of his submission. First he cites the dispute as to whether the property was, and if sold whether it was sold by public auction or not, and if by public auction, when was the auction held. He says there is inconsistency in the evidence filed by the plaintiff in that some deponents say the auction sale was conducted on 14th

February 2003 while others say it was on 17th February 2003. The defendant on the other hand says no auction of the property was conducted at all. In short, the defendant says no power of sale has been exercised by the plaintiff in respect of the mortgaged property.

The defendant further says there is a dispute on what was the outstanding when the defendant had discussions with the plaintiff in May 2003 in respect of the property. This was after the plaintiff had informed the defendant that the property had been sold by public auction on 14th February 2003. The defendant says he agreed with the plaintiff that he would be allowed to redeem the property by paying the amount outstanding on the mortgage loan. This was on the understanding that the property was still available for redemption – that is, it had not been sold. In this respect, on 4th June 2003 he paid the sum of K422,000.00 to the plaintiff towards the loan account. On the other hand the plaintiff acknowledges meeting the defendant but asserts that the discussion proceeded on the basis that the property was already sold but that it would cancel the sale if the defendant paid in full the outstanding loan plus any damages that would be payable to the purchaser of the property as a result of the cancellation of the sale. This, according to the defendant is a factual dispute which cannot be resolved on affidavit evidence.

There is also a dispute on whether the property was valued before the alleged sale. A valuation report has been exhibited by the plaintiff which the defendant disputes – not as to the value of the property indicated therein, but as to whether a valuation was indeed carried out. Defendant says no valuation was ever done. This is a factual dispute which cannot be resolved on the affidavit evidence, the defendants submit. The defendant therefore urges this court to make an appropriate order under Order 28/8 of Rules of the Supreme Court.

On the other hand, the plaintiff submits that if indeed there are factual disputes, they are such disputes which can be resolved on the affidavits. The plaintiff submits that the dispute on whether an auction sale took place or not, is resolved by the affidavit of Wawanya which shows that the property was sold by public auction held on 17th February 2003 at Lilongwe Hotel.

On the dispute as to what was the understanding at the meeting the defendant had with the plaintiff in May 2003, the plaintiff submits that the alleged dispute is also resolved by the affidavits. The exhibits clearly show that the defendant was advised of the sale of the property by letter dated 8th May 2003. There is therefore no way that the discussions which were held subsequent thereto, could have proceeded on the basis that the property had not been sold. And that the defendant paid the sum of K422,000.00 to the plaintiff in June 2003 when he was well aware that the property had been sold.

On the alleged dispute as to whether a valuation of the property was conducted or

not, the plaintiff says that the dispute (if any) is also resolved by the affidavits which exhibit a copy of the valuation report and also a letter which the plaintiff wrote to the defendant enclosing a copy of the report. In short, there is sufficient evidence to show that the property was valued before the auction sale.

In conclusion the plaintiff argues that even if it were admitted that there are inconsistencies on the date of the sale or on whether there was a public auction or not, such inconsistencies are not material as far as the issues before this court are concerned because the law does not require a mortgagee to sell only by public auction. Plaintiff cited the case of **Bishop D. Nkhumbwe vs National Bank of Malawi case number 2702/00** unreported. The law only obliges the mortgagee not to sell at gross undervalue.

These are the arguments of the parties on the preliminary issue raised by the defendant. I have carefully gone through the affidavits filed by both parties again, in the light of the submissions made and after carefully considering same I think the question should be, are there any factual disputes? If yes, then, are the factual disputes substantial? If the answer is yes then in terms of Order 5/4 and Order 28/8 Rules of Supreme Court, the matter is not appropriate to be begun by originating summons as such it ought to proceed as if begun by writ.

I have, as already said, looked at the affidavits again in the light of the submission and it is my considered opinion that though there may appear to be some factual disputes, I would agree with the plaintiff that they are such disputes which can be resolved on the affidavits. In my opinion if there are any disputes which cannot be so resolved, such disputes are not substantial as to warrant an order under Order 28/8 of Rules of Supreme Court.

I have taken the trouble of looking at the case file for civil cause number 1476 of 2003 which the defendant instituted against the plaintiff herein claiming for an injunction to restrain the National Bank from selling the defendant's property in question or from evicting him from the property. In the affidavit in support of the summons for injunction, the defendant, through counsel, asserts almost the same facts as he has in his affidavit in opposition to the originating summons herein. The valuation report for his property which contains a floor plan of the house on the property, is exhibited. The defendant says the valuation was done without visiting the property. However, he does not dispute the floor plan. It is therefore surprising how the valuer would have drawn the floor plan without visiting the property. This, in my opinion, only illustrates that the alleged factual disputes are not incapable of resolution on the affidavits. They are not material nor are they substantial bearing in mind the nature of the action in this matter.

Further, one may ask, if indeed the discussions the defendant had with the plaintiff in May 2003 proceeded on the understanding that the property had not been sold

as alleged by the defendant, then why did he find it necessary to institute the action I have referred to above, on 30th May 2003 soon after the discussions? I have taken judicial notice of the proceedings in civil case number 1476 of 2003 because I do not want either party to be prejudiced in any way.

Finally, I wish to agree with the plaintiff that whether the property was sold by public auction or private treaty is not material as far as these proceedings are concerned. There are many case authorities to that effect, such as **Bishop D. Nkhumbwe vs National Bank** (supra) and **Leasing and Finance Company of Malawi Ltd vs G. W. Sadiki**, civil cause number 1525 of 2001 (unreported), the mortgagee is not obliged to sell by public auction.

In the circumstances, I dismiss the preliminary issue raised by the defendant and the matter should proceed to hearing of the originating summons..

MADE in chambers this 16th day of January 2004.

J. Katsala

JUDGE