IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 455 OF 2004

BETWEEN:

I. I. LORGAT……....PLAINTIFF

- and –

FIRST MERCHANT BANK……..DEFENDANT

CORAM: CHIMASULA PHIRI J

Tembenu of counsel for the plaintiff

Salima of counsel for the defendant

Mdala– official interpreter

Mrs Pindani – court reporter.

JUDGMENT

Chimasula Phiri J,

The plaintiff is claiming damages from the defendant allegedly for an irregular exercise of the power of sale vested in the defendant as a mortgagee. It is the plaintiff's contention that his property known as Limbe Rest House was sold at an under-value.

The defendant disputes the plaintiff's claim and makes a counter-claim of K6,029,981.00 being the shortfall on the mortgage account plus accrued interest thereon. The matter initially commenced with originating summons but proceeded as if it began by writ of summons.

PLEADINGS

Amended Statement of Claim

1. The plaintiff was at all material times the proprietor of property known as Limbe Rest House held under the title number Limbe West KJ 23/3.

2. In or about 8th January 2002, the said property was mortgaged to the defendant as security for the sum of K14,000,000.00.

3. By reason of failure on the part of the plaintiff to service the loan punctually in terms of the mortgage/charge, the defendant notified the plaintiff of its intention to exercise its power of sale in respect of the said security.

4. In pursuance of the said notice of intention to realize security, the defendant proceeded to advertise for sale the said property in the Daily Times on 18th March 2003.

5. In or about the 28th March 2003, the defendant appointed a Receiver in terms of section 68 of the Registered Land Act.

6. The plaintiff repeats the above and states whilst the said Receivership was in existence, the defendant was not entitled to proceed to realize security by way of sale.

7. In breach of the statutory provisions referred to in paragraph 6 hereof the defendant, on a date unknown to the plaintiff proceeded to sell the property whilst the Receivership was still subsisting.

Particulars

In terms of the provisions of section 68 of the Registered Land Act, the plaintiff was entitled to a fresh Notice before the sale of the property could be revived.

8. By letter dated the 2nd and 18th September 2003, the plaintiff, as was entitled to do, requested for an account of the proceeds of the sale but the defendant has failed to provide the said account.

9. Further and in the alternative, the plaintiff will contend that the said property was sold by the defendant at a gross under value.

Particulars

9.1 In December 2002, the property was valued at K16,000,000.00.

9.2 The defendant sold the property at K8,000,000.00 in 2003.

9.3 A subsequent valuation done in April 2003 showed that the value of the property was K18,000,000.00.

10 In the premises, the plaintiff contends that the defendant was reckless and did not act in good faith when exercising its power of sale, and that the said sale was irregularly done.

11 Alternatively and in addition to the foregoing, the plaintiff avers that the defendant through its agent, namely Messrs Chagwamnjira and Company acted negligently in that they failed to obtain a proper price or the best price obtainable.

Particulars

(a) selling the property at an undervalue when the best price obtainable would have been around K18,000,000.00.

(b) failing to take sufficient and reasonable steps to obtain the market price or a proper price, or the best price in the circumstances.

(c) insufficient advertising of the property before sale.

12 By reason of the matters aforesaid the plaintiff has suffered loss and damage.

Particulars

12.1 Loss of property known as title number Limbe West KJ 23/3.

12.2 Continued indebtedness to the plaintiff by reason of the sale at an under value.

13 In the premises, the plaintiff claims damages in terms of Section 71 (3) of the Registered Land Act.

And the plaintiff claims:

i) damages to be assessed by the court for breach of duty as mortgagee and for negligence.

ii) such further relief as the court deems fit

iii) costs of the action.

Amended Defence

1. Paragraphs 1 – 5 of the statement of claim are admitted.

2. Paragraphs 6 and 7 of the statement of claim are scandalous and should be struck off for pleading the law.

3. Paragraph 2 above notwithstanding, the defendant refers to paragraphs 6 and 7 of the statement of claim and state:

   (i) That the operation of section 68 of the Registered Land Act was subject to express terms of the agreement between the parties herein, which contract, allowed the defendant to appoint a Receiver.

   (ii) That paragraph 3(i) above notwithstanding and without prejudice thereof, the sale was concluded before the appointment of the Receiver.

4. Paragraph 8 the statement of claim is denied and the defendant puts the plaintiff to strict proof thereof.

5. The defendant denies selling the property at an undervalue.

   Particulars

   Professional assessment by the same valuer who assessed the property as worth K16,000,000.00 showed that the same property could be sold at K8,000,000.00 in a given set of circumstances, which circumstances subsisted at the time of sale herein.

6. Paragraph 10 of the statement of claim is denied and the plaintiff is hereby put to strict proof thereof.

7. Further and in the alternative, the defendant deny negligence in the sale as they had no duty to seek out the highest price.

8. Further and in the alternative, the defendant puts the plaintiff to strict proof of bad faith as alleged in paragraphs 9 and 10 as sale at an undervalue ***per se*** is no proof of bad faith.

9. The defendant refers to paragraph 8 of the statement of claim and contends that the claimed account was duly done.

10 Further and in the alternative, the defendant refers to paragraph 8 of the statement of claim and contend that not being a trustee of the power of sale, they had no obligation to account. But this notwithstanding, the plaintiff accounted in total to the plaintiff which the plaintiff duly admitted by the plaintiff in paragraph 8 of the affidavit.

11 The defendant makes no admission as to the alleged loss and damage suffered by the plaintiff.

12 **ALTERNATIVELY,** and the foregoing paragraphs notwithstanding, the substance of the plaintiff's application was adjudicated upon by the court and the defendant hereby plead ***res judicata***, the honourable court having determined in civil cause number 3917 of 2002 that the defendant was entitled to proceed with exercising the power of sale and dismissed the plaintiff's injunction which was based on the same facts and law.

13 The defendant refers to paragraph 11 of the Amended Statement of Claim and denies that its agent acted negligently in failing to get the best price obtained.

14 The defendant further denies that the best prize was not obtained.

15 The defendant denies having failed to take reasonable steps to obtain the best market price or any other price and puts the plaintiff to strict proof thereof and the plaintiff further denies that the property was insufficiently advertised and will require proof of that allegation.

16 The defendant denies that the defendant was bound to sell the property at K18 million because that was a price estimate for a willing buyer, willing seller and not a forced sale which was the case in this regard.

Counter Claim

17 The defendant avers that the plaintiff's property was sold at K8,000,000.00 when the principal sum due from the defendant is K14,000,000.00 plus interest.

18 By reason of the foregoing, the plaintiff remains indebted to the defendant in the sum of K6,000,000.00 and interest thereon on the principal.

19 **Wherefore,** the defendant has suffered loss and damage.

Particulars

i) loss of part of the principal sum of K6,000,000.00;

ii) interest to be assessed to the date of payment.

20 **AND** the defendant claims:

i) the principal sum of K6,000,000.00;

ii) interest to be assessed;

iii) costs of this action;

iv) any other order as the court may deem proper.

21 **SAVE** as hereinbefore admitted expressly, the defendant denies each and every allegation of fact alleged in the statement of claim as if each was set out and traversed seriatim.

Reply and Defence to Counter Claim

1. The plaintiff joins issue with the defendant in its defence.

2. The plaintiff refers to paragraph 12 of the Defence and denies that the matters herein are ***res judicata.***

Defence to Counter Claim

3. The plaintiff denies the contents of paragraph 13 (sic 17) of the counter claim and puts the defendant to strict proof thereof.

4. The plaintiff refers to paragraph 14 (sic 18) of statement of claim and denies that he is indebted to the defendant in the sum of K6,000,000.00 or any sum of money as alleged or at all.

SAVE as hereinbefore expressly admitted, it at all, the plaintiff denies all the allegations in the defendant's Defence and Counter Claim and prays that the same be dismissed with costs.

BURDEN OF PROOF

The burden of proof rests upon the party (the plaintiff or the defendant), who substantially asserts the affirmative of the issue. It is fixed at the beginning of trial by the state of the pleadings, and it is settled as a question of law remaining unchanged throughout the trial exactly where the pleadings place it, and never shifts in any circumstances whatever. See ***Joseph Constantine Steamship Line vs Imperial Smelting Corporation Limited [1942] A.C. 154,174.***

STANDARD OF PROOF

The standard required in civil cases is generally expressed as proof on a balance of probabilities.

> ***"If the evidence is such that the tribunal can say: We think it more probable than not, the burden is discharged, but if the probabilities are equal it is not."*** **Denning J in** ***Miller vs Minister of Pensions [1947] ALL E.R. 372; 373, 374***.

ISSUES FOR DETERMINATION

The major issues that clearly come out of the pleadings are:-

(1) Whether the matters are ***res judicata*** in that they were also determined in **Civil Cause Number 3917 of 2002** between the same parties?

(2) Whether the exercise of the power of sale was irregular and contrary to section 68 of the Registered Land Act – at the time the sale had the defendant not already appointed a Receiver/Manager of the property?

(3) Whether the defendant was negligent in the exercise of its power of sale premised on the following considerations -

(a) Was the property sold at an undervalue?

(b) Did the defendant fail to obtain a proper price for the property with guidance from the valuation report or alternatively did the defendant ignore the valuation report?

(c) Did the defendant fail to carry out a proper and sufficient advertising campaign before selling the property?

(d) Did the defendant fail to take into account the nature of the property before proceeding to sell it?

(4) Whether the defendant's counter claim should succeed? The defendant is counter claiming for the balance on the loan account, which keeps on accumulating due to alleged non-service of the loan by the plaintiff. In this respect, the court should consider whether the defendant is entitled to continue to add interest on the loan balance. Further, whether the plaintiff is right to contend that his continued indebtedness is as a result of the defendant's negligence aforesaid.

THE EVIDENCE

The plaintiff called 3 witnesses. The 1st witness was Ismail Ibrahim Lorgat, the plaintiff who adopted his witness statement which stated as follows:

> ***I am the plaintiff in these proceedings. I am a Malawian citizen and I run several businesses in the country. Among those businesses I operate several filling stations and I also used to own and run what used to be called Limbe Resthouse, now called Kanjedza Lodge.***
>
> ***One of my businesses namely, Midway Filling Station used to maintain an account with the defendant. The business was being managed by my son, Fateh Lorgat. This business is situated near Kandodo Corner Shop in Blantyre and the account was maintained with the defendant's Blantyre Branch.***
>
> ***Unknown to me, my son had incurred an unauthorized overdraft with the defendant in the region of K16,000,000.00 or so. My son was very apprehensive and the reason appeared to be that he incurred such***

overdraft with the help of one of the bank officers. I had no clue as to how that was done. The Bank as well appeared to have no clue that the overdraft in their books related to my business.

I did not approve of what he had done. I therefore told my son the Bank needed to be made aware of the whole matter.

When I approached the Bank and explained the matter, they were very grateful to me for choosing to come up with the matter despite the fact that my son was implicated. They told me that if I had not presented the matter to them, they were not going to be able to trace the customer to whom the overdraft related because the Bank employee involved had absconded.

After a lengthy discussion and in order to regularize the position I offered to the Bank my property comprising Limbe Resthouse as security for the loan. A surety charge was therefore prepared.

We managed to pay several instalments, but later we started experiencing difficulties in servicing the mortgage. In due course, the defendant notified us about its intention to realize security by selling the property. We tried to save the property through injunctions but the defendant eventually sold the property.

Before the sale, the defendant put an advertisement in the Daily Nation. We saw this advertisement. The advertisement was put in the newspaper by Messrs Chagwamnjira and Company, legal practitioners for the defendant, and appeared in the Daily Nation of 5 December 2002. It invited tenders in excess of K8,000,000.00. Apart from this advertisement, I do not recall having seen any further advertisement.

Around the same time, the defendant had commenced legal action against me in Civil Cause 391 of 2002. In those proceedings, they were claiming the sum of K9,528,721.34 down from K17,610,100.00. They proceeded to apply for Summary Judgment.

An injunction was sought and obtained by me. It was subsequently discharged by the court on application by the defendant. I sought this injunction because of the extreme pressure brought to bear upon me by the defendant.

Subsequently, the defendant successfully applied for an order to have the injunction discharged.

Whilst all this was going on, I received a letter from Mr Makhambera who was then working as a legal practitioner for Chagwamnjira and Company. By that letter dated 28th March 2002, he was advising me that he had been appointed as the Receiver and he was requesting me to hand over everything to him. He also sent a copy of the actual notice of appointment of Receiver.

The notice was later advertised in the Daily Times of Tuesday, March 18, 2003.

Surprisingly, around the same time of the Receivership, I received a debit note from the Bank advising that the account of Midway Filling Station had been debited with the sum of K363,000.00 for legal fees arising out of the sale of the Resthouse at the price of K2,000,000.00. Later upon some query, the defendant supplied me with a fee note from Chagwamnjira and Company which indicated that they had sold the Resthouse at the price of K2,000,000.00. The buyer was not indicated.

I was shocked by this news because I did not believe that the Resthouse could fetch such a small amount. When I acquired the Resthouse I paid the sum of K3.1 million and property like houses normally appreciate. In fact, a valuation which was done before the sale indicated that the value of the property was K16,000,000.00. A later valuation done soon after the sale indicated that the value was K18,000,000.00.

I felt that the Bank acted recklessly and without due regard to my interests. I further felt that they had sold the property at an undervalue. I was further confused because I was getting conflicting signals from the Bank. There was the Receivership, then the sale.

In due course, I received a letter dated 11th August 2003 from the Bank advising me that the Bank had received full payment of the purchase price amounting to K8,000,000.00. The Bank further threatened to sell my other property at Chimwankhunda.

However, by my letter to them dated 29th August 2003, I pleaded with them not to sell that property.

For some time thereafter, I continued to receive debit notes which indicated the balance due to the Bank. I felt bad and did not see the need to pay considering the fact that my Resthouse had been sold at an undervalue.

I finally decided to seek legal advice and my lawyers wrote to the Bank querying the manner in which they had handled the whole transaction. When there was no response from the defendant, I instructed them to commence these proceedings.

Later I learnt that the Resthouse has been formally transferred to Farsha Investments who are operating it as Kanjedza Lodge.

I am complaining that the manner in which the property was sold resulted in fetching a low price. In my inquiries the property was sold by the lawyers and not professional estate agents who could have perhaps tried to fetch a good price.

He tendered exhibits as part of his evidence. In cross-examination he stated that valuation prior to the sale put the value of the property at K16 million. He agreed that he bought the property for K3.1million. However, at the time a dollar was pegged at K15.60 while at the time of the sale the same dollar was now at K109.00. He said valuation was done in December 2002 and was valid until June 2003. He was not sure of exactly when the property was sold but he believed it must have been between December 2002 and September 2003. He stated that he was not involved in the sale transaction. He stated that when Mr Makhambera collected the keys for the property, the plaintiff became confused on what was going on.

In re-examination he said that the Malawi kwacha was always depreciating against the dollar and price of real property was always appreciating. He made reference to **Exhibit P14** and stated that the value of the property in April 2003 was K18 million and that was 1 year 4months after the earlier valuation. He insisted that selling the property for K8,000,000.00 was still an undervalue.

The 2nd witness for the plaintiff was Samuel Maxwell Nhlane, a consultant in property valuation and estate management. He adopted his witness statement as follows: -

In December 2001, (sic 2002) I was engaged by Mr Lorgat to do a valuation of his Limbe Resthouse.

According to the circumstances then prevailing and in my experience, my opinion was that the value of the property was K16,000,000.00. The

valuation report is the document identified in the statement of Mr Lorgat.

In my professional judgment the amount of K16,000,000.00 would be the amount to be paid by a willing buyer to a willing seller. A prudent property owner would sell his property at that price.

If a prudent property owner cannot find a purchaser around that price, then it would not be wise to proceed with the sale.

I arrived at that figure of K16,000,000.00 after having taken into account all the circumstances prevailing at that time on the property market.

The valuation normally guides the property owner as regards the prices he could be looking for. In a properly conducted sale, it is possible to obtain an offer which matches the valuation or more

My experience is that in property matters, the seller must advertise the sale adequately and sufficiently before the actual sale. A property advertised for sale attracts many buyers and one can easily determine the open market value of the property at which to sell his property.

Sometime after the valuation, I do remember receiving a letter from Messrs Chagwamnjira and Company and in my response, I explained the difference between a forced sale situation and one where there is a willing buyer and a willing seller. In either case, the valuation should operate to guide a prudent seller of property.

He stated that the valuation report was made in December 2002. In cross-examination he said that there is no coersion when someone is willing to sell. He stated that in a properly conducted

sale by auction where there have been advertisements, some bids may be higher than the valuation price or equal or below that price. This occurs in both auction sale and sale by tender. He said in his opinion the Bank (defendant) was the willing seller while the buyer was a willing buyer. He could not comment if the defendant was forced to sell in the absence of knowledge of the actual circumstances. On the issue of advertisements he stated that the number of advertisements depends on the nature of property. For example, he stated that for a house, 2 weeks advertising for thrice a week would be adequate but where the demand is low one may advertise even for a month or more. He stated that in a forced sell the seller wants to get rid of the property for various reasons and the seller decides on the price. He said that in most instances of forced sale, the price is undervalue. However, one may be lucky to get a proper price.

In re-examination he stated that when selling property like the rest house which he valued, the property was in low demand and not many people would be interested in it. The market for such a facility would be limited and it was necessary for such a property to be adequately advertised. He estimated a period of one month for advertisements. He said that if he were the one selling he would keep on advertising until he got a price close to his expectation. He stated that property value is affected by market economy and that is why valuation report if made valid for 6 months or less. He said normally the price goes up. He said that the value may remain static but it never goes down.

The 3rd witness for the plaintiff was Geoffrey McDonald Wawanya, a Chartered Valuation Surveyor of Landed Property Agents who adopted his statement where he stated as follows: -

> ***I am a Chartered Valuation Surveyor. I am the Senior Partner in the firm known as Landed Property Agents. I also have vast experience in selling properties.***
>
> ***In April 2003, I was approached by the plaintiff to do a valuation of Limbe Resthouse. The copy of the valuation is the document that has***

been identified. In my experience, a valuation operates as a guide before property is put out into the market for sale.

According to the circumstances prevailing at the time, the market value of the property was K18,000,000.00.

In my experience, I have discovered that before any property is sold, it is very import to advertise the sale adequately. The advertisement ensures that you invite as many bidders as possible and in that way, the chances of obtaining a good price are high as well.

In cross-examination, he stated that the valuation report relates to valuation which was done in April 2003 and that any reference to April 2004 is erroneous. He explained the concept of willing buyer/seller situation and that it differs from forced sell situation. He stated that where a mortgagee is desperately looking for its money, it would be a forced sell. He stated that in his opinion as sought by counsel, he believes that whoever is to sell property has a duty of care towards the owner of the property and he should obtain the price under the circumstances and that advertising would help achieve that price because may possible bidders would be attracted. He said there is no rule of thumb on the number of advertisements for sale of property.

In re-examination, he stated that the number of advertisements would be determined by the desire of the seller to expose the property to the market to many people as possible and thereby achieve the best price. He doubted that one advertisement would achieve that effect.

This marked the close of the case for the plaintiff. The defendant called two witnesses. The 1st witness for the defendant was Alex Chigwale who adopted his witness statement in which he stated as follows: -

I am the Senior Advances Manager for the defendant and I handle all accounts where loans have been advanced.

The plaintiff obtained a loan from the Bank and gave two securities for the loan one of which was Limbe Resthouse.

We instructed our lawyers Chagwamnjira and Company to handle the matter in the process of which they sold the property by open tender. The said sale was conducted before the appointment of the Receiver and the final transactions were done after the appointment.

In view of the fact that the property was a functional Resthouse and that it was not possible to have vacant occupation at any point in time it was felt necessary to appoint a Receiver who would run the Resthouse from the date the property was offered for sale to the date Consent was obtained and final payment made.

The further reason for this was to safeguard the state of the property because once it was clear that an offer had been accepted the care of the property could not be guaranteed.

The property was sold for K8 million which in the view of the valuer is not a bad offer. He exhibited a valuation report – Exhibit D2 which stated as follows:

RE: VALUATION OF PLOT NO LW 50 LIMBE RESTHOUSE

Your letter on the above matter refers. As you have ably explained the value in the quoted valuation report prepared by us is open market value. Obviously in the situation of a forced sale, the sale value would go down and nobody can advise you the value for a forced sale as this would depend on how low the seller is prepared to go in order to achieve a sale. In a case of an auction, the value would be the highest bid achieved.

Yours faithfully

SAM NHLANE
for: SMN Property professionals

In cross-examination, he stated that the debt was not being serviced and despite repeated demands for repayment, the plaintiff was not paying and instructions were given by the defendant to M/S Chagwamnjira and Company to recover the debt through sale of charged property.

He said that he did not specify to the lawyers the mode of sale i.e. whether public auction or tender. However, he stated that the defendant wished for a transparent sale reaching for a wide spectrum of buyers. He said such a wide spectrum can be reached through advertising in the newspapers. He said that a single advertisement would not achieve that effect. He said that the letter of demand was requesting for payment of K9,528,721.34. The property was sold around February/March 2003 and that by that time the debt might have gone up to K15 or K16 million because interests rates were then very high. From the time the letter of demand was sent to the time of sale of the property, there were 8 months. The delay was not caused by the plaintiff or defendant but the plaintiff is obliged to pay for the delay on the mortgage. He stated that he did not tell M/S Chagwamnjira to sell the property for K8 million but that he communicated that the loan outstanding then was in the region of K9 million. He admitted that the property had prior to the sale been valued at K16 million. He said that the valuation report was not disregarded. He said that even in a forced sale, a valuation report is taken into account. He said that a Receiver was appointed about 10th March 2003 but did not know the exact date of sale.

In re-examination he stated that although the chargee may desire to recover the debt, there could be losses in the process and that in the event of interest still being payable, the chargor or borrower is liable to pay.

The 2nd witness for the defendant was Mr Dick Chagwamnjira who adopted his amended witness statement. He stated as follows:

The same has been necessitated by two amendments to the statement of claim on adequacy of advertising and on the adequacy of the price obtained and generally on general handling of the sale.

Limbe Resthouse, the subject matter of this claim was advertised three times in the newspapers as already indicated and in addition to such advertising the property being a special property, interest groups were advised about such sale in addition to the newspaper advertisement, copy of the other advertisement in the Nation and Daily Times newspaper.

When a property is up for sale the nature of the property itself will determine what type of advertising campaign you will do.

If the property is residential and is in a high density area and below a given bracket in price the advertisement is also different as compared to one in a high density area demanding more money.

If the sale is a factory or a rest house like in the present case or office complex, it is imperative to involve interest groups because of the calibre of people who would be interested.

For Limbe Rest house after the first advertisement the following special groups were advised of such a sale going on:

- **M/S Lakeshore Adventures Limited, P. O. Box 30356, Chichiri, Blantyre 3 by a letter dated 6th February 2003.**

- **The Raval Brothers Trading as Motel Paradise, P. O. Box 848, Blantyre by letter dated 6th February 2003.**

- **M/S Alexander Hotels Limited trading as Boadzulu and Kambiri Holiday Resorts (a Mrs Makawa) was advised by a letter dated 9th February 2003.**

- **M/S Victoria Hotel, P. O. Box 31124, Chichiri, Blantyre 3 who eventually put in a bid as Farsha Investments who ended up being the buyers. A letter dated 8th February 2003 was written.**

- **Honourable Nicholas Kachingwe trading as City Works being owners of two lodges in Lunzu was telephonically advised.**

- **Captain Lewis Mbilizi of Michiru Lodge and Entertainment Corporation, P. O. Box 1805, Blantyre was advised in a letter dated 12th February 2003. A bid was received.**

This being a special property three advertisements in the newspapers and several letters to interest groups could not be said to be inadequate exposure on the market.

Comparatively, we also sold two properties for the plaintiff in the same year 2003: one is a house in Namiwawa which was advertised only twice by Landed Property Agents and an acceptable price of K5,500,000.00 was obtained at an auction with two advertisements only.

Secondly, through the same Landed Property Agents Limited we instructed them to sell a property which belonged for the plaintiff herein namely CHICHIRI 42 where with two advertisements a price of K13,000,000.00 was obtained which in our view was too low for the property. My firm re-advertised once in the Daily Times and we were able to get bids for K14 million, K16 million, K9 million and K20 million and we closed the deal with Nantipwiri Trading at K20 million on a lone advertisement after the same Landed Property Agents who got a good deal on the Namiwawa property after two advertisements were unable to get the K20 million on Chichiri 42 which we got. It is important to mention that the two properties were advertised by Landed Property Agents twice and we advertised Chichiri 42 once and got the best deal.

It is clear that selling a property has nothing to do with how many advertisements you place in a newspaper. The property will sell itself if it is in good shape and at a good location and it does not matter who sells it to obtain the best price. We got a good price for Namiwawa house through Landed Property Agents and we failed to get a good price with the same sellers for Chichiri 42 and yet in the same period and with one advertisement we got K7 million more on the same property improving the sale from K13,000,000.00 gotten by Landed Property Agents to K20 million on a lone advertisement.

Limbe Rest house could not sell for good money because of the location where it is which is disadvantageous:-

a. **It is next to a busy market with Chibuku taverns next door.**

b. **It is in Limbe and it is on a difficult access road.**

c. This was a Resthouse which previously belonged to

Government and was in bad shape. At the time of sale there was no water and electricity and it had fallen in disrepair.

All these are factors which buyers take into account. In property sales, it is not who is selling that matters. It is the state and location of the property that matters.

When my firm was instructed to realize security on this matter, we studied the charge documents, the loan agreement documents and also the valuation document which has been exhibited already.

From the valuation report it provided that the price indicated in there is market price that can only be obtained if the following conditions have been met and accomplished: -

In this report, land and buildings valuations are on the basis of open market value as defined in ROYAL INSTITUTE OF CHARTERED SURVEYORS GUIDANCE NOTES i.e. asset value (capital value) is the best price at which an interest in a property might be expected to be sold at by private treaty at the date of valuation assuming the following factors:-

i) *willing seller and willing buyer situation*

ii) *reasonable time within which to negotiate the sale taking into account the nature of the property and the state of the market.*

iii) *the assumption that the values will stagnate throughout the sale period*

iv) *that the subject property will be freely exposed on the open market through advertisements*

v) *no account is to be taken of an additional bid by a special purchaser.*

The loan document and the charge however showed that the loan is payable on demand which is a normal term of Bank loans.

The charge also provided that once the debt has been called up and the property foreclosed the Bank will sell the property as Sellers.

By virtue of the charge, the plaintiff agreed that the defendant shall not be liable for any involuntary loss as a result of the execution or any powers under the charge.

In pursuance of such powers the Bank proceeded to sell and closed deal with Messrs Farsha Investments at K8 million (and they cannot be faulted and no claim can ensue vide:)page 6 paragraph 9 of the charge.

Further as has already been shown, the valuer who did the valuation for the property was asked before the deal for K8 million was concluded for his professional judgment as to how far you can go down from the K16 million and he advised that for a forced sale there is no guideline as to what is reasonable and how far a seller can go.

A forced sale is a term in the <u>Property and Banking Law</u> that relates to sale of property by a Bank on a person who has defaulted on his loan as contrasted to sale by the owner in his own time which is referred to as a willing seller sale which was the premise on which the valuation report was founded.

Among other matters that was done before sale was commenced was to check the valuation roll with Blantyre City Assembly which would give a price as to the value of improvements and of the Land itself.

We also checked on other transactions at the Blantyre Land Registry involving the same property and it was found that the property was bought three years earlier for K3,500,000.00.

Based on these searches we wrote a letter to the Land Registrar for purposes of a reserve price and a copy of such a letter is shown.

The price of Limbe Resthouse at K8 million was quite good considering the location of the property, past dealings on the property and the valuation on the valuation roll which was done without any inducement from the owners of the property and as it is the owners of the property who paid for the valuation for K16 million and further it was the amount on the valuation report that determined how much the valuer would get from the plaintiff.

Further, the property had been bought by the plaintiff for K3,5000,000.00 three years earlier (and K5 million on top cannot be said to be low in my professional view).

In cross examination he stated that there were no contradictions in his evidence relating to advertising campaign and securing best price. He stated that the best type of advertising that would be ideal for resthouse would be advertisement in newspapers followed by contacts of people in that industry because it is a specialised industry. He said that advertising in the papers is obligatory as it gives wide publicity. He conceded that the contacts he made of the industry members was a selective process and that other people outside the industry would also be interested in the property. He defended his process by saying that it was only supplementary to

the advertisement. He was not knowledgeable of the impact of spacing advertisements in series. He denied that the three advertisements appeared in one week. He said people have different motives for buying a house or a resthouse. He argued that if the resthouse was in good shape it would easily fetch a lot of money even just after one advertisement. He admitted that a resthouse or an office is a specialised property. He stated that the property was sold by private treaty for all intents and purposes. When he wrote the Land Registrar on the reserve price for the resthouse, the witness did not receive any response. On the advertisement dated 5thDecember 2002 he said that he invited for offers in excess of K8 million and that by that time he had already seen the copy of the valuation report which placed the value of the property at K16 million. He further stated that in his opinion he did not think it was necessary to send a copy of valuation report to the Registrar to assist the Registrar to form an opinion on the reserve price. He stated that at some point a Receiver was appointed under the powers conferred on the defendant in the charge to receive proceeds from the resthouse business. In the present case the Receiver was appointed after the offer had been accepted by the defendant but before the full purchase price was paid. The witness said he could not remember the exact dates. When he was shown letter to Mr F Gani dated 25th February 2003 he stated at that time there was no contract. When he was shown letter dated 5th March 2003 from M/S John Chirwa and Partners the witness said he could not remember if at that time there was a contract and the court observed that the witness was becoming evasive, defensive and emotional. He said that the Receiver was appointed by an instrument dated 4th March. He stated that Mr Chris Makhambera was working for his firm and it is the same firm that sold the property. He said he could not lose objectivity and that the Receiver was not involved in the sale. Further that his firm did not determine the price but the bidder did. He stated that all the proceeds of the sale went into liquidation of debt account and nothing for the legal fees. He said that at the time of the sale the debt account was K13 million but could not remember with exactitude.

In re-examination he stated that the property was advertised in print media and letters to interested groups. There were two advertisements in the daily papers and one in a weekend paper and six letters to industry members.

He confirmed that the valuers report came earlier than the conclusion of the sale of the property. Equally, the letter to the Land Registrar on reserve price was earlier than the conclusion of the sale of the property. Again that the appointment of the Receiver was earlier than the conclusion of the sale of the property.

This marked the close of the case for the defendant.

Both parties made written submissions for which this court is greatly indebted.

ANALYSIS OF THE LAW

The starting point is section 60 of the Registered Land Act Chapter 58:01. Section 60(1) states in the following:

> ***" a proprietor may, by an instrument in the prescribed form, charge his land or lease or charge to secure the payment of an existing future or contingent debt or other money or money's worth or the fulfilment of a condition, and the instrument shall, except where section 68 has by the instrument been expressly excluded, contain a special acknowledgement that the chargor understands the effect of that section, and the acknowledgement shall be signed by the chargor or, where the chargor is a Corporation, by one of the persons attesting the affixation of the common seal".***

A charge is by all means a binding contract between the chargee on the one hand and the chargor on the other hand. This then means that the parties thereto have a duty to go by the terms thereof and those legal terms as may be applicable.

Section 68 of the Act clearly states that if default is made in payment of a principal sum or of any interest or any other periodical payment or of any part thereof in the performance or observance

of the agreement in the charge, the chargee has the power to sell the property provided all the requirements under the said section have been met by the chargee.

APPOINTMENT OF RECEIVER

Section 68(2) of the Act states that if the chargor does not comply with the notice under sub-section (1), the chargee may either appoint a receiver of the income of the charged property or he may sell the charged property.

However, the provision to section 68(2) states that if the second option is employed, no sale shall be exercised unless the chargor fails to comply, within three months of the date of service, with a further notice served on him under that sub-section.

In terms of section 68(2) of the Registered Land Act, a chargee is entitled to two remedies upon default being made by the chargor. These remedies are:-

(a) selling the charged property;

(b) appointment of Receiver.

The proviso to section 68(2) expressly stipulates that a chargee who has appointed a Receiver may not exercise the power of sale unless the chargor fails to comply within three months with a further notice similar to the one made section 68(1).

Can it then be said that in terms of section 68(2) of the Registered Land Act, these remedies are mutually exclusive? The chargee exercises either one or the other, but not both at the same time. The plaintiff submits that this is the position but the defendant submits that the second notice has no effect and is irrelevant if at the appointment of the Receiver the property has been sold because no redemption can be effected if the charged property has already been sold to a third party.

DUTIES OF A CHARGEE

The starting point is section 71(1) of the Act.

> ***"Section 71(1): a chargee exercising his power of sale shall act in good faith and have regard to the interests of the chargor and may sell or concur with any person in selling the charged land, lease or charge, or any part thereof, together or in lots, by public auction or a sum payable in one amount or by instalments, subject to such reserve price and conditions of sale as the Registrar may approve; with power to buy it at the auction and to resell by public auction without being answerable for any loss occasioned thereby".***

A mortgagee who (whether by himself or through an agent) is exercising the power of sale is under a duty of care to act in good faith. If the chargor suffers any damage by reason of the chargee's negligence, the chargee is liable in damages*:* ***Cuckmere Brick Co. Ltd v Mutual Finance Ltd*** (1971) Ch.949, (1971) 2 WLR 1207; 2 All ER 636. In ***Cuckmere's*** case, the Court of Appeal held that although a mortgagee is not a trustee of the power of sale for the mortgagor, in exercising the power of sale, however, the mortgagee was not merely under a duty to act in good faith, i.e. honestly and without reckless disregard for the mortgagor's interest, but also to take reasonable care to obtain whatever was the true market value of the mortgaged property at the moment he chose to sell it. Such liability can only be avoided if the mortgagee acts in good faith and takes reasonable precautions to obtain a proper price: ***Farrar v Farrars Ltd*** (1888) 40 Ch. D 395, where it was held that if a mortgagee in exercise of the power of sale acts bona fide and takes reasonable precautions to obtain a proper price, the mortgagor has no redress, even though more might have been obtained for the property if the sale had been postponed. In deciding whether the mortgagee has taken reasonable precautions in the exercise of his power of sale all the circumstances of the case must be looked at: ***Kennedy v De Trafford*** (1897) AC 180. ***Kennedy v De Trafford*** was a case where a mortgagee sold mortgaged property to one of two mortgagors who were entitled to the equity of redemption as tenants in common for a sum equal to the mortgage debt. When considering an issue relating the propriety of the case, the House of

Lords held that in determining whether the mortgagee's conduct in that respect comes up to the required standard, regard must be had to all the circumstances of the particular case. Thus, in ***Mc Hugh v Union Bank of Canada,*** (1913) AC 299 the Privy Council opined that:

> ***"It is well settled law that it is the duty of a mortgagee when realising the mortgaged property by sale to behave in conducting such realization as a reasonable man would behave in the realization of his own property, so that the mortgagor may receive credit for the fair value of the property sold". Ibid at page 311.***

The onus of proving that he has acted in good faith and that reasonable precautions have been taken lies on the mortgagee: ***Tse Kwong Lam v Wong Chit Sen*** (1989) I WLR 1349. Where it was held that a mortgagee who wishes to secure the mortgaged property for a company in which he is interested ought to show that he protected the interests of the borrower by taking expert advice as to the method of sale, as to the steps taken to make the sale a success and as to the amount of the reserve.

FINDINGS OF THE COURT ON THE LAW AND FACTS

I will start with the issue on whether or not the matters are **res judicata** pursuant to the decision of Justice Mwaungulu in Civil Cause Number 3917 of 2002 between the same parties. What was the matter before my brother? I will do no better than quoting how he introduced the matter as follows: -

> ***This is an application, possible under Order 29 rule 1 of the Rules of the Supreme Court, by the defendant, Mr Lorgat, for an interlocutory injunction. At some stage, Mr Chagwamnjira, appearing for the plaintiff, proceeded as if the plaintiff, First Merchant Bank, applies to dissolve an injunction. The defendant on 13th January 2002 obtained ex parte an injunction essentially preventing the plaintiff, a chargee, from exercising a power of sale under a charge on property Limbe West***

> ***KJ 23/3. Today's hearing is inter partes. This Court has to decide whether this injunction should continue. The question resolves itself to deciding whether on the evidence this Court should grant the defendant the interlocutory injunction he requests.***

The defendant argued that the plaintiff had waived his right to exercise the power of sale under the charge by commencing a court action. The finding of the judge was as follows: -

> ***I have extreme difficulty thinking a mortgagee or chargee or taking an action for principal and interest thereby loses remedies under the charge or mortgage. In one instance, the rule yields injustice: when the principal and interest exceed the security's value. The mortgagee or chargee would only pursue the mortgaged property by execution. Yet, nothing would prevent her first getting principal and interest from the mortgaged property and sue and execute for the balance by other means. Moreover, a mortgagee or chargee who sues for the principal and interest does not, as is suggested for the defendant, thereby wave any remedies under the charge or mortgage. The mortgagee or chargee can pursue remedies concurrently subject, of course, only to agreement or statute. Consequently, a mortgagee can at the same time take, sue for payment on the chargor's covenant to pay the principal and interest, possession of the mortgaged property and foreclosure:*** **Lockhart v Hardy** ***(1846) 9 Beav. 349;*** **Palmer v Hendrie** ***(1859) 27 Beav.349, 351: and*** **Barker v Smark** ***(1841) 3 Beav 64, 65 per Lord Langdale, MR. Moreover, the mortgagee can include all these claims in one action:*** **Greenough v Littler** ***(1880) 15 Ch.D 93: and*** **Farrer v Lacy, Hartland & Co.** ***(1885) 31 Ch.D 42. The chargee, therefore, does not waive the right to exercise her power of sale by commencing an action to recover the principal and interest.***

> ***The defendant, therefore, is not entitled to a permanent injunction at the end of the trial. On the facts there is no triable issue entitling the defendant to an interlocutory injunction. I, therefore, dismiss the application for interlocutory injunction and set aside the <u>ex parte</u> injunction. The plaintiff will have costs.***

My view is that the issue decided by the judge was narrower than what I am being called upon to decide. In that case, it was an issue of whether or not an injunction could be granted to stop exercise power of sale. The current proceedings relate to the issue of whether or not that power of sale was negligently exercised or the sale was recklessly done without due regard to the interests of the mortgagor. Further, the current proceedings also raise a legal issue of whether the mortgagee can concurrently appoint a Receiver and at the same time exercise power of sale of the mortgaged property? My decision is that the matters are not **res judicata.**

The other issue for disposal is whether or not the exercise of power of sale was irregular and contrary to section 68 of the Registered Land Act. Both lawyers seem to agree that the provision offers two remedies – namely selling the charged property and /or appointment of a Receiver. However, the lawyers are not in agreement, on whether or not these remedies are mutually exclusive or can be pursued concurrently. The plaintiff submits that these remedies are mutually exclusive and that the chargee cannot exercise both powers at the same time. The defendant, other the other hand has contended that the second notice has no effect and is of no relevance if at the appointment of the Receiver the property has already been sold. The decision of this court is simply that section 68 of the Registered Land Act provides for two remedies which are not mutually exclusive. For example, the chargee may firstly appoint a Receiver to manage the charged property. Subsequently, the chargee may give notice to exercise power of sale. Where, however, the chargee firstly gives notice to exercise power of sale but before actual sale is done, the chargee may appoint a Receiver provided a notice of such appointment is given to the chargor. The decision of this court is that the second notice to the chargor is not irrelevant or superfluous. I doubt that a chargee would appoint a Receiver after exercising right of sale. At that point the charged property shall have changed hands to a third party (the buyer thereof) and why should the seller (chargee) still wish to manage property that is not his or hers? At the most,

the chargee would appoint the Receiver to manage the proceeds of the sale but certainly not to manage the previously charged property.

In the present case, the court will examine Exhibits P8, P9 and P10. Exhibit P9 is Notice of Receiver and Manager pursuant to clause 4 of the charge dated 8th February 2002 and section 71 of the Registered Land Act. It states: -

> **WE, CHAGWANJIRA AND COMPANY,** ***of Dalton Road Chambers, on Dalton Road Limbe, P. O. Box 51865, Limbe, Legal Practitioners for First Merchant Bank Limited*** *hereby* ***give notice that*** **MR CHRISTOPHER ELTON MAKHAMBERA** ***of P. O. Box 51865, Limbe on the 10th of March 2003 has been appointed as Receiver and Manager of the property and chattels of*** **LIMBE RESTHOUSE** ***under powers contained in a Charge dated 8th February 2002.***
>
> ***All income due to the said company should be paid to us and all claims with full particulars relating only to the said LIMBE RESTHOUSE should be forwarded to us as legal practitioners for the Receiver and Manager.***
>
> ***Dated this 12th day of March 2003***
>
> ***Chagwamnjira and Company***
> ***Legal Practitioners for First Merchant Bank Limited***

Exhibit P10 is publication of the above notice in the Daily Times newspaper of 18th March 2003.

Exhibit P8 is a letter from the Receiver/Manager dated 28th March 2003, addressed to Mr Lorgat. It is pertinent to note that it is on the letterhead of Chagwamnjira and Company and the

legal practitioners for that firm are named therein as Dick Chagwamnjira, Precious Chirwa, Chris Makhambera and Dan Kalaya. The letter reads as follows: -

Dear Sir,
PROCEEDS FROM LIMBE RESTHOUSE

As you know, I am the Receiver/Manager of the above captioned property. This knowledge derives from the documents, which I served upon you and confirmation of which receipt you made in the presence of Mr C. C. Nyirenda.

In line with the tenor and intent of those documents I expect you to pay to me the proceeds (accommodation fees) together with all daily incoming bankables from the date of my appointment (10th March 2003) up to the 31st of March 2003 at 9.00 a.m.

I have had to write because as you will definitely recall we had arranged to do all handovers on 18th March 2003, after you had indicated to me that you had received a visitor from South Africa in transit to Lilongwe on business.

Amicably it was felt that much deferment of date could be accommodated. Unfortunately, I have not heard from you since. Hence this note.

Yours faithfully,

CHRIS MAKHAMBERA
Receiver/Manager

cc: ***First Merchant Bank (MW) Limited***
P.O.Box 412
Blantyre.

Manager
Limbe Resthouse
Limbe.

By letter of 11th August 2003, the defendant informed the plaintiff that it had received a full payment of K8 million from the purchasers of Limbe West KJ 23/3. Further, that the plaintiff's account had been debited with K1,642,004.74 being legal fees on the debt recovery. The defendant informed the plaintiff that outstanding debt on 5th Account was K5,757,337.68. The defendant threatened to sell the plaintiff's other property situate at Chimwankhunda and registered in the name of Craft Pottery Industries Limited. (This is **Exhibit P15).**

By letter of 29th August 2003 in response to the letter of 11th August 2003, the plaintiff ***inter alia*** pleaded for mercy as follows: -

> ***I humbly request you not to sell my Chimwankhunda CM2/143 but to consider writing off the remaining debt. This is the only property I now rely on for my rental income after sharing out the filling stations to my children. The economic situation prevailing in the country has really hit me hard.***
>
> ***I do not need to go again into the background details pertaining to the overdraft, since you are most aware of it but I feel I must mention that it was not of my making. On discovery of some irregularities, I came forward and volunteered all the information. Please do not punish me further because of my good heartedness in offering documents for the properties. I believe the principal sum involved has been paid together***

with a lot of interest hence my sincere request to overlook the remaining balance and consider writing it off.

The plaintiff instructed M/S Tembenu, Masumbu and Company to demand from the defendant an account of: -

(ii) Receipts by the Receiver and how the same were appropriated with details of expenses and fees.

(iii) How the money realised from the sale was applied, with details of expenses and fees.

(iv) How much, if any, is the loan balance after realisation of security.

This contained in a letter of 18th September 2003 **(Exhibit P20).**

After the defendant took out a Notice of Receiver and Manager dated 12th March 2003, there does not appear to have been issued another Notice of intention to exercise right of sale of the charged property. The defendant admits that when the sale transaction was being finalised, the Receiver was already doing his work.

I should believe that the plaintiff was taken by surprise to come across a Transfer of Lease of Limbe West KJ 23/3 from First Merchant Bank (Malawi) Limited (the defendant) to Farsha Investments Limited. The decision of the court is that it was wrong for the defendant to proceed to exercise its right of sale after appointment of a Receiver/Manager without any further notice to the plaintiff.

The final issue for determination is whether the defendant was negligent in the exercise of its power of sale. The defendant has denied the allegation. Perhaps one has to consider the basic elements of negligence – namely existence of duty, breach of that duty and consequential loss suffered by the plaintiff. There is no dispute that a chargee is under a duty to act in good faith

when exercising the right to sell. In fact the defendant has not challenged the legal position concerning existence of duty. The challenge of the defendant is that it acted reasonably and did not breach any duty. The plaintiff has contended that the defendant acted negligently and recklessly. The recklessness manifests itself in the failure to be guided by the valuation; in its failure to seek proper guidance on reserve price and in its rushness to sell before a proper advertising campaign. One should consider the admissions made by Mr Chagwamnjira in cross-examination. Firstly, he had knowledge of the valuation report which placed the value of the property at K16 million. Secondly, he stressed that he advertised in two dailies and one weekend paper within a week and selectively wrote some prospective purchasers. He admitted having set the price in excess of K8 million well knowing that the debt account was more than K8 million. The property was rushed into sell notwithstanding existence of a Receiver/Manager. This court has no doubt that the defendant acted negligently, recklessly and without due regard to the interests of the plaintiff in addition to bad faith. This court decided in **Kalimbuka vs Stanbic Bank Ltd** – Civil Cause No. 274 of 2004 (unreported) that a mortgagee acts in bad faith and negligently where he sells at an undervalue and in total disregard of a valuation. Even in a forced sell the mortgagee is under a duty to obtain the best price in the circumstances. The evidence of Mr Nhlane, a professional valuer was very clear that if the mortgagee cannot secure good price, the sale must be postponed.

With respect to Mr Chagwamnjira, he is a professional lawyer but not a valuer or estate management officer. His opinions cannot stand against the professional opinions of Mr Nhlane and Mr Wawanya. There was therefore need to exercise informed judgment in exercising the power of sale. The Court of Appeal in **Michael v Miller** (2004) EWCA – Civ 282 per Parker LJ stated that

> ***"the need for the mortgagee to exercise informed judgment in exercising his power of sale in turn means that a prudent mortgagee will take advice, including, where appropriate, valuation advice from a duly qualified agent".***

I do not accept the assertion that Mr Chagwamnjira took advice on the price for a forced sell from Mr Nhlane. Mr Nhlane was non-commital and almost leaving the issue to the prudence of

the seller. I cannot say, with respect, that Mr Chagwamnjira acted prudently. If only he had acted reasonably and prudently, I believe that this matter could not have entered into our court system. I make this belief that the debt account would have been wiped off. Instead, the debt has continued to grow because of interest. The plaintiff has suffered loss of his property and incurred growing liability on the debt account. The plaintiff's claim has been proved to the required level. I award the plaintiff damages for negligence. If the defendant had sold the property for K16 million, probably there could have been a surplus of K3 million for the benefit of the plaintiff. Since, this was a forced sale, I would fix the appropriate price at K15 million or K14 million but not less than that. In that event the plaintiff would still be left with between K1 million and K2 million. On the average, I would put his award at K1,500,000.00 on the assumption that his debt with the defendant on the counter claim cannot stand. The defendant is deemed to have recovered this money from the proceeds of the sale of the Rest house. I dismiss the counter claim with costs.

PRONOUNCED in open court this 2nd day of September, 2005 at Blantyre.

Chimasula Phiri

JUDGE