



**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NO. 722 OF 2007**

BETWEEN

RESERVE BANK OF MALAWI PLAINTIFF

-AND-

JAMES BANDA DEFENDANT

CORAM : T.R. Ligowe : **Assistant Registrar**
Chioza : Counsel for the Applicant

RULING

The defendant in this case is an ex-employee of the plaintiff. His employment with the plaintiff was terminated on 31st January 2006. While on employment he got a loan under the plaintiff's Staff Housing Loan Scheme to purchase plot number 49/1/1013 at Area 49 in the City of Lilongwe and build a house thereon. He built the house and by the date of termination of his employment he had an outstanding loan of K1 501 206.34. According to Standing Instruction No. 80, entitled "Housing Loan Scheme for Reserve Bank of Malawi Staff," paragraph 3, the agreement between the parties as regards the loan was that it would immediately become payable upon termination of his services with the Bank. In the event that he is unable to pay the balance, the bank

would sell the property and recover the outstanding balance. If he does not wish to voluntarily vacate the house, the Bank would have the right to evict him.

The plaintiff has brought the present application under Order 113 of the Rules of the Supreme Court. It is supported by an affidavit which exhibits the agreement for the loan and the letter of termination of employment. The defendant in his affidavit in opposition challenges the application. He states that termination of his employment was unlawful and he is challenging it in the Industrial Relations Court. Paragraph 7 of the affidavit in opposition states;

“That according to clause 2 (i) in a member opts to obtain the loan for construction of a house it was a requirement that in order to have the house as security for the loan the parties the parties were required to execute all title document in respect of the loan but no title documents were executed in this respect.” (sic)

I understand this paragraph as referring to clause 2(i) of Standing Instruction No. 80. It provides;

“The payment cheque for the property will only be released on surrender to the Bank of the original Title Deed for the property, together with the certificate of Official Search or a letter to the effect that the seller is the rightful owner of the property. The Official Search Certificate or the letter may be obtained by the seller from the Government’s Lands Registry, the City Councils or the Malawi Housing Corporation, whichever is applicable.

The house purchased or constructed under the scheme shall be charged in favour of the Bank. No further charges shall be allowed on the property until the loan is fully repaid and the charge in favour of the Bank is discharged.”

So, I understand paragraph 7 as meaning no charge was executed in favour of the Bank because in the subsequent paragraphs the defendant deposes that the plaintiff has no legal title or authority to acquire possession of the property. Thus the defendant argues the plaintiff is not entitled to apply for possession of the land under Order 113.

There have been so many applications of this nature between the reserve bank and its ex-employees and almost all of them have been granted either by me or other Registrars before me. However, I have always had a question as to whether the summary procedure under Order 113 is proper for the circumstances between the Reserve Bank and its employees.

Order 113 rule 1 provides;

“Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order.”

In ***Msamala v Thawani*** [1990] 13 MLR 250 (HC) Mwangulu (R) as he then was gave a brief history to the rule. He said;

“The whole Order 113 is a summary procedure provision much like the famous Order 14. It was introduced for the first time by the Rules of the Supreme Court (Amendment No. 2) 1970 (S.I. 1970 No. 944). Prior to the amendment, possession of land could be had by writ and final judgment and, where there was no defence, recourse could be had to the summary procedure under Order 14. These two avenues were inadequate where trespassers, for example, who could not be properly identified, were occupying the property. In ***University of Essex v Djal and others*** [1980] 2 All ER 742, 744 Lord Justice Buckley said:

“From what we have been told (we have not seen any note of his reasons) the judge seems to have reached his conclusion on the ground that by implication the jurisdiction under RSC Order 113 is restricted to making a possession order limited to the particular area which can be said, in the circumstances of the case, to be occupied by a person or persons without the licence or consent of the owner. Counsel for the university has contended that RSC Order 113 is an order which relates to procedural matters only; that it was an order which was designed to meet the difficulty which arose out of the need for owners of property

from time to time to seek to obtain possession against defendants whose identity they could not discover, or the identity of some of whom they could not discover. The order permits proceedings to be commenced by originating summons and discovery, and enables the proceedings to be entertained by the court notwithstanding that the identity of the persons in adverse possession cannot be ascertained. I think that that submission by Counsel is a justified one. The note to the order in the Supreme Court Practice, (1979, Vol. 1 par 113/1-8/1, page 1557) says:

‘This Order does not provide a new remedy but rather a new procedure for the recovery of possession of land which is in wrongful occupation by trespassers. Its machinery is designed to overcome the apparent shortcomings of the present procedural law in two respects, namely ... by providing the procedure for claiming possession of land where not every wrongful occupier can reasonably be identified, the Order overcomes the question whether an order for possession of land can be made and enforced in ex parte proceedings in which no person is named as a defendant ... or only in proceedings in which at least one person is named as the defendant ...’.

I think the order is in fact an order which deals with procedural matters; in my judgment it does not affect in any way the extent or nature of the jurisdiction of the court where the remedy that is sought is a remedy by way of an order for possession. The jurisdiction in question is a jurisdiction directed to protecting the right of the owner of property to the possession of the whole of his property, uninterfered with by unauthorised adverse possession. In my judgment the jurisdiction to make a possession order extends to the whole of the owner’s property in respect of which his right of occupation has been interfered with, but the extent of the field of operation of any order for possession which the court may think fit to make will no doubt depend on the circumstances of the particular case.”

Further, the amendment was in response to the decision of the Court of Appeal in ***Manchester Corporation v Connolly***, [1970] 1 All ER 961. In a judgment

with which the other members, LJJ Widgery and Megaw, agreed, Lord Justice Diplock held that there was no power to make an order for possession and issue a writ of possession on an interlocutory motion before final judgment had been obtained. So Order 113 was introduced to overcome these two procedural problems; it did not create a new remedy.

“...The procedure has been construed restrictively, and the rule applies only to the category of people prescribed in the rule. The first case is the decision of Pennycuik V-C in ***Bristol Corporation v Person unknown*** [1974] 1 All ER 593. At 595 he defines the sort of situation the rule is intended to cover:

“Looking at the words of that rule, it seems to me to be clear that the order covers two distinct states of fact. The first is that of some person who has entered into occupation of the land without the licence or consent of the person entitled to possession or any predecessor in title of his, and secondly that of the person who has entered into occupation of the land with a licence from the person entitled to possession of the land or any predecessor in title of his but who remains in such occupation without the licence or consent of the person entitled to possession or any predecessor in title. That that is the true construction appears to be perfectly clear from the use of the word ‘or’ and if the rule did not cover the second state of affairs which I have mentioned, that is to say of entry with licence and remaining in occupation without licence, then the words ‘or remained’ would, so far as I could see, have no significant meaning at all. Obviously there never could be proceedings against someone who had entered but did not remain in occupation of the land.”

It is clear from the reading above that Order 113 was targeted at trespassers.

Coming back to Reserve Bank and its ex-employees, in ***Reserve Bank of Malawi v. Stephen Mabaleka Ng’oma*** Civil Cause No. 500 of 1996 Mzikamanda SDR as he then was said at page 2;

“I have examined the requirements of Order 113 of the RSC and what order to make in the present circumstances. The plaintiff is more interested in the

recovery of the money rather than the house although recovery of the house is the priority objective of the application.” (Emphasis supplied).

Paragraph 113/8/2 of the Rules of the Supreme Court on the scope of Order 113 emphasizes the limited nature of the Order. It states in part that;

“In proceedings under this Order, the only claim that can be made in the Originating Summons is for the recovery of possession of land; notwithstanding O.15, r.1, no other cause of action can be joined with such a claim in proceedings under this Order, and no other relief or remedy can be claimed in such proceedings, whether for payment of money, such as rent, mesne profits, damages for use and occupation or other claim for damages or for an injunction or declaration or otherwise. The Order is narrowly confined to the particular remedy described in r.1.”

As it was observed in ***Reserve Bank of Malawi v. Stephen Mabaleka Ng’oma*** the Bank is more interested in the recovery of the money than the land. In ***Reserve Bank of Malawi v. Catherine Njolomole*** Civil Cause No. 186 of 1997 the plaintiff’s application under Order 113 was justified as the parties were bound by clause 5 of the then Housing Loan Scheme which gave the employee an option to repay all outstanding sums of money and retain the house or surrender the house in case of a dismissal. The court held that that clause was crucial because it imported the construction that rights of possession remained with the employer until after full payment of the loan.

It appears the provisions of the Loan Scheme were amended. There is now Standing Instruction No. 80 made on 10th February 1998. However, it still remains that its provisions aim at recovering the money rather than the house.

Paragraph 3 provides;

“Retirement, Dismissal, resignation and Termination

- (a) If a member of staff retires, resigns or is dismissed from the services of the Bank or his service terminated, the outstanding amount of the loan will immediately become payable.

(b) In the event that the ex-member of staff is unable to pay the balance, the bank will sell the property and recover the outstanding balance including all expenses incurred in the process of effecting the sale.

(c) Any surplus funds will be paid to the ex-member of staff. In the event that the ex-member of staff does not wish to voluntarily vacate the house under the proper procedure, the bank will have the right to evict such a member.”

A reading of paragraphs 2(i) and 3 of Standing Instruction No. 80 clearly brings out a charge and chargor or a mortgagee and mortgagor relationship between the bank and the employee such that Division 3 of the Registered Land Act or common law principles as to mortgage would apply. Therefore there would be no need for any application before court to enforce payment of the balance other than following the law as to charges and mortgages.

Perhaps the bank misses one step after the loan is granted to an employee. It would appear no charge or mortgage is executed as required by paragraph 2(i) and so it would appear the bank has no authority to sell straight away.

In all I have difficulties to appreciate how the bank's ex-employee becomes a trespasser in view of the provisions of the Staff Housing Loan Scheme. My view is that this application is misconceived and therefore it is dismissed.

Each party bears own costs.

Made in chambers this 1st day of July 2008.

T.R. Ligowe

ASSISTANT REGISTRAR

