JUDICIARY

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NUMBER 1824 OF2007

BETWEEN:

J. A. CHIMWAZA ……..……..PLAINTIFF

- AND -

NEW BUILDING SOCIETY……...…….DEFENDANT

CORAM: THE HONOURABLE JUSTICE E. B. TWEA
Mr E. Banda, of the Counsel for the plaintiff
Mr N. Misanjo, of the Counsel for the defendant
Mrs V. Nkhoma – Official Interpreter

R U L I N G

Twea, J

This is as application by the defendant seeking leave to appeal out of time and leave to appeal.

The gist of the matter is the Judgment of this court dated 24 January 2007. The court ordered a "mandatory injunction requiring the defendant to complete the sale and transfer of the property to the plaintiff within the next 30 days subject to the plaintiff making all the requisite payments."

In its affidavit in support of leave to appeal out of time the defendant avers that "requisite payment" has been interpreted differently, between the two parties. The defendant interprets it to mean "money unpaid plus interest" while as the plaintiff interprets it to mean "money unpaid." Further the defendant averred that should its interpretation prevail then there would be no need to appeal because the yield would be sufficient to pay a third party to whom the house in issue was sold.

At the end of the day the crux of the matter is what the Judge meant by the terms "requisite payment" in the judgment?

The term "requisite" has not been defined legally. However, 'The Shorter Oxford English Dictionary' defines it as an adjective which means:

> "required by circumstances or the nature of things."

The Oxford Advanced Learners Dictionary defines it as an adjective which means:

> "required by circumstances or necessary for success."

and as a noun which means:

> "thing needed for a purpose"

In my view the Judge used the word as an adjective, hence this dispute.

I bear in mind that the substantial interest of a mortgagee in mortgaged property is security to recover his debt. This will depend on the terms of the

mortgage and rules of equity.[1] In the present case the dispute was on the mortgage itself and, according to the ruling, the Judge he found it equitable that the respondent should have the house in issue. There are concerns about the property having been sold to a third party, the respondent having lived in it free of charge, or money having been paid to a third party. These are issues that the applicant wishes to appeal on if this court does not rule in its favour. The bottom line therefore, in my view, is taking account, by both the applicant and the respondent. This is not done in court. This must be done by the parties before they come to court. In the case of ***Dryden Vs Frost (1838) 3 My. & C2 670 @ 675***[2], Cottenham L. C. said:

> "This court, in settling the account between a mortgagor and a mortgagee, will give the latter all that his contract, or the legal or equitable consequences of it entitle him to receive, and all the costs property incurred in ascertaining or defending such rights."

Be this as it may costs of litigation will not be allowed, except for "just allowances", unless they have been specifically pleaded and claimed at the hearing: ***Millar Vs Major (1818) Crop. Temp. Cott. 550***[3]

Admittedly, this case has its own peculiar features, however, this does not absolve the parties from taking the account of their entitlements in respect of the court order. The general rule for taking a mortgage account is to take it as a continuous debtor and creditor account. A Mortgagor, unless there is an

[1] The Law of mortgages, Sweet & Maxwal, London 1989 page 440
[2] Ibid p. 451
[3] Ibid p. 451

express contract, is never compelled to pay interest on interest in arrears: ***Parker Vs Butcher (1867) L. R. 3 Eq 762***[4].

If the parties comply with the rules, there will be less conflict in the bill of costs raised and thus less disputes as to what is payable or who is entitled to what.

In this respect therefore leave to appeal out of time and leave to appeal is denied. The parties should, take the account of the relationship according to the rules on mortgage debts and account.

This application therefore must fail with costs.

Pronounced in Chambers this 23rd day of January 2008 at Blantyre.

E. B. Twea
JUDGE

[4] Ibid p. 452