

**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY**

CIVIL CAUSE NO. 285 OF 2004

BETWEEN

JOHN BAUTALA..... APPLICANT

AND

THE NEW BUILDING SOCIETY RESPONDENT

CORAM : HON. JUSTICE MZIKAMANDA

: Mr. Mapila/Likongwe, Counsel for the Plaintiffs

: Mr. Msowoya, Counsel for the Defendants

: Mrs. Kabaghe, Court Reporter

: Mr. Bazilio – Court Interpreter

JUDGMENT

MZIKAMANDA, J.

This is a summons for vacant possession of mortgaged property taken out by the New Building Society against Mr. John Bautala. This matter first came to this court in April, 2004 when Mr. Bautala obtained on 30th April 2004 an injunction against the New Building Society restraining the latter from selling the property known as 49/1/377 in Area 49, Lilongwe. As his injunction was obtained ex-parte the court

directed that there be an inter-partes hearing. On 17th June 2004, Honourable Justice Chombo hearing the application ruled as follows:

“On the basis of the facts before me it is only fair that the sale so conducted by the Respondent be nullified. I therefore grant the applicant’s prayer restraining the Respondent, its agents or servants from possessing the said house. The Applicant and the Respondent should agree on how best the Applicant can discharge the outstanding balance.”

The Respondents were dissatisfied and they obtained leave to appeal on 23rd June, 2004.

The matter was later brought before Honourable Justice Kamanga on a summons for vacant possession of mortgaged property under Order 88 of RSC. It is not clear what happened with the appeal. Honourable Justice Kamanga refused to grant the prayer for vacant possession and stated as follows as reasons for the refusal:

“(1) Record shows that Justice Chombo on 17th June, 2004 ruled that as per irregularities that she identified, the defendant herein could not sell the house. That the 2 parties should agree on how best the applicant can discharge the outstanding balance.

(2) On 23rd June, 2004 there was an ex parte summons for leave to appeal moved by the [defendant].

The affidavit herein does not indicated how the 2 parties firstly dealt with the Judges' order of 17th June, 2007. Secondly the position of the appeal has not been indicated.

On those 2 observations, an application such as one sought by defendant to date that has a determinative effect can not be entertained until the above issues are resolved. Application dismissed."

This then is a fresh summons for vacant possession on the same property. The affidavit in support shows that the Respondent having been granted leave to appeal resolved against the appeal and met the Applicant. Fresh repayment arrangements were made that the Applicant pays K5,000.00 monthly installments. The applicant failed to pay the installments and the Respondent felt compelled to exercise its power of sale under the charge. It sold the house on 2nd February, 2006 following the Applicant's default after being given another chance. Following the sale the Applicant refused the bank's officers and agents entry into the house and consequently the purchaser withdrew his offer.

Despite the continuing default on 6th August, 2007 the Respondent offered the Applicant a chance to clear the debt by 31st August 2007. The Applicant continued to default and the house was sold again. The Applicant was given one month to vacate the house. The Appellant protested in writing and he was responded to.

The Applicant was given so many chances to try to redeem his house by clearing the arrears but has failed to do so.

The Applicant is not legally represented but appeared in person. He did file an affidavit in opposition. He argued out his case in opposition.

The genesis of the matter is that the New Building Society advanced some money to the Applicant and the Applicant mortgaged his house Alimaunde 49/1/377. He failed to pay the installments as per the terms of the loan agreement and the Respondent exercised the power of sale under the charge. In a similar application before Chombo, J. the parties were ordered to agree on fresh arrangements. The Applicant defaulted on the new installments. Again the bank exercised the power of sale under the charge. Now they ask for a court order for vacant possession.

In his argument the Applicant stated that he is surprised that he is being forced to quit from his own house. He stated that he and the Respondent could not agree on anything following the order of Chombo, J. Instead the General Manager of the Respondent a Mr. Bizwick shouted at him and called him a thief. It was the deputy general manager, Mrs. Chilumpha who appeared more understanding when he tried to meet them both. He said that he had paid more than enough and enough was enough. His advance was for K50,644.00 of which he only got K40,000.00 and to be repaid over 15 years from 1999 to 2015. To date he has paid K229,800.00 and at times he paid twice a month with a view to liquidate the loan. He finished constructing the house using his pension money from the Malawi Government. Some of the advance money was not given to him but was taken by one of the bosses of Respondent and yet he was being asked to repay that. He

argued that the Respondent put fake figures in his account including costs for the lawyer amounting to K87,259.29, charges by valuers and advertising charges.

This summons is made under Order 88 RSC. That Order applies to any action whether begun by writ or originating summons by a mortgagee or mortgagor or by any person having the right to foreclose or redeem any mortgage, being an action in which there is a claim for specified reliefs such as delivery of possession by the mortgagee or mortgagor or any other person alleged to be in possession of the property. Such an action is called a mortgage action. Order 88 r 3 RSC provides for commencement of action indicating the manner in which such an action should commence. Order 88 r 4 RSC provides for claim for possession. It is clear that under Order 88 RSC the action must either commence by writ or originating summons. Order 88 r 7 RSC provides that where foreclosure has taken place by reason of the plaintiff in a mortgage action for redemption to redeem, the defendant in whose favour the foreclosure has taken place may apply by motion or summons for an Order for delivery to him of possession of the mortgaged property, and the court may make such order there on as it thinks fit. The documentation on the file does not show that at any point the applicant filed for a substantive action whether by way of writ or originating summons. Neither did the Respondent. The initial documents were for an injunction under Order 29 of RSC to which was attached a certificate of extreme urgency. And indeed the first injunctive relief was granted ex parte owing to the extreme urgency. The ruling by Honourable Justice Chombo made inter parties was again granting an injunctive relief. In between the order for inter parties application for an injunction and the hearing of such an Order there was no writ or originating

summons filed in the matter contrary to Order 29 r 3 RSC. In a number of cases in this court failure to file documents for substantive relief have led to the collapse of an action (See Lilongwe Street Vendors Association v Lilongwe City Assembly Civil Cause No. 618 of 2006; Tapingiza and Others v Lilongwe City Assembly Civil Cause No. 884 of 2008; Charles Wemba for and on behalf of the Laity and Clergy of the Anglican Diocese of Lake Malawi v The Registered Trustees of the Anglican Diocese of Lake Malawi Misc Civil Cause No. 34 of 2006). The present summons seems to build on the Applicant's application for injunctive relief. I very much doubt that this is a proper way of commencing an action under Order 88 of RSC.

The manner of commencing the matter adopted by the Respondents has brought in serious problems in that reliance has only been placed on affidavit evidence when it is clear that there are serious issues in dispute herein which can not be resolved by affidavit evidence alone. There is serious dispute as to the amount owing on the mortgage. My sister Judge Chombo found irregularities in the first sale and nullified it with a direction that the parties agree on how whatever balance remained on the mortgage would be liquidated. As Judge Kamanga later observed it was not clear how the order of Judge Chombo was handled. The Respondent swore in an affidavit that the parties agreed to certain terms, but the Applicant said they did not agree on anything. That too raised a serious issue which could not be resolved on affidavit evidence alone. A question might be whether a charge in the terms of the mortgage, if at all, had legal consequences to govern the future conduct of the parties. In fact the Applicant's argument is that he never failed to repay his loan although he may have fallen behind with some of the installments. The Respondent on the other hand said he fell behind and

despite many chances given to him he failed to meet his obligation. That is why the Respondent offered the land for sale. That too is a serious issue which in my view could not be resolved on the basis of affidavit evidence alone.

There is no doubt that this matter has had a troubled experience in these courts. It must be appreciated that these courts recognize the rights and obligations of a mortgagor and mortgagee under any mortgage and will enforce them. As was stated in Msonda v The New Building Society 13 MLR 265, a breach of any conditions of mortgage entitles the mortgagee to exercise its power of sale. Yet an action for recovery of possession of land can not be done through summary proceeding as under Order 113 r 1 of Rules of the Supreme Court. (See Msamala v Thawani 5.13 MLR 250). As to foreclosure or sale under a mortgage See also Munthali v New Building Society 12 MLR 269; Commercial Bank of Malawi v Kara 9 MLR 220). In order for an action under Order 88 RSC to succeed it must first be properly commenced. In the case at hand it was not properly commenced. Further there is disagreement just about everything in the mortgage herein except the fact of its existence. There is disagreement about the terms of that mortgage. The correspondence I see on the file are not clear as to what exactly remained owing before the sale was done or if at all there was money owing. There is dispute about the fact of breach of the conditions of the mortgage. In all the circumstances an order prayed for by the present summons would not be granted. This summons is dismissed with costs.

MADE this 15th day of April, 2009 at Lilongwe.

R.R. Mzikamanda

J U D G E