JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

LAND CAUSE NO. 124 OF 2016

BETWEEN

FRANCIS SYMON MABEDI (MALE) ..... PLAINTIFF

AND

NBS BANK LIMITED ..... DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. George Kaliwo, of Counsel, for the Plaintiff
Mr. Mambulasa, of Counsel, for the Defendant
Mr. O. Chitatu, Court Clerk

ORDER

Kenyatta Nyirenda, J.

Introduction

The Plaintiff filed Ex-Summons seeking two orders, namely:

> *"(a) an order of injunction restraining the Defendant from taking possession of, in any way, dealing with or selling or purporting to sell or completing any purported sale of Title Number Bwaila-6/182 [hereinafter referred to as the "property"] to any intended purchaser or completing the sale or registering any Transfer of Lease of the property pending the final determination of the action herein or further order of the Court; and*
>
> *(b) An inhibition order inhibiting the Land Registrar of the Lilongwe District Registry from registering any dealing whatsoever concerning the property pending the final determination of this action."*

The Ex-parte Summons came before me on 13th October 2016. I granted the two orders subject to an inter-partes hearing on 27th October 2016. The Defendant is opposed to the grant of the two orders.

Facts

The Ex-parte Summons is supported by an affidavit sworn by the Plaintiff [hereinafter referred to as the Plaintiff's Affidavit"]. The case of the Plaintiff is that whilst employed by Reserve Bank of Malawi, he built a residential family home at Title Number Bwaila-6/182 [hereinafter referred to as the "property"] and, on or about the 25th May 2012, he obtained a loan of K12million from the Defendant repayable over a period of 120 months by monthly instalments of K246,315.66 inclusive of interest at the rate of 20.5% per annum. The loan period shall expire in the year 2022. As a condition of the loan, he charged the property as collateral for the loan and the property was registered as Application Number 1353/2012.

In 2013, the Plaintiff retired from the Reserve Bank of Malawi and he was thereafter unemployed for almost three years. It is only on 4th April 2016 that he began working for Catholic University as lecturer. The only income he had when he was unemployed was his pension of K250,000.00 a month which was insufficient to service the loan instalments and his day to day living. He was, therefore, unable to service the loan as required as I was unemployed.

On or about the 29th March 2016, the Plaintiff learnt that sometime in 2015 the Defendant had written him demanding that he should pay all arrears and that if he failed to pay, the Defendant would sell the property but he never received any such letter from the Defendant.

On an unknown date between the 18th day of April 2016 and 15th September 2016, the Defendant sold the property to an unknown buyer at an alleged price of K55 million. The Plaintiff claims that the sale is null and void in that the sale was made in bad faith, wrongly, improperly and in breach of the express and mandatory requirements of ss. 71 and 131 the Registered Land Act (RLA). It is alleged that the Defendant:

> *"(a) misled the Plaintiff to believe that as long as negotiations were on-going the Defendant had suspended its notice of sale and would not sell the Plaintiff's house;*

(b) advertised the Plaintiff's house for sale on the first day of August 2016, without the knowledge or consent of the Plaintiff as a result the Plaintiff's prospective tenant who had agreed to pay K650,000.00 per month three months in advance rescinded the agreement fearing that the Property would be sold;

(c) On the 22nd day of August 2016:

(i) Informed the Plaintiff that he should pay K2, 218,413.49 within 7 days;

(ii) That the whole balance of K22,082,096.73 should be paid in 12 months in monthly installments of K2,218,413.49;

(iii) required the Plaintiff to sign a harsh and unconscionable Loan Settlement agreement containing inter alia the terms mentioned in paragraph (c) (i), (c) (ii) and (c) (iv) hereof;

(iv) Advised the Plaintiff that it would make an offer to a bidder if the Plaintiff failed to pay K2, 218,413.49 within 7 days;

(d) improperly refused to allow the Plaintiff to service his mortgage account regardless of the fact that the Plaintiff has sufficient means and income to service the mortgage from his salary, pension and rental income of the house;

(e) While negotiations were going on the Defendant secretly sold the Plaintiffs house for K55 million to an 'unknown' purchaser;

(f) The Defendant sold the property at an undervalue of K55 million when its true value and worth was or is K70 million or thereabouts."

The Plaintiff further states that on the 22nd day of September 2016, he obtained a Certificate of Official Search from the Land Registrar, Lilongwe District Registry, indicating that as on the 22nd September 2016 the Defendant had not discharged the Plaintiff's charge and had not transferred the property to any intended purchaser. It is the Plaintiff's fear that unless restrained by an interlocutory injunction and an inhibition order, the Defendant will proceed to complete the sale and register the same at the Lilongwe District Land Registry to defeat the Plaintiff's claims and the justice of this case.

The Defendant filed with the Court an affidavit in opposition to the Plaintiff's Affidavit, sworn by Mercy Thandi Mulele, the Defendant's Head of Legal Services. [Hereinafter referred to as the "Defendant's Affidavit in Opposition"]. The Defendant states that it validly exercised its power of sale in good faith, properly and in compliance with all the express and mandatory requirements of the RLA and sold the property to Ulongwe Settlement Trust at the price of K55, 000,000.00. The Defendant does not admit that (a) the property was worth

K70 million and (b) it had suspended its notice of sale at any point during the alleged negotiations with the Plaintiff and that at no point did it undertake not to sale the property. It is also the Defendant's case that the Plaintiff had materially and substantially breached the Loan Agreement on several occasions and *inter alia* failed to report to the Defendant events of default as required and he did not honour his previous proposal to service his mortgage account and did not do so even when he was in employment. It was thus argued that the Plaintiff is not entitled to the interlocutory orders that he seeks.

Application for an Interlocutory Injunction

The main issue for determination with respect to the Plaintiff's application for interlocutory injunction is whether this Court should order continuation of the order of interlocutory injunction, as was argued by the Plaintiff through its Counsel, or dismiss the instant summons, as was argued by Counsel for the Defendant.

An interlocutory injunction is a temporary and exceptional remedy which is available before the rights of the parties have been finally determined: see O. 29, r. 1(2) of the Rules of Supreme Court, **Series 5 Software Ltd v. Clarke & Others [1996] 1 ALL ER 853** and **Ian Kanyuka v. Thom Chumia & Others, HC/PR Civil Cause No. 58 of 2003.** In the latter case, Justice Tembo, as he then was, observed as follows:

> *"The usual purpose of an interlocutory injunction is to preserve the status quo until the rights of the parties have been determined in the action. The injunction will almost always be negative in form, thus to restrain the defendant from doing some act. The principles to be applied in applications for injunction have been authoritatively explained by Lord Diplock in* ***American Cyanamid Co. v. Ethicon Limited [1975] A.C. 396****".*

Is there a serious question to be tried?

In any application for an interlocutory injunction, the first issue before the court has to be "*Is there a serious issue to be tried?*". Indeed this must be so because it would be quite wrong that a plaintiff should obtain relief on the basis of a claim which was groundless. It is, therefore, important that a party seeking an interlocutory injunction has to show that there is a serious case to be tried. If he or she can establish that, then he or she has, so to speak, has crossed the threshold; and the court can then address itself to the question whether it is just or convenient to grant an injunction: see **R v. Secretary of State for Transport, Ex-parte Factortame Ltd & Others (No.2), [1999] UKHL 44.** If the answer to the

Question whether there is a serious issue to be tried is "*no*", the application fails in *limine* (see **C.B.S. Songs v. Amstrad [1988] AC 1013**.

Counsel Kaliwo referred the Court to the writ and Statement which prima facie alleges impropriety and bad faith on the part of the Defendant. As an example, he questioned how the Defendant could be asking the Plaintiff to pay ten times more than the agreed sum. He submitted that these are very serious matters that call into question the transparency and accountability of the chargee as a lender. He further contended that these matters can only be resolved by a full trial involving all relevant witnesses and relevant documents

Counsel Kaliwo placed reliance on the case of **New Building Society v. Amosi C Makoni (2006) MLR 322 (Supreme Court of Appeal, Mtambo, J.A)** for its holding that *"An application for the relief of interim injunction is maintainable, where the respondent is alleging bad faith on the part of the appellants in the exercise of their power for sale"*. He also cited the case of **Wongani Kalua v. Business Finance Limited, Civil Cause No. 340 of 2015, (unreported)** wherein Chirwa, J., quoted with approval the following passage in **Malawi Savings Bank v. Sabreta Enterprises Limited, MSCA Civil Appeal No. 44 of 2015 (unreported)** where Chikopa J.A:

> *"It is rather the facts that (1) the Plaintiff had allegedly fully paid the amount of the loan secured, (2) the Defendant had not complied with sections 66 and 74 of the Registered Land Act before proceeding with the purported sale of the said Property and (3) the Defendant had purportedly sold the said property at an undervalue, which had led this Court to grant the said Order. These alleged facts raise pertinent questions to be determined by the Court at a full trial. For these reasons, the Court would thus not be inclined to discharge the said Order of Interlocutory Injunction".*

The Defendant, on the other hand, contends that there are no serious issues to go for trial. Counsel Mambulasa submitted that the Plaintiff was not servicing his loan facility and, in this regard, the Plaintiff suppressed material facts by not disclosing that he made no payment from 2014 to 2016, except for one payment. Counsel Mambulasa also submitted that the Plaintiff misrepresented facts in that when applying for the loan, the Plaintiff stated that he would service the loan using his salary and not rentals from the property as alleged in the Plaintiff's Affidavit in Reply. In response, Counsel Kaliwo contended that it is actually the Defendant that is suppressing material facts in that it does not want the Court to know that the single payment made by the Plaintiff was a very substantial one, that is, K11, 000,000, which cleared all the arrears.

I have carefully read and considered the affidavit evidence and the submissions by Counsel. One of the vexing questions in the present case is whether or not the Defendant exercised its power of sale in good faith. Unfortunately, the parties are not agreed on the material facts as borne out by the four affidavits filed by the parties herein. The Plaintiff's Affidavit was followed by the Defendant's Affidavit in Opposition. Thereafter, the Plaintiff challenged the averments in the Defendant's Affidavit in Opposition by filing the Plaintiff's Affidavit in Reply. The Defendant responded in kind by filing the Defendant's Affidavit in Reply to the Plaintiff's Affidavit in Reply. The net effect of all these affidavits is that the material facts in the present case are very much disputed

In light of the contestation on both factual matters and the legal questions arising therefrom, I really doubt, and I do not think that Counsel expects, that this case can be resolved at an interlocutory stage before the factual landscape of the case unfolds during the hearing of the substantive case: see **John Albert v. Sona Thomas (Nee Singh), Sukhdev Singh, Samsher Singh and Hellen Singh, MSCA Civil Appeal No. 46 of 2006 (unreported)**. As was aptly put in **Mwapasa and Another v. Stanbic Bank Limited and Another, HC/PR Misc. Civ. Cause No. 110 of 2003 (unreported)**, *"a court must at this stage avoid resolving complex legal questions appreciated through factual and legal issues only trial can avoid and unravel"*. It is enough, accordingly, that the Plaintiff has shown that there is a serious question to be tried: see **Matenda v. Commercial Bank of Malawi (1995) 2 MLR 560.**

In the circumstances, there can be no question of the present application being decided at the first stage of Lord Diplock's approach and it is necessary to proceed at once to the second stage.

Are damages an adequate remedy?

Having dealt with the first hurdle regarding the question whether the Plaintiff has an arguable case, it is time to turn to compensability, that is, the extent to which damages are likely to be adequate remedy for each party and the ability of the other party to pay.

As the subject matter of the present case relates to real property, there is really little to say on the matter. It is trite that every piece of land is of particular and unique value to the owner and damages are an inadequate remedy and, in any case, damages would be difficult to assess. The clearest and fullest statement of the principle regarding inadequacy of damages with respect to land is contained in Chitty on Contract – General Principles, 26th ed., Sweet and Maxwell at paragraph 1868:

> *"Land: The law takes the view that the purchaser of a particular piece of land or of a particular house (however ordinary) cannot, on the vendor's breach, obtain a satisfactory substitute, so that specific performance is available to him. A vendor of land, too, can get specific performance; for damages will not adequately compensate him if he cannot easily find another purchaser or if he is anxious to rid himself of burden attached to the land. It seems to make no difference that the land is readily saleable to a third party; or that after contract but before completion a compulsory purchase order is made in respect of it... Yet in such cases damages (based on the difference between the contract price and the resale price, or the compensation payable on compulsory acquisition) would seem normally to be adequate remedy.".*

The legal position taken by the learned authors of *Chitty on Contract – General Principles* has been fully endorsed by courts in Malawi: see the recent decision by the Supreme Court of Appeal in **Village Headman Kungwa Kapinya and Others v. Chasato Estates Ltd, MSCA Civil Appeal No. 75 of 2016 (unreported)** and the cases of **Sikawa v. Bamusi, HC/PR Land Civil Cause No. 53 of 2013 (unreported)** and **Mleva v. Simon, HC/PR Land Civil Cause No. 53 of 2013 (unreported)** referred to therein.

In the premises, it is unnecessary to consider whether or not the parties will be able to pay damages.

Balance of Convenience

In terms of the guidelines in the **American Cyanamid Case**, it is where there is doubt as to the adequacy of the respective remedies in damages that the question of balance of convenience arises. In the words of Lord Diplock at 408F and G:

> *"It would be unwise to attempt to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached them. These will vary from case to case. Where other factors appear to be evenly balanced it is counsel of prudence to take such measures as are calculated to preserve the status quo."*

The rationale is that if the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark upon a course of action which he has not previously found it necessary to undertake. On the other hand to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial.

The important question to ask is what would happen if the interlocutory injunction is removed? The Defendant would proceed to realize the securities in the Plaintiff's property and have it sold. Thus, in the event of the main action succeeding, the Plaintiff will have suffered irreparable damage and the assessment

Of their loss would be very difficult. In the circumstances, justice demands that the Plaintiff's property must remain intact until the main action is determined one way or the other.

The interlocutory injunction will, therefore, remain in force until the main action is determined.

Inhibition Order

It seems to me that the foregoing analysis in relation to the application for an interlocutory injunction applies with equal force to the application for an inhibition order: see ss. 123, 124 and 125 of the RLA. There is, however, one matter requiring separate attention by the Court.

The Defendant avers in the Defendant's Affidavit in Opposition that it had already transferred the property into Ulongwe Settlement Trust's name at the time that the Plaintiff approached the Court. In the premises, the Defendant contends (in the affidavit) that ex-parte Orders made by the Court on 19th October 2016 were wrongly granted and are of no effect as the property was already transferred into Ulongwe Settlement Trust's name at the time that the Plaintiff approached the Court

The same theme is pursued in the Defendant's Affidavit in Reply to the Plaintiff's Affidavit in Reply:

> *"22. **THAT** failure to have the Sale Agreement stamped may not render it null and void. The Defendant Bank undertakes to have the Sale Agreement duly stamped by close of business today and exhibit a duly stamped one.*
>
> *23. **THAT** Ulongwe Settlement Trust is a bona fide purchaser and it made payment once as reflected in **"MTM 1"**."* – Emphasis by underlining supplied

It is not uninteresting to note that although the issue is touched upon in the two Affidavits as mentioned, no submissions were made on the matter by Counsel Mambulasa. I was not surprised by this development because I know of no authority to the effect that an injunction or an inhibition order cannot be granted merely because an offer for sale of property has been accepted or the full consideration has been paid.

I reckon that the deponent seeks to resort to s. 71(3) of the RLA, which reads:

> *"A transfer by a chargee in exercise of his power of sale shall be made in the prescribed form, and the Registrar may accept it as sufficient evidence that the power has been duly*

exercised, any person suffering damage by an irregular exercise of the power shall have his remedy in damages only against the person exercising the power."

Clearly, s. 71 (3) of the RLA comes into play after a transfer has occurred. Whether or not transfer of the property was effected herein is an aspect that must be proven by evidence. Whilst the Defendant is full of generalities regarding the transfer and has made no attempt to prove that transfer took place, the Plaintiff went out of his way to obtain a Certificate of Official Search from the Land Registrar and the same shows that the Defendant had not transferred the property to any intended purchaser as at 22nd September 2016. In the premises, it is my finding on the available affidavit evidence that transfer of the property had not taken place at the time the Plaintiff was granted the two orders.

It is only after a transfer by a chargee in exercise of his or her power of sale has taken place that remedies are in damages only against the person exercising the power. The legislature in its wisdom has not placed any limitations on the remedies available at a pre-transfer stage. To my mind, the rationale behind s. 73(3) of the RLA can easily be discerned. For starters, fairness to the bonafide purchaser of the property for value dictates that the sale to such a purchaser should not be nullified or vitiated. In the present case, a transfer, as envisaged under s. 71(3) of the RLA, has yet to take place. I cannot, therefore, understand why the Court would on account of s. 71(3) of the RLA confine the Plaintiff to the remedy of damages only: see also **Train Africa Holdings Limited v. Malawi Savings Bank Limited, HC/PR Civil Cause No 88 of 2014** wherein the Court dealt with a similar question at pages 10 and 11:

*"For the sake of completeness, I hasten to add that the present case is also distinguishable from the **Leasing and Finance Company of Malawi Ltd v Sadiki**, which is also often cited for the proposition that "once a chargee exercises its power of sale, a chargor's only remedies are in damages against the charge". In **Leasing and Finance Company of Malawi Ltd v Sadiki,** the facts, in a nutshell, were as follows:*

> *"The defendant pledged his property as security for a loan from plaintiff. The defendant defaulted on repayment instalments and the property was eventually sold by private treaty. The defendant refused to deliver vacant possession of the property to the plaintiff. This led the plaintiff to bring an application under Order 88 of Rules of Supreme Court and sections 68 and 71 of the Registered Land Act seeking an order of the court compelling the defendant to deliver up possession of the property. The defendant argued, among other things, that the sale was illegal and unenforceable. According to the learned editors of Malawi Law Reports (com Series) the court, held, among other things, that 'where a sale is irregular the chargor's remedy is in damages only against the charge'"*

*In my decision in the case of **Kulinji Mafunga v. Litto Phiri t/a Eagle Contractors, HC/PR Civil Appeal 498 of 2012 (Unreported:13th February 2014)**, I have cautioned against placing too much reliance on head notes of cases. The relevant dicta in **Leasing***

and Finance Company of Malawi Ltd v Sadiki*, supra, is to be found at page 36 and it reads as follows:*

> *"The sale in the instant case can, therefore, not be faulted. If anything the defendant could only have a claim in damages against the Plaintiff. He cannot be allowed to continue to cling to the possession of the charged property, which has lawfully been sold to the buyer by the Plaintiff, pursuant to the exercise of its power of sale.*
>
> *It is, however, the considered view of the Court that there would be cases where the sale would indeed be vitiated by some form of illegality. I dare say that one of those cases, of which instant case is not one, would be where the chargee insists on selling the charged property in the face of chargor's expressed willingness to pay off the debt in full and in fact where the charger tenders money for the full payment of principal, interest and expenses prior to the contract for sale, be it by public auction or by private treaty. In such a case, if the chargee insists on exercising his or her power of sale, the sale would not be held to have been effected in good faith and with due regard to the interest of the chargor. In such a case the remedy prescribed under section 71 (3) of the RLA would not be appropriate one and the contract would be null and void. The other situation is if the sale is conducted not in compliance with sections 60 (2) and 68 (2) of the RLA; thus where the right to exercise the power of sale has not arisen in that the sale is purportedly effected prior to the expiration of the three months period following the issuance of the demand notice. There is, in my view, another situation where the sale would be null and void. This would be where the sale is effected in circumstances where the charge and the buyer would be guilty of fraud. This situation would readily come within the provisions of section 71 (1) of the RLA, thus where the charge has not done so in good faith and without regard to the interest of the charger."*
> – [Emphasis by underlining supplied]

To my mind, the defendant in ***Leasing and Finance Company of Malawi Ltd v. Sadiki****, supra, was confined to only a claim of damages because the sale in that case could not be faulted. That case affords no guidance to the present case. As already mentioned, I cannot at this stage determine whether or not the Defendant is acting in good faith in seeking to realize the securities in the Plaintiff's properties when there is an alternative source of financing that can be used to clear the arrears. That is the very question that has to be determined at the trial of the head case."*

The Court's observations in **Train Africa Holdings Limited v. Malawi Savings Bank Limited,** supra, apply to the present case with equal force. The facts herein have not matured enough (or reached a stage) to trigger the application of s.71(3) of the RLA.

Contempt of Court

Before resting, I must deal with one ancillary matter which has caused me great concern. It is to do with the conduct of the Defendant regarding the Interlocutory Injunction and Inhibitory Orders granted by the Court herein. These Orders were granted on 13th October 2016. I am, therefore, deeply shocked to learn that as of 4th November 2016 the Defendant was still taking steps to complete the sale, and/or the registering of transfer of lease, of the property: see paragraph 22 of the Defendant's Affidavit in Reply to the Plaintiff's Affidavit in Reply. There can be no doubt that the Defendant, in taking these steps, acted in breach of the two court orders. In short, the Defendant was acting in contempt of court.

The principle purpose of the law of contempt of court is to preserve an efficient and impartial system of justice, to maintain public confidence in the administration of justice as administered by the courts, and to guarantee untrammelled access to the courts by potential litigants. For this reason, it is essential that court orders are upheld and complied with and a court will commit a defendant to prison where it is satisfied that the defendant has disobeyed a court order.

However, as the issue of contempt of court was not argued during the hearing of this matter, I have come to the conclusion that I am under no duty to pursue contempt of court proceedings herein. I will, therefore, say nothing more about the question of contempt of court save this: it is very important that financial institutions, of all persons, must be astute enough to ensure that they comply with court orders to avoid giving credence to the growing perception that financial institutions routinely disregard court orders on account of the fact that they have the financial capacity to easily satisfy any monetary sanctions imposed by the court.

Conclusion

To sum up, I see no merit in the prayer by the Defendant that the two orders be set aside, or discharged or dissolved immediately. To the contrary, most of the matters put forward by the Defendant merely serve to confirm, in my view, that serious legal issues are raised on the sparse and agreed facts of this matter to warrant a trial on the basis of which I should accord the Plaintiff the interim reliefs sought. In the premises, the injunction and inhibition orders granted herein on 13th October 2016 shall remain in force until the main action is determined.

Pronounced in Chambers this 12th day of December 2016 at Blantyre in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE