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REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

LAND CAUSE NO. 25 OF 2014

BETWEEN

GERALD HILLARY MNYEMA.....CLAIMANT

AND

INDEFUND LIMITED.....DEFENDANT

CORAM: **WYSON CHAMDIMBA NKHATA (AR)**

Mr. Lihoma - Counsel for the Claimant

Mr. Mbale - Counsel for the Defendant

Ms. Chida - Court Clerk and Official Interpreter

ORDER ON ASSESSMENT OF DAMAGES

The Claimant obtained a loan from the Defendant by a second further charge made on 7th June 2011. By that second further charge, and previous charges the Claimant owed the Defendant the total sum of K1,266,583.00. The said sum was payable by the Claimant in twelve monthly instalments. As at 30th June 2012, the Claimant still owed the Defendant a sum of K936,607.00. The Defendant then decided to realize the sale, and eventually sold the property at K8.1 million in the year 2014. The Claimant then commenced an action against the Defendant claiming the following reliefs:

1. An order of the court declaring that the interest charged by the defendant on the second further charge especially the compound interest on arrears is excessive and unconscionable;
2. An order of the court on the proper interest to be paid and an assessment of such interest;
3. An order rescheduling the repayment of the loan secured by the second further charge;

4. An order restraining the defendant from selling and/or transferring the house on title number Soche West CM1/42 in exercise of its powers under the second further charge to Limodzi investment limited;
5. An order requiring the defendant to replace the items damaged during eviction by the Assistant Sheriff or to pay the replacement value thereof;
6. An order requiring the defendant, should the sale transaction be upheld, to pay the market value of the house to the plaintiff less the loan debt, and
7. An order for costs of this action.

By a judgment dated 20th April 2017, Judge Potani held as follows:

> *"This court would in the light of the above dictum uphold the sale in this case albeit the failure to get the approval of the Land Registrar on the reserve price. The relief the court would grant the plaintiff is damages he may have suffered for the failure by the defendant to get an approval of the reserve price. The damages to be assessed by the Registrar if not agreed."*

Further to that, on interest, the court invalidated the penalty interest that was charged by the Defendant. Further, the court stated that the 5% rate that was charged by the Defendant was not excessive as argued by the Claimant. The Judge further ordered that the interest to be paid by the Claimant should be based on the 6% above base lending rate, with no penalty interest. All other claims made by the Claimant were dismissed. This is an application for assessment of damages that the claimant may have suffered for failure by the defendant to get an approval of the reserve price.

When he matter came for hearing on assessment of damages, the claimant was the sole witness for his case. He adopted his sworn statement in which he averred that in or around the year 2011, he entered into a loan agreement with the defendant for the principal sum of MK600,000.00. By the year 2013, the loan herein was on or around MK3,000,000.00 inclusive of penalty interest that were being charged by the Defendant contrary to the loan agreement. The Defendant herein notified the Claimant of their intention to exercise their power of sale over the security for the said loan which was a house **Title Number Soche West CM 1/142**. However, the said sale was conducted without any valuation known to the Claimant, thus he was not aware of the basis upon which the said sale was made.

Further, the Defendant herein did not inform the Claimant of the price on which they sold the property herein and neither did the Defendant account for the proceeds of the said sale. It was found as a fact by the Court that the Defendant herein did not get an approval of the reserve price from the Registrar of Lands. Thus, it was because of this irregular sale that the Claimant lost valuable property. The property would therefore be at the present time be the Claimants if it was not for the irregular sale herein.

According to the current market value of the houses in the neighborhood that the property herein is located, the house would at present cost in excess of MK55,000,000.00. It is thus the prayer for the Claimant to be compensated by being awarded the current market value herein less the actual money owed to the Defendant at the time of the sale herein. As such this would enable the Claimant to buy another house of the same or equivalent value as the one that the Defendant irregularly sold.

In cross-examination, he said he also appeared before Justice Potani. He agreed that judgment was delivered and that he read the judgment. The Claimant was referred to the last part of page 6 of the judgment of Justice Potani and was asked if the Judge made an order for reimbursement of the price of the house and his answer was "No". He stated that he was aware that the court upheld the sale. He confirmed that all other claims were dismissed apart from the reserve price claim.

The Defendant paraded one witness, Mr Davie Kavinya. According to his witness statement which he adopted he stated that he used to work for Indefund. He stated that the Second Further Charge from which this case emanated was made by the claimant and he was involved in the transactions involved. When the claimant defaulted in the liquidation of the loan, he signed the letter to have the property sold to Messrs Knight and Frank marked "CT1". The claimant engaged Messrs John M. Chirwa & Partners to talk to the defendant bank to stop the sale and the bank refused the offer. He exhibits a copy of the letter marked "CT2".

He further testified that when they instructed Knight and Frank to sell the property, Knight Frank reported back to them on 7th August 2012 giving them the value of property at K5.8million. he exhibits the said letter marked "CT3". He indicates that the value was revised to K7,5million as shown in "CT4". The house was advertised for sale in the newspapers and he exhibits copies of the same marked "CT5" and "CT6". In response to the advert, two potential buyers wrote to Knight Frank expressing their interest to purchase the property. The claimant denied access to the property of the would be buyers and the defendant got a report from Knight Frank. He exhibits a report from Knight Frank marked "CT7". He further testified that the property was eventually sold to Limodzi Investments Limited at a price of K8.1million. he indicated that Limodzi Investments Limited was the highest bidder after the first highest bidder withdrew because of the claimant's conduct. Even after the house was sold there was hostile treatment from the claimant and his dependants. He

exhibits a letter marked "CT8" and "CT9". It was his testimony that the successful buyer first paid a deposit of K1,620,000. An agreement of sale was entered into by the buyer and Messrs Knight Frank. The purchaser eventually paid the balance of the selling price of K8.1. from the purchase price the defendant paid several accounts, for instance, on 16th May, 2014 a cheque was made payable to the City of Blantyre. He exhibits a letter marked "CT10". After paying the city rates, Messrs Knight Frank sent the defendant the breakdown of how the K8.1million had been used. He exhibits a copy of the report marked "CT11". He indicates that the defendant further paid K1,617,325.21 to MRA and outstanding electricity and water bills. He attaches evidence of several payments made marked "CT13", "CT14", "CT15", "CT16" and "CT17".

In cross examination, he confirmed that the house was sold. He said he couldn't recall the exact figure but said it was in his witness statement (K8.1 million). He also stated that he did not evaluate the property before writing the statement, because he relies on professional valuers which he isn't.

Such was the evidence adduced for the assessment proceedings. Counsel for both parties filed their submissions in form of skeleton arguments for which I must express my sincere gratitude for. Suffice to say, the questions for determination in this case in view of the orders made by Justice Potani in the ruling dated 20th April, 2017 are as follows:

1. What would be the appropriate quantum of damages the claimant "may have suffered" as a result of failure to get reserve price.
2. What would be the interest payable to the claimant in the circumstances of this case as ordered by the Judge.

This being a civil matter, I bear in mind that the legal burden rests on the claimant to prove his claim against the defendant. It is a well settled principle of law which is embedded in the Latin maxim **"ei incumbit probation qui decit non negat"** that the burden of proof lies on the party alleging a fact of which corrective rule is that he who assets a matter must prove it. See **Donnie Nkhoma v. National Bank of Malawi** Civil Cause No. 2174 of 1996. In the case of **Sawerengela vs- Pride Malawi Limited** [2008] MLR 301 (HC) the Court stated:

> "Thus the burden of proof rests upon the party 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 uncharged throughout the trial exactly where the pleadings place it, and never shifts in any circumstances whatever."

In the present matter this court has been called upon to determine the appropriate quantum of damages the claimant "may have suffered" as a result of failure to get reserve price. The facts indicate that the defendant sold the chargor's property at K8.1 million in the year 2014 in order to realise a loan which at the time was at K936,607.00. Section 71 of the Registered Land Act states that:

> *"A Chargee exercising his right of sale shall act in good faith and have regard to the interest 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 for 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 in at the auction and to resell by public auction without being answerable for any loss occasioned thereby."*

It is clear from the foregoing provision that the Registered Land Act enjoins a party seeking to execute against the residential immovable property of a judgment debtor to have regard to the interests of the charger among other safeguards, the right of sale must be subject to a reserve price as approved by the Registrar. I am compelled to believe that the spirit of the provision is that a sale in execution should not result in a house being sold for an unrealistically low price when compared to the true value of the property. The rationale seems to be that the sale must be done in good faith so the debtor is possibly not left homeless and becomes liable for any shortfall on the debt. If at the sale in execution the property is sold for a higher price, the debtor may receive the surplus after the settlement of the judgment debt and may use these funds to acquire alternative accommodation.

In the present case, the Judgment by Honourable Justice Potani faults the defendant for failure to obtain a reserve price. Essentially, the relief sought is based on an alleged error that occurred during the sale, in order to avoid an "injustice" for the property being sold at a fraction of its market price. In argument, the applicant's Counsel contends that the sale was conducted without any valuation known to him thus he was not aware of the basis upon which the said sale was made. Further, the claimant contends that the Defendant herein did not inform him of the price on which they sold the property herein and neither did the Defendant account for the proceeds of the said sale. He therefore prays that he be compensated by being awarded the current market value being K55,000,000.00 less the actual money owed to the Defendant at the time of the sale.

The defendant through Counsel in his written submissions acknowledge that the sale by the charge ought not to go below the reserve price. They assert that the loss suffered by the Claimant, if any, would have been the difference between the K8.1 million at which the property was sold and the reserve price at the time of the sale. However, they contend that the claimant was duty bound to ascertain the reserve price of the property in

2014 when the property was sold, and determine if it was sold below the reserve price or not. In their opinion, the claimant failed to discharge this duty as such they are of the view that he did not suffer any damage.

First of all, I take note that the claimant seems to fault the sale of the house in its entirety and wishes to recover damages equivalent to securing another house of similar value to the one the defendant sold less the obligations he had with the bank. It is submitted on behalf of the claimant by Counsel that the sale was irregular hence the claimant is entitled to damages either by being given back his house or in the alternative an equivalent sum of money of the said house. I wish to reiterate that the sale of the house was upheld by the Judge in his ruling. The Judge cites with approval the case of **Mkhubwe v National Bank of Malawi** (2000-2001) MLR 261 (HC) where it is stated as follows:

> *Justice is not met by the borrower having benefit of both the funds and the security. Conversely, the lender cannot lose both the funds and the security.*

It is therefore not correct to claim that the sale was irregular and therefore the claimant ought to be given back his house. In my considered opinion, it is the process of the selling that was faulted in that it presented an opportunity for the claimant to suffer damages by being deprived the difference between the defendant's dues and the market price of the house. In essence, there is absolutely no basis for the claimant to be awarded a sum equivalent to the sum of money for purchasing a similar house. The loss suffered by the Claimant ought to be the difference between the K8.1 million at which the property was sold and the reserve price at the time of the sale. In my view, this application is based on the events of the day the sale was held. Unfortunately, the claimant, against better judgment, does not make any reference whatsoever as to what ought to have been the value of the house at the time. Instead, the claimant is claiming K55,000,000.00 being the current value of the house. In the same breath, the claimant calls upon the court to consider the valuation done by Knight and Frank (Malawi) Limited as presented by the defendants pegging the price at K7,500,000.00. They submit that its value could be higher as of 2020.

At the risk of being repetitive, the claimant's duty in this matter was to show the court what ought to have been the reserve price for the house in question for the court to assess if he had suffered any loss or not. The reserve price ought to have been obtained from the Registrar who according to s.2 of the Registered Land Act is the Chief Land Registrar or the Deputy Chief Land Registrar or a Land Registrar or an Assistant Land Registrar who has been authorized under section 6 (4) of the Registered Land Act to exercise or perform any particular power or duty, that Land Registrar or Assistant Land Registrar so far as concerns that power or

duty. The Registrar determines the reserve price pursuant to s.71 of the Registered Land Act. In this case, the claimant failed to discharge this duty presumably laboring under the belief that the sale was irregular and that he ought to be given back his house. During examination in chief and cross-examination, the claimant indicated that he had understood the ruling by the Judge in that the Judge order that the sale was irregular and should be given back his house. In this somewhat misguided belief, he focused on proving the irregularity of the sale other than the loss he suffered by reason of the defendant's failure to obtain the reserve price. I believe it is not the duty of the court to hunt for the evidence that ought to have been proffered. In the circumstances, I make no order on this issue.

The other issue for consideration is the interest payable to the claimant in the circumstances of this case as ordered by the Judge. I wish to point out that the court invalidated the penalty interest that was charged by the Defendant. Further, the court stated that the 5% rate that was charged by the Defendant was not excessive as argued by the Claimant. The Judge further ordered that the interest to be paid by the Claimant should be based on the 6% above base lending rate with no penalty interest whatsoever and the amount payable to be assessed by the Registrar if not agreed by the parties. Nevertheless, when the matter came for assessment of damages, the claimant seemed not keen to pursue this issue. There was nothing in relation to the interest payable in his evidence in chief and neither was it alluded to by Counsel in his final written submissions on assessment of damages. Apparently, the focus was on the claimant getting back his house or an equivalent in monetary terms. The court has been left with nothing to work with in terms of the deductions that were made assuming the court was to be overzealous to still continue with the assessment in the circumstances. I re-iterate that it is not up to the court to engage into a voyage of discovery in search of evidence for the claimant's case. Similarly, I make no order on the same.

Costs follow the event. I am of the view that this is the right case in which each party should bear its own costs

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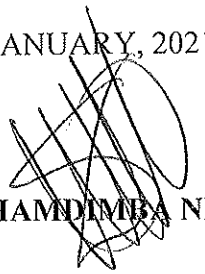

WYSON CHAMDIMBA NKHATA

ASSISTANT REGISTRAR