

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 2409 OF 1994

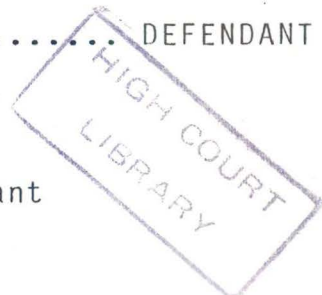
BETWEEN:

ROSE MATENDA PLAINTIFF

- AND -

COMMERCIAL BANK OF MALAWI DEFENDANT

CORAM: Tembo, Acting J
Chizeze, of Counsel for the Plaintiff
Sauti Phiri, of counsel for the Defendant
Tsoka, Official Interpreter



R U L I N G

This is an application by the defendant to vacate an order of injunction which order was made by this court on 29th December, 1994. The application is supported by the affidavit of counsel for the defendant and there is no affidavit in opposition by the plaintiff.

The grounds upon which the defendant has based his application are set out in the affidavit as follows:

"2 I contend that it was incorrect on the plaintiff's part to obtain an injunction in this matter on an ex parte summons since the matter was not urgent. In any case, even if the matter was urgent, the application for injunction ought to have been made promptly. Indications are that the Plaintiff was aware of this development as early as October, 1994. (the plaintiff's fax message of 21 October 1994 is hereto annexed marked "M1"). She therefore ought to have submitted her application so soon thereafter.

"3 Further, and notwithstanding the contents of paragraph 2 hereof, the plaintiff by paragraph (i) of the Injunction has obtained a prohibitory injunction against the Defendant. I contend that in so far as the law of contract is concerned, prohibitory injunctions are grantable only in the case of breach of a negative promise. By the alleged agreement for sale, the Defendant made a positive promise to sell. If the Defendant is in breach, which is denied, the appropriate course of action available to the plaintiff is to seek damages, and if they are inadequate, specific performance. The plaintiff has instituted a claim for damages and (if inadequate) specific performance. An

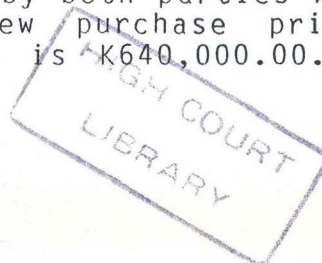
award of damages (and indeed specific performance) would be a sufficient remedy. Besides, the Defendant has more than the capacity to pay damages or comply with specific performance. The balance of convenience is consequently against the sustenance of this part of the injunction.

- 4 Paragraph (ii) of the Injunction requires the Defendant to deliver to the High Court all relevant documents of title. The plaintiff's statement of claim, however, does not state that the plaintiff has any better right to them than the Defendant who is presently retaining them as its security for a charge duly registered. As a result of the plaintiff's failure as aforesaid, it is difficult to imagine what right she seeks to protect by paragraph (ii) of the Injunction. That part of the Injunction therefore fails to satisfy the requisite test for granting an Injunction i.e. that a Plaintiff must establish that he has a good arguable claim to a right he seeks to protect."

During the hearing of the application, Counsel for the defendant submitted that in accordance with Order 29 rule 1 subrule 8, ex parte applications for an Order of an interlocutory injunction are only appropriate for cases of real urgency; that in the instant case there was no element of such urgency present; that, therefore, the Court should discharge the order of injunction under consideration. I accept the submission of counsel for the defendant as representing a correct statement of the law on the point. However, as to whether indeed in the circumstances of the instant case the element of urgency was present or absent, it would, in my view, also depend on the view of the plaintiff as to the effect of the conduct of the defendant respecting the validity, and the implementation by the parties, of the contract of sale in question. In that respect, Mr Chizeze, for the plaintiff, submitted that the matter became urgent when the defendant had intended to advertise the property for sale after the defendant had communicated to the plaintiff a request for the plaintiff to accept a new, but much higher, purchase price than the one previously agreed to by both parties to the contract of sale. In his communication to the plaintiff, therefore, the defendant expressly informed the plaintiff that if the defendant did not obtain the plaintiff's agreement to the new purchase price, the defendant will of course have no choice but to cancel the previous arrangement (by "arrangement" the defendant in fact meant "agreement. "). The defendant concluded his communication by the following remark-

"It is difficult to imagine on what basis we could be compelled to proceed with a transaction which is clearly contrary to the law."

The purchase price agreed to by both parties was K270,000.00 and the defendant's proposed new purchase price to which the plaintiff has not agreed to is K640,000.00. Alarmed by the



negative attitude of the defendant to the agreement of sale, the plaintiff has issued a writ of summons by which the plaintiff is mainly claiming specific performance of the contract, which contract the defendant has resolved to cancel unless if the plaintiff accepts the new purchase price now proposed by the defendant. In aid of that claim, the plaintiff sought an order of the Court for an interlocutory injunction, which was duly granted on 29th December, 1994, to subsist until the date for the final determination of the claim of the plaintiff for specific performance. With due respect to counsel for the defendant, regard being had to all circumstances of the case which led the plaintiff to the making of an ex parte application for an order of injunction in question and further to the time when the order therefor was made, I would not agree with counsel for the defendant that the element of urgency was absent in the matter to justify my discharge of the injunction. Consequently, I decline to discharge the injunction in question on that ground.

In support of paragraph 3 of his affidavit, counsel for the defendant cited the case of Zambezi Packaging Ltd -v- Mpungulira Trading Ltd Civil Cause No. 1963 of 1994 (unreported). He contended in that regard that, as a writ had already been issued for specific performance, the remedy of specific performance would suffice and further that an order for an interlocutory injunction would, in that case, only have been allowed if the defendant was about to sell the property to some other person other than the plaintiff. In other words, counsel for the defendant was saying that like in the Zambezi case the defendant in the instant case had simply remained idle about the contract of sale; that in such a case the order for injunction ought not to have been made at all in the first place, and finally, that the injunction should, therefore, be discharged now on that ground.

I remind myself of the fact that I am fully entitled to discharge the injunction if I indeed find that the order for injunction had been irregularly obtained by suppression of facts or that it was founded on an erroneous view of the law. As to the former ground for discharging an injunction, the defendant has not asserted or otherwise alleged that the plaintiff had irregularly obtained the injunction by the suppression of material facts. However, the defendant would like me to discharge the injunction on the ground that the same was founded on an erroneous view of the law. I proceed to examine the matter on the basis of that ground, if in fact I should thereupon discharge the injunction, in the light of the facts about the case and the law on that point.

To begin with, I would like to point out that the circumstances of this case are clearly distinguished from those of the Zambezi case. The conduct of the defendant in the instant case is dissimilar to that of the defendant in the Zambezi case. In the Zambezi case, the defendant had merely chosen to do nothing about the contract of sale in consequence of which the plaintiff had applied for an injunction and not specific performance. Thus, in that case the substantive remedy sought by the plaintiff was an order for injunction to the effect that the defendant whether by itself, or servants or agents or whomsoever be restrained from remaining in or on the premises and that the defendant should

vacate the premises. On the basis of that action, a summons had been taken for an interim injunction to restrain the defendant from remaining on the land. It is clear, therefore, that the plaintiff in the Zambezi case had not opted for specific performance directly. On the basis of those facts, the decision of Honourable Acting Justice Mwaungulu was well founded on the authority of the cases of Whitwood Chemical Co. -v- Hardman 2 Ch. 416; Mortimer -v- Beckett (1920) Ch. 571 wherein it was held that where a person seeks the observance of a positive contract, the proper remedy is specific performance unless the remedy is not available. In that regard Honourable Acting Justice Mwaungulu referred to a statement of Russell, J as follows:

"Therefore, I should to that extent be granting specific performance of a contract for personal service. The contract is not negative. It is, therefore, positive in form and there is no independent negative stipulation... I hold, therefore, that no injunction ought to be granted."

In the Zambezi Case Honourable Acting Justice Mwaungulu further stated the following:

"In the present case the contract has positive stipulations.

The defendant agreed to sell and deliver the property to the plaintiff. If the plaintiff has failed in any of his undertakings the plaintiff could at law sue for damages and at equity for specific performance... There is of course another line of authorities where, even though the contract is positive in form but is very clear, injunctions have been ordered to aid an action for specific performance. In all these cases, unlike here, the defendant has set out acting inconsistently with his obligations in the contract. When there is an action for specific performance, therefore, courts have granted an injunction to restrain the vendor from dealing with the property, but again only where there is a clear contract."

In that regard, I fully concur with my brother, Honourable Acting Justice Mwaungulu and also with Lord Justice Turner who, in the case of Hadley -v- London Bank of Scotland (1865) 3 De A J and S M 63, laid down the basis on which the equitable right of injunction would be granted, as follows:

"I have always understood the rule of the Court to be that if there is a clear valid contract of sale, the Court will not permit the vendor afterwards to transfer the legal estate to a third person such third person would be affected by Lis pendens. I think this rule well founded in principle, for the property is in equity transferred to the purchaser by contracts, the vendor then becomes a trustee for him, and cannot be permitted to deal with the estate as to inconvenience him. In a case, therefore, where there is a clear undisputed contract the Court would in my opinion interfere."

In the instant case there was a clear contract of sale and the

defendant had subsequently sought to act inconsistently with his obligations under that contract of sale, the effect of which would result in the inconvenience to the plaintiff in so far as the property was concerned, namely, failure to have the property conveyed to him as agreed between the parties. All these facts emerge from the affidavit of the plaintiff which had been filed in support of the application for the injunction in question. Paragraph 2 of that affidavit stated that an agreement had been evidenced by letters exchanged between the defendants, their agents, Trust Auctioneers and Estate Agents, and the plaintiff, which letters had been exhibited to that affidavit. From letter exhibited as "RMI" from the defendant to the Agent thereof, the defendant had signified its approval of the transaction in principle as follows:

"We... confirm our agreement in principle to the proposed offer from Miss R Matenda. We will of course, in due course, be interested to learn the outcome of Miss Matenda's application for a loan with New Building Society".

That was a reply to a letter from the Agent to the defendant marked exhibit "RM2", whose material contents were as follows:

"I have received an offer for the above house from Miss Rose Matenda in the sum of K270,000.00. She proposes to pay K70,000.00 cash deposit and another K70,000.00 in a month's time. The balance will be paid through loan."

In a further communication from the defendant to the Agent, exhibited as "RM3", the defendant stated the following:

"You, however, advised me that, on the strength of my letter of acceptance to you dated 29th July 1994, ("RMI" referred to above) you had already concluded an agreement with a prospective buyer who yesterday morning paid K70,000.00 by cheque being deposit. The position therefore is that if a contract was already concluded, as appears to be the case, then the injunction came too late."

Finally in the letter of the defendant's Agent to the plaintiff marked "RM5" in which the plaintiff was notified of the sale of the property to her, the Agent wrote the following:

"We write to confirm that a house at above plot was sold to you at K270,000.00. You paid deposit of K70,000.00. You may proceed asking for mortgage from the New Building Society and we will appreciate if this exercise can be done as soon as possible."

The foregoing would indeed give me the impression and a firm view that a contract of sale had been concluded between the plaintiff and the defendant. Indeed, such must be the case in the absence of any contention by the defendant to contrary. Subsequent thereto, the defendant had sought to change the price agreed upon by both parties as evidenced by a letter exhibited to the affidavit in support of the plaintiff's application, marked

"RM7", a letter from the defendant to the plaintiff whose material part is as follows:

"The purchase price of K270,000.00 appears to have been based on a gross undervaluation of the subject plot. A subsequent independent valuation has confirmed the market value of the property at K640,000.00. We, as mortgages, are obliged in law to sell the property at a proper price.

Consequently, we communicated to Trust Auctioneers that they should seek your agreement to a purchase price of no less than K640,000.00. If we do not obtain such an agreement we will of course have no choice but cancel the previous arrangement. It is difficult to imagine on what basis we could be compelled to proceed with a transaction which is clearly contrary to the law."

With respect to Counsel for the defendant, I do not agree that the defendant simply stayed idle as was the case in the Zambezi case. It is clear that the defendant has sought to act, and has in fact acted, inconsistently with his obligations under the contract of sale and further that in the instant case, unlike in the Zambezi case, the plaintiff had applied for an interlocutory injunction, not as a substantive remedy, but merely one in aid of a writ of summons for specific performance. In those circumstances, the law is very clear that the Court may intervene by granting an application for an interlocutory injunction. Consequently, I would, once again, decline to discharge the injunction on the ground set out in paragraph 3 of the affidavit of counsel for the defendant.

With regard to paragraph 4 of his affidavit, Counsel for the defendant cited, in support thereof, the ruling of Honourable Justice Tambala in the case of Mrs Saonda -v- Mr Chikaonda Civil Cause No. 1374 of 1994 (unreported). In the main counsel had sought to impress on me to find that the grant of injunction, in respect of paragraph (ii) thereof, had failed to satisfy the requisite test for granting injunctions, namely, that a plaintiff must establish that he has a good arguable claim to a right he seeks to protect. If only on the basis of my finding above that there was clearly established a contract of sale in the instant case, counsel's contention on that basis alone must fail. The operative expression in that regard is "a good arguable claim" to the right he seeks to protect. The principle to be applied in applications for interlocutory injunctions have been authoritatively explained by Lord Diplock in the case of American Cyanamid Company-V-Ethicon Ltd (1975) A C p. 396, as follows:

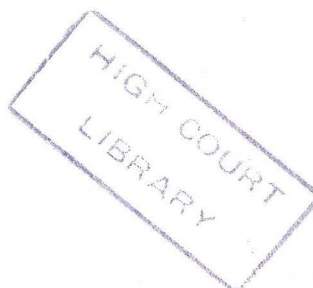
- "(a) that the plaintiff must establish that he has a good arguable claim to the right he seeks to protect; and
- (b) the court must not attempt to decide this claim on the affidavits, it is enough if the plaintiff shows that there is a serious question to be tried".

With respect to counsel for the defendant, it is my firm view that both these tests were satisfied on the affidavit evidence in the instant case and that indeed the balance of convenience had weighed in favour of the plaintiff's application for injunction. The order was not for the documents of title to be delivered to the plaintiff, but to the court, in order to maintain the status quo until the rights of the parties shall have been determined in the action commenced by the writ of summons of the plaintiff for specific performance. In that respect, the Saonda Case does not help the defendant at all. In that case the decision of Honourable Justice Tambala was clearly based on the ground that a grant of an injunction in that case would have occasioned injustice to the respondent concerned and would therefore have been contrary to the principles of equity. Let me add that such a situation does not arise in the instant case. In the direct words of Honourable Justice Tambala, the following was the basis of the decision in that case:-

"Then it seems to me that the respondent was in occupation of the plot at the time the lease was offered to the applicant. The fact that Blantyre City Council has offered him another plot to enable him to move out of the disputed plot would support that view. In that case the respondent may have certain rights against the City Council which may be prejudiced if the injunction is granted. I have a feeling that the granting of the injunction represented by the applicant would cause serious injustice to the respondent. An injunction is an equitable remedy. It would be contrary to the principles of equity to grant an injunction which would cause injustice".

Accordingly, I dismiss the application of the defendant in its entirety with costs.

MADE in Chambers this 13th day of March, 1995, at Blantyre.



A K Tembo
ACTING JUDGE