Malawi Judiciary

IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

MSCA CIVIL APPEAL NO. 58 OF 2013

STANDARD BANK LIMITED.....APPELLANT

– AND –

DR. GEORGE THAPATULA CHAPONDA .....RESPONDENT

BEFORE: THE HON. A. K. C. NYIRENDA, SC, CJ
THE HON. JUSTICE A.C. CHIPETA, SC, JA
THE HON. JUSTICE M.R. MBENDERA, SC, JA
Kubwalo, Counsel for the Appellant
Chokotho, Counsel for the Respondent
Chimtande (Mrs), Recording Officer
S.B. Mwafulirwa (Mrs.), Principal Personal Secretary

JUDGMENT

Nyirenda SC, CJ.

We render our judgment in this matter with a preliminary explanation. The judgment has long delayed for the main reason

that after our caucus after the hearing of the appeal it had been agreed that our Brother Justice of Appeal, Honourable Justice M. R. Mbendera, SC, would draw up the decision of the Court. As we will be aware, Justice of Appeal Mbendera, SC, since passed on. That meant the two of us remaining in the matter needed to consider how best to proceed from where we stopped with His Lordship. We wish we could confirm that the decision we render today is a unanimous one, because that is what emerged during our caucus with late Justice of Appeal Mbendera, SC. Unfortunately we are not entitled to so confirm. The judgment that we render is therefore a majority decision of the two of us.

One other consequence of our late Brother's departure is that as we deliver this judgment we cannot form a full Coram. Thus, while we sat as a full panel of three Justices of Appeal when we heard the appeal, of necessity we must now render the judgment whilst sitting as a panel of only two.

The appellant is prosecuting this appeal upon being dissatisfied with an order made by Honourable Justice Ivy Kamanga on 20th April 2012 in the court below granting an interlocutory injunction to the respondent restraining the appellant from selling the respondent's house on Title Number Alimaunde 12/266 in the City of Lilongwe until determination of the substantive action commenced by way of originating summons. The order was rendered following an inter-partes application and hearing.

In challenging the order, the appellant has advanced four grounds of appeal but we are of the view that, in essence, ground four namely, that the court erred in granting the injunction contrary to applicable legal principles, is omnibus and therefore covers the first three grounds. The respondent on his part strongly supports the decision of the court below and in this court places reliance on the arguments used in the lower court on the hearing of the inter-partes summons for an injunction which arguments are succinctly set out in a paragraph within the lower court's judgment as will be alluded to shortly.

We consider the essential background of this case to be well and concisely expressed in the judgment of the learned judge in the court below. The appellant herein was the defendant in the said court and the respondent was the plaintiff. With that description, we think it appropriate to reproduce the facts as captured in the second paragraph of the judgment as follows:

> *"[.....] The genesis of these applications appears to be a loan facility that a limited company, Northern Pine Limited obtained from the defendant. The defendant alleges that as at 10th May, 2011 the same stood at K205,735,602.23. The Plaintiff was at the material time, a director of the Northern Pine Limited. The Plaintiff charged his interest in the land composed in*

Title Number Alimaunde 12/266 in the City of Lilongwe to secure the payment to the defendant of a sum not exceeding K38 million or the balance thereof as may be owing by Northern Pine Industries, with interest at 5% above the charges Base Lending rate which was at 19.75%. The said sum or balance to be paid on demand together with interest due thereon. Plaintiff also indicated that he understood the effect of Section 68 of the Registered Land Act and that the charge was subject to the standard Terms and Conditions contained in a charge registered at the Lilongwe Land Registry as Application Number 51/92. Plaintiff signed this surety charge on 18th December 2009. Plaintiff depones that the surety lacks consideration which renders the charge unenforceable. And the charge is for an indefinite period. Further, it does not provide for Plaintiff's release from the charge and therefore unconscionable, harsh, oppressive and amounts to a clog on the equity of redemption. Plaintiff laments that the defendant is proceeding with the sale of the property without the sanction of the court and before the court prescribed manner in which the sale should be conducted. He submits that this conduct amounts to arbitrary deprivation of the right to own property and unconstitutional. In that vein, the Plaintiff in the substantive action seeks a declaration that Section 68

of the Registered Land Act should be read in light of Section 28 of the Constitution." [sic]

In a rather short paragraph which is strikingly deficient of a conscientious analysis of the legal principles as are applicable to interlocutory injunctions, the learned judge expresses her reasons for granting the order of injunction to the respondent in the following terms:

"The purpose of interlocutory injunctions is to preserve the status quo. Authorities are vast on the principle. Again, the likelihood of respondent having the capacity to adequately compensate the applicant has to also be factored in considering interlocutory injunction orders. We have vast authorities on the standards. I will not indulge on the same. Suffice to note that the matter at hand involves sell of property. And the applicant intends to contest this sale of property in probably a constitutional court? If sold the respondent has the capacity to compensate the applicant. If indeed the applicant's issue succeeds in the constitutional court after the property has been disposed of, then the process will not benefit him in recovering the same property. It will just aid the jurisprudence. In the circumstances, I opinion that the injunction should be granted. However, the

substantive action should be heard as soon as possible."[sic]

We shall, in relevant places, make reference to this paragraph which we will henceforward conveniently refer to as "the disposal paragraph of the judgment in the court below". For what it is worth, we should also mention that the approach we have taken in our judgment has been informed by the manner the court below went about determining the respondent's application for an interlocutory injunction.

But before that, allow us to register our profound gratitude to the parties for their focused submissions, directing the court to the law and case authorities which has afforded our task at hand to be effortless. We must also underline the fact that the parties' submissions gained in force because of their succinct nature. The parties must be rest assured that in arriving at our decision, we will have dutifully considered their arguments in light of the applicable legal principles.

Trite and mundane as it may be, we begin by addressing our minds to the seminal decision in the case of ***American Cynamid v Ethicon Ltd*** [1975] 2 WLR 316 which sets out guidelines to establish whether an applicant's case merits the granting of an interlocutory injunction. The *American Cyanamid guidelines,* as they have come to be known, have been

approvingly applied in umpteen decisions in this court and it would be wasteful to regurgitate them in full. For purposes of this appeal, it is apposite that we emphasize what Lord Diplock referred to as the *"governing principle"* which he explained as follows at p.408 of the case:

> *"... the governing principle is that the court should first consider whether, if the plaintiff were to succeed at trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial.* ***If damages in the measure recoverable would be [an] adequate remedy*** *and the defendant would be in a financial position to pay them,* ***no interim injunction should normally be granted,*** *however strong the plaintiff's claim appeared to be at that stage."* [Emphasis is ours]

With the *American Cyanamid guidelines* as well as the *governing principle* in mind, we pause here to make the following immediate observation concerning the disposal paragraph of the judgment in the court below. Surely any reader would instantly grasp that while the learned judge is plainly convinced that the appellant in this action is an entity of means so that it would adequately compensate the respondent in damages should the latter succeed in making his claims good, it is apparent, from a

reading of the paragraph, that ultimately the learned judge bases her decision to grant the injunction on what appears to be a special factor namely, that if the matter were indeed to be certified as constitutional and the respondent proceeded to carry the day in the Constitutional Court the property having already been disposed of, then the process will not benefit the respondent in "recovering the ***same property*** ".[Our emphasis].

This reasoning is acutely flawed and drives a coach and horses through the *American Cyanamid guidelines* as we know them. We give our reasons in the analysis hereunder.

With the affidavit evidence before it, the court below should have carefully embarked on the following process. In terms of the threshold question of whether there is a serious question to be tried, the respondent contends a litany of issues one of which is an examination or construction of the guarantee executed by the respondent in favour of the appellant. Specifically, the respondent's argument is that according to paragraph 6 (six) of the guarantee, the guarantee that the respondent entered into was on the ultimate balance that would be due. The respondent goes further to argue that since the debtor (that is, Northern Pine Industries Limited) remains under receivership, the appellant cannot claim to know the ultimate balance, with the result that its intended action to call in the security by exercising its power of sale under the charge is, as it were, premature.

Prefacing our view on the foregoing with a caveat that it is no part of this court's functions or indeed of the court below at the stage it was determining the application for an interlocutory injunction, to weigh the affidavit evidence and draw factual conclusions, we, on the face of it, surmise that there is force in the respondent's assertion that the ultimate balance referred to in the guarantee is presently at large since the amount of the debt that will lie outstanding upon payment by the debtor is unknown.

We are aware of and cite with approval the decision in *Sedom v Mwalubunju* [1991] 14 MLR where it is said there is no obligation, as a general rule, upon a creditor to first request the principal to pay before he proceeds against the debtor's guarantor. Nevertheless there is an important proviso to the rule in *Mwalubunju case* (supra) to wit, that it can be displaced by the express terms of the guarantee. And so, if the guarantee agreement makes provision for the guarantor's liability to accrue only after the creditor has exhausted all his remedies against the principal debtor, it follows that the creditor would not be justified to start by pursuing the guarantor as distinct from the debtor.

On the facts of the matter under consideration, paragraph 6 (six) of the guarantee will certainly require construction to determine what is meant by the respondent entering a guarantee on the ultimate balance. For instance, does it mean that the respondent's liability can only accrue after the appellant has

exhausted all its remedies against the principal debtor at the end of which the appellant will have known the ultimate balance? On this score, we are contented to proceed on the basis that there is a serious question to be tried.

In saying this we are alive to the principle that, at this stage, all the respondent needs to show by his action is that there is a serious question to be tried and that the action is not frivolous or vexatious. Differently put, there is no requirement for the respondent to establish a strong prima facie case. It is sufficient for the respondent to prove that a triable issue has arisen that merits judicial consideration. This is intended to prevent the court from prejudging the merits of the case.

We now turn to the second limb of the *American Cyanamid guidelines*, that is, whether damages would be an adequate remedy for a party injured by the court's grant of, or its failure to grant, an injunction. On the facts obtaining herein and alluding to the disposal paragraph of the judgment in the court below, this court is united in its agreement with the finding of the judge that if the property were to be sold, the appellant would be good for any damages claim the respondent pursues against it. In any event, the respondent in this case can only claim damages if he is aggrieved with the sale. Indeed if the learned judge had taken heed of Lord Diplock's exposition that "***if damages in the measure recoverable would be an adequate remedy and the defendant would be in a financial position to pay them, no***

interim injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage", (supra) she would not have granted the injunction.

In that event, the question whether the respondent was to recover the same property or not is neither here nor there. This consideration is what seemingly steered the learned judge in the wrong direction. The fact of the matter is that the respondent's remedy in the event of triumphing against the appellant would be in damages and these would be adequate.

In this context, we cannot resist the temptation to comment on the respondent's assertion that he attaches sentimental value to his property by reason of which he cannot be adequately atoned by the award of damages. We find this argument strange and lacking in principle. Without necessarily expressing a sweeping or final view on the point, we wish to observe that there would be much to be said for a principle in our law to the effect that any property, whether a family home or otherwise, offered as security for a loan of any type, is made on the understanding that the property stands at the risk of being sold by the lender if default is made on the payment of the debt secured. It would, therefore, naturally follow that where a party covenanted to commit a specified property as appropriate for purposes of security, such party would be enjoined from subsequently turning around and claiming that the property is a family home or that it has a sentimental value to it as the said party, surely,

will have known this state of affairs even before the time of giving the property as security.

Finally, in keeping with the *American Cyanamid guidelines,* it remains for us to demonstrate why the balance of convenience in this matter equally points away from the grant of the interlocutory injunction. It is evident that with the injunction in place and the appellant being kept out of its money, the debt is rising astronomically and exponentially. There can be no doubt that the injunction prevents the appellant from realising its security, causing it financial losses on a daily basis with accruing interest. On the other hand, we reiterate that should the injunction be dissolved and respondent's originating summons end up being determined in his favour, he can sufficiently be compensated in damages.

Our determination therefore is that this is not a case in which it was open to the court below to exercise its discretion in favour of granting the respondent the interlocutory relief it gave him. We would allow the appeal. The order for interlocutory injunction following the inter-partes hearing rendered by the judge in the court below is set aside with costs. The lower court's order that the matter should proceed in the Commercial Division of the High Court is upheld.

PRONOUNCED in Open Court at Blantyre this 20th day of March, 2018.

Signed: .....
HON. CHIEF JUSTICE A. K.C. NYIRENDA SC

Signed: .....
HON. JUSTICE A.C. CHIPETA SC, JA