REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
COMMERCIAL DIVISION
BLANTYRE REGISTRY
COMMERCIAL CAUSE NUMBER 14 OF 2023

TAMANDO LAMA CHOKOTHO **CLAIMANT**

VERSUS

FDH BANK PLC **DEFENDANT**

CORAM: **HON. JUSTICE J. ALIDE**
Mr. T. L. Chokotho, of counsel for the Claimant
Mr. P. Mpaka, of counsel for the Defendant
Mr. F. Makata, Court Clerk

RULING

1.0 On 22 January 2023 I granted the Claimant a without notice order for an interlocutory injunction under Order 10 Rule 27 of the Courts (High Court) (Civil Procedure) Rules 2017 ("the CPR 2017"), restraining the Defendant from selling property on Title Number Likabula 3319 (Title Number LK 3319) below the reserve price off K215,000,000, pending the hearing and determination of an application, with notice, for the extension of the same. The order was valid for 14 days within which the Claimant was supposed to bring an application with notice to extend the same.

2.0 On 3 February 2023, I extended the order to 8 February 2023 on account that the parties were discussing the matter. On 8 February 2023, I again extended the order for 21 days on the same account. On 1 March 2023, the parties informed the court that they were still discussing the matter and asked for more days. I granted a further extension of 30 days. As it was noted, at this point, that the Defendant had not yet served the Claimant with a response to the application, I further ordered that unless the Defendant files such process before the expiry of the 30 days, the order shall automatically extend to the conclusion, or determination of the substantive matter. On 21 March 2023, the Defendant filed its response to the application seeking, firstly, an order discharging the order for the interlocutory injunction, and secondly, for the court to summarily dispose of the matter for having not disclosed an arguable case.

3.0 The background of the Claimant's application is that he obtained a mortgage facility from the Defendant in the sum of K144,000,000 for the purposes of purchasing property on Title Number LK3319. The Claimant pledged the same property as security for the loan. However, the Claimant defaulted in the repayment for the loan, and the Defendant proceeded to issue a notice of sale of the property to recover the loan. Attempts to sell the property by public auction failed as it could not attract any buyers beyond the reserve price of K215,000,000.

4.0 It is the Claimant's contention that by a letter dated 1December 2022 the Defendant notified him that they had applied to the Ministry of Lands, Housing and Urban Development for a waiver over the reserve price and had obtained an approval to proceed and sell the property at K180,000,000. The Claimant stated that he protested the sale at that price, because it was below the reserve price. The Claimant, therefore, brought the present matter to court, claiming that the Defendant was proceeding with the sale of the property at K180,000,000 and sought for an order to re-open the transaction under Section 3 of the Loans Recovery Act. The Claimant further proceeded and filed the without notice application for an interlocutory injunction restraining the Defendant from proceeding with the sale of the property below the reserve price. It is in respect of that application that this court granted the Claimant the order for an interlocutory injunction pending the hearing of the present application, with notice, for the continuation of the order.

5.0 In his arguments, the Claimant contended that section 3 of the Loans Recovery Act provides that where the enforcement of a security had been conducted in an unconscionable inequitable or unfair manner the court has powers to re-open the transaction. He argued that the reading of the provision shows that in a case where the security had already been disposed of the remedy available to the debtor lies in damages, whereas in cases where the security has not yet fully been disposed of, like the present matter, the court has powers to re-open the transaction.

6.0 The Claimant argued that section 71 of the Registered Land Act provided that where a chargee is exercising his power of sale he must act in good faith and must have regard to the interest of the chargor. He submitted that the variation of the reserve price by the Registrar of Lands was made without consultation with the chargor and cannot be said to be in good faith as required by the Registered Land Act. The Claimant argued that his legitimate rights and expectations were affected because of the Land Registrar's decision. Accordingly, he should have been accorded an opportunity to be heard as provided under section 42 of the Constitution.

7.0 The Claimant further argued that section 73 of the Registered Land Act provides that variation of any powers of sale must be made by the court. He therefore argued that the variation of the reserve price by the Registrar of Lands was made *ultra vires* and not in good faith as required by section 71 of the Registered Land Act. The Claimant argued

that it is trite that any decision made by a Public Officer, in excess of his powers, as was in this present case, is void.

8.0 On the matters that had been presented before the court, the Claimant argued that there were serious questions to be tried by the court in this matter as the facts spoke for themselves. He argued that the property in question was valued at K230,000,000, with a forced sale value of K210,000,000. The Ministry of Lands had set the reserve price at K215,000,000. Therefore, this created a legitimate expectation to the Claimant that the property would be sold at a value more than that the reserve price if it was not redeemed. The Claimant argued that in proceeding to sell the property at K180,000,000 based on the varied reserve price, and without consulting the Claimant, the Defendant was clearly acting in bad faith and his conduct was unfair, inequitable, and unconscionable as it was deliberately suffering the Claimant a large loss.

9.0 On whether damages would be an adequate remedy in the circumstances, the Claimant, while acknowledging that they were, argued that section 3 of the Loans Recovery Act and Order 10 Rule 27 of the CPR 2017 provided the court with an exception to the rule in equity that injunctions must not generally be granted where damages are an adequate remedy. The Claimant argued that section 3 of the Loans Recovery Act allows the court to re-open the transaction and argued that the remedy of damages arises only when the security has already been taken and disposed of. He argued that where the security has not been disposed of the court can re-open the transaction. In that regard, the Claimant submitted that for the transaction be re-opened, it entailed that it must be stopped first, and then reviewed later.

10.0 The Claimant argued that since the Registrar of Lands did not have power to vary the reserve price, the court must not allow the breach to continue in anticipation of the payment of damages. The Claimant submitted that it was imperative in the circumstances for the court to perpetuate the interlocutory injunction to stop the disposal of the property which he argued, was apparently being conducted unlawfully. The Claimant argued that justice of the matter demanded that the disposal of the property of the security should not be below the reserved price. The Claimant therefore prayed that the order for an interlocutory injunction granted earlier should continue to allow the court to consider the re-opening and the reviewing of the sale transaction.

11.0 On the other hand, the Defendant, in support of its application to discharge the interlocutory injunction, and to summarily dispose of the matter for disclosing no arguable case, first and foremost, submitted that the property subject of the proceedings, Title Number LK 3319, was sold by private treaty in or around December 2022. Having sold the same, the Defendant duly transferred the property to the purchaser in or about 12 January 2023. The purchaser was duly registered as the proprietor of the property and transfer was complete. A Land Certificate was issued to the new proprietor, Investpack Solutions Limited. The Defendant submitted that it was only after the above-described sale, and registration of the property, that the Claimant approached the

court on the 6 February 2023 and obtained the order of interlocutory injunction without notice. The Defendant submitted that although the Land Registry is a matter of public record, the Claimant deliberately failed to disclose to the court that the sale had been concluded, and the new proprietor was registered over a month earlier.

12.0 The Defendant further submitted that as admitted in the statement of claim, the Claimant had defaulted in the repayment of the loan. Accordingly, the Defendant proceeded and issued a notice of sale to the Claimant to recover the loan and sold the property by private treaty after advertising it three times. The Defendant submitted that they got only one offer which was below the reserve price set by the Ministry of Lands and that was when they decided to seek the review of the same. They then received an approval from the Land Registrar to dispose of the property at the available market price.

13.0 On whether the sale infringed the Claimant's rights and legitimate expectations, the Defendant argued that the realisation of security was not a public law administrative function, and that the sale of charged registered land was not regulated by the Loans Recovery Act. The Defendant argued that both were a private law contractual matter regulated by the provisions of the Registered Land Act. The defendant argued that the Claimant's reference to the Loans Recovery Act was misplaced as the present matter had nothing to do with recovery of money lent and the interest charged but about the exercise of the Claimant's power of sale under the Registered Land Act. The Defendant argued that if at all the Registrar of Lands exercised his powers in excess, section 138 of the Registered Land Act allowed anyone who is aggrieved by such exercise of power to claim from the Government.

14.0 On the reserve price, the Defendant submitted that the duty to compute or obtain the reserve price from the Registrar of Lands did not apply if a chargee was selling the property by private treaty, and that the aspect of the chargee having a duty to act in good faith under section 71 of the Registered Land Act, was only available where the property was being sold by public auction. The Defendant observed that although it did not have any obligation to obtain the reserve price because it was selling the property by private treaty, it still went all the way to engage Registrar of Land for that purpose. The Defendant argued that the power of sale under the Registered Land Act was not for the chargor but the chargee, and therefore the Claimant's contention that he should have been consulted on the reserve price whatsoever was not supported by the law.

15.0 The Defendant further submitted that the Registered Land Act was very clear that where a party is aggrieved in the way the power of sale had been conducted, the available remedy was to claim damages. It was observed that in the present circumstances, the Claimant was not claiming any damages at all but that the transaction be re-opened. The Defendant argued that what the court decides, in any case, is based on the pleadings and that what had been filed and pleaded in the matter did not raise any triable issues.

16.0 The Defendant prayed to the court to discharge the injunction arguing that the business dealings of the Defendant had been affected in that the property was yet to be handed over to the purchaser and the Claimant was still deriving benefits through the rights of use and possession of the same despite defaulting in his obligations to the Defendant. It was submitted that the Claimant continued to hold on to the property by the operation of the interlocutory injunction thereby exposing the Defendant to claims from the purchaser. The Defendant further argued that it was in the interest of both parties under the overriding objective of the court that matters be disposed of with speed. They prayed that the injunction be discharged forthwith so that the parties' rights defined under the applicable statute are not impaired, and that the parties and the court must save expenses and time. The Defendant therefore prayed that the injunction be discharged, and the matter dismissed for it did not raise any arguable or serious legal issue worth the court's consideration or trial.

17.0 This court has considered the submissions from both parties in respect of the matter. The issue before me is twofold: first, whether to perpetuate the interim order for an injunction that was granted by the court restraining the Defendant from continuing with the sale of the property, and second, whether to dismiss the action for not having raised any arguable point.

18.0 I will not restate here the law as regards the granting of interlocutory applications and interlocutory injunctions in detail. Both counsels have comprehensively done the same. Order 10 Rule 27 provides that the Court may grant an interlocutory order for an injunction upon application by a party where it appears to the court that (a) there is a serious question to be tried; (b) damages may not be an adequate remedy; and (c) it shall be just to do so. Under the Rule, the court may make such an order unconditionally or on terms or conditions that it may consider just.

19.0 Order 10 rule 27 codifies the important principles and guidelines to be considered in applications for injunctions which were laid out in the leading authority of *American Cyanamid Co. v Ethicon Limited* [1975] 2 W.L.R. 316. The important dicta on the case were summarised by Tembo, J. in the case of *Ian Kanyuka v Thom Chiumia and Others* Civil Cause No. 58 of 2003 HC (unreported) in which he said:

> "The principles to be applied in applications for interlocutory injunctions have been authoritatively explained by Lord Diplock in American Cyanamid Co. v Ethicon. The plaintiff must establish that he has a good arguable claim to the right he seeks to protect. The court must not attempt to decide the claim on the affidavits; it is enough if the plaintiff shows that there is a serious question to be tried. If the plaintiff satisfies these tests, the grant or refusal of an injunction is a matter for the court's discretion on a balance of convenience. Thus, the court ought to consider whether damages would be a sufficient remedy. If so, an injunction ought not to be granted. Damages may not be a sufficient remedy if the wrongdoer is unlikely to be able to pay them. Besides, damages may not be a sufficient remedy if the wrong in question is irreparable or is outside the scope of pecuniary compensation or if the damages would be difficult to

assess. It will generally be material for the court to consider whether more harm will be done by granting or refusing to grant an injunction. In particular, it will usually be wiser to delay a new activity rather than to risk damaging one that is already established."

20.0 In that case, it was stated that 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. Therefore, in considering granting or refusing an injunction, courts must as much as possible try to preserve the status quo of the parties. It is further well settled that courts will only grant an interlocutory injunction where the applicant discloses a good and arguable claim to the right that he seeks to protect. However, in doing so, the court should not go into the full details to examine the merits or demerits of the action. It will only look at the sworn statements to determine whether the applicant has raised serious question to be tried.

21.0 I must state, most importantly, that at the time that the Claimant made his without notice application for the interlocutory injunction, he did not disclose to this court that the property the subject of this application, and the whole action, had been sold and transferred to the new proprietors i.e., that the power of sale had been exercised and transfer formalities of the property had been completed. This was very fundamental information that needed to be disclosed to this court at that point because from the current submissions, it is very clear, and not disputed at all, that the property was sold, and the sale was completed. In his sworn statement filed on 5 May 2023, whose application the Claimant withdrew, but the court still finds the sworn contents relevant to this subject matter, he submitted to this court that having raised objections regarding the proposed sale of the property at K180,000,000 he had no reason to believe that the Defendant would go ahead with the sale of the property before responding to his objection. It was the Claimant's contention that when he noted that there was no response to the objection, he proceeded to obtain the injunction, and that was when he was informed by the Defendant that the property had been sold and was already transferred although full payment was yet to be made. Apparently, the bank that had financed the purchaser was refusing to pay the balance because of the order of interlocutory injunction.

22.0 I take notice that the Claimant's application for an interlocutory injunction was premised on the fact that the property, subject of the application was not yet sold i.e., the Defendant had not yet exercised its power of sale. The Claimant's prayer under paragraph 18 of his sworn statement in support of the application for the interlocutory injunction is very clear in that regard. It states as follows:

"I therefore humbly pray for an order of an injunction restraining the Defendant from proceeding to sell the property Title Number Likabula 3319 below the reserve price

pending the hearing of an *inter-partes* application for an injunction extending the same with costs."

The Claimant's prayer, above, nailed the proposition that the property subject of the application was not yet sold i.e., the power of sale was yet to be exercised by the Defendant.

23.0 Following the hearing of that application, the court, made the following order:

> "Upon hearing the Claimant herein, it is hereby ordered and directed that:
> An injunction be and is hereby granted restraining the Defendant from selling the property Title Number LK 3319 below the reserve price of K215,000,000 pending the hearing and determination of an application with notice for an interlocutory injunction for the extension of the injunction."

The above order is also very clear. It was made on the assumption that the power of sale had not yet been exercised by the Defendant at the time. However, the court learnt in the run to the current with notice application that the facts on the ground were entirely different. At the time the court was making this order, the property had already been sold and transferred to a third party over a month before. In those circumstances, an equitable remedy of an interlocutory injunction not to sell the property was not available to the Claimant because the Defendant had already exercised its power of sale. The order of an interlocutory injunction made by this court on 22 January 2023 and formally endorsed by the court on 24 January 2023 was therefore nugatory and *void ab initio.* Consequently, as we stand now, there is no, and has never been, such an order of interlocutory injunction, and there is nothing to extend.

24.0 It is very clear that the court made its decision based on wrong information presented by the Claimant. If the court had the correct information, it was surely not going to grant the Claimant's prayer. The court was misled, whether deliberately or otherwise. The failure to present accurate information to court borders on misrepresentation and/or dishonesty which should not in any event find its way in applications of this nature. Surely, I take it with a pinch of salt that at the time the application was filed in this court, the Claimant did not know that his property had been sold and transferred to a third party. The Claimant had the duty and obligation to ensure that the information presented to the court was correct and up to date. That being the case, I hereby order that the Claimant be held liable and/or responsible for any damages that the Defendant have or may have suffered by reason of the erroneous order.

25.0 I would like to further observe that incidences of parties coming to court for urgent without notice applications with wrong, incorrect, and/or misleading information seem to be on the rise. It now certainly appears that the very essence of urgent, without notice applications, is being abused. It is very unfortunate that we, the courts, are finding ourselves at the receiving end of it all. Unfortunately, the increase in these kinds of

experiences may negatively impact deserving matters that ought to indeed be dealt with urgently and without notice. Surely, it is increasingly appearing that the only safe way of handling urgent applications is with notice. However, this may not be the best approach at the end of the day.

26.0 On whether this matter should be dismissed for failure to disclose any triable issues, I took time to consider the essence of the Claimants claim in this matter *vis-à-vis* the remedy he was looking for from this court bearing in mind the power of sale had been fully exercised by the Defendant. The Claimant's main contention in the statement of case is that the Defendant sold the property at K180,000,000 which was below the below the reserve price of K215,000,000 without consulting him. Therefore, he contends that the sale of the property was unconstitutional, unconscionable, unfair, and inequitable. The Claimant's prayer to the court is as follows:

> "The Claimant therefore claims:
> 14.1 An order to re-open the transaction disposing the security being Title Number LK3319 at K180,000,000 or any price below the reserve price under section 3 of the Loans Recovery Act;
> 25.0 Costs of this action."

27.0 I will first consider the issue of sale of property by private treaty generally as it will help in unlocking the present issue. From the facts presented in this matter, it is not in dispute that the property forming the security for the loan was sold by private treaty in the sum of K180,000,000. The question I would like to address is whether property securing a loan under a mortgage can be sold by private treaty as in the present case. In *New Building Society v Mumba* [2001-2007] MLR Com 243, the Supreme Court of Appeal took its time to consider this question and made the position very clear in their interpretation of section 71 of the Registered Land Act. In their words, their Lordships stated as follows on page 248:

> "Accordingly, we are of the view that a construction that allows a chargee to sell either by private treaty or by auction, or to concur with any person to sell by public auction, is better than they one that restricts the sale to be by public auction only and, therefore, that this is what the legislature must have desired. The High Court was of a similar view in the cases of *Mkhubwe v National Bank of Malawi* [2000-2001] MLR 261 and *Leasing and Finance Company Limited v Sadiki* [2001-2007] MLR Com 24.
>
> By reason of the foregoing, we are of the opinion that the court in the *Gondwe* case, overlooked the word "may", and the meaning thereof, in the second part of the sub-section and, therefore, that the decision in that case, to the extent that it suggests that section 71(1) makes it mandatory to sell charged property by public auction, should be overruled, and we do so."

In the above case, the Supreme Court of Appeal overruled the previous position that was set in *New Building Society v Gondwe* MSCA Civil Appeal No. 21 of 1994

(unreported) which was for the proposition that the sale of charged property under section 71 of the Registered Land Act should only be by public auction. As it stands now, it is trite that a chargee is by virtue of section 71 of the Registered Land Act at liberty to sell charged property either by public auction or by private treaty. This is the position that I take in this matter.

28.0 The next question which I must consider is whether the chargee exercising its power of sale by private treaty is obliged to sell the charged property at the reserved price. In this regard, the Claimant argued vehemently that the Defendant should not have sold the property at K180,000,000 because it was below the reserve price of K215,000,000 and contended that such sale was unconscionable, unconstitutional, and unfair. The *New Building Society v Mumba case,* supra, clearly settled the same. On the same page, 248, their Lordships stated as follows:

> "What we have said above also takes care of the next question, namely, whether by selling the property by private treaty and without a reserve price the appellant can be said to have acted in bad faith as would warrant rescission of the sale. It seems to us that the question does not now arise because, we have said, the appellant was at liberty to sell in the way it did (i.e. by private treaty). It is only when the option to sell by public auction has been taken that it becomes a requirement to sell subject to a reserve price as the Land Registrar may approve."

29.0 From the foregoing, it is very clear that a chargee exercising his power of sale is at liberty to sell charged property by private treaty without a reserve price. In other words, sell of charged property requires a reserve price only where such property is to be sold by public auction. In the present case, it is not disputed that the charged property was sold by the Defendant by private treaty. Therefore, the issue of the sale of the property below the reserve price that was set by the Ministry of Lands was of no consequence. In any case even if the Defendant was obligated to get a reserve price and failed to do so, such failure would not have constituted an illegality which renders the contract of sale a nullity. See *Leasing and Finance Company of Malawi Limited v Sadiki* [2001-2007] MLR (Com) 24. In this regard, the Defendant was not under any legal obligation to seek a variation of the reserve price from the Registrar of Lands as that was not needed at all. The Claimant's argument therefore that the Defendant acted in an unconscionable, unconstitutional, unfairly or in bad faith because they had sold the charged property below the reserve price does not, in my view, hold any water.

30.0 On the Claimant's plea for the court to re-open the sale transaction, under the Loans Recovery Act, I must state that mortgages that are concluded between a mortgagor and a mortgagee are as good as any other legal agreements that parties may enter. Courts must respect these agreements. The arrangement between the Claimant and the Defendant was such the Defendant was at liberty to exercise its power of sale where the Claimant defaulted on the repayment of the loan. The Claimant having defaulted in the repayment for the loan, the only available consequence was for the Defendant to

exercise its power of sale, which in this case it did. The court cannot. in that regard, re-open the sale transaction.

31.0 I must say that the Claimant' recourse to the Loans Recovery Act is very strange in the circumstances as the matter here is in respect of the Defendant's exercise of its power of sale. The Loans Recovery Act does not deal with a chargee's exercise of his statutory power of sale. To me, the reference to the said legislation is misplaced. In my mind, the Registered Land Act is the appropriate piece of law that comes into this equation. Even if the Loans Recovery Act was applicable in the current situation, which I am saying is not, it was not going to help anything since the remedy that the Claimant is asking from the court is not available. The Claimant has argued that the reading of section 3 of the Loans Recovery Act is to the effect that where security has already been disposed of the only remedy available to the debtor lies in damages. It is not in dispute that the security in this matter was sold. Therefore, the only available remedy for the Claimant is in damages, and not re-opening of the transaction.

32.0 I would like to buttress the above by having recourse to the Registered Land Act. Section 68(2) gives power to a chargee to exercise his power of sale where there is default on the part of the chargor. It further provides under section 71(3) that where such power has been duly exercised, the only recourse that any aggrieved person has is by way of claiming damages against the person who has exercised such power.

33.0 In the *New Building Society v Mumba* case, supra, the Supreme Court of Appeal considered this matter beautifully when it said, from page 248-249, as follows:

> "The next question is whether the equitable remedy of injunction restraining the appellant from completing the sale was available to the chargor after the chargee had exercised the power of sale. We will consider this issue as if the question is whether the remedy of injunction is available to a chargor at all, as it does not seem to make any difference to us whether the remedy is sought before or after the chargee has exercised the power of sale... Therefore, provided the power of sale is exercised in good faith, we are ourselves disposed to think that a mortgagor having voluntarily agreed with a mortgagee on what should happen when certain specified events take place should not be allowed to run to the courts the prevent the mortgagee from exercising the power of sale merely because, as will usually be the case, it is contrary to his interests... What this means is that the equitable remedy of injunction restraining the appellant from completing the sale should not, in the present case, have been available to the respondent. What was available to the respondent was the remedy in damages, which the statute envisages would be sufficient remedy, under sub-section (3). And these, it seems to us, would be easy to ascertain and that the appellant would be likely to pay them. And where damages would be a sufficient remedy, is itself a reason enough for refusing a grant of an injunction, we would add."

34.0 In the present matter, I have considered the Claimant's prayer in relation to the facts presented in respect of the matter. It is very clear that the jurisprudence points to one

direction: that where a party is aggrieved with the exercise of power of sale by a chargor, the only available remedy in that regard is in damages. In this case, the Defendant proceeded and acted in a manner consistent with the charge that they held and exercised their power of sale by private treaty. I have not seen any incidence in which the Defendant here has acted in any unconscionable, unconstitutional, in bad faith or unfair manner. However, the Claimant being aggrieved with such exercise of power of sale should have had recourse to a claim in damages against the Defendant. However, he has not. The Claimant is seeking this court to re-open the transaction. To me, such a remedy is not available under the law.

35.0 In respect of the Defendant's prayer to dismiss this matter for not having disclosed and arguable case, I must observe that the present matter is on all fours with *Rombani Londwa t/a Kaizwanga Investment and General Dealers v Standard Bank plc* Commercial Cause No. 32 of 2022. On page 5 Dr. Kachale, J. stated as follows:

> "In this case, though he was notified of his breach of loan agreement, the Claimant never sought such accommodation and was kept fully abreast of all steps taken to realise the security by the bank. In our judgement, it would be quite inimical to commercial banking if the Court were to intervene and prevent the chargee from exercising its statutory right as claimed in the cause of action. The law as discussed in the above cited decisions does not offer such remedies to a person in the position of the Claimant. Put differently, there are no prospect of the present cause of action succeeding even if it proceeds to trial because the factual scenario analysed in the context of the pertinent law would not yield such an outcome."

In the said case, the entire cause of action was dismissed as the court held that it had no legal merits whatsoever.

36.0 In the present case, in summary, I am left in no doubt that the Defendant duly followed what was agreed upon by the parties through the mortgage that they concluded. The Claimant was in default of the payments and the Defendant decided to exercise its statutory power of sale. The same was conducted, in my view, in compliance with the Registered Land Act. I have not proven any instance of bad faith or even any unconscionable conduct on the part of the Defendant. The sale of the property by the Defendant below the reserve price was of no consequence as the law is clear that the Defendant was never obligated by the law get a reserve price at all for a sale by private treaty. As it stands, the property was duly transferred, and the register reflects the name of a third party.

37.0 Further, following the exercise of the power of sale by the Defendant, the Claimant has brought up the current action seeking this court to stop the sale (that has already been concluded) and to re-open the transaction. The law is very clear however that the only available remedy in this case is a claim in damages against the person who has exercised the dispute power of sale. However, the Claimant has not claimed any damages in this regard.

38.0 In view of the foregoing, it is my view that the Claimant's action has no legal merit, and in any case, has not raised any triable issues. Further, it has sought remedies that are strange and not available under the applicable law. All I can see in this matter is the Claimant's attempt to coin some confusion with a view of creating an impression that there is some controversy worth the court's intervention. I must say, firmly so, that there is no legitimate controversy in this matter. I am compelled, in the circumstances, to cite the words of Dr. Kachale J. in the *Rombani Londwa t/a Kaizwanga Investment and General Dealers v Standard Bank plc* case, supra, with approval that:

> "Litigation should be about genuine controversy and not mere academic or frivolous or contrived disputes with no cloak of legality."

It is my view that the present cause of action is hinged on flimsy and untenable foundation bearing in mind the factual context and the applicable law in respect of issues raised herein. It is my view that the Claimant's action does not raise any arguable case.

39.0 For the above reasons, the Claimant's action herein fails in its entirety, and is dismissed with costs.

Made in chambers at Blantyre this 8th August 2023.

Jabbar Alide
JUDGE