IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 2539 OF 2000

BETWEEN

JOYCE MLOTHA (Mrs. J Mbekeani) PLAINTIFF

AND

THE NEW BUILDING SOCIETY DEFENDANT

CORAM: D F MWAUNGULU (Judge)

Nyimba, a legal practitioner, for the plaintiff

Mbvundula, a legal practitioner, for the defendant

S P Moyo, an official interpreter

Mwaungulu, J

ORDER

The defendant, the New Building Society, applies to dissolve an injunction. Mrs. Mbekeani obtained the injunction ex parte on 20th August, 1999. The injunction proscribed the society possessing, selling or transferring a plot number Soche East KS 3/9, No. SW8/766/215, Blantyre. The Court should set aside the injunction. The plaintiff suppressed material facts. Moreover, the Court should have refused the interim injunction.

The plaintiff, till these events, owned the house the subject of these proceedings. On 1st February, 1995 the society lent her K30, 000. A charge on the property secured the loan. The charge was for twenty years. The plaintiff had to pay K717 a month. The plaintiff paid from rentals from her tenant. She made four payments. She had arrears from before

22nd April, 1995.

The society wrote her about the arrears on 22nd April, 1996, 16th May, 1996 and 10th October, 1997. In all letters the society requested her to pay. The society wrote it would exercise its legal rights if she never paid. She paid. Interest on the loan has been erratic and debilitating. She never covered the arrears. The plaintiff never meaningfully responded to the society's letters. The Society on 29th July, 1999 exercised its power of sale. It publicly auctioned the property for K500, 000. On 6th August, 1999 it informed the plaintiff of the sale. She was not to negotiate or collect rentals. It would pay her the balance.

On 19th August, 1999 she sued for possession under Order 113 of the Rules of the Supreme Court. I wonder how the plaintiff sued under Order 113. The Order came because of decisions like Ex p Amalgamated West End Development and Property Trust, The Times, September 18, 1969 and Ex p London Diocesan Board of Education (Inc), The Times, September 25, 1969, on the one hand, and Re Wykeham Terrace, Brighton, ex p Territorial Auxiliary and Volunteer Reserve Association for the South East Territorial Association v Hales, [1971] 1Ch 204, on the other. These decisions decide that a court cannot order possession of land on an ex parte application and proceedings cannot be had against a person the originating summons never mentions. This Order enabled. This differs from the ordinary procedure of commencing possession of land actions.

The procedure, according to the Supreme Court Practice, 1995 ed., Sweet & Maxwell, para. 113/1-8/1, p.1622, aims at two situations:

"The order applies where the occupier has entered into occupation without licence or consent; and this order also applies to a person who has entered into possession of land with a licence but has remained in occupation without a licence, except perhaps where there has been the grant of a licence for a substantial period and the licencee holds over after the determination of the licence ..."

The plaintiff on the date of the originating summons applied ex parte for an interim injunction. The judge granted. The injunction was not to a specific date for hearing inter partes. The society had to apply to set aside. The society has. The society wants the order set aside. The society contends the plaintiff excluded several facts. The plaintiff never disclosed she had arrears. She concealed the society's several reminders and requests to pay. Mr. Mbvundula, for the society, argues that on this Court's decisions in Nkwanda v New Building Society, Civ. Cas. No. 1806 of 1997, unreported; Mbekeani v New Building Society, Civ. Cas. No. 597 of 1999, unreported and Mkhumbwe v National Bank, Civ. Cas. No. 2702 of 2000, unreported, the court should have refused the injunction.

She contends she is not in arrears at all. She paid the money due. She argues that this Court could, as in Birmingham Citizens Permanent Building Society v Caunt, [1962] Ch 883; and Royal Trust of Canada v Markham, [1975] 1 WLR 1462, extend time to pay. It is urged this Court could extend, in its discretion, for a reasonable time. She further contends the society, contrary to section 68 of the Registered Land Act, never informed her of the sale. She, therefore is entitled to the injunction. It should remain.

This Court does on an application dissolve an injunction. It does so on several grounds. This Court often does because the plaintiff suppressed material facts. It may continue the injunction notwithstanding the plaintiff suppressed facts. This was the case in Boyce v Gill, (1891) 64 LT 824. It depends on the facts. Certainly, the Court may dissolve an injunction founded on a wrong decision. This injunction should dissolve on both aspects.

The judge would have refused had the plaintiff disclosed the arrears and unattended notifications. The judge thought the society acted arbitrarily. The society often advised the plaintiff of the arrears and asked for payment. Mr. Nyimba's argument that the society should have informed the plaintiff about the sale is ununderstandable. Section 68 of The Registered Land Act Mr. Nyimba relies on creates no such duty. This Court in Mkhumbwe v National Bank considered the section extensively. Section 68 reads:

"(1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargeor notice in writing to pay the money owing or to perform and observe the agreement, as the case may be.

(2) If the chargeor does not comply, within three months of the date of service, with a notice served on him under subsection (1), the chargee may-

(a) appoint a receiver of the income of the charged property; or

(b) sell the charge property.

First it requires a default as in section 60. That default must persist beyond a month. The chargee must allow time to pay. The section never stipulates the time the chargee must give. The time given however must be reasonable. Even if unreasonable the mortgagee is protected if he allows more time than the notice.

Subsection 2 only states what happens after default. It regulates the mortgagee's right to sell and appoint a receiver. The rights arise after three months after the chargeor defaults

beyond a month since notice. The chargee could sell or appoint a receiver after three months after the chargeor fails to comply. In the Mkhumbwe case this Court said:

"The chargee need not inform the chargeor about the remedy he will deploy. The right springs immediately upon default in a subsection 1 notice. The chargee need not inform the chargeor the chargee will sell the property or stipulate the time of sale. Under section 68, upon defaulting payment for over a month, the chargee could notify the chargeor to pay. The chargee cannot appoint a receiver or sell the property until after three months of that notice."

The society never acted unreasonably. It complied with the letter of the statute. It informed the plaintiff of the arrears and requested payment. The plaintiff is in arrears beyond the period stipulated by section 68. It was open to the plaintiff to exercise the power to sell or appoint a receiver. Notification of the chargeor of the remedy is not required by the statute.

Mr. Nyimba argues failure to give notice violated the plaintiff's rights under the Constitution, specifically the right to be informed of administrative action adverse to him and the right not to be deprived of one's property arbitrarily. This point was accepted by the judge on the ex parte application. That point does not bind me, the decision having been made without argument from the other party. This Court, out of comity, respects a coordinate judge's decisions. The defendant never violated the plaintiff's rights described.

A mortgagee's or chargee's action on a mortgage or charge cannot by any strain of imagination be the administrative action the framers protected the citizen from under the Constitution. Moreover, section 68 protects the chargeor or mortgagor in giving him time to pay. Meanwhile, the mortgagee keeps the notice without resorting to her remedies. However, section 68 is a limitation on the rights Mr. Nyimba describes.

The rights Mr. Nyimba describes are derogable. They can therefore be limited by law. The plaintiff had the onus to show section 68 violates the Constitution. In particular the plaintiff had to show, on balance of probabilities, it violates international human rights standards and is unnecessary in an open and democratic society. The plaintiff never discharged the burden. The section offends no human right standard. It requires the chargee, before resorting to his remedies, to notify the chargeor and request for payment. It cannot be offending the rights described.

The chargeor or mortgagor knows his rights and duties. In principle, there is no reason for a party to remind the other of those rights and obligations. The notice under section 68 is statutory and imposes a duty unknown to the common law. It must be restricted to

the situations it covers. It only requires the mortgagee or chargee to notify the mortgagor or chargee and request for payment. If the mortgagor or chargeor complies in the time stipulated, cadit question. The mortgagee or chargee has no further duty if the mortgagor or chargeor never complies with the notice.

The mortgagee or chargee can sell the property privately, without notifying the mortgagor or chargeor. If, as happened here, the mortgagee or chargee sells by public auction, there is notice of the sale to the chargeor or mortgagor. The chargeor or mortgagor cannot complain of not being informed when the mortgagor or mortgagee advertised the sale. A public auction is an advertisement to all, including the mortgagor or chargeor. The mortgagor or chargeor can stop the sale by paying the arrears or sums due before the auction. The society never violated the plaintiff's rights. She should have told the judge that the society informed her of the arrears and requested payment. Had she informed the judge, the judge would not, on the House of Lords principles in American Cynamid Co. Ltd v Ethicon Ltd, [1975] 1 All ER 504, have granted the injunction.

The judge's application of the principles was however superficial. A court handling an interlocutory prohibitory injunction application must carefully regard matters the House of Lords laid in a case followed by this court and other jurisdictions. Interim injunctions demand considering the matters the House raised. Interfering with the rights before a trial determines them may cause injustice either way. A person prevented from pursuing a certain course of action on his rights may feel inconvenienced and delayed. She will feel deprived of justice due her if it turns out she had the right. Equally, if another is allowed to pursue a certain course of conduct based on a certain understanding of his rights that turns out to be erroneous, the other will feel grave injustice that the other was not prevented. Justice is, in these circumstances, difficult to achieve. The House of Lords in American Cynamid Co. Ltd vs Ethicon Ltd comes close to dealing with a situation highly susceptible to injustice.

This case falls on the first two principles in American Cynamid Co. Ltd vs Ethicon Ltd. The plaintiff must raise a triable issue and convince the court that the court could at the end of the trial grant an injunction. The court will not grant an interlocutory injunction if it would not grant an injunction at the trial. This must be obvious from Lord Diplocks statement of the principle:

"As to that, the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the 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."

The court refuses if damages are an adequate remedy for the interim losses. The court

will not grant an interlocutory injunction if on another principle it would not grant the injunction at the trial.

There is a principle on which this court would not have granted the injunction at the end of the trial. The judge granted the injunction because, though there was a sale of the property, the sale was not consummated. It is unclear what consummation was. It probably meant a conveyance. This position is unsustainable in principle and on clear authority. An agreement to sale real property immediately creates an equitable title to the purchaser. A bona fide purchaser of property without notice of a defect in the title has an immediate right at the conclusion of the agreement to sell. It is curious that a court would grant an injunction, an equitable remedy, when it can also grant specific performance, another equitable remedy, to a purchaser that can also be enforced by an injunction against the mortgagee or chargee. As a matter of principle courts have not granted injunctions after sale. They have done so before sale when the chargeor or mortgagor pays. This sound principle accords with good judgement.

The matter is however covered by authorities. There is this Court's decision in Mkhumbwe v National Bank. The starting point is a passage in Halsbury Laws of England, 4th ed. Butterworth, 1980, para. 725:

"The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagee has begun a redemption action, or because the mortgagee objects to the manner in which the sale is arranged."

The case cited is Anon, (1821) 6 Madd. 10. An injunction to stop the sale on want of notice was refused by Leach, V-C. The Vice Chancellor thought that the sale should not be stopped because "considering that if the ex parte case was true, the Plaintiff might relieve himself by giving notice to the purchaser."

There are other decisions of later import. There is a Queens Bench decision of Crossman, J., in Lord Waring v London and Manchester Assurance Co Ltd, [1935] Ch 310 approved by the Court of Appeal in Property and Bloodstock Ltd v Emerton, [1967] 3 All ER 321.Lord Waring v London and Manchester Co. Ltd is four walls with this case.

A company entered as mortgagee into a contract for the sale of mortgaged property. The mortgagee gave many opportunities to pay money due under the mortgage. At the mortgagor's request and undertaking to put the property up for sale by auction, the company refused a good purchase offer. When the mortgagor put the property up for sale by auction (when the period within which he had undertaken to do so was past) no acceptable bid was received. After a long period during which he was to the company's knowledge negotiating with a third party for a fresh loan on the security of the mortgaged

property, and during which the company, to help him as much as possible, postponed selling, the company ultimately contracted to sell the property for an amount less than that it refused at his request and upon his undertaking.

On a motion by the mortgagor for an injunction to restrain completion because there was no sale until conveyance and that the contract had been entered bad faith at a gross undervalues, and for leave to redeem the property upon paying into Court, as he claimed to be able to do, the moneys due under the mortgage the court held, that a mortgagee's exercise of his power under s. 101, sub-s. 1, para. (I), of the Law Property Act, 1925, to sell the mortgaged property by public auction or private contract is binding on the mortgagor before completion unless it is proved that the mortgagee exercised it in bad faith. Crossman, J., said:

"The contract is an absolute contract, not conditional in any way, and the sale is expressed to be made by the company as mortgagee. If, before the date of the contract, the plaintiff had tendered the principal with interest and costs, or had paid it into Court proceedings, then, if the company had continued to take steps to enter into a contract for sale, or had purported to do so, the plaintiff would, in my opinion, have been entitled to an injunction restraining it from doing so. After a contract has been entered into, however, it is, in my judgement, perfectly clear (subject to what has been said to me to-day) that the mortgagee (in the present case, the company) can be restrained from completing only on the ground that he has not acted in good faith and that the sale is therefore liable to be set aside."

He expressed the reason for the rule:

"In my judgement, s. 101 of that Act, which gives to a mortgagee power to sell the mortgaged property, is perfectly clear, and means that the mortgagee has power to sell out and out, by private contract or by auction, and subsequently to complete by conveyance; and the power to sell is, I think, a power by selling to bind the mortgagor. If that were not so, the extra-ordinary result would follow that every purchaser from a mortgagee would, in effect, be getting a conditional contract liable at any time to be set aside by the mortgagor's coming in and paying the principal, interest, and costs. Such a result would make it impossible for a mortgagee, in the ordinary course of events, to sell unless he was in a position to promise that completion should take place immediately or on the day after the contract, and there would have to be a rush for completion in order to defeat a possible claim by the mortgagor."

In the Court of Appeal in Property and Bloodstock Ltd v Emerton Dancwerts, L.J., Sachs

and Sellers L.J.J., agreeing, said:

"The actual decision of CROSSMAN, J., in Lord Waring's case (4) was: (I) that a mortgagee's exercise of has power under s. 101 (1) (I) of the Law Property Act, 1925, to sell the mortgaged property by public auction or private contract is binding on the mortgagor before completion unless it is proved that he exercised it in bad faith; and (ii) that the fact that a contract for sale was entered into at an undervalue is not by itself enough to prove bad faith. Counsel for the borrower contended in his initial argument that this case was wrongly decided and that we should overrule it. The decision has stood for thirty-two years without (so far as I know) any criticism. This, I would suppose, is a discouraging start for counsel's arguments, but counsel is certainly entitled to distinguish the case from the present one, because CROSSMAN, J., expressly stated at the beginning of his judgement that the contract was (5) "an absolute contract, not conditional in any way," always supposing that the contract in the present case is really a conditional contract, and that, if it is, the fact that it is subject to a condition makes any difference, having regard to the express terms of s. 101 (1) (I) of the Law Property Act, 1925."

Section 71 (3) has the same effect as section 101 of the Law of Property Act, 1925 in England. It has the same effect as a conveyance to transfer the legal title to the purchaser. It is independent from the power of the mortgagee or chargee to sell. Where there is a an absolute contract to sell between the mortgagee and a purchaser the court cannot stop the sale. Just as it cannot stop the chargee from placing the transfer for the approval of the land registrar. As the authorities show once there is a sale, the Court will not stop the sale, even if the chargeor tenders the money and costs except of course where there is collusion or fraud. Moreover, irregularities in the exercise of the power to sell the property only affect a purchaser who has notice of the defects in the exercise of power.

In my judgement, the plaintiff failed to raise a triable issue or, which is the same thing, to establish his right to an injunction at the end of the trial. A court cannot restrain by injunction a mortgagee's or chargee's sale if the mortgagee acted in good faith. Mr. Nyimba cited Birmingham Citizens Permanent Building Society v Count and Royal Trust of Canada v Markham. The cases can be distinguished. They did not deal with a mortgagee or chargee who sold the mortgaged or charged property. There the mortgagee or chargee claimed possession of a dwelling house.

In both these cases the extensions are based on statutory interventions in England and Wales. As Sir Pennycuick V. -C observed there was section 36 of the Administration of Justice Act 1970, superseded by section 8 of the Administration of Justice Act 1973. These statutes do not apply to us. There is no similar provision in our Registered Land

Act. The position before these statutes obtains in this country. It is found in the Vice Chancellor's statement at 1419:

"I will endeavour to deal with the points raised by the notice of appeal in the same order as they are there raised. I propose first to refer to the law as it stood before the enactment of those Acts, it had been established by a series of decisions that a mortgagee was entitled as of right to immediate possession of the mortgaged premises, subject only to the possibility of an adjournment for a short time to give the mortgagor an opportunity of paying off the mortgage."

The Court of Appeal approved the statement of the principle by Russell J in the case Mr. Nyimba cited Birmingham Citizens Permanent Building Society vs Caunt, at page 912:

"Accordingly, in my judgment, where (as here) the legal mortgagee under an instalment mortgagee under which by reason of default the whole money has become payable, is entitled to possession, the court has no jurisdiction to decline the order or to adjourn the hearing whether on terms of keeping up payments or paying arrears, if the mortgagee cannot be persuaded to agree to this course. To this the sole exception is that the application may be adjourned for a short time to afford to the mortgagor a chance of paying off the mortgagee in full or otherwise satisfying him; but this should not be done if there is no reasonable prospect of this occurring. When I say the sole exception, I do not, of course, intend to exclude adjournments which in the ordinary course of procedure may be desirable in circumstances such as temporary inability of a party to attend, and so forth."

This is the law in Malawi but only where the mortgagee or chargee seeks possession of the premises. The principle does not apply where, like here, the mortgagee or chargee exercises the power to sale. In the latter case the principles in Mkhumbwe vs National Bank of Malawi apply. Moreover, while besides the power of sale and appointment of a receiver a mortgagor has the right of foreclosure and possession, the chargee does not have a right to possess the property. The court cannot, therefore, grant an injunction where the mortgagee or chargee sells the mortgaged or charged property in proper exercise of the power to sell under the mortgage or charge. The decisions Mr. Nyimba relies on do not apply to this case where the plaintiff seeks an injunction to prevent a sale that has actually taken place.

This injunction is equally unsustainable on the other American Cyanamid Co. Ltd vs Ethicon Co. Ltd principles. The court must consider whether damages are an adequate remedy for the plaintiff if the injunction is wrongly refused. Here they are. The society, which already sold the property will repay the balance. It is not suggested the society sold the property under value. If it did, her remedy is in damages. The other consideration is whether the defendant can repay the damages if the injunction is

erroneously refused. The society can pay from the purchase price or other resources. There is little to justify granting the injunction.

The court must still consider the reverse side. This is whether damages would be adequate compensation to the plaintiff if the court refuses the injunction. It is the case. The court must however still consider whether the plaintiff can pay the damages if an injunction is erroneously granted. The defendant here can recover from the purchase price. I doubt whether, if damages exceed the price the property fetched, the plaintiff would pay the defendant.

With these conclusions, it is unnecessary to consider the balance of convenience. If it is necessary, the balance of convenience favours refusing the injunction. On the authorities referred to, the society's case is relativeIy stronger. A court will not grant an interim injunction after sale of property. Moreover, the arrears, with these prohibitive inflationary interests, could escalate to where the value of the property would be surpassed. That will make it harder for the chargeor to pay. I dissolve the injunction.

Made this 16th Day of February 2001

D F Mwaungulu

JUDGE