IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 340 OF 2003

BETWEEN

JEFFREY CHIKUMBANJE PLAINTIFF

AND

INDEFUND LIMITED DEFENDANT

CORAM: D F MWAUNGULU (JUDGE)

Kadwa, legal practitioner, for the plaintiff

Masumbu, legal practitioner, for the defendant

Machila, official interpreter

Mwaungulu, J

ORDER

In this summons the defendant, Indefund Limited, want to dissolve an injunction the plaintiff, Mr. Chikumbanje, obtained ex parte on 3rd February, 2003. The defendant opposes the application, wanting the injunction to continue, because the defendant, in accepting some payments, albeit not extinguishing the arrears on the principal and interest, waived the remedies under the mortgage. The defendant contends, correctly, in my judgment, that the court should not have granted the ex parte injunction in the first place or, if it could, the injunction should be set aside because the plaintiff failed to disclose material information to the court. A court can dissolve an injunction obtained ex parte where, for example, the applicant suppressed material facts or the injunction was based on a wrong understanding of the law. The questions for determination are whether the plaintiff suppressed material facts and whether the injunction sounds in law.

The facts are far from complex and, to the extent they resolve issues the application raises, are as follows. The defendant is a bank to who the plaintiff was a client of some time, at least, it so appears. The plaintiff borrowed money from the bank on a charge of his property MC 328 (Title number 13/1). At the time of the ex parte injunction the plaintiff, according to his affidavit, was K3, 000, 000 in arrears. It seems, from the plaintiff's letter of 20th January, 2002 that prior to that letter, the defendant tried to exercise the power of sale. It appears that matter ended in the plaintiff's action in Civil Cause Number 3313 of 2000 which the plaintiff lost. The details of that action are unknown to the Court. On 9th September (not December, as deposed in the affidavit) 2002 the bank wrote the plaintiff about arrears amounting as at 31st August, 2002, K2, 897, 335.48. The bank indicated exercising the power of sale in the charge. The plaintiff has not paid the arrears to the bank or into court at the time of the application. The bank, it is unclear when, after complying with all requirements under the Registered Land Act, sold the property to Dr Z Chirwa. The bank by 3rd February, 2003 gave the plaintiff notice to vacate the property for delivery of possession to Dr Chirwa.

On 3rd February the plaintiff took out this action claiming the house and cancellation of the sale to Dr Chirwa. He obtained an ex parte injunction on an affidavit in which he swears the bank sold the house without proper notice and under a private treaty with Dr Chirwa. On proper notice, his letter of 20th January 2002 indicates the bank informed him of the arrears and demanded payment. The bank also informed him that it was selling the property. The letter of 9th September, 2002 is a clear bank demand for the money and an intention to exercise the power. The affidavit is silent on a previous action the plaintiff lost on the same property and charge.

In my judgment, failure to disclose a previous action on which a court adjudicated and denial that an appropriate notice without which a course of legal conduct cannot occur are suppression of material facts which should undermine an injunction obtained ex parte. By nature ex parte applications are not the normal. They carry with them a subtle danger that orders courts make are based on a denial of another's right to be heard. A part from urgency they are, and that is how it should be, made at the peril of full disclosure of material facts. Full disclosure enables a court to do the right and the just thing. If a party discloses that previously another court determined a matter between parties on the same subject matter, a court would not, unless, at least, it insists for a hearing inter partes, grant an injunction ex parte. Apart, therefore, from not disclosing that the bank gave the plaintiff proper notice, failure to disclose a previous action on the same subject matter adjudicated by the courts, deprived the judge of material facts on which to exercise the power to grant the injunction ex parte.

The judge's exercise of the power to grant the injunction ex parte was substantially undermined by the plaintiff's suggestion in the affidavit that the bank never gave proper notice before selling the charged property. This created in the mind of the judge

exercising the power to grant interlocutory relief that, in exercising the power of sale, the bank overlooked the Registered Land Act. If the bank, and in my judgment it did, gave proper notice and the plaintiff never paid in the time the Registered Land Act stipulates, unless before the contract of sale, the plaintiff paid the arrears to the bank or into court, the court could not stop the sale. Certainly, if the plaintiff had informed the judge that he had proper notice under the Act, the judge would not have granted the injunction.

This Court in Mkhumbwe v National Bank of Malawi, Civil Cause Number 2702 of 2000 (unreported) and Mlotha v New Building Society, Civil Cause Number 2539 of 2000 (unreported) discussed the notice the Registered Land Act. The Act lays no obligation on the chargee under the Act to notify the chargor of the actual sale of the property. In Mkhumbwe v National Bank of Malawi, this Court said at 4 of the typed judgment:

"The plaintiff questions, on several grounds, the various notices the bank sent. The mortgagor attacks the notice of demand of 15th December, 1998. He agues that, under section 60 (2), the notice should indicate the three months in which to pay. Section 60 (2) never requires the mortgagee to stipulate to the mortgagor to pay within three months. A notice requiring immediate payment or intimating money be paid before expiration of three months from the date of service is effective. It is equally effective if it requires the mortgagor to pay at the end of the period since the three months notice begins to run immediately ..."

At page 9 this Court continued as follows:

"The chargee need not inform the chargor about the remedy he will deploy. The right springs immediately upon default on a subsection 1 notice. The chargee need not inform the chargor 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 chargor to pay. The chargee cannot appoint a receiver or sell the property until after three months of that notice.

In Mlotha v New Building Society, this Court stressed that as long as the chargee complies with a notice under the Act, the power of sale can be exercised without any further notice. This Court rejected the suggestion that failure, after the notice In the Act, the chargee would be violating a chargor's human rights if the chargee never informed the charger of the actual sale. This Court said:

"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 questio. The mortgagee or charger has no further duty if the mortgagor or charger never complies with the notice.

The mortgagee or charger can sell the property privately, without notifying the mortgagor or charger. If, as happened here, the mortgagee or charger sells by public auction, there is notice of the sale to the charger or mortgagor. The charger 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 plaintiff's affidavit only suggests the bank's notices were improper. The plaintiff never disclosed the notices were to the court. If they were, the court would have discovered they complied with the Act.

The bank, after fully complying with the Act, could, and actually did, properly exercise the power of sale. The plaintiff when applying for the injunction ex parte deposed that at the time of sale the bank had in fact sold the property. The plaintiff could not therefore prevent the sale or successfully annul the sale. This case is like the cases of Trustees of the Estate of Isaac Leo Douglas Kaunda v New Building Society, Lilongwe District Registry, Civil Cause No. 609 of 1999 (unreported), Mkhumbwe v National Bank of Malawi and Mlotha v New Building Society. It is unlike First Merchant Bank v Lorgat Civil Cause Number 3917 of 2002 (unreported), where there was no actual sale and the chargor was just preventing the chargee from exercising the power to sale. This Court said:

"I do not think however that Dancwerts, L.J., suggests that a court would, where there is no sale in fact, restrain by injunction a chargee's or mortgagee's exercise of power of sale where the chargor or mortgagor defaults and never pays arrears to the chargee or mortgagee or into court. If it were so, the chargee or mortgagee may never easily or at all exercise the power of sale for it is the default that triggers the power in the first place… A chargor or mortgagor has, therefore, up to the date of the contract in all other contracts or at the fall of the hammer on an auction, to pay arrears and restrain the mortgagor or charger from exercising the power of sale. If the mortgagor or mortgagor does not pay before a contract of sale to the mortgagee or chargee or into court, a court will not restrain by injunction the lawful exercise of the power of sale."

In Mkhumbwe v National Bank of Malawi and Mlotha v New Building Society this Court relied on the statement of Crossman, J., in Lord Waring v London and Manchester Assurance Co Ltd [1935] Ch. 310:

"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."

Crossman, J., states the reason for the rule:

"In my judgment, 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."

Where the matter reached, the Court could not, therefore, by injunction restrain the sale. As the cases of Trustees of the Estate of Isaac Leo Douglas Kaunda v New Building Society, and Mkhumbwe v National Bank of Malawi, assuming the bank wrongly exercised the power of sale, show, the plaintiff's remedy lay in damages. A court does not as, a matter of course, grant an interlocutory injunction where damages are an adequate remedy unless, of course, a party cannot pay them. Even on the plaintiff's affidavit, there was no triable issue to justify granting the injunction and the plaintiff would not have gotten a permanent injury at the end of trial.

I therefore allow the application to dissolve the injunction obtained ex parte on 3rd February, 2003. The defendant will have the costs of this application.

Made this 28th Day of April 2003.

D F Mwaungulu

JUDGE