

IN THE HIGH COURT OF MALAWI
PRINCIPLE REGISTRY
CIVIL CAUSE NO. 3143 OF 2000

DR NGA NTAFU

VERSUS

FINANCE CORPORATION OF MALAWI

CORAM: F.E. KAPANDA

Viva Nyimba, Counsel for the Plaintiff

Tembenu, Counsel for the Defendant

Mr Balakasi, Official Interpreter

Kapanda, J

RULING

Introduction:

The plaintiff took out a writ of summons and caused it to be issued on the 3rd day of October, 2000. In the said writ of summons the plaintiff's claim against the defendant is substantially, and only, for an injunction to restrain the defendant by itself, its servants or agents or otherwise howsoever from seizing or selling or taking possession of the plaintiff's land. In furtherance of his claim the plaintiff applied in an ex-parte summons on the 3rd of October for an interim order of an injunction. At the ex-parte hearing of the said summons, on the 12th day of October, 2000 an interim order of injunction, valid for 21 days pending the failing of an inter-parte summons for an interim injunction, was granted to the plaintiff restraining the defendant its servants, agents or employees from selling or taking possession of title No. Nancholi 268 situated in the City of Blantyre of the Republic of Malawi.

The application:

In compliance with the order of the court made on the said 12th of October, 2000 the plaintiff applied, in an inter-partes summons, for an interim order of injunction restraining the defendant, its agents, servants or employees or whosoever from selling or taking possession of property Title No. Nancholi 268 Blantyre, until the matter herein is concluded or until a further order of the court. In support of the application counsel for the plaintiff on 11th October, 2000 filed an affidavit and a supplementary affidavit in reply to an affidavit in opposition filed by the defendant on 31st October, 2000. I must confess that I am at a loss as to what the plaintiff's cause of action is in view of the fact that the writ of summons does not say much except that the Plaintiff is claiming for an injunction. But upon reading the plaintiff's affidavit, filed in support of the application, it appears the main argument of the plaintiff is that he agreed with the defendant that the former be allowed to repay the loan herein by monthly instalments which he did and that if there is any money still owing to the defendant it is only in respect of interest "that has accrued due to bad business resulting from difficult economic times." It has further been averred by the plaintiff that he is trying to source money to repay the loan interest and that if the defendant exercises its right of sale, the plaintiff would suffer irreparable damage in that he will be deprived of his property that is worth K3 million (three million Malawi kwacha) on the current market value when the plaintiff is ready and willing to pay the outstanding arrears in 3 months. This figure of K3 million (three million kwacha) is not supported by any valuation report or some independent verifiable evidence.

The defendant, on the other hand, opposes the application for an interim injunction. It has been stated by the defendant, as is contained in the affidavits of counsel for the defendant, that in terms of the charge executed by the plaintiff and the defendant the latter is now entitled to sell the said property Title No. Nancholi 268 in view of the fact that the plaintiff has been given more time to settle the debt but the repayments by the plaintiff have been erratic.

On the appointed day for the hearing of the summons, viz the 16th day of November, 2000 it was only counsel for the defendant who addressed me. Despite being served with the notice of adjournment for the hearing of this application, counsel for the defendant did not appear before me. I was informed by counsel for the defendant that the plaintiff's counsel had indicated to him that he was desirous of wanting a consent order being drawn to have the injunction obtained on 12th October, 2000 but that defense counsel did nevertheless inform learned counsel for the plaintiff that he wanted to proceed with the defendant's application to have the interim ex-parte vacated. I proceeded to hear defendant's counsel.

Defendant's case:

In his argument learned counsel submitted that it is trite law that an injunction basically seeks to protect a right which an applicant has and wants to maintain a status quo and that in the instant case the plaintiff has no right which is in danger of being breached or worth protecting by an order of an interlocutory injunction. It was further contended, on behalf

of the defendant, that it is the defendant's right to realise its security that is in danger of being breached because in terms of section 68 of the Registered Land Act a chargee has a power of sale if there is a default after giving notice, which the defendant gave the plaintiff. To this end learned counsel for the defendant has urged this court to vacate the injunction so that the defendant should proceed to exercise its right of sale of the property pursuant to the provisions of the charge. It has further been prayed by the defendant that all damage which has been suffered by it, because of the interim ex-parte injunction of 12th October, 2000, should be compensated by way of damages. In this respect it was, therefore, prayed by the defendant that an order of assessment of damages, as a result of the damage suffered by the defendant, should issue.

Issues for the determination:

The heart of the issue raised by this application is this: Whether or not the interim ex-parte injunction should be vacated. An ancillary issue that this court must determine is whether or not an order of an inquiry as to damages should issue.

Law and findings:

Regarding the issue of whether or not the ex-parte interim injunction of 12th October, 2000 should be discharged the starting point in answering this question is that the court would like to observe that it appears that the plaintiff's main reason for wanting to have an interim injunction was that he wants to be paying the outstanding money and interest repayments by instalments as per an alleged agreement with the defendant. Unfortunately from the affidavits, filed in support and in opposition to the application, the existence of such an arrangement is not evident. Further, this court has noted that the alleged arrangement deponed in the affidavits of the plaintiff have not been pleaded in the plaintiff's legal suit. If anything the plaintiff's substantive and only claim is an injunction and his ground for applying for this injunction is that he is experiencing problems in raising money because of difficult economic times. In my judgement the fact that the plaintiff is experiencing problems due to the said difficult economic times is not of itself a good arguable basis upon which an injunction should issue. Indeed the fact that the plaintiff is having these said problems is the more reason why the lender should realise his security for to hold otherwise will only create a situation where the said interest, which remains outstanding, will keep on rising with a slim possibility of the plaintiff being able to repay the outstanding sums of money due and owing to the defendant. Further, as has been commented elsewhere by this High Court, a lender cannot be made to lose both his security and the money. It does not matter that what remains to be repaid is only interest on the loan. The courts should be slow at interfering with commercial business transactions entered into between a lender and borrower with full knowledge of the consequences of defaulting in repayment of a loan and its attendant interest charges. The court will only interfere where the lender has wronged the borrower in terms of the agreement. Such is not the case here. The plaintiff has not been wronged nor is there a threat that he will be wronged but he wants to be protected by the court on the ground that he is experiencing economic difficulties. Since an injunction is an equitable remedy which is granted at the discretion of the court it will be abusing such discretion if this

court were to issue an injunction in the circumstances of this case.

Further, as earlier observed the plaintiff's only petition against the defendant is a claim for an injunction. It is my view that it will also be an abuse of discretion if an order for an interim injunction were to issue in this case because such an order will be tantamount to granting the plaintiff what he wants in the main action. In point of fact to grant such an interim relief of injunction, where the plaintiff's only claim in the injunction itself, will most likely make the plaintiff go slow in prosecuting his said claim for an injunction.

In view of the observations made above should this court aid the plaintiff and protect him by extending the interim relief he obtained on 12th October, 2000? In my considered opinion this court should not assist the plaintiff. Thus the question posed above is answered in the negative. This is so because the plaintiff has failed to demonstrate that he has a good arguable claim of right which he is seeking to be protected by an injunction. Indeed if an injunction were to be granted the only status quo to be preserved will be an accumulation of interest which will be harmful to both parties. For the reasons and observations I have given above the injunction of 12th October, 2000 is hereby discharged. The defendant is condemned to pay the costs occasioned by this application.

Finally, I must make a decision on the auxiliary question of whether or not an order of an inquiry as to damages should be made. In this case before me the defendant, in canvassing for this prayer for an order of an inquiry for damages, contends that all damage which has been suffered by the defendant because of this injunction should be compensated by way of damages. The defendant has not demonstrated in its affidavit what damage, if any, they suffered as a result of the injunction being served on it. The court has been left to speculate on this point.

It is an established principle of law that an inquiry as to damages may be granted in a case where the court decided that the party who prayed for the injunction is not entitled to an injunction, even in cases where such party was not guilty of misrepresentation; suppression or other default in obtaining it, but whether or not an inquiry as to damages should be granted is a discretionary one for the court - *The Registered Trustees of African International Church vs The Registered Trustees of African Church Civil Cause No. 18 of 1988* (unreported). Further, as I understand it, in exercising this discretion the court is not bound to grant the order of an inquiry as to damages where the party seeking the said order has sustained some damage by the granting of the injunction but rather it has the discretion, and may refuse any such inquiry if the damage is trivial or remote or if there has been great delay in making the application - *Smith vs Bay* (1882) 21 Ch. D. 421 cited in the case of the Registered Trustees of African International Church mentioned above.

Applying the principle of law enunciated in the cases cited above I find that a refusal of an inquiry as to damages will be in order because the defendant, as I have already noted above, has not demonstrated what damage it suffered as a result of the said injunction of 12th October, 2000. There is no basis on which I could make an order of an inquiry as to damages. In the case before me it is not that the damage is remote but it has not been proved by the evidence. It is my understanding of the law and need not cite an authority

for it, that before an order of an inquiry as to damages is made the party seeking the order must demonstrate by evidence that he in fact suffered damage as a result of the injunction that has been vacated or discharged.

In sum I am of the view that the defendant's prayer for an order of an inquiry as to damages must fail. I can find no ground upon which this court could make such an order in the circumstances of this case.

Pronounced in chambers this 8th day of December 2000 at Blantyre.

F.E Kapanda

JUDGE