IN THE MALAWI SUPREME COURT OF APPEAL
AT BLANTYRE

M.S.C.A. CIVIL APPEAL NO. 26 OF 2005

(Being High Court Civil Cause No. 1086 of 2004)

BETWEEN:

NEW BUILDING SOCIETY .....APPELLANT

- AND -

HENRY MUMBA .....RESPONDENT

BEFORE: HON. JUSTICE MTEGHA, SC, JA
HON. JUSTICE TAMBALA, SC, JA
HON JUSTICE MTAMBO, SC, JA

Chagwamnjira/Mpaka, of Counsel for the Appellant
Masiku, of counsel, for the Respondent
Selemani, Court Official

JUDGMENT

MTAMBO, SC, JA.

This appeal is about the construction of s. 71 of the Registered Land Act (Cap. 58:01) of the Laws of Malawi, and it arises from the decision of the High Court in which it held that

the need for sale of charged property by public auction and for a reserve price therefor is neither optional nor negotiable and, therefore, that the sale, not having been by public auction and there not having been a reserve price for the property, was illegal and that it was not conducted in good faith. The sale was accordingly set aside and the appellant was restrained from doing anything further about it.

There are five subsections to s. 71. Of the present concern are sub-sections (1) and (3); the other sub-sections are generally about how a chargee may exercise the power of sale and how title may be transferred ~~and passed on,~~ to a purchaser of charged property. The two sub-sections read as follows:

> ***"71- (1) A chargee exercising his power of sale shall act in good faith and have regard to the interests of the chargor, and may sell or concur with any person in selling the charged land, lease or charge, or any part thereof, together or in lots, by public auction for a sum payable in one amount or by instalments, subject to***

such reserve price and conditions of sale as the Registrar may approve, with power to buy in at the auction and to resell by public auction without being answerable for any loss occasioned thereby.

(3) A transfer by a chargee in exercise of his power of sale shall be made in the prescribed form, and the Registrar may accept it as sufficient evidence that the power has been duly exercised, and any person suffering damage by an irregular exercise of the power shall have his remedy in damages only against the person exercising the power."

The facts of the case can be narrated very briefly. Under a mortgage agreement between the parties, the appellant was the chargee and the respondent was the chargor in respect of a specific property, hereinafter referred to as "the charged property". The appellant was at liberty to sell the charged property by either public auction or private contract if certain specified events took place. It is not disputed that such events indeed occurred entitling the appellant to sell the charged property; it was sold by private treaty and without there being

a reserve price approved by the Land Registrar. And it is in these circumstances that the questions now arise whether: (a) s. 71 (1) makes it mandatory to sell charged property by public auction and upon approval of a reserve price by the Land Registrar; (b) by selling the property by private treaty and without a reserve price the appellant acted in such bad faith as would warrant rescission of the sale, and (c) the equitable remedy of injunction restraining the sale was available to a chargor after a chargee has exercised his power of sale.

This court has had occasion to consider the provisions of s. 71; it was in the case of **New Building Society – v – Fremont Gondwe,** M. S.C.A. Civil Appeal No. 21 of 1994 (unreported). It was argued in that case that the contract of sale contained an illegality in that it did not comply with s. 71 in that the sale of the property was done by tender and not by public auction as provided by statute. It was further argued that the sale did not comply with the provisions of having a reserve price of the property approved by the Land Registrar. It was submitted therefore that the illegalities made the sale

null and void and that no party ought to derive any benefits from it. The Court was of the view that the most important provision of that section was that the chargee must always have regard to the interests of the chargor in the charged property, and that the chargee is *"required under this section to sell the charged property by public auction and to have any reserve price approved by the Registrar"*. Accordingly, the court held that any contract dealing with the sale of charged property which fails to comply with the provisions of s. 71 is bad for illegality and unenforceable in a court of law. We have been asked to re-examine that decision.

A close reading of s. 71 (1) shows that it is effectually in two parts. There is the part that says _ *"A chargee exercising his power of sale SHALL act in good faith and have regard to the interests of the chargor, ..."* The word *"shall"* has been used in this part of the section. Therefore there can be no option or negotiation regarding this part of the section and we believe that this is what the court was saying in the **GONDWE** case when it said that the most important provision of this

section is that the chargee must always have regard to the chargor's interests in the charged property by ensuring, the court added, that those who deal with charged property must do so with full regard to the rights of other persons in such property.

Then there is the second part which says – *"A chargee exercising his power of sale ..... MAY sell or concur with any person in selling the charged land, ..., by public auction ..... subject to such reserve price ..... as the Registrar may approve ....."* The word "may" has been used in this part of the sub-section. And it is commonplace that the word "may" is usually employed to imply permissive, optional or discretional, and not mandatory, action or conduct – see **BLACK'S Law Dictionary" sixth Edition.** We are aware that it is sometimes argued that justice may not be a slave of grammar and, therefore, that the word has been construed as "shall" or "must," but the thread that runs through is that the word will not be treated as a word of command unless the context in which it is used indicate that it should be used in that sense.

The controlling factor therefore is the context in which the word is used. We have ourselves considered the context in which the word is used, coming as it does after the use of the word "shall' in the same sub-section, and it seems to us that the word "may" has been used in the second part of the sub-section advisedly and, therefore, that it would be wrong to treat it as a word of command, but rather as indicative of discretion or choice.

It seems to us, therefore, that the interpretation that the sale should be by public auction only may not always have regard to the interests of the chargor, whom it has been observed, the section primarily seeks to protect. It is quite conceivable, for instance, that there may be no bidders for the property, which would mean that the security cannot be realized, a thing which would not be in the interests of the parties, certainly. It is also observed that sale by private treaty can sometimes be better than by public auction in that it entails negotiation. Accordingly, we are of the view that a construction that allows a chargee to sell either by private

treaty or by public auction, or, to concur with any person to sell by public auction, is better than the 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 **Bishop Daniel Nkhumbwe –v- National Bank of Malawi,** Civil Cause No. 2702 of 2000 (unreported) and **Leasing and Finance Company Limited V. George W. Sadik**, civil cause No. 1525 of 2000 (unreported).

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 s. 71 (1) makes it mandatory to sell charged property by public auction, should be overruled, and we do so.

As for the requirement for a reserve price, it seems to us that once a charged property has to be sold by public auction there would have to be a reserve price, as the Land Registrar may approve. This is intended to accord with that important

part of the section which we have observed seeks to ensure protection of the interests of a chargor.

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 sale subject to a reserve price as the Land Registrar may approve.

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 or not the remedy is sought before or after the chargee has exercised the power of sale.

We have indicated above that it is not in controversy that the appellant exercised its express power of sale, usually inserted in mortgage agreements enabling a mortgagee to sell a charged property if certain specified events occurred. Therefore, provided the power 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 to prevent the mortgagee from exercising the power of sale merely because, as will usually be the case, it is contrary to his interests. In other words, the courts should be slow to intervene contrary to the express desire of the parties to any lawful agreement, as justice would never be met by the borrower having the benefit of both the funds and the security, (the charged property) or, conversely, the lender being denied both the funds and the security, even if temporarily. What we are saying here is that the courts

should almost invariably be slow to intervene contrary to the express desire or wish of the parties to a lawful agreement as to what should happen when certain specified events take place. 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 a sufficient remedy, under sub – s. (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 the grant of an injunction, we would add.

All in all, we allow the appeal in its entirety. The question of costs has exercised our minds. We think that each party should bear own costs considering primarily that the questions the appeal raised were purely of law and, we would say, of benefit to both parties and, indeed, the industry.

DELIVERED in open Court this 5th May 2006 at Blantyre.

Signed: .....

H. M. Mtegha, SC, JA

Signed: .....

D.G. Tambala, SC, JA.

Signed: .....

I. J. Mtambo, SC, JA.