

**REPUBLIC OF MALAWI**  
**IN THE HIGH COURT OF MALAWI**  
**COMMERCIAL DIVISION**  
**BLANTYRE REGISTRY**  
**COMMERCIAL CAUSE NUMBER 456 OF 2022**  
**(Before Honourable Justice Manda)**

**BETWEEN**

**DALITSO GENERAL SUPPLIERS LIMITED.....CLAIMANT**

**AND**

**NATIONAL BANK OF MALAWI.....DEFENDANT**

**CORAM: Manda, J**

Gondwe for the Claimant

Chakuwawa for the Defendant

Kachimanga, Court Clerk

**RULING**

This was the defendant's application to dismiss this action on grounds that it is an abuse of court process. The application is opposed by the claimant

The brief background of this matter is that the claimant was offered banking facilities by the defendant on 2<sup>nd</sup> of June, 2021. The facilities were listed as follows:

1. Overdraft facility for MK700, 000, 000. 00

2. Commodity Seasonal facility for MK2, 000, 000, 000
3. Continuation of Finance Lease Facility of MK61, 055, 698.85
4. Sale and Lease Back facility of MK100, 000, 000

The first two facilities were to augment the claimant's working capital and to finance the stocking of soya beans and maize, respectively. The 3 facility was to enable the claimant to purchase three truck horses. The last facility was to enable the claimant to stock 14, 000 bags of fertiliser.

For purposes of the application before be the facilities that are in issue are the first, second and fourth facilities which were secured by real property and 5 utility vehicles. In this sense, it is admitted by the claimant that he has defaulted on the facilities, apparently due to the facilities. Having defaulted on the facilities, the defendant recalled them.

The first facility to be called was the fourth facility which was secured by 5 utility vehicles. In this regard, the claimant went to the High Court Commercial Division in Lilongwe where he obtained an injunction under Commercial Case Number 467 of 2022. The injunction was duly granted.

In the action before the High Court in Lilongwe the claimant is seeking the following remedies:

1. An order reopening the banking facility transaction between the claimant and the defendant and to take account of the payments made by the claimant under the Loans Recovery Act so as to remove penalty interest
2. A declaration that the defendant's intended disposal of the claimant's properties without furnishing the claimant with a notice in writing and the exact outstanding amount is unlawful and contrary to the Consumer Protection Act. (No specific provision was cited)
3. An order prohibiting the defendant from proceeding with the seizure and sale of the claimant's motor vehicles and adjudging the procedure to be unlawful
4. An order for costs

The claimant then commenced these proceeding against the defendant in this court seeking the following declarations:

1. A declaration that the attempted sale of the claimant's property Title No. Bwaila 6/187 is illegal and invalid
2. A declaration that the defendant's conduct in offering the claimant's property Title Number 6/187 without offering the same to the claimant is illegal and unlawful
3. A declaration that the sale of the claimant's property without giving the claimant three months statutory notice is illegal and unfair
4. An order of permanent injunction restraining the defendant from selling the property herein without offering the same to the claimant
5. Costs of the action

The claimant also proceeded to get an injunction restraining the defendant from selling Title Number Bwaila 6/187. During the hearing of this application, the claimant also filed an application for the continuation of the injunction which he obtained.

The argument by the defendant is essentially that the claimant cannot commence the two actions in the different Registries as that amount to an abuse of court process and a burden on them. In this regard, it was the observation of Counsel Chikuwawa that the claimant was offered the facilities that were being recalled in one transaction and that it will be prudent for the claimant to amend the claim before the Lilongwe Court rather than commence a whole different matter.

On the other hand, the claimant's argument is that he has a right to commence the two actions since the causes of action are different. According to the claimant the cause of action of the matter in Lilongwe arose on the 8<sup>th</sup> of November, 2022 when a Debt Collector appointed by the defendant called the claimant with the intention of seizing the claimant's vehicles. In terms of the cause of action in the present instance, it was Counsel Gondwe's argument that the cause of action is based on real property and that the claimant commenced this action to protect his property. The claimant further argued that the causes of action arose at different times and that the reliefs being claimed are different.

Looking at the facts in this instance, it is noted that the loan facilities were indeed offered under one letter. The first two facilities were supposed to be fully paid by the 31<sup>st</sup> of March 2022. The third facility was supposed to run for 7 months while the last facility was supposed to run for 12 months. What is also certain is that the time for repaying the loans is past due and the claimant has acknowledged that he did default on the loans.

The loans being in default, it is really up to the defendant to decide when to recall them. This I am assuming would be done after the parties have tried to talk and that the talks have failed. In this regard, as the lender, the defendant bank (and not the claimant) would have the initial cause for action, that being the default in repaying the loans. On this note I believe that it is an established principle of law that a borrower defaults, they cannot keep the money and also retain the security.

What we increasingly see now is that when a borrower defaults on a loan and the lender recalls on the same, the borrower rushes to court to get an injunction. The normal assertions by the borrowers would be unfairness, unlawfulness, illegality and the like. On closer scrutiny though most of these assertions turn out to be bare and quite frankly baseless. To this end, injunctions obtained by borrowers, are for all intents and purposes, mere stopgap measures and nothing more. To say that these stopgap measures are causes of action would be a bit of a stretch.

Yes, there may an occasion where a borrower is not given adequate notice. However, in those circumstances the only prudent thing a court can do is to give the borrower an injunction for 90 days because that would be what the justice in the matter would require and nothing more. Further, I do not think a loan can be deemed illegal just because a borrower has failed to pay it back. Not after a borrower duly agrees to the terms of the loan and the loan does not offend any principles of public policy.

Further, it is not unlawful or illegal for a lender to offer a secured property for sale without offering it to the borrower. This is especially where the borrower is conceding to have defaulted on the loan. Defaulting on the loan is a clear indication of the borrower's inability to service a loan. One would then wonder as to how the borrower would then pay for the property! Further still, I believe

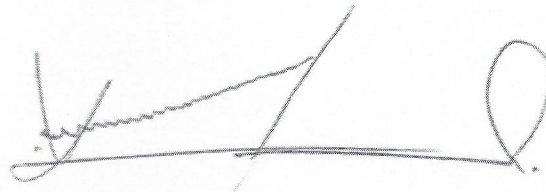
that it would be a fruitless exercise to reopen a loan under the Loans Recoveries Act, where a borrower admits to have defaulted.

The short of it is that the grant of injunctions to borrowers is really a matter of indulgence, with the faint hope that the borrower would pay back the loan. In some ways it is also done to bring the parties to the table for a more formal and structured discussions. It is in the context of this that I will make my determination in this case.

In order to bring the parties to the table and for good case management, I would order the consolidation of this case and case number 467 of 2022 which was filed in Lilongwe. The suggestion of consolidation having been made by the defendant and agreed to by the claimant. I would think that considering that the parties are the same and that the loan facility offer was contained in one document, any issues arising from that offer should be handled under one case.

The costs will be in the cause

Made in Chambers this.....25.....day of.....May.....2023

A handwritten signature in black ink, appearing to read 'K.T. Manda', with a large loop at the end of the signature.

**K.T. MANDA**  
**JUDGE**