

AFRICAN BANKING CORPORATION
ZAMBIA LIMITED
v
TURNPAN ZAMBIA LIMITED
CONSOLIDATED PROPERTIES LIMITED
MARGARET COLTMAN
NEVILLE COLTMAN
(Sued as Personal Representative
of the Late Donald Coltman)

HIGH COURT
WOOD, J.,
31st May, 2011.
2010/HPC/0341

[1] Land law - Equitable mortgage - Mode of creation thereof.

This was an application by the plaintiff by way of an originating summons for the following:

1. Payment of all monies which as at 10th May, 2010, stood at US\$1,073,910.96, interest, costs, and other charges due and owing to the plaintiff bank by the 1st defendant by virtue of banking facilities granted to the 1st defendant, and secured by a third party mortgage over stand number 1400, Kitwe; mortgage over stand number 11; Munali Crescent, Kitwe; and debenture dated 26th August, 2002;
2. Foreclosure;
3. Possession;
4. Sale of the mortgaged properties;
5. An order that the 3rd and 4th defendants do honour the guarantees offered as security for the borrowing of the 1st defendant;
6. An order for possession of the asset subject to the debenture dated 26th August, 2002;
7. Any other relief the Court may deem fit; and
8. Costs.

Held:

1. An equitable mortgage is a contract which creates a charge on the property but does not convey any legal estate or interest to the creditor.

2. An equitable mortgage by its very nature requires the actual deposit of title deeds with the mortgagee.

3. A mere mention of the property in the facility letter that it should be part of security does not automatically turn it into a mortgage. The certificate of title should have been surrendered to the plaintiff.

4. The surrender of the certificate of title would have created an equitable mortgage.

Case referred to:

1. Magic Carpet Travel and Tours v Zambia National Commercial Bank Limited (1999) Z.R. 61.

Legislation referred to:

1. Judgment Act, cap. 81.

Works referred to:

1. Halsbury Laws of England, 4th Edition, Volume 32.
2. Rules of the Supreme Court (White Book) Order 62/13/144.

C.C. Chonta of Messrs Lewis Nathan Advocates for the plaintiff.

I. Kunda (Mrs) of Messrs George Kunda and Company for the defendant.

WOOD, J.: The defendants have through their advocate admitted owing the plaintiff the sum of US\$831,811.02, but have denied the balance of the claim on ground that the plaintiff has charged penal interest, and that they had paid the plaintiff the total sum of K77,401,000.00 on 6th May, 2010, and 26th May, 2010, through KCM. They have stated that the plaintiff had agreed to restructure the loan and turn it into a long term commercial loan. They have also argued that No. 11 Munali Crescent, Kitwe, subdivision 'C1' of Farm No. 748, Ndola and subdivision 'C2' of Farm No. 748, Ndola, were not mentioned in the Facility Letter L-500459-4 and should not therefore be taken as having been mortgaged to the plaintiff. The last issue in contention was that Plot Number 2503, Kitwe, was not pledged as an equitable mortgage to the plaintiff.

I will start with the last contention. An equitable mortgage has been described in paragraph 405 of Volume 32 of Halsbury's Laws of England 4th Edition as follows:

"An equitable mortgage is a contract which creates a charge on the property but does not convey any legal estate or interest to the creditor; such a charge amounts to an equitable interest. Its operation is that of an executory assurance which, as between the parties, and so far as equitable rights and remedies are concerned, is equivalent to an actual assurance, and is enforceable under the Court's equitable jurisdiction."

In this case, what happened was that on 16th July, 2007, the first defendant offered the plaintiff the title deeds relating to Plot 2503, Kitwe once they were released by Zambia State Insurance Corporation Limited which was holding onto them as a guarantee for the first defendant's bonded warehouse. There is no evidence to show that the certificate of title was delivered to the plaintiff.

The question which needs to be answered is whether the same title deeds which were being held by Zambia State Insurance Corporation Limited as a guarantee for the first defendant's bonded warehouse could be pledged as an equitable mortgage without depositing them with the plaintiff. An equitable mortgage by its very nature requires the actual deposit of the title deeds with the mortgagee. Since this was not done, and in view of the competing claim by Zambia State Insurance Corporation Limited, I am of the view that while there was an intention to do so, no equitable mortgage was actually created in respect of Plot No. 2503, Kitwe. This view is supported by the Supreme Court in *Magic Carpet Travel and Tours v Zambia National Commercial Bank Limited* (1). The Supreme Court held as follows at page 64 on the issue of an equitable mortgage:

“On the last issue of an equitable mortgage, the position at common law is that once a borrower has surrendered his title deed to the lender as security for the repayment of a loan, an equitable mortgage is thus created; the borrower, in such a relationship, cannot deal with the land without the knowledge and approval of the lender whose interest in the land takes precedence. One of the shortcomings of an equitable mortgage is that it is not registered in the Lands and Deeds Registry as an encumbrance against the land; the relationship between the lender and borrower is one that is based on mutual trust between the two.

The lesson flowing from the present case is that an equitable mortgage is open to abuse; in cases of fraud, an equitable mortgage cannot, of itself, provide sufficient security for the re-payment of the loan. With the decline in the economic fortunes, the majority of borrowers have a tendency for dishonesty. To counteract the dishonesty, any potential mortgagee is strongly advised to take advantage of section 76 of the Lands and Deeds Registry Act by registering a caveat against a mortgaged property as a matter of routine.”

The defendants have argued that the plaintiff had agreed to convert the loan into a long-term commercial loan. The relevant part of the letter dated 23rd March, 2009, from the plaintiff which the defendants are relying on reads as follows:

“Can I reassure you, however, and your client also, that liquidation is an outcome that we would wish to avoid as it is not our priority to close down TZL if an alternative course of action can present itself. This being the case, we would be prepared to re-structure the current TZL facility into a long-term commercial mortgage (8years-10years, and subject to our HO approval) over stand No. 2503, Kitwe. The outcome of such an action would be to reduce materially TZL's annual financing costs, while allowing the company full flexibility to make pre-payments (at no penalty costs) when economic activity recovers on the Copperbelt.

I am sure that you will agree that this offer is a positive action on our part, and one that will relieve TZL of significant pressure on its annual cash flow. If the management of TZL are willing to negotiate this sort of facility, I will take the opportunity to meet with them within the next few days.”

The letter from the plaintiff quite clearly states that it was subject to its Head Office's approval, and that the long-term mortgage would be over Plot No. 2503, Kitwe. There is no proof of this approval, and as correctly submitted by counsel for the plaintiff, there was no accord and satisfaction to support the variation. I therefore hold that the plaintiff is not obliged to convert the loan into a long term commercial loan.

A perusal of the various affidavits and exhibits shows that Plot 1400 Kitwe, stand No. 4615, Kitwe, subdivision C1 of Farm No. 748, Ndola, and subdivision C2 of Farm No. 748, Ndola, were all mortgaged to the plaintiff. The exhibits also show that the third defendant, and the late Donald Coltman both executed unlimited guarantees in this matter in favour of the plaintiff. The exhibits also show that there was a debenture created in favour of the plaintiff on 26th August, 2002. The argument that no mortgages were executed because there were not mentioned in the Facility Letter L-500458-4 is therefore untenable. However, there is some merit in the argument that No. 11 Munali Crescent, Kitwe was not mortgaged to the plaintiff. A mere mention of the property in the facility letter that it should be part of security does not automatically turn it into a mortgage. The position would have been different if the certificate of title had been surrendered to the plaintiff. That would have at least created an equitable mortgage. I therefore find as a fact that no mortgage was created in respect of No. 11 Munali Crescent, Kitwe.

The last issue which remains to be determined relates to interest.

Clause 6.3 of the Facility letter states as follows:

“6.3 Excesses

All outstanding amounts falling due for payment and not serviced on due date shall be debited to a cash advance account and interest charged thereupon at the rate of interest indicated in 6.1 and 6.2 above plus 5% and 25% for United States Dollars and Kwacha facilities respectively.”

The explanation given in paragraph 13 of the affidavit in reply is that the interest component of US\$68,369.79 due as at 10th May, 2010, is not an entry or charge on the account, but that the plaintiff's accounting software system is set to summarize the status of principal and interest at the bottom and the indicated amounts do not reflect cardinal entries. Focus should be on the entries in the main body of the statement. The figure of US\$68,369.79 is the portion of interest relating to the over-due principal. The bank statements confirm this fact, and I have not found anywhere in the statements where the first defendant has been charged penal interest. The defendants have stated in the affidavit in opposition that substantial payments were made to the plaintiff, but have only proved the sum of K77,401,000.00, which the plaintiff converted to US\$15,029.31. The argument with regard to penal interest must fail, but the amount actually due must be reduced by K77,401,000.00.

Arising out of my findings above, I enter judgment in favour of the plaintiff against the defendants jointly and severally for the sum of US\$1,058,881.65, together with contractual interest from 28th May, 2010, to date of judgment, and thereafter in accordance with the judgments Act cap. 81 until full payment. This sum together with interest must be paid to the plaintiff by the defendants within 90 days from the date hereof. In the event that the judgment debt and interest remains unpaid at the expiry of the said period, then the first defendant shall deliver vacant possession of stand No. 4615 Kitwe, subdivision C1 of Farm No. 748, Ndola, and subdivision C2 of Farm No. 748, Ndola, to the plaintiff who shall be at liberty to foreclose and exercise its right of sale. The second defendant shall deliver vacant possession of Plot No. 1400, Kitwe to the plaintiff who shall be at liberty to foreclose, and exercise its right of sale. Should there be any amount outstanding after such sale, the third and fourth defendants shall as guarantors pay any shortfall. I also order that the plaintiff takes possession of the Komatsu Haulpak Dump Truck 630E 190 Tonne, with engine number E16 E2809163-7301, and chassis number GF309 41AFE 38A pursuant to the debenture dated 26th August, 2002, and made between the plaintiff and the first defendant. The plaintiff's claims relating to No. 11 Munali Crescent, Kitwe, and Plot No. 2503, Kitwe are both dismissed. Although a mortgagee is pursuant to Order 62/13/144 of the Rules of the Supreme Court entitled to recover, under the terms of the mortgage deed, the actual costs, charges and expenses incurred, except for any costs that have not been reasonably incurred or were unreasonable in amount, I am of the view that where both parties have been partially successful such as in this one, they should each bear their respective costs. The parties will therefore bear their respective costs. Leave to appeal is granted.

Plaintiff's and defendant's claims partially successful.