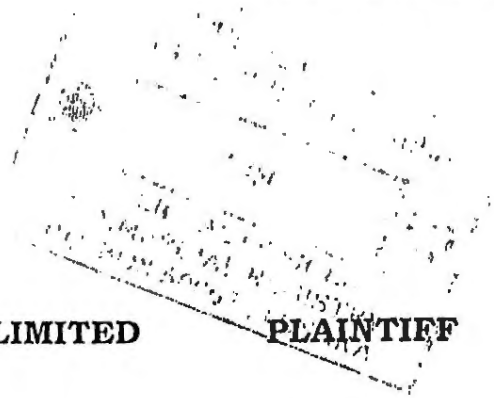


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**IN THE HIGH COURT OF ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Commercial Jurisdiction)**

2004/HPC/0368



BETWEEN:

STANDARD CHARTERED BANK (ZAMBIA) LIMITED

PLAINTIFF

AND

K.B. DAVIES AND COMPANY (ZAMBIA) LIMITED

1ST DEFENDANT

MUKULUMPE ESTATES LIMITED

2ND DEFENDANT

**Before the Hon. Mr. Justice A.M. Wood in Chambers at Lusaka this 20th
day of June 2012**

**For the Plaintiff: Mr. K. Mwondela of Messrs. Lloyd Jones & Collins
Legal Practitioners**

For the Defendants: Mr. L.C. Zulu of Messrs. Malambo & Company

RULING

Cases referred to:

1. *Investrust Merchant Bank Limited v. Ebrahim Yousuf* (2004) ZR 24
2. *Tse Kwong Lam v Wong Chit Sen and Others* [1983] 3ALL ER 54
3. *Finance Bank Zambia Limited v Africa Angle and others* (1998) ZR 315/237
4. *Standard Chartered Bank Ltd v Walker and another*[1982] 3 ALL ER 938
5. *James Daka V Shantilah Bhulabhai Patel and another* (1995-1997) ZR 108

Works referred to:

1. *Order 45, rule 11 Rules of the Supreme Court*
2. *Collins English Dictionary & Thesaurus*
3. *Snell's Principles of Equity, 26th Edition, (Sweet & Maxwell) 1966*

This is an application by the Defendants for an order to stay sale of property seized in execution made pursuant to Order 45, rule 11 of the Rules of the Supreme Court.

The brief history of this matter is that this mortgage action was commenced on 22nd September, 2004. Judgment was obtained on 7th August, 2009 after a trial. The application to stay sale was made more than two years after judgment was obtained. The judgment specifically stated that the Defendants had to pay the judgment debt within 60 days from the date of judgment failing which the Plaintiff could exercise its right of sale as mortgagee.

It has now emerged from the affidavit in support of Enoch Percy Kavindele that in November, 2011 Northwest Rail Company Limited, a company associated with the Defendants, made an offer to purchase Plot Numbers 558,559, and 697 Chingola for a total sum of US\$430,000.00. The Plaintiff's agent accepted the offer by Northwest Rail Company Limited to purchase the properties. The transaction between the Plaintiff's agent and Northwest Rail Company Limited did not materialize because the prospective purchaser did not have funds to purchase the properties. It accordingly fell through. The Plaintiff's agent then commenced negotiations with another prospective purchaser who according to the exhibits attached to the further affidavit in opposition filed on 14th June, 2012 paid the purchase price of US\$400,000.00. According to Mr. Kavindele's affidavit, the Defendant's advocates wrote to the Plaintiff's managing director on 16th February, 2012 to pre-empt that sale and seek her authority to work with the Plaintiff's agent to effect a better sale. The Plaintiff did not respond to the letter of 16th February, 2012. The affidavit further states that that the Defendants had received a tentative offer from Atlas Copco (Zambia) Limited

through its advocates Messrs. Wilson & Cornhill to purchase all the three mortgaged properties for the sum of US\$750,000.00. The offer by Atlas Copco (Zambia) Limited was therefore far superior to the offer the agent had received and would have allowed the Defendants to retain the surplus from the sale of the three properties. He also stated in his affidavit that as at 14th February, 2012 a search conducted at the Lands and Deeds Registry showed that the properties were still registered in the name of the first Defendant. It would therefore be just and equitable for the Court to order the stay of that part of the judgment that empowered the Plaintiff to sell the demised properties pending conclusion of a sale at an appropriate value.

The affidavit in opposition to the application sworn by Kasongo Nkazi and filed on 22nd May, 2012 states that on 19th April, 2011, a writ of possession was issued in respect of the mortgaged properties and that on 27th May, 2011, the undersheriff took possession of the mortgaged properties. On 9th June, 2011, the Plaintiff obtained a valuation report in respect of the mortgaged properties that placed their current value for sale purposes at US\$400, 100.00. He pointed out that Mr. Enoch Percy Kavindele made numerous proposals to settle the judgment sum and interest but none of them materialized. The Plaintiff then took the decision to advertise the properties for sale to the public and advertized them in the Times of Zambia and Zambia Daily Mail on 15th July, 2011, 18th July, 2011 and 5th August, 2011. On 5th October, 2011, the Plaintiff received an offer from Northwest Rail Company Limited to purchase the mortgaged properties for the sum of US\$430,000.00. The offer was accepted on 18th November, 2011, subject to the purchase price being settled by 25th November, 2011 but Northwest Rail Company Limited failed to honor the condition of the offer and accordingly, on 28th November, 2011 was informed that the offer had been withdrawn. At no time during the bidding process was the purported offer by Atlas Copco (Zambia) Limited ever communicated to the Plaintiff. The Plaintiff proceeded to contract with the next bidder Highlands Investments Limited, at the purchase price of US\$400,000.00 and not the sum

of US\$250,000.00 as alleged by the Defendants in the affidavit in support. The transaction with Highlands Investments Limited was quite advanced as the purchase price of US\$400,000.00 had been paid to the Plaintiff in full, consent to assign had been obtained and Property Transfer Tax settled. The deponent was of the view that the current application was yet another attempt by the Defendants to deprive or delay the Plaintiff from enjoying the fruits of its judgment. The further affidavit in opposition highlights the fact that the sum of US\$400,000.00 had been paid to the Plaintiff, the reference to the properties being in Lusaka was a clerical error by the Lands Department and that the correct Property Transfer Tax had in fact been paid to Zambia Revenue Authority.

The question that arises in this application is whether in the circumstances the sale of the three properties can be stayed. It has been submitted by the Defendants that the value placed on the property by the valuation report was not the current market value because it was a forced sale. A perusal of the valuation report shows that there is no difference in value whether it was the current market value, insurance value, forced sale value or rental value. As at 9th June, 2011, the three properties were valued at US\$400,100.00. The submission that it was not a fair market value because it was a distress sale is therefore untenable. These were properties that had been advertised for a considerable period of time and in fact the Defendants' associate company, Northwest Rail Company Limited made an offer of US\$430,000.00 which was quite close to the valuation report. The offer by Northwest Rail Company Limited defeats the Defendants' own argument that it was not a fair value as it had in fact offered a sum that was close to the valuation report.

There was no need, in my view, for the properties to be put on the market again and be subjected to a fresh competitive tender process as the second highest offer was very close to the valuation report and was only short by US\$100.00. The tentative offer by Atlas Copco (Zambia) Limited was made on 23rd February, 2012. The word 'tentative' according to the *Collins English*

Dictionary & Thesaurus (1) means 'provisional or experimental, hesitant, uncertain or cautious.' The offer cannot, in my view, be said to be a certain offer as an offer subject to contract as it is experimental, uncertain or cautious. It would have been unreasonable to expect the Plaintiff to wait indefinitely for the right price bearing in mind that there had been prolonged negotiations and that the properties had been advertised as early as July, 2011.

I have perused various authorities on the issue at hand starting with **Investrust Merchant Bank Limited v. Ebrahim Yousuf (1)** in which it was held that the power of sale given to a mortgagee is to enable him to realize his debt and that he should exercise it bona fide for that purpose, without corruption or collusion with the purchaser. It was further held in that case that the court will not interfere, even though the sale was disadvantageous to the mortgagor, unless the price is very low for it to be itself evidence of fraud. I have also perused the case of **Tse Kwong Lam v Wong Chit Sen and Others (2)** in which it was held that a mortgagee has to show that the sale was made in good faith and that the mortgagee had taken reasonable precautions to obtain the best price reasonably obtainable at the time, namely by taking expert advice as to the method of sale.

I agree with the quotation from the authors of **Snell's Principles of Equity, 26th Edition, (Sweet & Maxwell) 1966 (2)** at page 444 under the title 'Opening a foreclosure' which states that:


"Although the order of foreclosure absolute appears to be final, the courts will sometimes open a foreclosure even if the property has been sold by the mortgagee. Circumstances which will induce the court to do this are an accident at the last moment preventing the mortgagor from raising the money, any special value of the property to the mortgagor (e.g., if it was an old family estate), a marked disparity between the value of the property and the amount lent, and the promptness of the application. The

foreclosure will also be opened if the mortgagee pursues another remedy after obtaining an order of foreclosure absolute."

In the present case, there was no accident, special value or a marked disparity between the value of the property and the amount lent. While I accept that the application may have been made promptly after receiving the tentative offer, a tentative offer cannot be said to be certain to lead to the opening of a foreclosure.

It follows from what I have stated above that while the law recognizes the equitable right of a mortgagee to redeem his property and also places a heavy responsibility on the mortgagee to be as transparent as possible and obtain the best possible price (see the cases of ***Finance Bank Zambia Limited v Africa Angle and Others (3)***, ***Standard Chartered Bank Ltd v Walker and another (4)*** and ***James Daka V Shantilal Bhulabhai Patel and another (5)***), it is not in all cases that a foreclosure is opened and certainly not in a case such as this one where the Plaintiff obtained a valuation, advertised and the Defendants' associate company also made an offer to purchase the properties. The Plaintiff cannot be blamed for having sold the properties for US\$400,000.00 as this was the best possible price obtainable at the time and in any event cannot be expected to wait indefinitely for the best possible price. The application to stay the sale is accordingly dismissed with costs to the Plaintiff to be taxed in default of agreement. Leave to appeal is granted.

Delivered in Chambers this 20th day of June 2012



A.M. WOOD
JUDGE