

**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA**

2013/HPC/0181

(Civil Jurisdiction)

BETWEEN:

BETTERNOW FINANCE COMPANY LIMITED

APPLICANT

AND

ELIZABETH MZYECHE

1ST RESPONDENT

JOSEPH MZYECHE

2ND RESPONDENT

**BEFORE THE HON. MR JUSTICE JUSTIN CHASHI IN
CHAMBERS ON THE 25TH DAY OF MARCH, 2014**

For the Applicant:

E. Nkhosa, Messrs Ventus Legal Practitioner

For the 1st & 2nd Respondents: N/A

J U D G M E N T

Legislation referred to:

- The High Court Act, Chapter 27 of the Laws of Zambia

The **Applicant Betternow Finance Company Limited** commenced proceedings herein against **Elizabeth Mzyeche** and **Joseph Mzyeche**, the 1st and 2nd Respondents respectively by way of an Originating Summons on the 10th day of April 2013 pursuant to **Order 30 Rule 14 of The High Court Rules** claiming the following reliefs:

1. *Payment of all money due to the Applicant under the respective covenants in a loan facility entered into between the Applicant and the 1st Respondent on 30th October 2012 (the loan facility) as secured by an equitable third party mortgage (the Mortgage) relating to subdivision No. 43 of Farm 1751 Lusaka, (the Mortgaged Property) and such costs as would be payable if this were the only relief claimed.*
2. *That in default of the and the 1st Respondent agreeing upon the amount due to the Applicant, an account to be taken of what is due to the Applicant from the Respondent under and by virtue of the loan facility and the Mortgage.*
3. *An inquiry whether anything and if anything is due to the Applicant for any and what costs, charges and expenses in respect of the loan facility and the mortgage beyond the costs of this action.*
4. *A declaration that on the true construction of the loan facility and the mortgage, the total sum of K75,400 broken down as K65,000 principal and K10,400 interest is due to the Applicant from the 1st Respondent.*
5. *A declaration that until payment shall have been made to the Applicant of the balance which shall be found due on taking the said account (together) with the cost of this action) the Respondent is not entitled to redeem the Mortgaged Property,*

6. *A declaration that the equitable Mortgage over the Mortgaged Property created by the 2nd Respondent in favour of the Applicant to secure the loan facility be treated as a legal Mortgage.*
7. *That the Mortgage be enforced by foreclosure or sale.*
8. *Delivery by the 2nd Respondent to the Applicant of possession of the Mortgaged Property.*
9. *That a receiver and manager of the Mortgaged Property be appointed.*
10. *Interest on all sums due to the Applicant at such rate and for such period as the Court thinks fit assessed pursuant to the loan facility, **Order 36 Rule 8 of The High Court Rules and Section 2 of the Judgment Act.***
11. *Further or other relief*
12. *Costs.*

The Originating Summons is supported by an affidavit deposed to by Noel Nkoma the Managing Director of the Applicant.

According to the said affidavit, vide facility letter dated the 30th day of October 2012 and an equitable mortgage, the property namely **Subdivision No. 43 of Farm 1751** Lusaka was charged by the 2nd Respondent in favour of the Applicant to secure the repayment of the total of K75,400 together with interest at the rate of 15 per centum per month in accordance with the covenants for repayments contained therein.

It is averred that the 1st Respondent has defaulted in the payment of the principal sum and the interest.

A perusal of the record shows that the Applicant effected service of both the Originating process and the Notice of Hearing by substituted service and the affidavits of service were duly filed and are on record. I am therefore convinced and confident that the Respondents are aware of these proceedings despite their absence at the trial. It is on that premise that I proceeded with the hearing of the matter as the Respondents will not be prejudiced in any event.

I have carefully considered the application and the affidavit evidence before this Court. From the affidavit evidence it is clear that the 1st Respondent was offered a personal loan in the sum of K65,000 by the Applicant as shown by the letter of offer dated 30th day of October 2012 which was accepted by the 1st Respondent. The said loan according to the terms was to be repaid within 30 days together with interest of 15 per centum in that one month amounting to K10,400 bringing the total amount to K75,400.

As collateral, the 1st Respondent was to issue a Post dated Cheque and a third party Mortgage. The 2nd Respondent to that effect executed a Consent form for third parties on the 31st day of October 2013 in which they pledged the property namely Subdivision No. 43 of Farm 1751, Lusaka in the 2nd Respondents name as security. Indeed that action by the Respondents created

an equitable Mortgage even though no third party Mortgage was executed.

The application by the Applicant is not opposed by the Respondents.

In view of the aforestated, I am satisfied that this is a proper case for granting of some of the reliefs as endorsed on the Originating Summons. I am not in a position to grant all the reliefs as some of the reliefs being sought have no basis at all given the limited affidavit evidence and documentation before this Court.

In that respect I hereby award the Applicant the sum of K75,400 together with interest at the average deposit rate per annum as determined by Bank of Zambia from time to time from the 10th day of April 2013 being the date of commencement of this action to date of this Judgment and thereafter at the current Commercial Bank lending rate as determined by Bank of Zambia till full satisfaction of the Judgment debt.

I further Order as follows:

- 1. The Respondents are hereby granted a moratorium of thirty (30) days within which to pay the debt together with interest aforestated.*

2. *That should the Respondents fail to effect payment as aforestated, the Applicant shall be at liberty to foreclose, possess and dispose off the Mortgaged Property namely Subdivision No. 43 of Farm 1751 Lusaka.*
3. *Costs to the Applicant. Same to be taxed in default of agreement.*

Delivered at Lusaka this 26th day of March 2014.

JUSTIN CHASHI
HIGH COURT JUDGE