

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

**2014/HPC/0553**

(Commercial Jurisdiction)

**BETWEEN:**

EMMA NYANDORO

**PLAINTIFF**

**AND**

BOMACH FINANCIAL LIMITED

**DEFENDANT**

**BEFORE THE HON. MR JUSTICE JUSTIN CHASHI IN  
CHAMBERS ON THE 24<sup>TH</sup> DAY OF APRIL, 2015**

*For the Plaintiff: B Luo, Messrs P M Kamanga & Associates.  
For the Defendant: J Chibalabala, Messrs Douglas & Partners.*

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**R U L I N G**

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**Cases referred to:**

1. Development Bank of Zambia and KPMG Peat Marwick v Sunvst Limited and Sun Pharmaceuticals Limited –SCZ Judgment No. 10 of 1997.

**Legislation referred to:**

2. The High Court Act, Chapter 27 of the Laws of Zambia
3. The Supreme Court Practice (White Book) 1999

This is an application by the Defendant **Bomach Financial Services Limited** to set aside the Originating process herein which was commenced by the Plaintiff **Emma Nyandoro** on the 18<sup>th</sup> day of December 2014 by way of a Writ of Summons.

The application has been made pursuant to **Order 11 Rule 4 of The High Court Rules**<sup>2</sup> and is supported by an affidavit deposed to by Bornface Wataika Chirwa, a Director in the Defendant's Company.

According to the deponent of the said affidavit, the Defendant in July 2012 entered into a loan agreement with Gregory Mwanza in which the said Gregory Mwanza pledged **Subdivision 1229 of Subdivision F of Farm No. 33** as security (hereinafter referred to as the Property).

It is further asserted that on the 15<sup>th</sup> day of November 2012, the Defendant filed a Consent Settlement Order before Hon. Mrs Justice F Chishimba in which Mwanza was given 60 days within which to liquidate the Judgment debt. The said Consent Settlement Order is exhibited as **"BWC1"**.

According to the deponent, Mwanza defaulted on the terms of the Consent Order and the Defendant accordingly issued a Writ of Possession and sold the property to the Plaintiff herein as Mortgagee in possession and a Certificate of Title was issued in the Plaintiff's name on the 25<sup>th</sup> day of March 2013. Copy of the Certificate of Title is exhibited as **"BWC2"**.

It is further asserted that on the 3<sup>rd</sup> day of April 2015, after the property had already been sold, the Hon. Mrs Justice F Chishimba granted leave to Mwanza vide a Ruling exhibited as “**BWC3**” to pay the Defendant the outstanding balance on the loan.

As a result of the said Ruling, the Defendant appealed to the Supreme Court on the grounds that the Courts Ruling was overtaken by events.

A copy of the Appeal is exhibited as “**BWC4**”.

It is the deponent’s further assertion that the Plaintiff was joined to the proceedings subject to the Appeal as an interested party, since the property had been conveyed to her. That to date the Plaintiff remains the beneficial owner of the property and therefore cannot claim the refund of monies on the Property.

According to the deponent, allowing the Plaintiff to prosecute this matter will be an abuse of the Court process and a Multiplicity of actions in view of the Appeal pending determination before the Supreme Court.

The Defendants Skeleton arguments filed on the 17<sup>th</sup> day of February 2013 simply echoes the affidavit evidence.

The Defendants also placed reliance on the case **of Development Bank of Zambia and KPMG Peat Marwick v Sunvst Limited and Sun Pharmaceuticals Limited**<sup>1</sup> on the issue of Multiplicity of actions.

In opposing the application, the Plaintiff filed an affidavit in opposition deposed to by the Plaintiff in which it is asserted that the Defendant offered the property to the Plaintiff for the sum of K150,000 as Mortgagee in possessions.

That the Plaintiff consequently applied for a loan from her employers Stanbic Bank Zambia Limited for K300,000 which included extra funds for completion of the structure on the Property. That subsequently, Messrs P M Kamanga and Associates were instructed by the Bank to do the conveyancing and perfection of the Mortgage and on completion the Plaintiff took possession of the property and effected extensive improvements at great cost.

The deponent asserts that on the 19<sup>th</sup> day of June 2013, she was forcibly evicted from the property by Gregory Mwanza pursuant to the Ruling of the Court aforesated.

According to the deponent, she was not aware of the existence of any Court process relating to the Property, and as such, she attempted to intervene, although that has not borne any fruit.

It is the deponent's assertion that the Defendant sold the property knowing fully well that it was subject to ongoing litigation which had not been conclusively concluded at the time of sale.

Further according to the deponent when she noted that she was not making any progress with the application for joinder as an

intervenor, she instructed her Advocates to abandon the process, hence commenced proceedings under this Cause, to seek relief from the Defendant.

The Defendant is of the view that the application by the Defendant lacks merit and should the Court grant it, she would grossly be prejudiced and the interest of justice will not be served.

In addition to the affidavit in opposition, the Plaintiff also filed Skeleton arguments which at this stage are not appropriate for consideration.

At the hearing of the application on the 14<sup>th</sup> day of April 2015, both parties relied on their respective affidavit evidence and Skeleton arguments which I have taken into consideration in determining the application before me. In addition, I found it appropriate and of great assistance to call for the record relating to **Cause No. 2012/HPC/583** in the matter between the Defendant and Gregory Mwanza which was before Hon. Mrs Justice F Chishimba.

A recapitulation of the record shows that the main cause therein is a Mortgage action made under **Order 30 Rule 14 of The High Court Rules<sup>2</sup>** and **Order 88 Rule 1 of The Supreme Court Practice<sup>3</sup>**

It further shows that at the hearing of the application by Gregory Mwanza on the 14<sup>th</sup> day of March 2013, to set aside the Writ of

Possession and to allow him redeem the Mortgage, the Defendant herein did not bring to the attention of the Court that the property in issue had actually been sold to the Plaintiff herein. There was therefore suppression of evidence on the part of the Defendant.

Although they tried later to make amends by their application for review which was declined by the Court.

It is also evident from the record that the Ruling of the Court dated 2<sup>nd</sup> day of April 2013, set aside the Writ of Possession by the Defendant and as a consequence allowed Gregory Mwanza to redeem the mortgage and gain possession of the property. That subsequently adversely affected the interests of the Plaintiff in the Property and led to her ejection from the property.

It would seem in my view from the aforesaid that the likelihood of the Defendant succeeding on appeal on **Cause No. 2012/HPC/583** is therefore unlikely and I agree in that respect with Hon. Mrs Justice Chishimba in her Ruling of 19<sup>th</sup> day of September 2013 in which the Court refused a stay of execution pending appeal to the Supreme Court.

It would also seem that the Defendant never brought it to the attention of the Plaintiff that there were matters which were still pending and needed resolving under **Cause 2012/HPC/583**.

It would further seem that although the Plaintiff herein was joined to the proceedings as a Party to that Cause vide the Courts Ruling dated 24<sup>th</sup> day of July 2013, she abandoned her interest in the

matter by way of a Notice of discontinuance on the 14<sup>th</sup> day of August 2014 and ceased to be a Party to those proceedings.

Even assuming that the Defendant was to succeed in their appeal before the Supreme Court, I wish to draw the attention of the parties to the fact that apart from a claim for refund of monies in the sum of K300,000 the Plaintiff in this Cause is also in view of having been ejected from the property also claiming the following reliefs:

- (i) ***Mesne profits from date of ejectment until refund of the outstanding amount***
- (ii) ***Damages for loss of use***
- (iii) ***Damages for mental anguish***
- (iv) ***Damages for defamation of character***
- (v) ***Refund of interest paid on the mortgage.***

These reliefs are not part of **Cause No. 2012/HPC/583** and cannot be claimed under that Cause which is strictly a mortgage action.

The Plaintiff therefore having been ejected and deprived of the use of the property can only and appropriately so, claim those reliefs as is being claimed by commencing a separate legal action.

This therefore is neither a duplicity nor multiplicity of actions and cannot be said to be an abuse of the Court process.

In the view that I have taken, this is not a proper case for setting aside of the Originating process.

The Defendants application is misconceived and therefore dismissed with costs to the Plaintiff.

The Defendant is hereby Ordered to file its defence within the next fourteen (14) days from the date hereof.

The matter shall then come up for a Scheduling Conference on the 21<sup>st</sup> day of May 2015 at 09:00 hours.

**Costs to the Plaintiff.**

**Leave to appeal is hereby granted.**

**Delivered at Lusaka this 24<sup>th</sup> day of April 2015.**

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Justin Chashi  
**HIGH COURT JUDGE**