

IN THE HIGH COURT FOR ZAMBIA

2008/HPC/0506

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

FINANCE BUILDING SOCIETY

APPLICANT

AND

EVA NANYANGWE NYONDO

1ST

RESPONDENT

JOHN NYONDO

2ND RESPONDENT

GRACE CHAILA

INTERVENOR

Before the Hon. Mr. Justice Nigel K. Mutuna on 22nd April 2015

**For the Plaintiff : Mr. M. Phiri and Mr. Roberts of
Mwansa,**

Phiri and Partners

For the Defendant : N/A

**For the Intervener : Mr. K. Kamfwa of Messrs Wilson and
Corhill**

R U L I N G

Cases referred to:

- 1) Mwambazi vs. Morester Farms Limited (1977) ZR page 108*
- 2) Mulianga and another vs. Majasa and another (1988/9) ZR page 209*
- 3) Enesi Banda vs. Abigail Mwanza (2011) Volume 3 ZR page 239*

4) *Nora Mwaanga Kagoba and Valizani Banda vs. Eunice Kumwenda Ngulube and Andrew Ngulube 2003 ZR page 132*

Other authorities referred to:

1) *High Court Act*

This is the Intervener's application to set aside judgment entered in this matter on 31st day of July 2012.

The back ground to this application is as follows. The Plaintiff filed an originating summons on 24th November 2008, against the 1st Respondent for the payment of the sum of K503,169,801.70 together with interest at the agreed rate of 23% per annum and failing payment of the amount claimed, possession of the mortgaged property. The claim was in respect of a mortgage loan advanced to the two Respondents which was secured by property known as subdivision 431 of stand No.401a Lusaka (the property).

Subsequently, on the 9th December 2011 the Second Respondent was joined to these proceedings and on 31st July 2012 this court entered consent judgment against the two Respondents for payment of the sum of K440,215,480.66 with interest and alternatively, delivery up of the property in the event of default of payment of the judgment sum.

After the judgment was entered and on the 21st February 2013, I granted an order allowing the Intervener to join these proceedings and apply to set aside the judgment. The basis upon which she was joined to the proceedings is that she purchased the mortgaged property from the First Respondent and would like to set aside the judgment entered against the Respondents so that her right to the property can be determined. This is the back ground leading up to this application.

The application is supported by an affidavit sworn by the Intervener and skeleton arguments. The Plaintiff has responded with an affidavit in opposition and skeleton arguments.

The evidence in support of the application reveals that the Intervener is aware that this court entered default judgment in favour of the Plaintiff against the Respondents for a sum of money. Further that, the Respondents have failed to settle the adjudged sum, consequent upon which the Plaintiff intends taking possession and selling the property.

The evidence goes further to reveal that the Intervener is the bonafide purchaser of the property from the Respondents which was offered to her by the Second Respondent acting for an on behalf of the First Respondent, in the later part of 2010. Further that, prior to executing the contract of sale, her advocates Messrs Chibundi and Company advised her that there was a mortgage on the property in favour of the Plaintiff. This mortgage, she stated would be discharged if she agreed and honoured the terms and conditions upon which the Respondents were offering the property to her. That she was requested to pay the sum of K200,000,000 upon signing of the contract out of a purchase price of K800,000,000.00, to enable the Respondents settle the debt due to the Plaintiff. She averred further that, she paid the Respondents the sum of K200,000,000.00 on execution of the contract of sale and proceeded to deal with the Plaintiff regarding the mortgage over the property. Subsequently, she was informed by her advocates that the mortgage in favour of the Plaintiff had been discharged and was shown a copy of the memorandum of discharge duly executed by the Plaintiff (see exhibit GC1). Further that, she was shown a copy of the Lands Register print out which indicated and confirmed that the mortgage and further charge between the Plaintiff and First Respondent were discharged. (See exhibit "GC2"). Following from this she testified, her advocates obtained the states consent to assign and paid the property transfer tax. (See exhibits "GC3" and "GC4").

The affidavit evidence by the Plaintiff was that of Augustine Ndapisha. It revealed that the memorandum of discharge exhibited as "GC1" to the

affidavit of the Intervener is a fraud. Further that, the Plaintiff is still in possession of the original certificate of title to the mortgaged property which indicates the encumbrance of the mortgage still undischarged (See exhibit "AN2")

The deponent also averred that exhibit "GC2" exhibited to the affidavit of the Intervener is also a fraud because the latest print out from Ministry of Lands obtained by the Plaintiff indicates that the mortgage is still in place. (See exhibit "AN3"). He ended by testifying that the Plaintiff was not privy to the other transactions the Intervener engaged in with the Second Respondent. Further that, she did not conduct a due diligence check on the property before paying for it and as such she must bear the consequences of her default.

The application came up for hearing on 8th April 2015. Counsel for the two parties made both verbal and written submissions. Mr. K. Kamfwa for the Intervener argued that the Intervener wishes to be heard because the judgment in this matter has an effect on the property she purchased from the Respondents. It was argued that at the time she purchased the property, she was not aware that it was the subject of these proceedings.

Counsel argued that in view of the evidence the Intervener produced which shows that the mortgage was discharged, she would like to be accorded an opportunity to be heard on the matter and hear from both the Plaintiff and Respondents as to the circumstances leading to the execution of the memorandum of discharge. It was argued that since the Plaintiff is disputing the authenticity or genuineness of the memorandum of discharge it is in the interest of justice that the Plaintiff be heard.

Counsel went on to discuss order 12 rule 2 of the **High Court Act** and order 20 rule 1. He also referred to the case of **Mwambazi vs. Morester Farms Limited (1)** in which he argued it was held that the practice in dealing with bonafide interlocutory applications is for courts to allow triable issue to come to trial notwithstanding default by the parties. Counsel also discussed the case of **Muliango and another vs. Magasa and another (2)** and argued that the holding in the case was that where

there is a defence to an action it is preferable that a case should go to trial rather than being prevented on account of procedural irregularities.

In his concluding remarks, counsel argued that the Intervener had clearly demonstrated in her evidence that she has a defence on the merits and her application should therefore be granted.

In the Plaintiff's arguments, Mr. M. Phiri and Mr. Roberts argued that the Intervener had no *locus standi* in this matter because judgment has already been entered. Further that, the action before court is a mortgage action to which the Respondents have admitted liability and have no defence. It would therefore be wrong to set aside judgment where the principal parties have admitted liability. It was further argued that the judgment in issue is not a default judgment but a judgment on admission and as such it cannot be set aside.

Counsel argued further that the Plaintiff had succeeded in showing the court through the affidavit evidence the circumstances under which its right to possession of the subject property arose. That, the Plaintiff was not privy to transactions between the Second Respondent and the Intervener which transactions were not only illegal but also took place well after the Plaintiff had already sued the Respondents for breach of the mortgage agreement. Lastly that, the Intervener's best course of action is to take out an independent action against the Respondents because the relief she seeks has nothing to do with the mortgage application. Counsel therefore prayed that the application be dismissed with costs.

In his reply submissions Mr. K. Kamfwa argued thus: the Intervener has *locus standi* because she is directly affected by the judgment sought to be set aside; and that her evidence shows that she relied on documents which on their face were executed by the Plaintiff. Consequent upon this, the judgment must be set aside so that the parties can be heard on the matters in controversy.

I have considered the affidavit evidence and arguments by counsel. There are certain facts which are not in dispute in this matter which assist me in determining the issues in contention. These facts are as follows:

- 1) that the Plaintiff advanced a loan to the First and Second Respondents
- 2) the loan was secured by way of a mortgage over the property in dispute
- 3) the said mortgage was duly registered at Ministry of Lands
- 4) at the time the intervener was transacting with the two Respondent for purposes of purchasing the property she became aware of the existence of the mortgage over the property.
- 5) There is no evidence to show that the Intervener dealt with the Plaintiff in the sale transaction.

These facts can be discerned from the affidavit evidence of both the Plaintiff and Intervener which as I will demonstrate in the paragraphs that follow, assist me in determining the matter. Of crucial importance is paragraph 9 of the affidavit in support of this application sworn by the Intervener in which she states as follows:

“That before I signed the contract of sale, my Advocates Messrs Chibundi and Company advised me that there was a mortgage on the property in favour of the Plaintiff but that the same was going to be discharged if I agreed and honoured the terms and condition upon which the Respondents were offering the property to me.”

The foregoing facts prove the undisputed fact that I have stated at number 4, in the earlier part of this ruling. These facts are crucial because they are the determining factor as to the extent, if any, that the Intervener has of the protection of the law in her dealings with the two Respondents. This is demonstrated in the case of ***Enesi Banda vs. Abigail Mwanza (3)*** in which my brother Matibini J (as he then was) had this to say at page 239:

“Any one dealing with land will be protected only by the general equitable doctrine that a bonafide purchaser of a legal estate for value will take it free of any equitable interest of which he does not have actual or constructive notice.”

This is the purpose of registration of encumbrances at the Ministry of Lands, which is that it enables a prospective buyer to conduct a search on the property. Hence the undisputed fact I have stated at 3 in the earlier part of this ruling.

The effect of the foregoing is that if, as a purchaser you have notice of an encumbrance over the property you intend purchasing and you still go ahead and purchase it, you do so at your own peril. Further, the purchaser in such a situation buys the property subject to the encumbrance he or she had notice of. Therefore, since the Intervener, knew about the Plaintiff’s mortgage over the property, she bought it subject to the mortgage. She therefore cannot now be heard to say that she wishes the judgment to be set aside so that she can advance her case in relation to the property. My finding is fortified by the decision of the Supreme Court in the matter of ***Nora Mwaanga Kayoba and Valizani Banda vs. Eunice Kumwenda Ngulube and Andrew Ngulube (4)*** in which it was held as follows at page 133:

“In purchasing real properties parties are expected to approach such transactions with much more serious inquiries to establish whether or not the property in question has encumbrances.”

From a practical point of view the Intervener having established that the property was encumbered, should have through her advocates, communicated to the Plaintiff and obtained a written confirmation from it that if she paid to the Plaintiff the Respondents’ debt, then the Plaintiff would release the title deeds and memorandum of discharge to the Intervener’s advocates. This of course should have been in concert with the Respondents as vendors of the property. This was not done and as such the Plaintiff is a stranger to the Respondents’ dealings with the

Intervener and as such stranger, its right to possession of the property is not affected.

The decision by my brother Matibini. J in the ***Enesi Banda*** case which I have referred to is merely persuasive and not binding on this court but it is good law and as such I am persuaded by it and endorse it.

In arriving at the decision I have made in the preceding paragraphs, I have considered the argument by the Intervener that she was prompted to go ahead with the purchase because there was a memorandum of discharge executed by the Plaintiff. This argument can be discerned from the evidence in paragraph 12 of the affidavit in support in which she states as follows:

“That subsequently, my Advocates Messrs Chibundi & Company informed me that the mortgage in favour of the Plaintiff had been discharged. As proof of this I was shown copy of the memorandum of Discharge of mortgage executed by the Plaintiff. There is now produced and shown to me the true copy of the said Memorandum of discharge marked “GC1”.

In response, the Plaintiff has challenged the authenticity of the memorandum of discharge and led evidence to show that its mortgage is still endorsed on the certificate of title and the latest Lands Register shows that the mortgage is still registered.

I am inclined to accept the evidence of the Plaintiff over that of the Intervener’s for three reasons. The first is that the Intervener has not in any way demonstrated that she or her advocates dealt directly with the Plaintiff as mortgagee of the property she sought to purchase to ensure that her interest was properly protected. Secondly, the lands Register produced as exhibit “AN3” by the Plaintiff is later in time than that produced by the Intervener as exhibit “GC2”. The later in time prevails at law. Thirdly, the Plaintiff cannot be called upon to explain the memorandum of discharge that the Intervener relied on because there is no evidence to show that the Plaintiff participated in its preparation.

The fact that the judgment sought to be set aside is a consent judgment cannot pass without comment. There are rules in this court that set out the standard that must be met in order for a court to set aside a consent judgment. These standards, in my considered view, have not been met. A person seeking to set aside a consent judgment cannot do so by advancing arguments of defence on the merits and citing the ***Mwambazi*** and ***Muliango*** cases, as the Intervener has done because such arguments only relate to setting aside of default judgments. The said arguments do not therefore aid the Intervener in any way.

In view of my findings in the preceding paragraphs, I find no merit in this application and accordingly dismiss it. Consequent upon this, the consent judgment of this court dated 31st July 2012 is still in place and the Plaintiff is at liberty as mortgagee to enforce it forthwith. I also award the Plaintiff costs of this application as against the Intervener, to be agreed, in default taxed.

Dated this 22nd day of April, 2015.

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NIGEL K. MUTUNA
HIGH COURT JUDGE