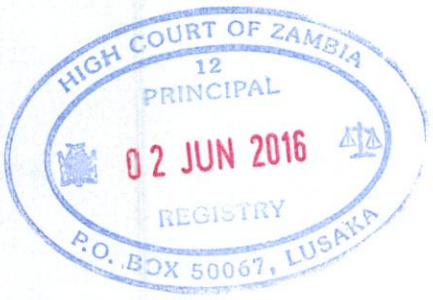
IN THE HIGH COURT FOR ZAMBIA 2014/HP/1497

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

BETWEEN:



ALIOS FINANCE ZAMBIA LIMITED APPLICANT

AND

ENIGMA PETROLEUM LIMITED 1ST RESPONDENT

LINK PHARMACY LIMITED 2ND RESPONDENT

COURT YARD HOTEL LIMITED 3RD RESPONDENT

CORAM : Honourable Mr. Justice Mubanga M. Kondolo, Sc

FOR THE APPLICANT : Mr. R. Petersen – Messrs Chibesakunda & Co.

FOR THE RESPONDENTS : Mr. B Mosha – Messrs Mosha & Co

RULING

AUTHORITIES

STATUTES & TEXT

1. The High Court Act, Chapter 27 of the Laws of Zambia
2. The Supreme Court Practice of England (Whitebook), 1999 Edition
3. Charles Harper, Megarry and Wade: The Law of Real Property. 6th Edition (2000)
4. Halsbury's Laws of England. 4th Edition. Volume 20

Cases

1. **Africa Banking Corporation Limited v Plinth Technical Works Limited and 5 others SCZ/28/2015**
2. **S.P Mulenga & Others v Investrust Merchant Bank Limited SCZ/15/1999**
3. **Nyampala Safaris Zambia Limited & Others v ZAWA SCZ/8/179/2003**
4. **Sata v Chimba & Others (2011) ZR 74**

The main matter in this case was before my sister Mulenga J in which the Applicant commenced a mortgage action against the Respondents *vis-à-vis* an Equipment Leasing Facility and in her Judgment dated 30th December 2015, Mulenga J ordered the Respondents to settle the judgment sum of USD172,233.55 within 90 days, failure to which would provide the Applicant liberty to foreclose and take possession of the pledged property.

Against this background, on 14th January, 2016 the Applicant issued a Writ of *Fierri Facias (fifa)* against the 1st and 2nd Respondents for the recovery of the judgment sum together with interest. The Respondent applied for and was granted a Stay of Execution on 29th March 2016. The Respondents application was supported by an Affidavit, sworn by Ayub Mulla, in which he averred that the Respondents had 90 days within which to settle the judgment debt after which the Applicant was at liberty to foreclose and take possession and that the Judgment did not provide for any other way by which the judgment could be executed. He further averred that I contravention of the judgment, the Applicant had issued a *fifa* 21 days after the judgment.

The Applicant made another ex parte application for a stay of execution on the basis that despite having been served with the Order staying execution of the *fifa* dated 14th January, 2016, the Applicant, in total disregard of the Stay, issued a fresh *fifa* dated 12th April, 2016 directed to the 1st and 2nd Respondent and which the sheriff of Zambia promptly executed the following day. I granted another Stay of Execution on 14th April, and an inter-partes date was set for 25th April, 2016.

The matter did not take off on the 25th April but I severely admonished Counsel for the Applicant for proceeding to issue a fresh *fifa* after I had issued an Order for stay of execution.

He apologized and explained that he thought the Stay of execution only covered the 3rd Respondent, the mortgagor, and had not understood it to also cover the 2nd Respondent.

The matter was finally argued on 24th May, 2016 and learned Counsel for the Respondents argued that the execution was wrong because the Applicant issued a *fifa* within 21 days of the Judgment of the Honourable Mulenga J which in fact provided the Respondents with a 90 day grace period. He further argued that it was customary for Courts to grant respondents in mortgage actions with time within which to redeem and it was an equitable right binding on both the mortgagor and mortgagee. He further argued that execution of the *fifa* defeated the whole essence of the grace period which was for the purpose of allowing the Respondents time within which to discharge the judgment debt by means other than applying the pledged security. He concluded by submitting that the *fifa* should be set aside and the 90 days period given by the Court should start running.

On behalf of the Applicant, Mr. Peterson relied on the Affidavit in opposition in which it was deposed that the Judgment of my sister Mulenga J found all 3 Respondents liable and they were ordered to pay the judgment sum inclusive of VAT. It was further deposed that the 3rd Respondent was granted the right to redeem the mortgaged property by making payment of the judgment sum within 90 days from the date of Judgment within which period no steps could be taken for the foreclosure of the mortgaged properties. He further averred that the Judgment did not restrict the Applicant from to enforcing the Judgment only against the 3rd Respondent.

Mr. Petersen submitted that the Judgment was clear on the 90 days period but argued that the right of redemption belongs only to the mortgagor (3rd Respondent). He stated that the Court record will show that the writ of execution taken out by the Applicant did not instruct the Sheriff of Zambia to execute against the 3rd Respondent. He referred the Court to pages 15 and 16 of the Judgment where the Court ordered that the Respondents pay the Applicant the judgment sum and on that basis submitted that as against the 1st and 2nd Respondent, the Order was effectively a money judgment entitling the Applicant to execute the Judgment in all lawful ways possible which to included the option to execute by way of *fifa*.

Mr. Peterson drew the Court's attention to the case of **Africa Banking Corporation Limited v Plinth Technical Works Limited and 5 others**[1] in which he argued that the Court, at page 37, held that the equity of redemption, in that case, was only against the mortgagee and not in respect of the other securities which strictly speaking do not form part of the mortgage. He further argued that the acts of the 1st and 2nd Respondent are not mortgage actions therefore the right to rely on the equity of redemption does not belong to them and the execution against their properties was therefore not irregular.

Mr. Petersen submitted, in the alternative, that in the event that the Court was persuaded by the Respondents' arguments and consequently finding that the issuance of a Writ of *Fifa* was irregular, he prayed that the period for redemption should commence from the date on which the Court ordered the Stay of Execution of the *Fifa* being 4th April, 2016.

Mr. Mosha, in his reply, submitted that he did not agree that this was not a mortgage action as the action had been brought under **Order 30 Rule 14 HCR**[2] which is primarily used for mortgage actions. He argued that once the Court gives a reprieve through the right of redemption it means that time has been given for settlement of the debt thus there cannot be deemed a failure to pay within that period and the guarantors cannot be touched. He further submitted that the 90 days period should not be back dated but must start from a date of the Order that will be given by this Court because there has been a disruption and the Respondents should be given a clear period.

I have considered the evidence on record and the arguments of the Parties together with the law cited to support their respective positions.

In the case of **Africa Banking Corporation Limited v Plinth Technical Works Limited and 5 others**[3] case, cited by Mr. Peterson, the Court restated that a multiplicity of actions should be avoided and in that case found nothing wrong with a court, in a mortgage action, determining matters related to other securities pledged against the same subject matter. I agree that the

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[1] Africa Banking Corporation Limited v Plinth Technical Works Limited and 5 others SCZ/28/2015
[2] Order 30 Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia
[3] *Ibid 1*

Applicant did not need to institute separate proceedings to execute against the guarantee provided by the 2nd Respondent.

Stays of execution are a discretionary remedy and **Order 47/1/1 RSC**[4] states that; *"This rule confers express power on the court to stay execution by writ of fi. fa. either absolutely or for such period and subject to such conditions as the court thinks fit"* and **Order 47/1/8 RSC**[5] provides that *execution may be set aside where it has been improperly issued, even after execution has been levied.*

In my view, the Judgment of Mulenga J was crystal clear and requires no complicated interpretation. The Parties are reminded that the law relating to equitable mortgages and the equitable right to redeem are irrelevant vis-à-vis the application before this Court because this is not an appeal. All that is to be considered is whether a stay should be granted on the basis that the Applicant disregarded the orders in the Judgment dated 31st December, 2015.

The Judgment at J16 reads as follows;

> *"It is further ordered that **the Respondents** settle the judgment sum and interest within 90 days from the date of Judgment failure to which the Applicant will be **at liberty** to immediately foreclose and take possession and the 3rd Respondent shall convey the mortgaged property No.s F797 and 798 in issue to the Applicant unconditionally."*

I find it hard to understand what part of this Judgment the Applicant had difficulty in understanding regarding the grace period of 90 days. The 90 days is clearly directed to the "Respondents", it does not specify which Respondents. All the Respondents were to benefit from the 90 days grace period. If the Applicant felt that the 90 day grace period should have been directed only to the Mortgage and not the Guarantee's, the correct course of action was to appeal and not to disobey the Stay of Execution in the manner that they did.

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[4] *Order 47/1/1, The Supreme Court Practice of England (Whitebook), 1999 Edition*
[5] *Order 47/1/8, The Supreme Court Practice of England (Whitebook), 1999 Edition*

Equally, the Judgment is clear that the Applicants were "at liberty" to execute against the mortgaged properties. They were not restricted to that mode of execution and nothing prevents the Applicant from enforcing the guarantee given by the 2nd Respondent subject to the grace period imposed by the Judgment.

I therefore find that all three Respondents were in fact accorded a 90 day grace period by Mulenga J and that the Applicant was not to enforce any of the securities within that period. I also find that after the 90 day period the Applicant is at liberty to execute against the mortgaged property and/or against any other security pledged by the Respondents.

In my view, the 90 days started running on the 1st of January, 2016 and were to expire on 30th March, 2016. Notwithstanding the fact that the Applicant irregularly issued a *fifa* on 14th January, 2016, the Respondents only applied to stay the *fifa* on the 24th March; six days before expiry of the grace period.

The application to stay execution of and to set aside the *fifa* was not a stay against the Judgment. The obligations of the Parties under the Judgment have remained active throughout the process of considering this application and, in particular, the obligation of the Respondents to settle the judgment debt within 90 days of the Judgment and the Applicants obligation not to execute the Judgment within that period remained untouched.

The Applicant, however, chose to disobey the Judgment and commenced the process of executing the Judgment by issuing a *fifa* 14 days after the Judgment was delivered. The Respondent quite rightly applied for a stay of execution which was granted. However, before the inter-partes hearing, the Applicant issued yet another *fifa* which was actually executed and I must state that the conduct in this regard, was on the face of it most unbecoming, cantankerous and plainly contemptuous. I have already stated that Counsel for the Applicant apologized and explained what had happened.

It is interesting to note that the 2nd *fifa* was issued on the 11th April, 2016 well after the 90 day grace period given by the Court had elapsed, however, execution of the Judgment was forbidden because the Stay of Execution granted on 29th March, 2016 was still in effect.

As indicated earlier, when the Stay of execution was granted, the Respondent only had four days within which to satisfy the Judgment. As a consequence, the only extension of time, if at all, due to the Respondents would be a period of 6 days. The wrongful issuance of the *fifa* did not freeze the time within which to comply with the Judgment.

I therefore allow the Application and set aside the two writs of *fifa* dated 14th January, 2016 and 11th April, 2016 with costs to the Respondents.

The Respondents are granted a 6 day grace period, from the date of this Order within which to settle the judgment debt after which the Applicant shall be at liberty to execute in the manner provided under the Judgment dated 31st December, 2015.

Dated at Lusaka this 02nd day of June, 2016

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M.M. KONDOLO, SC
JUDGE