

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Commercial Jurisdiction)

2016/HPC/0371



BETWEEN:

CHARLES MULENGA
(T/a Grand Corporate Business Consultants)

APPLICANT

AND

KAYUMBA EUNICE SHINDANO
LEONARD SIMUWELU

1st RESPONDENT
2nd RESPONDENT

Before the Honourable Justice B.G. Lungu on the 20th day of February 2016 in Chambers.

For the Plaintiff : Mrs. F. Muchiya, Messrs Barnaby & Chitundu Advocates.

R U L I N G

CASES REFERRED TO;

- 1. *Development Bank of Zambia v. Sunvest Limited an Another, (1995-1997) Z.R. 187;***
- 2. *Kelvin Hang'andu & Company v. Webby Mulubisha (2008) Z.R. 82, Vol.2;***
- 3. *Zambia National Building Society vs. Noriana Museteka 2013/HP/1579; and***
- 4. *Rosalyn Mukelabai and Mongu Meat Corporation Ltd, (2003) Z.L.R***

LEGISLATION AND OTHER WORKS REFERRED TO:

1. ***Order III, rule 2, High Court Rules, High Court Act, CAP 27 of the Laws of Zambia;***

This is an application on the part of the 1st Respondent for the Court to set aside and, or dismiss the entire action for irregularity and abuse of court process.

The application was made by way of Summons, accompanied by an Affidavit in Support and Skeleton Arguments filed on 12th October, 2016. The Summons was stated to be taken out under ***Order III., rule 2 of the High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia.***

According to the Affidavit in Support deposed to by the 1st Respondent, there already exists an action between the Applicant and the 1st Respondent, under Cause No. 2016/HK/360, relating to the same subject matter and issues as are in the Originating Process filed in this cause, 2016/HPC/0371.

The Affidavit in Support exhibits the Writ of Summons and Statement of Claim in respect of Cause No. 2016/HK/360, marked "EK1" and "EK2" respectively.

Exhibit "EK1", the Writ of Summons, was filed in the High Court holden at Kitwe, on 1st June, 2016 and was taken out by the 1st Respondent herein, as Plaintiff, against the Applicant herein, as the Defendant.

The Writ of Summons, as read with the Statement of Claim reveal that Cause No. 2016/HK/360 involves a debt transaction between the Applicant and 1st Respondent, where monies were lent to the 1st Respondent by the Applicant on the security of the 1st

Respondent's flat, Stand No. 6959/CL/B/2/1, High Rise Flats stage 1, Longacres, Lusaka.

In that action, the 1st Respondent's claim against the Applicant is for, *inter alia*:

- i. a declaratory order that the assignment of the her flat, Stand No. 6959/CL/B/2/1, High Rise Flats stage 1, Longacres, Lusaka was done under duress and mistake and thus *void ab initio*;
- ii. an order for specific performance that the Defendant (Applicant herein) do wait for the Plaintiff (1st Respondent herein) to be paid by the Government of the Republic of Zambia out of which payment the Defendant's shall be paid the monies that she borrowed.

In view of the assertion that Cause No. 2016/HK/360 pertains to the same subject matter as the cause before this Court, I take hiatus to juxtapose the two causes. In so doing, I take cognisance of the record which discloses that on 28th July, 2016, the Applicant took out an Originating Summons against the 1st and 2nd Respondent for, *inter alia*:

- i. repayment of monies lent to the 1st Respondent by the Applicant on the security of the 1st Respondent's flat, Stand No. 6959/CL/B/2/1, Lusaka; and
- ii. an order for foreclosure, possession and sale of the mortgaged property, namely Stand No. 6959/CL/B/2/1, Lusaka.

Bearing in mind the claims disclosed in the two causes of action as articulated above, the gist of the argument put forward by the 1st Respondent is that both causes are footed on the same loan agreement and are anchored on the same issues between the same parties.

The 1st Respondent is at odds with the commencement of this action on the basis that she considers the action to be an abuse of process occasioned by the birthing of multiple actions over the same issues. Her position was founded on the Supreme Court cases of *Development Bank of Zambia v. Sunvest Limited and Another*, (1995-1997) Z.R. 187¹; and *Kelvin Hang'andu & Company v. Webby Mulubisha* (2008) Z.R. 82, Vol.2².

I do not find it necessary to recount the individual facts and all the findings in each of the aforementioned cases relied on by the 1st Respondent. What is relevant however, is that the highlighted authorities, in my view, converge in articulating the disapproval, by the Courts in Zambia, of multiple actions between the same parties involving the same facts or issues or issues that can be dealt with before a sole competent court. The convergence is derived from the holdings and sentiments of the Supreme captured below.

Firstly, in the case of *Development Bank of Zambia v Sunvest*, the Supreme Court, in the mid-nineties, articulated its disapproval of the commencement of multiple actions, between the same parties, over the same set of facts and advised parties to raise whatever issues they wished to raise, between them, in one action.

More than a decade later, in 2008, the sentiments were reaffirmed in the *Kelvin Hang'andu* case, where the Court held, *inter alia*, that:

"once a matter is before court in whatever place, if that process is properly before it, the court should be the sole court to adjudicate all issues involved, all interested parties have an obligation to bring all issues in that matter before that particular court..."

The Applicant on the other hand, opposed the application on the strength of a tripod of arguments contained in the Applicant's Skelton Arguments filed on 8th February, 2017.

On the first leg, it was argued that commencing a mortgage action during the life cycle of Cause No. 2016/HK/360 did not amount to multiplicity of actions because a mortgage action was a unique and separate action. In so doing, the Applicant sought refuge in the case of ***Zambia National Building Society vs. Noriana Museteka 2013/HP/1579***.³ In that case, the High Court held that a mortgagee could not be deprived of the right to pursue a mortgage action merely on account of owing the mortgagor in another action relating to terminal benefits.

Whilst I take no issue with the ratiocination underpinning the decision of my Learned elder sister, Judge F.M Chisanga (as she then was), I am not persuaded that the reasoning can be applied *in casu*.

In the instant case, the mortgage action is not being juxtaposed with a claim for terminal benefits but a claim that the mortgage which the Applicant seeks to enforce was obtained under duress. Without delving into the merits of the claims, it is evident that the claims in the two cases herein are intrinsically interweaved by the same parties having entered into a loan agreement on the security of a specific property, Stand No. 6959/CL/B/2/1. Moreover, the enforceability of the security is at the core of both causes. Therefore, the 1st Respondent's contention cannot be perceived to

seek to defeat the mortgage action merely on account of some unrelated claims. Accordingly, I consider that the Applicant's first limb of argument lacks merit in terms of the application before Court.

The second leg of the Applicant's argument was that commencing a mortgage action was not an abuse of process because it is a separate and distinct action. In support, reference was made to the English case of ***National Westminster Bank Plc vs. Skeleton and Another (1993) 1 ALL ER 242***. In that case the Court of Appeal set down the principal that a borrower cannot normally resist a claim for possession by asserting a counterclaim which would be set off against the mortgagee. As above, I take the position that the principle enunciated by the Court of Appeal does not assist the Applicant's argument in this case. My reasoning is premised on the fact that the 1st Respondent's claim in Kitwe is not founded on any cross or counterclaim nor does it seek to defeat the mortgage action on the basis of any such counterclaim.

The last leg of the tripod argument articulated in the Applicant's Skeleton Arguments was that there was no merit in the 1st Respondent's application because the current cause is a separate cause of action. The argument was fortified by citing the case of ***Michelo Special Geroges Mwiinga and Another vs. Zambia National Commercial Bank 2003/HPC/0448***. The Applicant highlighted that my elder brother, Judge Kajimanga (as he then was), held that a counter claim that was set against the mortgage action before him had no relevance.

The Applicant did not delve into the facts of the ***Michelo Special Geroges Mwiinga*** case to further advance its arguments. Consequently, I see no need to escapade beyond the Applicant's submission. I too will focus on the holding and merely note that on the facts before Judge Kajimanga, he discerned no relevance

between the two causes of action before him. I take his cue to consider whether the two causes referred to in this application are relevant to one another.

In considering the relevance of the causes, I carefully analysed the Affidavit evidence before Court and maintain the view that when Cause No. 2016/HK/360 is juxtaposed with the Originating process in this cause, the two are intrinsically intertwined. I take this stance because the subject matter in the two causes of action are fundamentally the same, as are the parties. Although the reliefs are couched differently, I consider that the real issues to be determined in both causes are:

- i. the time within which the 1st Respondent ought to pay its outstanding indebtedness, if any, to the Applicant; and
- ii. whether the security for the loan transaction between the Applicant and the 1st Respondent, by way of mortgage or assignment of Stand No. 6959/CL/B/2/1, in favour of the Applicant is enforceable.

On the basis of the interface of the fundamental issues to be determined in both causes, I am persuaded that the commencement of this action by the Applicant fostered the existence of multiple actions.

Riding on the back of the convergence of principles that I alluded to above and having found that the two causes of action have resulted in a multiplicity of actions, I am bound by the Supreme Court guidance that the two causes should and must be dealt with by a sole court of competent jurisdiction. As such, an order for consolidation beckons the Court.

In responding to the call, I am fortified by the principle enunciated by the Supreme Court in the case of *Rosalyn Mukelabai and Mongu Meat Corporation Ltd, (2003) Z.L.R⁴* that common questions of law or facts and rights or relief arising out of the same transaction should be consolidated in one action.

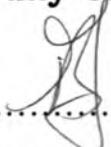
In view of the foregoing, I order that Cause No. 2016/HPC/0371 be consolidated with Cause No. 2016/HK/360 so that all the issues can be addressed by a sole court of competent jurisdiction.

Given that the actions in both causes arise out of a secured loan transaction, they fall within the class of actions referred to as commercial transactions. It is trite that commercial actions fall under the jurisdiction of the Commercial Division of the High Court. Accordingly, the consolidated cause shall be heard under the control Cause No. 2016/HPC/0371.

Costs are awarded to the Respondents, to be taxed in default of agreement.

Leave to appeal is granted.

Dated this 15th day of September, 2017



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Lady Justice B.G.Lungu

HIGH COURT