

IIN THE HIGH COURT FOR ZAMBIA

2016/HPC/0567

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Commercial Jurisdiction)

BETWEEN:

CAVMONT BANK LIMITED

V

KAPESIKA ENTERPRISES LIMITED

KATE MUTALE SIKAZWE

KAPEMBWA SIKAZWE



APPLICANT

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

Before the Honourable Lady Justice Irene Zeko Mbewe

For the Applicant:

*Mr. M. Mwananshiku of Messrs M & M
Advocates*

For the Respondents:

*Mr. W. Simutenda of Messrs GDC
Chambers*

R U L I N G

Cases Referred To:

1. *BP Zambia Plc v Interland Motors Limited SCZ Judgment No. 5 of 2001*
2. *Kelvin Hang'andu (A Firm) v Webby Mulubisha (2008) ZR 82 Vol. 2*
3. *Development Bank of Zambia v Sunset Limited and Another (1995-97) ZR 187*

4. *Mukumbuta and Others v Choobana and Others SCZ Judgment No. 8 of 2003*
5. *S Brian Musonda (Receiver of First Merchant Bank Zambia Limited) v Hyper Food Products [1999] ZR 124*

This is a Ruling on an application by the Respondents' for an Order to dismiss an action on a point of law. The application is supported by an affidavit deposed to by Kapembwa Sikazwe filed on 2nd March 2017. The deponent is the 2nd Respondent and Director in the 1st Respondent's company. It is deposed that on the 23rd November 2016, the Respondents commenced an action under Cause No. 2016/HP/2283 (**Exhibit "KP1"**). That on the 30th November 2016, the Applicant purportedly commenced the current action based on the same facts and subject matter as the Respondent's earlier action (**Exhibit "KP2"**).

According to the Respondents, this Court has no jurisdiction to entertain the action herein when there is the action of 30th November 2016 under Cause No. 2016/HP/2283. That the Applicant's entire action is untenable at law on the ground that the Respondents' action under Cause 2016/HPC/9567 commenced in the Commercial Registry is grossly irregular and a nullity for

multiplicity of Court actions over the same subject matter, forum shopping and abuse of Court process.

It is the Respondents' prayer that this is a proper and fit matter to dismiss the Applicant's entire action therein on a point of law with costs to the Respondents.

In its skeleton arguments, Counsel for the Respondent's relied on the Learned **Authors of Odgers on Civil Action, 24th Edition** where an abuse of Court process is defined. The case of **BP Zambia Plc v Interland Motors Ltd SCZ Judgment No. 5 of 2001¹** and **Kelvin Hang'andu & Company (A firm) v Webby Mulubisha (2008) ZR 82 Vol. 2²** was cited in support of the proposition on abuse of Court process.

The Applicant filed an opposing affidavit dated 28th April 2017 and deposed to by Martha Lungu Sichone the Recoveries and Securities Manager in the Applicant Bank. It is deposed that whilst the facts of the two cases are similar, they are not the same. That there are significant differences such as under Cause 2016/HP/2283 it only relates to one property known as S/D 'B' of Lot 2983. That the Applicant's action in the present proceedings relate to S/D 'B' of Lot

2983/M Lusaka and two other properties known as S/D 'A' of Lot 1861/M Lusaka and S/D 'B' of Lot 1861/M Lusaka **(Exhibit "MLS1")**. Further that the Applicant has acknowledge the interest of Barclays Bank who have an interest in one of the properties as they hold a first legal mortgage over S/D 'B' of Lot 2983/M Lusaka **(Exhibit "MLS2")**. It is deposed that the Respondents in 2016/HP/2283 have not acknowledged Barclays Bank in any way. According to the Applicant, the decision to commence foreclosure proceedings was made in July 2016 **(Exhibit "MLS3")** and that the proceedings could not be immediately filed due to several factors such as Barclay's Bank's first legal mortgage and the availability of the Applicant's Certificate of Title for two of the mortgaged properties **(Exhibit "MLS4")**. Further the process of engagement with Barclays Bank was protracted and on 8th November 2016, Barclays Bank issued a letter which required the Applicant to submit all pleadings to it for review before they were filed into Court **(Exhibit "MLS6")**.

It is deposed that the Respondent's action was filed on 23rd November 2016 and served on its Managing Director but the foreclosure proceedings were being handled by the Applicant's

Rehabilitation and Recoveries Department and that the Advocates had not been notified until they had already filed their action on 30th November 2016. That when the Applicant became aware of the two actions, it filed an application for consolidation of the two actions **(Exhibit “MLS7”)** before Hon. F. M. Lengalenga and it is awaiting a Ruling.

In its skeleton arguments, the Applicant argues that there was no deliberate attempt by the Respondent to abuse Court process by filing another action based on similar facts. It is argued that there are significant differences between the two actions which could cause injustice if this action were to be dismissed. That the Respondents' application to dismiss the action is premature as they should have waited for the Court Ruling in Cause 2016/HP/2283. It is submitted that the application to dismiss has the potential to embarrass the Court as it may order for the consolidation of two matters one of which may be dismissed. The case of **BP Zambia Plc v Interland Motors Ltd¹ SCZ Judgment No. 5 of 2001** was cited where it was held that the administration of justice may be brought into disrepute where a party gets conflicting decisions.

In its affidavit in reply, the deponent Kapembwa Sikazwe the 3rd Respondent herein deposed that the alleged differences between the facts of the matter and those in Cause 2016/HP/2283 do not warrant the Applicant to commence a fresh action against the Respondents or at all. That the alleged interest by Barclays Bank does not equally warrant the Applicant to commence a fresh action against the Respondent and the Applicant ought to have brought the alleged interest by Barclays Bank under Cause 2016/HP/2283. It is deposed that the alleged issue of the matter being handled by the Applicant's Rehabilitation and Recoveries Department and that of the Applicant's Advocates have nothing to do with the Respondents to warrant commencement of a fresh action whilst another one is pending before another High Court Judge herein.

At the hearing, the parties relied on their affidavit evidence, skeleton arguments and list of authorities. Oral submissions were made which mirror the skeleton arguments.

I have carefully considered the affidavit evidence as well as both parties' skeleton arguments supported by list of authorities in support of their respective rival arguments. The Respondents'

application is premised on **Order 14A Rule 4 and Order 33 Rule (3) Rules of the Supreme Court, 1999 Edition.**

The issue for determination is whether the present cause constitutes an abuse of court process. An abuse of Court process is where a party improperly uses the machinery of the judicial process to the annoyance of his opponent and effective administration of justice. The abuse lies in the intention, purpose and aim of the person exercising the right to harass or annoy the opponent and interfere with the due administration of justice. It is settled that generally, abuse of process contemplates multiplicity of suits between the same parties in respect to the same issues. I am guided by the case of **Development Bank of Zambia v Sunvest Limited and Another**³ where the Supreme Court held that:

"We disapprove of parties commencing a multiplicity of procedures and proceedings and indeed a multiplicity of actions over the same subject matter."

Similarly, in the case of **BP Zambia Plc v Interland Motors Limited**¹, cited by Counsel for the Respondents, the Supreme Court held that:

"For our part, we are satisfied as a general rule, that it will be regarded as an abuse of court process if the same parties re-litigate the same subject matter from one action to another from Judge to judge"

From the legal authorities cited, a multiplicity of suits against the other on the same subject matter and issues constitute an abuse of court process which impedes the administration of justice.

A perusal of the affidavit evidence shows that both claims arise from a loan agreement dated 12th September 2014 availed to the 1st Respondent by the Applicant with an unlimited personal guarantee by the 2nd Respondent, secured by a legal mortgage over Subdivision "B" of Plot 2983 Ibex Hill, Lusaka registered in the 2nd Respondent.

It is settled that a litigant has no right to pursue similar claims which will have the same effect in different Courts at the same time with a view of obtaining victory in one or in both. Counsel for the Applicant submits that once it became aware of the two processes, it applied for consolidation of the actions which Ruling is pending before Hon. Justice Lengalenga.

In order to determine whether the two causes are similar, it requires a careful scrutiny of the reliefs in either cause. The Respondents' argue that two similar actions have been commenced one under Cause 2016/HP/2283, and the present cause.

The claim under Cause 2016/HP/2283 are for:

- (i) *An Order for enlargement of time from the date of the grant of the Order by this Honourable Court within which the Applicants are to exercise their equitable right of redemption in respect of the mortgaged property situate at and known as Subdivision "B" of Plot 2983 Ibex Hill Lusaka by applying the rental proceeds towards redemption of the mortgage therein.*
- (ii) *Further or other relief that the Court may deem fit.*

In the present action, the Applicant's reliefs are as follows:

- (i) *Payment of all monies plus interest thereon due to the Applicant from the Respondents and such costs as would be payable by the Respondents if this were the only relief granted.*

- (ii) *Alternatively, delivery by the Respondents to the Applicant of possession of the mortgaged properties or the relief of foreclosure and further an Order for the power of sale by the Applicant of the properties subject to Barclays Bank Zambia Plc legal mortgage registered on Subdivision "B" of Plot 2983/M Lusaka.*
- (iii) *Further or other relief.*
- (iv) *Costs of this action.*

The said mortgaged properties in the present action relate to Subdivision "B" of Lot 2983 Lusaka, Subdivision "A" and "B" of Lot 1861/M, Lusaka.

In respect to the earlier Cause 2016/HP/2283, the relief relates to an enlargement of time to exercise the Respondents' equitable right of redemption in respect to the mortgaged property namely Subdivision "B" of Lot 2983/M Ibex Hill Lusaka. In the present case, the Applicant claim is for foreclosure of the same subject property being Subdivision "B" of Lot 2983 Ibex Hill, Lusaka but also includes Subdivision "A" and "B" of Lot 1861/M Lusaka which secured an overdraft facility availed to the 2nd and 3rd Respondent.

It is trite that where a mortgagor defaults, the mortgagee has a number of cumulative remedies available of foreclosure, possession, and exercising the power of sale over the mortgaged property as elucidated by the Supreme Court in the case of **S Musonda (Receiver of First Merchant Bank) v Hyper Food Products Limited and 2 Others**⁵. It is trite that a mortgagor has a right in equity to redeem even after the date fixed by the mortgage period for repayment has passed. The Court in exercise of its powers to afford the mortgagor the equity of redemption is duty bound to prescribe a reasonable period within which the mortgagee may wait before enjoying the fruits of its relief.

The Respondents herein are requesting for an enlargement of time to exercise their equitable right of redemption. If this specific claim is in both Courts, it has the potential to embarrass the Court as the different Judges can have conflicting judgments in respect to the same subject matter. Illustrative of this is in one Court, the enlargement of time to exercise the equitable right of redemption is granted, whilst in another Court it orders foreclosure of the same

property and grants the Respondents a different time period within which to exercise their equitable right of redemption.

As to whether the two suits have raised the same subject matter or issues, I opine that a different suit can emanate from the same subject matter but with different rights and reliefs. I find that the suits emanate from the same subject matter being the loan facility availed to the 1st Respondent by the Applicant. In the present case, the Applicant seeks foreclosure for two other properties namely Subdivision "A" and "B" of Lot 1861/M Lusaka, which properties are not part of the claim in Cause 2016/HP/2283. Therefore, in respect to Subdivision "A" and "B" of Lot 1861/M Lusaka, I find that this does not constitute a multiplicity of court action, an abuse of court process or forum shopping. Therefore, the Respondents' application to dismiss this action on a point of law in this respect fails.

However, in respect to respect to Subdivision "B" of Lot 2983 Ibex Hill, Lusaka, the Respondents' application to dismiss the action on a point of law partially succeeds in view of the fact that another matter is pending relating to the same subject property in a Court of similar jurisdiction. I find that this constitutes a multiplicity of action and is

an abuse of court process, which the Court frowns upon. I have taken into consideration the authorities cited by the Respondent herein namely **Mukumbuta and Others v Choboona and Others⁴**, **Kelvin Hangandu and Company v Webby Mulubisha²** and **BP Zambia Plc v Interland Motors Limited¹** whose principles I have adopted.

The upshot is that the Order to dismiss the action on a point of law is hereby granted in so far as it relates to the relief of foreclosure, possession and power of sell over Subdivision "B" of Lot 2983 Ibex Hill, Lusaka. For the avoidance of doubt, the remaining reliefs claimed in the originating summons subsist.

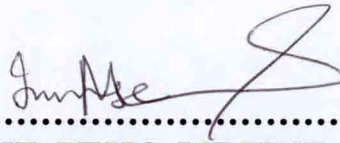
In view of the above Order, leave is hereby granted for the Applicant to make consequential amendments to the originating process which shall be filed into Court within 7 days of this Ruling. The Respondent is to file any amended affidavit within 7 days of receipt of the Applicant's amended originating process.

The originating summons shall be heard on 15th December 2017 at 09.00 hours.

Under the circumstances, I make no order as to costs.

Leave to appeal granted.

Dated in Chambers this 24th day of November, 2017.



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HON. IRENE ZEKO MBEWE
HIGH COURT JUDGE