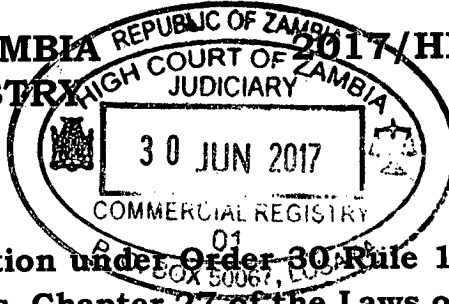


**IN THE HIGH COURT FOR ZAMBIA**  
**AT THE COMMERCIAL REGISTRY**  
**HOLDEN AT LUSAKA**  
*(Commercial Jurisdiction)*



**In the matter of:** An application under Order 30 Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia

**In the matter of:** The property comprised in a Legal Mortgage relating to Subdivision B446 of Farm No. 915 Lusaka

**In the matter of:** Foreclosure, possession and sale of the Mortgaged Property

**BETWEEN:**

**ZAMBIAN NATIONAL COMMERCIAL BANK PLC      APPLICANT**

**AND**

**PATRICK NYAMBE MAINZA      RESPONDENT**

**Before the Honourable Mr. Justice W. S. Mweemba at Lusaka  
in Chambers**

*For the Applicant:*                      *Mrs. N. N. Mbao – Mesdames Nkusuwila  
Nachalwe Advocates*

*For the Respondent:*                      *Mr. M. L. Mukande, SC – Messrs M. L.  
Mukande & Company*

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**JUDGMENT**

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**LEGISLATION REFERRED TO:**

1. Order 30 Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia

**CASES REFERRED TO:**

- 1. Lackson Mwabi Simwanza V Sangwa Simpasa, Chisha Lawrence Simpasa 2005/HP/0500**
- 2. S. Brian Musonda (Receiver of First Merchant Bank Zambia Limited (In Receivership) V Hyper Food Products Limited, Tony's Hypermarket Limited and Creation One Trading (Z) Limited (1999) ZR 124**

**WORKS REFERRED TO:**

- 1. Nigel P. Grovells, Land Law Text and Materials, Third Edition, London, Thomson Sweet and Maxwell, 2004**
- 2. Halsbury's Laws of England, Fourth Edition, Volume 32.**

The Applicant by way of Originating Summons filed into Court on 3<sup>rd</sup> February, 2017 made pursuant to Order 30 Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia seeks the following remedies or reliefs against the Respondent:

1. Payment of all monies which as at 31<sup>st</sup> January, 2017 stood at K1,007,335.88 plus interest, costs and other charges due and owing to the Applicant Bank by the Respondent under an Equity Release Loan Agreement dated 23<sup>rd</sup> March, 2015 for which a Legal Mortgage relating to Subdivision B446 of Farm No. 915 Lusaka was executed as security.
2. Foreclosure.
3. Delivery up by the Respondent to the Applicant of the Mortgaged Property.
4. Sale of the said Mortgaged Property.
5. Any further or other relief the Court may deem fit.

## 6. Costs.

The application is supported by an Affidavit in Support and Skeleton Arguments filed into Court on 3<sup>rd</sup> February, 2017. The Affidavit in Support was sworn by Arnold Chinyama the Senior Manager – Recoveries in the Applicant Bank. It is deposed that on 25<sup>th</sup> March, 2015 the Respondent obtained an Equity Release Loan from the Applicant in the amount of K767,614.00. A copy of the Equity Release Application approval is exhibited marked “AC1”. That the Applicant and the Respondent executed a Legal Mortgage over Subdivision No. B446 of Farm No. 915 Lusaka to serve as security for the said Loan. A copy of a Further Charge dated 20<sup>th</sup> March, 2015 and the Certificate of Title relating to Subdivision B446 of Farm No. 915 Lusaka are exhibited as “AC2” and “AC3” respectively.

It is averred that as at 22<sup>nd</sup> November, 2016 the Respondent was indebted to the Applicant Bank in the sum of K925,188.78 as per Account No. 1015744000634 with respect to the said Loan Agreement. A copy of the Statement of Account is exhibited marked “AC4”.

It is deposed that the Respondent defaulted in its payment obligations and that a demand having been made on him but no payment has been made so far. A copy of the demand letter dated 28<sup>th</sup> November, 2016 is exhibited marked “AC5”. That since demand was made on the Respondent no payment has been made

toward settling the loan which has since increased to an outstanding balance of K1,007.335.88 as at 31<sup>st</sup> January, 2017.

It is stated that the Respondent has no defence to the Applicant's claim and as such the reliefs contained in the Originating Summons should be granted to the Applicant Bank.

Counsel for the Applicant filed Skeleton Arguments into Court on 3<sup>rd</sup> February, 2017. She submitted that the action is filed pursuant to Order 30 Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia which states that:

**“Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclosure or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons, returnable in the chambers of a judge for such relief of the nature or kind following as may by the summons be specified, and as the circumstances of the case may require...”**

Regarding the rights and obligations that ensue from the relationship of mortgagor and mortgagee learned Counsel submitted that the essential nature of a mortgage in its traditional form is that it is a conveyance of a legal or equitable interest in property with a provision for redemption. That upon repayment of a loan or the performance of some other obligation stipulated in the mortgage,

the conveyance shall become re-conveyed. For this submission the Court was referred to the learned author of Land Law Text and Materials, Third Edition who makes the following observations at page 891:

**“Where one person lends money to another he may be content to rely on the personal obligation of the borrower to repay the loan. If the borrower fails to repay the loan in accordance with the agreement between the parties, the lender can sue the borrower to recover what is due; and provided that the borrower remains solvent and has assets at least equal in value to the amount of the loan (and his other liabilities), this right to sue is sufficient protection, for the lender. However, if the borrower cannot repay the loan because he is insolvent, the lender will become one of the general creditors of the borrower and along with them will recover at best only a portion of the original loan.”**

Nigel P. Grovells goes on to observe as follows at page 891:

**“The potential consequences for the lender are obvious and, especially where the amount is substantial (for example, where the loan is made to finance the purchase of land or some major business), a lender will normally refuse to accept the risk of excessive reliance on the personal obligation of the borrower. Instead, he will**

**require the borrower to provide security for the repayment of the loan such security may be personal or real.”**

It is further submitted that the creation of a mortgage is accompanied by the creation of remedies. That the remedies available depend on whether the mortgage created is a legal mortgage or an equitable mortgage. Mrs. Mbao stated that the learned author of Land Law Text and Materials, Third Edition, summarizes the purpose of the various remedies available as follows at page 891:

**“In addition to the personal remedy against the mortgagor for breach of the personal covenant to repay the loan, the mortgagee has a number of remedies against the mortgaged land. Foreclosure and sale are directed primarily at the recovery of the loan and termination of the mortgage transaction. The appointment of a receiver is directed primarily at the recovery of interest payable on the loan and possession of the mortgaged property although originally used as a means of securing the payment of interest and still in theory available for that purpose (see Western Bank Limited V Schidler (6)) is now sought almost exclusively as a preliminary remedy to the exercise of the power of sale so that the mortgagee may sell the property with vacant possession.”**

It was submitted that the case of **LACKSON MWABI MWANZA V SANGWA SIMPASA, CHISHA LAWRENCE SIMPASA (1)** gives

guidance to the extent that the mortgagee's remedies are cumulative. That a mortgagee is not bound to select any one of the remedies and pursue that particular remedy exclusively. A mortgagee is at liberty to employ one or all of the remedies to enforce payment. That for instance if he sells the property for less than the mortgage advance or debt, he may still sue the mortgagor upon the personal covenant for payment of the balance. That however, foreclosure puts an end to other remedies, since if the mortgagee takes the whole security, he cannot also claim payment.

It is contended that the following findings may be made in the instant case: The Applicant loaned the Respondent a total sum of K759,110.57 in March 2015. The Loan Agreement is evidenced by an Equity Release Application on record dated 25<sup>th</sup> March, 2015. Following the contraction of the loan, the Applicant and the Respondent did enter into a Mortgage Agreement relating to Subdivision B446 of Farm No. 915 Lusaka as security for the said Loan Agreement.

It is submitted that the Respondent has since defaulted in paying back the loan. That therefore the Applicant as Mortgagee in this action seeks an Order that the Respondent immediately pays the full amount owed being K1,007,335.88 with interest and that in default of such payment the Applicant be given possession of the mortgaged property, namely Subdivision B446 of Farm No. 915, Lusaka. That the recovery of possession, in default of payment, is being sought so that the Applicant can exercise its right as

Mortgagee to dispose of the property in order to enable it recover its monies.

When the matter came up for hearing on 19<sup>th</sup> April, 2017 it was adjourned at the behest of the Respondent who had requested a meeting with the Applicant to discuss possible ex-curia settlement. The matter was adjourned to 29<sup>th</sup> May, 2017 but on that date the hearing could not take place because the Respondent was not in attendance. The Originating Summons was heard on 28<sup>th</sup> June, 2017.

The Respondent's Counsel attended the hearing. The Respondent did not oppose the Applicant's application but requested that he be allowed to continue to occupy the Mortgaged Property for 90 days from the date of hearing so that he can find another house to which he and his family can move to.

I have considered the Applicant's claim together with the Affidavit in Support and Skeleton Arguments.

As there is no defence or Affidavit in Opposition the Respondent has not denied the Applicant's claim in any way.

The action herein brought pursuant to Order 30 Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia is a mortgage action because it is a claim for money secured by real property as well as a claim for inter alia possession of the Mortgaged Property.

A perusal of the Affidavit in Support of the Originating Summons shows that at paragraph 6 it is deposed that the Applicant and the



Respondent executed a Legal Mortgage over Subdivision No. B446 of Farm No. 915 Lusaka. The Legal Mortgage is however not exhibited as "AC2" is copy of the Further Charge dated 20<sup>th</sup> February, 2015 and not the Legal Mortgage. As the original advance was for K550,000.00 as shown by the Recitals to the copy of the said Further Charge, the Legal Mortgage ought to have been exhibited to the Affidavit in Support and the Further Charge should have been specifically referred to in the Affidavit in Support as being supplemental to the Legal Mortgage dated 16<sup>th</sup> June, 2010.

The failure by the deponent of the Affidavit in Support of the Originating Summons to refer to and exhibit the Legal Mortgage is however not fatal because the Recitals to the said Further Charge and the Memorials to the exhibited Certificate of Title relating to the Mortgaged Property shows that the Legal Mortgage was duly registered on 20<sup>th</sup> January, 2011 while the Further Charge was registered in the Lands and Deeds Registry on 20<sup>th</sup> March, 2015.

I accept the Applicant's submission that the mortgagee's remedies are cumulative. That is to say a mortgagee is not bound to select one of the remedies and pursue that particular remedy exclusively. A mortgagee is at liberty to employ one or all of the remedies enforce payment.

The position espoused in the case of **LACKSON MWABI MWANZA V SANGWA SIMPASA, CHISHA LAWRENCE SIMPASA (1)** by the High Court that a mortgagee has several remedies available namely payment of the money secured by the mortgage, foreclosure,

delivery up of possession of the mortgaged property and sale which are cumulative was following earlier authorities such as the Supreme Court decision in the case of **S. BRIAN MUSONDA (RECEIVER OF FIRST MERCHANT BANK ZAMBIA LIMITED (IN RECEIVERSHIP) V HYPER FOOD PRODOCUTS LIMITED, TONY'S HYPERMARKET LIMITED AND CREATION ONE TRADING (Z) LIMITED (2)**.

I accept the Applicant's submission that as part of the right of the mortgagee to pursue remedies concurrently – a mortgagee who sells the mortgaged property for less than the mortgage advance or debt, may still sue the mortgagor upon the personal covenant for payment of the balance.

I do not however accept the Applicant's contention that: **"...foreclosure puts an end to other remedies, since if the mortgagee takes the whole security, he cannot also claim payment."**

The correct position in my view is that if a mortgagee realizes part of the debt on the covenant for payment or by sale of the mortgaged property he must account or give credit for the amount realized in the foreclosure action. I refer to paragraph 785 of Halsbury's Laws of England, Fourth Edition, Volume 32 where it is stated that:

**"If the mortgagee realizes part of the debt by his action on the covenant, or by sale of part of the property, he must give credit in the foreclosure action for the amount**

**realized, and if, after foreclosure, he proceeds on the covenant, he re-opens the foreclosure,”**

Further at paragraph 787 of Halsbury's Laws, *ante* it is stated that:

**“As the mortgagee is entitled to pursue all his remedies concurrently, the pendency of a foreclosure action does not prevent him from suing on the covenant, although, if such proceeding is intended, the claim should be joined with the claim for foreclosure in one action. The order will then provide for any sums recovered being credited to the mortgagor in taking the foreclosure account.”**

From the evidence adduced by the Applicant, I am satisfied that the Applicant has proved its case on the balance of probabilities.

I accordingly enter Judgment in favour of the Applicant Bank against the Respondent for the sum of K1,007,335.88 and contractual interest from 1<sup>st</sup> February, 2017 to date of Judgment and thereafter at the current bank lending rate as determined by Bank of Zambia up to day of full payment.

The Judgment sum together with interest must be paid by the Respondent within 75 days from 28<sup>th</sup> June, 2017.

All the remedies or reliefs endorsed on the Originating Summons are hereby granted.

In the event that the Judgment debt and interest remains unpaid at the expiry of the said period of 75 days the Respondent shall deliver

vacant possession of the Mortgaged Property being Subdivision B446 of Farm No. 915 Lusaka in the Lusaka Province of Zambia to the Applicant Bank who shall be at liberty to foreclose and exercise its right of sale.

Costs to the Applicant Bank to be taxed in default of agreement.

Leave to appeal is granted.

Delivered at Lusaka the 30<sup>th</sup> day of June, 2017.



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**WILLIAM S. MWEEMBA**  
**HIGHT COURT JUDGE**