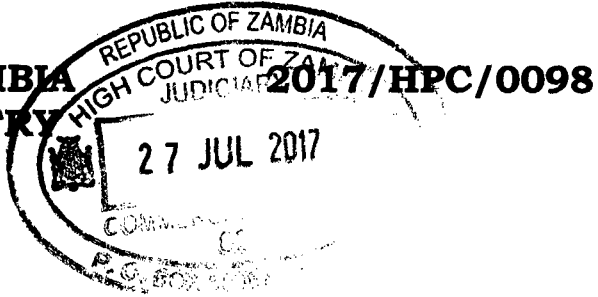


**IN THE HIGH COURT FOR ZAMBIA  
AT THE COMMERCIAL REGISTRY  
HOLDEN AT LUSAKA**  
*(Civil Jurisdiction)*



**IN THE MATTER OF: THE PROPERTY COMPRISED IN THIRD PARTY MORTGAGE OVER STAND NO. 393 KABLUNGA LUSAKA**

**IN THE MATTER OF: AN APPLICATION UNDER ORDER 30 RULE 14 OF THE RULES OF THE HIGH COURT, CHAPTER 27 OF THE LAWS OF ZAMBIA**

**BETWEEN:**

**ALS CAPITAL LIMITED** **APPLICANT**

**AND**

**BASMA INDUSTRIES LIMITED** **1<sup>ST</sup> RESPONDENT**

**SAEEDA RASHEED KHAN** **2<sup>ND</sup> RESPONDENT**

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

*For the Applicant: Ms. M. Muma – Messrs Corpus Legal Practitioners*

*For the Respondents: No Appearance*

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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.**
- 2. Order 35 Rule 3 of the High Court Rules, Chapter 27 of the Laws of Zambia.**

**CASES REFERRED TO:**

1. **Santley V Wilde (1899) CA 474**
2. **S. Brian Musonda (Receiver of First Merchant Bank Zambia Ltd (In Receivership) V Hyper Food Products, Tony's Hyper Market Limited and Creation One Trading (Zambia) Ltd (1999) ZR 124.**
3. **Halsbury's Laws of England, 4<sup>th</sup> Edition Volume 32.**

The Applicant by way of Originating Summons filed into Court on 3<sup>rd</sup> March, 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 Respondents:

1. Payment of all monies and contractually agreed interest due and owing to the Applicant and having been advanced to the 1<sup>st</sup> Respondent under a Facility Letter between the Applicant and the 1<sup>st</sup> Respondent dated 14<sup>th</sup> March, 2011 (the Facility Letter), and the Third Party Mortgage Deed entered into between the Applicant and the Respondents dated 9<sup>th</sup> June, 2011 (the Third Party Mortgage Deed);
2. An Order that the Respondents pay to the Applicant the total sum of ZMW 1,348,922.05 being the outstanding sum as at 31<sup>st</sup> December, 2016 secured by the Third Party Mortgage Deed, in respect of the Mortgaged Property;
3. Delivery by the 2<sup>nd</sup> Respondent to the Applicant of vacant possession of the Mortgaged Property;
4. An Order of foreclosure and sale of the Mortgaged Property;
5. Legal costs; and
6. Any other relief that the Court may deem necessary.

The application is supported by an Affidavit in Support and Skeleton Arguments filed into Court on 3<sup>rd</sup> March, 2017 and 14<sup>th</sup> March, 2017 respectively. The Affidavit in Support is sworn by Elizabeth Jayaseelan the Acting Managing Director in the Applicant company. It is deposed that by a Facility Letter dated 14<sup>th</sup> March, 2011 and made between the Applicant and the 1<sup>st</sup> Respondent, the Applicant agreed to make available to the 1<sup>st</sup> Respondent the Facility. A copy of the Facility Letter duly signed by the parties authorized signatories is exhibited marked "EJ2". That the Applicant and the Respondents executed a Third Party Mortgage dated 9<sup>th</sup> June, 2011 in relation to Stand No. 393 Kabulonga in the Lusaka Province of the Republic of Zambia securing the sum of ZMW 400,000.00 and interest. A copy of the Third Party Mortgage is exhibited marked "EJ3".

It is averred that the Third Party Mortgage Deed contained several provisions which are material to these proceedings including the following:

- a) The Applicant agreed to provide the Facility to the 1<sup>st</sup> Respondent upon having the same secured by the Mortgaged Property which is owned by the 2<sup>nd</sup> Respondent.
- b) The 2<sup>nd</sup> Respondent covenanted with the Applicant that the 1<sup>st</sup> Respondent will pay and discharge the obligations under the Facility in accordance with the Facility Letter.
- c) The 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondent jointly and severally covenanted with the Applicant that the 1<sup>st</sup> Respondent will pay

and discharge on demand all moneys and liabilities due or owing to the Applicant upon any current or other account.

- d) The 2<sup>nd</sup> Respondent as the beneficial owner demised and charged by way of the Third Party Mortgage unto the Applicant the Mortgaged Property.

It is deposed that during the subsistence of the Facility, the 1<sup>st</sup> Respondent defaulted in its repayment obligations up to date. That the Applicant made several demands on the 1<sup>st</sup> Respondent for the repayment of the amounts owing under the Facility Letter, but the 1<sup>st</sup> Respondent did not make any payments. That after the Applicant made several demands for repayment the 2<sup>nd</sup> Respondent responded by a letter dated 19<sup>th</sup> June, 2015 and acknowledged that the loan obtained by the 1<sup>st</sup> Respondent had remained unpaid, and requested that the amounts owing be treated as a bad debt and that her husband Abdul Rasheed Khan, who was also a shareholder, director and chairman of the 1<sup>st</sup> Respondent company had passed away and his fellow shareholder and “partner” Zubair Mohor, had defrauded the 1<sup>st</sup> Respondent; thus the 1<sup>st</sup> Respondent incurred losses and ceased operations. A copy of the said letter is exhibited marked “EJ4”.

It is stated that the Applicant responded to the 2<sup>nd</sup> Respondent’s letter marked “EJ4” by a letter dated 26<sup>th</sup> June, 2015 informing the 2<sup>nd</sup> Respondent that it was unable to write off the debt owed by 1<sup>st</sup> Respondent, which as at 25<sup>th</sup> June, 2015 amounted to ZMW833,732.52. That the Applicant, however informed the 2<sup>nd</sup>

Respondent that it would not pursue the late Abdul Rasheed Khan's estate for any shortfalls on compassionate grounds. A copy of the said letter is exhibited marked "EJ6".

It is further deposed that according to the Applicant's Loan Statement dated 31<sup>st</sup> January, 2016 the 1<sup>st</sup> Respondents outstanding installment amount was in the sum of ZMW 1,348,928.05. A copy of the said Loan Statement is exhibited marked "EJ6".

That despite reminders to settle its indebtedness the 1<sup>st</sup> Respondent has failed and/or neglected to do so. That the Applicant believes that the 1<sup>st</sup> Respondent has no capacity to pay the outstanding sum of ZMW 1,348,928.05 plus interest. That the Respondents have no defence at all to the matter and therefore the Court should grant the Applicant the reliefs sought.

Learned Counsel for the Applicant filed Skeleton Arguments into Court on 14<sup>th</sup> March, 2017. She submitted that this Court has jurisdiction to entertain the Applicant's application by virtue of Order 30 Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia which provides 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; that is to say;**

**Payment of moneys secured by the mortgage or charge;**

**Sale;**

**Foreclosure'**

**Delivery of possession (whether before or after foreclosure) to the mortgagee or person entitled to the charge by the mortgagor or person having the property subject to the charge or by any other person in, or alleged to be in possession of the property".**

Learned Counsel submitted that Judge Lindley in the English case of **SANTLEY V WILDE (1)** defined a mortgage as follows:

**"A mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given".**

Further that according to the learned authors of Halsbury's Laws of England 4<sup>th</sup> Edition, Volume 32 at paragraph 402:

**"a mortgage consists of two things, namely a personal contract of a debt and a disposition or charge of the Mortgagor's estate or interest as security for the repayment of the debt".**

Learned Counsel also submitted that in this jurisdiction it is trite law that in mortgage actions, the reliefs claimed can be cumulative in nature. This was enunciated in the case of **S.BRIAN MUSONDA (RECEIVER OF FIRST MERCHANT BANK ZAMBIA LTD (IN RECEIVERSHIP) V HYPER FOOD PRODUCTS AND 2 OTHERS (2)**.

It was submitted that the 1<sup>st</sup> Respondent has defaulted on its loan repayment obligations and the Applicant has made demands on the 1<sup>st</sup> Respondent. The Respondents have failed and/or neglected to pay the outstanding total sum to the Applicant. That therefore this is a proper case for the Court to grant the Applicant the reliefs sought so that the outstanding money may be recovered with costs to the Applicant.

The Respondents have not opposed the Applicant's application herein and they did not attend the hearing of the Originating Summons on 6<sup>th</sup> July, 2017. An Affidavit of Service sworn by Peter Langa Banda dated 26<sup>th</sup> April, 2017 shows that the Originating Summons dated 3<sup>rd</sup> March, 2017 was served on the Respondents by substituted service. Another Affidavit of Service sworn by the said Peter Langa Banda filed on 20<sup>th</sup> June, 2017 shows that the Notice of Hearing scheduling hearing on 6<sup>th</sup> July, 2017 was served by substituted service in the Zambia Daily Mail on 16<sup>th</sup> and 17<sup>th</sup> June, 2017.

I proceeded to hear the Originating Summons on 6<sup>th</sup> July, 2017 pursuant to Order 35 Rule 3 of the High Court Rules, Chapter 27 of the Laws of Zambia which provides that:

**“If the plaintiff appears, and the defendant does not appear or sufficiently excuse his absence, or neglects to answer when duly called, the Court may, upon proof of service of notice of trial, proceed to hear the cause and give judgment on the evidence adduced by the plaintiff, or may postpone the hearing of the cause and direct notice of such postponement to be given to the defendant”.**

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 by the Respondents on Record, the Respondents have therefore not denied the Applicant’s claim in any way. As a matter of fact, the 2<sup>nd</sup> Respondent acknowledged that the loan obtained by the 1<sup>st</sup> Respondent from the Applicant has remained unpaid by her letter dated 19<sup>th</sup> June, 2015 exhibited as “EJ4” to the Affidavit in Support. I note that in its letter dated 26<sup>th</sup> June, 2015 exhibited as “EJ5” the Applicant informed the 2<sup>nd</sup> Respondent that on compassionate grounds they would not pursue the Estate of the Late Mr. A. R. Khan for any shortfalls beyond the realizable value of the mortgaged property. I am of the considered view that the undertaking by the Applicant not to pursue the Estate of the late Mr. A. R. Khan for any shortfalls beyond the realizable value of the



mortgaged property was of no legal consequence or effect. This is so because the late Mr. A. R. Khan did not guarantee the loan advanced to the 1<sup>st</sup> Respondent and as such he was not obligated to make any repayment to the Applicant as the 1<sup>st</sup> Respondent was a legal entity with a legal personality distinct and separate from its shareholders and directors.

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 possession of the Mortgaged Property.

As submitted by the Applicant, it is indeed trite law that the reliefs or remedies claimed by a mortgagee 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 to enforce payment.

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 against the 1<sup>st</sup> Respondent for payment of K1,348,928.05 and contractual interest from 1<sup>st</sup> February, 2016 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 1<sup>st</sup> Respondent within 30 days from date hereof.

In the event that the Judgment debt and interest remains unpaid at the expiry of the said period of 30 days the 2<sup>nd</sup> Respondent shall deliver vacant possession of the Mortgaged Property namely Stand No. 393 Kabulonga, Lusaka in the Lusaka Province of Zambia to the Applicant who shall be at liberty to foreclose and exercise its right of sale.

I award costs to the Applicant to be taxed in default of agreement.

Leave to appeal is granted.

Delivered at Lusaka the 27<sup>th</sup> day of July, 2017.



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**WILLIAM S. MWEEMBA**  
**HIGH COURT JUDGE**