

**IN THE HIGH COURT OF ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA**

(Civil Jurisdiction)



2017/HPC/0158

IN THE MATTER OF:

**THE PROPERTY COMPRISED IN A LEGAL
MORTGAGE OVER SUBDIVISION NO. 2869 OF
STAND NO. 7417, CHILENJE SOUTH, LUSAKA**

AND

IN THE MATTER OF:

**AN APPLICATION UNDER ORDER 30 RULE 14 OF
THE HIGH COURT RULES, CHAPTER 27 OF THE
LAWS OF ZAMBIA AND ORDER 88 RULE 1 OF
THE SUPREME COURT OF ENGLAND 1965,
WHITE BOOK (1999 EDITION)**

BETWEEN:

STANBIC BANK ZAMBIA LIMITED

APPLICANT

AND

JAPHET MUNTHALI

RESPONDENT

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

For the Applicant:

*Mrs. V. Sichone, Mesdames Theotis,
Mataka & Sampa Legal Practitioners*

For the Respondent:

No Appearance

JUDGMENT

LEGISLATION REFERRED TO:

- 1. Order 30 Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia**
- 2. Order 88 Rules 1 and 3 of the Rules of the Supreme Court of England 1965, White Book, (1999 Edition)**

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

CASES REFERRED TO:

- 1. S. Brian Musonda (Receiver of First Merchant Bank Zambia Limited (In Receivership) V Hyper Food Products Limited, Tony's Hypermarket Limited, Creation One Trading Zambia Limited (1999) ZR 124**

The Applicant by way of Originating Summons filed into Court on 31st March, 2017 made pursuant to **Order 30 Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia** as read with **Order 88 Rule 1 of the Rules of the Supreme Court of England 1965, White Book (1999 Edition)** seeks the following remedies or reliefs against the Respondent:

1. Payment of all sums of money which as at 25th November, 2016 stood at K770,041.21, interest, costs and other charges due and owing to the Applicant by the Respondent under a Home Loan Facility dated 26th May, 2015 and secured by a Legal Mortgage relating to Stand No. 2869 of 7417 Lusaka, Lusaka Province;
2. Possession of Stand No. 2869 of 7417 Lusaka, Lusaka Province;
3. Foreclosure;
4. Sale;
5. Further or other relief as the Court may deem fit; and
6. Costs.

The application is supported by an Affidavit in Support and Skeleton Arguments filed into Court on the 31st March, 2017. The Affidavit in Support is sworn by Reuben Matale Malindi the Acting Head, Rehabilitation and Recoveries in the Applicant Bank.

It is deposed that by a Home Loan Facility Letter dated 26th May, 2015 the Applicant availed the Respondent a home loan facility (the Facility) in the sum of K585,000.00 for the purpose of equity release on property relating to Subdivision No. 2869 of Stand No. 7417 Chilenje South, Lusaka and refinance of existing loan facilities with Standard Chartered Bank, namely a mortgage loan and a personal loan. A copy of the Facility Letter is exhibited marked "*RMM1*".

That the aforesaid Facility was secured by a Legal Mortgage entered into between the Applicant and the Respondent relating to Subdivision No. 2869 of Stand No. 7417 Lusaka. A copy of the said Legal Mortgage is exhibited marked "*RMM2*". It is stated that in order to complete the Legal Mortgage aforesaid, the Certificate of Title relating to Subdivision No. 2869 of Stand No. 7417 Lusaka was handed to the Applicant's custody by the Respondent. A copy of the Certificate of Title No. 13486 is exhibited marked "*RMM3*".

It is averred that it was a term of the Facility that it was to be repaid in full by the Respondent by 30th May, **2015**. That it was a further term of the Facility that interest would be payable at the rate of 5% per annum above the Bank of Zambia Policy Rate prevailing from time to time.

That notwithstanding the Respondent's undertaking to settle his indebtedness to the Applicant as and when due, the Respondent has failed to make repayments in accordance with the agreed repayment terms. It is deposed that as at 25th November, 2016 the amount outstanding together with accumulated interest, costs and other charges was K770,041.21 as per the Respondent's Payoff Report exhibited to the Affidavit marked "RMM4".

It is stated that the Respondent has not made any further payment towards settlement of the amount due and owing to the Applicant, nor has there been anything of value in the satisfaction of the sum paid to the Applicant. That therefore the amount outstanding remains as stated together with additional accumulated interest and costs.

Mrs. V. Sichone learned Counsel for the Applicant filed Skeleton Arguments into Court on 31st March, 2017. She submitted that the Applicant commenced an action against the Respondent by way of Originating Summons pursuant to **Order 30 Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia and Order 88 Rule 1 of the Rules of the Supreme Court of England 1965, White Book (1999 Edition)**. Order 30 Rule 14 of the High Court Rules 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 mortgagee, 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 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;

Redemption;

Reconveyance;

Delivery of possession by the mortgagee”.

The provisions of **Order 88 Rule 1 of the White Book (1999 Edition)** which are similar to the provisions of **Order 30 Rule 14 of the High Court Rules** were also cited and written out.

It was submitted that it is clear from the Affidavit in Support of Originating Summons that the Respondent was advanced sums of money by the Applicant pursuant to a Home Loan Facility Letter

dated 26th May, 2015 for K585,000.00. That the loan was secured by a Mortgage between the Applicant and the Respondent relating to Subdivision 2869 of Stand No. 7417 Lusaka.

That it is further evident that the agreed interest on the loan was to be 5% per annum above the Bank of Zambia Policy Rate prevailing from time to time. The loan amount and interest thereon was to be repaid by the Respondent in full by 30th May, 2035. It was Counsels further submission that the Applicant's Affidavit in Support shows that the Respondent has defaulted in his repayment obligations and has failed, neglected and/or refused to settle his indebtedness with the Applicant.

Learned Counsel submitted that this is a case befitting for the Applicant to pursue all its remedies concurrently following the Respondent's default in repaying the loan advanced to him despite extensions of the legal redemption date. For this submission the case of **S. BRIAN MUSONDA (RECEIVER OF FIRST MERCHANT BANK ZAMBIA LIMITED (IN RECEIVERSHIP) V HYPER FOOD PRODUCTS LIMITED, TONY'S HYPERMARKET LIMITED, CREATION ONE TRADING (Z) LIMITED (1)** was cited. In that case the Supreme Court held that:

"The Appellant commenced a typical Mortgage action brought by a Mortgagee. He asked for payment of money secured by the Equitable Mortgage; Foreclosure; Sale; Delivery of possession and further or other relief deemed appropriate by the Court. The Mortgagee's remedies are

truly cumulative; leaving aside the fact that an Equitable Mortgagee's remedies are somewhat more restricted than those of a Legal Mortgagee's...we have quoted the terms of the Consent Order also in order to underline the fact that the Mortgagee's remedies are cumulative."

Learned Counsel also relied on **R.E. Megarry and H. W. Wade, 4th Edition** at page 921 where the learned author states that:

"The Mortgagee's remedies are cumulative. A Mortgagee is not bound to select any one of his remedies and pursue that exclusively; subject to his not recovering more than is due to him, he may select any or all of the remedies to enforce payment."

According to the Applicant, as at 25th November, 2016 the amount outstanding together with accumulated interest, costs and other charges was K770,041.21.

The Respondent has not opposed the Applicant's application herein and he did not attend the hearing of the Originating Summons on 12th July, 2017. An Affidavit of Service sworn by Kombe Mutale a Legal Assistant at Mesdames Theotis, Mataka & Sampa Legal Practitioners shows that the Originating Process was served by substituted service in the Zambia daily Mail newspaper on 24th and 25th April, 2017. Notice of Hearing for 12th July, 2017 was also served by substituted service in the Zambia Daily Mail newspaper on 5th and 6th July, 2017.

I proceeded to hear the Originating Summons herein on 12th 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 Respondent on record, the Respondent has therefore 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** as read with **Order 88 Rule 1 of the Rules of the Supreme Court of England 1965, White Book 1999 Edition** is a mortgage action because it is a claim for payment of money secured by a mortgage, delivery of possession of the mortgaged property by the mortgagor, foreclosure and sale of the mortgaged property. The action is properly before this Court.

As submitted by Mrs. Veronica M. O. Sichone the learned Counsel for the Applicant, it is 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 exclusive. A mortgagee is at liberty to employ one or all of the remedies to enforce payment by the mortgagor. The case of **S. BRIAN MUSONDA (RECEIVER OF FIRST MERCHANT BANK ZAMBIA LIMITED (IN RECEIVERSHIP) V HYPER FOOD PRODUCTS LIMITED, TONY'S HYPERMARKET LIMITED, CREATION ONE TRADING (Z) LIMITED (1)** cited by Counsel for the Applicant is authority for this principle.

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 Respondent for payment of the sum of K770,041.21 and contractual interest from 26th November, 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 within 45 days from date hereof.

As the mortgagee's remedies or reliefs endorsed on the Originating Summons are cumulative, all the remedies or reliefs sought by the Applicant are granted.

In the event that the Judgment debt of K770,041.21 and interest remains unpaid at the expiry of the said period of 45 days, the Respondent shall deliver vacant possession of the mortgaged property, namely Subdivision No. 2869 of Stand No. 7417 Chilenje South, 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 30th day of August, 2017.



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WILLIAM S. MWEEMBA
HIGH COURT JUDGE