

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



2017/HPC/0230

IN THE MATTER OF:

**THE PROPERTY COMPRISED IN A LEGAL
MORTGAGE OVER STAND NO. 5645 NDOLA**

AND

IN THE MATTER OF:

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

BETWEEN:

CAVMONT BANK LIMITED

APPLICANT

AND

JOHN CHILUFYA (T/A CHILUFYA AND ASSOCIATES)

1ST RESPONDENT

NGOSA CHILUFYA (T/A NGOSA C. STEEL TRADING)

2ND RESPONDENT

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

For the Applicant:

*Mr S. C. Mwananshiku – Messrs M & M
Advocates*

For the Respondents:

Mrs. Agness Chilufya (In person)

JUDGMENT

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. **Lackson Mwabi Mwanza 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 Hyper Market Limited and Creation One Trading (Z) Limited (1999) ZR 124.**

WORKS REFERRED:

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 18th May, 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 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;
2. Alternatively, delivery by the Respondents to the Applicant Possession of the mortgaged property or the relief of foreclosure;
3. Further or other relief;
4. Costs of this action.

The application is supported by an Affidavit in Support and Skeleton Arguments filed into Court on 18th May, 2017. The Affidavit in Support is sworn by Martha Lungu Sichone the Senior

Officer of the Applicant's Recoveries Department. It is deposed that on 25th June, 2013 the Applicant availed the 1st Respondent a Credit Facility in the sum of K113,000.00. Copy of the Loan Agreement dated 25th June, 2013 is exhibited marked "*MLS1*".

It is stated that the aforesaid Credit Facility was secured by a mortgage over the 1st Respondent's property. Copies of the Legal Mortgage Deed and the Certificate of Title relating to Stand No. 5645 Ndola are exhibited marked "*MLS2*" and "*MLS3*" respectively. The Legal Mortgage is dated 3rd October, 2013.

It is further deposed that on 16th August, 2014 the Applicant availed the 2nd Respondent an Overdraft Facility. Copy of the purported Facility Letter is exhibited marked "*MLS4*". It is stated that the 1st Respondent pledged his property as security for the 2nd Respondents Facility. Copy of the purported Letter of Undertaking to execute a Legal Mortgage is exhibited marked "*MLS5*".

Mrs. Sichone deposes that contrary to the Loan Agreements the Respondents have persistently defaulted in paying the agreed monthly instalments despite numerous demands and reminders from the Applicant. That the two facilities were subsequently merged and the total amount outstanding is K616,116.59 as at 2nd May, 2017 as is shown in the statement exhibited and marked "*MLS6*".

Mr. Mwananshiku learned Counsel for the Applicant filed Skeleton Arguments into Court on 18th May, 2017. He submitted that this

action was 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 be the summons be specified, and as the circumstances of the case may require”.

It is further submitted that the creation of a mortgage is accompanied by the creation of remedies. That the remedies available depend of course on whether the mortgage created is a legal mortgage or an equitable mortgage. For this Submission Nigel P. Grovells the learned author of **Land Law: Text and Materials, Third Edition (London, Thomson Sweet and Maxwell, 2004)** is cited when he summarises the purpose of the various remedies available to a mortgage 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 the 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 (c), 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 is also submitted that a mortgagee is at liberty to employ one or all of the remedies to enforce payment.

That a mortgagee is therefore not bound to select any one of the remedies and pursue that particular remedy exclusively. 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. For this submission the Applicant cited the case of **LACKSON MWABI MWANZA V SANGWA SIMPASA, CHISHA LAWRENCE SIMANSA (1)** which gives guidance to the extent the mortgagee's remedies are cumulative.

It is argued that in the Affidavit in Support of the Originating Summons the Applicant has stated that the Respondents have defaulted in paying back the loan. That therefore, the Applicant as Mortgagee in this action seeks an Order that the Respondents immediately pay the full amount owed being K616,116.59 with interest and that in default of such payment the Applicant be given possession of the property subject herein being Stand No. 5645,

Northrise, Ndola whose title was deposited by the 1st Respondent with the Applicant in order to secure the loan facility. It is submitted 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.

The Applicant's prayer is that the Court should order that the Respondents pay the amount owed in full with interest thereof and in default to Order that the Applicant be given possession of the said property for purposes of exercising its right of Sale as Mortgagee.

The Respondents have not opposed the Applicant's application herein. Mrs. Agness Chilufya the widow of late Mr. John Chilufya (the 1st Respondent) and the mother to Ngosa Chilufya (the 2nd Respondent) informed the Court that the Respondents do not deny owing the sum claimed but they request a year within which to pay.

The Record shows that the Originating Summons, Affidavit in Support, Skeleton Arguments and List of Authorities were served on the Respondents by letter dated 19th May, 2017 from the Applicant's lawyers. The 2nd Respondent acknowledged receipt of Originating Process on 24th May, 2017. One Annie Chilufya acknowledged receipt on behalf of the 1st Respondent. There is an Affidavit of Service sworn by one Sylvester C. Mwananshiku filed into Court on 5th September, 2017. The Affidavit of Service also shows that Mr. Mwananshiku confirmed the date of hearing of 5th

September, 2017 with the 2nd Respondent through a phone conversation on 4th September, 2017 and hence Mrs. Agness Chilufya's attendance.

I proceeded to hear the Originating Summons on 5th September, 2017 pursuant to **Order 35 Rule 3 of the high Court Rules, Chapter 27 of the Laws of Zambia.**

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.

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 payment of money secured by a mortgage, foreclosure, delivery of possession of the mortgaged property by the mortgagor to the mortgagee and sell of the mortgaged property.

I note that the Originating Summons is endorsed with the usual reliefs mortgagees seek in mortgage action but it does not seek an order to sell the mortgaged property. I also note that in the Affidavit in Support of the Originating Summons the exhibit marked "MSL4" is purported to be a Facility Letter relating to the Overdraft Facility availed by the Applicant to the 2nd Respondent.

An examination of the aforesaid exhibit marked "MSL4" shows that the same is not a Facility Letter but a Letter of Undertaking to Execute a Legal Mortgage dated 16th August, 2014 by John Chilufya (the 1st Respondent) wherein he deposited Certificate of Title No. L3064 relating to Stand No. 5645 Northrise Ndola with the Applicant to secure the sum of K513,000.00 advanced by the Applicant to the 2nd Respondent.

Although there is no Facility Letter relating to the sum of K513,000.00 advanced by the Applicant to the 2nd Respondent, I make the following findings of fact from the documents exhibited to the Affidavit in Support of the Originating Summons:

1. On 25th June, 2013 the Applicant availed the 1st Respondent a Credit Facility in the sum of K113,000.00. The agreed interest rate was the Bank of Zambia Policy Rate (BPR) prevailing from time to time (then 9.75%) per annum plus a top up margin of 9% on BPR.
2. The Credit Facility to the 1st Respondent was secured by a Legal Mortgage over the 1st Respondents property Stand No. 5645 Ndola to secure K113,000.00 and interest.
3. The Legal Mortgage was duly registered on 3rd October, 2013.
4. On 16th August, 2014 the Applicant availed the 2nd Respondent an Overdraft Facility of K513,000.00. The agreed interest rate was 24% per annum payable monthly.

5. The Credit Facility (Overdraft) to the 2nd Respondent was to be secured by a Third Party Legal Mortgage over the 1st Respondent's Property Stand No. 5645 Ndola to secure K513,000.00 and interest.
6. A Further Charge to the Applicant Bank to secure K400,000.00 and interest was duly registered on 3rd September, 2014.

There is no evidence that the two facilities were subsequently merged. I do however accept that the Legal Mortgage over Stand No. 5645 Ndola secures amounts due from the Respondents under the two facilities up to a total sum of K626,000.00 plus interest. This is evidenced by entry Registered Stand No. 5645/8 of 3rd September, 2014 in the Certificate of Title showing that a Further Charge for K400,000.00 was registered.

As noted above the Originating Summons issued by the Applicant on 18th May, 2017 does not include a claim that the mortgagee is to sell the Mortgaged Property. Although foreclosure only has been claimed by the Applicant, the Court may still direct a Sale of the Mortgaged Property. As to the Court's jurisdiction to order a sale, I refer to **HALSBURY'S LAWS OF ENGLAND, Fourth Edition, Volume 32 at paragraph 873** where it is stated that:

“Foreclosure or Sale. Where the mortgagee is suing for foreclosure only, the claim is that an account may be taken of what is due to him on the mortgage which must be specifically described, for principal, interest and costs

and that the mortgage may be enforced by foreclosure....if the mortgagee is willing to have a sale directed by the Court, he will claim foreclosure or sale, but even if foreclosure only is claimed the Court may still direct a sale". Emphasis provided.

The learned authors of **HALSBURY'S LAWS OF ENGLAND** (ibid) at paragraph 850 state that:

"When Sale may be directed. A sale may be directed at any time before the foreclosure has become absolute, where application to enlarge the time for payment is pending, the sale may be enforced on motion for foreclosure absolute. Similarly, an order for foreclosure absolute may be made after an order for sale. The only condition is that request must be made by one of the persons specified. This gives rise to the court's discretionary power, and hence the order may be made on an interlocutory application. If, however, the writ of summons claims foreclosure only and the mortgagor does not appear, an order for sale will not be made unless he has had notice". Emphasis provided.

In *casu*, the Respondents have not filed an Affidavit in Opposition and they have notice of the Applicant's request that in default of payment of the amount owed of K616,116.59 with interest it should be given possession of the Mortgaged Property so that it can be

sold. The notice is contained in the Applicant's Skeleton Arguments filed into Court on 18th May, 2017 and served on the Respondents by the Applicant's Counsel. Further the Legal Mortgage executed by the 1st Respondent contains a power of Sale in Clauses 6 ad 7. The Applicant Bank is therefore entitled to exercise its power of sale.

As submitted by the Applicant, it is indeed trite law that the reliefs or remedies claimed by a mortgagee are cumulative. The mortgagee has the right to pursue the remedies concurrently. **HALSBURY'S LAWS OF ENGLAND** (ibid) – at paragraph 785 states that:

“Right to exercise remedies concurrently. Once the mortgagor has made default in payment of the mortgage debt, the mortgagee is entitled to pursue any or all of his remedies, subject, as regards the powers of sale and appointing a receiver, to the restrictions imposed by agreement or by statute, according as the powers are express or statutory. Hence the mortgagee can at the same time sue for payment on the covenant to pay principal and interest, for possession of the mortgaged estate, and for foreclosure, and can combine these claims in the same action; and until judgment nisi has been obtained in his foreclosure action, he can exercise his power of sale”.

The case of **LACKSON MWABI MWANZA V SANGWA SIMPASA, CHISHA LAWRENCE SIMPASA(1)** relied on by the Applicant is not

binding on this Court. However the Supreme Court decision in the case of **S. BRIAN MUSONDA (RECEIVER OF FIRST MERCHANT BANK ZAMBIA LIMITED (IN RECEIVERSHIP) V HYPER FOOD PRODUCTS LIMITED, TONY'S HYPER MARKET LIMITED, CREATION ONE TRADING (ZAMBIA) LIMITED** which is binding on this Court 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 Respondents for payment of the sum of K616,116.59 and contractual interest from 3rd May, 2017 to date of Judgment and thereafter at the current commercial bank lending rate as determined by Bank of Zambia up to day of full payment.

I am mindful of the need for a Judgment Creditor to realise the fruits of success in the action within a reasonable time. As the Mortgaged Property herein is a dwelling house, the Judgment Sum together with interest must be paid within eight (8) months from date hereof.

As the mortgagee's remedies or reliefs are cumulative, I hereby grant the Applicant all the remedies or reliefs endorsed on the Originating Summons. For the reasons given above, I also use my discretionary powers and grant the Applicant the right to exercise its power of sale under the Legal Mortgage Deed.

For the avoidance of doubt, in the event that the Judgment debt of K616,116.59 and interest remains unpaid at the expiry of the said period of 8 months, the 1st Respondent shall deliver vacant possession of the Mortgaged Property namely Stand No. 5645 Ndola to the Applicant who shall be at liberty to foreclose and exercise its power of sale.

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

Leave to appeal is granted.

Delivered at Lusaka the 19th day of September, 2017.



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WILLIAM S. MWEEMBA
HIGH COURT JUDGE