

Yes

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

2016/HPC/0543

IN THE MATTER OF:

ORDER 30 RULE 14 OF THE HIGH COURT RULES
AND ORDER 6 RULE 2 OF THE HIGH COURT RULES,
HIGH COURT ACT, CHAPTER 27 OF THE LAWS OF
ZAMBIA.

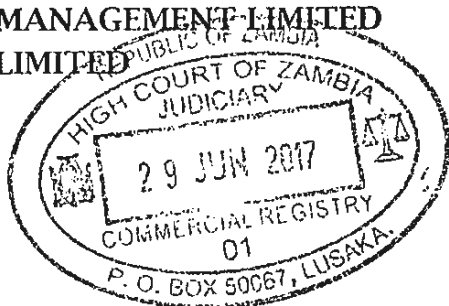
BETWEEN:

DEVELOPMENT BANK OF ZAMBIA

APPLICANT

AND

ALD PLANT AND FLEET MANAGEMENT LIMITED
NG'ANDU CONSULTING LIMITED
ABEL NG'ANDU
DAVID MWALE
MUMBUWA LIYUNGU
GILBERT CHIFITA
EVANS MASAITI



1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT
5TH RESPONDENT
6TH RESPONDENT
7TH RESPONDENT

Before Hon. Lady Justice Dr. Winnie S. Mwenda at Lusaka in Chambers this 29th day of June, 2017.

For the Applicant:

Mrs. N. Mumba, Legal Counsel, Development Bank of Zambia

For the Respondent:

Mrs. B. Chanda appearing with Mrs. V. Chitupila both of Messrs AB and David Legal Practitioners.

RULING

Cases referred to:

1. *Zambia Fitment Centre (T/A Kwikfit) v. M and N Resources and Michael Munyamula - 2014/HPC/0481 (unreported)*
2. *Zambia Revenue Authority v. Armcor Security Limited. SCZ/8/49/2014 (unreported)*
3. *African Banking Corporation Limited v. Plinth Technical Works Limited and Five Others - SJZ No. 28 of 2015 (unreported).*

Legislation referred to:

1. Order 18, rule 11 of the Rules of the Supreme Court, 1999 (White Book).
2. Order 30 rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia.
3. Order 88 rule 1 of the Rules of the Supreme Court, 1999 (White Book).
4. Section 13 of the High Court Act, Chapter 27 of the Laws of Zambia.

This is a preliminary issue raised by the 3rd, 4th, 5th, 6th, and 7th Respondents pursuant to Order 18 rule 11 of the Rules of the Supreme Court, 1999. According to Mrs. Chanda, learned Counsel for the Respondent, the action brought by the Applicant is a mortgage action and the provisions of Order 30 rule 14 of the High Court Rules relating to mortgage actions are very clear as to the types of relief that can be obtained in a mortgage action.

She contends that contrary to the relief permitted in a mortgage action, relief number 6 on the Originating Summons seeks for an order against the 2nd, 3rd, 4th, 5th, 6th, and 7th Respondents as guarantors for payment of the sum of ZMW17,042,427.47 and interest thereon; a relief not tenable in a mortgage action. Mrs. Chanda referred this Court to the Affidavit in Support of Originating Summons filed in Court on 18th November, 2016, specifically exhibit "DBM1" which is a copy of the Loan Facility Offer Letter dated 19th September, 2013 under clause 8.1.5 which shows that the guarantors of the loan did so in their capacity as shareholders and directors. Counsel submitted that claim No. 6 in the Originating Summons is not a proper claim in a mortgage action and should, therefore, be expunged from the summons.

Further, that because the claim against the 3rd to the 7th Respondents is premised on clause 8.1.5 referred to above, the said Respondents should be removed from the proceedings. Counsel referred the Court to the case of *Zambia Fitment Centre (T/A Kwikfit) v. M and N Resources and Michael Munyamula*¹. Where the High Court ruled that since the matter had been brought as a mortgage action the Court would only rule on that and if the Plaintiff wanted to proceed with the rest of the claims, it was at liberty to commence a separate action.

In addition to what her co-counsel submitted, Mrs. Chitupila submitted that the question to be considered by this Court is whether the Court can grant relief outside what has been specifically provided for by a statutory provision. That a perusal of

Order 30 rule 14 shows that the Order provides for the relief that can be claimed by an applicant in a mortgage action. It was the Respondents' contention that this Court can only grant relief under a mortgage action as provided for under Order 30 rule 14 and to this effect, Counsel referred the Court to the Supreme Court judgment in the case of *Zambia Revenue Authority v. Armcor Security Limited*² which addressed the question of the power of the Revenue Appeals Tribunal to grant an order for stay of execution.

Applying that case to the present case, Counsel submitted that where a statutory provision has specifically provided for the relief that can be granted by a Court, the Court cannot purport to grant a relief outside what has been provided by the statute. Counsel submitted that the relief relating to the said Respondents is not tenable at law as the Court does not have the discretion to grant the same under a mortgage action.

Mrs. Mumba, learned Counsel for the Applicant, requested for leave of Court to respond to the *viva voce* submissions by way of written submissions after the Respondents had filed their written submissions. Leave was granted.

The Respondents filed submissions in support of the preliminary issue on 13th April, 2017 where they basically restated their *viva voce* submissions and quoted Order 30 rule 14 which provides that: -

"Any mortgagee or mortgagor ... may take out as of course an originating summons, returnable in the chambers of a Judge for such relief of the nature or kind as may by summons be specified and as the circumstances of the case may require; that is to say-

Sale;

Foreclosure;

Delivery of possession (whether before or after the foreclosure) to the mortgagee...;

Redemption;

Reconveyance;

Delivery of possession by the Mortgagee."

In their submissions, the Respondents also referred to the provisions of Order 88 rule 1 of the Rules of the Supreme Court, 1999 Edition which has similar provisions to Order 30 rule 14 of the High Court Rules. It was the Respondents' submission that a mortgage action is a creature of statute and therefore, the provisions of the statute must be strictly applied. According to the Respondents, the Applicant is seeking to enforce the guarantees against the Respondents in a mortgage action, which is not tenable at law.

The Applicant filed a List of Authorities and Skeleton Arguments in Opposition to the Respondents' Preliminary Point of Law on 18th April, 2017 wherein it strongly opposed the Respondents' application, arguing that the application is misconceived at law and should be dismissed with costs. The Applicant's opposition to the preliminary issue is two-fold, firstly, that the basis of the claims against the guarantors was not Order 30 rule 14 of the High Court Rules but the Deeds of Guarantee executed by the guarantors and the law relating to guarantees. Secondly, that if the claims against the guarantors were made in a separate action, it would result in a multiplicity of actions.

The Applicant argued that a distinction must be made between claiming relief that is not provided for under Order 30 rule 14 of the High Court Rules and combining a claim based on other provisions of the law with a claim under Order 30 rule 14 of the High Court Rules. The Applicant fully agreed with the Respondents that one cannot competently claim relief other than that which is provided for under Order 30 rule 14 of the High Court Rules but in so doing, pointed out to the Court that the relief against the guarantors was not claimed on the basis of Order 30 rule 14 of the High Court Rules and that was the reason why the claims against the guarantors were argued separately in the Skeleton Arguments in Support of Originating Summons. That, whereas the relief relating to the mortgage was argued on the basis of Order 30 rule 14, the one against the guarantors was argued with reference to the operative terms of the Deeds of Guarantee and the statute of Frauds 1677. For this reason, the Applicant strongly opposed the Respondents' assertion that the claim against the guarantors is incompetently before this Court.

The Applicant further submitted that in seeking different types of relief under the same action, the Applicant was merely avoiding the undesirable situation of commencing multiple actions relating to the same set of facts. That combining of the two causes of action was done because they both involve the construction and interpretation of documents and are therefore, appropriate for determination by way of Originating Summons.

The Applicant cited the Supreme Court judgment in *African Banking Corporation Limited v. Plinth Technical Works Limited and Five Others*³ where the Court gave some guidance which is relevant to the case before this Court. The brief facts of that case were that the applicant brought an action for enforcement of a mortgage and guarantees. The High Court determined that the Originating Summons issued under Order 30 rule 14 of the High Court Rules and Order 88 rule 1 of the Rules of the Supreme Court, 1999 cannot be used to make any claim which does not arise under a mortgage and that where a party seeking to enforce a mortgage also claims relief which do not arise under the mortgage, the appropriate course of action is generally to commence the proceedings by way of writ of summons.

The Court was of the view that the claim related to personal guarantees and had nothing to do with any mortgage and fell outside the scope of the remedies which could be granted in the action, as such it would be incompetent to consider the merits of the said claim and that the appellant was at liberty to engage alternative court process to enforce the guarantees and debenture.

In upholding the ground of appeal that challenged the High Court's view regarding the enforcement of guarantees, the Supreme Court stated as follows:

"And in the same way, any number of causes of action, whether joint or separate, may be found in one action, subject to the power of the court to order that the action be confined to those causes of action that can be conveniently disposed of together or that any cause of action be excluded or that separate trials be held, if the joinder of causes of action or parties, as the case may be, may embarrass or delay the trial or is otherwise inconvenient (Order 15 Rule 5 of the Supreme Court Rules). The principal

objective of these provisions is to ensure that a multiplicity of actions is avoided where all issues can be brought together properly and conveniently and dealt with in one action."

The Supreme Court went further and stated thus: -

"In this case, a debenture and personal guarantees do not, strictly speaking, fall under a mortgage action, but the question that was before the court below was really one of construction of the documents executed by the parties to secure the facilities granted to the respondent and the rights to the relief claimed arose out of the same transaction or series of transactions as the facilities were secured by the third party mortgage, personal guarantees and the debenture. Further, in our view, the Court's decision on the construction of the written instruments would have satisfied the proceedings then at issue and avoided a multiplicity of action... In our view, the learned trial judge should also have entered judgment as requested by the appellant both under the debenture and personal guarantees which were not defended, particularly that section 13 of the High Court Act, Chapter 27 of the Laws of Zambia mandates the court or the judge to resolve all issues in dispute between the parties. For these reasons, we find merit in grounds two and three of the appeal."

In light of the above authority, the Applicant argued that it is in the interests of justice that the different claims be decided in one cause of action and that this Court has the power to competently make a determination regarding the mortgage and the personal guarantees. They urged the Court to be guided by the Supreme Court decision cited above and allow the Applicant's case to be heard on the pleadings currently before this Court. In the premises, the Applicant prayed that the preliminary issue raised herein be dismissed with costs to the Applicant.

I have perused the written submissions in support of and also in opposition to the preliminary issue before this Court. I have further considered the oral submissions by counsel on both sides. The issue for consideration in the preliminary issue is whether this Court can competently make a determination on the claim by the Applicant against the 3rd, 4th, 5th, 6th, and 7th Respondents who guaranteed the loan to the 1st Respondent in the mortgage action before this Court. The Respondents have

submitted that this Court has not been given the power to do so by Order 30 rule 14 of the High Court Rules and has cited a High Court Judgment of *Zambia Fitment Centre (T/A Kwikfit) v M and N Resources and Michael Munyamula*¹ where it was decided that the only relief that can be claimed under a mortgage action are those set out in Order 30 rule 14 of the High Court Rules. The Respondents on the other hand, have submitted that on the authority of *African Banking Corporation Limited v. Plinth Technical Works Limited and Five Others*², a Supreme Court judgment, this Court can competently make a determination regarding the mortgage and personal guarantees.


In the face of conflicting decisions between the High Court and the Supreme Court, I am bound to follow the Supreme Court's ruling on this matter since Supreme Court decisions are binding on this Court whereas High Court ones are merely persuasive. Thus on the authority of the Supreme Court Judgment cited above, I am of the view that much as personal guarantees do not, strictly speaking, fall under a mortgage action, the question before this Court is one of construction of the documents executed by the parties to secure the facilities granted to the 1st Respondent. The rights to the relief claimed in the mortgage claims and the personal guarantees arose out of the same series of transactions since the facilities were secured by, Third Party Mortgages, a Debenture and Joint and several guarantees of shareholders, amongst others. Therefore, this Court can competently make a determination on the claim against the 3rd to the 7th Respondents in the mortgage action before Court.

I am also of the view that hearing of the claims as set out in the Originating Summons will be in line with section 13 of the High Court Act, Chapter 27 of the Laws of Zambia which mandates the court or Judge to resolve all issues in dispute between the parties. It will additionally, avoid a multiplicity of actions which the courts frown upon.

For the aforesaid reasons, the preliminary issue must inevitably fail and is dismissed forthwith, with costs to the Applicant, to be taxed in default of agreement.

Leave to appeal is granted.

Delivered at Lusaka this 29th day of June, 2017.


Winnie S. Mwenda (Dr)
HIGH COURT JUDGE