

IN THE HIGH COURT FOR ZAMBIA

2017/HP/1366

AT THE PRINCIPAL REGISTRY

AT LUSAKA

(Civil Jurisdiction)



IN THE MATTER OF: AN EQUITABLE MORTGAGE RELATING TO 25 X 25 METRES OF S/D A OF LOT NO. 2414/M, LUSAKA.

IN THE MATTER OF: ORDER 30, RULE 14 OF THE HIGH COURT RULES CHAPTER 27 OF THE LAWS OF ZAMBIA.

BETWEEN:

FELIX LUMBWE

APPLICANT

AND

SAMSON LANJEN TEMBO

RESPONDENT

BEFORE HONOURABLE MADAN JUSTICE P. K. YANGAILO ON THE 12TH DAY OF DECEMBER, 2017.

For the Applicant: Mr. B. Sitali – Messrs. Butler & Co. Legal Practitioners

For the Respondent: N/A

JUDGMENT

CASES AUTHORITIES REFERRED TO:

1. *Magic Carpet Travel and Tours vs. Zambia National Commercial Bank Limited (1999) Z.R. 61;*
2. *S. Brian Musonda (Receiver of First Merchant Bank Zambia Limited) (In Receivership) vs. Hyper Food Products Limited and 2 Others 1999 ZR 124; and*
3. *Pemba Lapidaries, Lapemba Trading Limited vs. Industrial Credit Company Limited, Vol. 3, 2011 ZR 408.*

LEGISLATION AND OTHER WORKS:

1. *High Court Act Chapter 27 of the Laws of Zambia;*
2. *Halsbury's Laws of England, 4th Edition, Volume 32;*
3. *Nigel P. Grovells, Land Law: Text and Materials, 3rd Edition (London, Thomson Sweet and Maxwell, 2004);*
4. *P.G. Osborn, A Concise Law Dictionary, (London, Sweet and Maxwell, 1971); and*
5. *Charles Harpum, Stuart Bridge and Martin Dixon, Megarry and Wade: The Law of Real Property, 7th Edition (London, Sweet and Maxwell, 2008).*

The Applicant **FELIX LUMBWE** applied by way of Originating Summons pursuant to **Order 30 Rule 14** of **The High Court Act**¹ for the following reliefs: -

1. *That the Applicant is entitled to be considered as an equitable mortgagee over a portion of land measuring 25 x 25 metres of Subdivision A of Lot No. 2414/M, Lusaka under and by virtue of an agreement to create a mortgage and by the delivery of title deeds hereinafter mentioned;*
2. *Payment of all sums and money to the Applicant by the Respondent under a loan agreement dated 21st February, 2017, which as at 27th July 2017 stood at K100,500.00;*
3. *Further interest on this amount until payment;*
4. *An Order that the said equitable mortgage may be enforced by foreclosure and sale;*
5. *Any other relief as the Court may consider fit; and*
6. *Costs of and incidental to these proceedings.*

The application is supported by an Affidavit deposed by the Applicant one **FELIX LUMBWE**. The facts of the Case as deposed is that pursuant to a written loan agreement dated 21st February, 2017 between the parties the Applicant lent the Respondent the

sum of Seventy-five Thousand Kwacha (K75,000,000) repayable in forty (40) days with interest at bank lending rates. The loan was secured by an equitable mortgage over the portion of 25 x 25 Metres of Subdivision A of Lot No. 2414/M, Lusaka pledged as security by the Respondent and the Respondent delivered to the Applicant the Certificate of title relating to the said Subdivision A of Lot No. 2414/M, Lusaka.

It is further deposed that the Respondent failed to honour the loan repayment within 40 days, resulting in the loan account standing in arrears of One Hundred Thousand and Five hundred Kwacha (K100,500.00) as at 27th July, 2017. The Respondent has failed to settle his indebtedness to date.

The Respondent **SAMSON LANJEN TEMBO**, was served with the originating process but did not oppose the application. The Respondent did not attend the scheduled hearing on 4th December, 2017 and did not advance any reasons for his absence. Proof of service was filed herein by the Applicant and in accordance with **Order 34 Rule 3** of **The High Court Act**¹, I proceeded to hear the cause.

The Applicant's Counsel Mr. Sitali in his *viva voce* submissions reiterated the contents of the Affidavit in Support and prayed that the reliefs sought be granted.

I have considered the application together with the Affidavit in Support. I will start with the first relief sought. According to

Halsbury's Laws of England², an equitable mortgage has been described in paragraph 405 as follows: -

“An equitable mortgage is a contract which creates a charge on the property but does not convey any legal estate or interest to the creditor; such a charge amounts to an equitable interest. Its operation is that of an executory assurance which, as between the parties, and so far as equitable rights and remedies are concerned, is equivalent to an actual assurance, and is enforceable under the Court's equitable jurisdiction.”

An equitable mortgage by its very nature requires the actual deposit of the title deeds with the mortgagee. I refer to the case of ***Magic Carpet Travel and Tours vs. Zambia National Commercial Bank Limited***¹, in which the Supreme Court held at page 64 as follows: -

“On the last issue of an equitable mortgage, the position at common law is that once a borrower has surrendered his title deed to the lender as security for the repayment of a loan, an equitable mortgage is thus created; the borrower, in such a relationship, cannot deal with the land without the knowledge and approval of the lender whose interest in the land takes precedence...”

A perusal of the Affidavit in Support and exhibits shows that a certificate of title relating to 25 x 25 Metres of Subdivision A of Lot No. 2414/M, Lusaka, was delivered to the Applicant by the Respondent as security for the loan obtained from the Applicant by the Respondent. The exhibits also show that the Applicant and Respondent both executed the loan agreement which was secured by the said certificate of title on 21st February, 2017. The equitable

mortgage was thus created when the Respondent surrendered the Certificate of Title to the Applicant. I therefore find an equitable mortgage was created in respect of Subdivision A of Lot No. 2414/M, Lusaka.

I will now consider the relief sought for an order of foreclosure and sale. The learned author of ***Land Law: Text and Materials***³ states as follows: -

"Foreclosure is the name given to the process whereby the mortgagor's equitable right to redeem is declared by the Court to be extinguished and the mortgagee is left as owner of the property both at law and in equity. An order of the Court is essential for a foreclosure"

An equitable mortgagee can either foreclose or have a receiver appointed by a Court, in a proper case. *In casu*, the parties agreed that in the event of a failure to pay back the money, the Respondent who is the borrower would have no claim whatsoever to the property in question. However, the Applicant who is the equitable mortgagee has no power of sale. He instead has the power to foreclose. I refer to the case of ***S. Brian Musonda (Receiver of First Merchant Bank Zambia Limited) (in Receivership) vs. Hyper Food Products Limited and 2 Others***², where the then Chief Justice Ngulube observed as follows: -

"Foreclosure and sale are two distinct and separate remedies though admittedly both are remedies primarily for the recovery of capital in contradistinction with the taking of possession or the appointment of a receiver which are remedies primarily for the

recovery of interest. A foreclosure degree absolute extinguishes the equity of redemption and vests the mortgagor's entire interest in the property in the mortgagee. So that the mortgagor's property belongs to the mortgagee absolutely. Sale on the other hand is usually more appropriate where the property mortgaged is worth substantially more than the mortgage debt..."

I also refer to the case of ***Pemba Lapidaries, Lapemba Trading Limited vs. Industrial Credit Company Limited***³, where my learned brother, Justice Siavwapa held as follows: -

"an equitable mortgage does not convey legal title to the mortgagee. And consequently, no power of sale vests in the mortgagee."

As can be noted from the above, an equitable mortgagee does not have the power to sell property, but has the power to foreclose. He is entitled to a declaration that the mortgagor's interest be extinguished and the equitable mortgagee be left to be the owner of the property both at common law and equity.

There is a course of foreclosure, which the equitable mortgagee must pursue before the property can be sold. The process of foreclosure is outlined by ***P.G. Osborn*** in ***A Concise Law Dictionary***⁴ as follows: -

"the Court may make an order for foreclosure nisi for the payment of the principal with interest and costs, usually within six months, failing which an order absolute will be made, the land thereupon becoming the property of the mortgagee."

According to ***Megarry and Wade: The Law of Real Property***⁵, foreclosure is explained as follows: -

"Foreclosure is the primary remedy of an equitable mortgagee since he has no legal estate. The Court order absolute will direct the mortgagor to convey the land to the mortgagee unconditionally"

With regard to the relief for sale, which is sought by the Applicant, it is my considered view that where the security is an equitable mortgage, as is *in casu*, the Applicant is not entitled to sell the mortgaged property before going through the course of foreclosure.

From the evidence adduced before me, the Applicant has proved his claim against the Respondent on a balance of probability. Accordingly, I hereby enter Judgment in favour of the Applicant against the Respondent for the payment of the outstanding sum of K75,000.00 together with interest within three months (90 days) from the date hereof. Interest shall be applied at the contractual rate from 21st February, 2017 to date of Judgment and thereafter at the Bank of Zambia short term lending rate until date of full and final settlement.

In the event of default by the Respondent to pay the Judgment debt and interest, the Applicant shall be at liberty to foreclose, have vacant possession and exercise his right of sale of the property in dispute, namely Subdivision A of Lot No. 14370/M Lusaka.

I further order that in the event of default and upon foreclosure, the conveyance shall be undertaken by the Registrar of the High Court on behalf of the Respondent as provided in **Section 14** of **The High Court Act**¹, in the event that the Respondent refuses or neglects to convey the property in dispute to the Applicant.

Granted the outcomes in this application, I also order that the costs for this application shall be awarded to the Applicant, to be taxed in default of agreement.

Leave to Appeal is granted.

Delivered the 12th day of December, 2017.



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P. K. YANGAILO
HIGH COURT JUDGE