

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

2016/HPC/0209

In the Matter of:

A Mortgage over Stand No. 465,
Kabulonga, Lusaka and a Third Party
Mortgage over Stand 502/CL/A/2,
Lusaka

BETWEEN

J. L Morison (Export) Limited

Plaintiff

and

Chita Chibesakunda
Abode Properties Limited

1st Defendant
2nd Defendant



Coram: Hon. Lady Justice Dr. Winnie S. Mwenda in Chambers this 10th
day of January, 2018.

For the Plaintiff: Mr. E. K. Mwitwa of Messrs Mwenye and Mwitwa
Advocates.

For the Defendants: Mr. B. Luo of Messrs Palan George Advocates

RULING

Cases referred to:

1. *George Andries Johannes White v. Ronald Westerman and Others* (1983) Z.R. 135 (H.C.).
2. *Roger Williams and Others v. Redcard Limited and Others* [2011] EWCA Civ. 466.
3. *Sun Country Limited v. Charles Kearney and Another*, SJZ. No. 20 of 2017.

Legislation referred to:

1. Section 197 of the Companies Act, Chapter 388 of the Laws of Zambia.
2. Section 6 of the Commissioner for Oaths Act, Chapter 33 of the Laws of Zambia.

3. *Order 5, rule 20 (g) of the High Court Rules, Chapter 27 of the Laws of Zambia.*
4. *Conveyancing Act, 1882.*
5. *Section 4 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia.*
6. *Companies Act No. 10 of 2017.*

Other Works referred to:

Halsbury's Laws of England, 4th Edition, Vol. 9 (1) (Re-Issue) 2007, paragraph 618 p.358.

By Notice of Intention to Raise Preliminary Issue pursuant to the Provisions of Order 14A and 33 rule 3 of the Rules of the Supreme Court, 1965 (White Book) 1999 Edition as read together with Order XLVII of the High Court Rules, Chapter 27 of the Laws of Zambia filed on 6th November, 2017 the 1st and 2nd Defendants raised the following preliminary issues, namely: -

1. That from the parties' clause, one of the purported borrowers seems to be a limited liability company and its common seal ought to be affixed to the attestation clause.
2. That the exhibit marked "FM1" was improperly executed owing to the fact that the signature of the second purported borrower is not witnessed by a witness and as such, a nullity and the agreement is therefore, void *ab initio*.

In support of the Notice of Intention to Raise Preliminary Issue, the 1st and 2nd Defendants (hereinafter referred to as "the Defendants"), filed a verifying affidavit sworn by one Bwalya Luo, Counsel seized with the conduct of this matter on behalf of the Defendants wherein he avers that a cursory perusal of the exhibit marked "FM1" reveals that the document is defective and consequently, incompetent and therefore, null and void *ab initio*.

The Defendants also filed into Court on 6th November, 2017 their Skeleton Arguments in Support of Notice of Intention to Raise a Preliminary Issue, which were erroneously entitled Skeleton Arguments in Reply.

It is the Defendants' argument that this Court is being asked to adjudicate on a matter which arises out of an invalid contract and as such, is unenforceable. That the Plaintiff and 2nd Defendant being limited companies, the contract ought to be sealed. The Defendants relied on the provisions of Section 197 of the Companies Act, 1994 (Chapter 388 of the Laws of Zambia) which provides as follows: -

“Any contract or instrument; which, if entered into by a person other than a body corporate, would not be required to be under seal may be entered into or executed without seal on behalf of a company by the secretary, a director, or any person generally or specifically authorised by the directors to do so.”

According to the Defendants, from the foregoing provision, a contract ought to be signed by the secretary, a director or any person generally or specifically authorised by the directors to do so. (emphasis by the Defendants). That in this particular instance this requirement was clearly overlooked and was signed by parties whose positions or authority to bind limited liability companies were never stated.

It is the Defendants' further argument that the attestation clause is also defective as it leaves it in the realm of speculation as the provision on which the 2nd Borrower signed was not witnessed and the borrower was not indicated. According to the Defendants, they are fortified in their argument by the case of *George Andries Johannes White v. Ronald Westerman and Others*¹ where it was held that: -

“A deed of assignment was signed only by the purported purchaser and was therefore, improperly executed, null and void ab initio and should never have been registered ...”.

It is, therefore, the Defendants' submission and prayer that the exhibit is defective and ought to be expunged from the Affidavit in Support of Originating Summons.

The Plaintiff filed Skeleton Arguments in Response to the 1st and 2nd Defendants' Notice of Intention To Raise Preliminary Issue and Defendants' Skeleton Arguments in Relation to the said Notice on 4th December, 2017. The Plaintiff indicated that it would rely on the authorities listed therein.

It is the Plaintiff's argument that the Affidavit in Support of the present application deposed to by Bwalya Luo, learned Counsel for the Defendants, is defective and ought to be disregarded by this Court. This is so firstly, because it does not state the defect complained of in the said exhibit "FM1" and secondly, the jurat offends the provisions of section 6 of the Commissioner for Oaths Act, Chapter 33 of the Laws of Zambia and Order 5, rule 20 (g) of the High Court Rules, Chapter 27 of the Laws of Zambia. Section 6 of the Commissioner for Oaths Act, states that: -

"Every Commissioner for Oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made."

Order 5 rule 20 (g) of the High Court Rules has a similar requirement. It stipulates that: -

"(g) The jurat shall be written, without interlineation, alteration or erasure (unless the same be initialled by the Commissioner), immediately at the foot of the affidavit, and towards the left side of the paper, and shall be signed by the Commissioner.

It shall state the date of the swearing and the place where it is sworn."

It is the Plaintiff's contention that both section 6 of the Commissioner for Oaths Act and Order 5 rule 20 (g) of the High Court Act are couched in mandatory terms in relation to the need for the jurat to have the date when the oath or affidavit was taken. That as such, the Plaintiff objects to the admission of the Affidavit in Support in evidence or in relation to the Notice

and therefore, this Court should disregard the Affidavit in Support and deem the same as though it had not been filed along with the Notice.

With regards to exhibit "FM1", the Plaintiff submitted that contrary to the Defendants' apparent belief that exhibit "FM1" (which has not been specified by the Defendants but which the Plaintiff will take to refer to the loan agreement between the Plaintiff and Defendants which is exhibited in the Plaintiff's Affidavit in Support of Originating Summons), is a deed, the loan agreement is a simple contract. According to the Plaintiff, it is trite law that a simple contract need not be in a particular form, that is, it does not have to conform to formalities. In this regard, the Plaintiff referred this Court to Halsbury's Laws of England, Volume 9 (1), paragraph 618 at page 358 where the learned authors state that in the ordinary case, the law does not require a contract to be made in any particular form, or according to any particular formalities; that it is sufficient that there be a simple contract which can be either oral or in writing or partly oral and partly in writing.

It is the Plaintiff's contention that exhibit "FM1", being a loan agreement is not one which is required by statute, particularly the Conveyancing Act, 1882 as read together with Section 4 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia, to be executed as a deed and subsequently registered. That as such, it is a simple contract which is in writing that does not have to follow the formalities of a deed.

The Plaintiff observed that the Defendants' Skeleton Arguments did not cite any law to the effect that a loan agreement must be signed as a deed.

The Plaintiff further submitted with reference to exhibit "FM1" that the body of the text clearly shows that it is an instrument under hand and not under seal. The Plaintiff reiterated its submission that it is trite law that simple contracts or contracts under hand are not required to be attested. That for an instrument under hand, no formalities are required; it suffices that there is a meeting of the minds and sufficient consideration provided. Thus, the

fact that one of the signatures on exhibit "FM1" is not witnessed does not render it invalid.

With regards to the Defendants' contention that exhibit "FM1" is invalid because the capacity in which the parties were signing on behalf of the corporate entity is not indicated, the Plaintiff submitted that section 197 (1) of the Companies Act which was cited by the Defendants, does not state that a person signing on behalf of the company must indicate the capacity in which they are signing, but that they should either be the company secretary, director or be authorised by the directors to do so. That it follows that section 197 of the Companies Act presumes that a person who signs is either the company secretary, a director, or any person generally or specifically authorised by the directors.

According to the Plaintiff, any challenge as to the capacity or authority of the signatory is an issue of evidence and does not affect the validity of the contract entered into. That be that as it may, in the case of *Roger Williams and Others v. Redcard Limited and Others*², the Court of Appeal of England and Wales held that absence of the capacity in which a person signed on behalf of the company did not affect the validity of the agreement. Similarly, that the signatories to exhibit "FM1" did not indicate the capacities in which they signed, does not in any way affect the validity of the agreement they signed.

The Plaintiff also submitted that it is worth noting and they submit, that todate, there is no affidavit evidence on record from the Defendants disputing the fact that the loan agreement, exhibit "FM1" was duly signed by, for and on behalf of the Defendants. The Plaintiff therefore, contends that the Defendants do not dispute the fact that the loan agreement was signed for their benefit and on their behalf and that they received the loan amount in question. That in view of the foregoing, it is the Plaintiff's submission that the Defendants' Notice is frivolous, misconceived, unmeritorious and

unjustified. It is thus the Plaintiff's prayer that the Defendants' Notice of Intention to Raise Preliminary Issue be dismissed with costs to the Plaintiff.

I have perused the Notice of Intention to Raise Preliminary Issues and supporting affidavit. I have equally perused the Skeleton Arguments filed by both parties.

Before I delve into the merits of the preliminary issues raised by the Defendants, I must point out that I have observed that the Affidavit in Support is undated and as correctly submitted by Counsel for the Plaintiff, it is defective as it offends the provisions of section 6 of the Commissioner for Oaths Act, and Order 5, rule 20 (g) of the High Court Rules.

Secondly, as learned Counsel for the Plaintiff again correctly observed, the Affidavit in Support makes an allegation that exhibit "FM1" is defective without specifying the type of defect being alluded to. To compound matters, the affidavit does not name the exhibit referred to as "FM1" or indicate which document it is attached to or exhibited. It is left to the reader to speculate as to which document is being referred to. As if that was not enough, the Defendants' Skeleton Arguments in support of the Notice are wrongly referred to as Skeleton Arguments in Reply to the Plaintiff's Skeleton Arguments in Opposition to the Defendants' Notice of Intention To Raise a Preliminary Issue. All these oversights, in my view, do not reflect well on the person who drafted these documents. Counsel should always exercise great care when drafting court documents to avoid such unnecessary errors.

As earlier indicated, Mr. Luo's affidavit is clearly defective. However, Order 5 rule 13 of the High Court Rules authorises the Court to receive affidavits despite irregularities in form. Order 5, rule 3 of the High Court Rules stipulates as follows: -

“The Court or a Judge may permit an affidavit to be used notwithstanding it is defective in form according to these Rules, if the Court or a Judge is satisfied that it has been sworn before a person duly authorised.”

Ruling on the matter in the case of *Sun Country Limited v. Charles Kearney and Another*³, Malila JS stated thus: -

“An affidavit afflicted by such a defect is receivable under Order 5 rule 13 of the High Court Rules which Counsel for the appellant quoted. The rule authorises the Court to receive affidavits despite irregularities in form.”

Therefore, a defective affidavit is not incurably fatal and can be received in evidence under the provisions of Order 5 rule 13 above. I am satisfied that notwithstanding the defect, the Affidavit in Support of this application was sworn before a person duly authorised. I will therefore admit the same in evidence.

Moving on to the merits of the application before Court, it is the Defendants' argument that the Plaintiff and 2nd Respondent being limited companies, the contract ought to have been sealed and further, that exhibit “FM1” was improperly executed since the signature of the second purported Borrower was not witnessed. Therefore, the contract was a nullity and void *ab initio*. The Defendants relied on the provisions of section 197 of the Companies Act, 1994 and the case of *George Andries Johannes White v. Ronald Westerman*¹ (cited above).

Let it be noted that the Companies Act 1994 was repealed and replaced by the Companies Act No. 10 of 2017. However, Act No. 10 of 2017 does not operate retrospectively and since this application was filed before the 1994 Act was repealed, the provisions of the said Act cited in support of this

application, being the law applicable at the time, are applicable to this application.

I have examined exhibit "FM1" annexed to the Affidavit in Support of Originating Summons filed on 9th May, 2016. The said exhibit is a loan agreement made on 31st March, 2011 between the Plaintiff and the Defendants and one other person. It is indeed correct that the said agreement was not sealed and the 1st Defendant's signature was not witnessed. The question to be asked therefore, is, was the loan agreement a nullity and therefore, void *ab initio* by virtue of the fact that it was not sealed and the 2nd Borrower's signature was not witnessed?

In answer to the above question, it is my considered opinion that the loan agreement was not a nullity as it did not need to be sealed. The loan agreement, as submitted by the Plaintiff was a simple contract which did not have to be sealed. Indeed, it is trite law that a simple contract need not be in a particular form and does not need to conform to formalities which a deed would need to.

I concur with the submission by the Plaintiff that as a simple contract, the loan agreement is not one required by statute, in particular, the Conveyancing Act, 1882 as read together with section 4 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia, to be executed by deed and therefore, need not follow the formalities required for a deed.

The Plaintiff submitted that the mere fact that the signature of the 2nd borrower was not witnessed does not render the loan agreement invalid. I agree with this submission for the reason already alluded to above, namely, that the loan agreement is a simple contract which did not require any formalities to be binding.

I also concur with the Plaintiff's submission that any challenge as to the capacity or authority of the signatory to the loan agreement is an issue of

evidence and does not affect the validity of the contract entered into. In support of its contention, the Plaintiff cited the case of *Roger Williams and Others v. Redcard Limited and Others*² (cited above) where the Court of Appeal for England and Wales held that the absence of the capacity in which a person signed on behalf of the company did not affect the validity of the agreement. I find this judgment persuasive on this aspect and I adopt the same.

In view of the above considerations, I find the Defendants' Notice of Intention to Raise Preliminary Issues to be without merit. I accordingly dismiss the same with costs to the Plaintiff.

Dated at Lusaka this 10th day of January, 2018.



W. S. Mwenda (Dr)
HIGH COURT JUDGE