

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

2016/HPC/0528

IN THE MATTER OF:

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

IN THE MATTER OF:

**THE PROPERTY COMPRISED IN A LEGAL
MORTGAGE AND EQUITABLE MORTGAGE
RELATING TO STAND NO. 6508 KITWE AND
STAND NO. 9751/CL/1 NDOLA RESPECTIVELY
BOTH PROPERTIES IN THE NAME OF CHABUKA
JEROME KAWESHA**

IN THE MATTER OF:

**FORECLOSURE, POSSESSION AND SALE OF THE
MORTGAGED PROPERTIES**

BETWEEN:

FIRST NATIONAL BANK ZAMBIA LIMITED

APPLICANT

AND

CHABUKA JEROME KAWESHA

RESPONDENT

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

For the Applicant:

*Mr. T. Gausi, In House Counsel – First
National Bank Zambia Limited*

For the Respondent:

*Ms. C. Mumba, Mesdames Bemvi
Associates Legal Practitioners*

JUDGMENT

LEGISLATION REFERRED TO:

- 1. Order 30 Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia**
- 2. Section 13 of the High Court Act, Chapter 27 of the Laws of Zambia**

CASES REFERRED TO:

1. Stanley V Wilde (1899) CA 474.
2. Reeves Malambo V Patco Agro Industries Limited SCZ Judgment No. 20 of 2007.
3. Kasengele V Zambia National Commercial Bank SCZ Judgment No. 11 of 2011.
4. Thornborough V Baker (1675) 2 Swans 628, 630, 36 Eng. Rep 1000.
5. Match Corporation and Development Bank of Zambia V The Attorney General SCZ Judgment No. 3 of 1999.
6. Emery V UCB Bank Plc (CA) 5 May 1997.
7. Banque des Marchants de Mascau (Kapetschesky) V Kindersly (1951) 2 ALL ER 549.
8. Dunn V Shanks (1932) NI 66, CA.
9. S. Brian Musonda (Receiver of First Merchant Bank Zambia Limited (In Receivership) V Hyper Food Products Limited & 2 Others (1999) ZR 124.

OTHER WORKS REFERRED TO:

1. Halsbury's Laws of England, 4th Edition, Volume 16.
2. Fisher and Lightwood's Law of Mortgage, 11th Edition, Butterworths, Lexis Nexis.

The Applicant by way of Originating Summons filed into Court on 8th November, 2016 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 Respondent:

1. Payment of all monies which as at 2nd September, 2016 stood at K1,947,947.29 plus contractually agreed interest, costs and all other charges due and owing to the Applicant Bank by the Respondent under facilities availed to the Respondent and secured by a First Legal Mortgage over Stand No. 6508 Kitwe

- and Stand No. 9751/CL/1 Ndola (the Mortgaged Properties) the properties registered in the name of the Respondent;
2. An Order to Foreclose on the Mortgaged Properties;
 3. Delivery of vacant possession of the Mortgaged Properties by the Respondent to the Applicant;
 4. An Order of Sale of the Mortgaged Property by the Applicant;
 5. Costs; and
 6. Any other relief the Court shall deem fit.

The application is supported by an Affidavit in Support and Skeleton Arguments filed into Court on 8th November, 2016. The Affidavit in Support is sworn by Ms. Euphrice Kombe the Manager – Ongoing Risk Management, in the Credit Department of the Applicant Bank. It is deposed that the Respondent was on 21st March, 2013 availed credit facilities by way of a Home Loan in the sum of K1,200,000.00. Copies of the Facility Letter and Loan Agreement both dated 21st March, 2013 duly executed by the Respondent are exhibited marked “EK1” and “EK2” respectively.

That it was an agreed term of the Facility that interest will be charged at the Bank’s Home Loan Base/Prime Rate (then at 9.25%) plus a margin of 5% that is 14.25%. Interest payable would also –

- (a) Be calculated on the basis of a 365 day year;
- (b) Be calculated on a daily basis on the balance owing, notwithstanding that such balance may have been increased by the debiting of interest to such balance;
- (c) Accrue from day to day;

- (d) Be debited to the borrower's account held with the Bank, monthly in arrears; and
- (e) Be compounded monthly.

It is averred that the Home Loan Facility was secured by a First Legal Mortgage registered over Stand No. 6508 Kitwe. A copy of Certificate of Title No. 53109 relating to Stand No. 6508 Kitwe is exhibited marked "EK4".

It is stated that the Home Loan Facility would expire after a period of 180 months from the date of drawdown by which date it should be repaid in full. The Respondent was required to make monthly repayment instalments over the 180 months towards repayment of the loan.

That the Respondent was on 8th September, 2015 availed another credit facility by way of a further Home Loan of K285,549.88. Copies of the Facility Letter and the Loan Agreement both dated 8th September, 2015 duly executed by the Respondent are exhibited marked "EK5" and "EK6" respectively.

It is stated that it was agreed that the second Home Loan would be charged interest at MPC Rate (then at 12.25%) plus a margin of 6% - that is 18.5%. It was agreed that interest payable would be calculated in similar basis to the first Home Loan. That the second Home Loan was secured by a Further Charge registered over Stand No. 6508 Kitwe. A copy of the Further Charge registered, on 21st December, 2015 is exhibited marked "EK7".

It is averred that the said Home Loan Facility would expire after 153 months from the date of drawdown by which date it should be repaid in full. The Respondent was required to make monthly instalment payments.

It is stated that it was further agreed that the Home Loan Facilities would be secured by an Equitable Mortgage over Stand No. 9751/CL/1 Ndola a property registered in the name of the Respondent which is evidenced by a Caveat placed on the said property. True copies of Memorandum of Deposit of Title Deed, Certificate of Title No. 199733 relating to Stand No. 9751/CL/1 Ndola and the Printout from the Lands Register are exhibited marked "EK8", "EK9" and "EK10" respectively.

That the conduct of the Respondent's Loan Account has not been to the Applicant's satisfaction as the Respondent has continually failed to meet his monthly repayment obligations. That despite numerous reminders to normalize the account, the Respondent has failed and/or neglected to do so. Copies of the reminders are exhibited and collectively marked "EK11". That to-date the facility remains unsettled and Stands at K1,947,947.29 as at 2nd September, 2016. Copies of the Respondent's Statement of Account on the Facility are exhibited marked "EK12".

The Respondent has opposed the application. His Affidavit in Opposition was filed on 7th June, 2017. It is deposed that on 21st March, 2013 he entered into a loan agreement with the Applicant for a sum K1,200,000.00. That on 8th September, 2015 he entered

into another loan agreement with the Applicant to consolidate loans he had with Barclays Bank, Indo Zambia Bank and his previous loan with the Applicant.

It is stated that the loan was to be repaid in equal monthly amounts of K26,157.12 over a period of 153 months. That the loan was to be serviced from rentals from 2 properties on lease in respect of which the Applicant held as security because the Respondent had no other source of income – namely:

- (i) Legal Mortgage on Stand No. 6508 Kitwe;
- (ii) House Owners Insurance ceded to the Applicant;
- (iii) Valuation Report of K1,700,000.00 as at 15th April, 2014;
and
- (iv) An Equitable Mortgage on Stand No. 9751/CL/1.

Copy of letter from the Respondent to the Applicant dated 28th February, 2018 showing details of Tenants and rental amounts is exhibited marked “CJK3”.

That owing to loss of salaried income and loss of tenants in the properties he was unable to meet his obligations to the Applicant regularly from March 2014 to December 2016 and in total accrued to K478,000.00. That the Applicant was constantly updated on his efforts to find tenants for the 2 mortgaged properties.

It is averred that in the Respondent’s efforts to settle the outstanding amount, he engaged the services of property consultants Sherwood Greene to assist him in selling 2 flats on Plot

No. 9751 Mitengo, Ndola. The efforts have been ongoing since 9th April, 2015 and the mandate was renewed on 3rd December, 2016. Copies of the Letters of Engagement are exhibited collectively marked “CJK4 a- b”.

That the Respondent continued making efforts to settle the outstanding amounts and kept the Applicant informed. Copies of letters to the Applicant dated 10th July, 2015 and 4th March, 2016 are exhibited marked “CJK5” and “CJK6” respectively.

In September 2016 he found a tenant for Stand No. 6508 Kitwe. Copies of correspondence with the tenant (Examination Council of Zambia) and himself as well as the Lease Agreement are exhibited and marked “CJK7”, “CJK8” and “CJK9”.

That the initial rentals received for Stand No. 6508 Kitwe together with security deposit of K140,000.00 were paid to the Applicant to service the Loan Facility.

That in December, 2016 in order to bring his Loan Facility up to date, he was advised by the Applicant to obtain an overdraft facility from the Applicant in the amount of K478,000.00 by converting K478,000.00 from his total outstanding amount of K1,947,947.29 to the Overdraft Facility at 25.5% interest thereby creating two separate liabilities with the Applicant. A copy of the Facility Letter dated 22nd December, 2016 is exhibited marked “CJK10”.

It is stated that the said two separate liabilities have worsened the Respondent’s financial position, as interest is now accruing on both

accounts and monthly repayments have to be made concurrently on both accounts. Copies of Bank Statements showing repayments made since December, 2016 are exhibited collectively marked “CJK11a – b”.

That on 26th March, 2017 after the Overdraft Facility was credited to the Home Loan and repayments have been made, he received the Originating application for foreclosure proceedings from the Applicant dated 8th November, 2016. That the Applicant’s action in commencing proceedings against him prematurely and inequitably is a failure by the Applicant to practice fair principles of equity and to comply with the Bank of Zambia’s corporate governance principles thereby causing him distress and grave prejudice.

The Respondent averred that the remaining loan term is 11 years and 3 months and it is therefore misguided and contrary to the laws of equity for the Applicant to demand immediate payment of the entire loan amount at this stage. That he will incur substantial economic loss if the Applicant’s application is allowed without allowing him to continue to make repayments.

That the Respondent’s current ability and capacity to repay the Home Loan and the Overdraft Facility is a total of K23,000.00 per month as follows:

- (i) K20,000.00 being monthly rental from Stand No. 6508 Kitwe; and
- (ii) K3,000.00 being rental from Stand No. 9752/CL/1 Ndola.

The Respondent stated that it is within the Court's jurisdiction to allow that all the loan facilities with the Applicant be reconsolidated into one amount and that he should be allowed to make repayments of K23,000.00 per month and for the tenure of the Loan to be adjusted upwards to meet his capacity.

The Applicant filed an Affidavit in Reply on 20th June, 2017. According to this Affidavit sworn by Biggie Banda the Recoveries Team Leader in the Ongoing Risk Management Department of the Applicant Bank, in December 2016 the Respondent's loan account was in arrears, that is, the Respondent had not made the agreed monthly instalment payments, resulting in a total sum of K478,000.00 being in arrears. To assist the Respondent in bringing the Home Loan up to date, that is, paying off the missed instalments; it was agreed that the arrears would be converted to an Overdraft to allow the loan be current and the arrears equally paid off. That the Respondent was under no duress to agree to this and was free, at any time before agreeing to the facility, to decline this proposal.

It is stated that the Respondent was under no obligation to accept the offer to have his arrears converted into an overdraft and thereby having his home loan updated. That in any event he still had an obligation to settle his arrears.

That the Foreclosure proceedings were instituted on 8th November, 2016 because the Respondent was in default of the terms of the Loan Agreement as his account was in arrears; the Loan Agreement

signed between the parties provides that any action taken by the Bank is without prejudice to any of its other rights of recovery of the full amount owing. Reference was made to Clause 11.2 of the exhibit marked, "CJK2b" in the Respondent's Affidavit in Opposition.

It is stated that contrary to the Respondents assertion that the remaining loan term is 11 years and 3 months and it is therefore misguided and contrary to equity for the Applicant Bank to demand immediate payment of the entire loan amount, the Loan Agreement exhibited to the Respondent's Affidavit in Opposition expressly provides for the right of the Applicant to demand payment in full on the default of the Respondent.

That the Respondent's statements at paragraph 20 and 21 of the Affidavit in Opposition are an attempt to settle the debt in instalments which should properly be the subject of a separate and distinct application.

That the Respondent does not in his Affidavit in Opposition dispute the debt owed.

Counsel for the Applicant filed Skeleton Arguments into Court on 8th November, 2016. He relied on **Order 30 Rule 14 of the Laws of Zambia** which 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 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 by the summons be specified, and as the circumstances of the case may require; that is to say:

Payment of money secured by the mortgage or charge;

Sale;

Foreclosure;

Delivery of possession (whether before or after foreclosure) to the mortgagee or person entitled to the charge by 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”.

Learned Counsel cited the case of **STANLEY V WILDE (1)** in which Judge Lindley, defined a Mortgage as follows:

“A mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given”.

It was argued that the credit facilities by way of Home Loan in the sum of K1,200,000.00 and K258,549.88 availed to the Respondent by the Applicant on 21st March, 2013 and 8th September, 2015 respectively were secured by a First Legal Mortgage and a Further

Charge registered over Stand No. 6508 Kitwe and an Equitable Mortgage over Stand No. 9751/CL/1 Ndola.

It was stated that the Respondent has defaulted on the facilities availed to him as he has failed to meet the agreed monthly repayment instalments, and following demands issued to the Respondent by the Applicant, the Applicant commenced the action herein seeking the reliefs endorsed on the Originating Summons.

The Court's attention was drawn to the case of **REEVES MALAMBO V PATCO AGRO INDUSTRIES LIMITED (2)** where the Supreme Court held that:

“A mortgagee is at liberty to exercise his right to foreclosure and sell the property in the event of default and failure by the mortgagor to redeem the mortgaged property; and that under a legal mortgage by demise, the mortgagee becomes an absolute owner of the mortgaged term at law as soon as the day fixed for redemption has past”.

The Court's attention was further drawn to the case of **KASENGELE V ZAMBIA NATIONAL COMMERCIAL BANK (3)**, where the Supreme Court held as follows:

“We wish also to comment on the Respondent's ability or non-ability to pay. There is evidence at page 88 of the record of appeal from DW1, Edward Mutale, the Respondent's accountant that if the Board had ordered

the Bank to pay it was going to be done. Moreover, inability to pay has never been and is not a defence to a claim. Neither is it a bar to entering judgment in favour of a successful litigant. Emphasis provided.

In opposition, the learned Counsel for the Respondents filed written Respondent's Submissions on 30th June, 2017. It is contended that where a legal or equitable mortgage exist, a mortgagor has the right to pay off the debt and get back his property. That this is a mortgagor's equity of redemption, which continues even if the mortgagor fails to pay his debt in accordance with the provisions for repayment. That the right emanates, as was stated in the case of **THORNBOROUGH V BAKER (4)**, from the mortgage transaction primarily being considered a loan of money, secured by a pledge of property, and therefore the principal right of the mortgagee is to the money, and his right to the land is only as a security for the money. With respect to the principles of equity the case of **MATCH CORPORATION AND DEVELOPMENT BANK OF ZAMBIA V THE ATTORNEY GENERAL (5)** was cited. In that case the Supreme Court said that:

“The relief which equity affords requires that a reasonable balance be struck between the right to redeem within any extended period beyond that stipulated in the contract and the right of the other party to the benefit of the security in case of inexcusable default or in a hopeless

case where for instance there is in fact no reasonable prospect of the borrower ever being able to pay”.

It was submitted that from the date of the Loan Agreement, the Respondent has been making repayments on the Home Loan, as shown in the Bank Statements exhibited in the Respondent's Affidavit marked "CJK11". That during the time period that he was unable to make repayments, he expressed willingness to continue to make repayments and constantly informed the Applicant on all efforts he made to liquidate the loan, as shown in correspondence to the Applicant marked "CJK3 - CJK9" in the Respondent's Affidavit.

It was also contended that the Applicant commenced the proceedings in November 2016 and thereafter in December 2016 proceeded to concretely restructure the Respondent's loan repayments, without informing the Respondent of the Originating process. It was submitted that in the case of **EMERY V UCB BANK PLC (6)**, the Bank was stopped from enforcing its security without further notice to the borrower following interim agreements to reschedule payments.

That in principle, as stated by Sir Raymond Evershed MR in the case **BANQUE DES MARCHANDS DE MOSCOU (KOPETSCHESKY) V KINDERSLY (7)**, a person having two courses of conduct must be treated as having made an election from which he cannot resile, and he will not be regarded, in general, at any rate as having so elected unless he has taken a benefit under or arising out of the

course of conduct which he first pursued, and with which his subsequent conduct is inconsistent.

It is stated that exhibit "EK11" in the Applicant's Affidavit in Support, is a copy of the demand letter to the Respondent dated 5th January, 2016 for the outstanding amount. That from the date of the demand letter various arrangements were made between the Respondent and the Applicant with respect to repayments, including the Facility Letter executed on 22nd December, 2016 marked "CJK10" exhibited in the Respondent's Affidavit in Opposition by which an overdraft facility was given to the Respondent to bring the arrears up to date. That if the Overdraft was to bring the Loan Facility up to date, then the Applicant cannot rely on the previously existing default on the account, which has been restored. The account has been normalized with respect to the outstanding amount, and as such there is no default on which the Applicant can, in good faith, make this application.

It is submitted that they are fortified in their argument by the words of Lord Birkenhead LC in the case of **DUNN V SHANKS (8)** applying the doctrine as laid down in **Maclaine V Gatty (1721) 1 AC 376** at page 386:

"where A had by his words or conduct justified B in the believing that a certain state of facts exists, and B has acted upon such belief to his prejudice, A is not permitted to affirm against B that a different state of facts exists at the same time."

That **Halsbury's Laws of England, 4th Edition, Volume 16 at paragraph 955** is instructive in this regard and states that –

“where a person has by words or conduct made to another a clear and unequivocal representation of fact either with knowledge of its falsehood or with intention that it should be acted upon, or has so conducted himself that another would as a reasonable person, understand that a certain representation of fact was intended to be acted upon, and the other person has acted upon such representation and thereby altered his position to his prejudice, an estoppel arises against the party who made the representation, and he is not allowed to aver that the fact is otherwise than he represented it to be”.

Learned Counsel for the Respondent submitted that the Applicant should not be allowed to commence foreclosure proceedings on one hand without informing the Respondent, and on the other hand, restructure the loan repayments. That the application is unreasonable and contrary to the principles of equity. That had the Applicant been acting in good faith and reasonably, they would have notified the Respondent that action was commenced for foreclosure before entering into another agreement to restructure the loan repayments.

It is further contended that paragraph 15 in the Applicant's Affidavit in Support directly contradicts paragraph 11 in the Applicant's Affidavit in Reply, which makes the Applicant's

application misguided and was made in bad faith. It is stated that an application to foreclose before the due day can only be made where a mortgagor defaults. That in this case the default was remedied by the Respondent, thereby restoring the Respondent's right to redeem his property, which right is so inseparable from the Respondent that it cannot be taken away even by the express agreement of the parties.

The Respondent also cited **Section 13 of the High Court Act** which provides that:-

“In every civil cause or matter which shall come in dependence in the Court, law and equity shall be administered concurrently, and the Court, in the exercise of the jurisdiction vested in it, shall have the power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever, interlocutory or final, to which any of the parties thereto may appear to be entitled in respect of any and every legal or equitable claim or defence properly brought forward by them respectively or which shall appear in such cause or matter, so that, as far as possible, all matters in controversy between the said parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided; and in all matters in which there is any conflict or variance

between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail”.

It was submitted that equity must prevail in this case because of the prejudicial manner in which the Applicant handled the Respondent's account, and the likelihood for the Respondent to lose his main source of income, which he has been using diligently to repay the loan. That as at March 2017 the Overdraft Facility of K478,00.00 had been credited to the Home Loan thereby updating the Respondent's default.

It is submitted that the Respondent has established an equitable right to redeem his property, upon which the Court must exercise its discretion by dismissing the Applicant's application and allow the Respondent to continue making repayments on the loan.

As regards the remedy of possession, it is submitted that this remedy is subject to the limitation that the Court has the discretion to delay the making or enforcement of a possession order if it considers that the mortgagor is likely to pay any money due under the mortgage within a reasonable time. That the effect of physical possession is that if the property is on lease, the mortgagee receives the rent, thus depriving the mortgagor of this benefit. In this case the arrangement between the Applicant and the Respondent was that the Applicant has been receiving the rentals from both mortgaged properties.

It was submitted that the Applicant's application to foreclose and sale the mortgaged properties was made prematurely and should be dismissed.

The Respondent also relied on the Banker's Association of Zambia Code of Banking Practice. It was submitted that the Code creates a legal obligation on the Applicant Bank to do everything possible to help the Respondent to bring the account to order. That the correspondence exhibited in the Respondent's Affidavit shows that the Applicant has been benefiting from the mortgaged properties and the Overdraft Agreement was calculated by the Applicant to lead the Respondent to believe that the Overdraft Facility would restructure the Respondent's loan payments.

It is submitted that from the facts of the case and the law set out there is a danger that the Respondent will suffer grave prejudice as a result of the Applicant's unreasonable conduct unless the Applicant's application is dismissed. That the foreclosure and sale of the Respondent's properties thereby depriving him of his single source of income is unjustifiable. It is submitted that the modern approach with respect to mortgage actions is that where a mortgagor has demonstrated willingness and commitment to make repayments on a loan, the principles of equity require such a mortgagor to be protected.

The Applicant's Submission in Reply were filed into Court on 12th July, 2017. Regarding the placement of the unpaid arrears on an overdraft facility it is submitted that this did not restructure the

original loan facility as contended by the Respondent. That this contention is misconceived as the loan facility continued and still continues to run even after the granting of the overdraft.

It is further submitted that on the granting of the loan facility and the further financial advances, the Respondent signed Loan Agreements and Facility Letters, thereby accepting the provisions contained therein as binding upon him. That based on the terms of the Facility Letters and Loan Agreements, the Applicant was and is entitled to bring this action. The Court's attention was drawn to Clause 2.2 of the Facility Letters dated 21st March, 2013 and 8th September, 2015 each providing as follows:

“2.2 The home loan facility expires after 153 months that is (07/09/2027) by which date it should be paid in full. However, the bank reserves the right to demand full payment of the loan before the expiry date”.

Clause 11 of each of the Loan Agreements signed by the Respondent on 21st March, 2013 and 8th September, 2015 provide for events of default, in consequence of which, Clause 11.2 provides for the rights of the Applicant as follows:

“11.2 Then in any such case referred to above:

11.2.1 Without prejudice to any other rights which might thereupon be available to the Bank, the full amount owing in terms of this agreement together with all interest

accrued but unpaid and other charges shall forthwith become due and payable by the borrower.

11.2.2 The Bank reserves the right to cancel the facility and demand immediate full repayment; and/or

11.2.3 The Bank shall be under no obligation to make further advances hereunder and the loan and/or any other outstanding debts due by the Borrower to the Bank, must be repaid in full by the Borrower”.

That Clause 17.1 of each of the Loan Agreements then goes on to provide as follows:

“17.1 No delay in exercising or omission to exercise any right, power or remedy available to the Bank under this Agreement shall impair any such right, power or remedy or be construed as a waiver thereof or as acquiescence in default nor shall any action of the Bank in respect of any default or any acquiescence in default affect or impair any right, power or remedy of the Bank in respect of any other default. The rights and remedies provided for herein are cumulative and additional to and not exclusive of or in substitution for any rights or remedies arising by operation of law”.

It is submitted that from the foregoing contractual provisions what is clear is that – even if the overdraft were to be considered a restructure and thus a bar to enforcement as contended by the

Respondent and denied by the Applicant, the Applicant is free to adopt any one course of action without prejudice to any other rights of enforcement it may have. In the present case, the Applicant has brought these proceedings as a mode of enforcement.

Regarding the right of redemption it is the Applicant's argument that on the default of the Respondent in paying the mortgage instalments as and when they fell due, the legal right of redemption ceased. That a delay in bringing these proceedings did not constitute a waiver of the Applicant's right to seek foreclosure nor did taking any alternate course of action constitute impairment of the rights of the Applicant to seek foreclosure as shown by the contractual provisions outlined above. Therefore, the Applicant was entitled to bring these proceedings as the Respondents legal right of redemption ceased at the occurrence of the default, what the Applicant now seeks is the operation of foreclosure in extinguishing the equitable right of redemption and hence the proceedings.

For this submission learned Counsel for the Applicant relied on the learned author's of **FISHER AND LIGHTWOOD'S LAW OF MORTGAGES** who at page 403 say that:

“Foreclosure consists of depriving the mortgagor of his equitable right to redeem the mortgage... The Mortgagor has two rights of redemption. First, he has a legal right of redemption until the date fixed for repayment arrives, and where there is an express provision for redemption, he cannot be deprived of this. Secondly, on default in

payment on that day, his legal right to redeem ceases and thenceforth he has only an equitable right of redemption.... In the modern form of instalment mortgage there is generally no provision for redemption, but it seems to be accepted that the right of foreclosure nevertheless arises when the mortgaged moneys become due, on default or otherwise”.

In conclusion the Applicant’s Counsel maintained that the terms set out in the Facility Letters and Loan Agreements are binding on the Respondent. The terms highlighted above show that the rights of the Applicant are cumulative and not in prejudice to other rights. That therefore the granting of the overdraft is no bar to litigation. Further that the legal right of redemption ceased on the event of default in instalment repayments and therefore the Applicant is entitled to seek extinguishment of the equitable right of redemption through foreclosure. It was the Applicant’s prayer that it be granted the reliefs as prayed for.

I have considered the claim by the Applicant, First National Bank Zambia Limited against the Respondent for the payment of all monies due and interest as well as the reliefs pursuant to **Order 30 Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia**. I have also considered the Affidavits filed herein, the Skeleton Arguments, Submissions by the learned Advocates for the parties hereto and the Authorities cited.

It is not in dispute that the Respondent was availed a Home Loan of K1,200,000.00 on 21st March, 2013 and another Home Loan of K285,549.88 on 8th September, 2015. The loan facilities were secured by a Legal Mortgage over Stand No. 6508 Kitwe and an Equitable Mortgage over Stand No. 9751/CL/1 Ndola.

It is common cause that the terms and conditions of the Home Loans are contained in Facility Letters and Loan Agreements dated 21st March, 2013 and 8th September, 2015 which were duly executed by both the Applicant and the Respondent. It is also common cause that the Respondent was in default in paying the monthly mortgage instalments as and when they fell due. The Respondent admits that he was in default and states thus at paragraph 8 of his Affidavit in Opposition filed into Court on 7th June, 2017:

“That owing to loss of salaried income and loss of tenants in the properties that serviced the loan repayments, I was unable to meet my obligations regularly to the Applicant from March, 2014 to December, 2016 which in total accrued to ZMW475,000.00.....”

It is not in dispute that on 22nd December, 2016 the Applicant granted the Respondent a Short Term Temporary Overdraft Facility for K478,000.00 to enable him bring his Home Loan arrears up to date.

The Respondent's main gist of opposition is that the Applicant having granted the Respondent an Overdraft Facility executed on 22nd December, 2016 for the sum of K478,000.00 to bring arrears up to date, the Applicant restructured the Home Loan. The Home Loan Account was normalized with respect to the outstanding amount, and as such there is no default on which the Applicant can in good faith make the application for Foreclosure and Sale herein.

It is contended that the Applicant's application is unreasonable and contrary to the principles of equity. That if the Applicant was acting in good faith, they would have notified the Respondent that action was commenced for foreclosure before entering into another agreement to restructure the loan repayments. That an application for foreclosure before the due date can only be made where a mortgagor defaults. In this instance, the default was remedied by the Respondent, thereby restoring the Respondent's right to redeem his property.

I find it necessary from the outset to state that the transaction entered into between the Applicant and the Respondent on 22nd December, 2016 was not a restructuring or re-financing facility as asserted by the Respondent. This contention by the Respondent is a misconception. It is trite that a refinance or restructure occurs when a lender revises a payment Schedule for repaying the debt.

Mechanically, the old loan is paid off and replaced with a new loan offering different terms. The lender extends the maturity date of the loan or credit facility. Refinancing or loan restructuring refers to

the replacement of an existing debt obligation with another debt obligation under different terms and the parties are the same. That is to say, a refinancing or restructuring takes place when the lender agrees to replace an existing debt with a new debt under different terms. The credit facility as originally arranged between the lender and the borrower, ceases to exist in the original format and is recreated in the refinanced or restructured facility.

In *casu*, the Overdraft Facility of K478,000.00 availed to the Respondent only dealt with arrears not paid by the Respondent to the Applicant from March, 2014 to 31st December, 2016. The said Overdraft Facility did not deal with the actual Home Loan facility which remained in place on its original terms and conditions. The Home Loan continued to exist in its original format as agreed by the parties when they executed the Facility Letters and Loan Agreements on 21st March, 2013 and 8th September, 2015. The repayment period remained as per Facility Letter of 8th September, 2015.

From the foregoing, I find that the Short Term Temporary Overdraft Facility that the Applicant granted to the Respondent on 22nd December, 2016 did not restructure the Home Loan.

Learned Counsel for the Respondent argued that the Home Loan Account has been normalized with respect to the outstanding amount, and as such there is no default on which the Applicant can make the application herein. That as at March 2017 the overdraft

Facility of K478,000.00 had been credited to the Home Loan, thereby updating the Respondent's default.

It is common cause that on 8th November, 2016 the date on which the Applicant issued the Originating Summons herein the Respondent was in default and therefore the Applicant was entitled to bring these proceedings as the Respondent's legal right of redemption ceased at the occurrence of the default.

The Facility Letter dated 22nd December, 2016 provides inter alia that the Respondent gave assurances that the monthly repayment plan on the Home Loan will be adhered to plus the Overdraft will reduce monthly until repaid (Clause 6.2). The Home Loan was to continue being serviced monthly and to be current. This means that effective 31st December, 2016 the Respondent was required to pay monthly instalments of K36,157.12 for 5 months made up of K26,157.12 monthly Home Loan repayment and K10,000.00 payment to reduce the Overdraft. On 31st May, 2017 the Respondent was to pay a total of K816,157.12 being K26,157.12 monthly Home Loan repayment and K790,000.00 in full settlement of the Overdraft Facility.

I refer to Clause 6 of the Facility Letter for the Overdraft which provides as follows:

“6.1 The Overdraft Facility will reduce on a monthly basis but no later than the last business day of the month in

accordance with monthly income deposited by you. The minimum reductions per month are as follows:

31/12/16 – K10,000.00

31/01/17 – K10,000.00

28/02/17 – K10,000.00

31/03/17 – K10,000.00

30/04/17 – K10,000.00

31/05/17 – K790,000.00 (Proceeds from House Sale)”.

A perusal of the Bank Statement on the Overdraft Facility exhibited as “CJK11a” to the Affidavit in Opposition reveals that the debt balances were as follows:

30/03/2017 – K493,570.22 –

30/04/2017 – K459,239.05 –

31/05/2017 – K442,103.85 –

It is clear that the Overdraft Facility was not settled in full by 31st May, 2017 as envisaged by the Facility Letter dated 22nd December, 2016 and as such the Respondent is in default.

A perusal of the Bank Statement of the Home Loan (or (Mortgage) exhibited as “CJK11c” to the Affidavit in Opposition shows that between 28th December, 2016 and 8th May, 2017 payments made by the Respondent were as follows:

28/12/2016 – K19,000.00

08/05/2017 – K50,000.00

It is clear that the Respondent was in default as he was not making the monthly instalments payments as stipulated by the Facility Letter dated 8th September, 2015. Between 28th December, 2016 and 8th May, 2017 the Respondent ought to have paid a total of K130,785.60 but he only paid K69,000.00 towards the Home Loan.

I therefore find that despite the sum of K478,000.00 arising from the Overdraft Facility having been credited to the Home Loan account the Respondent continued to be in default because he failed to meet the agreed monthly repayment instalments between December 2016 and 31st May, 2017.

The Overdraft Facility for K478,000.00 which was for a period of 6 months was premised on the house being sold and K790,000.00 Sale Proceeds being paid to the Credit of the Overdraft Facility account on 31st May, 2017. As no house was sold by the Respondent it is not surprising that he was in default on making the monthly instalment payments on the House Loan as well as Settling the Overdraft Facility on 31st May, 2017.

The case of **EMERY V UCB BANK PLC (6)** cited by the Respondent in which the Bank was stopped from enforcing its security without further notice to the borrower following interim agreements to reschedule payments does not apply to the case before the Court because the repayments of the Home Loan were not rescheduled

and in any event the Respondent defaulted in making repayments of both the Home Loan and the Overdraft Facility.

It is my considered view that the authorities relating to misrepresentation cited by the learned Counsel for the Respondent do not apply to this case. There was no misrepresentation by the Applicant as the Overdraft Facility was effected as agreed between the parties.

I am also of the considered view that even if the Overdraft Facility of K478,000.00 were to be considered to be a restructure of the Home Loan this would not have been a bar to enforcement of the Applicant's rights with respect to the Home Loan and also the Overdraft Facility. In this respect Clause 6.6 of the Facility Letter dated 22nd December, 2016 relating to the Overdraft Facility provides that:

“Court action will proceed until judgment at which point the repayment plan will be converted into consent”.

Further Clause 2.2 of the Facility Letters dated 21st March, 2013 and 8th September, 2015 and Clause 11.2 of the Loan Agreements cited above give the Applicant Bank the right to demand full payment of the loan before the expiry date. Clause 17.1 of the Loan Agreements also cited above entitles the Applicant to enforce any right, power or remedy available to it at any time and despite any delay or omission in so exercising such right, power or remedy.

It is common cause that on the default of the Respondent in paying the Home Loan instalments as and when they fell due, the Respondent's legal right of redemption ceased. Consequently the Applicant was entitled to bring these proceedings.

The submission by the Respondent's Counsel that the Applicant's application to foreclose and sale the mortgaged properties which they are benefiting from flies in the teeth of the principles espoused in the Code of Banking Practice and the rules of equity is contrary to the evidence on the record. On 4th March, 2016 the Respondent wrote to the Applicant Bank thanking the Bank for support given to him and requesting that he be allowed to sell Stand No. 6508 Kitwe. The letter exhibited to the Affidavit in Opposition marked "CJK6" states that:

"4th March 2016

P.O. Box 51074
Lusaka
ZAMBIA

The Loan Manager
FNB Zambia
Head Office
Lusaka
ZAMBIA

Attn.: Mrs. Jane Mwila

Dear Madame,

REF: MORTGAGE CLEARANCE

Allow me to thank you for the support I continue to receive from the Bank. Your customer engagement is second-to-none and interactions with your team pleasing.

I write on the subject of my Mortgage facilitate with your selves. I would like to place my Security (House No. 6508, Riverside, Kitwe) on sale and utilize part of the proceeds towards settling the full balance on my mortgage facility.

I have consulted Estate Agents like Horizon Properties, Sherhourd Greene and others to appreciate the market prices and have them undertake the transaction on my behalf through your office.

The Banks approval to undertake this request will be appreciated.

Yours sincerely

Signed
Chabuka Kawesha

c.c. Legal Counsel, FNB Zambia, Lusaka"

the Respondent sought and obtained the Applicant's approval to sell Stand No. 6508 Kitwe in March 2016 but he has been unable to sell it. The Respondent's application to foreclose, take possession and sell both Mortgaged Properties cannot therefore be said to be unreasonable or prejudicial to the Respondent.

The Respondent avers that his current ability and capacity to repay the Home Loan and the Overdraft Facility is a total of K23,000.00 per month. This means that he requires 85 months to settle the debt outstanding as at 2nd September, 2016. Given that interest continues to accrue the time he requires is much more than 85 months. I find and hold that there are no good and sufficient grounds advanced by the Respondent for the Court to grant him the equitable right to redeem.

It is clear from the record that the Respondent has no means to redeem the mortgages and that there are no reasonable prospects of the mortgages being redeemed within a reasonable time.

Having defaulted in his repayment obligations as admitted by himself the whole amount or sum due under the Home Loan became immediately payable. I find that the Respondent has no defence to the Applicant's claim given that inability to pay no matter what the reasons for such failure may be, has never been and is not a defence to a claim.

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 Bank against the Respondent for the sum of K1,947,947.29 being the sum owing as at 2nd September, 2016 with interest as agreed between the parties from 3rd September, 2016 to date of Judgment and thereafter at the average lending rate as determined by the Bank of Zambia.

It is ordered that the sum of K1,947,947.29 together with interest be paid within ninety (90) days from date hereof.

It is trite law that the mortgagee's remedies or reliefs indicated in the Originating Summons are cumulative. 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 AND CREATION**

ONE TRADING (ZAMBIA) LIMITED (9) is authority for this principle. It follows therefore that **all the reliefs sought by the Applicant in its Originating Summons are granted.**

In the event that the Judgment debt and interest remains unpaid at the expiry of the said period of 90 days, the Respondent shall deliver vacant possession of the Mortgaged Properties being Stand No. 6508 Kitwe and Stand No. 9751/CL/1 Ndola to the Applicant Bank who shall be at liberty to foreclose on both properties and exercise its right of Sale in relation to Stand No. 6508 Kitwe.

As regards Stand No. 9751/CL/1 Ndola over which the Applicant has an equitable mortgage, the Respondent must convey this property to the Applicant Bank unconditionally. In default the Deed of Transfer shall be executed by the Registrar of the High Court in terms of **Section 14 of the High Court Act, Chapter 27 of the Laws of Zambia.** The Applicant shall then be at Liberty to sell the said Stand No. 9751/CL/1 Ndola.

Costs are awarded to the Applicant Bank to be taxed in default of agreement.

Delivered at Lusaka the 17th day of January, 2018.



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WILLIAM S. MWEEMBA
HIGH COURT JUDGE