

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

2017/HP/1831

IN THE MATTER OF: ORDER 30 R 14 OF THE HIGH COURT RULES CAP  
27 AND ORDER 88 OF THE RULES OF THE  
SUPREME COURT (1999)

AND

IN THE MATTER OF: THIRD PARTY MORTGAGE RELATING TO STAND  
NO. 974/975 LUKANGA KABWE

BETWEEN:

MADISON FINANCE COMPANY LIMITED

APPLICANT

AND

TS GLOBAL ENTERPRISES LIMITED

1<sup>ST</sup> RESPONDENT

DANIEL SOKA BWALYA

2<sup>ND</sup> RESPONDENT

PAULINE MUBANGA

3<sup>RD</sup> RESPONDENT

Before Hon. Mrs. Justice A. M. Banda-Bobo on the 17<sup>th</sup> day of May,  
2019

FOR THE APPLICANT : Miss N. Mbuyi of Paul Norah &  
Associates

FOR THE RESPONDENTS: In Person

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J U D G M E N T

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**Cases referred to:**

1. Intermarket Banking Corp Zambia v Pricilla Kasonde Appeal No. 15/2009
2. Kalusha Bwalya v Chadore Properties and Ian Chamunora Nyalungwe Haluperi SCZ/8/296/2013;
3. Printing and Numerical Registrating Co v Sampson (1875) LR 19 Eq at 465;
4. S.Brian Musonda (Receiver of First Merchant Bank Zambia Limited) (In Receivership) v Hyper Food Products Limited, and Two Others [1999] Z.R. 124 (SCZ);
5. Zambia Export and Import Bank Limited v Mkuyu Farms Limited and Ellias Sypron and Mary Ann Langley Sypron(1993-1994) Z.R. 36;
6. Intermarket Banking Corp Zambia Limited v Pricilla Kasonde SCZ Judgment No. 44 of 2014;
7. Barclays Bank Plc v O'Brien (1993) 4 All ER 417;
8. Nkongolo Farms Limited v Zambia National Commercial Bank & Orthers (2007) Z.R. 149;
9. Galunia Farms Limited v National Milling Company Limited (2004) Z.R. 135;
10. Constantine Line v Imperial Smelting Corporation (1942) AC 154 at page 174;
11. Lewanika and Others v Chiluba (1998) Z.R. 79;
12. Anderson Namboora Mazora and Others v Levy Patrick Mwanawasa and Others (2005) Z.R. 138; and
13. Khalid Mohammed v The Attorney General (1982) Z.R. 49.

**Legislation and works referred to:**

- Halsbury's Laws of England, Fifth Edition, Volume 77
- Black's Law Dictionary 7<sup>th</sup> Edition by Bryan A. Garner

The Applicants instituted this action by way of Originating Summons against the Respondent on June, 2017 and sought the following reliefs: -

- (i) **Repayment of the sum of ZMW 201,972.89 together with interest at 50.28% secured by a Third Party Mortgaged over Plot/Stand No. 974/945;**



- (ii) An Order for foreclosure of the Mortgaged Property referred to Paragraph 1 hereof;**
- (iii) An Order for sale of Mortgaged Property;**
- (iv) The balance due in the event the mortgaged property is of less value than the loan obtained;**
- (v) Interest on the sums found due under (I) above at such rate and for such period as the court may deem fit;**
- (vi) Costs; and**
- (vii) Any other reliefs that the Court shall deem fit.**

The applicant by way of an affidavit sworn by Chaponda Kuwani deposed that the respondents obtained a Loan Facility from the applicant in the principal sum of ZMW. 150,000.00 on 7<sup>th</sup> March, 2017. He deposed that the said loan facility was secured by way of a Third Party Mortgage over Stand No. 974/975 Lukanga, Kabwe.

The deponent deposed that the respondents had since breached the loan agreement by not remitting the agreed upon instalments. He explained that the said loan was further secured by a personal guarantee by the 2<sup>nd</sup> Respondent who is a director in the 1<sup>st</sup> respondent.

He deposed that the respondents now owed the applicant the sum of ZMW, 201,972.89 inclusive of interest as at 16<sup>th</sup> October, 2017 at an annual interest rate of 50.28% and that the respondents have neglected to settle this amount

The deponent prayed that this court should order the respondents to pay the outstanding loan amount or in the alternative to order



for foreclosure, possession and sale of the properties offered as collateral for the loan the respondents obtained from the applicant.

The respondents, in an affidavit in opposition sworn by Pauline Mubanga deposed that at no time did she obtain a loan nor apply for one from the applicant. She explained that at no time did the respondents nor their agents ever explain to her the contents of the documents exhibited as "CK2" nor that it was a third party mortgage in which she was pledging her house. She claimed that she was unable to read or write. She deposed that the 2<sup>nd</sup> respondent was her son who never explained to her the purpose of the document she was signing but only explained that the document was meant for her son's business in the 1<sup>st</sup> respondent's company.

It was her deposition that she was advised by her advocates that the applicant was duty bound as the lender and entity preparing the Mortgage to educate her on the nature and consequences of the document she was signing. She further said that, had it been made known to her that she was pledging her house she would have not done so as she was far too advanced in age to gamble over the only asset she owned.

She prayed that this Court deny the reliefs sought by the applicant.

The applicant filed skeleton arguments in support of the originating summons on 23<sup>rd</sup> July, 2018. Counsel for the applicant Ms. Natalie Mbuyi, submitted that the applicant was claiming for the sum of Two Hundred and One Thousand Nine Hundred and Seventy-Two and Eighty-One Ngwee (ZMW 201, 972.81) inclusive of interest at 50.28% arising out of a mortgage that was secured



by a legal mortgage over stand No. 974/975 Lukanga, Kabwe, Central Province. She further submitted that the applicant was seeking the payment of the said sum or foreclosure, possession and sale of the property offered as collateral for money the respondent obtained from the applicant.

Ms. Mbuyi submitted that the 3<sup>rd</sup> respondent did execute the third party mortgage with full knowledge of her action and consequences and that she surrendered the certificate of title relating to the property pledged as security to the applicant.

Counsel referred to the case of **Intermarket Banking Corp Zambia v Pricilla Kasonde**<sup>1</sup> to support her argument that there was no undue influence on the 3<sup>rd</sup> respondent and that the applicant did explain the consequences of the third-party mortgage and the consequences of pledging her house as security. She explained that the applicant did discharge its duty to ensure that the 3<sup>rd</sup> respondent had adequate understanding of the nature and effect of the third party mortgage. As a result of the foregoing, she submitted that the 3<sup>rd</sup> respondent was bound by the terms of the mortgage. To support the foregoing, Counsel referred me to the case of: **Kalusha Bwalya v Chadore Properties and Ian Chamunora Nyalungwe Haluperi**<sup>2</sup>.

Miss Mbuyi submitted that the 3<sup>rd</sup> respondent had not brought out any evidence to demonstrate that she had been forced or tricked into signing the third party mortgage or that there was some fraud on the applicant which then would invalidate the third party mortgage. She argued that an analysis of the third party mortgage show that the 3<sup>rd</sup> respondent signed the mortgage in the presence



of her literate daughter and as such had an opportunity wherein she could be advised on the execution of the mortgage deed. Counsel further referred me to the case of **Printing and Numerical Registrating Co v Sampson (1875)**<sup>3</sup> wherein it was held that:

**“if there is one thing more than another which public policy requires, is that men of full age and competent understanding shall have the utmost liberty of contracts and that their contracts, when entered into freely and voluntarily, shall be sacred and shall be enforced by the Courts of Justice.”**

It was Counsel's submission that this Court had discretion to evoke **Rule 14 of Order XXX of the High Court Rules** Chapter 27 of the Laws of Zambia and **Order 88 Rule 1 of the Rules of the Supreme Court of England 1999 Edition** for the remedies therein having established that the third party mortgage was valid. Counsel also referred to the case of **S.Brian Musonda (Receiver of First Merchant Bank Zambia Limited) (In Receivership) v Hyper Food Products Limited, and Two Others (1999)**<sup>4</sup> to show that the Mortgagee's rights are cumulative and can be enforced all at once against the mortgagor.

The applicant sought leave of Court to call in a witness, which application I granted.

The applicant called Mr. Chaponda M. Kuwani, the legal recoveries and securities manager as a witness. It was his testimony that the 1<sup>st</sup> respondent applied for a loan from the applicant and was required to provide collateral for the loan. He said that after the loan was approved the respondent was required to provide the original title deeds. He explained that owing to the fact that the mortgage was provided by a third party, the 3<sup>rd</sup> respondent was



required to execute a mortgage deed as well as a consent form. He explained that the 3<sup>rd</sup> respondent went to the applicant's Kabwe branch accompanied by her daughter and in the presence of both staff she executed the said documents. He said upon execution of the said documents, the mortgage deed was registered at the lands and deeds registry at the ministry of lands.

Mr. Kuwani explained that prior to signing the said documents as per their standard procedure, the head of credit wrote to the 3<sup>rd</sup> respondent informing her of the consequences of pledging her property as collateral to secure the loan facility. He testified that the letter advised the party pledging the collateral to seek independent legal advice prior to pledging her property as collateral. He testified that the 3<sup>rd</sup> respondent appended her signature by thumb print on the documents owing to the fact that she was illiterate in the presence of her daughter and Madison staff at Kabwe branch. He said the letter on which she appended her thumb print explained that the 1<sup>st</sup> respondent had applied for a loan and that they were pledging her property as security to obtain a loan from the applicant. He said the letter explained that in case the 1<sup>st</sup> respondent did not meet the loan obligations the applicant reserved the right to commence legal proceedings for an order of possession over the property pledged as security.

The witness prayed that owing to the fact that the 1<sup>st</sup> respondent had breached the terms of the loan by not remitting the agreed instalments, the court orders the 1<sup>st</sup> respondent to pay the outstanding loan balance including interest at the agreed rate and



that in the event of failure to pay the said sum, to grant the applicant possession of the property pledged as collateral.

At the hearing, the applicant submitted that the plaintiff witness was supposed to be cross-examined but that the respondents failed to show up despite the applicant having been notified as proved by filing an affidavit of service dated 5<sup>th</sup> February, 2019. It was on this premise that the applicant requested to have their case closed.

I allowed them to close their case and I will render judgment in this matter based on the documents that the applicant had filed, namely its originating summons, affidavit evidence, viva voce evidence, skeleton arguments and list of authorities and on the basis that the 3<sup>rd</sup> respondent had filed its affidavit in opposition.

I have carefully considered the applicant's claims, the affidavits on record and oral submissions by the applicant.

It is not in dispute that the applicant commenced proceedings against the respondents by way of originating summons on 23<sup>rd</sup> October, 2017 claiming the sum of Two Hundred One Thousand Nine Hundred Seventy-Two and Eighty-One Ngwee (ZMW 201, 972.81) arising out of a grant of a loan to the respondents' request secured by a third party mortgage over Stand No. 974/975 Lukanga, Kabwe. it is further not in dispute that the 3<sup>rd</sup> respondent is the beneficial owner of the property pledged as collateral in this matter. It would appear from the record that this is as far as the parties could agree on the facts of this dispute. What is in dispute is that the 3<sup>rd</sup> respondent denies having at any time pledged her property for the subject loan. She alleges that



the applicant and/or its agents never explained to her the contents of the document exhibited as a third party mortgage in which she pledged her house, especially bearing in mind that she was illiterate. It is also disputed that the applicant explained its duties to the 3<sup>rd</sup> respondent or the consequences of the document she signed.

In my view the issues that fall to be resolved in this matter are whether there was a third-party mortgage executed by the 3<sup>rd</sup> respondent to secure the 1<sup>st</sup> respondent's loan and that she did so knowingly. Further whether the applicant applied undue influence on the 3<sup>rd</sup> respondent and whether the applicant herein is entitled to its claims.

According to **Black's Law Dictionary**, a mortgage is defined at page 1031, as follows;

**"A conveyance of title to property that is given as security for the payment of a debt or the performance of a duty and that will become void upon payment or performance according to stipulated terms."**

In **Halsbury's Laws of England** volume 77, fifth edition at paragraph 103, the authors state that:

**"A mortgage is a disposition of property as security for a debt. It may be effected by a demise or sub-demise of land, by transfer of a chattel, by assignment of a chose or thing in action, by charge on any interest in real or personal property or by an agreement to create a charge, for securing money or money's worth, the security being redeemable on repayment or discharge of the debt or other obligation. Generally, whenever a disposition of an estate or interest is originally intended as a security for money, whether this intention appears from the deed**



**itself or from any other instrument or from oral evidence, it is considered as a mortgage and redeemable.”**

The author further explains the characteristics of a mortgage to include the following:

**“A mortgage consists of two things, namely a personal contract for payment of a debt and a disposition or charge of the mortgagor’s estate or interest as security for the repayment of the debt; in equity the estate or interest so transferred is no more than a pledge or security. Every mortgage implies a debt and a personal obligation by the mortgagor to pay it.”**

The features of a mortgage therefore are the assigning of a property as security for payment, which assignment is rendered void upon payment of the money.

In casu, the applicant in its Originating Summons anchored its claim in exhibits “CK1”, “CK2”, and “CK3” respectively. In particular, exhibit “CK1” the facility letter which forms the basis of the legal mortgage. A perusal of the said exhibits reveals that by, “CK3” the 3<sup>rd</sup> respondent charged her property stand No. 974/975 Lukanga, situate in Kabwe in Central Province of Zambia, to the applicant, by way of a third party mortgage deed that was duly registered. The said Mortgage Deed declared that:

*“That if default shall at any time be made by the Mortgagor in paying the said rates, taxes and impositions or any of them or in keeping the said buildings and other improvements or any part thereof in such state of repair as aforesaid, the Mortgagor will repay to the Mortgagee on demand every sum, which under the power hereinbefore contained may be expended by the Mortgagee with interest thereon at the given Mortgagee of Zambia rate of interest per annum from the time of each payment and until repayment of all and every of such sums with interest thereon as aforesaid shall be a charge upon the said hereditaments”.*



Essentially, what emerges from the above is that a third party mortgage is a mortgage where there are three parties involved; one party known as Mortgagor gives property to second party called the Bank as security for a loan which is given to a third party known as Customer.

In the present case, the 3<sup>rd</sup> respondent denies having pledged her house or having executed the third party mortgage as security for the loan obtained on behalf of the 1<sup>st</sup> respondent. The 3<sup>rd</sup> respondent claims that she was illiterate and that at no time did the applicant nor the 2<sup>nd</sup> respondent explain to her the consequences of signing the third party mortgage. She said had someone explained the consequences she would never have pledged her only asset as security especially at such an advanced age as hers.

On the other hand, the applicant contends that the 3<sup>rd</sup> respondent did execute the third party mortgage with full knowledge of her actions and the consequences of pledging her house as security and this was explained to her fully. The applicant contends that there was no undue influence on her. Further, the applicant argues that it discharged its duty to ensure that the 3<sup>rd</sup> respondent had adequate knowledge and understanding of the nature and effect of the third party mortgage. Therefore, the applicant was of the view that the 3<sup>rd</sup> respondent was bound by the terms of the instrument she signed and that the respondents should pay the outstanding debt sums or in the alternative the court should order



foreclosure, possession and sale of the property offered as collateral for the loan the 1<sup>st</sup> respondent obtained.

In the present case it can be deduced through the facility letter marked as exhibits “CK1”, the third party mortgage deed marked as “CK2” and the testimony of the plaintiff witness who said that when the certificate of title was deposited with the applicant it was subsequently registered at the Lands and Deeds Registry at the ministry of lands because there was a third party mortgage created. This in my view is a clear indication that a contract for payment of a debt by the 1<sup>st</sup> respondent was entered and secured by a pledge from the 3<sup>rd</sup> respondent’s house as security for the repayment of the debt on behalf of the 1<sup>st</sup> respondent. I therefore find that there was a valid third party mortgage created by the 1<sup>st</sup> respondent and secured by a pledge over the 3<sup>rd</sup> respondent’s house Stand No. 974/975, Lukanga, Kabwe.

In the case of **Zambia Export and Import Bank Limited v Mkuyu Farms Limited and Ellias Sypron and Mary Ann Langley Sypron**<sup>6</sup> it was held that:

**“An agreement is signed freely if it is signed in the course of business practice and the respondent had a choice not to sign it.”**

In the case of **Intermarket Banking Corp Zambia Limited v Pricilla Kasonde SCZ Judgment No. 44 of 2014** the Supreme Court held that:

**“Nonetheless, the law requires that before accepting a third party’s security, where there is a relationship of trust and confidence between the borrower and the**



surety, a creditor must take steps to eliminate undue influence or misrepresentation.”

In the case of Barclays Bank Plc v O'Brien (1993) 4 All ER 417 Lord Wilberforce when discussing undue influence stated that:

“.....On the facts, the bank knew that the parties were husband and wife and should therefore have been put on inquiry as to the circumstances in which the wife had agreed to stand as surety for the debt of her husband. The failure by the bank to warn the wife when she signed the security documents of the risk that she and the matrimonial home were potentially liable for the debts of the company or to recommend that she take legal advice fixed the bank with constructive notice of the wrongful misrepresentation made by the husband to her and she was therefore entitled as against the bank to set aside the legal charge on the matrimonial home securing the husband's liability to the bank.”

The aforementioned principle was reiterated in the case of Nkongolo Farms Limited v Zambia National Commercial Bank Limited and Others (2007) Z.R. 149 where the Court held that:

“The law imposes on a creditor a duty to take steps to ensure that not only does a borrower or debtor not exercise undue influence and or make false misrepresentation to a surety, but also that the creditor has a duty to ensure that a surety has adequate



understanding of the nature and effect of the transaction in question.

The creditor has the obligation to inform itself as to whether or not there is a relationship of trust and confidence between the borrower and guarantor, and the attendant risk to abuse that the relationship. The Bank has the further obligation to ensure that the guarantee did not in any way exercise undue influence on the guarantor.”

Lastly in the case of Galunia Farms Limited v National Milling Company Limited (2004) Z.R. 135 the Court held that:

“The basis of estoppel is when a man has so conducted himself that it would be unfair or unjust to allow him to depart from a particular state of affairs, another has taken to be settled or correct.....in order to succeed under the doctrine of estoppel, there must be a representation of fact intended to be acted upon by the person to whom it is made; the person to whom it is made must actually act on the representation; and by so acting it must be to his detriment.”

In this case, the 3<sup>rd</sup> respondent avers that the applicant or its agents never explained to her the document exhibited as “CK2” as being a third party mortgage. The 3<sup>rd</sup> respondent contends that the applicant never took steps to establish that she had adequate information about the nature of the transaction, or that she understood the implication of offering her house as security for the debts of the 1<sup>st</sup> respondent company, or that the company’s director who was her son did not exert undue influence on her.



In my view the 3<sup>rd</sup> respondent willingly and voluntarily signed the third party mortgage deed exhibited as “CK2” in the applicant’s bundle of documents. The 3<sup>rd</sup> respondent therefore was well aware of the contents of the third party mortgage despite her being illiterate because she was accompanied by her daughter when she executed the mortgage deed. She was further advised through a letter (“CK1”) to seek independent legal advice. She claims in her affidavit that to the best of her knowledge the 2<sup>nd</sup> respondent advised her that the document she was signing was to help with his business in the 1<sup>st</sup> respondent company. That to me signifies that she was well aware of what was transpiring and should have refused to append her thumb print knowing fully well that she was pledging her house to help her son secure a loan for his business.

In applying Nkongolo Farms Limited v Zambia National Commercial Bank and Others (supra), Barclays Bank Plc v O’Brien (supra) and Intermarket Banking Corp Zambia Limited v Pricilla Kasonde (supra) it is trite that before accepting a third party’s security the bank must establish that there is a relationship of trust and confidence between the borrower and the creditor. In this case, it is clear that the applicant did discharge its duties in explaining the consequences of pledging her house as security for the loan borrowed by the facility letter dated 7<sup>th</sup> March, 2017 to eliminate undue influence or misrepresentation. Further, it is clear that the 3<sup>rd</sup> respondent never made any effort to bring her son or daughter and the 1<sup>st</sup> respondent to Court so that they could back up her assertion that she was never advised. This is because both the daughter and the son knew the steps the bank had undertaken to advise the 3<sup>rd</sup> respondent regarding the



consequences. If anything I believe her children are the ones who deceived her.

It is clear and I agree with Counsel for the applicant that the 3<sup>rd</sup> respondent has failed to demonstrate that she was unduly influenced at the time she executed the third party mortgage which led her to surrender the certificate of title relating to the property pledged as security to the applicant. It is therefore my considered view that the 3<sup>rd</sup> respondent failed to prove undue influence. I therefore find that there was no undue influence by the applicant when the 3<sup>rd</sup> respondent was executing the third party mortgage deed and that the applicant did discharge its duties in explaining the consequences of pledging her house as security for the said loan facility.

I am fortified in my finding as per the case of **Galunia Farms Limited v National Milling Company Limited**(supra) that the 3<sup>rd</sup> respondent is estopped from claiming that the applicant failed to discharge its duties in explaining the consequences of pledging her house as security for the 1<sup>st</sup> respondent's loan. I agree with the applicant that there was no undue influence, I therefore find that the 3<sup>rd</sup> respondent is bound by the terms of the third party mortgage deed in which she signed freely and voluntarily knowing the contents of the document.

There is a plethora of cases to support the principle that the burden of proof falls upon the party who substantially asserts the affirmative of the issue. See the cases of **Constantine Line v Imperial Smelting Corporation (1942)**<sup>7</sup>, **Lewanika and Others v Chiluba (1998)**<sup>8</sup>, **Anderson Kambela Mazoka and Others v Levy**



**Patrick Mwanawasa and Others<sup>9</sup> and Khalid Mohammed v The Attorney General<sup>10</sup>.**

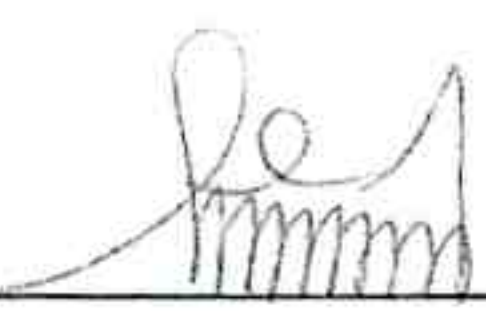
Accordingly, on the basis of the foregoing, I find that the third party mortgage is enforceable by the applicant. I further order that the respondents pay the outstanding debt sum and in the alternative I order foreclosure, possession and sale of the property offered as collateral for the loan the 1<sup>st</sup> respondent obtained.

In sum, all the applicant's claims succeed.

Each party to bear own costs.

Leave to appeal is granted.

**DELIVERED AT LUSAKA THIS 17<sup>TH</sup> DAY OF MAY, 2019**

  
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**MRS. JUSTICE A. M. BANDA-BOBO**  
**HIGH COURT**