

**IN THE HIGH COURT FOR ZAMBIA**

**2018/HP/1985**

**AT THE PRINCIPAL REGISTRY**

**HOLDEN AT LUSAKA**

*(CIVIL JURISDICTION)*



**IN THE MATTER OF:**

**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 RELATING  
TO HOLDING NO. 2018,  
KALUNDU RESETTLEMENT  
AREA, CHOMA LOCAL  
AUTHORITY IN THE SOUTHERN  
PROVINCE OF ZAMBIA IN THE  
NAME OF DEVELIA MWAKA  
MUKACIBUKE**

**IN THE MATTER OF:**

**FORECLOSURE AND  
POSSESSION**

**BETWEEN:**

**ZAMBIA NATIONAL BUILDING SOCIETY**

**APPLICANT**

**AND**

**ADEVELIA MWAKA MUKACIBUYE**

**RESPONDENT**

**BEFORE THE HON. JUSTICE G. MILIMO - SALASINI IN  
CHAMBERS ON THE 28<sup>TH</sup> DAY OF FEBRUARY, 2020.**

*For the Applicant: Ms. S.K Bwalya - National Legal Aid Clinic for  
Women*

*For the Respondent: Mr. Khunga - Messrs Barnaby and Chitundu  
Advocates*

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**RULING**

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**CASES REFERRED TO:**

- 1. Sanat Limited vs Shaileshkumar Suryakant Amin Appeal No. 146/2017*
- 2. Access Bank (Zambia) Limited vs Group Five/Zcon Business Park Joint  
Ventures (suing as a firm) SCZ/8/52/2014*
- 3. Mopani Copper Mines Plc vs Monlo Investments Limited Appeal No.  
36/2011*

**LEGISLATION REFERRED TO:**

- 1. Order 30 of the Rule 14 of the High Court Rules Chapter 27 of the Laws*

This is an application to set aside foreclosure and possession granted to the Applicant. This action arose out of a Credit Facility extended to the Respondent which created a Legal Mortgage dated 20<sup>th</sup> October, 2015 in favour of the Applicant by virtue of which the Respondent pledged Holding No. 2018 Kalundu Resettlement in Choma, Situate in the Southern Province of Zambia.

***(For the purpose of this ruling hereafter, the Applicant  
will be referred as the Respondent while the Respondent***



***will be referred as the Applicant respectively).***

The Applicant defaulted in her repayments of the principal sum and interest and the Respondent instituted proceedings to foreclose by way of originating summons pursuant to ***Order 30 of the Rule 14 of the High Court Rules Chapter 27 of the Laws of Zambia***. The court granted the application for foreclosure and possession on 13<sup>th</sup> March 2019. On 27<sup>th</sup> March, 2019, the Applicant filed an *inter parte* summons to set aside the writ of possession.

At the hearing of the application, Ms. S Bwalya Counsel for the Applicant informed the court that they wished to rely on their Affidavit in support filed on 5<sup>th</sup> June, 2019 especially paragraph 4, 5, and 6 and their reply filed in court on 9<sup>th</sup> September, 2019.

In opposition Counsel for the Respondent Mr. M. Khunga informed the court that they had filed an Affidavit in Opposition to the Summons issued on 31<sup>st</sup> July 2019 as deposed by Bwalya Mwanza of ZNBS. He submitted that the current application had no merit because firstly as deposed to in paragraph 7 of the Respondent's Affidavit, court process leading to the foreclosure was served on the Applicant on 30<sup>th</sup> November, 2018. He submitted that as such, the Applicant had more than enough time to seek services of legal counsel and to acquaint herself with the geography of the court premises to know the judge's chambers.

Secondly, Mr. Khunga submitted that, the order granted was not a Default Judgment as the matter was duly heard and

fully determined by this court and delivering its decision rendered this court factus officio. He further submitted that this court cannot re-open a matter which is closed. He added that the overtures made by the Applicant is in fact a veiled appeal and does not lie with this court because it is unattainable at Law. Counsel cited the case of ***Sanat Limited vs Shaileshkumar Suryakant Amin<sup>1</sup>***, ***Access Bank Zambia Limited vs Group Five/Zcon Business Park Joint Ventures<sup>2</sup>*** and ***Mopani Copper Mines Plc vs Monlo Investments Limited Appeal<sup>3</sup>*** as authorities on principle of the court being Functus Officio.

Thirdly, Counsel submitted that regarding the Affidavit in Reply filed into court on 2<sup>nd</sup> May 2019, there is a letter exhibited “DMM1” requesting for the restructuring of the loan facility which the deponent had with ZNBS. Counsel submitted that there was no corresponding letter to show that the contents of the “letter” was agreed to. He further submitted that an exhibit of an account statement by ZNBS cannot be used to show that there was an agreement to restructure the facility. He explained that the statement merely showed payments towards the Applicant’s indebtedment and the said indebtedment was already in the order to foreclosure, therefore the averment for restructuring should be disregarded as there was no agreement.

Lastly, Counsel submitted that the Applicant in her Reply at paragraph 6 has admitted her default. He concluded by asking the court to dismiss the application as it had no merit.



In reply, Ms. Bwalya submitted that this court was not functus officio as deposed of in *Paragraph 9* of their Affidavit. Counsel submitted that despite the Applicant being served with court documents on 30<sup>th</sup> November 2018, the Applicant had not retained counsel until June, 2019 which caused Counsel to follow up as soon as possible. She further submitted that it would be an injustice to argue that the Applicant was served in 2018 bearing in mind that she was a lay person who could not afford to retain Counsel. Counsel concluded by stating that they believe that this is a proper case for setting aside the order for possession and foreclosure.

I have considered the submissions advanced by counsel for the applicant and for the respondent. The provision which provide this application is made is order 47/1/8 of the Rules of the Supreme Court (White Book) which provides thus: -

***“Setting aside execution. - This may be done where execution has been improperly issued, even after execution has been levied.”***

In the case of ***Sunday Kawayya vs First Alliance Bank Zambia Limited***, the Supreme Court stated:-

***“there may be cases where the harshness of an execution and its harmful consequences can be avoided without keeping the creditor out of his money and while ensuring that the money is recovered within a reasonable period. This facility is not available as a matter of course, the debtor***

***should make out a good case for instalments which can be a sufficient reason or special circumstances.”***

From the above authorities, I can only grant the application for a stay if I am of the opinion that there some irregularities in the foreclosure process that would make the sale void, or there has been non-compliance with the terms of the mortgage that might result in an inadequate sale price. Further in my view, the respondents have not shown seriousness in unduly redeeming the mortgage, that is, providing sufficient ground which amount to special circumstances for me to grant the stay. I therefore think this is an improper case for granting this application and I accordingly dismiss the application with costs to the Respondent.

Leave to appeal is granted.

**Delivered at Lusaka on 28<sup>th</sup> February, 2020**



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**G. MILIMO - SALASINI  
HIGH COURT JUDGE**