

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

**2019/HP/1310**



**IN THE MATTER OF:**

**ORDER 50 RULE 9A OF THE RULES OF  
THE SUPREME COURT 1965 (1999  
EDITION).**

**AND**

**IN THE MATTER OF:**

**ORDER 88 RULE 5A OF THE RULES OF  
THE SUPREME COURT 1965 (1999  
EDITION).**

**AND**

**IN THE MATTER OF:**

**PLOT NO. L/MUNTE/69 SITUATE IN  
SERENJE CENTRAL PROVINCE IN THE  
REPUBLIC OF ZAMBIA.**

**AND**

**IN THE MATTER OF:**

**AN APPLICATION OF SALE OF  
CHARGED PROPERTY**

**BETWEEN:**

**GERHARDDOUS PRINSLOO**

**APPLICANT**

**AND**

**SAMUEL MWAPE SABI**

**RESPONDENT**

**Before the Hon. Mr. Justice M.D. Bowa in Chambers on 9<sup>th</sup> April 2020**

*For the Plaintiff: Mr. Yeta Central Chambers*

*For the Defendant: No appearance*

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## **JUDGMENT**

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### **Authorities referred to**

1. *Clement Chunga and Hilda Chunga vs Halikunda (2002) ZR SCZ no 3 of 2002*
2. *RSC of England 1999 edition Order 50 rule 9 (A) and Order 88 rule 5(A)*

The Applicant commenced this action by originating summons dated 16<sup>th</sup> August 2019 for the determination of the following questions.

- 1. Whether or not this honourable court ought not to order that the charging order dated 9<sup>th</sup> July 2019 be enforced by the sale of the property charged there under.*
- 2. Whether or not this honourable court ought not order that the Respondent do pay the costs of this application and incidental to these proceedings.*

The affidavit in support of even date was sworn by Gerharodus Prinsloo the Applicant herein. He deposed that he commenced an action against the Respondent under cause no 2018/HPC/286 from which he obtained a judgment in default of appearance and defence on 26<sup>th</sup> September 2018 in the sum of K600, 000 together with interest and costs. He duly informed the Respondent about the judgment through his advocates and attempted to enforce the judgment by a writ of *fifa*. However, that this failed as the Sherriff of Zambia could not locate the Respondent's premises confirmed by the Sherriff report exhibited "GSP-2."

However he believed based on advice from his advocates that a search at lands revealed that the Respondent actually has real property within jurisdiction being Lot No. L/MUNTE/69 situate at Serene Central Province in the Republic of Zambia and further that he could enforce his judgment by way of a charging order. Exhibited "GSP-3" is a copy of the lands search form. Further that by a charging Order and Notice to show cause dated 15<sup>th</sup> March 2019 it was ordered that the property known as Lot No L/MUNTE/69 situate in Serene Central Province in the Republic of Zambia do stand charged with the payment of K600,000 together with costs and interest returnable on the 8<sup>th</sup> May 2019. Exhibited "GJP-4" is a copy of the charging Order and Notice to show cause.

It was deposed further that the charging order and Notice to show cause was made absolute on the 9<sup>th</sup> of July 2019 by an order of Lady Justice I.Z Mbewe and duly registered at Ministry of Lands as per copy marked "GLP-5". The Applicant averred that to date the entire judgment sum of K600, 000 together with interest and costs under cause 2019/HPC/288 remains unpaid. Further that the outstanding balance as at date of affidavit stood at K724500

inclusive of the pre and post judgment interest at 15.50% and 20.79% respectively.

It was averred further that the Respondent is the beneficial owner of the said property known as Lot No. L/MUNTE/69 Serenje and the charging order was effected and duly registered on 10<sup>th</sup> July 2019. It was deposed further that as far as is known to the Applicant there are no encumbrances on the property charged. The Applicant proposes that the sale of the property charged be by public auction to the best bidder. The Applicant believed this to be a proper case in which the court ought to exercise its inherent power and grant the order sought.

At the hearing held on 15<sup>th</sup> of November 2019 I allowed the Applicant to proceed with the application in the absence of the Respondent upon proof of service and being satisfied that the Respondent did not sufficiently excuse his absence. Counsel for the Applicant Mr. Yeta relied on the originating summons and affidavit in support dated 16<sup>th</sup> August 2019. He submitted that order 50 rule 9A as read with order 88 rule 5 (a) of the RSC clothes this court with authority to grant an order of sale of a charged property where

all other forms of execution have failed. He submitted that the affidavit in support clearly showed that a judgment was granted by Judge Mbewe on the commercial list exhibited "JP1."

An attempt at execution by writ of *fifa* was made which was followed by a Sheriff's report showing a failure to execute. It was submitted further that the affidavit further exhibits "GJP3" which is a lands print out confirming that the Respondent has a beneficial interest in the land identified. Exhibit "GJP4" and "GJP5" therefore show that the property was duly charged after the Respondent failed to report and show cause why the property should not be sold. He added that as things stand the Respondent was indebted the sum of K724500 inclusive of pre and post judgment interest which he has failed to liquidate in over 2 years.

It was against this background that counsel prayed to have the property known as L/MUNTE/69 situate in Serenje Central province sold so as to allow the Applicant enforce his judgment and reclaim his dues in the interest of Justice.

I have considered the originating summons the affidavit in support and submissions by counsel. This action is brought to order 50 rule

9 (a) of the RCS of England 1999 edition. The order makes provision for the enforcement of charging orders by sale and stipulates that proceedings for such enforcement must be commenced by originating summons. The rule also has elaborate provisions on the powers of the court to impose charging orders and what properties or assets may be charged. Order 50 rule 9(a) specifically mentions that the provisions of order 88 shall apply to all such proceedings.

For ease of reference, order 88 rule 5 (A) (2) provides that

***“(2) The affidavit in support of the originating summons must -***

***(a) Identify the charging order sought to be enforced and the subject matter of the charge;***

***(b) Specify the amount in respect of which the charge was imposed and the balance outstanding at the date of the affidavit;***

***(c) Verify, so far as known, the debtor's title to the property charged;***

***(d) identify any prior incumbrancer on the property charged stating, so far as is known, the names and addresses of the incumbrancers and the amounts owing to them;***

***(e) set out the plaintiff's proposals as to the manner of sale of the property charged together with estimates of the gross price which would be obtained on a sale in that manner and of the costs of such a sale; and***

***(f) where the property charged consists of land in respect of which the plaintiff claims delivery of possession -***

***(i) give particulars of every person who to the best of the plaintiff's knowledge is in possession of the property charged or any part of it; ...”***

I have found it necessary to reproduce the relevant portion of the rule to show the extent of what is expected to be included in the affidavit in support of the originating summons for the application under consideration in this matter. It is clear to me that the law seeks to protect third party interests and the need for clarity on the extent of the judgment debtors own interest in the charged property. The Supreme Court in the case of **Clement Chuugu and Hilda Chuuga vs. J. J Hankwenda**<sup>1</sup> in fact ruled that the use of this Order to enforce a Charging Order by sale actually places the judgment creditor in the same position as a mortgagee in possession with his attendant responsibilities.

Importantly the learned authors of the White book state that the purpose of rule 5A is threefold:

***“first to enable the court to Judge whether there is sufficient equity in the property for the charge to justify ordering a sale. Secondly to ensure that if possible, the court will be in possession of sufficient evidence at the time of first appointment under the originating summons to make an***

*immediate order for sale without the need for further subject to the charging order, as to encumbrances or as to amount and sum due. Thirdly to ensure that the rights of third party occupiers are protected.”*

A quick perusal of the affidavit in support of the application confirms that it does sufficiently meet the requirements of order 88 5 (A) as set out above. The affidavit reveals the background to the obtaining of the charging order and in fact exhibits such order. It goes further to confirm the Respondent is the beneficial owner and hence has sufficient equity in the property charged.

No known encumbrances or third party interests are disclosed and in compliance with order 88 5(a) (d) there is a proposal on the mode of sale by public auction to the best bidder. Having been satisfied therefore that the requirements of Order 50 (9) A as read with order 88 rule 5 (a) have been met, I grant the order for the sale of the charged property to recover the amount owed plus interest owed with costs to be taxed in default of agreement.

Dated at Lusaka the .....<sup>g<sup>n</sup></sup> day of .....<sup>April</sup>.....2020



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**HON. JUSTICE M.D BOWA**



