

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

2020/HPC/0197

BETWEEN:

BARCLAYS BANK ZAMBIA LIMITED

APPLICANT

AND

COPPERFIELDS MINING SERVICES LIMITED 1ST RESPONDENT

IRVIN CHILUFYA (Sued as Guarantor of

Copperfields Mining services Limited)

2ND RESPONDENT

PATRICIA KALYATI (Sued as Guarantor of

Copperfields Mining services (Limited)

3RD RESPONDENT

MUKANALA KAPITA

4TH RESPONDENT

VIJO LIMITED (Sued as Corporate Guarantor

of Copperfields Mining Services (Limited)

5TH RESPONDENT



Before Hon. Madam Mrs. Justice Irene Zeko Mbewe.

Appearances:

For the Applicant: Mr. C. Sianondo of Messrs Malambo & Company

For the Respondents: Ms. G. Kumwenda of Messrs Grace & Partners

J U D G M E N T

Cases referred to:

- S Brian Musonda (Receiver of First Merchant Bank Zambia Limited in Receivership v Hyper Food Product*

2. *Malambo v Patco Agro Industries Limited (2007) ZR 177*
3. *Kanjala Hills Lodge Limited v Stanbic Bank Zambia [2012] 2 ZR 285*

Legislation referred to:

1. *High Court Rules, Cap 27 of the laws of Zambia*

On 18th March 2020, the Applicant commenced legal proceedings by way of originating summons pursuant to *Order 30 Rule 14 High Court Rules, Cap 27 of the laws of Zambia* claiming for:

1. As against the 1st Respondent, payment of the outstanding sum of the principal amount of money which currently stands at ZMW453,064.82 to the Applicant under the respective covenants in the Legal Mortgage, Legal Charge, and facilities which the Applicant claims to consolidate, particulars of which are set out in the schedule below by virtue of which Stand No. 8721, City Centre Kitwe was demised unto the Applicant the hereditaments and premises being the unexhausted improvements comprised in and demised by the Lease (hereafter called “the Mortgaged Property”) to hold the same unto the Applicant for the residue unexpired of the said term thereof subject to the right of redemption to secure the repayment to the Applicant of the principal sums therein set out and payment in the meantime of interest currently at ZMW2,117,950.51 in accordance with the covenants for payment therein contained and such costs as would be payable if this claim were the only relief granted.
2. An Order that the said Mortgage and/or Charge may be enforced by foreclosure or sale.
3. Delivery by the 1st Defendant to the Applicant of possession of the mortgaged property.

4. As against the 2nd, 3rd, 4th and 5th Respondents (upon their respective undertakings as Guarantor to make good the Applicant's claim upon the default by the 1st Respondent) for an Order that the 2nd, 3rd, 4th and 5th Respondents do forthwith pay the Applicant the sum of ZMW463,064.82 and interest now due in the sum of ZMW2,117,950.51 in accordance with the covenants for payment contained in the Guarantee respectively.
5. Further and any other relief that the Court may deem fit.
6. As against the Respondents, jointly and severally, for an Order that they bear the costs of and incidental to this action in any event.

The supporting affidavit is deposed to by Beene Kaoma the Recoveries Manager in the Applicant Bank.

According to the Applicant, several facilities were availed to the 1st Respondent and was secured by a legal mortgage over Stand No. 8721 Kitwe to secure repayment of the principal sum of ZMW7,500,000.00 on the term loan and ZMW15,000,000.00 on the asset finance credit facility at an annual rate of 15.25 per centum and the facility currently stands at ZMW2,117,950.51. (Exhibits "BK1-4"). That the 1st Respondent is in default of payment of principal and interest hence the Applicant is entitled to the entire payment pursuant to the mortgage deed (Exhibit "BK5-6").

According to the Applicant out of the total amount advanced the 1st Respondent has only paid ZMW22,036,935.18 towards satisfaction of the consolidated amount advanced leaving a balance of ZMW2,117,950.51 and ZMW463,064.82.

In the meantime, the personal guarantees undertaken and made by the 2nd, 3rd, 4th and 5th Respondents are personally liable to pay the Applicant the full amount of moneys, liabilities and other obligations now due and owing (Exhibit "BK 8-10").

The Respondents did not oppose the application.

At the hearing Counsel for the Applicant relied on the affidavit evidence, skeleton arguments and list of authorities. Counsel for the Respondents argued that the amount owing is an interest computation by the Applicant which had no input from the 1st Respondent. In response, Counsel for the Applicant submitted that the evidence of the interest amount posited in the supporting affidavit be adopted.

I have carefully considered the Applicant's supporting affidavit, skeleton arguments and list of authorities. The Respondents did not file any opposing affidavit.

This matter is pursuant to *Order 30 Rule 14 High Court Rules, Cap 27 of the Laws of Zambia* which provides:

“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 moneys 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;

Redemption;

Reconveyance;

Delivery of possession by the mortgagee.

On the facts of this case, it is not in dispute that on 31st January 2013 a facility was availed to the 1st Respondent for the sum of ZMW7,500,000.00 for financing the construction of a commercial property in city centre Kitwe at the aggregate of the Applicant margin of 6% and the benchmark rate (Bank of Zambia policy rate). The facility was repayable in 74 instalments of ZMW101,351.36 payable on a monthly basis. It is not in dispute that the security was a mortgage over Stand 8721 Kitwe and personal guarantees of the 2nd, 3rd, 4th and 5th Respondents. (Exhibit “BK1, 8, 9 and 10”).

On 31st January 2013, a second facility of ZMW15,000,000.00 was availed to the 1st Respondent for purposes of financing the purchase of construction equipment (Exhibit “BK 3”). There was a continuing security of the pledged property including an assignment of receivables from a contract dated 29th October 2013 between the borrower and Road Development Agency.

The Applicant exhibited the 1st Respondent’s statement which I accept. The claimed amount is the outstanding interest payment of ZMW ZMW2,117,950.51 and the principal amount of ZMW ZMW453,064.82 totaling ZMW2,581,015.33. I do not accede to Counsel for the Defendant’s contention that interest was unilaterally computed by the Applicant in the absence of the 1st Respondent. Firstly, the issue only arose when Counsel was submitting and secondly it was never challenged by the 1st Respondent who failed or neglected to file any opposition to the Applicant’s originating summons.

A mortgagee has several remedies available namely payment of money secured, foreclosure, delivery up of possession of mortgaged property. These remedies are cumulative as espoused in the case of *S Brian Musonda (Receiver of First Merchant Bank Zambia Limited in Receivership v Hyper Food Product* ⁽¹⁾ cited by Counsel for the Applicant. Similarly, I am guided by the case of *Malambo v Patco Agro Industries Limited (2007) ZR 177* ⁽²⁾, where the Supreme Court held that:

“A mortgagee is at liberty to exercise his right to foreclose and sell the property in the event of default and failure by the mortgagor to redeem the mortgaged property.”

I am further guided by the Supreme Court in the case of *Kanjala Hills Lodge Limited v Stanbic Bank Zambia [2012] 2 ZR 285* ⁽³⁾ where the Court held that once there is a default on a condition, such as default of a repayment instalment, the mortgagee becomes entitled to pursue all the remedies available to it. In those circumstances, the Court in exercise of its power to afford the mortgagor the equity of redemption is duty bound to prescribe a reasonable period within which the mortgagee may wait before enjoying the fruits of its relief.

I adopt the same principles elucidated in the cited authorities as my own.

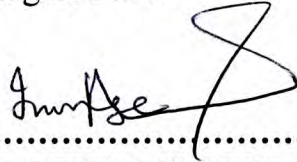
In the absence of any evidence to the contrary, I find that this is a fit and proper case to enter Judgment in favour of the Applicant against the 1st Respondent in the claimed sum of ZMW2,581,015.33 with interest at the short-term deposit rate from date of the originating summons to Judgment and thereafter at the commercial lending rate until full payment.

The 1st Respondent is to liquidate this amount within forty-five (45) days from the date herein and in default the Applicant shall be at liberty to foreclose and take possession of Stand 8721, Kitwe and exercise the power of sale without further recourse to this Court.

In the event that monies realized from the sale of the property is inadequate to cover the Judgment sum, the personal guarantees of the 2nd, 3rd, 4th and 5th Defendants shall be enforceable.

Costs to the Applicant to be taxed in default of agreement.

Dated at Lusaka this 28th day of August 2020.

A handwritten signature in black ink, appearing to read 'Irene Zeko Mbeve', written over a horizontal dotted line.

IRENE ZEKO MBEWE
HIGH COURT JUDGE