

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

2017/HKC/0017

In the matter of : **Order 30, Rule 14 of the High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia as read with Order 88 of the Supreme Court Rules, 1965**

In the matter of : **An application for delivery of possession foreclosure and sale of the property known as plot No. 11043, Solwezi**

BETWEEN:

ELPE FINANCE LIMITED

APPLICANT

AND

RICHARD MALWA

RESPONDENT



Before Lady Justice B.G. Shonga this 18th day of May 2020

For the Applicant, Mr. K. Mulenga, Messrs Ivan Mulenga & Co

For the Respondent, Messrs Chilupe & Permanent Chambers

JUDGMENT

Cases Referred to:

- 1. Magic Carpet Travel and Tours Vs Zambia National Commercial Bank Limited.**

2. *Kasabi Industries Limited V Intermarket Banking Corporation Limited Appeal No. 168/2009 (SC).*

Legislation and Other Material Referred To:

- 1. *Coote's Treatise on the Law of Mortgages, 9th Edition, Richard Holmes Coote, volume 1, 1927.***
- 2. *Megarry and Wade, the Law of Real Property, 7th Edition, (Paragraphs 1125-1127).***
- 3. *Section 66 (1), Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia.***

By Originating Summons dated 28 December, 2017 the Applicant took out a mortgage action against the Respondent. The Applicant seeks the following reliefs: (i) payment of K201, 713.16 being the outstanding balance on a loan that the Respondent allegedly obtained from the Applicant; (ii) an order for foreclosure, possession and sale of stand No. 11043, Solwezi; (iii) interest; and (iv) costs.

The summons was supported by an affidavit in support and one in reply deposed by Cyril Mununga, the branch Manager of the Applicant.

According to the affidavit in support, on 17th May, 2017 the Respondent applied to the Applicant for a loan of K120, 000 by

completing the Applicant's Short-Term Loan Application Form, exhibit marked "**CM-1**". The affiant avowed that he explained to the Respondent that the loan would only be granted if the Respondent agreed to sign a loan agreement prepared by the Applicant. The Respondent signed the Loan Agreement dated 9th June, 2017, exhibit marked "**CM-2**", and obtained the loan in the sum of K120, 000 from the Applicant.

On the same date, the Respondent deposited Title Deeds to Stand no. 11043, Solwezi as security for the loan. A Memorandum of Deposit of Title Deeds was executed in favour of the Applicant, exhibit marked "**CM-3**". Thereafter, the Applicant registered its interest on the property by lodging a caveat at the Lands and Deeds Registry as evidenced by exhibits marked "**CM-5**" collectively.

It was deposed that as at the date of the Originating Summons, the Respondent had only paid the sum of ten thousand Kwacha (10,000), leaving an outstanding balance of K201, 713.16, illustrated by the loan statement, exhibit marked "**CM-4**".

In response, the Respondent filed an Affidavit in Opposition on 12th February, 2018. In his affidavit, he refuted having obtained the loan from the Applicant. He attested that the loan was obtained by a company known as Calamus Enterprises, in which he is a director. However, the Respondent acknowledged that he provided security by depositing Title Deeds relating to his property Stand No. 11043 Solwezi and that he executed a Memorandum of Deposit of Title Deeds.

According to the Respondent the agreed interest rate under the loan was 10% for a period of 3 (three) months as demonstrated by exhibit marked "RM1", Short Term Loan Application Form. He avowed that on 9th June, 2017 he was directed by the Applicant to sign a loan agreement bearing an interest rate of 120% per annum, which interest rates were not explained to him. In addition, the affiant deposed that the neither the Loan Agreement nor the security were registered. Moreover, it was deposed that the Applicant failed and neglected to provide, in the Originating Summons and supporting affidavit, details relating to the amount advanced, the agreed periodic

payments required and the amount of interest or installments that were in arrears.

I have contemplated the claims by the Applicant in the light of the law and affidavit evidence adduced before Court. The first issue that I considered was whether the Respondent did in fact obtain a credit facility from the Applicant. I answer this in the affirmative based on the exhibited Application Form, "**CM-1**" and the Loan Agreement, "**CM-2**". I observed that under the Loan Application Form, the application was made in the name of the Respondent and not Calamus Enterprises. Further, the Loan Agreement, reads, in part, as follows:

*"This Agreement is made... between Elpe Finance Limited...and **Malwa Richard** (hereinafter called the "Borrower"). (Court emphasis)*

The agreement does not refer to Calamus Enterprises as the Borrower. Additionally, the Respondent is not only reflected as Borrower, but he executed the Loan Agreement in that capacity. In light of the foregoing, I indubitably concluded that the Respondent was and remains the sole Borrower.

The second issue that I pondered was whether the Respondent defaulted in complying with the Loan Agreement. I studied the Loan Statement of account, exhibit "**CM-4**". My analysis of the Statement of Account was that the Applicant disbursed a loan of K120, 000.00 on 9th June 2017 to the Respondent. The Statement also revealed that the Respondent made one repayment of K10,000.00 on 8th July, 2017, being the only reflected repayment before the expiry of the 3-month loan tenure. The tenure expired on 7th September, 2017. In his affidavit in Opposition, the Respondent affirmed that the loan tenure was 3 months. It is not disputed that the loan has not been fully settled. In my view, failure to settle the repayment obligation within the agreed tenure is tantamount to default. I therefore find that the Respondent defaulted and is indebted to the Applicant to the tune of K201,713.16 as at 28 December, 2017.

Having established default, I turned to consider whether the Applicant held a viable security. The affidavit evidence before Court is that the Respondent pledged his property to the Applicant as security. The Respondent not only deposited Title Deeds, but also

executed a Memorandum of Deposit of the said Title Deeds. Consequently, it is with ease that I find that the Title Deeds were in fact surrendered for the purpose of providing security for the loan.

I have also considered the nature and rights that attach to a pledge of property by way of deposit of title deeds. The learned author of **Coote's Treatise on the Law of Mortgages, 9th Edition, Richard Holmes Coote, volume 1, 1927**, made the following observation at page 168:

"A deposit of title deeds by the owner of freeholds or leaseholds with his creditor for the purpose of securing either a debt antecedently due, or a sum of money advanced at the time of the deposit operates as an equitable mortgage or charge, by virtue of which the deposittee acquires, not merely the right of holding the deeds until the debt is paid, but also an equitable interest in the land itself".

In terms of import, the Supreme Court in the case of **Magic Carpet Travel and Tours Vs Zambia National Commercial Bank Limited**¹ held as follows:

"On the last issue of an equitable mortgage, the position at common law is that once a borrower has surrendered his title deed to the lender as security for the repayment of a loan, an equitable mortgage is thus created; the borrower, in such a relationship, cannot deal with the land without the knowledge and approval of the lender whose interest in the land takes precedence. One of the shortcomings of an equitable mortgage is that it is not registered in the Lands and Deeds Registry as an encumbrance against the land; the relationship between the lender and borrower is one that is based on mutual trust between the two".

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Given the above pronouncement, I am of the settled view that the deposit of title deeds relating to plot No. 11043, Solwezi by the Respondent to the Applicant created an equitable mortgage in favour of the Applicant.

The next question that begged rumination was, what are the remedies available to a holder of an equitable mortgage where the borrower defaults?

According to the erudition of the learned authors of *Megarry and Wade, the Law of Real Property, 7th Edition, (Paragraphs 1125-1127)*, the remedies exercisable by an equitable mortgage are restricted to the following:

1. Foreclosure, being the primary remedy of an equitable mortgagee since the mortgagee has no legal estate. In this instance, the Court order absolute will direct the mortgagor to convey the land to the mortgagee unconditionally, that is, free from any right to redeem.
2. Appointment of a receiver, being the right vested in an equitable mortgagee to have a receiver appointed by the Court in a proper case.

Aside identifying the available remedies, the erudite specify the remedies which are not available to an equitable mortgagee, namely:

- i. The statutory power of sale, which applies only where the mortgage was made by deed; and
- ii. The right to take possession, which is generally not available because an equitable mortgagee has no legal estate.

The above erudition is consistent with **Section 66(1) of the Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia** and the holding of the Supreme Court in the case of **Kasabi Industries Limited V Intermarket Banking Corporation Limited Appeal No. 168/2009** (4) where it was held as follows:

"...it is clear that an equitable mortgagee does not have power to sell the mortgaged property as a way of enforcing the mortgage. He however has the right to obtain an Order of Court for Foreclosure and once the property is foreclosed, the mortgagor's right of redemption is extinguished and the property must be conveyed to the mortgagee by the mortgagor unconditionally."

Section 66(1) of the Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia provides that the right to sell a mortgaged property is only exercisable where the mortgage is by deed.

In terms of the application of interest, the agreed annual contractual interest rate stipulated in the Loan Agreement was 120%. The Respondent has not assisted the Court with any legal basis to fault the application of agreed contractual interest. As such, contractual interest shall be upheld.

In applying germane jurisprudence, I take the position that the Applicant, being an equitable mortgagee, is only entitled to an order for foreclosure. At this stage, the Applicant is not entitled to an order for possession or the right to exercise a power of sale of the pledged property. Accordingly, Judgment is entered in favour of the Applicant as follows:

1. Order of Foreclosure nisi: The Respondent shall, within 30 days of this Judgment, pay the Applicant the outstanding balance of ZMW 201,713.16, being the Judgment Debt, which is inclusive of contractual interest owing as at 28th December, 2017.
2. The Judgment Debt shall attract interest to be applied at the prevailing average short-term deposit-rate per annum from the date of the Originating process to date of Judgment and thereafter at 10% per annum until full settlement.

3. Foreclosure absolute: Should the Respondent fail to pay the Judgment Debt and interest due to the Applicant within 30 days of the date of Judgment, foreclosure shall be rendered absolute and the Respondent shall convey the mortgaged property to the Applicant unconditionally, who shall then be at liberty to take possession and exercise its right of sale;
4. Costs: costs of and occasioned by these proceedings shall be borne by the Respondent, such costs to be taxed in default of agreement.

Dated this 18th day of May, 2020



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B. G SHONGA

