

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

2020/HCP/0033

IN THE MATTER OF: ORDER 88 OF THE RULES OF THE
SUPREME COURT, 1965 (WHITE BOOK)
RSC, 1999 EDITION, VOLUME 1

IN THE MATTER OF: ORDER 30 RULE 14 OF THE HIGH COURT
RULES CHAPTER 27 OF THE LAWS OF
ZAMBIA

IN THE MATTER OF: A SECOND RANKING THIRD PARTY
MORTGAGE CREATED OVER
SUBDIVISION "E" OF STAND NO. 12755,
LUSAKA

IN THE MATTER OF: RETENTION OF OWNERSHIP OF 24XNEW
2018 FLATDECK TRAILERS

IN THE MATTER OF: FORECLOSURE OF PROPERTY A SECOND
RANKING THIRD PARTY MORTGAGE
CREATED OVER SUBDIVISION "E" OF
STAND NO. 12755, LUSAKA PLEDGED AS
SECURITY TO SECURE FINANCING
FACILITIES HEREIN

BETWEEN:

ROUTE QUEST (PTY) LIMITED
HENRED FRUE HAUF ZAMBIA LIMITED

1ST APPLICANT
2ND APPLICANT

AND

SWIFT CARGO SERVICES LIMITED
GOODWARD MULUBWA

1ST RESPONDENT
2ND RESPONDENT

Before the Honourable Madam Justice Mrs. Irene Zeko Mbewe

Appearances

For the Applicant : Mr. Chanda/Mr. Simunyola of Messrs Eric Silwamba,
Jalasi, Linyama

For the Respondent : N/A (Messrs Sinkamba Legal Practitioners)

J U D G M E N T

Cases Referred to:

1. *Stanley Wilde (1899) 2 CH 474*
2. *Malambo v PATCO Agro Industries [2007] ZR 177*
3. *Kanjala Hills Lodge Limited and Another v Stanbic Zambia Limited Appeal
No 46/2010*

Legislation referred to:

1. *High Court Rules, Chapter 27 of the Laws of Zambia*
2. *Rules of the Supreme Court, 1999 Edition*
3. *Megarry and Wade, The Law of Real Property, by Charles Harpum*

By way of originating summons, the 1st and 2nd Applicants claim for-

1. *Immediate payment of all monies due which as at 10th June 2019 stood at Two Hundred Forty Five Thousand Three Hundred Ninety Four Dollars and Seventeen Cents (US\$245,394.17) interest thereon, costs and other charges due and owing to the Applicant from the 1st Respondent under Master Lease Agreement for a short term asset - finance approval – 24 X New 2018 Flat Deck Trailers dated the 14th day of December 2018 secured by a Second Ranking Third Party Mortgage executed by the 1st and 2nd Respondents over subdivision 'E' of Stand No. 12755, Lusaka.*
2. *An Order for foreclosure and sale of the mortgaged property by the Applicant or its duly authorized Agents.*
3. *An Order for delivery of vacant possession of the mortgaged property by the 1st and 2nd Respondents to the Applicant.*
4. *Further or other relief.*
5. *Costs and other charges incurred by the Applicant.*

The supporting affidavit is deposed to by Jasper Christoffel Jave Van Rensburg, the Country Director or duly appointed representative of the 1st Applicant.

According to the deponent, by a Master Lease Agreement and Short Term Asset Finance Approval for 24 X New 2018 Flatdeck Trailers dated 14th December 2018 between the parties, the 1st Applicant advanced to the 1st Respondent loan amounts

up to US\$639,976.60. As security for the supply of the said 24 X NEW 2018 Flatdeck Trailers, the 1st Respondent executed a second ranking third party mortgage over S/D 'E' of Stand No. 12785, Lusaka registered to the 2nd Respondent in favour of the 1st Applicant (Exhibit "JCJVR 2"). It is stated that on 6th November 2018, the parties executed a Cession of Book Debt (Memorandum of Agreement) as further security (Exhibit "JCJVR3").

According to the deponent, the 1st Respondent's account in respect of the loan stands at US\$245,394.17 with interest due and owing to the 1st Applicant. It is the deponent's belief that the Respondent has no defence.

The application is opposed by way of affidavit deposed to by Goodward Mulubwa the 2nd Respondent herein and Executive Chairman of the 1st Respondent Company.

It is deposed that the Respondents herein have made payments to the 1st Applicant amounting to about US\$336,918.00 thereby reducing its indebtedness.

According to the deponent, it entered into an Agreement with Marks International Limited to carry out rehabilitation of the Ndola-Mufulira-Mukambo Roads (Exhibit "GM1"). It is stated that payment for this project has not been recovered from the Road Development Agency through the National Road Fund Agency resulting in the 1st Respondent's liquidity problems. Due to this state of affairs, it is stated that this has led to the 1st Respondent defaulting on its monthly obligations to the 1st Applicant and other creditors.

According to the deponent, it was agreed with the Applicant that the 1st Respondent instructs the Road Development Agency through the National Road Fund Agency to make payments directly to its creditors and that the Applicants agreed not to take any action against the 1st Respondent so as to allow payments to be made as

proposed. The deponent exhibited the assignment of payments directly to creditors (Exhibit “GM2-3”).

It is stated that the National Road Fund Agency assured the 1st Respondent that two payments had been paid to various creditors including the Applicants. Therefore the 1st Respondent is unable to determine what is owing to each creditor in the absence of a reconciliation.

It is stated that the 1st Respondent is desirous of fully settling any amount due to the 1st Applicant subject to a reconciliation of the account with the 1st Applicant. That if given sufficient or reasonable time and after a reconciliation it will be able to settle any amount owing. The Court was urged not to grant the reliefs and remedies sought until the reconciliation is carried out.

I proceeded to hear the matter in the absence of the Respondents as the Notice of hearing was issued on 17th April 2020 and duly placed in the pigeon hole. There was no explanation from Counsel for the Respondents absence.

At the hearing on 15th June 2020, the Applicants relied on the affidavit evidence and skeleton arguments.

I have considered the affidavit evidence on record of the parties herein, the filed skeleton arguments and list of authorities.

The Applicants’ application is made pursuant to *Order 30 Rule 14 High Court Rules, Cap 27 of the Laws of Zambia* which states as follows:

“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.

Similarly, *Order 88 Rules of the Supreme Court, 1999 Edition* states as follows:

“(1) This Order applies to any action (whether begun by writ or originating summons) by a mortgagee or mortgagor or by any person having the right to foreclose or redeem any mortgage, being an action in which there is a claim for any of the following reliefs, namely-

(a) payment of moneys secured by the mortgage,

(b) sale of the mortgaged property,

(c) foreclosure,

- (d) *delivery of possession (whether before or after foreclosure or without foreclosure) to the mortgagee by the mortgagor or by any other person who is or is alleged to be in possession of the property,*
- (e) *redemption,*
- (f) *reconveyance of the property or its release from the security,*
- (g) *delivery of possession by the mortgagee.*

(2) In this Order "mortgage" includes a legal and an equitable mortgage and a legal and an equitable charge, and references to a mortgagor, a mortgagee and mortgaged property shall be construed accordingly.

(3) An action to which this Order applies is referred to in this Order as a mortgage action."

It is evident from the foregoing Orders that a mortgage action is an action where there is a claim for moneys secured by a property accompanied by a claim for possession of the mortgaged property.

These features of a mortgage have aptly been summed up by *Megarry and Wade, The Law of Real Property*, by *Charles Harpum* at page 1169 as follows:

"The essential nature of a mortgage is that it is a conveyance of a legal or equitable interest in property with a provision for redemption i.e. that upon repayment of a loan or the performance of some other obligation the conveyance shall become void or the interest shall be reconveyed."

Stemming from the definition of a mortgage by Lord Lindley in the case of *Stanley v Wilde* [1899] 2 CH 474⁽¹⁾, the mortgagee in a mortgage transaction takes title to the property as legal owner whereas the mortgagor becomes an equitable owner with a right of redemption. The right of redemption compels the mortgagee to re-convey title to the property back to the mortgagor upon the repayment of the loan in full. The law however does not divest the mortgagor of their title in the property. The circumstances in the present case shows that the 1st Respondent defaulted thus compelling the mortgagor to commence this action.

I agree with the submissions of Counsel for the Applicants relating to the remedies available to a mortgagee as espoused in the case of *Malambo v PATCO Agro Industries* [2007] ZR 177⁽²⁾.

Having set out the law on mortgages, I now apply it to the facts at hand.

It is not in dispute that by a Master Lease Agreement and Short-Term Asset Finance dated 14th December 2018 approval was made for the acquisition of 24 X NEW 2018 Flatdeck Trailers by the 1st Respondent. The 1st Applicant advanced a loan amount up to US\$639,97.60 as security for the supply of the said 24 X NEW 2018 Flatdeck Trailers to the 1st Applicant. A third party mortgage in favour of the 1st Applicant was created over Subdivision 'E' of Stand No. 12755, Lusaka belonging to the 2nd Respondent. On 5th November 2018, the parties executed a Cession of Book debt as security and the 2nd Respondent also executed a suretyship (both Exhibit "JCJVR 3")

The 1st Respondent does not deny owing the 1st Applicant except to state that the National Roads Fund Agency had intimated that two payments would be paid to various creditors including the Applicant. This admission can be discerned from

paragraphs 16 and 17 of the opposing affidavit dated 25th February 2020 where it states that:

“16. The 1st Respondent is desirous of fully settling any amount that may be owed to the Applicant, however, I truly and verily believe that there is need to reconcile the account with the Applicant and with National Road Fund Agency so that the amount can be determined and modalities can be agreed.

17. That I truly and verily believe that if the 1st Respondent were given sufficient and reasonable time it will be able to settle any amount owing after reconciliation.”

It is the 1st Respondents’ position that it is not in a position to determine exactly how much is owing to each creditor and therefore a reconciliation is necessary. However, it is interesting to note that the 1st Respondent has not adduced any evidence to show that the National Roads Fund Agency paid its creditors including the 1st Applicant. The onus was on the 1st Respondent to attach any documentary evidence to prove payments to the 1st Respondent that would warrant a reconciliation to be undertaken. Instead the 1st Respondent has merely made assertions which have not been proved leaving it instead to speculation. In the absence of such proof, I do not see any basis for the Respondents request for a reconciliation.

Further, I do not accept the 1st Respondent’s schedule of payments which seemingly is an instruction to pay as opposed to a schedule of actual payments (Exhibit “GM2”).

Further, the Respondents averred that it engaged Marks Industries Limited to write to the National Roads Fund Agency assigning payments directly to the 1st Respondent’s creditors. I hasten to note that the Applicants herein have no

contractual relationship with the National Roads Fund Agency or Marks Industries Limited. There is also no proof that the Applicants consented to such payment arrangements outside the terms of the Master Lease Agreement.

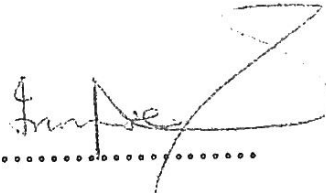
In respect to the remedies available to a mortgagee, I am guided by the case of *Kanjala Hills Lodge Limited and Another v Stanbic Zambia Limited Appeal No 46/2010* ⁽³⁾ where the Supreme Court held that once there is a default on a condition, such as default of a repayment instalment, the mortgagee becomes 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.

For the foregoing reasons, I enter Judgment in favour of the 1st Applicant against the 1st Respondent in the claimed sum of US\$245,394.17 plus contractual interest from date of the originating summons to date of Judgment and thereafter at the average commercial lending rate for dollar denominated loans (taken from three Commercial Banks), until full payment.

The Judgment sum shall be paid within a period of one hundred and twenty (120) days hereto and in default, the 1st Applicant shall foreclose and take possession of Subdivision 'E' of Stand No. 12755 situate in Lusaka in the Lusaka Province belonging to the 2nd Respondent. The 1st Applicant shall be at liberty to exercise its power of sale over the mortgaged property without any further recourse to this Court.

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

Delivered at Lusaka this 17th day of June, 2020.



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IRENE ZEKO MBEWE
HIGH COURT JUDGE