

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

**2021/HPC/0246**

**IN THE MATTER OF:**

**PROPERTIES COMPRISED IN AN  
EQUITABLE MORTGAGE  
RELATING TO PLOT/STAND NO 35  
/BLOCK 192 KANYAMA  
IMPROVEMENT AREAS LUSAKA  
PROVINCE**

**IN THE MATTER OF:**



**ORDER 30 RULE 14 OF THE HIGH  
COURT RULES CHAPTER 27 OF  
THE LAWS OF ZAMBIA AS READ  
TOGETHER WITH ORDER 88 OF  
THE RULES OF THE SUPREME  
COURT OF ENGLAND 1999  
EDITION (WHITE BOOK)**

**IN THE MATTER OF:**

**A MORTGAGE ACTION**

**BETWEEN:**

**PULSE FINANCIAL SERVICES**

**APPLICANT**

**LTD (Trading as**

**ENTREPRENEURS FINANCIAL**

**CENTRE)**

**AND**

**JOHN MUMBA**

**RESPONDENT**

**Coram: Hon. Madam Mrs. Justice Irene Zeko Mbewe**

*For the Applicant:*

*Mr. Shawwa, In House Counsel*

*For Respondent:*

*In Person*

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## JUDGMENT

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### Cases referred to:

1. *John Paul Kasengele v ZANACO SCZ Appeal No 11 of 2011*
2. *Magic Carpet Travel Tours Ltd Zambia National Commercial Bank [1999] ZR 61*
3. *Kasabi Industries v Intermarket Banking Corporation SCZ Appeal No 168 of 2009*

### Legislation referred to:

1. *High Court Rules, Cap 27 of the laws of Zambia*
2. *Rules of the Supreme Court, 1999 Edition*

By way of originating summons the Applicant claims against the Respondent the following:

1. Payment of all monies secured by an equitable mortgage which as at 29<sup>th</sup> April 2021 stood at K288,661.83 plus contractual interest on the loan amount.
2. The Applicant seeks a declaration that the equitable mortgage over Plot/Stand 35/Block 192 Kanyama Improvement Area Lusaka in the Lusaka Province of the Republic of Zambia to secure the loan be treated as a legal mortgage.
3. An Order for foreclosure, delivery and possession of the mortgaged property being Plot/Stand 35/Block 192 Kanyama Improvement Area Lusaka in the Lusaka Province.
4. An Order for delivery, possession and sale of the Respondent's pledged household goods assigned as additional security.

5. Further or other relief the Court may deem fit.

6. Costs.

The supporting affidavit is sworn by Kelvin Mayonga the acting chief credit officer in the Applicant. The salient facts as deposed are that on 30<sup>th</sup> January 2020, the Respondent was availed a loan by the Applicant in the sum of K180,000.00 with interest at 5.42% per month (Exhibit “KM1a-c”).

The loan was for a duration of 24 months. The security of the loan was an occupancy licence relating to Plot/Stand 35/Block 192 Kanyama Improvement Area Lusaka and a mortgage deed over the same property was executed to secure the said loan but not registered though a caveat was registered (Exhibit “KM3a-b”).

The said loan was partially secured by household goods. As at 18<sup>th</sup> May 2020, the Respondent was in arrears (Exhibit “KM5”).

A moratorium addendum was executed on 23<sup>rd</sup> May 2020 to lighten the Respondent’s burden as a result of the COVID19 pandemic leading to a restructuring of the loan (Exhibit “KM6-7”).

A second moratorium addendum was executed on 18<sup>th</sup> September 2020 to run for a further 3 months up to 18<sup>th</sup> December 2020 with monthly instalments of K5000.00 with an annual interest of 57% and the outstanding balance was K210,894.32 consisting of K197,719.32 and K13,175 as interest (Exhibit “KM8a-b”).



A third moratorium addendum was executed between the parties on 16<sup>th</sup> December 2020 and the loan was extended to 48 months at an annual interest rate of 57%. The outstanding balance was K217,200 principal and K14,700.00 interest.

According to the deponent, the Respondent had been defaulting in loan repayments since the beginning of the third moratorium and has failed or neglected to settle the outstanding amount. That as at 29<sup>th</sup> April 2021, the loan amount stands at K288,661.83 (Exhibit “KM13”). The Court is implored to grant the Applicant the reliefs sought.

At the hearing on 14<sup>th</sup> July 2021, Counsel for the Applicant relied on the affidavit in support, skeleton arguments and list of authorities.

The Respondent did not file any opposing affidavit and made oral submissions. The Respondent submitted that he did not deny owing the Applicant the claimed amount plus interest and this was due to the closing down of his shop by the landlord. However, the shop has re-opened and is now trading.

The Respondent requested for an extension of time within which to settle his indebtedness to the Applicant.

In reply, Counsel for the Applicant relied on the case of *John Paul Kasengele and Others v ZANACO Appeal No 11 of 2011*<sup>(1)</sup> where the Supreme Court held that inability to pay is not a defence neither is it a bar to enter Judgment. Counsel informed the Court that as per the averments in the supporting affidavit the Respondent was already in arrears even before the moratorium was availed to him.

I have considered the affidavit evidence, skeleton arguments and list of authorities and oral statements from Counsel for the Applicant and the Respondent. The 2<sup>nd</sup> Respondent did not file any opposing affidavit.

The Applicant's originating summons is anchored on Order 30 Rule 14 *High Court Rules, Cap 27 of the laws of Zambia* and 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.*

It is trite law that pursuant to Order 30 Rule 10 *High Court Rules, Cap 27 of the laws of Zambia*, the Applicant as mortgagee is entitled to payment of the monies secured by the mortgage.

The Applicant seeks a declaration that the equitable mortgage over Plot/Stand 35/Block 192 Kanyama Improvement Area, Lusaka to secure the loan be treated as a legal mortgage.

An equitable mortgage creates a charge on the property that does not convey any legal estate or interest to the lender. An equitable mortgage by its very nature requires the deposit of the title deeds with the mortgagee (lender) as espoused in the case of *Magic Carpet Travel Tours Ltd Zambia National Commercial Bank [1999] ZR 61<sup>(2)</sup>*.

A perusal of the record shows that the legal mortgage was not registered hence it shall be treated as an equitable mortgage as the occupancy licence was surrendered to the Applicant. I therefore decline to make a declaration.

The Applicant seeks an Order for foreclosure, delivery and possession of the mortgaged property being Plot/Stand 35/Block 192 Kanyama Improvement Area, Lusaka. I heed the guidance of the Supreme Court in the case of *Kasabi Industries v Intermarket Banking Corporation SCZ Appeal No 168 of 2009* <sup>(3)</sup> where it held that once an equitable mortgage is created by way of deposit of title, the lender can only convey the property to themselves on default.

For the foregoing reasons, I decline to grant an Order for foreclosure, delivery and possession of the mortgaged property as the same are not available to an equitable mortgagee.

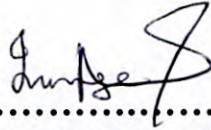
### **Disposal**

By way of disposal, I make the following Orders:

1. Upon the Respondent's own admission of his indebtedness to the Applicant, I enter Judgment in favour of the Applicant in the claimed sum of K288,661.83 as at 29<sup>th</sup> April 2021. The Judgment debt shall accrue interest at the short-term deposit rate from the date of originating summons to date of Judgment and thereafter at the commercial lending rate until full payment. The 1<sup>st</sup> Respondent shall settle the Judgment debt with interest within one hundred and twenty (120) days herein. In default, the Respondent shall convey to the Applicant absolutely and unconditionally the mortgaged property being Plot/Stand 35/Block 192 Kanyama Improvement Area, Lusaka.
2. I decline to grant a declaratory Order to treat the equitable mortgage as a legal mortgage as it is without merit.
3. I grant the Order for delivery, possession and sale of the Respondent's pledged household goods assigned as additional security should the Respondent fail to settle the Judgment debt within 120 days as stipulated in paragraph (1).
4. I award costs to the Applicant to be taxed in default of agreement.

Leave to appeal granted.

Delivered and dated this 14<sup>th</sup> day of July 2021.



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**IRENE ZEKO MBEWE**  
**HIGH COURT JUDGE**