

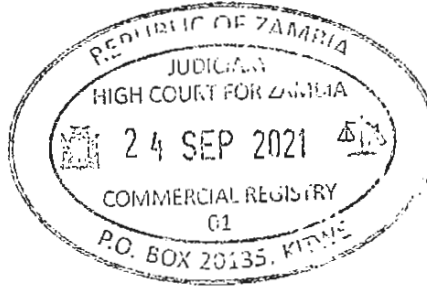
IN THE HIGH COURT FOR ZAMBIA

2020/HKC/031

AT THE COMMERCIAL REGISTRY

HOLDEN AT KITWE

(CIVIL JURISDICTION)



BETWEEN:

VISION FUND ZAMBIAN LTD

APPLICANT

AND

KENOS MASEKA

1ST RESPONDENT

EURISTER CHIYASA

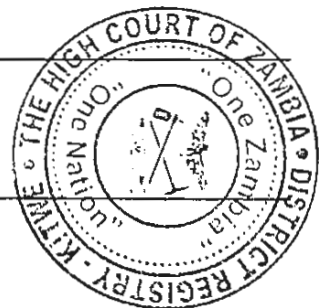
2ND RESPONDENT

Before the Hon. Lady Justice Abha Patel, S.C.

For the Applicant: Mrs. M. Kasali- Assistant Legal Officer

For the Respondents: Kenos Maseka - In person

JUDGMENT



Cases referred to:

- 1. MusakuMukumbwa Vs RodyMusatwe, Northern Breweries Limited and Kailande Trading Limited, SCZ Judgment No. 47/2014.**

2. **Brian Musonda (receiver of First Merchant Bank Zambia Limited v Hyper Food Products and Two others- 1999 ZR 12**
3. **Magic Carpet Travel and Tours Limited v Zambia National Commercial Bank Limited (1999) Z.R. 61**
4. **Kasabi Industries vs Intermarket Banking Cooperation Limited Appeal No. 168 of 2009**

Legislation referred to:

1. **High Court Rules, Cap. 27 of the Laws of Zambia – Order 30 Rule 14.**

1. INTRODUCTION

On 24th April, 2020, the Applicant took out an Originating Summons from the Commercial Registry at Kitwe, (subsequently amended on 17th December, 2020), seeking the following reliefs:

- i. *Payment of all monies which as at 6th July, 2020 stood at a total sum of K74, 350.42 at the agreed rate of 66% per annum on reducing balance and other charges due all secured by an equitable mortgage over plot No. 286 South Kalengwa in Kalulushi District and subdivision No. 1103 of Farm No. 10435 situate in Kalulushi in the Copperbelt of the Republic of Zambia and a motor vehicle, namely, Toyota Chaser of registration number ABC 5555,*

- ii. *Foreclosure, possession and sale of the said mortgaged properties being plot No. 286 South Kalengwa in Kalulushi District and subdivision No. 1103 of Farm No. 10435 situate in Kalulushi in the Copperbelt of the Republic of Zambia and a motor vehicle, namely, Toyota Chaser of registration number ABC 5555,*
- iii. *Interest as agreed to by the parties,*
- iv. *Any further or other relief the court may deem fit, and*
- v. *Legal costs of and incidental to this action.*

2. THE APPLICANT'S EVIDENCE

2.1 This action was brought pursuant to **Order 30 Rule 14** of the High Court Rules, Chapter 27 of the Laws of Zambia, was supported by an amended Affidavit in Support, Affidavit in Reply and skeleton arguments.

2.2 The deponent, one Mubanga Chileshe deposed in its amended Affidavit in support of the Originating Summons filed on 17th December 2020, that on 4th January, 2019, the Applicant granted a loan facility to the 1st Respondent in the sum of K112, 700.00 at an interest rate of 66% per annum repayable in 18 equal monthly instalments of K10,156.69. A copy of the said loan Agreement dated 4th January, 2019 was exhibited and marked "**MC1**".

2.3 It was a further term of the agreement to add to the principal loan amount the following; interest rate of 66% per annum on the reducing balance, 0.7% credit life assurance

scheme, 12% commitment fee and credit Reference Bureau bringing the loan payable to the sum of K182, 820.42.

2.4 The Deponent went on to aver that the Loan Facility was secured by an Equitable Mortgage on the property, namely, Subdivision No. 1103 of Farm 10435 situate in Kalulushi in the Copperbelt Province of the Republic of Zambia and it was agreed that in the event of the 1st Respondent defaulting the Applicant would be at liberty to foreclose and sale the pledged property. A notice of understanding was produced and marked "**MC2**".

2.5 The Respondents also pledged a 32 inch plasma TV valued at K1,000, a Defy upright fridge valued at K2,000 and a Defy stove valued at K 2,800 pursuant to a collateral agreement dated 15th November, 2018, produced and marked "**MC3**".

2.6 The Deponent further averred that the 1st Respondent paid a compulsory savings in the sum of K10,000 as cash collateral towards the loan in case of default. The loan Facility was further guaranteed by the 2nd Respondent who pledged house No. 286 Kalengwa South and a motor vehicle, namely a Toyota Chaser registration No. ABC 5555. A true copy of the Guarantor Declaration was produced and marked "**MC4**".

2.7 It was also averred that the 1st Respondent executed a Deed of Assignment in favour of the Applicant in respect of Subdivision No. 1103 of Farm No. 10435 situate in

Kalulushi in the Copperbelt province of the Republic of Zambia, as assurance to the Applicant that if he defaulted, the Applicant would be allowed to change ownership of the said property. A copy of the said Deed of Assignment was produced and marked "**MC5**".

2.8 The Deponent averred that as of the date of this action, the 1st Respondent had only paid 8 instalments translating into K91,420.00 plus the compulsory savings of K10,000, leaving the outstanding balance of K81,400.42. Despite several reminders the 1st Respondent has neglected to pay the balance from November, 2019. Copies of the Demand Notices were collectively produced and marked "**MC6**" and "**MC7**".

2.9 That as a result of the 1st Respondent's persistent default to settle the loan, the Applicant issued a confiscation notice for the pledged movable assets and some of the confiscated goods were sold for a total amount of K7,050.00 which reduced the outstanding amount to K74,350.42 as of January 2020. Respective copies of confiscation notice and receipts issued to the buyer were produced and marked "**MC8**" and "**MC9**".

2.10 Further, the Deponent also averred that the Applicant discovered that the 1st Respondent dishonestly and fraudulently obtained a subsequent loan from FINCA Zambia by pledging Subdivision 1103 of Farm No.10435 situate in Kalulushi, which he had already pledged to the Applicant. This action by the 1st Respondent compromised

the Applicant's interest in the said property. A print out from the Ministry of Lands was produced and marked "MC10".

2.11 The deponent also averred that apart from the letter of sale, the notice of understanding in respect of Subdivision No. 1103 of Farm No. 10435 and the related collateral contract, the Applicant has not entered into any other collateral agreement with the Respondents in respect of the loan subject of these proceedings. However, because of the constant demands by the Applicants, the 1st Respondent by a letter dated 3rd March, 2020 purportedly committed to sell Plot No. KALU/LN 1006598/19 belonging to Sanika Collins in order to settle the said outstanding loan.

2.12 The Deponent went on to aver that the Applicant has not accepted Plot No. KALU/LN-1006598/19 as it belongs to a third party not privy to the loan subject of the proceedings herein. And that should the Respondent wish to provide additional collateral for the loan in the form of Plot No. KALU/LN 1006598/19, the Applicant may consider the same as further collateral in addition to Subdivision No. 1103 of Farm No. 10435 situate in Kalulushi as long as Sanika Collins executes the thirdparty mortgage and collateral contract in favour of the Applicant.

3.THE RESPONDENT'S EVIDENCE

3.1 The unrepresented Respondents, filed an affidavit in opposition to the amended affidavit in support on 13th April,

2021 sworn by the 1st Respondent, **Kenos Maseka**, on behalf of both Respondents.

- 3.2 The 1st Respondent did not deny that he applied for and was availed a Loan Facility in the sum of K112,700 with interest in the manner deposed in the affidavit in support. However, he denied the contents of **paragraph 5** and averred that Subdivision No.1103 of Farm No. 10435 situate in Kalulushi was never pledged to the Applicant as security and that it was just inserted into the notice of understanding without his knowledge and consent as shown by "**MC2**" of the Applicant's document.
- 3.3 The contents of **paragraph 6** were not denied but the 1st Respondent added that the Applicant also collected a home theatre worth K3,000.00, Kitchen unit worth K1,500, water dispenser worth K1,200.00, kitchen chairs worth K3,000.00 and half set kitchen unit worth K500.00
- 3.4 Further, the 1st Respondent admitted having paid a compulsory savings in the sum of K10,000 as cash collateral towards the loan in case of default. He added that it was an agreed term that the K10,000 compulsory savings was to be transmitted back to the Respondent upon completion of the loan and in the event of default the same was to be deducted from the balance of the loan.
- 3.5 The 1st Respondent disputed having created a deed of assignment in relation to Subdivision No.1103 of Farm No. 10435. He also averred that when he obtained a loan from

the Applicant in 2015, he pledged 6128 as collateral and not Plot 1103. A copy of the membership card was produced and marked "**KM1**".

- 3.6 It was his evidence that "**MC5**" of the Applicant's document related to Plot 6128 and not Subdivision No. 1103 of Farm 10435 Kalulushi and he also averred that the exhibit marked "**MC5**" has several alterations on the date, which alterations he did not know or consent to. He averred that if the alterations were authorized by himself he could have appended his signature to it.
- 3.7 The contents of **paragraph 11** and **12** were denied and he averred that the total of the amount paid back was K91,440 over a period of 9 months including transfer of company savings of a total sum of K10,000.00. The contents of **paragraphs 13 to 15** were not disputed.
- 3.8 As regards the contents of **paragraph 16**, the 1st Respondent averred that the contents were within the Applicant's peculiar knowledge as to the price of the goods. Further, it was averred that the value of the goods were higher than that said by the Applicant and they were not sold in a transparent manner as the 1st Respondent was not given notice of the date of auction and goods were not advertised in any national paper as required by law.
- 3.9 It was also averred that "**MC9**" was not sufficient proof of items sold, as it reflects deposit slips from Atlas Mara by persons unknown without indicating the purpose of the

receipt. The 1st Respondent insisted that "**MC9**" comprises of receipts from the Applicant which showed the receiver's name as that of the Respondent when the Respondent did not make such payment.

3.10 As regards Plot KALU/KN-1006598/19, the 1st Respondent disputed the contents of **paragraph 22** and averred that he had suggested selling the said plot in order to offset the balance but the Applicant refused and instead requested the said plot to be handed over to them as shown by **MC13**.

3.11 He further deposed that since the Applicant is in possession of Plot KALU/KN-1006598/19 whose value is K90,000.00, and also collected goods whose value is K18,800.00, the Respondent is not indebted to the Applicant instead it is the Applicant who owes the 1st Respondent K27,420.00.

3.12 In conclusion, the 1st Respondent averred that since the Applicant did not seek leave to amend the originating process the same should be expunged from the record and the matter be dismissed.

4. THE APPLICANT'S EVIDENCE IN REPLY

4.1 In the affidavit in reply filed on 27th January 2021 and sworn by **Mubanga Chileshe**, the Branch Manager of the Applicant Company, it was averred that apart from executing a Notice of Understanding in relation to Subdivision 1103 of Farm No.1937, the 1st Respondent did submit a copy of his title deed in relation to the same. A copy of the title deed was produced and marked "**MC1**".

- 4.2 It was also averred that the 1st Respondent physically showed the said plot to the Applicant's officer, Kennedy Malasa who was the Branch Manager for Kitwe.
- 4.3 As to the contents of **paragraph 8** of the affidavit in opposition, it was averred that the Applicant's affidavit in support stated items pledged as collateral pursuant to the collateral contract duly executed by the 1st Respondent and not the confiscated items. The contents of **paragraph 10, 11, 12 and 13** were disputed. The Applicant also disputed the contents of paragraph 16 and **17** and maintains that the items were sold pursuant to the amounts stated by the 1st Respondent in the Collateral Contract as exhibited in **MC3** produced in the amended affidavit in support.
- 4.4 As for contents of **paragraph 18 and 19** of the affidavit in opposition, it was averred that the 1st Respondent was fully aware that the Applicant would sell his items after 7 days of confiscation as per Asset Agreement exhibited as **MC8** in the amended affidavit in support.
- 4.5 The contents of **paragraph 20, 21, 22 and 23** were denied and the Applicant averred that **MC9** showed receipts issued to buyers for the sold items and that the 1st Respondent's name reflecting on the receipt was for administrative purposes for posting the said amounts to the 1st Respondent's account.
- 4.6 The Applicant denied the contents of **paragraph 24 and 25** and reiterated its statement in **paragraph 23, 24 and 25** of

its affidavit in support and averred that prior to 3rd March, 2020, the Applicant was not aware of the said property and has no interest in the additional property.

4.7 Further, it was averred that the Applicant did not know the whereabouts of the mentioned plot as it had not confiscated the said plot or accepted it as further collateral because the plot was in a third person's name who was not a party to this suit.

4.8 As regards **paragraph 30, 31, and 32** of the affidavit in opposition, it was averred that the Applicant did make an application to amend the proceedings which application was granted by this Honourable Court.

5. **THE HEARING**

5.1 When the matter came up for hearing, on 16th June, 2021, Counsel for the Plaintiff, Mrs. M. Kasali relied on the amended Originating Summons and the amended Affidavit in Support filed on 17th December, 2020. In her viva voce submissions, she basically stated what was in the amended affidavit in Support, the Affidavit in Reply and the Skeleton Arguments. She beseeched the Court to grant the Applicant, with costs, the reliefs sought in the Originating Summons.

Counsel called on the Court to consider the holdings in the case of **Brian Musonda (receiver of First Merchant Bank Zambia Limited v Hyper Food Products and Two others and Magic Carpet Travel and Tours Limited v Zambia National Commercial Bank Limited** in support of the

Applicants claims and enter Judgment in favour of the Applicant.

5.2 The 1st Respondent on behalf of himself and the 2nd Respondent also relied on the amended Affidavit in Opposition filed on 13th April, 2021.

6. THE ISSUES

6.1 It is clear that the issue for determination is whether the Applicant has proved its claims against the Respondent, both on the sum outstanding and on the properties the subject of the equitable mortgage?

7. ANALYSIS AND APPLICATION OF THE LAW

7.1 The Summons was issued pursuant to **Order XXX, rule 14 of the High Court Rules, High Court Act, Chapter 27, Volume 3 of the Laws of Zambia, and Order 88., rules 1 and 3 of the Rules of the Supreme Court, 1965, Supreme Court Practice (White Book), 1999 Edition.**

Order XXX, rule 14 of the High Court Rules entitles a mortgagee to take out an originating summons for various types of relief, including: (i) Payment of moneys secured by the mortgage; (ii) Sale; (iii) Foreclosure; and (iv) Delivery of possession (whether before or after foreclosure) to the mortgagee.

I have carefully reflected upon the affidavit evidence before Court, the submissions tendered, and the authorities presented on behalf of the applicant. My examination of the

affidavit evidence reveals and satisfies me that the Applicant and the 1st Respondent entered into a loan agreement, a copy of which is produced and marked 'MC1". I therefore make a finding of fact of the existence of the loan agreement.

- 7.2 It is further not in dispute that, in contravention of the terms and conditions of the Loan Facility, the 1st Respondent failed to repay the facility as agreed in the Loan Agreement, dated 4th January, 2019. This is apparent from the contents of the 1st Respondent's affidavit in opposition.
- 7.3 The Applicant in its affidavit in support claimed that the 1st Respondent pledged his property known as Subdivision No. 1103 of Farm No. 10435 situate in Kalulushi in the Copperbelt Province of the Republic of Zambia by way of an equitable mortgage and that it was agreed that in the event of the 1st Respondent defaulting the Applicant would be at liberty to foreclose and sale the pledged property.
- 7.4 To this effect the Applicant produced a copy of the true copy of the Notice of understanding marked "**MC2**" and a true copy of the deed of assignment marked "**MC5**" which was apparently executed by the 1st Respondent in favour of the Applicant.
- 7.5 However, the 1st Respondent has denied pledging Subdivision No.1103 of Farm No.10435 situate in Kalulushi to the Applicant or executing a deed of assignment in relation to Subdivision 1103 of Farm No. 10435.

- 7.6 The 1st Respondent further pointed out that **MC5** had several alterations which were not authorised by him and added that if he had authorised the said alterations, he would have appended his signature. According to the 1st Respondent, the exhibit marked **MC5** related to Plot 6128.
- 7.7 After critically analysing **MC2** I have noticed that the number 1103 was added in brackets next to Stand No. 6128 and I also note that **MC5** relates to a property described as Stand No. 6128 and not Subdivision No. 1103 of Farm No. 10435.
- 7.8 If indeed **MC5** related to Subdivision No. 1103 of Farm No.10435, a proper description of the said property would have been given in the same way the property is being referred to and described in the affidavit in support. The Applicant also produced a title deed for Subdivision No.1103 of Farm 10435, and having looked at it, I have serious difficulties reconciling stand No.6128 indicated in the deed of assignment (**MC5**) with the produced title deed. Clearly, **MC5** and the title deed relates to different properties.
- 7.9 It appears to me that there must be no doubt as to the property pledged as collateral. To this end the Court frowns upon the Applicant's document which has been examined and does appear to have several alterations. Failure to authenticate the deed of assignment and to dispel the challenge mounted by the 1st Respondent rests on the Applicant, a burden it has not discharged to the satisfaction

of the Court as to the property pledged by way of an equitable mortgage.

7.10 I am also alive to the fact that all supporting documents such as **MC2** and **MC5** appear to refer to Stand No. 6128. I am of the considered view and as confirmed by the 1st Respondent that considering that the parties had been doing business since 2015, it is possible that security documents got mixed up for the various facilities enjoyed by the 1st Respondent.

For the above reasons, I am of the view that Subdivision 1103 of Farm No. 10435 is a different property from Stand No. 6128. The 1st Respondent denied surrendering the original title deed for Subdivision 1103 of Farm. 10435 to the Applicant.

I also note that no evidence was offered by the Applicant to prove that the 1st Respondent surrendered the title deed to them. Accordingly, I hold that no equitable mortgage was created over Subdivision 1103 of Farm 10435 Kalulushi.

7.11 The Applicant also claimed for the foreclosure, possession and sale of Plot No. 286 South Kalengwa in Kalulushi district and for an order of sale for the Toyota Chaser Registration No. ABC 5555.

7.12 It is not in dispute that the Loan Facility was guaranteed by the 2nd Respondent's property, namely house No. 286, South Kalengwa and a motor vehicle, namely a Toyota

Chaser registration No. ABC 5555, thereby creating an Equitable Mortgage over the said property.

In the case of **MusakuMukumbwa Vs RodyMusatwe, Northern Breweries Limited AndKailande Trading Limited**, the Supreme Court held that:

"It is settled law that where a third party provides his or her Title Deeds, to be used by another person as security for a debt obtained by that other person, an equitable mortgage is created. The owner of the Title Deeds cannot, therefore, renege and claim the Deeds before the debt secured thereby has been fully paid."

7.13 The 2nd Respondent has not defended this action by the Applicant. As regards the 1st respondent's evidence that Plot No. KALU/LN-1006598/19 had been accepted as substitute collateral, I find that it was not part of the pledged properties, and should therefore not be part of these proceedings. No evidence was called by either of the parties and the Court will not speculate into this being a non-issue to the main action.

7.14 In the affidavit in opposition, the 1st Respondent averred that in addition to the movable assets indicated in paragraph 6 of the affidavit in support the Applicant also collected a home theatre worth K3000, Kitchen Unit worth K1,500.00, a water dispenser worth K1,200.00, Kitchen Chairs worth K3000.00 and half set kitchen unit worth K500.00. However, no evidence in terms of receipts was

adduced to support this claim. The age old adage, "*he who alleges must prove*" remains true even here. I will therefore accept what the Applicant stated in **paragraph 6** of the affidavit in support and hold that the goods were sold in the market overt and will accept the values obtained.

7.15 The record will reflect that the Court had granted leave to the Applicant to amend its process and no further analysis of this is required.

8. FINDINGS OF THE COURT

8.1 In totality of the evidence placed before the Court and from my analysis above, I find and hold that the 1st Respondent is indebted to the Applicant in the sum of K74, 350.42 as at 6th July, 2020.

I therefore enter Judgment in favour of the Applicant against the 1st Respondent for the said sum of K74,350.42, with interest as agreed between the parties, from 6th July, 2020, to the date of Judgment, and thereafter at the current Commercial Bank lending rate as determined by Bank of Zambia till full satisfaction of the Judgment debt.

8.2 I order that the said sum together with interest shall be paid to the Applicant by the 1st Respondent within 90 days from the date of Judgment.

In the event that the judgment debt and interest remain unpaid at the expiry of the said period, then the 2nd Respondent shall deliver and convey the property known as

House No. 286, South Kalengwa, Kalulushi to the Applicant unconditionally, together with the Toyota Chaser Registration No. ABC 5555.

8.3 For avoidance of doubt, I adjudge as follows;

- i. *The claim for payment of the sum of K 74, 350.42 at the rate of 66% per annum on reducing balance is allowed, with interest as agreed between the parties, from 6th July, 2020, to the date of Judgment, and thereafter at the current Commercial Bank lending rate as determined by Bank of Zambia till full satisfaction of the Judgment debt.*
- ii. *I order that the said sum together with interest be paid to the Applicant by the 1st Respondent within 90 days from the date of Judgment.*
- iii. *The claim for foreclosure, possession and sale of Subdivision No. 1103 of Farm No. 10435 Kalulushi is dismissed as no equitable mortgage was created on that property.*
- iv. *In the event that the 1st Respondent fails to pay the Judgment sum and interest as awarded, within 90 days, the Respondent will convey the property at Plot No. 286 South Kalengwa in Kalulushi District, Copperbelt Province to the Applicant.*

- v. *I also grant the Applicant an Order of sale for the vehicle namely, Chaser car registration number ABC 5555.*
- vi. *I order costs to be in the cause.*

Leave to appeal is granted.

Dated at Kitwe this 24 day of September, 2021.



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Mrs. Abha N. Patel, S.C.
HIGH COURT JUDGE