

IN THE HIGH COURT FOR ZAMBIA

2021/HPC/0279

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Commercial Jurisdiction)

BETWEEN:



In the matter of:

Property comprised in Certificate of Title Number L6572 relating to the Remaining Extent of Subdivision D of Farm No 50a Doorfontein, Situate in the Lusaka Province of the Republic of Zambia.

AND IN THE MATTER OF: An application for delivery of possession of the Remaining Extent of Remaining Extent of Subdivision D of Farm No 50a Doorfontein, Situate in the Lusaka Province of the Republic of Zambia.

BETWEEN:

ZAMBIA INDUSTRIAL COMMERCIAL BANK

APPLICANT

AND

CENTRAL PROVINCE AGRICULTURAL GROWTH 1ST RESPONDENT

SCHEME OF ZAMBIA LIMITED

BRIGHT CHELLAH

2ND RESPONDENT

GEORGE RAY SITUNYA

3RD RESPONDENT

GEORGE RAY SITUNYA

3RD RESPONDENT

MICHAEL KAINGA

4TH RESPONDENT

THERESA MWANGO SAMPA

5TH RESPONDENT

Before the Honourable Madam Mrs Justice Irene Zeko Mbewe

Appearances

For the Applicant: Mr T Kasweshi of Mesdames TMN Legal Practitioners

For the 2nd Respondent: Mr Musonda of Messrs Anthony Associates

J U D G M E N T

Cases referred to:

- 1. Reeves Malambo v PATCO Agro Industries Limited SCZ Judgment No 20 of 2007.*
- 2. S Brian Musonda (Receiver of First Merchant Bank Zambia Limited v Hyper Food Products [1999] ZR 124*

By way of originating summons the Applicant claims against the Respondents for the following reliefs:

1. Payment of all monies due under the third-party mortgage dated 12th August 2020;
2. Payment of all monies guaranteed to the paid under the Personal Guarantee deeds dated 29th July 2020 and 19th June 2020 by the 2nd, 3rd, 4th and 5th Respondent;

3. Delivery up and possession of the Remaining Extent of Subdivision D of Farm No 50a Doornfontein, Lusaka'
4. Foreclosure and sale;
5. Further or other reliefs; and
6. Costs.

The supporting affidavit is deposed to by Martha Lungu Sichone the Manager collections and recoveries in the Applicant bank. The facts as deposed are that by facility letter dated 18th June 2020, the Applicant availed the 1st Respondent a facility of One Million Eight Hundred Thousand Kwacha (ZMW1,850,000.00) (Exhibit "MLS1"). The 2nd, 3rd, 4th and 5th Respondent guaranteed the facility and executed personal guarantees (Exhibit "MLS2-5").

A third-party mortgage was created and registered over Remaining Extent of Subdivision 'D' of Farm No 50a Doornfontein Lusaka for purposes of creating a third-party mortgage (Exhibit "MLS6-7"). According to the deponent, contrary to the terms of the facility, the 1st Respondent has defaulted and the outstanding balance as at 19th May 2021 stands at Two Million Three Hundred and Twenty-One Thousand Twenty Eight Kwacha Forty Four Ngwee (ZMW2,321,028.44) (Exhibit "MLS 8").

The 1st Respondent filed an opposing affidavit on 17th June 2021 sworn by George Ray Situnya, the 3rd Respondent therein. The salient facts are the 3rd Respondent does not dispute that the 1st Respondent was availed a

loan secured by the personal guarantees of the 2nd, 3rd, 4th and 5th Respondents. He disclosed that the loan was for an intended solar farm project which could not continue due to a lack of funding from the sponsors of the project.

According to the 3rd Respondent, the 1st Respondent has since signed a contract on 16th April 2021 with Hongkong Gongtou Group Limited of HongKong for the supply of copper concentrates to run until 15th March 2023 with a total value of US\$795,820.00 (Exhibit “GRS1”). The expected net income from the contract is US\$318,00.00

It is disclosed that the 1st Respondent is still able and willing to redeem the mortgage within a reasonable time and proposes a repayment period of six months. Furthermore, the loan was secured by the mortgaged property which is a dwelling house belonging to the 2nd Respondent.

The Court is urged to grant the 1st Respondent sufficient time to raise the monies required to settle its indebtedness to the Applicant and redeem the mortgaged property.

At the hearing of the originating summons on 15th July 2021, both Counsels relied on their respective affidavits, skeleton argument and list of authorities.

I have carefully considered the affidavits for and against the originating summons, skeleton and list of authorities brought to my attention.

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

"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.

Where there is default by a borrower such as the 1st Respondent herein, a mortgagee has several cumulative remedies available to it namely payment of the money secured, foreclosure, delivery up of possession of the mortgaged property and sale of the mortgaged property. This proposition finds support in the case of *Reeves Malambo v PATCO Agro Industries Limited SCZ Judgment No 20 of 2007*⁽¹⁾.

Instructive is the case of *S Brian Musonda (Receiver of First Merchant Bank Zambia Limited v Hyper Food Products [1999] ZR 124* ⁽²⁾ cited by Counsel for the 1st Respondent where the Supreme Court held inter alia that the Court can extend the time within which a mortgagor may repay the loan and redeem the mortgage.

The 1st Respondent admits their indebtedness to the Applicant in the claimed sum but only seek an extension of time within which to liquidate the said debt. The Court in the exercise of its equitable jurisdiction can afford relief to a mortgagor to pay a loan within a reasonable time. The 1st Respondent proposes to pay the said loan within six months.

Disposal

Upon the 1st Respondent admission of their indebtedness to the Applicant, I enter Judgment in favour of the Applicant in the claimed sum of Two Million Three Hundred and Twenty-One Thousand Twenty-Eight Kwacha Forty-Four Ngwee (ZMW2,321,028.44) as at 19th May 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.

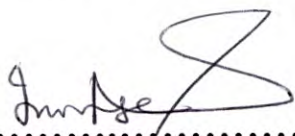
The 1st Respondent shall settle the Judgment debt with interest within one hundred and twenty (120) days herein and in default the Applicant shall take delivery and possession of the mortgaged property being Remaining Extent of Subdivision "D" of Farm No 50a "Doorfontein, Lusaka and exercise the power of sale without further recourse to this Court.

In the event that monies realised after the sale of the mortgaged property are insufficient to extinguish the debt, the personal guarantees of the 2nd, 3rd, 4th and 5th Respondents shall be enforceable.

I award costs to the Applicant to be taxed in default of agreement.

Leave to appeal granted.

Delivered and dated this 16th day of July 2021.


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IRENE ZEKO MBEWE
HIGH COURT JUDGE