

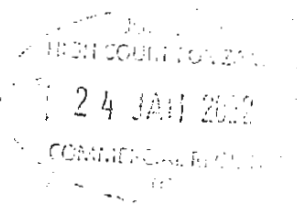
IN THE HIGH COURT FOR ZAMBIA

2021/HKC/016

AT THE COMMERCIAL REGISTRY

HOLDEN AT KITWE

(CIVIL JURISDICTION)



BETWEEN:

ZAMBIA INDUSTRIAL COMMERCIAL BANK LTD

PLAINTIFF

AND

COSTER MWABA

1ST DEFENDANT

HEARMES MINING AND TRADING LIMITED

2ND DEFENDANT

(IN RECEIVERSHIP)

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

For the Plaintiff: Mr. Paul Kalogo

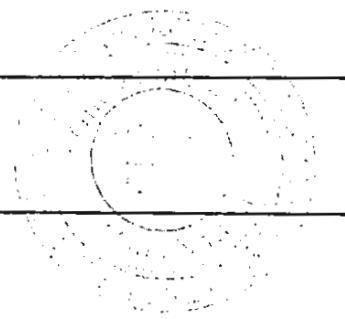
Messrs Ellis and Co.

For the 1st Defendant: Mr. K. Bota

Messrs William Nyirenda and Co.

For the 2nd Defendant: N/A

JUDGMENT



Legislation referred to:

1. High Court Rules, Cap. 27 of the Laws of Zambia - Order 30 Rule 14.
2. Supreme Court Practice 1999 Edition, The White Book, 1999

Cases referred to:

1. Wilson Masauso Zulu V Avondale Housing Project Limited (1982) Z.R. 172 (S.C.)
2. Printing and Numerical registering Co v Sampson (1875) LRR 19 Eq 462
3. Kalusha Bwalya v Chadmore Printing and Anor SCZ Appeal No. 222/2013
4. Colgate Palmolive (Z) INC v Able Shemu Chuka and Others

1. INTRODUCTION

1.1 The Plaintiff commenced this action by way of Originating Summons seeking the following reliefs:

- i. *Payment of all monies due by the 1st and 2nd Defendants to the Plaintiff under the respective covenants in the mortgage between the Plaintiff and the 1st and 2nd Defendant, dated the 14th day of July 2011 relating to the leasehold dwelling house known as Stand No. 7270 Kitwe in the Copperbelt Province of the Republic of Zambia and registered with good title in the Lands Registry under Certificate of Title No. 54281 dated the 23rd day of August 2001 in favour of the 1st Defendant.*
- ii. *Payment of all the money due by the 1st and 2nd Defendants to the Plaintiff under and by virtue of an overdraft facilities extended by the Plaintiff to the 1st and 2nd Defendants dated 18th September 2015 and 12th August 2016 respectively upon the security of the 1st Defendant's*

property at and known as Stand No. 7270 Kitwe otherwise referred to and described in subparagraph 1 herein.

- iii. An account of what is due to the Plaintiff by the 1st and 2nd Defendants under and by virtue of the said mortgage and overdraft facilities for principal, interest and costs and otherwise making due allowance for any money paid pursuant to a judgment under paragraphs 1 and 2 herein.*
- iv. An inquiry whether anything and if so what is due to the Plaintiff for any and what costs, charges and expenses in respect of the said mortgage beyond the costs of this action.*
- v. An order that the said mortgage and/or security may be enforced by foreclosure or sale.*
- vi. Delivery by the 1st and 2nd Defendants to the Plaintiff of possession of the said mortgaged property.*
- vii. Further or other relief.*
- viii. Costs.*

2. PLAINTIFF'S EVIDENCE

2.1 This application was brought pursuant to **Order 88 Rule 1** of the Supreme Court Practice 1999 Edition and **Order 30 Rule 14** of the High Court Rules, Chapter 27 of the Laws of Zambia, was supported by an Affidavit in Support, List of Authorities and Skeleton Arguments.

2.2 The Affidavit in Support was sworn by one **Martha Lungu Sichone**, a Manager of Collections and Recoveries in the employ of the Plaintiff Company. She deposed that by a mortgage dated the 14th day of May,

2011 made between the Plaintiff, and the 1st and 2nd Defendants, the leasehold dwelling house known as Stand No. 7270 Kitwe, and registered with good title in the Lands and Deeds Registry under title No. 54281 dated 23rd August 2006 was mortgaged to the Plaintiff. A copy of the said mortgage dated 14th May, 2011 was exhibited and marked "MLS1".

2.3 She also deposed that the said mortgage over stand No. 7270 Kitwe was registered as security for the overdraft facility of K450,000 as shown in the copy of the certificate of title produced and marked as "MLS2".

2.4 It was further her evidence that on 18th September 2015 and 12th August 2016 respectively, the Plaintiff granted the 1st and 2nd Defendants additional facilities in the sum of K250,000.00 and \$60,000.00 against the security of the said Stand No. 7270 Kitwe. Copies of letters of grant of the said facilities were collectively exhibited and marked "MLS3".

2.5 The Deponent also averred that the total amount of monies owed to the Plaintiff by the 1st and 2nd Defendant was K1,504,214.77 as at 1st October, 2018. She also averred that it had come to the Plaintiff's attention that the 2nd Defendant is under receivership. A copy of a letter authored by the 2nd Defendant's Receiver and Manager was produced and marked "MLS5".

3. THE 1st DEFENDANT'S EVIDENCE

3.1 The 1st Defendant, Coster Mwaba, filed an Affidavit in Opposition on 4th June, 2021. The salient features of the opposition were as follows:

- 3.2 The 1st Defendant deposed that the purported registration of the mortgage referred to in paragraph 4 of the Affidavit in Support was suspicious and smacked of fraud. He averred and relied on copies of computer search print-outs, exhibited and marked '**CM1 to CM4**' which showed that the document purported to be registered in 2011, was not reflected as at 19 June 2018 and was only reflected in 2019. Further, he deposed that there was an over-writing on the mortgage "**MLS1**" as regards the entry for the receipt number and the date and averred that he had reported the fraud to Zambia Police in 2019.
- 3.3 He also deposed that the purported mortgage dated 14th May 2011 was statute barred. And that the sum of K450,000 was fully amortised by the 2nd Defendant by the 10th of June 2014, as is discernible from the Plaintiff's exhibit marked "**MLS4**".
- 3.4 Further and with reference to the sums of K250,000 and US\$60,000, he deposed that he never made any commitment to those amounts and neither was he aware of their disbursement to either the 2nd Defendant or himself.
- 3.5 Furthermore, he averred that the K250,000 was not disbursed to account No. 12102004703 on 18th September 2015. He also deposed that exhibit "**ML3**" which is the purported charge on Plot 7270 Lantana Street Nkana East, Kitwe was not registered, hence it was null and void for all purposes.

3.6 As regards the US\$60,000, he deposed that there was no indication that the money was disbursed, as neither the 2nd Defendant or himself accessed the said money. And that the alleged charge for the US\$60,000 over Plot No. 7270 Lantana Street, Nkana East was not registered, hence it is null and void.

3.7 In response to **paragraph 8** of the Affidavit in Support, he deposed that there was no proof that the sums of K1,291,552.93, K212,661.84 and K1,504, 214.77 were disbursed and that the figures did not match any figures in the purported statements produced before the Court.

4. **PLAINTIFF'S EVIDENCE IN REPLY**

4.1 In its Affidavit in Reply dated 20th July 2021, sworn by Lazarus Matafwali, the Relationship Manager SME of the Plaintiff Company, the contents of **paragraph 5** of the Affidavit in Opposition were denied, and it was averred that the mortgage on stand No. 7270 could not be registered initially because the then Intermarket Bank was closed, and it was only when the Plaintiff took over the operation, that it was registered in order to protect its interest. A copy of the letter to the Plaintiff dated 17th August 2016 and a Ministry of Lands Computer print-out were produced and marked "LM1".

- 4.2 The contents of paragraph 7 of the Affidavit in Opposition were denied. Instead it was averred that the statement presented by the 1st Defendant did not come from the Plaintiff, as the loan statement from the Plaintiff on account number 11400000752 indicated that the loan was not paid in full. A copy of the loan statement was produced and marked "LM2". Also copies of the facility letters dated 18th September, 2015 and 12th August, 2016 respectively were produced and marked "LM3" and "LM4" respectively. He averred further that the two facilities were running as overdrafts, therefore, the amounts transferred to the current account could not be seen. And that only the K450,000 loan on account number 11400000752 and proceeds were transferred to the current account number 12102004703 on 20th December 2011.
- 4.3 It was also averred that the Defendants had multiple facilities with the Plaintiff as indicated in a facility letter dated 15th May, 2015 "LM5" for a temporary overdraft facility of K208, 610.00.
- 4.4 As to the contents of paragraph 8.3 and 8.4 of the Affidavit in Opposition, it was averred that the Defendants account was mostly overdrawn and that the Defendants kept issuing payments, even at the time that Intermarket Bank was closing in November 2016. A copy of the facility letter dated 12th August 2016 was produced and marked "LM3".
- 4.5 It was further averred that since the 1st Defendant claims that he did not obtain US\$60,000, he ought to have queried the Plaintiff to

reverse the transactions dated 11th November, 2016 of the transfer of US\$11,234.86 at K9-7565 from dollar account number 12122004192 to Kwacha account number 12102004703 dated 11th November 2016 which was equivalent to K109,612. 91. Copies of the dollar statement and kwacha statement highlighting the said instructions were produced and marked "LM6" and "LM7". It was also averred that the dollar account remained overdrawn and all payments were done by the 1st Defendant as indicated on the statement.

5. ISSUES

- 5.1 In this application I am called upon to determine whether a mortgage was created upon Stand No. 7270 Kitwe and to also determine how much is owed to the Plaintiff.

6. THE LAW

- 6.1 This action is brought pursuant to **Order 30 rule 14 of the High Court Act** which provides 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....."

6.2 **Order 88 Rule 1** of the Supreme Court Practice 1999 edition has also been cited by the Plaintiff in support of its application, the contents of which are noted.

6.3 It is the Plaintiff's submission that a mortgage having been created over Stand 7270 Kitwe, and it being an undisputed fact that the 1st and 2nd Defendants having failed and neglected to discharge the said mortgage, that the Plaintiff is entitled to enforce its rights under the mortgage and seeks the Order accordingly.

6.4 In the English case of **Printing and Numerical Registering Company v Simpson** cited with approval by the Supreme Court of Zambia at page 8 of its Judgment in the case of **Colgate Palmolive (Z) INC v Able Shemu Chuka and Others** and in particular the exposition from the English case by Sir George Jessel who had this to say:

"...If there is one thing more than another which public policy requires it is that men of full age and competent understanding shall have the utmost liberty in contracting and that their contract when entered into freely and voluntarily shall be enforced by court of justice." (Emphasis ours)

- 6.5 I also cite the more recent decision of **Friday Mwamba v Sylvester Nthenge and 2 Others** where Mumba Ag DCJ observed on behalf of the Supreme Court:

"The law of contract regarding contract entered into voluntarily by legal persons has been honoured since time immemorial."

- 6.6 It is the Plaintiffs submission, and they place reliance on the general provisions of the law of contract that Parties should be as free as possible to make agreements on their own terms which agreements should be upheld and enforced by the Courts.

7. ANALYSIS AND APPLICATION OF THE LAW

- 7.1 I have carefully considered the pleadings and the affidavit evidence of the Parties. The Plaintiff herein seeks the relief outlined above in this Judgment. In its Affidavit in Support the Plaintiff has exhibited a mortgage marked **MLS1** dated 14th May, 2011.
- 7.2 Although the 1st Defendant has not disputed having obtained the sum of K450,000 from the Plaintiff, his position is that the said amount was amortised by the 2nd Defendant by 10th June, 2014. The 1st Defendant refuted the registration of the mortgage referred to in **paragraph 4** of the Affidavit in Support for reasons cited above.
- 7.3 The 1st Defendant further pointed out that there was over-writing on **MLS1** on the receipt number and the date. He also said that

since **MLS3** was not registered, within the time permitted by law, it is null and void.

7.4 The Plaintiff's claim is based on exhibit **MLS1** which is said to be a mortgage on Stand No. 7270 Kitwe for K450,000, K250,000 and US\$60,000. I have critically looked at the documents exhibited by the Plaintiff and make the following observations:

7.5 Firstly, although **MLS1** clearly indicates that Stand No. 7270 Kitwe was offered as security for the sum of K450,000, it does not indicate when the said loan was supposed to be paid back. The issue that arises is, when was the loan supposed to be paid back? In the absence of an answer to this question it is difficult to know when the Defendants defaulted and whether or not the said amount was indeed amortised as claimed by the 1st Defendant.

7.6 I have also noted that the 1st Defendant did not bring any evidence to show that the K450,000 was indeed amortised, although in my considered opinion, that does not work against him if the Plaintiff has not been able to prove its case to my satisfaction. On this I refer to the case of **Wilson Masauso Zulu V Avondale Housing Project Limited** wherein the Supreme Court pronounced the following:

"I think that it is accepted that where a plaintiff alleges that he has been wrongfully or unfairly dismissed, as indeed any other case where he makes any allegations, it is generally for him to prove those allegations. A plaintiff who has failed to prove his case

cannot be entitled to judgment, whatever may be said of the opponents case."

7.7 Secondly, in response to the 2nd Defendant's claim that the mortgage on Stand 7270 Kitwe was not registered, the Plaintiff in his Affidavit in Reply admitted that it was not initially registered in 2011 but it was done later. **Paragraph 5** of the Affidavit in Reply clearly concedes that the mortgage was not registered as pleaded on 14th May 2011. To this effect, the Plaintiff produced a letter to the Plaintiff dated 17th August 2016, and a computer printout from the Ministry of Lands. However, the computer printout is so faded and completely illegible that the Court cannot make any findings on such a document, especially to aid the Plaintiff on the issue of registration, to counter the computer printouts exhibited by the 1st Defendant and marked 'CM1 to CM4' which do not reveal the registration of the alleged mortgage till at least 19th June 2018.

7.8 Thirdly, as regard the statement of accounts produced by the Plaintiff, I found them ambiguous and they did not help this Court in discerning what amounts were disbursed and how much had been paid so far. The same applies to **MLS3** and the Plaintiff's reply that the amounts which were transferred to the current account could not be seen and did not help the matter. The Plaintiff has a duty to prove its case to satisfy the Court on its claims.

7.9 It is trite that mortgage actions, as they are called, relate to a basket of actions that can be proved on Affidavit evidence and in

Chambers and for uncontested matters. It is obvious that the Plaintiff in this case has not been able to substantiate its claims against the 1st and 2nd Defendant. I have also noted the contents of the exhibit marked 'MLS5' to the Plaintiffs Affidavit in Support of Ex Parte Summons for an Order for leave to commence legal proceedings against a company in receivership filed on 23 April 2021. The contents of the said letter, dated 10 October 2019, from the Receiver for the 2nd defendant, leaves more questions than answers and does not assist the Court to assess the Plaintiff's claims and the manner in which it has presented its claims against the 1st and 2nd Defendant.

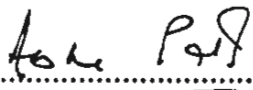
- 7.10 There is also no evidence before the Court of issues stated in the said letter, save for the finding that there appears to have been litigation in respect of the same or similar claims between the Parties.
- 7.11 For the above reasons, I am of the view that the Plaintiff has not adduced sufficient evidence to show that there was an existing charge on Stand No. 7270 Kitwe for K450,000, K250,000 and US\$60,000 at the time the facility was obtained. It has already been noted that the mortgage was not registered as at 19th June 2018 and if at all, it was registered after and in 2019, as alleged by the 1st defendant, that purported registration was out of time and without leave of Court, rendering it null and void.
- 7.12 Further I have also noted that no evidence was offered by the Plaintiff to prove that the 1st Respondent surrendered the title

deeds to them, as alleged, to secure the initial facility and or to support any finding of the creation of an equitable charge.

7.13 In view of the findings above, I am not satisfied and find that the Plaintiff has not proved its case against the 1st and 2nd Defendants on a balance of probabilities. I therefore find and hold that the Plaintiff has not proved its entitlement to the reliefs of foreclosure on Stand 7270 Kitwe and for an account of any monies owed to it by the 1st and 2nd Defendants and I decline the Orders sought by the Plaintiff in its Originating Summons.

I do not make any order of costs.

Dated at Kitwe this ²⁴..... day of January, 2022.


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

