

IN THE HIGH COURT FOR ZAMBIA

2022/HKC/07

HOLDEN AT COMMERCIAL REGISTRY

AT KITWE

(Civil Jurisdiction)



IN THE MATTER OF: ORDER 30 RULE 14 OF THE HIGH COURT RULES, CAP 27 VOLUME 3 OF THE LAWS OF ZAMBIA.

AND

IN THE MATTER OF: PAYMENT OF MONEY'S SECURED BY A THIRD PARTY MORTGAGE

AND

IN THE MATTER OF: AN ORDER FOR POSSESSION, SALE AND/OR FORECLOSURE OF STAND NO. 5692 KITWE

BETWEEN:

ZAMBIA INDUSTRIAL COMMERCIAL BANK APPLICANT

AND

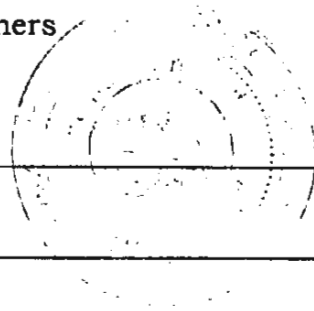
**MPELEMBE PROPERTIES CHINGOLA 1st RESPONDENT
LIMITED**

NONDE SAMPA LUMBWE 2nd RESPONDENT

Before Lady Justice Abha Patel, S.C. on 7th June 2022

For the Applicant: Mr. F. Tembo
Messrs G.M. Legal Practitioners
For the Respondents: No Appearance

JUDGMENT



Rules of Court:

1. Order 30 of the High Court rules, Chapter 27 of the Laws of Zambia.

Case Law:

1. Printing and Numerical Registering Company v Simpson (1875) L.R. 19 E.Q. 462.
2. Colgate Palmolive (Z) INC vs Able Shemu Chuka & Others – Appeal No. 181 of 2005 (unreported).
3. Friday Mwamba vs Sylvester Nthenga & 2 Others – SCZ Judgment No. 5 of 2013 (Appeal No. 174/2010).
4. S. Brian Musonda vs Hyper Food Products Limited & 2 Others (1999) Z.R. 124.
5. Courtyard Hotel Limited & Others vs First National Bank Zambia Limited and Another – Appeal No. 006/2015.

1. INTRODUCTION AND BACKGROUND

- 1.1. The Applicant commenced a typical mortgage action on 3rd February 2022 seeking:

- (i) Payment of the sum of K589,000.81;
- (ii) An order for possession, sale and or foreclosure of the mortgaged property;
- (iii) Interest at commercial bank lending rates from 18 September 2019;
- (iv) Any other relief the court may deem fit;
- (v) Costs.

- 1.2. The Originating Summons was supported by an Affidavit deposed to by one **Lazarus Matafwali**, in his capacity as the Branch Manager of the Applicant Company. The operative paragraphs of which were:

"4. That on 24th November, 2014, the Respondents were availed a facility by Intermarket Bank for the sum of ZMW 700,000.00 There now produced and shown to me marked "LM1" is a true copy of the Facility.

5. That the said facility was secured by a third party mortgage relating to Stand 5692 Kitwe. Now produced and shown to me marked 'LM2" is a true copy of the said Third Party Mortgage and a copy of the Certificate of Title deposited with the Bank.

10. That Applicant herein issued a demand letter to the 1st Respondent on 18th September 2018 for the sum of K589,008.81. The 2nd Respondent acknowledged the said debt and by way of e-mail dated 6th October 2019 undertook to liquidate the debt. There is now produced and shown to me marked "LM5" a true copy of the letter of demand and the Respondents response.

12. That in view of the forgoing, the Applicant humbly seeks the indulgence of this Honourable Court to grant it an Order for the payment of the sum of ZMW 589,008.81 or in the alternative an order for the foreclosure and delivery up/sale of Stand 5692 Kitwe."

1.3. According to a facility letter dated 24th November, 2014 ("Invoice Discounting Line") exhibited as "LM1" in the Applicant's affidavit in support of originating summons, it was agreed *inter alia* that:

"4. Repayment : Proceeds from discounting Invoices will come to clear the existing exposure.

Perfection of Security

It is a condition of approval of this Invoice Discounting Facility that all security is perfected before the facility is granted.

6.0 Security

*6.1 Plot 1397 Chingola- Commercial property with OMV of K1,300,000.00
Mortgaged at K650,000.00*

*6.2 Plot 5692 Riverside Kitwe- Residential property with OMV K700,000
Mortgaged at K350,000.00*

7.0 CHARGES AND INTEREST

The following charges will apply on this Invoice Discounting Facility:

7.1 Arrangement fee of 4.5% which is payable upfront on acceptance of this offer for Invoice Discounting Facility.

7.2 Interest rate per annum will be charged at the BOZ policy rate of 12% plus a margin of 12%. Therefore, the effective rate that would be applicable is 24% per annum.

7.3 Interest on the Invoice Discounting Facility will be accruing on a daily basis on the principal position of the account and becomes due and payable at the end of each month. Unsettled interest will be capitalized and interest calculated on the capitalized account balance. (i.e. compounded).

7.4 Interest rate (both Base Rate and Margin) is subject to change at the Bank's sole discretion and without notice.

12. DEFAULT

In the event of any default by you in the terms and conditions of this facility, the full amount of the facility then outstanding, together with all interest accrued thereon and any other amount or charges payable or outstanding in terms of his facility shall become immediately due for payment and we shall be entitled to demand payment forthwith."

1.4 There was also a mortgage deed ("**Third Party Legal Mortgage**") exhibited as "**LM2**" to the same affidavit. The Mortgage clearly stated on the cover: 'Relating to Stand 5692 Kitwe

1.5 Some of the salient terms of the Mortgage were:

"1. **NOW THIS MORTGAGE WITNESSETH** and it is agreed and declared as follows:

1. *THE Mortgagor and the Customer hereby covenants with the Bank that the Mortgagor will on demand in writing made to the Mortgagor pay or discharge to the Bank all moneys and liabilities which shall for the time being (whether formally demanded or at any time after such demand) be due owing or incurred to the Bank by the Mortgagor and the Customer whether actually or contingently and whether solely or jointly with any other person and whether as principal or surety including interest discount commission or other lawful charges and expenses which the Bank may in due course of its business charge in respect of any of them matters aforesaid keeping the Mortgagor's account and so that interest shall be computed and compounded according to the usual mode of the Bank as well after as before any*

demand made or judgment obtained hereunder and discount with the Bank to which the Mortgagor are a party whether as drawer accept or maker or endorser without any deduction whatsoever provided that after demand has been made compound interest charged shall be at the rate of 30% per annum and unsettled interest shall be compounded on the capitalized account balance.

2. THE Mortgagor as Beneficial Owner hereby charges by way of legal mortgage ALL THAT property referred to in the schedule hereto (hereinafter called "the Mortgaged Property") with the payment or discharge of all moneys and liabilities hereby covenanted to be paid or discharged by the Mortgagor."

- 1.6 That was the case as presented/pleaded by the Applicant. It has also been noted that the facility was granted by Intermarket Banking Corporation Zambia Limited which was subsequently possessed by the Bank of Zambia and restructured. Notice of the same was exhibited and marked 'LM3'.
- 1.7 The Record will reflect that the 1st and 2nd Respondents have not entered appearance despite the indulgence of the Court which at the 1st hearing of this matter on 1st March 2022, allowed the Parties time to continue their negotiations and for Applicant Counsel to seek a fresh date in the event that the negotiations did not culminate in a settlement.
- 1.8 The matter came up for hearing for the 2nd time on 23rd May 2022 and the Court noting from the Affidavit of Service that the Respondents

were desirous of engaging Counsel, did in the interest of justice, allow a further adjournment to 7th June 2022 and directed Applicant Counsel to effect service of the date to the Respondent, and to inform the Respondent of the Court's directive, which it duly did, by its Affidavit of Service on record of 7th June 2022.

1.9 On 7th June 2022, the third time the matter came up for hearing, there being no appearance for the Respondents, the Court duly allowed the Applicant to proceed with the matter.

1.10 Counsel relied on its supporting Affidavit and skeleton arguments all filed into Court on 3rd February 2022 and prayed for Judgment in the matter.

2 REQUIREMENTS OF PLEADING/DEFENCE TO ACTION

2.1 It is trite that this action was commenced in the Commercial Division, and Parties ought to be aware of the Rules of this Court and the fast-track nature of Actions in this Division. The Record has reflected that the Respondents have been granted several adjournments. It is also clear that there is no defence nor any opposition filed in this action.

2.2 Coming to the case before Court, the Respondent in several documents which have been exhibited, have accepted the debt. I refer to the Affidavit of Service filed on 23 May 2022 and the exhibit marked '**PB1**' I have also noted the exhibits collectively marked '**LM5**' to the Supporting Affidavit being the letter of demand and e-mail reply dated 18th September 2019 and 6th October 2019 respectively.

2.3 Quite clearly therefore, in terms of the rules of court and case law, the Respondent has not only impliedly but also expressly admitted:

- (i) the existence of a debt owed to the Applicant; and
- (ii) the incidence of default in the repayment obligations to the Applicant.

3 FINDINGS

3.1 In view of the preceding part of this Judgment, I find as a fact that as at 18th September 2019, the Respondent was indebted to the Applicant in the sum of K589,000.81.

3.2 Further, I find that the Respondents are in default of their obligations under the Facility Agreement marked "LM1".

4 REMEDIES OF APPLICANT AS LEGAL MORTGAGEE

4.1 It has already been alluded to in the earlier parts of this Judgment that the Facility Agreement and Mortgage created repayment obligations on the part of the Respondents and prescribed sanctions for default which included accrual of interest, the crystallisation of the entire balance into a lump sum payable and enforcement of the security in form of the Mortgage.

4.2 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 is by the Court.)

- 4.3 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."

- 4.4 Therefore, in view of the findings made by this Court, the role at this stage is to give full force and effect to the terms of the Facility Agreement and Mortgage.

- 4.5 In the case of S. Brian Musonda v Hyper Food Products Limited and 2 Others, the Supreme Court pronounced that the remedies of mortgagee are cumulative.

"The mortgagee's remedies are truly cumulative;

leaving aside the fact that an equitable mortgagee's remedies are somewhat more restricted than those of a legal mortgagee." (Emphasis added)

- 4.6 In the more recent decision in Courtyard Hotel Limited and Others v First National Bank Zambia Limited and another, the Supreme Court guided:

"The point to note from what we said in the Kanjala Hills Lodge case is that once there is default on a condition, such as the default on a repayment instalment, the mortgagee becomes entitled to pursue all the remedies available to him. In those circumstances, the court, in exercise of its powers 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 his relief. The court cannot go back to the period prescribed in the agreement, whose term or terms have been abrogated. Therefore, in this case the trial court was on firm ground when it ordered the appellants to pay the sums due within sixty days, failing which the respondents were to foreclose." (Emphasis added)

- 4.7 Quite clearly therefore, in view of the Respondent's default, the applicant is entitled to all of the remedies as prayed for, subject to the lapse of a reasonable grace period to be afforded for the equity of redemption.

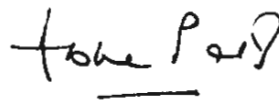
5 CONCLUSION AND ORDERS

- 5.1 In view of the findings above, I am satisfied that the Applicant has proven its case against the Respondent on a balance of probabilities.
- 5.2 I accordingly enter Judgment in favour of the applicant against the Respondent for sum claims of K589,000.81 as at 18th September, 2019. I further make the following orders:
- (i) that the Judgment sum shall bear interest at the agreed contractual rate of 24% per annum from 14th September, 2019 until date of this

Judgment and thereafter according to the provisions of the Judgment Act till the date of payment;

- (ii) that the Respondents should pay the applicant the Judgment sum and interest as foresaid **within 60 days from date hereof**, failing which the Applicant will be at liberty to foreclose on, repossess and sell the mortgaged property namely Stand 5692 Kitwe in the Copperbelt Province of the Republic of Zambia.
- (iii) That the Respondents shall bear the Applicant's costs of and occasioned by this action, to be taxed in default of agreement.

Delivered at Kitwe, the 20th day of June, 2022.



Lady Justice Abha Patel, S.C.