

**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**

**2022/HP/0573**

*(Civil Jurisdiction)*

**IN THE MATTER OF: A CLAIM FOR K350,000 PLUS INTEREST  
ARISING FROM AN INVESTMENT  
AGREEMENT DATED 13<sup>TH</sup> AUGUST,  
2020.**

**IN THE MATTER OF: ORDER 30 RULE 11 (F) (I) AND (J) OF THE  
HIGH COURT RULES, CHAPTER 27,  
VOLUME 3 OF THE LAWS OF ZAMBIA.**

**BETWEEN:**

**LIKI INVESTMENTS**

**AND**

**MAPEPI BIBLE COLLEGE  
REGISTERED TRUSTEES**

**APPLICANT**

**RESPONDENT**

**BEFORE THE HONOURABLE LADY JUSTICE P. K. YANGAILO, ON  
30<sup>TH</sup> DAY OF DECEMBER, 2022.**

*For the Applicant: Mr. P. Chulu – Messrs. Kalokoni and Company.*

*For the Respondent: No Appearance.*

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**JUDGMENT**

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#### **CASES REFERRED TO:**

1. *Rural Development Corporation Limited v Bank of Credit and Commerce (Zambia) (1987) Z.R. (SC);*
2. *African Banking Corporation (Z) Limited (t/a Bank ABC) V Plinth Technical Works Limited and Others – Judgment No. 28 of 2015;*
3. *Printing Numerical Registering Company v Simpson (1875) L.R. 19 E.Q. 62;*
4. *Arnold v Britton and Others (2015) UKSC 35;*
5. *Edman Banda v Charles Lungu – Selected Judgment No. 22 of 2017;*
6. *Zambia Railways Limited v Pauline S Mundia, Brian Sialumba (2008) Vol. 1 Z. R. 287 (S.C);*
7. *Luke Phiri v David Tembo- HPC 574 of 2010;*
8. *Colgate Palmolive (Z) Incorporated v Able Shemu and 110 others – Appeal No. 181 of 2005; and*
9. *JZ Car Hire Limited v Malvin Chala and Scirocco Enterprises Limited (2002) ZR 112.*

#### **LEGISLATION REFERRED TO:**

1. *The High Court Act, Chapter 27, Volume 3 of the Laws of Zambia.*

#### **OTHER WORKS REFERRED TO:**

1. *Phipson on Evidence, 17<sup>th</sup> Edition, (Thomson Reuters (Legal) Limited 2010);*
2. *A. Garner, Black's Law Dictionary, 8<sup>th</sup> Edition (United States of America: Thomson West, 2007);*
3. *Halsbury's Laws of England, 4<sup>th</sup> Edition, Vol. 9 (Re-issue), Sweet and Maxwell, London; and*
4. *Charles Harpum, Megarry and Wade, The Law of Real Property, 6<sup>th</sup> Edition.*

## **1 INTRODUCTION**

1.1 This Judgment is in respect of an action launched by the Applicant, Liki Investments Limited, against the Respondent, Mapepi Bible College Registered Trustees. It is an action for recovery of money lent on an investment agreement, sale of the real property offered as security under the said investment agreement and recovery of damages for breach of agreement.

## 2 BACKGROUND

2.1 The background to this matter, as can be discerned from the pleadings and evidence adduced, is that the Applicant entered into an investment agreement ("the Agreement") with the Respondent, whereby the Applicant agreed to advance the Respondent with a sum of K200,000.00, as an investment, on express terms. In return for this investment, made by the Applicant to the Respondent, the Respondent agreed to pay the Applicant a return of its investment at the rate of K50,000.00 per month for the agreed period of time of three months, being the aggregate reward of the Applicant's investment to a sum of K150,000.00, over and above the invested principal sum of K200,000.00. The Applicant, therefore, expected to receive a total of K350,000.00 from the Respondent at the end of the agreed three months' period.

2.2 As security for the investment made by the Applicant to the Respondent under the Agreement, the Respondent offered its real estate, known as Plot No. F/411a/D/4/T Chilanga ("the Subject Property"). The terms of the security offered, as agreed in the Agreement, were, *inter alia*, such that on default of the Respondent on its commitment under the Agreement would trigger forfeiture of the Subject Property to the Applicant. To this effect the Respondent and Applicant signed a Contract of Sale and

Deed of Assignment, relating to the Subject Property. The original title deed of the Subject Property was also surrendered to the Applicant, by the Respondent. In the intervening time the Respondent still retained vacant possession of the Subject Property. As fate would have, the misfortune of default befell upon the Respondent and the terms of the Agreement crystallised, triggering this Court action for enforcement of the said terms of the Agreement.

### **3 PLEADINGS**

3.1 By an Originating Summons filed on 11<sup>th</sup> April, 2022, the Applicant herein claims the following reliefs: -

1. *An order that the Respondent pays the Applicant the sum of K350,000.00 owing plus interest and upon payment, Plot No. F/411a/D/4/T Chilanga (subject property) Lusaka registered in the name of the Applicant be surrendered back to the Respondent;*
2. *An order that in default of full payment, the subject property be sold to recover the outstanding monies and the rest be given back to the Respondent;*
3. *Damages for breach of the Investment Agreement;*
4. *Costs;*
5. *Interests on all the amounts found due; and*
6. *Any other relief the Court deems fit.*

3.2 By Affidavit in Support of Originating Summons, filed on 11<sup>th</sup> April, 2022, deposed to by **Bongani Maano**, the Applicant's Manager, it was stated, *inter alia*, that on 13<sup>th</sup> August, 2020, the Applicant entered into the Agreement with the Respondent where it was agreed that the Applicant would invest K200,000.00 in the Respondent's business on condition that the Respondent must give profits to the Applicant for three consecutive months amounting to a total of K150,000.00 at K50,000.00 per month. By the said Agreement the Respondent was required to pay back the principal amount invested. A copy of the Agreement was produced and marked "**BM1**". It was further deposed that in the Agreement, the parties agreed upon the following terms: -

1. *The Original Certificate of title for the Subject Property shall be deposited with the Investor until the full investment plus profits are settled. The Investor is hereby allowed to place a caveat at the Ministry of Lands with regards to the property.*
2. *A contract of sale of the property shall be executed between Mapepi Bible College Registered Trustees and the Investor and all the conveyancing documents shall be executed before the investment is disbursed to Mapepi Bible College Registered Trustees.*
3. *Upon Default to pay the Principal investment amount and the profits as agreed, the Investor shall immediately transfer title of the property from Mapepi Bible College Registered Trustees*

*name into the investor's name and Mapepi Bible College Registered Trustees shall have no further claim to the property.*

- 3.3 It was further deposed that in addition to the Agreement, the parties executed a Contract of Sale and a Deed of Assignment relating to the Subject Property. Copies of the said Contract of Sale and Deed of Assignment were produced and marked "**BM2**" and "**BM3**".
- 3.4 It was deposed that on 17<sup>th</sup> August, 2020, after signing the Agreement, the Applicant invested the sum of K200,000.00 in the Respondent's business. According to the said Agreement, the first profits of K50,000.00 were supposed to be paid to the Applicant on 17<sup>th</sup> September, 2020; the second profits on 17<sup>th</sup> October, 2020; and the third profits on 17<sup>th</sup> November, 2020, together with the principal sum.
- 3.5 It was deposed that the Respondent breached the Agreement as it never paid anything to the Applicant as agreed and as a consequence, the Applicant wrote a demand letter to the Respondent on 18<sup>th</sup> November, 2020. By the said demand letter, the Applicant demanded the sum of K350,000.00 failure to which the Applicant would exercise its rights under the Agreement to change the title of the Subject Property to its name.
- 3.6 It was further deposed that despite several reminders to pay, the Respondent failed to pay the K350,000.00. This failure prompted the Applicant to exercise its rights under

the Agreement to change title to the Subject Property into its name. A copy of the certificate of title to the Subject Property was produced and marked “**BM4**”.

3.7 Despite the change of title, the Respondent did not give up possession of the Subject Property which prompted the Applicant to sue for possession of the Subject Property. A copy of the said originating process was produced and marked “**BM5**”. However, the Court refused to grant possession of the Subject Property on the basis that there was impropriety in obtaining the Certificate of Title. A copy of the Judgment was produced and marked “**BM6**”.

3.8 It was deposed that after the Judgement of the Court, the Applicant was left with a Certificate of Title to the said property and could not sell the Subject Property to recover the money as the property was not in its possession. It was further deposed that if the Applicant was not granted its reliefs, the Respondent would be unjustly enriched as it had consumed the Applicant’s money and would also be in possession of the Subject Property. Further, it was deposed that if the Court does not grant the Applicant the reliefs sought, the Applicant would lose out and this would greatly affect its business.

#### **4     SUBMISSIONS**

4.1 By the Applicant's Skeleton Arguments and List of Authorities, filed on 11<sup>th</sup> April, 2022, the Applicant's Counsel submitted *that the* issues for determination in this application were as follows: -

a) *Whether or not the mode of commencement in this matter is correct; and*

b) *Whether or not the applicant is entitled to the reliefs sought.*

4.2 On the issue of whether or not the mode of commencement of this matter is correct, Counsel submitted, *inter alia*, that **Order XXX, Rule 11 (b) of The High Court Rules<sup>1</sup>** allows this matter to be commenced by Originating Summons. Counsel cited the case of **Rural Development Corporation Limited v Bank of Credit and Commerce (Zambia)<sup>1</sup>** in support of the submission that this matter qualifies to be commenced by way of originating summons pursuant to **Order XXX, Rule 11 of The High Court Rules<sup>1</sup>** as the Applicant claims to be entitled to K350,000.00. The holding in the aforementioned case was cited as follows: -

*“Order 30 Rule 11 of the High Court Rules sets out the business to be disposed of in chambers. The Supreme Court went on to state that in addition business stipulated under any other rule or by statute or by the law and practice for the time being observed in England*

*and applicable to Zambia, may also be disposed of in chambers and by implication may be commenced by originating summons.”*

- 4.3 Additionally, in the case of ***African Banking Corporation (Z) Limited (t/a Bank ABC) v Plinth Technical Works Limited and Others***<sup>2</sup>, it was held as follows: -

*“Applications by Originating Summons are appropriate where the decision depends on the construction of an instrument or statute or the granting of a relief in mortgage proceedings.”*

- 4.4 On the issue of whether or not the Applicant is entitled to the reliefs sought, Counsel cited the cases of ***Printing Numerical Registering Company v Simpson***<sup>3</sup> and ***Arnold v Britton and Others***<sup>4</sup> in support of the submission that the Respondent is bound by the terms of the Agreement and must be compelled to pay.

- 4.5 Further, Counsel cited the case of ***Edman Banda v Charles Lungu***<sup>5</sup> as follows: -

*“There is nothing wrong for a party who is neither a money lender nor registered under the Banking and Financial Services Act Chapter 387 of the Laws of Zambia to give a loan and expect profits as per agreed terms.”*

- 4.6 Based on the foregoing authorities, Counsel submitted that this Court can order the Respondent to pay the

outstanding money. In the alternative, the Applicant seeks the Court to grant the Applicant power to proceed and sell the Subject Property so that it can recover the outstanding monies.

4.7 The Respondent did not enter appearance or file any documents in response to the Applicant's Originating Summons. On my satisfaction that the originating process was effectively served on the Respondent by the Applicant, I proceeded to hear the Applicant's application.

## **5 EVIDENCE AT HEARING OF THE MATTER**

5.1 At the hearing of the application, the Respondent, despite being aware of the hearing date, did not attend Court nor offer any explanation for its absence. The Applicant, on its part, stated that it would rely entirely on the Originating Summons, Affidavit and Skeleton Arguments filed in support thereof.

## **6 CONSIDERATION AND DECISION OF THE COURT**

6.1 I have carefully considered the Applicant's Originating Summons, Affidavit and Skeleton Arguments, filed in support thereof. I have also considered the authorities cited for which I am grateful to Counsel for the Applicant.

6.2 It is settled law that a person who commences a civil action must prove his case against the Defendant in order to succeed in his claim. To that effect, the learned authors

of ***Phipson on Evidence***<sup>1</sup>, in **paragraph 6-06**, at **page 151**, state the following, regarding the burden of proof in civil cases: -

*“So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issues. If, when the evidence is adduced by all parties, the party who has the burden has not discharged it, the decision must be against him.*

- 6.3 Additionally, the standard to which a Plaintiff should prove his case was discussed by the Supreme Court in the case of ***Zambia Railways Limited v Pauline S Mundia, Brian Sialumba***<sup>6</sup> as follows: -

*“The standard of proof in a civil case is not as rigorous as the one obtaining in a criminal case. Simply stated, the proof required is on a balance of probability as opposed to beyond all reasonable doubt in a criminal case. The old adage is true that he who asserts a claim in a civil trial must prove on a balance of probability that the other party is liable...”*

- 6.4 The Applicant herein seeks an order that the Respondent pays the Applicant the sum of K350,000.00 owing plus interest and upon payment that the Subject Property registered in the Applicant's name be surrendered back to the Respondent. Further, the Applicant seeks an Order that in default of full payment, the Subject Property be sold

to recover the outstanding monies and that the rest of the excess money, if any, be given back to the Respondent; damages for breach of the Investment Agreement, costs and interest on the amount found due.

6.5 From my analysis of the originating process I am of the view that the Applicant herein appears to be seeking reliefs that a mortgagee would be entitled to in the event of default by a mortgagor. Further, on my analysis of the application and the evidence on record, I, as such, find that the following are the legal issues that fall for determination by this Court:

1. Whether the Agreement entered into by the parties to this action amounted to an equitable mortgage, entitling the Applicant herein for an order that the sum of K350,000.00 be paid by the Respondent and in default thereof, the Court should order the sale of the Subject Property for the Applicant to recover the sum owed; and
2. Whether the Applicant is entitled to damages for breach of the Agreement.

6.6 I will determine the legal issues in the order I have identified them above, starting with the determination of whether or not the Agreement amounted to an equitable mortgage entitling the Applicant herein to an order that

the sum of K350,000.00 be paid by the Respondent and in default thereof, the Court should order the sale of the Subject Property.

6.7 **Black's Law Dictionary**<sup>2</sup> defines the term 'mortgage' as follows: -

*"A conveyance of title to property that is given as security for the payment of a debt or the performance of a duty and that will become void upon payment or performance of a duty and that will become void upon payment or performance according to stipulated terms."*

6.8 Further, **Black's Law Dictionary**<sup>2</sup> goes on to define the term 'equitable mortgage' as follows: -

*"A transaction that has the intent but not the form of a mortgage, and that the court of equity will treat as a mortgage."*

6.9 Additionally, the learned authors of **Halsbury's Laws of England**<sup>3</sup>, described an equitable mortgage as follows: -

*"An equitable mortgage is a contract which creates a charge on the property but does not convey any legal estate or interest in the creditor; such a charge amounts to an equitable interest."*

6.10 From the foregoing, it is clear that the features of a mortgage are the assigning of a property as security for payment of money that is due, which assignment is rendered void upon payment of the said money. Further,

any agreement bearing such intention is an equitable mortgage. I am further persuaded by the learned authors of ***Megarry and Wade, The Law of Real Property***<sup>4</sup>, who describe the nature of a mortgage as follows: -

***“The essential nature of a mortgage is that it is a conveyance of a legal or equitable interest in property with a provision for redemption i.e. that upon repayment of a loan or the performance of some other obligation the conveyance shall become void and the interest shall be reconveyed.”***

6.11 As regards the rights of a mortgagor, the said authority states as follows: -

***“These remedies may be classified as follows;***

***a) Remedies primarily for recovery of capital***

***i) Foreclosure***

***ii) Sale...”***

6.12 In this case, the Applicant entered into the Agreement with the Respondent in which it was agreed that the sum of K200,000.00 would be advanced to the Respondent by the Applicant and that the Respondent would pay the Applicant K50,000.00 per month for 3 months including the principal amount advanced. This meant that at the end of the 3-month period, the Applicant would receive a total sum of K350,000.00.

6.13 As security for the sum of K200,000.00 disbursed to the Respondent by the Applicant, it was agreed that the Respondent's original certificate of title with respect to the Subject Property would be deposited with the Applicant. Further, a Contract of Sale and an Assignment were executed for the conveyance of the Subject Property to the Applicant from the Respondent. According to the Agreement, in the event of default on the repayment of the loan, the Respondent was supposed to immediately transfer the title to the Subject Property to the Applicant with no further claim to the Subject Property.

6.14 On my analysis of the Affidavit evidence on record, I am of the view that the Agreement, *prima facie*, may appear to bear the semblance of an equitable mortgage as the loan disbursed to the Respondent was secured by the depositing, with the Applicant, the Respondent's original certificate of title with respect to the Subject Property. However, on close scrutiny of the default clause of the Agreement it emerges that the Agreement provides that in the event of default on the repayment by the Respondent of the sums due to the Applicant, the Subject Property would be forfeited to the Applicant and the Respondent would have no further claim to the Subject Property. To give effect to the said intention expressed in the default clause, the parties executed a Deed of Assignment, which assignment has since been registered resulting in the

Subject Property being assigned to the Applicant. In the circumstances of the Agreement in issue, the mortgagor's right of redemption was significantly tempered with and the consequences that follow upon default in a typical mortgage action were vitiated by the manner in which the default clause was crafted. The Default clause provide for forfeiture of the Subject Property, rather than the typical mortgage action of the remedy of right to sale the mortgaged property. Therefore, I find that the transaction from which this action arises is neither a typical mortgage or equitable mortgage action. I am persuaded in my finding by the High Court case of **Luke Phiri v David Tembo**<sup>7</sup> in which it was held, as follows: -

*"I find that the transaction from which this action arises is neither a mortgage or equitable mortgage for two reasons. Firstly, although the property was initially offered as security, the deed "LP1" provided for forfeiture of property rather than a sale of the property. As I highlighted above, the remedy open to a mortgagee such as the Applicant, which remedy highlights a feature of mortgages lies in recovery of capital (funds lent) by way of foreclosure and subsequent sale of the property. In my considered view, a transaction that provides for forfeiture of a property on default cannot be said to fall under the umbrella of a mortgage or equitable mortgage. My finding is fortified by the fact that a mortgagor always retains the right of*

*redemption, as is evident from the definition of mortgage...”*

6.15 From the foregoing it is clear that as the Agreement, in issue in this matter, provided for the immediate forfeiture of the Subject Property to the Applicant by the Respondent in the event of default, the Agreement was, therefore, taken out of the realms of a mortgage action and instead amounted to a sale agreement.

6.16 In the case of ***Colgate Palmolive(Z) Incorporated v Able Shemu and 110 others***<sup>8</sup>, the Court held as follows: -

*“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 courts of justice.”*

6.17 Additionally, the learned authors of ***Halsbury’s Laws of England***<sup>3</sup>, state as follows: -

*“There is no limit at common law on the types of contracts pursuant to which credit may be given. Such contracts are governed by the usual contractual principles, subject to the intervention of statute and particularly, or statutory provisions regulating dealings between consumers and businesses.”*

6.18 From the foregoing authorities, it is abundantly clear that when parties enter into legally binding contracts, it is for the Courts to respect the terms and conditions of those contracts and not interfere with the terms agreed upon by the parties. That the parties, who signed the agreements are bound by them, and the Court's role is to enforce the terms of the agreement. Therefore, in my view, as the Investment Agreement provided for the immediate conveyance of the Subject Property to the Applicant in the event of default by the Respondent, the Applicant herein is entitled to the Subject Property as beneficial owner pursuant to the terms of the Agreement.

6.19 Accordingly, I order the Respondent to convey the Subject Property to the Applicant and also forthwith surrender vacant possession of the said Subject Property to the Applicant.

6.20 It follows therefore, that the Applicant's claim for an order that the Respondent pays the sum of K350,000.00, plus interest and upon such payment the Subject Property be surrendered to the Respondent, and the claim for an Order that in default of payment, the Subject Property be sold to recover the money owing lack merit and accordingly falls off.

6.21 I now turn to consider the Applicant's claim for damages for breach of the Investment Agreement. In the case of

case of **JZ Car Hire Limited v Malvin Chala and Scirocco Enterprises Limited**<sup>9</sup> it was held as follows: -

***“It is the party claiming any damages to prove the damages.”***

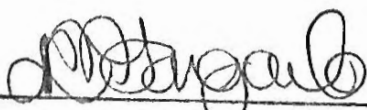
6.22 Based on the foregoing authority, it is clear that it is for the party, who is claiming damages, to prove the damages. On my analysis of the Applicant's evidence on record, I find that the Applicant has not led any evidence to support the allegation that it suffered damages as a consequence of the Respondent's breach of the Agreement. Therefore, I find that the Applicant has not proved, on a balance of probability, that it is entitled to damages for the Respondent's breach of the Investment Agreement and this particular claim is, therefore, dismissed.

## **7 CONCLUSION**

7.1 In conclusion, as the Agreement, by the use of the word of forfeiture, provided for the immediate conveyance of the Subject Property to the Applicant, in the event of default by the Respondent, the Applicant herein is entitled to the Subject Property, as beneficial owner, pursuant to the said express terms of the Agreement. Accordingly, I order the Respondent to convey the Subject Property to the Applicant and also forthwith surrender vacant possession of the said Subject Property to the Applicant.

- 7.2 It follows therefore, that the Applicant's claim for an order that the Respondent pays the sum of K350,000.00, plus interest and upon such payment the Subject Property be surrendered to the Respondent, and the claim for an Order that in default of payment, the Subject Property be sold to recover the money owing lack merit and are accordingly dismissed.
- 7.3 Further, the Applicant has failed to prove, on a balance of probability, that it is entitled to damages for the Respondent's breach of the Agreement. Accordingly, the claim is dismissed.
- 7.4 Costs are for the Applicant to be taxed in default of agreement.
- 7.5 Leave to Appeal is granted.

**SIGNED, SEALED AND DELIVERED AT LUSAKA, THIS 30<sup>TH</sup> DAY  
OF DECEMBER, 2022.**

  
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**P. K. YANGAILO  
HIGH COURT JUDGE**