JAMES DAKA v SHANTILAL BHULABHAI PATEL AND ZAMBIA STATE INSURANCE CORP LTD (1995) S.J. (S.C.)

SUPREME COURT
GARDNER, CHAILA AND CHIRWA, JJ.S.
24TH JANUARY, 1995 AND 9TH NOVEMBER, 1995
S.C.Z. JUDGMENT NO. 19 OF 1994
APPEAL NO. S.C.Z./8/118/92

Flynote
Conveyancing - Power of sale under Conveyancing Act - Sale of mortgaged property - Notice to the purchaser

Headnote
The appellant appealed against a judgement of the High Court awarding to the first respondent vacant possession of premises at stand No. 4512 Northmead and mesne profits.

Held:
(i) **The second respondent was under no duty to plead his entitlement to sell the property**
(ii) **There is nothing in the Conveyancing Act to prevent the sale of mortgaged property by tender**
(iii) **When a mortgagee sells under his power of sale, the mortgage is extinguished and the question of notice to a purchaser does not apply.**

For the appellants: H. Silweya and Company
For the respondent: S.S Kakoma of Mundia Kakoma and Company

Judgement
GARDNER,J.S.: delivered the judgement of the court.

appeal. This is an appeal against a judgement of the High Court awarding to the first respondent vacant possession of premises at stand No. 4512 Northmead and mesne profits.

Before the hearing of the appeal we dealt with an application by the appellant to set aside an order by the learned trial judge that the appellant should pay into court the sum of K500,000 as security for costs. The quest of security for costs is dealt with by Rule 55 of the Zambian Supreme Court Rules. This rule reads as follows;

"The Court or a judge thereof may at any time, in any case where it or he thinks fit, upon application or of its or his own motion, order security or further security for costs to be given, and may order security to be given for the payment of past costs relating to the matters in question in the appeal, and may make compliance."

The reference to the court or a judge means the Supreme Court or a judge thereof, and, consequently, no other part or judge can order security for costs in excess of the sum laid down in Rule 54 as amended. As a High Court judge has no power to make such an order, we granted the application and set aside the order. We now turn to the appeal

The facts of the case are that the appellant was the owner of the property at Stand No. 4512 Northmead and this was used as security for a first mortgage with Zambia National Commercial Bank Limited in which the defendant's company Shardlow Taylor and Company Limited was the borrower and the appellant was the Guarantor. There was also a second mortgage in favour of the Zambia State Insurance Corporation Limited (the second respondent) in which the appellant was the borrower. The appellant had his companies experienced some financial difficulty, they were unable to pay the interest on the mortgages and the company Shardlow Taylor was put into receivership.

As a consequence both the Zambia National Commercial Bank and the second respondent decided to sell the appellant's property on Stand No. 4512. Arrangements were made for payment to Zambia National Commercial Bank of the money due under the mortgage in their favour.

The property was advertised and the first respondent put forward a tender which was accepted on condition that he increased his offer by sufficient money to pay off both mortgages. The first respondent agreed to this proposal and the contract of sale was accordingly finalised. Subsequently both mortgages were paid off for a total of K397,369.67 and the property was assigned to the purchaser, the first respondent.

The appellant maintained that the he had never received notice that the property was to be sold and that he was surprised when he received a request from the purchaser to give vacant possession of the premises. In this connection a letter dated 27th January 1988 (7 days after the finalisation of the contract with the first respondent) was written to Mr R K Mwanza of M F K Management Consultant Services by the legal counsel of the second respondents stating that some seventeen months later, Mr Mwanza replied to this letter enclosing a sum of K357,779.00 in settlement of the debt to the Corporation; this cheque was returned because the property had already been sold to the first respondent.

The first respondent issued a writ claiming vacant possession of the premises from the appellant. When the action was heard the appellant gave evidence that he had never received any notice demanding payment of the amount due under the mortgage to the second respondent, nor had he been given notice that the premises were to be sold to settle the indebtedness. Mr Lungu a former employee of the second respondent gave evidence that notice requiring payment and of intention to sell was given to the appellant on a number of occasions. He was unable to specify the occasions or produce copies of such correspondence, but the learned trial judge accepted that he was telling the truth. The learned trial judge further accepted that the appellant must have seen the notice advertising the property for sale and that he was not telling the truth when he said that he was not aware of any demand for payment or any notice of intention to sell. The appellant had further complained in the High Court that the premises should not have been sold by tender because this would not obtain the highest possible price. The learned trial judge found that there was nothing improper in selling the property by tender and that the price of K397,369.67 was reasonable for the premises. On these grounds the learned trial judge granted the order of vacant possession and mesne profit, and it is against that judgement that the appellant now appeals.

Mr Silweya on behalf of the appellant put forward a number of grounds of appeal. The first of which was that the learned trial judge erred in concluding that the appellant received all the reminders and notices of the intention to sell the property and was wrong in equating service of property by tender had resulted in loss to the appellant because the property, according to a valuation report in February 1989, was valued at one million two hundred and sixty thousand kwacha. Finally, Mr Silweya argued that as the purchaser of the property had notice that it was subject to a mortgage, he took the property subject to such mortgage and the rights of the

appellant.

Before delivering this judgement we asked counsel to appear before us to argue the question of whether or not notice was required to be given when interest under the mortgage was in arrears and unpaid for two months after becoming due. Mr Silweya, for the appellant, argued that no interest was due under the mortgage because clause 1 of the mortgage deed provided that, if interest was not paid, it would be added to the principal sum and would be repayable from time to time. clause 1 reads as follows:

> "In consideration of the sum of Ninety Four Thousand Four hundred and Twenty one kwacha Ninety five ngwee (K94,421.95) now paid by the Lender to the Borrower (the receipt whereof the Borrower hereby acknowledges) the Borrower HEREBY COVENANTS with the Lender that he will on the First day of September One thousand Nine hundred and Eighty six next pay to the Lender the sum of Ninety Four thousand and Four hundred and Twenty one kwacha Ninety five ngwee (94,421.95) with interest thereon from the date hereof at the rate of Ten percentum (10%) per annum and if the said sum shall not be paid on that date then so long as any part thereof shall remain owing that he will pay to the Lender interest at the rate of aforesaid on the said sum or such part thereof as shall from time to time remain owing by equal monthly payments on the fifth day of each month."

It is clear that the wording of the clause does not allow for unpaid interest to be added to the principle sum. The words "from the time to time"

The mortgage deed in this case provided for the repayment of the money that on 1st September, 1986 with a proviso that, if the money was not paid, interest would continue to be payable. The power of sale under section 19(i) of the Conveyancing Act, 1981, came into effect after the date for repayment and thereafter the only restraint on such sale was provided for by section 20 of the Act. This section reads as follows:

> "A mortgage shall not exercise the power of sale conferred by this Act unless or until:
>
> > (i) Notice requiring payment of the mortgage money has been served on the mortgagor or one of several mortgagors and default has been made in payment of the mortgage money, or of part thereof, for three months after such service; or
> >
> > (ii) Some interest under the mortgage is in arrears and unpaid for two months after becoming due; or
> >
> > (iii) There has been a breach of some provision contained in the mortgage deed or in this act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon."

Although this section was referred to in full by Mr Silweya, he concentrated solely on sub section (i) which provides that the power of sale would not be exercised until notice has been served on the mortgagor. There was no argument addressed to us in connection with sub paragraph (ii) which is an alternative to the paragraph requiring notice.

The evidence concerning the failure to pay interest was contained in a letter dated the 7th of September, 1987 written by the agent for the appellant to the Managing Director of the Zambia National Commercial Bank Limited. This letter reads as follows:

Dear Sir

ZNBC AND OURSELVES STAND NO. 4512
MADZIMOYO ROAD LUSAKA___________

We refer to our recent discussion with the Managing Director of the Bank in connection with the intended sale of the above property by order of the mortgagees.

This company fully acknowledges the debt with your bank and its inability to service the said debt since James Daka Limited was placed under receivership. The debt was incurred by this company as a step gap measure to help James Daka Limited continue supplying stones and cement blocks to the party complex as receipt of claim moneys from Government by James Daka Limited in the sum of over K400,000.00 was being awaited. Unfortunately this did not materialise and so James Daka Limited was placed under receivership in consequence of which operations ceased and this company's current account with the Premium House Branch of your Bank became non operational.

In the light of the new development the owner of James Daka Limited who is also director of this company and Shareholder has agreed with this company to put forward the following proposals for a possible satisfactory settlement of the matter.

1. That the Bank which holds first mortgage over the property and the Zambia State Insurance Corporation being the second mortgagee delay execution of the sale of the property being stand No. 4512 Madzimoyo Road Lusaka.
2. That James Daka the principal shareholder and director of this company offers to sell to the Bank his personal property along Nyerere Road, Lusaka at an agreed valuation based on current market prices. Details of the property would be made available latter.

We trust that you will give our proposals your favourable consideration in the interest of both parties and look forward to your early response to our proposals."

This letter was an acknowledgement that the debt to the Zambia National Commercial Bank could not be serviced and that the second respondent was also entitled in the same circumstances to exercise its power of sale. Further, according to the defence and counter claim at paragraph 16, the amount due under the mortgage by the 27th of January, 1988 was K112,291.92 indicating non payment of interest above the principal sum of K94,421.95.

By paragraph 15 the appellant pleaded that the amount due to settle the mortgage debt and interest in June, 1989 had risen to K357,779 and this was only one month after the assignment to the first respondent was executed. From the evidence in the pleadings therefore it is clear that, before the property was sold, interest under the mortgage was unpaid for at least two months. It follows therefore that there was no requirement for any notice under subsection (i) of section 20 of the Act. The argument for both parties relating to service or lack of service of notice was therefore irrelevant, although we would comment, that the appellant's own evidence that he was aware of the proposed substitution of one property for another, as referred to in his agent's letter dated the 7th of September, 1987, was an indication that he was aware that the second respondent intended to sell the property. Had there been no intention to sell there would have been no need for the attempted substitution of another property.

We have considered whether in view of the fact that the effect of section 20 sub section (ii) was not pleaded, the second respondent was debarred from relying on it. Apart from the fact that it

is a question of law, the appellant's counterclaim was based on the allegations at paragraph 14 that the property was wrongly sold on the grounds that there has been no service of notice demanding payment or intention to sell, and that sale by tender was wrong. The second respondent replied to this by maintaining that notice had been given and that the appellant had not been prejudiced by the sale by tender. In the circumstances, the second respondent, having answered the counterclaim, was under no duty to plead his entitlement to sell the property. It would have been preferable and it would have saved unnecessary argument, had the second respondent indicated that there was no need for notice in this case, but there was no duty on it to put in such a pleading. The first ground of appeal and these relating to lack of service of notice cannot succeed.

With regard to the ground of appeal relating to the sale of the property by tender we note that section 19 of the Act, which gives the power of sale, provides that such sale may be by auction or by private contract.

There is nothing in the Act to prevent the sale of mortgaged property by tender. In this case in order to prove that the price obtained for the property was in some way inadequate it was not sufficient to produce a valuation report dated February, 1989 in respect of property which was contracted to be sold in January, 1989. As the learned trial judge commented in his judgement, at the relevant period there were dramatic increases in the prices of property, and, without evidence that in or about January, 1988 the price realised was too low, the appellant's claim in this respect cannot be supported. This ground of appeal also cannot succeed.

With regard to the ground of appeal relating to the proposition that the purchaser in this case took subject to the appellant's rights as a mortgagor, we would comment, as we did in court, that, when a mortgagee sells under his power of sale, the mortgage is extinguished and the question of notice to a purchaser does not apply.

For the reasons we have given the appeal is dismissed with costs to the respondents and we order, that the appellant do deliver up possession of the property within thirty-one days from today.

Appeal dismissed
Costs to the respondents

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