IN THE SUPREME COURT OF ZAMBIA SCZ APPEAL No.88 OF 1996

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

B E T W E E N:

SAM AMOS MUMBA	1ST APPELLANT
PROGRESSIVE BUSINESS SERVICES LIMITED	2ND APPELLANT
AND	
BANK OF CREDIT AND COMMERCE (Z) LIMITED	RESPONDENT

Coram: Ngulube, C.J., Sakala and Muzyamba JJS

13th March 1997 and 10th April 1997

For the Appellants: H.H. Ndhlovu, H.H. Ndhlovu & Company

For the Respondent: C.M. Ngenda, Solly Patel Hamir & Lawrence

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J U D G M E N T

Muzyamba, J.S. delivered the judgment of the court.

For convenience we shall refer to the respondent as plaintiff and the appellants as defendants for that is what they were in the court below.

This is an appeal against a High Court decision granting the plaintiff possession of the mortgaged property known as stand number 5432 Lusaka.

The facts of this case as they appear from the affidavits are that the first defendant is the registered owner of stand 5432. On 11th December 1989 the parties signed a Mortgage Deed for a loan of K430,000 by the plaintiff to the 2nd defendant. The loan attracted 25% interest per annum. As security for the repayment of the loan plus interest the first defendant mortgaged his property to the plaintiff. It is not clear from the mortgage deed what the repayment schedule was but it would appear that the 2nd defendant fell in arrears and at the time of issuing the originating summons the amount outstanding was K1,158,053-19. The originating summons was duly served upon the defendants and an appearance was entered, we understand, by Messrs Kambiti and Partners on behalf of the defendant(s). On 12th October 1992 a notice to hear the originating summons was issued out of the principal registry. It was to be heard on 14th April 1993. On the appointed day there was no appearance for the parties and the matter was struck out. There then followed several applications until 21st February 1994 when the matter was finally heard and the order for possession made against the 1st defendant. Before then a notice of hearing in the usual form was issued by the court on 19th January 1994.

The record of proceedings on 21st February, 1994 at pages 85-86 of the record read as follows:

"21st February 1994 1992/HP/515

0942 hours

Before: Commissioner F.M. Lengalenga

Marshall: Mr. R.N. Ntoshya

For the Plaintiff: Mr. K.M. Maketo - Messrs Solly Patel, Hamir and Lawrence

For the defendant: Nil

Maketo - May it please my Lady, Messrs Kambiti & Partners are the respondents' advocates and I served the documents on them on 3rd December 1993 and a Notice of Hearing issued by the court was also sent to them. There is no explaination as to why they are not present today. In the circumstances I apply that we proceed with the main application.

Court - You may proceed with the application

Mr. Maketo - I will rely on the originating summons and the affidavit in support thereof and I accordingly pray for an order for possession.

Court - After considering the plaintiff's application and in the absence of an affidavit in opposition and or any other evidence to rebut the plaintiff's claim as contained in the affidavit in support, and upon being satisfied that the plaintiff has made out his claim, I accordingly grant the order as prayed in the originating summons for possession and costs.

Signed

21st February, 1994".

Mr. Ndhlovu argued one main ground of appeal, that the learned Commissioner erred in law by failing to satisfy herself that the notice of hearing was served upon the defendant's advocates before proceeding to hear the matter. He argued that although the notice of hearing dated 19th January 1994, unlike other notices which were directed to Mulungushi Chambers, was properly directed to Messrs Kambiti & Partners there was no

evidence or proof that it had been served on them. In support of his argument he referred the court to page 86 of the record where Mr. Maketo, then appearing for the plaintiff said 'a notice of hearing issued by the court was also sent to them'. That it was not clear how it was sent and by whom. If it was sent by the court, was it through the pigeon hole? That in terms of Order 35 rule 3 of the High Court rules, Cap 50 the Court ought to have been satisfied that the notice of hearing was served upon the defendants' advocates before proceeding to hear the matter. That the fact that the court was not so satisfied is quite clear from the record at page 86. He therefore urged the court to allow the appeal and order a retrial so that various issues are resolved, such as the present status of the plaintiff, is it in liquidation or was it taken over by Union Bank as a going concern; how much is owing as at present; the interest chargeable, was it simple or compound interest; the question of water and electricity charges and legal fees reflected on the ledger card at pages 62-63 of the record and the fact that the plaintiff has been in possession of the house since December 1995. In response, Mr. Ngenda argued that although it was not clear from the record how the notice of hearing was served on the defendants' advocates it must have been served through the High Court pigeon hole because that is how they got theirs. And while conceding that the matter should be sent back to the High Court he nevertheless argued that the failure by the defendants to file an affidavit in opposition was a clear indication that they owned the plaintiff some money. Therefore that if there was any dispute at all that would relate to quantum and interest. Further, that the plaintiff was never liquidated but bought as a going concern. In the circumstances he urged the court not to order a retrial but to order that the court below do ascertain the defendants' actual indebtedness.

In reply Mr. Ndhlovu said that in addition to the issues he had pointed out there was need for the court to construe the mortgage deed.

We have considered the evidence on record and the arguments by both Counsel. Order 35 rule 3 of Cap 50 cited by Mr. Ndhlovu provides as follows:

> "If the plaintiff appears, and the defendant does not appear or sufficiently excuse his absence, or neglects to answer when duly called, the Court may, upon proof of service of notice of trial, proceed to hear the cause and give judgment on the evidence adduced by the plaintiff, or may postpone the hearing of the cause and direct notice of the such postponement to be given to the defendant."

It is quite clear from this rule that if a defendant is not present at the hearing of any cause the court must, before proceeding to hear the cause, satisfy itself that the notice of hearing was served on him. In this case the record does not show that the learned trial Commissioner was so satisfied before she proceeded to hear the cause. This was a mistake on her part. Moreover, there was no proof of service on record. We would therefore allow the appeal and set aside the order for possession.

As regards whether or not we should order a retrial or ascertainment of the defendants' indebtedness we would refer to Orders VI rule 2 and XXX rule 8 of the High Court rules, Cap 50 which provide as follows:

> O. VI rule 2
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> "Any matter which under any written law or these Rules may be disposed of in chambers shall be commenced by an originating summons."
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> O. XXX rule 8
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> "In every cause or matter where any party thereto makes any application at chambers, either by way of summons or otherwise, he shall be at liberty to include in one and the same application all matters upon which he then desires the order or directions of the Court or Judge; and upon the hearing of such application it shall be lawful for the Court or Judge to make any order and give any directions relative to or consequential on the matter of such application as may be just; and such application may, if the Judge thinks fit, be adjourned from chambers into Court, or from Court into chambers."

It is quite clear from these rules that as a matter of practice an originating summons is heard and disposed of on affidavits in chambers and that where the issues raised cannot be disposed of on affidavits then the court may of its own motion or on application by parties or either of them adjourn the matter into open court for summary hearing, which may take the form of cross examining the deponents on their affidavits. For this reason we feel that the matter should take its normal course. Moreover, from the evidence available on record so far we do not conceive that the defendants' indebtedness could be properly ascertained on affidavits alone. We would therefore order that the matter goes back to High Court to take its normal

course. For this reason we order that the defendants do file their affidavit or affidavits in opposition within 10 days from to-day.

We also order that the matter be heard by another Judge and we do direct that in determining the matter the court should take into account the fact that the plaintiff has been in possession of the mortgaged house since December 1995 within which period, if the house had been rented, the plaintiff would have recovered part of the money owing.

Costs will follow the event and to be taxed in default of agreement.

M.M.S.W. NGULUBE
CHIEF JUSTICE

E.L. SAKALA
SUPREME COURT JUDGE

W.M. MUZYAMBA
SUPREME COURT JUDGE