

(2012)

**SCZ Judgment No.
51/2014**

IN THE SUPREME COURT FOR ZAMBIA

APPEAL

NO.145/2011

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

IN THE MATTER OF: The property comprised under a first legal mortgage

over lot No.5876/M situate at Lusaka in the Lusaka Province of the Republic of Zambia.

IN THE MATTER FOR FORECLOSURE AND POSSESSION.

BETWEEN:

**MICHELO SPECIAL GEORGES MWIINGA
APPELLANT**

1ST

(Sued as mortgagor and guarantor)

**FLORENCE KACHESA MWIINGA
APPELLANT**

2ND

(Sued as mortgagor and guarantor)

AND

**ZAMBIA NATIONAL COMMERCIAL BANK PLC
RESPONDENT**

CORAM: Mwanamwambwa, Ag. DCJ, Wood and Kaoma, JJS.

On 15th October, 2014 and 20th November, 2014.

For the appellants: Mr. L. Kalaluka-Messrs Ellis & Company.

For the Respondent: Mrs. S. N. Wamulume- Manager Legal.

JUDGMENT

WOOD, JS delivered the judgment of the Court.

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CASES REFERRED TO:

1. *National West Westminster Bank Plc v Skelton and another* (1993) 1 ALL E.R.242.
2. *Sonny Paul Mulenga & Vismar Mulenga (Both personally and Practicing as SP Mulenga International), Chainama Hotels Limited and Elephants Head Hotel Limited v Investrust Merchant Bank Limited* (1999) Z.R. 101.
3. *S. Brian Musonda (Receiver of First Merchant Bank (In Receivership) vs Hyper Food Products Limited and Two Others* (1999) Z.R.124.
4. *Ashley Guarantee Plc v Zacarai and another* (1993) 1 ALL E.R.254.
5. *Citibank Trust Ltd v Ayivor and another* (1987) 3 ALL E.R.241.

OTHER WORKS REFERRED TO:

Halsbury's Laws of England 4th Edition, Volume 32.

When we heard this motion, we allowed it and indicated that we shall give our reasons later. We now do so.

By this motion, the respondent is seeking an order to discharge a stay of execution of judgment granted by a single Judge on 1st December, 2011.

The brief facts of this case are that the respondent commenced a mortgage action against the appellants in respect of the outstanding sum of K419,590,509.96, that the appellants borrowed from the respondent. The learned trial Judge in the court

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below gave judgment in favour of the respondent, on the basis that the appellants did not deny the debt. He further stated that the appellants could not rely on the counter-claim against the respondent in respect of terminal benefits owing to the 1st appellant, since the cause of action in which the counter-claim was made had no relevance to the mortgage action. The appellants were not satisfied with the judgment and have since filed in an appeal. The learned trial Judge refused to grant a stay of execution of his judgment, prompting an appeal to a single Judge of the Court.

The single Judge granted the stay of execution of judgment on grounds that even though she was unable to assess the prospects of success of the appeal, the 1st appellant had shown a

reasonable prospect of trying to redeem the mortgage by suggesting a set off.

The respondent filed in an affidavit in support of the notice of motion to discharge the stay of execution of judgment, deposed to by one Mr. George Kashoki, an assistant manager in the employ of the respondent. Mr. Kashoki stated that the respondent was dissatisfied with the ruling granting the respondent a stay of

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execution of the judgment, as the ruling had only served to deny the applicant immediate enjoyment of the fruits of the judgment, since the appeal had no likelihood of success. He further deposed that the continued stay of execution would prejudice the respondent, as the interest rate on the judgment sum would continue to accrue and the sum outstanding would not be compensated for by the sale of the security.

Counsel for the respondent, Mrs. Wamulume, filed in skeleton arguments on behalf of the respondent. She submitted that the appellants were allowed a stay of execution of judgment

on the basis that the 1st appellant had obtained a judgment of the Industrial Relations Court entitling him to his benefits. On this basis, the single Judge of the Court found that the appellants had reasonable prospects of redeeming the mortgage debt by way of set off. Mrs. Wamulume contended that the single Judge erred in her ruling as a counter claim, even for an amount in excess of the mortgage debt, would not stop a mortgagee from acquiring the mortgaged property. In support of her submission, Mrs. Wamulume

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cited the case of *National Westminster Bank Plc v Skelton and another*¹ which held that:

“Subject to contractual or statutory limitations, a mortgagee under a legal charge was entitled to seek possession of the mortgaged property at any time after the mortgage was executed and that the existence of a cross claim, even if it exceeded the amount of the mortgage debt, would not by itself defeat the right to possession enjoyed by the mortgagee was applicable both where the cross claim was a mere counter claim and where it was a cross claim for unliquidated damages which, if established, would give rise to a right by way of equitable set off.”

Mrs. Wamulume further contended that the decision of the single Judge to grant the appellants a stay was flawed as there

was no proof before her that the 1st appellant would receive money from the respondent and if so, how much. She argued that irrespective of money being due or not due to the 1st appellant, it is common place that any money due to a mortgagor by a mortgagee bank cannot defeat the mortgagee's right to repossess the mortgaged property.

Mrs. Wamulume submitted that there was no basis upon which the stay was granted and in so doing, referred us to the case of *Sonny Paul Mulenga & Vismer Mulenga (Both personally and Practicing as SP Mulenga International), Chainama Hotels Limited*

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*and Elephants Head Hotel Limited v Investrust Merchant Bank Limited*² in which we held that:

"The successful litigant should not be denied immediate enjoyment of a judgment unless there are good and sufficient grounds."

In response, the appellants filed in an affidavit in opposition deposed to by the 1st appellant. The 1st appellant stated that the stay of execution of judgment was properly granted as the chances of the appeal succeeding were very high. He further

deposed that the judgment sum in the mortgage action could be compensated for by the superior damages which are currently awaiting assessment by the Industrial Relations Court. Counsel for the appellant, Mr. Kalaluka also filed in skeleton arguments in opposition. He submitted that the case of *National Westminster Bank Plc vs Skelton and another*¹ that the respondent relied on does not support the respondent's application, because the principle in that case is that a mortgagee's right to possession cannot be defeated by a counter claim or set off unless by way of statutory or contractual limitation. Mr. Kalaluka argued that in this case, the stay of execution did not defeat the respondent's right to possession of the mortgaged

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property, but merely suspended the right to possession pending determination of the appeal. Mr. Kalaluka contended that this Court has, in certain circumstances, postponed a mortgagee's right to possession and referred us to the case of *S. Brian Musonda (Receiver of First Merchant Bank (In Liquidation) vs Hyper Food Products Limited and Two Others*³ in which we held that:

“It is not contrary to law or to the rules for the Court to exercise its equitable jurisdiction of affording relief where a judgment debtor can pay within a reasonable time even if this results in fettering the judgment creditors’ freedom of inflicting a remedy of their own choice or preference in a mortgage action.”

Mr. Kalaluka argued that in any event, the respondent’s right to possession was subject to contractual limitations as there was in existence an employer/employee contractual relationship between the 1st appellant and the respondent, upon which the single Judge exercised her discretion to stay execution of the judgment.

We have examined the affidavits in support of and in opposition to the notice of motion before us. We have also considered the skeleton arguments filed in support thereof. It is clear from the holding in the case of *National Westminster Bank Plc*

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*vs Skelton and another*¹ that a mortgagee’s right to possession of the mortgaged property cannot be defeated by a cross claim, even if the cross claim exceeded the amount of the mortgage debt. This case was cited with approval in the latter case of

*Ashley Guarantee Plc v Zacaria and another*⁴ in which the court also acknowledged the general rule that subject to contractual or statutory limitations, a mortgagor could not defeat a legal mortgagee's right to possession by claiming an equitable set off for an un-liquidated sum, even if it exceeded the amount of the mortgage arrears.

This position was sustained in the case of *Citibank Trust v Ayivor and another*⁵ in which Mervyn Davies J, stated as follows:

"The next question that arises in this case is whether or not the existence of the counter-claim affects the right to possession. The cases show that the existence of the counter-claim does not affect that right. In Barclays Bank Plc v Tennet (1984) C.A, 242, Slade LJ said:

....and in my opinion, the Keller case (Samuel Keller (Holdings) Limited v Martins Bank Ltd (1970) 3 ALL ER, 950 makes it quite clear that the existence of the counter-claim cannot defeat the right to possession which the bank enjoys as mortgagee. Indeed, only recently in Mobil Oil Co. Limited v Rawlinson..... which was brought to our attention, Nourse J specifically held that the existence of a counter-claim will not defeat the

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legal mortgagee's right to possession where he establishes his indebtedness. The correctness of that decision does not appear to be in doubt as a matter of principle."

We are in total agreement with the principle enunciated in the above cited cases and hold that the 1st appellant's claim against the respondent for benefits does not defeat the respondent's right to possession.

Mr. Kalaluka relied on the case of *S. Brian Musonda (Receiver of First Merchant Bank (In Liquidation) vs Hyper Food Products Limited and Two Others*³ to argue that the respondent's right to possession may be postponed for good reason. In the *S. Brian Musonda (Receiver of First Merchant Bank (In Liquidation)*³ case, the respondents were asking for a reasonable time within which to pay the mortgage debt in installments, which application the High Court granted. The respondents also began to make monthly installment payments as directed by the court. In that case, we exercised our discretion to postpone the mortgagee's right to possession because the respondent had demonstrated that they were able to repay the mortgage debt within the time given by the court. In this case before us, the appellants have not made an application to pay off the debt

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in installments, but are asking the court to postpone possession on account of the counter claim before the Industrial Relations Court.

In the case of *Citibank Trust v Ayivor and another*⁵ it was held that the court could exercise discretion to postpone possession if it appeared that the mortgagor was likely to pay any sums due under the mortgage within a reasonable time. It was further held that the existence of a counter-claim did not mean that the defendants would be able to pay off their arrears within a reasonable period, since even if they had a reasonable prospect of success, there was no reason for the court to conclude that they would pay over any damages they might recover.

In the motion before us, the appellants have not indicated how much is due to the 1st appellant to enable us determine whether or not the money due is sufficient to cover the outstanding sum and any interest that will accrue. Further, the court below gave the appellants 120 days within which to repay the sum due but at the hearing of this motion, there was no evidence before us to suggest that they had made any payment. We are not satisfied that the

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appellants are in a position to pay the sums due within a reasonable time frame. Our considered view is that the facts of this case do not merit the postponement of the respondent's right to possession of the mortgaged property.

In exercising its discretion whether to grant a stay or not, the Court is entitled to preview the prospects of the proposed appeal. The single Judge of the court clearly stated that she was unable to assess the likelihood of success of the appeal and accordingly based the stay on the appellants' claim for a set off. On our part, we have looked at the arguments advanced at the hearing of the application for stay of execution at page 27 of the record of appeal and form the view that the appeal has no likelihood of success. It was for the above reasons that we granted the application to discharge the stay. Costs to the respondent, to be taxed in default of agreement.

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M.S. MWANAMWAMBWA
ACTING DEPUTY CHIEF JUSTICE

.....
A.M.WOOD
SUPREME COURT JUDGE

.....
R.M.C.KAOMA
SUPREME COURT JUDGE