

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

(Commercial Jurisdiction)



2017/HPC/0389

IN THE MATTER OF:

**Order 30 Rule 14 of the High Court Rules,
Chapter 27 of the Laws of Zambia**

AND

IN THE MATTER OF:

**The Property comprised under a Third Party
Mortgage over Holding Number 2169/117
Market Square, Lundazi**

BETWEEN:

PULSE FINANCIAL SERVICES LIMITED

APPLICANT

(T/A Entrepreneurs Financial Centre "EFC")

AND

STANLEY LENARD NGWENYA

1ST RESPONDENT

LEONARD PINGULANI NGWENYA

2ND RESPONDENT

**Before the Honourable Mr. Justice W. S. Mweemba in Chambers
at Lusaka**

*For the Applicant: Ms Chituwa S. Mwamba – Messrs S C M. Legal
Practitioners*

For the Respondents: No Appearance

JUDGMENT

LEGISLATION REFERRED TO:

- 1. Order 30 Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia**
- 2. Order 35 Rule 3 of the High Court Rules, Chapter 27 of the Laws of Zambia.**

CASES REFERRED TO:

1. **Lackson Mwabi Simwanza V Sangwa Simpasa, Chisha Lawrence Simpasa, 2005/HP/0500.**
2. **S. Brian Musonda (Receiver of First Merchant Bank Zambia Limited (In Receivership) V Hyper Food Products Limited, Tony's Hypermarket Limited and Creation One Trading (Z) Limited (1999) ZR 124**

WORKS REFERRED TO:

1. **Nigel P. Gravells, Land Law Text and Materials, Third Edition, London, Thomson Sweet and Maxwell, 2004.**
2. **Halsbury's Laws of England, 4th Edition, Volume 32.**
3. **Sir Robert Megarry, Megarry's Manual of the Law of Real Property, Fourth Edition, London, Stevens & Sons Limited, 1975**

This is an application by the Applicant against the Respondents pursuant to **Order 30 Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia** for the following:

1. Payment of all monies which as at 7th July, 2017 stood at a total sum of K154,698.11 plus interest, costs and other charges due and owing to the Applicant by the Respondents under a Facility Loan Agreement dated 6th June, 2015 and a Third Party Legal Mortgage over Holding Number 2169/117 Market Square, Lundazi owned by the 2nd Respondent.
2. An Order for foreclosure, delivery up by the 2nd Respondent to the Applicant and Sale of the mortgaged property.
3. Any further or other relief the Court may deem fit; and
4. Costs.

The Affidavit in Support sworn by Julius Nkhuwa the Legal Officer of the Applicant Company filed on 29th August, 2017 shows that on 28th May, 2015 the 1st Respondent applied for a Business Loan from the Applicant. A copy of the Individual Loan Application form is exhibited marked "JN1".

That the Applicant availed the Loan facility by the Individual Loan Agreement dated 6th June, 2015 to the 1st Respondent at the 1st Respondent's instance for the sum of K190,000.00 together with interest. Copy of the Loan Agreement is exhibited marked "JN2".

It is deposed that the 1st Respondent pledged personal chattels as collateral to secure payment of the said loan facility by duly signing a Pledge on Overall Assets (Moveable) Agreement with the Applicant relating to the surrendering of all personal assets mentioned in the Schedule therein. A copy of the Pledge on Overall Assets (Moveable) Agreement is exhibited marked "JN3".

That further a Third Party Mortgage was created after the 2nd Respondent pledged his property being Stand NO. 2169/117 Market Square, Lundazi, signed the Mortgage Deeds and deposited Certificate of Title No. 900060 with the Applicant as security to secure the said sum of K190,000.00 and interest. Copies of the registered Third Party Mortgage and Certificate of Title relating to the property are exhibited marked "JN4" and "JN5" respectively.

That it was a term in the Loan Agreement that the loan taken by the 1st Respondent was repayable in monthly instalments according to the Payment Schedule and thus the same was due on 18th July, 2015. A copy of the signed Consent Form stipulating the same is exhibited marked "JN6".

It is stated that the 1st Respondent failed to pay back the amount borrowed as agreed and as at 7th July, 2017 was indebted to the Applicant in the sum of K154,698.11. That the Respondents have failed, refused and neglected to repay

the loan to the Applicant's detriment and thereby depriving the Applicant of the use of its money as it is in the business of lending money.

It is deposed that the Respondents have no meritorious defence whatsoever to this claim.

There is no Affidavit in Opposition.

Counsel for the Applicant filed Skeleton Arguments into Court on 23rd July, 2018. She submitted that the action is filed pursuant to **Order 30 Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia.**

Regarding the rights and obligations that ensure from the relationship of mortgagor and mortgagee, it is submitted that the essential nature of a mortgage in its traditional form is that it is a conveyance of a legal or equitable interest in property with a provision of redemption. That upon repayment of a loan or the performance of some other obligation stipulated in the mortgage, the conveyance shall become re-conveyed. For this submission she relied on the learned author of **Land Law Text and Materials, Third Edition.**

It is further submitted that the creation of a mortgage is accompanied by the creation of remedies. That the remedies available depend on whether the mortgage created is a legal mortgage or an equitable mortgage. It is stated that the learned author of Land Law Text and Materials, Third Edition, summarizes the purpose of the various remedies available as follows at page 891:

"In addition to the personal remedy against the mortgagor for breach of the personal covenant to repay the loan, the mortgagee has a number of remedies against the mortgaged land. Foreclosure and sale are directed primarily at the recovery of the loan and termination of the mortgage transaction. The appointment of a receiver is directed primarily at the recovery of interest payable on the loan and possession of the mortgaged property although

originally used as a means of securing the payment of interest and still in theory available for that purpose (see Western Bank Limited V Schidler) is now sought almost exclusively as a preliminary remedy to the exercise of the power of sale so that the mortgagee may sell the property with vacant possession”.

Mrs. Mwamba also submitted that the case of **LACKSON MWABI SIMWANZA V SANGWA SIMPASA, CHISHA LAWRENCE SIMPASA (1)** gives guidance to the extent that the mortgagee's remedies are cumulative. That a mortgagee is not bound to select any one of the remedies and pursue that particular remedy exclusively. A mortgagee is at liberty to employ one or all of the remedies to enforce payment. That for instance if he sells the property for less than a mortgage advance or debt, he may still sue the mortgagor upon the personal covenant for payment of the balance. That however, foreclosure puts an end to other remedies, since if the mortgagee takes the whole security, he cannot claim payment.

It is contended that the Respondent has since defaulted in paying back the loan. That therefore the Applicant as mortgagee in this action seeks an Order that the Respondent immediately pays the full amount owed with interest and that in default of such payment the Applicant be given possession of the mortgaged property. That the recovery of possession, in default of payment, is being sought so that the Applicant can exercise its right as mortgagee to dispose of the property in order to enable it recover its monies.

It is submitted by learned Counsel for the Applicant that the legal position espoused in the case of **LACKSON MWABI SIMWANZA V SANGWA SIMPASA CHISHA LAWRENCE SIMPASA (1)** by the High Court that a mortgagee has several remedies available namely payment of the money secured by the mortgage, foreclosure, delivery up of possession of the mortgaged property and sale which are cumulative was following earlier authorities such as the Supreme Court decision in the case of **S. BIRAN MUSONDA (RECEIVER OF**

FIRST MERCHANT BANK ZAMBIA (IN RECEIVERSHIP) V HYPER FOOD PRODUCTS LIMITED, TONY'S HYPERMARKET LIMITED AND CREATION ONE TRADING (Z) LIMITED (2).

Finally it was submitted that a mortgagee who sells the mortgaged property for less than the mortgage advance or debt, may still sue the mortgagor upon the personal covenant for payment of the balance. She cited the learned authors of **Halsbury's Laws of England, Fourth Edition, Volume 32** where at paragraph 785 it is stated that:

"If the mortgagee realizes part of the debt by his action on the covenant, or by sale of part of the property, he must give credit in the foreclosure action for the amount realized, and if, after foreclosure, he proceeds on the covenant, he re-opens the foreclosure".

That further at paragraph 787 of **Halsbury's Laws**, *ante* it is stated that:

"As the mortgagee is entitled to pursue all his remedies concurrently, the pendency of a foreclosure action does not prevent him from suing on the covenant, although, if such proceeding is intended, the claim should be joined with the claim for foreclosure in one action. The order will then provide for any sums recovered being credited to the mortgagor in taking the foreclosure account".

The Applicant's Counsel urged the Court to enter judgment in favour of the Applicant who has proven their case on a balance of probabilities.

There is proof of service showing that the originating process was served on both Respondents on 4th September, 2017. Notice of Hearing of the Originating Summons was served on the 1st Respondent on 2nd August, 2018.

The Respondents did not attend the hearing on 22nd August, 2018 but I proceeded to hear the Originating Summons pursuant to **Order 35 Rule 3 of the High Court Rules, Chapter 27 of the Laws of Zambia**.

There is no Affidavit in Opposition and therefore no defence to this claim. From the evidence on the record the Applicant has proven its case on a balance of probabilities.

I therefore enter Judgment in favour of the Applicant against the Respondents for the sum of K154,698.11 together with contractual interest from 8th July, 2017 to date of Judgment and thereafter at the average lending rate as determined by the Bank of Zambia up to date of full payment.

The Judgment debt together with interest must be paid to the Applicant by the Respondents within 30 days from the date hereof.

In the event that the Judgment debt and interest remain unpaid at the expiry of the said period, it is ordered that:

- (i) The 1st Respondent is to deliver up possession of his personal chattels listed in the Schedule to the Pledge on Overall Assets (Moveable) dated 10th June, 2015 to the Applicant which shall be at liberty to sell the same; and
- (ii) The 2nd Respondent shall deliver vacant possession of the Mortgaged Property namely Stand Number 2169/117 Market Square, Lundazi to the Applicant who shall be at liberty to foreclose and exercise its right of sale.

Costs to the Applicant to be taxed in default of agreement.

Leave to appeal is granted.

Delivered in Chambers this 14th day of September, 2018.

A handwritten signature in black ink, consisting of several slanted, parallel strokes followed by a circular flourish.

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WILLIAM S. MWEEMBA
HIGH COURT JUDGE