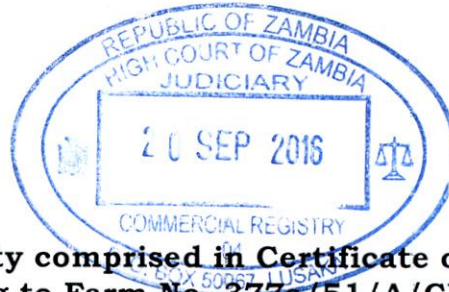


IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2016/HPC/0305



IN THE MATTER OF : **Property comprised in Certificate of Title**
relating to Farm No. 377a/51/A/CL/A/1
Lusaka

B E T W E E N :

STANBIC BANK ZAMBIA LIMITED

APPLICANT

AND

DONNY MWEEMBA MAILA
ROSEMARY CHILESHE MAILA

1ST RESPONDENT
2ND RESPONDENT

For the Applicant:

Ms. N. Sameta

Messrs Mambwe, siwila & Lisimba Advocates

For the Respondent:

Absent

J U D G M E N T

CASES REFERRED TO:

1. *S. Brian Musonda (Receiver of First Merchant Bank Zambia Limited) v Hyper Foods Products Limited and Creation One Trading (Z) Limited, (1999) ZR 124.*
2. *Lackson Mwabi Mwanza V. Sangwa Simpasa, Chisha Lawrence Simpasa, 2005/HP/0500*
3. *Khalid Mohamed V The Attorney-General (1982) Z.R. 49 (S.C.)*
4. *Anderson Kambela Mazoka, Lt General Christon Sifapitembo, Godfrey Kenneth Miynada Vs Levy Patrick Mwanawasa, the Electoral Commission of Zambia, and the Attorney General, (2005) Z.R. 138*
5. *Zambia Consolidated Copper Mines Investments Holding Plc V Woodgate Holdings Limited, 2008/HK/01*

LEGISLATION AND OTHER MATERIALS REFERRED TO:

1. *High Court Act, CAP 27 of the Laws of Zambia*
2. *Megarry's Manual at the Law of Real Property, 4th Edition at 479*
3. *Supreme Court Practice, 1999 Edition*

The Applicant commenced this action against the Respondents on 16th May, 2016, by way of Originating Summons pursuant to **Order 30 Rule 14 of the High Court Act** as read with **Order 88 of the Supreme Court Practice 1997 edition**. The reliefs that the Applicant seeks are as follows:

1. *Payment of the sum of K557,983.19 plus interest under First Legal Mortgage;*
2. *Delivery up and possession of Farm No. 377a/51/A/CL/A/1, Roan Road, Kabulonga, Lusaka;*
3. *Foreclosure and Sale;*
4. *Further or other relief;*
5. *Costs.*

The Originating Summons was supported by an Affidavit sworn by Reuben Matale Malindi, the team leader for Specialized Recoveries Rehabilitation and Recoveries in the Applicant bank. The deponent deposed that by Facility Letter dated 9th June, 2010 the Applicant availed the Respondents a credit facility in the sum of K620,000,000.00 (unrebased). It was deposed that the facility was secured by a First Legal Mortgage over Farm No. 377a/51/A/CL/A/1. The deponent further attested that the Respondents have not been servicing the debt regularly and that as

a result there was an outstanding balance of K557,983.19 owing as at the date of commencement of the action. A copy of the Statement of Account was adduced in support as exhibit "RMM4". The deponent also adduced a copy each of the relevant Facility Letter being exhibit "RMM1", Certificate of Title as exhibit "RMM2" and Mortgage Deed, exhibit "RMM3", in support. The deponent summed up by deposing that the Respondents failed or refused to settle their indebtedness to the Applicant, without any defence, despite several reminders by the Applicant. There was no documentary evidence tendered to support the deposition that reminders were issued or sent to the Respondents.

When the matter came up for hearing, the Respondents were neither in attendance nor had they filed any Affidavit in Opposition. However, I noted that an Affidavit of Service was sworn by Rodson Nkatya, a legal clerk in the firm representing the Applicant, revealing that substituted service had been effected through publication in the Zambia Daily Mail on 2nd and 3rd August, 2016. An Order for leave to serve process and notice of hearing by substituted service had been obtained on 20th July, 2016. Being satisfied that service had been effected, I proceeded to hear the matter in the absence of the Respondents.

In her submission before Court, Counsel for the Applicant, Ms. N. Sameta relied on the Affidavit in Support of the Originating Summons, as well as the Skeleton Arguments filed on 16th May, 2016.

In summation, the Skeleton Argument tendered by Counsel was that the Respondents borrowed money on the security of a legal mortgage and that since the Respondents have defaulted in the repayment obligations, with no defence, contrary to the terms and conditions of the Credit Facility, the Applicants ought to be granted the reliefs prayed for in the Originating Summons. The Skeleton Arguments, disappointingly, contained mere quotations from cited authorities without any impact assessment as to how the quoted texts supported the Applicant's case. I therefore will not venture into making detailed arguments or making the connections on the Applicant's behalf, suffice to say that I have taken note of the cited authorities, namely, **Order 30 Rule 14 of the High Court Rules, CAP 27**, the case of ***S. Brian Musonda (Receiver of First Merchant Bank Zambia Limited) Vs Hyper Foods Products Limited and Creation One Trading (Z) Limited*** ⁽¹⁾ and the learned authors of **Megarry's Manual at the Law of Real Property**.

The gist of the cited authorities is that when a Mortgagee's right to enforce the Mortgage security is activated, the available remedies are cumulative and the Mortgagee is not bound to select one of the available remedies, but could employ any or all of the available remedies to enforce payment. This position of law was applied by my learned brother, Justice Dr. Matibini, SC (as he then was), in the case of ***Lackson Mwabi Mwanza Vs Sangwa Simpasa, Chisha Lawrence Simpasa*** ⁽²⁾, where it was held that the Mortgagee's remedies are cumulative and as such a Mortgagee is not bound to

select any one of the remedies, and pursue that particular remedy exclusively. Justice Dr. Matibini went further in his holding to elucidate that a Mortgagee is at liberty to employ one or all of the remedies to enforce payment. I am persuaded and agree that this is the position of the law. The question that needs to be answered therefore, is whether the Applicants right to enforce its Mortgage security has matured.

I have carefully examined the affidavit evidence before me and find that both Respondents appended their signature to the Facility Letter dated 9th June, 2010 for the sum of ZMK 620,000, 000 (unrebased). The Respondents accordingly expressly signified their acceptance of the terms and conditions contained in the said Facility Letter. Under paragraph 4.2 of the said Facility Letter, the Respondents were obliged to make 144 monthly instalments, beginning 30 (thirty) days after first use of the Loan and expiring, according to paragraph 10 thereof, on 9th June 2022, by which date the Loan ought to be repaid in full, albeit the Bank reserved the right to demand full payment of the loan before the expiry date.

I further find that the Respondents provided security by way of First Legal Mortgage over Unit No. CL/A/1 of F/377a/51/A as required by paragraph 7 of the accepted Facility Letter. The Mortgage Deed was duly registered in the Registry of Deeds on 29th, June 2010.

In scrutinising the Mortgage Deed, I took hiatus on the last paragraph on page 5 and in particular its spill over, item (vi) on

page 6, which stipulates that the principal and other monies secured by the Mortgage become immediately payable and security enforceable, ***"if the Borrower makes a default in observing and performing or fulfilling any of their obligations hereunder including the payment of the principal and interest or other monies and the Bank by notice in writing to the Borrower calls in the principal and other monies hereby secured."*** (Court emphasis).

My interpretation of this item (vi) is that before the Applicant can claim that the monies secured by the Mortgage Deed have become payable and further that the security has become enforceable on account of the Respondents default, the Applicant bank must have, prior to the claim, given notice in writing to the Respondents calling in the principal and other monies secured by the Mortgage Deed. I further find that item (vi) on page 6 of the Mortgage Deed is consistent with the Applicant's reserved right to demand full payment of the loan before the expiry date contained in paragraph 10 of the Facility Letter. In this regard, I must consider whether the Applicant has proved that the loan secured by the Mortgage Deed has become payable and that the security has become enforceable in the manner stipulated by the Mortgage Deed.

At this point I must emphasize that I am cognisant of the fact that the Applicant's claim is unopposed and therefore there is no defence on record. However, I am under a judicial duty to adjudicate upon every aspect of the suit so that every matter in

controversy is determined with finality. Accordingly, I have resisted the attraction of entering judgment on the basis of an absence of a defence or opposition as the case may be. In this regard I am not only persuaded but also bound by the Supreme Court decision in the case of **Khalid Mohamed Vs The Attorney-General (1982) Z.R. 49 (S.C.)** ⁽³⁾, where it was held that

"a plaintiff cannot automatically succeed whenever a defence has failed; he must prove his case".

Particularly, I draw attention to the words of Justice NGULUBE, D.C.J (as he then was), which I adopt, that

"An unqualified proposition that a plaintiff should succeed automatically whenever a defence has failed is unacceptable to me. A plaintiff must prove his case and if he fails to do so the mere failure of the opponent's defence does not entitle him to judgment. I would not accept proposition that even if a plaintiff's case has collapsed of its inanity or for some reason or other, judgment should nevertheless be given to him on the ground that defence set up by the opponent has also collapsed. Quite clearly a defendant in such circumstances would not even need defence"

The holding in the **Khalid Mohammed** ⁽³⁾ case was later reaffirmed and applied in the Supreme Court case of **Anderson Kambela Mazoka, Lt General Christon Sifapitembo, Godfrey Kenneth Miynada Vs Levy Patrick Mwanawasa, the Electoral**

Commission of Zambia, and the Attorney General ⁽⁴⁾. The position remains unchanged and holds true even today, as was applied and transcended by my learned sister Judge Kaoma (as she then was) in the case of **Zambia Consolidated Copper Mines Investments Holding Plc V Woodgate Holdings Limited** ⁽⁵⁾, where she held that;

“evidence adduced must establish the issues raised to a fairly high degree of convincing clarity and where there is a lacuna in the evidence, the trite position of the law is that the lacuna should be resolved in favour of the party who is not responsible for that lacuna”.

I am thus compelled to interrogate the Applicants claim autonomous to the Respondents' opposition or lack thereof.

In this regard, my examination of the affidavit evidence before me clearly shows that the loan expiry date is 9th June, 2022, as stipulated in paragraph 10 of the Facility Letter. It is also evident that there is nothing before Court to show that the Applicant did in fact exercise its reserved right to demand full payment of the loan before the expiry date; neither is there proof that the Applicant complied with the Mortgage Deed by issuing written notice to the Respondents calling in the monies secured on account of their default.

I am persuaded by my learned sister's decision in the **Zimco case** and hold that this lacuna in evidence must be resolved in favour of

the Respondents. Accordingly, I find that the Applicant has failed to prove, with a high level of clarity, that the loan was called in early, before the stated expiry date, on the basis of the Respondents default. This being the case, I am satisfied that this intended mortgage action is premature. The loan remains within its operational cycle and will expire on 9th June, 2022, unless and until the Applicant calls it in pursuant to the conditions of the Facility Letter, as read with the registered Mortgage Deed. It is only when the monies become payable and the security enforceable that this Court can veer into considering the available cumulative remedies.

For the foregoing reasons, I take the view that the Applicant has failed to prove its case against the Respondents. The claim by the Applicant as contained in the Originating Summons of 16th May, 2016 is accordingly dismissed.

Each party shall bear its own costs.

Leave to appeal is granted.

Dated the 20th day of September, 2016



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Hon. Madam Justice B. G. Lungu
HIGH COURT JUDGE