IN THE HIGH COURT OF ZAMBIA **2013/HP/1579**

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

ZAMBIA NATIONAL BUILDING SOCIETY **APPLICANT**

AND

NORIANA MUSETEKA MUNEKU **RESPONDENT**

Before the Hon. Mrs. Justice F. M. Chisanga, this .....day of ..... 2014.

For the Plaintiff: *Ms. Viyuyi, Messrs Simeza Sangwa & Associates*

For the Defendant: *L. Kalaluka, Messrs Ellis & Co.*

R U L I N G

Cases Cited:

1. ***Michelo Special Geroges Mwiinga and Another vs Zambia National Commercial Bank PLC HPC/0448***
2. ***National Westminster Bank PLC vs Skelton and Another (1993) 1 ALL ER 242***
3. ***Ashley Guarantee PLC vs Zacaria (1993) 1 ALL ER 254 at 260,***
4. ***Warren vs Murray (1894) 2QB 648 at 665***
5. ***Attorney General vs Tall and Another (1995/97) ZR 54***

6. ***Kelvin Hang'andu and Co vs Webby Mulubisha (2008) ZR 82 vol. 2***
7. ***BP Zambia PLC vs Interland Motor (2001) ZR 103***
8. ***Development Bank of Zambia and Another vs sunset Ltd and another (1997) ZR 187***
9. ***Mobil Oil Co. Ltd vs Rawlinson (1981) 43 PCR 221.***
10. ***Hanak vs Green (1958) 2 ALL ER 417***
11. ***British Anzani (Felixstowe) Ltd vs International Marine Management (UK) Ltd (1972) 2 ALL ER P 1063***

Other works referred to:

1. ***Halsbury's Laws of England 4th Edition, vol. 32, paragraphs 672 & 606***

On 25th October 2013, the applicant commenced these proceedings by way of originating summons, claiming for payment of all monies and interest due and owing to the applicant under various credit facility letters secured by a deposit of the certificate of title over subdivision 123 of farm 509 situated at Lusaka in the Lusaka Province of Zambia. The secured credit stood at KR512,976.45 as at that date. The applicant equally claimed for an order that the legal mortgage be enforced by foreclosure on the property, as well as delivery of vacant possession of the mortgaged property by the respondent to the applicant and that the applicant exercises a power of sale of the property.

Soon thereafter, the respondent through her advocates, took out summons to dismiss the action pursuant to order 3 rule 2 HCR as read with order 18 rule 19 (1) RSC. The application was supported by an affidavit sworn by the respondent, who deposed that the action was premised on an amount outstanding on loans advanced to her during her employment by the applicant.

She deposed that she was employed in January 2000 as Board Secretary/Legal counsel, and later as Managing Director, until her services were prematurely terminated on 20th August 2012. Following that premature termination, she took out process for terminal benefits due to her under the contract. The action was under cause number 2012/HP/1164. She went on to state that the issue concerning loans owing to her former employees had been pleaded in that action. She stated that trial had already commenced, with the issue of loans featuring prominently in her testimony. That she specifically testified that she had loans owing to the applicant which she wanted to be paid by way of set-off against her terminal dues, and she was cross examined by the applicant's legal counsel.

The respondent went on to state that she had been advised by her counsel and verily believed that the reliefs sought in the transaction by the applicant could have been raised and litigated upon in earlier proceedings under cause number 2012/HP/1164 by way of counterclaim. That the applicant's action would result in conflicting decisions being made by different courts over the same subject matter.

The application was opposed by one Mutinta Charity Syulikwa, legal counsel in the applicant entity. She deposed that the respondent had admitted owing the applicant. That the proceedings herein, being a mortgage action, were distinct and separate from those under cause number 2012/HP/1164 which were based on employment law and the employer and employee relationship that had existed between the applicant and the respondent.

The deponent went on to depose that it was a misconception to assert that this action could have been raised in cause number 2012/HP/1164 as a counterclaim as the two actions are different and separate actions, and not premised on the same facts. She has asserted further that there is no merit in the application to dismiss action because this action is a separate cause of action and should not be dependent on the findings of the court in cause

number 2012/HP/1164 by way of set-off, as the two are independent and the present action could have been brought against the respondent, whether or not her contract was terminated by the applicant.

Skeleton arguments were filed into court on behalf of the applicant. Reference was made to a statement by the learned authors of ***Halsbury Laws of England***[1] where they state:

> *"Where a legal mortgage has been created, whether by demise or by legal charge and no provision is made for retention of possession by the mortgagor, the mortgagee is entitled to immediate possession or receipt of the rents and profits at any time after the execution of the mortgage and equity does not interfere, notwithstanding that there has been no default on the mortgagee's part."*

Premised on that statement, it was submitted that since equity could not interfere with the mortgage's right to enforce the right to possession or sale, the question whether there was a matter before another court in which the mortgage was referred to could not postpone or in any way interfere with the mortgagee's rights.

Reliance was equally placed on a High Court decision in *Michelo* ***Special Geroges Mwiinga and Another vs Zambia National Commercial Bank PLC***[2] where Kajimanga J, as he then was, stated that the alleged counterclaim had no relevance to those proceedings, which related to a mortgage action by which the applicant was seeking to recover its debt which had not been settled by the respondent.

Learned counsel for the applicant made reference to ***National Westminster Bank PLC vs Skelton and Another***[3] *and* ***Ashley Guarantee PLC vs Zacaria***[4] where the court of appeal reportedly held that it was a general rule that subject to contractual or statutory limitations a mortgagor could not defeat a legal mortgagee's right to possession of the mortgaged property and in each case the

cross claims could not be unilaterally appropriated in discharge of the mortgage debt.

The mere fact that a guarantor was not primarily liable for payment of the debt was immaterial because the company was in default of its obligations to the plaintiff within clause 1(a) of the mortgage agreement. It followed that the plaintiff was entitled to enforce its rights and remedies over the mortgaged property.

Learned counsel argued that these authorities clearly showed that the respondent's contention that the applicant should have counter-claimed its mortgage rights before the other court in cause number 2012/HP/1164 was a misconception as a mortgage was a special claim, and a mortgager could not defeat a legal mortgagee's right to possession by claiming an equitable set off.

Therefore, the respondent's summons to dismiss the claim was unfounded. It was further contented that a mortgage action could not be suspended by merely commencing another court action, and merely pleading that the monies due under the mortgage would be paid upon conclusion of the other court action.

These contentions were countered through arguments filed into court on the 23rd January 2016 on behalf of the respondent. Reference was made to ***Westminster Bank PLC vs Skelton and another***[3] where the judge stressed that the bank's claim was simply for possession, not payment.

It was pointed out that the applicant's principal claim in this case was for payment of money, failing which the mortgage could be enforced by foreclosure and sale, in order to recover the sum of KR512,976.45 which the respondent allegedly owed the applicant. If the respondent paid the sum claimed, the question of foreclosure would not arise. It was submitted that in a case where the mortgagee sought recovery of the sum due and foreclosure as an alternative, the mortgagee was not entitled to immediate possession after

execution of the mortgage. That therefore, the applicant's argument was misconceived.

Reference was made to ***Waren vs Murray***[4] where Lord Asher MR stated, *"a legal right to possession cannot be enforced if the defendant has an equitable right to prevent its enforcement."*

Premised on the said proposition, it was contended that if the respondent could demonstrate that she was owed more than KR512,976.45 which the respondent was claiming in this action, the applicant's right to possession could not be enforced. It was further contended that whether the respondent's equitable right to set-off could override the applicant's right fell to be decided in cause number 2012/HP/1164, and not in the present action.

It was submitted further that cause number 2012/HP/1164 was the first to be commenced and witnesses had already led evidence in respect of the set-off. Therefore, that issue could not be summarily dealt with in this action. Further, that the right to equitable set-off was raised in an earlier action to the present one.

Learned counsel went on to argue that the court had power to adjourn, stay, suspend or postpone a mortgage action relating to a dwelling house where the cross claim had prospects of success. Reference was made to the statement in ***Halsbury's Laws of England***[1] which is in the following terms:

> *A legal mortgage's right to possession cannot, in the absence of some contractual or statutory provision to the contrary be defeated by a cross-claim for damages made by a mortgagee, even if the cross-claim is liquidated and admitted, and in excess of the mortgage arrears, or is for unliquidated damages giving rise to a right of equitable set-off.*
>
> *However, in the case of a dwelling house, the court may adjourn proceedings for possession, stay or suspend an order for possession, or postpone the date for possession if the existence of prospects of success of*

the mortgagee's cross-claim could be regarded as enabling the sums due to be paid within a reasonable time.

It was contended that the mortgage action was not a special claim. According to learned counsel, support for that argument was to be found in order XXVIII rule 3 of the High Court Rules CAP 27.

It was further argued that all matters in controversy between the parties should be brought under one action, as provided in Section 13 of the High Court Act CAP 27 of the Laws of Zambia. ***Attorney General vs Tall and Another***[5] was prayed in aid, and ***Kelvin Hang'andu and Co vs Webby Mulubisha***[6] equally cited as frowning upon forum shopping. ***BP Zambia PLC vs Interland Motor***[7] was also relied upon.

The Deputy Registrar considered the application and dismissed this action on the ground that maintaining the two separate causes had the potential of exposing the court to embarrassment. He invoked Order 3 Rule 2 of the High Court Rules.

Aggrieved with that ruling, the applicant appealed, on the following grounds:

1. The Learned Deputy Registrar erred in law and in fact when he held that there was a likelihood of conflicting decisions when in both 2012/HP/1164 and the present case, the plaintiff does not dispute the claim made by the plaintiff herein.
2. The Learned Deputy Registrar misdirected himself in Law and Fact when he dismissed this matter notwithstanding the finding that a mortgage action is a unique action available to a mortgage and that it can still subsist notwithstanding a set off in another matter.

Heads of arguments were filed in on behalf of the respondent. It is submitted that if this cause were allowed to continue, there is a likelihood of different courts trying the two actions, notwithstanding that in both cases, the respondent does not necessarily dispute the principal disbursed on the staff

loans. Therefore, the argument proceeds, the Deputy Registrar was on firm ground in dismissing this action. Reference is made to ***Development Bank of Zambia and Another vs Interland[8],*** as well as ***Attorney General vs Tall and Another[5]*** and ***Kelvin Hang'andu and Co vs Mulubisha[6].***

It is further contended that it is not correct to say this mortgage action is unique because the mortgagee is claiming payment of monies owed in addition to or as an alternative to possession. Put succinctly, the arguments advanced before the Deputy Registrar have been repeated before this court.

At the hearing, learned counsel for the applicant placed reliance on skeleton arguments filed before the Deputy Registrar. He added that the claim was not disputed. That dismissing this matter would give a defaulting party a chance to escape his or her obligation by merely stating in another action that he or she owes the money under a mortgage, as the respondent had done in cause number 2012/HP/1164.

Learned counsel for the respondent placed reliance on the heads of arguments filed don 19th May, 2014 and emphasized some points, which I will not repeat here, as they are adequately stated above.

In response, learned counsel for the applicant argued that the existence of other unsecured claims justify continuance of these proceedings as the respondent in 2012/HP/1164 only made reference to the mortgage claim.

I have considered the arguments advanced for and against the grounds of appeal stated in the appeal before me. The genesis of the appeal is that the plaintiff commenced an action under cause number 2012/HP/1164, in which she seeks a declaration that the defendant's decision to terminate her contract of employment purportedly in the public interest, and arising from her conduct but without first affording her a hearing, is wrongful. She also seeks a declaration that she is entitled to her full benefits under her contract of service

despite the contract having been prematurely determined in the public interest. Damages for breach of contract are equally craved.

The defendant's defence to those claims is that the plaintiff's retirement in public interest was justified, that it was disciplinary in nature and does not entitle her to her full benefits under her contract. Her claims have been denied in their entirety.

Subsequently, the defendant commenced this mortgage action, claiming payment of all monies and interest due and owing to the applicant under various credit facility letters secured by a deposit of the Certificate of Title, and the second mortgage over subdivision 123 of Farm 50a situate at Lusaka, the sum claimed being that of KR512,976.45. Foreclosure and vacant possession of the mortgaged property are sought, so that the applicant may exercise a power of sale.

Upon being served with the originating summons, the respondent issued summons for an order to dismiss the action pursuant to Order 3 rule 2 of the High Court Rules as read with Order 18 rule 19 of the Supreme Court Rules 1999. Order 3 rule 2 of the High Court Rules confers the Court with jurisdiction to make interlocutory orders in the furtherance of justice whether asked for or not, while Order 18 rule 19(1) of the Supreme Court Rules empowers the Court to strike out or order amendment of any pleading or endorsement of any writ in the action or anything in any pleading or in the endorsement, on the ground that it discloses no reasonable cause of action or defence, is scandalous, frivolous or vexatious. An action that may prejudice, embarrass or delay the fair trial of the action is liable to be struck out. So is an action that is an abuse of the process of the court.

The specific ground on which the respondent sought dismissal of this action is that it is an abuse of the process of the court for being vexatious. In the affidavit in support, the plaintiff stated that in the matter she had commenced against the respondent, she had testified that she had loans owing to the

applicant, which she wanted to be paid by way of set-off against her terminal dues, and she was cross examined in her testimony by counsel representing the applicant, who is the defendant in the other matter. She further stated that the applicant could have raised the relief sought in this action by way of counter claim.

The Deputy Registrar dismissed the present action. His reasoning was that while a mortgage action is a unique action available to a mortgagee, and that it can still subsist notwithstanding a set-off in another matter, it is a highly likely possibility that the two matters before the court could result into two conflicting decisions over the same subject matter as demonstrated.

That is the ruling that led to the present appeal. It should be kept in view that an appeal from a Deputy Registrar to a Judge in chambers is a rehearing of the application on which the order appealed against was made. It is trite that a mortgage action is unique and may not ordinarily be extinguished by a set-off. Perhaps I should first deal with the assertion that the applicant should have raised its claim in cause number 2012/HP/1164 as a counterclaim. A counterclaim has the same effect as a cross action. Where one is claimed, the court will pronounce a judgment in the same action, on the original claim as well as the counter claim.

While it is correct to say that Order XX enables a defendant to make a counterclaim in any action, as argued on behalf of the respondent, that provision does not in my view change the character of a mortgage action. A mortgage action is unique. I would here refer to the statement of the law made by the learned authors of ***Halsbury's Laws of England***[1] in the passage cited by learned counsel, from Volume 32 of the 4th Edition re-issue at paragraph 606 at page 292, where they state the following:

> *"A legal mortgagee's right to possession cannot, in the absence of some contractual or statutory provision to the contrary, be defeated by a cross-claim for damages made by a mortgager, even if the cross-claim is*

liquidated and admitted, and in excess of the mortgage arrears, or is for unliquidated damages giving rise to a right of equitable set off..."

I have not seen, nor have I been shown a provision in the mortgage deed, in which the applicant can be said to have contracted itself out of the right to possession. Nor has a statutory provision to that effect been brought to my attention. That being the case, the applicant's claim for possession is unassailable, even on a cross claim.

The latter part of the quoted passage is in the following terms:

However, in the case of a dwelling house, the court may adjourn proceedings for possession, stay or suspend an order for possession, or postpone the date for possession, if the existence and prospects of success of the mortgager's cross-claim could be regarded as enabling the sums due to be paid within a reasonable time.

The learned authors refer to the case of ***Ashley Guarantee PLC vs Zacaria and Another***[3]. That case was decided by the Court of Appeal, after the same court had decided ***National Westminster Bank PLC vs Skelton and Another***[2], reported in the same volume, at page 242.

In the latter case, it was held that the general rule 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. Furthermore, any right to a set-off to which the defendant's right might be entitled as sureties was excluded by virtue of clause 11 of the mortgage agreement since the mortgage was deemed to be a primary security and the

defendants were deemed to be in a position of primary debtors rather than guarantors. It followed that there was no defence to the bank's claim to immediate possession of the property. The appeal would therefore be dismissed.

Slade L J, wrote the main judgment with which Anthony Lincoln J agreed. Learned counsel for the respondent has referred to the Lord Justice's words, at page 248, where he said, *"In explaining my reasons, I begin by stressing that the bank's claim is one simply for possession, not payment."*

In articulating his reasons, his Lordship said this at page 249,

> *".....If then the mortgage does not itself restrict the bank's right to take immediate possession of the property as legal mortgagee, the defendants have to submit and do submit that these rights have been abrogated by virtue of the events alleged in the disputed paragraphs of their pleading. One formidable obstacle in the way of such submission is the line of authority which clearly establishes the principle that the existence of a cross-claim, even if it exceeds the amount of a mortgage debt will not by itself defeat a right to possession enjoyed by a legal Charge."*

He referred to the decision of Nourse J in ***Mobil Oil Co. Ltd vs Rawlinson***[9]. In the last paragraph on the same page, 249 Slade LJ said:

> *"I cannot accept the submission that the mobil oil principle is not applicable where a mortgager has a claim to unliquidated damages by way of equitable set-off, and in my judgment it makes no difference that such a claim may in the event prove to exceed the amount of the mortgage debt."*

In ***Ashley Guarantee Plc vs Zacaria and Another***[3] supra, the plaintiff brought an action against the defendants claiming some £151,000 or in default possession of the mortgaged property. The defendants contended inter alia, that the company had cross-claimed against the plaintiffs which gave it a right

of equitable set-off for an unliquidated sum exceeding the figure owed. The trial judge upheld the defendants' contention. On appeal, it was held that the general rule that subject to contractual or statutory limitation a mortgagor could not defeat a legal mortgagee's right to possession by claiming an equitable set-off for an unliquidated sum exceeding the amount of the mortgage arrears applied irrespective of whether the mortgagor was the principle debtor of the mortgagee or was only a guarantor, since in each case the mortgagee had, as an incident of his estate in the land, a right to possession of the mortgaged property and in each case the cross claims could not be unilaterally appropriated in discharge of the mortgage debt. The mere fact that a guarantor was not primarily liable for payment of the debt was immaterial because when he came to be made liable his position vis-à-vis the appropriation of cross-claims was at best no different from and certainly could not be better than, that of a mortgagor who was a primary debtor.

Furthermore, since it was clear that the aggregate value of the company's cross-claim did not in fact exceed the sums owed to the plaintiff, the company was in default of its obligations to the plaintiff within clause 1(a) of the mortgage agreement. It followed that the plaintiff was entitled to enforce its rights and remedies over the mortgaged property.

In delivering judgment, Nourse L J said, "*In **National Westminster bank Plc vs Skelton**[2], this court decided that the mortgagor cannot usually resist a mortgagee's action for possession by claiming an equitable set-off for an unliquidated sum exceeding the amount of the mortgage arrears. Now we have to decide whether any distinction is to be made where the mortgagor is not the principal debtor of the mortgagee but only a guarantor.*"

This question, as can be observed from the holding cited above, was decided in the negative. Nourse L J noted that Slade L J expressed no view as to the effect of a cross-claim for a liquidated sum giving rise to a right of equitable set-off. He then, premised on ***Hanak vs Green***[10], expressed readiness to assume that

the cross-claims by the company in the case he was dealing with would give rise to a right of equitable set-off, although he made it clear that he was far from certain that that was the case. He went on to state that even on those assumptions however, there was an insuperable objection as learned counsel had been unable to satisfy the Lord Justice that the aggregate value of the cross-claims came anywhere near the amount of the company's indebtedness to the plaintiff. In other words, the company had made default in its obligations to the plaintiff within clause 1(a) of the legal charge.

The doctrine of equitable set-off was considered by Forbes J in ***British Anzani (Felixstowe) Ltd vs International Marine Management (UK) Ltd***[11]. The facts were that the plaintiffs developed a block of reclaimed land by building and then leasing warehouses on it. By an agreement dated 7th June 1973 the plaintiffs agreed to construct a warehouse and lease it to the defendants. The agreement contained a provision that the plaintiffs would make good at their own expense any defects in the floor of the warehouse occurring within two years of completion caused by inadequate design or faulty materials or workmanship, and provided that, notwithstanding the completion of the lease, the agreement was to continue in force between the parties. On 24th April 1974 the parties signed a lease of the warehouse for a term of 21 years. The lease contained no covenant by the landlord to repair. A similar arrangement was later made in respect of a second warehouse. By action commenced in 1975 and 1978 the defendants alleged that serious defects had appeared in the floors of both warehouses making them unusable, and claimed damages of more than £1 million from the plaintiffs. They also refused to pay any further rent. In 1977 the plaintiffs issued a writ claiming possession, and unpaid rent and mesne profits amounting to £570,000. The defendants admitted owing some £540,000 but claimed that the amount owing was subject to a set-off in respect of their counter-claim. It was ordered that a preliminary issue be tried whether the defendants were entitled in law or in equity to deduct or set off against their admitted liability for rent and mesne profits the damages claimed

against the plaintiffs for breach of the agreement of 7th June 1973 and the lease. It was contended on behalf of the plaintiffs that the defendants were not entitled to a set-off because:

(i) an liquidated or unquantifiable demand could not be used as a set-off in equity

(ii) in the very nature of rent there could be no set-off against it, and

(iii) the counterclaim did not arise out of the lease or the relationship of landlord and tenant on which the demand for rent was based and was therefore not sufficiently closely connected with the plaintiffs' claim for rent to support an equitable set-off.

It was held inter alia that –

(i) An unliquidated demand could give rise to an equitable set-off against a claim for a debt, and, since unliquidated damages by their nature remained unquantified until an award was made, there was no reason why a demand could not be used as a set-off merely because it was unquantified. If a defendant claimed unliquidated damages and bona fide claimed that they could exceed the amount of the plaintiff's claim, he was entitled to a set-off amounting to a complete defence.....

(ii) In order to rely on the doctrine of equitable set-off the defendants had to show, inter alia, that their counterclaim was so directly or closely connected with the plaintiffs' claim as to go to the foundation of that claim, and they were unable to do that either from the lease itself or directly from the relationship of landlord and tenant created by the lease, because the plaintiffs had not breached any covenant in the lease.....

(iii) However, it was not essential for the application of the doctrine for the claim and counterclaim to arise out of the same contract: it was sufficient if the defendants' counterclaim arose out of a transaction so closely connected with the lease that it would be manifestly unjust not to allow a set-off. Since the defendants' counterclaim arose out of alleged breaches of the agreement of 7th June 1973 which had rendered the warehouses unfit in part for the purposes for which they were leased, and because it would be manifestly unjust to allow the plaintiffs to recover rent without taking into account damages caused by the plaintiffs' failure to perform their part of the agreement, the defendants had established a sufficiently close connection between the transactions for them to raise their counterclaim as a set-off against the plaintiffs' claim.

Turning to the present case, the issue that was raised was that it was an abuse of the process of the court to have commenced this action. In my considered view, that issue was ill-founded. In the action under cause number 2012/HP/1164, the pleadings make no reference at all to the mortgage over subdivision 123 of farm 50a Lusaka. The defendant was not called upon to respond to any averment regarding the said mortgage. While a party is at liberty to set up a set-off or counter claim in an action against it, it is not bound by the rules of pleading to always raise whatever claim it may have against its opponent by way of counter claim. A counter claim should be a claim that a court would have jurisdiction to entertain as a separate action. Clearly, a party is at liberty to decide whether to raise the counter claim in the action in which he has been sued, or to bring a separate action altogether against his opponent. As earlier observed, no reference was made to the mortgage in cause number 2012/HP/1164. I thus fail to appreciate how the defendant's action can be dismissed, merely because the plaintiff, in her testimony before that court alluded to the money she owed the defendant.

As rightly stated by the Deputy Registrar, a mortgage action in unique. The mortgage deed exhibited to the affidavit in support of originating summons in this action makes no indication that the agreement was dependent on the employment relationship between the parties. It cannot therefore be said, in terms of the *British Anzani* case that the defendant's claim is so directly or closely connected with the plaintiff's case. This is aside from the fact that the defendant is not obliged to raise the claim arising from the mortgage deed as a counter claim. In the circumstances, I do not see the danger that prompted the Registrar into deciding as he did. In any event, if the Court seized with conduct of 2012/HP/1164 were to find in favour of the plaintiff, it goes without saying that the defendant in that cause would have to compute its dues under the mortgage deed, and pay the balance to the plaintiff in that action accordingly.

As I see it, the respondent herein would have recourse to Order 88/5/13 Rules of the Supreme Court in the event the action in 2012/HP/1164 is decided later than the present case. Under that rule, the Court can suspend an order for possession of a dwelling house on certain conditions. As matters stand, the respondent herein having defaulted in its mortgage payments, the applicant is at liberty to pursue this action, and cannot be deprived of that right, merely because the respondent acknowledged owing the applicant in another action. In the result, the Learned Deputy registrar's ruling dated 11th February 2014 in which he dismissed this action is set aside. The action stands revived, to be heard and determined to its logical conclusion. The costs of the appeal are awarded to the applicant in any event.

Dated the 6th **day of** October **2016**

F. M. CHISANGA
HIGH COURT JUDGE