

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

*(Civil Jurisdiction)*

**2016/HPC/0333**



**B E T W E E N :**

FINANCE BUILDING SOCIETY

**APPLICANT**

**AND**

ALBERT ZUZE

**RESPONDENT**

**Coram:** Lady Justice B.G Lungu this 20<sup>th</sup> day of October, 2016 in chambers at Lusaka.

**For the Applicant:** Mr A. Roberts - Messrs Alfred Roberts & Co.

**For the Respondent:** Absent

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**J U D G M E N T**

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**CASES REFERRED TO:**

1. *Luke Phiri V David Tembo, 2010/HPC/0574 (2011 ZLR Vol. 3)*
2. *Informatics Limited and Ors V Stanbic Bank Zambia Limited, S.C.Z No. 2 Of 2011 (2011 ZLR Vol. 1)*
3. *Khalid Mohamed V The Attorney-General (1982) Z.R. 49 (S.C.)*
4. *Anderson Kambela Mazoka, Lt General Christon Tembo, Godfrey Kenneth Miyanda 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. *Rules of the Supreme Court, 1965, 1999 Edition*
2. *High Court Act, CAP 27 of the Laws of Zambia*

The Applicant commenced this action against the Respondent on 7<sup>th</sup> July, 2016, by way of Originating Summons pursuant to Order 30 Rule 14 of the High Court Rules, CAP 27 of the Laws of Zambia. The reliefs that the Applicant seeks are as follows:

1. Payment of the all monies due to the Applicant under a legal mortgage made between the Applicant and the Respondent together with such costs as would be payable if the claim were the only relief granted;
2. That in default of the Applicant and the Respondent agreeing to the amount due to the Applicant an account may be taken of what is due to the Applicant from the Respondent under and by virtue of the mortgage;
3. Delivery by the Respondent to the Applicant of possession of the mortgaged property, or relief of foreclosure and in the alternative an order for the sale of the mortgaged property.
4. Further or other relief;
5. Costs.

The Originating Summons was supported by an Affidavit of even date sworn by Teza Silwamba, the Manager- Credit Risk & Control in the employ of the Applicant.

The deponent deposed that the Applicant availed the 1st Respondent a home loan facility that was secured by registered Mortgage Deed relating to Plot no. CHT 984 Chifubu, Ndola, which property was

charged in favour of the Applicant in the sum of K35,000.00 (rebased) principal loan amount and K1,335.23 (rebased) mortgage protection policy.

The deponent produced a copy of pages 1, 14 and 15 of the Mortgage Deed bearing registration date 10th September 2008 marked as exhibit "TS1". A copy of the Certificate of Title relating to the mortgaged property, registered in the name of the Respondent and endorsed with the mortgage in favour of the Applicant to secure K30,000 with interest was produced, as exhibit "TS2". Also produced as exhibit "TS3" is a document bearing reference "Proposed Home Loan", which document contains a statement of acceptance of the loan on terms and conditions specified in the document. The statement of acceptance bears a signature dated 21<sup>st</sup> April, 2008.

The deponent of the Affidavit in Support further attested that the Respondent was to pay the loan amount in 84 equated monthly instalments of K910.10 rebased. This repayment term is contained in section 4 of the Proposed Home Loan Facility Letter. The deponent went on to state that the Respondent, despite being reminded to settle his indebtedness, failed to adhere to the mortgage repayment terms rendering the Respondent in default of his contractual obligations under the mortgage facility.

It was further deposed that the Applicant has not received any part of the outstanding debt of K27,761.69, being the balance as at 22<sup>nd</sup>

June, 2016. There was produced a letter marked "TS5" which notified the Respondent of the Applicants intention to commence foreclosure proceedings in the event of the Respondent's default in complying with the terms of the rescheduled Mortgage.

The Affidavit in Support of the Originating Summons was reinforced by Skeleton Arguments dated 1<sup>st</sup> September, 2016 which, aside from the Affidavit in support, primarily placed reliance on Order 30 Rule 14 of the High Court Rules.

When the matter came up for hearing on 1<sup>st</sup> September 2016, the Respondent was not in attendance. Moreover, the Court observed that the Respondent had not filed any Affidavit in Opposition. Having noted the Affidavit of Service filed on 26<sup>th</sup> August 2016, I was satisfied that the Respondent had been duly served with both the Originating Summons and the Notice of Hearing. Accordingly, I proceeded to hear the matter on the merits.

In considering this matter on the merits, there were two specific questions that I considered indispensable for the just determination of this matter. Firstly, whether this action can be classified as a mortgage action to which Order 30 Rule 14 of the High Court Rules applies; and secondly, if the answer to the first question is affirmative, whether the Applicant had proved whether it's right to enforce the Mortgage Deed had matured.

The term "mortgage action" was aptly defined in the holding of my learned brother, Judge Mutuna, in the case of **Luke Phiri V David Tembo** <sup>(1)</sup> as

***"an action where there is a claim of moneys secured by a property. The claim is normally accompanied by a claim for possession of the mortgaged property".***

This definition is consistent with the fall back position contained in Order 88 Rule 1, as read with Rule 3, of the Rules of the Supreme Court of England, 1999 edition, which refers to a mortgage action as

***"an action by a mortgagee or mortgagor or by any person having the right to foreclose or redeem any mortgage, being an action in which there is a claim for any of the following reliefs, namely : (a) payment of moneys secured by the mortgage, (b) sale of the mortgaged property, (c) foreclosure, (d) delivery of possession (whether before or after foreclosure or without foreclosure) to the mortgagee by the mortgagor or by any other person who is or is alleged to be in possession of the property, (e) redemption, (f) reconveyance of the property or its release from the security, (g) delivery of possession by the mortgagee."***

As regards the rules applicable to mortgage actions, I am guided by the Supreme Court decision in the case of **Informatics Limited and Others V Stanbic Bank Zambia Limited** <sup>(2)</sup> where the Court

unequivocally pronounced that Mortgage actions are brought under Order 30, Rule 14, of the High Court Act.

Having carefully read the Affidavit and Skeleton Arguments in Support of the Originating Summons herein, it is clear from the unopposed Affidavit evidence on file that this is an action for a claim of moneys secured by a property, which claim is accompanied by a claim for delivery of possession of the mortgaged property or the relief of foreclosure and, alternatively, an order for the sale of the said property. This being the case, I am persuaded by the Applicants Skeleton Arguments and, consequently, affirmatively respond to the first question under my consideration; that is, I find that this action falls squarely within the class of actions notoriously referred to as a mortgage action to which Order 30 Rule 14 of the High Court Rules applies.

I now move to the second fundamental question of whether the Applicant has proved that its enforcement rights under the Mortgage Deed have matured. At this point I must emphasize that I am cognisant of the fact that the Applicant's claim is unopposed and that 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 in 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 V The Attorney-General*** <sup>(3)</sup>, 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*** <sup>(3)</sup> case was later reaffirmed and applied in the Supreme Court case of ***Anderson Kambela Mazoka, Lt General Christon Tembo, Godfrey Kenneth Miyanda Vs Levy Patrick Mwanawasa, the Electoral Commission of Zambia, and the Attorney General*** <sup>(4)</sup>. 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*** <sup>(5)</sup>, 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.

I now return to the question at hand, namely, whether the rights of enforcement under the Mortgage Deed have matured, I turned to examine the Mortgage Deed, Proposed Home Loan Facility Letter and Statement of Account, exhibit "TS4". My perusal of the Home Facility Letter reveals that the Respondent appended his signature to the grant of a Home Loan Facility Letter dated 21st April 2008 under the terms and conditions contained therein. The Facility Letter expressed a total loan amount of K 36, 335, 235.65 which comprised of the Loan amount of K35, 000, 000 and MPP Premium of K1, 335, 235.65 plus interest at an initial rate of 23% pa. The Other terms under the Facility Letter included repayment period of 84 Equated Monthly instalments of K910,100.21 on the security of a first legal mortgage over the property on CHT 984, Chifubu, Ndola. I accept the unopposed Affidavit evidence that the Respondent has defaulted in meeting his repayment obligations and that the Respondent is



indebted to the Applicant to the tune of K27, 761.69 as reflected in the Statement of Account, exhibit "TS4". However, my observation is that there is nothing in the Facility Letter which addresses the consequences of default of servicing the loan.

My journey into examining the Mortgage Deed, exhibit "TS1", led me to the dismayed finding that the exhibit was not a complete copy of the Mortgage Deed, but a mere production of three pages thereof, namely pages 1, 14 and 15 of the said registered Mortgage Deed. These pages do not in any way assist the Court in determining whether the enforcement rights of the reliefs sought under the Mortgage have arisen. As the remedies which the Applicant seeks must flow from the creation of a legal mortgage, I take the view that the Applicant ought to have exhibited the legal mortgage in its entirety to satisfy the court that its enforcement rights have indeed materialised. Unfortunately, it is evident that there is nothing before Court to show that the Applicant's right to the reliefs sought are in the Mortgage Deed and that such rights of enforcement have been activated under the Mortgage Deed.

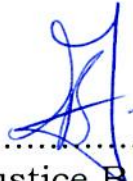
I am persuaded by my learned sister's decision in the **Zimco** case and hold that this lacuna in evidence must be resolved in favour of the Respondent. Accordingly, I find that the Applicant has failed to prove, with a high level of clarity, that the reliefs sought are contained in the Mortgage Deed and more importantly that enforcement rights under the Mortgage which have matured and become activated. For

the foregoing reasons, I take the view that the Applicant has failed to prove its case against the Respondent at this stage. The claim by the Applicant as contained in the Originating Summons of 7<sup>th</sup> July, 2016 is accordingly dismissed.

Each party shall bear its own costs.

Leave to appeal is granted.

**Dated the 20<sup>th</sup> day of October, 2016**



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