

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

2015/HPC/0726  
2008/HPC/0506

**BETWEEN:**

**EVA NANYANGWE NYONDO** : **PLAINTIFF**

**AND**

**JOHN NYONDO** : **1<sup>ST</sup> DEFENDANT**  
**FINANCE BUILDING SOCIETY** : **2<sup>ND</sup> DEFENDANT**

Before Hon. Madam Justice Dr. W. S. Mwenda in Chambers at Lusaka on the 23<sup>rd</sup>  
day of November, 2016.

For the Plaintiff : No Appearance  
For the 1<sup>st</sup> Defendant : No Appearance  
For the 2<sup>nd</sup> Defendant : Mr. A. Roberts of Messrs Alfred Roberts and  
Company

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## **RULING**

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*Legislation referred to:*

1. *Order 14A and Order 33 rule 7 of the Rules of the Supreme Court, 1999  
(The White Book)*

2. **Order 67 rule 3 of the Rules of the Supreme Court, 1999**
3. **Order 53 rule 11 of the High Court Rules (S.I. No. 27 of 2012)**
4. **Order 4 rule 9 of the Rules of the Supreme Court, 1999.**

On 3<sup>rd</sup> August, 2016 the 2<sup>nd</sup> Defendant herein filed a Summons to Dismiss Case on a Preliminary Issue on a Point of Law pursuant to Order 14A and Order 33 rule 7 of the Rules of Supreme Court, 1999.

The grounds upon which the said application was presented were:

"1. That it is an abuse of Court process for the Plaintiff to institute this action in cause number 2015/HP/0726 where she essentially claims in paragraphs 4 to 6 of the Statement of Claim that she never applied for any loan with the 2<sup>nd</sup> Defendant nor entered into any loan agreement to mortgage her property when in fact she raised the same arguments in paragraphs 5 to 11 of her Further Affidavit in Opposition to Originating Summons in the earlier case of **Finance Building Society v Eva Nanyangwe Nyondo and John Nyondo 2008/HPC/0506** which ended in a judgment and a ruling in favour of the 2<sup>nd</sup> Defendant by Hon. Mr. Justice N. K. Mutuna.

2. That the Judgment and Ruling by Hon. Mr. Justice N. K. Mutuna in cause number 2008/HPC/0506 which allowed the 2<sup>nd</sup> Defendant to repossess the mortgaged property subdivision 431 of Farm 401a Makeni, Lusaka, belonging to the Plaintiff were never stayed nor appealed against by the Plaintiff herein who was the 1<sup>st</sup> Respondent in those proceedings. That the Plaintiff herein ought to have stayed and appealed to the Supreme Court against the Judgment and Ruling of Hon. Mr. Justice N. K. Mutuna.

3. That it makes it a mockery of justice and an abuse of the court process for the Plaintiff herein to obtain an Interim Injunction restraining the 2<sup>nd</sup> Defendant from possessing or selling the mortgaged property in these proceedings when there is already in place a judgment and ruling by Hon. Mr. Justice N. K. Mutuna in



2008/HPC/0506 allowing the 2<sup>nd</sup> Defendant, Finance Building Society, as mortgagee to repossess and sell the same property subject of these proceedings.

4. That the allegation in paragraph 11(ii) of the Statement of Claim that she never engaged services of lawyers in cause number 2008/HPC/0506 is untenable as three different law firms filed documents that they represented her and that in any event, it was never Finance Building Society's concern to see that such law firms were properly appointed by their client. That the only recourse, assuming that the allegation is true, is for Eva Nanyangwe Nyondo to make claims directly against the law firms.

5. That the Plaintiff's action in cause number 2915/HP/0726 be dismissed and the interim Injunction be discharged with costs for abuse of Court process."

The application to dismiss the case on a preliminary issue on a point of law was buttressed by an Affidavit in Support sworn by one Andycell Phiri, the 2<sup>nd</sup> Defendant's Acting Chief Financial Officer in which the following facts emerge, namely, that in an earlier action in cause number 2008/HPC/0506 Finance Building Society instituted a mortgage action by way of Originating Summons for repayment of monies secured by a mortgage over subdivision 431 of Farm 401a, Lusaka belonging to Eva Nanyangwe Nyondo. In the said action Eva Nanyangwe Nyondo was represented by three Lusaka law firms, namely Messrs. Wright Chambers; Messrs. Tembo Ngulube and Associates and Messrs. Dumisani Tembo & Company. To this end, the deponent exhibited Notices of Appointment as Advocates by the said firms as exhibits "AP1" to "AP3", respectively.

Further, that in an Affidavit in Opposition to Originating Summons sworn by Eva Nanyangwe Nyondo filed into Court on 16<sup>th</sup> December, 2008, she admitted in paragraph 7 to owing monies to Finance Building Society and stated that the mortgaged property would be put on rent and all monies would be channeled to Finance Building Society to liquidate the loan as evidenced by exhibit "AP4," being a copy of the said affidavit.

Andycell Phiri further deposed that in a Further Affidavit in Opposition to Originating Summons sworn by Eva Nanyangwe Nyondo in cause number 2008/HPC/0506 exhibited as "AP5", she expressed surprise in paragraph 10 that the Applicant sued her and was intending to seize her property because at no time did she apply for a loan facility with them. In paragraph 11 she stated that she had never heard of the Applicant institution and did not even know where their offices are located.

The deponent stated further that on 22<sup>nd</sup> April, 2015 Hon. Mr. Justice N. K. Mutuna delivered a ruling in favour of Finance Building Society, exhibit "AP6" where the judge made the following findings, *inter alia*:

- (i) That Finance Building Society advanced a loan to Eva Nanyangwe Nyondo and John Nyondo;
- (ii) The loan was secured by way of a mortgage over the property in dispute;
- (iii) The said mortgage was duly registered at Ministry of Lands.

Mr. Justice Mutuna also said that a Consent Judgment of the Court in foreclosure proceedings dated 31<sup>st</sup> July, 2012 wherein Finance Building Society was granted liberty to enforce the mortgage was still in place and Finance Building Society as mortgagee was at liberty to enforce the judgment forthwith.

A List of Authorities and Skeleton Arguments in Support of Summons to Dismiss Case on a Preliminary Issue on a Point of Law were filed on 21<sup>st</sup> June, 2016.

The matter came up for hearing of the application on 22<sup>nd</sup> August, 2016. There was no appearance by the Plaintiff or her advocates. An Affidavit of Service of the documents relating to the application before Court sworn by one Peter Kapembwa Mhlanga, a Legal Assistant in the employ of the advocates for the 2<sup>nd</sup> Defendant was filed into court which proved that the Plaintiff's advocates were served with the documents on 9<sup>th</sup> August, 2016 and duly acknowledged the service. Upon satisfying myself that the Plaintiff's advocates were aware that the application was coming up for hearing, I allowed the hearing to proceed.



*of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just”.*

As submitted by the 2<sup>nd</sup> Defendant, it is on record that an Originating Summons was filed by Finance Building Society against Eva Nanyangwe Nyondo and John Nyondo in cause number 2008/HPC/0506 for the repayment of monies borrowed and secured over subdivision 431 of Farm 401a, Lusaka, being a property belonging to Eva Nanyangwe Nyondo.

It is also on record that a Consent Judgment in the matter was entered on 31<sup>st</sup> July, 2012 and that Hon. Justice Mutuna gave a Ruling in favour of Finance Building Society on 22<sup>nd</sup> April, 2015, (exhibit “AP6”) in which he found the following facts, *inter alia*, as not being in dispute, namely:

- (i) The Plaintiff (Finance Building Society) advanced a loan to the First and Second Respondents (Eva Nanyangwe Nyondo and John Nyondo, respectively);
- (ii) The loan was secured by way of a mortgage over the property in dispute;
- (iii) The said mortgage was duly registered at Ministry of Lands.
- (iv) Since a Consent Judgment of the Court dated 31<sup>st</sup> July, 2012 which granted the Plaintiff the right to foreclose was still in place, the ruling gave the Plaintiff the liberty to enforce it forthwith.

The evidence before this Court shows that Eva Nanyangwe Nyondo did not apply for a stay or appeal against Hon. Justice Mutuna’s Ruling but instead commenced new proceedings under cause number 2015/HP/0726 and obtained an interim injunction before another High Court Judge (as he then was) Hon. Mr. Justice Kondolo restraining Finance Building Society from dealing with, disposing of or selling the same mortgaged property.

any way as she would be able to present her case and it would also assist the court in properly determining all issues in the matter which are interrelated.

On 29<sup>th</sup> September, 2015 Hon. Mr. Justice Kondolo ordered the transfer of cause number 2015/HP/0726 to the Commercial List Registry and the consolidation of the two matters, namely, cause numbers 2008/HPC/0506 and 2015/HP/0726.

I am of the considered view that as a consequence of the consolidation of the two matters, the application to dismiss cause number 2015/HP/0726 for being an abuse of court process is unsustainable as there are no longer two separate actions but one. In other words, due to the consolidation, it is no longer feasible to isolate cause number 2015/HP/0726 and deal with the application to dismiss the said action. Therefore, all the contentious issues amongst the parties must necessarily be determined in the consolidated matter. The application is accordingly dismissed for lack of merit. The application to discharge the interim injunction herein is also dismissed. Costs of the application shall be in the cause.

The matter shall come up for Status Conference on 1<sup>st</sup> December, 2016 at 09:45hrs.

Leave to appeal is hereby granted.

**Dated at Lusaka this 23<sup>rd</sup> day of November, 2016**

  
**W. S. MWENDA (Dr)**  
**HIGH COURT JUDGE**