

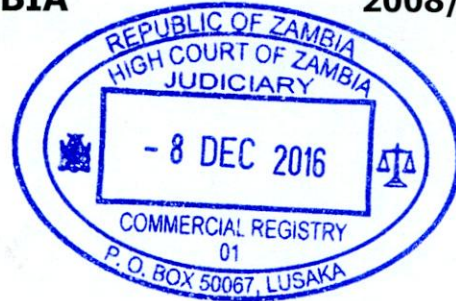
IN THE HIGH COURT FOR ZAMBIA

2008/HPC/0583

IN THE COMMERCIAL DIVISION

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)



BETWEEN:

FINANCE BUILDING SOCIETY

APPLICANT

AND

SAMUEL MWAPE SABI

RESPONDENT

CORAM: Hon. Madam Justice Dr. W. S. Mwenda in Chambers the 8th day of December, 2016

For the Applicant: Mr. A. Roberts of Messrs Alfred Roberts and Company

For the Respondent: No Appearance

JUDGMENT

Cases referred to:

- 1. Reeves Malambo v. Patco Agro Industries Limited (2007) Z.R. 177.***
- 2. Finance Building Society v. Iden Chitambala 2015/HPC/0291 (unreported)***
- 3. Finance Building Society v. Imasiku Mwanalushi (2012/HPC/0451 (unreported)***

Legislation referred to:

- 1. Order 30 rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia.***

The Applicant filed an Originating Summons on 31st December, 2008 for the following relief:-

- (i) The Respondent pays the accrued sum of K244,498,646.24 together with interest at the agreed rate of 28% per annum.
- (ii) That the Respondent having defaulted on the payment of principal and interest in respect of the loan granted, the property known as subdivision No. 138, Lusaka be delivered to the Applicant with power to sell, assign, transfer or otherwise dispose of the said property.
- (iii) That costs of these proceedings be borne by the Respondent.

The Applicant filed an Affidavit in Support of Originating Summons of even date sworn by one Augustine Ndapisha, a Manager in the Applicant's Company wherein he deposed that in or about the month of March, 2007 the Applicant entered into a Loan Agreement with the Respondent in which the Respondent borrowed a sum of K207,487,826.00 (unrebased) which loan facility was for a period of One Hundred and Twenty Four (124) months.

The parties then entered into a Legal Mortgage to secure the loan together with interest as evidenced by exhibit "AN1" and the Respondent had neglected or refused to pay the said sum and accrued interest which then stood at K244,498,646.24 (unrebased). The deponent craves the indulgence of the Court to order the Respondent to pay the principal sum plus interest as agreed or grant an order to recover possession of the mortgaged property and exercise the power of sale.

The Respondent opposed the Originating Summons and filed an Affidavit in Opposition to Originating Summons on 15th April, 2009 sworn by Samuel Mwape Sabi, the Respondent herein, wherein he agreed to have borrowed some money save that the amount was K200,000,000.00 and not K207,487,826.00. He also averred that the interest rate was reduced to 23% after one month of the facility becoming operational.

The Respondent denied neglecting or refusing to pay the amount borrowed together with interest and stated that he had as at that date paid a total sum of K196,085,456.00 against a loan facility of K200,000,000.00.

On 19th December, 2009 a Consent Settlement Order was executed wherein it was agreed that having liquidated the principal loan facility, the Respondent would be allowed to revert to the payment of the equated monthly instalments (EMI) in terms of interest as agreed on the Loan Agreement taking into account the amount paid, and that the Respondent was to bear the costs of the proceedings. However, the Consent Settlement Order was set aside by the High Court in a separate action under cause 2013/HPC/0048. The setting aside was confirmed by the Supreme Court in a judgment delivered on 14th August, 2015.

When the matter came up for hearing of the Originating Summons on 15th June, 2016 the Respondent was not in attendance. However, Counsel for the Applicant filed an Affidavit of Service in which was exhibited proof of service of the Notice of Hearing on the Respondent who acknowledged receipt of the same. Having satisfied himself that the Respondent was duly served with the Notice of Hearing, the Court proceeded to hear the Originating Summons and reserved judgment.

On 15th July, 2016 an Order to Arrest Judgment was signed on application by the Respondent who applied to the Court by summons for the Court to arrest judgment so that he could be afforded an opportunity to be heard. He also applied for leave to file a Further Affidavit which was duly granted. The Respondent filed his Further Affidavit on 29th July, 2016. The Applicant replied to the Respondent's Further Affidavit through an Affidavit in Reply to Respondent's Further Affidavit filed into Court on 30th August, 2016.

When the matter came up again for hearing on 30th November, 2016 the Respondent did not appear and a perusal of the Court record showed that he had filed a Request for Adjournment, not a Notice of Motion to Adjourn, supported by an

affidavit where he deposed that he could not attend the hearing on that day as he would be in Europe writing his examinations which were running from 28th November, 2016 to 16th December, 2016. The nature of the examinations were not disclosed and no time-table of the said examinations or indeed copy of his air ticket were exhibited as proof that he would be out of the jurisdiction.

For this reason and taking into account the fact that this matter has been pending since 2008 and the parties had filed their Affidavits and Skeleton Arguments where their positions are clearly stated, the Court denied the request for adjournment and resolved to proceed with writing of the judgment based on the evidence in the documents on the record.

The record shows that on 30th May, 2016 the Applicant filed an Affidavit in Reply sworn by Teza Silwamba, Manager-Credit at the Applicant's Head Office who stated that the principal loan availed to the Respondent in February, 2007 was K200,000.00 (rebased) as well as K7,847.83 (rebased) for a Mortgage Protection Policy bringing the total amount disbursed to K207,487.83 (rebased) and that therefore, it was misleading for the Respondent to claim in paragraph 4 (a) of the Affidavit in Opposition that the amount of the Loan Facility was K200,000.00.

The deponent asserted further that the Applicant had the contractual right to vary the interest rate in accordance with paragraph 3 of the Facility Letter dated 9th February, 2007, exhibit "TS1" in the Certificate of Exhibits appended to the Affidavit in Reply, and Clause 24 of the Mortgage Deed, exhibit "TS2".

It was the deponent's further evidence that exhibit "TS3" is a revised statement of account which shows that the Respondent owed the Applicant the sum of K523,932.79 as at 31st May, 2016 and that the total amount paid by the Respondent to date is K231,418.59 out of which K30,000.00 went towards repayment of the principal sum in April, 2009.

The deponent averred further that even though the sum of K150,000.00 appears as "amount received" on the statement as at 27th April, 2009, the Applicant only received K100,000.00 (rebased) from its previous advocates who withheld K50,000.00 as legal costs but that since the High Court and Supreme Court in a separate action under Cause Number 2013/HPC/0048 had effectively set aside the Consent Settlement Order of this Court of 14th December, 2009 which, inter alia, awarded costs to the Applicant, the Respondent's statement of account had been revised so that the full K150,000.00 paid by the Respondent to the previous advocates is credited. This followed a request made by the Respondent vide his letter of 15th March, 2016, exhibit "TS4".

The deponent stated in addition that the Respondent failed each month to pay the equated monthly instalments (EMI) and fell into arrears, thus worsening the state of account in view of the application of interest leading to default in his contractual obligations under the mortgage facility.

The Respondent filed a Further Affidavit on 29th July, 2016 wherein he averred inter alia, that as at 3rd April, 2009 the balance on the principal sum was K172,472.00 against which he paid K150,000.00 Further that exhibits "SMS 2 A" are copies of correspondence between the Applicant and Respondent indicating the agreement on the outstanding amount and payment thereof.

It was the Respondent's further averment that the remaining unresolved issues mainly cover the component of interest which the parties agreed would be ascertained and payable to the Applicant after the Applicant has reconciled its account. Further, that it was agreed that interest would be static and there would be no application of interest upon interest as of April, 2009.

The Respondent averred further that the Applicant did not provide the reconciled account in terms of interest in a long time inspite of the agreement. That meanwhile, the Respondent effected massive developments to the subject property

which included renovations, extensions and erection of four flats on the same premises.

The Respondent asserted in addition that the only agreed interest rate was 28% per annum as any change in interest is supposed to be communicated to the Respondent and no such change was communicated apart from 23% per annum. That it is incorrect to state that almost the entire amount paid by the Respondent was apportioned to the interest component. That the parties are agreed that the principal loan amount has been paid and what remains is to reconcile the interest component.

The Respondent stated that what is in dispute between the parties herein is what is payable as interest and he craves the indulgence of this Court to refer the matter to assessment. Further, that the only sum outstanding is K22,472.00 which should attract interest at the rate of 23% per annum for the period April, 2009 to March, 2011.

In an Affidavit in Reply to Respondent's Further Affidavit dated 29th July, Teza Silwamba, the Applicant's Manager – Credit deposed, inter alia, that the Respondent's assertion in paragraph 9 of the Further Affidavit that the balance on his account as at 3rd April, 2009 was K172,472.00 is totally incorrect; that the correct position is that the balance as at 3rd April, 2009 was K275,871.04 as evidenced by the interim statement of account exhibited as "TS5".

The deponent averred further that it is incorrect to state that there was an agreement by the Applicant that the principal sum had been paid and what remained was interest only because the Consent Settlement Order entered in these proceedings dated 14th December, 2009 was set aside by the judgment of Justice P. M. Nyambe in Cause Number 2013/HPC/0048 and the Supreme Court judgment in Appeal No. 67/2014 which are exhibited as "TS2" and "TS3" respectively, in the Affidavit in Support of Notice of Appointment of Hearing Date of Originating Summons filed on 9th February, 2016.

Further, that there is no letter signed by the Applicant which has been exhibited by the Respondent to prove that there was an agreement by the Applicant that the principal sum had been paid and what remained to be resolved was interest only.

It was the deponent's further evidence that it is incorrect that the Applicant was charging interest on interest as stated in paragraph 12 of the Further Affidavit but that interest was only charged on the overdue principal loan portion; that the statement of account exhibited as "TS3" in the Affidavit in Reply filed on 30th May, 2016 shows that simple interest was charged.

The deponent averred that it is incorrect to state that the Applicant agreed to sell the mortgaged property at K2.5million because the Respondent never furnished a Valuation Report to substantiate the claim. He deposed that the Applicant's duty at law is to sell a mortgaged property at the highest price obtaining in the market and not necessarily the price sought by the Respondent.

In addition, the deponent stated that it is incorrect to state that interest was limited to 23% per annum because the Applicant had the right to vary the interest from time to time and all borrowers including the Respondent were notified through regular newspaper advertisements such as the one exhibited as "TS6".

The deponent asserted further that it is incorrect to say that the Respondent only owes K22,472.00 as the statement of account exhibited as "TS3" in the Affidavit in Reply filed on 30th May, 2016 shows that the Applicant is owed K523,932.79 as at 31 May, 2016 and interest continues to accrue until full settlement.

I have considered the Applicant's claims as outlined in the Originating Summons, the supporting affidavits as well as opposing affidavits filed by the parties hereto. I have also considered the authorities submitted in the Skeleton Arguments filed herein.

The Applicant brought this action pursuant to Order 30 rule 14 of the High Court Rules which provides as follows:-

"Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclosure or redeem any mortgage, whether legal or equitable, may take out as of course an Originating Summons, returnable in the chambers of a judge for such relief of the nature or kind following as may by the summons be specified, and as the circumstances of the case may require, that is to say-

Payment of moneys secured by the mortgage or charge;

Sale;

Foreclosure;

Delivery of possession (whether before or after foreclosure) to the mortgagee or person entitled to the charge by the mortgagor or person having the property subject to the charge or by any other person in, or alleged to be in possession of the property;

Redemption;

Reconveyance;

Delivery of possession by the Mortgagee".

In the case of ***Reeves Malambo v. Patco Agro Industries Limited (1)*** the Supreme Court held at page 187 that:-

"The mortgagee is at liberty to exercise his right to foreclose and sell the property in the event of default and failure by the mortgagor to redeem the mortgaged property".

Contrary to the Respondent's assertion, It is clear from the statement of account produced by the Applicant, exhibit "TS3" in the Affidavit in Reply that the last payment of equated monthly instalment (EMI) was done on 27th April, 2009. The total loan payable, inclusive of interest, as at 31st May, 2016 was K523,932.79.

As Mr. Roberts correctly submitted, there is no evidence of any agreement between the parties that the principal sum had been paid and what remains is interest only. I also agree with Mr. Roberts that reference to the Consent Settlement Order entered in these proceedings dated 14th December, 2009 is misleading because the said order was set aside in cause number 2013/HPC/0048 which setting aside was confirmed by the Supreme Court in Appeal No. 67 of 2014.

I find that contrary to the Respondent's claim that the Applicant was charging interest on interest or compound interest, the statement of account exhibited as "TS3" shows that the Applicant only charged simple interest. It is noteworthy that there were similar findings in two other High Court judgments cited by the Applicant in which Finance Building Society, the Applicant herein, sued two other defaulting mortgagors. These cases are ***Finance Building Society v. Iden Chitambala (2)*** and ***Finance Building Society v. Imasiku Mwanalushi (3)***.

I find from the evidence before me that the Applicant had the contractual right to vary the interest rate in accordance with paragraph 3 of the Facility Letter dated 9th February, 2007, exhibit "TS1" and Clause 24 of the Mortgage Deed, exhibit "TS2" in the Certificate of Exhibits appended to the Affidavit in Reply.

Further, the Applicant produced a newspaper advertisement as proof that similar advertisements were placed by the Applicant to customers notifying them about the revision of interest rates. Therefore, there is no basis for the Respondent's claim that interest should be limited to 23% per annum.

Consequently, I enter judgment in favour of the Applicant in the sum of K523,932.79 together with contractual interest from 31st December, 2008 to date of judgment and thereafter, at short term bank deposit rate as determined by the Bank of Zambia until full payment. The said sum shall be paid within ninety (90) days from the date hereof. In default thereof, the Respondent shall deliver vacant possession of the mortgaged property being subdivision No 138 of subdivision 'A' of farm No.

378a, Lusaka to the Applicant who shall be at liberty to foreclose, take possession and exercise its right of sale.

Costs are awarded to the Applicant, to be taxed in default of agreement.

Leave to appeal is granted.

Delivered at Lusaka this 8th day of December, 2016.



W. S. MWENDA (Dr)
JUDGE