

**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**



**IN THE MATTER OF : ORDER 30 RULE 14 OF THE HIGH COURT RULES,
CHAPTER 27 OF THE LAWS OF ZAMBIA.**

AND

**IN THE MATTER OF : AN APPLICATION FOR PAYMENT OF MONIES
SECURED BY MORTGAGE AND AN APPLICATION
FOR DELIVERY UP OF POSSESSION OF PROPERTY
KNOWN AS STAND NO. 69 OF 11321 LIBALA STAGE
4B LUSAKA.**

BETWEEN:

ZAMBIA NATIONAL COMMERCIAL BANK PLC

APPLICANT

AND

SAMUEL MULANGU

RESPONDENT

Before the Honourable Mr. Justice William S. Mweemba in Chambers at Lusaka.

*For the Applicant : Mrs. N.N. Mbao – Messrs Nkusuwila Nachalwe
Advocates.*

For the Respondent : Mr. S. Mulangu (In Person)

J U D G M E N T

LEGISLATION REFERRED TO:

- 1. ORDER 30 RULE 14 OF THE HIGH COURT RULES, CHAPTER 27 OF THE LAWS OF ZAMBIA.**

CASES AND OTHER WORKS REFERRED TO:

1. **LACKSON MWABI MWANZA V SANGWA SIMPASA, CHISHA LAWRENCE SIMPASA 2005/HP/0500.**
2. **FOUR MAIDS LIMITED V DUDLEY MARSHALL (PROPERTIES) LIMITED (1957) CH. 317.**
3. **FREDRICK S. MUDENDA, LAND LAW IN ZAMBIA: CASES AND MATERIALS.**
4. **NIGEL P. GROVELLS, LAND LAW TEXT AND MATERIALS, THIRD EDITION (LONDON, THOMSON SWEET AND MAXWELL, 2004).**
5. **S. BRIAN MUSONDA (RECEIVER OF FIRST MERCHANT BANK ZAMBIA LIMITED (IN RECEIVERSHIP) V HYPER FOOD PRODUCTS LIMITED, TONY'S HYPERMARKET LIMITED AND CREATION ONE TRADING (Z) LIMITED (1999) ZR 124.**
6. **KASABI INDUSTRIES LIMITED V INTERMARKET BANKING CORPORATION LIMITED APPEAL NO. 168/2009.**

This is an Originating Summons pursuant to Order 30 Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia. The Applicant is claiming the following reliefs against the Respondent:

1. *Payment of all monies which as at 21st September, 2016 stood at K371,846.88 inclusive of interest due and owing to the Applicant by the Respondent under a House Loan Agreement dated 24th September, 2013 and a Mortgage Deed of 2013 over Stand No. 69 of 11321 held on Certificate of Title No. 18221 situate at Libala Stage 4B which was pledged as security for the said House Loan.*
2. *Foreclosure.*
3. *Delivery up by the Respondent to the Applicant of the Mortgaged Property.*
4. *Sale of the said Mortgaged Property.*
5. *Any further or other relief the Court may deem fit.*
6. *Costs.*

There is an Affidavit in Support of the Originating Summons sworn by Arnold Chinyama, Senior Manager – Recoveries in the Applicant Bank and filed into Court on 30th September, 2016. The Affidavit shows that by letter dated 24th September, 2013, the Applicant availed the Respondent a Loan Facility in the

sum of K300,000.00. A true copy of the said Loan Facility Letter was exhibited as "AC1".

It is stated that as security for the Loan Facility of K300,000.00 the Respondent executed a Legal Mortgage relating to Plot/Stand No. 69 of 11321 Libala Stage 4B Lusaka. A true copy of Certificate of Title No. 18221 relating to the said property was exhibited as 'AC2".

It is further deposed that as at 21st September, 2016 the Respondent was indebted to the Applicant Bank in the sum of K371,846.88 as per Account No. 1031752000257 in respect of the banking facility. A true copy of the Statement of Account was exhibited as "AC3". That the Respondent having defaulted in his payment obligations and a demand has been made on him but no payment has been made so far.

No Affidavit in Opposition was filed by the Respondent.

Counsel for the Applicant Bank filed Skeleton Arguments into Court on 30th September, 2016. It is stated that the action is made pursuant to Order 30 Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia which provides that:

"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 circumstances of the case may require..."

The Applicant in its submissions made reference to one of the ways of creating an Equitable Mortgage by referring to the learned author Fredrick S. Mudenda in his book Land Law in Zambia: Cases and Materials at page 162 citing Cootes's observance that:

“A deposit of title deeds by the owner of freeholds or leaseholds with his creditor for the purpose of securing either a debt antecedently due, or sum of money advanced at the time of the deposit operates as an equitable mortgage or charge, by virtue of which the deposittee acquires, not merely the right of holding the deeds until the debt is paid, but also an equitable interest in the land itself”.

The Applicant also referred to the observations of the learned author Nigel P. Grovells, Land Law Text and Materials, Third Edition at page 891 that:

“Where one person lends money to another he may be content to rely on the personal obligation of the borrower to repay the loan....

The potential consequences for the lender are obvious and, especially where the amount is substantial (for example, where the loan is made to finance the purchase of land or some major business venture), a lender will normally refuse to accept the risk of excessive reliance on the personal obligation of the borrower. Instead, he will require the borrower to provide security for the repayment of the loan such security may be personal or real”.

It was submitted that the Applicant and the Respondent by their loan agreement created a relationship of mortgagee and mortgagor or lender and borrower respectively. That the essential nature of a mortgage in its traditional form is that it is a conveyance of a legal or equitable interest in property with a provision for redemption. That therefore a principal right that arises when a mortgage is created is the right to redeem and reconvey the property: the subject matter of the security on payment of the principal and interest.

It is submitted further that a number of remedies are available to a mortgagee for enforcing a legal mortgage. The remedies are – the right of foreclosure; the right of sell; and the right to take possession.

Regarding the right to take possession it was submitted that since a legal mortgage gives the mortgagee a legal estate in possession he is entitled subject to any agreement to the contrary, to take possession of the mortgaged property, as soon as the mortgage is made, even if a mortgagor is guilty of no default. The case of **FOUR MAIDS LIMITED V DUDLEY MARSHALL (PROPERTIES) LIMITED (2)** was cited for this submissions.

It is also submitted that a mortgagee's remedies are cumulative. A mortgagee is therefore not bound to select one of the remedies and pursue that particular remedy exclusively. A mortgagee is at liberty to employ one or all of the remedies to enforce payment. That for instance, if he sells the property for less than the mortgage advance or debt, he may still sue the mortgagor upon the personal covenant for payment of the balance. It is contended that foreclosure puts an end to other remedies, since if the mortgagee takes the whole security, he cannot also claim payment. The case of **LACKSON MWABI MWANZA V SANGWA SIMPASA, CHISHA LAWRENCE SIMPASA (1)** was cited for this submission.

The Respondent did not file any Skeleton Agreements.

When the matter came up for hearing of the Originating Summons Counsel for the Applicant Mrs. Mbao and the Respondent were present. The Respondent (Mr. Samuel Mulangu) who was unrepresented told the Court that he had no defence to the Applicant Banks claim herein.

I have considered the claim by the Applicant, Zambia National Commercial Bank against the Respondent for the payment of all monies due and interest as well as the reliefs pursuant to Order 30 Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia.

It is not in dispute that the total amount advanced to the Respondent by the Applicant Bank was K300,000.00. This pursuant to a Loan Facility Agreement dated 24th September, 2013.

Although Mr. Arnold Chinyama at paragraph 7 of the Affidavit in Support of Originating Summons dated 30th September, 2016 deposes that the Respondent further executed a Legal Mortgage pledging the property namely Plot/Stand No. 69 of 11321 as security, the Record shows that no such Legal Mortgage was produced and exhibited to the Affidavit in Support. I find as a fact that the Respondent gave Certificate of Title No. 18221 relating to Subdivision 69 of Stand 118221 Libala Stage 4B Lusaka to the Applicant as security to secure the loan of K300,000.00 and interest. The Respondent therefore created an Equitable Mortgage over the said Subdivision 69 of Stand 11321 Libala Stage 4B Lusaka in favour of the Applicant Bank.

As submitted by Mrs. Mbao it is trite that a mortgagee's remedies are cumulative. That is to say a mortgagee is not bound to select one of the

remedies and pursue that particular remedy exclusively. A mortgagee is at liberty to employ one or all of the remedies to enforce payment.

However Mrs. Mbao's contention that foreclosure puts an end to other remedies, since if the mortgagee takes the whole security, he cannot also claim payment is misconceived. The correct legal position is as stated at paragraph 797 of HALSBURY'S LAWS OF ENGLAND, FOURTH EDITION that:

"As the mortgagee is entitled to pursue all his remedies concurrently, the pendency of a foreclosure action does not prevent him from suing on the covenant, although, if such a proceeding is intended, the claim should be joined with the claim for foreclosure in one action. The order will then provide for any sums recovered being credited to the mortgagor in taking the foreclosure account. If a separate action is brought, the sums recovered must also be brought into account. If this is not done, the Certificate will be erroneous and a fresh account will have to be taken".

The position is that if the mortgagee realizes part of the debt by his action on the covenant to pay principal and interest, or by sale of part of the Mortgaged Property, he must give credit in the foreclosure action for the amount realized, and if, after foreclosure, he proceeds on the covenant, he re-opens the foreclosure.

The position espoused in the case of **LACKSON MWABI MWANZA V SANGWA SIMPASA, CHISHA LAWRENCE SIMPASA (1)** that a mortgagee has several remedies available namely payment of the money secured, foreclosure, delivery up of possession and sale which are cumulative was following earlier cases such as the Supreme Courts decision in the case of **S. BRIAN MUSONDA**

(RECEIVER OF FIRST MERCHANT BANK ZAMBIA LIMITED (IN RECEIVERSHIP) V HYPER FOOD PRODUCTS LIMITED, TONY'S HYPERMARKET LIMITED AND CREATION ONE TRADING (Z) LIMITED (5).

That is the position with respect to a Legal Mortgage. The Legal Mortgagee's remedies are truly cumulative. However, the remedies of an Equitable Mortgagee are somewhat restricted than those of a Legal Mortgagee. The remedies of an Equitable Mortgagee were settled by the Supreme Court in the case of **KASABI INDUSTRIES LIMITED V INTERMARKET BANKING CORPORATION LIMITED (6)** where it was held that:

"...it is clear that an equitable mortgagee does not have the power to sell the Mortgaged Property as a way of enforcing the mortgage. He however has the right to obtain an Order of Court for foreclosure and once the property is foreclosed, the mortgagor's right of redemption is completely extinguished and the property must be conveyed to the mortgagee by the mortgagor unconditionally".

From the evidence adduced by the Applicant and the Respondents admission that he has no defence I am satisfied that the Respondent is truly indebted to the Applicant Bank in the sum of K371,846.88. I accordingly enter Judgment against the Respondent for the payment of the sum of K371,846.88 as at 21st September, 2016 with interest as agreed between the parties.

It is Ordered that the said sum be paid within sixty days from date hereof. In the event of default the Applicant Bank shall be at liberty to foreclose on the Mortgaged Property namely Subdivision No. 69 of Stand 11321 Libala Stage 4B Lusaka and the Respondent must then convey the Mortgaged Property to the Applicant Bank unconditionally.

In default the Deeds of Transfer shall be executed by the Registrar of the High Court in terms of Section 14 of the High Court Act, Chapter 27 of the Laws of Zambia.

It is further Ordered that once the Mortgaged Property is foreclosed the Respondent must deliver up possession of the same to the Applicant Bank which will be at liberty to sell the Mortgaged Property.

Costs to the Applicant Bank to be taxed in default of agreement.

Leave to appeal is granted.

Delivered in Chambers at Lusaka this 30th day of January, 2017.



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WILLIAM S. MWEEMBA
HIGH COURT JUDGE