

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



2016/HPC/0403

IN THE MATTER OF: IMMOVABLE PROPERTY COMPRISED IN A LEGAL MORTGAGE AND FURTHER CHARGE BETWEEN THE APPLICANT AND THE RESPONDENT RELATING TO STAND No. 4185, CHIPATA.

IN THE MATTER OF: ORDER 30 RULE 14 OF THE HIGH COURT RULES CHAPTER 27 OF THE LAWS OF ZAMBIA AS READ TOGETHER WITH ORDER 88 OF THE RULES OF THE SUPREME COURT, 1999 EDITION.

AND
IN THE MATTER OF : A MORTGAGE ACTION

BETWEEN

INVESTTRUST BANK PLC : APPLICANT

AND

ARNOLD JAMES PHIRI T/A
GOLDVIEW TRADING : RESPONDENT

Before Hon. Madam Justice W. S. Mwenda in Chambers on the 17th day of February, 2017

For the Applicant : Ms. T. Sakala of Fraser Associates

For the Respondent : In Person

RULING

Legislation Referred to:

1. Order 30 rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia.
2. Order 21 Rule 6 of the High Court Rules.

3. Order 30 rules 15 and 17 of the High Court Rules.
4. Order 14 rule 5 of the High Court Rules.
5. Section 1 (1) of the Civil Liability (Contribution) Act, 1978.
6. Order 15 rule 4 (1) (b) of the Rules of the Supreme Court, 1995 (White Book).

This Ruling is in respect of two applications before this Court, namely, an application by the Applicant for entry of judgment on admission and the Respondent's application to join parties as respondents to the main cause.

The brief background to this case is that on 10th August, 2016 the Applicant herein filed an Originating Summons in the Commercial Registry pursuant to Order 30 rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia wherein it claims the following relief against the Respondent, namely:-

1. Payment of all monies secured by a Legal Mortgage and Further Charge which as at 18th March, 2016 stood at ZMW135,205.00;
2. Contractual interest;
3. Delivery and possession of Stand No. 4185, Chipata;
4. Foreclosure and Sale of Stand No. 4185, Chipata;
5. Further or other relief; and
6. Costs.

To buttress the Originating Summons is an Affidavit in Support deposed to by one Crispin Isukanji Daka, Acting Head of Credit Department in the Applicant Bank.

On his part the Respondent filed a Defence on 23rd September, 2016 which too was supported by an affidavit which he swore of even date. Simultaneously, he filed a Notice of Motion for Leave to Join Parties as Respondents in which he sought leave to join the Ministry of Agriculture and Live Stock - Farmer Input Support Programme and the Food Reserve Agency for purposes of making contributions towards the Applicant's claims against him. The Notice of Motion also had a supporting affidavit.

In addition, a further Affidavit in Support of Joinder of Parties for Contribution was filed on 28th November, 2016. Meanwhile, the Applicant filed a Summons for Entry of Judgment on Admission pursuant to Order 21 rule 6 of the High Court Rules whose supporting affidavit was also sworn by Crispin Isukanji Daka.

Determination of application for entry of judgment on admission

The ground for the application for entry of judgment on admission as gleaned from the affidavit in support is that the Respondent has expressly admitted owing the sum claimed in paragraphs 6 - 9 of his Defence where he also proposes to settle the same in instalments. That in light of the said paragraphs 6 - 9 of the Respondent's Defence, the Applicant is desirous of having judgment on admission entered for the sum of ZMW135,205.00 and costs. For this application, the Applicant is relying on Order 21 rule 6 of the High Court Rules which stipulates as follows:-

“A party may apply, on motion or summons, for judgment on admission where admissions of facts or part of a case are made by a party to the cause or matter either by his pleadings or otherwise”.

It is clear, in my view, that in paragraphs 6- 9 of his Defence filed on 23rd September, 2016 the Respondent does not deny owing the amount of K135,205.00 to the Applicant. What he is contending is that his failure to comply with the monthly repayment schedule occurred because the Food Reserve Agency contracted him to transport maize from farmers to their main depot but failed to honour his invoice in the sum of K22,968.00 within the contract period of 60 days.

The Respondent further alleges that he did another job for the Ministry of Agriculture and Live Stock - Farmer Input Support Programme who also failed to honour their obligation to settle his invoice in the sum of K74,157.27 within the contract period of 90 days. According to the Respondent, if the two institutions paid off the debt, the outstanding balance would be reduced. He is further alleging that he deposited cash in the Applicant's Bank Account amounting to K15,000.00 and Food Reserve Agency directly deposited the sum of K15,147.11 into the Applicant's Bank Account which sums should be deducted from the outstanding amount.

I am of the opinion that due to the allegation by the Respondent that the Food Reserve Agency directly deposited K15,147.11 into the Applicant's Bank Account on 10th August, and that he made a cash deposit of K15,000.00 bringing the total to K30,147.11, this amount is in dispute and therefore, judgment on admission can only be entered on the undisputed amount of K105,057.89. This amount is arrived at by deducting K30,147.11 from K135,205.00.

It is also my considered view that the Respondent's defence that he is owed money by the institutions referred to above is no defence at all since the said institutions were not privy to the loan facility advanced to the Respondent by the Applicant. The doctrine of privity of contract dictates that no one except a party to a contract can be subjected to liabilities under it. Therefore, the two institutions cannot be liable for payment of the loan or any part thereof.

Determination of motion to join Food Reserve Agency and Ministry of Agriculture and Livestock - Farmer Input Support Programme to the action

As indicated earlier on in this Ruling, the Respondent filed a Notice of Motion for Leave to Join the Food Reserve Agency and Ministry of Agriculture - Farmer Input Support Programme as Respondents for the purpose of having them contribute towards the Applicant's claim against him.

In a nutshell, the grounds for this application as advanced by the Respondent are that the Food Reserve Agency failed to honour their obligation to settle his invoice in the sum of K22,968 within the contract period while the Ministry of Agriculture and Live Stock also failed to honour their obligations to pay his invoice in the sum of K74,157.27 within the contract period leading to his default in settling the Applicant's money.

It is the Respondent's contention that joining the two institutions to this action is necessary to ensure that all matters in dispute in this cause are effectively and completely determined and adjudicated upon and further, to help the Court to apportion liability between the

Respondents. It is the Respondent's further contention that he could claim contribution from the two institutions if they are joined to the cause.

The Applicant opposed the Respondent's application on the ground that it was wrongly before Court since he had relied on the wrong provisions of the law; namely, Order 30 rules 15 and 17 of the High Court Rules when the correct provision is Order 14 rule 5 which provides for non-joinder.

It was the Applicant's submission that Order 14 rule 5 of the High Court Rules provides that where a litigant to an action is of the view that a third party ought to be joined to the proceedings, such litigant ought to make the necessary application to court for leave to have the third party joined. The third party ought to be heard before being joined to the proceedings. However, the Respondent did not apply for leave to join the two institutions to the proceedings.

It is noteworthy that the Respondent has relied on Section 1 (1) of the Civil Liability (Contribution) Act 1978 in addition to Order 15 rule 4 (1) (b) of the Rules of the Supreme Court of 1995 and Order 30 rules 15 and 17 of the High Court Rules.

Section 1 (1) of the Civil Liability (Contribution) Act 1978 provides as follows:

"...any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise)".

In my view, there is a serious misapprehension of Section 1 (1) quoted above by the Respondent. In the circumstances of this case this section is not applicable to the Respondent as he has not suffered any damage envisioned by the Act at the hands of the Applicant and neither are the two institutions which are subject of the application for joinder liable to the Respondent for any damages.

Further, as the Applicant rightly submitted, the correct provision under which the Respondent should have filed his application is Order 14 rule 5 of the High Court Rules.

The correct action which the Respondent should have taken was to apply for leave of this Court to join Food Reserve Agency and the Ministry of Agriculture and Live Stock as co-Respondents. The two institutions would then have been afforded the opportunity to be heard before any order could be made. Unfortunately that was not done. As a Court I cannot issue an order to join the two institutions without hearing them. In any event, as earlier alluded to, they were not privy to the contract for the Loan Facility advanced to the Respondent by the Applicant.

For these reasons, the application to join the two institutions aforesaid must fail, and is accordingly dismissed.

Ruling

For the reasons given above, the application for Entry of Judgment on Admission succeeds to the extent that I enter Judgment on Admission for the undisputed amount of K105,057.89.

The matter shall proceed for hearing on the disputed amount of K30,147.11 and the other claims, namely, contractual interest; delivery of possession of Stand No. 4185, Chipata; foreclosure and sale of Stand No. 4185, Chipata; further or other relief and costs.

I make no order for costs for this application.

Delivered at Lusaka this 17th day of February, 2017.


W. S. Mwenda (Dr.)
JUDGE