

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

*(Commercial Registry)*

**2015/HPC/0085**



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

**MADISON FINANCE COMPANY LIMITED                      APPLICANT**

**AND**

**MAHOGANY AIR CHARTERS LIMITED  
JIM MUZYAMBA BELEMU**

**1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT**

*Before the Honourable Justice B.G. Lungu on the 2<sup>nd</sup> day of March, 2017  
in Chambers.*

*For the Respondents                      :                      Ms. M Mushipe, Mesdames Mushipe & Associates*

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**RULING**

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**LEGISLATION AND OTHER WORKS REFERRED TO:**

1. Order XXXVI, Rule 9, High Court Rules, CAP 27 of the Laws of Zambia
2. Nigel P. Grovells, *Land Law: Text and Material, Third Edition* (London, Thomson Sweet and Maxwell, 2004.)

This is an application on the part of the Respondents for an Order for Stay of sale of property No. 1582, Chelstone, Lusaka.

The application is supported by an Affidavit in Support sworn by Jim Belemu and List of Authorities, both filed on 8<sup>th</sup> February, 2017.

In his Affidavit in Support, the deponent deposed that a Consent Judgment dated 23<sup>rd</sup> June, 2015 was entered between the Parties. Further, that notwithstanding the Consent Judgment, the Respondents could not manage to settle the loan facility in the manner agreed in the Consent Judgment, albeit the Respondents were still desirous of settling the loan facility.

When the matter came up for hearing, Counsel for the Respondents highlighted paragraph 9 of the Affidavit in Support which stated that there was an outstanding balance of ZMW 60,000 Kwacha. She contended that the Applicant had insisted that there was an outstanding balance of K100, 000 which was disputed. She informed the Court that the Applicant had proceeded to advertise the property and that the fear was that these proceedings would be rendered an academic exercise. She averred that the Respondents stood to lose the property which was the subject of these proceedings, and accordingly urged the Court to order a stay.

At this stage, I find it necessary to begin with a brief synopsis of the relevant facts leading up to this application in order to cloth it with perspective.

The brief background is that by Originating Summons dated 27<sup>th</sup> February, 2015 the Applicant took out an Originating Summons wherein it claimed, inter alia:

- i. payment of all monies due under a loan facility entered between the Applicant and the Respondents;



- ii. a declaration that a total sum of ZMW 210, 292.87 is due the Applicant from the Respondents;
- iii. a declaration that until payment shall have been made to the Applicant the Respondents are not entitled to redeem the mortgaged property; and
- iv. that the legal mortgage be enforced by foreclosure or sale.

On 23<sup>rd</sup> June, 2015 the Parties executed a Consent Judgment which was approved by My Learned brother, Justice Nigel Mutuna, (as he then was), wherein Judgment was entered against the Respondents in the sum of ZMW 290, 806.80.

According to paragraph 2 of the Consent Judgment, the Judgment Debt was payable in monthly instalments on or before the 15<sup>th</sup> day of every month commencing 15<sup>th</sup> July, 2015. Moreover, paragraph 4 of the Consent Judgment reads as follows:

***"That in the event of default on any one of the above instalment by the Respondents, the Applicant shall be at liberty to take possession of the mortgaged property being Subdivision A of Stand No. 1582, Chelstone, Lusaka, foreclosure and exercise its power of sale and the Respondents shall bear the costs thereof"***

Given the terms of the Consent Order, I must draw attention to law governing the grant of a stay of execution of a judgment where the Judgment Debt is payable in instalments, namely, Order 36., r 9 of the High Court Rules, which reads as follows:

***"Where any judgment or order directs the payment of money, the Court or a Judge may, for any sufficient reason, order that the amount shall be paid by installments, with or without interest. The order may be made at the time of giving judgment, or at any time afterwards, and may be"***

***rescinded or varied upon sufficient cause, at any time. The order shall state that, upon the failure of any installment, the whole amount remaining unpaid shall forthwith become due:***

***Provided that where there is a default in paying any one installment, there shall be no order for stay of execution on the balance."***

My interpretation of Order 36., r 9 is that the Court has no power to grant a stay of execution where there has been a default in paying any one installment on a Judgment Debt payable in installments.

Aside from the restriction contained in Order 36., r9, mortgage actions as such that once the Court orders foreclosure, the mortgagor's equitable right to redeem is extinguished. This principle is articulated by ***Nigel P. Grovells, Land Law: Text and Materials*** which guides that ***"Foreclosure is the name given to the process whereby the mortgagor's equitable right to redeem is declared by the Court to be extinguished and the mortgagee is left as owner of the property both at law and in equity. An order of the Court is essential for a foreclosure"***

In the case at hand, the Consent Judgment intertwined the two elements: Firstly, a default in the payment of any one instalment by the Applicant automatically ousted this Court's jurisdiction to grant a stay of judgment by virtue of Order 36., r9 and secondly, a default in the payment of the adjudged installments automatically activated foreclosure, rendering the loss of the Respondents right of redemption.

In view of the admission, contained in the Affidavit in Support of this application, that the Respondents defaulted in complying with

the installment payments under the Consent Judgment, my hands are tied. I have no jurisdiction to order a stay of sale, which is tantamount to a stay of execution of the Judgment, more so that the mortgaged property has been foreclosed.

The application is dismissed.

Each party shall bear its own costs

**Dated this 2<sup>nd</sup> day of March, 2017**



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**Judge B. G. Lungu**