

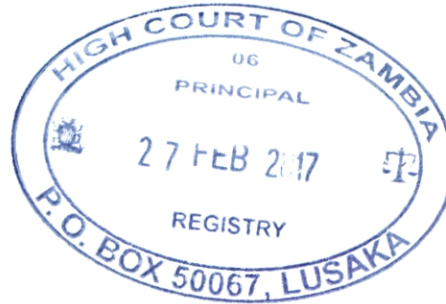
IN THE HIGH COURT FOR ZAMBIA

2016/HPC/0288

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

FMC FINANCE ZAMBIA LIMITED

APPLICANT

AND

**BAPO BAKERY LIMITED
MISHECK PHIRI
IKBAL IBRAHIM PIRAWALA**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT**

Before Lady Justice B.G Lungu on 30th January, 2016 in chambers at Lusaka.

For the Plaintiff: Mr. F. Zulu- Messrs MSK Advocates

For the Respondent: Mrs J. Mulenga- Messrs Isaac and Partners

J U D G M E N T

CASES REFERRED TO:

- 1. Ellis v. Allen [1914] 1 Ch. 904 at 909;*
- 2. Lackson Mwabi Mwanza v. Sangwa Simpasa, Chisha Lawrence Simpasa, ZLR, 2011, Vol.1;*
- 3. Pemba Lapidaries Lapemba Trading Limited v. Industrial Credit Company Limited, ZLR, 2011 Vol. 3.*

LEGISLATION AND OTHER MATERIALS REFERRED TO:

- 1. Order XXI., rules 5 and 6 of the High Court Rules, High Court Act, CAP 27 of the Laws of Zambia;*

2. ***Order 18/0/2, Rules of Supreme Court of England, 1965, Supreme Court Practice (White Book), 1999 Edition;***
3. ***Halsbury's Laws of England, Volume 32, fourth edition, at p. 189***
4. ***Charles Harpum, Stuart Bridge and Martin Dixon, Megarry and Wade: The Law of Real Property, Seventh Edition (London, Sweet and Maxwell, 2008) at pages 1125 to 1127***
5. ***P.G. Osborn, A Concise Law Dictionary, (London, Sweet and Maxwell, 1971)***

This is an application by the Applicant to enter Judgment on Admission of the claim contained in the Originating Summons of 9th June 2016, wherein the Applicant claims:

1. *Payment of the sum of K82, 323.04 due under the Equitable Mortgage relating to Stand No. 02/Block 228, George Compound, Lusaka (the "mortgaged property");*
2. *Delivery up and possession of the mortgaged property;*
3. *Foreclosure and sale;*
4. *Interest on all monies found due;*
5. *Costs; and*
6. *Further or other relief.*

The application to enter Judgment on Admission is supported by an Affidavit in Support, sworn by Peter Jule, the Credit Manager in the Applicant Company, as fortified by Skeleton Arguments filed on 2nd December, 2016.

The deponent of the Affidavit in Support deposed that the Respondents, through paragraphs 7, 8 and 9 of their Affidavit in Opposition to the Originating Summons, filed on 23rd June 2016,

admitted the debt. That the admission was augmented by a proposal to pay the debt in instalments as attested in the said Affidavit in Opposition.

In view of the deposed admission, the Applicant took out a summons under **Order XXI., r.6 of the High Court Rules**. Order XXI.,r6 provides that "**A party may apply, on motion or summons, for judgement on admissions 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.**"

At this stage, I consider that the first question to be determined by the Court is whether this application properly sits under Order XXI.,r.6. In order to do that, I must be satisfied that the Respondents have made an admission of fact or an admission of part of the Applicant's case, either in their pleadings or otherwise.

Although trite, I must state that neither the Summons nor the Affidavit in Support thereof are classified as pleadings. This is clearly articulated in **Order 18/0/2 of the Rules of Supreme Court of England, 1965 as contained in the White Book, 1999 Edition**. Therefore, the admission being considered in this case, being contained in an affidavit, cannot be said to have been made in a pleading.

Order XXI., r.6 does, however, encompass admissions made "**otherwise**" than pleadings. I take the position that the use of the term "**otherwise**" widens the scope of where the admission can be

housed. The scope clearly transcends admissions contained in pleadings and includes other instruments or sources.

The Applicant also captured my attention by delving into the nature of an admission when it referred to the English case of *Ellis v. Allen*¹ [1914] 1 Ch. 904 at 909, where the Court expounded that "**the admission may be express or implied but it must be clear...**" I am persuaded by this authority to the extent that the instrument evidencing the admission must visibly demonstrate that there is affirmation of specific facts or to the claim or part thereof.

In the present case, it was deposed in the Affidavit in Opposition to the Originating Summons that the Respondents were granted a loan of K100,000 which they have not refused to pay. Further, that all that was required was time to settle the debt. These depositions were contained in paragraphs 4, 7, 8, and 9 of the said Affidavit. Evidently, the Affidavit in Opposition contains a clear admission of indebtedness.

Bearing in mind my interpretation of the term "otherwise" used in Order XXI., r 6, I am of the settled view that an admission contained in an affidavit falls within the category of "**or otherwise**" prescribed in Order XXI., r 6. I am satisfied, therefore, that the Applicant is entitled to make this application under Order XXI., r6 of the High Court Rules.

In presenting the substantive argument, it was submitted that the Court has jurisdiction to enter Judgment on Admission on the basis of **Order XXI., r. 5 of the High Court Rules**. Order XXI., r. 5 of the High Court Rules states as follows:

"If any defendant shall sign a statement admitting the amount claimed in the summons or any part of such amount, the Court or a Judge, on being satisfied as to the genuineness of the signature of the person before whom such statement was signed, and unless it or he sees good reason to the contrary, shall, in case the whole amount is admitted, enter judgment for the plaintiff for the whole amount or the part admitted, as the case may be..."

My interpretation of Order XXI., r5 is that for the Court to exercise its discretion to enter Judgment on Admission, the Court must be satisfied of primarily three things: Firstly, that there is a statement of admission by the Defendant; secondly, that the statement of admission is signed by the Defendant; and thirdly, that the signature appended to the statement of admission is the genuine signature of the Defendant.

In the case at hand, the admission is presented through the instrumentality of an Affidavit, being sworn testimony. The Affidavit in question was signed and sworn before a Commissioner for Oaths. As at the date of Judgment, the Affidavit had not been withdrawn or in any other way repudiated by the Respondents. In the premise, I have no reason to doubt the authenticity of the signature of the deponent to the Affidavit nor the admission contained therein.

Accordingly, being satisfied that the Respondents issued a statement admitting the amount claimed in the Originating Summons, and being satisfied as to the genuineness of the signature of the deponent of the Affidavit in Opposition which

contains the admission, and further not seeing any good reason to the contrary, I hereby enter Judgment in favour of the Applicant for the payment of the sum of ZMW 82, 323.04.

I now consider the other reliefs sought by the Applicant, namely possession, foreclosure and sale of Plot/Stand No. 02/Block 228, George Improvement Area, Lusaka.

The Originating Summons, through the articulation of the first relief sought, clearly acknowledged that the loan was secured by an equitable mortgage.

The nature of an equitable mortgage is articulated in **paragraph 405 of Halsbury's Laws of England, Volume 32, fourth edition, at page 189** which states as follows:

“An equitable mortgage is a contract which creates a charge on the property but does not convey any legal estate or interest to the creditor, such a charge amounts to an equitable interest. Its operation is that of an executor assurance which, as between the parties, and so far as equitable rights and remedies are concerned, is equivalent to an actual assurance, and is enforceable under the Court's equitable jurisdiction.”

The significance of the absence of a legal estate or legal interest in an equitable mortgage is that no power of sale vests in the mortgagee. This principle of the law is founded upon both literary works as well as judicial precedent. To this end, the renowned text ***Megarry and Wade: The Law of Real Property , Seventh Edition (London, Sweet and Maxwell, 2008) at pages 1125 to 1127*** elucidates that ***“the***

statutory power of sale applies only where the mortgage was made by deed; an equitable mortgagee has no power of sale" .

A declaratory precedent of the principle that an equitable mortgagee has no right to sell was applied in the case of ***Lackson Mwabi Mwanza v. Sangwa Simpasa, Chisha Lawrence Simpasa², ZLR. Vol. 1***, where my Learned brother, Justice Matibini, SC (as he then was), held as follows: "***...the plaintiff being an equitable mortgagee has no power of sale. He has instead the power to foreclose.***"

Similarly, in the case of ***Pemba Lapidaries Lapemba Trading Limited v. Industrial Credit Company Limited³, ZLR, Vol. 3***, my learned brother, Justice Siawwapa held that "***an equitable mortgage does not convey legal title to the mortgagee and consequently, no power of sale vests in the mortgagee***".

With respect to the right to foreclosure, ***Nigel P. Grovells, Land Law: Text and Materials*** 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***"

I found it necessary to begin with the aforementioned meaning of foreclosure in order to demonstrate that it is the process of foreclosure that births the legal interest in an equitable mortgage.

P.G. Osborn, A Concise Law Dictionary, outlines the process as follows: *"the Court may make an order for foreclosure nisi for the payment of the principal with interest and costs, usually within six months, failing which an order absolute will be made, the land thereupon becoming the property of the mortgagee."*

Megarry and Wade expound that *"Foreclosure is the primary remedy of an equitable mortgagee since he has no legal estate. The Court order absolute will direct the mortgagor to convey the land to the mortgagee unconditionally"*

Bearing in mind the cited authorities, I am of the settled view that in the case at hand, where the security is an equitable mortgage, the Applicant is not entitled to sell the mortgaged property before the going through the complete cycle of foreclosure.

Having entered Judgment in favour of the Applicant, and in view of the existence of the equitable mortgage, I further Order as follows:

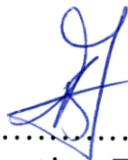
1. **Foreclosure nisi:** That the Respondents shall, within 180 days of the date of this Judgment, pay the Applicant the outstanding balance of ZMW 82,323.0 together with interest. Interest shall be applied at the contractual rate from 9th June, 2016 to date of Judgment and thereafter at the Bank of Zambia short term lending rate until date of full and final settlement.

2. **Foreclosure absolute:** In the event that the Respondents fail to liquidate the Judgment Debt and interest within 180 days from the date of Judgment, foreclosure relating to Lot No.02/Block 228 in George Improvement Area, Lusaka shall be rendered absolute immediately upon the expiry of the 180 days.

3. **Possession and Sale:** The Applicant shall only be entitled to take possession of Lot No. 02/Block 228 in George Improvement Area, Lusaka and exercise its right of sale after the expiry of 180 days from the date of this Judgment in the event that Judgment Debt shall not have been settled in full, at which point the legal interest in the property shall have vested in the Applicant.

4. Costs incidental to these proceedings shall be borne by the Respondents, such costs to be taxed in default of agreement.

Dated the 27th day of February, 2016



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Lady Justice B.G.Lungu
HIGH COURT JUDGE