

**IN THE HIGH COURT FOR ZAMBIA  
AT THE COMMERCIAL REGISTRY  
HOLDEN AT LUSAKA**  
*(Civil Jurisdiction)*



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

**IN THE MATTER OF:** THE PROPERTY COMPRISED IN AN EQUITABLE  
MORTGAGE RELATING TO HOUSE NO. 14 BLOCK  
188 KANYAMA IMPROVEMENT AREA, LUSAKA

**IN MATTER OF:** POSSESSION, FORECLOSURE AND SALE OF THE  
MORTGAGED PROPERTY

**BETWEEN:**

**CHIBUYU FINANCING COMPANY LIMITED** APPLICANT

**AND**

**IREEN INUTU MUWINDWA** 1<sup>ST</sup> RESPONDENT

**LOYNESS HANAMBE** 2<sup>ND</sup> RESPONDENT

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

*For the Applicant:* Mr. M. Nzonzo – Messrs ICN Legal  
Practitioners

*For the Respondent:* No Appearance

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**JUDGMENT**

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**LEGISLATION REFERRED TO:**

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

2. **Order 88 Rule 1 of the Rules of the Supreme Court of England (White Book) 1999 Edition.**
3. **Order 35 Rule 3 of the High Court Rules, Chapter 27 of the Laws of Zambia.**

**CASES REFERRED TO:**

1. **Luke Phiri V David Tembo 2011/HPC/0574; (2011 Vol. 3) ZR 189.**
2. **Magic Carpet Travel and Tours V Zambia National Commercial Bank Limited (1999) ZR 61.**
3. **S. Brian Musonda (Receiver of First Merchant Bank Zambia Ltd (In Receivership) V Hyper Food Products Limited, Tony's Hypermarket Limited and Creation One Trading (Z) Limited (1999) ZR 124.**
4. **Kasabi Industries Limited V Intermarket Banking Corporation Limited Appeal No. 168/2009.**

**OTHER AUTHORITIES REFERRED TO:**

1. **A. Garner, Black's Law Dictionary, 8<sup>th</sup> Edition (United States of America, Thompson West, 2007).**

The Applicant by way of Originating Summons filed into Court on 22<sup>nd</sup> March, 2017 made pursuant to Order 30 Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia claims the following against the Respondents:

1. Payment by the 1<sup>st</sup> Respondent of all monies and interest due to the Applicant under a Loan Application Form dated 8<sup>th</sup> June, 2016 and secured by an Equitable Mortgage over House No. 14 Block 188 Kanyama Improvement Area, Lusaka by the 2<sup>nd</sup> Respondent as Equitable Mortgagee;
2. An Order that the said Equitable Mortgage may be enforced by foreclosure and sale;
3. Delivery by the 2<sup>nd</sup> Respondent of possession of the said property;

4. Any other relief the Court may deem fit; and
5. Costs.

The application is supported by an Affidavit in Support and Skeleton Arguments filed into Court on 22<sup>nd</sup> March, 2017. The Affidavit in Support was sworn by Kenneth Chipungu a Director and Shareholder in the Applicant Company. It is deposed that by Loan Agreement Form dated 8<sup>th</sup> August, 2016 the 1<sup>st</sup> Respondent applied for and the Applicant granted the 1<sup>st</sup> Respondent a Loan sum of K40, 000.00. In terms of the Loan Agreement, the Respondent was to pay back the capital sum in monthly installments failing which the Applicant would seek redress in the Courts of Laws. A copy of the Loan Agreement Form is exhibited and marked "KC2".

That as security for repayment of the Loan Sum and interest aforesaid, the 2<sup>nd</sup> Respondent surrendered her Occupancy License relating to House No. 14 Block 188 Kanyama Improvement Area, Lusaka. A copy of the Occupancy License is exhibited and marked "KC3". It is stated that accompanying the remission of the Occupancy License was a letter under the hand of the 2<sup>nd</sup> Respondent authorizing the use of her Occupancy License by the 1<sup>st</sup> Respondent for provision of the Loan Facility. A copy of the Authority Letter and National Registration Card is exhibited and marked "KC a-b". That in order to secure an interest in the subject property, the Applicant duly lodged a Caveat on House No. 14/188

Kanyama, Lusaka. A copy of the Caveat is exhibited and marked "KC5".

It is deposed that the 1<sup>st</sup> Respondent has defaulted in her repayment obligation to the Applicant. The amount due as principal and agreed interest currently stands at K39,999.00 as per Loan Application Form. That despite letters of demand being issued by the Applicant and its Advocates, the Respondents have failed, neglected or refused to abide by the demands. Copies of letters of demand to the 1<sup>st</sup> Respondent were exhibited marked "KC6 a-b".

The Applicant in its Skeleton Arguments filed into Court on 31<sup>st</sup> May, 2017 submitted that the application is made under Order 30 Rule 1 of the High Court Rules, Chapter 27 of the Laws of Zambia, seeking a sum of K39,999.00 being money lent to the 1<sup>st</sup> Respondent by Loan Agreement of 8<sup>th</sup> August, 2016. That the said sum was secured by an equitable mortgage over the 2<sup>nd</sup> Respondent's property being House No. 14 Block 188 Kanyama Improvement Area, Lusaka.

Apart from Order 30 Rule 14 of the High Court Rules, the Applicant also cited Order 88 Rule 1(2) of the Rules of the Supreme Court of England (White Book) 1999 Edition. It is contended that the Court has the power to order or grant the reliefs that the Applicant is seeking. Order 30 Rule 14 of the High Court Rules provides that:

**"Any Mortgagee or Mortgagor, whether legal or equitable, or any person entitled to or 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 money 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...”.**

The Applicant’s Counsel also relied on the case of **LUKE PHIRI V DAVID TEMBO (1)** in which N.K. Mutuna J (as he then was) recited the definition of an equitable mortgage from the authorities of the Black’s Law Dictionary and The Law of Real Property text books. The learned author of Black’s Law Dictionary at page 1032 defines an equitable mortgage as follows:

**“A transaction that has the intent but not the form of a mortgage, and that a Court of Equity will treat as a mortgage.”**

Bryan A. Garnet defines a legal mortgage at page 1031 thus:

**“A conveyance of title to property that is given as security for the payment of a debt or the performance of a duty that will become void upon payment or performance according to stipulated terms.”**

It is submitted that the Affidavit in Support of the Originating Summons demonstrates that the said sum was advanced by the Applicant to the 1<sup>st</sup> Respondent and the property was equitably mortgaged by the 2<sup>nd</sup> Respondent by way of deposit of title. That the intention to mortgage the property is evidenced by letter from the 2<sup>nd</sup> Respondent exhibited and marked as “KC4a”. Further a Caveat was placed.

It is also submitted that the letters of demand written to the Respondents on default have been ignored. That the Respondents despite having been duly served with process herein, have neither entered any appearance nor filed any Affidavit in Opposition. The Court was asked to enter Judgment in favour of the Applicant for K39,999.00 and interest. That should the Respondents fail to settle the Judgment sum within the prescribed time then the Applicant should be at liberty to foreclose on the 2<sup>nd</sup> Respondent’s property, take possession of the same and exercise a right to sell the property.

The Affidavit of Service sworn by Chewe Nyirongo filed into Court on 15<sup>th</sup> May, 2017 shows that the Originating Summons and Affidavit in Support issued on 22<sup>nd</sup> March, 2017 were served on the 1<sup>st</sup> Respondent personally on 28<sup>th</sup> March, 2017 and on the 2<sup>nd</sup>

Respondent by substituted service on 2<sup>nd</sup> and 3<sup>rd</sup> May, 2017. Notice of the proceedings was also served on the Respondents on 2<sup>nd</sup> and 3<sup>rd</sup> May, 2017.

The Respondents have not opposed the application herein and they did not attend the hearing of the Originating Summons on 15<sup>th</sup> May, 2017. I proceeded to hear the Originating Summons pursuant to Order 35 Rule 3 of the High Court Rules, Chapter 27 of the Laws of Zambia.

I have considered the Applicant's claim together with the Affidavit in Support and Skeleton Arguments.

As there is no defence or Affidavit in Opposition by the Respondents on Record, the Respondents have therefore not denied the Applicant's claim in any way.

The action herein brought pursuant to Order 30 Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia is a mortgage action because it is a claim for moneys secured by real property as well as a claim for possession of the mortgaged property.

The Applicant contends that the sum of K40,000.00 advanced by it to the 1<sup>st</sup> Respondent was secured by an Equitable Mortgage over the 2<sup>nd</sup> Respondents property namely, House No. 14 Block 188 Kanyama Improvement Area, Lusaka.

In discussing the creation of an Equitable Mortgage, the Supreme Court held, in **MAGIC CARPET TRAVEL AND TOURS V ZAMBIA NATIONAL COMMERCIAL BANK LIMITED (2)** that;

**“As regards an equitable mortgage, the position at common law is that when a borrower surrenders his title deeds to the land as security for the repayment of a loan, an equitable mortgage is created.”**

From the facts on the Record, it is clear that the 2<sup>nd</sup> Respondent surrendered her Occupancy License relating to House No. 14 Block 188 Kanyama Improvement Area, Lusaka to the Applicant as security for the repayment of a loan of K40,000.00 availed to the 1<sup>st</sup> Respondent by the Applicant. the 2<sup>nd</sup> Respondent’s letter dated 8<sup>th</sup> June, 2016 exhibited as “KC4a” reads in part thus:

**“I Loyness Hanambe bearer of NRC No. 651516/11/1 do here authorize my sister Ireen Inutu Muwindwa NRC 104355/86/1 to use the documents for my house situated in Kanyama Improvement Area House No. 188/14 to enable her get loan from any money lending institution willing to help her...”**

I therefore find and hold that the 2<sup>nd</sup> Respondent created an Equitable Mortgage over House No. 14 Block 188 Kanyama Improvement Area, Lusaka when she surrendered her Occupancy License to the Applicant to secure the loan of K40,000.00 granted to the 1<sup>st</sup> Respondent.

The Applicant among other remedies or reliefs seeks an Order that the Equitable Mortgage may be enforced by foreclosure and sale.

It is trite that a mortgagee has several remedies available namely, payment of money secured, foreclosure, delivery up of possession of the mortgaged property and sale of the mortgage property. These remedies are cumulative. However, this is the position with respect to a Legal Mortgage as held by the Supreme Court in **S. BRIAN MUSONDA (RECEIVER OF FIRST MERCHANT BANK ZAMBIA LIMITED (IN RECEIVERSHIP) V HYPER FOOD PRODUCTS LIMITED AND TWO OTHERS (2)**.

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 (4)** where it was held that:

**“...it is clear that an equitable mortgagee does not have 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 extinguished and the property must be conveyed to the mortgagee by the mortgagor unconditionally.”**

From the evidence adduced by the Applicant, I am satisfied that the Applicant has proved its case on the balance of probabilities.

I accordingly enter Judgment in favour of the Applicant against the 1<sup>st</sup> Respondent for payment of K39,999.00 and contractual interest

from 22<sup>nd</sup> March, 2017 to date of Judgment and thereafter at the current bank lending rate as determined by Bank of Zambia up to day of full payment.

The Judgment Sum together with interest must be paid by the 1<sup>st</sup> Respondent within 30 days from date hereof.

In the event of default, the Applicant shall be at liberty to Foreclosure on the Mortgaged Property namely, House No. 14 Block 188 Kanyama Improvement Area, Lusaka and the 2<sup>nd</sup> Respondent must then deliver vacant possession of the Mortgaged Property to the Applicant. The 2<sup>nd</sup> Respondent must further convey the Mortgaged Property to the Applicant unconditionally.

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

The Applicant will be at liberty to sell the Mortgaged Property after Foreclosure.

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

Delivered at Lusaka the 2<sup>nd</sup> day of June, 2017.



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**WILLIAM S. MWEEMBA**  
**HIGH COURT JUDGE**