

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

2017/HPC/0300

IN THE MATTER OF:

**THE PROPERTY COMPRISED IN AN EQUITABLE
MORTGAGE OVER STAND NO. 445 KABULONGA,
LUSAKA**

AND

IN THE MATTER OF:

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

BETWEEN:

CAVMONT BANK LIMITED

APPLICANT

AND

**MACH INNOVATIONS LIMITED
PHILLIP NONDE CHINOMBWE**

**1ST RESPONDENT
2ND RESPONDENT**

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

For the Applicant:

*Mr. S. C. Mwananshiku – Messrs M & M
Advocates*

For the Respondents:

No Appearance

JUDGMENT

LEGISLATION REFERRED TO:

- 1. Order 30 Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia**
- 2. Order 35 Rule 3 of the High Court Rules, Chapter 27 of the Laws of Zambia**

3. Section 66(1) of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia

CASES REFERRED TO:

- 1. Lackson Mwabi Mwanza V Sangwa Simpasa, Chisha Lawrence Simpasa 2005/HP/0050**
- 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 Zambia Limited (1999) ZR 124**
- 4. Kasabi Industries Limited V Intermarket Banking Corporation Limited SCZ Appeal No. 168/2009**

OTHER WORKS REFERRED TO:

- 1. Megarry and Wade, The Law of Real Property, 7th Edition para 25-004**

The Applicant by way of Originating Summons filed into Court on 12th July, 2017 made pursuant to Order 30 Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia seeks the following remedies or reliefs against the Respondents:

- (i) Payment of all monies plus interest thereon due to the Applicant from the Respondents and such costs as would be payable by the Respondents if this were the only relief granted;
- (ii) Alternatively, delivery by the Respondents to the Applicant of possession of the mortgaged property or the relief of foreclosure;
- (iii) Further or other relief;
- (iv) Costs of this action.

The mortgaged property is Stand No. 445 Kabulonga, Lusaka.

The application is supported by an Affidavit in Support and Skeleton Arguments filed into Court on 12th July, 2017. The Affidavit in Support is sworn by Carol Kaputo a Banker with the Recoveries Department of the Applicant bank. It is deposed that on 17th March, 2014 the Applicant availed the 1st Respondent an overdraft facility in the sum of K120,000.00. A copy of the Facility Letter dated 14th March, 2014 is exhibited to the Affidavit marked "CK1". That Clause 6.1.2 of the Facility Letter indicated that security for the facility would be a 3rd Party Mortgage for K120,000.00 over Plot No. 445 Woodlands, Lusaka belonging to the 2nd Respondent.

It is stated that the 2nd Respondent released the original Certificate of Title for Stand No. 445 Kabulonga, Lusaka which was deposited with the Applicant. A copy of the Certificate of Title is exhibited marked "CK2".

It is deposed that contrary to the Loan Agreement the 1st Respondent has persistently defaulted in paying the agreed monthly installments despite numerous demands and reminders from the Applicant. That the total amount outstanding as at 14th June, 2017 as shown by the Statement of Account exhibited and marked "CK3" is K142,287.78.

Learned Counsel for the Applicant filed Skeleton Arguments into Court on 12th July, 2017. He submitted that the action is filed pursuant to Order 30 Rule 14 of the High Court Rules, which states 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 the circumstances of the case may require”.

Learned Counsel further submitted that the creation of a mortgage is accompanied by the creation of remedies. That the remedies available depend of course on whether the mortgage created is a legal mortgage or an equitable mortgage. That Nigel P. Gravells the learned author of Land Law (Text and Materials, Third Edition (London, Thomson Sweet and Maxwell, 2004) at page 891 summarizes the purpose of the various remedies available as follows:

“In addition to the personal remedy against the mortgagor for breach of the personal covenant to repay the loan, the

mortgagee has a number of remedies against the mortgaged land. Foreclosure and sale are directed primarily at the recovery of the loan and termination of the mortgage transaction. The appointment of a receiver is directed primarily at the recovery of the interest payable on the loan and possession of the mortgaged property although originally used as a means of securing the payment of interest and still in theory available for that purpose (see *Western Bank Limited V Schidler* (6), is now sought almost exclusively as a preliminary remedy to the exercise of the power of sale so that the mortgagee may sell the property with vacant possession.”

The case of **LACK MWABI MWANZA V SANGWA SIMPASA, CHISHA LAWRENCE SIMPASA (1)** was cited as giving guidance to the extent that the mortgagee's remedies are cumulative. It was submitted that a mortgagee is not bound to select any one of the remedies and pursue that particular remedy exclusively. That a mortgagee is at liberty to employ one or all of the remedies to enforce payment. 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 was further submitted that as the Respondents have defaulted in paying back the loan, the Applicant as mortgagee seeks an Order that the Respondents immediately pay the full amount owed being K142,287.78 with interest and that in default of such payment the

Applicant be given possession of the property namely, Stand No. 445 Kabulonga, Lusaka whose title was deposited by the 1st Respondent with the Applicant in order to secure the loan facility. That recovery of possession, in default of payment is being sought so that the Applicant can exercise its right as mortgagee to dispose of the property in order to recover its monies. That the Applicant therefore prays and urges the Court to order that the Respondents pay the amount owed in full with interest and in default thereof to Order that the Applicant be given possession of the said property for purposes of exercising the Applicant's right of sale as Mortgagee.

The Respondents have not opposed the Applicant's application herein and they did not attend the hearing of the Originating Summons on 24th August, 2017. An Affidavit of Service sworn by Mathews Chita Nonde dated 18th August, 2017 shows that the Originating Summons dated 12th July, 2017 and Supporting Affidavit and Skeleton Arguments were served on the 1st Respondent on 14th August, 2017 and on the 2nd Respondent on 17th August, 2017. The Notice of Hearing scheduling hearing on 24th August, 2017 was also served on the Respondents on the said dates.

I proceeded to hear the Originating Summons on 24th August, 2017 pursuant to Order 35 Rule 3 of the High Court Rules, Chapter 27 of the Laws of Zambia which provides that:

“If the plaintiff appears and the defendant does not appear or sufficiently excuse his absence, or neglects to answer

when duly called, the Court may upon proof of service of notice of trial, proceed to hear the cause and give judgment on the evidence adduced by the plaintiff, or may postpone the hearing of the cause and direct notice of such postponement to be given to the defendant."

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 the 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 foreclosure as well as a claim for possession of the mortgaged property.

The Applicant contends that the sum of K120,000.00 advanced by it to the 1st Respondent was secured by an Equitable Mortgage over the 2nd Respondents property namely, Stand No. 445 Kabulonga, 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 2nd Respondent surrendered his Certificate of Title No. 4548 relating to Stand No. 445 Kabulonga, Lusaka to the Applicant as security for the repayment of a loan of K120,000.00 availed to the 1st Respondent by the Applicant. The Overdraft Facility Letter executed by the Applicant and the 1st Respondent on 15th March, 2014 provides at Clause 6.1.2 that Collateral for the Overdraft Facility would be 3rd Party Mortgage for K120,000.00 over Plot No. 445 Woodlands, Lusaka. The reference to ‘Woodlands’ is a typographical error as the property is in Kabulonga.

I therefore find and hold that the 2nd Respondent created an Equitable Mortgage over Stand No. 445 Kabulonga, Lusaka when he surrendered his Certificate of Title to the Applicant to secure the Advance or Overdraft of K120,000.00 granted to the 1st Respondent.

The Applicant among other remedies or reliefs seeks possession of the Mortgaged Property and 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 mortgaged 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 (3) and the case of **LACKSON MWABI MWANZA V SANGWA SIMPASA, CHISHA LAWRENCE SIMPASA (1)** cited by learned Counsel for the Applicant.

The remedies of an Equitable Mortgagee are somewhat restricted than those of a Legal Mortgagee. The learned authors of Megarry and Wade, *The Law of Real Property*, 7th Edition, describe the remedies exercisable by an Equitable Mortgagee at pages 1125 to 1127 as follows:

- “1. To foreclose: 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, i.e. free from any right to redeem.**
- 2. To sell: The statutory power of sale applies only where the mortgage was made by deed; an equitable mortgagee has no power of sale.**
- 3. To take possession: It is generally said that an equitable mortgagee has no right to take possession because he has no legal estate.**
- 4. To appoint a receiver: an equitable mortgagee has always had the right to have a receiver appointed by the Court in a proper case.”**

Under Section 66(1) of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia, the right to sell mortgaged property is only exercisable where the mortgage was made by deed. It provides that:

“66.(1) A power of sale of the whole or any part or parts of any property subject to a mortgage shall become exercisable by a mortgagee if the mortgage is made by deed and the mortgage money payable thereunder has become due and the mortgage is not redeemed before sale, and every such power of sale shall be with and subject to the powers and obligations and other provisions relating to sales by mortgagees contained in the Conveyancing and Law of Property Act, 1881 of the United Kingdom, or any statutory modification thereof applicable in Zambia...”

From the above, it is clear that an Equitable Mortgagee does not have power to sell the mortgaged property as a way of enforcing the mortgage. How an Equitable Mortgagee can enforce the mortgage security by sale was 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.”

Once the mortgagor conveys the mortgaged property to the mortgagee, the mortgagee gets the legal estate and he can sell the property.

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 1st Respondent for payment of K142,287.78 and contractual interest from 15th June, 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 1st 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 Stand No. 445 Kabulonga, Lusaka and the 2nd Respondent must then deliver vacant possession of the Mortgaged Property to the Applicant. The 2nd Respondent must further covey 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, Chapter 27 of the Laws of Zambia.

The Applicant shall 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 28th day of August, 2017.

A handwritten signature in black ink, consisting of a series of loops and strokes, positioned above a dotted line.

WILLIAM S. MWEEMBA
HIGH COURT JUDGE