

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

2017/HKC/0009

B E T W E E N :

PULSE FINANCIAL SERVICES LIMITED
T/A ENTREPRENEURS FINANCIAL CENTRE

APPLICANT

AND

ESTER KALALA

RESPONDENT

Before Lady Justice B.G Lungu on 15th August, 2017 in chambers at Kitwe.

*For the Applicant, Mr.H. Pasi, Messrs Pasi Advocates
For the Respondent, Ms Ester Kalala, In- Person*

J U D G M E N T

CASES REFERRED TO:

1. *S. Brian Musonda (Receiver Of First Merchant Bank Zambia Limited) V Hyper Foods Products Limited And Creation One Trading (Z) Limited, (1999) ZR 124;*
2. *James v. James (1873) L.R 16 Eq. 153;*
3. *China Henan International Economic Technical Cooperation v Mwange Contractors Limited, 2002 ZR 28;*
4. *Reeves Malambo v. Patco Agro Industries Limited, S.C.Z Judgment No. 20 of 2007, ZLR (2007);*

5. *Salt v. Marquis of Northampton (1892) A.C. 1;*

6. *Match Corporation Limited and Development Bank of Zambia and the Attorney General, S.C.Z. Judgment No. 3 OF 1999.*

LEGISLATION AND OTHER MATERIALS REFERRED TO:

1. *Order XXX, rule 14, High Court Rules, High Court Act, CAP 27 of the Laws of Zambia, CAP 27 of the Laws of Zambia;*
2. *Section 14 of the Housing (Statutory and Improvement Areas) Regulations, Housing (Statutory and Improvement Areas) Act, Cap 194 of the Laws of Zambia;*
3. *David J. Hayton, Megarry's Manual of the Law of Real Property, 6th Edition.*

The Applicant commenced this action against the Respondent on 20th July, 2016 by way of Originating Summons. The reliefs that the Applicant seeks are as follows:

1. Payment by the Respondent of all monies and interest due and owing to the Applicant under Loan Agreements dated 31st March, 2015 secured by a Legal Mortgage over Stand No. 5074/68, Chingola Statutory Housing Area, Chingola which monies stand at ZMW 31, 021.89 as at 6th June, 2017;

2. An order that the Legal Mortgage over Stand No. 5074/68, Chingola Statutory Housing Area, Chingola may be enforced by foreclosure and sale;
3. An order for delivery of vacant possession of the mortgaged property by the Respondent to the Applicant;
4. Further or other relief;
5. Costs and other charges incurred by the Applicant.

The Originating Summons was supported by an Affidavit deposed by one Huntley Ng'andu, a legal officer in the employ of the Applicant, Skeleton Arguments and List of Authorities filed on 20th July, 2017.

The deponent of the Affidavit in Support attested that by Loan Agreements entered into on 31st March, 2015 the Applicant granted the Respondent a loan in the sum of ZMW 40,000.00.

It was deposed that the loan attracted interest at the rate of 4.25% per month and that the facility was secured by way of a legal mortgage over Stand No. 5074/68, Chingola Statutory Housing Area, Chingola.

It was further attested that the Loan Agreement prescribed loan repayment dates and that failure to make a payment within 7 days of the due date constituted default. Additionally, the deponent avowed that default in turn activated the Applicant's right to seize

and dispose of all collateral provided. The Affidavit in Support also reveals that the Respondent had defaulted in her payment obligations and had failed to settle her account notwithstanding demand having been made. Accordingly, the Respondent was stated to be indebted to the Applicant in the sum of ZMW 31, 021.89 as at 6th June, 2017.

The Affidavit in Support exhibited several documents as evidence to fortify the Applicant's claim, including:

- i. A copy of the Loan Agreements, exhibit marked "**HN2**".
- ii. A copy of the Mortgage Deed over Stand No. 5074/68 Chingola executed by the Respondent in favour of the Applicant, bearing Chingola Municipal Council date stamp for 1st April, 2015, exhibit marked "**HN3**".
- iii. A copy of the Respondent's Statement of Account printed on 6th June, 2017 bearing a current principal balance of ZMW 31, 021. 89 and contractual interest balance of ZMW20, 220,55, exhibit marked "**HN4**"; and
- iv. A copy of the Final Notice of Default dated 3rd November, 2015 addressed to the Respondent, exhibit "**HN5**".

In the Skeleton Arguments filed on behalf of the Applicant, it was submitted that the Applicant extended a secured loan facility to the Respondent, who failed or neglected to settle its indebtedness to the Applicant, notwithstanding demand having been made.

The gist of Applicant's legal argument, deducible from their Skeleton Arguments, was that the Applicant, as mortgagor, had the right to take out this mortgage action under Order 30 rule 14 of the High Court Rules.

Additionally, it was argued that cumulative remedies were available to the mortgagee in the event of default by the mortgagor. The case of **S. Brian Musonda (Receiver of First Merchant Bank Zambia Limited) v Hyper Foods Products Limited and Others (1999) Z.R. 124¹** was cited as an authority for the mortgagee's right to the benefit of cumulative remedies.

Moreover, the Applicant's Skelton Arguments, in a rather glib manner, sought the refuge of the case of **James v James (1873) L.R 16 Eq. 153²**, where a mortgagee from an equitable mortgage received the benefit of foreclosure free from any right to redeem. However, the Applicant elected not to elucidate the import of this authority to its case. As a result, I will not attribute any credence of significance to its citation.

When the matter came up for hearing on 15th August, 2017, Counsel for the Applicant relied on the Summons and supporting Affidavit, List of Authorities and Skeleton Arguments on record.

The Respondent on the other hand did not file any documents in opposition. She appeared in person and informed the Court that she understood the claim. She also verbally admitted that she got a loan which she had been servicing, albeit with some lapses. The Respondent requested that she be given time to settle the debt and proposed to pay the arrears including the interest in September, 2017.

I have carefully examined the Affidavit evidence presented and find that the Applicant extended a credit facility in the sum of ZMW 40,000 to the Respondent, which loan attracted contractual interest at the monthly rate of 4.24%.

I further find that the Respondent provided security by way of a legal mortgage over Stand 5074/68, Chingola.

Bearing in mind my findings, it is clear that this is an action by a mortgagee seeking a blend of reliefs including delivery of possession of the mortgaged property, foreclosure and sale of the mortgaged property. As such, I am satisfied that the action falls squarely within the class of actions notoriously referred to as mortgage actions, to which Order 30 Rule 14 of the High Court Rules applies.

Having heard the submissions of both parties, I am also of the settled mind that the Respondent has admitted the Applicant's claim

with respect to her indebtedness. My position is premised on the express admission made by the Respondent, reinforced by the fact that no Affidavit in Opposition was filed into Court. Consequently, Judgment on Admission beckons the Court. In this regard, I draw attention to the findings of the Supreme Court in the case of **China Henan International Economic Technical Cooperation v Mwange Contractors Limited**.³In that case, the Court stated that *"it would be absurd to expect a Court which is in control, to pause and wait for an application {for judgment on admission} where clearly the defence is deemed to have admitted the claim."*

Given my satisfaction that the Respondent has unequivocally admitted her indebtedness to the Applicant, I take the view that this is an appropriate case for the Court to enter Judgment on Admission. Accordingly, Judgment on Admission is hereby entered in favour of the Applicant in the principal sum of ZMW 31, 021.89 as at 6th June, 2017. The Judgment debt shall attract contractual interest up until the date of Judgment. Thereafter interest shall accrue at the Bank of Zambia Short term lending rate until date of full and final settlement

I now move to consider the cumulative claims for foreclosure, possession and sale.

With respect to the claim for an order of vacant possession, I note that the Mortgage Deed does not explicitly give the Applicant the

right to re-enter and take possession of the mortgaged property. However, it is trite law that a legal mortgage gives the mortgagee a legal estate in possession subject to any agreement or court order to the contrary. In essence, in the absence of agreement or the interference of the court, a mortgagee is entitled to take possession of the mortgaged property as soon as the mortgage is made, even if a mortgagor is guilty of no default.

With respect to foreclosure, I draw attention to the case of **Reeves Malambo v. Patco Agro Industries Limited, S.C.Z Judgment No. 20 of 2007, ZLR (2007)⁴**, where the Supreme Court held that "**A mortgagee is at liberty to exercise his right to foreclosure and sell the property in the event of default and failure by the mortgagor to redeem the mortgaged property...**"

This brings me to consideration of the mortgagor's right to redeem which is founded in the law of equity. There exists a plethora of legal authorities that recognise that a mortgagor has a right, in equity, to redeem even after the date fixed by the mortgage agreement for repayment has passed.

The mortgagor's right to redeem is articulated in case law and literary works, including **David J. Hayton, Megarry's Manual of the Law of Real Property, 6th Edition** as considered with the cases of **Salt v.**

Marquis of Northampton (1892) A.C. 1.⁵, Match Corporation Limited and Development Bank of Zambia and the Attorney General, S.C.Z. Judgment No. 3 OF 1999⁶ and S. Brian Musonda (Receiver Of First Merchant Bank Zambia Limited) V Hyper Foods Products Limited And Creation One Trading (Z) Limited, (1999) ZR 124.

These authorities reveal that the Court has the power to interfere with the contractual rights of a mortgagee by extending the time in which the mortgagor can settle its outstanding indebtedness before foreclosure is rendered absolute. The interference is preceded by there being reasonable prospects that the monies due can be paid within a reasonable time.

In considering equity, I am alive to the caution that was expressed by the Supreme Court in the *Match Corporation v DBZ* case where it was stated that "*The relief which equity affords requires that a reasonable balance be struck between the right to redeem within any extended period beyond that stipulated in the contract and the right of the other party to the benefit of the security in case of inexcusable default or in a hopeless case where for instance there is in fact no reasonable prospect of the borrower ever being able to pay.*"

I also recognize that *Section 14 of the Housing (Statutory and Improvement Areas) Regulations, Housing (Statutory and Improvement Areas) Act, Cap 194 of the Laws of Zambia* prescribes that the

mortgagee's right to sale can be exercised where the mortgage is not redeemed before sale. In my mind, this means that the converse is also true. That is, that mortgage can be redeemed at time before sale.

Bearing in mind the foregoing, I am not persuaded that the Respondent's plea to be given one month to settle her indebtedness would occasion an inordinate deprivation of the benefit, to the Applicant, of its security. Therefore, I take the view that this is an appropriate case to afford the Respondent a right, in equity, to redeem the mortgage. Consequently, it is adjudged as follows:

1. **Foreclosure nisi:** The Respondent shall, within 90 days of the date of this Judgment, pay the Applicant the Judgment Debt of ZMW 31,021.89 together with the adjudged interest.
2. **Foreclosure absolute:** In the event that the Respondent fails to liquidate the Judgment Debt and interest within 90 days from the date of Judgment, foreclosure relating to Stand No. 5074/68, Chingola shall immediately upon the expiry of the 90 days be rendered absolute.
3. **Possession and sale:** The Applicant's right to take possession of the mortgaged property is suspended until foreclosure is

rendered absolute. Consequently, the Applicant shall be entitled totake possession and exercise its right of sale effective the day following the expiry of 90 days from the date of this Judgment should the Judgment Debt not be settled in full by that date.

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

This 16th Day of August 2017



.....
Lady Justice B.G.Lungu
HIGH COURT