

IN THE HIGH COURT FOR ZAMBIA

2017/HP/2057

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

IN THE MATTER OF: ORDER XXX RULE 14 OF THE HIGH COURT RULES
CHAPTER 27 OF THE LAWS OF ZAMBIA

IN THE MATTER OF: THE SUPPLEMENTARY AGREEMENT DATED 27TH
JUNE, 2016

IN THE MATTER: THE PAYMENT AGREEMENT DATED 26TH MARCH,
2017

BETWEEN:

DONG FENG LOGISTICS LIMITED

APPLICANT

AND

AVOCADO MINING LIMITED

1ST RESPONDENT

MARKOV INVESTMENTS LIMITED

2ND RESPONDENT

MA CHUHUA

3RD RESPONDENT

**BEFORE HONOURABLE MADAM JUSTICE P. K. YANGAILO ON
THE 4TH DAY OF APRIL, 2017.**

For the Applicant: Ms. M. Mukuka – Messrs. Ellis & Co.

For the 1st Respondent: N/A

For the 2nd Respondent: N/A

For the 3rd Respondent: N/A

JUDGMENT

LEGISLATION AND OTHER WORKS:

1. *The High Court Act, Chapter 27 of the Laws of Zambia;*
2. *The Supreme Court Practice, 1999 Edition, Volume 1, London, Sweet & Maxwell;*
3. *Bryan A. Garner, Black's Law Dictionary, 10th Edition, Thomson Reuters;*
4. *Charles Harpum, Megarry and Wade: The Law of Real Property 7th Edition, London, Sweet and Maxwell, 2008; and*
5. *John Mc Ghee, Snell's Equity, 31st Edition, Thomson Reuters (Legal) Limited 2005.*

The Applicant Dong Feng Logistics Limited has applied by way of Originating Summons for foreclosure, possession and sale of Stand No. 4141, Kitwe pursuant to **Order XXX Rule 14 of The High Court Act**¹. The reliefs sought are as follows: -

1. *A declaration that under and by virtue of the aforementioned Payment Agreement and Supplementary Agreement, the Applicant is entitled to be considered as being legal mortgagee of the lands comprised in the agreements;*
2. *Payment of the sum of US\$1,079,400.00 being the sum payable by the 1st and 2nd Respondents, and in default thereof, by the 3rd Respondent under the aforementioned agreements, with interest, and such costs as would be payable if this claim were the only relief granted;*
3. *An order for foreclosure or sale of Stand No. 4141, Kitwe together with all assets on the said land being the security for the performance of the aforementioned Payment Agreement;*
4. *That the 2nd and 3rd Respondents do execute a proper conveyance of the said mortgaged properties to the Applicant;*
5. *Delivery by the Respondents to the Applicant of possession of the said mortgaged property;*
6. *Further or other relief; and*
7. *Costs.*

The application is supported by an Affidavit deposed to by Wei Huang, the General Manager of the Applicant company. The facts as deposed are that pursuant to a written agreement between the Applicant, 1st Respondent and Lunga Resources Limited, for the supply and transportation of 400,000 tons of copper slug, the Applicant agreed to provide transport to ferry the materials provided by Lunga Resources Limited to various destinations. That as at 26th March 2017, monies owing by the 1st and 2nd Respondent to the Applicant amounted to US\$1,079,400.00 as shown in the Payment Agreement entered into by the 1st and 2nd Respondent of the one part and the Applicant of the other part, exhibited herein as "WH2". It was also deposed that a Supplementary Agreement exhibited herein as "WH3" for payment obligations of the 2nd Respondent was further entered into where it was agreed that the Payment Agreement would be performed by the two shareholders of the 2nd Respondent, namely the 3rd Respondent and Song Guolin. That by the said Supplementary Agreement, Stand No. 4141 Kitwe, whereof the 3rd Respondent is the registered proprietor and all assets thereon, was pledged as security for payment of the aforementioned sum of US\$1,079,400.00. The terms of payment were agreed as follows: -

- 1. Before end of April, 2017 the 1st and 2nd Respondent shall pay to the Applicant US\$300,000.00;*
- 2. Before end of June, 2017 the 1st and 2nd Respondent shall pay to the Applicant US\$300,000.00;*
- 3. Before end of October, 2017 the 1st and 2nd Respondent shall pay to the Applicant US\$279,400.00.*

The Respondents, it is deposed, failed or neglected to pay the sum of US\$1,079,400.00 or any part thereof.

The Respondents did not enter appearance nor oppose the application.

At the scheduled hearing of this matter on 3rd April 2017, the Respondents were not in attendance and no reason was advanced to justify their non-appearance. The record showed that the Respondents had been served with the originating process and proof of such service was filed herein by the Applicant. I proceeded to hear the matter in accordance with **Order XXXV Rule 3** of **The High Court Act**¹ which states as follows:-

“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 appointment to be given to the defendant.”

Learned Counsel for the Applicant, Ms. Mukuka, in her *viva voce* submissions referred to **Order XXX Rule 14** of **The High Court Act**¹ and reiterated the contents of the Affidavit in Support of the application. She prayed that the Applicant be granted the reliefs sought and interest on the sum of US\$1,079,400.00 from the date of commencement of action until full payment.

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

I have considered the suit together with the Affidavit on record and submissions by Counsel. According to the Affidavit evidence on record, on 27th June 2016, Lunga Resources Limited (contractor) of Kitwe, Markov Investments Limited (2nd Respondent) of Kitwe and Dong Feng Logistics Limited (Applicant) entered into an agreement in which the Applicant was to provide transport to ferry material being provided by the contractor to various destinations and the 2nd Respondent was responsible for all payments relating to this agreement. In the said agreement, the Applicant was represented by Ms. Cheng Tenghuai, while the 2nd Respondent was represented by Mr. Ma Chuhua, who is the 3rd Respondent herein.

Subsequent to this agreement, a Payment Agreement effective from 26th March, 2017 was entered into by Avocado Mining Limited (1st Respondent) and the 2nd Respondent of the one part and the Applicant of the other part, whose terms have been translated and reproduced *verbatim* as follows: -

PAYMENT AGREEMENT

Party A: AVOCADO MINING LIMITED & MARKOV INVESTMENTS LIMITED

Party B: DONG FENG LOGISTICS LIMITED

Since end of June 2016, Party B has provided transportation for material from Black Mountain in Kitwe to Party A. Through confirmation between two parties, up to 26th March 2017, Party A still owed Party B the amount

of transportation fee in total US\$1,079,400. Two parties now agreed to the payment terms as follows: -

1. Before end of April 2017, Party A shall pay to Party B US\$300,000;
2. Before end of June 2017, Party A shall pay to Party B US\$300,00;
3. Before end of August 2017; Party A shall pay to Party B US\$200,000;
4. Before end of October 2017, Party A shall pay to Party B US\$279,400.

Meanwhile, both parties agreed that:

- A. If Party A failed to pay to Party B as the terms above, Party B has the right to prosecute Party A in Court and pursue all the loss.
- B. Before paying all the residual balance US\$1,079,400 without authorisation from Party B, Party A is not allowed to sell the material (which Party B had transported from Black Mountain to Party A) to the third party; if such situation has been found by Party B, Party B has the right to prosecute Party A in Court and pursue all the loss.

This Payment Agreement shall be effective from 26th March 2017.

Upon the two parties agreed and signed.

Signed on behalf of Party A:

Signed on behalf of Party B:

The Applicant's Affidavit evidence further shows that a Supplementary Agreement was entered into on 27th June 2016, between Markov Investments Limited (2nd Respondent) represented by Ma Chuhua (3rd Respondent) and Song Guolin of the one part and Dong Feng Logistics Limited (Applicant) of the other part, in

which the 2nd Respondent agreed that Certificate of Title No. 1001625 for Stand No. 4141, Kitwe, including all buildings and assets on this land be pledged as guarantee for the outstanding payment. A document, being a print out of the Lands Register, was exhibited in the said Affidavit as "WH4", which shows that Certificate of Title No. 1001625 for Stand No, KIT/4141 is held by Ma Chuhua, the 3rd Respondent herein. Other than this print out, the actual Certificate of Title in respect of the said property was not placed before this Court and no other documentation to show the endorsement of legal interest in the estate was placed before Court.

The Applicant herein seeks a declaration that under and by virtue of the aforementioned Payment Agreement and Supplementary Agreement, the Applicant is entitled to be considered as being legal mortgagee of the lands comprised in the said agreements. This relief is predicated on **Order XXX Rule 14** of **The High Court Act**¹ which makes provision for the recovery of moneys secured by a mortgage or foreclosure and sell of such secured property. The Order states as follows: -

“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; that is to say -

Payment of moneys secured by the mortgagor 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;

Redemption;

Re-conveyance;

Delivery of possession by the mortgagee.”

I refer to **Order 88 Rule 1** of **The Rules of the Supreme Court²**, which states as follows: -

- "(1) This Order applies to any action (whether begun by writ or originating summons) by a mortgagee or mortgagor or by any person having the right to foreclose or redeem any mortgage, being an action in which there is a claim for any of the following reliefs, namely -**
- (a) payment of moneys secured by the mortgage,**
 - (b) sale of the mortgaged property,**
 - (c) foreclosure,**
 - (d) delivery of possession (whether before or after foreclosure or without foreclosure) to the mortgagee by the mortgagor or by any other person who is or is alleged to be in possession of the property,**
 - (e) redemption,**
 - (f) reconveyance of the property or its release from the security,**
 - (g) delivery of possession by the mortgagee.**
- (2) In this Order "mortgage" includes a legal and an equitable mortgage and a legal and an equitable charge, and**

references to a mortgagor, a mortgagee and mortgaged property shall be construed accordingly.

(3) *An action to which this Order applies is referred to in this Order as a mortgage action."*

It is evident from the foregoing, that a mortgage action is an action where there is a claim for moneys secured by a property, which claim is normally accompanied by a claim for possession of the mortgaged property. The issue that arises, is whether the Supplementary Agreement herein can be termed a mortgage transaction warranting this action pursuant to **Order XXX Rule 14 of The High Court Act**¹.

I refer to **Bryan A. Garner** who defines a mortgage at page 1163 of **Blacks Law Dictionary**³ as follows: -

"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."

I further refer to the learned authors of **Megarry and Wade: The Law of Real Property**⁴ who at paragraph 24-001, page 1077, state as follows: -

"...If some security of adequate value is given for the loan, the Lender is protected even if borrower becomes insolvent because the lender has a claim to the security which takes precedence over other creditors. The most important kind of security for a debt is the mortgage. The essential nature of a mortgage in its traditional form is that it is a conveyance of a legal or equitable interest in property, with a provision for a redemption. i.e. that upon

payment of a loan or the performance of some other obligation stipulated in the mortgage, the conveyance shall become void or the interest shall be reconveyed."

From the foregoing, it is evident that for a mortgage to be created, there must be a deposition of property as security for payment, which conveyance of a legal or equitable interest in property is rendered void upon payment of the money.

The Applicant *in casu* has anchored its claim on exhibit "WH3", which is the Supplementary Agreement and has argued that it forms the basis of the legal mortgage. A perusal of the said exhibit under item 4 reveals that the 2nd Respondent agreed that the land comprised in Certificate of Title No. 1001625 relating to Stand No. 4141, Kitwe to be guarantee for payment. The agreement is silent on whether there was a conveyance of any legal interest in the estate or deposit of title deed and there is no evidence on record to suggest that there was a conveyance of a legal interest in the estate or that the title deed was deposited with the Applicant. The said agreement further declares that in the event of default, the Applicant has the right to deal with the payment guarantee provided by the 2nd Respondent and put forward corresponding legal action.

John McGhee in ***Snell's Equity***⁵ at page 778 describes a mortgage in the following terms: -

"A mortgage is a conveyance of some interest in land or other property as a security for the payment of a debt or discharge of some other obligation for which it is given. Where a legal estate is

transferred, the mortgage is a legal mortgage. Where only an equitable interest is transferred, whether because the mortgagor has merely an equitable interest or because he uses a form insufficient for the transfer of a legal interest, the mortgage is called an equitable mortgage. On satisfying the obligation in respect of which the mortgage was given, the mortgagor has a right to redeem, that is to recover full ownership in the property..."

Given the foregoing facts and in view of the authorities cited, I find that the Supplementary Agreement from which this action arises did not create a legal mortgage as the formalities necessary for the creation of a legal mortgage were not fulfilled. Neither can the said agreement be construed to have created an equitable mortgage. I say so because there was no conveyance of a legal interest in the estate and there was no deposit of title deeds with the Applicant. For a mortgage to exist, there must be a conveyance of a legal interest in the estate or a memorandum of deposit of title deeds to secure the debt with the mortgagee. A mere mention of the property in the Supplementary Agreement that it should be payment guarantee does not automatically turn it into a mortgage. The legal interest in the estate should have been conveyed or the certificate of title should have been surrendered to the Applicant. This would have created a mortgage.

From the facts of this matter, it is evidently clear that no mortgage was created. In the circumstances, I therefore find that the Applicant cannot enforce its rights by way of a mortgage action. Having found that there was no mortgage created, there is therefore no need for a foreclosure order to be given by the Court nor an

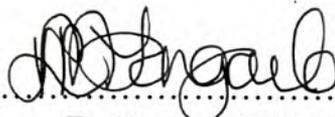
order for delivery by the Respondents to the Applicant of possession of Stand No. 4141 Kitwe. Further, the relief sought for 2nd and 3rd Respondents to execute a proper conveyance of the said property fails and is dismissed.

I now turn to the relief sought for payment of US\$1,079,400.00. Having found that the Applicant cannot enforce its rights by way of a mortgage action, the recovery of the said sum cannot be enforced in the manner that it has been brought. The recovery of this sum should be enforced by way of an ordinary debt recovery action. While it may be argued that the Court may treat this claim as having been sought in an action commenced by Writ of Summons, this can only be done prior to Judgment stage. *In casu*, the Applicant did not request for this at the time of presenting its evidence to the Court. For the foregoing reasons, the relief sought is untenable and accordingly dismissed.

By way of conclusion, I find that the Applicant's claim is misconceived and is accordingly dismissed. My findings, however, do not deprive the Applicant, from taking the necessary action to recover its money.

I make no order as to costs.

Delivered at Lusaka this 4th day of April, 2018.



.....
P. K. YANGAILO
HIGH COURT JUDGE