

**IN THE COURT OF APPEAL OF ZAMBIA**  
**HOLDEN AT LUSAKA**  
(Civil Jurisdiction)

**APPEAL NO. 219/2020**

BETWEEN:

**GREAT LENDERS SERVICES LIMITED**

**1<sup>ST</sup> APPELLANT**

**VOMECK ENTERPRISES LIMITED**

**2<sup>ND</sup> APPELLANT**

**MEDIUM CAPITAL LIMITED**

**3<sup>RD</sup> APPELLANT**

**MARTIN KABUNGO**

**4<sup>TH</sup> APPELLANT**

**JOSEPHINE MUTANGA**

**5<sup>TH</sup> APPELLANT**

AND

**INDO ZAMBIA BANK**

**RESPONDENT**



**CORAM: KONDOLO SC, MAKUNGU AND MAJULA JJA**

**On 26<sup>th</sup> March, 2021 and on 27<sup>th</sup> September, 2022**

*For the Appellants*

*: Mr. A. Mulenga and Mr. L. Mtonga of  
Philsong & Partners.*

*For the Respondent*

*: Mr. G. Pindani of Messrs Chonta, Musaila &  
Pindani Advocates*

---

## **J U D G M E N T**

---

**KONDOLO SC JA** delivered the Judgment of the Court.

CASES REFERRED TO:

- 1. African Banking Corporation v Plinth Technical Works and  
5 others Selected Judgment No. 28 of 2015**

2. **Felix Chipota Mutati and 3 others v Winnie Zaloumis  
Selected Judgment No. 31 of 2018**
3. **Photo Bank Zambia Ltd. V Shengo Holding Ltd. SCZ Appeal  
No. 26 of 2006**

LEGISLATION REFERRED TO:

1. **The Lands and Deeds Registry Act, Chapter 185, Laws of  
Zambia**
2. **The Rules of the Supreme Court 1965, 1999 Edition (White  
Book)**
3. **The High Court Rules, Chapter 27, Laws of Zambia**

OTHER TEXT REFERRED TO:

1. **Charles Harpum et al. Megarry and Wade: The Law of Real  
Property, 7<sup>th</sup> edition. Sweet and Maxwell: London (2008)**
2. **Halsbury's Laws of England (4<sup>th</sup> Edition). Volume 32,  
paragraph 405**

## **1. INTRODUCTION**

- 1.1. This is an appeal against an *ex-tempore* Ruling delivered by  
Musona J, on 20<sup>th</sup> June, 2020 in which he ordered that the  
prosecution of the main action and the counter-claim will  
be done using two different modes of commencement.

## **2. BACKGROUND**

- 2.1. By Originating Summons, the Respondent moved the Court  
to order the Appellants to pay the sums of K1,899,228.43

and K769,308.79 owed under loan facilities availed on 20<sup>th</sup> September, 2017 and 28<sup>th</sup> March, 2018 respectively. The said loan facilities were secured by legal mortgage deeds over stand No. 1172 and Stand No. 1173 Livingstone, both owned by the 1<sup>st</sup> Appellant.

- 2.2. *Inter alia*, were claims for foreclosure, possession and sale of the mortgaged properties as well as execution of personal guarantees of the 2<sup>nd</sup> to 5<sup>th</sup> Appellants.
- 2.3. The Appellants opposed the Summons with an Affidavit sworn by the 5<sup>th</sup> Appellant, attesting that the subject properties were advertised by the Respondent as mortgagee in possession and the advertisement negligently misrepresented the two properties as a single property.
- 2.4. The Appellants made further allegations against the Respondent regarding the sale and disbursement of the funds under the loan facilities. For reasons that will become apparent, we shall not recapitulate the contents of the affidavit save to state that it contained a counter-claim with particulars of fraudulent and negligent misrepresentation as well as particulars of fraud.



2.5. The Appellants later applied to the lower Court to determine, *inter alia*, whether the Respondent's legal mortgages registered out of time without leave of Court were null and void and as such could not be legally enforceable.

### **3. DECISION OF THE HIGH COURT**

3.1. The lower Court made an *ex-tempore* Ruling reproaching the Appellants for trying to escape their obligation under the loan facilities by trying to hide behind an assertion that the Respondent filed the legal mortgages out of time without leave of Court.

3.2. The learned Judge held that the responsibility for failing to register in time should be borne by both parties because they used the same lawyers. Therefore, allowing the Appellants' application would not serve the best interest of justice. Consequently, he dismissed the application.

3.3. Further, the trial Judge ordered that the counter-claim shall be heard as though it was commenced by writ of summons and that the main action shall be determined by affidavit evidence. The trial Judge made no order as to costs and granted leave to appeal.

#### **4. APPEAL**

4.1. Dissatisfied with the Ruling of the lower Court, the Appellants launched their appeal on two grounds as follows:

- 1. The Honourable Court below erred in law and fact when it held that the main matter could proceed as a legal mortgage action and be decided on affidavit evidence when in fact there are no legal Mortgages at law on record same being null and void for want of registration regardless of whose fault it was for non-registration.**
- 2. The Honourable Court below erred in law and fact when it held that the main matter could proceed as a legal mortgage action and be decided on affidavit evidence when there are contentious issues including conditions precedent before disbursing the funds that the Bank did not comply with before attempting to enforce the purported mortgages and particularly in the face of a counter claim.**

## 5. APPELLANTS ARGUMENTS

- 5.1. The main argument in ground one is that the legal mortgages were invalid for want of registration as required by **section 4 of the Lands and Deeds Registry Act**. Therefore, the Court's finding that the main matter could proceed as a legal mortgage and be decided on affidavit evidence was a misdirection. Registration, in the Appellants' view, was a condition precedent in the facility agreement which the Respondent breached.
- 5.2. In ground two it was contended that the lower Court did not apply its attention to the injustice which the Appellants are likely to face once the main action proceeds separate from the counter claim. In as much as **Order 27/7/3 [sic] of the Rules of the Supreme Court 1965 (White Book) 1999 Edition** empowers the Court to order that a counter-claim can be heard separately, if this happened *in casu*, the Appellants would be prejudiced because there would be no opportunity to cross-examine the Respondent's witnesses. We were implored to allow the appeal with costs to the Appellants.



## 6. RESPONDENT'S ARGUMENTS

- 6.1. The Respondent began by attacking the phrase "legal mortgage" as referred to by the Appellant in the first ground of appeal. It was submitted that the trial Judge did not order that the main matter could proceed as a "legal mortgage". We were directed to pages 10 and 11 of the Record of Appeal in this regard.
- 6.2. It was further contended that the Appellants' did not at any point, in the lower Court, raise the issue of contentious issues including conditions precedent as indicated in ground 2.
- 6.3. The Respondent argued that **Order 30 rule 14 of the High Court Rules**, allows the enforcement of mortgages whether legal or equitable in nature. It was therefore contended that an equitable mortgage was created by the surrendering of the certificates of title as security for the two loans to the Respondent, and as such, a mortgage action was rightly brought against the Appellants by the Respondent.
- 6.4. We were referred to **Order 28/7(1) and (2) RSC** which provides that, instead of bringing a separate action, a Respondent to a matter commenced by originating

summons may make a counterclaim and the Court can direct how the counterclaim will be disposed of or dealt with.

6.5. Additionally, to this order, the Respondent cited **Order 15/2/ (1) (2) (3) RSC** which provides that a counterclaim is a separate action and the Court can issue orders for directions as regards the counterclaim. Therefore, it was submitted, that the lower Court was on firm ground and issued orders for directions some of which have been complied with.

6.6. We were reminded that the matter is yet to be heard and the Appellants, who filed a detailed affidavit in opposition and a counter-claim, can thus not be said to be prejudiced at all. We were entreated to allow the lower Court to hear the matter and urged to dismiss the appeal for lack of merit with costs to the Respondent.

## **7. THE HEARING**

7.1. At the hearing, Mr. Mtonga, Counsel for the Appellants, emphasized that the legal arguments which were advanced to justify the enforcement of legal mortgages which were registered out of time without leave of court, were null and void.



That it was folly to argue that the failure resulted in the creation of an equitable mortgage, when the same has not been pleaded in the originating summons. The Appellants disputed ever depositing certificates of title with the bank because the same were always in the possession of the bank. Our attention was drawn to pages 313 - 325 of the Record of Appeal.

- 7.2. In bolstering ground two, Counsel cited **Order 33 Rule 49(12) RSC** which he stated was instructive that matters that interact should be heard as one and he sought comfort in the spirit of **Order 4 Rule 9 RSC** on the concept of consolidation of matters which arise from a similar transaction.
- 7.3. In rejoinder, Mr. Pindani invited us to take note of clause 5 of the loan facility of K600,000, which shows that the primary security was a mortgage over plot 1173 and that a contract of sale was signed by the Respondent and the 1<sup>st</sup> Appellant, and change of ownership was effected. He further indicated that the legal mortgage deeds were also signed by the 1<sup>st</sup> Appellant. However, the matter has not been heard

in the lower Court on the recovery of the loan and enforcement of the security.

- 7.4. He argued that **Order 30 rule 14 HCR** allowed the Respondent to enforce a legal mortgage or an equitable mortgage by filing an Originating Summons. The Originating Summons at relief No. 5 is for any further or other relief which the Court may deem fit and this is done upon evaluation of the evidence. Therefore, he submitted that whether the legal mortgages are imperfect or not, the matter still falls to be dealt with as an equitable mortgage.
- 7.5. We were referred to **Order 28 rule 1 RSC** which provides that mortgage actions can be disposed of by affidavit evidence, as well as **Order 38 (2) (3) RSC** which provides that parties wishing to cross examine a deponent can make an application to the court. The case of **African Banking Corporation v Plinth Technical Works** <sup>(1)</sup> was cited in aid.
- 7.6. On ground two, Mr. Pindani maintained that a counter-claim is a separate action and in a matter commenced by originating summons, where there is a counter-claim, the court has the discretion to order how the counter-claim will be determined as per **Order 15 Rule 2 RSC**. The cases of

**Felix Chipota Mutati and 3 others v Winnie Zaloumis** <sup>(2)</sup>

**Photo Bank Zambia Ltd. V Shengo Holding Ltd** <sup>(3)</sup> were cited to show that a counter-claim is a claim in its own right.

7.7. That the arguments by the Appellants that the matters are intertwined is not the correct position of the law and the aspect of consolidation of actions does not arise in this matter. There is only one cause number, hence there is nothing to add to this cause.

7.8. He submitted that the lower Court properly addressed the matter presented before it and ordered that the counter-claim should stand as a separate action and issued orders for directions which is in line with the law. He insisted that the Appellants will have a chance to present their case as the matter has not been heard yet and that any fears of prejudice are unfounded. Counsel ended by stating that this is a matter of a debt which the Appellants are trying to run away from.



## 8. OUR DECISION

- 8.1. We have examined the record together with the arguments advanced by the parties.
- 8.2. In ground one, the Appellant took issue with the decision of the lower Court to proceed with the main matter as a mortgage action under **Order 30 rule 14 HCR**. We note that the arguments against this ground centred on the finding that the legal mortgages, despite having been filed out of time, were valid on the basis that Advocates entrusted to handle the filing were representing both parties and as such, the parties should share the liability arising from the failure to register the legal mortgages on time. The trial Judge then ordered that the main matter should proceed on affidavit evidence.
- 8.3. However, as correctly pointed out by the Respondent, the trial Judge did not rule that the matter would proceed as a 'legal mortgage' and for that reason, he cannot be said to have misdirected himself.
- 8.4. The trial Judge's finding that there was nothing wrong with proceeding on the basis of the mortgage deeds which did not comply with **sections 4, 5 and 6 of the Lands and**

**Deeds Registry Act**, cannot go without comment. It was pointed out that the legal mortgages were signed sometime in 2017 and 2018 but were only registered in 2020, in breach of the statutory provisions, as it was done well outside the prescribed thirty (30) days within which they should have been filed.

8.5. The Appellant observed that the Respondent relied on the legal mortgages as did the Judge and it was further put forward that the title deeds were never deposited because they were always in the possession of the Respondent Bank as mortgagee in possession.

8.6. In response, the Respondent argued that a mortgage action based on an equitable or legal mortgage could be commenced under **Section 30 rule 14 HCR**. Counsel cited **Megarry & Wade: The Law of Real Property** in which the authors state that an imperfect legal mortgage is treated as an agreement for a mortgage and is thus an equitable mortgage. Therefore, under the circumstances, since title deeds were deposited with the Respondent, the mortgages in question could be treated as equitable mortgages.

8.7 The learned authors of **Halsbury's Laws of England (4<sup>th</sup> Edition) Volume 32, paragraph 405** describe ways in which an equitable mortgage can be created. In the circumstances, it can either be by depositing title deeds or by an agreement to create a mortgage. *In casu* the legal mortgages were clearly null and void for want of registration and the only way for the said deeds to be given efficacy was for the applicant to obtain leave of the court to file them out of time. This was not done.

8.8. However, even though the legal mortgage deeds were void for non-registration, the facts reveal that the title deeds securing the loan facilities are in the possession of the Respondent Bank. It goes without saying that the manner in which the bank came into possession of the title deeds was for purposes of creating a mortgage. In this regard, we are inclined to agree with the Respondent's submission that there are still equitable mortgages on the two pieces of land.

8.9. The lower Court was therefore entitled to proceed to hear the matter under **Order 30 Rule 14 HCR** which provides



for both legal and equitable mortgages. Ground 1 thus fails.

8.10. Moving to ground 2, the 1<sup>st</sup> Appellant, in its affidavit in opposition to the originating summons, raised a number of issues and allegations, including allegations of fraud and breaches of statutory duties. This, coupled with the failure by the Respondent to properly register the mortgages, caused the Appellants to request that the matter proceed as though commenced by writ of summons.

8.11. The lower Court reacted by severing the counter-claim from the main action, stating that only the counter claim would proceed as though commenced by writ. However, gleaning from the record, the trial Judge did not give any reasons as to why he arrived at the decision to sever the counter-claim from the main action.


8.12. Further, the lower Court did not state its position on the fears raised by the 1<sup>st</sup> Appellant on the prejudice it would suffer if the counter-claim was severed. We are cognizant of the law that the Court can decide how to hear and determine a counter-claim.

- 8.13. **Order 28/7 RSC** provides for counter-claims in actions begun by originating summons.
- 8.14. **Order 28/8 RSC** provides for directions of the court under which the Court has the power to order that the matter continues as if it was begun by writ.
- 8.15. The subject matter of the main matter and the counter-claim is the same and we see no reason why the counter-claim should be severed from the main action. We are of the view that the matter should proceed either by way of originating summons or as if begun by writ. We therefore find merit in this ground.

## **9. CONCLUSION**

- 9.8. We order that the main matter and the counter-claim be determined together under the same mode of commencement.
- 9.9. We are cognizant of the High Court's discretion, in matters such as this, to proceed either by originating summons or writ of summons. We therefore do not wish to direct the High Court on which mode of commencement to employ.
- 9.10. We remit the matter back to the High Court for hearing before a different Judge.

9.11. The costs of this appeal shall abide the outcome of the matter in the High Court.

  
.....  
**M.M. KONDOLO SC**  
**COURT OF APPEAL JUDGE**

  
.....  
**C.K. MAKUNGU**  
**COURT OF APPEAL JUDGE**

  
.....  
**B.M. MAJULĀ**  
**COURT OF APPEAL JUDGE**