

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

2016/HP/2317

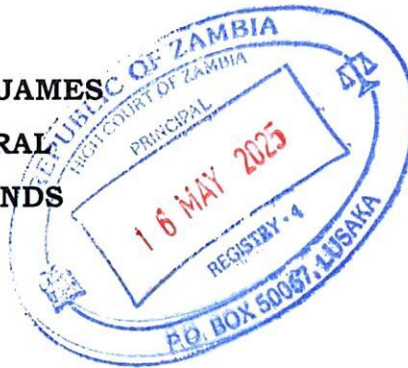
BETWEEN:

TERRY BANDA

APPLICANT

AND

NYIRENDA LAZAROUS JAMES
THE ATTORNEY GENERAL
COMMISSIONER OF LANDS



JAMES NYIRENDA

1ST RESPONDENT

MARY NYIRENDA

2ND RESPONDENT

RUTH NYIRENDA

3RD RESPONDENT

ELINA NYIRENDA

4TH RESPONDENT

BETTY NYIRENDA

5TH RESPONDENT

ALICE NYIRENDA

6TH RESPONDENT

PHILIP NYIRENDA

7TH RESPONDENT

WILSON NYIRENDA

8TH RESPONDENT

MAINASE NYIRENDA

9TH RESPONDENT

10TH RESPONDENT

11TH RESPONDENT

12TH RESPONDENT

Before the Hon. Mr. Justice M.D. Bowa on 16th of May 2025

For the Applicant: Mr. MC Hamachila of MC Hamachila Legal Practitioners

For the Respondents: Mr. D Banda of JMP Associates

RULING

Cases referred:

- 1. Intelligent Mobility Solutions Ltd vs. Lamise Trading Limited CA Judgment Appeal 2014 of 2022*
- 2. Lyson Brooke Band Zambia Limited vs. Zambia Tanzania Road Services (1977)ZR 317 H.C*
- 3. Hakainde Hichilema and Five Others vs. Attorney General SCZ Appeal No. 28 of 2017*
- 4. FMC Finance Limited vs BAPO Bakery and Others (2017) ZMHC*

5. *S. Brian Musonda (Receiver of the First Merchant Bank Zambia Limited) vs Hyper Foods Products Limited (1999) ZR 124.*
6. *Pemba Lapidaries and Another vs Industrial Credit Company Limited (2011)ZMHC*
7. *Shilling Bob Zinka Vs Attorney General (1991) 53 (SC)*
8. *Hangling Xing Building Company Limited Vs Zam Capital Enterprises Limited (2011) ZMHC 69*
9. *Isaacs Vs Robertson (1984) 3 ALL ER 1169*
10. *Amos John Mulemena Vs NIEC Agencies Limited and Another (2013) ZMS C40*
11. *Kasaba Industrials Vs Intermarket Banking Corporation SCZ Appeal No. 168 of 2009*
12. *Mwanza Vs Simpasa and Another HP 500 of 2005(unreported)*

Other materials referred to:

1. *Harpum C et all, Megarry & Wade The Law of Real Property Seventh edition (.London Sweet and Maxwell , 2008*
2. *Blacks Law Legal Dictionary 9th edition*

1. Background

- 1.1 The 7th Respondent moved the Court by Summons dated 24th May 2024 seeking an Order to set aside or in the alternative suspend possession Order granted to the Applicant in this action. The application was brought pursuant to Order 3 rule 2 (1) of the High Court rules Chap 27 of the Laws of Zambia and Order 88 rule 5 (13) of the RSC 1999 edition.
- 1.2 The application was supported by an affidavit in support dated 24th May 2024 and skeleton arguments of even date. The Applicant later on 12th June 2024 filed into Court an

amended affidavit in support of the application. The 7th Respondent on the 21st June 2024, filed a notice to raise preliminary issue pursuant to Order 3 rule 2 as read with Order 5 rule 13 and Order 16 rule 1 of the High Court Rules Cap 87 of the Laws of Zambia.

1.3 In the preliminary application, the Applicant contends that the amended affidavit dated 12th June 2024 filed by the 7th Respondent is irregular as it was filed without the leave of Court. Also filed into Court was an affidavit in opposition to affidavit in support of summons for an Order to set aside or in the alternative suspend possession order granted to the Applicant as Mortgagee and list of authorities and skeleton arguments in support of the notice to raise preliminary issue. The Applicant further filed skeleton arguments and list of authorities in opposition to the Respondent's summons to set aside and or suspend the possession Order granted to the mortgagee, all dated 21st June 2024.

1.4 This ruling considers the preliminary issue raised and the substantive application in that order.

2. Preliminary application

2.1 There were no affidavits filed in support of or in opposition to the application. At the hearing which I entertained whilst

sitting at Chipata on the 17th of July 2024, Counsel for the Applicant submitted that the application was brought pursuant to Order 3 rule 2 of the High Court Rules and Order 14 of the RSC of England 1999 edition. He submitted that the application questions whether the amended affidavit is properly before the Court. He argued that it was not competently before the Court as no leave of court was obtained before the filing.

2.2 The second issue he raised though not included in the notice filed, was whether the substantive application itself was properly before the Court as the 7th Respondent has disclosed that the mortgagor appearing in this action as the 1st Respondent has since died. That the 7th Respondent is not the mortgagor. Therefore, that she is not the competent person to bring an action for redemption as the proper person should be the personal representative on behalf of the deceased's estate. That it is only a mortgagor or personal representative that can assume the rights of the mortgagor.

2.3 Order 16 rule 1 of the High Court Rules was cited in the skeleton arguments which provides that:

“where after the institution of a suit, any change of transmission of interest or liability occurs in relation to any party to the suit

or any party to the said suit dies or becomes incapable of carrying on the suit, or the suit in any other way becomes defective or incapable of being carried , any person interested may obtain from a Judge an Order requisite for curing the defect or enabling or compelling proper parties to carry on the proceedings”.

- 2.4 It was argued based on the above, that prior to the Respondent filing the application for redemption, an application should have been made to replace the 1st Respondent with an appropriate representative for purposes of proceeding with this matter.
- 2.5 That the record will show that no letters of administration have been obtained and presented before this Court and the 7th Respondent cannot as such be deemed to represent the deceased 1st Respondent.
- 2.6 It was argued further as regards the impugned affidavit that the leave of Court was required to amend. Order 5 rule 13 of the High Court Rules and Order 14 rule 7(1) of the RSC were cited in aid of this proposition. The Applicant prayed that the amended affidavit be struck off the record and that the substantive application be dismissed for irregularity for the above stated reasons.

2.7 Mr. Banda on behalf of the Respondent opposed the application by arguing that the Applicant's preliminary issue was itself irregular on 2 fronts. First that Order 30 Rule 1 of the High Court Rules dictates that all interlocutory applications should be by summons supported by an affidavit. He argued that the application in this issue was raised by notice and it was not accompanied by an affidavit. That the application can only be supported by facts presented in an affidavit.

2.8 **Intelligent Mobility Solutions Ltd vs. Lamise Trading Limited**¹ was cited in aid in which the Court of Appeal stressed that skeleton arguments are legal arguments which depend on facts properly set out in the affidavits. That the arguments in this case are not supported by such an affidavit.

2.9 It was argued further that Order 3 Rule 2 of the High Court Rules do not clothe this Court with Jurisdiction to grant the reliefs sought by the Applicant.

2.10 In response to the specific issues raised by the Applicant, the Respondent argued that the amendment of the affidavit without leave of Court was done on the understanding that there was not prejudice that was going to be suffered as the

amendment was on the caption of the affidavit and not the main body with the averments which remains the same. Secondly, that there was no opposition that had been offered against the first affidavit filed .

2.11 Further, that reliance on Order 14(7) (1) of the RSC is misconceived as the provision deals with alterations and not amendments to the body or jurat of an affidavit .That the affidavit was amended and duly sworn before a Commissioner for oaths. Further, that the amendment in the caption in this case does not make the affidavit defective as the change is merely in form.

2.12 It was further submitted that the application is properly before the Court as the 7th Respondent is the beneficial owner of the property in issue and therefore competent to challenge the possession that was effected. It was argued as the 7th Respondent position that a beneficial owner can claim redemption more so that the matter hinged on an equitable mortgage.

3. Court's consideration of the Preliminary inquiry

3.1 I have carefully considered the parties respective positions. The questions for consideration are 2 fold. Simply put, whether or not the affidavit in support of the substantive

application as amended is irregular on account of failure to obtain leave of court before proceeding to amend and file it; and secondly, whether or not the application is competently brought by the 7th Respondent.

3.2 On the first issue regarding the amended affidavit, I find that the Respondent raises an issue with the manner the preliminary issue is brought arguing that it should have been by summons supported by an affidavit. The notes of the RSC in Order 14A/2/7 giving an explanation on the mode of commencement state that:

“Great flexibility has been introduced as to the manner in which an application under r.1 may be made, namely, by summons or motion and notwithstanding O.33, r.1 , it may be made orally in the course of any interlocutory application to the court ...

3.3 Clearly no issue can be entertained on the issue of the mode of the application granted the Applicant moved the Court by notice which is permissible under the rules.

3.4 However, Counsel Banda also raises the important point about the need for the application to be supported by an affidavit and that there was no such affidavit in this case. This argument finds merit in the explanatory notes of order 14A/2/8 which reads in part that:

“The summons should be supported by affidavit evidence deposing to all the material facts relating to the questions of law or construction to be determined by the Court. For the purposes of O.41, r.5 (2) , proceedings under O.14A are not interlocutory proceedings, since by its nature, the application will decide the rights of the parties and will terminate the action or otherwise finally dispose of it...and therefore, the affidavits for use in proceedings under O.14A may depose only to such facts as the deponent is able of his own knowledge to prove...”

3.5 This makes clear that an application pursuant to order 14 A of the RSC should almost always be accompanied by an affidavit. However, I find no prejudice in the absence of such affidavit in this case as the facts are sufficiently presented in material that is already before the Court, which is in this case, the impugned affidavit in support of the Respondent’s application.

3.6 The rules make such consideration clearly permissible in the above cited order 14A/2/8 wherein the authors of the white book conclude that:

“In addition to the material facts proved by the evidence of the parties, the Court will take into account all those facts which have been duly admitted, whether by the pleadings or otherwise (see O.27, r.3)”

3.7 That said, I would still agree with the Respondent that the Orders cited by the Applicant typically refer to defective affidavits in form and order 14 rule 7(1) of the RSC specifically speaks to erasures or alterations in the body or jurat of the affidavit. What is presented before me, is an amended affidavit properly commissioned before a Commissioner for oaths with no notable defects. What the Applicant objects to in truth is the filing of the amended affidavit which he contends ought to have been with leave of Court.

3.8 I do not disagree with the Applicant's position. Leave of court would have been necessary, had the Applicant taken a step to oppose the initial affidavit. No such step was taken. The Respondent could in such circumstances proceed to amend once without leave of Court. No prejudice has been occasioned to the Applicant who has proceeded to file an Affidavit in opposition of the amended process. In any event no changes were made to the body and averments as it will be noted that it was merely the caption that was amended. I would dismiss this limb of the Preliminary objection for the stated reason.

3.9 Moving on to the second point, the record will show that the 3rd – 12th Respondents were joined to the proceedings by order of Court dated 9th of August 2018. The basis of that joinder was that the property in dispute had been gifted to them by their father the 1st Respondent and person whom the Applicant had advanced a loan. It is not disputed that the 1st Respondent has since passed on.

3.10 The 7th Respondent being mover of the application for the setting aside of the writ of possession deposes that she does so in her capacity as beneficial owner and exhibits a title deed in which she and her siblings are listed as joint tenants. The Learned authors of **Halsbury's Laws of England 4th Edition at paragraph 573 and 574** opine that the mortgagor and all persons having an interest in the property subject to the mortgage or liable to pay the mortgage debt can redeem the property.

3.11 I would have no hesitation in finding that the 3rd – 12th Respondents inclusive of the 7th as mover of the substantive application, do have an interest in this matter as beneficial owners and hence can move the Court to redeem the property. An application to set aside the writ of possession with a view to claiming such equitable right is in my

consideration, properly raised by the 7th Respondent in this case. I would dismiss the second limb of the preliminary application as well. In the result the whole preliminary issue fails and is dismissed.

4. The substantive application to set aside the writ of possession.

4.1 Affidavit in support

4.2 As stated earlier above, the Respondents filed an amended Affidavit in support of Summons for an Order to set aside or in the alternative suspend possession Order granted to the mortgagee dated 12th June 2024.

4.3 The Affidavit was deposed by the 7th Respondent. She averred that she is the biological daughter of the 1st Respondent who is now deceased. That before he died, her father informed her he had borrowed about K50,000.00 from one Terry Banda, the Applicant herein and was to refund K66,800.00 That he had pledged Stand Number 466 Chipata as security.

4.4 She stated that on the 1st of September 2017, a judgment in default was entered against Lazarous Nyirenda her father, for the sum of K66,800.00 as he had defaulted in settling the loan. The default judgment was exhibited “EN2”. The 7th Respondent believed that the said judgment did not grant the Applicant the right to take possession of the property.

- 4.5 She deposed that her father made an application before the Deputy Registrar to stay execution and possible sale of Stand 466 Chipata and to liquidate the judgment sum in installments.
- 4.6 That by Order dated 15th January 2018 the stay of execution and order to pay the judgment sum in installments was granted and is exhibited **“EN3”**. That the full judgment sum was liquidated through two installments paid into Court as per notices exhibited **“EN4”**.
- 4.7 It was her further evidence that her father informed her he had liquidated the loan and gifted her and her siblings the said Stand 466 Moth area in Chipata as per Certificate of title marked **“EN5”**. On the 15th of February 2018, the Applicant decided to Appeal against the Order to the Judge of the High Court in chambers. By Order dated 31st March 2021 exhibited **“EN6”**, the Judge overturned the Deputy Registrar’s decision.
- 4.8 It was her further evidence that following the transfer of title for the property to her and her siblings, Terry Banda the Applicant, made an application to join them to the action. The order by the Court joining them to the action is exhibited **“EN7”**.
- 4.9 After obtaining the order, the Applicant proceeded to obtain an order granting leave to issue a writ of possession exhibited

“EN8.” Following this development, the Respondents made an application to have the judgment reviewed by the Judge. However, the Court did not rule in favour of the Respondents as per ruling marked **“EN9”**. She averred that she had been reliably informed that the Applicant was in the process of selling the house and has been advertising it to a number of people for the proposed consideration of K1,000,000.00.

4.10 That however, the originating process filed by the Applicant in this matter did not contain reliefs of foreclosure and sale as confirmed in the Originating Summons marked **“EN10”**. She added that the Respondents were not aware of any Order of foreclosure by any Court ordering the sale of the house. Further, that the Mortgagor was not given the opportunity to redeem this property even after paying the full amount of the debt owed into Court.

4.11 That the total sum amounting to K66,800.00 which is due to the Applicant is still in the Court’s account. Therefore, that if the Applicant is allowed to continue with possession and sale of the property, she and other successors in title would suffer prejudice as the Applicant would be unfairly enriched with a house which is now being advertised for K1,000,000.00.

4.12 Affidavit in Opposition

4.13 Terry Banda the Applicant deposed to the affidavit in opposition dated 21st June 2024. He deposed that on the 23rd March 2016 the 1st Respondent and he entered into a loan agreement whereby the 1st Respondent was availed a facility for a principal sum of K50,000.00 which was to be paid back with interest in the sum of ZMW68,800.00. Exhibited **"TB1"** was a copy of the agreement.

4.14 That it was a term of the agreement that in the event of the borrower defaulting in paying back the loan he would have no claim to the said property. That the 1st Respondent defaulted on the payment. Therefore, on the 29th November 2016, he commenced an action against the 1st Respondent by way of originating summons supported by an affidavit.

4.15 A judgment in default of appearance and defence was entered in his favour which was duly served on the 1st Respondent. He averred further that on 21st December 2017 he was granted an order for leave to issue a writ of possession of Plot 466 Chipata exhibited **"TB3"**. On 26th December 2017 he proceeded to register the order granting leave to issue the writ of possession at the Lands and Deeds Registry. Exhibited **"TB4"** and **"TB5"** are copies of the lodgment schedule and lands and deeds register.

4.16 On 22nd of December 2017, he filed the writ of possession of Lot No. 466 Chipata exhibited “**TB5**”. He added that on 27th December 2017 the Sheriff’s office duly executed the writ of possession and handed over the property to him as per Sheriff’s debit and advice note marked “**TB7**”. He averred further that on the 7th January 2018, the said property was sold as per contract of sale marked “**TB8**”.

4.17 It was the Applicant’s further evidence that on 15th of January 2018, a Court Order in favour of the 1st Respondent allowing him to liquidate the judgment sum in installments and also staying execution of the judgment was granted. Further that the 1st Respondent proceeded to make payments into Court on 12th January 2018 and 17th January 2018 in the sum of K40,000.00 and 26,800.00 respectively.

4.18 He added that on 2nd March 2018, he was granted an Order to stay execution of the Order dated 15th January 2018 pending Appeal. That order is exhibited “**TB12**”. The decision on his appeal against the order granting payment in installments was as per ruling marked “**TB13**”. He therefore on 18th May 2021 re-issued a writ of possession to repossess the property occupied by the 1st Respondent situate at Lot No. 466 Chipata. The re-issued writ was exhibited “**TB14**” which he registered at

the Lands and Deeds Registry confirmed by lodgment schedule marked **"TB15"**.

4.19 On 15th June 2021, the Sheriff's office duly executed the re-issued writ of possession of Lot No. 466 Chipata and handed the property to him. The Sheriff's debit and advice note was exhibited **"TB16"**. He reiterated that it was a term of the loan agreement that in the event of default of payment, the 1st Respondent as borrower would have no claim on the property in issue given as security for the loan. Further that the Applicant as lender would proceed with change of ownership in event of such default.

4.20 He averred that the money that the Respondent paid into Court remains in Court. He confirmed the position averred by the 7th Respondent that the application for the review of the Court's judgment on appeal was unsuccessful.

4.21 He stated further that he filed a re-issued writ of possession on 17th May 2024. He averred that he objects to the application to set aside and or suspend the possession order as granting it would be prejudicial to him and prevent him from enjoying the fruits of his judgment.

4.22 Affidavit in reply

4.23 The 7th Respondent filed an affidavit in reply dated 17th July 2024. She believed as informed by her lawyers that the Applicant has never been granted an Order for sale of the mortgaged property. Arising from such information, she further believed the Applicant has no authority to sell the mortgaged property. She believed the averment in the Affidavit in opposition of the sale of the property to one Frank Majara on the 27th of December 2017 to be false.

4.24 That the property was always in her possession until only recently when she was evicted. That at no particular time while she was in possession of the said property did the said buyer visit the house before he allegedly purchased it. She added that the Applicant had further failed to show proof that he indeed received any money pertaining to the alleged sale of the property.

4.25 It was her evidence that between January- February 2024, she received information that the house was being advertised by the Applicant to be sold for an amount of K1,000,000.00 to a Mr. Daya of Chipata. She personally confronted this man in February, 2024 who informed her that the Applicant approached him with an offer to sell him the property. She

therefore believes that the disclosed contract of sale is fictitious and intended to mislead the Court.

5 Submissions

- 5.1 In skeleton arguments filed in support of the application, reliance was placed on order 88 rule 5 (13) of the RSC to argue that the Court has power to suspend possession granted to a mortgagee.
- 5.2 It was submitted that it must be demonstrated that the mortgagor has prospect to pay the mortgagor in full. That in the present case, the mortgagor paid the judgment in full on or about 17th January 2018.
- 5.3 It was argued further that Order 12 Rule 9 of the High Court Rules states that: -

“In any action in which the Plaintiff is claiming any relief of the nature for kind specific in Order XXX rule 14, No. judgment shall be entered in default of appearance without leave of the Court or a Judge who may require the application for leave to be supported by such evidence as might be required if relief were being sought on Originating Summons under Order XXX rule 14, and may require notice of such evidence to be given to the Defendant and to such other person (if any) as the Court or Judge may think proper”.

- 5.4 It was submitted that a judgment in default was entered against the 1st Respondent in this matter which was commenced by originating summons without obtaining leave thereby making the action a nullity. It was submitted as therefore immaterial whether the 1st Respondent challenged the entry of judgment or not as going by the definition proffered by **Black's Law Legal Dictionary 9th edition**, null is defined as "*having no legal effect, without binding force.*"
- 5.5 It was argued that the Applicant not having obtained mandatory leave rendered the judgment in default a nullity. As such that the Order for the possession of the property had no legs to stand on. The failure to challenge a nullity did not validate what was a nullity.
- 5.6 It was submitted further that the equity of redemption is entrenched in both law and equity and it would be a grave miscarriage of justice to deny a party the opportunity to redeem such property. The Respondent argued further that it would be noted that there was no claim in the originating summons for foreclosure or sale and yet the Court proceeded to grant those claims.

5.7 Reliance was placed on the case of **Lyson Brooke Band Zambia Limited vs Zambia Tanzania Road Services**² wherein it was held that: -

“The functions of pleading is to assist the Court by defining the bonds of the action, which cannot be extended without of Court and consequential amendment of the pleading”.

5.8 **Hakainde Hichilema and Five Others vs Attorney General**³ was also relied on in which the Court held: -

“The Courts will not grant reliefs beyond what has been prayed for or pleaded, and that Courts must confine themselves to reliefs that were pleaded”.

5.9 It was submitted that the Applicant prayed for mere possession to enforce the payment of K66,800.00 and the Respondent having paid the amount there was no further need for the Applicant to take or remain in possession of the mortgaged property. Allowing him to do so, it was argued, would amount to unjust enrichment.

5.10 It was submitted further that the mortgagor’s interest in this matter was not extinguished by any order of Court. That the property was not foreclosed. It thus fully belongs to the beneficial owners notwithstanding the orders for possession.

5.11 **FMC Finance Limited vs BAPO and Others**⁴ a High Court decision was relied on in which the Court stated: -

“Foreclosure is the name given to the process awaiting the Mortgagor’s equitable right to redeem is declared by the Court to be extinguished and the Mortgagee is left as owner of the property both at Law and equity. An order of the Court is essential for a foreclosure”.

5.12 **S. Brian Musonda (Receiver of the First Merchant Bank Zambia Limited vs Hyper Foods Products Limited**⁵ a

Supreme Court decision was cited in which the Court held: -

“A foreclosure decree absolute extinguishes the equity of redemption and vests the Mortgagor’s entire interest in the property in the Mortgagee so that the Mortgagor’s property belongs to the Mortgagee absolutely”.

5.13 It was submitted that a foreclosure can only be granted by the Court and the Court not having done so in this matter, the Respondents have an opportunity and right to redeem the property in issue. That the Respondents equity of redemption having not been extinguished by the Court is still alive.

5.14 It was submitted that the 1st Respondent redeemed the property in issue when he paid into Court the sum of K40,000.00 and K26,000.00 on the 12th and 17th January 2018 respectively pursuant to the Court Order dated 15th January 2018.

5.15 That when the Applicant sought to stay the Order of the Court, The 1st Respondent had already paid the full amount into Court.

It was argued further as trite that one cannot stay the performance of an event that has already occurred. The Court was implored to exercise its jurisdiction in considering this application pursuant to section 13 of the High Court Act Chapter 27 of the Laws of Zambia which provides: -

“In every civil cause or matter which shall come in dependence in the Court, law and equity shall be administered concurrently, and the Court, in the exercise of the jurisdiction vested in it, shall have the power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever, interlocutory or final, to which any of the parties thereto may appear to be entitled in respect of any and every legal or equitable claim or defence properly brought forward by them respectively or which shall appear in such cause or matter, so that, as far as possible, all matters in controversy between the said parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided; and in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail”.

5.16 Alternatively, that the Court has the necessary power or jurisdiction to allow assignees of the mortgaged property to redeem the property. Reference was made to **paragraphs 573**

and 574 of Halsbury's Laws of England 4th edition in which the learned authors state the following: -

"The Mortgagor and all persons having any interest in the property subject to the Mortgage or notice to pay the Mortgage debt can redeem. Until he has absolutely assigned his equity of redemption, the Mortgagor can redeem the Mortgaged property, and a Mortgagor who entirely parted with the equity of redemption nevertheless, upon being sued for the payment of the mortgage debt by the Mortgagee acquires a new right to redeem..."

The following persons claiming under the Mortgage can redeem: an assignee of the equity of redemption including a volunteer; a subsequent incumbrancer; a tenant for years under a lease made subsequent to the mortgagee which the mortgagee refuses to confirm; a surety on payment by himself or refusal by the principal debtor to discharge the mortgage debt, or if the surety has mortgaged his own estate as security for the debt..."

Where Mortgagees on several plots have been consolidated and the Mortgagor has changed the property to different purchasers the purchasers are entitled in foreclosure proceedings by the Mortgagee to redeem in the sequence of the dates of the instruments under which the purchasers acquired their interest".

5.17 It was submitted that after the 1st Respondent paid the judgment debt in full he proceeded to assign the property to his children among whom was the 7th Respondent and mover of the present application. It was argued that she and all the assignees are entitled to redeem the said property. It was

argued that the Applicant's attempt to sell the property in issue borders on criminality. That it was clear that he seeks to take advantage of the mortgagor and his assignees and consequently to unjustly enrich himself.

5.18 Further reference was made to the case of **Pemba Lapidaries and Another vs Industrial Credit Company Limited**⁶ in which it was held that: -

"An equitable Mortgage does not convey any legal title in the Mortgaged properties to the Mortgagee and consequently no power of sale vests"

5.19 That the Court went further to hold that: -

"The Defendant has no power to foreclose the property without having recourse to judicial process and obtaining a Court order....As regards, the equity of redemption, there is again no doubt that by selling the property to a third party, without a Court order, the Defendant seriously violated the 2nd Plaintiff's right to equity of redemption which ss already stated is non-negotiable as it is incidental to mortgage created and more so an equitable mortgage which does not convey any legal title to the lender"

5.20 The Court was invited to note as submitted earlier that the judgment in default of appearance in this case was entered pursuant to order 12 rule 1 of the High Court rules and did not award the Applicant the relief of possession of the house. That

this being the case, the successors in title who have always had actual possession of the premises ought to have been heard on the question of delivering up possession.

5.21 The case of **Shilling Bob Zinka vs Attorney General**⁷ was cited in aid on the principles of natural justice and what it translates to specifically on the right to be heard.

5.22 The Respondent prayed that the Court sets aside the Order for possession of Stand Number 466 Chipata and further that the Court declare that the 1st Respondent by paying into Court redeemed his property. Alternatively, that the 7th Respondent and her siblings be allowed to redeem the property.

5.23 The Applicant's submissions

5.24 The Applicant filed in skeleton arguments and list of authorities in opposition dated 21st June 2024. Reliance was placed on Order 45 Ruled 3 (1) and (2) of the White Book which provides as follows: -

“3 (1) subject to the provisions of those rules, a judgment or order for the giving of Possession is land may be enforced by one or more of the following means, that is to say: -

(a) Writ of Possession

(1) A Writ of Possession to enforce a Judgment or Order for the giving of Possession of any land shall not be issued without leave

of the Court except where the Judgment or Order was given or made in a Mortgage action to which order it applies”.

5.25 Also relied upon was the case of **Hongling Xing Building Company Limited Vs Zam Capital Enterprises Limited**⁸ where it was held that: -

“The grant of leave to issue a Writ of Possession presupposes in the first place the existence of an Order of Judgment giving possession of Land”.

5.26 It was submitted that pursuant to the above authorities the Applicant was within his right when he issued a Writ of Possession against a mortgaged property in issue on Lot no. 466 Chipata District, by virtue of the Judgment in default of appearance and defence which was duly granted in the Applicant’s favour on 1st September 2017.

5.27 It was submitted that the Applicant lawfully executed the writ of possession against the property when he exercised the right to sale as mortgagee of the said property as the default judgment was not set aside by an Order of this Court.

5.28 It was submitted further that the Respondent had the opportunity to apply to this Court to challenge the alleged irregularity of the default Judgment but neglected to do so.

That they therefore sat on their rights to be heard on the merits of this matter.

5.29 It was contended further that this Court had occasion to hear the Respondent's when they filed an application for review which application was dismissed. The case of **Isaacs Vs Robertson**⁹ was cited in aid wherein the Court held that: -

“Any Court order must be obeyed unless and until it is set aside and there are no orders which are void ipso facto without the need for proceedings to set the aside”.

5.30 It was argued based on this authority that the writ of possession issued by the Applicant on 22nd December 2017 was valid as there was no subsequent Court Order setting it aside and the writ could not be valid for the fact that an order for payment of Judgment sum in installments was later granted.

5.31 It was further submitted that the 1st Respondent's payment of the judgment sum in installments into court on 12th January 2018 and 17th January 2018 respectively, were made after the writ of possession issued by the Applicant had duly been executed as confirmed by the contract of sale of Lot No. 466 Chipata dated 7th January 2018 as shown in the Applicant's Affidavit in Opposition.

5.32 It was argued that the 1st Respondent had ample opportunity to redeem the property and the equitable right to redeem the

property was extinguished when it was sold on the disclosed date. Thus, that the Respondents lost the right to reclaim the property notwithstanding the payments of the judgment sum in installments into Court. The case of **Amos John Mulemena Vs NIEC Agencies Limited and Another**¹⁰ was cited in aid wherein the Supreme Court held that: -

“it is to enjoy the fruits of litigation our view that a successful litigant must be entitled”.

5.33 It was submitted that it will be noted as demonstrated in the Applicant’s affidavit that the Respondent filed several interlocutory applications which were all determined in favour of the Applicant. Thus, that the Applicant as successful litigant duly exercised his right to reap the benefits of a judgment and order determined in his favour by this honourable Court when he executed a writ of possession against the Lot No. 466 Chipata District and when he subsequently exercised the right to sale the said property as mortgagee.

5.34 That exhibit **“TB8”** exhibited in the affidavit in opposition will show that the writ of possession was executed on 17th December 2017 and the property was sold on 7th January 2018. Further, that this Court in its Order dated 31st March, 2021

properly found that the writ of possession issued in this matter was at the time still in force and had been executed.

5.35 It was thus the Applicant's position that the writ of possession in this matter cannot be suspended pending the application by the Respondents for redemption as the property in issue has already been sold.

5.36 He prayed that the Court dismisses the application for lacking merit with costs.

6 Hearing

6.1 At the hearing the parties relied on their respective filed document and augmented their portions with oral submissions. I will not lay out the oral submissions as they were more or less a repeat and emphasis of the filed arguments.

7 Court's consideration

7.1 I have carefully considered the application before me. In light of the background to this case, it is important that from the outset I warn myself of the possible danger of conflicting decisions with what was rendered by my sister Lady Justice Banda Bobo sitting as a High Court Judge as she was then . The application before her came by way of an appeal against the decision of the Deputy Registrar to allow the application by the 1st Respondent to pay the judgment sum in installments. She allowed the

appeal reasoning that such order could not be granted without first setting aside a writ of possession earlier granted.

- 7.2 An application before me to review Judge Bobo Banda's decision was declined on the basis that the 1st Respondent did not present any fresh evidence that was not already before the court to warrant the revision of that decision. In other words that the Respondent did not meet the settled threshold that would have warranted a favorable consideration of his application. The ruling of the court in this regard is on record.
- 7.3 The present application before me has not been considered by any Court. That is simply to set aside the writ of possession and consider a plea for redemption of the property that was subject to the said writ in this case. There is therefore as I see it no possibility of a conflicting decision and the application is properly brought before me.
- 7.4 That said, the Respondents main argument is this: This is a matter that was commenced by originating summons seeking payment of K66,800.00 being principal and interest of a loan advanced to the 1st Respondent at his request. He pledged a property Plot 466 Chipata as security for that loan.
- 7.5 The Applicant commenced this action claiming payment of the money borrowed and in spite the fact that the matter was

commenced by originating summons and the subject of the dispute was on equitable mortgage, he obtained a default judgment without the leave of court.

7.6 Further that no prayer was made and granted for possession of the property. In spite of this, the Applicant was granted a writ of possession and now purports to have sold the property to a third party. This, it was argued, he had no legal authority to do on account of the fact that the writ of possession resulted from a judgment that was a nullity and consequently had no legs to stand on; and secondly, that there was no order of foreclosure and sale that is a mandatory requirement before any sale can have legal sanction particularly for an equitable mortgage.

7.7 The Respondents question the claimed sale and assert that the 1st Respondent earned the right to redeem the property when the installments were paid into Court that satisfied the judgment sum. The Court is invited to declare that the property has been redeemed or alternatively that the Respondents being the assignees in title have the right to such redemption.

7.8 The Applicant's position on the other hand, is that is that he used the available remedies to him to enforce a judgment duly obtained in default of appearance and defence for the loan advanced to the late 1st Respondent.

7.9 That the RSC under order 45 allow an Applicant claiming for possession of land to obtain a writ of possession which he applied for and was granted on 17th December 2017. That this writ was executed before the Order for payment and actual payment into Court was made by the Respondents.

7.10 He contends that following the execution of the writ of possession, he went on to sell the property to a third party exercising his right as a mortgagee in possession. It is further his position that the Respondents sat on their rights in not challenging the impugned default Judgment and that all challenges mounted against the Court's order upholding the appeal against the payment in installments and for a review of that decision went against the 1st Respondent and in favour of the Applicant. He argues that the right of redemption was extinguished the moment the property was duly sold to the third party confirmed by a contract of sale exhibited in the affidavit in opposition.

7.11 The questions for my determination that resolves this dispute as I see it is as whether or not this is a proper case in which I can suspend or set aside the writ of possession granted in this case and by definition allow the property to be redeemed after the claimed sale of the property.

7.12 I am indebted to Counsel for their industry in filing submissions that I have considered quite useful. It is not in dispute that the Plaintiff commenced this action in which he seeks reliefs couched in the following terms: -

1. *The Order for Possession of the property at Lot Number 466 Chipata and to secure the loan and or in the alternative: -*
2. *Repayment of the sum of K66,800.00 together with interest at the rate aforesaid owed to Mr. Terry Banda.*
3. *Costs to these incidentals*
4. *Any other relief that the Court shall deem fit.*

7.13 The Deputy Registrar granted a judgment in default of appearance and defence pursuant to order 12 rule 1 of the High Court rules in the following terms: -

“The Defendant not having appeared and delivered a defence. It is this, day of 2017 adjudged that the Plaintiff do recover K66,800.00 as a loan grant at the Respondent’s request and secured by a third party mortgage over lot Number 466 Chipata District in the Eastern Province of Zambia and costs incidental to these proceedings be taxed thereon at the current bank lending rates from the date of the Originating Summons to the date of this Judgment and

thereafter at the current bank lending rates as determined by Bank of Zambia until the final payment”.

7.14 Immediately discernable therefore is that the default judgment did not grant the right of possession. I also find unquestionable that this matter was commenced by originating summons pursuant to Order 30 rule 14 of the High Court Rules and Order 88 of the RSC.

7.15 It settled that in terms of order 12 rule 9 of the High Court rules in an action in which relief of the kind specified in order 30 rule 14, no judgment can be entered in default of appearance without the leave of Court or a Judge who may require the application for leave to be supported by such evidence as might be required if relief were sought by originating summons under the said Rule and require notice to be given to the Defendant or such party the Court may deem fit. I do not see any evidence of any application for leave to enter the default judgment having been made in this case.

7.16 It is not disputed that a writ of possession was subsequently issued and order for payment in installments made by the court. The Applicant contends that he proceeded to sell the property after the writ of possession was executed. I note that

the claimed sale was barely weeks after the writ was issued and before the order of payment in installments was granted.

7.17 The 7th Respondent questions the truthfulness about such sale granted the information she had that as late as February 2024, a named gentleman was approached by the Applicant and offered the property for sale at K1,000,000.00.

7.18 What I find material for present purposes, is whether such sale had the sanction of the Court.

In **Kasaba Industrials Vs Intermarket Banking Corporation**¹¹, the Supreme Court guided 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 completely extinguished and property must be conveyed to the mortgagee by the Mortgagor unconditionally”.

7.19 According to the learned authors of **Megarry & Wade The Law of Real Property Seventh edition (London Sweet and Maxwell) pages 1125 to 1127**, the rights exercisable by an equitable mortgagee include: -

“1. To Foreclose. This the primary remedy of an equitable mortgagee since he has not legal estate. The Court order absolute will direct the Mortgagor to convey the land to the mortgagee unconditionally.

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.

5. To take possession. It is generally said that an equitable mortgagee has no right to take possession because he has no legal estate.

6. To appoint a receiver. An equitable mortgage has always had the right to have a receiver appointed by the Court in a proper case”.

7.20 In **Mwanza Vs Simpasa and Another**¹² Matibini J as he was then made the following observation:

“What remedies therefore are available to an equitable mortgagee?. An equitable mortgagee can either foreclose, or have a receiver appointed by Court, in a proper cause. In the instant case, although the parties agreed that in the event of a failure to pay back the money, the property in question would be sold in order to recover the loan advanced, the Plaintiff being an equitable mortgagee has no power of sale. He has instead the power to foreclose...”.

7.21 It is clear from the above and decisions such as Pemba Lapidaries and another vs Industrial credit company (supra), that an equitable mortgage does not create a legal interest

unlike one executed by deed in which there is a power of sale ordinarily inserted in the mortgage deed.

7.22 On the facts before me, there was clearly no order of foreclosure that was sought and granted and certainly no order of sale of the property that was obtained. Any sale made assuming it to be true, would therefore be, needless to say, illegal.

7.23 The Court's guard a party's equitable right of redemption. It is not in the interest of justice to deny a party the right to redeem the property where there are prospects of paying the borrowed sum in reasonable time.

7.24 In S. Brian Musonda (Receiver of First Merchant Bank Zambia Limited (in Receivership) vs Hyper Food Products Limited and Two Others (supra), the Supreme Court observed that:

“In the exercise of its equitable jurisdiction, the Court has long been entitled to interfere with the contractual rights of the Mortgagee to the extent of enlarging time even where there is foreclosure (see for example paragraph 903 of Halsbury’s Laws of England, 4th Edition, Volume 32) or Suspending orders for Possession or postponing the alternatives if there are reasonable prospects that the money due can be paid within a reasonable time...It is not contrary to law nor to the rules for

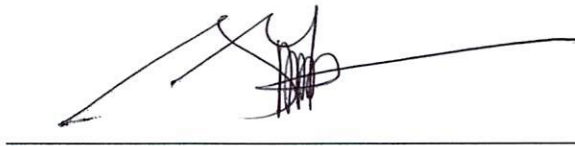
the Court to exercise its equitable jurisdiction of affording relief where a Judgment debtor can pay within a reasonable time even if this results in fettering the Judgment creditor's freedom of their own choice or preference in a Mortgage action".

- 7.25 In exercise of my equitable jurisdiction therefore, I find this to be a fit and proper case in which I can and should intervene to favourably consider the Respondent's ultimate prayer to redeem the property.
- 7.26 It is common cause that the money that was owed in this case totaling K66,800.00 was in fact paid into Court in January 2018 barely a month after the judgment in default of appearance was obtained. That money remains in Court till present day.
- 7.27 The Applicant's primary interest appears to have been more in securing the property probably with the view of selling it for more than what was actually owed for profit if the claimed offer to sell at K1000,000 is to be believed. Whatever his motives there is no doubt he was not keen to collect the money. There can be no question of delay in the payment of what was due for the simple reason that the money was in this case already paid into Court.
- 7.28 I would accordingly set aside the writ of possession in issue and declare that the Respondents are entitled to redeem the

property as assignees in title to the property in their own right. The Applicant should proceed to take out the money owed to him from Court and is awarded interest from date of suit to date of payment in Court at average short term deposit rate as determined by Bank of Zambia.

7.29 The property should be conveyed back to the Respondents within 30 days of this ruling. Costs for the application are awarded to the Respondents to be taxed in default of agreement.

Dated at Lusaka this *16th* day of *May*2025



JUDGE