

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

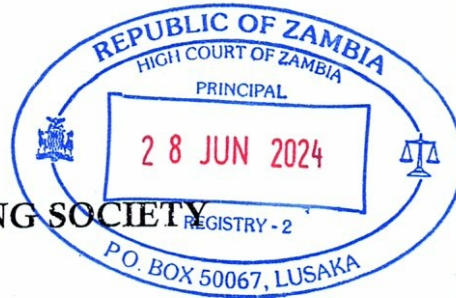
2029/HP/1467

BETWEEN:

FINANCE BUILDING SOCIETY

AND

MUKUBE KAPOTA
VIOLET ZULU



APPLICANT

1ST RESPONDENT
2ND RESPONDENT

Before: Honourable Lady Justice C. Chinyanwa Zulu

*For the Applicant: Mr. A. Roberts of Messrs Alfred Roberts & Co.
For the Respondent: No Appearance*

JUDGMENT

LEGISLATION AND OTHER MATERIALS REFERRED TO:

1. High Court Rules, Chapter 27 of the Laws of Zambia.

1.0 THE APPLICATION

- 1.1 The delay in delivery of this Judgment is regretted.
- 1.2 The Applicants commenced this action by Originating Summons and Affidavit in Support claiming for an order for the sale of Plot No. ND/1219 Ndeke, Ndola, Copperbelt Province.
- 1.3 The application is made pursuant to Order 30 Rule 14 of the High Court Rules. The Originating Summons is supported by an Affidavit.

2.0 AFFIDAVIT IN SUPPORT

- 2.1 The Affidavit was sworn by Gladys Chibwe Masumbuko, an Assistant Manager- Recoveries in the Applicant company. She averred that the 2nd Respondent executed a Mortgage Deed relating to the subject property, charging it in favour of the Applicant, in the sum of ZMW38,000,000.00. A copy of the Mortgage Deed was exhibited marked "GCM1". She went on to aver that the 2nd Respondent obtained the mortgage facility in order to purchase the subject property from the 1st Respondent. In this regard, copies of the Certificate of Title, a Facility Letter dated 8th December 2006 and the contract of sale all relating to the subject property were exhibited marked "GCM2", "GCM3" and "GCM4" respectively.
- 2.2 It was her evidence that the 2nd Respondent defaulted in paying the monthly instalments under the mortgage facility that was availed to her by the Applicant. Further, that before the 2nd Respondent finalised the change of ownership of the subject property with the 1st Respondent, she decided to surrender the property to the Applicant as mortgagee. This was to enable the Applicant to sell the property so that her loan could be settled. A letter wherein the 2nd Respondent surrendered the property to the Applicant to sell was exhibited marked "GCM5."
- 2.3 She averred that the Applicant sold the property to a third party, a Mwiinde Mbangweta, for ZMW110,000.00 who is now in possession as owner. A copy of his offer to purchase the property and the Applicant's letter of acceptance were exhibited collectively marked "GCM6". She averred that the Applicant was seeking an Order of Sale to facilitate the change of ownership of the mortgaged property with the Ndola City Council Deeds Registry.

3.0 HEARING

3.1 At the hearing of the application, Counsel for the Applicant relied on the documents filed into Court. He briefly augmented the same with oral submissions. These will not be reflected here as they constitute a reiteration of what is already on record.

4.0 DECISION

4.1 I have seriously considered the application together with the affidavit evidence and arguments advanced by the Applicant. The main issue for determination is whether this Court should grant the Applicant the relief it seeks in this matter.

4.2 The Respondents did not file a response to the application nor were they present at the hearing of the matter. The record shows that the Applicant made an application to serve the Respondents the court process in this matter by way of substituted service. The application was made on account of the Respondents' whereabouts being unknown to the Applicant. I granted the application and the Applicant did proceed to effect service on the Respondents by way of substituted service through the print media. It is on this basis that I proceeded to hear the matter on 13th November 2019.

4.3 Order 30 Rule 14 of the High Court Rules provides 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 mortgage 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;
Reconveyance;
Delivery of possession by the mortgagee.

- 4.4 It is clear from the foregoing provision that a mortgagee as is the Applicant can apply for, among other reliefs, an order of sale of a mortgaged property. The question that begs to be answered is whether this Court should grant an Order of Sale in this matter.
- 4.5 The evidence on record shows that the Certificate of Title relating to the subject property is in the name of the 1st Respondent. The evidence also shows that the 1st Respondent sold the subject property to the 2nd Respondent in a contract of sale executed by the parties on 15th November 2006. The evidence further shows that the Applicant availed the 2nd Respondent a Home Loan Facility on 14th December 2006. The 2nd Respondent executed a Mortgage Deed in favour of the Applicant on 8th December 2006 wherein the subject property was charged as security for the said Home Loan Facility.
- 4.6 It is also clear from the letter dated 1st September 2015 which is exhibited as "GCM5" that the 2nd Respondent defaulted in making the monthly instalments towards the Loan Facility. She admitted this in the said letter wherein she also surrendered the property to the Applicant to sell. The relevant portion of the letter reads: -

"Ref: My/Our Mortgage A/C No. 000HOM1132262791 Plot No 1219 House No. 3006

I/We make reference to our several discussions regarding the equated monthly instalments arrears on my/or loan account and wish to inform you that we are/I am unable to pay the lump sum amount to adjust or liquidate the outstanding balance on the account.

In this regard, and in order to avoid the astronomical legal bills, we/I wish to propose that we/I surrender the property on 19/09/2015 without further duress to Finance Building Society for disposal. Please upon disposal, adjust our/my account including all costs incurred in the process of disposal of sale proceeds of the property. After the adjustment of the loan account from the sale proceeds, any surplus funds may be refunded to us/me.

Furthermore, we/I undertake to adjust any shortfall that should arise on my/our loan account after the disposal of the property. With your permission, I wish to continue staying in the house until it is sold to the highest bidder.

...”

4.7 The offer to purchase the subject property which is dated 27th October 2015 and the Applicant's letter of acceptance dated 28th October 2015 which are collectively marked "GCM6" show that the property was sold to Mwiinde Mbangweta following the 2nd Respondent's authorization. I therefore find that the Applicant had the requisite authority to sell the subject property to a third party.

4.8 Given the foregoing and the Applicant's inability to locate the Respondents, I hereby grant the Applicant's application for an Order of Sale of Plot No. ND/1219 Ndeke, Ndola, Copperbelt Province to facilitate the change of its ownership.

4.9 Since the Respondent did not oppose this application, I shall make no order as to costs.

Delivered at Lusaka this 28th day of June, 2024



C. Chinyanwa Zulu
HIGH COURT JUDGE