

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

2022/HP/0482



**BETWEEN:**

**TOONSE SAVINGS AND CREDIT CO-OPERATIVE  
 LIMITED**

**PLAINTIFF**

**AND**

**MUTELO HAMANJE**

**DEFENDANT**

**BEFORE HON. JUSTICE E. P. MWIKISA**

**FOR THE PLAINTIFF: Mr. M. Mabolobolo of Messrs Makala and Co.**

**FOR THE DEFENDANT: Mr. Daka of Messrs George Kunda and Co.**

## **RULING**

### **CASES REFERRED TO:**

1. *Leicester Permanent Building Society vs. Shearley* (1951) 2 ALL ER
2. *Kanjala Hills Lodge Limited and Another vs. Stanbic Limited* SCZ Judgment No. 17 of 2012
3. *African Banking Corporation vs. Copper Harvest and Others* Appeal No. 18 of 2021
4. *Lungu vs. Kalikeka* (Appeal 114 of 2013) [2014] ZMSC 37 (1 April 2014)
5. *LC and DK Limited (in receivership) and Another vs. Chinyama* (CAZ Appeal 270 of 2020) [2021] ZMCA 172 (30 December 2021)
6. *Hongling Xing Xing Building Company Limited vs. Zamcapital Enterprises Limited* 2011 Vol. 2 ZR 105

### **OTHER WORKS REFERRED TO:**

1. *Order 45 Rule 3 of the Rules of the Supreme Court of England, 1999 edition*

## **1. INTRODUCTION.**

- 1.1 This ruling emanates from the Defendant's application dated 8<sup>th</sup> December 2023 for summons for an order to set aside the writ of possession pursuant to **Order 3 Rule 2** of the High Court Rules, Chapter 27 of the laws of Zambia (hereinafter referred to as "HCR") as read together with **Order 45 Rule 3** of the Rules of the Supreme Court of England, 1999 Edition (hereinafter referred to as "RSC").
- 1.2 The Plaintiff filed its affidavit in opposition and skeleton arguments dated 19<sup>th</sup> September 2024.

## **2. BACKGROUND.**

- 2.1 This Court delivered a ruling dated 17<sup>th</sup> March 2023 in which the Plaintiff is a successful litigant and was granted the reliefs it sought from the Originating Summons, including an order of foreclosure, possession, and sale of Stand No. 148 Livingstone Road Mazabuka.
- 2.2 The Plaintiff executed the writ of possession and upon receipt of the sheriff's seizure form, the Defendant filed into Court an application to set aside the writ of possession for irregularity.

### **3. AFFIDAVIT IN SUPPORT.**

- 3.1 It was deposed by one Mutelo Hamanje the Defendant herein.
- 3.2 He stated that he received a sheriff's seizure form for possession of Stand No. 148 along Livingstone Road Mazabuka. A copy of the seizure form was exhibited and marked "MH1".
- 3.3 Upon receipt of the seizure form, he informed his counsel who conducted a search in the registry and extracted copies of a writ of possession. Copies of the writ of possession and praecipe were exhibited and marked "MH2".
- 3.4 Furthermore, he stated that the Plaintiff did obtain a ruling in its favor. However, he was advised by his counsel that the Plaintiff ought to have obtained leave of Court before issuing the writ of possession.
- 3.5 It was stated that this Court should exercise its authority to set aside the writ of possession for irregularity.

### **4. SKELETON ARGUMENTS IN SUPPORT.**

4.1 It was the counsel's submission that the Plaintiff did not employ the use of Order 88 of RSC during the matter and as such, the Plaintiff requires leave of the Court to issue the writ of possession in compliance with the Court rules. To reinforce this position, counsel relied on Order 45 of RCS, and the case of **Leicester Permanent Building Society vs. Shearley**<sup>1</sup>.

4.2 It was counsel's prayer that the writ of possession filed and executed upon be set aside for irregularity.

#### **5. AFFIDAVIT IN OPPOSITION.**

5.1 It was deposed by one Humphrey Lungu the executive secretary of the Plaintiff.

5.2 It was stated that owing to the failure by Defendant to settle the judgment, the Plaintiff caused to be issued a writ of possession on 8<sup>th</sup> May 2023.

#### **6. SKELETON ARGUMENTS IN SUPPORT.**

6.1 Order 45 Rule 2 of RSC was quoted and submitted that Order 30 Rule 14 HCR which the Plaintiff relied upon provides for the same reliefs set out in Order 88 of RSC.

- 6.2 The cases of **Kanjala Hills Lodge Limited and Another vs. Stanbic Limited<sup>2</sup>** and **African Banking Corporation vs. Copper Harvest and Others<sup>3</sup>** were cited to reinforce the position that the case in casu is a mortgage action. Thus, the Plaintiff as a mortgagee is entitled to foreclose, take possession, and sale plot 148, Livingstone Road Mazabuka as per the ruling dated 17<sup>th</sup> March 2023.
- 6.3 Counsel argued that since this is a mortgage action, there is no need to seek leave to issue a writ of possession as seeking leave will be tantamount to asking the Court to grant a relief of possession which it already has granted.
- 6.4 In conclusion, counsel submitted that the Rules of the Supreme Court of England entail that no leave is required prior to issuance of a writ of possession in mortgage actions.

## **7. HEARING.**

- 7.1 The matter came up on 23<sup>rd</sup> September 2024 and both counsel for the Plaintiff and Defendant were present.

- 7.2 Counsel for the Defendant submitted that he would rely on the affidavit and skeleton arguments dated 8<sup>th</sup> December 2023. Counsel briefly augmented by stating that, per Order 88 of RSC, leave of Court is a prerequisite before possession can be enforced.
- 7.3 Counsel contended that a perusal of the record shows that the Originating Summons were commenced under Order 30 Rule 14 of HCR and not Order 88 of RSC, this meant that Order 45 Rule 3 of RSC was not complied with. It was the counsel's submission that the Court has the authority to set aside the writ of possession filed herein.
- 7.4 In reply, counsel for the Plaintiff stated that he would rely on the affidavit in opposition and skeleton arguments dated 19 September 2024. Counsel briefly augmented by stating that the main contention for the Plaintiff is that Order 45 RSC, does not require the Plaintiff to obtain leave of Court to issue a writ of possession in a mortgage action.
- 7.5 Counsel argued that Order 30 Rule 14 of HCR sets out the same reliefs as Order 88 of RSC. Counsel cited the case of **Lungu vs. Kalikeka**<sup>4</sup> which provides that English practice

and procedure only apply in so far as there is a lacuna in the Zambian practice and procedure.

7.6 In reiteration, counsel for the Defendant submitted that according to his understanding, using Order 30 Rule 14 HCR to be similar to Order 88 of RSC is not tenable. This is so because if the Applicant intended to rely on the benefits that come with Order 88 of RSC then the Applicant should have cited it. The fact that counsel for the Plaintiff did not cite Order 88 of RSC means that they are not exempted from the rules of the Court.

7.7 In conclusion, counsel asserted that the Court's rules are mandatory and must be complied with and the only exemptions that apply are specified under Order 45 Rule 3 (2) of the Rules of the Supreme Court of England, 1999 edition.

## **8. CONSIDERATION AND DETERMINATION.**

8.1 I have considered the Defendant's application, the evidence and submissions from both parties.

8.2 This Court is moved Pursuant to Order 3 Rule 2 of HCR as read together with Order 45 Rule 3 of RSC which provides as follows;

*Order 3 Rule 2 of HCR*

***“Subject to any particular rules, the Court or a Judge may, in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not.”***

*Order 45 Rule 3 of RSC*

***“1) Subject to the provisions of these rules, a judgment or order for the giving of possession of land may be enforced by one or more of the following means, that is to say -***

***(a) writ of possession;***

***(b) in a case in which rule 5 applies, an order of committal;***

***(c) in such a case, writ of sequestration.***

***(2) A writ of possession to enforce a judgment or order for the giving of possession of any land shall not be issued without the leave of the Court except where the judgment or order was given or made in a mortgage action to which Order 88 applies”***

8.3 The issue that falls for determination is whether this is a proper case for the exercise of my discretionary power to set aside the writ of possession for irregularity.

8.4 The Defendant contends that the Plaintiff herein did not employ the use of Order 88 of RSC during the commencement of the matter, and as such, the Plaintiff requires leave of the Court to issue the writ of possession in compliance with Order 45 Rule 3 of RSC. On the other hand, the Plaintiff contends that Order 45 Rule 2 of RSC, does not require the Plaintiff to obtain leave of Court to issue a writ of possession in a mortgage action.

8.5 It is trite law that leave to issue a writ of possession ought to be sought in cases that seek to enforce a judgment for possession of land. This was reaffirmed in the case of **LC and DK Limited (in receivership) and Another vs. Chinyama**<sup>5</sup> wherein it was held that;

***“The rationale for seeking leave is to ensure that the person in actual possession of the land subject of the mortgage being enforced, is made aware of the proceedings and availed an opportunity to seek any relief from the court to which he may be entitled to”***

8.6 In the case of **Hongling Xing Xing Building Company Limited vs. Zamcapital Enterprises Limited**<sup>6</sup>, Dr.

Justice Matibini SC, observed that it is the fundamental requirement of Order 45 Rule 3 of RSC that leave is necessary in all cases to enforce a judgment or order for the giving of possession of land except in a mortgage action to which Order 88 of RSC applies or an order for summary possession under Order 113 of RSC.

8.7 Before I determine whether the writ of possession was irregularly issued warranting it to be set aside by this court, I must ascertain whether the Defendant was aware of the proceedings.

8.8 A perusal of the record shows that a ruling was made in favor of the Plaintiff, and the defendant was aware of the court's ruling hence this application.

8.9 **Order 45 Rule 3(3)** of RSC is instructive on what the Court ought to do when a party to the proceedings has not given notice of the proceedings to the other party, the Court is mandated not to grant such leave.

8.10 From the foregoing, it is clear that the Plaintiff commenced this action pursuant to Order 30 Rule 14 of HCR which in my considered view is couched along the same lines as

Order 88 of RSC. Thus, Order 45 Rule 3 of RSC is not applicable here.

**9. CONCLUSION.**

9.1 The Defendant has not proved his case on a balance of probabilities. It has been established that leave was not required as the court in its ruling of 17<sup>th</sup> March, 2023, granted foreclosure of the said property, as one of the reliefs sought.

9.2 The Defendant's application is dismissed.

9.3 I award no costs.

Leave to appeal is granted.

Dated at Lusaka this .....19<sup>th</sup>.....day of February.....2025

.....  
**ELITA PHIRI MWIKISA**  
**HIGH COURT JUDGE**