

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



2024/HP/0097

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

IN THE MATTER OF: AN APPLICATION FOR FORECLOSURE AND
DELIVERY OF POSSESSION OF SUBDIVISION
'A31' OF FARM NO.1870, LUSAKA TO THE
APPLICANT AS MORTGAGE WITH POWER OF SALE
TO RECOVER DEFAULT AMOUNT OF DEBT AND
INTEREST THEREON.

BETWEEN

PRUDENT SOLUTION LIMITED

APPLICANT

AND

KENNEDY MALUNDU SAMASOJI

RESPONDENT

BEFORE THE HONOURABLE MRS. JUSTICE M. C. KOMBE

For the Applicant: Mrs. N. Daka – Messrs. G.M. Legal Practitioners

For the Respondent: No - appearance

J U D G M E N T

Cases referred to:

1. Robert Simeza, Motel Enterprises Limited, Marianthy Noble, Yolande Hadjipetrou v. Elizabeth Mzyece SCZ Judgment No.23 of 2011
2. Khalid Mohamed v. Attorney General (1982) Z.R 49(S.C)
3. Magic Carpet Travel & Tours v. Zambia National Commercial Bank 1999 Z.R 61.

4. **S. Brian Musonda (Receiver of First Merchant Bank Zambia Limited (In Receivership) v. Hyper Food Products Limited, Tony's Hypermarket Limited, Creation One (Z) Limited (1999) Z.R 124.**
5. **Kasabi Industries Limited v. Intermarket Banking Corporation Limited, Appeal No.168/2009.**

Legislation and other material referred to:

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

1. INTRODUCTION

The Applicant commenced this action on 22nd January, 2024, by way of an originating summons, with an affidavit in support seeking the following reliefs:

- i) *An order for the recovery of the sum of ZMW750,000.00 plus interest and costs;*
- ii) *In the alternative an order for delivery of possession of the property known as Subdivision 'A31' of Farm No.1870, Lusaka, with power to sale to recover the debt amount;*
- iii) *Costs.*

2. APPLICANT'S EVIDENCE

- 2.1 The affidavit in support of originating summons was deposed to by **COLLINS KAPUNGWE KABALI** the Director in the Applicant Company.

- 2.2 He deposed that in September, 2022 the Respondent at his own instance applied to borrow the sum ZMW 605,000.00 from the Applicant which was upon consideration, offered to him for a duration of six (6) months. The Respondent accepted the offer on 29th September, 2022.
- 2.3 By a loan agreement dated the 29th September, 2022 the Applicant advanced a sum of ZMW 605,000.00 to the Respondent at an interest rate of 4% per month for a period of six (6) months. The Respondent contracted to pay back the total sum of ZMW 750,000.00 made up of the principal amount and simple interest at 4% per month for six (6) months. A copy of the loan agreement was exhibited and marked **“CKK 2a-d.”**
- 2.4 As security for the debt, the Respondent executed an equitable mortgage over his own property known as Subdivision ‘A31’ of Farm No. 1870, Lusaka in favour of the Applicant. A copy of the Certificate of Title was exhibited and marked **“CKK 4a-i.”**
- 2.5 Further, that the Applicant had since registered a caveat against the said property in accordance with clause 3 of the loan. Proof of registration of the caveat was exhibited and marked **“CKK 5 a-b.”**
- 2.6 That the Respondent had defaulted on the contract and was indebted to the Applicant in the sum of ZMW750,000.00 as at

18th January, 2024 and had refused/neglected to settle the debt despite numerous reminders and demands from the Applicant.

2.7 In the premise, the Applicant craved the indulgence of the Court to order the Respondent to pay the principal debt plus interest and costs or grant an order to recover possession of the pledged property as security for the debt due and exercise a power to sale to recover the principal debt plus interest and costs.

3. RESPONDENT'S EVIDENCE

3.1 There was no affidavit filed in opposition by the Respondent.

4. HEARING

4.1 At the hearing, the Respondent was not present and no reasons were advanced for his non-attendance. I proceeded to hear the Applicant after I was satisfied that the Respondent had been served, therefore, he had deliberately not attended Court.

4.2 Learned counsel for the Applicant, Mrs. N. Daka relied on the affidavit and the skeleton arguments filed in support of the originating summons.

4.3 In the skeleton arguments, Mrs. Daka relied on Order 30 rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia which provides that:

“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 mortgage”

4.4 It was argued that the Applicant had demonstrated from the loan agreement that the Respondent secured the debt of ZMW605,000.00 by executing an equitable mortgage over the property known as Subdivision 'A31' of Farm No.1870, Lusaka in favor of the Applicant.

4.5 It was submitted that in the circumstances, the Applicant was entitled to the reliefs sought in the originating summons.

5. CONSIDERATION AND DECISION

5.1 I have considered the affidavit evidence and the arguments advanced by learned counsel for the Applicant in this case.

5.2 I would like to make it clear from the onset that the failure by the Respondent to offer any reasonable explanation to the Court means that he elected to dispense with his presence and by so doing I had the discretion to proceed to hear the matter. I am alive to the guidance given by the Supreme Court in Case of **Robert Simeza, Motel Enterprises Limited, Marianthy Noble, Yolande Hadjipetrou v. Elizabeth Mzyeche**⁽¹⁾ when it stated that:

“There is no procedural injustice that is occasioned when a party who is aware of the proceedings does not turn up.”

- 5.3 The failure therefore by the Respondent to attend Court was at his own peril.
- 5.4 I should nevertheless state that, it is trite law that in civil cases the one who alleges must prove his case on a balance of probabilities against the Respondent if judgment has to be obtained in his favour as espoused in the case of **Khalid Mohamed v. Attorney General** ⁽²⁾.
- 5.5 It is not in dispute that on 29th September, 2022, the Applicant and Respondent executed a loan agreement whereby the Applicant advanced the Respondent the sum of ZMW605,000.00 at an interest rate of 4% per month for a period of six (6) months.
- 5.6 By reason of this agreement, the Respondent executed an equitable mortgage over his property known as Subdivision 'A31' of Farm 1870, Lusaka in favour of the Applicant.
- 5.7 The issue that falls for determination is whether the Applicant is entitled to an order for delivery of possession of the mortgaged property with power to sale to recover the debt amount.
- 5.8 This matter is anchored on **Order 30 rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia** already

referred to by counsel for the Applicant which allows 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, to take out an originating summons for any such relief of the nature or kind specified under the Order.

5.9 The Supreme Court in the case of Magic Carpet Travel & Tours v Zambia National Commercial Bank⁽³⁾ held regarding equitable mortgages that:

“On the issue of an equitable mortgage, the position at common law is that once a borrower has surrendered his title deed to the lender as security for the repayment of a loan, an equitable mortgage is thus created; the borrower in such a relationship cannot deal with the land without the knowledge and approval of the lender whose interest in the land takes precedence.”

5.10 It is clear that at common law, once a borrower surrenders a title deed to the lender as security for repayment of a loan, an equitable mortgage is created and capable of enforcement at law.

5.11 Given the foregoing, I find that by depositing the Certificate of Title No. 93007 with the Applicant to secure the debt in the

sum of ZMW 605,000.00 and contractual interest created an equitable mortgage.

5.12 The Respondent however has failed or neglected to settle the sum of ZMW 605,000.00 with interest accrued thereby entitling the Applicant to commenced a typical mortgage action.

5.13 The Supreme Court in the case of **S. Brian Musonda (Receiver of First Merchant Bank Zambia Limited (In Receivership) v. Hyper Food Products Limited, Tony's Hypermarket Limited, Creation One (Z) Limited** ⁽⁴⁾ stated regarding the remedies of a mortgagee that:

"The Appellant commenced a typical mortgage action brought by a mortgagee. He asked for the payment of the money secured by the equitable mortgages: foreclosure; sale; delivery of possession; and further or other relief deemed appropriate by the Court. The mortgagee's remedies are truly cumulative, leaving aside the fact that an equitable mortgagee's remedies are somewhat more restricted than those of a legal mortgagee... We have quoted the terms of the Consent Order to underline the fact that mortgagees remedies are cumulative."

5.14 It is established principle of law from Order 30 rule 14 and the Supreme Court's guidance above that a mortgagee's remedies

on default by the mortgagee are foreclosure, sale and appointment of a receiver and possession and therefore cumulative.

5.15 The Applicant herein seeks for the cumulative remedies of ZMW750,000.00 plus interest and costs or alternatively an order of delivery of possession of the mortgaged property with the power to sale.

5.16 Concerning the remedies available to a mortgagee to enforce an equitable mortgage, I am guided by the Supreme Court case of **Kasabi Industries Limited v. Intermarket Banking Corporation Limited**⁽⁵⁾ where it held that:

“...it is clear that an equitable mortgagee does not have the 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 the property must be conveyed to the mortgagee by the mortgagor unconditionally.”

5.17 Unlike the remedies of a legal mortgagee, an equitable mortgagee does not have the power to sell the mortgaged property as a way of enforcing the mortgage. The mortgagee does however have the right to obtain an order for foreclosure which extinguishes the mortgagor's right of redemption. It is

after the right of redemption of the mortgagor has extinguished that the mortgagee attains the right to have the property conveyed to him unconditionally.

5.18 In the light of the foregoing, I find that the Applicant in this case being an equitable mortgagee, is not entitled to an order of sale for the mortgaged property or delivery of possession before an order of foreclosure.

6. ORDER

6. 1 Having considered the evidence in its totality, I am satisfied that the Applicant has proved its case on a balance of probabilities against the Respondent. I hold that the Applicant is entitled to the cumulative remedies of an equitable mortgagee direct and order as follows:

- 1) Payment of the judgment debt of ZMW750,000.00 being the principal and contractual interest. The said amount which shall be paid within a period of ninety (90) days shall attract interest at the short-term deposit rate from date of originating summons to date of judgment and thereafter at the commercial lending rate until final payment.
- 2) In default, the Applicant shall be at liberty to foreclose the mortgaged property being Subdivision 'A31' of Farm No. 1870,

- Lusaka, and the Respondent shall convey the mortgaged property to the Applicant unconditionally;
- 3) In default, the provisions of Section 14 of the High Court Act, Chapter 27 of the Laws of Zambia shall be invoked wherein the Registrar of the High Court shall execute the Deed of Transfer; and
 - 4) Once foreclosed, the Respondent shall deliver up possession of the mortgaged property known as Subdivision 'A31' of Farm No. 1870, Lusaka, to the Applicant.
 - 5) I award costs to the Applicant and in default of agreement to be taxed.
 - 6) Leave to appeal is granted.

DELIVERED AT LUSAKA THIS 23RD DAY OF MAY, 2024.


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M.C. KOMBE
JUDGE

