

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

2023/HP/1547



IN THE MATTER OF: AN APPLICATION TO ENFORCE AN ORDER ABSOLUTE  
IMPOSING CHARGE ON LAND DATED 15<sup>TH</sup> JUNE 2023  
BY SALE OF STAND NO. 5252, NDOLA

IN THE MATTER OF: ORDER 88 RULE 5A OF THE RULES OF THE SUPREME  
COURT OF ENGLAND 1965 EDITION

BETWEEN:

EL SEWEDY ILLUMINATION

PLAINTIFF

AND

ZAMBIA ELECTROMETER LIMITED

DEFENDANT

Before the Honourable Mrs Justice Ruth Chibbabbuka on the 14<sup>th</sup> day of  
February, 2024

For the Plaintiff:

Mr K. Kawana & Ms N. Mwila, Messrs Simeza &  
Sangwa Associates

For the Defendant:

No appearance

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## JUDGMENT

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**Cases referred to:**

1. *Chuyya and Another Vs Hankwenda* (2002) Z.R 11
2. *Marsh Vs L Kristals Limited* (2016) HPC/0558 (unreported)

**Legislation referred to:**

*The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia*

*The Rules of the Supreme Court, 1999 Edition, White Book*

## **1.0 Introduction**

The plaintiff issued an Originating Summons on the 5<sup>th</sup> September, 2023 pursuant to *Order 30 Rule 14* of the *High Court Rules, The High Court Act, Chapter 27* of the *Laws of Zambia* claiming the following reliefs:

- (i) An order for the sale of Stand No. 5252, Ndola, towards the settlement of the judgment sum of USD1,288,112.00 in cause number 2022/HPC/0454, which property is subject to a charging order absolute dated 15<sup>th</sup> June, 2023;
- (ii) An order for the defendant to yield vacant possession of Stand No. 5252, Ndola; and
- (iii) An order for the defendant to surrender the original certificate of title relating to Stand No. 5252, Ndola, to the plaintiff.

## **2.0 The plaintiff's affidavit evidence**

In support of the Originating Summons, Ahmed Elamir Abdelrhaman Abdelsalam an Egyptian national in the employ of the plaintiff avers as follows: By a judgment dated 23<sup>rd</sup> September, 2022, the defendant was ordered by the High Court to pay the plaintiff the judgment sum of USD1,288,122.00, interest on the sum due and costs. The said judgment remains wholly unsatisfied and therefore the plaintiff is at liberty to enforce the said judgment.

The defendant is the registered title holder of Stand No. 5252, Ndola (the property). By charging order absolute dated 15<sup>th</sup> June, 2023 made in the action referred to above, it was ordered that the property of the defendant do stand charged with the payment of the sum of USD1,288.112.00 due to the plaintiff in this action. As of today, the defendant is still indebted to the plaintiff in the sum of USD1,288,112.00 by virtue of the charging order absolute. The plaintiff is desirous of selling the charged property.

## **2.1 The plaintiff's list of authorities and skeleton arguments**

Counsel for the plaintiff also filed their list of authorities and skeleton arguments on the 5<sup>th</sup> September, 2023. In relation to how the court ought to be moved in obtaining an order for sale, reference was made to *Order 88 Rule 5A* of the *Rules of the Supreme Court of England 1965 (RSC)* which provides as follows:

*“5A. An action for the enforcement of charging order by sale*

- (1) This rule applies to a mortgage action in the Chancery Division to enforce a charging order by sale of the property charged.*
- (2) The affidavit in support of the originating summons must-*
  - (a) Identify the charging order sought to be enforce and the subject matter of the charge;*
  - (b) Specify the amount in respect of which the charge was imposed and the balance outstanding at the date of the affidavit;*
  - (c) Verify, so far as known, the debtor's title to the property charged;*
  - (d) Identify any prior incumbrancers on the property charged stating, so far as is known, the names and addresses of the incumbrancers and the amounts owing to them;*
  - (e) Set out the plaintiff's proposals as to the manner of sale of the property charged together with estimates of the gross price which would be obtained on a sale in that manner and of the costs of such a sale; and*
  - (f) Where the property charged consists of land in respect of which the plaintiff claims delivery of possession-*

- (i) *Give particulars of every person who to the best of the plaintiff's knowledge is in possession of the property charged or any part of it....."*

Reference was also made to Order 88/5A/2 of the Rules of the Supreme Court, which states in part that:

*"A charging order has the effect and is enforceable in the same manner as an equitable charge created by writing under his hand."*

Counsel also made reference to the case of **Chuuya and Another Vs Hankwenda**<sup>1</sup> where the Supreme Court stated the following with respect to enforcement of charging orders:

*"In any event, the plaintiff appears to have forgotten that a charging order simply gives security and that an order for sale thereafter places the judgment creditor in the same position as a mortgagee. This is why Order 50/9A provides that Order 88 which is for mortgage actions shall apply to proceedings to enforce a charging order by sale...."*

The court was also referred to the case of **Marsh Vs L Kristals Limited**<sup>2</sup> where the court stated that:

*"It is trite law that a charging order by sale is an indirect mode of enforcement since it provides the creditor with security in whole or part over the debtors property. A charging order is primarily a mode of providing a creditor with security for his debt, not a mode of obtaining immediate payment. If the debtor will not pay, it becomes necessary to institute separate proceedings for an order for sale under the charging order. Proceedings to enforce a charging order by sale of the property charged must be begun by originating*

*summons and the rules relating to mortgage actions will apply to such proceedings.”*

Last but not the least, the court was referred to *Order 30 Rule 14* of the *High Court Rules*, in the *High Court Act Chapter 27 of the Laws of Zambia* which provides:

*“Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal 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.”*

Based on the foregoing authorities, counsel argued that it is clear that this Court has jurisdiction to grant an order for sale as *Order 88/5A* of the *Rules* of the

*Supreme Court* speaks specifically to actions for the enforcement of charging orders by sale and further states that a charging order has the effect and is enforceable in the same manner as an equitable charge. It was counsel's further argument that this is complimented by *Order 30 Rule 14* of the *High Court Rules* which defines a mortgage action to include an action for enforcement of an equitable charge whose reliefs include the delivery of possession to the person entitled to the charge or person having property subject to the charge.

Counsel contended that in *casu*, the High Court on the 15<sup>th</sup> June, 2023 granted the plaintiff an order absolute imposing charge land against the charged property of the defendant. That as such, this Court has the power to grant the plaintiff an order for sale of the charged property to liquidate the sums owed by the defendant.

On this basis, counsel submitted this is a proper case to grant an order for sale of the charged property.

### **3.0 The defendant's affidavit in opposition**

The defendant did not file an affidavit or skeleton arguments in opposition to the plaintiff's application despite being served with process by way of substituted service on the 21<sup>st</sup> and 22<sup>nd</sup> November, 2023 as is evidenced by the affidavit of service filed into Court on the 24<sup>th</sup> November, 2023.

### **4.0 The hearing**

At the hearing of the matter on the 13<sup>th</sup> February, 2024, only the plaintiff's advocates were in attendance. As there was evidence that the defendant was notified of the date of hearing in the affidavit of service, being proof of the substituted service, this Court proceeded to hear the plaintiff's application.

#### **4.1 The plaintiff's arguments**

Counsel for the plaintiff stated that this was an application for sale of property subject to a charging order. That on the 5<sup>th</sup> September, 2023, they filed an originating summons for an order for sale of property together with an affidavit in support and skeleton arguments. Counsel went on to argue that they served the said documents on the defendants on the 21<sup>st</sup> and 22<sup>nd</sup> November, 2023 by way of substituted service for which they filed an affidavit of service as proof of service on the 24<sup>th</sup> November, 2023. Further that there was no opposition by the defendant to their application.

Counsel placed reliance on the documents before court for the granting of the application sought.

#### **5.0 Decision of the Court**

I am indebted to counsel for the plaintiff for their list of authorities and arguments which I have carefully considered. The plaintiff in this matter has applied to this Court for the enforcement of a charging order absolute dated 15<sup>th</sup> June, 2023. The said charging order was issued in the High Court's Commercial division under cause number 2022/HPC/0454 where Stand No. 5252, Ndola was made subject of the charging order for a judgment sum of USD 1,288,112.00 owed by the defendant to the plaintiff which money is still outstanding.

In relation to jurisdiction, the explanatory notes to *Order 88/5A* under *Order 88/5A/2* of the *Rules of the Supreme Court* state:

*“ A charging order has effect and is enforceable in the same manner as an equitable charge created by the debtor by writing under his hand....The usual manner of enforcement is by an order for sale.....In the High Court the application for the sale is made in the*

*case of land invariably....It is made by fresh proceedings begun by originating summons and not by application in the proceedings in which the charging order was made.*

The aforementioned explanatory notes make it clear that an application to enforce a charging order must be made by way of originating summons before the High Court but not in the proceedings in which the charging order was made. As such, I agree with counsel for the plaintiff that this Court has been correctly moved by the plaintiff to hear and determine this matter.

88/5A/2 of the *Rules of the Supreme Court* goes on to state that:

*The purpose of r.5A is threefold. First, to enable the Court to judge whether there is sufficient equity in the property for the charge to justify ordering a sale. Secondly, to ensure that, if possible, the Court will be in possession of sufficient evidence at the first appointment under the originating summons to make an immediate order for sale, without the need for further accounts or enquiries as to the defendant's interest in the property subject to the charging order as to encumbrances or as to the amount of the sum due. Thirdly, to ensure that the rights of the third party occupiers are protected. Because the proceedings are a fresh action, the charging order being enforced will not be on the Court file and it should be lodged with, or exhibited to, the affidavit in support. In the case of registered land up-to-date office copy entries should be obtained from the Land Registry and exhibited. Inquiries should be made of all known incumbrancers of the amount owing to them to enable para. 2 (d) to be complied with. It is the practice of the mortgagees to provide such information to subsequent incumbrancers. The proposals and estimates required by para.*

*2 (e) should be supported by a report or letter from an estate agent which should be exhibited.*

Being guided by the foregoing explanatory notes, a perusal of the record reveals that the affidavit in support identifies the charging order sought and the subject matter therein. The said charging order is exhibited as "AEAA3". The affidavit in support of the application, as well as the charging order both indicate the amount in respect of which the charge was imposed, this being the sum of USD 1,288,112.00.

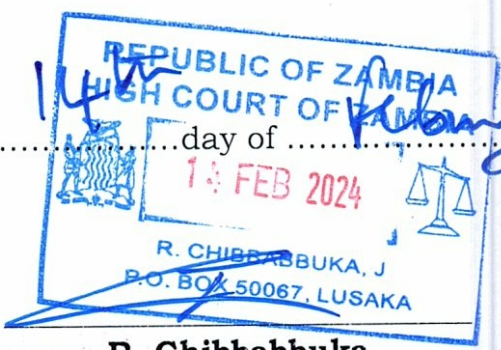
Additionally, the plaintiff has also exhibited a print out from the Lands Register at the Ministry of Lands which indicates the defendant as the current owner of the property. The said print out also indicates the incumbrancers that had an interest in the property, the last of which was Ecobank which had registered a mortgage on the 18<sup>th</sup> April, 2018 to secure the sum of K6,522,051.24 plus interest. The said mortgage was discharged on the 2<sup>nd</sup> March, 2022.

For its part the plaintiff has complied with *Order 88/5A (2) (a), (b), (c), and (d)* of the *Rules of the Supreme Court*. The plaintiff however has not set out the proposals as to the manner of sale of the property charged together with estimates of the gross price which would be obtained on a sale in that manner and of the costs of such a sale. This is contrary to the provisions of *Order 88/5A (2) (e)* of the *Rules of the Supreme Court*. Further, the plaintiff having claimed for vacant possession of the property is also supposed to have complied with *Order 88/5A (2) (f)* of the *Rules of the Supreme Court* with regard to providing information and details of every person, who to the best of the plaintiff's knowledge, is in possession of the said property.

As the plaintiff has not provided the aforementioned information which is needed for this Court to arrive at a just determination of the matter, this Court is not satisfied that the plaintiff has sufficiently met the requirements of the said *Order 88/5A* of the *Rules of the Supreme Court* under which it moved this Court. Consequently, the application is denied and dismissed. No award for costs is made.

Leave to appeal is granted.

Dated the..... day of ..... 2024.



**R. Chibbabbuka**  
**HIGH COURT JUDGE**