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IN THE HIGH COURT FOR ZAMBIA **2024/HP/0393**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

REPUBLIC OF ZAMBIA
HIGH COURT OF ZAMBIA
PRINCIPAL
30 SEP 2025
REGISTRY - 6
P.O. BOX 50067, LUSAKA

IN THE MATTER OF: **FARM NO. 532 B CHISEKESE MONZE DISTRICT SOUTHERN PROVINCE OF THE REPUBLIC OF ZAMBIA**

IN THE MATTER OF: **REMOVAL OF MORTGAGE RELATING TO FARM NO. 532B CHISEKESI MONZE DISTRICT SOUTHERN PROVINCE OF THE REPUBLIC OF ZAMBIA**

IN THE MATTER OF: **SECTION 67 OF THE LANDS DEEDS REGISTRY ACT CAP 185 OF THE LAWS OF ZAMBIA**

BETWEEN:

ABEL MOOYA *(applying as the administrator of the late JOHN MOONGA'S estate)* **APPLICANT**

BEFORE THE HONOURABLE MRS. JUSTICE M. C. KOMBE

For the Applicant: *Ms. Loveness Mwanakulanga Phiri – Power of Attorney for the Applicant*

J U D G M E N T

<u>Cases referred to:</u>

1. **Joseph Constantine Steamship Line Limited v. Imperial Smelting Corporation Limited (1941) 2 ALLER 165.**
2. **Sablehand Zambia Limited v. Zambia Revenue Authority (2005) Z.R. 109.**

Legislation referred to:

1. **The Lands Deeds Registry Act Chapter 185 of the Laws of Zambia.**
2. **Snell's Principles of Equity (1954) 24th Edition.**

1. INTRODUCTION

1.1 The Applicant commenced this action by way of originating summons seeking an order to remove the mortgage placed on Farm No. 532B Chisekese Monze District in Southern Province of the Republic of Zambia.

2. AFFIDAVIT IN SUPPORT

2.1 The Applicant **ABEL MOOYA,** the administrator of the estate of the late John Moonga appointed by the High Court of Zambia on 30th November, 2016 deposed to the affidavit in support. Produced and marked **"AM1"** was a copy of letters of administration and National Registration Card.

2.2 The deponent explained that the late John Moonga purchased Farm No. 532B from Johannes Jacobs Rossouw in 1964 as shown by the Certificate of Title in the names of the said Johannes Jacobs Rossouw transferred to John Moonga which was marked **"AM2".**

2.3 That when he conducted a search at the Ministry of Lands, it revealed that there was a mortgage placed on the said property from the Agricultural Bank of Northern Rhodesia in 1965. Produced and marked **"AM3"** was a copy of the mortgage.

2.4 He further conducted a search at the Bank of Zambia to ascertain whether the late John Moonga was indebted to any bank which revealed that the late John Moonga did not have any mortgage with any bank. Produced and marked **"AM4"** was a copy of the letter from Bank of Zambia. That the correspondence from the Bank of Zambia clearly indicated that no financial institution had an enforcement interest on the said property.

2.5 The deponent added that he was advised by the Ministry of Lands that the only way to remove the mortgage was through the Court process.

2.6 In addition to the affidavit in support, the Applicant also filed an affidavit verifying execution of the power of attorney. He disclosed that he signed the power of attorney in favour of Loveness Mwanakulanga in this case for the removal of a mortgage.

2.7 He added that the late John Moonga purchased Farm 532B from Johannes Jacobs Rossouw in 1964 cash and not credit and the property was transferred to John Moonga.

2.8 Furthermore, that the late John Moonga never got a loan from the Agricultural Bank of Northern Rhodesia amounting to 135 pounds.

3. HEARING

3.1 At the hearing, Ms. Loveness Mwanakulanga, the appointed Power of Attorney acting for and on behalf of Abel Mooya, the Applicant was present.

3.2 Ms. Mwanakulanga stated that the application was for the removal of a mortgage which was at the Ministry of Lands in favour of the Land and Agricultural Bank of Northern Rhodesia.

3.3 Ms. Mwanakulanga asserted that Bank of Zambia refuted that John Moonga got a loan from Agricultural Bank of Northern Rhodesia and that there was no evidence of it.

4. DECISION OF THE COURT

4.1 I have carefully considered the Applicant's affidavit evidence and the oral submissions made herein.

4.2 This action is for the removal/discharge of mortgage relating to Farm 532B Chisekesi Monze District. It was commenced pursuant to **Section 67 of the Lands Deeds Registry Act Chapter 185 of the Laws of Zambia**.

4.3 According to the learned author John Mc Ghee Snell's Equity, a mortgage is described as:

> **"Conveyance of some interest in the land or other property as a security for the payment of a debt or discharge of some other obligation for which it is given. Where a legal estate is transferred, the mortgage is a legal mortgage. Where only an equitable interest is transferred whether because the mortgagor has merely an equitable interest or because he uses a form insufficient for the transfer of a legal interest, the mortgage is called an equitable mortgage. On satisfying the obligation in respect of which the mortgage was given, the mortgagor has a right to redeem that to recover full ownership in the property."**

4.4 It is abundantly clear from the foregoing that a mortgage is a conveyance of some interest in the land or other property as a security for the payment of a debt or discharge of some other obligation for which it is given.

On satisfying the obligation in respect of which the mortgage was given, the mortgagor has a right to redeem that to recover full ownership in the property.

4.5 Furthermore, section 67(1) enacts as follows:

> **"67. (1) Upon production of any memorandum by endorsement on the mortgage or otherwise, signed by the mortgagee and attested by a witness discharging the land, estate or interest from the whole or part of the principal sum or annuity secured, or discharging any part of the land comprised in such mortgage from the whole or any part of such principal sum or annuity, the Registrar shall make an entry in the Register and on the outstanding instrument of title, noting that such mortgage is discharged wholly or partially."**

4.6 From the above provision it is clear that there must be a memorandum signed by the mortgagee and attested by a witness declaring that the mortgage had been discharged from the whole or part of the principal sum and then the Registrar of the Lands and Deeds can make an entry in the Register discharging the mortgage.

4.7 In short, before a mortgage is discharged, there must be proof of payment of the debt and also proof that the mortgagee/lender has removed its rights over the property by providing a mortgage discharge or release.

4.8 However, having considered the affidavit evidence by the Applicant, he has come to this Court on the basis that although there is a mortgage deed as shown by exhibit **"AM3"** that the late John Moonga obtained a loan from the Land and Agricultural Bank of Northern Rhodesia in the sum of 1,350 pounds, it is contended that the late John Moonga did not obtain a loan from the said Bank.

4.9 This is evident from his affidavit verifying the power of attorney filed into Court on 4th September, 2024, where he explained that the late John Moonga did not get a loan from the Land and Agricultural Bank of Northern Rhodesia because the property in question was not bought on credit but on cash basis.

4.10 In addition, in exhibit **"AM5"** which is entitled: <u>THE HISTORY OF CAVEAT AND MORTGAGE FARM 532B CHISEKESE, MONZE DISTRICT</u>, the Applicant contends that the mortgage refers to Northern Rhodesia but this was erased and was placed with Zambia. That the signature of the John Moonga on the document is not his.

4.11 What I discern from the foregoing is that since the Applicant disputes that the late John Moonga signed on the mortgage, he is alleging that the signature was forged.

4.12 It is trite that an allegation that a document was created falsely is an allegation that it was fraudulently procured. However, an allegation on this front requires a higher standard of proof. In the case of **Joseph Constantine Steamship Line Limited v. Imperial Smelting Corporation Limited (1),** it was held that there is no presumption of fraud. It must be alleged distinctly in the pleadings and proved.

4.13 Furthermore, in the case of **Sablehand Zambia Limited v. Zambia Revenue Authority (2)** it was stated that the party alleging fraud must equally lead evidence so that the allegation is clearly and distinctly proved.

4.14 The present case was commenced by way of originating summons and supported by an affidavit. However, the issue of fraud on the mortgage was not specifically pleaded by the Applicant by providing particulars of the fraud and who committed the fraud. Furthermore, the Applicant did not distinctively prove that the signature on the mortgage was not for the late John Moonga.

4.15 In addition, while the Applicant has taken this position that the late John Moonga did not obtain a loan, the other evidence he has adduced is contradictory. I have in mind the letter in the affidavit verifying power of attorney which is unmarked but dated 23rd June, 2023 from his lawyers JMC & ASSOCIATES to the Registrar of Companies. In that letter, his lawyers mentioned that the Applicant was requesting for a memorandum of discharge for a mortgage which he redeemed before Lima Bank was liquidated.

4.16 It was also mentioned that at the time of obtaining the mortgage, the property was on fourteen (14) year lease and he now wished to obtain a ninety-nine (99) year lease.

4.17 In view of the foregoing, I cannot bring myself to accept the Applicant's evidence that the late John Moonga did not obtain a loan because the letter I have referred to above was an acknowledgment that the late John Moonga had obtained a mortgage and that the Applicant had redeemed it.

4.18 In the absence of proof to the required standard that the late John Moonga is not the one who signed the mortgage deed and in view of the evidence he adduced that he the late John Moonga obtained a mortgage, I find as a fact that the late John Moonga obtained a mortgage from the Land and Agricultural Bank of Zambia in the amount of 1,350 pounds.

4.19 The crucial question now to be determined is whether the Applicant is entitled to the relief sought.

4.20 As already alluded to, before a mortgage is discharged, there must be proof of payment of the debt and also proof that the mortgagee/lender has removed its rights over the property by providing a mortgage discharge or release.

4.21 The Applicant contends that a search was conducted at the Bank of Zambia to ascertain whether the late John Moonga was indebted to any bank and the search revealed that he was not. Reliance has been placed on the letter marked **"AM4"** in the affidavit in support.

4.22 I have carefully examined the said letter. The import of that letter was merely to clarify that Bank of Zambia was unable to establish its interest in the mortgage placed on the property as it was not placed by Bank of Zambia but by the Agricultural Bank of Zambia.

4.23 The author did not at any point indicate that no financial institution had an enforcement interest on the property as the Applicant would like this Court to believe. The Bank of Zambia has maintained this position as is evident from the letter dated 17th February, 2023 addressed to the Chief Registrar, Lands and Deeds exhibited in the affidavit verifying execution of power of attorney.

4.24 In this regard, I cannot accept the Applicant's contention that no financial institution has an enforcement interest on the said property in the absence of any evidence that the loan was paid in full.

4.25 In any event, I have already stated that the Applicant produced a letter in the affidavit verifying power of attorney which is unmarked but dated 23rd June, 2023 from his lawyers JMC & ASSOCIATES to the Registrar of Companies. In that letter, his lawyers mentioned that the Applicant was requesting for a memorandum of discharge for a mortgage which he redeemed before Lima Bank was liquidated.

4.26 It was also mentioned that at the time of obtaining the mortgage, the property was on fourteen (14) year lease and he now wished to obtain a ninety-nine (99) year lease.

4.27 By stating the Applicant redeemed the mortgage before Lima Bank was liquidated, he contends that the loan was paid and that is why he sought a memorandum of discharge for the mortgage. That notwithstanding, the Applicant did not bother to adduce proof that the mortgage debt had been fully paid.

4.28 I should pause here and state that while I have made a finding that the Applicant herein obtained a loan from the Land and Agricultural Bank of Zambia on 9th February, 1965 and I have also taken judicial notice of the fact that the successor to this Bank was Lima Bank which was liquidated in 1997.

4.29 From the evidence on record being the affidavit in support as well as the affidavit verifying execution of a power of attorney, it is clear that the Applicant has made inquiries aimed at locating the entity that could discharge the mortgage. However, there is nothing to show that the Applicant has been successful.

4.30 Given this state of affairs, should this Court proceed to grant the relief sought on the basis that the mortgagee cannot be found?

4.31 From the legal research I have conducted, what I have observed is that proof of payment of the debt is cardinal even where the mortgagee cannot be found. In my view, this is the position because discharge of a mortgage is connected to the legal principle that the mortgagor exercises the right to redemption after paying off the debt.

4.32 Given the foregoing, it was therefore incumbent upon the Applicant to provide this proof especially that his lawyer had indicated that he had redeemed the mortgage. However, he did not adduce this evidence.

4.33 In the absence of any documentation discharging the mortgage placed on Farm No. 532B Chisekesi Monze District by payment of the debt, I find that I cannot facilitate the removal of the mortgage placed on the said property.

4.34 Should this Court then exercise its inherent jurisdiction? I have noted that the Applicant commenced this matter in his capacity as administrator of the estate of the late John Moonga in relation to Farm 532B Chisekese in Monze District. However, the power of attorney on the record reads as follows:

"I Abel Mooya, holder of NRC number 110505/74/1 residing at Farm No. 532B, Chisekese, Monze District, Southern Province do hereby appoint Loveness Mwanakulanga Phiri holder of NRC number 203676/6/1, residing at Plot No. 103/125, Chawama, Lusaka to be my true and lawful attorney to act in my name, place and stead in any and all matters relating to the legal issues <u>surrounding my farm described as Farm No. 532B, Chisekese, Monze District, Southern Province."</u> (Underlining mine for emphasis only.

4.35 What I discern from the foregoing is that the Applicant Abel Mooya contends that he is the owner of property Farm No. 532B, Chisekese. However, he commenced the action as administrator of the estate of the late John Moonga.

4.36 Just to add, in the document marked **"AM5"**, the Applicant has mentioned a third party by the name of Suresh Manilla Desai and also a court case at the Subordinate Court in Choma. He asserts that if he does not obtain the title deed, he and his family will suffer with the unending story of Suresh Manilla Desai.

4.37 Although he mentioned Suresh Manilla Desai, the Applicant proceeded to commence this matter *ex parte* without citing the third party. This revelation has made me conclude that the Applicant is not pursuing the interests of the estate but his own interests. That is why he has not made a full and accurate disclosure regarding the issues relating to the subject property.

4.38 **Section 19 of the Intestate Succession Act** outlines the duties of an administrator which emphasize that the administrator's primary responsibility is to manage the estate for the benefit of the estate and the beneficiaries. As I have mentioned, the power of attorney is silent on this responsibility and that is why I have come to the conclusion that the Applicant is seeking to protect his own interests in this matter and not that of the estate of the late John Moonga. However, the law is very clear that an administrator has a fiduciary duty to act in the best interest of the estate.

4.39 Given the forgoing, I am not satisfied that it will be just and equitable to exercise my inherent jurisdiction and remove the mortgage as there is no evidence that the removal of the mortgage will benefit the estate of the late John Moonga.

5. CONCLUSION

5.1 On the whole and taking into account what I have stated above, I find that the Applicant has failed to prove his case on a balance of probabilities that he is entitled to the relief sought by virtue of section 67(1) of the Lands and Deeds Registry Act or even the Court's own inherent jurisdiction.

5.2 The action is accordingly dismissed as it lacks merit but I make no order as to costs.

5.3 Leave to appeal is granted.

DELIVERED AT LUSAKA THIS 30TH DAY OF SEPTEMBER, 2025

REPUBLIC OF ZAMBIA
HIGH COURT OF ZAMBIA
30 SEP 2025
M.C. KOMBE, J
P.O. BOX 50067, LUSAKA

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M.C. KOMBE
JUDGE