**IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 125/2008**

**HOLDEN AT LUSAKA**

**(Civil Jurisdiction)**

**BETWEEN:**

**FRIDAH NASITWITWI APPELLANT**

**AND**

**COMMERCIAL CAPITAL COOPERATION LTD RESPONDENT**

**CORAM: Sakala, CJ., Chirwa, Mwanamwambwa, JJS.**

**on 20th July, 2010 and 14th June, 2012**

**For the Appellant : Mr. A.M. Kasonde (The late)**

**For the Respondent: Mr. A. Siwila of Mambwe, Siwila and Partners**

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**JUDGMENT**

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**Sakala, CJ., delivered the Judgment of the Court.**

The delay in delivering this Judgment in this matter is deeply regretted. We also take judicial notice that Mr. A.M. Kasonde represented the Appellant at the hearing of this Appeal; but died before the Judgment was ready. May His Soul Rest in Eternal Peace.

This is an appeal against the Ruling of the High Court granting the Respondent the Orders prayed in th**e Originating Summons For Foreclosure** with costs.

For convenience, the Appellant will be referred to as the 1st Respondent, while the Respondent will be referred to as the Applicant, the designations which the parties were at trial. At the outset, it must be mentioned that at trial, there were three Respondents. There seems to be no appeal by the other two Respondents.

The history of the case, leading to this appeal, is not in dispute. On or about 9th January, 2006, the Applicant granted the 2nd Respondent a Credit Facility for the sum of K90,000,000.00 to expire after thirty (30) days. The 2nd Respondent executed a Financial Contract dated 9th January, 2006. As security for the Credit Facility, the 1st Respondent surrendered her Title Deeds relating to Subdivision No. 706 of Stand No. 17428, Lusaka.

As further security for the Credit Facility, the 3rd Respondent executed a Personal Guarantee dated 9th January, 2006. Contrary to the terms and conditions of the Credit Facility, the Respondents failed to repay the Facility as agreed.

Due to the non servicing of the Credit Facility, the amount owing as at 18th July, 2006 stood at K147,600,000. Consequently, the Applicant commenced a cause of action by way of **Originating Summons For Foreclosure;** Claiming against the Respondents as follows:

“1. That it may be considered as Equitable Mortgagee of Subdivision No. 706 of Stand No. 7428, Lusaka;

2. For Payment of all monies due under the Equitable Mortgage plus interest at agreed rates;

3. Foreclosure;

4. Delivery and possession of Subdivision No. 706 of Stand No. 7428, Kaunda Square, Lusaka;

5. Sale;

6. Further or other relief; and

7. Costs.

The **Originating Summons** was supported by an Affidavit sworn by the Director in the Applicant Institution. We take note that all the Respondents did not file an affidavit in opposition.

At the hearing of the **Originating Summons**, Mr. Kasonde, who attempted to appear for all the Respondents, had not filed a Notice of Appointment to represent the Respondents and did not file a Memorandum of Appearance and an Affidavit in opposition.

Despite adjourning the case on three occasions; Mr. Kasonde did not still file the Notice of Appointment, the Affidavit in Opposition and the Memorandum of Appearance. On the last adjournment, the Court had ordered that the Respondents do pay hearing fees before the hearing date. However, on the hearing date, in addition to the relevant documents not being filed, the hearing fees were not paid. The Court, after ordering that Mr. Kasonde could not represent the Respondents, proceeded to hear the application by the Applicant. Counsel for the Applicant relied on the **Originating Summons** and the Affidavit in support of the **Summons.**

The Court, after reviewing the history of the case, and after considering the Affidavit evidence and the Counsel’s submissions, granted the Applicant’s application as prayed in the **Originating Summons For Foreclosure** with costs.

On the 5th March, 2007, the Respondents obtained an Order to Stay the Ruling of 9th November, 2006, pending the hearing and determination of the Respondents’ application to settle the Judgment debt by installments. This Order was obtained after the Respondents had first paid an instalment of K100,000,000 on 1st February, 2007. But on 29th May, 2007, the application to settle the Judgment debt by instalments was dismissed.

The 1st Respondent then decided to appeal against the Ruling of the trial Court to this Court basing her appeal on three grounds namely:

1. That the learned Judge in the Court below erred in law and in fact by proceeding to hear and determine the matter in the absence of the Appellant or her advocates;

2. That the learned Judge in the Court below erred in law and in fact in making the order for **Foreclosure** of the Appellant’s property known as Subdivision No. 706 of Stand No. 17428, Kaunda Square, Stage II, Lusaka in favour of the Respondent with whom the Appellant had no bargain, no business and no contract; and

3. That the learned Judge in the Court below erred in law and in fact in assuming that the Contract dated 9th January, 2006 made between Cable Foods Limited and the Respondent also included the Appellant while in point of fact the Appellant was a total stranger and was never a party to the said contract.

On behalf of the parties detailed written heads of argument were filed based on the three grounds. But on account of the detailed history of the case as set out above, we do not intend to review the written heads of argument in great detail.

On ground one, the gist of the written heads of argument on behalf of the 1st Respondent, is that the Respondent was never served with the **Originating Summons For Foreclosure** and the Affidavit in support; and that the trial Judge erred when she proceeded to hear the case in the absence of the Respondent without satisfying herself that process had been served on the Respondent.

It was submitted that the Ruling of the lower Court be set aside because it was obtained without the presence of the Respondent; that the Judge should not have proceeded to hear the matter after asking Counsel to leave Court thereby, leaving the Respondent unrepresented by Counsel or even on their own; and that the rules of natural justice were not met in this case because the Respondent was not given an opportunity to be heard.

The short summary of the written heads of argument on grounds two and three which were argued together is that an Equitable Mortgage can only be created by deposit of Title Deeds belonging to a borrower being deposited with the lender of money as security for the payment of the money thus borrowed, with interest; but that consideration must move from the promisee, thus, only a person who is a party to a contract can sue on it, or be sued on it. It was submitted that the Respondent was not a party to the Financial Contract dated 9th January, 2006; and that under the doctrine of **“privity of contract”** the Respondent could not be sued in respect of the Financial Contract of which the Respondent was and still is not a party.

The summary of the written response to ground one is that the Court below did not err in law and in fact by proceeding to hear and determine the matter in the absence of the Respondent or her advocates; that on 30th October, 2006, none of the Respondents appeared but instead, Mr. Kasonde attempted to appear for all Respondents but had not filed a Notice of Appointment, a Memorandum of Appearance or an Affidavit in Opposition; that again on 9th November, 2006, when the matter came up, there was no Notice of Appointment, no Memorandum of Appearance and no Affidavit in Opposition was filed and the hearing fees as ordered by the Court had not been paid. It was submitted that the Court was entitled not to allow Mr. Kasonde to represent the Respondents and proceed with the matter and granted the relief sought in the Originating Summons.

It was pointed out that when the Respondent became aware of the Ruling of the Court below, instead of applying to set aside the Ruling, Counsel filed into Court Summons to settle Judgment Debt by way of Instalments and an Ex-Parte Summons to stay execution of the Ruling pending hearing of Summons to settle Judgment Debt by Instalments. It was submitted that this did not amount to an objection as regards the entry of the Ruling.

The gist of the written response on ground two is that the trial Judge did not err in ordering for **Foreclosure** of the Respondent’s property known as Subdivision No. 706 of Stand No. 17428, Kaunda Square Stage II, owing to the fact that the Respondent was a party to the Mortgage Contract between the Applicant and Cable Foods Limited; that when the Respondents became aware of proceedings in Court, they instructed Counsel to act for them, including after delivery of the Ruling of 9th November, 2006 by proceeding to ask Counsel to file the applications for settlement of Judgment Debt by way of instalments and for an Order for stay of Execution of the Ruling pending hearing of an application of settlement of date by way of instalments; and that the Respondent’s surrender of her Certificate of Title relating to Subdivision No. 706 of Stand No. 17428 Kaunda Square, Lusaka, as security for the Credit Facility availed to Cable Foods Limited, was not disputed and

that the surrender of her Title Deeds for purposes of giving security for the Credit Facility availed to Cable Foods Limited created an Equitable Mortgage over the property, making the Respondent a party to the Mortgage Contract and the Applicant was, therefore, entitled to commence a Court action against the Respondent together with the borrower and the Guarantor for an order for **Foreclosure,** when there was default.

The summary of the written response to ground three is that although the 1st Respondent was not a party to the Financial Contract dated 9th January, 2006 between the Respondents and Cable Foods Limited, she nevertheless was a party to the Mortgage Contract between the Applicant and Cable Foods Limited, having surrendered her Certificate of Title relating to Subdivision No. 706 Stand No. 17428 Kaunda Square, Lusaka.

At the hearing, Mr. Kasonde, on behalf of the Respondent, informed the Court that he was only representing the 1st Respondent, Fridah Nasitwitwi. And Mr. Siwila, on behalf of the Applicant, asked the Court to dismiss the appeal on the basis that this Court could not sit in the “shoes” of the trial Court to decide as a Court of first instance on the issue of whether there are sufficient grounds to set aside the Ruling obtained in the absence of the Respondent, when the 1st Respondent never attempted to set aside the Ruling, but only asked the trial Court to stay that Ruling pending the hearing of the application to pay the debt by way of Instalments and not to set aside the Ruling.

We have carefully considered the affidavit and the documentary evidence on record, the Ruling appealed against and the written heads of argument on behalf of the parties.

We are satisfied from the history of this case, leading to this appeal, that the conduct of the Respondents and their advocate led to the trial Court proceeding to determine the **Originating Summons For Foreclosure** in their absence.

To complicate the situation, after the Ruling was made in favour of the Applicant, the Respondents paid a sum of K100,000.000 towards the settlement of the debt. Subsequently, they applied for stay of execution of the Ruling of 9th November, 2006, pending determination of the application to settle the debt by instalments. It was only after the application to settle the debt by way of instalments was dismissed that the 1st Respondent decided to appeal against the Ruling of 9th November 2006. There was never any application to set aside the Ruling of the Court in the Court below.

In these circumstances, we find no merit in this appeal. It is therefore dismissed with costs to be taxed in default of agreement.

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**E.L. Sakala**

**CHIEF JUSTICE**

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**D.K. Chirwa M.S. Mwanamwambwa**

**AG/DEPUTY CHIEF JUSTICE SUPREME COURT JUDGE**