

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA
(CIVIL JURISDICTION)

APPEAL NO. 109/2014

BETWEEN:

BOMACH FINANCE LIMITED

APPELLANT

AND

GREGORY MWANZA

RESPONDENT

EMMA NYANDORO

INTERVENER

Coram: Chibomba, Hamaundu and Kaoma, JJS.

On 3rd March, 2015 and on 13th March, 2015.

For the Appellant: Mr. J. Chibalabala of Messrs Douglas and Partners

For the Respondent: No Appearance

For the Intervener: No Appearance

J U D G M E N T

Chibomba, JS, delivered the Judgment of the Court.

Cases referred to:

1. S. Brian Musonda (Receiver of First Merchant Bank Zambia Limited (in receivership) vs Hyper Food Products Limited, Tony's Hypermarket and Creation One Trading (Z) Limited (1999) ZR 124

The Appellant appeals against the Ruling of the High Court at Lusaka, which ordered the Respondent to pay the outstanding balance with interest at current bank lending rate.

The facts leading to this appeal are that the Appellant, by Originating Summons and Affidavit in Support, sought to recover the sum of K91,530,720 together with interest at agreed rate which the Appellant had advanced under a mortgage secured by Sub-division 1229 of Sub-division F of Farm No. 33a, Lusaka. The Respondent had defaulted.

The parties filed a Consent Order in which it was agreed that the Respondent would settle the Judgment debt within 60 days. In default thereof, liberty to foreclose on the mortgaged property was granted.

Following the failure to settle the entire debt within the agreed 60 days period, the Appellant issued a Writ of Possession. This was after the Respondent had paid a substantial part of the Judgment debt as only K13,530.72 was outstanding. The Respondent applied to set aside the Writ of Possession which the Appellant opposed. The learned trial Judge, after hearing the parties, set aside the Writ of Possession on the authority of our decision in **S. Brian Musonda vs Hyper Food Products Limited and two others**¹ and ordered as follows:-

“It is further ordered that the Respondent do pay the balance outstanding in the sum of Kwacha rebased K13,530.72 with interest at current bank lending rate within 30 days from date hereof.”

Dissatisfied with the above order, the Appellant has appealed to this court advancing one Ground of Appeal. This is that the trial Judge erred both in law and fact when she varied the Consent Settlement

order by allowing the Respondent to pay the outstanding balance with interest at current bank lending rate when the agreed rate in the mortgage deed was 20% per month compound interest.

The learned Counsel for the Appellant relied on the Appellant's Heads of Argument filed. The Respondent and the Intervener neither appeared at the hearing of the Appeal nor did they file any Heads of Argument. The major argument in the Appellant's Heads of Argument is that the Court below erred as it ought not to have varied the interest rate agreed in the Mortgage deed with the rate in the Ruling appealed against.

We have seriously considered the sole ground of Appeal together with the Appellant's Heads of Argument and the authorities cited. We have also considered the Ruling by the learned Judge in the court below. The question raised in this appeal is whether the learned Judge in the Court below was on firm ground when she Ordered the Respondent to pay the outstanding sum of K13,530.72 with interest at current bank lending rate, instead of the agreed rate in the mortgage deed of 20% per month compound interest.

It is our firm view that the learned Judge in the Court below erred by varying the interest rate from the 20% per annum agreed in the Mortgage Deed by Ordering the outstanding balance to be paid with interest at current bank lending rate. This was contrary to what the Parties agreed upon in the Mortgage deed. We, therefore, set

aside the Order by the learned trial Judge that the outstanding balance be paid with interest at current bank lending rate and substitute it with the interest rate agreed in the Mortgage deed of 20% per month compound interest.

The sum total is that this appeal has succeeded on ground that it has merit.

We order that each party shall bear its own costs of this appeal.



H. Chibomba
SUPREME COURT JUDGE



E.M. Hamandu
SUPREME COURT JUDGE



R.M.C. Kaoma
SUPREME COURT JUDGE