

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

2012/HPC/0166

BETWEEN:

INVESTRUST BANK PLC

1ST APPLICANT

FIRST ALLIANCE BANK (Z) LIMITED

2ND APPLICANT

AND

KAVINO LIMITED

1ST RESPONDENT

VIMAL SAXENA

2ND RESPONDENT

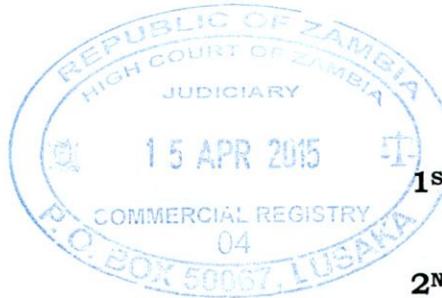
CHARU SHARMA SAXENA

3RD RESPONDENT

For the 1st Applicant : Mr A. Siwila – Messrs Mambwe Siwila & Lisimba Advocates.

For the 2nd Applicant : Ms. J. Mutemi - Messrs Theotis Mataka & Sampa Legal Practitioners.

For the Respondents : No Appearance.



RULING

LEGISLATION REFERRED TO:

1. *Rule 3 of Order LIII of the High Court (Amendment) Rules, Cap 27 of the Laws of Zambia.*

2. *Order 50 Rule 7 of the Rules of the Supreme Court 1965, White Book (1999 Edition).*
3. *Order 50/ 9A/ 25 of the Rules of the Supreme Court 1965, White Book (1999 Edition).*
4. *Section 7 of the Lands & Deeds Registry Act, Cap 185 of the Laws of Zambia.*

WORKS REFERRED TO:

1. *Halsbury's Laws of England, 4th Edition Vol 32 1980.*
2. *R. E. Meggery & H. W. Wade The Law of Real Property 4th Edition 24- 026.*

This is an application by the 2nd Applicant to discharge or vary the Charging Order dated 20th August, 2013.

The application is supported by an Affidavit sworn by Thula Nyasulu the Accountant of the 2nd Applicant and Skeleton Arguments filed into Court on the 14th of October, 2014.

It was deposed by Mr Nyasulu that on 20th August, 2013 this Honourable Court granted a Charging Order in favour of the 1st Applicant over the 2nd Respondent's beneficial interest in stand No. 12756, Chinika Industrial Area, Lusaka so as to secure the payment of the sum of ZMW6, 800,000 together with interest by the 1st, 2nd and 3rd Respondents to the 1st Applicant.

That he believed that the said Charge over the 2nd Respondent's beneficial interest in Stand Number 12756, Lusaka was wrongly obtained due to the fact that as at 20th August, 2014, there was already registered against the said stand Number 12756 Lusaka a Third Party Mortgage dated 15th January, 2010 and entered into between the 1st Respondent, the 3rd Respondent and the 2nd Applicant in order to secure the sum of ZMW 2,000,000 and interest as well as a Further Charge dated 22nd February,

2011 and entered into between the parties aforesaid to secure a further sum of ZMW 500,000 plus interest.

It was further deposed that he believed that the aforesaid Third Party Mortgage and Further Charge registered in favour of the 2nd Applicant herein ranked in priority to the subsequent Charge registered by the 1st Applicant and the Charge is 'otiose' as the amount now outstanding from the 1st Respondent to the 2nd Applicant is ZMW 8, 593,746.23 which amount exceeds the value of Stand No. 12756.

He further stated that he believed that by reason of the fact that the amount owed by the 1st and 3rd Respondent to the 2nd Applicant exceeded the value of Stand No. 12756, Chinika Industrial Area, Lusaka, there would be no amount left as residue for the 1st Applicant to have recourse to from the proceeds of the sale of the said property.

He also deposed that he verily believed and was advised by his Advocates that the registration of the Third Party Mortgage and Further Charge aforesaid by the 2nd Applicant constituted actual and or constructive notice to the 1st Applicant or other interested parties of the 2nd Applicant's prior interest and it was for the 1st Applicant to satisfy itself of the viability of the security before it took the Charge.

Further, that he believed that the 1st Applicant had taken possession of the property in question and further applied to enforce the Charging Order under Cause Number 2013/ HPC/ 486 which actions were in direct conflict with the 2nd Applicants rights and interest in the said property as registered Mortgagee with possession of the original Certificate of Title.

That he further believed that the 1st Applicant initially obtained a Charge over Stand Number 20614, Lusaka without conducting its due diligence by ascertaining its actual location, and only realised that the property aforesaid

did not belong to the 3rd Respondent after it took possession of the said Stand Number 20614. It was only then that the 1st Applicant obtained a Charge over Stand Number 12756, Lusaka being the property over which the 2nd Applicant had at all material times had a proprietary interest.

That he craved the indulgence of this Honourable Court to discharge the said Charging Order.

There is also an Affidavit in Opposition filed into Court on 26th November, 2014 sworn by Esau Mtonga the Head of Credit Control in the 1st Applicant Bank.

He deposed that contrary to the contents of paragraph 5 of the Affidavit in Support, the 1st Applicant disclosed all material facts in its Affidavit in Support of Exparte Summons for a Charging Order on land prior to the Court granting the Order. Further that paragraph 17 of the Affidavit aforesaid clearly points out the fact that the 1st Applicant had conducted a search at Lands and Deeds Registry on Stand No, 12756 Lusaka which search revealed that the property was encumbered to the 2nd Applicant which fact was brought to the Courts attention for consideration.

Further that in light of the full disclosure of the full facts by the Applicant to this Court in its earlier application the 2nd Applicant has no basis for making an application to discharge or vary the Order granted by this Court. That he was also advised by Counsel and verily believed the same to be true that there was nothing that prohibited the Court from granting a Charging Order for Sale over property that was subject of a prior encumbrance or charge.

He also deposed that in any event despite the 2nd Applicant having a Charge over Stand No. 12756 Lusaka they had not taken any steps towards enforcing their security. Further that with regard to the contents of

paragraphs 6 and 7 of the Affidavit in Support he wished to state that the Valuation Report of Stand No. 12756 Lusaka putting the value of the property at the sum of K4, 500, 000.00 was commissioned or undertaken on 28th April, 2011.

The deponent also stated that the 2nd Applicant had not adduced any evidence to support the assertion that the amount owed by the 2nd Respondent to the 2nd Applicant far exceeded the value of Stand No. 12756 Lusaka by way of production of a current Valuation Report for the said property.

Moreover, that with regard to the contents of paragraph 9 of the 2nd Applicant's Affidavit in Support he wished to confirm that the 1st Applicant took possession of the property in question after the Court made the Charging Order absolute and have since taken out process under Cause No. 2013/ HPC/ 486 to enforce the Charging Order the matter being presided by Madam Justice P. M. Nyambe SC.

That he had been advised by Counsel and verily believed the same to be true that the issues to be determined under Cause 2013/ HPC/ 486 and this Cause were different in that under Cause 2013/ HPC/ 486 the 1st Applicant was seeking to enforce the Charging Order whereas under this Cause the issue to be determined by this Court was whether the Court had jurisdiction to grant the Charging Order or not.

That in the circumstances, he humbly urged this Court to dismiss with costs the 2nd Applicant's application as it lacked merit.

There is also an Affidavit in Reply filed into Court by the 2nd Applicant on 9th December, 2014 and deposed by Thula Nyasulu the Accountant employed by the 2nd Applicant.

That in response to the contents of paragraphs 4 and 5 of the Affidavit in Opposition he verily believed that the 1st Applicant in their Affidavit in Support of the application for a Charging Order did not bring it to the Court's attention that the two prior Charges in favour of the 2nd Applicant were to secure the sum of ZMW2, 500, 000.00 together with interest having only disclosed to the Court that there was only ZMW 2, 500,000.00 outstanding which amount when added to the amount owed to the 2nd Applicant by the 1st Respondent was within the value of the property in issue.

Further, that in response to paragraph 6 of the Affidavit in Opposition, he verily believed that the basis of the application before this Court is that there was already in existence at the material time and also to date, two charges in favour of the 2nd Applicant far exceeding the value of the property and therefore the 1st Applicant's charge stemming from the Charging Order dated 20th August, 2013 is otiose.

He further stated that where a prior encumbrance exceeded the value of the property to be subject to a second charge, the Court would be precluded from granting a charge in the first place and later on, an Order for sale of the property subject to the prior encumbrance or charge.

Mr. Nyasulu stated that he verily believed that the Respondents herein handed over vacant possession of Stand Number 12756 Lusaka to the 2nd Applicant the Respondents having already executed letters of sale in favour of the 2nd Applicant herein relating to Stand No. 12756, Lusaka.

That by reason of the same, he verily believed that the 1st Applicant had a duty to notify the 2nd Applicant as an interested party before they proceeded to execute on Stand No. 12756, Lusaka and the 2nd Applicant had by reason of the two applications made by the 1st Applicant under Cause Number 2012/ HPC/ 0166 and Cause Number 2013/ HPC/ 486 been precluded

from taking any further steps towards enforcing their power of sale as conferred by the Mortgage Deed and the Further Charge.

He further deposed that he verily believed that the 1st Applicant in their Application to Charge Stand No. 12756, Lusaka under Cause Number 2012/ HPC/ 0166 produced as their evidence the Valuation Report commissioned on 28th April, 2011 putting the value of the property at the sum of ZMW 4, 500,000.00 and used the same Valuation Report in their subsequent application to enforce the Charging Order under Cause Number 2013/ HPC/ 486 and labelled exhibit CM5.

That he verily believed that a current valuation had not been produced before this Court because the Valuation Report dated 28th April, 2011 was already in evidence before this Court as well as in the matter presided over by Honourable Madam Justice P. C. Nyambe S. C.

He also stated that he verily believe that cause Number 2013/HPC/ 486 wherein the 1st Applicant was seeking to enforce the Charging Order dated 20th August, 2013 which emanated under cause Number 2012/ HPC/ 0166 before this Court and by reason of the same could not be overlooked.

That by reason of the aforesaid he craved the indulgence of this Honourable Court in discharging and or varying the said Charging Order.

Counsel for the 2nd Applicant filed in Skeleton Arguments in Support of Summons for an Order to Discharge or Vary the Charging Order dated 20th August, 2013.

Counsel submitted that the 2nd Applicant had applied to discharge the Charging Order dated 20th August, 2013 pursuant to Order 50 Rule 7 of the Rules of the Supreme Court 1965, White Book (1999 Edition) which provides that:

“Subject to paragraph (2), on the application of the judgment debtor or any other person interested in the subject matter of the charge, the Court may, at any time, whether before or after the order is made absolute, discharge or vary the order on such terms (if any) as to costs or otherwise as it thinks just.”

Counsel further submitted that the 2nd Applicant herein was a person interested in the subject matter of the Charge dated 20th August, 2013 and therefore this was a case befitting the exercise of the Court’s discretion in discharging the Charging Order dated 20th August, 2013.

Counsel referred this Court to the provisions of Order 50/ 9A/25 of the Rules of the Supreme Court 1965, White Book (1999 Edition), which sets out factors that the Court must take into account before it can exercise its jurisdiction in making Charging Orders. It provides inter alia that:

“in deciding whether to make a charging order the Court shall consider all the circumstances of the case, and, in particular any evidence before it as to - ...

whether any other creditor of the debtor would be likely to be unduly prejudiced by the making of the order.”

Counsel then submitted that this Court was not presented with evidence before it as to whether the 2nd Applicant would likely to be unduly prejudiced by the making of the Order as the Courts attention was not drawn to the fact that the 2nd Applicant’s Charge was to secure the sum of ZMW2, 500,000.00 together with interest and no attempt was made to ascertain the actual amount outstanding and due from the 1st and 3rd Respondents to the 2nd Applicant.

Counsel also relied on the Halsbury's Laws of England, 4th Ed, Vol 32 1980 as regards priority between Mortgagees and other encumbrances which provides that:

“A judgment creditor can obtain a Charging Order on the debtor’s land, but, in order that the Charge may be effectual against a Mortgagee, the Order for enforcing the debt must have been registered at the time of the Mortgage.”

Counsel stated that he was further fortified in his submissions by Section 7 of the Lands and Deeds Registry Act, Cap 185 of the Laws of Zambia which provides that:

“ (1) All documents required to be registered as aforesaid shall have priority according to date of registration; notice of a prior unregistered document required to be registered as aforesaid shall be disregarded in the absence of actual fraud.

(2) The date of registration shall be the date upon which the document shall first be lodged for registration in the Registry or, where registration is permitted in a District Registry, in such District Registry.”

Counsel also relied on the learned authors R. E Megarry and HW Wade: The Laws of Real Property 4th Edition, paragraph 24 – 026 which provides that:

“Save for special provisions relating to certain statutory charges, registered Charges rank in priority to the Order shown on the register and not the order of creation.”

He also referred to the Latin maxim **qui prior est, temporepotior est jusre** translated as **he who is first in time is stronger in law**. It was submitted

that the Charging Order in favour of the 1st Applicant was granted on 20th August, 2013 and registered in the Lands and Deeds register on 22nd August, 2013. On the said date there was already registered in the said Lands Register, a Third Party Mortgage dated 15th January, 2010 and entered into between the 1st and 2nd Respondents, and the 2nd Applicant herein in favour of the 2nd Applicant to secure K2, 000,000.00 and interest as well as a Further Charge dated 22nd February, 2011 and entered into between the parties aforesaid to secure a further sum of K500,000.00 plus interest.

It was contended that it is trite law that Creditors taking security must make a point of establishing by due diligence that there are no pre existing interests to which their own security will be subordinated. It was Counsel's considered view that the existence of the 2nd Applicant's absolute superior opposing interest extinguishes the 1st Applicant's Charge altogether. She further submitted that the said charge was 'otiose' as the amount now outstanding from the 1st Respondent to the 2nd Applicant is ZMW 8,593,746.32 which amount exceeds the value of Stand No. 12756 Chinika Industrial Area Lusaka, consequently the 1st Applicant cannot have recourse to the same in order to recover its debt of K6, 800,000.00.

Further that the 1st Applicant initially obtained a Charging Order over Stand Number 20614, Chinika Industrial Area Lusaka and not Stand Number 12756, Chinika Industrial Area, Lusaka. It was only after realising that the said property did not belong to the 3rd Respondent that the 1st Applicant did seek to cast its net wide and Charge Stand number 12756, Chinika Industrial Area, Lusaka which property was already encumbered by the 2nd Applicant.

It was therefore Counsel's prayer that this Court discharges the Order dated 20th August, 2013 with costs to the Applicant.

The 1st Applicant also filed Skeleton Arguments in opposition to the Summons for an Order to Discharge or Vary the Charging Order.

Counsel for the 1st Applicant submitted that the Charging Order could not be discharged on the basis that the judgment debtor's land was encumbered because there was nothing which prohibited the Court from issuing a Charging Order over land which was subject to a prior encumbrance like in the present case.

Counsel submitted that contrary to the assertion that the 1st Applicant did not disclose to the Court that the property in issue was encumbered by way of a Third Party Mortgage and a Further Charge in favour of 2nd Applicant, the 1st Applicant did disclose all material facts to the Court in its Affidavit in Support of Exparte Summons for a Charging Order on land filed into Court on the 26th of July, 2013. Paragraph 17 of the aforesaid Affidavit contains the disclosure relating to the prior encumbrances on Stand 12756 Lusaka.

It was contended that in view of the fact that the 1st Applicant disclosed all material facts before the Court made its decision, the 2nd Applicant's application should not be entertained. Further, the 2nd Applicant appeared to be asking this Honourable Court to discharge the Charging Order on the assertion that the debt owed to it by the Respondent far exceeds the value of the property in question.

Counsel submitted that the aforesaid assertion was not backed by evidence by way of a current Valuation Report stating the current value of the property. The Valuation Report the 2nd Applicant was relying on to determine the value of the property was undertaken in 2011. In any event, issues of the value of the property which is the subject of the Charging Order were to be determined under Cause 2013/ HPC/486.

In the premises Counsel for the 1st Applicant urged this Court to dismiss the 2nd Applicant's application with costs.

During the hearing on 10th December, 2014 both the 1st and 2nd Applicants were before Court, however there was no representation from the Respondents. Both Counsel for the Applicants basically repeated what had been stated in the respective Affidavits and the arguments in the respective Skeleton Arguments.

In his Affidavit sworn on behalf of the 1st Applicant Mr. Esau Mtonga confirmed that the 1st Applicant took possession of the property in question after the Court made the Charging Order absolute and that the 1st Applicant has since taken out process under Cause No. 2013/HPC/486 to enforce the Charging Order the matter being presided by Madam Justice P.M. Nyambe SC. He states that he has been advised by Counsel that the issues to be determined under Cause No. 2013/HPC/486 and this Cause were different. It is my considered view that the 1st Applicants taking out process under Cause No. 2013/HPC/486 is a classical example of multiplicity of actions and an abuse of Court process. In the two Causes of Actions there are common questions of law and facts and the rights to relief are arising out of similar transactions. The 1st Applicant ought to have applied for enforcement of the Charging Order under this cause instead of taking out a new cause.

I have considered the Affidavit evidence, the Skeleton Arguments, the authorities cited by both learned Counsel for the 1st and 2nd Applicants.

Having done so, I am of the view that the main issue for determination by this Court is whether this Court should discharge or vary the Charging Order dated 20th August, 2013.

Counsel for the 2nd Applicant contends that as a person interested in the subject matter the 2nd Applicant would be prejudiced if this Court did not consider its prior interest in the property that A.M. Wood J (as he then was) Charged on 20th August, 2013. Further that at the time that the Charging Order was created, the Court was not presented with evidence to show that the 2nd Applicant would not be prejudiced. Counsel relied on the Halsbury's laws of England, the Lands and Deeds Registry Act, Cap 185 of the Laws of Zambia as well as Megarry & Wade: Law of Real Property to show that the 2nd Applicant a prior interest in the property which deserved consideration by the Court.

Counsel for the 1st Applicant on the other hand opposed the application to discharge or vary the Charging Order. The gist of his arguments are that there was nothing that prohibited the Court from issuing a Charging Order over land which was subject to a prior encumbrance as was the case here.

Further that the Court was on firm ground on the authority of Order 50 Rule 7 of the Rules of the Supreme Court 1965 White Book to issue a Charging Order against the 3rd Respondents land as well as based on the fact that the 1st Applicant had actually disclosed all material facts before the Court made its decision.

Although Counsel for the 2nd Applicant contends that the Charge of 20th August, 2013 was wrongly obtained by the 1st Applicant, I do not agree with this contention because although the Court was aware of the fact that there was already a Third Party Mortgage dated 15th January, 2010 and a Further Charge dated February, 2011 between the 1st Respondent, the 3rd Respondent and the 2nd Applicant the Court used its equitable jurisdiction in allowing the 1st Applicant register its Charge. The 1st Applicants Counsel in their Skeleton Arguments filed on 26th July, 2013 in Support of the application that a Charging Order be issued submitted inter alia that:

“... we are also alive to the fact that the property currently stands encumbered to First Alliance Bank, but beseech the equitable jurisdiction of this Honourable Court to allow the Applicant’s register a charge on the said property even as second charges, so as to ensure that the Applicant recovers from even from the residue of sale value of the property, more that the Applicant has been made to believe until now that it had a charge over Stand No. 12756 Lusaka when in fact not.”

It is clear that the 1st Applicant knew about the 2nd Applicants land charges over the property and wished to be granted a second charge which would be subordinated to the 2nd Applicants prior or first charge.

When it comes to the priority of registered land charges, the Halsbury’s Laws of England, 4th Edition Vol 32 is instructive. At paragraph 545 it states that:

“When mortgages which require to be registered as land charges (that is, every mortgage whether legal or equitable, not being a mortgage protected by the deposit of documents relating to the legal estate affected) are registered, they rank according to their date of registration.”

Therefore, all prior interests should be taken into consideration and the 2nd Applicant as a proper interested party deserves the right to be considered since its prior interests were registered long before the Charge of 20th August, 2013.

The submission by the 1st Applicant that the 2nd Applicants application for an Order to Discharge or Vary the Charging Order issued or made by this Court on 20th August, 2013 should not be entertained flies in the teeth of the disclosure of the prior encumbrances on Stand No. 12756 Lusaka

contained at paragraph 17 of the 1st Applicants Affidavit in Support of Ex – parte Summons for a Charging Order on Land and the 1st Applicants Counsels submission that the 1st Applicant would settle for a second charge.

The authorities that Counsel for the 2nd Applicant cited in her Skeleton Arguments also supported her submissions. Section 7 of the Lands & Deeds Registry Act, Megarry & Wade: The Law of Real Property, the Halsbury's Laws of England all confirm that prior interests should be taken into consideration.

I therefore allow the application of the 2nd Applicant to vary the Charging Order of 20th August, 2013 so that it can now take the prior interests of the 2nd Applicant into consideration.

The Charging Order made by A.M. Wood, J (as he then was) on 20th August, 2013 is varied by making it subject to the 2nd Applicants prior charges on the property known as Stand No. 12756, Chinika Industrial Area, Lusaka securing the sum of K2,500,000.00 and interest which as at 14th October, 2014 was reportedly K8,593,746.23.

For avoidance of doubt it is hereby adjudged that the Third Party Mortgage dated 15th January, 2010 and the Further Charge dated 22nd February, 2011 and entered into between the 1st and 3rd Respondents and the 2nd Applicant which were duly registered at the Lands and Deeds Registry on 15th January, 2010 and 22nd February, 2011 respectively rank in priority to the Charging Order made by the Court on 20th August, 2013.

It is trite that mortgagees can not share equally in the proceeds of sale of Mortgaged Property. Each mortgagee takes his full claim in order of priority. Consequently the Mortgaged Property must be valued before it is sold. I accordingly Order that Stand No. 12756, Chinika Industrial Area, Lusaka be valued by a registered valuation surveyor to be agreed upon by the parties.

The Valuation Report which must be completed within 45 days from date hereof is to provide opinions of both the Open Market Value and the Forced Sale Value. The costs of the Valuation and the Valuation Report are to be paid by the 2nd Applicant as mortgagee in possession from the sale proceeds of the Mortgaged Property.

Costs are awarded to the 2nd Applicant to be taxed in default of agreement.

Leave to appeal is granted.

Delivered in the Chambers at Lusaka this 15th day of April, 2015.

A handwritten signature in black ink, consisting of a series of slanted, parallel strokes followed by a circular flourish at the end.

**WILLIAM S. MWEEMBA
HIGH COURT JUDGE**