

**IN THE HIGH COURT FOR ZAMBIA**

**2017/HPC/0130**

**AT THE COMMERCIAL REGISTRY**

**HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*



**BETWEEN:**

**CAVMONT BANK LIMITED**

**APPLICANT**

**AND**

**JOHN SAKALA**

**(T/a Naojo Blessing Trading)**

**RESPONDENT**

*Heard and delivered by Lady Justice B.G Lungu on 6<sup>th</sup> June, 2017 in chambers at Lusaka.*

*For the Applicant, Mr. K. Musabandesu, Messrs M & M Advocates  
For the Respondent, Mr John Sakala, In person*

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## **J U D G M E N T**

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**CASES REFERRED TO:**

- 1. China Henan International Economic Technical Cooperation v Mwange Contractors Limited, 2002 ZR 28*
- 2. Reeves Malambo v. Patco Agro Industries Limited, S.C.Z Judgment No. 20 of 2007, 2007 ZLR*
- 3. Salt v. Marquis of Northampton (1892) A.C. 1;*
- 4. Match Corporation Limited and Development Bank of Zambia and the Attorney General, S.C.Z. JUDGMENT NO. 3 OF 1999;*
- 5. S. Brian Musonda (Receiver Of First Merchant Bank Zambia Limited) V Hyper Foods Products Limited And Creation One Trading (Z) Limited, (1999) ZR 124.*

**LEGISLATION AND OTHER MATERIALS REFERRED TO:**

1. ***Order XXX, rule 14, High Court Rules, High Court Act, CAP 27 of the Laws of Zambia, CAP 27 of the Laws of Zambia***
2. ***David J. Hayton, Megarry's Manual of the Law of Real Property, 6th Edition***

This matter was commenced on 20<sup>th</sup> March, 2017 by way of Originating Summons pursuant to ***Order 30 Rule 14 of the High Court Rules of the High Court Act, Chapter 27 of the Laws of Zambia***. The Summons was accompanied by an Affidavit in Support of even date.

In the Originating Summons, the Applicant sought the following reliefs:

- i. Payment of all the monies plus interest thereon due to the Applicant from the Respondent and such costs as would be payable by the Respondent if this were the only relief granted;
- ii. alternatively, delivery by the Respondent to the Applicant of possession of the mortgage property or the relief of foreclosure with respect to Stand No. 94 Block 22 Garden Compound, Lusaka ;
- iii. further or relief;
- iv. costs for the action

The Affidavit in Support, sworn by Martha Lungu Sichone, the Senior Officer of the Recoveries Department of the Applicant, revealed that the Applicant availed the Respondent a credit facility in the sum of K250, 000 on 27<sup>th</sup> June, 2016, on the security of a legal mortgage over Stand No. 94 Block 22, Garden Compound, Lusaka.

It was deposed that the Respondent persistently defaulted in his payment obligations notwithstanding numerous demands and reminders and that his outstanding indebtedness stood at K221, 856.15.

The Affidavit in Support exhibited: (i) a copy of the Loan Agreement, exhibit "MSL1"; (ii) a copy of the Mortgage Deed, exhibit "MSL2"; (iii) a copy of the Occupancy Licence in respect of House Number 94 Block 22, Garden Improvement Area, registered in the name of the Respondent, exhibit "MSL3"; (iv) and the Respondent's Loan Account Statement held with the Applicant covering the period 30<sup>th</sup> June, 2016 to 3<sup>rd</sup> November 2016, exhibit "MSL4".

When the matter came up for hearing on 6<sup>th</sup> June, 2017, Counsel for the Applicant relied on the Originating Summons and Affidavit in Support .

Counsel submitted that the Applicant's prayer was for payment of the amount of K221,856.15 plus with interest, within a reasonable

time to be given by the Court for redemption, and in default of payment within such redemption time, and in the alternative, delivery to the Respondent of possession and the relief of foreclosure of the mortgaged property.

Counsel drew the Court's attention to paragraph 6 of the Affidavit in Opposition, sworn by the Respondent, wherein the Respondent admits owing the amount claimed.

As regards the Respondent's position, the Affidavit in Opposition filed on 5<sup>th</sup> June, 2017 revealed that the Respondent did not dispute his indebtedness, albeit the Respondent sought time within which to settle the debt. At the hearing, the Respondent exhorted the Court to grant him time to pay the debt in monthly instalments of K5000 kwacha.

Having heard the submissions of both parties and having examined the Affidavit evidence on record, I am satisfied that the Respondent has admitted the Applicant's claim for payment of the outstanding sum claimed.

My position is premised on the express admission contained in paragraph 6 of the Affidavit in Opposition which reads, in part, as follows:

*"... it is true that the Respondent got a credit facility from the Applicant that the Respondent is not disputing the amount and is willing to settle all monies due if only given an opportunity by the Honourable Court to pay in instalments within a specified period of time"*

I find it necessary at this point to draw attention to the findings of the Supreme Court in the case of **China Henan International Economic Technical Cooperation v Mwange Contractors Limited**.<sup>1</sup> In that case, the Court stated that *"it would be absurd to expect a Court which is in control, to pause and wait for an application {for judgment on admission} where clearly the defence is deemed to have admitted the claim."*

Bearing in mind the **China Henan** case, and being satisfied that the Respondent unequivocally admits its indebtedness to the Applicant, I take the view that this is an appropriate case for the Court to enter Judgment on Admission. I accordingly enter Judgment on Admission in favour of the Applicant in the sum of K221, 856.15 plus interest at the contractual rate from 20<sup>th</sup> March, 2017 to date of Judgment and thereafter at the Bank of Zambia short term lending rate until date of full and final settlement by the Respondent.

I now move to consider the Applicant's claim for the alternative remedies of possession and foreclosure.

With respect to possession, I note that clause 3 (vii) of the Mortgage Deed gives the Applicant the right to re-enter and take possession of the mortgaged property when it has become entitled to do so. Further, it is trite law that a legal mortgage gives the mortgagee a legal estate in possession subject to any agreement to the contrary. As such, in the absence of agreement to the contrary, the mortgagee is entitled to take possession of the mortgaged property as soon as the mortgage is made, even if a mortgagor is guilty of no default.

In the case before me, I note that Counsel for the Applicant has indicated the Applicant's willingness to forbear from taking possession unless and until default goes beyond the time sets for the Respondent to redeem the mortgaged property.

As regards foreclosure, I draw attention to the case of *Reeves Malambo v. Patco Agro Industries Limited, S.C.Z Judgment No. 20 of 2007, ZLR (2007)<sup>2</sup>* where the Supreme Court held that "*A mortgagee is at liberty to exercise his right to foreclosure and sell the property in the event of default and failure by the mortgagor to redeem the mortgaged property...*"

The right to redeem is founded in the law of equity as articulated in case law and literary works, which include *David J. Hayton, Megarry's*

***Manual of the Law of Real Property, 6th Edition*** as considered with the cases of ***Salt v. Marquis of Northampton (1892) A.C. 1***,<sup>3</sup>, ***Match Corporation Limited and Development Bank of Zambia and the Attorney General, S.C.Z. JUDGMENT NO. 3 OF 1999***<sup>4</sup> and ***S. Brian Musonda (Receiver Of First Merchant Bank Zambia Limited) V Hyper Foods Products Limited And Creation One Trading (Z) Limited, (1999) ZR 124***<sup>5</sup>.

The highlighted authorities, in my view, converge in articulating the principle that a mortgagor has a right, in equity, to redeem even after the date fixed by the mortgage agreement for repayment has passed. This is effected through the exercise of the Court of its power to interfere with the contractual rights of a mortgagee by extending the time in which the mortgagor can settle its outstanding indebtedness before foreclosure is rendered absolute. The interference is preceded by there being reasonable prospects that the monies due can be paid within a reasonable time.

In the case before me, both parties are amenable to the Respondent being given time to redeem the mortgaged property. They are, however, at odds regarding the time that should be given. The proposal by the Respondent to be permitted monthly instalment of K5000 translates to a payment period in excess of 3 years. In my view, a period of 3 years cannot be considered reasonable in light of the fact that the loan agreement provides for a two year repayment

period of principal and interest, constituting 24 monthly instalments ending on 30<sup>th</sup> June 2018.

Considering, also, that the Respondent has been delinquent in servicing the loan, his breach has exposed him to the demand of earlier payment pursuant to the proviso contained in Clause 1 of the Mortgage Deed. The fact that the Respondent proposes to pay over three year period notwithstanding that the Applicant has called in the entire loan, to me, indicates that the Respondent has no capacity to pay, as attested in paragraph 7 of his Affidavit in Support.

The delinquency, together with the deposed capacity challenges are indicators of the Respondent's likely inability to make immediate payment or payment within a period less than 3 years. However, as the Applicant is not averse to giving the Respondent an opportunity to redeem, the Court considers that a period of six months should suffice as reasonable in the circumstances.

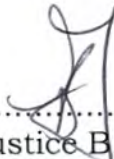
In view of the foregoing it is adjudged that the Respondent pay the Judgment Debt of K221, 856.15 plus interest within 6 months from the date of Judgment.



In the event that the Respondent fail to liquidate the Judgment Debt within 6 months from the date of Judgment, foreclosure relating to the mortgaged property will automatically be rendered absolute, upon which the Respondent's right to redeem in equity and at law shall stand extinguished.

It is further adjudged that although the Applicants right to take possession has become enforceable in terms of the Mortgage Deed, that right is suspended during the period of foreclosure nisi. As such, the Applicant may take possession after foreclosure has been rendered absolute.

Costs incidental to these proceedings shall be borne by the Respondent, such costs to be taxed in default of agreement.



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Lady Justice B.G.Lungu  
**HIGH COURT JUDGE**