

**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT KITWE**
(Civil Jurisdiction)

2017/HKC/0006

B E T W E E N:

**PULSE FINANCIAL SERVICES LIMITED
T/A ENTREPRENEURS FINANCIAL CENTRE**

APPLICANT

AND

EMMANUEL KANJELE

1ST RESPONDENT

DORIS KABASO KANJELE

2ND RESPONDENT

Before Lady Justice B.G Lungu on 15th August, 2017 in chambers at Kitwe.

*For the Applicant, Mr.H. Pasi, Messrs Pasi Advocates.
For the Respondents, Each In-Person.*

J U D G M E N T

CASES REFERRED TO:

1. *China Henan International Economic Technical Cooperation v Mwange Contractors Limited, 2002 ZR 28;*
2. *Salt v. Marquis of Northampton (1892) A.C. 1;*
3. *James v. James (1873) L.R 16 Eq. 153;*
4. *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. *section 14 (1) of the Housing (Statutory and Improvement Areas) Regulations;*
3. *David J. Hayton, Megarry's Manual of the Law of Real Property, 6th Edition.*

This matter was commenced on 5th July, 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 seeks the following reliefs:

- i. Payment by the Respondents of all monies and interest due and owing to the Applicant under Loan Agreements dated 18th March 2015 secured by a Legal Mortgage over Stand No. 7839 Chingola and a Third Party Mortgage over House No. 13, Gibson Chimfwembe Road, Twatasha Site and Service, Chingola which monies stood at ZMW515, 541.94 as at 31st May, 2017;
- ii. An order that the Legal Mortgage over Stand No. 7839 Chingola and Third Party Mortgage over House No. 13, Gibson Chimfwembe Road, Twatasha Site and Service, Chingola may be enforced by foreclosure and sale;
- iii. An order for delivery by the Respondents to the Applicant of vacant possession of the mortgage properties;
- iv. Further or other relief; and

v. Costs and other charges incurred by the Applicant.

According to the Affidavit in Support deposed by Huntley Ng'andu, a legal officer in the employ of the Applicant, the Applicant availed the Respondent a credit facility in the sum of K475, 000 on 18th March, 2015, on the security of a Legal Mortgage over Stand No. 7839 Chingola, a Guarantee issued by the Second Respondent and a Third Party Mortgage over House No. 13, Gibson Chimfwembe Road, Twatasha Site and Service, Chingola.

It was deposed that the Loan Agreement of 18th March, 2015 gave the Applicant the right to seize and dispose of all collateral provided in the event that the Respondents defaulted in any payment of the loan and interest due. The deponent avowed that the Respondents were in default of payment and that by letter dated 15th March, 2016, a notice of default was issued to the 1st Respondent. Additionally, a letter of demand dated 23rd November, 2016 was stated to have been issued to the 1st Respondent.

In summation, it was attested that the Respondent's indebtedness to the Applicant as at 31st May, 2017 stood with an outstanding balance of ZMW515, 541.94.

The Affidavit in Support exhibited the following documents in aid of the deposition: (i) a copy each of the Loan Agreements dated 18th March, 2015 entered into between the Applicant and the 1st

Respondent, exhibit "HN2"; (ii) a copy of the Mortgage Deed over Stand No. 3492, Kitwe made between Alfred Harrison Ali Mubamba and the Applicant, exhibit "HN3"; (iii) a copy of the Specific Guarantor Agreement entered into between the Applicant and the 2nd Respondent, exhibit "HN4"; (iv) a copy of the Third Party Mortgage over Stand No. 13 Gibson Chimfwembe Road-Twatasha, Chingola, entered into by the 2nd Respondent and the Applicant; (v) a copy of the notice of demand issued on 15th March, 2016, exhibit "HN6"; and (vi) a copy of the letter of demand dated 23rd November, 2016 addressed to the 1st Respondent issued on behalf of the Applicant by its attorneys, exhibit "HN7."

When the matter came up for hearing on 15th August, 2017, Counsel for the Applicant relied on the Originating Summons, Affidavit in Support and Skeleton Arguments on record.

Counsel drew the Court's attention to the fact that the loan was secured by two properties.

As regards the Respondents' position, no documents were filed in opposition. On the date of hearing, the 1st Respondent submitted that he did not dispute his indebtedness and affirmed that he had no problems with the mortgaged properties being enforced, albeit he had hoped that the parties could settle the matter out of court.

Having heard the submissions of both parties and having examined the Affidavit evidence on record, I am satisfied that the 1st Respondent has admitted the Applicant's claim for payment of the outstanding sum claimed.

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**.¹In 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 ZMW515,541.94 plus interest at the contractual rate of 3% per month from 5th July, 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 Respondents.

I now move to consider the Applicant's claim for the alternative remedies of possession, foreclosure and sale of Stand 7839,

Chingola. This claim is premised on the terms of the Mortgage Deed, exhibit "HN3". I have examined exhibit "HN3" which, in fact, is a Mortgage Deed relating to Stand 3492 and relates to a loan extended to one Rose Namonje. The exhibited Mortgage Deed has no bearing on the matter now before Court. As such, there is no evidence before me to support the Applicant's claim for enforcement of the reliefs sought in respect of Stand No. 7839, Chingola.

Consequently, in the absence of evidence of the existence of a legal mortgage over Stand No. 7839, Chingola, the Applicant's claim to take possession of, foreclose on and exercise the right of sale over Stand No. 7839, Chingola fails.

I have also considered the claim to enforce the Third Party Mortgage over Stand No. 13 Gibson Chimfwembe Road- Twatasha, Chingola.

My examination of the Third Party Mortgage Deed relating to that property reveals that the Mortgage contains the following provision:

"... In the event of default of the Borrower of which I have received Notice of Default from the Lender, as Guarantor of the Borrower I hereby agree:

- 1. That I will pay the lender the above sum of K475, 000 together with interest and costs.***
- 2. That I will pay interest ... at the rate of 51% per annum ...***

3. That ... for better securing to the lender the repayment in the manner aforesaid of the principal sum and interest I hereby charge and mortgage..."

My interpretation of the aforementioned provision is that enforcement of the Mortgage is activated when the mortgagor, being the 2nd Respondent, receives Notice of Default from the Lender, being the mortgagee, and fails to pay the sum that she undertook to pay.

The Affidavit evidence reveals that both the Notice of Default of 15th March, 2016 and the Letter of Demand of 23rd November, 2016 were copied to the 2nd Respondent. As such, I do not hesitate in finding that the right to enforce the Third Party Mortgage has been activated as Notice of Default was effected, the mortgage money has become payable and the 2nd Respondent has to date failed to redeem the mortgage.

I take this opportunity to address the right to redeem, which 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. 1.2*, *James v James (1873) L.R 16 Eq. 153*³ and *S. Brian Musonda (Receiver Of First Merchant Bank Zambia*

Limited) V Hyper Foods Products Limited And Creation One Trading (Z) Limited, (1999) ZR 124⁴.

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, the 1st Respondent expressed his willingness for the mortgaged properties to be disposed of. No request was made to the Court to extend the time for redemption. Accordingly, I see no need to delve into interfering with the Mortgagee's right to enforce the cumulative rights associated with its security.

In view of the foregoing, it is adjudged that in lieu of the payment of the Judgment Debt of ZMW 515, 541.94, the 2nd Respondent is ordered to deliver up vacant possession of Stand No. 13 Gibson Chimfwembe Road- Twatasha, Chingola.

It is further adjudged that the Applicant is at liberty to foreclose and exercise the power of sale in respect of Stand No. 13 Gibson Chimfwembe Road- Twatasha, Chingola in accordance with **section 14 (1) of the Housing (Statutory and Improvement Areas) Regulations.**

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

Dated the 15th day of August, 2017



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Lady Justice B.G.Lungu
HIGH COURT JUDGE