

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

2017/HKC/0010

B E T W E E N :

PULSE FINANCIAL SERVICES LIMITED
T/A ENTREPRENEURS FINANCIAL CENTRE

APPLICANT

AND

REUBEN GERSHOM MULWANDA

RESPONDENT

Before Lady Justice B.G Lungu on 17th August, 2017 in chambers at Kitwe.

For the Applicant, Mr.H. Pasi, Messrs Pasi Advocates

JUDGMENT

CASES REFERRED TO:

1. *S. Brian Musonda (Receiver Of First Merchant Bank Zambia Limited) vs. Hyper Foods Products Limited and Creation One Trading (Z) Limited, (1999) ZR 124;*
2. *Luke Phiri vs. David Tembo, (2011) ZLR (Vol. 3);*
3. *Informatics Limited and Others vs. Stanbic Bank Zambia Limited, (2011), ZLR (Vol. 1).*

LEGISLATION AND OTHER MATERIALS REFERRED TO:

1. *Order XXX, rule 14, High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia;*

2. *Order XI, rule 22, High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia;*
3. *Regulation 12, Housing (Statutory and Improvement Areas) Regulations, Housing (Statutory and Improvement Areas) Act, Chapter 194 of the Laws of Zambia;*
4. *Section 9, Housing (Statutory and Improvement Areas) Act, Chapter 194 of the Laws of Zambia;*
5. *Section 16, Housing (Statutory and Improvement Areas) Act, Chapter 194 of the Laws of Zambia.*

The Applicant commenced this action against the Respondent on 20th July, 2017, by way of Originating Summons. The reliefs that the Applicant seeks are as follows:

1. Payment by the Respondent of all monies and interest due and owing to the Applicant under Loan Agreements dated 25th April, 2015 secured by a Legal Mortgage over Plot No. MC139, Mikomfwa Statutory Housing Area, Luanshya which monies stood at ZMW 327, 690.986 as at 31st May, 2017;
2. An order that the Legal Mortgage over Plot No. MC139, Mikomfwa Statutory Housing Area, Luanshya may be enforced by foreclosure and sale;
3. An order for delivery of vacant possession of the mortgaged property by the Respondent to the Applicant;
4. Further or other relief;

5. Costs and other charges incurred by the Applicant.

The Originating Summons was supported by an Affidavit deposed by one Huntley Ng'andu, a legal officer in the employ of the Applicant, Skeleton Arguments and List of Authorities filed on 20th July, 2017.

The deponent of the Affidavit in Support attested that by Loan Agreements entered into on 18th May, 2015, the Applicant granted the Respondent a loan in the sum of ZMW 280,000.00.

It was deposed that the loan attracted interest at the rate of 4.25% per month and that the facility was secured by way of a legal mortgage over Plot No. MC139, Mikomfwa Statutory Housing Area, Luanshya.

It was further attested that the Loan Agreement prescribed loan repayment dates and that failure to make a payment within 7 days of the due date constituted default. Additionally, the deponent avowed that default in turn activated the Applicant's right to seize and dispose of all collateral provided. The Affidavit in Support also reveals that the Respondent defaulted in his payment obligations and has failed to settle his account notwithstanding demand having been made. Accordingly, the Respondent was stated to be indebted to the Applicant in the sum of ZMW 327,690,986.

The Affidavit in Support exhibited several documents as evidence to fortify the Applicant's claim, including:

- i. A copy of the Loan Agreement signed by the Respondent on 25th April, 2015, exhibit marked "**HN2**";
- ii. An unclear copy of the Mortgage Deed over PlotNo. MC139, Mikomfwa Statutory Housing Area, Luanshya, executed by the Respondent in favour of the Applicant, exhibit marked "**HN3**";
- iii. Copies of Final Notices of Default dated 15th March, 2016, 4th April, 2016, and 13th April, 2016, exhibit "**HN4**";
- iv. A copy of the letter of demand issued to the Respondent on behalf of the Applicant, dated 23rd November, 2016.

The gist of the Applicant's argument, as contained in the Skeleton Arguments filed on behalf of the Applicant, is that the Applicant extended a secured loan facility to the Respondent, who failed or neglected to settle its indebtedness to the Applicant, notwithstanding demand having been made.

The Applicant contends that as a mortgagee, it has a right to take out this action under **Order XXX, rule 14 of the High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia** to seek the cumulative remedies stated in the Originating Summons. The case of **S. Brian Musonda (Receiver of First Merchant Bank Zambia Limited) v Hyper Foods Products Limited and Others (1999) Z.R. 124¹** was cited as an authority for the mortgagee's entitlement to cumulative remedies.

When the matter came up for hearing, Counsel for the Applicant relied on the Summons and supporting Affidavit, List of Authorities and Skeleton Arguments on record.

At the said hearing, the Respondent was not in attendance. The Respondent's absence followed my Ruling of 17th August, 2017, wherein I explicated that in terms of **Order XI, rule 22 of the High Court Rules**, a party who has not entered appearance to an Originating Summons has no audience before Court. In that Ruling, I also expunged the Affidavit in Opposition for being irregularly filed in the absence of the entry of appearance and outside the period limited in the Originating Summons. Accordingly, I proceeded to hear the matter on the merits in the absence of the Respondent.

In considering this matter on the merits, I will examine whether this action can be classified as a mortgage action. Thereafter, I will consider whether the Applicant has proved that the debt has become due and payable. Lastly, I will address whether the Applicant's right to enforce the Mortgage Deed has matured.

The term "mortgage action" was aptly defined in the holding of my learned senior brother, Judge Mutuna, in the case of **Luke Phiri V David Tembo²**, as *"an action where there is a claim of moneys secured by a property. The claim is normally accompanied by a claim for possession of the mortgaged property"*.

As regards the rules applicable to mortgage actions, the Supreme Court had occasion to pronounce, in the case of **Informatics Limited and Others V Stanbic Bank Zambia Limited**³ that mortgage actions are brought under Order 30, Rule 14, of the High Court Rules.

Having carefully read the Affidavit and Skeleton Arguments in Support of the Originating Summons herein, it is clear from the unopposed Affidavit evidence that this is an action for a claim of moneys secured by property, which claim is accompanied by a bouquet of other reliefs including delivery of possession of the mortgaged properties, foreclosure and sale of the said property. Accordingly, I am of the settled view that this action falls squarely within the class of actions notoriously referred to as mortgage actions, which are taken out pursuant to Order 30 Rule 14 of the High Court Rules applies.

Penultimately, I move to consider whether the Applicant has proved that the debt has become due and payable. In this regard, the Affidavit evidence reveals that the Loan Agreement prescribes instances that constitute events of default. One such instance is a delay, by the Borrower, in making payment of a scheduled instalment of the loan and interest. Clause 6, as read with clause 12 of the Loan Agreement discloses that such default exposes the Borrower to specific sanctions, namely:

- a) seizure of any funded asset, seizure of the collateral and legal proceedings;
- b) display and publication of the defaulter's name and picture in news media;
- c) disposal of all collateral; and
- d) the payment of additional default interest of 66% of the overdue amount.

My scrutiny of the Loan Agreement did not yield the discovery of any express stipulation that the total loan outstanding becomes due and payable immediately upon default. Moreover, the Applicant did not draw my attention to any such provision in the Loan Agreement. Upon further reflection, I consider that the proposition that the whole loan becomes due, without more, is at odds with the clause ascribing the charge of additional default interest on delay.

In view of the foregoing, I am of the settled mind that the total outstanding debt and interest has not become due and payable. Nonetheless, I am satisfied that in so far as a claim for payment stands, the Applicant is entitled to claim all outstanding installment payments together with the applicable default interest.

Given that the Loan Agreement expressly gives the Respondent the right to seize and dispose of all collateral in the case of default, the question whether the Applicant's right to enforce the Mortgage Deed is now at the fore.

In considering whether the Applicant has a right to enforce the mortgage, I examined exhibit "**HN3**", the Mortgage relating to Plot No. MC 139, Mikomfwa Statutory Housing Area, Luanshya. In so doing, I observed that the copy of the Mortgage Deed that was exhibited was not clear. As a result, I could not see any registry stamp to confirm that the Mortgage was registered as required by **Regulation 12 of the Housing (Statutory and Improvement Areas), Regulations, Housing (Statutory and Improvement Areas), Act, cap 194 of the Laws of Zambia.**

I also noticed that the Applicant elected not adduce a copy of the Certificate of Title relating to the mortgaged property. The Certificate of Title would have assisted the Court in ascertaining whether the mortgage was registered. In terms of **section 9 of the Housing (Statutory and Improvement Areas) Act**, the council registrar is obliged to endorse, on the Certificate of Title, all unsatisfied mortgages and other encumbrances which the land is subject to. I am therefore, not satisfied that the mortgage herein was registered.

The Law, as contained in **section 16 of the Housing (Statutory and Improvement Areas) Act**, reads as follows:

"Any document which is required to be registered under the provisions of this Act and is not so registered shall be null and void"

A mortgage is required to be registered under **Regulation 12 of the Housing (Statutory and Improvement Areas), Regulations, Housing (Statutory and Improvement Areas), Act, cap 194 of the Laws of Zambia**

In this case, I reiterate that there is no evidence before Court to show that the Mortgage Deed was registered. Consequently, the mortgage suffers the fate of being unenforceable in accordance with section 16 of the Act. That being the case, the Applicant's claim for enforcement of the mortgage fails.

In conclusion, it is hereby adjudged that the Respondent shall pay the Applicant all outstanding installment payments together with the applicable contractual default interest, which Judgment Debt shall be assessed by the Deputy Registrar.

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

Leave to appeal is granted.

This 21st Day of August 2017



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Lady Justice B.G. Lungu
HIGH COURT