

IN THE HIGH COURT FOR ZAMBIA 2016/HPC/0479
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)



IN THE MATTER OF: ORDER 30 RULE 14 OF THE HIGH COURT
RULES, CHAPTER 27 OF THE LAWS OF
ZAMBIA

AND

IN THE MATTER OF: AN APPLICATION FOR PAYMENT OF MONIES
SECURED BY MORTGAGE AND APPLICATION
FOR DELIVERY OF POSSESSION OF PROPERTY
KNOWN AS SUBDIVISION NO. 52640 OF
STAND NO. PZ/1208, PAMODZI, NDOLA.

BETWEEN:

ZAMBIA NATIONAL COMMERCIAL BANK PLC **APPLICANT**

AND

DONALD MWILA **RESPONDENT**

Coram: Before Hon. Lady Justice Dr. W. S. Mwenda in Chambers
at Lusaka this 12th day of May, 2017.

For the Applicant : Mrs. N. N. Mbao of Messrs Nsukuwila
Nachalwe Advocates

For the Respondent : No Appearance

JUDGMENT

Case referred to:

***Reeves Malambo v. Patco Agro Industries Limited. SCZ
Judgment No. 20 of 2007.***

Legislation referred to:

- 1. Order 30 rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia.***
- 2. Section 20 of the Conveyancing and Law of Property Act, 1881.***
- 3. Section 66 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia.***

On 30th September, 2016, the Applicant herein caused to be issued out of the Commercial Registry of the High Court, an Originating Summons against the Respondent for the following remedies, namely:-

1. Payment of all monies which as at 18th August, 2016 stood at ZMW338,672.76 inclusive of interest due and owing to the Applicant by the Respondent under a house loan agreement dated 20th November, 2014, wherein Subdivision No. 52640 of Stand No. PZ/1208 Pamodzi, Ndola was pledged as security for the said house loan;
2. Foreclosure;
3. Delivery up by the Respondent to the Applicant of the mortgaged property;
4. Sale of the said mortgaged property;
5. Any further or other relief the Court may deem fit; and
6. Costs.

The Summons were supported by a verifying affidavit sworn by one Arnold Chinyama, Senior Manager-Recoveries in the

Applicant Bank who deposed to the contents therein from knowledge and information personally known to him.

The Applicant's evidence as garnered from the verifying affidavit is that on 20th November, 2014, the Applicant entered into a loan agreement with the Respondent, then an employee of the Bank, in the sum of ZMW285,000.00. The Respondent surrendered Certificate of Title No. 52640 for Stand/Plot No. PZ/1208, Pamodzi, Ndola as security for the loan. A First Legal Mortgage was created over the property and duly registered at the Ministry of Lands on 29th January, 2015. Following the contraction of the loan, the Respondent surrendered to the Applicant Certificate of Title No. 52640 relating to the said property.

It was a condition of the loan that it be serviced within twenty (20) years. It was also a term of the agreement that should the Respondent leave the bank's employment, all loans would automatically become due and payable. The Respondent was dismissed on 2nd October, 2015 and, in accordance with the terms of the agreement, the loan automatically became payable. The Respondent defaulted in his payment obligations and a demand was made on him. The Respondent did not effect any payment after the demand was made on him leading to the institution of the present proceedings against him by the Applicant.

A perusal of the court record reveals that the Respondent did not enter an appearance to the summons or file an opposing affidavit.

The matter came up for hearing on 14th February, 2017 and the Respondent was not in attendance. Learned Counsel for the

Applicant produced an Affidavit of Service of the Originating Summons, affidavit in support thereof and Skeleton Arguments dated 13th October, 2016 which showed that service of the said documents were effected by the deponent personally on the Respondent on 5th October, 2016. A second Affidavit of Service was filed on 10th February, 2016 proving that the Respondent was served with a Notice of Hearing returnable on 14th February, 2017 at 11.30 hours before this Court. In spite of his awareness of the proceedings, the Respondent opted to stay away from Court on the return date.

At the hearing, I made it a point to satisfy myself that the Respondent had been duly served with Court process but had nonetheless opted not to attend the proceedings. Having done so, I proceeded to hear the *viva voce* submissions from learned Counsel for the Applicant. Counsel submitted that the Applicant was relying on the Affidavit in Support of the Summons and Skeleton Arguments both filed into Court on 30th September, 2016. It is the Applicant's prayer that the relief it seeks in the Originating Summons be granted by this Court.

I have perused the Affidavit in Support of Originating Summons and Skeleton Arguments filed by the Applicant. As the Applicant correctly submitted, this action was filed pursuant to Order 30 rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia under which a mortgagee or mortgagor, amongst others, may take out as of course an originating summons returnable in the chambers of a judge for relief of the kind being sought by the Applicant.

I concur with the submission by the Applicant that the essential nature of a mortgage is that it is a conveyance of a legal or equitable interest in property with a provision for redemption. Indeed, the mortgagor's right to redeem the property which he used as security is sacrosanct. However, there is a proviso to this and that is, redemption is only available if the mortgagor pays the principal and interest. Where there is default, the mortgagor's right of redemption is extinguished.

The evidence on record shows that the mortgagor, who is the Respondent herein, has defaulted in the loan repayments. As such, he has lost his right to redeem the mortgaged property. In the case of *Reeves Malambo v Patco Agro Industries Limited* the Supreme Court held that:

“A Mortgagee is a liberty to exercise his right to foreclose and sell the property in the event of default and failure by the mortgagor to redeem the mortgaged property; and that under a legal mortgage by demise, the mortgagee becomes an absolute owner of the mortgage term at law as soon as the day fixed for redemption has passed”.

The case cited above is instructive as regards the remedies available to a mortgagee of a legal mortgage such as the Applicant herein. In addition to foreclosure, the right to sell the mortgaged property is another remedy available to a mortgagee. This remedy is sanctioned by section 20 of the Conveyancing and Law of Property Act, 1881 (which applies to Zambia) and section 66 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia. The said Section stipulates as follows:-

“66. (1). A power of sale of the whole or any part or parts of any property subject to a mortgage shall become exercisable by a mortgagee if the mortgage is made by deed and the mortgage money payable there under has become due and the mortgage is not redeemed before sale, and every such power of sale shall be with and subject to the powers and obligations and other provisions relating to sales by mortgagees contained in the Conveyancing and Law of Property Act, 1881, of the United Kingdom or any statutory modification thereof applicable in Zambia...”

Section 20 of the Conveyancing and Law of Property Act provides as follows:

“A mortgagee shall not exercise the power of sale conferred by this Act unless and until –

- (i) notice requiring payment of the mortgage money has been served on the mortgagor or one of several mortgagors and default has been made in payment of the mortgage advance or part thereof for three months after service; or*
- (ii) some interest under the mortgage is in arrears and unpaid for two months after becoming due; or*
- (iii) There has been a breach of some provision contained in the mortgage deed or in this Act, on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed other than and besides a covenant or payment of the mortgage money or interest thereon.”*

In my view, the conditions which must be satisfied before a mortgagee can exercise his power of sale have been met in the case before this Court and therefore, the Applicant as mortgagee is entitled to exercise the power of sale of the mortgaged property.

The taking of possession of a mortgaged property is yet another remedy available to a mortgagee of a legal mortgage. Therefore, this remedy is also available to the Applicant herein.

Taking into account the authorities cited herein, I find that the Applicant has proved its claim against the Respondent who clearly has no defence to the claim herein. The remedies the Applicant seeks being cumulative, I make the following order, namely, that judgment is entered for the Applicant in the sum of ZMW338,672.76 plus contractual interest from the date of the Originating Summons to the date of judgment and thereafter, at average short term bank deposit rate as determined by the Bank of Zambia until full payment. The said sum shall be paid within ninety (90) days from the date hereof, failure to which the Respondent shall deliver vacant possession of the mortgaged property being subdivision No. 52640 of Stand No. PZ/1208, Pamodzi, Ndola to the Applicant who shall be at liberty to foreclose, take possession and exercise its right of sale.

Costs to the Applicant, to be agreed and in default thereof, taxed.

Delivered at Lusaka this 12th day of May, 2017.



W. S. Mwenda Dr
HIGH COURT JUDGE