

**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA**

2016/HPC/0414

(Commercial Registry)

B E T W E E N :

ZAMBIA NATIONAL COMMERCIAL BANK

APPLICANT

AND

**LANGA GENERAL CONTRACTORS LIMITED
(sued as Customer)**

1ST RESPONDENT

**ALFRED MPUNDU
(Sued as Mortgagor and Guarantor)**

2ND RESPONDENT

**VICTOR MPUNDU
(Sued as Guarantor)**

3RD RESPONDENT

**PRVIOUS MPUNDU
(Sued as Guarantor)**

4TH RESPONDENT



Before Lady Justice B.G Lungu on 15th March, 2016 in chambers at Lusaka.

For the Applicant, Mrs A Mwalulua, In house Legal Counsel

J U D G M E N T

Cases referred to:

1. *Salt v. Marquis of Northampton (1892) A.C. 1;*

Legislation and Other Materials referred to:

1. ***Order XXX, Rule 14 of the High Court Rules, High Court Act, CAP 27 of the Laws of Zambia;***
2. ***Halsbury's Laws of England, 4th Edition, Volume 32, at paragraph 402***

The Applicant commenced this action against the Respondents on 22nd August, 2016 by way of Originating Summons, pursuant to ***Order XXX., Rule 14 of the High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia.*** The Summons was endorsed with a claim for the following reliefs:

1. An order to foreclose on the mortgaged property;
2. Delivery of vacant possession of the mortgaged property by the 2nd Respondent to the Applicant;
3. An order of Sale of the mortgaged property by the Applicant;
4. An order that the 2nd, 3rd, and 4th Respondents being Guarantors of the 1st Respondent be ordered to honour their Guarantees in the event of the 1st Respondent failing to settle its indebtedness in full to the Applicant; and
5. Any other relief the Court shall deem fit.

The facts giving rise to the cause are stated in the Affidavit, sworn in support of the Summons, by George Mubanga Kashoki, an Assistant Manager in the Special Assets Management Department of the Applicant bank.

The Affidavit in Support reveals that by Credit Facility Agreement dated 9th April, 2001 the Applicant availed the 1st Respondent an overdraft facility of K15, 000, 000.00 (unrebased), which Facility attracted interest at a margin of 10% above the Bank's base rate.

The Facility was deposed to have been availed on the security of (i) a Third Party Mortgage relating to Plot No. 1871, Kasama; and (ii) Guarantees executed by the 1st Respondent's directors, being the 2nd, 3rd and 4th Respondents.

It was deposed that despite reminders having been issued, and notwithstanding the expiry of the Facility, the Respondents had failed or neglected to settle their outstanding indebtedness to the Applicant to the tune of K270, 505.53 as at 10th August, 2016.

Evidentiary support tendered included: (i) exhibit "**GMK1**", the Facility Agreement; (ii) exhibits "**GMK2, GMK3 and GMK4**", a copy of the 3rd Party Mortgage, Certificate of Title and Further Charge respectively, in respect of Stand No. 1871, Kasama; (iii) exhibits "**GMK5, GMK6 and GMK7**", a copy of each of the Guarantees executed by the 2nd, 3rd and 4th Respondents, respectively; (iv) exhibit "**GMK10**", a compendium of documents comprising correspondence from the Applicant to the Respondents regarding the 1st Respondent's indebtedness, including copies of the 1st Respondent's Statement of Account.

Turning to the Respondents perspective, the record reflects that the Originating Summons stands unopposed with no documents in opposition having been filed. The record also reflects that the Applicant effected substituted service on the Respondents by dint of Zambia Daily Mail News Paper advertisement of 21st October, 2016. Substituted service was effected on the strength of an Order for leave to do so granted by this Court on 14th October, 2016.

When the matter came up for hearing on 15th March, 2017, there was no representation for or on behalf of the Respondents. Having noted the contents of the Affidavit of Service on file and being satisfied that service of the Notice of hearing had been effected, I proceeded to hear the matter on the merits, in the absence of the Respondents.

In her submission before Court, Counsel for the Applicant, Mrs Mwalula, relied on the Affidavit in Support of the Originating Summons as well as the Skeleton Arguments filed on 22nd August, 2016.

The essence of the argument contained in the Skeleton Arguments is that the Respondents' failure to settle their indebtedness to the Applicant, as mortgagee, after demand having been made justifies the grant of the reliefs claimed.

In advancing its argument, the Applicant threw spotlight on Order XXX., rule 14 as giving the Court jurisdiction to entertain the Applicant's claim.

In addition, the Applicant tendered the definition of the term mortgage that was ascribed by Judge Lindley in the case of **Santley vs. Wilde (1899) C.A 474¹** where he illumed as follows:

" a mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given"

The Applicant further elaborated that the scholastic penmanship of **Halsbury's Laws of England, Volume 32 at paragraph 402** guides that a mortgage consists of a personal contract of debt coupled with a disposition or charge over the mortgagor's estate or interest as security for the repayment of the debt.

I have noted the authorities which I see no need to interrogate for the simple reason that they have been aptly stated.

I have, on the other hand, carefully examined the undisputed Affidavit evidence presented and find that the 1st Respondent was extended a K15, 000, 000 (unrebased) renewed and enhanced Overdraft Facility by the Applicant.

I also find that the 2nd Respondent, as the registered Titleholder of Stand No. 1871, Kasama executed a Third Party Mortgage in favour of the Applicant as security for the Facility extended to the 1st Respondent.

Moreover, it is clear from exhibits "**GMK 5 to 7**" that the 2nd, 3rd and 4th Respondents provided additional security by way of undated Personal Guarantees.

Bearing in mind my findings, it is clear that this is an action by a mortgagee seeking a blend of reliefs including delivery of possession of the mortgaged properties, foreclosure and sale of the mortgaged property. As such, the action falls squarely within the class of actions notoriously referred to as mortgage actions, to which Order XXX., Rule 14 of the High Court Rules applies. I therefore concur that the Applicant is in order to take out this action under Order XXX., rule 14.

I now move to consider whether the securities have become enforceable by examining their key terms.

In analysing the Guarantees, I rested on paragraph 1 of each of the standard Guarantee Forms, wherein the Guarantor undertakes to make payment on demand in writing to pay all sums of money which may be or become due or owing by the 1st Respondent.

As regards the terms contained in the Third Party Mortgage, clause 1 of the Mortgage Deed requires that the 1st and 2nd Respondents as Customer and Mortgagor respectively, pay and discharge on demand all moneys and liabilities due or owing from the 1st Respondent.

By clause 2 of the Deed, the 2nd Respondent demised the mortgaged property unto the Applicant. I digress to observe that the demise, having made to secure the repayment of debt, is consistent with the articulation of the learned authors of the Halsbury's Laws of England regarding the nature of a mortgage.

Looping back to enforceability, what is cardinal is that by clause 7 of the Deed, the mortgagor's statutory right of sale is suspended to after payment of monies have been demanded and the mortgagors have made default for one month. That brings me to the correspondence exhibited as "**GMK 10**". The correspondence from the Applicant reveals that the Applicant beckoned the Respondents to service the facility. That aside, the undisputed attestation by the deponent of the Affidavit in Support confirms that demands and reminders were issued. Resultantly, I accept the said Affidavit testimony.

In view of the foregoing, I am satisfied that the Respondents have remained in default in excess of one month after demand was made. Accordingly, enforcement of the securities has been activated

and Judgment is entered in favour of the Applicant, cumulatively, as follows:

1. That the 1st Respondent shall, within 7 days of the date of this Judgment, pay the Applicant the outstanding balance of ZMW 270, 505.53 plus interest.
2. The Applicant is at liberty to forthwith enforce the Guarantees signed by the 2nd , 3rd and 4th Respondents. That is, the 2nd, 3rd and 4th Respondents are by this Judgment jointly and severally liable for the Judgment Debt.
3. In the event that the Respondents fail to liquidate the Judgment Debt within 7 days from the date of Judgment, foreclosure relating to the mortgaged property will automatically be rendered absolute.
4. That the 2nd Respondent shall deliver up, to the Applicant, immediate possession of the mortgaged property;
5. That the Applicant is at liberty to exercise its right of sale after foreclosure has been rendered absolute;
6. That Interest shall be applied at the contractual rate from 10th August, 2016 to date of Judgment and thereafter at the Bank of Zambia short term lending rate until date of full and final settlement.

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

Dated the 14th day of February, 2018

A handwritten signature in blue ink, consisting of stylized, overlapping loops and lines, positioned above a horizontal dotted line.

Hon. Justice B.G.LUNGU