

**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2018/HP/0041

**IN THE MATTER OF: ORDER XXX RULE 14 OF THE HIGH COURT RULES
CHAPTER 27 OF THE LAWS OF ZAMBIA**

AND

**IN THE MATTER OF: A LEGAL MORTGAGE RELATING TO STAND NO
5622 MPIKA**



BETWEEN:

CITIZENS ECONOMIC EMPOWERMENT COMMISSION **PLAINTIFF**

AND

CHIDULU ESTATES LIMITED **1st DEFENDANT**

AMOS MOSES NYIRENDA **2nd DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 3rd DAY OF APRIL,
2018**

For the Plaintiff : *Mrs Edna Mwansa, Legal Counsel*

For the Defendants : *Ms K. Pashotan, Andrew and Partners*

J U D G M E N T

CASES REFERRED TO:

1. ***Taylor V Okey 1896 13 Ves 180***

LEGISLATION AND OTHER WORKS REFERRED TO:

1. ***The High Court Rules, Chapter 27 of the Laws of Zambia***
2. ***Halsbury's Laws of England 4th Edition, Volume 20***
3. ***Halsbury's Laws of England 4th Edition, Volume 42***

The Plaintiff commenced this action on 11th January, 2018 by way of Originating Summons claiming;

- i. Payment of all monies which as at 25th November, 2017, stood at ZMW113, 863.54, interest thereon to the date of payment at the agreed rate, costs and other charges due and owing to the Plaintiff by virtue of a loan availed to the Defendants and secured by a legal mortgage over Stand No 5622, Mpika.*
- ii. An order that the sum due to the Plaintiff be considered as a charge on the said mortgaged property.*
- iii. An order that the said mortgage be enforced by foreclosure or sale.*
- iv. Delivery up by the 2nd Defendant to the plaintiff of the mortgaged property known as Stand No 5622, Mpika.*
- v. Delivery up of all assets procured by the Commission*
- vi. Any other relief that the court may deem fit.*
- vii. Costs.*

The affidavit in support of the Originating Summons shows that the Plaintiff, a statutory body established under the Citizens Economic Empowerment Act No 9 of 2006 is the custodian of the Citizens Economic Empowerment Fund called the empowerment fund. That the 1st Defendant presented itself to the Plaintiff as a citizen owned company, and in or about 2013 applied to access the empowerment fund, by way of a loan for a Dairy Fodder Production Business. It is states that the said loan was approved as set out in the facility letter dated 20th July, 2015, and signed by the Defendants, which is exhibited as 'AL1' to the affidavit.

The affidavit further states that it was an express and fundamental term of the agreement that the 1st Defendant would be given ZMW533, 938.80 to procure

processing equipment for livestock feed, a five (5) tonne Isuzu light truck and farming machinery, and repay the Plaintiff ZMW13, 438.01 per month. That in default thereof, the outstanding balance would be due and payable to the Plaintiff together with interest at the agreed rate of twelve (12) percent per annum.

It is also stated that it was a precondition of the 1st Defendant being granted the loan facility that security in the form of Stand No 5622 Mpika would be provided, and to this effect a third party mortgage dated 22nd September, 2014 was executed between the Plaintiff as mortgagee, and the 2nd Defendant as mortgagor, wherein Stand No 5622 Mpika was demised and charged to secure repayment of the loan in the amount of ZMW1, 053, 188.00, with interest at twelve percent per annum.

The third party mortgage is exhibited as 'AL2' to the affidavit, and provides in clause 1 that the mortgagor would pay or discharge to the Plaintiff all monies and liabilities due to the Plaintiff, together with interest at twelve percent. Further that clause 2 of the said agreement provides that the mortgagee charged the mortgaged property with payment to the Plaintiff and discharge of all monies and liabilities then or thereafter due from or incurred by the mortgagor and.

The affidavit also states that clause 9 of the third party mortgage states that all costs, charges and expenses incurred by the Plaintiff in connection with the security, and proceedings to enforce the security, are recoverable from the Defendant as mortgagor as a debt, and shall be charged to the mortgaged property in addition to any other charges.

It is further deposed that the mortgaged property is held under the certificate of title exhibited as 'AL3' to the affidavit, and that the mortgagor is in possession of the mortgaged property, and is in default of payment of the principal and interest. That the Plaintiff on or about 24th September, 2014 registered a specific and floating charge to secure ZMW540, 640.00 plus interest on all the

assets procured from the Citizens Economic Empowerment loan, as shown on exhibit 'AL4'. Then on or about 4th April, 2016, the Plaintiff approved disbursement of a further ZMW71, 690.00 to the 1st Defendant, to enable it clear the farm equipment at the border in Tanzania, which amount was not enough to clear the equipment due to fluctuation of the kwacha against the dollar, and the said loan was set out in the facility letter exhibited as 'AL5'.

It is averred that the amount of ZMW71, 690.00 would be repaid in monthly instalments of ZMW15, 787.46, and in the event of default, the outstanding balance would become due and payable, together with interest at the agreed rate of twelve percent per annum.

Further that on or about August, 2016, the Plaintiff approved the additional disbursement of ZMW645, 510.00 to the 1st Defendant, out of which ZMW321, 520.00 was meant to enable the 1st Defendant to redeem the farm equipment which was still at the port in Tanzania, and ZMW324, 990.00 was meant to enable the 1st Defendant finish constructing the feed processing plant, install the livestock feed equipment, connect power and water to the plant and for working capital to support the purchase of raw materials in order to operationalize the business.

The terms of that agreement are stated as being those set out in the facility letter exhibited as 'AL6', and under which the amount disbursed would be repaid in monthly instalments ZMW31, 304.19, and in the event of default of payment, the outstanding amount would become due and payable, together with interest at twelve percent per annum. The Plaintiff alleges that the 1st Defendant has to date not put the project to operation and the statement of account shows that ZMW1, 431, 341.50 was advanced and that the periodic payments would not exceed ZMW25, 336.11, and that the amount in arrears as at 25th November, 2017 on the instalments and interest was ZMW113, 863.54, and that the loan amount called in was ZMW1, 431, 341.50. The full statement is exhibited as 'AL7'.

The affidavit in support of the Originating Summons also shows that the 2nd Defendant guaranteed the 1st Defendant's debt to the Plaintiff as shown on exhibit 'AL8'. That the Defendants have either failed, refused and or neglected to pay the amount due, and are in default of the principal and interest as the 1st Defendant has not paid anything towards clearing the loans, and has no defence on the merits.

The Defendants on 19th February, 2018 filed an affidavit in opposition to the Originating Summons sworn by the 2nd Defendant, in his capacity as director of the 1st Defendant as well as skeleton arguments, as well as skeleton arguments. In the said affidavit he avers that three loan agreements were executed with the Plaintiff as follows;

- a) ZMW533, 938.80 received on 20th July, 2015
- b) ZMW71, 690.80 received on 4th April, 2016
- c) ZMW400, 000.00 out of the total ZMW645, 510.00 requested received in September, 2016.

The Defendants admit that a third party mortgage was executed under which Stand No 5622, Mpika was provided as security for the loan amounts received from the Plaintiff, and that interest at a rate of twelve percent per annum would be charged on the loan. The Defendants also agree that they are in possession of the mortgaged property, and that a floating charge was registered by the Plaintiff to secure ZMW540, 640.00 together with interest on all assets procured from the Plaintiff.

The 2nd Defendant also deposes that on 8th January, 2016 he informed the Plaintiff that the bulk of the funds that it had disbursed to the Defendants went towards the importation of the equipment, and they required additional funding to enable speedy clearance of the equipment which was already at the port of Dar Es Salaam in Tanzania, failing which it would start incurring

demurrage and storage charges, as shown on the letter written to the Plaintiff, and exhibited as 'MAN1' to the said affidavit in opposition.

However the Plaintiff delayed to disburse the money from the time the request was made in March, 2016, as shown on exhibit 'MAN2', and disbursed ZMW71, 690.00 in April, 2016 and this resulted in the Plaintiff incurring storage and demurrage charges, and therefore the ZMW71, 690.00 disbursed by the Plaintiff was insufficient to cover the clearing costs. The 2nd Defendant then wrote 'MAN3' attaching the report 'MAN4', explaining the position and indicating the amount required to clear the equipment in the amount of USD16, 483.00, which exceeded the ZMW71, 690.00 availed to the Defendants. It is further deposed that on 20th October, 2016, the 2nd Defendant wrote 'MAN5' to the Plaintiff informing it of the possibility of the equipment being seized, as it had been at the port since 14th December, 2015.

That when the Defendants sent a coordinator to Tanzania to follow up on the equipment, it was discovered that the equipment had been advertised and sold. Exhibits 'MAN6' and 'MAN7' were letters from the High Commissioner and the Tanzanian Revenue Authority respectively revealing the position. The 2nd Defendant on 21st December, 2016 wrote to the Plaintiff the letter exhibited as 'MAN8', advising it that the equipment had seized and auctioned by the authorities in Tanzania.

It is the 2nd Defendant's averment that the Plaintiff was aware of the delays in remitting the money, as well as completing the project was occasioned by it, and resulted in the Defendants not receiving the equipment. It is the 2nd Defendant's further averment that it has never received the amount of ZMW645, 510.00 from the Plaintiff, but that the 1st Defendant only received ZMW400, 000.00. The 2nd Defendant then wrote to the Plaintiff asking it to review the amounts owing as seen from the correspondence exhibited as 'MAN9' and 'MAN10'.

The 2nd Defendant deposes that it is in the interests of justice that the loan amount should be reduced by ZMW380, 000.00, as the sum of ZMW200, 000.00 has not been disbursed to date, while ZMW180, 000.00 which was meant for the procurement of the equipment was not realized as the Defendants did not receive the equipment, due to delay on the Plaintiff's part. That the loan account should read;

- a) Loan amount ZMW533, 938.80, less ZMW180, 000.00 for equipment never received by the Plaintiff, and the reduced amount being ZMW353, 938.80.
- b) Loan amount ZMW 71, 690.00 received.
- c) Loan amount ZMW645, 510.00, less ZMW200, 000.00 not disbursed after confirmation that the equipment had been seized and sold hence reducing the loan amount to ZMW445, 510.00.

The Defendants deny having failed, neglected or refused to pay the loan amounts to the Plaintiff, and states that it remains willing to pay the same, and had requested the Plaintiff to reduce the loan amounts not received, as well the amount for the equipment not received, and that when the loan amount is reduced by ZMW380, 000.00, it will leave the amount of ZMW871, 138.80 as owing. That seizing the mortgaged property and all the assets will be prejudicial to the Defendants especially that the Defendants are willing to settle the debt, save for the request to reduce the amounts owing. Further that the business plan should be reviewed as the design of the original plan hinged on the delivery of the initial equipment, which has never been received.

At the hearing, Counsel for the Plaintiff stated that they applied pursuant to Order 30 Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia for the reliefs sought, and relied on the affidavit filed in support of the Originating Summons. It was Counsel's submission that particular attention of the court was drawn to paragraph 6 of the said affidavit, wherein the 1st Defendant had presented itself to the Plaintiff as a citizens owned company,

and had applied for an empowerment fund for a Gerry Fodder Production business.

That the Plaintiff approved the loan of ZMW533, 938.80 to enable the 1st Defendant procure equipment for livestock feed, a five tonne Isuzu light truck and other farming equipment to enable it operationalize its business. It was stated that the 1st Defendant was expected to make monthly payments of ZMW13, 438.01 with interest at twelve percent per annum, and that according to the facility letter signed between the parties, in the event of default of payment, the outstanding amount would become due and payable. Further that as a pre-condition of the loan, the 1st Defendant provided security in the name of real property known as Stand No 5622, Mpika, by way of a third party mortgage, which property was held under certificate of title number 279489, and which title was deposited with the Plaintiff.

Counsel further testified that in September, 2016 the Defendants requested for additional funding even though it had not paid any of the amount owing on the first loan, and the Plaintiff gave the 1st Defendant additional funding of ZMW400, 000.00, bringing the total to ZMW971, 689.50. That at the time the Originating Summons was taken out, ZMW113, 836.00 was owing and the Plaintiff claimed the payment of the reliefs stated in the Originating Summons being;

- a) Payment of all monies due as at 25th November, 2011 including interest by virtue of a legal mortgage created over Stand No 5622, Mpika.
- b) That the sum due to the Plaintiff be considered as a charge on the mortgaged property.
- c) Foreclosure and or sale of Stand No 5622, Mpika.
- d) Delivery up of all assets procured by the Plaintiff.
- e) Any other relief and costs.

Counsel for the Defendants in response stated that they relied on the affidavit in opposition filed on 19th February, 2018, as well as the skeleton arguments and list of authorities dated 5th March, 2018. She stated that the Defendants did not dispute owing the Plaintiff, but merely sought that the amounts of ZMW380, 000 be offset, as they were not received by the Defendants as due to the slow processing of the funds by the Plaintiff, the Defendants equipment was auctioned and sold. Counsel prayed that the Plaintiff's claim be dismissed and ZMW380, 000.00 be offset, and the Defendants be allowed to liquidate the amount owing in instalments.

In reply, Counsel for the Plaintiff submitted that there was no basis upon which the reliefs sought by the Plaintiff should be dismissed, as monies were disbursed to the Defendants, and they had not made a single loan repayment. That the amounts that the Defendants claim were not disbursed were paid to the supplier of the equipment upon the Defendants providing quotations. That the loan amounts that had been called in included amounts disbursed to the Defendants, with interest thereon.

Counsel further submitted that the Plaintiff had no problem offsetting the ZMW200, 000.00 as it had not been disbursed to the Plaintiff, but could not do the same for the ZMW180, 000.00, as the Defendants had the responsibility of catering for the equipment together with the costs associated with the same when the ZMW533, 000.00 was disbursed. Counsel reiterated the earlier prayers.

I have considered the matter. In this case it is not dispute that the Plaintiff advanced various amounts to the Defendants by way of loans, and that a third party mortgage was executed to secure payment of the said monies. The dispute is on whether the Defendants are liable to pay the sums owing as they contend that they did not receive some of the amounts. The Plaintiff commenced this action by way of Originating Summons pursuant to Order XXX Rule 14 of the High Court Rules. This Order provides that;

“(1) This Order applies to any action (whether begun by writ or originating summons) by a mortgagee or mortgagor or by any person having the right to foreclose or redeem any mortgage, being an action in which there is a claim for any of the following reliefs, namely -

(a) payment of moneys secured by the mortgage,

(b) sale of the mortgaged property,

(c) foreclosure,

(d) delivery of possession (whether before or after foreclosure or without foreclosure) to the mortgagee by the mortgagor or by any other person who is or is alleged to be in possession of the property,

(e) redemption,

(f) reconveyance of the property or its release from the security,

(g) delivery of possession by the mortgagee.

(2) In this Order "mortgage" includes a legal and an equitable mortgage and a legal and an equitable charge, and references to a mortgagor, a mortgagee and mortgaged property shall be construed accordingly.”

From the affidavit in support of the Originating Summons, it can be seen that a third party mortgage which is exhibited as ‘AL2’ was executed to secure the payment of the amounts of money borrowed, and therefore the action before me is a mortgage action. The Plaintiff in the said affidavit avers that the amount of ZMW1, 431, 341.50 was disbursed to the Defendants, and that as at 25th November, 2017, that amount was due and owing.

The Defendant on the other hand alleges that it received ZMW533, 938.80, ZMW71, 690.80 and ZMW400, 000.00 totaling ZMW1, 005, 629.60. The 2nd

Defendant deposed that out of the ZMW533, 938.80, the amount of ZMW180, 000.00 should be offset as it never received the equipment. Further that from the ZMW645, 510.00 it only received ZMW445, 510.00 and the amount of ZMW200, 000.00 should be offset. Counsel for the Plaintiff stated that it had no difficulty offsetting the ZMW200, 000.00 as it was never advanced to the Plaintiff, but not the ZMW180, 000.00, as the Defendants were responsible for catering for the equipment and its cost.

In the skeleton arguments, the Defendants stated that out of the ZMW533, 938.80 disbursed by the Plaintiff, the sum of ZMW180, 000.00 was for the equipment that the Defendants were supposed to receive, but which they did not, as it was auctioned and sold in Tanzania due to delay attributed to the Plaintiff. That out of the ZMW645, 510.00, the amount of ZMW200, 000.00 was not received.

Reference was made to paragraph 406 of *Halsbury's Laws of England, 4th Edition Volume 42* where the meaning of set off is stated as “ *where A has a claim for a sum of money against B, and B has a cross claim for a sum of money against A such that B is, to the extent of his cross claim, entitled to be absolved from payment from A's claim, and plead his cross claim as a defence to an action by A or the enforcement of his claim, then B is said to have a right of set off against A to the extent of his cross claim.*”

That the Defendants are entitled to have the amounts of ZMW180, 000.00 and ZMW200, 000.00 offset as the delay to clear the equipment was occasioned by the Plaintiff. That the right to have the amounts offset is recognised at law and in equity, as Order XXVIII of the High Court Rules, Chapter 27 of the Laws of Zambia provides that;

“1. Every suit implies an offer to do equity in the matter thereof, and admits of any equitable defence.”

2. *The plaintiff may obtain any such equitable relief as the facts stated and proved entitle him to, though not specifically asked.*
3. *A defendant in an action may set off, or set up by way of counter-claim against the claim of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross-action so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross-claim. But the Court or a Judge may, if, in its or his opinion, such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereto.”*

Further reference was made in the skeleton arguments to Section 13 of the High Court, which states that;

“ In every civil cause or matter which shall come in dependence in the Court, law and equity shall be administered concurrently, and the Court, in the exercise of the jurisdiction vested in it, shall have the power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever, interlocutory or final, to which any of the parties thereto may appear to be entitled in respect of any and every legal or equitable claim or defence properly brought forward by them respectively or which shall appear in such cause or matter, so that, as far as possible, all matters in controversy between the said parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided; and in all matters in which there is any conflict or variance between the rules of equity and the rules

of the common law with reference to the same matter, the rules of equity shall prevail.”

Also relied on was the case of **TAYLOR V OKEY 1896 13 Ves 180** set out at the end notes of paragraph 434 of **Halsbury’s Laws of England 4th Edition, Volume 42** where the court stated that; **“a defendant who borrows from his debtor on an express promise that the loan is to be repaid without a deduction may, if sued for repayment of the loan, set off an antecedent debt.”** That the Defendants in this matter seek to set off an antecedent debt by virtue of the fact that they have not received the equipment, due to delay on the Plaintiff’s part, which can be said to be antecedent debt.

Further, that the 2nd Defendant has been sued in his individual capacity for guaranteeing the loan. That paragraph 219 of **Halsbury’s Laws of England 4th Edition, Volume 20** states that **a liability under a guarantee may be the subject of set off or counterclaim, even though the party relying on the set off has collateral security for the debt.....**” Therefore despite the 2nd Defendant being a guarantor having provided security, that is Stand No 5622 Mpika, the delay by the Plaintiff to disburse the funds for the equipment entitles the amount of ZMW380, 000.00 to be offset from the loan amount owing.

In deciding whether the Defendants are entitled to have the amount of ZMW380, 000.00 set off from the loan amount disbursed, regard must be had to the agreements made in this matter. Exhibit ‘AL1’ to the Originating Summons shows that ZMW533, 938.80 was advanced as a project finance loan, while ‘AL5’ also the loan facility provided additional funding of ZMW71, 690.00 and ‘AL6’ provided additional funding of ZMW645, 510.00.

Paragraph 14 of the affidavit in support of the Originating Summons states that the Defendant on or about 4th April, 2016 applied for the additional amount of ZMW71, 690.00 to enable it clear the equipment at the Tanzania border, but that the amount was not enough as the fees had gone up due to

fluctuation of the kwacha against the dollar. Exhibit 'MAN1' to the affidavit in opposition dated 8th January, 2016 shows that the Defendants wrote to the Plaintiff explaining that the equipment that they had procured abroad had arrived in September, 2015, at which time the kwacha had depreciated against the dollar resulting in increased costs of the purchase. In that letter it is indicated that the Defendants needed to pay an extra ZMW60, 000.00 to complete the importation of the tractor and other agricultural machinery.

Exhibit 'MAN2' to the affidavit in opposition is a letter dated 24th March, 2016 in which the Defendant requested for additional funding of ZMW210, 000.00 from the Plaintiff, and requested the initial release of ZM71, 690.00 to secure the equipment that had delayed in transit. Exhibit 'MAN3' dated 7th July, 2016 is a letter from the Defendants to the Plaintiff to the effect that ZMW71, 690.00 was disbursed to the Defendants by the Plaintiff in April, 2016 but was not enough to meet the costs of USD16, 483 needed to clear the equipment. It is clear from the correspondence on record that the Defendants remained responsible for the costs of importing the equipment and the Plaintiff cannot be said to have caused the delay in the disbursement of the funds as exhibit 'MAN1' to the affidavit in opposition to the Originating Summons is clear that the Defendant was asking for additional funding to clear the equipment.

This was largely due to the fact that the kwacha had depreciated against the dollar and the result was that the fees required to clear the equipment had risen. The fluctuation of the kwacha against the dollar could not be attributed to the Plaintiff. The claim for set off of ZMW180, 000.00 will fail on that basis, but the amount of ZMW200, 000 is set offset as it was never received by the Defendants.

Therefore the Defendants are liable to pay the Plaintiff the amount of ZMW533, 938.80, ZMW71, 690.80 and K445, 510.00 totaling ZMW1, 051, 139.60 together with interest thereon. The amount shall attract interest at the average short term deposit rate from date of issue of the writ until judgment, and thereafter at the Bank of Zambia lending rate until payment.

The said amount shall be a charge on the mortgaged property and the Defendants are given ninety days from today to pay the same. In default thereof as the mortgage was legal, having been registered at the Land and Deeds Registry as since in the memorials of the title deed exhibited as 'AL3' to the affidavit in support of the Originating Summons, the Plaintiff shall have possession of the said property, as well as all the assets it procured, and shall foreclose and sell the said property in order to realize the amount owing. The Plaintiff is also awarded costs to be taxed in default of agreement. Leave to appeal is granted.

DATED THE 3rd DAY OF APRIL, 2018



S. KAUNDA NEWA
HIGH COURT JUDGE