

RAEYS INVESTMENTS LIMITED (Sued as Guarantor)	13TH RESPONDENT
IMS MANAGEMENT SERVICES LIMITED (Sued as Guarantor)	14TH RESPONDENT
AL SHIFA HEALTH ENTERPRISES LIMITED (Sued as Guarantor)	15TH RESPONDENT

Before the Honourable Mr. Justice W. S. Mweemba at Lusaka

For the Applicant: Mrs. K. Musana – In House Counsel, Zambia National Commercial Bank Plc

For the 1st & 2nd Respondents: Mr. M. Ndhlovu – Messrs MRN Legal Practitioners

JUDGMENT

LEGISLATION REFERRED TO:

1. Order 30 Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia.

CASES REFERRED TO:

1. Santley V Wilde (1899).
2. Kanjala Hills Lodge Limited & Another V Stanbic Bank Zambia Limited Appeal No. 46/2010.
3. Avon Finance Company Limited V Bridger (1985) 2 ALL ER 281.

OTHER WORKS REFERRED TO:

1. Halsbury's Laws of England 4th Edition, Volume 32 Paragraph 402.

By Originating Summons taken out on 21st September, 2017 the Applicant is claiming against the Respondents the following:

1. Payment of all monies and contractually agreed interest due and owing to the Applicant under a Credit Facility Letter dated 30th May, 2016 for K2,000,000.00 Renewed Overdraft Facility and K1,669,009.00 Existing Restructured Medium Term Loan Facility which facilities were secured by a Third Party Mortgage relating to Stand No. 7264 situate in the Lusaka Province of Zambia in the name of Mohmed Ahmed Seedat (the Mortgaged Property) and which monies stand at K1,190,184.00 and K965,368.80 respectively as at 1st August, 2017;
2. An Order to Foreclose on the Mortgaged Property;
3. Delivery of vacant possession of the Mortgaged Property by the 2nd Respondent to the Applicant;
4. An Order for Sale of the Mortgaged Property by the Applicant;
5. An Order that the 2nd to 15th Respondents being Guarantors of the 1st Respondent honour their Guarantees in the event of the 1st Respondent failing to settle its indebtedness in full to the Applicant; and
6. Any other relief the Court shall deem fit.
7. Costs.

There is an Affidavit in Support of the Originating Summons deposed to by Museke Chilufya a Relationship Manager in the Portfolio Workout Department of the Applicant bank filed into Court on 21st September, 2017.

He deposed that the 1st Respondent was by a Credit Facility Letter dated 30th May, 2016 availed inter alia facilities of K2,000,000.00 being an Existing Restructured Medium Term Loan Facility. A copy of the Credit Facility Letter signed by the 1st Respondent was exhibited marked "MC1".

That it was an agreed term of the Credit Facility Letter that interest would be calculated per annum as follows:

- (i) on the Renewed Overdraft Facility at the variable Bank of Zambia Policy Rate plus a margin of 19.5% (current effective rate of 15.5% + 19.5% = 35%).
- (ii) on the Existing Restructured Medium Term Loan Facility at the variable Bank of Zambia Police Rate plus a margin of 14% (current effective rate of 15.5% + 14% = 29.5%).

That it was a further term of the Credit Facilities granted that they would be secured by inter alia a Third Party Mortgage relating to Stand No. 7264 situate in the Lusaka Province of Zambia in the name of the 2nd Respondent.

He also stated that the 2nd Respondent obtained independent legal advice from his Advocates before the Third Party Mortgage was created. A copy of the letter from the 2nd Respondent's Advocates was exhibited marked "MC2".

It was further deposed that the Third Party Mortgage was duly registered in favour of the Applicant. Copies of the Third Party Mortgage and the Certificate of Title relating to the property were exhibited marked "MC3" and "MC4" respectively. That it was an agreed term of the Credit Facilities granted that they would be guaranteed for unlimited sums by the 2nd and 3rd Respondents. Copies of the unlimited Guarantees were exhibited collectively marked "MC5".

That it was another term of the Credit Facilities granted that the 4th to 15th Respondents would guarantee the 1st Respondents indebtedness under the said credit facilities for a maximum sum of US\$1,000,000.00 each. Copies of the said limited Guarantees were exhibited collectively marked "MC6".

Mr. Chilufya also stated that the 1st Respondent has failed to make payments due under the said credit facilities. That despite reminders to settle their indebtedness, the Respondents have failed and/or neglected to do so. Copies of letters of reminders to the Respondents were exhibited collectively marked "MC7".

He lastly deposed that to date, the Credit Facilities remain unpaid and stand at the sum of K1,190,184.00 and K965,368.80 respectively as at 1st August, 2017. Copies of the 1st Respondent's Statement of Account were exhibited marked "MC8".

There was no Affidavit in Opposition filed on behalf of the Respondents.

Counsel for the Applicant filed Skeleton Arguments and List of Authorities on 21st September, 2017. She submitted that the application was made pursuant to **Order 30 Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia** which provides as follows:

"Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclosure or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons, returnable in the chambers of a Judge for such relief of the nature or kind following as may by the summons be specified, and as the circumstances of the case may require; that is to say -

Payment of moneys secured by the mortgage or charge;

Sale;

Foreclosure;

Delivery of possession (whether before or after foreclosure) to the mortgagee or person entitled to the charge by the mortgagor or person having the property subject to the charge or by any other person in, or alleged to be in possession of the property;

Redemption;

Reconveyance;

Delivery of possession by the mortgagee".

She also cited the learned authors of **Halsbury's Laws of England, 4th Edition, Volume 32 at paragraph 402** where it is stated that a mortgage consists of two things, namely a personal contract of a debt and a disposition or charge of the mortgagor's estate or interest as security for the repayment of the debt.

Reference was made to the case of **SANTLEY V WILDE (1)** in which Judge Lindley defines a mortgage 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 also relied on the case of **KANJALA HILLS LODGE LIMITED & ANOTHER V STANBIC BANK ZAMBIA LIMITED (2)** in which the Supreme Court held thus:

"The Appellants having defaulted in their repayment obligation cannot hide behind the right of redemption. This view is buttressed in Atkins Court Forms Vol. 28 where the learned authors have stated at page 8 that:

"When the mortgagor defaults, the mortgagee is entitled to pursue all his remedies concurrently.

...

Further, the learned authors of Megary's Manual of the Law of Real Property have also stated that once there is a breach of a condition which had to be complied with to keep alive the legal right of redemption, the mortgagee may commence foreclosure proceedings.

Therefore, in this case the Respondent was entitled to commence an action by Originating Summons for payments of sums due, for foreclosure, sale and possession".

In relation to guarantees the case of **AVON FINANCE COMPANY LIMITED V BRIDGER (3)** was cited, in which Lord Denning, MR, opined as follows:

“Now let me say at once that in the vast majority of cases a customer who signs a bank guarantee or a charge cannot get out of it. No bargain will be upset which is the result of the ordinary interplay of forces. Take the case of a borrower in urgent need of money. He borrows it from the bank at high interest and a friend guarantees it. The guarantor gives his bond and gets nothing in return. The commons law will not interfere”.

It was submitted that in *casu*, the Affidavit in support of this action shows that the Respondents have failed to honour their obligations to pay back the monies advanced to the 1st Respondent under the Credit Facilities which were secured by the Third Party Mortgage relating to Stand No. 7264 Lusaka and unlimited Guarantees from the 2nd and 3rd Respondents as well as Guarantees from the 4th to 15th Respondent for payment of the sum of US \$1,000,000.00 respectively. That to date, the facilities remain unpaid and stand at the sums of K1,190,184.00 and K965,368.80 respectively as at 1st August, 2017.

Finally learned Counsel for the Applicant submitted that in light of the foregoing authorities and demand having been made by the Applicant and the Respondents having failed and/or neglected to pay the monies outstanding, this is a fit and proper case in which the Court should exercise its discretion to grant the reliefs sought.

During the hearing on 2nd February, 2018 Counsel for the Applicant Mrs. K. Musana and Counsel for the 1st and 2nd Respondents Mr. M. Ndhlovu were both before Court.

Mr. Ndhlovu told the Court that the 1st and 2nd Respondents do not oppose the Applicant's application but they request that they be given 5 months within which to pay.

From the evidence adduced by the Applicant and the 1st and 2nd Respondents admission that they have no defence, I am satisfied that the 1st Respondent is truly indebted to the Applicant Bank in the sums of K1,190,184.00 and K965,368.80 as at 1st August, 2017.

I accordingly enter Judgment against the 1st Respondent for the payment of the sums of K1,190,184.00 and K965,368.80 as at 1st August, 2017 with interest as agreed between the parties.

It is Ordered that the said sums be paid within twenty (20) days from date hereof.

In the event that the Judgment debts and interest remain unpaid at the expiry of the said period, then the 2nd Respondent shall deliver vacant possession of the Mortgaged Property Stand No. 7264 Lusaka to the Applicant which shall be at liberty to foreclose and exercise its power of Sale.

In the event that there is any amount outstanding after such sale the 2nd to 15th Respondents shall as Guarantors pay any shortfall.

Costs to the Applicant to be taxed in default of the agreement.

Delivered in Chambers at Lusaka this 5th day of June, 2018.



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WILLIAM S. MWEEMBA
HIGH COURT JUDGE