IN THE HIGH COURT FOR ZAMBIA **2010/HPC/0574**
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

IN THE MATTER OF: AN EQUITABLE MORTGAGE DATED 28th APRIL, 2010 RELATING TO STAND NUMBER 24727, LUSAKA

BETWEEN:

LUKE PHIRI **APPLICANT**

AND

DAVID TEMBO **RESPONDENT**

BEFORE THE HON. JUSTICE NIGEL K. MUTUNA ON 31th DAY OF AUGUST, 2011

For the Applicant : Mr. W. Mweemba of Mweemba & Company
For the Respondent : Mr. A. Kasonde of Kasonde & Company

JUDGMENT

Cases referred to:

1. ***Williams –VS- Bayley (1966) LR1 HL 200.***
2. ***Zambia National Commercial Bank Limited –VS- Dismas Mwila SCZ No. 94 of 1999.***
3. ***Waterwells Limited –VS- Jackson (1984) ZR page 98.***
4. ***Ruth Kumbi –VS- Robinson Caleb Zulu SCZ No. 19 of 2009.***
5. ***Printing and Numerical Registering Company –VS- Simpson (1875) LR 19EQ 462.***
6. ***Colgate Palmolive (Z) Inc –VS- Able Shemu Chuka and 110 Others appeal No. 181 of 2005.***

Other authorities referred to:

1. ***Supreme Court Practice, 1999 Volume 1.***
2. ***Statute of Frauds.***
3. ***Cheshire's, The Modern Law of Real Property, 8th edition.***
4. ***High Court Act, Cap 27.***
5. ***Cheshire, Fifoot and Firmston's Law of Contract, 13th edition, Butterworths, London 1996, page 317.***
6. ***Blacks Law Dictionary by Bryan A. Garner 8th edition.***
7. ***Megarry and Wade, The Law of Real Property, by Charles Harpum, 6th edition.***

The Applicant, Luke Phiri, commenced this action against the Respondent, David Tembo, on 29th September, 2010, by way of originating summons. The relief that he seeks is as follows;

> *"(1) The Applicant be granted possession of stand number 24727, Lusaka.*
>
> *(2) The Applicant is entitled to recover the sum of K60,000,000.00 being balance on debt of K160,000,000.00 secured by the equitable mortgage relating to stand number 24727 Lusaka, following the assignment of the said property by the Respondent to the Applicant at K100,000,000.00.*
>
> *(3) Costs.*
>
> *(4) Further and any other relief as may be deemed fit by the Court."*

In support of the originating summons, the Applicant filed an affidavit in support, affidavit in reply and skeleton arguments. The Respondent's response was by way of an affidavit in opposition and skeleton arguments.

The affidavits in support and reply were sworn by the Applicant and they revealed that; the Respondent deposited with the Applicant his certificate of title for property known as stand number 24727 Lusaka; the deposit of the said deeds was as security for repayment of a loan advanced to him of

K160,000,000.00 (see exhibit "LP1"); by the said exhibit the Respondent pledged to liquidate the debt by paying the sum of K60,000,000.00, on 7th May, 2010, and the balance of K100,000,000.00 on 7th June, 2010, in default whereof, the Respondent would forfeit his property, stand number 24727 (the property) (see exhibit LP2"); following default by the Respondent, the Applicant proceeded to register the assignment of the property to himself and obtained title to the property (see exhibit LP3); arising from the foregoing there is still an amount of K60,000,000.00, due to the Applicant along with his being entitled to vacant possession of the property; the execution of the deed of assignment relating to the property by the Respondent was not under duress and neither were the police present; the deed of assignment was executed in the Applicant's advocates chambers in the presence of other people, one of whom was the Respondent's colleague; the Applicant had placed a caveat over the Respondent's other property known as plot 30274, Woodlands, not to secure the funds in dispute in this matter, but for purposes of securing the sale of that said property to him for K150,000,000.00 (see exhibit "DT3" to the Respondent's affidavit in opposition); it has since transpired that the Respondent sold the said property to four different people before signing the contract with him and collecting the deposit (see "LP1" to the affidavit in reply); and the caveat on the property plot 30274 Woodlands was being retained by him for purposes of collecting his money from the Respondent.

In the affidavit in opposition, the Respondent stated thus; the agreement between himself and the Applicant whereby he pledged his property as security and assigned it, was made under duress; this followed his arrest and detention by the Mande Hill Police and a charge of obtaining money by false pretenses being laid against him; he did sign the deed of assignment appearing as exhibit "LP2" but that he did so under duress; the Applicant can not avail himself to the remedy of sale as the transaction was an equitable mortgage whose remedy rests in foreclosure; there has been no valid equitable mortgage, deposit of title deeds to stand 24727, Lusaka or pledge, whatsoever on account of duress as is

evidenced by the exhibits "DT1" and "DT2;" the transfer of the property into the Applicant's name, claim for K60,000,000.00, balance, and vacant possession of the property can not be effected in the absence of the Applicant obtaining a Court order for foreclosure. The Applicant has not removed the caveat on plot number 30274, Woodlands, whilst pursing the K160,000,000.00, in respect of the alleged equitable mortgage, resulting from which he may end up grabbing two of the Respondent's plots; the Applicant has breached the contract for the sale of a portion of plot number 30274, Woodlands, by failing to complete and claiming a refund of the deposit paid. The Respondent therefore counterclaims for an order of specific performance or in the alternative damages plus interest from the date of the agreement (see exhibit "DT3"); and in view of the breach of contract as stated above, the Applicant should forfeit at least 10% of the total purchase price paid in respect of stand number 30274, Woodlands, Lusaka which should be set off from the Applicant's claim of K160,000,000.00.

The matter came up for hearing on 14th July, 2011. Counsel for the two parties relied on their respective skeleton arguments. Mr. W. Mweemba for the Applicant began his arguments by restating the claim as endorsed in the originating summons. It was argued that as evidenced by exhibit "LP1" there is no dispute that the Respondent deposited the certificate of title relating to stand number 24727, Lusaka, with the Applicant. This was for purposes of the Applicant securing the payment of the sum of K160,000,000.00, advanced to the Respondent. By the said exhibit "LP1" the Respondent unequivocally pledged to forfeit the said property if he defaulted. Counsel went on to argue that having defaulted, the Applicant enforced his rights by registering the assignment. In so doing, there is a balance outstanding of K60,000,000.00, because the property was valued at K100,000,000.00. Counsel ended by arguing that the Applicant is on firm ground in commencing the action in the manner he has despite it being an equitable mortgage. My attention in this respect was drawn to Order 88 rule 1 subrule (ii) of the ***Supreme Court Practice (whitebook)***.

In the skeleton arguments counsel for the Respondent, Mr. Kasonde, advanced his arguments on three limbs. The first limb was that the action was wrongly commenced. It was argued that in view of the relief sought and the description of the parties in the agreements marked "LP1" and "DT3", the action should have been commenced by way of a writ of summons. Counsel argued further that this action arises from the contract of sale marked "DT3" in which, after there was break down in contractual negotiations, the Applicant demanded a refund of the sum of K150,000,000.00. In an effort to settle the matter *ex curia* the parties agreed that the Respondent pay an extra K10,000,000.00, being extra costs incurred. In doing so, the Respondent agreed to pay the sum as a debt not a mortgage. Following the Respondent's failure to pay, the Applicant then had him arrested by the police and detained. It was during this detention that he signed "DT1" or "LT1". Counsel proceeded to argue that exhibit "LT1" is not supported by a contract of sale despite referring to the parties as vendor and purchaser. It therefore contravenes the provisions of section 4 of the ***Statute of Frauds***. He also argued that it was neither a valid equitable mortgage, deposit of certificate of title, nor valid pledge of stand number 24727, Lusaka. In advancing the said argument, counsel drew my attention to the case of ***Williams –VS- Bayley (1)***.

In the second limb of his arguments counsel argued that the documents purportedly signed by the Applicant, i.e "LP2" and "LP3", are baseless at common law and that the same can only exist in equity. The legal estate with equity of redemption still resides in the Respondent because only an order of the High Court can enable the Applicant to foreclose on an equitable mortgage and vest the legal estate into the equitable mortgagee. In articulating the foregoing argument, counsel drew my attention to ***The Modern Law of Real Property***, by Professor Cheshire.

In addressing the third limb of his arguments, counsel argued that the Applicant should have proceeded by way of order 30 rule 14 of the ***High Court***

Act. My attention in this respect was drawn to the cases of ***Zambia National Commercial Bank Ltd –VS- Dismas Mwila (2)*** and ***Waterwells Limited –VS- Jackson (3)***. He argued further that since there are a number of contentious facts in this matter, it is necessary for it to be heard at full trial in line with Order 28 rule 8 of the ***whitebook***.

In reply counsel for the Applicant argued thus; the exhibit "LP1" is a declaration of forfeiture of the property in the event of default. It therefore creates an equitable mortgage on the property in issue especially that the Respondent deposited his title deeds; there was no duress exerted on the Respondent in executing "LP1" as is evidence by paragraphs 5 to 8 of the affidavit in reply. Even assuming "LP1" was signed under duress, it does not render it void but merely voidable (see Cheshire Fifoot and Firmston's, ***Law of Contract)***; and it is in order for an Applicant claiming relief or remedy available to a mortgagee to commence an action by originating summons pursuant to order 88 rule 1 of the ***whitebook***.

Counsel went on to argue that the Applicant was on firm ground when he foreclosed on the property without a Court order because the two parties had entered into a further agreement. By the said agreement the Respondent had assigned the property to the Applicant. This position, counsel argued, is reinforced by the fact that the Respondent does not dispute his signature on the assignment.

As regards the argument that the Applicant should have commenced this action under Order 30 rule 14 of the ***High Court Act*** as opposed to the rules of the ***whitebook***, counsel argued that, indeed it would have been proper to commence the action pursuant to Order 30 rule 14 of the ***High Court Act*** especially that the said order provides for the same remedies claimed in the action. There was however, no irregularity in commencing the action via the ***whitebook*** as it was now settled law that one can proceed pursuant to the

whitebook even where the ***High Court Act*** is applicable. My attention in this respect was drawn to the case of ***Ruth Kumbi –VS- Robinson Caleb Zulu (4)***.

Counsel ended by advancing what he termed an alternative argument. In doing so it was argued that if the Court was of the view that this matter should not have been began by originating summons, I should consider ordering that the matter proceeds as though commenced by writ of summons. In support of this argument, counsel drew my attention to order 28 rule 8 of the ***whitebook***. In doing so, he argued that the Court should order that the affidavits stand as pleadings or the parties exchange pleading or make any other order for directions.

I have considered the pleadings, affidavit evidence and the arguments by counsel for the two parties. By the originating process filed in this matter, the Applicant seeks to enforce what he terms an equitable mortgage dated 28th April, 2010, relating to stand number 24727, Lusaka. In so doing he is requesting this Court to grant him the reliefs set out at page J2 of this judgment. The action is therefore couched as a mortgage action.

The Respondent has objected to this alleging that the basis of this action, "LP1" indicates that it is a sale transaction. This is especially so when "LP1" is read with "DT3". The action it was argued should therefore have been commenced by way of writ of summons.

Mortgage action are governed by the provisions of Order 30 rule 14 of the ***High Court Act*** and Order 88 rule 1 of the ***white book***. The former order states 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."

Whilst the latter states as follows;

"(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.

(3) An action to which this Order applies is referred to in this Order as a mortgage action."

It is evident from the foregoing orders that a mortgage action is an action where there is a claim for moneys secured by a property. The said claim is normally accompanied by a claim for possession of the mortgaged property.

The issue that therefore arises is, can the transaction entered into by the parties be termed a mortgage transaction warranting this action? In determining this issue it is best to begin by defining the words "mortgage" and "equitable mortgage". ***Blacks Law Dictionary***, by Bryan A. Garner defines mortgage at page 1031 as follows;

"A conveyance of title to property that is given as security for the payment of a debt or the performance of a duty and that will become void upon payment or performance according to stipulated terms,"

Whilst at page 1032 it defines equitable mortgage as follows;

"A transaction that has the intent but not the form of a mortgage, and that a Court of equity will treat as a mortgage"

The features of a mortgage therefore are the assigning of a property as security for payment, which assignment is rendered void upon payment of the money. Further, any agreement bearing such intention is an equitable mortgage.

These features have aptly been summed up by ***Megarry and Wade, The Law of Real Property***, by Charles Harpum at page 1169 as follows;

> ***"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 i.e. that upon repayment of a loan or the performance of some other obligation the conveyance shall become void or the interest shall be reconveyed."***

As regards the rights of a mortgagor, the said authority states at page 1185 as follows;

> ***"These remedies may be classified as follows;***
>
> ***(a) Remedies primarily for recovery of capital***
>
> ***(i) Foreclosure***
>
> ***(ii) Sale..."***

The Applicant in this matter has anchored his claim on exhibits "LP1" and "LP2". It has been argued that "LP1" forms the basis of the equitable mortgage, whilst "LP2" was executed for purposes of enforcing the alternative pledge i.e. assignment of the property. A perusal of the said exhibits reveals that by, "LP1" the Respondent charged his property stand No. 24727, Lusaka, to the Applicant, by way of deposit of title deeds. Prima facie, the said exhibit bears the semblance of an equitable mortgage. However, it declares further that in the event of default the Respondent would forfeit the property to the Applicant. To give effect to the said intentions, the parties executed the deed of assignment "LP2". The said assignment as at the date of commencement of this action was already registered resulting in the property being assigned to the Applicant. This is as per exhibit "LP3" being the certificate of title. Given the foregoing facts, I find that the transaction from which this action arises is neither a mortgage or equitable mortgage for two reasons. Firstly, although the property was initially offered as security, the deed "LP1" provided for forfeiture of the property rather than a sale of the property. As I have highlighted above,

the remedy open to a mortgagee such as the Applicant, which remedy highlights a feature of mortgages, lies in recovery of capital (funds lent) by way of foreclosure and subsequent sale of the property. In my considered view a transaction that provide for forfeiture of a property on default can not be said to fall under the umbrella of a mortgage or equitable mortgage. My finding is fortified by the fact that a mortgagor always retains the right of redemption, as is evident from the definition of mortgage as I have demonstrated above which indicates that the assignment of the property becomes void upon payment. By providing for forfeiture of the property by the Respondent and subsequent assignment to the Applicant, the agreement "LP1" was taken out of the realms of a mortgage.

Secondly a perusal of orders 30 rule 14 of the ***High Court Act*** and 88 rule 1 of the ***whitebook*** and indeed by definition of mortgage and equitable mortgage, reveals that the person instituting proceedings (the mortgagee) should not be the registered proprietor of the property. That is, he should merely hold title to the mortgaged property as security, the proprietary interest being vested in the mortgagor. In this case the converse is what is applicable. As I have stated above, "LP3" reveals that the "security" i.e stand number 24727, Lusaka, has already been assigned to the Applicant. He is therefore not holding the property as security for payment but he is the beneficial owner. Further, as Mr. Kasonde has quite rightly argued, the instruments pursuant to which the deal between the parties was sealed, "LP1" and "LP2", describe the two parties as seller and buyer. This clearly indicates the intention of the parties as being the eventual assignment of the property, albeit, following default. In these circumstances, I therefore find that the Applicant cannot enforce his rights by way of a mortgage action. The Applicant's action is therefore misconceived.

Despite, my findings in the preceding paragraph I am compelled to make a determination on the issue raised by both counsel to the effect that I should treat this matter as having commenced by writ of summons. In articulating

the issue, Counsel argued that if I should find that the action is wrongly commenced and should have been commenced by writ of summons and since a number of triable issues are raised, I should treat it as such and give the necessary directions. Reliance was made by counsel on Order 28 rule 8 of the ***white book***.

Order 28 rule 8 of the ***white book*** states as follows;

> ***"(1) Where, in the case of a cause or matter begun by originating summons, it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof.***
>
> ***(2) Where the Court decides to make such an order, Orders 25, rules 2 to 7, shall, with the omission of so much of rule7(1) as requires parties to serve a notice specifying the orders and directions which they require and with any other necessary modifications, apply as if there had been summons for directions in the proceedings and that order were one of the orders to be made thereon."***

As counsel argued the said order does vest in the Court discretion to continue a matter as if began by writ. Further, it stipulates that the Court will also give directions as to pleadings as it deems fit. In my considered view however, I find that the use in the order of the phrase, "any stage of the proceedings," refers to any stage of the proceedings prior to judgment. This is because, directions as to the exchange of pleadings can only be given before judgment. In this matter the request by the parties was made at judgment stage after the parties had

presented their respective arguments on the matter. I find that it is rather late in the day for a Court to give directions for trial whilst it is mandated the task of writing the judgment. For this reason, I find the request by the parties untenable and accordingly dismiss it.

Lastly, I turn to consideration of the counterclaim by the Respondent. He has argued in this respect that the Applicant is in breach of contract of sale in respect of property known as Stand number 30274 Lusaka. The Respondent also urged me to nullify the assignment of the property Stand 24727, Lusaka to the Applicant. As regard the first counterclaim a copy of the contract of sale is produced as exhibit "DT3" to the affidavit in opposition. It has been argued further, that the Applicant having breached the said contract, he should forfeit the 10% deposit paid on the purchase price which should be used to offset what the Respondent owes him. I find that the Respondent's counterclaim as regards the setoff lacks merit because a perusal of exhibit "DT3" to the affidavit in opposition, in particular clause 8, stipulates how the purchase price will be paid. From the facts it would appear that the deposit on the purchase price has been paid by the Applicant. This is evident from the Respondent's quest to have the deposit forfeited. As regards the balance on the purchase price, clause 8 stipulates that same is due and payable on completion of the subdivision of the property and registration thereof. This balance would appear to be what the Applicant is alleged to be in default of paying. There is however, no evidence adduced by the Respondent to prove that indeed the subdivision has been effected on the property and registered in compliance with clause 8 warranting payment of the balance.

As regards the second counterclaim for nullification of the assignment of the property 24727 Lusaka, it was argued that an assignment of the property can only be effected after a Court order has been granted in foreclosure proceedings. It was also argued that the Respondent was under duress when he signed over the property to the Applicant. In determining this issue it is

important to state the effect of "LP1" and "LP2". The said documents are contracts, which are signed by both parties and appear on their face to have been freely entered into. This being the case the Court is bound to enforce them. My finding is based on the decision in the case of ***Printing and Numerical Registering Company –VS- Simpson (5)*** quoted in the case of ***Colgate Palmolive (Z) Inc –VS- Able Shemu Chuka and 110 Others*** quoted at page 8 as follows;

> ***"If there is one thing more than another which public policy requires it is that men of full age and competent understanding shall have the utmost liberty in contracting and that their contract when entered into freely and voluntarily shall be enforced by Courts of justice."***

Applying this test to our current case, the Respondent did by "LP1" agree to assign his property to Applicant in case of default of settlement of the debt of K160,000,000.00. He has not denied default and indeed subsequent to default he executed the deed of assignment "LP2". The fact that "LP1" is not a formal contract is irrelevant because in its form it is sufficient memorandum to assign a property. This is because all details are present as to the vendor and buyer, the price and description of the property. The Respondent is therefore bound by the terms of "LP1" and "LP2" and there is no need for a foreclosure order to be given by the Court to enforce them. It is for this very reason that the Applicant's claim for K60,000,000.00 cannot succeed, because the forfeiture of the property was as a result of default in payment of the K160,000,000.00. The forfeiture cannot be based on an alleged value of the property as being K100,000,000.00. The property was given up for the K160,000,000.00 due and not just K100,000,000.00. This position is strengthened by my earlier finding that the transaction between the parties was not a mortgage transaction but rather a sale transaction. Further, the Respondent cannot escape responsibility by alleging duress. In adducing evidence for the duress, the Respondent has produced "DT2" and "DT3" being police bonds. These

documents in and of themselves do not prove the duress as whatever investigations and actions the police took were in the due process of investigating a criminal complaint. Moreover, at paragraph 6 (ii) of the affidavit in opposition, the Respondent is by implication admitting that the deed of assignment was signed of his own free will save for the fact that he had no lawyer present. The absence of a lawyer representing him does not render any document signed a nullity on account of duress. I therefore find that the counterclaim lacks merit.

By way of conclusion, I therefore find that the Applicant's claim is misconceived and I accordingly dismiss it. I also find no merit in the Respondent's counterclaim and accordingly dismiss it. My findings however, do not deprive, the Applicant, as the beneficial owner of the property stand number 24727, Lusaka, from taking the necessary action to enforce his rights over it.

Both parties having failed in their claim and counterclaim, I make no order as to costs.

Leave to appeal is granted.

Delivered on the 31th day of August, 2011.

Nigel K. Mutuna
HIGH COURT JUDGE