

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

2016/HP/513

**B E T W E E N:**

MEANWOOD FINANCE CORPORATION LIMITED

PLAINTIFF**AND**

MUBUKWANU KABANJE (FEMALE) (Sued as
Administratrix of the Estate of the late Chingala
Hamazyangwe Hang'omba)

1ST DEFENDANT

HACHISAALA NG'ANDU (Sued as Administrator
of the Estate of the late Chingala Hamzyangwe
Hang'omba)

2ND DEFENDANT

PATSON CHAAVA HANG'OMBA

3RD DEFENDANT

HANG'OMBA HANG'OMBA

4TH DEFENDANT

**Before Honourable Mrs. Justice M. Mapani-Kawimbe on the 20th day of
July, 2017**

For the Plaintiff : Mr. W. Simutenda & Mr. N.S. Choonga, Messrs
GDC Chambers
For the 1st Defendant : In Person
For the 2nd Defendant : In Person
For the 3rd & 4th Defendants: Mrs. L. Mwansa, Messrs Thandwe Legal
Practitioners

J U D G M E N T

Cases Referred To:

1. *Courtyard Hotel Limited and Others v First National Bank Zambia Limited and another SCZ Appeal No. 6/2015*
2. *Reeves Malambo v Pateo Agro Industries SCZ Judgment No. 20 of 2007*

3. *L'Estrange v f Graucob Limited (1934) ALL ER Rep 16*
4. *Sableland Zambia Limited v Zambia Railway Authority (2005) Z.R 109 (SC)*
5. *John Paul Kasengele & 4 Others v Zambia National Commercial Bank Limited SCZ Appeal No. 161 of 1999*
6. *Nkongolo Farms Limited v Zambia National Commercial Bank Limited and Others (2007) ZR 149*
7. *Barclays Bank PLC v O'Brien (1993) 4 ALL ER 417*

Legislation Referred To:

1. *Lands and Deeds Registry Act, Chapter 185*
2. *Conveyancing and Law of Real Property Act 1881*

Other Works Referred To:

1. *Halsbury Laws of England, 4th Edition, Volume 9*
2. *Mudenda F. Land Law in Zambia (2006)*

By Writ of Summons, the Plaintiff seeks the following reliefs:

- (i) *An Order for payment by the Defendants to the Plaintiff of the sum of K140,083.53 as at 7th October, 2015 and continuing being in respect of a loan facility obtained by the late Chingala Hamazyangwe Hang'omba from the Plaintiff at his own instance and request.*
- (ii) *Interest on the said amount at current Bank of Zambia lending rate from the 7th October, 2015 until payment in full.*
- (iii) *An Order for absolute attachment of the 3rd and 4th Defendant's leasehold property pledged as security or collateral herein, namely Lot No. 5160/M, Makeni West, Lusaka to the satisfaction or payment of the outstanding loan facility owed by the 1st and 2nd Defendant to the Plaintiff herein.*
- (iv) *An Order for delivery up of possession and disposal or sale of the said Leasehold property pledged by the late Defendant to the Plaintiff as security or collateral for the repayment of the outstanding loan facilities herein by the Plaintiff to recover the outstanding loan facilities owed by the Defendants to the Plaintiff herein.*
- (v) *Costs of the action herein; and*
- (vi) *Any other relief the Court may deem fit under the circumstances*

The Statement of claim discloses that the 3rd and 4th Defendants are the registered legal and absolute owners of leasehold

property Lot No. 5160/M, Makeni West, Lusaka, which was pledged to the Plaintiff as collateral for the repayment of the loan secured by the late Chingala Hamazyangwe Hang'omba, (the deceased). The Plaintiff states that the deceased obtained loans on 26th July, 2011 and 6th March, 2012 for K20,000 and K30,000 respectively. As at 7th October, 2015, the Defendants owed the Plaintiff K140,083.53 on the principal amount and interest.

The Plaintiff states that the Defendants executed a Deed of Assignment in favour of the Plaintiff on Lot No. 5160/M Makeni West, Lusaka, registered in the 3rd and 4th Defendants name and deposited the certificate of title with the Plaintiff. Despite several reminders and demands, both verbally and in writing, the Defendants failed to settle the balance on the loan.

The 1st and 2nd Defendants settled a Defence where they barely denied the Plaintiff's claim.

The 3rd and 4th Defendants settled a Defence and admit that Lot No. 5160/M Makeni is registered in their names. They deny that they pledged their property as collateral for the loans secured by the

deceased and that they are indebted to the Plaintiff. The 3rd and 4th Defendants aver that the certificate of title currently in the Plaintiff's possession was fraudulently obtained by the deceased from the 3rd Defendant.

As particulars of fraud, they state that the deceased falsely informed the 3rd Defendant that the 4th Defendant had consented to the use of their certificate of title to secure a loan, when he did not. The 3rd Defendant acting on the false statement released the title deed to the deceased. They aver that any consent given on their behalf was fraudulently obtained and are being deprived of their property by the Plaintiff. They also aver that the Plaintiff did not verify if they had given consent to the use of their title as collateral.

The Plaintiff's only witness was **Henry Mukonde**, a Senior Credit Analyst who testified as **PW1**. His evidence was that the deceased applied for a loan from the Plaintiff and part of the requirements required collateral, which he produced in the form of the 3rd and 4th Defendants' title deed; and a letter of consent by the 3rd Defendant authorizing the use of his title.

PW1 testified that the loan was approved and subsequently granted to the deceased on 26th July, 2011. The loan disbursed was K20,000 and had a tenure of six months with the effective date of 27th July, 2011. The deceased accepted the terms of the loan and signed against each page of the offer letter. PW1 stated that under Clause 8 of the offer letter, the deceased gave security of postdated cheques and the title deed.

PW1 further stated that the deceased signed a Deed of Assignment to perfect the security. According to PW1, the deceased defaulted on the loan repayments and in March, 2012, he asked for a further loan facility of K30,000 which was provided. Another letter of offer was drawn on 6th March, 2012, wherein the deceased pledged the same title deed as collateral. The loan tenure was equally six months and the deceased yet again defaulted on the repayments.

PW1 testified that the Plaintiff instructed its Advocates to recover the balance on the loans. The Plaintiff's Advocates pursued the debt through the administrators of the deceased's estate after they learnt of his demise. According to PW1, his administrators

asked to settle the loan but sought a waiver of interest. However, no payments were ever received from the administrators.

PW1 testified that the Plaintiff was owed K140,083.53 as at 7th October, 2015, according to the statement of accounts. It was PW1's evidence that the 3rd and 4th Defendants' title gave consent for their title deed to be used as collateral and this was affirmed by the letter of consent produced in the Plaintiff's Bundle. PW1 prayed to the Court to grant the Plaintiff the reliefs sought in the Writ.

In **cross-examination** by the **1st Defendant**, PW1 stated that the administrator's letter seeking a waiver of interest was addressed to the Plaintiff's Advocates. The Plaintiff was not privy to the communication.

In **cross-examination** by the **3rd and 4th Defendants**, PW1 stated that he was aware that the 3rd Defendant was the deceased's father. He also stated that the Plaintiff did not obtain a letter of consent from the 4th Defendant, neither did it verify if the 3rd and 4th Defendants had given consent.

PW1 could not tell if the signature on the letter of consent belonged to the 3rd Defendant because he was not a handwriting expert. PW1 testified that the Plaintiff only signs a Deed of Assignment in the event of default. PW1 added that the 4th Defendant did not sign the Deed of Assignment.

In **re-examination**, PW1 testified that the Plaintiff's relationship with the deceased was premised on a business transaction. He did not know why the 4th Defendant's consent was never obtained. He added that at the time of pledging security, it was crucial for a client to sign a Deed of Assignment to enable the Plaintiff execute in the event of default.

Hachisaala Ng'andu testified as **DW1** on behalf of the **1st and 2nd Defendants**. His testimony was that he only became aware of the Plaintiff's claims when he and his co-administrator the 1st Defendant received a letter of demand on the loan from the Plaintiff's Advocates. According to DW1, the 1st Defendant was aware that the deceased had secured a loan but was not aware of the obligations. DW1 stated that the deceased did not leave much for his estate and

as administrators they requested the Plaintiff to settle the principal and waive off interest, but did not receive a response.

In **cross-examination** by the **Plaintiff**, DW1 stated that the administrators never settled the balance on the loan because there was no response to their proposal. DW1 conceded that the Plaintiff's Advocates informed them of the mandatory obligations on the loan.

The 3rd and 4th Defendants did not **cross-examine** DW1.

The witness was not **re-examined**.

Partson Chaava Hang'omba testified on behalf of the 3rd and 4th Defendants as **DW2**. His testimony was that he gave the deceased, his son, his title deed who intended to borrow money from a friend and not a company. The deceased told DW2 that his friend would hold on to the title deed as security until he repaid the loan through postdated cheques. DW2 testified that he only discovered that the deceased was indebted to the Plaintiff when he was sued. DW2 also testified that he never signed any other documents for the loan.

In **cross-examination** by the **Plaintiff**, DW2 stated that he freely gave the deceased his title deed to secure a loan. DW2 stated that he never signed the letter of consent in the Plaintiff's Bundle and the signature on that letter was not his.

The witness was not **cross-examined** by the **1st and 2nd Defendants**.

The witness was not **re-examined**.

Learned Counsels filed written submissions for which I am grateful. On behalf of the Plaintiff, Learned Counsel submitted that there was a binding contract between the Plaintiff and the Defendants, which was perfected by a Deed of Assignment of the property belonging to the 3rd and 4th Defendants.

Counsel referred me to the Learned Authors of **Halsbury's Laws of England, 4th Edition**, paragraph 203, where they state that:

"For a firm, valid, binding and enforceable contract to be in existence the following must be shown:

(a) There must be two or more separate and definite parties.

- (b) **The parties must be in agreement that there is a meeting of the minds (consensus ad idem).**
- (c) **They must intend to create a legal relationship in the sense that the promises of each side are to be enforceable simply because they are contractual promises.**
- (d) **The promise of each party must be supported by consideration or by some other factor which the law considers sufficient.”**

Counsel submitted that the Plaintiff and the deceased had a valid contract as shown by the execution of the two facility letters dated 26th July, 2011 and 6th March, 2012. Counsel further submitted that the Plaintiff was entitled to foreclose and sale the property pledged as collateral, which was provided as an express term of agreement between the parties in the event of default. Further, that the consent to pledge the property was voluntarily given by the 3rd Defendant to the Plaintiff.

Counsel cited section 65 of the Lands and Deeds Registry Act, which provides that:

“A mortgage or an interest in land shall have effect as security and shall not operate as a transfer or lease of the estate or interest thereby mortgaged, but the mortgagee shall have and shall be deemed always to have had the same protection powers and remedies (including power of sale, the right to take proceedings to obtain possession from the occupiers and the persons in receipt of rents and profits or any of them and, in the case of land held in leasehold, the right to receive any notice relating to the land the subject of the mortgage which under any law or instrument the mortgagor is entitled to receive) as if the mortgage had so operated as a transfer or lease or interest mortgaged.”

Counsel also cited section 19 of the Conveyancing and Law of Real Property Act, which states thus:

“A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers to like extent as if they had been in terms conferred by the mortgage deed but no further

(1) A power, when the mortgage money has become due, to sell, or to concur with any other person in selling the mortgaged property, or any part thereof, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as he (the mortgagee) thinks fit, with power to vary any contract of sale, and to put in at an auction or to rescind any contract of sale, and to re-sell, without being answerable for any loss occasioned thereby.”

He further called in aid the case of **Courtyard Hotel Limited and Others v First National Bank Zambia Limited and Another¹**, where the Supreme Court stated as follows:

“The point to note from what we said in *Kanjala Hills Lodge* case is that once there is default on a condition such as the default on a repayment installment, the mortgagee becomes entitled to pursue all the remedies available to him.”

Counsel referred me to the case of **Reeves Malambo v Pateo Agro Industries²**, where the Supreme Court stated that:

“A mortgagee is at liberty to exercise his rights of foreclosure 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, mortgagee becomes an absolute owner of the mortgage term at law as soon as the day fixed for redemption has past.”

Counsel submitted that the Plaintiff had the power to sell the property that was pledged as collateral to recover the outstanding debt and accrued interest. Counsel also submitted that since DW2 freely released his title to the deceased, he could not turn around to allege fraud or undue influence for which he did not tender evidence.

Counsel called in aid the case of **L'Estrange v F Graucob Limited**³, where it was held that:

"In the absence of fraud, or I will add, misrepresentation, the person signing it is bound.... I strongly object to deal with allegations of fraud where fraud is not expressly pleaded. I have read the evidence with care and it contains no material upon which fraud could be found."

He referred me to the case of **Sableland Zambia Limited v Zambia Railway Authority**⁴, where the Supreme Court held that:

"Where fraud is an issue in the proceedings, then a party wishing to rely on it must ensure that it is clearly and distinctly alleged. Further, at the trial of the cause, the party alleging fraud must equally lead evidence, so that the allegation is clearly and distinctly proved."

Counsel added that the title deed vested with DW2 following the 4th Defendant's demise and the lack of consent on the part of the 4th Defendant was inconsequential and had no legal effect. He

referred me to the learned author **Mudenda F., Land Law in Zambia** who states that:

“The Right of Survivorship (Jus Accrescendi)

By virtue of the principle of Jus accrescendi, if one tenant dies during the existence of the joint tenancy, their interest in the joint tenancy automatically passes to the remaining joint tenant(s). The right of survivorship takes precedence over any attempted transfer by will of the ‘share’ of the dead joint tenant because there is no such ‘share’ to transfer.”

With regard to the 1st and 2nd Defendants, Counsel submitted that their inability to pay was not a defence at law and that the estate of the deceased was liable to the Plaintiff. He referred me to the case of **John Paul Kasengele and 4 Others v Zambia National Commercial Bank Limited**⁵, where the Supreme Court held that:

“We also wish to comment on the Respondent’s ability or non-ability to pay.... Moreover, inability to pay has never been and is not a defence. Neither is it a bar to entering Judgment in favour of a successful litigant.”

Counsel concluded with a prayer urging the Court to grant the Plaintiff the reliefs sought in the Writ and costs.

On behalf of the 3rd and 4th Defendants, Learned Counsel submitted that the 3rd Defendant was unduly influenced by the deceased and relied on the case of **Nkongolo Farms Limited v Zambia National Commercial Bank Limited and Others**⁶.

Counsel referred me to the case of **Barclays Bank PLC v O'Brien**⁷, where the bank took no steps to explain the documents in its possession to the surety, nor suggest that the surety could seek independent legal advice. The bank later sought an order for possession, which the Court denied. Counsel submitted that this case was premised on undue influence and the Plaintiff did not conduct due diligence to ensure that the certificate of title given as collateral had the blessings of the surety.

On fraud, Counsel submitted that DW2's testimony disputing the signature on the consent letter was not countered by competing evidence from the Plaintiff. Counsel also submitted that the Deed of Assignment tendered by the deceased was not signed by the 4th Defendant, who was alive at the time. She prayed to the Court to dismiss the Plaintiff's case against the 3rd and 4th Defendants.

I have anxiously considered the pleadings, evidence adduced and written submissions filed herein. The issues that fall for determination in my considered view are twofold: firstly, whether the estate of the deceased is liable to the Plaintiff and secondly,

whether the mortgaged property was validly pledged as collateral by the deceased?

It is plain from the record that on 27th July, 2011 and 6th March, 2012 the deceased procured two loans from the Plaintiff in the sums of K20,000,000 and K30,000 respectively. Both loans had a tenure of six months and were secured on the basis of post-dated cheques and the 3rd and 4th Defendants' title deed.

The deceased defaulted on both loan facilities and as at 7th October, 2015, he owed the Plaintiff K140,083.53 an amount which continued to attract monthly interest of 12% up to the date of Writ of Summons. This amount is due to the Plaintiff and the inability of a Defendant to pay a debt is not a defence. I accordingly enter judgment for the Plaintiff in the sum of K140,083.53 and interest thereon at 12% per month up to the date of Writ. I also award the Plaintiff interest on the debt at the short term deposit rate from the date of Writ till judgment, thereafter at the rate to be determined by the Bank of Zambia lending rate. These monies are to be recovered from the estate of the deceased.

The lingering issue is whether the 3rd and 4th Defendants' title deed was validly obtained by the deceased to secure the loan. DW2 did not deny the fact that he freely surrendered his title deed to his son for the purposes of obtaining a loan. PW1 contended that the certificate of title was produced with DW2's letter of consent and a signed Deed of Assignment. The consent of the 4th Defendant was never obtained and it is alleged that he was alive at the material time.

Learned Counsel for the 3rd and 4th Defendants argued that the Plaintiff did not produce evidence to rebut DW2's assertion that he did not sign the letter of consent. I found it very perplexing that DW2's signature on the letter of consent and the undated Deed of Assignment substantially differed from his signature on his registration card.

In inopportune fashion, the certificate of title produced in the Plaintiff's Bundle omitted the page which contains the signatures of the title holders. On the basis of documents produced by the Plaintiff, it was quite shocking to observe how DW2's signature had drastically changed from the one on his national registration card to

the documents produced by the Plaintiff. I am inclined to the view that the documents in the Plaintiff's Bundle were signed by different persons.

According to PW1, the Plaintiff never took steps to verify the 3rd Defendant's signatures. The Plaintiff never approached the 3rd and 4th Defendants to ascertain if they had given consent to the use of their title deed as collateral for the deceased's loans. This reacts against the Plaintiff given the authority derived from the case of **Nkongolo Farms Limited v Zambia National Commercial Bank Limited and Others**⁶, where the Supreme Court held that:

"The law imposes on a creditor a duty to take steps to ensure that not only does a borrower or debtor not exercise undue influence and or make a false representation to a surety, but also that the creditor has a duty to ensure that a surety has adequate understanding of the nature of the transaction in question. The creditor has the obligation to inform itself as to whether or not there is a relationship of trust and confidence between the borrower and the guarantor, and the attendant risk to abuse that relationship. The lender has a further obligation to ensure that the guarantee did not in any way exercise undue influence on the guarantor."

The Plaintiff was under an obligation to ensure that the deceased did not unduly influence or make a false representation to the surety. In like manner, it was under an obligation to ensure that the surety had adequate understanding of the nature of the transaction. This was not done. Moreover, if the 4th Defendant was

alive at the time, the Plaintiff had a further obligation to obtain his consent as joint title holder with equal rights as DW2.

Given the Plaintiff's failings, I decline to order the absolute attachment of the 3rd and 4th Defendants' property Lot No. 5160/M Makeni West and the disposal of the property.

I order each party to bear their own costs.

Leave to appeal is granted.

Dated this 20th day of July, 2017.


M. Mapani-Kawimbe
HIGH COURT JUDGE