

IN THE COURT OF APPEAL OF ZAMBIA

Appeal No. 206/2023

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

WEBGET INVESTMENTS LIMITED

1st APPELLANT

WEBSTER SIYINGWA

2ND APPELLANT

AND

CITIZENS ECONOMIC EMPOWERMENT COMMISSION

RESPONDENT

Coram: Chashi, Sichinga and Sharpe-Phiri, JJA

On 27th March, 2024 and 10th April, 2024

For the Appellants: Mr. G. Chombo of Messrs Chombo and Partners

For the Respondent: Mr. G. Hakaainsi of Messrs LM Chambers

JUDGMENT

Sichinga JA, delivered the judgment of the Court.

Cases referred to:

1. *African Banking Corporation (Z) Limited (T/A Bank ABC) v Plinth Technical Works Limited SCZ Appeal No. 128 of 2015*
2. *John Mugala and Kenneth Kabenga v. Attorney General (1988 – 1989) ZR 171*
3. *Murray & Roberts Construction Limited and Kaddoura Construction Limited v. Lusaka Premier Health Limited and Industrial Development Corporation of South Africa Limited SCZ Appeal No. 141 of 2016*
4. *African Banking Corporation Limited v. Copper Harvest Foods Limited and Others SCZ Appeal No. 18 of 2021*

Legislation referred to:

1. *The High Court Act, Chapter 27 of the Laws of Zambia*
2. *The Rules of the Supreme Court of England 1965 (1999) Edition (White Book)*

1.0 Introduction

- 1.1 This is an appeal by Webget Investment Limited and Webster Siyingwa (who are the respondents in the court below) against the Ruling of the High Court Commercial Division (Zeko-Mbewe J) handed down at Lusaka, dated 18th December, 2022, in which the learned Judge granted the Citizens Economic Empowerment Commission (applicant in the court below) leave to amend the court process.

2.0 Background

- 2.1 The brief background was that the respondent, Citizens Economic Empowerment Commission (CEEC) availed the 1st appellant (Webget Investments Limited) a loan facility in the sum of K553,816.00 to procure a stock feed machine, utility truck and to operate the processing plant in Nakonde District. The loan was secured by a Third Party Mortgage over Stand No. 3002 situate at Nakonde in the Nakonde District of Muchinga Province of the Republic of Zambia and structures thereon registered in the name of Webster Siyingwa, the 2nd appellant herein. The loan was also secured by a Debenture over all plants and machinery to be procured from the proceeds of the loan obtained from CEEC. Further, the loan was personally guaranteed by Webster Siyingwa.
- 2.2 Additional loans were availed by CEEC to the 1st appellant and the same were secured by a Further Charge over Stand No. 3002 Nakonde and personal guarantees by the 1st appellant's directors. Part of the disbursed amount was used to purchase a motor vehicle, a Scania Rigid Truck, Registration Number AJD 9836ZM. It was registered in the names of the 2nd appellant with CEEC as the absolute owner.

2.3 Following breach by the appellants of their repayment obligations, CEEC commenced an action by way of originating summons for the following claims:

1. Payment of all monies which as at 30th October, 2021 stood at a sum of K533,057.77 plus interest at the agreed rate of 12% per annum and other charges due or secured by Third Party Legal Mortgage over Stand No. 3002 Nakonde;
2. Foreclosure, possession and sale of the said mortgaged properties being Stand No. 3002 Nakonde;
3. Interest as agreed or other relief the court deems fit; and
4. Legal costs of and incidental to the action.

2.4 On 14th November, 2022, CEEC sought the court's leave to amend court process to include reliefs on the originating summons relating to the said utility truck which it bought as part of the loan disbursement.

2.5 The appellants opposed the application to amend the originating process stating that the proposed amendment and the relief sought to be included in the originating summons was not supported by statutory provision.

3.0 **Decision of the High Court**

3.1 The learned Judge found that she retained the jurisdiction to determine the application at any stage of the proceedings. She found that the claim for the motor vehicle did not fall under a mortgage action per se, however, that the issue for determination in the originating summons is one of construction of the documents executed by the appellants to secure the facility from CEEC. She found that the proposed amendment has a correlation with the earlier reliefs in the originating summons as they arises from the same transaction.

3.2 The learned Judge found merit in the application and accordingly granted leave to CEEC to amend the originating process.

4.0 The appeal

4.1 The appellants appealed the decision of the High Court to this Court on the following grounds:

1. *The Court below erred in law and fact by misapplying the Supreme Court decision of African Banking Corporation (Z) Limited (T/A Bank ABC) v Plinth Technical Works Limited SCZ No. 128 of 2015 and therefore misdirected itself by granting the respondent leave to amend originating summons;*
2. *The Court below erred in law and fact when it volunteered its decision by invoking the provisions of section 13 of the High Court Act CAP 27 of the Laws of Zambia without allowing the appellants and respondent to address it on the issue;*
3. *The court below erred in law and fact when it disregarded the rules of procedure pertinent to originating summons by allowing an amendment which is not supported by law; and*
4. *The court below erred in law and fact by holding that the amendment has a correlation with the earlier reliefs in the originating summons as it arises from the same transactions.*

5.0 Appellants' arguments

- 5.1 The appellants relied on their heads of argument filed on 10th July, 2023.
- 5.2 In support of ground one, it was submitted that the case of ***African Banking Corporation (Z) Limited (T/A Bank ABC) v Plinth Technical Works Limited¹*** is distinguishable from the present case in that it did not deal with joinder of parties as was the case in the *African Banking* case which dealt with issues pertaining to personal guarantees. That the amendment sought in this case related to a motor vehicle purchased from a loan facility. It was contended that the claim for the motor vehicle does not fall under the mortgage action as the issue for determination in the originating summons is one of construction of documents executed by the appellants to secure the facility from the respondent.

- 5.3 It was argued that the amendment was an afterthought reaction to the appellants' argument in the pending application for preservation of property contending the Scania Truck Registration No. AJD 9832ZM is not a subject of this suit. The contention is that the amendment is an attempt to rectify that error which will render the appellants' argument otiose and academic. Consequently, the lower court misdirected itself by misapplying the Supreme Court decision of ***African Banking Corporation (Z) Limited (T/A Bank ABC) v Plinth Technical Works Limited*** *supra* and granting the respondent leave to amend the originating summons.
- 5.4 On ground two of the appeal, the appellants placed reliance on the case of ***John Mugala and Kenneth Kabenga v. Attorney General***² where the Supreme Court held as follows:

"we have not, of course, lost sight of the fact that the ruling here was volunteered by the Court and did not follow upon any submission by the defence; but the point is whether it was competent for the learned trial Judge, even on his own motion, to make such a ruling. We do not doubt that it was competent but hasten to point out that it is most undesirable for the trial Judge to volunteer such a ruling, especially without affording the parties advance notice of what the Judge had in mind and giving them the opportunity to address him..."

- 5.5 Reliance was also placed on the case of ***Murray & Roberts Construction Limited and Kaddoura Construction Limited v Lusaka Premier Health Limited and Industrial Development Corporation of South Africa Limited***³ which followed the same principle.
- 5.6 It was submitted that the jurisdiction of the trial court is confined to the questions and/or issues raised in an application by the parties. That if the trial court considers that there is pertinent issue that has not been raised but is critical, such an issue must be presented before the parties who must then be given an opportunity to be heard on the

- same. It was argued that a trial court that fails to take such steps but nevertheless renders its decision is said to have volunteered a ruling, which is liable to be set aside on appeal.
- 5.7 Counsel submitted that the issue that fell for determination before the lower court was whether the respondent satisfied the requirements under **Order 27 rules 1 and 3 of the High Court Rules**¹ which relates to injunctions and preservation orders.
- 5.8 It was contended that the respondent did not satisfy the requirements of *Order 27 rules 1 and 2*, therefore the *ex-parte* Order dated 21st April, 2022 was improperly obtained. That the motor vehicle mentioned in the *ex-parte* Order and seized by the respondent is not part of this action or property which is a subject of this suit.
- 5.9 It was argued that the respondent's application was improperly before the lower court since the 2nd appellant's Scania Truck registration No. AJD 9832ZM is not mentioned anywhere in the applicant's originating summons as the subject of this suit. That as such the *ex-parte* Order obtained by the respondent does not meet the requirement of *Order 27 Rule 1 or 3 of the High Court Rules*.
- 5.10 It was submitted that the lower court went on a tangent of its own when it went on to determine the issue of multiplicity of actions. That none of the parties to the proceedings raised such an issue. That if the lower court felt that there would be a multiplicity of actions in this matter, the learned Judge should have invited both parties to address the court on it. The appellants contended that such a ruling cannot be allowed to stand in the interest of justice.
- 5.11 With respect to ground three, we were referred to *Order 30 rule 14 of the High Court Rules* which pertains to the mode of commencement of mortgage actions. Reliance was placed on the case of ***African Banking Corporation Limited v Copper Harvest Foods Limited and Others***⁴ where it was held *inter alia* as follows:

"From our point of view, the only claim against the said Respondent that qualify to be commenced as mortgage actions proper are those for orders of foreclosure

and sale of the Respondents assets of security. We say so because under Order XXX rule 14 of the High Court Rules, the right to commence a mortgage action is very specific to mortgagees, mortgagors, and "persons entitled to or having property right to foreclosure or redemption of a mortgage". Among reliefs to be sought under an originating summons are: payment of moneys secured by the mortgage or charge, sale, foreclosure and the summons is returnable before the Judge in Chambers."

5.12 The appellants contended that in a mortgage action the only relief an applicant can obtain is payment of moneys secured by the mortgage or charge, sale and foreclosure. That it can be further understood that an applicant cannot seek a relief from his or her opponent's assets that has not been mortgaged or charged. Therefore, the intended relief the respondent in this case seeks to add for an order for possession and sale of Scania Rigid Truck No. AJD 9832ZM is not provided for under **Order 30 rule 14 of the High Court Rules** as it was not placed as security for the mortgage. That further, the respondent has not provided any alternative statutory provision under any written law which would make the relief or amendment being sought, suitable for determination by way of originating summons. That the lower court's ruling granting leave to amend is an affront to the provisions of **Order 6 rule 1 of the High Court Rules** on commencement of proceedings as such a relief is not provided for anywhere in the law for commencement or amendment in an action commenced by originating summons.

5.13 Reliance was placed on the case of **African Banking Corporation (Z) Limited (T/A Bank ABC) v Plinth Technical Works Limited** where it was held *inter alia* that:

"We are alive to the fact that applications by originating summons are appropriate where the decision depends on

the construction of an instrument or statute or the granting of relief in mortgage proceedings."

- 5.14 It was submitted that the respondent's application was not supported by law.
- 5.16 On ground four, we were referred to ***Order 30 rule 14 of the High Court Rules*** which provides for mortgage actions and it was submitted that this provision cannot be used to commence other class of actions by way summons. Reliance was placed on the case of ***African Banking Corporation Limited v Copper Harvest Foods Limited and Others*** *supra*.
- 5.17 It was submitted that the parties' real intention was to have the loan secured by a third party mortgage in which security for this mortgage was Stand No. 3002 situate in Nakonde. That the amendment granted in favour of the respondent was misconceived as there was already security which from inception counsel contended that it is unjust for the respondent to resort to the appellants other properties before foreclosure of the mortgaged property.
- 5.18 It was submitted that the lower court erred in holding that the amendment has a correlation with the earlier reliefs sought in the originating summons as it does not arise from the same transaction because the Scania Rigid Truck Registration No. AJD 9832ZM was not placed as security for the mortgage transaction and therefore cannot be a relief in this mortgage action. We were urged to allow the appeal with costs.

6.0 Respondent's arguments

- 6.1 On 14th August, 2023, the respondent filed its heads of argument. Grounds one and two are argued separately and ground three and four are argued together.
- 6.2 In response to ground one, it was submitted that the court below did not misapply the ***African Banking Corporation (Z) Ltd case*** because

the said case was not only dealing with joinder of parties but it actually dealt with a similar issue where the High Court Judge dismissed an action on account that the appellant had included claims which did not fall under the mortgage action although arising out of the same facts or transaction. That a reading of the said case will reveal that the ruling of the court below *in casu* was actually supported by the decision of the Supreme Court in the ***African Banking case*** where the Supreme Court had this to say at page J37:

"Even though the principal debtor is the person primarily liable to the creditor for the debt or default answered for by the surety and even if the principal debtor is not a party to the surety's contract to be answerable to the creditor although sometimes bound by the same instrument as his surety, it is not uncommon for claims in a mortgage action to be joined to a claim for enforcement of personal guarantees even though a guarantee is a contract ancillary and subsidiary to some other contract or liability on which it is founded, but without which it must fail."

6.3 It was submitted that the court below did not in any way misapply the ***African Banking Corporation (Z) Ltd case*** above because as can be seen even in that case the Supreme Court held that matters that arise out of the same transaction ought to be brought before the same court to avoid multiplicity of actions. This is especially that ***section 13 of the High Court Act*** mandates the court or the Judge to resolve all issues in dispute between the parties. We were urged to dismiss the first ground of appeal for want of merit.

6.4 In response to the second ground of appeal, it was submitted that the appellants' allegation that the court volunteered its decision by invoking ***section 13 of the High Court Act*** without allowing the parties to address the issue, is factually flawed and not supported by law. That the learned Judge did not introduce any new issue in her ruling. It was

contended that the appellants, throughout their submissions, have lamentably failed to point out any new issue which the court below considered without allowing the parties to address the court on it.

- 6.5 It was argued that the authorities cited by the appellants to support ground two are irrelevant, and not applicable in this case, where **section 13 of the High Court Act** was invoked. It was argued that there is no reason to fault the Judge in the court below because in invoking **section 13 of the High Court Act**, the Judge restricted herself to the issues in dispute between the parties. We were therefore urged to dismiss ground two of the appeal.
- 6.7 In response to grounds three and four, it was submitted that the said motor vehicle was not being claimed, for having been placed as security for the mortgage, but for having been bought by the respondent using the loan disbursed to the appellants. We were referred to page 60 of the Supplementary record of appeal, exhibiting a Loan Facility Letter, which shows that the 1st appellant was availed additional funding for the purpose of *inter alia* purchasing a utility truck. That the said utility truck was accordingly purchased and registered in the name of both the 2nd appellant and the respondent. The motor vehicle Registration Certificate is shown at page 86 of the Supplementary Record of Appeal.
- 6.8 It was submitted that the court below was on firm ground in allowing the amendment, to include the claim for sale of the utility truck, which was purchased using the loan disbursed by the respondent. That the utility truck forms part of the mortgage transaction having been bought using the loan amount disbursed by the respondent and having been registered in the name of the respondent and the 2nd appellant. Reliance was placed on the case of **African Banking Corporation (Z) Limited (t/a Bank ABC) v Plinth Technical Works Limited** where the Supreme Court stated that **section 13 of the High Court Act**

mandates the court or the Judge to resolve all issues in dispute between the parties.

- 6.9 Reliance was also placed on the case of ***African Banking Corporation Limited v Copper Harvest Foods Limited and Others*** *supra*, cited by the appellants, where the Supreme Court held, as follows, at page J38:

"In the case of Corpus Legal Practitioners v Mwanandani Holdings Limited, we took the view, looking at the circumstances of the case, that to insist that the claim for removal of the caveat must be brought in a separate action, commenced by way of originating summons, would amount to asking that different claims in that case, although involving the same parties and arising from the same set of facts be severed and brought in separate actions which in turn, would amount to multiplicity of actions, a practice which we have always frowned upon. This is still a sound legal position."

- 6.10 It was submitted that the effect of the above decision of the Supreme Court is that parties ought not to commence piecemeal actions over matters arising from the same set of fact. We were therefore urged to dismiss the appeal with costs to the respondent.

7.0 Decision of this Court

- 7.1 We have carefully considered the record of appeal and the submissions by counsel for the parties. In our view, there is only one issue for consideration, that is, whether the decision of the lower court falls squarely within the case of ***African Banking Corporation (Z) Limited (t/a Bank ABC) v Plinth Technical Works Limited***. To this end, we shall deal with all the grounds together as they are interrelated.

- 7.2 The brief facts of the ***African Banking Corporation case*** relevant to this appeal are that the appellant availed the 1st respondent a 12 months advance payment guarantee facility in the sum of K14,510,466.62 for the purpose of performing on contracts awarded by the Government of Zambia. The facility was also for a sum of US\$700,000 for a letter of credit facility. The borrowing was secured by a third party mortgage over Stand No. 11989, Chudleigh, Lusaka owned by the 2nd respondent. The third party mortgage was executed by the appellant, and the 1st and 2nd respondents. The facilities were also secured by a fixed and floating debenture over all the assets of the 1st respondent and personal guarantees of the 3rd to 6th respondents. Before expiry of the facility, the 1st respondent applied for and was granted a bridging loan facility, continuation of a term loan, continuation of an advance payment guarantee facility and continuation of a letter of credit in the total sums of K17,124,114.69 and US\$700,000 to enable the 1st respondent meet working capital requirements relating to purchase of materials and hire equipment on the contract.
- 7.3 The 1st respondent defaulted on its repayment obligations to the appellant. The appellant commenced proceedings by originating summons against the respondents seeking payment of all monies due and owing to the appellant on the two facilities: foreclosure, possession, and sale of the mortgaged property; an order that the 3rd to 6th respondents honour their personal guarantees; any other relief the court may deem fit; and legal costs.
- 7.4 In his judgment, the learned trial Judge found *inter alia* that an originating summons issued under ***Order 30, rule 14 of the High Court Rules supra and Order 88, rule 1 of the Rules of the Supreme Court (RSC)***² cannot be used to make any claim which does not arise under a mortgage and that where a party seeking to enforce a mortgage also claims relief which do not arise under the mortgage, the

appropriate course of action is 'generally' to commence the proceedings by way of writ of summons. Regarding the claim against the 3rd to 6th respondents, the Judge found that it related to personal guarantees and had nothing to do with any mortgage and fell outside the scope of the remedies which could be granted in the action, as such it would be incompetent to consider the merits of the said claim; and that the appellant was at liberty to engage alternative court process to enforce the guarantees and the debenture.

- 7.5 For that reason the Judge declined the appellant's attempt to apply for leave to enter judgment in default against the 3rd to 6th respondents. The Judge was of the view, after examining the clauses of the third party mortgage deed that the said clauses were not, in any way, intended to allow the 1st respondent to borrow at will from the appellant, upon the security of the third party mortgage. In addition, the Judge found that since the loan facilities secured by the third party mortgage were repaid in full, the appellant's claims against the 1st and 2nd respondents could not be sustained under that cause; and that the court could not order the 1st and 2nd respondents to pay the sums being claimed as the repayment was not secured by the mortgage.
- 7.6 In allowing the appellants' other claims, the Supreme Court's reasoning was as follows at page J37 of its Judgment:

"It also seems to us that originating summons is appropriate for determining questions of fact pertaining to questions of construction, but not for determining questions both of fact and construction where a decision on the latter would not necessarily put an end to the question. When, however, it appears to the court that its decision on the construction of a written instrument will satisfy the proceedings then at issue, the court will not refuse a decision on the possibility of further litigation arising in connection with matters not directly before it (The Encyclopedia of Court Forms and Precedents in Civil Proceedings, p. 400)."

- 7.7 In the present case, the facts are not as intricate as they were in the ***African Banking Corporation case***. The primary loan facility document is the agreement at pages 10 to 14 of the supplementary record of appeal dated 27th September, 2016. By this agreement, the respondent availed the 1st appellant a loan facility in the sum of K553,816 secured by a charge over Stand No. 3002, Nakonde, debenture on all assets, insurance on Stand No. 3002, Nakonde and company assets with interest of the respondent, as first loss payee. Clause 9 of the loan facility refers.
- 7.8 To define the security, the 1st appellant's loan was secured by: a Third Party Mortgage over Stand No. 3002, Nakonde to secure the sum of K500,000 plus interest registered on the 2nd appellant's Certificate of Title in respect of the said property; Debenture Deed registered with the Patents and Companies Registration Agency (PACRA) on 31st August, 2016; and an Undertaking and Personal Guarantee by the 2nd appellant dated 8th July, 2016. Pages 15 to 59 of the supplementary record of appeal refer.
- 7.9 On 27th July, 2017, the respondent and 1st appellant executed yet another loan facility agreement in the sum of K1,035,616.52. In effect this was an amendment to the loan facility agreement executed on 27th September, 2016. According to paragraph 9, the affidavit in support of originating summons at page 6 of the supplementary record of appeal, this was an additional loan facility for the sum of K447,770.00 to enable the 1st appellant purchase a utility truck, finish the construction of the plant and connect Zesco power. The security for the additional funding was, a Further Charge over Stand No. 3002, Nakonde to secure the sum of K447,770 plus interest, an Undertaking and Personal Guarantee by the 1st appellant's directors for the combined loan facility in the sum of K1,197,016.52. Further, the Scania Rigid Truck purchased for the additional loan was registered in the 2nd appellant's name with the

respondent as the absolute owner. Pages 60 to 86 of the supplementary record of appeal refer.

7.10 In our view, a construction of the documents executed by the parties to secure the loans availed to the 1st appellant, and the right to relief, arose from the same transactions or sequence of transactions leading to the consolidation of the loan account as evidenced by the execution of the second facility letter of 27th July, 2017. The combined facility was secured by the Third Party Mortgage and Further Charge on the same property, Personal Guarantees and the Debenture. In addition, the said Scania Rigid Truck was registered in the 1st appellant's name and the respondent as the absolute owner. The learned Judge correctly heeded the Supreme Court's guidance in the ***African Banking Corporation case*** to the effect that hearing the claim sought to be added in the originating summons would be in line with ***section 13 of the High Court Act*** which enjoins the court to resolve all issues in dispute between parties.

7.11 Our reaction to the appellant's submissions on *section 13 of the High Court Act* is that they are misguided. The court can, pursuant to *section 13 of the High Court Act*, administer equity even when it is not pleaded. The fact that the respondent did not plead multiplicity of actions does not preclude the court from invoking the said section in order to avoid multiplicity of actions. We accept the respondent's submission that reference to *section 13 of the High Court Act* did not introduce any issue that called for the parties to be heard.

7.12 As to whether the procedure for amendment was adhered to, the lower court had power to amend pursuant to ***Order 18 of the High Court Rules*** *supra*. The rule provides as follows:

"The Court or Judge may, at any stage of the proceedings, order any proceedings to be amended, whether the defect or error be that of the party applying to amend or not; and all

such amendments as may be necessary or proper for the purpose of eliminating all statement which may tend to prejudice, embarrass or delay the fair trial of the suit, and for the purpose of determining, in the existing suit, the real question or questions in controversy between the parties, shall be so made. Every such order shall be made upon such terms as to costs or otherwise as shall seem just.”

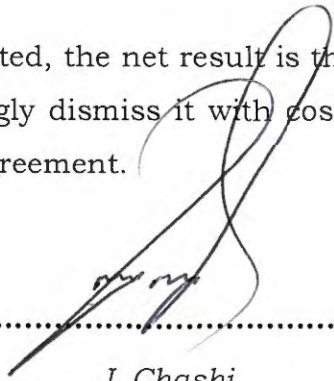
7.13 The rule is plain as it allows amendments to be made with leave of the court. In exercising its discretion to allow or disallow the amendments a court will base its decision on the primary goal. Generally disposing of a case justly requires that amendments should be allowed to enable the real issues in controversy between the parties to be determined. The usual costs rule thereafter, is that the party granted leave to amend will bear the other party's costs of and incidental to the amendment.

7.14 The learned Judge's view was that by allowing the amendment all matters in dispute would be conclusively determined. In our view, the amendment was relevant to the issues before the lower court for her determination.

7.15 As a result, all the grounds of appeal are devoid of merit.

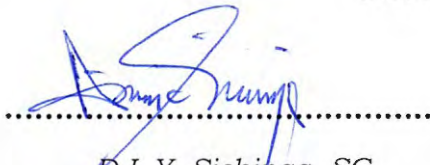
8.0 Conclusion

- 8.1 In view of the forestated, the net result is that we find no merit in this appeal and accordingly dismiss it with costs to the respondent to be taxed in default of agreement.



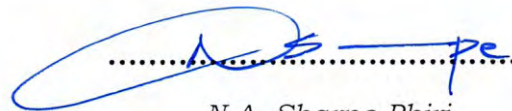
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J. Chashi
COURT OF APPEAL JUDGE



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D.L.Y. Sickinga, SC
COURT OF APPEAL JUDGE



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N.A. Sharpe-Phiri
COURT OF APPEAL JUDGE