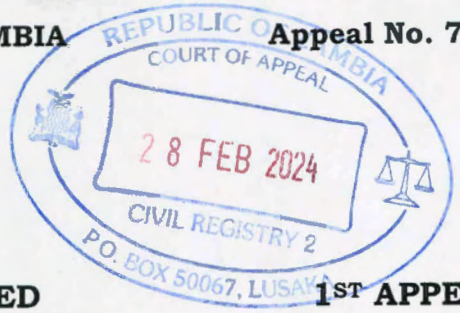
IN THE COURT OF APPEAL OF ZAMBIA **Appeal No. 78/2023**
HOLDEN AT NDOLA
(Civil Jurisdiction)



BETWEEN:

PROSPER INVESTMENTS LIMITED **1ST APPELLANT**

CHILUFYA DAINESS BWALYA SILWAMBA **2ND APPELLANT**

AND

STANBIC BANK ZAMBIA LIMITED **RESPONDENT**

CORAM : Siavwapa JP, Chishimba, and Banda-Bobo JJA

On 20th February, 2024 and 28th February, 2024

For the Appellant : Mr. M. Nzonzo & Mr. R. Musumali of Messrs. SLM Legal Practitioners

For the Respondent : Mr. A. Siwila of Messrs. Mambwe, Siwila & Lisimba Legal Practitioners.

J U D G M E N T

CHISHIMBA JA, delivered the judgment of the Court.

CASES REFERRED TO:

1) Shimonde & Another v Meridian BIAO Bank (2) Limited (1999) Z.R. 47
2) Nyati Bakery Limited & Others v Prudence Bank Limited (2000) ZR 135
3) Embassy Supermarket v Union Bank Zambia Limited (In Liquidation) (2007) ZR
4) Investrust Merchant Bank Limited & Simbeye Enterprise Limited v Ebrahim Yousuf (2004) Z.R. 28
5) American Express International Banking Corp v Hurley (1985) 3 All ER 564
6) Kennedy v De Trafford (1897) A.C. 180
7) Samuel Miyanda V Raymond Handahu (1993 - 1994) ZR 187
8) Tse Kwong Lam v Wong Chit Sen & Others (1983) 1 WLR 1349

9) Roland Leon Norton v Nicholas Lastrom (2010) 1 ZR 358
10) Khalid Mohammed v The Attorney General (1982) ZR 49
11) Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172
12) Wilheim Roman Buchman v Attorney General (1994) ZR 76
13) Posa Estates Limited & Others v First National Bank of Zambia Limited CAZ Appeal No. 007 of 2020

OTHER WORKS CITED:

1) Megarry's Manual of the Law of Real Property. 4th edition. 1969

1.0 INTRODUCTION

1.1 This appeal arises from the judgment of Madam Justice Dr. W. Sithole-Mwenda dated 8th February, 2021. In that judgment, the court found that the respondent did not unilaterally convert the judgment debt from United States Dollar to Kwacha denomination currency.

1.2 The court below further found that the collateral properties in issue were sold at a fair price and that the appellants were not entitled to damages. In respect of rendering of statement of account, the court held that no statement had been rendered. Therefore, the respondent was ordered to produce a statement of the 1st appellant's loan account within 30 days of the judgment.

2.0 BACKGROUND

2.1 The 1st appellant obtained a term loan facility in the sum of ZMK1,350,000,000.00 (unrebased) from the respondent as per letter dated 31st July, 2009 which was varied on 12th August, 2009. The loan was secured by a mortgage of the 2nd appellant's property known as Subdivision No. 36 of Farm No. 401a, Lusaka.

2.2 The 1st appellant obtained a further term loan facility of US$2,500,000.00 from the respondent to acquire a farm being the Remaining Extent of Farm No. 3546, Off Makeni Road, Lusaka. This second loan was by a facility letter dated 20th May, 2010. A mortgage was executed in favour of the respondent for the said property.

2.3 Following breach by the appellants in their repayment obligations, the respondent commenced a mortgage action seeking repayment of the outstanding monies. A consent judgment dated 3rd April, 2014 was executed between the parties, which was subsequently varied on 11th June, 2015. The appellants breached the terms of the consent judgment. The respondent took possession of the remaining extent of Farm No. 3546, Lusaka belonging to the 1st appellant, and

Subdivision No. 36 of Farm No. 401a, Lusaka belonging to the 2nd appellant.

2.4 The appellants alleged that the respondent unilaterally converted the 1st appellant's judgment debt from United States Dollar, which attracted a lower interest rate, to Kwacha that attracts a higher interest rate, thereby exposing the appellants to a higher debt to repay under the consent judgment.

2.5 The appellants further alleged that contrary to the valuation report, the respondent sold the mortgaged properties at very low prices compared to the market value and forced sale values. A search at the Ministry of Lands revealed that the remaining extent of Farm No. 3546, Lusaka was sold at US$2,500,000.00. Following the execution of the consent judgment, the appellants paid the respondent $1,000,000.00 towards the liquidation of the judgment debt which stood at $3,829,710.95 on the date of the consent judgment.

2.6 In a letter dated 2nd February, 2017, the appellants' advocates wrote to the respondent's advocates demanding an update on the status of the properties together with copies of adverts for the sale; the price at which the properties were

sold and to whom; an account of how much was applied to the liquidation of the judgment debt; and a statement of the 1st appellant's account from date of consent judgment to the date of demand.

2.7 Upon failure by the respondent to render an account of the sale as demanded, the appellants commenced an action by writ of summons endorsed with the following reliefs:

1) *An inquiry or account of whether the properties foreclosed under Cause No. 2014/HPC/0005 being Subdivision No. 36 of Farm No. 401a, Lusaka and the remaining extent of Farm No. 3546, Lusaka have been advertised and sold, and if so, who purchased the properties, for what sums of money and by whom the purchase money has been received and in what manner the purchase money had been expended;*
2) *An inquiry as to whether the respondent was at liberty following execution of a consent judgment under the said cause to unilaterally convert the Dollar judgment sum into Kwacha, and thereafter apply Kwacha interest rates which are inevitably higher than the Dollar interest rates, thereby exposing the appellants to a higher judgment debt sum to be liquidated;*
3) *An order for the respondent to produce a statement of the appellants' accounts to ascertain the current outstanding sums, if any, due to the respondent after taking into account the proceeds for the sale of the foreclosed properties;*
4) *An inquiry or account whether the money produced by the sale of the foreclosed properties was a fair and proper price;*
5) *An order for payment to the appellants by the respondent of any excess sums due to the appellants upon taking into account the application of the proceeds of sale of the foreclosed properties;*

6) *Alternatively, if the properties were undervalued/undersold, an order for payment of any sums that would have been due to the appellants in excess had the properties been sold on a fair price and proper price;*
7) *An inquiry as to damages; and*
8) *an order for costs.*

3.0 EVIDENCE IN THE COURT BELOW

3.1 At the trial, the appellant called five witnesses. PW1, Chela Silwamba, a shareholder in the 1st appellant, told the court below that a valuation report of the remaining extent of Farm No. 3546, Lusaka dated 5th October, 2015, showed that the market value of the property was K73,000,000.00 or $7,300,000.00 with a forced sale value of K55,000,000.00 or $5,500,000.00. This could have been sufficient to liquidate the 1st appellant's indebtedness

3.2 That the 1st appellant paid $1,000,000.00 into its account to reduce on its indebtedness which stood at $3,829,710.95 following the execution of the consent judgment. However, since that time, the respondent has not furnished the appellants with a full statement of the loan account to enable the appellants appreciate the extent of their indebtedness. A search conducted at the Ministry of Lands revealed that the property was sold for $2,500,000.00 inclusive of agricultural assets that were separated and encumbered under an

agricultural charge. A demand for an account from the respondent was ignored until after this action was instituted.

3.3 In cross-examination, PW1 conceded that the respondent did advertise the property prior to the sale and that the highest offer received for Subdivision No. 36 of Farm 401a, Lusaka was $400,000.00.

3.4 The 2nd appellant was PW2 who executed a third party mortgage for Subdivision No. 36 of Farm 401a, Lusaka. She complained that she was never availed an account from the respondent following foreclosure and possession of her property, and how much was realized and applied to reduce the indebtedness of the 1st appellant. She stated that a valuation of the property conducted on 5th October, 2015 placed the market value at K8,300,000.00 or $830,000.00 and a forced sale value of K6,200,000.00 or $620,000.00.

3.5 In cross-examination, she conceded that the property was advertised by the respondent prior to being sold, and that the highest offer received was $400,000.00. While stating that she understood the currency clauses in the facility letter, she denied that the respondent was entitled to change the Dollar account into a Kwacha account. However, she accepted that

there was communication by the respondent to one of the 1st appellant's directors relating to the conversion of the currency.

3.6 The third witness (PW3) was Zik Zekko, a chartered accountant and Chief Executive Officer of Delta Options Financial Signage Limited which put in a bid of $18,500,000.00. The bank wrote back offering them the property but that they could not meet the terms of the offer.

3.7 Azim Ticklay, was PW4. He told the court that he is a director in several companies that made offers to purchase Farm 3546, Lusaka. He stated that two of his companies made two bids in the sums of $3,500,000.00 and $3,600,000.00 namely Alliance Resources Limited and Sun Express Tours Limited respectively. A day after making the offers, he met with Mr. Reuben Malindi from the respondent. He requested for time to raise the funds but that the respondent did not revert to him.

3.8 In cross-examination, PW4 conceded that he had no documentary evidence that he requested for more time or that the Development Bank of Zambia had requested for a meeting with the respondent.

3.9 PW5, was Ephraim Chindima, a banker who gave expert witness evidence in matters of lending, mortgages and recoveries. He told the court that under a forced sale value arrangement, a bank can sell a property below the market value and that it is not always the case that a bank sells the property at the reserved price. That the highest bidder is usually preferred unless they do not meet the conditions of sale, at which point the bank is at liberty to engage the second highest bidder from the bids received.

3.10 The only witness for the respondent was Reuben Matale Malindi, the Manager for Specialised Recoveries in the respondent. He stated that after taking vacant possession of the remaining extent of Farm No. 3546 Lusaka, the respondent advertised the property in the Times of Zambia, Zambia Daily Mail and the Post Newspapers from 2nd February, 2016 to 18th March, 2016. An offer was received on 18th March, 2016 from Sunrise Estates Limited for $2,500,000.00. A contract of sale was subsequently executed.

3.11 In respect of Subdivision No. 36 of Farm No. 401a Lusaka, the property was advertised between 14th March, 2016 and

1st April, 2016. An offer was received on 8th November, 2016 from Wilfred Mwanza for the sum of $400,000.00. The sale proceeds from the two landed properties and movable assets amounted to the sum of $2,956,043.25 with a net sum of $2,811,043.25 being applied towards the judgment sum of $3,829,710.95. This left an outstanding balance of $1,018,667.70.

3.12 This witness stated that the conversion of the judgment debt from Dollar to Kwacha was done on 2nd September, 2015 after execution of the consent order varying the consent judgment, with the consent of the appellants. That in any event, it was an express term of the general terms and conditions applicable to the loan facility, that at its sole discretion, when demand has been made, for repayment of the debt, the bank could convert any foreign currency indebtedness into local currency at the respondent's spot rate ruling at the time of the conversion.

3.13 This witness further stated the respondent availed the appellants copies of the sale of assets statement in a letter dated 22nd March, 2017.

3.14 In cross-examination, DW stated that the decision to sell the remaining extent of Farm 3546, Lusaka at $2,500,000.00 was made after the two highest bidders failed to meet the conditions given in the offer letters. That the $2,500,000.00 was less $70,000.00 on account of an encroachment. However, this witness conceded that only $2,200,000.00 was appearing on the account statement for the 1st appellant without any evidence of a conversion. While the $400,000.00 for Subdivision 36 of Farm 401a, Lusaka was not appearing on the statement.

4.0 DECISION OF THE COURT BELOW

4.1 The learned Judge considered the evidence on record and took the view that the issues for determination were as follows:

1) Whether or not the respondent unilaterally converted the judgment debt from Dollar to Kwacha;
2) Whether or not the respondent rendered an account to the appellants regarding the sale of the properties;
3) Whether or not the properties were sold at a fair price; and
4) Whether or not the appellants are entitled to damages and other reliefs prayed for.

4.2 As regards the conversion of judgment debt from Dollar to Kwacha, the court below found that it was not in dispute that the debt was converted to Kwacha on or about 2nd September, 2015 in view of the consent order varying the consent judgment dated 11th June, 2014. In light of the cases of **Shimonde & Another v Meridian BIAO Bank (Z) Limited** [1] and **Nyati Bakery Limited & Others v Prudence Bank Limited** [2] the lower court found that the relationship of banker and customer came to an end upon entry of judgment, and that the parties became judgment creditor and judgment debtor. That their relationship was now governed by the terms of the consent judgment which indicates the judgment sum as ***"... USD3,829,710.95 or the Kwacha equivalent ..."***, and not by the remedies and waivers clause in the general conditions governing the loan facility.

4.3 The court further found that the evidence on record showed that the appellants, through PW1, were consulted in connection with the conversion of the loan from Dollar to Kwacha. Though the 2nd appellant testified that they opposed the conversion, the court found no evidence to support PW2's contention that they were against the move by the bank.

Consequently, the court below found that the respondent did not convert the loan facility from Dollar to Kwacha unilaterally.

4.4 As regards whether or not the respondent rendered an account to the appellants regarding the sale of the properties, the learned Judge considered the document entitled 'Sale of Assets Statement' at page 274 of the record of appeal. The Judge also considered the case of **Embassy Supermarket v Union Bank Zambia Limited (In Liquidation)** [3] where it was held that:

> ***"A Bank statement is a document which shows the status of a particular account at any given time and is not conclusive proof of all monies deposited into such an account."***

4.5 The court found that the 'sale of assets statement' does not qualify as a statement of account of the loan or a bank statement, but that it was a statement of the sale of assets. The court then ordered the respondent to produce a statement of the 1st appellant's loan account showing postings or entries made to the loan account when the respondent sold the properties in 2016, the rate of interest charged, and the charges debited and account balance within 30 days of the date of judgment.

4.6 The court below considered whether the properties were sold at a fair price and was of the opinion that the respondent did not fail in discharging its duties as mortgagee in possession to obtain the best possible price for Subdivision No. 36 of Farm 401a, Lusaka. This is because, in the circumstances, $2,500,000.00 was the best possible price it could get for the same. In any case, there was no evidence of any *mala fides* on the part of the respondent.

4.7 As for the remaining extent of Farm 3546, Lusaka, the court below found that though the accepted bid was the fourth highest, there was no evidence of fraud in the sale. That both properties were sold under a forced sale arrangement requiring the bank to sell below the market value. In any case, bidders that offered high prices failed to meet the terms of the offer to deposit 10% of the selling price. In this regard, the court found that the properties were sold at a fair price.

4.8 Having found that the respondent did not unilaterally convert the judgment debt from Dollar to Kwacha, and that the properties were sold at a fair price, the court below held that the appellants are not entitled to damages. The court ordered the respondent to produce a statement of the 1st appellant's

loan account within 30 days taking into account the $1,000,000.00 paid by the appellants to reduce their indebtedness. Each party was ordered to bear its own costs.

5.0 GROUNDS OF APPEAL

5.1 The appellants appealed against the decision of the court below and have advanced three grounds of appeal as follows:

1) ***The trial court erred in law and in fact when it held that the sale price for the properties, S/D No. 36 of Farm No. 401a, Lusaka and the remaining extent of Farm No. 3546, Lusaka, was not so low and that the properties were sold at a fair price;***
2) ***The trial court erred in law and in fact when it held that the respondent did not act contrary to the terms of the consent judgment under Cause No. 2014/HPC/0005 dated 11th June, 2014 and that the respondent did not unilaterally convert the loan from Dollar to Kwacha; and***
3) ***The trial court erred in law and in fact when it did not award damages to the appellants on grounds that the respondent did not unilaterally convert the judgment debt from Dollar to Kwacha, and that the properties were sold at a fair price.***

6.0 APPELLANT'S HEADS OF ARGUMENTS

6.1 The appellants filed their heads of argument on 24th March, 2023 in support of the appeal. In ground one, the appellants contend that the selling prices for S/D No. 36 of Farm No. 401a, Lusaka and the remaining extent of Farm No. 3546,

Lusaka, were so low that they warrant interference by the court, and that they were not sold at fair prices.

6.2 They submit that the remaining extent of Farm No. 3546, Lusaka was sold at $2,500,000.00. That Special Condition No. 11 and 12 show that the farm land was sold at that amount together with the equipment. That the valuation report at page 147 of the record of appeal shows that the 3,195.33 hectares also had various assets such as three centre pivot farms, 10 hectares of built area with two offices, two warehouses, workshops and storage sheds, a director's house, six prefabricated houses, three managers' houses, 32 workers' houses, eight reservoirs and two pump houses, ten boreholes, an irrigation system and 400 herds of cattle.

6.3 The said farm and assets were valued at K73,000,000.00 with a forced sale of K55,000,000.00 or $7,300,000.00 and $5,500,000.00 respectively. However, the farm was sold for $2,500,000.00.

6.4 S/D No. 36 of Farm No. 401a, Lusaka was equally sold at $400,000.00 when the valuation report at page 160 of the record shows that it had a market value of K8,300,000.00

and a forced sale value of K6,200,000.00 or $830,000.00 or $620,000.00 respectively.

6.5 The appellants contend that the selling prices of $2,500,000.00 and $400,000.00 are manifestly very low and warrant the presumption of collusion and fraud, both assets having been sold far below the forced sale values. That the prices at which the properties were sold is evidence of fraud by the respondent. In support of this argument, we were referred to the case of **Investrust Merchant Bank Limited & Simbeye Enterprise Limited v Ebrahim Yousuf** [4] where the Supreme Court held that:

> ***(i) A mortgagee is not directly a trustee of the power of sale. The power of sale given to a mortgagee is to enable him to realize his debt, if he exercises it bona fide for that purpose without corruption or collusion with the purchaser.***
>
> ***(ii) The Court will not interfere, even though the sale was disadvantageous to the mortgagor, unless the price is very low for it to be itself evidence of fraud.***

6.6 The appellants further argued that the respondent ought to have endeavoured to ascertain the true market value of the farm and its equipment on an open market. That the court ought to consider the valuation of the property in its determination on whether or not the price at which the

mortgaged property was disposed of was low. In this case, the respondent did not exercise proper due care in an endeavor to sell the properties at their market value.

6.7 The case of **American Express International Banking Corporation v Hurley** [5] was relied upon where the court said

> ***"A mortgagee, or a receiver, was under a duty to a guarantor of the mortgagor's debt to take reasonable care to obtain the true market value of the mortgaged property when either of them realised the property in the exercise of a power of sale. In the circumstances the receiver had not taken reasonable care to obtain the true market value of the equipment, because although he knew that the equipment was of a specialist nature and that it had been valued at £193,323, he had failed to take specialist advice from anyone in the popular music business and he had failed to advertise in publications specialising in the popular music industry. Accordingly, the receiver had been negligent and the bank was liable to the guarantor. It followed that, although the bank had a claim against the defendant under the guarantee according to its terms, it was under a liability, as principal, to the defendant for the negligent acts of the receiver. Furthermore, the receiver was liable under an implied term of the contract of agency between the bank and the receiver to indemnify the bank against any loss caused by his negligence."***

6.8 It was further submitted that the respondent did not act in good faith in the sale of the properties as the same was

detrimental to the interests of the appellants. Reliance was placed on the case of **Kennedy v De Trafford** [6] where the court stated that a mortgagee who willfully and recklessly deals with the property in such a manner that the interests of the mortgagor are sacrificed, would not be exercising his power of sale in good faith.

6.9 In ground two, the appellants contend that the respondent acted contrary to the terms of the consent judgment and unilaterally converted the loan from Dollar to Kwacha. They submitted that the consent judgment as read with the order varying consent judgment at pages 260 and 262 respectively of the record of appeal, did not give discretion to the respondent to convert the judgment sum of $3,829,710.95 into kwacha and charge interest in Kwacha at the rate contained in the facility letter.

6.10 The appellants submitted that while the initial consent judgment stated that judgment is entered in the sum of $3,829,710.95 or its equivalent, the varied consent order at page 262 dated 11th June, 2015, contemplated all payments to be made in United States Dollars. That a literal or plain meaning of the consent order confirms that the judgment

debt was supposed to be settled in instalments in United States Dollars, and did not accord an option of converting the judgment debt in Kwacha.

6.11 We were referred to the case of **Samuel Miyanda v Raymond Handahu** [7] where the court guided that:

> ***"When the language is plain and there is nothing to suggest that any words are used in technical sense or that the context requires a departure from the fundamental rule, there would be no occasion to depart from the ordinary and literal meaning and it would be inadmissible to read into the terms anything else on grounds such as of policy, expediency, justice or political exigency, motive of the framers, and the like."***

6.12 It was further submitted that the consent judgment as read with the subsequent consent order, in their literal meaning, did not accord the respondent the discretion to convert the judgment debt to Kwacha. That the meaning and intention of the consent judgment was to ensure that at the point of repayment of an instalment, the appellants had an option of making payment of the sum of the United States Dollar judgment sum at a Kwacha equivalent amount to the respondent.

6.13 The appellants argued that in any case, the banker and customer relationship terminated immediately the court

entered judgment through the consent judgment which was later varied. The case of **Shimonde & Another v Meridian BIAO Bank (Z) Limited** [1] was cited as authority. The appellants further submitted that it was immaterial whether or not the appellants were consulted before the conversion because the terms of the consent judgment and order are final and cannot be varied by making a consultation.

6.14 For this reason, the respondent is liable to the appellants for converting the loan in contravention of the terms of the consent judgment as the appellants suffered loss as a consequence of the conversion. This is because the loan in Kwacha attracts a higher interest rate as compared to the Dollar rate.

6.15 Lastly, in ground three, the appellants seek damages for the conversion of the loan from Dollar to Kwacha and for the alleged loss on account of the properties being sold at an unfairly low price. They submit that once grounds one and two succeed, the court should award damages to the appellants. That the measure of damages due to the appellants is the difference between the market value of the properties and the price at which they were disposed of by

the respondent, which difference ought to be charged to the benefit of the appellants.

6.16 The case of **Tse Kwong Lam v Wong Chit Sen & Others** [8] was cited where the court stated that the borrower was not entitled to have the sale set aside, but was entitled to the alternative remedy of damages. The appellants prayed that the appeal be upheld with costs to the appellants.

7.0 ARGUMENTS BY THE RESPONDENT

7.1 The respondent filed heads of arguments dated 20th April, 2023. In ground one, the respondent submitted that S/D No. 36 of Farm No. 401a, Lusaka and the remaining extent of Farm No. 3546, Lusaka were sold at a fair price and that the price was not so low. It was submitted that in arriving at a decision, the court below took into account the fact that the respondent advertised the sale in the newspapers.

7.2 With respect to the remaining extent of Farm No. 3546, Lusaka, the court found that offers in the range of $18,500,000.00 to $1,000,000.00 were received, but that the highest bidder having failed to meet the condition of paying a deposit of 10% of the purchase price within seven days, the property was sold to the fourth highest bidder at

$2,500,000.00. Similarly, S/D No. 36 of Farm No. 401a, Lusaka was sold for $400,000.00.

7.3 As regards the allegation that the prices at which the two properties were sold is evidence of fraud and raises suspicion of fraud or collusion, the respondent contend that a perusal of the writ of summons and statement of claim shows that the claim for fraud or collusion was never pleaded by the appellants. Further that no evidence of fraud or collusion was led at the trial of the matter as it relates to the sale of the subject properties.

7.4 It was submitted that the appellants, not having pleaded fraud or collusion, and not having led any evidence during trial, cannot raise the issues now. For authority, we were referred to the case of **Roland Leon Norton v Nicholas Lastrom** [9] where it was held that:

(i) Matters which are neither pleaded nor raised in the court below cannot be raised on appeal because doing so would be ambushing the other side:

(ii) If an issue is not pleaded in the court below and is raised in evidence without an objection by the other party in the court below, the court has an obligation to consider the issue raised.

7.5 There is no evidence on record of bidders that met the requirements of the sale to support the allegations of fraud or collusion by the respondent which were neither pleaded nor proved. Having asserted, it was incumbent upon the appellants to prove the allegations of fraud and collusion as per the case of **Khalid Mohammed v The Attorney General** [10].

7.6 Citing the case of **Investrust Merchant Bank Limited & Simbeye Enterprise Limited v Ebrahim Yousuf** [4] the respondent submitted that by advertising the subject properties in the public media, it exercised due care in an endeavor to sell the properties at their market value. That a perusal of the book, **Megarry's Manual of the Law of Real Property. 4th edition. 1969** at page 475 to 476 shows that the law does not oblige the mortgagee in possession to advertise the property before disposing of the same, but that the respondent still advertised the properties in a bid to obtain the best prices for the same. This conduct of the respondent cannot be deemed to be *mala fides* on the part of the respondent but was *bona fide* and in good faith.

7.7 It was further submitted that the finding of the court below that the selling price of the two properties was not so low and that they were sold at a fair price was a finding of fact which can only be reversed on appeal if the findings were either perverse or made in the absence of any relevant evidence or upon a misrepresentation of the facts. See the case of **Wilson Masauso Zulu v Avondale Housing Project Limited** [11].

7.8 In ground two, the respondent submits that the court below was on firm ground when it held that the respondent neither acted contrary to the terms of the consent judgment nor did it unilaterally convert the loan from Dollar to Kwacha. That the court below found as a fact that the conversion was done in consultation with the director of the 1st appellant as appears at page 316 of the record.

7.9 The submission by the appellants that it is immaterial whether or not the appellants were consulted before the conversion because the terms of the consent judgment and order are final and cannot be varied, was said not to have been raised in the court below and cannot be raised on appeal as a ground of appeal. Reliance was placed on **Wilheim Roman Buchman v Attorney General** [12].

7.10 The respondent further submitted that contrary to the arguments of the appellants, the varied consent order only varied the timeframe in which the instalments were supposed to be settled and not the consent judgment in relation to the same being denominating the judgment sum in United States Dollars or Kwacha equivalent. That in either case, the appellants were at liberty to settle the judgment sum in United States Dollar or Kwacha equivalent.

7.11 Therefore, the conversion of the judgment sum from United States Dollars to Kwacha, did not in any way contravene or breach the terms of the consent judgment owing to the fact that the aforesaid consent judgment provided for either repayment in Dollar or Kwacha.

7.12 In ground three, the respondent submits that the appellants are not entitled to damages the court below having found as a fact that the respondent did not unilaterally convert the judgment debt from Dollar to Kwacha, and that the properties were sold at a fair price.

8.0 ORAL ARGUMENTS BY COUNSEL

8.1 At the hearing of the appeal, the Learned Advocates reiterated their submissions. The respondent cited the case of **Posa**

Estates Limited & Others v First National Bank of Zambia Limited CAZ Appeal No. 007 of 2020 as authority that when an order for foreclosure is made by the court, the property vests in the mortgagee and it is sold; the mortgagee is not accountable for the excess. Therefore the respondent was not obligated to account for the surplus money arising from the sale.

8.2 The appellant in response, contended that the mortgage in issue was a legal mortgage. Therefore, an obligation to account arises to the mortgagor.

9.0 ANALYSIS AND DECISION OF THE COURT

9.1 We have considered the appeal, the authorities cited and the arguments advanced by Learned Counsel for the parties. In brief, following breach by the appellants in their repayment obligations, the respondent commenced a mortgage action seeking repayment of the outstanding monies. This resulted in a consent judgment under Cause No. 2014/HPC/0005 dated 3rd April, 2014 which read as follows:

> ***1. That judgment be and is hereby entered in favour of the Applicant for the sum of USD 3,829,710.95 or Kwacha equivalent plus interest at the contractual rate from the date of Originating Summons to date of Judgment and***

thereafter at the current Bank lending rate as determined by the Bank of Zambia until final payment.

2. ***That the Judgment sum plus interest be settled in three instalments the first such instalment to be settled between May and August, 2014 in the sum of USD 750,000.00 or Kwacha equivalent; the second instalment in the sum of USD 350,000.00 or Kwacha equivalent on or before October, 2014; and the balance on or before 31st August, 2015 and that should there be default the 1st and 2nd Respondents shall deliver vacant possession of Subdivision No. 36 of Farm No. 401a and the Remaining Extent of Farm No. 3546 Lusaka respectively and the Applicant shall foreclose and be at liberty to exercise the right of sale.***
3. ***In the event that there is any amount outstanding after such sale, the 3rd respondent shall as guarantor pay any shortfall up to the maximum of USD 3,000,000.00 or Kwacha equivalent.***
4. ***That costs shall be for the Applicant to be taxed in default of agreement.***

9.2 This consent judgment was subsequently varied on 11th June, 2015 and the consent order reads as follows:

1. ***That the settlement of the balance of the Judgment sum be settled in Five (5) instalments as here below:***
   a) ***That the Respondents do settle the sum of US$400,000.00 on or before 31st May, 2015.***
   b) ***That the Respondents do settle the sum of US$300,000.00 on or before 31st October, 2015.***
   c) ***That the Respondents do settle the sum of US$300,000.00 on or before 31st May, 2016.***
   d) ***That the Respondents do settle the sum of US$300,000.00 on or before 31st October, 2016.***

e) That the Respondents do settle the balance on or before 31st October, 2017.

2. That costs shall be for the Applicant to be taxed in default of agreement.

9.3 Following the execution of the consent judgment, the appellants paid the respondent $1,000,000.00 towards the liquidation of the judgment debt which stood at $3,829,710.95 on the date of the consent judgment.

9.4 On or about 2nd September, 2015 the respondent notified the 1st appellant, through its director that it would proceed to convert the judgment sum from United States Dollar to Kwacha. It is not in dispute that the appellants breached the terms of the consent judgment and the respondent, pursuant to the terms of the consent judgment, took possession of the remaining extent of Farm No. 3546, Lusaka belonging to the 1st appellant, and Subdivision No. 36 of Farm No. 401a, Lusaka belonging to the 2nd appellant.

9.5 We have perused all the adverts and bids received from bidders for the properties in issue. The respondent advertised the properties in the print media and sold them on a forced sale value after the highest bidders failed to meet the

conditional obligation of depositing 10% of the selling price within a week.

9.6 The appellants' contentions are two-fold, in the first instance, that the respondent unilaterally converted the 1st appellant's judgment debt from United States Dollar, which attracted a lower interest rate, to Kwacha that attracts a higher interest rate, thereby exposing the appellants to a higher debt to repay under the consent judgment.

9.7 The appellants, in the second instance alleged that contrary to the valuation report, the respondent sold the mortgaged properties at far lower prices than the market value and forced sale values. A search at the Ministry of Lands revealed that the remaining extent of Farm No. 3546, Lusaka was sold at US$2,500,000.00 while S/D No. 36 of Farm 401a, Lusaka was found to have been sold at $400,000.00.

9.8 The three grounds of appeal raise the following issues for determination:

(i) Whether the sale price for S/D No. 36 of Farm No. 401a and the remaining extent of Farm No. 3546 Lusaka were sold at fair price, or low value to impute a presumption of collusion and fraud.

(ii) Whether the conversion of the loan from Dollar to Kwacha, by the bank was unilaterally effected.

(iii) Whether the court below erred by failing to award damages to the appellant on the basis of the unilateral conversion of judgment debt from Dollar to Kwacha and the sale of properties at low value price.

9.9 The law on power of the mortgagee to sell or mortgage mode of exercise of the power is that a mortgagee is not in a fiduciary position. It is not a trustee for the mortgagor as regards the exercise of the power of sale. The power to sell must be exercised in a prudent way with due regard to the mortgagor's interest and in good faith for the purpose of realizing the security.

9.10 The mortgagee must take reasonable precautions to secure a proper price with due regard to the value of the property. Good faith requires that the property is not dealt with recklessly.

9.11 It is trite that where a mortgagee sells at a price so low as to be in itself of evidence of fraud, damages may arise. It is cardinal to note that sale of property on grounds of mere

undervalue alone is no basis for setting aside the sale or seeking damages for any loss from it.

9.12 The mortgages in issue are legal mortgages with remedies such as right of foreclosure and sale. Under an order of sale, a mortgagee has a right to sell the subject property and render an account with a view of showing in a transparent manner whether the debt is extinguished or outstanding. We refer to the cited **Halsbury's Laws of England** for the above position of the law.

9.13 In determining the issue, we have analysed the evidence on record regarding the manner of sale of the properties in issue.

9.14 In addressing ground one, we note that it is not in issue that the two properties were sold at forced value. Evidence was adduced of the remaining extent of Farm No. 3546 Lusaka, being advertised in the Times of Zambia, Zambia Daily Mail and the Post Newspaper from 2nd February, 2016 to 18th March, 2016. An offer was received on 18th March, 2016 from Sunrise Estates Limited of $2,500,000.00 and that a contract of sale was subsequently executed.

9.15 In respect of Subdivision No. 36 of Farm No. 401a Lusaka, the property was advertised between 14th March, 2016 and

1st April, 2016. An offer was received on 8th November, 2016 from Wilfred Mwanza for the sum of $400,000.00. The sale proceeds from the two landed properties and movable assets amounted to the sum of $2,956,043.25 with a net sum of $2,811,043.25 being applied towards the judgment sum of $3,829,710.95.

9.16 There was undisputed evidence that a sum of $1,000,000.00 was earlier paid upon execution of the consent judgment. We had earlier referred to the valuation reports of the properties. Farm No. 3546, Lusaka was valued at K73,000,000.00 ($7.300,000.00) with a forced sale value of K55,000,000.00 ($5,500,000.00).

9.17 In respect of S/D No. 36 of Farm No. 401a, Lusaka the valuation report dated 5th October, 2015, placed the market value at K8,300,000.00 ($830,000.00) and a forced value of K6,200,000.00 or $620,000.00. The said properties were sold at below the market value, having been forced sales.

9.18 We are of the view that while the appellants attempted to argue that the properties were sold at par value, the forced sale price was the best that the respondent bank sold at from the offers it received. It is not in dispute that there were bid

offers that were higher than what the bank settled for. However, the bank could only accept a bid from a bidder who met the conditions of sale. As the highest bidders could not meet the deposit condition, the bank was not obliged to enter into a contract of sale with them.

9.19 It is trite that a mortgagee is entitled to sell upon such conditions as he thinks suitable for securing a sale of the property.

9.20 By way of emphasis, the other bidders did not fulfil the conditions of sale, hence the reason Mr. Azim Ticklay's offer was rejected even when they offered $3,600,000.00. As regards the bid from Alliance Resources Limited, the bank explained that it did not follow up on its bid because it had the same director i.e. Azim Ticklay who had put in several bids under different companies ranging from $3,600,000.00 to $1,500,000.00. Since he failed to meet the conditions in an earlier bid, and was merely fishing, the respondent acted prudently in not following him up.

9.21 As guided by the Supreme Court in **Investrust Merchant Bank Limited & Simbeye Enterprise Limited v Ebrahim Yousuf** [4] the power of sale given to a mortgagee is to enable

9.24 The **"Consent Order varying Consent Judgment"** dated 3rd April, 2014 varied the amounts to be paid, that is, instead of $750,000.00, the sum of $400,000.00 was to be paid by 31st May, 2015 as well as other subsequent lower monthly instalments. The said sum though indicated in United States Dollars, did not vary the conditions that the amount could be paid in Dollars or Kwacha equivalent earlier stipulated. In other words, the discretion option to convert the judgment sum to the Kwacha equivalent was not extinguished by the consent order varying the consent judgment. What was varied were the instalment amounts to be settled and the perceived/dates when they were to be settled.

9.25 For the above reason, we find no merit in the assertion that the respondent unilaterally converted the loan from Dollar to Kwacha, the consent judgment provided for the said conversion. In any case, whether in Dollar or Kwacha, there was still default by the appellants. The consent judgment, provided for payment in foreign currency, which could be converted to the local currency equivalent. Therefore, ground two fails and is dismissed.

9.26 In ground three, we are called upon to determine whether the appellants suffered damages as a result of the conversion of the loan from Dollar to Kwacha on the basis of a higher interest rate. Having earlier held that there was no unilateral converting of the judgment debt from Dollar to Kwacha, we find no merit in the claim for damages sought.

9.27 We further hold that the properties having been sold at a fair price, the claim for damages sought of the difference between the market value and price sold does not arise. It fails because no liability has been attached to the respondent in the manner the sale of the properties was conducted and the conversion of the judgment debt from Dollar to Kwacha equivalent. For these reasons, ground three is bereft of merit and falls away.

10.0 CONCLUSION

10.1 We reiterate that the lower court was on firm ground in holding that the properties were sold at a fair price, that there was no unilateral converting of the judgment debt from Dollar to Kwacha currency.

10.2 Having found no merit in the three grounds, we dismiss the appeal and uphold the judgment of the court below. Costs to follow the event, to be taxed in default of agreement.

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M. J. Siavwapa

JUDGE PRESIDENT

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F. M. Chishimba

COURT OF APPEAL JUDGE

.....

A. M. Banda-Bobo

COURT OF APPEAL JUDGE