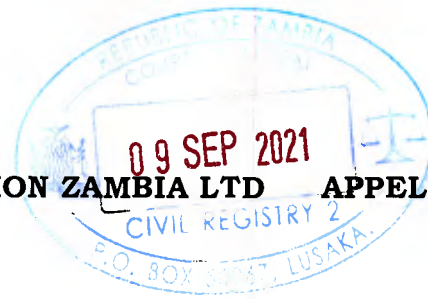
IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO 18/2021**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:



AFRICAN BANKING CORPORATION ZAMBIA LTD **APPELLANT**

AND

COPPER HARVEST FOODS LIMITED	**1ST RESPONDENT**
SABRINA'S FARMERS HARVEST LIMITED	**2ND RESPONDENT**
LUKASU PROPERTIES	**3RD RESPONDENT**
ARULANANDAM RAMESH	**4TH RESPONDENT**

CORAM: CHASHI, SIAVWAPA AND BANDA-BOBO JJA

On 18TH MAY AND 9TH SEPTEMBER, 2021

FOR THE APPELLANT: MR. M. MWENYE SC WITH E. B. KALUBA BOTH OF MESSRS MWENYE AND MWITWA ADVOCATES

FOR THE 1ST, 2ND AND 4TH RESPONDENTS: MISS W. CHIRWA WITH MRS S. BANDA BOTH OF J AND M. ADVOCATES

FOR THE 3RD RESPONDENT: MR. M. MANDO OF MANDO ADVOCATES

J U D G M E N T

SIAVWAPA, JA, delivered the Judgment of the Court.

Cases referred to:

1. *Finance Bank (Z) Limited v Sidik Valli Patel T/A Libala Stores and Judith Hamaluba (SCZ) Appeal No. 40 of 2009*
2. *African Banking Corporation Limited v Mubende Country Lodge Limited SCZ Appeal No. 116/2016*
3. *New Plast Industries v The Commissioner of Lands and the Attorney-General (SCZ) Judgment No. 8 of 2001*
4. *Derrick Chitala (as Secretary of the Zambia Democratic Congress) v The Attorney General (1995) ZR*
5. *Gilcon Zambia Limited v Kafue District Council and Bradford Machila, Appeal No. 10 of 2010 and 43 of 2009*
6. *Bank of Zambia (as liquidator of Credit Africa Bank Limited (in liquidation) v AL Shams Building Materials Trading Company Limited Appeal No. 16 of 2017*
7. *Leopold Walford (Z) Limited v Unifreight (1985) ZR 203*
8. *Standard Chartered Bank Zambia Plc v John M. C. Banda (SCZ) Appeal No. 94 of 2015*

Legislation referred to

1. *Rules of the Supreme Court of England 1965, 1999 Edition*
2. *The High Court Act, Chapter 27 of the laws of Zambia*
3. *The High Court (amendment) Rules 2020 Chapter 27 of the Laws of Zambia*

Other works

Halsbury's Laws of England 4th Edition Volume 1(1)

1.0. INTRODUCTION

1.1. This appeal is against the Ruling of the Hon. Mr. Justice E. L. Musona delivered on 20th October 2020 on a preliminary issue at the instance of the Respondents.

1.2. By the said Ruling, the learned Judge upheld the preliminary issue and dismissed the cause on account that the Appellant

wrongly commenced the action by writ of summons when it should have been commenced by originating summons since it was a mortgage action.

2.0. **BACKGROUND**

2.1. The genesis of the matter is in the merger following the transfer of the assets of Leasing Finance Company (LFC) to the Appellant.

2.2. The transfer and merger were done pursuant to the provisions of Section 29 of the Banking and Financial Services Act No. 7 of 2017 on 27th February 2019.

2.3. The 1st, 2nd and 3rd Respondents are sister companies which were also related to the Leasing Finance Company (LFC) whose Managing Director was the 4th Respondent prior to its merger with the Appellant.

2.4. The 1st and 2nd Respondents obtained facilities from Leasing Finance Company (LFC) in 2009 and 2014 respectively secured by debentures issued in respect of the debtors' fixed and floating (movable) assets. The affected fixed asset in respect of the 1st Respondent is Stand No. 5274 and S/DA of S/D6 of S/DX of Farm No. 748, Ndola to secure the sum of K3,600,000.00 (unrebased) plus a top up of K2,900,000

(unrebased) to bring the total indebtedness by the 1st Respondent to K6,500,000.

2.5. With respect to the 2nd Respondent, a debenture was issued over its fixed and movable assets to secure the sum of K4,900,000 (unrebased) plus a top up of K1,600,000 advanced on 4th August 2015 to bring the 2nd Respondent's total indebtedness to K6,500,000 (unrebased).

2.6. In both cases, the condition for the disbursement of the funds was perfection of the securities by the surrendering of the Certificates of Title to the Leasing Finance Company (LFC) which condition was not met.

2.7. The 4th Respondent nonetheless authorised the disbursement of the funds to both borrowers leaving the Leasing Finance Company (LFC), without security for the facilities.

2.8. Following the 2019 transfer and merger of Leasing Finance Company (LFC) with the Appellant, the Appellant commenced an action against the Respondents by writ of summons. The summons was accompanied by a statement of claim containing the following remedies;

1. Against the 1st and 3rd Defendants;

(i) *An order directing the 1st Defendant to pay the Plaintiff the sum of ZMW 15,829,867.70 and interest at the contractual rate till the same is paid in full.*

(ii) *A declaration that the copper harvest loan agreement created an equitable mortgage in favour of LFC and subsequently the Plaintiff in relation to Stand Nos 5274 and S/DA of S/D 6 of S/DX of Farm No. 748 Ndola.*

(iii) *A declaration that the 1st Defendant's transfer of Stand No. S/DA of S/D 6 of S/DX of Farm No. 748 Ndola to the 3rd Defendant was done in bad faith with the objective of depriving LFC and subsequently the Plaintiff of its rights in relation to the properties.*

(iv) *An order cancelling the Certificate of Title number CT 19696 issued to the 3rd Defendant in respect of S/DA of S/D6 of S/DX of Farm No. 748 Ndola.*

(v) *An order directing the 1st Defendant to execute deeds of assignment conveying title to Stand No. 5274 and S/DA of S/D6 of S/DX of Farm No. 748 Ndola to the Plaintiff.*

(vi) *An order of foreclosure and sale of their properties.*

(vii) *An order of injunction to restrain the 1st and 3rd Defendants from selling, transferring, assigning, mortgaging, charging, pleading or otherwise encumbering stands No. 5274 and S/DA of S/D6 of S/DX of Farm No 748 Ndola or deal with the properties or any of them in any manner that would create third party interests or transfer title for Stand No. S/DA of*

S/D6 of S/DX of Farm No. 748 Ndola from the 3rd Defendant until the matter is finally determined.

2. *Against the 2nd Defendant*

(viii) *An order directing the 2nd Defendant to pay the Plaintiff the sum of ZMW 19,312,156.00 (unrebased) and interest at the contractual rate till the same is paid in full.*

(ix) *A declaration that the Sabrina's loan agreement created an equitable mortgage in favour of LFC and subsequently the Plaintiff in relation to 2nd Defendant's fixed assets.*

(x) *An order directing the 2nd Defendant to execute deeds of assignment conveying title for its fixed assets to the Plaintiff.*

(xi) *An order of foreclosure and sale of the 2nd Defendant's fixed assets.*

(xii) *An order of injunction to restrain the 2nd Defendant from selling, transferring, assigning, mortgaging, charging, pleading; or otherwise encumbering any of its fixed assets in any manner that would create third party interests until the matter is finally determined by the Court.*

3. *Against the 4th Defendant*

(xiii) *a declaration that the 4th Defendant breached his fiduciary duties owed to LFC and is therefore liable*

to indemnify the Plaintiff for all losses it has suffered as a result of his breaches.

(xiv) An order directing the 4th defendant to indemnify the Plaintiff for all the losses the Plaintiff has suffered.

4. Against all Defendants jointly and severally

(xv) Interest on all sums found to be due at the average short term deposit rate from the date of the writ to the date of Judgment.

(xvi) Costs and

(xvii) Any other relief the Court may deem fit.

3.0. **PRELIMINARY ISSUES**

3.1. After the close of pleadings counsel for the 1st, 2nd and 4th Respondents filed a notice of motion to raise preliminary issues pursuant to Order XXX Rule 14 of the High Court Rules and Orders 33 Rule 3 and 18 Rule 19 of the Rules of the Supreme Court 1999 Edition. The motion was accompanied by an affidavit in support.

3.2. The Respondent sought the Court's determination of two issues namely;

1. Whether the Plaintiff's claims in so far as they relate to mortgage actions under facilities provided by the Plaintiff to the named 1st and 2nd Defendants which by Statute under Order XXX Rule 14 and by the Supreme Court holding under

the case of Finance Bank (Z) Limited v Sidik Valli Patel T/A Libala Stores and Judith Hamaluba[1] *is mandatorily required to be commenced by originating summons.*

2. *That the originating process in the form of a writ of summons and statement of claim in so far as it includes mortgage claims is incompetent and must be struck out.*

3.3. By Notice of Motion dated 2nd October 2020, the 3rd Respondent raised two preliminary issues pursuant to Order 33 Rule 3 and 14A rule 1 of the Rules of the Supreme Court 1999 Edition.

1. *Whether the Plaintiff's claim must not be commenced by way of originating summons pursuant to the provisions of Order XXX Rule 14 of the High Court Rules.*
2. *Whether this action is not a nullity ab initio and or incompetent for having been filed without service of and accompanied by a letter of demand contrary to the mandatory requirement of Order VI Rule 1 (d) of the High Court (Amendment) Rules 2020 Chapter 27 of the Laws of Zambia.*
3. *Whether that based on the above, this action must not wholly be dismissed.*

4.0. **THE DECISION OF THE HIGH COURT**

4.1. After considering the affidavit evidence and the arguments in writing by the parties, the learned Judge dismissed the motion by the 1st, 2nd and 4th Respondent for being incompetent.

4.2. This was for non-compliance with the guidance by the Supreme Court of Zambia in the case of *African Banking Corporation V Mubende*[2] (Supra) that compliance with Order 11 Rule 1 High Court Rules entails entering appearance and filing a defence which the said Respondents had not done.

4.3. The learned Judge however, upheld the motion and the preliminary issues raised by the 3rd Respondent and dismissed the cause for being commenced using a wrong mode.

5.0. **THIS APPEAL**

5.1. The Appellant, aggrieved by the outcome, filed a Notice and Memorandum of Appeal on 23rd November, 2020. The Memorandum of Appeal contains two grounds of Appeal set out as follows:

1. *The Court below erred in law and fact when it determined the 3rd Respondent's application and dismissed the Appellant's action on the basis of the said 3rd Respondent's application which was filed into Court on 2nd October 2020 without first fixing a hearing date for the application and according the Appellant an opportunity to*

be heard on the 3rd Respondent's application as by law mandated.

2. *The Court below erred in law and fact when it awarded costs to the Respondents when in fact the Appellant was successful in the 1st, 2nd and 4th Respondent's application, the only application which was heard by the Court.*

6.0. **APPELLANT'S ARGUMENTS**

6.1. The thrust of the Appellant's arguments in ground one is that the Court below erred in law when it passed judgment against it on the application by the 3rd Respondent without being accorded an opportunity to be heard contrary to the rules of natural justice.

6.2. The principles of natural justice are well settled through various judicial and academic authorities and in that regard we were referred to the learned authors of *Halsbury's Laws of England 4th Edition Volume 1(i) paragraph 105 and 107* which state as follows:

> ***"The Rule that no man is to be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a fundamental principle of justice....The rule generally applies at least with full force, only to conduct leading to a final act or decision".***

"A person or a body determining a dispute between parties must give each party a fair opportunity to put his own case and to correct or contradict any irrelevant statement to the contrary"

6.3. The Appellant further drew our attention to the explanation of the application of Order 14A under Order 14A/2/6 as follows;

Rule 1(3) expressly requires that one of the two conditions should be fulfilled before the Court determines any question of Law or construction under this order namely either;

(a) That the parties have had an opportunity of being heard on this question r 1(3) (a): or

(b) That the parties had consented to an order or Judgment on such determination r 1 (3) (b).

6.4. In providing the rationale to the requirement for an opportunity to be heard Order 14A/2/6 states;

"The first condition is somewhat unusual since the practice and procedure relating to proceedings in chambers are already dealt with under O.32 rr 1-6. Nevertheless, the principle underlying this provision would seem to be that since the procedure under O. 14A for the determination of a question of law or

construction without a full trial virtually replaces the trial process for such determination the occasion on which it is employed should be treated as an important and special occasion. Accordingly great care should be employed in the service of a summons or motion under this order, unless the opposite party consents or there is a clear acknowledgement of the service of the summons or motion, it would be desirable to attend the hearing with an affidavit of service to avoid the adjournment of the hearing in order to satisfy the Court that the opposite party had the opportunity of being heard."

6.5. On the basis of the authorities cited, it is the Appellant's argument that the decision on the 3rd Respondent's preliminary issues filed into Court on 2nd October 2020 is null and void and the matter ought to be sent back to the Court below for a hearing of the same.

6.6. In ground two, the argument, in the main, is that having succeeded against the 1st, 2nd and 4th Respondents, the Appellant ought not to have been condemned in costs. This is on the basis of the principle that costs follow the event though at the Court's discretion.

6.7. The Appellant has maintained the argument that only the first preliminary issue jointly filed by the 1st, 2nd and 4th Respondents was heard in which the Appellant was successful and ought to have been award costs.

7.0. 1ST, 2ND AND 4TH RESPONDENTS ARGUMENTS

7.1. In relation to the first ground, the Respondents argue that since all parties were in attendance at the hearing on 30th September 2020, including the 3rd Respondent, the Appellant dispensed with a hearing as agreed.

7.2. They further argue that since by the date of hearing the 3rd Respondent had already entered appearance and defence and the 3rd Respondent filed arguments in support of Notice of Motion to raise a preliminary issue the Appellant had the opportunity to reply before the ruling was delivered on 20th October 2020.

7.3. In support of the arguments our attention was drawn to an extract from *Halsbury's Laws of England 4th Edition Volume (1) at paragraph 84 of page 157* couched as follows;

> ***"....These two principles, the rules of natural justice must be observed by the Courts, tribunals, arbitrators and all persons and bodies having the duty to act judicially, save where their application is excluded expressly or by necessary implication".***

7.4. There was further reliance on the statement by the Supreme Court of Zambia in the case of *New Plast Industries v The Commissioner of Lands and the Attorney-General*[3] *to the effect that;*

> ***"We wish to take advantage of the present appeal to make the point that the content of what amounts to the hearing of the parties in any proceedings can take either form of oral or written evidence."***

7.5. The Respondents then made reference to Order XXX Rule 6A of the High Court (Amendment) Rules 2020 providing as follows;

> ***"Where the Court is satisfied that the application can be disposed of on the basis of the documents before it, the Court may determine the matter without the attendance of the parties or their advocates and shall issue a notice of the date of delivery.***
>
> ***(2) This rule shall apply to-***
>
> ***(a) an interlocutory application***
>
> ***(c) an application for determination of question of law or construction of documents; or***
>
> ***(d) any other application as may be directed by the Court".***

7.6. By making reference to the above rule, the Respondents sought to strengthen their argument that the Court below acted within the law by making an adverse decision against the Appellant on the 3rd Respondent's application without according the Appellant an opportunity to be heard.

7.7. The other arguments raised by the Respondents will be dealt with in our analysis and decision section as we now turn to the arguments on the second ground.

7.8. The 1st, 2nd and 4th Respondents' argument in ground two is simply that the Appellant's cause was dismissed in its entirety by reason of which the Court exercised its discretion judiciously by condemning it in costs.

8.0. **ARGUMENTS BY THE 3RD RESPONDENT**

8.1. The 3rd Respondent anchored its arguments on the issue of merit stating that the Appellant, in ground one, had focused on the issue of not being heard and failed to consider whether the learned Judge's dismissal of the cause was on merit.

8.2. Arguing that an appeal is a hearing on the record, the 3rd Respondent submitted that we are empowered to determine the merits and demerits of the 3rd Appellant's preliminary issue in this appeal.

8.3. The 3rd Respondent called into aid the case of *Derrick Chitala (as Secretary of the Zambia Democratic Congress) v The Attorney General*[4] in which the Supreme Court of Zambia said the following;

> ***"We have no reason to disagree with the forgoing. The Judge below cannot validly be criticised for forming an opinion on the papers before him. Whether he was correct or not in his conclusion is a different question which we are capable of addressing since an appeal operates as a rehearing on the record."***

8.4. Another of the several authorities cited is the case of Gilcon *Zambia Limited v Kafue District Council and Bradford Machila*[5], in which the Supreme Court of Zambia observed as follow;

> ***"We restate what we said in Chisata v Attorney-General that the Order to dismiss the whole action without calling upon counsel to argue the matter was irregular and should not have been made. This was procedural impropriety. The question is, had the appellant been heard, would the learned Judge have inevitably dismissed the matter or such dismissal would have been a wrong exercise of discretion under Order 18, rule 19 sub-rule 6 of the Rules of the Supreme Court 1999 edition or, are the***

circumstances such that the trial Judge would in any event have exercised his discretion within the confines of Order 18 rule 19 sub-rule 6."

8.5. Based on the above the 3rd Respondent has asked us to pose the same question in this case namely; would the Court below have come to the same decision had the Appellant been heard?

8.6. In the 3rd Respondent's opinion, the question falls to be resolved in the affirmative for the reason that the Appellant chose to commence the action by writ of summons instead of an originating summons and without a demand letter as per Order VI rule 1(d) High Court (Amendment) Rules 2020.

8.7. On the procedure adopted by the Appellant to challenge the failure to hear it, the 3rd Respondent argues that the correct procedure should have been to apply to set aside the ruling pursuant to Order 35 rule 5 of the High Court Rules and Order 32 rules 5 and 6 of the Rules of the Supreme Court 1999 Edition.

8.8. As regards ground 2 the 3rd Respondent has simply echoed the view taken by the 1st, 2nd and 4th Respondents that having wholly dismissed the action by the Appellant, the learned Judge was on firm ground to order costs against the Appellant.

8.9. Finally, the 3rd Respondent raises what, we may call a speculative cross- appeal on whether or not the learned judge below included the 3rd Respondent when he stated in the Ruling in lines 28, 29 and 1 at pages 30 and 31 respectively of the Record of Appeal;

> ***"None of the Defendants filed a Memorandum of Appearance or, Defence prior to filing their Notices to raise a preliminary issue on a point of law."***

9.0. **ARGUMENTS IN REPLY**

9.1. The Appellant filed submissions in reply which were preceded by what it called ***"Clarification of certain factual issues".*** The issues were that the agreement of 30th September 2020 for the Court to render its ruling based on the documents filed into Court related to the application by the 1st, 2nd and 4th Respondents.

9.2. This clarification is based on the fact that the 3rd Respondent's application was only filed on 2nd October 2020 and as such the agreed position could not have envisaged it.

9.3. On the right to be heard based on the case of *New Plast Industries* (Supra) it is submitted that the case is distinguishable with the case instant in that it referred to a case where parties have filed affidavits in respect of the case for determination. In the instant case, there was no filing of

affidavit evidence in response to the Motion by the 3rd Respondent.

9.4. In support of the submission, we were referred to the case of *Bank of Zambia* (as liquidator of Credit Africa Bank Limited (in liquidation) *v AL Shams Building Materials Trading Company Limited*[6].

9.5. In that case, the Supreme frowned upon a trial Court rendering a decision on a matter without hearing the parties. The Court below had been presented with preliminary issues which it determined. It however, went further to determine the main cause on merits without a hearing. The Supreme Court called that determination premature, incompetent and a complete nullity.

9.6. On the 3rd Respondent's call on Order XXX Rule 6A of the High Court (Amendment) Rules of 2020, the Appellant has submitted that the same does not permit the Court to determine an application without giving the opposing party an opportunity to respond. It is submitted further that it was not the Appellant's argument that it should have been heard orally but simply that it should have been given an opportunity to be heard.

9.7. On the Respondent's argument that even if the Appellant had been heard (on the 3rd Respondent's application), the outcome,

would have been the same, it is submitted to the contrary that they would argue that the action was not a mortgage action but a composite one.

9.8. In that regard it is submitted that the Court below ought to have struck out the reliefs that are mortgage related and sustained the ones which are not mortgage related if the reliefs relating to mortgage actions were improperly before the Court.

9.9. It is however, submitted that the claims relating to the enforcement of equitable mortgages were properly before the Court below and this submission was buttressed by a plethora of pronouncements in various decisions of the Supreme Court of Zambia referred to.

9.10. In essence, the gist of the cited decisions is that disputes arising out of the same facts involving the same parties are better dealt with by way of joinder of causes or parties to avoid multiplicity of actions. One such Judgment from which the Appellant extensively quoted is the case of *African Banking Corporation (Z) Limited v Plinth Technical Works Limited and Five Others Selected Judgment No. 28 of 2015.*

9.11. In dealing with the provisions of Order XXX rule 14 of the High Court Rules as regards contracts of guarantee, the Supreme Court of Zambia opined that the same were not part of

mortgage actions and that, actions against guarantors should ordinarily be commenced by writ of summons. We will revisit some of the authorities in the analysis and decision part of this Judgment.

9.12. In responding to the Respondents' arguments in ground two, the Appellant has maintained that it was erroneous for the Court below to have dealt with the two applications together in its ruling as the first and only application heard was decided in its favour.

9.13. As regards the argument by the 3rd Respondent that failure to file the writ of summons together with a letter of demand as prescribed by Order V1 rule 1(d) entitles the Court to dismiss the matter, it was submitted that the penalty for such omission under sub-rule (2) was non-acceptance of the writ of summons.

9.14. It is further submitted that once the defective summons is accepted by the Registry, the default becomes an irregularity subject to cure and not one that is fatal to the whole matter. This submission was buttressed by the cases of *Leopold Walford (Z) Limited v Unifreight*[6] *and Standard Chartered Bank Zambia Plc v John M. C. Banda*[7] among others.

9.15. In both cases, the Supreme Court of Zambia made the point that breach of regulatory rules is not always fatal and one of the factors that determine whether a breach is fatal or not is its prejudicial effect to the other party.

9.16. To that effect, in *Standard Chartered Bank* case (Supra) the Supreme Court stated as follows;

> ***".....rules should generally not be used as a minefield for parties who make fairly inadvertent mistakes that translate into no tangible prejudice to the other party. If an irregularity can be cured without undue prejudice then it is desirable that such irregularity be put right subject to an order as to costs against the erring party....We think that rules of Court should indeed serve a definitive purpose and we are not to apply them using a rigid approach without regard whatsoever to the consequences of any delayed rectification of their breach. In case of breach of rules that do not result in any real or serious prejudice or negative consequences to any party, the Court does surely retain the discretion always as to what order would best meet the justice of the situation."***

10.0 **OUR ANALYSIS AND DECISION**

10.1 Having carefully considered the two grounds of appeal, the Ruling which is the subject of this appeal and the arguments and submissions presented by all the parties, we take the firm view that the question we are called upon to determine is;

> ***"Did the Court below properly direct itself when it wholly dismissed the Appellant's action under Order 14 A rule 1 and Order 33 Rule 3 RSC 1999?***

10.2. The issues raised in the two grounds of appeal relating to non-compliance with the rules of natural justice and imposition of costs on the Appellant both arise from the lower Court's decision to dismiss the Appellant's matter on a point of law.

10.3. A brief recap of the genesis of the dispute is the Appellant's filing of a writ of summons and statement of claim against the Respondents with some remedies that are categorized as mortgage related and others not.

10.4. As a result of the above situation the Respondents raised preliminary issues questioning the propriety of the mode of commencement of the action as they considered it to be a mortgage action falling to be commenced by originating summons as prescribed by Order XXX rule 14 of the High Court Rules under Chapter 27 of the Laws of Zambia.

10.5. This scenario then begs a subsidiary question to the one we posed at the start of our analysis and the question is; is the Appellant's action in the Court below a mortgage action proper, suitable for commencement by originating summons?

10.6. Without reproducing the endorsement on the writ and the reliefs sought in the statement of claim, our perusal of the pleadings reveals that as against the 1st, 2nd and 3rd Respondents, the first claim is for liquidated sums of money allegedly owed to the Appellant by the said Respondents. The second claim is for a declaration that the loans advanced to the Respondents created equitable mortgages.

10.7. From our point of view, the only claims 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.

10.8. 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 subject to a legal or equitable mortgage". It goes on to include person with "the right to foreclosure or redemption of a mortgage".

10.9. Among reliefs to be sought under an originating summons are;

(1) Payment of moneys secured by the mortgage or charge

(2) Sale

(3) Foreclosure

And the summons is returnable before a Judge in Chambers.

10.10. Our observation is that where a loan facility is unsecured and default arises, an action by originating summons under Order XXX rule 14 of the High Court Rules is incompetent as no rights and obligations are created under any mortgage as none is created.

10.11. The undisputed fact of the case in the Court below is that the conditions of the facilities obtained by the 1st and 2nd Respondents were that the securities for the loans were to be perfected by the surrender of the original Certificate of Title to the lender in this case, LFC before disbursing the funds.

10.12. It is not in dispute that the securities were not and had not been perfected at the time of hearing the preliminary issues. This therefore begs the question whether any mortgage was created when no title documents for the security properties were deposited with the lender.

10.13. In our view, no mortgage was created leaving the moneys obtained by the 1st and 2nd Respondents unsecured. In our

view this is the reason the Appellant sought a declaration against the 1st and 2nd Respondent that Copper Harvest and Sabrina's Loan Agreements created equitable mortgages in favour of LFC and subsequently to the Plaintiff (now Appellant) in respect of the fixed assets affected.

10.14. By necessary implication the Appellant could only enforce its equitable reliefs if the Court granted the declaration that equitable mortgages had been created in respect of the properties against which an order of foreclosure and sale were being sought by the Appellant.

10.15. In the circumstances it is our considered view that the conditions under which the provisions of Order XXX rule 14 of the High Court Rules apply did not exist. As such we would find that the action commenced by the Appellant was not a mortgage action.

10.16. But even assuming that it was a mortgage action the position as argued by the Appellant is that for an action or a preliminary issue raised under Order 14A of the Rules of the Supreme Court 1999 Edition to be properly settled, one of the two conditions precedent ought to be met as earlier set out in this Judgment namely, an opportunity for the parties to be heard or, a mutually agreed position for the Judge to determine the issue on the filed documents.

10.17. In countering this argument by the Appellant, the Respondents found solace in Order XXX rule 6A High Court (Amendment) Rules of 2020 earlier cited in so far as it empowers the Court to determine applications such as those envisaged under Order 14A of the Rules of the Supreme Court 1999 Edition on the basis of filed documents only.

10.18. Our view is that this Rule is very clear in so far as it refers to the Court's reliance on documents filed by all the parties and not just one of the parties in particular the Applicant. It follows that before making such a decision, the Court would have to satisfy itself that the other party has been properly served with process and has either filed a response, or deliberately failed to respond or has consented to the court proceeding to determine the matter without his input.

10.19. The opportunity to hear a party is in two forms namely, in writing or orally as espoused by the Supreme Court in *Newplast Industries* (Supra). This is the bone of contention by the Appellant in that it was not given an opportunity to be heard either in writing or orally in the Notice of Motion to raise preliminary issues filed by the 3rd Respondent although the Court went ahead to determine the issues against the Appellant.

10.20. We further note that Order XXX rule 6A of the High Court Rules has close similarities to Order 14A of the Rules of the Supreme Court 1999 as well as Order XXX rule 14 of the High Court Rules in that they all provide for matters capable of determination in chambers without a trial.

10.21. It is however, worthy of note that when the application is made pursuant to Order 14A rule 1(3) of the Rules of Supreme Court 1999 Edition the explanatory note makes it clear that one of the two conditions earlier mentioned namely, affording parties an opportunity to be heard or consent of the parties to an order or Judgment must be met. The rationale is as set out at page 26 of this Judgment.

10.22. Because the effect of a successful application under Order 14A of the Rules of the Supreme Court 1999 Edition is to dispose of the main matter, it is imperative that the parties are accorded an opportunity to be heard on the application.

10.23. Our reading of the record of proceedings in the Court below shows that the 3rd Respondent only filed its Notice of Motion on 2nd October 2020 whereas the last proceeding at which it was agreed that the matter would be determined on the documentation was on 30th September 2020.

10.24. Clearly, the 3rd Respondent's application was not before Court and whatever was agreed upon on the 30th September 2020 only related to the application by the 1st, 2nd and 4th Respondents.

10.25. It is therefore a fact that the Appellant was not given an opportunity to be heard on the 3rd Respondent's application and neither was the application part of the agreement for disposal on documents and that being the case, the learned Judge went beyond his powers to make a determination on the application to the detriment of the Appellant.

10.26. Clearly the learned Judge went against the clear provisions of Order 14A of the Rules of the Supreme Court 1999 Edition under which the application was made.

10.27. As regards the failure by the Appellant to file a letter of demand along with the writ of summons and statement of claim, we opine that the submissions by the Appellant on how the default ought to be treated, is the correct position of the law.

10.28. Order VI Rule 1 (2) of the High Court Rules does not provide for any penalty once the documents have passed through the Registry.

10.29. Further, as earlier shown in this Judgment, we do not think that the default is fatal to the case and in saying so, we are alive to the employment of the word "Shall" in that rule which is couched as follows;

> ***"Except as otherwise provided by any other written law or these rules, an action in the High Court shall be commenced in writing or electronically by writ of summons endorsed and accompanied by:-***
>
> ***(d) a letter of demand whose receipt shall be acknowledged by the defendant or an affidavit of service attesting to the service of the letter which shall set out the claim and circumstances surrounding the claim in details".***

10.30. Our reading of the rule is that it provides the general mode of commencing an action in the High Court either in writing or electronically to be by writ of summons where other laws do not provide otherwise. The word "Shall" refers specifically to the mode of commencement. However, most importantly is the aspect of prejudice and any default in procedural requirement that has no prejudicial effect on the other party is an irregularity amenable to cure.

10.31. The final contention with regard to ground one is that the appeal was not properly before us because the correct procedure would have been to apply to set aside the ruling based on Order 35 rule 5 of the High Court Rules as well as Order 32 rules 5 and 6 of the White Book.

10.32. We need not say much on this argument save to agree with the Appellant's submission that the Orders relied upon do not apply to the circumstances of this case. Order 35 of the High Court Rules applies to failure by a party to attend at the hearing and the procedure to be adopted by the Judge depending on which party is not in attendance. In this appeal we are dealing with failure by the Judge to accord a party an opportunity to be heard.

10.33. Based on what we have said the result is that ground one of the appeal is allowed.

10.34. Ground two challenges the Order of costs against the Appellant on the basis that the Appellant was successful in the application by the 1st, 2nd and 4th Respondents which was heard. The Respondents on the other hand argue that the resulting dismissal of the Appellant's cause in totality entitled them to costs.

10.35. Our position is that by its very nature, an application under Order 14A of the Rules of the Supreme Court 1999 Edition seeks to determine the cause or dispose of it on a point of law without a full trial.

10.36. Inevitably, if the Applicant succeeds, he is entitled to costs as the whole action is terminated. We however understand the argument by the Appellant to the extent that the application by the 1st, 2nd and 4th Respondents which was heard was dismissed and as such the costs should abide the event.

10.37. It is however, understandable that because the learned Judge proceeded to consider the 3rd Respondent application upon which he based his decision to dismiss the Appellant's action, he was justified to condemn the Appellants in costs.

10.38. We would therefore dismiss the 2nd ground of appeal as the Judge was correct in principal to accord costs to the successful parties.

11.0. **CONCLUSION**

11.1. We have allowed the first ground of appeal on two points namely; that the Appellant's action was not a mortgage action proper and that it was erroneous for the learned

Judge to have delivered an adverse ruling against the Appellant without giving it an opportunity to be heard.

11.2. In the view we have taken and having found that the action was not a mortgage action, the prayer by the Appellant to remit the record to the High Court for a hearing of the 3rd Respondent's application becomes moot.

11.3. We however, remit the record back to the High Court for the hearing of the main cause before a different Judge.

11.4. We also order costs for the appeal to the Appellant to be taxed in default of agreement.

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J. CHASHI

COURT OF APPEAL JUDGE

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M. J. SIAVWAPA

COURT OF APPEAL JUDGE

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A. M. BANDA-BOBO

COURT OF APPEAL JUDGE