IN THE COURT OF APPEAL OF ZAMBIA **Appeal No. 122/2020**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

DAR FARMS LIMITED **APPELLANT**

AND

MPONGWE FARMS LIMITED **RESPONDENT**

Coram: Kondolo, SC, Chishimba and Sichinga, JJA

On 15th October, 2020, 22nd October, 2020 and 11th March, 2021

For the Appellant: *Mr. C. Sianondo of Messrs Malambo and Company*

For the Respondent: *Mr. K. Wishimanga of Messrs AMW and Company Legal Practitioners.*

JUDGMENT

Sichinga, JA, delivered the Judgment of the court.

Cases referred to:

1. ***Freshmint Limited and 2 others v Kwawambwa Tea Company (1996) Limited (2008) ZR 32***
2. ***Magnum (Zambia Limited v Basi Quadri and others (1981) ZR 141***
3. ***Silven Properties Limited and another v Royal Bank of Scotland Plc and Others (2004) 4 ALL ER 484***

4. *Pearse v Green and Others (1814-23) ALL ER 405*

5. *Smiths Limited v Middleton (1979) 3 ALL ER 842*

6. *Stanbic Bank v Micoquip Zambia Limited SCZ Judgement No. 22 of 2018*

7. *Patrick Makumbi and 25 others v Greytown Breweries Limited SCZ No. 32 of 2012*

8. *Standard Chartered Bank Limited v Walker and Another (1982) 3 ALL ER 938*

9. *Rodger Chali Ponde and Others v Zambia State Insurance Corporation Limited (2004) ZR 151.*

10. *Khalid Mohammed v Attorney – General (1982) ZR 49 (1982) ZR 49*

11. *George Andries Johannes White v Ronald Westerman and Others (1983) ZR 135*

12. *Trevor Limpic v Rachel Mawere and Others – SCZ Appeal No. 121 of 2006 unreported.*

13. *The Attorney – General v Marcus Kampamba Achiume (1983) ZR 1*

14. *R v Secretary of State for Transport, Ex Parte, Roths Child (1989) 1 ALL ER 933*

15. *Nkhata and Four Others v The Attorney – General (1966) ZR 124*

16. *Inter Market Banking Corporation (Zambia) Limited v Grancom Investments Limited SCZ NO. 14 of 2014.*

17. *Palk v Mortgage Services Funding Plc (1993) 2 ALL ER 481*

18. *Clement Chuuya and Hilda Chuuya v J.J. Hakwenda (2002) ZR (SCZ NO.3 of 2002)*

19. *Contruction sales and services Limited and Others v Standard Bank Zambia Limited (1990-1992) ZR 157*

20. *Southwell v Roberts (1940) 63 CLR 581*

21. *Zambia Revenue Authority v Hitech Trading Company Limited (SCZ Judgement No. 40 of 2000)*

22. *Isaac Tentameni Chali v Liseli Mwale (1995-1997) ZR 199*

23. *Attorney – General v Major Samuel Mbunilwee and 1419 Other Officers and Soldiers unreported SCZ No. 83 of 2010.*

24. *Bank of Zambia v Aaron Chungu, Access Financial Services Limited and Access Leasing Limited (2008) 1 ZR 81*

25. *Chief Chanje v Zulu SCZ Appeal No. 73 of 2008.*

26. *Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172.*

Legislation referred to:

1. *Conveyancing and Law of Property Act 1881*

2. *Rules of the Supreme Court of England 1999 Edition (white Book)*

Other authorities referred to:

1. *Kerr on Receivership and Administrators 17th Edition, 1989*
2. *Halsbary's Laws of England, volume 39, Fourth Edition*
3. *Fisher and Lightwood's Law of Mortgage, 11th Edition Butterworth's London, 2002*
4. *Halsbary's Laws of England, Volume 77, Fifth Edition*
5. *Atkins court Forms 2nd Edition volume 28*
6. *Megarry's Manual of the Law of Real Property, 5th Edition, D.V. Baker*
7. *Halsbary's Laws of England Volume 32, 4th Edition*
8. *Fisher and Lightwood's Law of Mortgage, 2012, 13th Edition.*

1.0 Introduction

1.1 This is an appeal from a Ruling on account by mortgagee in possession rendered by the High Court (Chenda J) delivered on 21st April, 2020. The account was done pursuant to a judgement of the Supreme Court delivered on 21st September, 2016.

1.2 The brief facts of the matter are that the respondent commenced the matter in the High Court, in the main, for an Order that the purported transfer of rights and interests in a mortgage dated 14th July, 1997 by three entities, namely, Zisc Limited, Development Bank of Zambia and Nederlandse Financierings (collectively called the lenders) to Dar Farms Limited was null and void *ab initio* and that the latter had no interest or estate in Farm No. 4809, Ndola. The respondent also sought an Order of possession and damages for trespass. In the alternative, the respondent sought an account of what, if anything, was due under the said mortgage; an account of rent and profits in respect of the property, an order that it (Mpongwe Farms Limited) could be at liberty to redeem the property, a declaration that it was entitled to the property, discharged from all claims under the mortgage and delivery of the property by the appellant to the respondent; and damages for deterioration of the property for the period in which the appellant was in occupation.

1.3 The appellant equally had a counter-claim against the respondent. It sought a declaration that the respondent defaulted on the mortgage and did not acquire any legal or beneficial ownership in Farm No. 4809, Ndola;

a declaration that the lenders lawfully repossessed the property and were at liberty to dispose of it to the appellant as unpaid vendor; and an order that it (Dar Farms Limited) was in lawful possession of the property having paid consideration to the lenders.

2.0 Decision of the Court below

2.1 On 6th October, 2015, the trial Judge delivered judgement dismissing both the respondent's claim and the appellant's counter-claim and made no clear orders as to the rights or the respective legal positions of the parties. Both parties were aggrieved by that judgement and launched their appeal and cross-appeal.

3.0 Decision of the Supreme Court

3.1 In its judgement delivered on 21st September, 2016, the Supreme Court found in favour of the respondent (Mpongwe Farms Limited). The Court found that the respondent was the owner of the farm No. 4809, Ndola which was under the occupation of the appellant as mortgagee in possession. The court ordered an account to be rendered by Dar Farms Limited, as mortgagee in possession. The Supreme Court referred the account to the High Court on the recovery of the mortgage sum.

3.2 On 26th March, 2019 the appellant filed an application to account by way of notice pursuant to the judgement of the Supreme Court of 21st September, 2016.

4.0 Ruling on account

4.1 In its Ruling of 21st April, 2020, the lower court was of the view that the appellant had proceeded as if it was totally oblivious to the requirements of **Order 43 Rule 4 of the Rules of Supreme Court**[1], and it admitted that its computations were devoid of the inflows component. The learned judge ordered that the total rental income of $492,916.69 (admitted by the appellant as realised from the property) be applied to defray part of the mortgage debt to be recomputed as a reducing balance at each interval of payment of the said rent. The judge ordered that the appellant was liable to pay the respondent for unoccupation rent from the date it first occupied the property continuing every day that it remained in possession of the property. The resulting amount was to be applied to defray the mortgage debt.

4.2 The lower court further ordered that the parties were at liberty to amicably agree on the value of the unoccupation rent and thereafter recompute the value of the mortgage debt; in light of the Covid-19 pandemic the Judge granted the parties 120 days from the date of the Ruling to reach an agreement on the mortgage debt; for their failure to reach such agreement, the Judge ordered that either party was at liberty to move the Deputy Registrar of the High Court for assessment of the unoccupation rent and the re-computation of the mortgage debt; if the assessment revealed that the respondent were in credit in relation to the mortgage debt, then the

respondent would be at liberty to invoke clause 5 of the mortgage for it to be discharged, and if the mortgage debt was still outstanding, then the appellant would be at liberty to enforce its rights under the mortgage. The learned Judge awarded costs to the respondent of and incidental to the account up to the date of the Ruling, 21st April, 2020. In the event that the *ex-curia* settlement failed, the learned Judge ordered that each party were to bear its own costs following as assessment by the Deputy Registrar.

5.0 Grounds of appeal

5.1 The appellant now appeals against the Ruling of the High Court on the following grounds as follows:

1. ***The court below erred both in law and in fact, after holding that the occupation of the farm had happened during receivership, failed to find that it was the receiver and not the defendant (appellant) who was to account to the receiver for that period of the receivership.***
2. ***The court below erred both in law and infact in holding that the defendant failed to use its best endeavour in total disregard of the terms of the Mortgage deed and the implements surrounding the farm.***

9. ***The court erred both in law and in fact by not giving full regard to the effect of the land acquisition process and in view of the fact that even the respondent participated in the process of challenging the process.***

10. ***The court erred in law in holding that the squatters were as a result of the Defendant's (Appellant) neglect.***

11. ***The court erred both in law and in fact in not accepting that the mining occurred so as to have an effect on the operation of the farm.***

12. ***The court erred both in law and in fact in failing to find that the claim by Mr. Nundwe to the Farm had an effect on the utilisation of the farm more so by failing to credit the expenses incurred by the defendant (Appellant)***

6.0 Grounds of cross-appeal

6.1 The respondent equally dissatisfied with the Ruling of the court below contends that the Ruling ought to be varied to the extent and in the manner and upon the grounds hereinafter set out, namely:

A. Variations contended for:

i. The finding at page R-23 of the Ruling that the total rental income of $492,916.69 (admitted by the Defendant as realised from the property) be applied to defray part of the mortgage debt to be recomputed as a reducing balance at each interval of payment of the said rent.

B. Grounds

i. The learned Judge misdirected himself in law and fact when he found that the appellant had realised the sum of $492,916.69 as rental income from the property known as Farm 4809 Mpongwe ("the property") contrary to the evidence on the record.

ii. The learned Judge misdirected himself in law and fact when he failed to attend to the accounting process as ordered by the Supreme Court.

7.0 Appellant's submissions

7.1 On behalf of the appellant, Mr. Sianondo, relied on the heads of argument filed herein on 21st July, 2020, and the appellant's arguments in reply and arguments in response to cross-appeal filed into court on 12th October, 2020.

7.2 In ground one, it was submitted that the respondent did obtain facilities from the appellant and Barclays Bank of Zambia Limited. It was argued that due to the difficulties in the payment of the money due to Barclays

Bank of Zambia Limited, a receiver was appointed on 27th August, 1999. Counsel stated that the mortgage was transferred to the appellant from the previous mortgage on 22nd January, 2002. His contention was that the receiver in relation to the respondent having been appointed on 24th August, 1999, and the transfer of the mortgage to the appellant having occurred on 22nd January, 2002, it followed that the transfer of the mortgage to the appellant happened when the respondent was under receivership. Counsel's argument was that the receiver managed the property from 24th August, 1999 to 24th August, 2011 when the deed of termination was effected. The question as to who is to account to the respondent for the period that it was in receivership was raised. We were referred to the cases of ***Freshmint Limited and 2 others v Kawambwa Tea Company[1], Magnum (Zambia) Limited v Basit Quadri and Others[2] and Silven Properties Limited and Another v Royal Bank of Scotland Plc and Others[3].*** The import of these authorities being that a receiver acts as an agent of a company under receivership, and that the duty of the receiver, which is constituted in the relief, is to account to the parties interested.

7.3 To buttress arguments on the duties of a receiver we were further referred to a plethora of authorities including ***Pearse v Green and Others[4]*** which held that the first duty of an accounting party, whether an agent, a trustee, a receiver, or an executor, is to be constantly ready with accounts.

7.4 The learned author of ***Kerr on Receivership and Administrators***[1] states at page 208 that:

> ***"Liability to account.***
>
> ***A receiver is liable for all the money coming into his hands, in his capacity as receiver, at any time whatever, before or after the appointment has lapsed."***

7.5 ***Halsbary's Laws of England, volume 39, Fourth edition***[2] at paragraph 938 was cited where it states that a receiver appointed out of court has a statutory duty to account as agent and a receiver of the whole or substantially the whole of the assets of a company appointed on behalf of debenture holders.

7.6 Additionally Counsel cited the cases of ***Smiths Limited v Middleton***[5], ***Stanbic Bank v Micoquip Zambia Limited***[6], ***Patrick Makumbi and 25 Others v Greytown Breweries Limited***[7] and ***Standard Chartered Bank Limited v Walker and Another***[8]. These authorities in varying degrees highlight a receiver's duty to account to a company in receivership.

7.7 As regard grounds two and six, Mr. Sianondo made a short oral point that the impeachability of the appellant's act was restricted to clause 22 of the mortgage.

7.8 Following Counsel's written arguments, it was submitted that a mortgage is a contract between the parties to which no terms could be added to

impose protection to the mortgagor which protection is not stated in the mortgage. We were referred a number of authorities on this point including ***Rodgers Chali Ponde and Others v Zambia State Insurance Corporation Limited***[9] where the Supreme Court held that:

> ***"Parole evidence is inadmissible because it tends to add, vary or contradict the terms of a written agreement validly conducted by the parties."***

7.9 Counsel submitted that by the terms of the mortgage the appellant had power to enter into possession and any impropriety or irregularity in the exercise of the power was not impeachable by the mortgagor. That in the exercise of the power and whatever irregularity existing, the same could not affect the interest of the appellant to the money it is owed as this was the agreement which the parties entered into and are bound.

7.10 The argument pertaining to the third ground of appeal is that the burden of proof in accounting is on the plaintiff and not the defendant. The case of ***Khalid Muhammad v Attorney General***[10] was referred to and it was submitted that the respondent was the party that alleged the money was made by the appellant during the period of possession. As such the respondent had to prove that allegation in the context of the clauses agreed to by the parties in the mortgage.

7.11 Under ground four and five, it was submitted that the appellant was not credited with resources it spent on the farm either improving it or defending it. That the appellant carried out improvements on the farm valued at K30, 211,000=00. It was submitted that the sum of K401, 565=00 was expended in legally defending the farm against an invasion of squatters. The cases of ***George Andries Johannes White v Ronald Mesterma and Others***[11] and ***Trevor Limpic v Rachel Mawere and Others***[12] were referred to for the propositions that the appellants decisions were impeachable, and that it was an injustice for the appellant not to be reimbursed for the developments that it made on the farm. We were urged to allow grounds four and five of the appeal.

7.12 In ground 7 the appellant contended that the mortgagor's responsibilities did not cease on account of the fact that the mortgagee was in possession. Counsel referred us to the learned author of ***Fisher and Lightwood's Law of Mortgage***[2] where it states at ***paragraph 19.69 of page 534*** as follows:

> ***"It is the duty of the mortgagor, if he has the opportunity, to give notice to the mortgagee that the mortgaged property can be made more productive and to assist him in making it so. If the mortgagor fails to do this and stands by, and does not object to the mortgagee's conduct, he cannot afterward charge him with mismanagement."***

7.13 It was submitted that the appellant was accessible and the respondent had the opportunity to advise the appellant on how to make the farm more productive. That the failure, on the part of the respondent to advise should react against it, in the sense that the respondent cannot innovate claims which it could not bring to the attention of the appellant in the hope that it could claim at the end of the possession period. Counsel contended that the respondent had a duty to mitigate its circumstances. That it also had a duty to eradicate the squatters which it never did. It was submitted that the respondent should have employed the same zeal in challenging the acquisition of the farm by the state to make the farm more productive. We were urged to uphold this ground of appeal, and hold that the mortgagor equally has responsibilities.

7.14 In ground eight the appellant complains that the court predominantly analysed the appellant's evidence and outwardly said nothing of the respondent's evidence, which culminated in an unbalanced view of the evidence. The case of ***Attorney-General v Marcus Kampumba Achiume***[13] referred to. It was submitted that had the lower court appreciated the entire evidence, it would have given appropriate guidance on the procedure to be applied on accounting before the Deputy Registrar. That appropriate guidance would have been availed on issues such as the terms of mortgage demanded of the parties, the accounting by the receiver, the investments and expenses incurred by the appellant, the effect of issuance of intention for land acquisition by the state, and the effect of

mining on the land and that of the resultant squatters. We were urged to consider the evidence in totality and how it impacts the accounting process.

7.15 It was the appellant's argument in ground nine that the process of acquisition by the state negatively affected its utilisation of the farm as there was complete loss of the right to the property. We were referred to the case of ***R v Secretary of State for Transport, Ex Parte, Rothschild***[14] where Slade L.J observed at page 935 that:

> ***"...it has to be recognised that compulsory purchase of land involves a serious invasion of the private proprietary rights of citizens."***

7.16 Counsel submitted that the lower court ought to have appreciated the effect of the acquisition, which it did not. We were urged to allow ground three.

7.17 Turning to ground ten the appellant's complaint is that it found squatters on the land, and the receiver did nothing about them. It was argued that it was incorrect to accuse the appellant of negligence for allowing the squatters on the land when it took steps, at its own expense, to correct the situation. Counsel submitted that the finding by the lower court that it was negligent is a misapprehension of facts which this Court should

reverse. The case of ***Nkhata and four others v The Attorney General***[15] referred to.

7.18 Grounds eleven and twelve were argued together because they relate to the effect of the mining activities and the claim of ownership by one Nundwe of a part of the farm. It was briefly submitted that there was evidence on record that the mining events were disruptive to the farm activities. Further, that the claim by Mr. Nundwe of a part of the farm made it difficult to actualise the land. It exposed the appellant to the cost of defending the farm. That the court below did not rely on the documents on record but merely heard the respondent's oral evidence. The case of ***Inter Market Banking Corporation (Zambia) Limited v Graincom Investments Limited***[16] was cited where the Supreme Court reasoned that:

> ***"Failure by the learned Deputy Registrar to consider these important documents that were readily available on the record and instead, to place reliance on the oral evidence given by PW2 (Mumbwali Simuzimbili), was a serious misdirection that caused for our interference with the findings."***

7.19 We were also urged to find that these complaints had an effect on the utilisation of the land, and to allow these grounds.

8.0 Respondent's submissions

8.1 The respondent filed detailed heads of arguments dated 2nd October, 2020, which we have duly considered but shall summarise for brevity. Counsel commenced by narrating the factual background which we have hereinbefore given a summary of.

8.2 In response to ground one, it was submitted that the Supreme Court was clear in its Judgement of 21st September, 2018 as to who was under the obligation to account. The receiver was never in possession of the property at any point. It is submitted that whilst the appellant argues that it is the receiver that must render an account, the appellant also claims sums due during the period that the respondent was under receivership. According to the respondent this shows that the appellant does not in fact even believe in the merits of its own appeal.

8.3 It was submitted that the appellant's argument is oblivious of the fact that the debenture between the respondent and Barclays Bank only incorporated the property subject of the dispute as a second mortgage. To illustrate the effect of a second mortgage we were referred to the learned authors of ***Halsbury's Laws of England***[4] 5th Edition where it states at paragraph 261 that:

> ***"When mortgages which require to be registered as land charges (that is, every mortgage, whether legal or equitable, not being a mortgage protected by the deposit of documents***

relating to the legal estate affected) are registered they rank accordingly to their date of registration."

8.4 Further, that the authors of ***Atkins Court Forms[5], second Edition, paragraph 8*** opine that a second or subsequent lender is also entitled to possession except against prior mortgages. It was submitted that the import of these authorities is that the holder of a second mortgage can only enforce such mortgage in the order of priority to other mortgages.

8.5 It was submitted that the Supreme Court in its Judgement considered all the relevant documentation and found that the appellant entered the property under licence of the lenders. It is argued that the appellant did not deal with the receiver when taking possession of the property, and any contention that it did is an attempt aimed at misleading the Court. Counsel submitted that only the appellant could render the account as ordered by the Supreme Court. We were urged to dismiss ground one for want of merit.

8.6 In response to grounds two and six, the respondent argued that the appellants submissions were misconstrued because, firstly, the accounting process was ordered by the Supreme Court, and secondly, the provisions of clause 22 of the mortgage have been completely misconstrued because a reading of clause 22 of the mortgage reveals that it relates to "***the exercise or purported exercise of any powers***

hereinbefore contained or referred to or vested in the Lenders as mortgagees by virtue of any state."

8.7 In terms of the powers conferred upon the appellant as mortgagee in possession by statute, ***section 18*** of the ***Conveyancing and Law of Property Act 1881***[1] was referred to. It avails a mortgagee in possession *inter alia,* the capacity to lease mortgaged land or a part of it from time to time. ***Section 19*** of the Act provides the powers of a mortgagee in possession including the power to sell, or to agree with any other person in selling the mortgaged property of a part of it. The respondent contended that these powers were exercisable by the appellant as mortgagee and for which acts it would operate without the threat/risk of impeachment. It was argued that the appellant did not carry out or undertake any of the enlisted powers conferred upon it by the mortgage because it believed it entered upon the property as purchaser and not as mortgagee. It was submitted that the appellant could not rely on the provisions of clause 22 of the mortgage to defeat a claim for an account. Further that the full extent of clause 22 reveal that they are intended for the protection of third parties and not the appellant. It is submitted that arguments relating to clause 22 of the mortgage are misplaced and these grounds ought to be dismissed.

8.8 With regards to ground three, the respondent submitted that the law on who should render an account is well settled. Reference was made to **Order**

43 rule 4 of the Rules of the Supreme Court[2]. It was submitted that the accounting party is under an obligation to prove the entries in his account.

8.9 We were also referred to the learned authors of ***Fisher and Lightwood Law of Mortgage*** where they state at paragraph 29.55 of page 633 that:

> ***"...equity does not allow a mortgagee who as such goes into possession of the mortgaged property any advantage beyond securing payment of the sums due under the mortgage. The property was mortgaged only as security for the moneys owed to the mortgagee and thus the mortgagee is under an equitable duty to be reasonably diligent in utilizing the property to realise the moneys owed, so that the property can be restored to the mortgagor."***

8.10 Further, the case of ***Palk v Mortgage Services Funding Plc[17]*** where it states in respect of a mortgagee that:

> ***"If he takes possession he might prefer to do nothing and bide his time, waiting indefinitely for an improvement in the market, with the property empty meanwhile. That he cannot do. He is accountable for his actual receipts from the property. He is also accountable to the mortgagor for***

what he would have received but for his default. So he must take reasonable care to maximise his return from the property. He must also take reasonable care of the property."

8.11 It was submitted that *in casu* the appellant was under a strict duty to maximise the property and recoup the debt. That therefore the burden of proving how the property was utilised rests with the appellant. We were urged to dismiss ground three for lack of merit.

8.12 In response to grounds four and five it was argued that is settled in so far as it states that a mortgagee in possession is obliged to employ his best endeavours to realise the mortgage debt and thereafter, to account to the mortgagor. We were once again referred to various passages of ***Fisher and Lightwood Law of Mortgage*** *supra* all affirming the mortgagee's duty to account.

8.13 The respondent cited the case of ***Clement Chuuya and Hilda Chuuya v J.J. Hakwenda***[18] where the Supreme Court stated that:

"We reaffirm also that where a judgement creditor in possession of the debtor's property from which an income could be denied, wilfully defaults by failing to realise any income from the property, the debtor can apply to court for an inquiry of the income which would

reasonably have been realised and the sum found should be credited to the judgement debtor."

8.14 Further, it was held in ***Construction sales and Services Limited and Others v Standard Bank Zambia Limited***[19] that:

"It is necessary for oral evidence to be heard to ascertain whether there has been wilful default by the respondent in failing to realise any income from the property and, if so, what amount of income would reasonably have been expected to be realised. Thereafter any such sum should be credited to the appellants until the judgement debt is satisfied so that an order can be made for the return of the property to the appellants."

8.15 It was submitted that mortgagee expenditure must be reasonable. That if an unreasonable amount is spent, then the mortgagee cannot claim reimbursement for the money spent, even if this leads to a windfall in favour of the mortgagor. The case of ***Southwell v Roberts***[20] was cited in support of this preposition.

8.16 The respondent contended that the appellant's expenditure was at the least unreasonable and irresponsible. That the appellant could not be allowed to benefit from the exorbitant costs highlighted in the valuation

report. And in any event, the purported improvements were not undertaken by the appellant as mortgagee but as the purported owner of the property.

8.17 In his oral and submissions on these grounds, Mr. Wishimanga submitted that the court below was dealing with issues which were evidentiary in nature. The court below said the appellant did not provide any evidence as such it could not grant the relief sought. Counsel contended that there was no evidence that the property was fenced off. He submitted that the improvements that the appellant undertook were on the belief that it was the owner of the property.

8.18 Further, Counsel submitted that the squatters entered the property as a result of the appellant's neglect of the property as the record shows that the appellant had abandoned the property.

8.19 In response to ground seven, the respondent contends that the appellant, by its own testimony alleged that it was a purchaser of the property. It was submitted that there was no evidence that the respondent sat back and did nothing. There was also no evidence on record that the appellant approached the respondent to assist with managing the property, which request was turned down by the respondent. It was submitted that by its submissions on this ground, the appellant's counsel was attempting to place on the court's record, evidence from the bar, which is inadmissible. The case of ***Zambia Revenue Authority v Hitech Trading Company***

Limited[21] for this proposition. It held that it is trite law that arguments and submissions at the bar, spirited as they may be, cannot be a substitute for sworn evidence.

8.20 It was the respondent's submissions that it was excluded from management of the property and as such any liability for mismanagement should fall squarely on the appellant. We were urged to dismiss this ground of appeal.

8.21 In response to ground eight, the respondent made brief submissions to the effect that the consideration of the evidence was not unbalanced, more so that it was the appellant who was rendering the account. We were urged to dismiss ground eight for lack of merit.

8.22 The respondent's response to ground nine is that the appellant's testimony throughout the proceedings was that it had purchased the property and it considered itself to be the owner of the property. That the appellant's position changed when it heard the argument that it was actually mortgagee in possession when the action was commenced in 2011. It was argued that the appellant cannot therefore be heard to say that it would have utilized the property in such a way as to recoup the mortgage debt had it not been for the compulsory acquisition notice. It was submitted that the appellant confirmed in its oral testimony that it had never been divested of the property as a result of the said notice. It was

thus contended that those submissions by the appellant were merely an afterthought. We were urged to dismiss ground nine of the appeal.

8.25 In response to ground ten, the respondent referred to the case of ***Nkhata and four Others v The Attorney General*** *supra,* to the effect that a trial Judge sitting alone without a jury can only be reversed on the facts when it is positively demonstrated to an appellate court that the Judge erred in accepting the evidence, or the Judge failed to take into account some matter which ought to have been into account, or where it appears from the evidence itself, or from the reasons advanced by the Judge in accepting it, that he could not have taken proper advantage of his having seen and heard the witness; or where there are other circumstances which indicate that the evidence of the witnesses which the Judge accepted was not credible.

8.26 It was submitted that the record reveals that the appellant did not do anything about the squatter invasion of the land between 2006 and 2013. That the evidence is clear that the appellant was negligent in dealing with the invasion because it took it 9 years to seek court intervention. We are urged to dismiss this ground of appeal.

8.27 Turning to grounds eleven and twelve of the appeal, the respondent argued that the court below considered the evidence adduced by the appellant and discounted it. Further, that in his cross-examination the appellant's witness conceded that the appellant was unaffected by the occupation of

the property by Mr. Nundwe. It was submitted that these grounds are bereft of merit and ought to be dismissed. Counsel contended that in any event, the same would not aid the appellant as it failed to render an account.

9.0 Appellant's submissions in reply

9.1 In reply to ground one the appellant accepts that the court will not take interest or pronounce itself on entities or persons who are not party to proceedings. The cases of ***Isaac Tentanani Chali v Liseli Mwale***[22] *and* ***Attorney-General v Major Samuel Mbumwae and 1419 other Officers and Solders***[23] was referred to.

9.2 The appellant further accepts that the Supreme Court directed that an account be taken. Its contention was that the Supreme Court did not state that the appellant in rendering an account should be responsible for all other parties which the respondent chose not to pursue in its action. It was submitted that the debenture holder was the second mortgagee. It is contended that the second mortgagee cannot exercise the power in the absence of the first mortgage.

9.3 It was further argued that the statement by the Supreme Court that the appellant took possession of the suit property colourably under the license from the lenders, was said in obiter to import the meaning of ***seemingly***,

which is not a fact. The case of ***Bank of Zambia v Aaron Chungu, Access Financial Services Limited and Access Leasing Limited***[24] was relied upon where the Supreme Court reasoned that:

> **"Obiter does not form part of the judgment and it is not binding."**

9.4 It further was contended by the appellant that it could only account for the period when the respondent company was under receivership as this is the period which the respondent had the capacity to do so. And for the other period, the respondent should approach the receiver.

9.5 In reply to grounds two and six, it was submitted that it was not in dispute that the Supreme Court directed that the account be done. It was submitted that the reference to account did not endorse that the respondent owed any money but that the court had to review the evidence before it to determine which party was owing the other. It was submitted that the respondent quietly accepted, going by the power of the mortgagee, including clause 19(1), that the appellant had the power to enter into possession and any irregularity in the exercise of the power cannot be impeached.

9.6 In reply to ground three, it was submitted that since the respondent was the plaintiff in the court below, it had the burden to prove. That according to ***Order 43 rule 4(5) of the Rules of the Supreme Court, 1999,*** it was

the burden of the disputing party to challenge the account that has been rendered and not the defendant who is the accounting party.

9.7 Further it was contended that the authority of ***Palk v Mortgage Service Foundry Plc*** *supra* does not address the issue of the effect of the clauses in a Mortgage where parties have agreed on how to proceed. That the issue of the clauses in a mortgage as agreed by the parties was dealt with in the case of ***Silven Properties Limited and Another v Royal Bank of Scotland Plc and others*** *supra.*

9.8 The reply to grounds four and five is that it is not in doubt that the mortgagee in possession's decision, according to cause 22 of the mortgage, is impeachable. Secondly, that there is no doubt that having been in possession, expenses in protecting the farm were expended including the expenses on the repairing of building and fencing. It was contended that all the expenses on the property must be credited to the account of the appellant. It was submitted the only thing the respondent said was that the appellant's figure was unreasonable. That in the absence of a counter figure, the appellant's figures were intact. The case of ***Garrick Refrigeration and Air Condition v Fresh Direct Zambia Limited***[25] was referred to.

9.9 In reply to ground seven, it is contended that the respondent had a duty even when the mortgagee was in possession. That by commencing an action, the respondent knew that the appellant was just a mortgagee in

possession. It was submitted that the respondent still had the duty to give notice if it believed that the property could be made more productive.

9.10 In reply to ground eight it was submitted that the court misapprehended what it ought to have taken into consideration during account proceedings. We were referred to the learned author of ***Megarry's Manual of the Law of Real Property,*** where it states that:

> ***"A mortgagee in possession must effect reasonable repair, and may without the mortgagor's consent effect reasonable but not excessive improvements; the costs will be charged to the mortgagor in the accounts."***

9.11 Further, that the evidence of squatters and the threat of compulsory acquisition by the Government should have been considered by the court.

9.12 With respect to ground nine, the appellant's reply was that apart from the evidence in cross-examination on page 816 of the record of appeal, which shows that the appellant was not allowed to do anything, there is evidence on pages 826 to 827 of the record of appeal, by the appellant to the effect that the appellant faced interference from the Chiefs and the Ministry of Lands and that no development could be undertaken.

9.13 In reply to ground ten, the appellant submitted that the evidence on ***record at pages 815 and 819 of the record of appeal*** is consistent with the appellant's position that it found squatters and that the Member of

Parliament had been taking them to the property. That the receiver, who was the agent of the respondent, did nothing about the squatters. It was submitted that the court ought to have taken a broad view of the evidence before it.

9.14 Finally, in reply to grounds eleven and twelve, it was submitted that the respondent did not deny that mining activities took place. That the running of the farm would not be in conformity with farming. It was submitted that the court ought to have taken these facts into consideration.

10.0 Decision of the court

10.1 We have considered the appeal, the record before us, the authorities cited and the submissions advanced by learned counsel for the parties.

10.2 It is common cause that the outstanding issue in this long-standing matter is the account. It is also not in dispute that the order to render an account was a result of the ***Supreme Court Judgment No. 38 of 2016 under appeal No. 208 of 2015.*** In advancing its argument raised in ground one, the appellant be-laboured the point that a receiver was appointed on 24th August, 1999, while the transfer of the mortgage to the appellant occurred on 22nd January, 2002. Therefore, the receiver had an obligation to render the account for the period under receivership.

10.3 We have been referred to a plethora of authorities on the duty of a receiver to the indebtedness of a company to which he is an agent. These authorities, accurate as they may be, are inapplicable *in casu* where the parties' rights and obligations were well established and an unambiguous pronouncement made by the Supreme Court. At pages 127 and 128 (J59 and J60) of the record of appeal, Malila, JS stated:

> ***"We emphasize that the obligation to account belongs with the mortgagee in possession and that obligation to account could be enforced through an appropriate court order, rather than by way of a default procedure, as the learned counsel for the appellant appeared to have been advocating under this ground."***

10.4 It is clear that the issue of who was to render an account was adequately dealt with by the Supreme Court of which we are bound by its decisions. We find no merit in ground one and we dismiss it forthwith.

10.5 The appellant's argument put forward in grounds two and six is that a mortgage is a contract between the parties and therefore no other terms can be added to impose protection to the mortgagor, which term or protection is not spelt out in the mortgage. The contention by the appellant here being that it had power to enter in possession and any

impropriety or irregularity in the exercise of that power is not impeachable by the mortgagor, in relation to the money it is owed.

10.6 The unimpeachability of the appellant's act is in reference to clause 22 of the mortgage found at page 56 of the record of appeal. It provides:

> ***"22. No sale, lease, receipt of rents, entry into possession or other act done by the lenders in the exercise or purported exercise of any power hereinbefore contained or referred to or vested in the lenders as Mortgagees by virtue of any statute shall be impeachable by reason of any impropriety or irregularity in the exercise of the power and no purchaser or lessee from or other persons dealing with the Lenders shall be bound to inquire if any money is owing on this security or into the right of the lenders to exercise any of the said powers."***

10.7 According to the respondent, clause 22 of the mortgage relates to the power of the mortgagee/lender as contained in the mortgage or the statute. These powers include the power to sale, lease, receipt of rents, entry into possession and any other powers of the mortgagee or lender.

10.8 Our reading of the mortgage deed revels that the unimpeachable acts to which clause 22 refers are those covered in the context of clause 19 of the mortgage deed. It provides as follows:

"19. During the continuance of this security the Lenders shall have power without any further consent from or notice to the Borrower to do all or any of the following acts or things:

(i) To enter into possession of the Mortgaged Property but so that the Lenders may at any time after entering into possession of the Mortgaged Property relinquish such possession on giving notice to the Borrower.

(ii) To grant and accept surrenders of leases of the Mortgaged Property at such rent and generally upon such terms as the Lenders in their absolute discretion shall think fit and any lease created in exercise of this power may be made in the name of the Borrower or the Lenders and the Borrower hereby appoints the lenders or their nominee to be the attorney of the Borrower to sign in the name of the Borrower or otherwise execute any document entered into the exercise of this power.

(iii) To appoint such person as they think fit to be receiver of the income of the mortgaged property and at any time and from time to time to remove

any receiver appointed hereunder and appoint a new receiver in his place.

(iv) To exercise any statutory power of sale applicable hereto or otherwise to sell or to concur with any other person selling the Mortgaged property either subject to prior charges or not and either together or in lots by public auction or by private contract subject to such conditions respecting title or evidence of title or other matter as the lenders think fit with power to vary any contract for sale and to buy in at an auction or to rescind any contract for sale and to resell without being answerable for any loss occasioned thereby."

10.9 In respect of the appellant, the question we have considered is whether it exercised any of the powers as mortgagee in possession. Clearly the mortgagee's unimpeachable deed must be those consistent with its powers under the mortgage or statute. The learned judge in the court below was consistent with this approach. At page R5 of the impugned Ruling he stated as follows:

"Quite clearly, the parameters of the account are cast in stone as being confined to the Defendant's activities (as

mortgagee in possession of the property) for the recovery of the mortgage."

10.10 The learned Judge derived his guidance from the Supreme Court Judgment at page J57-58 where Malila, JS stated:

"The position of the law is settled and that is that a mortgagee in possession is obliged to employ his best endeavours to realise the mortgage debt and thereafter to account to the mortgagor. We accept as good law the position given by the learned authors of Fisher and Lightwoods Law of mortgages, 13th Edition 2010, paragraph 29.55 at page 633 as quoted by the learned counsel for the appellant in their submissions that:

"The Mortgage is therefore bound to account to the mortgagor from both the rent and profit actually received and for rent and profits which, but that his wilful default or neglect, might have received from time of taking possession... the mortgagee who takes possession of the mortgaged estate is required to be diligent in realizing the amount due on the Mortgage so that the estate may be redelivered to the mortgagor. He is liable to account for the rents and other profits during

his possession and if he remains in occupation himself he is liable to unoccupation rent. . "

10.11. The learned Judge then opined that the appellant as mortgagee in possession was duty bound to utilize the property to recover the mortgage debt.

10.12. A reading of the proceedings in the court at page 807 of the record of appeal revels that the appellant's managing director agreed in cross-examination that he believed he bought the property and all the improvements he carried out were in his capacity as the owner and for his benefit. As admitted by its managing director, the appellant did not exercise the powers consistent with those provided in clause 22 of the mortgage. We cannot fault the learned Judge's holdings. Grounds two and six are therefore bereft of merit and accordingly dismissed.

10.13. Under ground three, the appellant briefly argued that because the respondent was the plaintiff in the court below, it had the burden of proof. In response the respondent submitted that the burden of proving how the property was utilized rests with the appellant and was the reason the Supreme Court directed that the account be taken by the appellant and not the respondent.

10.14. We do not accept the argument by counsel for the appellant that the respondent must prove that money was made by the appellant during the period of possession. In this case a notice to account was filed by the

appellant on 26th March, 2019. In its affidavit in support it deposed as to the facts of the monies it received whilst in possession. As directed by the Supreme Court only the appellant could render an account as mortgagee in possession. It is trite that the burden of proof is required of one party in a claim. Typically, the party filing a claim must demonstrate its validity and carries the burden of proof. Therefore the learned trial Judge cannot be faulted for holding that the burden of proof in accounting lay with the appellant. We dismiss ground three for lack of merit.

10.15. The fourth and fifth grounds of appeal relate to the court's alleged failure to credit the amount the appellant spent in defending the farm, and the improvements it made to the mortgaged property. We have earlier found in this Judgment that the appellant's utilization of the property was inconsistent with its position as mortgagee in possession.

10.16. The evidence on record shows that the appellant accepted that the improvements it carried out on the farm were in its capacity as the owner of the farm. In paragraph 11 of the affidavit in support of the notice to account, the appellants managing director deposed the following:

> ***"11. That the Defendant has also done a valuation report of the market value of the improvements on the Farm No. 4809 which put the value of K30, 211,000.00. Now produced and shown to me marked "DV4" is the valuation report."***

10.17. The cross-examination on the valuation report is at page 810 of the record of appeal. It went as follows:

> ***"Q: The valuation at page 132 of your affidavit lists value for different properties and includes that total value for compensation is K30,211,000.00***
>
> ***A: Yes***
>
> ***Q: The improvements you did on the property were in your capacity as owner of the land?***
>
> ***A: Yes"***

10.18. Further on the contention in defence of the farm against acquisition by the state and the invasion by squatters the appellants managing director deposed in the said affidavit:

> ***"18. That the land in issue became subject of compulsory acquisition by the state which disrupted the defendant's possession of the land and the same happened on 8th August, 2003.***
>
> ***19. That Defendant commenced action to challenge the process initiated by the state. The Judgement was only delivered on 7th July, 2006. Now produced and shown to me marked "DV9" is the said Judgment.***

20. That for the period of the existence of the acquisition no activities occurred on the farm as the outcome of the Judgement was unknown.

21. That during the period when the government was in possession of the farm after acquisition it allowed a lot of squatters to settle on the land."

10.19. In defence of these averments, Vangelatos was questioned about the defence of the farm and this is what he stated in cross-examination:

"Q: You said in your affidavit that the land was acquired by the state. Did the state take possession of the farm?

A: No, they did not

Q: Confirm that the state had only given notice of intention to acquire.

A: No.

Q: Look at page 173, can you see that what was given was just a notice of intention to acquire

A: I don't know

Q: The matter in court was determined in your favour in 2006

A: *Yes*

Q: *Between 8th August, 2003 and 7th July, 2006 you were still on the land as per paragraph 18 and 19 of your affidavit.*

A: *We were there but not allowed to do anything until the case was through.*

Q: *Confirm that between 2003-2006 there was no physical interference by the Government of the Republic of Zambia (GRZ) on the land.*

A: *No, there was none*

Q: *In your affidavit you have indicated that you now had squatters on the land*

A: *We found them there but they were increasing*

Q: *Turn to paragraph 21 of your affidavit, your diary during the period that GRZ was in possession it allowed squatters*

A: *The MP was bringing them in truck loads...*

Q: *Have you provided any pictorial evidence of squatters' activities on the property.*

A: *We did not provide the picture but they are there."*

10.20. With respect to the improvements done on the farm, the learned Judge found that the appellant neither produced any quotation, invoice receipt or other form of documentation from which the court could assess, attach a value and credit the appellant for having made the improvements, nor adduce any evidence to show that the improvements were consistent with its position as mortgagee in possession.

10.21 Further, the lower court found that the invasion of the squatters was not as a result of any wrong doing by the Government because the latter neither took possession of the property nor did it interfere with the property during the interval between 2003 and 2006.

10.22 In the premises, we hold that the learned trial Judge was on firm ground when he declined to credit the appellant for the improvements done to the farm and the amount the appellant spent in defending the farm. We uphold the findings of the learned trial Judge and dismiss grounds four and five of the appeal.

10.23 In ground seven, the complaint against the trial court was that it ought to have confirmed the obligations of the mortgagor during possession of the property. As we understand this argument, it is premised on the principle that if the mortgagor's duties were spelt out during the period the appellant was in possession of the farm, then the mortgagor ought to have been able to mitigate against the losses or circumstances. In response to this ground, the respondent contended that there was neither evidence on

record to show that the respondent sat back and did nothing, nor that the appellant approached the respondent to assist with managing the farm, which request the respondent turned down. It was submitted by the respondent that this was in fact evidence from the bar, which is inadmissible.

10.24 We have combed through the record and agree with the respondent's submissions that there is no clear evidence on record showing that the respondent was excluded from management of the property. We note that the Supreme Court in its detailed judgment considered the obligations of both parties. In considering whether the respondent had led the appellant to assume that it had abandoned its rights against the mortgage, the Supreme Court had this to say at page 119 to 120 (J50 – J52) of the record:

> ***"We equally have to consider whether by its conduct, active or tacit, the appellant led the respondent to assume that the appellant had abandoned its right against the respondent ..."***
>
> ***In our considered opinion, as long as that mortgage is subsisting and has not been discharged, the appellant's cause of action consisting in a discharge of the mortgage is unaffected..."***

10.25 After considering the parties' rights in relation to the mortgage and the property, the Supreme Court went on to make an important finding at the core of the dispute. The first being that the respondent was the title holder of the property, and secondly that the mortgage in relation to the property was still subsisting. The Supreme Court found that Mpongwe Farms Limited had a cause of action seeking to dislodge the mortgage. Having considered the obligations of the parties under the mortgage, the Supreme Court ordered an account to be undertaken by the appellant. It is our view, it was not the place of the lower court to re-open the case by confirming the rights of the parties. The lower court was directed to consider the account to be rendered by the appellant. We find no merit in this ground and we dismiss it.

10.26 The next consideration in ground eight, is whether or not there was an unbalanced evaluation of the evidence at the account hearing. At page 30 of the record of appeal, the trial Judge had this to say of the respondent's contentions:

> ***"5.31. I have considered the cross contentions by the plaintiff (respondent now) and it is tempting to delve into the same but I must remind myself that this is an account by the defendant (appellant now) and not assessment of damages due to the plaintiff.***

5.32. The letter (if it had been ordered) is the correct platform for redress of the issues of alleged misuse and conversion of movable chattels and structural damage to fixed assets.

5.33. However, there is no such Order in the High Court judgment nor is there any enabling directive in the Supreme Court Judgment.

5.34. I will therefore, confine myself to the black letter of the direction given by the Supreme Court Judgment which is for the defendant's account of recovery of the mortgage debt from its possession of the property."

10.27 As we see it, the lower court's boundaries were set by the Supreme Court and embodied in the directive to the lower court to preside over the account hearing ordering the appellant as mortgagee in possession to render an account to the respondent as mortgagor.

10.28 In our view, the lower court considered the evidence before it consistent with the Order given by the Supreme Court. In rendering an account to the respondent, the appellant had the burden to prove its receipts. The lower court considered the evidence adduced by the appellant at the account hearing and made findings on its factual claims. This ground is without merit and we dismiss it accordingly.

10.29 With respect to ground nine, we note that the issues of the State's acquisition of the farm have been argued earlier in this appeal. We found that State's Notice of Intention to acquire the farm had no effect on the appellant's capacity to manage the farm because the state never assumed possession of the farm. This ground of appeal attacks the lower court's consideration, or lack of it, of the effect of the land acquisition process and the fact that the respondent participated in the process of defending the farm.

10.30 At page 208 of the record of appeal is the High Court's Judgment in which the respondent (Mpongwe Farms Limited), the appellant (Dar Farms Limited) and Barclays Bank as applicants challenged the decision of the Minister of Lands made on 7th January, 2004 on behalf of the President, giving notice of the State's intention to compulsorily acquire Farm 4809, Ndola.

10.31 The applicants were successful as the court held that the State acted illegally in compulsorily acquiring Farm No.4809, Ndola. That matter was determined in 2006. The lower court considered the effect of notice by the state to acquire the property. The learned Judge stated that even though the appellant had alleged that the State had compulsorily acquired the farm, the State never took possession of the farm. We have earlier upheld the learned trial Judge's findings. We find no merit in ground nine and we dismiss it.

10.32 In ground ten, the appellant attacks the holding that the squatters were the result of its neglect. We have earlier in this judgment upheld the lower court's finding to the effect that the amounts spent in defending the farm could have been avoided had the appellant acted consistent with his duty as a mortgagee in possession. The appellant's evidence on record was that it believed it had purchased the property.

10.33 At page 224 of the record of appeal is the appellant's Statement of Claim in an action it took against several individuals who had allegedly occupied various portions of the farm. The action was taken in 2013 notwithstanding that the Mr. Vangelatos testified that the squatters were on the property before the appellant took possession. In his affidavit at page 39 of the record of appeal, he did not state what steps, if any, the appellant had taken to remove the squatters from the time it took possession.

10.34 In cross-examination by the respondent's Counsel, Mr. Vangelatos was asked if he had provided any pictorial evidence of the squatters' activities on the property. His response was in the negative (page 818 of the record of appeal refers). What is apparent to us is that there appears not to have been any urgency in addressing the squatter invasion. We, therefore, cannot fault the lower court for the conclusions it made. We find no merit in ground ten and we dismiss it.

10.35 Grounds eleven and twelve are premised on similar logic as grounds four and five to the extent that some occurrences on the farm hindered the appellant's utilization of the farm. In these grounds particular reference is made to mining operations on the farm and a claim of the farm by one Nundwe.

10.36 The appellant's argument is simply that there were mining activities taking place on the farm as evidenced by the writ of summons at page 443 of record of appeal we were also referred to a letter by the advocates of Bilole Milling Limited to the appellant couched as follows:

> *"The Managing Director*
> *Dar Farms and Transport Limited*
> *LUSAKA*
>
> *Mr. D. Vangelatos*
>
> *Dear Sir,*
>
> *Re: BILOLE MINING LTD – CLAIM FOR ENCROACHMENT*
>
> *We enclose herewith a note of our proforma invoice relating to the above matter and trust that you will find this in order. We shall issue a tax invoice upon receipt of your remittance. We look forward to receiving your remittance.*
>
> *Yours faithfully*
>
> *D.H. Kemp & Co."*

10.37 In considering the claim of mining activities the learned trial court reasoned that:

> ***"5.17 The Defendant has quite plainly failed to adduce any cogent evidence of:***
>
> ***(i) What mining activities took place on the property;***
>
> ***(ii) What extent of the property was affected;***
>
> ***(iii) What was the duration of the activities or period of mining;***
>
> ***(iv) Whether the defendant took any steps to get the miners to account for the profits and if so to what outcome; and***
>
> ***(v) How exactly the alleged mining activities have been a hindrance***
>
> ***5.19 In the absence of cogent evidence, I am unable to accept the alleged mining activities an excuse for the Defendant's failure to utilise the property to recover the mortgage debt."***

10.38 Whilst the respondent does not deny that mining activities took place, we understand the lower court's reasoning to be that the appellant did not prove its mining claims conclusively. We say so because the appellant, as the party to account, had the burden of proof of the declarations it made. By referring to a writ of summons and letter from the mining party's advocates, it did not establish how the mining activities, in the main,

affected the appellant's utilisation of the property. We, without difficulty, accept the learned Judge's position regarding the mining activities.

10.39 With respect to the contention of a competing claim to the property by Mr. Nundwe, the learned Judge reviewed the body of evidence. He came to the conclusion that the evidence adduced did not show that Mr. Nundwe's alleged claim affected the appellant's possession and quiet enjoyment of the property or any part thereof. Further, that the evidence did not reveal that Mr. Nundwe's claim restricted the appellant's activities on the property or any party thereof. The learned Judge declined to accept Mr. Nundwe's claim as an excuse for the appellant's failure to utilise the property to recover the mortgage debt.

10.40 It is trite as we have stated before that the burden of proof in civil matters lies with the party making the claim, to prove his case on a balance of probabilities. *In casu,* it was incumbent upon the appellant, as the party ordered to account, to prove its claim. That claim is averred to in paragraph 31 of its affidavit in support of notice to account at page 44 of the record of appeal. A perusal of the appellant's witness testimony in cross-examination at page 819 of the record of appeal shows that Mr. Vangelatos accepted that Mr. Nundwe vacated the property after a court order to that effect. Mr Vangelatos did not tell the court how Mr. Nundwe's claim affected the appellant's utilisation of the farm.

10.41 In our view, the learned Judge considered the evidence as adduced by the appellant to support his claim. In the absence of cogent evidence to support its claim as to how its operations were impacted by Mr. Nundwe's competing claim, we are inclined to uphold the learned Judge's holding that the appellant did not adduce sufficient evidence to support its claim. We accept the respondent's counsel's submissions that these grounds are bereft of merit and we dismiss them.

10.42 We find no merit in all the grounds of appeal and accordingly dismiss the appeal.

11.0 Cross appeal

11.1 We now turn to the respondent's cross-appeal against the Ruling. This is set out in the Notice of Cross-Appeal filed in court on 4th August, 2020.

11.2 In the Cross-Appeal the respondent contends that the finding at page R23 of the ruling that the total rental income of USD492, 916.69 (admitted by the appellant as realised from the property) be applied to defray part of the mortgage debt to be recomputed as a reducing balance at each interval of payment of the said rent be varied on the following grounds:

1. **The learned Judge misdirected himself in law and fact when he found that the appellant had realised the sum of USD492,916.69 as rental income from the property known as farm 4809 Mpongwe ("the property") contrary to the evidence on the record; and**

2. **The learned Judge misdirected himself in law and fact when he failed to consider the effect of failure by the appellant to render an account as ordered by the Supreme Court.**

12.0 Respondent's submissions on cross - appeal

12.1 In the first ground of cross-appeal the respondent attack the finding of the sum of USD492, 916.69 as rental income for the period 24th August 2011 to July 2019 as mere conjecture. It was argued that the figure was presented by the appellant as a supposition. Therefore it was a finding based on a misapprehension of facts. Reliance for this proposition was placed in the cases of ***Attorney General v Achiume*** *supra* and ***Chief Chanje v Zulu***[25], ***Mohammed v Attorney General*** *supra.*

12.2 In the second ground it was submitted that the lower court, despite having all the material before it failed to conclusively deal with the matters referred to it by the Supreme Court. We were referred to the case of ***Wilson Masauso Zulu v Avondale Housing Project Limited***[26] for its holding to the effect that a trial court has a duty to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined in finality. The respondent assails the lower court's reference of the account to the Deputy Registrar rather than itself attending to it.

12.3 It was submitted that ***Order 43 rule 1 (3) of the Rules of the Supreme Court of England (1999)*** provides for the order to be made in the following terms:

> ***"on the hearing of the application, the Court may, unless satisfied that there is some preliminary question to be tried, order that an account be taken and may also order that any amount certified on taking the account to be due to either party be paid to him within a time specified in the order."***

12.4 The respondent argued that the court was under an obligation to order that the amount certified on taking the account as due to a party, to be paid to that party within a time specified in the order.

12.5 Reliance was placed on the learned authors of ***Halsbury's Laws of England Volume 32, 4th Edition***[7] where they state at paragraph 912 that:

> ***"In the absence of special direction, the account taken against a mortgagee in possession is a continuous debtor and creditor account. The mortgagee is debited with all sums which he has received or which he is treated as having received by virtue of the mortgage, whether rents and profits, or accidental payments, such as proceeds of sale; and he is credited with the principal money, with interest accruing from the time, and with costs, charges***

and expenses including all expenditure upon the mortgaged property which he is entitled to charge against it. The nature of the account requires that it be taken without limit, that is, from the commencement of the possession, or, if there has already been a settled account, from that account."

12.6 It was submitted that the learned Judge had all the material before him to make a determination of this matter without referring the same to the Deputy Registrar.

12.7 It was further submitted that since the mortgage debt was fully recovered and the mortgagee remains in possession of the property, then all interest and rents due would be for the account of the mortgagor. We were referred to the learned authors of ***Fisher and Lightwood's Law of mortgage 2012, 13th edition at paragraph 29.64*** where they state:

"As soon as no principal remains due, the effect of the order is to charge the mortgagee with compound interest on the excess of rents and profits over outgoings at each rest. Generally, if the mortgagee has been paid off his interest and principal out of rents and profits and nevertheless continues in possession, he becomes a debtor to the mortgagor in respect of subsequent receipts..."

12.8 Based on the submission that the mortgage debt was repaid in 2003, it was contended that appellant was now liable to the respondent for all sums received and interest thereon. We were urged to order the lower court to deal with the account as all the information and witnesses were readily available before him.

13.0 Appellant's submissions to cross - appeal

13.1 In response to the submissions on the first ground of cross-appeal, Counsel relied on the arguments in response to Cross-appeal filed on 12th October, 2020. Counsel conceded that the calculation was what was due to the respondent and not what was realised from the farm. Counsel defended the findings by the trial Judge on the basis that the evidence on page 843 lines 7 to page 845 lines 7 shows that the respondent's witness admitted that the rentals were US$63,000 per year. That the lease between the lenders and Mount Isabella, which was prepared by the respondent's witness for the whole farm was for US$65,000 per annum from 24th August, 2011 when the respondent was lifted out of receivership. The respondent's calculation could not be used because if it was able to make the amount it claims, it would have in fact paid all its debt and the possibility of going into receivership would not have arisen.

13.2 As regards the second ground of the cross-appeal, reference was made to ***Order 43/2/3 of the Rules of the Supreme Court, 1999 edition***, which states:

> ***"By whom order made-The Order is made by a chancery or Q.B Master, or a District Judge."***

13.3 Further, ***Order 43/2/3 of the rules of the Supreme Court, 1999 edition*** which provides:

> ***"direction by the Court- where a Judgement given in a cause or matter in the Chancery Division contains directions which make it necessary to proceed in chambers under the Judgment the Court may, when giving the Judgment or at any time during proceedings under the Judgment, give further directions for the conduct of those proceedings, including, in particular, directions with respect to***
>
> ***(a) The manner in which any account or inquiry is to be prosecuted,***
>
> ***(b) Evidence to be adduced in support thereof,***
>
> ***(c) ...***
>
> ***(d) ...***
>
> ***(e) ..."***

13.4 And finally reference was made to the learned author of ***Halsbury's Laws of England, 4th Edition 44 (1) paragraph 938***, where it states that:

> ***"Where the Judgment of the court makes it necessary to proceed in Chambers, as on a reference as to title, the court, when giving Judgment or any time during proceedings under the Judgment, may give further directions for the conduct of those proceedings..."***

13.5 It was submitted that whatever the lower court did was in accordance with the law to refer the other issues to the Deputy Registrar.

13.6 In conclusion, it its general observations, the appellant submitted that the respondent raised two arguments in its submission which do not support any ground of appeal. The first is the contention that the appellant was now indebted to the respondent, and the second was that an area of 36,000 hectares was unaffected by squatters. It was submitted that the arguments which do not support any ground of appeal are of no help to the Court and amount to shooting without aiming. We were urged to disregard the same as bearing no consequence with the ground of appeal.

14.0 Decision of the court on cross - appeal

14.1 Upon carefully examining the first ground of the cross-appeal and the submissions of the parties, we are of the considered opinion that the ground raises purely findings of fact by a trial Judge. The established law regarding findings of fact is that an appellate court will only reverse findings of fact where the findings are not supported by the evidence, or where the findings are perverse. The case of ***Wilson Masauso Zulu v Avondale Housing Project Limited***[26] refers.

14.2 *In casu*, at paragraph 16 of the affidavit in support of notice to account at page 41 of the record of appeal, the appellant's witness deposed that the property had been leased out to Mount Isabelle Farm Limited for a yearly sum of US$63,000.00. In response to paragraph 16, the respondent's witness, John William Kelly Clayton, in paragraph 16 of his affidavit in opposition dated 18th July, 2019, deposed that paragraphs 12-16 of the appellant's affidavit were not in dispute save to state that the lease was for the purpose of maintaining the farm. Further during the cross-examination of Mr. Vangelatos by Mr. Wishimanga, counsel for the respondent, at pages 815 and 828, the latter had put questions to him regarding the lease of the property at US$63,000.00. This was notwithstanding, the lease between the parties showing that the property was leased to Mount Isabelle Farm Limited by the lenders at the sum of US$65,000.00 (Page 203 of the record of appeal refers). Further, at page

844 of the record, Mr. Clayton stated that the amount payable for the year was US$65,000.00.

14.3 Our reading of the sum of US$492,916.69 is that it was based on a yearly sum of $63,000.00 when it ought to have based on the sum of $65,000.000 as the lease reveals. We agree with the appellant's counsel's concession to the extent that the amount available to the respondent to claim based on the lease is the sum of US$65,000 per annum.

14.4 We accordingly reverse the findings of $442,916.60 as the learned trial Judge misapprehended the basis of the US$63,000.00 when the lease reveals the rental income was US$65,000.00 per annum. Ground one of the cross-appeal is allowed.

14.5 Ground two is premised on the preposition that the learned Judge did not conclusively attend to the accounting process as ordered by the Supreme but instead referred the matter to the Deputy Registrar for assessment of the inoccupation rent and re-computation of the mortgage debt. Having carefully considered the Supreme Court judgment and ***Order 43 rule 1 (3) of the rules of the Supreme Court, 1999, edition***, we are inclined to accept the respondent's counsel's submissions that the learned Judge was under an obligation to conclusively determine the account and the resulting net positions of the parties. In the premise we allow the cross-appeal.

14.6 The net effect of our Judgment is that we find the appeal without merit and we allow the cross-appeal. In allowing the cross-appeal, we remit the matter to the High Court before the same Judge for the appellant to render an account to the respondent on the recovery of the mortgage sum and the net position of the parties.

14.7 We award costs to the respondent to be taxed in default of agreement.

M.M. Kondolo, SC
COURT OF APPEAL JUDGE

F.M. Chishimba
COURT OF APPEAL JUDGE

D.L.Y. Sichinga
COURT OF APPEAL JUDGE