IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA

Appeal No. 277 of 2021

*(Civil Jurisdiction)*

**IN THE MATTER OF:** **AN APPLICATION UNDER ORDER 30, RULE 14 OF THE HIGH COURT ACT, CHAPTER 27 OF THE LAWS OF ZAMBIA**

**IN THE MATTER OF:** **THE PROPERTY COMPRISED IN THE THIRD PARTY MORTGAGE AND THIRD-PARTY FURTHER CHARGE RELATING TO STANDS NO. 900. 901, 902, MBALA**

**IN THE MATTER OF:** **FORECLOSURE, POSSESSION AND SALE OF THE MORTGAGE PROPERTY**

BETWEEN:


**CAVMONT BANK LIMITED** Appellant

**AND**

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|---|---|
| **CEREAL MILLERS AND FARMS LIMITED** | 1st Respondent |
| **GREAT LAKES PRODUCTS LIMITED** | 2nd Respondent |
| **ACM PROEPRTIES LIMITED** | 3rd Respondent |
| **BARWIN HILAL SALIM** | 4th Respondent |
| **SARHAN SALIM ALBARUANI** | 5th Respondent |
| **HARTI SALEH MOHAMED** | 6th Respondent |
| **BARUANY SARHAN SALIM** | 7th Respondent |

**CORAM: Chashi, Majula and Sharpe-Phiri, JJA**
**on 5th April 2022 and 25th November 2022**

For the Appellant: Mr. P.G. Katupisha & Mrs. T.B. Chasiya of Messrs Milner & Paul Legal Practitioners

For the Respondents: Mr. W. B. Nyirenda SC & Mr. K. Mwinga of Messrs William Nyirenda & Company

# JUDGMENT

**SHARPE-PHIRI, JA, delivered the Judgment of the Court**

Legislation referred to:

1. *The High Court Rules, Chapter 27 of the Laws of Zambia*
2. *The Court of Appeal Act, No. 7 of 2016 of the Laws of Zambia*
3. *The Constitution of Zambia, Chapter 1 of the Laws of Zambia*

Cases referred to:

1. *Union Bank (Z) Limited v Southern Province Co-operative Marketing Union (1977) ZR. 30*
2. *Posa Estates Limited & 4 others v First National Bank (Z) Limited - Appeal No. 007 of 2020.*
3. *Nkhata & 4 others v Attorney General (1966) ZR 124*
4. *Wilson Masauso Zulu v Avondale Housing Project (1982) ZR 172*
5. *Hamalambo v Zambia National Building Society -SCZ Appeal No. 64 of 2013*
6. *Magic Carpet Travel & Tours v Zambia National Commercial Bank Limited (1999) ZR 61*
7. *Vangelatos v Metro Investment Limited & others – SCZ judgment No. 35 of 2016*
8. *Courtyard Hotels Limited and others v First National Bank Zambia Limited & another - SCZ Appeal No. 06 of 2015*
9. *S. Brian Musonda v Hyper Foods Limited & 20 others (1999) ZR 24*
10. *Kaumba Lemba (alias Chief Kasaka) & another v Senior Chief Ishindi (suing as the Lunda Royal Establishment) & the Attorney General – SCZ Appeal No. 169 of 2010*
11. *Godfrey Miyanda v The High Court (1984) ZR 62*
12. *Zambia National Holdings Limited & the United National Independence Party v The Attorney General (1993-1994) SC ZR 115*
13. *Wileim Roman Buchman v Attorney General – SCZ Judgment No. 14 of 1994*
14. *Modern Jacks Limited v Strong Engineering Limited & George Sokota (Liquidation Manager of Africa Commercial Bank Zambia Limited) – SCZ Appeal No. 50 of 2001*
15. *Chainama Hotels Limited & others v Investrust Merchant Bank Zambia Limited 2017 ZMSC 16*

16. *Cukurova Finance International Limited & Cukurova Holdings A.S v Alfa Telecom Turkey Limited (2013) UKPC 20 Privy Council Appeal No. 0023 of 2012*
17. *Plaff v Mendel (1884) CHD 246*[17]
18. *Kapembwa v Maimbolwa & the Attorney General (1981) ZR 127*
19. *Kanjala Hills Lodge v Jayetileke & Stanbic Bank (Z) Limited SCZ No. 17 of 2012*
20. *Zambia Privatisation Agency Vs Huddell Chisenga Chibichabo & Zamcargo Zambia Limited (2005) Z.R. 74*
21. *Magic Carpet Travel and Tours v Zambia National Commercial Bank Limited (1999) Z.R. 61*
22. *Musonda (Receiver of First Merchant Bank Zambia Limited (in Receivership) v Hyper Food Products Limited and Others (1999) Z.R. 124*

Other works

1. *R.E Megarry: A Manual of the Law of Real Property (2nd Edition, London, Sweet and Maxwell)*
2. *Halsbury's Laws of England, 3rd Edition, Volume 27, paragraph 567.*
3. *(Charles Harpum, Stuart Bridge and Martin Dixon, Megarry and Wade: The Law of Real Property, Seventh Edition (London, Sweet and Maxwell, 2008))*

## 1.0 **INTRODUCTION**

1.1 This appeal and cross-appeal originate from a decision of Mwenda-Zimba, J of the High Court delivered on 26th April 2021.

1.2 By that decision, the learned Judge ruled that the sale of Stand numbers 898 and 899, Mbala was illegal. She accordingly ordered that possession of the two properties and equipment thereon be surrendered to the respondents. She also ordered that the appellant should unfreeze bank account number Chk-060300029019 and grant the 1st respondent access to the funds in the said account.

1.3 The Judge further ordered that Stand numbers 1170 and 1103 Mpulungu be released to the respondents only upon full settlement of the judgment debt, interest, and costs. She also decided that the appellant was under no obligation to account to the respondents for the sale of the mortgaged properties as it had exercised its right of sale.

## 2.0 BACKGROUND OF THE APPELLANT'S CASE

2.1 The appellant commenced an action by originating summons on 11th September 2019 under **Order 30 Rule 14 of the High Court Rules**[1] seeking as against the respondents these reliefs:

1. **The payment of K8,017,632=28 owing as at 30th August 2019, being the amount owed plus daily contractual interest from the date of the last payment.**
2. **An order to foreclosure the mortgaged properties.**
3. **Delivery of vacant possession of the mortgaged properties by the respondent to the applicant.**
4. **An order of sale of the mortgaged properties by the applicant.**
5. **An order for the crystallizing of the floating charge being the milling machinery on plot no. 1103 and plot 1070.**
6. **An order of possession and sale of charged assets both floating and fixed.**
7. **Any other relief the Court shall deem fit; and**
8. **Costs.**

2.2 The gist of the appellant's evidence in the affidavit in support was that it had awarded the 1st respondent with credit facilities of K1,000,000 on 14th September 2009; K2,000,000 on 18th August 2010; K2,000,000 on 18th August 2010 and K4,000,000 on 21st September 2016 and that varied interest rates were applicable to the different facilities.

2.3 The appellant further contended that by virtue of the loan agreement of 19th September 2019, the debt owed by the respondent stood at K5,076,285.48 for which the 2nd respondent provided security by way of a second mortgage over Stands 900, 901 and 902, Mbala registered in the 1st respondent's name and a debenture creating a fixed charge over the assets at the said premises.

2.4 The 2nd respondent also provided a mortgage over Stands number 1070 and 1103, Mpulungu to secure the sum of K2,000,000 on behalf of the 1st respondent. A floating charge was created on the 2nd respondent's milling plant and machinery located at the premises. The directors of the 2nd, 3rd, 4th, 5th, 6th, and 7th respondents also provided unlimited personal guarantees as further security for the loan.

2.5 That the respondents have failed to settle their indebtedness to the bank and as of 30th August 2019, the facilities remained unpaid and the balance owed stood at K8,017,632.28.

## 3.0 **RESPONDENT'S OPPOSITION TO THE ACTION**

3.1 The evidence of the respondents in their affidavit in opposition of 21st October 2019 confirm that the 1st respondent had obtained loan facilities from the appellant which were secured by a mortgage and personal guarantees of directors of the respondent's companies.

3.2 That the 1st respondent defaulted on the loan repayments which resulted in them suffering unforeseen economic losses on account of an increase in the exchange rate between the US Dollar and the Kwacha, for which they blame the appellant for failing to educate and advise them on these adverse effects.

3.3 The respondents contended that the loan amount escalated on account of the illegal compound interest applied to the facility. They also contended that the action was prematurely brought as they were willing to settle the loan upon agreeable terms.

## 4.0 **APPELLANT'S REPLY**

4.1 In reply, the appellant averred that the facilities availed to the respondents were pegged in Kwacha, therefore, contrary to the respondent's argument, the change in exchange rate between the US dollar and Kwacha would not affect the repayments.

4.2 The appellant also claimed that it had no obligation to monitor the respondents loan account as the onus was on the respondents to repay their loan facility.

4.3 Further, that it had reminded the respondents of their default in the repayment of the facilities, but they took no steps to rectify the situation.

## 5.0 THE HEARING

5.1 After hearing and determining the matter, the Judge in the Court below found that the respondents had obtained a loan from the appellant but had defaulted on repayment thereof, and therefore the appellant was entitled to bring an action against them.

5.2 The Judge entered judgment in favor of the appellant for the sum of K8,017,632.28 plus interest at the agreed rate of interest from date of issuance of the originating process to date of judgment and thereafter at the current lending rate as determined by the Bank of Zambia until full payment.

5.3 On the question of compound interest, relying on the **Union Bank v Southern Province Co-operative Marketing Union**[1] case, the Judge held that the respondents had agreed to pay this interest and that the appellant was entitled to charge it.

5.4 The Judge ordered payment of the judgment debt within 120 days failing which the appellant could foreclose, repossess, and sell the mortgage properties, being Stands 900, 901 and 902, Mbala and Stands 1070 and 1103, Mpulungu.

5.5 The Court also allowed enforcement of the Debenture over the said assets and the director's personal guarantees if the sale of the mortgaged properties did not extinguish the debt.

## 6.0 **RESPONDENTS' APPLICATION TO ACCOUNT**

6.1 Following delivery of this judgment, the respondents brought several applications. The subject of this motion is the application filed on 12th February 2021 for an account of monies, to unfreeze bank accounts, to surrender Stands 1070 and 1103 Mpulungu, and to release of surplus amounts.

6.2 In the supporting affidavit, the respondents allege that following the judgment of the Court, the appellant foreclosed and advertised the mortgaged properties for sale, Stands 900, 901, and 902 Mbala and Stands 1070 and 1103, Mpulungu.

6.3 That the appellant's affidavit of 13th October 2020 showed that it had accepted the highest offer for Stands 900, 901 and 902, Mbala of K15,500,000. That the sale was complete and monies

received, and the respondent's indebtedness to the appellant had been extinguished, with some monies remaining.

6.4 The respondent also stated that at the time of the purported sale, they had paid K3,500,000 and K750,000 towards liquidation of the judgment sum in an account held at the appellant.

6.5 The respondents further contend that the sale of the 3 properties in Mbala clears its indebtedness to the appellant and therefore the properties in Mpulungu ought to be handed back to them.

6.6 Further, although the debt remains settled through the sale of Stands 900, 901 and 902, Mbala, the appellant has also taken possession of Stands 898 and 899, Mbala purporting to include the same in the sale. That these two properties were never advertised for sale and the judgment of the Court for foreclosure relates only to Stands 900, 901 and 902, Mbala and Stands 1070 and 1103, Mpulungu.

6.7 The respondents also aver that since the sale of the Mbala properties in September 2020, the appellant had failed and/or refused to render an account to them and to release the surplus of the proceeds. That as a result they have been prejudiced and have suffered loss by being deprived of the use of their premises.

They urged the Court to order the appellant to render an account.

## 7.0 APPELLANT'S AFFIDAVIT IN OPPOSITION TO ACCOUNT

7.1 The appellant opposed the application by affidavit of 18th March 2021 sworn by Christopher Witola, the Bank's Recovery Officer.

7.2 Their evidence was to the effect that the respondents had deposited the sums of K3,500,000 and K750,000 into an unrelated bank account held at the appellant's Bank and not into the respondent's loan account. That the funds have remained in that account as the respondents had not issued instructions to the Bank to apply the funds towards settlement of their loan.

7.3 In relation to Stands 900, 901 and 902, Mbala, the appellant confirmed that the properties had been contracted to be sold and the purchaser had taken possession of the properties and the fixed assets on the Debentures. However, the conveyance of the 3 properties could not be completed as Stands 898, 899, 900, 901 and 902, Mbala have been developed as one lot with exhausted improvements overlapping on all plots and with a boundary wall enclosing the properties.

7.4 The appellant indicated that this information is contained in the valuation report used for the procurement of the loan and the same report was used for the advertisement of the properties for sale.

7.5 That since the 5 Mbala plots are physically inseparable, they had engaged the respondents to give up Stands 898, Mbala in place of Stands 1070 and 1103 Mpulungu. However, nothing has been forthcoming from the respondents and the conveyance of the properties cannot be completed, nor the funds released.

7.6 The further contention is that the respondent's debt to the appellant cannot been extinguished until the conveyance of the properties is complete and all the incidental expenses such as property transfer tax, consent fees, bailiff's fees, and legal costs have been cleared.

7.7 That the respondents have defaulted in settling the judgment sum within the 120 days and have lost their rights of redemption. They cannot therefore be rushed into selling or conveying the properties until there is agreement with the purchaser who has unresolved issues in relation to Stands 898 and 899, Mbala.

7.8 The further indication is that the appellant is in possession of Stand 899, Mbala and the certificate of title having been deposited with the bank, it holds an equitable mortgage.

## 8.0 **AFFIDAVIT IN REPLY**

8.1 The respondents filed an affidavit in reply on 25th March 2021, in which the 7th respondent deposed that the sums of K3,500,000 and K750,000 were paid into an account on the instruction of the appellant through their Advocate on record and that notices of deposits were issued. Further, that the purchase sum of K15,500,000 for the 3 properties in Mbala was deposited into their account, although they had not given instructions on the money.

8.2 The respondents also contended that the advertisement for the sale revealed that Stands 900, 901 and 902, Mbala were being sold. He stated that the sale of Stands 1070 and 1103, Mpulungu were advertised separately and there were no overlaps that existed at the time of issuance of the advert. They stated that there could no confusion in this regard as the site plans for stands 898, 899, 900, 901 and 902 were separate, although the appellant had engaged the respondents with a view to them giving up Stand 898 Mbala.

8.3 The respondents disputed the appellant's contention that the proceeds of the sale of Stand numbers 900, 901 and 902, Mbala was insufficient to settle its indebtedness to the appellant.

8.4 The respondents argued that the appellant had an obligation to account to them for monies that had come into their possession in relation to the mortgage. They requested the Court to order the appellant to render an account and to release surplus funds to the respondents.

## 9.0 DECISION OF THE LOWER COURT

9.1 After considering the application for an account, as well as the arguments of the respective counsel, the Court below rendered its decision on 26th April 2021 and held as indicated below.

9.2 In relation to Stands 898 and 899, Mbala, that these two plots were never part of this Court action. That the Court's earlier order for foreclosure, possession and sale of the mortgaged properties did not cover Stands 898 and 899, Mbala. That the appellant, as a regulated financial institution could not have resolved to sell property which was not part of a Court order.

9.3 The Court further held that any foreclosure, possession, or sale of Stands 898 and 899, Mbala purportedly made because of these proceedings is illegal, and null and void.

9.4 The Court directed the appellant to return possession of Stands 898 and 899, Mbala to the respondents and reverse any purported sale of the property made as a result of an order of the lower Court.

9.5 With regard to the request to unfreeze the respondents' bank account, the learned Judge held that the appellant was abusing its position as mortgagee. It had on the one hand, confirmed that the money was deposited in the respondents bank account and not the loan account and hence it could not apply the funds to the loan, while on the other hand, the appellant was holding onto the personal money for its own benefit. The Judge held that there was no basis for the appellant to hold onto the funds paid into the account by the respondents in pursuit of an amicable agreement.

9.6 The Court ordered the unfreezing of the 1st respondent bank account and the funds in the account be made available to the respondents.

9.7 With regard to the claim for an account and release of surplus money, damages and surrender of Stands 1070 and 1103, Mpulungu, the Judge ordered the appellant to account to the respondents for the sale of Stands 900, 901 and 902, Mbala and to release the surplus money to them.

9.8 The Court further directed the appellant to surrender the remaining mortgaged properties being Stands 1070 and 1103, Mpulungu to the respondents.

9.9 Relying on the **Posa Estates Limited and 4 others v First National Bank Zambia Limited**[2], the Court concluded that:

> **'Having exercised the right of sale in this case, and as guided by the Posa case cited above, I find that the Appellant is not accountable to the Respondents. I therefore, refuse to order an account and surrender of Stands 1070 and 1103, Mpulungu. It accordingly follows that the Respondents are not entitled to damages arising from the failure to surrender Stands 1070 and 1103, Mpulungu.'**

9.10 The learned Judge ordered on 24th May 2021 as follows:

1. **The Applicant's sale of Stand numbers 898 and 899, Mbala pursuant to the judgment of this Court dated 31st December 2020 under this action is not tenable as the two properties have never been the subject of litigation in this cause and therefore the sale of these two properties and the equipment thereon not ordered by this Court are unsupported and consequently the said properties and the equipment that is on Stand numbers 898 and 899 must therefore be surrendered to the Respondents forthwith as the order of this Court of 31st December 2020 was only to effect that the Applicant be at liberty to foreclose, repossess and sale the mortgaged property, being Stands number 900, 901 and 902, Mbala and Stands number 1070 and 1103, Mplulungu, without any**

**further recourse to the Court. Further, that in the event that the foreclosure and sale above does not extinguish the 1st Respondent's indebtedness, the Applicant shall be at liberty to enforce the debenture over the assets of Stands number 900, 901, 902, Mbala and Stand numbers 1070, 1103, Mpulungu, as well as the Director personal guarantees against the 2nd and 3rd Respondents and the unlimited guarantees against the 4th, 5th, 6th and 7th Respondents;**

**2. The 1st Respondent is granted access to its Bank account number Chk-060300029019 and accordingly the account is unfrozen and the money therein be made available to the 1st Respondent;**

**3. The surrender of Stand numbers 1070 and 1103 Mpulungu can only be ordered once the debt due to the Applicant namely the sum of K8,017,632.28 with interest as adjudged by this Court and all attendant costs to its recovery have been paid.**

**4. The Applicant is not obliged to account to the Respondents for the sale of the mortgaged property in this action and which is subject to the Order of Foreclosure Absolute where the mortgagee has exercised its right to sale of the property.**

**5. Both parties having succeeded in part, costs in this application shall be in the cause.**

9.11 Although this order is not included under the appeal, the lower Court has made some pronouncements in relation to matters which are the subject of this appeal.

Therefore, it is imperative that this order be considered with the appeal to avoid conflicting judicial pronouncements on the same matters.

## 10.0 APPELLANT'S GROUNDS OF APPEAL

10.1 Being dissatisfied with the ruling of the learned Judge in the Court below of 26th April 2021, the appellant filed a Notice of appeal and memorandum of appeal on 20th May 2021 advancing 3 grounds of appeal as follows:

1. **The Court below erred both in law and fact when it held at R30 that, *"I therefore find that any foreclosure, possession or sale of Stands 989 and 899 purportedly made as a result of these proceedings is illegal and null and void. The Applicant is accordingly ordered to give back possession of Stands 898 and 899 to the Respondents as well as reverse any purported sale of the aforementioned properties purportedly made as a result of an order of this Court"* without proof of such sale or possession and without due regard to the draft contract exhibited by the Respondents that showed what was sold.**

2. **The Court below erred in law and fact when it made orders regarding Stand 899 which is held as equitable mortgage by the Appellant after the Respondents deposited the certificate of title with the Appellant as part of security as stated in the facility documents exhibited before the Court.**

3. **The Court below erred in law and fact when it held that, *"The surrenders can only be ordered when the debt and all the attendant costs to its recovery are paid. The above notwithstanding, I must add that much as the Court can only interfere in a mortgagee's right to sale (sell) on limited grounds, it is the expectation of equity that a mortgagee, who exercises his right to sale (sell), does so within reasonable time so that the fate of the mortgagor is known as regards the debt"*, when that amounts to ordering the mortgagee to be accountable to the mortgagor for any surplus sale money contrary to the Posa case relied upon.**

## 11. ARGUMENTS IN SUPPORT OF THE APPEAL

11.1 The appellant's argument in ground one is that the lower Court erred by holding that any purported sale by the appellant is illegal, null and void and ordering the appellant to give possession of Stands 898 and 899 to the respondents. That the trial Court erred entering judgment as regards Stands 898 and 899, Mbala when there was no evidence of a sale of the said properties by the appellant. The gist of this argument was that the Judge erred by rendering a ruling on two properties that were never the subject before her in the main matter and on which no evidence was laid to prove their sale.

11.2 This Court's attention was drawn to the case of **Nkhata and four others v Attorney General**[3], where the Supreme Court of Zambia held that a trial Court can only be reversed on findings of facts

when it is positively demonstrated to the appellate Court that in assessing and evaluating the evidence, the Judge has considered some matter which he ought not to have considered.

11.3 The case of **Wilson Masauso Zulu v Avondale Housing Project**[4] was also highlighted where the Court held that:

> ***'An appellate Court will only reverse findings of facts if it is satisfied that the findings in question were either perverse of made in the absence of relevant evidence or upon a misapprehension of facts.'***

11.4 The appellant argued that the Judge's conclusion that it had disposed of Stands 898 and 899, Mbala was not supported by any cogent evidence. The evidence on record clearly showed that the draft contract only related to Stands 900, 901 and 902. Therefore, this Court ought to reverse this finding of fact. The appellant argued that the issue that arose in relation to the 5 properties was that the valuation report revealed that the properties were interlinked and cannot physically be divided on account of the construction of the buildings.

11.5 The appellant further argued that the Judge contradicted herself when finding that the appellant had advertised Stands 900, 901 and 902, Mbala and Stands 1070 and 1103, Mpulungu for sale and that according to the letters of offer and draft contract of sale, the only properties offered, accepted, and

paid for were Stands 900, 901 and 902. But after this finding, the Judge proceeded to order the purported sale of Stands 898 and 899, Mbala as null and void.

11.6 On ground two, the appellant argued that the Judge erred in making orders in relation to Stand 899, Mbala which it held as an equitable mortgage, following the deposit of certificate of title by the respondents as security for the facility availed. Further, that Stand 899, Mbala was never the subject of the main matter and the judgment of the Court below. Hence the lower Court was *res judicata* as regards the action immediately it entered judgment on the matter.

11.7 The appellant argued that the Judge in the Court below ought not to have entered another decision in the action between the same parties in relation to a new subject matter being Stand 899, Mbala over which the appellant has an interest.

11.8 The Court was referred to the case of **Hamalambo v Zambia National Building Society**[5], where the Supreme Court held:

> ***'Res judicata means a matter that has been adjudicated upon. It is the matter that has been heard and determined between the same parties. The principle of res judicata states that once a matter has been heard between the same parties, by a Court of any competent jurisdiction, the same matter should not be reopened...'***

11.9 The appellant argued that the Judge ought not to have allowed new issues to be raised before her after judgment in relation to properties that were not previously the subject before the Court. The Court ought not to have entertained the respondent's claim for repossession of Stands 898 and 899, Mbala and determined that the respondents could take possession of the same despite the properties not being a subject of the main matter.

11.10 The appellant further argued that it was holding onto Stand 899, Mbala on the basis of an equitable mortgage created by way of deposit of certificate title by the respondents as repayment of a loan advanced by the appellant.

11.11 This is in line with the decision of the Court on equitable mortgages in the case of **Magic Carpet Travel & Tours v Zambia National Commercial Bank**[6], where the Supreme Court held that:

***'On the issue of an equitable mortgage, the position at common law is that once a borrower has surrendered his title deed to the lender as security for the repayment of a loan, an equitable mortgage is thus created; the borrower in such a relationship cannot deal with the land without the knowledge and approval of the lender whose interest in the land takes precedence.'***

11.12 The further argument was that the Judge erred when making the order suggesting that the mortgage property for the various facilities availed to the respondents by the appellant did not

include Stand 899, Mbala when in fact an equitable mortgage had been created by the deposit of certificate of title of the property as security for the repayment of the loan.

11.13 The further argument was that the Judge erred when she made orders to the effect that Stand 899, Mbala was never part of the mortgaged properties and consequently that the appellant had no right to foreclosure and/or sell the aforesaid properties. The trial Court having found that the appellant had wrongly taken possession and sold Stand 899, Mbala, makes it difficult for the appellant to enforce its interest in future as it could be argued that the Court have already decided on the appellant's interest in this property, when in fact not.

11.14 The appellant concluded the argument on ground two by reiterating that the trial Court had no jurisdiction to entertain and decide on new issues in relation to Stand 899, Mbala as the matter had become *res judicata*. To support this contention, reliance was placed on the case of **Vangelatos v Metro Investment Limited & others[7].**

11.15 On the third ground of appeal, the contention of the appellant is that the Court below erred when holding that properties could be surrendered only once the debt and all costs are paid and that this amounted to ordering the mortgagee to account to the mortgager for any surplus sale money contrary to the holding of

the Court of Appeal in the **Posa Estates Limited and Others v First National Bank Zambia Limited.**[2]

11.16 The appellant further submitted that the Court contradicted itself when it held that the surrender of the properties could only be done once the debt and all costs are settled while in another breath stating that the mortgagee is not accountable to the mortgagor for any surplus of the sale money. They argued that in line with the **Posa Estate** case, the fact that the respondents' right of redemption lapsed after the 120 days given by the judgment of the Court, the appellant is not entitled to render an account to the respondents for any surplus of the sale as ownership of the property vests in the appellant.

11.17 The appellant further drew the Court's attention to various authorities to illustrate that upon default of payment of a loan, the mortgagee becomes entitled to pursue all the revenues available to it. See **Courtyard Hotels Limited & others v First National Bank Zambia Limited & another**[8].

11.18 Further, in **S. Brian Musonda v Hyper Foods Limited & 20 others**[9], the Court held that a mortgagee's remedies on default by the mortgagee are foreclosure, sale and appointment of a receiver and possession.

11.19 In that vein, they argued further that the learned authors of **R.E Megarry in A Manual of the Law of Real Property**, guided that a statutory power of sale is exercisable without an order of the Court being required.

11.20 The appellant concluded by contending that the lower Court erred by holding that the appellant had to account to the respondents for any surplus of the proceeds of the sale. It is trite law that after foreclosure absolute, the mortgaged property vests absolutely and there is no need for the mortgagee to account. The appellant urged the Court to set aside the ruling of the lower Court.

## 12. RESPONDENT'S ARGUMENTS IN OPPOSITION TO APPEAL

12.1 In responding to the appellant's first ground of appeal in which the appellant argued that the learned trial Judge erred in ruling on Stand 898 and 899, Mbala, as the two properties were not the subject before her and therefore findings were perverse and liable to be set aside by an appellate Court, the respondents argued that the findings of the lower Court were not perverse or made in the absence of any relevant evidence or indeed a misapprehension of facts.

12.2 The respondent referred to the case of **Kaumba Lemba (alias Chief Kasaka) v Senior Chief Ishindi and the Attorney General**[10] where it

was held that an appellate Court can only reverse findings of fact made by a trial Court if satisfied that the findings are either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts, such that no trial Court acting correctly, could reasonably make.

12.3 The respondent argued that the evidence in the Court below is clear and elaborate to the effect that the subject pieces of land were sold, and possession taken, that there were no misapprehension of facts and no basis to disturb the findings of the lower Court.

12.4 In relation to ground two in which the appellant complained that the Judge erred in making orders regarding Stand 899, Mbala which it held as equitable mortgage, the respondents argued that the lower Court had jurisdiction to order as it did regarding Stand 899, Mbala on account of the property having been made the subject of the proceedings before it. Several authorities were cited to support this contention on the issue of jurisdiction namely: **Godfrey Miyanda v The High Court[11], Zambia National Holdings Limited and the United National Independence Party v The Attorney General[12]** and **Article 134 of the Constitution of Zambia**.

12.5 The respondents' Counsel argued further that the Judge was on firm ground in ruling as she did as she was competent to hear the matter having original and unlimited jurisdiction.

12.6 On the appellant's argument that the matter was *res judicata* in respect of the orders in the subsequent ruling made by the Judge, the respondents argued that this issue was not raised in the Court below and that Court did not have the opportunity to address its mind on the issue and it is akin to raising new issues on appeal.

12.7 Reliance was placed on the case of **Wiliem Roman Buchman v Attorney General**[13], where the Court held that a matter not raised before a commissioner cannot be brought as a ground of appeal.

12.8 Turning to ground three, in which the appellant submitted that the Judge erred in suggesting that an account be made to the mortgagor after the debt and costs be paid contrary to the decision in the Posa Estates case, the respondents argued that the Judge in the lower Court was on firm ground in ignoring the **Posa Estates** case and ruling as she did, in line with the case of **Modern Jacks Limited v Strong Engineering Limited & George Sokota (liquidation manager of Africa Commercial Bank Zambia Limited.**[14]

12.9 In the above case, the Supreme Court held that:

***'Where a mortgagee exercises his right of sale and there has been some payments and a sale has in fact taken place, the mortgagee must account to the mortgagor the total sum paid under the mortgage and proceeds from the sale.'***

12.10 The respondents highlighted the position of the learned authors of **R.E Megarry in Works, A Manual of the Law of Real Property**[1] on mortgagee's exercise of power of sale.

12.11 The learned authors state that:

> ***'Although the mortgagee is not a trustee of his power of sale, he is a trustee of proceeds of sale. After discharging any payments properly due, any balance must be paid to the next subsequent incumbrancer or if in one, to the mortgagor.'***

12.12 The Court's attention was also drawn to the case of **Chainama Hotels Limited & 4 others v Investrust Merchant Bank Zambia Limited**[15] and the authority of **Halsburys Laws of England**[2] in relation to a Mortgagee's duties to have due regard to the interest of the mortgagor in the surplus sale money.

## 13.0 APPELLANTS ARGUMENTS IN REPLY

13.1 In relation to ground one, the appellant essentially repeated its earlier arguments that the lower Court misdirected itself when it made a pronouncement with regards to Stand 898 and 899, Mbala in the absence of evidence from either party to prove that the aforesaid properties were sold by the Appellants. The appellant highlighted that the evidence before the Court showed that the only properties advertised and contracted to be sold

were Stands 900, 901 and 902, Mbala and not Stands 898 and 899 aforesaid.

13.2 In respect of ground three, the appellant repeated its earlier arguments that the Court erred when ordering the appellant to account to the Respondents contrary to the **Posa Estates** case. In that case, this Court held that where the mortgagee exercises its right of sale after an order for foreclosure is made by the Court, the mortgaged property vests in the mortgagee and not required to account to the mortgagor.

13.3 The appellant urged the Court to allow the appeal and set aside the ruling of the Court with costs to the appellant.

14.0 **RESPONDENTS' GROUNDS OF CROSS-APPEAL**

14.1 The respondents filed a Notice of Cross-Appeal on 11th June 2021 expressing their dissatisfaction with the Judge's decision of 26th April 2021 and seeking a variation of the ruling in the manner and upon the following grounds:

1. **The Court below erred both in law and fact when it held that failure to pay within the period prescribed in the order for foreclosure automatically makes the foreclosure order absolute. There ought to have been an application making the order absolute.**

2. **The Court below erred in fact and in law in failing to make an order that all other securities not part of the sale should have been released as the applicant had recovered the entire debt including costs in the sale price of K15,500,000 on mortgaged properties ordered to be sold and which were to be sold cumulatively. There is no justification in holding on to properties whose value far exceeds the indebtedness of the respondents when the entire debt has been recovered.**

3. **The Court below erred in fact and in law when it refused to order damages against the applicant in respect of the unlawful occupation of plot 898 and 899, Mbala when the Court had in fact ruled that the sale of plot 898 and 899, Mbala was illegal and therefore null and void. The fact that plot numbers 898 and 899, Mbala were illegally sold and occupied ought to attract compensatory damages in favor of the respondents.**

4. **The Court below erred in fact and in law by not ordering the immediate release of plot 898 and 899, Mbala which the Court acknowledged were not part of the process and whose sale by the applicant was declared null and void. The applicant did in fact acknowledge the sale in their affidavit quoted by the Court in its ruling.**

5. **The Court below erred in fact and law by not ordering the release of Stand number 1070 and 1103, Mpulungu when it is prima facie from the ruling of the Court that the entire debt to the Bank has been liquidated with a huge surplus remaining. The cost of transferring the sold properties namely Stand numbers 900, 901 and 902, Mbala would in no way be near the totality of the excess**

**funds realized by the sale of the three properties and the equipment therein.**

## 15.0 RESPONDENTS ARGUMENTS IN SUPPORT OF CROSS-APPEAL

15.1 Ground one of the respondents' cross-appeal challenges the lower Court's finding that the failure to pay the debt within the prescribed period for foreclosure automatically makes the foreclosure order absolute.

15.2 Counsel for the respondents argued that in mortgage actions where foreclosure is an option, the relief of foreclosure is obtained by way of decree nisi and later made absolute by a separate application. Counsel placed reliance on the Posa Estates case in stating the need for a decree nisi and absolute as well as the case of **Cukurova Finance International Limited and Cukurova Holdings A.S v Alfa Telecom Turkey Limited**[16], where the case of **Plaff v Mendel**[17] was cited as having held that a foreclosure action would initially lead to a foreclosure order nisi giving the mortgagor a last chance to redeem. If it did not do so within the time stipulated by the Court (which could be extended or enlarged) the mortgagee could apply for the order to be made absolute." Counsel argued further that a Court cannot make two judgments in one, a decree nisi and absolute and hence this ground of appeal.

15.3 On ground two, the respondents argued that the Court erred in failing to order the appellant to release all other securities which were not part of the sale since the appellant had recovered the entire debt of K8,017,632.28 from the sale price of K15,000,000. The case of **Chainama Hotels Limited** referred to earlier was cited in support of the contention that once the judgment debt is extinguished, the other securities ought to have been discharged.

15.4 The respondent's further contention was that the Court failed to order an account and discharge of the other securities, which the appellant ought to have done and returned any surplus monies to the Respondents.

15.5 In relation to ground three, the respondents argued that the Court below erred by refusing to order damages against the appellant for the unlawful occupation of Stands 898 and 899, Mbala when it had ruled that the sale of the said properties was illegal and therefore null and void. Counsel argued that unlawful occupation of land is actionable *per se* and entitles a party to claim damages. Also, that trespass entitles one to recover nominal damages even when the claimant has not suffered any actual loss.

15.6 They argued that it was not in dispute that the lower Court had found that the appellant had unlawfully occupied Stands 898

and 899, Mbala and that the sale of the properties was illegal and declared null and void. The fact that the Court agreed that there was trespass, it ought to have attracted nominal damages, as well as compensatory damages for being deprived of the loss of use of the land. The case of **Kapembwa v Maimbolwa and the Attorney General**[18] was called in aid.

15.7 The respondents reiterated that the sale and occupation of Stands 898 and 899, Mbala being unlawful is evident of trespass entitling the respondents to damages. The respondents abandoned ground four.

16. **APPELLANTS ARGUMENTS IN OPPOSITION TO CROSS-APPEAL**

16.1 In relation to ground one of the cross-appeal that there ought to have been a separate application making the foreclosure absolute, the appellant argued that the trial Court Judge was on firm ground when she held that the period for redeeming the mortgage lapsed after 120 days of the judgment herein making the foreclosure absolute.

16.2 The appellant denied that the trial Judge erred and argued that the decision was in line with the **Kanjala Hills Lodge V Jayetileke & Stanbic Bank Zambia Limited**[19], where it was held that the Court

must state the payment period and the consequences of any further default by the borrowers.

16.3 In response to ground 2, the appellant argued that the sale and conveyance of Stands 900, 901 and 902, Mbala has not been completed owing to the building overlap from one plot to another. Therefore, the Court was correct to not order the surrender of any securities until conclusion of the matter.

16.4 In response to ground 3 of the cross-appeal which faults the lower Court for refusing to award damages to the respondent, the appellant submitted that the Judge ought not to have granted an award which was not prayed for, and the respondents had not pleaded for damages.

16.5 The appellant reiterated that the action only dealt with Stands 900, 901 and 902, Mbala and Stands 1070 and 1103, Mpulungu and not Stands 898 and 899, Mbala. Therefore, the Judge was wrong to decide on facts that were not pleaded.

17.0 **RESPONDENTS ARGUMENTS IN REPLY**

17.1 On ground one, the respondents reiterated its argument that the Court was not entitled to make a decree nisi and absolute without an application to that effect.

17.2 On ground two, the respondents insisted that the sale of the mortgaged properties was complete, and that the appellant was not entitled to sell machinery and that the proceeds from the sale of the property exceeds the judgment sum.

17.3 The respondents repeated their argument on the issue of the Court's failure to award damages after having found that the sale of Stands 898 and 899, Mbala as illegal. The respondents also sought costs of the cross-appeal.

## 18.0 DECISION OF THIS COURT

18.1 We have carefully considered the evidence on record and the arguments of the respective parties in relation to the appeal and the cross-appeal before us. There are essentially 8 grounds of appeal, a combination of grounds in the main appeal and the cross-appeal. We shall address them separately below.

18.2 The facts which are essentially undisputed are that the appellant advanced the 1st respondent several loan facilities between 12th September 2009 to 19th September 2019. Various securities were pledged for the repayment thereof, more particularly, a 2nd legal mortgage registered on 8th December 2009 relating to Stands 900, 901 and 902, Mbala shown at pages 63 to 71 of Volume 1 of the ROA; a mortgage deed registered on 2nd November 2010 in respect of Stand 1103,

Mpulungu shown at pages 72 to 83 of Volume 1 of the ROA and a mortgage deed registered on 2nd November 2010 relating to Stand 1070, Mpulungu exhibited at pages 84 to 95 of Volume 1 of the Record of Appeal.

18.3 The 1st respondent defaulted in the repayment of the loan prompting the appellant to act for the recovery of the debt. As earlier indicated in clauses 5.2 and 5.5 above, the Court entered judgment in favour of the appellant for K8,017,632.28 plus interest to be paid within 120 days failing which the appellant could foreclose, repossess, and sell Stands 900, 901, 902 Mbala and Stands 1070 and 1103, Mpulungu.

18.4 The respondents later brought an application on 21st February 2001, to account for monies, unfreeze bank accounts and surrender Stands 1070 and 1103, Mpulungu and release of surplus funds. The learned trial Judge decided that Stands 898 and 899, Mbala were never part of the earlier action and ordered that any purported sale made of these properties was illegal, null and void. The Judge also ordered the appellant to unfreeze the respondent's bank accounts; to surrender Stands 1070 and 1103, Mpulungu; to account for the sale of Stands 900, 901, and 902, Mbala; and to release surplus funds to the respondents.

19. **MAIN APPEAL**

19.1 We now turn to address the main grounds of appeal. In ground one, the appellant contends that the lower Court erred in finding that any foreclosure, possession, or sale of Stands 898 and 899, Mbala was illegal, null and void, and ordering the return of the properties to the respondents.

19.2 The appellant argued that these findings were perverse, unsupported by evidence of a sale or occupation of the properties by the appellant and without due regard to the draft contract of sale exhibited by the respondents which showed what properties were sold.

19.3 The respondents insisted that the learned Judge was on firm ground in deciding as she did as there was sufficient evidence before her as exhibited at pages 600 and 810 of the Record of Appeal, which showed that the subject properties were sold, and possession given to the purchaser.

19.4 The first ground of appeal relates to Stands 898 and 899, Mbala and the argument is that there was no evidence before the learned Judge in the Court below for her to decide that these properties were indeed sold by the appellant and to order that any purported sale be deemed null and void and order the return of the properties to the respondents.

19.5 As afore stated, judgment was entered in favour of the appellant and an order for foreclosure and sale was granted in relation to 5 properties namely: Stands 900, 901, and 902, Mbala and Stands 1103 and 1170, Mpulungu. Following the entry of judgment, the appellant proceeded to advertise these properties for sale as evidenced by the advert published in the Times of Zambia on 25th August 2019 (shown at page 815 of the ROA).

19.6 It is evident from the letters of offer and draft contract of sale that a purported sale existed between the appellant and Atlantic Commodities Limited with respect to Stands 900, 901 and 902, Mbala. See pages 524 to 526 and 584 of the ROA.

19.7 Although, the deponent of the appellant asserted in paragraph 13 of their affidavit of 18th March 2021 that *'the whole lot comprising 898, 899, 900, 901 and 902, Mbala were developed as one and sold as such for the value of K15,500,000 as they were inseparable* (page 600 of the record of appeal), there is no evidence that the appellant had in fact sold the two properties, known as Stands 898 and 899, Mbala.

19.8 A review of the Records of Appeal reveals the first mention of Stands 898 and 899, Mbala was in the application to account brought by the respondents in which they complained that the appellant had sold Stands 898 and 899 with Stands 900, 901, and 902, Mbala and requested the Court to nullify the sale and order the appellant to return the two properties to them.

19.9 It is evident that the properties known as Stands 898 and 899, Mbala were not the subject of the main action in the lower Court. There is no reference to the properties in the pleadings nor were they adjudicated upon by the lower Court. The only properties considered and adjudged under the foreclosure order were Stands 900, 901, and 902, Mbala and Stands 1070 and 1103, Mpulungu.

19.10 Although, the learned Judge was correct in her finding that the two Mbala properties were not part of the earlier action, we accept the appellant's argument that the lower Court erred when she made findings in relation to the said two properties to the effect that there was a sale as this was unsupported by evidence of an actual sale or evidence of occupation of the properties by the appellant. She also erred in ordering the return of the property, but this will be addressed under the second ground of appeal.

19.11 In our opinion, this is the issue for consideration under this ground of *whether the learned Judge in the Court below has jurisdiction after rendering her earlier judgment, to adjudicate and determine new issues relating to Stands 898 and 899, Mbala, which were not previously before her. Had the learned Judge become functus officio after she delivered her judgment of 31st January 2020?*

19.12 On the question of incapacity of Courts and lack of jurisdiction, the Supreme Court pronounced itself in the case of **Zambia Privatisation Agency v Huddell Chisenga Chibichabo & Zamcargo Zambia Limited**[20] that:

> ***'The position at law is that once a judgment is rendered, the Industrial Relations court becomes functus officio. This is so because unlike the High Court, which is clothed under Order 39 of the High Court Rules (5) with powers of review.'***

19.13 Based on the foregoing authority, by extension, we are of the view that even the High Court is not exempt from this position once the 14 days period under which review can be done has lapsed. The Courts are strictly incapacited from considering a matter it has adjudicated upon afresh and considering new issues not previously before it under that action.

19.14 In the present case, the learned Judge had no jurisdiction to consider new issues relating to Stands 898 and 899, Mbala which were not the subject-matter in the Court under the main action. Part of the reasoning for the holding of the Supreme Court in the **Zambia Privatisation Agency case** cited above is that a reconsideration of adjudicated and disposed of matter may result in prejudice to a party that may never be afforded an opportunity to be heard on a given issue.

19.15 We therefore find that the learned Judge in the Court below had no jurisdiction to consider and make orders relating to Stands 898 and 899, Mbala, which matters were not subject of an action in the main action before it. The ground of appeal is therefore successful for the said reasons.

19.16 We now turn to address the second ground of appeal in which the respondent argued that the learned Judge erred when making orders in relation to Stands 899, Mbala which the appellant held as equitable mortgagee after the deposit of certificate of title as security for the repayment of the debt.

19.17 A further review of the evidence reveals that the respondent did pledge Stands 898 and 899, Mbala to the appellant and deposited the certificate of title in respect of Stand 899 as repayment for a loan from the appellant. The respondents were awaiting issuance of the original certificate of title in respect of Stand 898, Mbala. There was no dispute that the appellant held an equitable mortgage in relation to Stand 899. Mbala following the pledge of its certificate of title.

19.18 Regarding the position on equitable mortgages, the Supreme Court held in the case of **Magic Carpet Travel and Tours v Zambia National Commercial Bank Limited**[21] that:

***'On the last issue of an equitable mortgage, the position at common law is that once a borrower has surrendered his title deed to the***

***lender as security for the repayment of a loan, an equitable mortgage is thus created; the borrower, in such a relationship, cannot deal with the land without the knowledge and approval of the lender whose interest in the land takes precedence. One of the shortcomings of an equitable mortgage is that it is not registered in the Lands and Deeds Registry as an encumbrance against the land; the relationship between the lender and borrower is one that is based on mutual trust between the two.'***

19.19 The foregoing authorities illustrate that an equitable mortgage is created by the simple deposit of title deeds with a mortgagee. By the respondent's deposit of the certificate of title for Stand 899 with the appellant, an equitable mortgage was created over that property in favour of the appellant.

19.20 Therefore, the Judge erred in ordering the return of the property to the respondents without considering the appellant's rights over this property.

19.21 In view of our earlier finding in ground one, that the learned Judge in the lower Court ought not to have dealt with the two properties under the subsequent application to account as they were not the subject of the main action which had been concluded by judgment of the lower Court on 31st January 2020.

19.22 The trial Court found itself in a precarious and awkward position of making orders in relation to Stand 899 Mbala which

was not a subject matter in the main action for which the parties equally had other subsisting legal and equitable relations independent of the matters in the contention main action below.

19.23 Considering our position on ground 1 above and the fact that the appellant holds an equitable mortgage over Stand 899 Mbala, the trial Court ought not to have ruled as she did. For the said reasons, ground 2 of the appeal is equally successful.

19.24 We therefore find that the order of the Court directing the return of the said mortgaged property to the respondent was a misdirection. We accordingly order that the Ruling of the Court in relation to Stands 898 and 899, Mbala be and is hereby set aside accordingly.

19.25 The appellant's third ground of appeal relates to the learned Judge's holding that the mortgagee must be accountable to the mortgagor for any surplus monies from the sale of the mortgaged properties. This had the effect of ordering the appellant to account to the respondent for any surplus monies after the conclusion of the sale of the mortgaged properties.

19.26 The appellant maintains that the lower Court erred in directing it to account to the respondents as soon as the sale is completed. The appellant argues that this decision was contrary to the holding of this Court in the **Posa Estates** case.

19.27 The respondent contended that the Judge was on firm ground in ignoring the **Posa Estates case**. The respondents asserted that the sale of the properties was completed and that the purchase monies were deposited into an account held in their name at the appellant's bank. That this therefore prompted them to apply for an account by the appellant. The appellant claimed that the sale transaction was not finalized, and the conveyance not completed on account of an overlap of the buildings on the properties which were not part of the sale.

19.28 The issue for consideration under the third ground is: *whether the appellant as a mortgagee has a legal obligation to render an account to the respondent once the sale of the mortgaged property is complete?*

19.29 In addressing this issue, we begin by recasting our pronouncements in the **Posa Estates** case that:

> **'(b) Where a mortgagee opts to exercise the power of sale before an account for foreclosure it is accountable to the mortgagor for any surplus of the sale money.**
>
> **(c) When an order for foreclosure is made by the Court, the same vests the ownership of the mortgaged property in the mortgagee and if the mortgagee decides to sell the property it is not accountable to the mortgagor for any surplus of the sale money.'**

19.30 We also held at page J21 of our judgment that:

> ***'We think that the learned Judge based his orders on the reliefs sought in so far as foreclosure and sale are concerned. However, we agree with the Appellants that where the mortgagee decides to sell or indeed sells in accordance with section 85(1)(b) of the Banking and Financial Services Act, after an order of foreclosure, there is no requirement to turn over any excess to the mortgagor as is the case when the mortgagee exercises the power of sale.***
>
> ***We also note that in the case of Charles Chimumbwa v Augustine Mutale and Others (2008) ZR 7 which is a High Court judgment which the Respondent has sought to persuade us with dealt with a mortgagee who invokes the power of sale before an order of foreclosure is made. It is in those instances that the power of sale ought to be exercised 'with due regard to the mortgagor's interest in the surplus sale money.'***

19.31 We made those pronouncements in the **Posa Estates** case. We have reexamined the laws in relation to Mortgage actions, particularly para 25-005 of Halsburys Laws of England, 4th Edition, volume which states as follows:

> ***'A legal mortgage or legal charge has the following remedies for enforcing his security.***
>
> ***a. The right of foreclosure – ... Foreclosure was the name given to the process whereby the mortgagor's equitable right to redeem was declared by the court to be extinguished and***

***the mortgagee was left owner of the property, both at law and in equity. Equity had interfered to prevent the conveyance by way of mortgage from having its full effect; but there had to be some final point at which the mortgagee could enforce his security and therefore by foreclosure, 'the court imply removes the stop it has itself put on'.***

19.32 The learned authors of Halsbury's Laws of England state in citing Nicholls V-C in the case of **Palk v Mortgage Services Funding Plc** (1993) Ch 330 at 336 further at paragraph 25-007 that:

***'In practice, 'foreclosure actions are almost unheard of today and have been for many years.' This is because of the lack of finality of a foreclosure decree and because mortgagees prefer to exercise other remedies, such as sale or appointment of a receiver.'***

19.33 The learned authors of **Halsbury's Laws of England** state further at paragraph 25-009 that: ***'the effect of a foreclosure order absolute in an action brought by the first mortgagee is to make him the sole owner both at law and in equity, free from any subsequent mortgages.'***

19.34 Based on the foregoing, foreclosure is in our view an alternative remedy to an order for sale.

19.35 In effect, under foreclosure, a mortgagee has the right to seize and possess the subject property which after an order of

foreclosure vests in the mortgagee as beneficial owner and the duty to account for proceeds of sale that may come thereafter does not arise.

19.36 The authors also state further that:

> ***'A foreclosure action gives the mortgagor and all others interested in equity of redemption an opportunity of redeeming the mortgage or of applying for a sale in lieu of foreclosure.'***

19.37 The learned authors of **Halsbury's Laws of England** state further at paragraph 25-011 that:

> ***'Sale in lieu of foreclosure - At the request of the mortgagee or any person interested, the Court may order a sale of the property instead of foreclosure... It is an important safeguard where the property mortgaged is worth substantially more than the mortgage debt... When the sale has taken place, each incumbrancer is paid what is due to him according to his priority, and the balance belongs to the mortgagor.'***

19.38 Hence, under an order for sale, a mortgage has a right to sell the subject property and render an account with a view of demonstrating in a transparent manner whether the mortgagor's debt is extinguished, or a portion thereof is still outstanding.

19.39 By the very nature of the order for sale, it also entails that the mortgagee has an obligation to channel the excess proceeds of sale to the mortgagor. A mortgagee cannot by law exercise both options i.e., foreclosure as well as sale.

19.40 Given that the appellant as Mortgagee in this action has opted to sell the mortgaged properties, we order that it accounts to the respondent after completion of the conveyance of the properties.

19.41 In the case in casu, the Judgment of the lower Court in our view erroneously issued both an order of sale and an order of foreclosure. From the record before us, the appellant is desirous and has opted to elect the exercise of an order for sale, save for the fact that the sale/conveyance could not be completed on account of the overlapping nature of Stands 898 and 899 on one hand and Stands 900, 901 and 902 on the other hand. It is therefore imperative that the appellant is required to render an account upon exercising its right to sale the Stands 900 901 and 902, Mbala.

19.42 The appellant contended that the sale transaction of the mortgaged property has not been completed due to the overlapping nature and physical inseparability of the said properties with Stands 898 and 899 in which the respondents have ownership interest.

19.43 The respondents did not deny the assertion that there was an overlap of buildings on the properties, nor did they provide an explanation on how the challenge could be resolved. While it is also not disputed that the appellant has received the purchase monies for a conveyance of Stands 900, 901 and 902, Mbala, it is also not in dispute from the evidence of the draft contracts of sale that the buildings sought to be sold did not include 898 and 899 Mbala.

19.44 We are satisfied with the appellant's explanation that the said sale or conveyance has not been concluded as the said Stands 898 and 899 Mbala which belong to the respondents overlap and are physically inseparable from Stands 900, 901 and 902 which were sought to be sold by the appellants.

19.45 We also find that the respondent's refusal to address the overlapping nature of the said properties yet seek to benefit from its apparent continued breach of various charges/mortgage facilities it has been accessing from the appellant. This is self-conflicting, self-defeating, and indirect way of prolonging the business dispute between the parties with potential hauling the judiciary in the spotlight of this conflict.

19.46 It is our desire to see a full resolution of this dispute between the parties. We therefore urge the parties to resolve the physical

impediments associated with the said properties to avert any possible future litigation.

19.47 That notwithstanding, we find that this ground of appeal lacks merit since the appellant has opted to exercise the option of an order for sale which invariably renders it liable to account to the respondents for the proceeds therefrom. This ground therefore fails.

## 20 THE CROSS- APPEAL

20.1 The respondents maintain in ground one of the cross-appeal that the Court ought not to have made the foreclosure nisi automatically absolute upon failure to pay within the period prescribed by Court. There ought to have been a separate order for foreclosure absolute and not to make them in a single Court order. The appellant on the other hand argued that the trial Court merely spelt out the consequences of what would befall the respondents if the period of redemption expires.

20.2 To put the contention under this ground in perspective, the trial Court in its ruling of 26th April 2021 at pages 51 and 52 of the Record of Appeal held that:

> ***"From the above, it is clear that once the period is given for a mortgagor to redeem the mortgage, the foreclosure order remains nisi. It only becomes absolute once the period lapses,***

***it follows that in the present case, the period for redeeming the mortgage lapsed after 120 days of the Judgment herein making the foreclosure absolute"***

20.3 Given the foregoing, it is our understanding that the trial Court in its ruling aforesaid was implying that the foreclosure absolute had taken effect automatically upon effluxion of time.

20.4 The question for our consideration whether decree absolute takes effect automatically upon effluxion of time given for redemption of the mortgage? According to the learned authors of **Megarry and Wade, The Law of Real Property** at pages 1125 to 1127 about foreclosure under legal mortgage, they described foreclosure as follows:

***'To foreclose: Foreclosure is the primary remedy of an equitable mortgagee since he has no legal estate. The Court order absolute will direct the mortgagor to convey the land to the mortgagee unconditionally, i.e., free from any right to redeem (see James v James (2)).***

20.5 Furthermore, though we did not delve into the specific difference between foreclosure nisi and absolute in the Posa case, we held in our concluding paragraph that:

***'On making the final order for payment of the debt money, the Judge should give a reasonable period within which the mortgage shall be redeemed and as such order does not***

***amount to an order of foreclosure absolute but an order nisi as the mortgagor has the opportunity to exercise the equity of redemption during the period allowed.'***

20.6 It is clear from the foregoing that the order for foreclosure absolute is not granted automatically upon the effluxion of time meant for equity of redemption but that foreclosure absolute results from a subsequent application by a mortgagor seeking for an order absolute. In seeking to benefit from the wisdom of the Supreme Court on the subject in the case of **Musonda (Receiver of First Merchant Bank Zambia Limited (in Receivership) v Hyper Food Products Limited and Others**[22], it was held that:

***'Foreclosure and sale are two distinct and separate remedies though admittedly both are remedies primarily for the recovery of capital in contradistinction with the taking of possession or the appointment of a receiver which are remedies primarily for the recovery of interest. A foreclosure decree absolute extinguishes the equity of redemption and vests the mortgagor's entire interest in the property in the mortgagee. So that the mortgagor's property belongs to the mortgagee absolutely. Sale on the other hand is usually more appropriate where the property mortgaged is worth substantially more than the mortgage debt...'***

20.7 For the said reason, the respondent's first ground of appeal is successful, we hold that it was erroneous for the trial Court to have held in the manner that she did.

20.8 In the second ground, the respondent's contention is that the Court ought to have ordered the release of all other securities not part of the sale as the Appellant had recovered the entire debt and costs out of the sale price. In determining this ground, our position is as stated in dealing with the grounds of appeal. We found that the sale transaction had stalled due to the overlapping nature of properties, that though Stands 898 and 899 are both connected to the parties in casu, they were not subject of adjudication in the main action in the Court below and the Court had no locus to pronounce itself on the same and that the appellant has a duty to account to the respondent in the event that it elects to exercise its right to sale as opposed to foreclose.

20.9 It is our view that this ground cannot succeed as the sale or conveyance has yet to be completed owing to the physical and geographical standing of the properties in Mbala.

20.10 In the third ground, it was argued that the Court ought to have awarded damages to the respondent upon concluding that the sale of Stands 898 and 899 was illegal, null and void. We repeat that it was our finding under ground 1 of the main appeal that there was no evidence that the two properties were illegally sold and that the trial Court had no jurisdiction to make pronouncement on properties which were not subject of the

main action in the Court below, therefore the respondent's argument under this ground of appeal is otiose.

20.11 In the fourth ground, in relation to Stands 898 and 899, Mbala, the respondents contend that the Court ought to have ordered the immediate release of the said two properties whose sale had been declared illegal, null and void. As noted under ground 3 above, this ground equally fails for the same reason.

## 21. CONCLUSION

21.1 For the foregoing reasons and having found that the main appeal succeeds on grounds 1 and 2 and the cross appeal succeeding in ground 1, we accordingly order that the ruling of the lower Court of April 2021 be and is hereby set aside accordingly.

21.2 We further order and direct that the appellant conclude the conveyance of Stands 900, 901 and 902, Mbala expeditiously in consultation with the respondents, particularly in relation to the overlapping aspect of Stands 898 and 899, Mbala. The respondent is directed to make proposals for the resolution of the overlap of the said properties with Stands 898 and 899 to the appellant within 30 days from date of this Judgment.

21.3 The appellant shall render an account to the respondents once this transaction in relation to the sale and conveyance of the mortgaged properties had been fully completed.

21.4 Given that the parties have been partially successful in their respective appeals, we order that each party bears their own costs of the appeals.

**J. Chashi**
**COURT OF APPEAL JUDGE**

**B.M. Majula**
**COURT OF APPEAL JUDGE**

**N.A. Sharpe-Phiri**
**COURT OF APPEAL JUDGE**