IN THE COURT OF APPEAL OF ZAMBIA **CAZ Appeal No. 178/2021**
HOLDEN AT LUSAKA **CAZ/08/274/2021**
(Civil Jurisdiction)

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

IN THE MATTER OF: **THE PROPERTY IN A THIRD PARTY MORTGAGE RELATING TO S/D 96 OF S/D A OF FARM 841, SITUATE IN THE COPPERBELT PROVINCE OF THE REPUBLIC OF ZAMBIA IN THE NAME OF ROSEMARY MULENGA LOMBE**

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

BETWEEN

ROSEMARY LOMBE MULENGA **APPELLANT**

AND

INVESTRUST BANK PLC **RESPONDENT**

CORAM : Kondolo, Chishimba and Sichinga JJA

On 22nd February, 2023 and 26th April, 2023

For the Appellant : Mr. B. Gondwe of Messrs. Buta Gondwe & Associates

For the Respondent : Mr. C. Hamwela of Messrs. Nchinto & Nchinto

---

J U D G M E N T

CHISHIMBA, JA

CASES REFERRED TO:

1) Societe National Des Chemis De Pur Du Congo v Joseph Nonde Kakonde (2013) 3 ZR 51
2) Finance Bank Zambia Limited v Noel Nkhoma SCZ Appeal No. 77 of 2015
3) Henderson v Henderson (1846-60) All ER Rep 378
4) BP Zambia PLC v Interland Motors Limited (2001) ZR 37
5) Donovan v Gwentoys Limited (1990) 1 WLR 472
6) City Express Service Limited v Southern Cross Motors Ltd 2007) ZR 263
7) Ndhlovu and Another v Al Shams Building Material Company Ltd and Another (2002) ZR 48
8) New Plast Industries v Commissioner of lands & Another (2001) ZR 57
9) JCN Holdings & Others v Development Bank of Zambia (2013) 3 ZR 299
10) Ituna Partners v Zambian Open University Limited SCZ Appeal No. 117 of 2008
11) Bank of Zambia v Aaron Chungu & Others (2008) I ZR 81
12) Bank of Zambia v Jonas Tembo & Others (2002) ZR 103
13) Investrust Bank PLC v Hearmes Mining and Trading Limited & Others under SCZ/8/194/2015
14) Masaku Mukumbwa v Rody Musatwe & Others SCZ Judgment No. 47 of 2014 (App. No. 102/2007)
15) Investrust Bank PLC v Hearmes Mining and Trading Limited & Others Cause 2012/HK/215
16) Magic Carpet Travel and Tours v Zambia National Commercial Bank Limited (1999) ZR 61

LEGISLATION CITED:

1) Rules of the Supreme Court, 1999 Edition
2) The Law Reform (Limitation of Actions) Act, Chapter 72 of the Laws of Zambia
3) The Limitation of Actions Act, 1939
4) The Statute of Frauds, 1677

OTHER WORKS CITED:

1. Bullen and Leake on Precedents and Pleadings. 12th edition. Sweet and Maxwell
2. Halsbury's Laws of England, 4th edition, Vol.16
3. Hulsbury's laws & England, 5th Edition (2015) Volume 12 A Civil Procedure, Lexis Nexis

1.0 INTRODUCTION

1.1 This appeal is twofold, it is against the ruling arising from a preliminary issue on a point of law and the judgment of Madam Justice I. Z. Mbewe dated 4th June, 2021 and 24th June, 2021 respectively. In the ruling subject of appeal the learned Judge held that the matter was not *res judicata* because issues relating to Subdivision No. 96 of Subdivision A of Farm No. 841, Copperbelt Province (hereinafter 'the property') were not determined in an earlier cause. The court below further held that the matter was not statute barred.

1.2 In the judgment subject of appeal, the learned Judge ordered foreclosure and delivery of vacant possession of the mortgaged property to the respondent, payment of sums due and sale of the property with costs.

2.0 BACKGROUND

2.1 We will give a detailed background to the facts and make reference to the initial **Cause 2012/HK/215** and appeal number **SCZ/8/194/2015** to the Supreme Court because the facts precipitating the appeal before us originate/or arose from the said matter.

2.2 The respondent Investrust Bank PLC, by way of Originating Summons in **Cause No. 2012/HK/215** sought against **Hearmes Mining & Trading Limited** as well as the appellant herein Rosemary Lombe Mulenga, payment of monies in the unrebased sum of K3,056,749,195.62, US Dollars 1,509.64 and interest. Further, an order to enforce security over Stand No. 1893, Mufulira, Stand No. 3476 Kitwe and Lot No. 9284/N Kalulushi, foreclosure and possession. This arose from a loan of K2,000,000 obtained by Hearmes Mining and Trading Limited. Judge Mulongoti J, as she then was, found that Mrs. Rosemary Lombe Mulenga as administrator of her late husband's estate, had no power to charge the properties pledged as security to the bank. The Learned Judge held that the said third party mortgages are null and void as Mrs. Mulenga acted outside her duties and power as administratrix by charging the three properties as securities to the loan obtained by Hearmes Mining. Therefore, the reliefs sought cannot be granted.

2.3 As regards the status of the loan or balance claimed, Justice Mulongoti, held that the third party mortgages being null and void, it follows that the Investrust Bank has lost out.

2.4 Being dissatisfied with the above decision, Investrust Bank PLC appealed to the Supreme Court **(SCZ/8/194/2015)** on the ground that the court below erred by failing to grant it a monetary judgment on the loan and reliefs with regard to the debenture and guarantees executed by Rosemary Mulenga and the Others.

2.5 The Supreme Court upheld the holding that Rosemary Mulenga Lombe held no power or authority to mortgage the properties. As regards the loan, the Supreme Court entered monetary judgment in the sum of K2,842,081,511.17 (unrebased) on the current account, K3,056,749,195.62 on the loan account and US$ 1,509.64 with contractual interest. In respect of the other securities, the Supreme Court observed that no specific claim was brought with regards to enforcement of guarantees.

2.6 Then Investrust Bank moved the Supreme Court by way of motion to review its judgment for failure to consider the security pledged namely S/D96 of S/D A of Farm 841 Kitwe. The Supreme Court dismissed the motion on the basis that it was made more than fourteen days after the time stipulated had elapsed.

3.0 **PROCEEDINGS IN THE LOWER COURT**

3.1 On the 9th of December, 2020, the respondent bank took out Originating Summons against the appellant for payment of the sums of K15,278,607.75 and US$ 5,569.39 plus interest being monies owing to the bank under credit facilities availed to her, secured by a 3rd party mortgage and further charge over subdivision No. 96 of Farm S/D A 841 Copperbelt. Further, an order of foreclosure, delivery of vacant possession and sale of the said mortgaged property was sought in the court below.

3.2 The appellant opposed the originating summons. In her affidavit in opposition, she denied executing any mortgage in respect of property S/D 96 of S/D A of Farm No. 841. Further that the respondent had failed to exhibit the alleged mortgage documents. The appellant's version of account being that she handed over her certificate of title to the above property in issue in 2005 when Hearmes Mining Trading Limited sought to obtain a facility from the bank. The sole purpose was for the respondent to carry out an evaluation as to the suitability and sufficiency of the property to cover its exposure.

3.3 The appellant stated that the bank selected the securities it wanted secured as collateral and executed documents for the

transaction. S/D 96 of S/D A of Farm 841 was not included in the transaction. Neither did the appellant execute a legal mortgage over the said property. The appellant stated that the respondent remained with her certificate of title for the said property because the company in which she is a director had a facility with the bank. She was bewildered as to how the respondent registered a third party mortgage over the property without her executing any mortgage documents.

3.4 The appellant further stated that in 2010 when the facility was restructured, there were equally no facility letters or mortgage documents concerning the property in issue executed by her.

3.5 The appellant deposed that the respondent commenced an action against Hearmes Mining and Trading Limited, herself and others under Cause No. 2012/HK/215 and that in the circumstances, the facility advanced to the company was cancelled in 2012. Judgment was entered against the respondent. The respondent appealed to the Supreme Court, which dismissed claims subject of appeal. A motion to review the Supreme Court decision was equally dismissed.

3.6 In this regard, the issue of both the debts due to the respondent and the enforcement of the security relating thereto, including

the property in issue, were already determined by the Supreme Court. Hearmes Mining and Trading Limited was also placed under receivership by the respondent.

4.0 PRELIMINARY POINT OF LAW RAISED BY MOTION

4.1 Before the matter under originating summons could be heard, the appellant issued a notice of motion to raise a preliminary issue pursuant to **Order 14A rule 1 and 2 of the Rules of the Supreme Court, 1999 Edition** and **section 4 of the Law Reform (Limitation of Actions) Act Chapter 72 of the Laws of Zambia**.

4.2 The appellant sought the determination of the following issues:

1) *Whether the matter commenced by the respondent was competent when the subject matter of the proceedings in relation to the appellant, had already been dealt with before the Kitwe High Court; and*
2) *Further or in the alternative, whether the matter was not statute barred as the cause of action subject of the proceedings which is a debt owed to the respondent arose in or before 2012 when the respondent commenced proceedings against the primary debtor before the High Court for the same debt it now sought to recover.*

5.0 AFFIDAVIT IN SUPPORT OF THE MOTION

5.1 In her affidavit in support of the motion, the appellant repeated the contents of the affidavit in opposition to the originating summons and maintained that the action was statute barred because the debt owed by Hermes Mining and Trading Limited was due in 2012 when the respondent commenced legal action. That the subject debt was the same debt that was now being claimed nine years later, hence the matter being statute barred.

6.0 AFFIDAVIT IN OPPOSITION TO MOTION RAISED

6.1 The respondent opposed the motion, in its' affidavit in opposition. It was stated that the matter was not res judicata because there was no judgment touching on the subject matter of the proceedings. The Supreme Court, in its judgment observed that no specific claim had been made regarding the enforcement of the other guarantees by the 2nd and 3rd respondents and made no order on them. Therefore, the matter was not statute barred and that liability under a third party mortgage flows from when a demand is made.

7.0 RULING AND JUDGMENT OF THE COURT BELOW

7.1 In her ruling of 4th June, 2021 on the motion to dismiss the matter on a point of law, the learned Judge found that the

action commenced under **Cause No. 2012/HK/215**, by the respondent was against eight respondents who included Hermes Mining and Trading Limited as 1st respondent and the appellant herein as 2nd respondent. In the said mortgage action, the respondent sought payment of K3,056,749,195.62 and US$1,509.64 in relation to an overdraft facility availed to the 1st respondent and the late Fanwell Chanda Lombe, husband to the 2nd respondent.

7.2 The action was in relation to Stand No. 1893 Mufulira, Subdivision of Stand No. 3476 Kitwe and Lot No. 9284/M Kalulushi pledged as security for the borrowing by Hermes Mining, guaranteed by the appellant herein and 3rd respondent therein. The respondent further sought to enforce the securities over the mortgaged properties, delivery up and sale.

7.3 The court below held that the earlier suit was different from the present action. The present action being a mortgage action over payment of all monies which as at 7th December, 2020 stood in the sums of K15,278,607.75 and US$5,569.39 plus interest, costs and all other charges due and owing to the respondent bank by the appellant under credit facilities availed to the appellant secured by a legal mortgage and further charge over

Subdivision No. 96 of Subdivision A of Farm No. 841, Copperbelt Province registered in the names of the appellant.

7.4 The court below stated that though the action arose from the same transaction and in both, the appellant secured the facility by personal guarantees and third party mortgages over various properties, the two actions were not the same. The basis being that there was no adjudication in respect of the property in issue, that is, Subdivision No. 96 of Subdivision A of Farm No. 841, Copperbelt Province. Therefore, the matter was neither an abuse of court process, nor was it *res judicata*.

7.5 The court below further stated that the law relied upon by the appellant was not applicable as the claim was not for recovery of land as envisaged under **section 4(3) of the Limitation Act, 1939**, but a debt owed under **section 18(1) and (2).** Therefore, as the starting point was the restructured loan facility date of 12th February, 2010, the application was not statute barred. Consequently, the preliminary issues were dismissed with costs.

7.6 On 24th June, 2021, the learned Judge delivered judgment in the originating summons action. She found that the appellant had an interest in the restructured loan of 12th January, 2010

and signed the facility letters in her capacity as a director and managing director. The court below held the following view: that the facility letter of 27th July, 2006, the restructured loan facility of 12th February, 2010, the certificate of title relating to the property and the computer printout from the Lands and Deeds Registry dated 16th February, 2020, complimented each other in showing the existence of a third party mortgage over the property in issue, securing the facilities.

7.7 The court further held that the subject property was not determined or considered in **Cause No. 2012/HK/215** and the subsequent Supreme Court judgment. Hence her ruling that the matter was therefore not *res judicata.* The apex court entered a monetary judgment and also recognized that the company had been placed under receivership by the respondent.

7.8 Consequently, the court below found that the appellant had defaulted settling the debt and entered judgment in the claimed sums and in the event of default, foreclosure, possession, and sale of property without further recourse to court.

8.0 GROUNDS OF APPEAL

8.1 Being dissatisfied with the ruling and judgment of the court below, the appellant has advanced five grounds of appeal as follows:

1) ***The court below erred in law and in fact in not finding that the mortgage action commenced in Lusaka was res judicata having already been determined by the High Court previously in the decision confirmed by the Supreme Court and later by a motion by the same parties before the Supreme Court;***
2) ***That the court below erred in fact and in law by finding that the matter is not statute barred;***
3) ***The court below had no jurisdiction to entertain this matter and hence all proceedings were a nullity;***
4) ***The court below was functus officio having determined the issues between the parties in the initial action before the Kitwe High Court; and***
5) ***Alternatively, that the claim was not proved and offends the Statute of Frauds.***

9.0 APPELLANT'S HEADS OF ARGUMENTS

9.1 The appellant filed heads of argument dated 9th August, 2021 in which each ground was addressed separately. In ground one, the appellant argued that at law, a judgment recovered by the plaintiff in an action in an English Court of record merges the original cause of action and affords a good defence to a second action for the same cause. That a creditor who had obtained

judgment, which remained unsatisfied against two partners could not afterwards sue a third partner on the same contract.

9.2 To this end, the appellant cited the learned authors of **Bullen and Leake on Precedents and Pleadings. 12th edition. [Sweet and Maxwell]** who at page 1145 state that where a plaintiff has recovered judgment for only a part of one entire claim, the judgment is conclusive as to the amount recoverable and affords a good defence to a subsequent action for the residue of the claim.

9.3 The appellant placed reliance on a plethora of cases on the principle of *res judicata* and multiplicity of actions among them, **Societe National Des Chemis De Pur Du Congo v Joseph Nonde Kakonde** [1] where it was held that:

> ***"Res judicata is not only confined to similarity or otherwise of the claims in the first and second cases. It extends to the opportunity to claim matters which existed at the time of instituting the first action and giving judgment."***

9.4 Our attention was also drawn to the case of **Finance Bank Zambia Limited v Noel Nkhoma** [2] where the Supreme Court guided that:

"to sue Finance Bank Zambia Limited, twice over one and the same set of facts, constitutes multiplicity of actions and piece meal litigation. ..."

The court further stated that:

"... Res judicata is not only confined to similarity or otherwise of the claims in the first action and the subsequent one. It extends to the opportunity to claim matters which existed at the time the Respondent lodged his complaint in the Industrial Relations Court. ..."

9.5 The appellant submits that as far as the Supreme Court was concerned, after considering the appeal from the decision of the Kitwe High Court between the parties therein, the only securities which the apex court could not determine were those dealing with the personal guarantees on which there was no specific claim.

9.6 It was argued that the respondent sought to have the Supreme Court review its judgment and pronounce itself on the property subject of this appeal but that the apex court declined to do so.

9.7 The appellant submitted that this matter is res judicata which in effect covers all matters which except, for a party's own inadvertence or omission were not raised but in fact should have been raised in the same matter. As authority, the case of **Henderson v Henderson** [3] was referred to which was cited by

the Supreme Court in the **Finance Bank Zambia Limited v Noel Nkoma** [2]. Reference was also made to the **B. P. Zambia PLC Interland and Motors Limited** [4] on a part deploying grievances in piecemeal in scattered litigations and hauling of the same opponent over the same matter before various courts.

9.8 In ground two, the appellant maintained that the matter was statute barred because the guarantee sought to be enforced was executed in 2006, way beyond the requisite period of six years. Reference was made to the provisions of **section 2 of the Limitation of Actions Act, 1939**. Further, that it is also beyond the time from which the action initially accrued leading up to the time of the current High Court action. Therefore, the matter was caught up by the limitation period.

9.9 The case of **Donovan v Gwentoys Limited** [5] was cited as authority that the primary purpose of the limitation period is to protect a defendant from the injustice of having to face a stale claim which he never expected to have to deal with.

9.10 It was submitted that the statute provides limitation as a procedural defence, to be specifically set out in the defence. Time barred cases rarely go to trial. The appellant cited the case of **City Express Service Limited v Southern Cross Motors**

Ltd [6] on the principle that there can be no *estoppel* against a statute and that the benefit of a statute can be pleaded at any time as held in the case of **Ndhlovu and Another v Al Shams Building Material Company Ltd** and **Another** [7].

9.11 In ground three, it was contended that the lower court had no jurisdiction to entertain this matter and, as a consequence, all proceedings were a nullity. That the lower court over-reached its jurisdiction by determining matters already determined by a competent court of co-ordinate jurisdiction being the Kitwe High Court which determined the issues concerning all third party mortgages. Further, that this position was upheld and confirmed by the Supreme Court which equally refused to review its decision. Therefore, the court below had no jurisdiction and the orders made are not legally tenable. As authority the case of **New Plast Industries v Commissioner of Lands & Another** [8] was cited.

9.12 We were also referred to the case of **JCN Holdings & Others v Development Bank of Zambia** [9] where it was held that:

> ***"... it is settled law that if a matter is not properly before a court that court has no jurisdiction to make any orders or grant any remedies."***

9.13 It was submitted that this matter was improperly before the court below. Therefore, all proceedings culminating in the judgment of 24th June, 2021 are null and void for want of jurisdiction.

9.14 In ground four, the appellant argues that the court below was *functus officio* for all intents and purposes with respect to the matter of any third party mortgage, the issues between the parties having been determined in the initial action before the Kitwe High Court.

9.15 The case of **Ituna Partners v Zambian Open University Limited** [10] was cited for the definition of *functus officio* that:

> ***"a court becomes functus officio when all the substantive issues in the cause are determined by it. If such matters are not determined by the court, like in the Jack Lwenga case, the court is not functus officio. In the instant case, the lower court did not rule on the issue as to who should bear the cost between the respondent and the advocates. Therefore, we do not accept the argument and the lower court was functus officio on the issue of costs."***

9.16 It was contended that in this case, the issue of third party mortgages was determined by both the High Court and Supreme Court on merit, except for the personal guarantees. Therefore, the parties and their privies were bound to the

decision involving third party mortgages as decided by the Supreme Court. In a nutshell that the interpretation of a Supreme Court Judgment is not in the province of this court except the Supreme Court itself. As authority **Bank of Zambia v Aaron Chungu & Others** [11] was cited. That the issue of the third party mortgage having merged into a judgment, the parties are bound by the Supreme Court Judgment of 12th June 2018. Therefore, the matter was henceforth *res judicata.*

9.17 In ground five, it was contended that in terms of **section 4 of the Statute of Frauds (1677)**, all contracts creating a charge to an individual such as a guarantee, should be in writing, or be executed by the person that is liable. That no guarantee has been shown that was executed by the appellant with respect to the restructured facility.

9.18 The appellant submits that, contrary to the Statute of Frauds Act, no mortgage deeds were produced in evidence. The respondent only relied on a print-out from the Ministry of Lands showing that there was a mortgage. This does not satisfy the mandatory requirements of **Order 88 rule 5(2),(3) and (4) of the RSC, 1999**. **Halsbury's Laws of England Vol 32 4th Edition paragraphs 721 and 786** was drawn to our attention

on restrictions on exercise of statutory power and the periods of limitations in foreclosure in respect of mortgage personal property.

9.19 It was submitted that the provisions of a mortgage deed and its terms including the covenants, require specific proof together with whether the limitation period is in fact six or twelve years. That the print-out from the Ministry of Lands is not proof of a mortgage or the full terms agreed in the security to be enforced unless the deed itself is produced and proved with respect to what terms it included and whether it made reference to the facility letter. That the terms of the mortgage were not sufficiently proved as well as the guarantee.

10.0 <u>ARGUMENTS BY THE RESPONDENTS</u>

10.1 The respondent filed heads of arguments dated 9th September, 2021. In ground one, it is submitted that the principle of *res judicata* is that a party may not commence an action in connection with a matter which arose in a previous proceeding, and has been adjudicated upon. It is a plea that is called upon to prevent a party from re-litigating a matter.

10.2 To this end, reliance was placed on the learned authors of **Halsbury's Laws of England, 4th edition, Vol.16 paragraph 1528**, who state:

> ***"in order that a decree of res judicata may succeed, it is necessary to show that the cause of action was the same, and that the plaintiff had an opportunity of recovering, but for his own fault, might have recovered in the first action that which he seeks to recover in the second. A plea of res judicata must show either an actual merger or that the same point had been actually decided between the same parties."***

10.3 The respondent submitted that a plea of res judicata will only succeed where the cause of action is the same as a previously determined one and the plaintiff had an opportunity of recovering debt but by his own fault, did not recover.

10.4 It was argued that this is not the case in this matter because there was no adjudication and determination of the issues in relation to the present subject matter, being Subdivision 96 of Subdivision A of Farm No. 841, Copperbelt. This is because the Supreme Court did not exhaustively determine issues to do with the securities under the guarantees, thus the respondent's argument that the matter has not already been adjudicated upon in relation to both the debt due and the enforcement of

the security with finality. The case of **Bank of Zambia v. Tembo & Other** [12] on *res judicata* was cited that a plea must show an actual merger or that the same point had been decided upon in the previous action.

10.5 It was further contended that the issues in the present case were not the same points actually decided in the previous action because the court did not consider the mortgaged property but instead, only considered the three held by the 2nd respondent as administratrix of her late husband's estate. That the Supreme Court held that the respondent also sought to enforce that security as per its amended originating summons filed on 25th June, 2013.

10.6 That while the Supreme Court held that the respondent had succeeded on its monetary judgment, there was no pronouncement in respect of the mortgaged property which property did not form part of the estate of the deceased, despite the fact that the appellant was the legal owner of it and had pledged it as security for the repayment of the debt in the event that the primary debtor failed to fulfill its obligation.

10.7 Thus, the Supreme Court noted at J15 that:

> ***"With regard to the other securities, we observe that no specific claim was brought with regard to enforcement of the guarantees by the 2nd and 3rd respondents. Therefore, we make no order on them."***

Therefore, the court did not pronounce itself on the mortgaged property entailing that this action is not res judicata as alleged by the appellant.

10.8 The respondent distinguished this case from the **Finance Bank Zambia Limited v Noel Nkhoma** [2] case cited by the appellant. That in the present case, the respondent did claim in its amended originating summons for the enforcement of the security but that in error, the court below did not make any order or pronouncement on the same. Citing the case of **BP Zambia PLC v Interland Motors Limited** [4], it was submitted that the case at hand cannot be considered to be piecemeal litigation because the subject matter is different from that in the previous action in both the High Court and Supreme Court. No judgment was given over the mortgaged property.

10.9 Further that the courts did not give any order with regard to the subject matter of this appeal to raise the probability of getting different judgments over the same subject matter.

10.10 In response to ground two, the contention that the action is statute barred, the respondent began by making reference to **section 2 of the Limitation of Actions Act, 1939** which reads as follows:

> ***"The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued that is to say:-***
>
> ***(a) Actions founded on simple contract or tort;***
>
> ***(b) Actions to enforce a recognizance;***
>
> ***(c) Actions to enforce an award where the submission is not by an instrument under seal;***
>
> ***(d) Actions to recover any sum recoverable by virtue of any enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture."***

10.11 It was submitted that the above provision is not applicable in this action because (a) relates to simple contracts not done under seal unlike a mortgage action or guarantee agreement. That (b) refers to an undertaking given by someone to a court to make sure that they do what the court requires; (c) relates to enforcement of an award given but not under seal and (d) relates to sums recoverable by virtue of some law and is not applicable to the given facts.

10.12 It was submitted that the correct law which applies herein is **section 18(1) and (2) of the Limitation of Actions Act, 1939** which provides as follows:

> ***18. Limitation of actions to recover money secured by a mortgage or charge or to recover proceeds of the sale of land***
> ***(1) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on property, whether real or personal, or to recover proceeds of the sale of land, after the expiration of twelve years from the date when the right to receive the money accrued.***
> ***(2) No foreclosure action in respect of mortgaged personal property shall be brought after the expiration of twelve years from the date on which the right to foreclose accrued:***
> ***Provided that if, after that date the mortgagee was in possession of the mortgaged property, the right to foreclose on the property which was in his possession shall not, for the purposes of this subsection, be deemed to have accrued until the date on which his possession discontinued.***

10.13 That as the overdraft facility was restructured on 12th February, 2010, the Supreme Court in **Investrust Bank Limited v Hearmes Mining and Trading Company & Others** [13], held that the starting point is the restructured loan facility whose terms where accepted by the company. Consequently, the twelve years have not elapsed because from 2010 when the loan was restructured to 9th December, 2020, only a period of 10

years and 10 months had elapsed. Therefore, the action is not statute barred.

10.14 The response to grounds three and four was consolidated together. It was contended that having shown that the principle of *res judicata* does not apply in this instance, it follows that the court had the proper jurisdiction to adjudicate upon the matters raised before it regarding the mortgaged property. Therefore, the decision in **JCN Holdings & Others v Development Bank of Zambia** [9] does not apply to the given facts of this case as the subject matter was not adjudicated upon by any other court.

10.15 In arguing that the court below was not *functus officio* when it determined the matter before it, the respondent referred to **Halsbury's Laws of England, 4th edition Vol. 29 paragraph 390** where the learned authors state that:

> ***"functus officio is an instance where justice or indeed the court has discharged all its judicial functions in a case."***

Citing the **Ituna Partners Case**, it was argued that not all matters in the case had been determined by the other two courts as no pronouncement was made with respect to the mortgaged property.

10.16 In response to the alternative argument advanced in ground five, the respondent contends that the position taken by the appellant that the case was not proved because the document relied on was a printout from PACRA, is flawed. This is because though the respondent did not exhibit the mortgage deed, there is a plethora of documents which served as evidence in the court below of the existence of the mortgage agreement and intention to create such an agreement.

10.17 The respondent cited the case of **Masaku Mukumbwa v Rody Musatwe & Others** [14] where the Supreme Court stated that it is trite law that an equitable mortgage is constituted merely by the deposit or delivery of title deeds as security, without any express agreement, whether in writing or oral as to the conditions or purpose of delivery. The court noted that in such circumstances, the court would infer the intent and agreement to create a security from the relation of the debtor and creditor subsisting between the parties.

10.18 Therefore, the respondent submitted that the appellant can neither claim that no mortgage existed nor that she had not entered into an agreement to that effect. Further, paragraph 6 of the appellant's affidavit in opposition clearly shows an

understanding of the nature of the company's dealing and the certificate of title was clearly sought in order to evaluate its suitability as security over the loan. The appellant admits having handed over the said title deeds to the Bank clearly showing her intention to mortgage the property as collateral.

10.19 The respondent prayed that the decision of the court below be upheld and that the appeal be dismissed with costs.

11.0 DECISION OF THIS COURT

11.1 We have considered the appeal before us, the authorities cited and the arguments advanced by the Learned Counsel for both parties. We had earlier on narrated the background to the appeal and will not rehash save where pertinent. The issues for determination raised in the five grounds of appeal are as follows;

(i) Whether the mortgage action subject of the appeal was res judicata. Simply put, whether the claims in the High Court matter subject of appeal had already been determined in the Kitwe cause and by the Supreme Court.

(ii) Whether the matter is statute barred.

(iii) Whether the court proceedings in the court below are a nullity on basis of lack of jurisdiction.

(iv) Whether the court below was functus officio the issues between the parties having been determined before the High Court.

(v) Whether the claims by the respondent were proved or offends the statute of frauds.

11.2 The substantive issue being whether the matter *is res judicata* and statute barred. We shall start with determining ground two, whether the claims subject of appeal are statute barred.

11.3 The contention by the appellant is that the matter was statute barred because the guarantee sought to be enforced was executed in 2006. That **cause number 2020/HPC/0944** was commenced beyond the period of six years from date of accrual of action. Therefore, it was caught by the statute of limitation period. The appellant cited **Section 2 of the Limitation of Action Act 1939** cited earlier on under paragraph 10:10.

11.4 The **Limitation of Action Act 1939** limits the time period within which an action can be brought before the courts of law from the date the cause of action accrued. It is trite that the limitation period starts to run from the time the cause of action arises, that is when a party becomes entitled to bring a claim. The purpose of limitation periods is to prevent claims being brought long after the cause of action accrued. The length of the limitation period varies with the type of claims being made.

11.5 The issue is whether the claims giving rise to this appeal are statute barred. The action herein arose from a loan obtained by Hearmes Mining in 2006. This facility was restructured on 12th February, 2010 for the sum of K4,487,704,109 (unrebased). It was subject to terms and conditions i.e such as furnishing of securities by the appellant, namely a guarantee for K3.5 billion and a third party mortgage over S/D 96 of S/D A of Farm 841 Kitwe. The facility was also secured by other properties belonging to the appellant's late husband. The Supreme Court in appeal **SCZ/8/194/2014** (supra) stated that:

> *"the starting point is the restructured loan facility terms the 1st respondent signed (appellant) and accepted. The facility letter was dated 12th February 2010. At that date the loan was said to be K4,487, 704,109."*

11.6 We refer to page 294 of the record of appeal where the restructured loan facility dated 12th February 2010 appears, offered to Hearmes Mining & Trading Company, accepted on behalf of the company by the appellant as Managing Director on the 15th of February 2010. As security there was a guarantee by Rosemary Mulenga Lombe (the appellant) and a third party mortgage over S/D96 of S/D A of Farm 841 for K2.5 billion.

11.7 The originating summons herein subject of this appeal was issued on 9th December, 2020. The action as earlier stated arises from a loan facility secured by a guarantee, a third party mortgage or charge over Farm 841 Kitwe.

11.8 We are of the view that actions to recover money secured by a mortgage or charge is limited to a period of twelve years from the date when the right to receive money accrued. The same applies to foreclosure action in respect of mortgage personal property. We refer to **Section 18 (1) and (2) of the Limitation Actions Act 1939** which stipulates as follows:

> ***"(1) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on property, whether real or personal, or to recover proceeds of the sale of land, after the expiration of twelve years from the date when the right to receive the money accrued.***
> ***(2)No foreclosure action in respect of the mortgage personal property shall be brought after the expiration of twelve years from the date on which the right to foreclosure accrued."***

11.9 We are of the view and hold that the action commenced under **Cause 2020/HPC/0944** on 9th December 2020 was not statute barred. It was brought within the twelve years period from the date when the right to receive or foreclose accrued. It is not caught up by the Statute of Limitation.

11.10 Reverting back to the other substantive issue of whether the matter is *res judicata*, we make reference to **Halsburys Laws of England 5th Edition (2015) volume 12 A Civil Procedure, Lexis Nexis** paragraph 1603. The learned authors discuss the basis for the doctrine of *res judicata* and state as follows;

"The doctrine of res judicata provides that, where a decision is pronounced by a judicial or other tribunal with jurisdiction over a particular matter, that same matter cannot be reopened by parties bound by the decision, save on appeal. It is most closely associated with the legal principle of 'cause of action estoppel,' which operates to prevent a cause of action being raised or challenged by either party in subsequent proceedings where the cause of action being raised or challenged by either party in subsequent proceedings where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties (or their Privies), and having involved the same subject matter. However, res judicata also embraces 'issue estoppel,' a term that is used to describe a defence which may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided, but in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant, one of the parties seeks to reopen that issue. For this reason, res judicata has been described as a portmanteau term which is used to describe a number of different legal principles with different juridical origins upon which the

courts have endeavoured to impose same coherent scheme only in relatively recent times."

Further **Volume 16 of Halsburys Laws of England** on *res judicata* reads as follows:

> *"In order that a defence of res judicata may succeed it is necessary to show that not only the cause of the action was the same, but also that the plaintiff has had an opportunity of recovery and but his own fault might have recovered in the first action, that which seeks to recover in the second. A plea of res judicata must show either an actual merger, or that the same point had been actually declared between the same parties where the former judgment has been for the defendant, the conditions necessary to conduct the plaintiff are not less stringent. It is not enough that the matter alleged to be concluded might have been put in issue or that the relief sought might have claimed. It is necessary to show it was actually so put in issue or claimed."*

11.11 The appellant contends that the mortgage action commenced in the Lusaka High Court was *res judicata* as it had already been determined by the Kitwe High Court and confirmed by the Supreme Court on appeal.

11.12 A perusal of the record shows that there was a mortgage action between **Investrust Bank PLC v Hearmes Mining and**

Trading Limited & Others [15]. We refer to the amended originating summons and affidavit in support at pages 76 to 81 of Record of Appeal. The appellant herein was the 2nd respondent in the matter in which the applicant (respondent herein) sought the following reliefs:

(1) *Payment of all monies which as at 10th April, 2012 stood at K2,842,081,511.17 on current account and K3,056,749,195.62 on loan and (unrebased) US$1,509.64 and contractual interest as per facility letter, costs and other charges due and owing to the applicant by the respondent's under an overdraft facility availed to the 1st respondent in or about 2006 wherein late Fanwell Chanda Lombe (now represented by the 2nd respondent as administratrix) in his capacity as registered owner pledged Stand No. 1893 Mufulira, Subdivision of Stand 3476, Kitwe and Lot No. 9284/M Kalulushi and S/D 96 of S/D 'A' of Farm 841, Kitwe pledged as security as security for the 1st respondent's borrowing guaranteed by the 2nd and 3rd respondents;*

(2) *An order to enforce security over Stand No. 1893. Mufulira subdivision 1 of 3476 Kitwe, Lot No. 9284/M Kalulushi and S/D 96 of S/D 'A' of Farm 841, Kitwe*

(3) *Foreclosure;*

(4) *Delivery up by the respondents to the applicant bank of the charged properties;*

(5) *Sale of the charged properties;*

(6) *In the event of sale, if the charged properties do not extinguish the debt herein, enforcement of the debenture;*

(7) *Any other relief the court may deem fit; and*

(8) *Costs.*

11.13 In the above Kitwe cause, the learned judge, found that the appellant herein executed the third party mortgages in relation to the three properties in her capacity as administratrix when she had no such power or duty to invest the estate or charge the properties as she did. Therefore, her actions were *void ab initio* thereby rendering the third party mortgages null and void. The court below refused to grant the respondent bank the reliefs it sought on account of the three properties having belonged to her late husband, namely Stand No. 1893 Mufulira, subdivision 1 of Stand 3476 Kitwe and lot 9284/M Kalulushi.

11.14 The respondent appealed to the Supreme Court, which agreed with the court below that the third party mortgages in respect of the three properties were null and void. The Supreme Court proceeded to enter a monetary judgment in the sums of K2,081,511.17, K3,056,749,195.62 and US$ 1,509.64 as they were not predicated on the validity of the mortgages. That a mortgage consists of a personal contract for payment of a debt and a disposition or charge of the mortgagor's estate or interest as security for the repayment of the debt.

11.15 Therefore, despite the said charges having been found to be invalid, the mortgagor's obligation to pay the debt was not

extinguished. Taking the date of the restructured loan as a starting point, the Supreme Court entered a monetary judgment for the sums due. As no specific claim was brought regarding the other securities with regard to the enforcement of the guarantees by the 2nd and 3rd respondents, the apex court made no order.

11.16 It is clear that in the Kitwe action, the respondent sought payment of a loan debt secured by the mortgaged properties that belonged to the deceased namely Stand No. 1893 Mufulira, Subdivision of Stand 3476, Kitwe and Lot No. 9284/M Kalulushi. The issue of Subdivision No. 96 of Subdivision A of Farm No. 841, Copperbelt Province, which belonged to the appellant and was pledged as security, though claimed, was not dealt with. The Supreme Court stated that with regard to the other securities as no specific claim was brought regarding the enforcement of the guarantees by the 2nd respondent (appellant herein) and 3rd respondent, they made no order on them.

11.17 In this appeal, it is evident that the respondent then sought to claim/enforce the other securities for the payment of the monies outstanding against the appellant based on her personal guarantee and third party mortgage in respect of S/D 96 of S/A

of Farm No. 841 Kitwe. The appellant having deposited title deeds for her property S/D 96 of S/D A of Farm 841 which was not part of the claims determined before the Kitwe High Court and Supreme Court.

11.18 In **Bank of Zambia v Jonas Tembo & Others** [12], the Supreme Court guided that:

(i) In Order that a defence of res judicata may succeed, it is necessary to show that the cause of action was the same, but also that the plaintiff had an opportunity of recovering and but for his own fault might have recovered in the first action that which he seeks to recover in the second.

(ii) A plea of res judicata must show either an actual merger or that the same point had been actually decided between the same parties.

11.19 The action subject of appeal, and the Kitwe matter involves the same parties, and in both actions, the claims are based on the same transaction, being the loan obtained which was subsequently restructured by the facility letter referred to earlier. It listed the security which included a personal guarantee by the appellant secured by the S/DF 96 of S/D A of Farm 841 property. In the earlier action, the respondent sought enforcement based on the third party mortgages that belonged to the deceased (appellant's husband). While in the present, the

focus is on the guarantee by the appellant secured by the said property belonging to her (Third party mortgage).

11.20 As the action subject of appeal is based on a different security belonging to the appellant, of which no specific claim was brought and no order was made, it follows that this action is not *res judicata.* For this reason, ground one lacks merit. In fact the Supreme Court in regard to the other security i.e guarantees stated as follows:

> ***"With regard to the other security, we observe that no specific claim was brought with regard to enforcement of the guarantees by the 2nd and 3rd respondents. Therefore, we make no order on them....."***

11.21 The claims subject of this appeal were not dealt with. The affidavit in support of originating summons herein states that the obtained credit facilities were secured by a personal guarantee from the appellant and a third party mortgage over S/D 96 of A/D A of Farm 841 Copperbelt registered in the appellant's name.

11.22 We, therefore reiterate our earlier view that the action subject of this appeal is not *res judicata.* The claims not having been claimed or put in issue and determined in the Kitwe cause of

the Supreme Court decision. The court below was on firm ground to dismiss the preliminary issue raised on *res judicata.*

11.23 Having found that the matter was neither *res judicata* nor statute barred, it follows that grounds three and four lack merit. The court below had the requisite jurisdiction to entertain the matter and was at no time *functus officio.*

11.24 Ground five has been argued in the alternative, that the claim in the court below was not proved because the transaction was not evidenced by a mortgage deed. In a nutshell, that no proof of the executed third party mortgage was adduced to prove that the property was pledged as security to warrant enforcement.

11.25 As regards the issue whether the claim was proved, recourse may be had to the evidence adduced on record. Evidence of the overdraft facility of K2,000,000 obtained in 2006 is on record. There was produced the restructured loan facility of K4,487,704,109 dated 12th February 2010 which listed the security held as guarantee for K3.5 billion by Rosemary Mulenga Lombe (appellant) and the third party mortgage over S/D No. 96 of S/D A of Farm No 841 Kitwe for K2.5 billion.

11.26 In our view, the appellant does not dispute having obtained the overdraft facility in issue, the restructured facility or having

failed to pay back the debt outstanding. The appellant does not dispute the personal guarantee but refutes having executed a third party mortgage or pledging the property as security.

11.27 The respondent produced a Lands Register printed on 19th June, 2013, showing an entry dated 16th February, 2010 namely the third party mortgage to secure K2.5 billion plus interest in respect of property number F/841/A/96. This third party mortgage was registered soon after the restructured facility dated 12th February, 2010, which lists third party mortgage by the appellant as part of the security to be held.

11.28 We are of the view that the claim in the court below was proved. The print out from the Lands Register is proof that there was a third party mortgage by the appellant in favour of the bank. The appellant does not dispute having furnished a personal guarantee.

11.29 Even assuming, for arguments sake, that no evidence of proof of third party mortgage by the appellant was adduced, the appellant does not dispute having given the bank her certificate of title in respect of the property in issue. She attempted to argue as per her evidence in the court below that title deeds were submitted for the mere purpose of the bank carrying out

an evaluation as to suitability and sufficiency of the property to cover its exposure. We are of the view that title deeds for Farm No. 841 were submitted to the bank by the appellant as security for the credit facilities obtained by Hearmes Mining.

11.30 It is trite that, deposit of title deeds to the bank as security for the loan, constitutes creation of an equitable mortgage. See the case of **Magic Carpet Travel and Tours v Zambia National Commercial Bank Limited** [16] where it was held:

> ***"As regards an equitable mortgage, the position at common law is that when a borrower surrenders his title deeds to the land as security for the repayment of a loan, an equitable mortgage is created."***

11.31 An equitable mortgage is constituted by the mere deposit or delivery of title deeds as security, without any express agreement, whether in writing or oral as to the conditions or purpose of delivery. Therefore, the deposit of her certificate of title with the bank create an equitable mortgage.

11.32 Therefore, the deposit of the certificate of title and the execution of the restructured loan facility letter by the appellant and respondent lends credence, coupled with the Land's Register printout showing the entry for registration of the third party

mortgage, that there was a third party mortgage executed by the appellant in respect of the restructured loan facility. We find no merit on ground five.

11.33 **CONCLUSION**

11.34 For the forgoing reasons, we find no merit in the appeal, and uphold the judgment of the lower court. Costs are awarded 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 SC
COURT OF APPEAL JUDGE