

IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICT REGISTRY

2008/HK/79

(CIVIL JURISDICTION)

BETWEEN

CHARLES CHIMUMBWA	-	PLAINTIFF
AND		
AUGUSTINE MUTALE (Sued as duly appointed receiver for Mofu Industries Limited)	-	1 ST DEFENDANT
DEVELOPMENT BANK OF ZAMBIA	-	2 ND DEFENDANT
BAPU CONSTRUCTION LIMITED	-	3 RD DEFENDANT

Before the Hon. Mr. Justice I.C.T. Chali in Open Court the 15th day of June, 2012

For the Plaintiff: Mr. W. K. Cheelo - Messrs Wilson and Cornhill
For the 1st Defendant: Mr. G. Pindani – Messrs Lewis Nathan Advocates
For the 2nd Defendant: Mr. W.B. Nyirenda, SC - Messrs William Nyirenda and Company
For the 3rd Defendant: Ms. M. Syulikwa - Messrs KBF & Partners

JUDGMENT

Cases referred to;

1. Cuckmere Brick Company Limited And Another v. Mutual Finance Limited and Mutual Finance Limited v. Cuckmere Brick Company Limited And Others (1971) 2 All ER 633
2. Kennedy v. De Trafford And Another (1895-99) All ER Rep 408
3. Warner v. Jacob (1882) 20 Ch. D 220
4. Finance Bank Limited v. Africa Angle Limited And Two Others (1998) Z.R 237
5. Standard Chartered Bank Ltd v. Walker and Another (1982) 3 ALL ER 938.
6. Moschi v. Lep Air Services Limited and Another (1972) 2 ALL ER 393

Legislations referred to;

1. High Court Rules, Chapter 27 of the Laws of Zambia
2. Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia

Texts referred to;

1. Encyclopedia of Forms and Precedents 5th Edition Vol. 33 by Sir Raymond Walton.
2. Halsbury's Laws of England 4th Edition Vol. 32

The Plaintiff took out a writ of summons on 20th February, 2008 initially only against the 1st and the 2nd Defendants seeking the following reliefs, namely –

1. An order for the re-evaluation of Plot Numbers 14097 and 14098 Lusaka to determine the true values of the said properties;
2. An order to set aside the sale of the said properties to BAPU CONSTRUCTION LIMITED;
3. An order that the 1st Defendant renders an account of the property under his receivership; and
4. Costs.

The said writ was accompanied with a statement of claim of which the following is a summary:

1. The Plaintiff is the Managing Director of a company called MOFU INDUSTRIES LIMITED (MOFU) and he was the title holder of Plot Numbers 14097 and 14098 Lusaka (the properties).
2. The 2nd Defendant (the Bank) is a body corporate created under the Development Bank of Zambia Act of 1972.
3. In May, 2006 the Plaintiff, in his capacity as Managing Director of MOFU applied for a loan from the Bank in the sum of US \$ 200,000 on behalf of MOFU which the Bank approved.
4. As security for the repayment of the said loan the following documents were executed –
 - (a). A Third Party Mortgage relating to the properties between the Plaintiff and MOFU on the one hand and the Bank on the other hand dated 15th May, 2006;
 - (b). A specific charge on equipment and machinery between MOFU and the Bank dated 20th October, 2006;

- (c). A Deed of Guarantee between the Plaintiff and JULIA MWAPE as Directors in MOFU on the one hand and the Bank on the other dated 15th May, 2006;
5. In February, 2007 the Bank notified the Plaintiff of its intention to reinforce the securities in order to safeguard its money. This followed an act of default on the part of MOFU in the repayment of the loan.
 6. In March, 2007 the Bank appointed the 1st Defendant as Receiver or Manager of MOFU and notice of such appointment was duly registered with the Registrar of Companies.
 7. Although the Plaintiff requested for the re-scheduling of the loan repayments he did not receive any response from the Bank.
 8. In January, 2006 the Plaintiff had engaged Government valuers who had valued the properties in the region of K815,000,000=00.
 9. Upon being appointed, the 1st Defendant advertised the properties for sale but assured the Plaintiff that he would secure a good price for them and told the Plaintiff to also look for a buyer in order to secure the right price.
 10. In April, 2007 someone offered US \$ 300,000 for the properties but the sale could not be concluded on account of the mode of payment which was not accepted by the Defendants.
 11. Also in December, 2007 there was another offer of US \$ 200,000 for the properties which was not concluded and instead the 1st Defendant sold the properties to someone else at less than the market value. Hence the present action.

In his defence, the 1st Defendant stated that he was duly appointed as Receiver by the Bank on 8th March, 2007 but denied any impropriety in the manner he sold the properties. His position as pleaded in his defence was that the Plaintiff is not entitled to any of the reliefs he seeks.

For its part, the Bank's defence may be summarized as follows:

1. The Bank appointed the 1st Defendant as Receiver / Manager of MOFU pursuant to a Debenture and Mortgage created over the assets of MOFU and over the properties of the Plaintiff,
2. The Plaintiffs valuation of the properties at K815,000,000=00 was not relevant to the issue between the parties in view of the Bank holding charges over the assets of MOFU and the properties of the Plaintiff.
3. The Bank was not privy to the process of the sale of the properties because the onus and responsibility of the assets over which the Bank had a charge rested with the 1st Defendant who was the Receiver / Manager. The Bank relied on the judgment of the 1st Defendant who had an unlimited legal duty to discharge the functions of Receiver / Manager over the charged assets as by law provided.
4. Hence also the Bank's denial that the Plaintiff is entitled to any of the reliefs sought in this action.

The Bank further pleaded that it has a counter claim against the Plaintiff in the sum of US \$ 114,488.02 being the amount still outstanding and due after taking into account the sum of US \$ 149,928.53 recovered by the 1st Defendant from the sale of the Plaintiff's properties. The bank also claims interest on the outstanding amount in accordance with the terms of the Third Party Mortgage, and costs.

In his defence to the counter claim, the Plaintiff simply denied owing any money to the Bank either as counter claimed or at all.

Before the trial of the action commenced, and following an application by the Plaintiff for joinder, I did on 29th March, 2011 order that BAPU CONSTRUCTION LIMITED (BAPU), which had been identified as the purchaser of the properties, be joined to the proceedings as 3rd Defendant. This was in terms of Order 14 Rule 5 (i) of the High Court Rules which provides thus;

"If it shall appear to the court or a Judge, at or before the hearing of a suit, that all the persons who may be entitled to, or claim some share or interest in, the subject matter of the suit, or who may be likely to be affected by the result, have not been made parties, the court or a Judge may adjourn the hearing of

the suit to a future day, to be fixed by the court or a Judge, and direct that such persons shall be made either plaintiffs or defendants in the suit, as the case may be...

With the order for the joinder of BAPU to the suit, I also gave further directions as to the conduct of the proceedings including the filing of amended statement of claim, defences, if any.

In his amended statement of claim the Plaintiff claimed that he had discovered that the properties had been sold to BAPU at a price far much lower than the current market price much to the detriment of the Plaintiff. Hence the Plaintiff's prayer for an order to set aside the sale of the said properties.

I did not receive any amended defence from the 1st Defendant. However, the Bank, in its amended defence, denied any impropriety in the sale of the properties and maintained that the subject properties were sold in accordance with due process.

The defence filed by BAPU (the 3rd Defendant) may be summarized thus;

1. BAPU is now the registered title holder of the subject properties.
2. The properties were advertised for sale by the 1st Defendant and BAPU responded to the said advertisement.
3. The sale of the properties to BAPU by the 1st and 2nd Defendants was properly conducted and in accordance with the power of sale and the sale was made to the highest bidder.
4. The price of K550,000,000=00 paid by BAPU for the properties was justifiable and commensurate with the value thereof at the time and not low as claimed by the Plaintiff.
5. BAPU is a bona fide purchaser of the properties who had acquired title thereto and there are no grounds upon which the said sale can be set aside.

At the trial the Plaintiff gave evidence of how MOFU contracted the loan and on the events leading up to the sale of the properties. He said that he applied to the Bank for a loan of US \$ 200,000=00 by letter dated 16th February, 2006 which letter

appears at Page 1 of the 2nd Defendant's Bundle of Documents. This was in order to enable MOFU to purchase some foundry equipment. In that letter the Plaintiff proposed as security for the repayment of the loan a charge on the equipment to be purchased, an equitable mortgage on some properties whose value the Plaintiff placed at K2 billion, and Director's personal guarantees. He said that the loan was granted and disbursed to MOFU and the money was utilized to purchase the equipment. He said prior to the said disbursement of the loan amount the security documents had been signed.

The Plaintiff said that MOFU had started repaying the loan but defaulted along the way, whereby the Bank recalled the full outstanding amount. The request by MOFU for extension of time in which to pay was rejected by the Bank. The Bank then appointed the 1st Defendant as Receiver.

The Plaintiff said that the Bank had requested that the equipment MOFU was to purchase be part of the security together with the machinery the company had been using in Chingola. He said the Bank also got his two properties as part of the security. He said the agreement was that in case MOFU defaulted on the loan repayment, the Bank would sell the machinery in Chingola and the foundry equipment in Lusaka. However, the Bank proceeded to sell the two properties leaving the two sets of equipment.

The Plaintiff further testified that when he heard that the two properties in Lusaka were about to be sold, he offered to assist the 1st Defendant in finding a buyer for them in order to realize a good price. In that effort, he said, he introduced a prospective buyer, a Mr. FAROOK, who was offering US \$ 350,000 for the two properties, but the sale did not materialize. He said the 1st Defendant had told him that the properties could fetch at least US \$ 250,000=00. Instead only K550 million was realized by the 1st Defendant for both properties. Hence his claim that the properties be evaluated and for the sale to the 3rd Defendant to be nullified.

Under cross examination by Mr. PINDANI, Counsel for the 1st Defendant, the Plaintiff said he owned 70% of the shares in MOFU and was the Managing Director of the company. He said it was in the said capacity that he wrote the letter of application for

the loan. He said he signed a Third Party Mortgage over the two properties that he owned in favour of the Bank. He said at the time of applying for the loan he had obtained a valuation report of the two properties which had placed their market value at K815 million as at 14th January, 2006. He said he therefore did not accept that the K550 million realized was the right amount the market could offer.

The Plaintiff also stated that the 1st Defendant had told him to find a suitable buyer in order to realize the full value of the properties. He said his lawyers were in communication with the 1st Defendant during the process of sale and that he had seen the advertisement that appeared in the Times of Zambia news paper edition of 7th May, 2007 with a reserve price of K1.2 billion.

Under further cross examination by Mr. Nyirenda, SC, Counsel for the Bank, the Plaintiff re-confirmed and identified the three security documents before court as;

1. Debenture over all the assets of MOFU;
2. Third Party Mortgage over his two personal properties; and
3. Directors' Guarantee signed by himself and Mrs. JULIA MWAPE.

The Plaintiff said that the Bank had authority, under both the Debenture as well as the Third Party Mortgage, to appoint a Receiver. He said the 1st Defendant was properly appointed as Receiver and that the receiver had the power under the said security documents to sell the properties. He also said that following the appointment of the Receiver, the Bank had very little role to play in the process and that the work for the disposal of the properties was done by the Receiver and not by the Bank. The Plaintiff said there was constant communication between his lawyers and the Receiver during the sale process up to the end. He was also aware of the advertisement in the process as well as some of the offers that had been made by prospective purchasers. He said the offer of US \$ 300,000 had fallen through. He said the offer of K550 million for the two properties is the one that went through and is confirmed in the State's Consent to Assign, the Assignments, as well as the Receiver's report to the Bank.

The Plaintiff also said that during the entire process MOFU's debt to the Bank was accruing interest and that after the sale the Bank was still owed US\$ 114,488.02 at the time this case was commenced. He said the Bank still has a charge over the equipment and machinery both at Chingola and Lusaka.

The Plaintiff said that the Receiver's duty to MOFU was to sell the properties in a transparent manner, while his duty to the Bank was to get the best price in the market in order to liquidate MOFU's debt.

Cross examined further by Ms. SYULIKWA, Counsel for the 3rd Defendant, the Plaintiff reaffirmed that the Receiver was properly appointed, that he had power to sell the subject properties, that he had advertised the properties for sale, that he had offered them to UDAYAM INVESTMENTS LIMITED as highest bidder who directed that the assignment be in the name of BAPU a sister company, and that BAPU paid the full purchase price. The Plaintiff, however, maintained that there was no accountability over the affairs of MOFU.

In his testimony, the 1st Defendant told the Court that he was appointed in March, 2007, by the Bank as Receiver in MOFU in respect of a loan the Bank had availed to MOFU. He identified the instrument of his appointment at pages 64 to 68 of his Bundle of Documents. The notice of his appointment as Receiver was duly registered at the Patents and Companies Registration Office and was also advertised in the press. He said the appointment was pursuant to the powers given to the Bank under the specific charge and Third Party Mortgage. His specific mandate was to sell the charged properties and not to manage the business of MOFU.

As one of the first steps, the 1st Defendant visited MOFU's business premises in Chingola where he found the company had ceased operations. He then called upon the Plaintiff's lawyers in Chingola whom he briefed about the receivership. Upon the 1st Defendant's return to Lusaka he visited the charged properties where he found the company was not operational also. He then met with the Plaintiff. The two discussed the action that had been taken by the Bank when the Plaintiff said he would find potential buyers for the two properties, to which the 1st Defendant agreed. He gave the Plaintiff two months in which to find a buyer. However, the sale could

not materialise with the buyer the Plaintiff introduced. The Plaintiff's lawyers were communicated to about that buyer and even had sight of the aborted contract of sale.

Meanwhile, the 1st Defendant had obtained a valuation from the Government Valuation Department which put the value of the properties at K960 million.

After the failed contract, the 1st Defendant advertised the properties for sale in the Times of Zambia News Paper. He described the response to the said advertisement as very low which prompted him to invoke a firm of real estate agents, Messrs HOMENET, but he was unsuccessful. He made offers to Messrs CITY EXPRESS and a Mr. AZIM TICKLAY but their responses were negative. After the deadline for the bids, the 1st Defendant had received a bid for K1.4 billion for the properties. That offer was not responded to either. The 1st Defendant then decided to offer the properties to UDAYAM INVESTMENTS who had bid for K550 million, which UDAYAM accepted. This was communicated to all the parties concerned, including the Plaintiff's lawyers. UDAYAM then instructed the 1st Defendant to assign the properties to BAPU. He said the money realized from the said sale translated to just under US \$ 150,000=00. Therefore, MOFU's debt to the Bank was not liquidated and the balance continued to accrue interest.

The 1st Defendant also said that when he discussed the offer to UDAYAM/BAPU with the Plaintiff, the Plaintiff did not raise any objection or complaint about the price at which the two properties were being sold. He reiterated that as per terms of his appointment his mandate was simply to sell the assets, and not to manage the business, of MOFU.

Under cross examination by Mr. Cheelo, Plaintiff's Counsel, the 1st Defendant said that the instrument by which he was appointed spelt out his terms of reference, namely, to sell MOFU's assets which had been charged. He started with the two properties which he considered to be "**primary securities**" as compared to the machinery which were "**secondary**". He said he had expected to realize a higher value from the two properties, but when he tested the market he found the price to be much lower, hence his later opinion that the securities were rather weak. He said

the price he realized was in the interest of the Bank even though the Bank did not recover the debt in full. He said he did not obtain a valuation for the machinery at Chingola because it was specialized equipment and required the manufacturers to do their valuation. He did not engage valuers for such machinery because it was going to add to MOFU's debt in costs.

Cross examined by Mr. Nyirenda, SC, the 1st Defendant said he realized US \$ 149,928.53 from the sale and that there was still money owing to the Bank which was still accruing interests. He said his mandate ended in 2008. By then the charged properties had not been redeemed. He said as Receiver he was an agent of the company but also had obligations to the debenture holder and he had to balance the interest of the two. As far as he was concerned he involved all the parties and their lawyers throughout the process and that as such he was both transparent and accountable to all concerned. He said there are usually differences between valuations and market values. He said the values he indicated in the inception report were proper but the economic fundamentals on the ground had changed for the worse.

The witness for the Bank was Mr. MUSENGA ANDREW MUSUKWA (DW2) who was the Bank Secretary/Legal Counsel at the time of the events which are the subject of this case. He recalled that at the time MOFU was granted the loan facility the Bank had prepared a Term Sheet which highlighted the main terms and conditions of the loan and which MOFU had accepted. DW2 said MOFU offered a floating charge over its assets and a specific charge over the equipment that was to be purchased from the proceeds of the loan, a Third Party Mortgage over the two properties of the Plaintiff in Lusaka, as well as Directors' Guarantees. DW2 identified all the relevant documents in the various Bundles of Documents before Court. DW2 said that in about the fourth month, MOFU defaulted on the loan repayments, which compelled the Bank to recall the loan. At this point MOFU's lawyers wrote to the Bank requesting an opportunity to enter into fresh arrangements for the repayment of the loan. However, the Bank refused to accede to any new arrangements. When MOFU failed to pay as per demand the Bank opted to appoint the 1st Defendant as Receiver as empowered by the charging documents. He identified the Deed of Appointment of the 1st Defendant as Receiver in the Bundles of Documents. At the

time the Receiver was appointed the outstanding amount was \$264,416=55. He said the Receiver's specific mandate was encapsulated in Clause 3 of the Deed of Appointment, namely, to sell the charged assets.

DW2 said that from the time the Receiver was appointed the Bank did not have anything to do with the recovery of the loan but was only briefed by the Receiver from time to time until the sale was concluded. He said the Bank sold the two properties in issue as mortgagee in possession and executed the assignments in favour of BAPU. DW2 said up to the time of concluding the sale of the properties he was not aware of any complaint from MOFU about any impropriety in the sale. He said the Bank, as charge holder, was quite happy with the Receiver's performance even though he did not recover all the money. He said further that after receipt of the proceeds of sale the sum of US \$ 114,488 was still outstanding. On behalf of the Bank, DW2 prayed that judgment be entered for the Bank in that amount plus interest and costs against the Plaintiff.

Under cross examination, DW2 said that the Deeds of Assignment were registered on 8th February, 2008 in respect of both properties, while the writ of summons was filed on 20th February, 2008. He said in view of the court case the Bank did not find it prudent to proceed to dispose of the machinery and equipment that was charged. He said the Receiver was not required to dispose of the machinery and equipment first before selling the land. However, it made sense to sell the land first. He said the Receiver did not need any instructions from the Bank to take the steps that he did in executing his mandate but the Bank agreed with the Receiver's recommendations in his Status Report of 6th July, 2007 on the proposed sale of the two properties at K550 million.

Following the conclusion of the testimony of DW2, the matter was adjourned for the 3rd Defendant's case. However, on 16th April, 2012 Counsel for the 3rd Defendant wrote to my Marshall, with copies to the other Parties' Advocates, to indicate that they had received instructions to close the case without calling any witness. Accordingly, on 23rd April, 2012 I issued an order directing the parties Advocates to file their respective written submissions and adjourned the case for judgment.

I received submissions from Counsel for the Plaintiff, as well as for the 2nd and 3rd Defendants, all of which I have considered in arriving at my decision.

From the evidence before me, both from the Plaintiff himself as well as from DW2, it is not in dispute that the Bank had advanced MOFU a loan of US \$ 200,000 for the purchase of some machinery and equipment for the company's foundry plant. The said loan was secured by:

1. A Third Party Mortgage dated 15th May, 2006 on Stands Number 14097 and 14098 Lusaka in the name of the Plaintiff. This was duly registered at the Lands and Deeds Registry on 22nd May, 2006 in accordance with the Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia.
2. A debenture dated 15th May, 2006 by MOFU in favour of the Bank over both the existing plant, machinery and assets as well as the plant and machinery that was to be purchased by MOFU from the loan. This was duly registered at the Patents and Companies Registration Office on 20th October, 2006 in accordance with the Companies Act, Chapter 388 of the Laws of Zambia
3. A Deed of Guarantee executed by the Plaintiff and Julia Mwape as Directors in MOFU dated 15th May, 2006 in favour of the Bank **“to secure US \$ 200,000=00, interest and other monies”**.

There is also clear evidence from the Plaintiff and DW2 that there was default by MOFU on the repayment of the loan which prompted the Bank to give notice to recall the outstanding amount. Upon the failure by MOFU to settle its debt, the Bank proceeded to appoint the 1st Defendant as Receiver over the properties and assets that had been secured by the Third Party Mortgage and by the Debenture. These facts are not in dispute.

Firstly, in case of default, the Third Party Mortgage provided under Clause 7 as follows:

“7.00. WHEN REPAYMENT IMMEDIATELY REQUIRED

7.01. Notwithstanding anything herein before contained the principal monies hereby secured shall become immediately repayable and all unpaid interest which shall have accrued hereunder shall become immediately payable and the security enforceable on the happening of the following:

7.02. If the Borrower makes default for thirty (30) days in the repayment of any interest hereby secured and the Bank before such interest is paid by notice in writing to the Borrower calls in the principal monies hereby secured;

7.03. If the Borrower makes default for thirty (30) days in the repayment of any principal monies due hereunder....”

By letter dated 1st February, 2007 from the Bank’s Acting Managing Director to the Managing Director of MOFU, the company was reminded as follows:

“As at 31st January, 2007 your Account shows that you are in arrears for more than 90 days as follows:

September, 2006 interest	US\$ 1,812.32
October, 2006 interest	US\$ 2,282.53
November, 2006 interest	US\$ 2,213.92
November, 2006 interest	US\$ 5,555.56
December, 2006 interest	US\$ 2,282.23
December, 2006 Principal Instalment	US\$ 5,555.56
January, 2007 interest	US\$ 2,302,99
January, 2007 Principal Instalment	<u>US\$ 5,555.56</u>
Total due	<u>US\$ 27,560.67</u>

Given that you have not honoured your pledge to settle your arrears by 31st January, 2007, as per your letter to the Bank dated 8th January, 2007, please take note that the Bank has no other option but to reinforce its securities in order to safeguard its money in this company....”

I find as a fact that MOFU was in default and admitted this default both through the evidence of the Plaintiff before this court as well as through the letter dated 7th March, 2007 from its Advocates, Messrs WILSON AND CORNHILL, to the Bank in which they proposed “**fresh repayment arrangements to be put in place**”.

The evidence before me is that it was upon the said default and after due notice that the 1st Defendant was appointed as Receiver.

As to appointment of Receivers the Third Party Mortgage Provided thus:

“8.01. The Bank may at any time after any of the principal monies hereby secured shall have become payable from time to time appoint in writing any person to be receiver and / or manager of the property comprised in this security....”

It is my further finding that in the circumstances as outlined above the Bank acted in accordance with the security document of the Third Party Mortgage.

I must restate that the foregoing facts are not disputed by the plaintiff. However, I have taken the trouble to outline the scenario in order to highlight the backdrop to the Plaintiff's grievance.

In his written submission in support of the Plaintiff's case, Mr. Cheelo raised two issues to attack the sale of Stands Number 14097 and 14098, thus:

1. Whether the 1st and 2nd Defendants were right to sell the two properties without first disposing of the machinery and equipment belonging to MOFU which formed part of the security for the loan; and
2. That the two properties were sold at a much lower price than the market value thereof, hence the prayers for the evaluation thereof and for the nullification of the sale to BAPU. The ancillary relief is for an order for an account to be rendered by the 1st Defendant.

With regard to the first issue, Mr. Cheelo's submission was that according to the loan agreement the Bank was to dispose of the machinery at Chingola and the foundry equipment at Lusaka in case of default on the part of MOFU. He submitted that the two properties the subject of the Third Party Mortgage were only going to be disposed of if the said machinery and equipment did not realize sufficient money to cover the loan together with interest, costs and other charges. He said that the Plaintiff's obligations to the Bank, and the Third Party Mortgage, could only be enforced by way of sale of the two plots after the sale of MOFU's said machinery and equipment.

Unfortunately, the actual agreement concerning the loan of US \$ 200,000 was not exhibited before court to enable me to ascertain Mr. Cheelo's contention. What was exhibited in the Bank's Bundle of Document was only an unsigned draft Loan Facility Agreement. I am unable to give any effect to that draft in the circumstances. However, as already stated, on the agreement of the parties MOFU and the Bank executed the securities referred to already in this judgment, which I have examined in order to ascertain how the securities were to be enforced. I did not find any clause in the specific charge on the equipment and machinery that obliged the Bank to first dispose of the machinery and equipment before resorting to any other measure of enforcing its securities. Clause 7(n) of the said charge simply stated that:

"The security hereby created is in addition to any other security or securities which the Bank may now or from time to time hold or take from the Company".

Similarly by Clause 4 of the Third Party Mortgage the Plaintiff demised unto the Bank the two properties together with all buildings all un exhausted improvements then or thereafter subsisting thereon to hold the same subject to the provision for redemption.

The fourth schedule to the Third Party Mortgage covered foundry machinery to be purchased from the monies thereby secured as well as all the company's existing plant and machinery both present and future wherever situate. Again there was no clause as to what assets, either of MOFU or the Plaintiff, were to be disposed of first upon MOFU defaulting. Therefore, in my view, in case of default the Bank was at

liberty to invoke the provisions of Clause 7 and 8 of the Third Party Mortgage parts of which I have already cited in this judgment. I accept the submission by Ms. SYULIKWA, Counsel for BAPU, that there was no provision in any of the instruments executed by the Plaintiff and the Bank to the effect that the Receiver had to sell off the machinery and equipment before resorting to selling off the lands and buildings. The Plaintiff's claim in that respect is therefore not supported by the evidence on the record.

The instrument appointing the 1st Defendant as Receiver acknowledged that the appointment was by virtue of **“a specific charge and Third Party Legal Mortgage documents.....between the Bank and MOFU.....and CHARLES CHIMUMBWA Charged in favour of the Bank all plant machinery and equipment purchased from monies therein secured and all existing plant machinery and assets whatsoever wherever situate, Stand number 14097 Lusaka and Stand number 14098 Lusaka”**.

The Receiver's specific mandate was spelt out in clause 3b of the instrument as follows:

“The Receiver's specific mandate is to sell for the benefit of the Bank the charged property and not manage the company except in so far as it is necessary and incidental to the sale of the aforesaid assets”.

Under Clause 8.03 the Third Party Mortgage the Receiver was to have power **to sell or concur in selling or letting any part of the property which is the subject of the security....”**

Further the specific charged provided inter alia under Clause 6:

“At any time after the Bank shall have demanded payment of any money hereby secured the Bank may in writingappoint any person or persons to be a receiver or receivers of the property hereby charged or any part thereofand the receiver or receivers so appointed shall have power.

- (a). to take possession of collect and get in any property hereby charged;
- (b). to carry on, manage or concur in carrying on and managing the business of the company or any part thereof.....)
- (c). forthwith and without any restrictions to sell or concur in sellingand to let or concur in letting ...of all or any part of the property hereby charged.....”

I must reiterate that both the appointment of and the mandate given to the Receiver (the 1st Defendant) were in accordance with the security instruments and that as such they were lawful. The fact that the mandate did not require the Receiver to first sell the machinery and equipment, in my view, did not diminish the legality of the Bank's decision. I find that the 1st Defendant acted quite properly, even if he chose not to assign any reason for doing so, by selling the two properties of the Plaintiff comprised in the Third Party Mortgage.

The Plaintiff's contention in the first ground must therefore fail and it is accordingly dismissed.

With regard to the second leg of the Plaintiff's grievance, Counsel for the parties seemed to be agreed in their respective submissions as to the powers and duties of the mortgagee or receiver over the mortgaged property.

The learned authors of The encyclopedia of Forms and Precedents 5th edition Volume 33 at page 33 describe the duties of a receiver to be **“similar to those of a mortgagee, namely to take reasonable care to obtain a proper price and to obtain and follow professional advice about the best method of sale, the appropriate reserve price if the sale is by auction, and the desirability of seeking planning permission and such like matters. He may sell promptly and does not have to delay in the hope prices will rise.”**

In Halsbury's Laws of England Volume 32 of the 4th Edition at paragraph 726 the learned authors, while citing a lot of authorities for the proposition, state the following legal principles about a mortgagee.

“A mortgagee is not a trustee for the mortgagor as regards the power of sale; he has been so described, but this only means that he must exercise the power in a prudent way, with due regard to the mortgagor’s interests in the surplus sale money. He has his own interest to consider as well as that of the mortgagor, and so long as he keeps within the terms of the power, exercises the power in good faith for the purpose of realizing the security, and takes reasonable precautions to secure a proper price, the court will not interfere, nor will it inquire whether he was actuated by any further motive.....A mortgagee is entitled to sell at a price just sufficient to cover the amount due to him, so long as the amount is fixed with due regard to the value of the property.

It is sufficient if the mortgagee complies with the terms of the power and acts in good faith, but good faith requires that the property is not to be dealt with recklessly. If the sale is in good faith and he charges himself with the whole of the purchase price, he may sell on the terms that a substantial part, or even the whole, is to remain on mortgage. The mortgagee is apparently not bound to watch the market so as to sell at the highest price”.

In the cases of CUCKMERE BRICK COMPANY LIMITED AND ANOTHER v. MUTUAL FINANCE LIMITED AND MUTUAL FINANCE LIMITED v. CUCKMERE BRICK COMPANY LIMITED AND OTHERS (1971) 2 ALL ER 633, cited under paragraph 726 of Halsbury’s just quoted, the English Court of appeal held that:

“A mortgagee was not a trustee of the power of sale for the mortgagor and, where there was a conflict of interests, he was entitled to give preference to his own over those of the mortgagor, in particular in deciding on the timing of the sale; in exercising the power of sale, however, the mortgagee was not merely under a duty to act in good faith, i.e. honestly and without reckless disregard for the mortgagor’s interest, but also to take reasonable care to obtain whatever was the true market value of the mortgaged property at the moment he chose to sell it”.

In an earlier case of KENNEDY v. DE TRAFFORD AND ANOTHER (1895-99) ALL ER REP 408 two tenants in common mortgaged a property and one of them collected the rents and managed the property. The power of sale having become

exercisable, the mortgagee gave notice that, unless the mortgage were paid off, he would sell at a price equal to principal, interest and costs. He received no objection to a sale on those terms and later sold the property under his power of sale for the stated price to the co-tenant who had collected the rents. The English House of Lords held:

“In the circumstances the mortgagee had taken proper precautions in complying with his power of sale and had acted in good faith, and the sale could not be set aside”.

In the case of WARNER v. JACOB (1882) 20 CH. D 220 the mortgagor sued the mortgagee and purchaser of the mortgaged property to set aside the sale on the ground that the property was sold for less value. The Court held that if a mortgagee exercises his power of sale bonafide for the purpose of realizing his debt and without collusion with the purchaser, the court will not interfere even though the sale be very disadvantageous, unless the price is so low as in itself to be evidence of fraud.

In agreeing with the holding in the WARNER case, our Supreme Court in the case of FINANCE BANK LIMITED v. AFRICA ANGLE LIMITED AND TWO OTHERS (1998) Z.R 237 held that:

“It is not unreasonable for a court to order re-valuation of a property where a mortgagor claims that the price obtained on a sale by a mortgagee was insufficient”.

Mr. Cheelo in his submissions argued that the debt intended to be recovered by the sale of the two mortgaged properties was US\$ 200,000 plus interest and costs. He said that in his Inception Report to the Bank dated 19th March, 2007, the 1st Defendant stated, inter alia;

“After visiting the premises in Lusaka that form part of the security, we are reasonably confident a disposal of the same property will realize the full amount owed by Mofu Limited of US\$ 250,000. Mr. Chimumbwa (the Plaintiff) has indicated that he has found buyers for the property at US\$350,000. Whilst we have let him continue discussing with potential buyers, we shall also go

ahead and value the property. If the current negotiations do not yield any results within the next two weeks, we shall go ahead and advertise the property. In our view the property's strategically located and will be able to realize at least US\$ 250,000....”

Further, Mr. Cheelo argued, the 1st Defendant did not give a reasonable explanation why he sold the properties at a total of only K550 million. The thrust of Mr. Cheelo's argument was that the 1st Defendant could have obtained, and should have endeavoured to obtain, a much higher value for the properties than he did.

Indeed, the evidence shows that the 1st Defendant had given his opinion of the value of the properties to be at least US\$ 250,000, enough to cover the outstanding debt without resorting to the sale of the machinery and equipment.

Further the Plaintiff had obtained a valuation report which had placed the value of the two properties **“in the region of K815,000,000”** as at 14th January, 2006. This appears to be the basis of the Plaintiff's Claim that the properties could fetch US\$ 350,000.

There is evidence before me that the Plaintiff was allowed by the Receiver to look for buyers. This was an act of good faith on the part of the 1st Defendant to allay any fears that the Plaintiff might have had that he might be cheated in the process of the sale. Even his lawyers were taken on board from inception in that vein and were briefed at every turn. For example,

1. By their letter to the 1st Defendant dated 23rd March, 2007 the said lawyers said **“we have managed to source for a potential buyer of our Client's premises and the full amount outstanding shall be paid to you directly”**.
2. When the potential buyer, Mr. FAROOK BHARUCHI, was identified they prepared and sent a draft contract of sale, quoting a price of US\$ 300,000, to Mr. Farook's Lawyers under cover of their letter dated 27th March, 2007, with copies to the Bank.
3. There was extensive correspondence between the Plaintiff's Lawyers on the one hand and the 1st Defendant and the Bank on the other hand concerning

that “**potential buyer**” as well as on other matters. Towards the end of the year 2007 it became apparent that there was not going to be any deal with Mr. FAROOK. The evidence of both the Plaintiff and the 1st Defendant was that the deal had fallen through.

4. By letter dated 24th August, 2007 from the Plaintiff’s Lawyers to the 1st Defendant there was intimation at another potential buyer. They wrote, inter alia,

“Meanwhile, we have since sent a draft contract of sale to the intended purchaser. We have included inter alia the condition that the sum of US\$ 255,502 shall be paid directly to the (Bank) upon execution of the contracts....”

5. On 18th January, 2008 the Plaintiff’s Lawyers wrote to the Bank in part:

“Some time in 2007, you informed us that you had no conduct of the properties involved herein because the same was under the jurisdiction of the Receiver. Consequent upon that, you advised us to be in touch with the Receiver in respect of any matter relating thereto. Following that advice, we have had several meetings with the Receiver in Lusaka and a lot of correspondence with his Advocates and discussions have since ensued.

This is to advise that following the numerous discussions and meetings with the Receiver as aforesaid together with discussions with his lawyers, we found a customer to purchase the property for purposes of liquidating (the) debt”.

Neither the intended purchaser was identified nor the agreed purchase price stated in the last-cited letter-

The point to note is that although the Plaintiff was allowed the chance to find a buyer for a “**reasonable price**” he did not find any either by himself or through his lawyers. And it should be further noted that the discussions, meetings and correspondence between the Plaintiff and his lawyers on the one hand and the 1st Defendant went on for a very considerable period.

The 1st Defendant's evidence was that firstly he had agreed to the Plaintiff finding a buyer for the two properties. He said he gave the Plaintiff two months to do so. After the sale to the person introduced by the Plaintiff had failed he advertised the properties for sale in the Times of Zambia News Paper on four occasions from 7th May, 2007. By their letter to the Bank dated 16th May, 2007, the Plaintiff's lawyers admitted having had sight of such advertisements by the Receiver in the Times of Zambia Newspaper and were grateful to him for the effort.

He also engaged a firm of real estate agents. What emerged from his evidence, which I find to be true, was that he acted above board and in a transparent manner. Unfortunately, none of the bidders who offered higher prices concluded the sale/purchase agreement until UDAYAM INVESTMENTS on behalf of the 3rd Defendant, BAPU, which was only concluded by way of registered assignments in February, 2008 for a total consideration of K550 million. This was after CITY EXPRESS and AZIM TICKLAY who had bid US\$ 450,000 and US\$150,000 respectively did not follow through their offers.

I find as a fact that all the efforts the 1st Defendant undertook in the disposal of the properties, as well as the offers that were made including the prices, including the one by UDAYAM (BAPU), were known by the Plaintiff and his lawyers. I also find as a fact that they did not raise any objection to UDAYAM's offer until well after the event. In my view they had an opportunity to arrest the sale if they had found it to be totally unacceptable, but they chose not to do so.

In my view both the Plaintiff as well as the 1st Defendant had expected an easy sale at a reasonable price which could wipe out the debt completely. However, the market proved a disappointment. Both the Plaintiff and the 1st Defendant had simply confused value and price. In my view the result cannot be blamed on the 1st Defendant who had borne in mind his duty both to the Bank to realize a good price to settle the debt as well as to the MOFU and the Plaintiff to safeguard their interests. In this regard the 1st Defendant had discharged his duty of care as propounded by Lord Denning MR in the English Court of Appeal case of STANDARD CHARTERED BANK LTD v. WALKER AND ANOTHER (1982) 3 ALL ER 938.

There is no evidence before me of any collusion by the 1st Defendant with UDAYAM or BAPU in the sale of the properties. On the totality of the evidence before me I do not find any wrong doing on the part of either the 1st Defendant or the Bank in the manner in which the sale was conducted. Consequently I refuse to order a revaluation of the properties, or to order an account to be rendered by the 1st Defendant, or to set aside the sale to the 3rd Defendant. In fact the Plaintiff did not plead any fraud in the manner BAPU acquired title to the said property, which is one of the prerequisites in cancelling a certificate of Title under the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia.

In sum, the Plaintiff's action has no merit and I dismiss it accordingly.

I now turn to the Bank's counter claim.

The 1st Defendant had said that the amount realized was US\$ 149,928.53 from the sale and that there was still some money owing to the Bank. This was admitted by the Plaintiff who said the outstanding amount at the time he commenced this action was US\$ 114,488.02.

The Counter Claim by the Bank against the Plaintiff personally is premised on the Deed of Guarantee dated 15th May, 2006 signed by the Plaintiff and Ms. JULIA MWAPE in favour of the Bank as further security for the loan to MOFU. The said Guarantee provided amongst other clauses:

"1. In consideration of the Bank lending MOFU INDUSTRIES LIMITED United States Dollars Two Hundred Thousand (US\$ 200,000) and interest and other monies hereinafter mentioned (hereinafter called "the principal sum and interest") at the request of the Guarantor, the Guarantor hereby guarantees to the Bank the due payment by the Borrower of all principal monies and interest and other monies falling due under and by virtue of the facility letter dated the 8th day of May, Two Thousand and Six between the Borrower of the one part and the Bank of the other part and if the Borrower makes default for more than thirty days in the payment of any such principal monies interest or other monies the Guarantor shall pay the amount aforesaid to the Bank on demand".

2. ***The liability hereunder of the Guarantors and each of them shall be as primary obligators and not merely as sureties and shall not be impaired or discharged by reason of any time or other indulgence granted by the Bank to the Borrower or by reason of any arrangement (by operation of law or otherwise the rights and remedies of the Bank) or of any omission on the part of the Bank to enforce any of its rights against the Borrower.***

3. ***This guarantee shall continue until all monies outstanding and payable by the Borrower under the (Loan) Agreement shall have been repaid to the Bank including interest and other monies payable thereby”.***

In the House of Lords case of MOSCHI v. LEP AIR SERVICES LIMITED AND ANOTHER (1972) 2 ALL ER 393 the court held:

“In the absence of any agreement to the contrary the obligation of a guarantor at common law was to see to it that the debtor performed the obligations which were the subject of the guarantee; a breach of those obligations by the debtor entailed a breach by the guarantor of his own contract for which he was liable to the creditor in damages to the same extent as the debtor.Accordingly, for the breach of his contract of guarantee, the appellant was liable to make good in damages the whole loss which the respondents had suffered by reason of the company’s failure to make the agreed payments.....”

In his defence to the counterclaim filed in court, the Plaintiff simply denied that he owed any monies to the Bank as claimed or at all. As earlier stated in this judgment the evidence before me was that there was still some money owing on the loan by MOFU to the Bank after the sale of the two mortgaged properties.

In the WALKER Case the directors had guaranteed the loan to their company by the bank. They were sued to recover the balance of the loan after the money realized from the sale of the company’s assets, which were sold by a receiver appointed by the bank under a fixed and floating charge, was found far short to discharge the loan and interest. The directors alleged inter alia, by way of defence to set aside a judgment under RSC Order 14 that the company’s assets were sold at a gross under

value. The court of appeal granted the directors leave to defend on the principles in the CUCKMERE case.

In the instant case, I have considered such a defence but rejected it for the reasons I have already given. I have also considered whether the Bank is first obliged to exhaust enforcement of other securities before resorting to the Guarantee. I find that not to be the case after considering the circumstances of the case and the wording of the Guarantee itself which expressed the Guarantors to be **“primary obligators and not merely as sureties”**.

In the circumstances I find that there is no defence to the counter claim. I accordingly enter judgment for the 2nd Defendant against the Plaintiff in the sum of US\$ 114,488.02 plus interest thereon as per the security documents on the loan from the date of the writ to the date of this judgment and thereafter at short term deposit rate until full payment.

The Defendants shall have the costs of the action, to be taxed if not agreed.

Leave to appeal granted.

Delivered at Kitwe in Open Court this 15th day of June, 2012

I.C.T. Chali
JUDGE

