

**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL LIST REGISTRY
AT LUSAKA**

2009/HPC/0500

BETWEEN:

C AND H FUEL SERVICES LIMITED

PLAINTIFF

AND

FINANCE BANK ZAMBIA LIMITED

DEFENDANT

**BEFORE HON. JUSTICE NIGEL K. MUTUNA ON 30TH DAY OF
JANUARY, 2013**

**For the Plaintiff: Mr. Lukangaba of Messrs Mweemba Chashi
and Partners**

**For the Defendant: Mr. A. Roberts of Messrs Alfred Roberts and
Co.**

J U D G E M E N T

Cases referred to:

- 1) *London Joint Stock Bank-Vs-Macmillan and Arthur (1918) AC page 777***
- 2) *Yeoman Credit Limited-Vs-Gregory (1963) 1 ALL ER page 245***
- 3) *Lombard Banking Limited-Vs-Central Garage and Engineering Co. Ltd, and Others (1962) 2 ALL ER page 949***
- 4) *Martha Chingwe-Vs-Finance Bank Zambia Limited Comp. No. 212/2009***

Other authorities referred to:

- 1) *Halsbury's Laws of England, by Lord Hailsham of St. Marylebone, 4th edition, volume 3(1), Butterworths, London, 1989***
- 2) *Byles on Bills of Exchange, by Frank R. Ryder and Antonio Bueno, 1988 edition, Sweet and Maxwell, London***

3) Bills of Exchange Act, 1882

4) Commercial Law, by Robert Laws, Sweet and Maxwell, London

5) Halsbury's Laws of England, by Lord Hailsham of St. Marylebone, 4th edition, Volume 4, Butterworths, London, 1989

6) English Law (Extent of application) Act Cap 11

7) Halsbury's Laws of England, by Lord Hailsham of St. Marylebone 4th edition, Volume 3, Butterworths, London, 1989

The Plaintiff, C and H Fuel Services Limited, commenced this action against the Defendant, Finance Bank Zambia Limited, on 22nd July 2009. This was by way of writ of summons and statement of claim. The claim as it is endorsed on the writ of summons is for the following relief: K42,786,628.00 being moneys deposited in the Plaintiff's account numbers 0334212100010, 0334280050013 and 0334165380016 but not credited to the account: K25,013,021.00 being interest wrongly charged to the Plaintiff's accounts, K259,933,687.00 loss of business; interest on the amounts claimed; an order for the release of certificate of title number L 3264; and costs.

The Defendant's response was by way of memorandum of appearance and defence and counter claim filed on 30th July, 2009.

The facts of this case are that the Plaintiff is a customer of the defendant bank with whom it holds three bank accounts at the Industrial branch. The accounts are numbered 0334212100010, 0334280050013 and 0334165380016.

Sometime between 10th April 2008 and 6th October 2008, the Plaintiff deposited four cheques and cash in its accounts as follows: cheque in the sum of K9,985,200.00 drawn on account of hazels Farmers Shop deposited in account number 0334280050013: cheque in the sum of K8,716,800.00 drawn on account of Hazels Farmers Shop deposited in

account number 0334280050013; cheque in the sum of K20,472,728.00 drawn on account of Hazels Farmers Shop deposited in account number 0334212100010; and cash in the sum of K1,795,000.00

Whilst the relationship of banker and customer subsisted between the two parties, the Plaintiff and its directors in or about 25th September, 2007 executed a mortgage deed over stand number 10275 Lusaka to secure an over draft facility availed to the Plaintiff by the Defendant. The overdraft facility was in the sum of K70,000,000.00 and it was for purposes of the Plaintiff meeting its operational costs. In addition to securing the K70,000,000.00 overdraft, Clause 1 of the mortgage deed equivocally stipulated that it would be security for payment to the bank on demand all moneys and liabilities whether certain or contingent now or hereafter owing or incurred or on any current account or in any manner Clause 11 of the said mortgage deed provides that the Defendant has a right to charge compound interest and at its discretion to alter its base rate for interest. Whilst clause 20 stipulates that a certificate by an officer of the Defendant as to the moneys or liabilities for the time being due or incurred to it from or by the Plaintiff shall be conclusive evidence against the Plaintiff in any proceedings.

Subsequently, by agreement of the parties, the overdraft was raised from K70,000,000.00 to K100,000,000.00.

Arising from the foregoing facts, it is contended in the statement of claim that the Defendant has not credited the amounts deposited in the Plaintiff's account. It was also contended that the Defendant did not inform the Plaintiff that the four cheques were referred to drawer on account of insufficient funds, in the drawer's account. Further that, this has created overdrafts on the Plaintiff's accounts as a consequence of which the Defendant has been charging interest on the accounts and refusing to honour cheques issued by the Plaintiff against the accounts on the grounds of insufficient funds. It is also contended that as a consequence of the purported overdrafts the defendant has retained custody of certificate of title number L3264 belonging to the Plaintiff.

The Plaintiff has contended further that it has been deprived the use of the said moneys and suffered loss of business. The particulars of the loss of business are as follows: K249,051,734.00 on account numbers 0334212100010 and 0334280050013, which accounts are used fuel sales; and K10,881,958.00 on account number 0334165380016, which amount is use for telephone credit. It was contended further that the Plaintiff deposited cheque in the sum of K430,000.00 drawn on the Agriver Transport Logistics account which cheque was only credited to the account on 17th October, 2003. Further that, another cheque in the sum of K1,795,000.00 was deposited on 10th April, 2008 but was only credited to the account on 29th May 2009 following protestation by the Plaintiff. However, that the said credit was not with interest.

As regards damages suffered as a consequence of the amount not credited to the account, the particulars of the claim are as follows: wrong interest charged on account number 03342121000120 in the sum of k6,460,000.00; wrong interest charged on account number 0334280050013 in the sum of K7,892,068.00 and loss of interest on the account number 0334165380016 in the sum of K660,965.00. It is contended further that the loss which was suffered by the Plaintiff has been acknowledged by the Defendant in the letter of summary dismissal of one of its employees one, Martha Chingwe, dated 21st November, 2008.

Lastly, whilst the Plaintiff did not deny that it has an overdraft facility with the Defendant, it contended that the overdraft facility was not for purposes of the Plaintiff purchasing a truck as contended by the Defendant but rather meeting its operational costs. It contended further that the overdraft was settled in full at the time of expiry of the term.

In the defense and counter-claim the Defendant contended as follows. The cheques in the sum of K9,985,200.00 K8,716,800.00, K20,472,728.00 and K1,816,900.00 which were deposited into the Plaintiff's account, were drawn on the account of Hazels Farmers Shop, which account had insufficient finds. As such the cheques were returned marked "refer to drawer". Further that, the Plaintiff's accountant who visited the Plaintiff's

branch was aware that the said cheques could not be honoured because the drawer's bank account which was also held at the Defendant's Industrial branch had insufficient funds. As regards the cash deposit of K1,795,000.00, it was contended that the amount was credited to the Plaintiff's account. As a consequence of the foregoing it was contended that there was no overdraft created as a specific result of the non payment of the cheques drawn on the account of Hazels Farmers Shop.

The defendant also contended that the letter of dismissal relating to the Defendant's former employee, Martha Chingwe did not amount to an acknowledgement or admission that the Plaintiff had in fact suffered loss or was entitled to the moneys claimed it was contended in respect of the acts of the Defendant's former employee Martha Chingwe thus: although she was negligent in withholding the cheques beyond the clearing period the Plaintiff was not entitled to the funds because the drawer's account was insufficiently funded; there is no law which entitles the Plaintiff to receive value for the cheques simply because the cheques were not cleared within the normal clearing period. What was critical was the fact that there was insufficient funds in the drawer's account. That was on account of the fact that the clearing period is only significant in the Inter Bank transactions and not where the transaction is at one bank; and the Plaintiff would be unjustly enriched if it were to obtain the benefit of cheques drawn on an account with insufficient funds.

The Defendant contended further that at the time the Plaintiff deposited the four cheques drawn on Hazels Farmers Shop, it already had and still has the overdraft facility, and therefore, the overdraft did not arise nor was it created as a result of the said cheque. Further that the overdraft facility expired on 30th April, 2009 and the debit due on the Plaintiff's account numbers 033421200010 and 0334280050013, as at 28th July, 2009, is K22,274,755.51 and K12,931,877.30 respectively. The said amounts continue to attract compound interest.

As a consequence of the foregoing, the Defendant counter-claim against the Plaintiff as follows:

- “1) payment of the sum of K35,206,632.81 as at 28th July 2009 plus interest. In the alternative, payment of all mortgage moneys due and secured by the mortgaged deed*
- 2) in default of payment on order of foreclosure possession and the statutory power of sale by the defendant of the mortgaged property”*

At the hearing of the matter, the Plaintiff called one witness while the Defendant called three witnesses.

The Plaintiff's witness was Hazel Mary Holland Gausi, PW the general manager of the Plaintiff. She testified that the Plaintiff was incorporated in the year 2005 for purposes of running two filing stations namely, Total Great North Road, "A" Filing Station, and Total Freedom Way Filing station. For purposes of easing its administration, the Plaintiff opened three separate accounts with the Defendant's industrial branch. These were account numbers, 033421200010, 0334280050013 and 0334165380016. Further, the Plaintiff obtained an overdraft facility under account number 033421200010 from the Defendant to facilitate the operation of the two filing stations. The security that was provided by the Plaintiff for the overdraft was plot 10275 Njase Close Nyumba Yanga Lusaka. Pursuant to the said overdraft, the Plaintiff was entitled to overdraw the account up to K100,000,000.00 and the Defendant charged interest on the amount overdrawn.

Between 3rd October, 2008 and 6th October, 2008, the Plaintiff deposited various cheques in its accounts as follows: 3rd October, 2008 cheque number 44 in the sum of K9,985 drawn on Hazels Farmers Shop and deposited in account number 033420250013, 6th October, 2008 cheque number 56 in the sum of K8,716, 800.00 drawn on Hazels Farmers Shop and cheque number 39 in the sum of K430,000.00 drawn on Agriver Transport Logistics deposited in account number 0334280050013; and cheque number 44 in the sum of K9,983,200.00 drawn on Hazels Farmers Shop on 17th October, 2008.

Later PW checked the telephone credit account number 0334165380016 and noticed that the account was not credited in the sum of K1,795,000.00. The said amount was a cash deposited as evidenced by the deposit slip at page 11 of the Plaintiff's bundle of documents. The anomaly was earlier reported to Juliet Mudenda an employee of the Defendant but no action was taken. Subsequently on 31st October, 2008, PW wrote to the Defendant to find out why the amounts deposited in the Plaintiff's accounts were not credited to the accounts despite assurance by the senior manager that he would look into the matter. The assurance made by the senior manager prior to this letter are at pages 6 and 9 of the Plaintiff's bundle of documents, however, there was no response to the letter PW wrote on 31st October, 2008.

Subsequently PW received the Plaintiff's bank statement for account number 0334280050013 and noticed that cheque number 0396 drawn on Agriver Transport was credited to the account on 17th October 2008. The other cheque numbers 44 and 56 in the respective sums of K8,716,800.00 and K9,985,200.00 drawn on the account of Hazels Framers Shop were also still not credited to the Plaintiff's account number 0334280050013. Upon receipt of bank statement for account number 03342121210010, PW also confirmed that the account was not credited with the sums of K20,472,728.00 and K1,816,900.00. However, a cheque drawn on the account of Martha Chingwe of K150,000.00 was credited. The failure by the Defendant to either credit or return the cheques drawn on Hazels Farmers Shop unpaid, surprised PW because Hazels Farmers Shop held an account in the same branch of the Defendant bank where the Plaintiff held its accounts. The cheques drawn on Hazels Framers Shop were therefore in-house cheques which in accordance with banking regulations should have been given immediate value once the cashier and the supervisor approved the payments on condition that there were sufficient funds in the account. PW went on to explain that when a deposit slip is presented to a cashier for an in-house deposit or inter branch transaction, the cashier checks the drawer's account and if there are sufficient funds in the drawer's account, it is debited and the payee's account credited

immediately. The deposit slip is then stamped and returned to the depositor. In the event that the drawer of the account has insufficient funds the cashier refers the cheque deposit to his immediate supervisor who will return both cheque and deposit slip without stamping them. At this point the depositor is informed that the Defendant cannot accept the deposit. In this case she explained that, the deposit slips were stamped but not processed because the statements of account show that the deposits were not fed into the clearing system. The cheques were therefore not referred to drawer to enable the Plaintiff pursue the drawer, Hazels farmers Shop. As a consequence of this, the Defendant charged and dismissed its employee who dealt with the transactions.

Since the cheques were not credited to accounts, payments that were made against the accounts were taken as over drawing the account and interest was charged. This prompted PW to see the Plaintiff's bank manager who assured her that the uncredited deposits would be taken into account when considering the balance in the account. Notwithstanding the said assurance, on 30th July, 2009, a letter of demand was received by the Plaintiff from the Defendant alleging that the Plaintiff owed the Defendant K22,274,755.49 on account number 0334212100010 and K12,931,877.36 on account number 0334280050013. PW testified further that had the Defendant credited the sums deposited of K20,472,728.00 and K1,816,900.00 to the account, the claim of K22,274,755.49 would have been offset by the credit balance and an amount of K14,872,49.00 would have been due to the Plaintiff. As regards the other account, if the sums of K8,716,800.00 and K9,985,200.00 totaling to K18,702,000.00 had been credited to the account the claim by the Defendant for K12,931,877.32 would have been off set and a balance of K5,770,123.00 would have been due to the Plaintiff. Despite this, the Defendant is still holding the title deeds pledged as security and has continued to deprive the Plaintiff the use of it as security for financial assistance. PW ended by summarizing the Plaintiff's claim as endorsed in the statement of claim.

In cross examination PW confirmed that the Plaintiff had an over draft with the Defendant in the sum of K100,000,000.00 which was secured by a mortgage. She also confirmed that all the accounts held by the Plaintiff were pledged as security for the overdraft. PW went on to confirm that as at 6th October, 2006, when the four cheques were deposited the Plaintiff already had an overdraft with the Defendant. Further that, there was nothing in the Plaintiff's bundle of documents to show that the four cheques deposited created the overdraft because the Plaintiff had not exhibited any of its bank statements to show the status of its accounts.

PW went on to confirm that the Plaintiff's overdraft account was account number 0334212100010 and that after October 2008, the Plaintiff continued to issue cheques on the account. Some of the cheques issued on the account, she testified, were for purchase of fuel and to cater for its business operation. She stated further that on 4th July, 2009 a cheque for K3,236,349.00 was issued for salaries and on 13th July, 2009 a cheque was issued to cater for the Plaintiff's business operations. She went on to state that on 5th June, 2009 the debit balance in the account was K11,645,702.72 but that afterwards the sums of K13,467,000.00, K28,979,000.00 and K15,945,500.00 were deposited into the account which brought the credit balance to K46,745,797.28. She went on to state that on the same day that the account went into credit balance on 8th June, 2009, the Plaintiff issued three more cheques in the sums of K45,000,000.00, K43,500,000.00 and K43,500,000.00. This she stated was in excess of the sum of K120,000,000.00 and therefore, resulted in the account going into a debit balance of k85,200,000.00. The account she stated went into debit and credit balance from time to time. Further that, the statement of the account at page 31 of the Defendant's bundle of documents indicates that the account was indebt balance of K19,600,000.00. She explained that the said K19,600,000.00 to her knowledge had not been settled by the Plaintiff.

On the Plaintiff's claim for loss of business, PW testified thus: the total amount claimed was K249,000,000.00 and it was based on the fact that if

the funds for the four cheques were in the Plaintiff's account it would have given the Plaintiff a better position to purchase more fuel and sell more fuel; the claim for K249,000,000.00 is not based on assumptions and she had proved the loss in her evidence in chief; the Plaintiff was allowed to continue using the overdraft facility from October, 2008 up to the time this action was commenced; the cheques the Plaintiff issued against the account assisted it in its business operations; the Plaintiff did not have an accountant's certificate nor did it produce an audited report to prove the loss; she is not an accountant but worked for a bank at one time and therefore understands how interest is calculated hence her ability to tabulate the plaintiff's claim; in her evidence in-chief the figures she had tabulate originated from the Plaintiff's books of accounts and they were verified by the Plaintiff's accountant; and that the four cheques should have cleared on the day they were deposited on 6th October, 2008 but that she was later informed on 17th October, 2008 that the cheques were unpaid. Further that the Plaintiff did not take action against the drawer of the cheques nor did she notify them that the cheques were unpaid.

As regards the Defendant's employee by the name of Martha Chingwe, PW confirmed that she knew her and that she transacted with her in her personal capacity. She proceeded to confirm that Martha Chingwe issued cheques to the Plaintiff for purchase of fuel as appears in the documents at pages 3, 4 and 5 of the Defendant's supplementary bundle of documents. She stated further that on certain occasions Martha Chingwe would draw fuel from the Plaintiff and issued postdated cheques. She however stated that she did not know if it was Martha Chingwe who handled the four cheques when they were deposited with the Defendant.

In re-examination PW stated that the documents in the Plaintiff's bundle of documents at pages 1 to 5 relate to the overdraft facility granted to the Plaintiff by the Defendant. She stated further that the documents at pages 5 to 14 in the Defendants bundle of documents relate to the mortgage in respect of the same overdraft. The overdraft facility she testified further, related to account number 0334212100010.

PW went on to testify that there was an overdraft created on the Plaintiff's account number 0334280050013 due to the fact that the four cheques were not present. She testified further that, the said overdraft was evidenced by the documents at page 18 of the Plaintiff's bundle of documents and that it had the effect of limiting the funds the Plaintiff was operating with and the Plaintiff was paying interest which it was not supposed to pay.

As regards the negative balance of K19,651,301.00 in account number 0334212100010 reflected at page 31 of the Defendant's bundle of documents, PW testified that the amount remained unpaid because of the two cheques that were not credited to the account. She testified that the two cheques were for K21 million and K2 million and that if they had been credited to the account and the correct interest charged, the Plaintiff would have had a credit balance of K27 million.

On the claim for loss of business made of K249,000,000.00, PW clarified that this was based on minimum sales of 4,364 litre per day. Further that if the Plaintiff did have the money that was supposed to be credited to the account it would have been able to sell that amount of fuel on a daily basis. She clarified that the daily profit multiplied by the number of days leading up to the filing of the claim, which totalled two hundred and forty, gives the total of K249,000,000.00 claimed for loss of business.

PW went on to confirm that despite the Plaintiff having access to the overdraft facility, it still suffered loss of business because the Defendant was charging the Plaintiff the wrong interest on account of the cheques that were not credited to its accounts. As such the Plaintiff did not have enough working capital. She went on to clarify the position on the Plaintiff's claim for interest and stated that the table given in her examination in-chief indicated a column with interest that the Defendant charged. This was without taking into consideration the two cheques that should have been deposited. The second column, she testified, indicates the correct interest that the Defendant should have charged because it takes into account the two cheques that should have been credited to the

account number 0334212100010. The claim by the Plaintiff is the difference between the two sets of interest charged which is what, PW claimed is supposed to be refunded to the Plaintiff.

As regards the role Martha Chingwe played in the events leading up to the action, PW testified that she knew Martha Chingwe as an employee of the Defendant in the foreign exchange section. She dealt with her in that capacity. She ended by testifying that the Defendant still held onto the cheques and that they were neither credited nor debited to the account. Despite this she stated further the Defendant continued to charge the Plaintiff interest and to hold onto the title deeds pledged as security.

The Plaintiff proceeded to close its case.

The Defendant's first witness, DW1 was Chiko Mwale a banker by profession who worked for the Defendant in the audit department. His evidence was as follows. On 28th October, 2008, the Director - Audit of the Defendant instructed him to investigate a case involving the deposit of the four cheques by the Plaintiff in its account numbers 0334280050013 and 0334212100010. His investigations revealed that the Plaintiff deposited cheque numbers 56 and 44 in the respective amounts of K8,716,800.00 and K9,985,800.00 into its account number 0334280050013. Further that, cheque numbers 55 and 43 in the respective amounts of K1,816,900.00 and K20,472,728.00 into account number 0334212100010. All four cheques were drawn on account number 0334397620017 held by Hazels Farmers Shop, which account was in the Defendant's Industrial branch and was insufficiently funded. This he stated is evident from bank statement at page 1 of the Defendant's bundle of documents which indicates that the balance in the Hazels Farmers shop account was K3,274.193.87 as at 6th October, 2008 and k691,393.87 as at 8th October, 2008.

The four cheques, DW1 testified further were received at the Defendant's Industrial branch by Martha Chingwe who informed the Plaintiff's accountant a Mr. Ngulube on divers days that the cheques had not cleared

due to insufficient funds in the drawer's account. This he stated is evidence from the letter at page 1 of the Defendant's supplementary bundle of documents. He testified further that Martha Chingwe was dismissed from the Defendant's employment because she withheld the four cheques due to an arrangement entered into between herself and the drawer of the cheques and the Plaintiff. He went on to state that Martha Chingwe had personal dealings and transacted with both the drawer of the cheques and the Plaintiff which compromised and conflicted with her duties as an employee of the Defendant as follows: she issued cheques for K290,000.00 K520,000.00, K385,000.00, K250,000.00, K200,000.00 and K283,000.00 from her personal account number 0334147185011 as reflected by bank statements at pages 3 to 8 of the Defendant's supplementary bundle of documents; she is and was related to Mr. Malembeka the director of Hazels farmers Shop who is her cousin; she received payment in the sum of K1,000,000.00 from hazels farmers shop by way of cheque number 000006 dated 2nd September, 2008 as is evident from document at page 9 of the Defendant's supplementary bundle of documents; she incorporated a company called Nthembe Limited in which she was a director and majority shareholder, which company received payment in the sum of K2,500,000.00 from Hazel's Farmers Shop as evidenced by documents at pages 10,11,12 and 14 of the Defendant's supplementary bundle of documents; and she made a deposit of money into the account held by Hazels Farmers Shop in the Defendant's supplementary bundle of documents.

DW1 testified that the allegations against Martha Chingwe prove that she transacted personally and through her business with both the Plaintiff and Hazels Farmers shop both of whom she was well acquainted with. Therefore, he concluded, the withholding of the four cheques in issue was as a result of her unethical and compromised position with the parties involved.

In cross examination DW1 began by confirming that Hazels farmers Shop and the Plaintiff held bank accounts in the same branch of the Defendant.

He also confirmed that a cheque that is drawn in a situation where the drawer and payee are in the same branch is given immediate value. In this case however he testified, it had not been done.

DW1 went on to confirm that even in a situation where the drawer's account is not sufficiently funded the credited and debiting of the account is done on the same day. He confirmed further that this was not done in this case and that the cheques in issue were not introduced into the banking system. He also conceded that when a cheque is deposited it had to be introduced into the banking system to start the process of payment and clearing. Further that when a cheque is not honoured it is returned to the payee and there is an unpaid cheque register, but that he could not confirm if the cheques in issue were not registered in the unpaid cheque register. He also confirmed that the Defendant did not return the cheques to the Plaintiff but that according to the information he had, the Plaintiff was informed that the cheques were not paid by Martha Chingwe. He ended by testifying that since Martha Chingwe was an official of the bank the activities that she did bound the Defendant.

In re examination DW1 testified as follows: if there are insufficient funds in the account of a drawer of a cheque the Defendant does not debit the account and credit the payee's account; the four cheques deposited by the Plaintiff were not debited and credited in the system on account of the negligence by the Defendant's member of staff Martha Chingwe; and that the action of a negligent employee do not bind the Defendant.

DW2 was Chinyemba Hendrix Chiyenge the manager - credit in the Defendant. His evidence was as follows. On 25th September, 2007, the Plaintiff executed a mortgage deed over stand number 10275 Lusaka to secure an overdraft facility availed to it by the Defendant in the sum of K70,000,000.00. This was evidenced by documents at pages 5 to 14 of the Defendant's bundle of documents. By clause I of the mortgage deed the parties agreed that the security was for repayment to the Defendant on demand all moneys and liabilities whether certain or contingent now or hereinafter owing or incurred on any current account or in any manner.

DW2 went on to testify that the overdraft facility was increased to the sum of K100,000,000.00 in April, 1 2008 pursuant to a letter of offer and acceptance. Further that the overdraft was made to the Plaintiff through its account number 0334214100010 by issuance of various cheques and that as at 28th July, 2009 the Plaintiff owed the Defendant the sums of K22,274,755.51 on account number 0334212100010 and K12,931,877.30 on account number 00334280050013 by way of debit balances. This he testified is evidenced by documents at pages 30 and 41 of the Defendant's bundle of documents. He ended by testifying that interest continues to accrue on the debit balance at the Defendant's lending rate until settlement and that since July, 2009, the Defendant has not received any payment from the plaintiff.

In cross examination DW2 began by confirming that he is aware that certain cheques had not been credited to the Plaintiff's accounts. He confirmed that if the said cheques had been credited to the Plaintiff's two accounts they would have had credit balances.

In re-examination DW2 testified that the document at page 1 of the Defendant's supplementary bundle of documents indicates that as at 17th October, 2008 account number 0334212100010 had a debit balance of K142,595,311.00. He testified that the cheques that were deposited into the account by the Plaintiff were not sufficient to clear the debit balance.

DW3 was Peter Kaloto an assistant manager in the Defendant. His testimony was follows. Sometime in October, 2008 whilst he was working at the Defendant's Industrial branch a complaint was received from the Plaintiff that four cheques that were deposited into its account had not received value. The four cheques were deposited on 6th October 2008 in the Plaintiff's account numbers 0334280050013 and 0334212100010. The cheques were numbered 56 and 44 in the respective sums of K8,716,800.00 and K9,985,800.00 deposited in the former account and number 43 for K20,472,728.00 and 55 for K1,816,900.00 in the latter account. They totalled the sum of K40,991,628.00 and were all drawn on

the Hazels Farmers shop account number 0334397620017 held at the Defendant's Industrial branch.

DW3 went on to testify that the Hazels Farmers Shop account against which the cheques were drawn was insufficiently funded for purposes of paying the cheques because as at 6th October, 2008 the balance in the account was K3,274,193.87 and after forty-eight hours it fell to K691,393.07. This he stated is evidence by document at page 1 of the Defendant's bundle of documents. As a consequence of this, he testified, the Plaintiff could not receive value for the four cheques.

DW3 went on to explain that the four cheques were received by Martha Chingwe who was his subordinate and reported to him and that she had explained to him that she received the cheques but did not post them to the account because there were insufficient funds in the drawer's account. Further that, she had been in touch with both the drawer of the cheques and the Plaintiff and that she withheld the cheques because the drawer was expecting to deposit funds into its account. He also testified that he often used to see a Mr. Ngulube of the plaintiff company come into the Defendant branch to discuss banking matters with Martha Chingwe. Further that when Martha Chingwe was subsequently charged in relation to the transaction by the Defendant, she explained the circumstances surrounding her withholding of the cheques in a letter dated 23rd October, 2008 addressed to him. The said letter he testified is at page 1 of the Defendant's supplementary bundle of documents. He ended his testimony by stating thus: cheques deposited with a bank can not receive value or be credited to the payee's account unless there are sufficient funds in the drawer's account; the mere fact that the deposit slips in respect of the cheques were "stamped" by the bank teller is not of itself an acknowledgement of payment because a bank has the right to subsequently refer a cheque to drawer if the drawer's account has insufficient funds; therefore a bank stamp is simply an acknowledgment of receipt of the instrument and nothing more; and there is no requirement

under the Banking Act that in-house cheques that are deposited should be cleared immediately or within forty-eight hours.

In cross examination DW3 testified that he had been in the employ of the Defendant since 1988 and that he is familiar with the procedure involved in cheque clearance. He also confirmed that the procedure was not followed with regard to the four cheques and that the cheques were not transacted. In doing so he confirmed that the Defendant did not perform its duty and that the cheques were not referred to drawer. Further that, once a cheque is dishonoured it has to be entered into a dishonoured cheques register and the customer informed. He stated that the four cheques were not entered in the dishonoured cheques register and that they are still in the possession of the Defendant. But that the Plaintiff was informed that the cheques had been dishonoured through its accountant a Mr. Ngulube. He however conceded that Mr. Ngulube was not a signatory to the Plaintiff's account.

DW3 stated further that a bank owes a duty to inform the signatory to an account if a cheque is dishonoured and that in this case the signatory to the account was not informed. He ended his testimony by stating that as an employee of the bank Martha Chingwe acted for and on behalf of the Defendant and as such her actions bound the Defendant. Further that the Defendant breached its duty to the Plaintiff as its customer.

In re-examination DW3 testified as follows: that Martha Chingwe did not act in the normal way she was expected to act; Mr. Ngulube was the known agent for the Plaintiff and he was given authority to collect bank statements, cheque books and he handled cheque transactions; and the signatory to the Plaintiff's account rarely visited the Defendant bank.

The Defendant proceeded to close its case.

At the close of the hearing I directed the parties to file submissions twenty one days apart. Pursuant to the said directive, the Defendant filed submissions on 24th September, 2012. The Plaintiff did not file submissions.

In the Defendant's submissions counsel for the Defendant Mr. A. Roberts advanced his arguments from two limbs, that is to say, in respect of the Plaintiff's claim and in respect of the Defendant's counter claim. He argued in respect of the Plaintiff's claim that a banker is obliged to honour and pay a customer's cheque as long as there are sufficient and available funds for that purpose. There is no obligation on the part of the banker to pay any part of a cheque for an amount exceeding the available balance. Counsel referred to **Halsbury's Laws of England, 4th edition, Vol 3(1)** in articulating the foregoing argument. He argued further that the relationship of a banker and customer is that of debtor and creditor with the super added obligation on the part of the banker to honour the customer's cheques if the account is in credit. Reference was made to the case of **London Joint Stock Bank-Vs Macmillian and Authur (1)**. It was submitted that since there were insufficient funds in the Hazels Farmers Shop account meant that the Defendant had no duty to effect payment on the four cheques.

As regards the mode or manner of giving notice to a customer where a cheque is referred to drawer, counsel argued that **Byles on Bills of Exchange 26th edition** provides that where a cheque is dishonoured the collecting bank in practice would return the bill or cheque to its customer. This it was argued is no more than a practice, because notice of dishonour can be given in other ways without necessarily returning the cheque marked "refer to drawer." It was argued further that by virtue of section 49(5) of the Bills of Exchange Act 1882, notice may be given in writing or by personal communication and may be given in terms which sufficiently identify the bill and intimate that the bill has been dishonoured. Further that **Robert Lowe Commercial Law** sheds further light on the issue by stating that notice of a dishonoured cheque can be oral or in writing or partly oral and partly in writing. Counsel argued that the holding in the case of **Yeoman Credit Limited-Vs-Gregory (2)** is to the effect that notice can be given orally. Whilst in the case of **Lombard banking Limited-Vs-Central Garage and Engineering Co. Limited & Others (3)**, Scarman. J accepted that even a telephone conversation was

effective notice of dishonour. It was argued that notice of the four dishonoured cheques deposited by the Plaintiff was effected when Martha Chingwe verbally communicated with Mr. Ngulube, the Plaintiff's accountant, by supplying him with bank statements of drawers account. Counsel drew my attention in this respect to Martha Chingwe's exculpatory letter dated 23rd October, 2008 and the case of **Martha Chingwe-Vs-Finance Bank (Z) Limited (4)**. The said Mr. Ngulube, it was argued was a known agent of the Plaintiff as the testimony of DW3 demonstrated.

Arguing in the alternative, counsel submitted that if the Court accepts the evidence of PW that she only became aware that the cheques had not cleared on 17th October, 2008, the delay is excusable as per section 46(1) of the **Bills of Exchange Act** because of the unauthorized arrangements entered into between Martha Chingwe, the drawer of the cheques and the Plaintiff's Mr. Ngulube. Reliance was made on **Halsbury's Laws of England, 4th edition Volume 4** which counsel argued states as follows at paragraph 433:

“Delays in Giving Notice-Delay in giving notice of dishonour is excused when the delay is caused by circumstances beyond the control of the party giving notice and not imputable to his default, misconduct or negligence, but when the cause of delay ceases to operate the notice must be given with reasonable diligence.”

Counsel argued that the relationship between Martha Chingwe, the drawer of the cheques and the Plaintiff was demonstrated in the evidence of DW1. He argued further that, the Defendant cannot be held vicariously liable for Martha Chingwe's actions because vicarious liability was not pleaded by the Plaintiff.

It was also argued that the Plaintiff failed to mitigate its loss because although it did not get value for the four cheques, it failed to enquire from the drawer of the cheques or recover the money from it.

Counsel ended his arguments on the Plaintiff's claim for wrongful interest and loss of business by arguing that: the claim should fail because the Plaintiff was still enjoying the overdraft facility offered by the Defendant and as such any business or operational requirement of the Plaintiff could be met; PW's calculations in relation to loss of business were not verified by a competent accountant and were based on rough estimates; and PW did not produce any audited accounts to verify the claim. He ended by praying that the Plaintiff's claim should fail.

As regards the counter claim, counsel argued that it is not in dispute that the Defendant availed the Plaintiff an overdraft for K70,000,000.00 which was increased to K1000,000,000.00. The said overdraft, counsel argued, was to enable the Plaintiff draw funds to meet its daily operational business requirements, which fact was admitted by PW in cross examination. Counsel argued that clause 1 of the mortgage executed to secure the overdraft indicated that the mortgage was security for recovery of all moneys and liabilities owed to the Defendant by the Plaintiff. He argued further that the Plaintiff did not challenge the counter claim as DW2's evidence shows the Plaintiff owes the Defendant the sums of K22,274,755.51 on account number 0334212100010 and K12,931,831,877.30 on account number 00334280050013 as at 25th July, 2009, plus interest. Counsel therefore prayed that judgment, be entered in the said amounts plus interest.

I have considered the pleading, evidence and arguments by counsel. There are two claims that I have to determine in this matter namely, the Plaintiff's claim and the Defendant's counter claim. Put simply, the Plaintiff's claim is as follows: for amounts not credited to its three accounts numbered 03342121000110, 0334280050013 and 0334165380015; loss of interest; loss of business, and return of certificate of title in respect of stand number 10275 Lusaka. On the other hand, the Defendant's claim is for payment of moneys owing to it and secured by mortgage over stand number 10275 Lusaka.

From the facts adduced in evidenced and the pleading, the following facts are not in dispute.

- 1) *that the Plaintiff presented to the Defendant four cheques in the sums of K9,985,200.00, K8,716,800.00, K20,472,728.00 and K1,816,900.00 for depositing into account numbers 0334280050013, 0334212100010 and 0334165380016.*
- 2) *that the said cheques were drawn on Hazels Farmers Shop account held in the Defendant's industrial branch which is the same branch in which the Plaintiff held its accounts.*
- 3) *that the said four cheques were not deposited into the Plaintiff's accounts by the Defendant.*
- 4) *as at 6th and 8th October 2008, the Hazels Farmers Shop account was not sufficiently funded for purposes of paying all the four cheques.*
- 5) *that the Plaintiff had an overdraft facility with the Defendant which was initially for K70,000,000.00 but was increased to K100,000,000.00.*
- 6) *the said overdraft facility was secured by a mortgage deed dated 25th September 2007 over stand number 10275 Lusaka and it was for purposes of meeting the Plaintiff's operational costs.*
- 7) *the Plaintiff continued to utilize the overdraft facility after October 2008.*

Having listed the undisputed facts, I now turn to determine the two claims. In doing so I will begin by determining the Plaintiff's claim in the order that it has been presented.

The Plaintiff's first claim is for payment of the sum of k42,786,628.00 in respect of cheques and cash presented to the Defendant but allegedly not deposited into the Plaintiff's account. The said amount comprises four cheques and cash. The four cheques are the one drawn on the Hazels farmers Shop account in the following amounts: K9,985,200.00; K8,716,800.00 K20,472,728.00 and K1,816,900.00. The Plaintiff has

contended that despite presenting the said cheques to the Defendant it has not credited them to Plaintiff's accounts. The Defendant in its response contended that the said cheques were not deposited into the Plaintiff's accounts to introduce them into the clearing system on account of the negligence of its employee who receive them by the name of Martha Chingwe. It was however, contended further that in any event, the drawer's account was not sufficiently funded for purposes of clearing the cheques.

In order for the Plaintiff to succeed in the claim in respect of the four cheques drawn on the Hazel Farmers Shop, it must demonstrate that the drawer's account had sufficient funds to meet the value of the four cheques. My find is based on the fact that the onus of proving a claim in civil matters rests with Plaintiff.

An evaluation of the evidence shows that the Plaintiff has not demonstrated to my satisfaction that there were sufficient funds in the account of Hazels Farmers Shop, the drawer, to cater for the four cheques. The evidence that has been presented in this respect is that of the Defendant and is in the form of a bank statement for Hazels Farmers Shop at pages 1 and 2 of the Defendant's bundle of documents. It shows that as at 6th October 2008 when the Plaintiff presented the cheques to the Defendant the balance in the account was K3,274,193.87 and dropped to K1,821,393.87 and K1,191,393.87 on 7th October 2008 and finally to K691,393.87 on 8th October 2008. It is therefore clear that the balance in the Hazels Farmers Shop account was not at the material time sufficient to clear the four cheques. This means that the Defendant was not obliged to credit the Plaintiff's account with the value of the four cheques. This fact was confirmed by PW in her evidence in chief when she testified that a bank will only credit the payee's account if there are sufficient funds in the drawer's account. Further, the fact that the Defendant has admitted that its employee did not actually deposit or introduce the four cheques into the accounts does not change the situation because the fact still remains that there were insufficient funds in the drawer's account and as

such the Plaintiff was not entitled to the said moneys. It was negligence on the part of the Defendant's officer as DW3 admitted but this does not entitle the Plaintiff to the moneys because even assuming the Plaintiff is entitled to damages arising from the said negligence, the damage would have to be proportionate to the loss suffered. In my considered view, the loss suffered, if any by the Plaintiff arising from the said negligence of the Defendant is by no stretch of imagination equal to the value of the said cheques.

Further, I have considered the provisions of the ***Bills of Exchange Act 1882*** of England which counsel for the Defendant referred to. The said Act, is applicable to Zambia by virtue of section 2 of the ***English Law (Extent of Application) Act*** which states as follows:

“subject to the provisions of the constitution of Zambia and to any other written law -

(a)

(b)

(c) The statutes which were in force in England on the 17th August, 1911 (being the commencement of the Northern Rhodesia Order in Council, 1911); and

(d)

Shall be in force in the Republic.”

By the said section all statutes that were in force in England on 17th August, 1911 are applicable to Zambia. The ***Bills of Exchange Act*** is one such bill because it is an 1882 Act.

In referring to the ***Bills of Exchange Act***, counsel for the Defendant argued that there is need for a bank to give notice of dishonour of a cheque to its customers. He also argued that the form that the notice should take is provided for in the Act.

The relevant sections of the ***Bills of Exchange Act*** are sections 48 and 49. The former section stipulates as follows:

“Subject to the provisions of this Act, when a bill has been dishonoured by non-acceptance or non-payment, notice of dishonour must be given to the drawer and each endorser, and any drawer or endorser to whom such notice is not given is discharged....”

Whilst the latter states in part as follows:

“Notice of dishonour in order to be valid and effectual must be given in accordance with the following rules:-

(1) The notice must be given by or on behalf of the holder or by or on behalf of an endorser who at the time of giving it, is himself liable on the bill.

(2)

(3)

(4)

(5) The notice may be given in writing or by personal communication and may be given in any terms which sufficiently identify the bill, and intimate that the bill has been dishonoured by non-acceptance or non-payment.”

In my considered view, these provisions are not applicable to a banker such as Defendant and as such the obligation or need for giving of notice as stipulated by these two sections is not directed at bankers. As section 49 (1) stipulates the notice must be given by or on behalf of the bill. Further, the notice of dishonour in the situation provided for by the two sections is not to the customer or payee of a bill such as the Plaintiff but the drawer of a bill. This is clear from ***Halsbury’s Laws of England, 4th edition, volume 4*** at pages 189 and 188 which states as follows by way of explaining the effect of sections 49 and 48, respectively of the ***Bills of Exchange Act***:

“By whom and for whom notice may be given. Notice of dishonor must be given by or on behalf of the holder, or by

or on behalf of an endorser who at the time of giving, it is himself liable on the instrument,”

“Necessity for notice of dishonor. As in the case of dishonor by non-acceptance, so also in that of dishonour by non payment, notice of dishonour must be given to the drawer and each endorser; otherwise the drawer or any endorser to whom such notice is not given is discharged.”

In my considered view, the holder of a cheque referred to in the sections is the payee such as the Plaintiff, in this case whilst the drawer or endorser of a cheque is the person issuing the cheque such as Hazels Farmer Shop. It is the former in the circumstances of the sections who should give notice to the latter. The sections do not refer to a banker such as the Defendant in this matter and they are therefore not relevant for purposes of determining whether or not the Defendant in this matter should have given notice to the Plaintiff of the dishonoured cheques. The same is the case with cases of ***Lombard Banking Limited-Vs-Central Garage and Engineering Co. Ltd and Others (3)*** and ***Yeoman Credit Limited-Vs-Gregory (2)*** cited by counsel for the Defendant. The said cases hinged on the interpretation of section 49 of the ***Bills of Exchange Act*** and address the issue whether or not an endorser of a bill of exchange is liable on the bill in view of the notice given or want of such notice. They are therefore not relevant to this matter as they do not deal with a banker’s obligation to give notice on the dishonour of a cheque.

The obligation that a banker shoulders is to present a cheque for clearance once it is received. This is evident from ***Halsbury’s Laws of England, 4th edition, Volume 3.*** The said authority states at page 76 as follows

“As agent for collection he is bound to exercise diligence in the presentation of the cheque for payment. He fulfils his duty if, when the cheque is drawn on a bank in the same place, he present it the day after receipt, or, when on a bank

in another place, he wither presents it or forwards it on the day following receipt. The forwarding may be to another branch or to an agent of the bank, who has the same time after receipt in which to present. A non-clearing bank may so utilize a clearing bank. But in any case the bank which has received the cheque from its customer remains liable to him for default of its agent.....

If a banker fails to present a cheque within a reasonable time after it reaches him, he, is liable to his customer for loss arising from the delay.”

This authority clearly indicate an obligation by the banker to present a cheque that it receives and to do so within reasonable time. Failing such presentation, the banker is liable for loss arising from such delay.

The facts of this case clearly show that the Defendant defaultted in presenting the four cheques left with it. They show that instead of presenting the cheques after it received them, the Defendant's officer one Martha Chingwe held onto the cheques and that to date they have not been presented. DW1 did confirm that the cheques were not introduced into the clearing system. The Defendant was therefore in breach of its duty to its customer the Plaintiff. However, as I have found in the earlier part of this judgment, there were insufficient funds in the drawer's account to meet payment of the cheques. As such there is no loss that the Plaintiff can be said to have suffered because even assuming that the cheques were presented they would have been dishonoured.

As regards the other two cheques for K430,000.00 and K1,795,000.00 which were deposited but allegedly credited late to the accounts, apart from referring to the deposit slip at 7 of the Plaintiff's bundle which proves the deposit, PW did not lead evidence by way of reference to a bank statement to show the late crediting of the K430,000.00 cheque. Further, she did not explain to the Court what damages the Plaintiff suffered in terms of interest lost. I therefore find that the said claim is not proved.

The same is the case with the allegation of the deposit of cheque in the sum of K1,795,000.00. This clearly refers to cash deposit in the like sum which is evidenced by deposit slip at page 11 of the Plaintiff's bundle of documents, whose fate I will deal with in the next paragraph.

As regards the K1,795,000.00 cash deposit made on 10th April, 2008, the allegation is that the aid funds were not credited to the account. A perusal of the document at page 17 of the Plaintiff's bundles of documents is to the contrary. The said document is a bank statement for account number 0334165380016 and it clearly indicates that the cash deposit of K1,795,000.00 was credited to the account. I therefore find no merit in the claim.

I now turn to determine the second claim which is for loss of business. The particulars of the said claim are contained in paragraph 10(a) and (b) of the statement of claim and they are as follows: the amount of K249,051,734.00 on account numbers 0334212100010 and 0334280050013; and K10,881,953.00 an account number 0334165380016. The evidence of PW indicates that the basis of this claim is that it arises from the Defendant's failure to credit the four cheques to its account and as such the Plaintiff was deprived of the use of the said money and interest it would have earned there from, in its business operations. In articulating the said claim PW has gone to great length to workout the interest the Plaintiff should have earned from the funds and the interest the Defendant allegedly wrongly charged it as a result of its accounts going into debt balance when the cheques were not credited.

I find that the Plaintiff has failed to prove this claim to my satisfaction for three reasons. The first reason is that the foundation upon which the claim is based is untenable because as I have found in the earlier part of this judgment, the Plaintiff is not entitled to the amount claimed on the four cheques because they would have been dishonoured if they were presented. The Plaintiff would therefore not have had access to the said funds to utilise them in its business or earn interest on them.

Secondly, I have already found as a fact that the Plaintiff was availed an overdraft on account number 0334212100010 to the tune K100,000,000.00. the said overdraft as I have found was for purposes of meeting the Plaintiff's operational costs. I also found further that, the Plaintiff continued to enjoy the latter fact was confirmed by PW under cross examination in which she gave details of cheques issued against the overdraft and is evident from the Plaintiff's bank statements at pages 27 to 30 of the Defendant's bundle of documents in respect of account 0334212100010, the overdraft account. The said statements indicate at page 28 that the Plaintiff issued cheques on 3rd June 2009 in the sums of K44,000,000.00, K10,500,000.00 and K10,000,000.00, which cheques were paid by the Defendant against an account with a debit balance. Further, at page 29 it indicates that the Plaintiff issued three cheques numbered 000581,000588 and 000589 in the respective sums of K45,000,000.00, K43,500,000.00 and K43,500,000.00 on 8th June 2009. The said cheques were paid by the Defendant despite there being insufficient funds and a negative balance in the account. Therefore, the Plaintiff did have access to funds to meet its operations and as such its claim for loss of business is untenable.

The third reason is that I find the computation for amounts allegedly lost in interest and wrongly charged to the account as interest unreliable because, by her own admission, PW who did the calculations, is not an accountant. Further, she did not produce audited accounts of the Plaintiff to prove the loss claimed. The computations made by the Plaintiff in the statement of claim and evidence of PW are mathematical and of a very technical nature. The said computations require technical expertise and qualifications such as accountancy by the person making them. PW, as I have stated, conceded that she is not an accountant and as such her evidence on the mathematical computations cannot be relied upon. Further, PW was not introduced as an expert witness or declared as one for purposes of her presenting the technical evidence.

As regards the last claim for the return of the title deeds of the mortgaged property, I will consider it when I consider the counter claim

I now move on to determine the Defendant's counter claim. The Defendant has contended that the basis of the counter claim is that the overdraft facility in the sum of K100,000,000.00 expired on 30th April, 2009. It is contended further that there are debit balances due on the Plaintiff's account numbers 0334212100010 and 0334280050013 in the sums of K22,274,755.51 and K12,931,877.30, respectively as at 28th July, 2009.

The Plaintiff has alleged that the overdraft has been settled in full.

In determining the counter claim I have considered the evidence of DW2 to be pertinent. He testified that as at 28th July, 2009, the Plaintiff owed the Defendant the sum of K221, debt, on account number 0334212100010 and K12,931,877.30 on account number 00334280050013. In tendering this testimony he referred the Court to documents at pages 30 to 41 of the Defendant's bundle of documents.

I have perused the said documents which are the statement for account number 0334212100010 at pages 30 to 35 and statement for account number 0334280050013 at pages 35 to 40. The first statement has a closing debit balance of K19,263,039.92 as at 30th June 2010. There is no entry reflected for 28th July, 2009, of K22,274,755.51 as claimed by the Defendant and stated by DW2. The second statement reflects a closing debit balance of K11,713,090.45 as at 9th December, 2009. There is not entry of a debit balance of K12,931,877.30 as at 28th July, 2009 as claimed by the Defendant and stated by DW2. It is clear from the foregoing documents, which were not challenged by the Plaintiff, that as at 30th June, 2010, the Plaintiff was owing the Defendant the sum of K19,263,039.92 on account number 0334212100010 and K11,713,090.45 as at 9th December, 2009 on account number 0334280050013. I accordingly enter judgment in favour of the Defendant against the Plaintiff in the said sums of k19,263,039.92 as at 30th June, 2010 and

K11,713,090.45 as at 9th December, 2009, or their rebase values. The said amounts to attract in interest at the agreed rate, as is evidence by clause 11 in the mortgage deed which is at page 5 of the Defendant's bundle of documents of 15% above the Defendant's base rate, which interest will be compounded, from date of counter claim to date of judgment. Thereafter at the current bank rate as determined by Bank of Zambia till date of payment. I further order that the Plaintiff should pay to the Defendant the said amounts plus interest within 30 days of the date hereof. Failing such payment the Defendant will be at liberty to possess and sell property known as stand number 10275 Lusaka, provided as security for the overdraft.

In arriving at the order I have made in the preceding paragraph I am alive to the provisions of clause 1 in the mortgage deed which is at page 7 of the Defendant's bundle of documents. The said provision states in part as follows:

"The mortgagor as Beneficial Owner hereby dismisses unto the BANK ALL THAT property described in the schedule hereto.....as security for repayment to the Bank on demand of all monies and liabilities whether certain or contingent now or hereafter owing or incurred to it by THE CUSTOMER on any current account or in any manner whether as principal or surely....."

(The underlining is the Court's for emphasis only).

By the said clause, especially the portion I have underlined, the Defendant is entitled to invoke the provisions of the mortgage deed against the Plaintiff to recover all moneys owing whether on the overdraft account or not. This fact was confirmed by PW in her evidence under cross examination. It is for this reason that I have invoked the provisions of the mortgage deed in respect of account number 0334280050013 as well which was not the overdraft account.

Further, I have order possession and sell of mortgaged property in default of payment because the Plaintiff not only charged the property to the

Defendant under clause 1 of the mortgage which I have cited earlier, but also because the Defendant has a right to sell the property. The said right is contained in clause 4 at page 8 of the Defendant's bundle of documents which states as follows:

"In favour of a purchase the monies hereby secured shall be deemed to have become due when payment thereof is determined by the Bank and the statutory power of sale as hereby varied or extended shall be exercisable from and after that date which date without prejudice to the equitable right to redeem shall be the redemption date."

Further, as a consequence of the said order of sale, the Plaintiff's claim for the return of the title deeds to the property fails.

By way of conclusion, I find that the Plaintiff's claim lacks merit and it fails in its totality. I accordingly dismiss it. The Defendant's claim succeeds to the extent I have stated in the preceding paragraphs. I award the Defendant costs of this action, to be agreed, default taxed.

Leave to appeal is granted

Delivered in Open Court this 30th day of January, 2013.

(SIGNED)

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**NIGEL K. MUTUNA
HIGH COURT JUDGE**

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