IN THE HIGH COURT FOR ZAMBIA **2013/HP/1540**
THE PRINCIPLE REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

JINGTAI ZHOU **1ST PLAINTIFF**

AEOLUS INTERNATIONAL (Z) LIMITED **2ND PLAINTIFF**

AND

NGALASA NGALASA **1ST DEFENDANT**

NTANYI ENTERPRISES LIMITED **2ND DEFENDANT**

Before the Hon. Mrs. Justice A.M. Banda – Bobo on .....day of ....., 2015

FOR THE PLAINTIFFS: Mrs. L. Mushota of Messrs Mushota and Associates.

FOR THE DEFENDANT: N/A

J U D G M E N T

Cases referred to:

1. *Mohamed vs The Attorney General (1982) ZR 49*
2. *Exp Hall.*
3. *Mounsey v Rankin.*
4. *Exp Kensington.*
5. *Bozon v Williams.*
6. *Megary & Wade.*
7. *William Brandt's Son and Co v Dunlop Rubber Company Limited.*
8. *Re Wallis v Simmonds Builders Ltd (1974) I W L R 391.*
9. *United Bank of Kuwait Plc v Sahils and Others (1966) 3 All ER 215 (CA).*
10. *Maddison v Aderson (1881-5) All ER 742 at 750.*

11. *Magic Carpet Travel and Tours Ltd v Zambia National Commercial Bank Ltd[10] (1999) ZR 61*
12. *Re Bethem, Exp Broderick (1886) 18 QBD 380.*
13. *James v James (1873) L R 16 Eq 153.*
14. *Gartift v Allan (1887) 37 Ch D 48 at 50.*
15. *Musonda Receiver of First Merchant Bank Zambia Ltd (in Receivership) v Hyper Food Products Ltd and Others (1999) ZR 124 at 125.*

Works referred to:

1. *Order 35 Rule 3 of the Rules of the High Court Act, Cap 27.*
2. *The Principles of the General Law of Mortgages, 3rd Edition, London, Sweet and Maxwell, 1925.*
3. *Megary and Wade, The Law of Real Property, 7th Edition, London Sweet and Maxwell, (2008).*
4. *Snells Equity, 29th Edition, London, Sweet and Maxwell, 1990.*

By way of Originating Summons and an Affidavit in Support, the Applicants Jingtai Zhou and Aeolus International Zambia Limited brought suit against Ngalasa Ngalasa and Ntanyi Enterprises Limited, Respondents herein claiming the following reliefs:-

a. A declaration that the Applicants are mortgagees in relation to property No L5172/M, Lusaka, the Certificate of Title in the name of the late Gibson Ngalasa deceased father of the 1st Defendant given to them to guarantee repayment of a loan in the sum of K81, 000.00;
b. A declaration that the Plaintiffs are entitled to exercise their rights over the property as the Defendants have failed, neglected or refused to repay the debt;
c. A declaration that the Plaintiff have a right to sell the property that secured the money obtained by the defendant being Number L5172/M;

d. An Order that the Applicants do sell the property Number L5172/M that was used to secure the loan with interest thereon;
e. Further or other remedies as the Court deems fit; and
f. Costs of and occasioned by this suit.

The suit was filed on 15th October, 2013.

According to the Affidavit in Support, the Respondents had obtained money from the Plaintiff on the understanding that they would procure a motor vehicle on his behalf from the Republic of South Africa, as that is the nature of business they were normally engaged in. An initial sum of K56, 000.00 was paid on 5th December, 2012 from the agreed purchase price of K144, 000.00. Another amount of K25, 000.00 was paid upon request from the Defendant while in South Africa which he said he needed to pay for fuel and insurance.

Unfortunately, the vehicle was never delivered. The 1st Defendant then at his own pledge, voluntarily and personally surrendered a Certificate of Title for lot No L5172/M, Lusaka as security for the return of the repayment of the money, turned into a loan.

According to the averments, attempts to pay by cheque, amounts of K31, 000.00 and K40, 000.00 were frustrated as one was stopped and the other bounced due to insufficient funds in the account. Efforts to claim the money without interest in the Subordinate Court failed

due to lack of jurisdiction by the lower Court as the amount was in excess of their jurisdiction, and that the 1st Defendant was convicted for a similar offence of failing to repay money obtained in similar circumstances.

It appears several meetings were called but only one was fruitful where the 1st Defendant attended with his Counsel and at which he admitted and confirmed owing money. However, no payment has been made. It is on that ground that the Plaintiffs want to exercise their right to enforce the security, which is in the name of the 1st Defendant's deceased father. This was by way of Company Resolution in a company meeting dated 30th August, 2013 by the Plaintiffs.

After several scheduled hearing dates at which the 1st Defendant never appeared, because he could not be found, and Counsel upon which service had been effected indicated that he had no instructions to handle the matter, the 1st Defendant appeared in person on 24th July, 2014. No affidavit in opposition had been filed. He asked to be granted an opportunity to retain Counsel. Against protestations by Plaintiffs' Counsel, I allowed, in the interest of justice, an adjournment to enable the 1st Defendant seek legal representation. When the matter came up on 1st September, 2014, he was again in person. I adjourned the matter to 1st October, 2014, at which date, Counsel from a law firm was in attendance, but was unable to proceed firstly, according to him, he had just been retained and so had not put himself on record. He had not yet

researched the file and he beseeched the Court to grant a last short adjournment, which Counsel for the Plaintiff graciously agreed to.

In granting the adjournment, I ordered that the Defendants' Counsel should put himself on record, file an affidavit in opposition, and the Plaintiffs' Counsel to file a reply, that both parties would file their heads of arguments. Based on these documents, I would render judgment. The matter was reserved for judgment on that day.

The Applicants' Counsel filed heads of arguments on 1st October, 2014. As at the time of the judgment, Counsel for the Defendant had not put himself on record. There was no affidavit in opposition and no heads of arguments by the Defendant. This is a rather curious case in which the respondents for reasons best known to themselves did not oppose the application for the relatively large claims against them. Be that as it may, the fact that the plaintiff should prove his claims is no doubt no less significant in a case of this sort. I am fortified by the holding in the case of Khalid ***Mohamed vs The Attorney General (1982)***[1] where Ngulube CJ, as he was then held that:

"An unqualified proposition that a Plaintiff should succeed automatically whenever a defence has failed must prove his case and if he fails to do so, the mere failure of the opponent's defence does not entitle him to judgment. I would not accept a proposition that inanition or for some reason or other, judgment should

nevertheless be given to him on the ground that a defence set up by the opponent has also collapsed."

I am also guided by Order 35 Rule 3 of the Rules of the High Court Act, Cap 27 as I proceed to render judgment based on the evidence before me.

In her submission in support of their case, Mrs. Mushota, the Applicant's Counsel went over their claims as the record will show. There was submission on the genesis of the suit.

It was submitted that after failure to pay back the money, the Plaintiffs demanded interest on it. They then commenced this action, an expression of unequivocal intention to take possession and sell property to recover their money with interest. Further that when the Defendant willingly and voluntarily gave the Certificate of Title for Lot/5172/m as guarantee and security for the repayment of the money, the relationship became that of borrower and lender. That the parties decided to treat their contract as an agreement to lend/borrow money respectively.

It was submitted that the 1st Defendant claimed to have inherited the property from his late father Gibson Ngalasa, but that title had not yet passed to him as beneficiary. Counsel brought the Court's attention to ***Megary and Wade*** the Learned authors of "Law of Real Property", who referred to this situation as equitable mortgage. Counsel stated that the Learned authors say that equitable

mortgage is where the mortgagor, in this case the Defendants, has no legal estate but only an equitable interest. That this arrangement can be referred to as an informal mortgage – *"a simple and effective type of security which gives an equitable interest to a party entitled to specific performance."* Further, that the authors cited the cases of ***Exp Hall***[2] and ***Mounsey v Rankin***[3] at pages 894, where the Courts held the arrangement to be equitable mortgage or informal mortgage.

Further, that the same authors cited the custody of Title Deeds as one of the advantages the mortgagee has. She quoted the same authors at page 892, where they wrote:

> ***"It has always been to the mortgagee's advantage to take into his custody the title deeds of the property, for then any person to whom the mortgagor might try to convey or re-mortgage it would soon discover from the absence of the deeds that there was a prior mortgage. This precaution was of particular importance in the case of equitable mortgage in order to prevent a purchase of a legal estate without notice of the mortgagee's rights...***
>
> ***The expression "title deed" is used in a wide sense, so as to refer to all documents necessary to prove the mortgage title."***

Counsel went on to submit that the Learned authors further stated that depositing title deeds by way of security has been taken both as showing a contract to create a mortgage and also as being part

performance of that contract, even if not a word about such a mortgage has been said. To that effect, my attention was drawn to the cases of **Exp Kensington**[4] and **Bozon v Williams**[5] where it was said:

> ***"A mere deposit of deeds thus creates an equitable mortgage, without any writing. In order to make possible this informal transaction, which proved very useful in commerce, the part performance was stretched beyond its normal limits: the deposit of documents was taken as part performance by both parties, despite the rule that only the person who performs may take advantage of performance. There is therefore no risk of an equitable mortgage by deposit being enforceable on one side only, as may happen in other cases."***

The deposit must be made for the purpose of giving a security; delivery of the deeds by mistake, or to enable a mortgage to be drawn up will not create a mortgage, but it is not essential that all the title deeds should be deposited, provided if the intent is to create a mortgage. Prima facie the deposit will secure noy only the original loan, but also any further advances. There was also submission on the Statute of Frauds, which Counsel said had been dealt with in extensio by the same authors at page 896.

Reverting to the issue of the mortgage of an equitable interest, Counsel drew my attention again to the cited authors of the works of **Megary & Wade**[5] who said that if the mortgager has no legal

estate but only an equitable interest, any mortgage he effects must necessarily be equitable. Further, that at page 894, the authors stated that the actual form of words employed is immaterial provided the meaning is plain, per **William Brandt's Son and Co v Dunlop Rubber Company Limited**[6].

I am indebted to Mrs. Mushota for her submissions and arguments in this matter.

A starting point in this matter is to determine the legal relationship between the parties. J. Andrew Strahan, in his works entitled **The Principles of the General Law of Mortgages, 3rd Edition, London, Sweet and Maxwell, 1925** at page 7, describes a mortgage at common law:-

> ***"as an assurance of a legal interest in land or chattels as a security for the payment of a debt subject to a condition that the assuree will reassure the legal interest to the assuror on the due payment of the debt."***

In later works, the definition of a mortgage has retained the same meaning albeit expressed in modern language. The authors of **Megary & Wade: The Law of Real Property**, 7th Edition, London Sweet and Maxwell, (2008) describe a mortgage, at paragraph 24-001, page 1077 as follows:

> **"The most important kind of security for a debt is a mortgage. The essential nature of a mortgage in its traditional form is that it is a conveyance of a legal equitable interest in property, with a**

provision for a redemption, i.e that upon payment of a loan or the performance of some other obligation stipulated in the mortgage the conveyance shall become void or the interest shall be reconveyed. The borrower is known as the "mortgagor", the lender as the "mortgagee".

Further, John McGhee in **Snells Equity**, 31st Edition (Thomson Reuters (Legal) Ltd, 2005) describes a mortgage at page 778 in the following terms:

> **"A mortgage is a conveyance of some interest in land or other property as a security for the payment of a debt or discharge of some other obligation for which it is given. Where a legal estate is transferred, the mortgage is a legal mortgage. Where only an equitable interest is transferred, whether because the mortgagor has merely an equitable interest or because he uses a form insufficient for the transfer of a legal interest, the mortgage is called an equitable mortgage. On satisfying the obligation in respect of which the mortgage was given, the mortgagor has a right to redeem, that is to recover full ownership in the property..."**

From the above, it is patent that an equitable mortgage is created either because the mortgager has only an equitable interest or because the mortgage is not created with the formalities necessary for the creation of a legal mortgage. The mortgagee in an equitable mortgage does not obtain a legal estate. An equitable mortgage may

arise even if the mortgagor uses a form of conveyance ineffectual to transfer a legal estate, the resulting mortgage will be equitable.

It is trite that if the property being dealt with is land, the agreement to give a charge thereon is required by statute to be in writing. However, it is now settled that a mere deposit of title deeds as security for a loan constitutes an equitable charge on the land. The deposit of title deeds with a creditor to secure a debt gives rise to a presumption that the land is to be charged in equity, even where the debt is owed not by the depositor of the deeds but by a third party. See the case of **Re Wallis v Simmonds Builders Ltd**[7]. If there was an express or implied agreement for a mortgage, the deposit constituted an equitable mortgage on the ground that although the agreement was not evidenced by writing, it had partly been performed. In the case of **United Bank of Kuwait Plc v Sahils and Others**[8], Peter Gibson, L J had this to say:

> **"I accept that there need not be an express contract between the depositor of the title deeds and the person with whom they are deposited for an equitable mortgage to arise..."**

Further,

> **"It is clear that the rule relating to the creation of an equitable mortgage by deposit proceeded on the footing that the act of deposit constituted a sufficient act of part performance of the presumed agreement to mortgage."**

In the earlier case of **Maddison v Aderson**[9], Lord Selborne, L C said that:

> ***"The law of equitable mortgage by deposit of title deeds depended upon the same principles as the cases of part performance...and in each of which a valid contract was an essential feature."***

In **Re Bethem, Exp Broderick**[10], Cane J, said at pages 382-383 that:

> ***"The law on the subject forms a branch of the equitable doctrine of specific performance of oral contract relating to land based on part performance. It has been held that there is an inference from the mere deposit of title deeds that it was intended to give an interest in the land and in that way there is something more than a mere oral contract, something in the nature of part performance so as to take the case out of the statute fraud."***

In the Zambian case of **Magic Carpet Travel and Tours Ltd v Zambia National Commercial Bank Ltd**[11], Silomba J as he was then:

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

In order to create an equitable mortgage, it is sufficient if the deeds deposited are material to the title and are proved to have been deposited with the intention of thereby creating a mortgage.

In the matter in casu, it has been stated that the Applicants had commissioned the 1st Defendant, and his company the 2nd Defendant, whose nature of trade was the supply of motor vehicles, to procure a vehicle for him, at a total cost of K144, 000, 000, inclusive of duty and registration. According to the undisputed evidence on record, a total sum of K81, 000, 000.00 paid at two different intervals was remitted to the 1st Defendant. However, it appears that the 1st Defendant did not procure the vehicle and the Applicant demanded his money back. Efforts were made by the 1st Defendant to refund the money through the issuance of two cheques, but unfortunately one bounced while the other was withheld by the 1st Defendant due to insufficient funds. It appears all efforts to recover this money failed.

In the process, the 1st Defendant gave willingly and voluntarily, the Certificate of Title for lot 5172/M as guarantee and security for the repayment of the money. Having looked at the process for creation of a mortgage, I believe that the aspect of depositing the title deeds with the Applicant herein created an equitable mortgage. This is so because the 1st Respondent only has an equitable interest in the property whose Certificate of Title he handed over to the Applicants, thereby turning their relationship into one of lender and borrower. The equitable mortgage thus created used a form that was ineffectual to transfer legal title to the Applicants herein as the

same was contrary to the norms for creation of a legal mortgage. The deeds deposited are material to the title, and it is safe to state that the intention of depositing them with the lender was to create a security for the repayment of the money due, and that deposit constituted part performance. There is something more than a mere oral contract, something in the nature of part performance so as to take the case out of the Statute of Fraud.

There has been no allegation that the Applicant herein got hold of the title deeds in a manner other than that it was voluntarily and willingly handed over. In other words, there has been no allegation of fraud in the way the Applicant ended up having custody of the title. It can only in the circumstances, be because these were freely given to them.

I find proved that the relationship between the Plaintiffs and Defendants is that of lender and borrower, which created an equitable mortgage after the deposit of title deeds with the lender by the borrower. That deposit, to all intents and purposes was to guarantee the repayment of the loan in the sum of K81, 000.00.

Having so found, the question to ask is what remedies the applicant has in such a situation.

In dealing with this issue, P.V. Baker and P. St. J. Langan, in their work, **Snells Equity, 29th Edition**, London, Sweet and Maxwell, 1990, at page 447 states that:

"There is nothing to prevent an equitable mortgagee or charge from exercising the powers given by the law of Property Act, 1925...But even if the memorandum of deposit is under seal, it has been held that a mere equitable mortgage cannot transfer the legal estate by virtue of his Statutory power. The memorandum should therefore contain some conveyancing device for that purpose, such as an irrevocable power of authority given by the mortgagor to the mortgagee to convey the legal estate. If there is no such power of sale, as where there is a mere equitable mortgage by deposit of title deeds the Court may order a sale."

Megary and Wade: The Law of Real Property[5] at pages 1125-1127, sets out the extent of the remedies exercisable by an equitable mortgagee, namely, foreclosure, sale, possession and appointment of a receiver. It has been stated therein that foreclosure is the primary remedy for an equitable mortgage since he has no legal estate. If there is an equitable mortgage, by deposit of title deeds, the mortgagee may foreclose. The case of **James v James**[13] is instructive on this point.

On the remedy of possession, an equitable mortgagee has no right to take possession because he has no legal estate, save by way of a Court Order. See the case of **Gartift v Allan**[14].

On the remedy of appointment of a receiver, an equitable mortgagee has always had the right to have a receiver appointed by the Court in a proper case. I take heed of the observations by the then Chief Justice Ngulube in the case of **Musonda Receiver of First Merchant Bank Zambia Ltd (in Receivership) v Hyper Food Products Ltd and Others**[15] where he stated that:

> **"Foreclosure and sale are two distinct and separate remedies though admittedly both are remedies primarily for the recovery of Capital in contradiction with the taking of possession on the appointment of a receiver which are remedies primarily for the recovery of interest. Further, a foreclosure decree absolute extinguishes the equity of redemption and vests the mortgagor's entire interest in the property in the mortgagee so that the mortgagor's property belongs to the mortgagee absolutely. Sale on the other hand is usually more appropriate where the property mortgaged is worth substantially more than the mortgage debt."** (Underline by Court for emphasis only)

In the matter in casu, the Applicants have among others, claimed a declaration that they are entitled to exercise their right over the property, as the Defendants have failed, neglected or refused to repay the debt, that they have a right to sell the property that secured the money obtained by the Defendant, being number L5172/M and an order that the Plaintiff do sell the said property No 5172/M that was used to secure the loan with interest thereon.

After due consideration of the various authorities cited herein, I am of the considered opinion that the Plaintiffs are entitled to a declaration to exercise their right over the property. Further, they have a right to sell this property that was pledged as security for the money. I am fortified in holding that they can sell by the holding in the cited case of ***Musonda v Hyper Food Products Ltd***[15] where it was said that:

> ***"Sale on the other hand is usually more appropriate where the property mortgaged is worth substantially more than the mortgage debt."***

In this case, the Plaintiffs are owed a sum of K81, 000.00. The property in issue is in the extent of 3.6459 Hectares. It is common knowledge that the cost of land in Lusaka is quite high, and therefore it would be safe to state that the value of this property is substantially more than K81, 000.00 plus interest that was secured.

Thus even though the net effect of most of the authorities considered herein on the remedies is that an equitable mortgagee does not have the power to sell property but the power to foreclose, I believe on the facts of this case the proper order to make is that the property be sold so that the Plaintiff can recover their money. This is because, the property is substantially worth more than the Plaintiff's claim, including interest. It would be unjust to order a foreclosure in the circumstances. I believe the Plaintiff were aware of this and that is why they did not ask for this remedy.

In the circumstances, I find that the Plaintiffs have proved their case and I grant them the reliefs sought. Costs follow the event to be taxed in default of agreement.

Leave to appeal is granted.

Delivered at Lusaka this .....day of ....., 2015

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MRS. JUSTICE A. M. BANDA-BOBO
HIGH COURT JUDGE