**IN THE HIGH COURT FOR ZAMBIA** **2016/HPC/0598**

**AT THE COMMERCIAL REGISTRY**

**HOLDEN AT LUSAKA**

(Civil Jurisdiction)


**BETWEEN:**

**ECOBANK ZAMBIA LIMITED** **PLAINTIFF**

**AND**

**YOSHIMI MKANDAWIRE NGOSA** **1ST DEFENDANT**
**SATO TOMY NGOSA** **2ND DEFENDANT**

**Before the Honourable Mr Justice W.S Mweemba at Lusaka in Chambers.**

*For the Plaintiff:* *Ms S. Nyirenda Eco Bank in House Counsel.*

*For the Defendants:* *Mrs F. Muchiya- Messrs Barnaby & Chitundu Advocates.*

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## RULING

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**LEGISLATION REFERRED TO:**

1. **Rules of the Supreme Court of England 1965, 1999 Edition (White Book).**
2. **Halsbury's Laws of England (4th Edition, 1993) Vol 20 par 159.**
3. **The High Court Rules, Cap 27 of the Laws of Zambia.**

**CASES REFERRED TO:**

1. **Moschi v Lep Air Limited (1973) AC 336.**
2. **Development Bank of Zambia & Mary Ncube (Receiver) V Christopher Mwanza & 63 Ors SCZ/8/103/08.**
3. **Bank of Zambia v Jonas Tembo & Ors (2002) ZR 103.**
4. **Selly Yoat Asset Management Limited v Remotesite Solutions Zambia Limited (2010) 2 ZR 35.**

5. **MTN Zambia Limited v Investrust Bank PLC (Appeal No. 155/2015) ZMSC 36 (9th March, 2016).**
6. **Chimumbwa & Anr (Mofu Industries Ltd) v Development Bank of Zambia and Bapu Construction Limited (2012) ZMHC 35.**
7. **Attorney General v Aboubacar Tall & Zambia Airways Corporation Ltd (1995) S.J (S.C).**
8. **China and South Sea Bank Ltd V Tan Soon Gin (1990) AC 536.**

This is a Ruling on four Preliminary Issues raised by the Defendants pursuant to **Order 33 Rule 3** as Read with **Order 14A Rule 1 of the Rules of the Supreme Court of England 1965, (1999 Edition)**. The issues raised were as follows:

1. *Whether or not this matter should be dismissed for being Res Judicata as the amount sought by the Plaintiff from the Defendant was already recovered by the Plaintiff in a Mortgage action commenced under Cause No. 2012/HPC/0598 through the sale of the Mortgaged Properties.*

2. *Whether or not the Plaintiff can enforce the personal guarantees against the Defendants when the Loan was already settled by the Principal Debtor Millennium Importers and Logistics Limited through a repossession and sale of the Mortgaged Properties by virtue of Judgment obtained by the Plaintiff under Cause No. 2012/HPC/0598.*

3. *Whether or not the Plaintiff can pursue the Defendants in their capacity as guarantors for Millennium Importers and Logistics Limited without first rendering an account of the sale of the Mortgaged properties to the Mortgagors as required by the Third Party Mortgage and thereafter demanding by way of a letter settlement of the balance from firstly, the Principle Debtor and thereafter the Guarantors.*

4. *Whether or not this matter should be dismissed for irregularities and abuse of Court process.*

The Notice to Raise Preliminary Issues was supported by an Affidavit sworn by Yoshimi Mkandawire Ngosa the 1st Defendant and Skeleton Arguments filed into Court on 23rd March, 2017.

It is deposed by Mr Ngosa that Millennium Importers and Logistics Limited was offered two facilities by the Plaintiff; namely a Short Term Loan of ZMK140, 000.00 granted on the 21st of September, 2010 as working Capital for the construction of the Kafubu Block Rural Local Court in Luanshya District and a Purchase Finance Facility in the sum of K220, 000.00 granted on 1st November, 2010.

Mr Ngosa further deposed that the two facilities were secured by, two Third Party Mortgages over Stand KS/4331 Kabushi Ndola and Subdivision No. 553 of Farm No. 931, Mufulira, respectively and that the facilities were under Comprehensive Insurance. That apart from this they were secured by an Assignment of receivables by Millennium Importers and Logistics Limited in respect of the proceeds from the business as well as the Director's Personal Guarantees. That domiciliation of receivables from Ministry of Works and Supply also secured the Plaintiff's interest.

Further, that sometime in 2012, Millennium Importers & Logistics Limited started defaulting to settle its monthly instalments as agreed by the parties in the facility letters due to financial constraints and as such the Plaintiff took out Legal action against it to enforce the first security under the facilities.

He also stated that on 22nd October, 2012 a Mortgage action was instituted by the Plaintiff against Millennium Importers and Logistics Limited under Cause Number 2012/HPC/0598 seeking among other reliefs payment of the sum of ZMW570,801,605.48 and delivery up of the property comprised under the two (2) Third Party Mortgages over Subdivision No.553 of Farm No.931 Mufulira and Plot No. KS/4331, Ndola collectively and respectively. A copy of the Originating Summons and the Affidavit in Support were exhibited marked *"YMN1"*.

It is also deposed that on 16th January, 2013 this Court entered Judgment in favour of the Plaintiff against Millennium Importers & Logistics Limited in the sum of K570, 801,605.48 and further ordered that if the Judgment sum would not be paid within sixty (60) days, the Plaintiff was at liberty to take possession of the two properties pledged as security for the loan. A copy of the said Judgment was exhibited marked *"YMN2"*.

Mr Ngosa also averred that on 10th April, 2013 the Plaintiff foreclosed the Mortgaged Properties being Sub Division No. 553 of Farm No. 931 Mufulira and Plot No. KS/4331 Ndola as evidenced by the Writ of Possession and the Praecipe for Writ of Possession collectively exhibited as *"YMN3."* Further that the two Mortgaged Properties were repossessed and sold by the Plaintiff to recover the Judgment sum.

Further that he had been informed by his Advocates and believed that the Plaintiff was required by law to render an account of the proceeds of the sale from the Mortgaged Properties, but the Plaintiff had not done so therefore it could not come back to enforce the personal guarantees as the debt had been paid in full from the proceeds of the sale of the two properties.

He also stated that he had been informed by his Advocates and believed that his liability as Guarantor for Millennium Importers and Logistics Limited was secondary and he could only be liable to pay the amount claimed by the Plaintiff if it was not settled by the Principal Debtor. Moreover that since the Principal Debtor paid the Judgment sum in full under Cause Number 2012/HPC/0598 the Defendants were not liable to pay the amount claimed by the Plaintiff.

That he was informed by his Advocates and believed that the claim by the Plaintiff in the sum of K621, 992.19 was Res Judicata as the monies being claimed were already recovered by the Plaintiff in full under Cause Number 2012/HPC/0598.

Moreover that since the two facilities were insured at a cost by the Principal Debtor, the Plaintiff should recover its funds (if any were to be recovered)

from the Insurance Company that issued the Insurance Cover Note and not the Defendants.

There is also an Affidavit in Opposition to the Notice filed into Court on 13th April, 2017 sworn by Themba Lusengo the Head of Early Warning and Remedial Recovery of the Plaintiff.

He stated that after taking possession of the Mortgaged Properties and disposing of same only K185, 000.00 on 6th January, 2015 and ZMW90, 000.00 on 30th September, 2016 was realised from the sale of the properties, leaving the Judgment sum now outstanding which the Plaintiff now claims from the Defendants. A copy of the Statement of Account showing computations of interest on the Judgment sum and all monies received thereon is exhibited marked *"TL1"*.

It is further deposed that the Personal Guarantees for payment by the Defendants in Clause 2 specifically pledged that the Plaintiff had the right to pursue the Defendants at any time whether it had pursued the principal debtor or not.

That the clause read, as follows: **"we unconditionally and irrevocably undertake to honour upon presentation by you all contractual obligations in respect of the facility owed by the Customer to you as they become due without requiring you to first of all pursue any remedies against the customer for no- payment or default of any of its contractual obligations to you."** A copy of the Personal Guarantee exhibited by the Defendants is exhibited marked *"TL2"*.

It is also deposed that the Judgment sum under cause 2012/HPC/0598 has to date not been fully settled as there still remains ZMW621,992.19 outstanding after the sale of the mortgaged properties as can be seen on the Statement of Account exhibited and marked *"TL1"*.

Moreover that the facilities were not insured but rather the property held as security and the Plaintiff demanded that any other such insurance be proved. That nonetheless the Plaintiff relied on the clauses of the Guarantee

which gave the Plaintiff the right to pursue the Defendants at any time upon default without needing to pursue any other persons or security first.

That Clause 11 of the Guarantee exhibited to the Affidavit in Opposition marked *"TL2"* provided that, **"This Guarantee shall be in addition to any other guarantee or security for the customer which you may now or hereafter hold whether from them or any other person."**

Mr Lusengo also stated that the Plaintiff sent a letter of Demand to the Defendants last known address before commencing this action but received no response.

There is also an Affidavit in Reply filed into Court on 24th April, 2017 and deposed to by Mr Yoshimi Mkandawire Ngosa aforesaid.

It is deposed that the two Mortgaged Properties were valued at ZMK390,000,000.00 and ZMK180,000.00 respectively at the time the loan of K220,000,000.00 was granted to Millennium Importers and logistics Limited by the Plaintiff, and therefore the Plaintiff could not realize a value less than the market value of the two properties after the sale. Exhibit *"YMN1"* was a true copy of the Preliminary Term Sheet dated 10th October, 2011 indicating the value of the Mortgaged Properties.

It is further stated that he was informed by his Advocates and believed that the Plaintiff was under an obligation to render account of the proceeds of the sale of the mortgaged properties and having failed to do so the Plaintiff was estopped from claiming any monies from the Defendants.

That if indeed the Personal Guarantees provided that the Plaintiff had the right to pursue the Defendants at any time whether it had pursued the Principal Debtor or not, the Plaintiffs would have sued the Defendants in the cause herein, in the same action with the Principal Debtor under Cause No. 2012/HP/0598 to avoid a multiplicity of actions.

That the sum claimed by the Plaintiff was not within the knowledge of both the Principal Debtor and the Guarantors because the duo believed that the amount claimed by the Plaintiff under Cause No. 2012/HPC/0598 was

recovered from the sale of the Mortgaged Properties in that the balance of debt owing after the sale of the Mortgaged properties was never brought to the attention of both the Principal debtor and the Guarantors.

That he had been informed by his Advocates and believed that the Plaintiff sat on its rights to pursue the Defendants on the Guarantees as it ought to have sued the Defendants under Cause No. 2012/HPC/0598.

In the Skeleton Arguments filed in support of the Notice to raise Preliminary Issues on 23rd March, 2017, Counsel for the Defendants stated that it was a well – established principle of law that at common law a Guarantor had two kinds of liability, namely; a promise by the Guarantor which becomes effective if the Principal debtor failed to perform his obligation and a promise that the Principal Debtor would perform his obligation.

Counsel relied on the case of **MOSCHI V LEP AIR SERVICES LIMITED & ANR (1)** where the House of Lords held that:

> **"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".**

Counsel then submitted that it was clear from the foregoing that the liability of the Defendants in this case as Guarantors for Millennium Importers and Logistics Limited was secondary. Therefore, the Defendants could only be called upon to settle Millennium Importers and Logistics Limited's liability to the Plaintiff upon its default.

Counsel then stated that the record under Cause Number 2012/HPC/0598 clearly showed that on 10th April, 2013 the Plaintiff foreclosed the Mortgaged Properties being Subdivision No.553 of Farm No. 931 and Plot No. KS/4331, Ndola which was evidenced by the Writ of Possession and the Praecipe for Writ of Possession collectively produced and marked *"YMN3"* in the Defendant's Affidavit in Support of the application, to recover the amount being claimed by the Plaintiff in this case.

According to Counsel, due to this the Plaintiff could not enforce the Personal Guarantees against the Defendants because monies claimed by the Plaintiff were recovered under Cause No. 2012/HPC/0598. That the Principal Debtor never failed to settle the debt, and therefore the Defendants were not liable to the Plaintiffs as their liability would only arise if Millennium Importers and Logistics Limited failed to settle its indebtedness.

Further that there was overwhelming evidence establishing that the Plaintiff repossessed two properties pledged as security for the loan under Cause Number 2012/HPC/0598, and sold them as Mortgagee in Possession to recover ZMW570, 801.61 being the outstanding balance, and interest on the two facilities availed to Millennium Importers and Logistics Limited in the respective sum of ZMK140,000.00 and ZMK220,000.00.

Counsel then urged this Court to dismiss the matter as the Plaintiff would be unjustly enriched if this Court proceeded with the matter and awarded the Plaintiff the reliefs sought in this case.

That even if the monies claimed by the Plaintiff were not fully recovered under Cause Number 2012/HPC/0598, the Plaintiff could not bring an action to enforce the Personal Guarantees without first rendering an account of the proceeds of the sale realized from the mortgaged properties under the Cause Number 2012/ HPC/0598.

According to Counsel, after the repossession of the two properties under Cause Number 2012/ HPC/0598, the Plaintiff never accounted to Millennium Importers and Logistics Limited the total sum realized from the

sale of the Mortgaged Properties. Further that since an account of the sale had not been made by the Plaintiff the Defendants could not be compelled to settle the outstanding debt being claimed by the Plaintiff as there was a presumption that the Plaintiff recovered all its monies from the sale of the properties. It was further contended that it was a mandatory requirement of the law for the Plaintiff to have rendered an account to the Principal Debtor to ascertain whether the sum claimed by the Plaintiff was fully recovered from the proceeds of the sale of the Mortgaged properties.

It was Counsel's submission that the Plaintiff could not come back to this Court after 3 years to enforce the Personal Guarantees against the Defendants without first rendering an account to the Principal Debtor of the proceeds of the sale of the Mortgaged properties aforesaid because the Defendants who were the Guarantors for the Principal Debtor and the Principle Debtor itself; Millennium Importers and Logistics Limited reasonably believed that the debt was paid in full.

Counsel then cited the case of **DEVELOPMENT BANK OF ZAMBIA & MARY NCUBE (RECEIVER) V CHRISTOPHER MWANZA & 63ORS (2)** where it was observed by the Supreme Court of Zambia that:

> **"There must be finality to litigation and a party that is clearly in default should reap the consequences of its inertia and cannot be allowed to roam the courts like a headless chicken keeping the other party in suspense, moreso that the party was represented by Counsel."**

He also cited the case of **BANK OF ZAMBIA V JONAS TEMBO & ORS (3)** where it was held by the Supreme Court that there should be an end to litigation. Based on this Counsel contended that this matter having been determined under Cause Number 2012/HPC/0598 as confirmed by the Plaintiff in paragraph 5 of its Statement of Claim, this Court should not allow the Plaintiff to prosecute the case any further as it was *Res Judicata*.

Lastly it was Counsel's prayer that this Court dismisses this matter on the grounds stated in the Notice to Raise Preliminary Issues and that this Court condemns the Plaintiff to costs.

Counsel for the Plaintiff also filed Skeleton Arguments to oppose the Notice to raise Preliminary Issues. Regarding the Defendants' submission that the Guarantor's liability was secondary to the principal debtor's liability and that the Plaintiff could only pursue the Defendant when the Principal Debtor failed to settle the debt, it was submitted that, the determination of the Guarantor's liability and when it rises should be determined by the substance of the agreement. That in the case of **MOSCHI V LEP AIR SERVICES LIMITED (1)** Lord Diplock stated that **"Every case should depend upon the true construction of the actual words in which the promise is expressed"**.

Further still that in the case of **SELLY YOAT ASSET MANAGEMENT LIMITED V REMOTESITE SOLUTIONS ZAMBIA LIMITED (4)** it was held that **"the cardinal presumption is that the parties have intended what they have in fact said so that their words must be construed as they stand. The meaning of a document or a particular part of it is sought in the document."** Counsel argued that these were the principles that were used by the Supreme Court in **MTN ZAMBIA LIMITED V INVESTRUST BANK PLC (5)** when they enforced the Guarantee in question.

Counsel also cited Paragraph 159 of the Halsbury's Laws of England, Volume 20, 4th Edition which states that it is not mandatory to give notice of the principal debtor's default to the surety. This is so because: **"...he is liable without being requested to pay, in the absence of a stipulation to the contrary, express or implied or of circumstances rendering a demand upon him a legal obligation. It is not necessary for the creditor, before proceeding against the surety, to request the principal debtor to pay or to sue him, although solvent, unless this is expressly stipulated for..."**

With regard to the Defendants' assertion that the guarantees can only be enforced after exhaustion of remedies against the principal debtor or after pursuit of insurance purportedly had over the facilities Counsel submitted that in the case of **CHIMUMBWA & ANR (MOFU INDUSTRIES LTD) V DEVELOPMENT BANK OF ZAMBIA AND BAPU CONSTRUCTION LIMITED (6)** the High Court held that there was no fault in the Bank's decision not to enforce the mortgage before resorting to the Guarantee. In that case there existed a clause in the exact form as Clause 11 of the Personal Guarantees exhibited as *"TL2"* which read thus:

> **(This Guarantee shall be in addition to any other guarantee or security for the customer which you may now or hereafter hold whether from us or from any other person.)** The High Court stated that, **"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".**

On the issue of Res Judicata Counsel for the Plaintiff stated that he agreed with the authorities presented by Counsel for the Defendant that there should be an end to litigation, however that this was not a proper case in which to apply this principle.

Counsel went on to state that the Defendants Notice to Raise Preliminary Issues be dismissed with costs for lacking merit. Moreover that it was clear from the Defendant's Affidavit, Notice and Arguments that the Defendants were not disputing owing the Plaintiff but only that they could not be pursued until exhaustion of remedies against the Principal Debtor.

Further that since it had been shown that this position was incorrect and that the Plaintiff was well within its rights, Counsel sought the indulgence of this Court to consider entering Judgment on Admission as permitted by Order XXI Rule 5 of the High Court Rules, Cap 27 of the Laws of Zambia which provided that:

**"If any defendant shall sign a statement admitting the amount claimed in the summons or any part of such amount, the Court or a Judge, on being satisfied as to the genuineness of the signature of the person before whom such statement was signed, and unless it or he sees good reason to the contrary, shall, in case the whole amount is admitted, or in case the plaintiff consents to a judgment for the part admitted, enter judgment for the plaintiff for the whole amount or the part admitted, as the case may be, and, in case the plaintiff shall not consent to judgment for the part admitted, shall receive such statement in evidence as an admission without further proof."**

That this provision was supplemented by Order 27 Rule 3 of the Rules of the Supreme Court of England, 1999 Edition (White Book) which provides that:

**"Where admissions of fact or of part of a case are made by a party to a cause or matter either by his pleadings or otherwise, any other party to the cause or matter may apply to the Court for such judgment or order as upon those admissions he may be entitled to, without waiting for the determination of any other question between the parties and the Court may give such judgment, or make such order, on the application as it thinks just."**

Lastly Counsel for the Plaintiff highlighted important clauses of the guarantee as follows:

Clause 8, **"No failure on your part or delay in exercising any right hereunder shall operate as a waiver thereof, nor shall partial exercise of a right preclude any other or further exercise of such right.**

Clause 10: **"A certificate by an Officer of Ecobank as to the sum for the time being owing to you by the Customer shall be conclusive evidence in any legal proceedings against us."**

Clause 2: **"We unconditionally and irrevocably undertake to honour upon presentation by you all contractual obligations in respect of the facility owed by the Customer to you as they become due without requiring you to first of all pursue any remedies against the customer for no- payment or default of any of its contractual obligations to you."**

During the hearing on 26th May, 2017 both Counsel for the Plaintiff and Counsel for the Defendants were before Court. Counsel for the Defendants relied on the notice filed on 23rd March, 2017, the Affidavit in Support of the Notice and Skeleton Arguments as well as Affidavit in Reply to Affidavit in Opposition filed on 24th April, 2017.

Counsel for the Plaintiff relied on the Affidavit in Opposition, Skeleton Arguments filed into Court on the 13th of April, 2017.

I have considered the affidavit evidence, the skeleton arguments, the authorities cited and oral submissions made by both learned Counsel for the Defendants and the Plaintiff.

The main issue for determination by this Court is whether or not this matter should be dismissed on account of the preliminary issues raised by the Defendants.

The first issue raised by the Defendants was whether this matter should be dismissed for being Res Judicata considering that the amount sought by the Plaintiff was reportedly already recovered in a Mortgage action commenced under Cause No. 2012/HPC/0598 through the sale of the Mortgaged Properties.

In response to this it has been stated by the Plaintiff that this was not a proper case to apply this principle as despite the subject matter being the same the parties were different and the Plaintiff commenced this action rather than join the parties to the proceedings not only on the strength of the wording of the guarantee which permitted it to pursue the Guarantors at any time but also on the strength of the case of the **ATTORNEY GENERAL V ABOUBACAR TALL AND ZAMBIA AIRWAYS CORPORATION LTD (7)**

where the Court held that a party could not be joined to proceedings after judgment.

It was further argued that the Plaintiff brought this case against the Defendants because the latter were Guarantors in a loan facility that was given to Millennium Importers and Logistics Limited.

*Res Judicata* is the principle that a matter may not generally, be re-litigated once it has been judged on the merits. It is trite that under the doctrine of *Res Judicata* a judicial decision is conclusive as between the parties although other parties may not be bound. In *casu* the 1st Defendant and 2nd Defendant were not parties to cause No. 2012/HPC/0598 and as such they are not bound by the Court's decision in that Cause. I am of the considered view that the Court's Judgment in Cause No. 2012/HPC/0598 does not bind the Defendants in the case herein. I am in this regard fortified by the learned authors of **HALBURY'S LAWS OF ENDLAND, Fourth Edition Reissue, Volume 20** who state thus at paragraph 150:

> **"Evidence of surety's liability. In an action against the surety by the creditor, a judgment or award obtained by the creditor against the principle debtor is not evidence against the surety; but the principal debtors' admissions of liability in such proceedings will be evidence if the requirement of the Civil Evidence Act 1968 are complied with".**

If follows that the Plaintiff's action herein as creditor against the Respondents as guarantors or sureties cannot be dismissed for being *Res Judicata*.

In my view there is no dispute that the Defendants herein were both Guarantors of the facilities that were given to Millennium Importers and Logistics Limited by the Plaintiff. Therefore since a Guarantor is liable for the debt or default of another (the Principal Debtor) who is the party primarily liable for the debt, I find that the Plaintiff was on firm Ground to

pursue the Guarantors where the principal debtor did not completely settle the debt as claimed by the Plaintiff in commencing this case.

Moreover a matter can only be *Res Judicata* once it is completely settled by a Court and in this case this will happen once there is no question on whether or not the Principal Debtor and Guarantors have completely settled the debt in question.

On the second Preliminary Issue this court was tasked to determine whether or not the Plaintiff could enforce the personal guarantees against the Defendants when the loan was already settled by the Principal Debtor.

The Defendants argued that the Plaintiff repossessed two properties pledged as security for the loan under Cause Number 2012/HPC/0598 and sold them as Mortgagee in Possession to recover the outstanding balance and interest on the two facilities availed to Millennium Importers and Logistics Limited.

Further that after the sale of these properties no account was made by the Plaintiff on the proceeds of the sale of the Mortgaged Properties which left a presumption that the Plaintiff recovered all its money from the sale of the properties.

In response the Plaintiff stated that after taking possession of the properties and disposing them only ZMW185, 000.00 and ZMW90, 000.00 was realized from the sale of the properties leaving the judgment sum outstanding which the Plaintiff has now claimed from the Defendants as guarantors.

That exhibit *"TL1"* was a Statement of Account showing computations of interest on the judgment sum and all monies received.

The Third Preliminary Issue was whether or not the Plaintiff could pursue the Defendants in their capacity as Guarantors for Millennium Importers and Logistics Limited without first rendering an account of the sale of the Mortgaged Properties to the Mortgagors and thereafter demanding by a letter settlement of the balance from the Principal Debtor then the Guarantors.

The Plaintiff in responding to this issue contended that it was incorrect for the Defendants to assert that the guarantees could only be enforced after exhaustion of the remedies against the principal debtor or after pursuit of insurance purportedly had over the facilities.

I intend to deal with the second and third Preliminary Issues raised by the Defendants together as the issues raised therein are inter-related.

I find it necessary from the outset to state that the assertion by the Defendants that the Plaintiff ought to have sued the Defendants in the same action as the Principal Debtor under Cause No. 2012/HP/0598 to be a misconception. A creditor is not obligated to join a guarantor or surety to an action he brings against the principal debtor. This is so because although the guarantors liability to the creditor is co-extensive with the liability of the principal debtor to the creditor, the principal debtors liability is not a suretyship liability. A guarantee, being merely an accessory contract, does not, even when under seal, cause a merger with it of the principal debtor's simple contract debt to which it relates. The principal debtor and the guarantor or surety are not jointly liable to the creditor and as such the creditor need not join the guarantor to the action the creditor brings against the principal debtor for payment of the debt due to the creditor. Regarding the lack of privity between the guarantor and the principal debtor the learned authors of **HALSBURY'S LAWS OF ENGLAND, Fourth Edition Reissue Volume 20** at paragraph 103 state as follows:

> **"Although sometimes bound by the same instrument as his surety, the principal debtor is not a party to the surety's contract to be answerable to the creditor: there is not necessarily privity between the surety and the principal debtor; they do not constitute one person in law, and are not as such jointly liable to the creditor, with whom alone the surety contracts".**

I find and hold that the Plaintiff was not required to join the Defendants to its mortgage action against Millennium Importers and Logistics Limited (the principal debtor) in Cause No. 2012/HPC/0598.

The Defendants contend that the banking facilities that the Plaintiff availed to Millennium Importers and Logistics Limited a total of K360,000.00 (being Short Term Loan of K140,000.00 and Order Finance Facility of K220,000.00) plus interest were paid in full under Cause No. 2012/HPC/0598 and as such they are not liable to pay the amount of K621,992.19 plus interest being demanded by the Plaintiff.

Payment made by the principal debtor of the guaranteed debt will normally discharge the guarantor or surety. Whether a payment is accepted by a creditor in full satisfaction of a guaranteed debt is a question of fact which may depend, for example, upon the form of receipt given. In *casu* it is common cause that consequent upon the Plaintiff's mortgage action against the principal debtor the mortgaged properties were sold. The Plaintiff says that it realised a total of K275,000.00 from the sell of the two Mortgaged Properties. A copy of the Statement of Account showing that one property was sold for K185,000.00 and the other for K90,000.00 is exhibited to the Affidavit in Opposition to Notice to Raise Preliminary Issues marked *"TL1"*.

The Defendants on the other hand assert that as the Mortgaged Properties were at the time that the banking facilities were availed to the principal debtor valued at K390,000.00 and K180,000.00 respectively, the Plaintiff could not have realised values less than the market values of the two properties after the sale. No reasons have been given for this assertion.

It is common knowledge that when properties are being sold by mortgagees in possession it is usual to realise prices which are below the estimated open market values and hence the provision in valuation reports for Forced Sale Values. There are no reasons given by the Defendants for me to doubt the assertion by the Plaintiff that it only realised a total of K275,000.00 from the sell of the Mortgaged Properties.

It is trite that a mortgagee is not a trustee for the mortgagor as regards the exercise of power of sale. 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. The learned authors of **HALSBURY'S LAWS OF**

**ENGLAND, Fourth Edition Reissue, Volume 32** at paragraph 726 states as follows regarding the mode of exercise of the power of Sale by a mortgagee:

> **"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 realising 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. <u>This duty to obtain a proper price is owed also to subsequent mortgagees, but not to a surety</u>. 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".**

In the case of **CHINA AND SOUTH SEA BANK LIMITED V TAN SOON GIN (8)**, Lord Templeman, delivering the advice of the Privy Council, held that a creditor owed the surety no duty to exercise his power of sale over mortgaged securities, which meant that the surety was not discharged from liability by a reduction in the value of the securities which resulted from the creditor's delay in selling them.

It is clear from the foregoing authorities that the Plaintiff does not owe the Defendants a duty to obtain a proper price from the sale of the mortgaged property. It follows that the manner in which the Plaintiff realised the mortgage security it held with regard to the banking facilities it availed to the Principal Debtor cannot be used by the Defendants as a defence in the Plaintiff's action on the Guarantee executed by them.

The Defendants are not discharged from liability under their joint Guarantee by a reduction in the value realised from the sale of the 2 Mortgaged Properties.

The Defendants raise the issue of the need for a mortgagee who realises his mortgage security to render an account. They contend that the Plaintiff

cannot pursue them under the Guarantee until it renders an account of the sale of the Mortgaged Properties to the mortgagors. They say that this is a requirement under the Third Party Mortgage.

It is not in issue that the Plaintiff Bank pursuant to the Court's Judgment of 16th January, 2013 sold the mortgaged properties. The relation of mortgagor and mortgagee is terminated by redemption, foreclosure or the accounting for the proceeds of realisation, and proceedings for any of these purposes involve the taking of an account between the mortgagor and mortgagee.

**Order 43 Rule 1 of the Rules of the Supreme Court of England 1965, White Book (1999 Edition)** empowers the Court to make an order that an account be taken. Order 43 (1) provides for Summary Order for Account. It empowers the Court to hear such applications and make an order that an account be taken and order that the certified amount be paid to either party (i.e. either the mortgagee or the mortgagor).

According to **HALSBURY'S LAWS OF ENGLAND, Fourth Edition, Volume 32** Paragraph 998 the proceedings for redemption or foreclosure or the accounting for the proceeds of realisation involve the taking of an account between the mortgagor and the mortgagee. In such an account the mortgagor is debited with principal and interest, and also with the costs, charges and expenses incurred by the mortgagee in relation to the mortgage security. The Mortgage Deed is construed as the basis of settling the account.

In *Casu*, the Mortgagors have not sought an account of the proceeds of sale or realisation of the Mortgaged Properties namely Stand No. KS.433.Kabushi Ndola and Subdivision No. 553 of Farm No. 931 Mufulira. As the Mortgagors have not applied to the Court for an account to be taken between themselves and the Plaintiff Bank as mortgagee pursuant to **Order 43 of the Rules of the Supreme Court of England, 1965** cited above the Court has not ordered that an account be taken. The lack of an account cannot be blamed on the Applicant Bank because the Mortgagors are at

liberty to institute proceedings for the accounting for the proceeds of realisation.

The Defendants further contend that because no account was made by the Plaintiff after the sale of the mortgaged properties there is a presumption that the Plaintiff recovered all its money from the sale of the properties. No legal basis was given for this presumption which in my view is unjustified. The issue as to the taking of an account of what is due to the Plaintiff Bank as mortgagee under its mortgage security will be determined when an appropriate application is made by the Mortgagors or the Principal Debtor.

The lack of an account between the mortgagor and mortgagee whose rights and liabilities were dealt with under Cause No. 2012/HPC/ 0598 cannot in my view be a bar to the Plaintiff Bank instituting legal proceedings against the Defendants under their Guarantee.

A guarantor or surety who has not mortgaged his property to the creditor cannot in my view seek that an account be made by the mortgagee.

For the foregoing reasons I am of the view that the second and third Preliminary Issues raised by the Defendants must fail.

I do not accept the Defendants' contention that the Guarantee can only be enforced after exhaustion of remedies against the Principal Debtor or after pursuit of insurance purportedly had over the banking facilities.

It is trite that the principles of construction governing contracts in general apply equally to contracts of guarantee. Paragraph 143 of **HALSBURY'S LAWS OF ENGLAND, Fourth Edition Volume 20** states that:

> **"dealing with a guarantee as a mercantile contract, the court does not apply to it merely technical rules, but construes it so as to reflect what may fairly be inferred to have been the parties' real intention and understanding as expressed by them in writing, and so as to give effect to it rather than not".**

In this matter Clause 2 of the Joint Guarantee executed by the Defendants states that:

> **"I/We unconditionally and irrevocably undertake to honour upon presentation by you, all contractual obligations in respect of the Facility owed by the Customer to you as they become due, without requiring you to first of all pursue any remedies against the customer for non-payment or default of any of its contractual obligations to you".**

The wording of the Guarantee is crystal clear. The Applicant Bank is allowed to pursue the Defendants on the Guarantee at any time without first pursuing any remedies it has against the Principal Debtor. The wording of the Joint Guarantee is similar to the wording of a Guarantee which was considered by the High Court in the case of **CHIMUMBWA & ANOTHER (MOFU INDUSTRIES LTD) V DEVELOPMENT BANK OF ZAMBIA, BAPU CONSTRUCTION LIMITED (6)** where it was held that the Bank was not obliged to first exhaust enforcement of other securities before resorting to the Guarantee.

I find as a fact that it is the Mortgaged Properties which were insured and not the banking facilities and as such the contention that the Applicant Bank should pursue the insurance money is without any legal basis.

The final Preliminary Issue raised by the Defendants was whether or not this matter should be dismissed for irregularities and abuse of court processes.

For the reasons advanced above, I must come to the conclusion that there are no irregularities with the action taken out by the Plaintiff and there is no abuse of court processes. For avoidance of doubt the principle of Res Judicata does not apply because the Court's decision in the Mortgage Action under Cause No. 2012/HPC/0598 binds the Principal Debtor but it does not affect and bind the Defendants herein in their capacity as joint Guarantors. Further the Plaintiff was not required to join the Defendants to its Mortgage action against the Principal Debtor and is therefore at liberty to bring a

separate action against the Defendants on the Joint Guarantee executed by them on 24th September, 2010.

Counsel for the Plaintiff also asked this Court pursuant to **XXI Rule 5 of the High Court Rules, Cap 27 of the Laws of Zambia** and **Order 27 Rule 3 of the RSC White Book (1999) Edition** to enter Judgment on Admission in its favour considering that the Defendants Affidavit, Notice and Arguments were not disputing owing the Plaintiff but only that the Defendants could not be pursued until exhaustion of remedies against the Principal Debtor.

It is trite law that where admissions are made by a party in his pleadings or otherwise any other party to the cause may apply for judgment on admission.

However, I will not grant this application at this stage, because I would like the Plaintiff to show how it arrives at its claim of K621,992.19 as at 21st December, 2016. I therefore Order and Direct that the Plaintiff applies for leave to enter final judgment for the amount claimed. The Plaintiff's application for summary judgment will be heard on 11th October, 2017 at 11:00 hours.

Based on the foregoing the Defendant's Preliminary Issues are all misconceived. All 4 Preliminary Issues raised by the Defendants are dismissed with costs to the Plaintiff. The costs are to be agreed and in default of such agreement to be taxed.

Leave to appeal is granted.

Delivered in Chambers at Lusaka this 11th day of September, 2017.

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**WILLIAM S. MWEEMBA**
**HIGH COURT JUDGE**