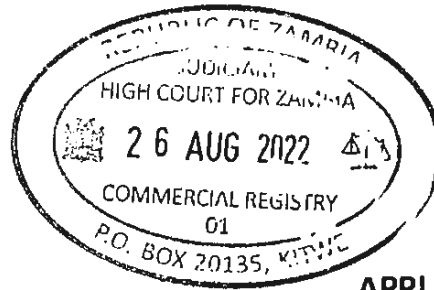


**IN THE HIGH COURT FOR ZAMBIA**  
**AT THE COMMERCIAL DIVISION**  
**HOLDEN AT KITWE**  
**(CIVIL JURISDICTION)**

**2022/HKC/14**



**BETWEEN:**

**PREMIUM FINANCE LIMITED**

**APPLICANT**

**AND**

**ROSEMARY MUBANGA MULENGA**

**1<sup>ST</sup> RESPONDENT**

**MWABA COSTER**

**2<sup>ND</sup> RESPONDENT**

**Before the Hon. Lady Justice Abha Patel, S.C.**

For the Applicant: Mr. E. Chibeluka-  
Messrs. Douglas & Partners

For the Respondents: Mrs. W.N. Nyirenda  
Messrs. William Nyirenda & Co

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**JUDGMENT**

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**Cases referred to:**

1. Abel Mulenga and Others v Mabvuto Chikumbi and Others (2006) ZR 33.
2. Lafarge Cement v Peter Sinkamba (Suing for and on behalf of Citizens for a Better Environment) SCZ Appeal No. 169 of 2009.
3. Credit Africa Bank Limited (In Liquidation) v John Dingani Mudenda.
4. Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Company (1914) UKHL 1.
5. Printing and Numerical Registered Company v Simpson (1975) LR 19 EQ4 62,

6. Colgate Palmolive Z Inc v Abel Shemu Chuka and 100 others Appeal No. 185 of 2005.
7. Finance Bank Zambia Limited and Rajan Mahtani v Simataa Simatta Appeal No. 11/2017 (Selected judgment No.21 of 2017).
8. Union Bank Zambia Limited V Southern Province Co-Operative Marketing Union Limited (1997) S.J. 30 (S.C.).
9. Exhilda Mtonga & Halive Mtonga vs Money Matters Limited 2010 ZLR vol 1 p 382
10. Neighbours City Estates vs Mark Mushili Appeal No.47 of 2013.
11. National Drug Company Limited and Zambia Privatisation Agency vs Mary Katongo Appeal No. 79/2001.
12. Holmes Limited vs Buildwell Construction Company limited (1973) Z.R 97.
13. Commerce Bank Limited vs Ganson Simfukwe vs Arundel International Investments Appeal No. 181 of 1999.
14. Kalusha Bwalya vs Chardore Properties Limited & Anr Appeal No. 222/2013.
15. Credit Africa Bank Limited (In Liquidation) vs John Dingani Mudenda SCZ 10 of 2003.

#### **Legislation referred to:**

1. High Court Act, Chapter 27 of the Laws of Zambia
2. The Intestate Succession Act, Chapter 59 of the Laws of Zambia
3. The Money Lenders Act, Chapter 398 of the Laws of Zambia

#### **Reference Materials:**

1. Chitty on Contracts General Principles, Vol 1, 20<sup>th</sup> Edition
2. Evan Mckendrick's Contract Law 3<sup>rd</sup> Edition

### **1. INTRODUCTION**

- 1.1 On 7<sup>th</sup> March, 2022, the Applicant took out an Originating Summons from the District Registry at Kitwe seeking the following reliefs:

- i. *Payment of the sum of K328,666.67 due to the applicant as at 11<sup>th</sup> February 2022 under the respective covenants in the loan Agreement of 5<sup>th</sup> October 2021, Guarantor Agreement form and the Mortgage Deed dated 5<sup>th</sup> October 2021 executed by the 1<sup>st</sup> Respondent in favour of the Applicant to secure the repayment of the said loan facility. The mortgage being a legal mortgage of all that leasehold property known as Stand No.1893 Mufulira and executed by the 1<sup>st</sup> Respondent in favour of the Applicant to secure all monies advanced under the said loan,*
- ii. *That in default of the Applicant and the Respondents agreeing the amount due to the Applicant an account may be taken of what is due under the said loan agreement and the mortgage,*
- iii. *An order for foreclosure and sale of the mortgaged property,*
- iv. *That the 1<sup>st</sup> Respondent do deliver to the Applicant vacant possession of the said mortgaged property,*
- v. *Interest on the sum owing at the rate of 25% per month as agreed under clause 4 of the loan agreement from 11<sup>th</sup> February, 2022 until it is fully paid,*
- vi. *Costs*
- vii. *Any other relief the court may deem fit.*

## **2. APPLICANT'S AFFIDAVIT EVIDENCE**

- 2.1 This application was brought pursuant to **Order 30 Rule 14** of the High Court Rules, Chapter 27 of the Laws of Zambia, and was supported by an Affidavit, and an Affidavit in Reply and skeleton arguments.

- 2.2 The Affidavit in Support dated 7<sup>th</sup> March 2022 was sworn by one Patrick Sakala, the Branch Manager in the Applicant Company, who deposed that on 5<sup>th</sup> October, 2021 the 1<sup>st</sup> Respondent accessed a Loan Facility in the sum of K307, 377.00 from the Applicant to be paid in three equal monthly instalments of K102,459.00, a copy of the Loan Agreement was exhibited and marked "PS1".
- 2.3 The said Loan Facility was secured by a creation of a legal mortgage on property known as Stand No. 1893 Mufulira, registered in the name of the 1<sup>st</sup> Respondent's late husband Fanwell Chanda Lombe. It was averred that the 1<sup>st</sup> Respondent is the Administratrix and beneficiary of the late husband's estate. Copies of the order of Appointment of the 1<sup>st</sup> Respondent as Administratrix and a printout from Ministry of lands were collectively exhibited and marked "PS2".
- 2.4 It was also deposed that the 1<sup>st</sup> Respondent deposited the title deed, exhibited and marked "PS3" and that the loan was also secured by execution of a Guarantor Agreement form signed by the 2<sup>nd</sup> Respondent. A copy of the Guarantor Agreement was exhibited and marked "PS4".
- 2.5 It was the deponent's averment that as at 11<sup>th</sup> February 2022, the 1<sup>st</sup> Respondent had only paid a total sum of K63,000.00 leaving a balance of K328,666.67 inclusive of interest. It was further at term of agreement (*clause 4 thereof*) that, in the event of default, 25% interest per month would be charged on the defaulted principle amount or

interest or both from the date of the default until both principle and interest sum is paid.

- 2.6 The Deponent also stated that the 1<sup>st</sup> Respondent had defaulted on her loan obligations and that as at 11<sup>th</sup> February, 2022 the outstanding amount stood at K328,666.67 which amount continues to accrue interest at the rate of 25% per month until the debt is paid as agreed between the parties. Despite numerous reminders the Respondents have neglected, refused or denied to settle the loan balance, exhibited and marked "PS5" was a copy of demand letter sent to the Respondent.

### **3. RESPONDENT'S AFFIDAVIT EVIDENCE**

- 3.1 The Respondents filed an affidavit in opposition to the affidavit in support on 29<sup>th</sup> April, 2022 sworn by the 1<sup>st</sup> Respondent on behalf of both Respondents. The 1<sup>st</sup> Respondent did not deny that she was availed with a Loan Facility but disputed the loan amount. According to her the amount of the loan she was availed with was K200, 000.00 and not K307,377.00 as alleged by the Applicant. A copy of the 1<sup>st</sup> Respondent's ABSA bank statement showing proof of payment of K200,000 on 20<sup>th</sup> October, 2021 was exhibited and marked "RMM1".
- 3.2 The 1<sup>st</sup> Respondent further averred that the repayment schedule she was given was incomplete and that she was requested to sign a blank form in the interest of expedience. She pointed out that what she

understood was that interest was at the rate of 25% per annum and not per month over the period of three months.

3.3 According to her, the first instalment which was to be paid on 21<sup>st</sup> November 2021 was K70,832.00 which included K66,666.66 principal and K4,166.66 interest calculated at the rate of 25% per annum. The second instalment payable on 21<sup>st</sup> December 2021 was K69,444.43 which included K66,666.66 as principal amount and K2,777.77 as interest at the rate of 25%. The last instalment payable on 21<sup>st</sup> January, 2022 was K68,055.54 which was K66,666.66 principal and interest of K1,388.88 at 25%.

3.4 It was her understanding that the total interest payable on the principal of K200,000.00 for three months was K8,331.97. The 1<sup>st</sup> Respondent did not deny that the Loan Facility was secured by a legal mortgage created over Stand No. 1893 situate in Mufulira. However, she averred that on the advise by Counsel, the legal mortgage was irregular at law and voidable, as the said property was not in her name, but was in the name of her deceased's husband.

3.5 She also averred that she had no legal capacity to deal with the estate of her late husband in the manner and form she has been sued. And that the interest on the principal amount was compounded, which is unlawful. She averred that the compounded interest of 25% per month was unreasonably high and penal in the prevailing economic climate.

3.6 It was her further averment that in the circumstances, the legal mortgage was voidable for want of capacity, as it was not clear whether the loan was obtained by the deceased or the 1<sup>st</sup> Respondent. She admitted that the only remedy available to the Applicant was in restitution, which is the repayment of the sum of K200,000 which amount was borrowed.

3.7 The 1<sup>st</sup> Respondent admitted that she had repaid a total amount of K63,000.00 and averred that the remaining balance on the loan was K137,000.00 and not the sum of K328,666.67 as claimed by the applicant.

#### **4. APPLICANT'S EVIDENCE IN REPLY**

4.1 In the affidavit in reply dated 13<sup>th</sup> May, 2022 sworn by Patrick Sakala, the Branch Manager of the Applicant Company, it was averred that the loan repayment schedule was not incomplete when the 1<sup>st</sup> Respondent signed it. And that the agreement between the parties under the loan agreement was that the interest was to be charged at the rate of 25% per month and not per annum as alleged by the 1<sup>st</sup> Respondent.

4.2 It was also averred that the 1<sup>st</sup> Respondent's tabulations in paragraph 6 of the affidavit in opposition are outside the terms of the Loan Agreement. It was pointed out that the 1<sup>st</sup> Respondent obtained the loan in her personal capacity and pledged the property which is registered in her late husband's name and that she has capacity to deal

with the estate of her husband as she was both an administratrix and beneficiary of her late husband's estate.

4.3 Further, it was averred that the legal mortgage was not voidable as the land register showed that the 1<sup>st</sup> Respondent was the mortgagor and the Applicant the mortgagee. The Deponent insisted that the outstanding balance on the loan was K328, 666.67 as tabulated in the exhibited loan statement in the affidavit in support and that the accrued interest was contractually agreed upon under clause 4 of the loan agreement.

4.4 Finally, this Court was urged to infer the true intentions of the parties from the Loan Agreement and the Deed of Legal Mortgage.

## **5. Agreed Facts**

5.1 I have carefully considered the affidavit evidence before Court and the documents attached thereto, as well as the written submissions from both parties dated 29 April 2022 and 13 May 2022 respectively.

5.2 It is not disputed that the 1<sup>st</sup> Respondent obtained a loan from the applicant and at the time did produce an Order of Appointment as Administrator and that a legal mortgage was registered over Stand 1893 Mufulira as security, and that the 2<sup>nd</sup> Respondent did execute a Guarantee. These documents have been exhibited and marked 'PS1', 'PS2' & 'PS3' collectively and 'PS4'.



5.3 I further find as an agreed fact that the said property was registered in the name of the 1<sup>st</sup> Respondent's late husband, Fanwell Chanda Lombe. It is also not in dispute that the 1<sup>st</sup> Respondent has not paid the loan which should have been paid in full by January, 2022.

5.4 I am also satisfied that the Mortgage Deed exhibited in the affidavit in support was registered with the Lands and Deeds Registry on 12<sup>th</sup> October, 2021 as evidenced by a print out from the Lands Register dated 4 March 2022.

## **6. Submissions of the Applicant**

6.1 The Applicant by referring to the salient provisions in the said Loan Agreement, as well as the Loan Repayment Schedule, in support of its submission that the Parties having agreed the terms of the loan, as signified by the execution by the 1<sup>st</sup> Respondent, of the Loan Agreement marked '**PS1**', it is the function of the court only to give effect to the meaning and intention of the Parties. I have also noted, as submitted by Counsel, that each page of the Loan Agreement having been initialled by the 1<sup>st</sup> Respondent, constituted an agreement voluntarily entered and secured by a legal mortgage.

6.2 Counsel has urged this Court and has submitted that it is a matter of trite law, that where Parties have agreed on contractual terms, the Court has no option but to give effect to what the Parties have agreed on. In support of this line of submission, Counsel has referred to the decision in the often-cited case of **Printing and Numerical Registered**

**Company v Simpson** and submitted that the above principle was adopted by the Supreme Court of Zambia in the case of **Colgate Palmolive (Z) Inc v Abel Shemu and 110 others**. Counsel has also drawn the attention of the Court to the decision of the Supreme Court of Zambia, in the case of **Finance Bank Zambia Limited and Rajan Mahtani vs Simataa Simataa** to further support its submission that an agreement entered into between the Parties, is amenable to the core principles of English Law and the need to preserve the value and sanctity of contracts.

6.3 My attention was also drawn to the holding of the Supreme Court, in the case of **National Drug Company Limited and Zambia Privatisation Agency vs Mary Katongo**, in support of the submission that it is simply the role of the Court to give efficacy to the contract where one party has breached it. This same line of submission was further echoed by reference to written texts on Contract by the learned Authors **Evan Mckendrick and Chitty**.

6.4 Counsel has also urged the Court to disregard the computations as proffered by **paragraph 6** of the 1<sup>st</sup> Respondents Affidavit in Opposition, as doing so, would be tantamount to allowing a Party to alter the terms of the Agreement and would violate the established principles against extrinsic evidence. In support, Counsel has referred to the decision in the case of **Holmes Limited vs Buildwell Construction Company Limited** as well as reference to texts from the learned author, **Chitty**.

6.5 On the issue of the legal mortgage being voidable on account of the 1<sup>st</sup> Respondent not having capacity to deal with the property, I have taken note of the applicants extensive submissions, and will make my findings later in the Judgment. Equally on the issue of the recovery of compound interest being allowed where specifically agreed upon, Counsel has referred the Court to the decision of the Supreme Court in the cases of **Commerce Bank Limited & Ganson Lottie Simfunkwe and Arundel International Investments** which reaffirmed the position espoused in the case of **Union Bank and Southern Province Co-operative Union Limited** to support the submission of the applicant that the Mortgage deed executed by the 1<sup>st</sup> Respondent did allow for the application of compound interest.

6.6 On the averment of the 1<sup>st</sup> Respondent that she was made to sign a blank Loan Agreement, Counsel has submitted that she has not led tenable evidence in support of that proposition and in any event, on the strength of the authority in the case of **Kalusha Bwalya vs Chardore Properties Limited**, that she only had herself to blame for any possible adverse consequences.

6.7 The applicant urged the Court to enter Judgment and grant the reliefs it seeks.

## **7. Submissions by the Respondents**

7.1 The Respondents have submitted that the legal mortgage as created is irregular at law and that the 1<sup>st</sup> Respondent has no locus standi in the matter. The Respondent has also submitted that the Applicant

charging high compound interest without notice, offends the principles settled by the Supreme Court of Zambia in the cases of **Credit Africa Bank Limited (In Liquidation) vs John Dingani Banda and Union Bank Zambia Limited.**

- 7.2 On the issue of being presented with blank documents, the Respondent has submitted that the same offends the Regulations promulgated under the **Banking and Financial Services (Microfinance) Regulations 2006** and has quoted regulation **30 (1)**. And has further referred the Court to the decision of the House of Lords in the case of **Dunlop Pneumatic Tyre Co Limited vs New Garage & Motor Company**

to advance its argument of unconscionable and penal interest being applied by the Applicant, and which should not be enforced by the Court.

- 7.3 It was also submitted for the Respondents and Counsel made reference to the provisions of **Order XIV rule 1** of the Rules of the High Court, in support of its submission that the 1<sup>st</sup> Respondent lacked capacity to be sued in this Action. Counsel has further referred the Court to the decisions in the cases of **Abel Mulenga and Others vs Mabvuto Chikumbi and Others** and **Lafarge Cement vs Peter Sinkamba** on the issue of locus and has urged the Court to consequently find that the proceedings are incompetent and ought to be dismissed entirely.

## **8. Judgment of the Court**

- 8.1 I have considered the applicants application, the documents filed in support thereof as well as the opposing affidavit and submissions and

the viva voce submissions of the Parties. I am of the considered view that the issues for my determination are the following:

- a. what amount was lent to the Respondents;
- b. whether compound and penal interest has been applied to the loan; and if so, was there agreement or acquiescence;
- c. whether the applicant is entitled to charge interest in accordance with the Loan Agreement;
- d. what set of rules and or law governs the operation of the Applicant company?

8.2 What is glaringly obvious, as I begin to dismantle these issues is that the Applicant has not disclosed its corporate status while asking the Court to grant it the reliefs it seeks in the Originating Summons. Nor has the Respondent challenged the status of the applicant company, whether as money lender or licenced financial business under the **Banking and Financial Services Act No. 7 of 2017**. As I have stated, the Parties do not dispute that a loan was advanced on the security of the now challenged legal mortgage and that the Respondents have defaulted in repaying the said loan. On the issue of the quantum of the loan, the Loan Agreement referred to as 'PS1' confirms that the applicant has provided a loan facility in the sum of K307,377 *inclusive of interest*. (The highlighting is by the Court). The Respondent has countered that she borrowed the sum of Kwacha Two Hundred Thousand (K200,000.00) and has referred to her exhibit marked '**RMM1**' being a Bank statement from Absa Bank, showing a payment in the sum of K200,000.00 received from the Applicant on 20 October 2021. Further, the deed of mortgage and the printout from the

Lands Register equally refers to a "mortgage to secure the sum of ZMW 200,000.00 plus interest". The Applicant's Loan Statement as at 11 February 2022, attached as the last document to the exhibit marked 'PS1' also confirms the principal amount in the sum of K200,000.00. This has not been countered or denied by the Applicant. I therefore find that the principal loan amount was the sum of K200,000.00

8.3 I note the respective submissions of the Parties on the application of compound agreement as embodied in 'PS1'. However, and before I pronounce on whether there was agreement or not, it is important to establish the entitlement of the Applicant to charge interest in the manner it seeks to do, purely based on what it terms as an *agreement of the parties*

8.4. I take notice that in another matter before this court, under cause No. **2022 HKC 013**, the Court in dealing with a similar matter with the same Applicant, had cause to find that the Applicant as a money lender, was governed by the provisions of the **Money Lenders Act**. I see no reason to depart from that finding.

8.5 I am ably guided by the Supreme Court in the case of **Neighbours City Estate** when it had occasion to pronounce on the issue of interest, albeit agreed between the Parties, if the same offended the provisions of statute. In that decision, the Supreme Court was referred to the decision in the case of **Exhildah Mtonga and Halive Mtonga vs Money Matters Limited** where the Court, albeit the High Court, did not allow the charging of interest which was in violation of **section 15** of the Money Lenders Act. The Supreme Court in considering the position of the law as regards interest agreed between the Parties found that **section 15** of the Money

Lenders Act caps the ceiling on interest chargeable to 48% per annum. For the applicant in that case to charge interest at the rate of 120% per annum was unconscionable and harsh. The Supreme Court found without a doubt that the said agreement offended the provisions of the Act.

In the case in *casu*, the application of interest at the rate of 25% per month, which translates to 300% per annum is not only unconscionable, harsh and punitive, but in any event, offends the provisions of the Act.

8.6 The Supreme Court, in the cited case of **Neighbours City Estate**, with reference to the cases of **Kalusha Bwalya**, and **Printing and Numerical Registered Company** clearly distinguished the application of the principles espoused in those cases, which could not be applied wholesomely and without distinction. This Court in *casu*, with reference to those authorities and the cited cases of **Colgate Palmolive (Z) Inc vs Abel Shemu and 110 others**, **Finance Bank and Another vs Simataa Simataa** and **National Drug Company Limited**) can do no better than to adopt the reasoning of the Supreme Court. It would be a very naïve Court to be blindly persuaded by the heap of authorities referred to by the Applicant, in allowing the argument that a Court has no option but to enforce the will of the Parties and enforce the agreement entered into. It is the duty of the court is discharging its judicial function, to protect the public from extortionate and illegal interest and where it is not sanctioned by Law. The provisions of **section 10** and **section 15 (1)** of the Money Lenders Act are clear and unambiguous and need no further elaboration.

8.7 I shall now move to consider the Applicant's claim for an Order of foreclosure and sale of the mortgaged property combined with the Respondents submission that the mortgage is irregular and

unenforceable. As noted above, the Applicant has submitted extensively on this issue. It is also not in dispute that the 1<sup>st</sup> Respondent has used this same property as collateral for borrowings from other Institutions. This can be clearly seen from the printout of the Lands Register under entries numbered 4,5,6 and 7. These printouts and the Order of Appointment of Administrator of the 1<sup>st</sup> Respondent, has also been exhibited collectively marked as 'PS2'. It is without a doubt that I find that the argument of status or locus and indeed capacity, is raised as a red-herring, and after the Respondents had submitted to the jurisdiction of the Court. The Respondent did not make an application to be removed from the Action and this argument is untenable and has simply come too late in the day to be considered.

8.8 In dealing with the Applicant's claims, I will now determine whether the legal mortgage created over Stand No.1893 Mufulira, by the Applicant is null and void as claimed by the Respondents. The Applicant's position is that the loan facility was secured by a registered legal mortgage on Stand No. 1893 Mufulira. It is the 1<sup>st</sup> Respondent's contention, in response, that the legal mortgage is void because it is in the name of her late husband as the borrower in his personal capacity when at the time of the mortgage he was already deceased. She also said that she had no legal capacity to deal with the estate of her late husband in that manner.

8.9 Counsel quoted order XIV rule 1 of the High Court Rules, which reads:

*"If any Plaintiff sues, or any Defendant is sued, in any representative capacity, it shall be expressed on the writ. The Court or a Judge may order any of the persons represented to be made parties either in lieu of, or in addition to the previously existing parties."*



It was argued that the 1<sup>st</sup> Respondent executed the mortgage as Administrator of the estate of the late Fanwel Chanda Lombe and not in her personal capacity as she had no authority to deal with the said property in her personal capacity. Counsel drew the attention of this court to the cases of **Abel Mulenga and Others v Mabvuto Chikumbi and Others (2006) ZR 33** and **Larfage Cement v Peter Sinkamba (Suing for and on behalf of Citizens for a Better Environment) SCZ Appeal No. 169 of 2009**.

- 8.10 The Applicant, on the other hand, relied on section 24 of the **Intestate Succession Act** to show that the 1<sup>st</sup> Respondent, as Administrator, is entitled to all the rights which the deceased was entitled to. Section 24 provides that:

*"Subject to any limitations and exceptions contained in a grant of letters of administration the grant entitles the administrator to all rights belonging to the deceased as if the administration had been granted at the moment after his death except that letters of administration shall not render valid any intermediate acts of the administrator tending to the diminution or damage of an intestate's estate."*

- 8.11 I have already noted that the 1<sup>st</sup> Respondent has used this same property as collateral. I also note that one of the duties of an Administrator is to take possession of the assets of the deceased or assume control over them with due diligence as soon as he/she properly can. This is done by registering his/her interest against each asset, which the 1<sup>st</sup> Respondent did as evidenced by entry **No.3** on the Lands Register. I am therefore of the considered view that the 1<sup>st</sup> Respondent did offer the said property as

collateral for the loan and that the Applicants interest was properly secured by the Deed of Mortgage.

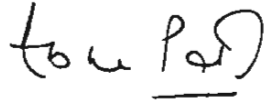
9. Based on the foregoing, I enter Judgment in favour of the Applicant and order as follows:

- i. *The Respondents should pay the Applicant the principal debt in the sum of Kwacha Two Hundred Thousand (K200,000.00) less the sum of Kwacha Sixty three Thousand (K63,000.00) with interest calculated in accordance with the provisions of the Money Lenders Act, and in default of agreement to be assessed by the Deputy Registrar.*
- ii. *The outstanding amount (the Judgment Sum) to be paid shall attract simple interest at the average of the short term deposit rate from date of action to date of Judgment, and thereafter at current Commercial Bank lending rate as determined by Bank of Zambia from time to time until full payment.*
- iii. *The Judgment sum together with simple interest shall be paid to the Applicant by the Respondents within 120 days from the date of assessment or agreement.*
- iv. *Should the Respondents fail to pay the principal and interest due to the Applicant within 120 days from date of assessment, the Applicant will be entitled to foreclose, possess and sale the charged property known as Stand No.1893, Mufulira.*

v. *I order cost to be in the cause.*

vi. *Leave to appeal is granted.*

Dated at Kitwe this 26<sup>th</sup> day of August, 2022.

A handwritten signature in black ink, appearing to read 'to u P.D.' with a horizontal line under the 'P'.

**Mrs. Abha N. Patel, S.C.**

**High Court Judge**