IN THE SUPREME COURT OF ZAMBIA **SCZ JUDGMENT NO. 20/2007**
HOLDEN AT LUSAKA **APPEAL NO. 134/2005**
(Civil Jurisdiction)

Appellant

Respondent

BETWEEN:

REEVES MALAMBO

AND

PATCO AGRO INDUSTRIES LIMITED

CORAM: SAKALA, CJ, MUMBA, JS, KABALATA, AJS

3rd May and 16th August, 2007

For the Appellant:	**Mr. G.S. Cornhill of Messrs Wilson and Cornhill**
For the Respondent:	**Mr. S. Mambwe of Mambwe Siwila and Partners.**

JUDGMENT

Sakala, CJ, delivered the Judgment of the Court

In this judgment, the Appellant will be referred to as the Plaintiff; and the Respondent will be referred to as the Defendant; which designations they were in the court below.

This is an appeal against the Ruling of the High Court dated 20th June 2005,

in which the High Court interpreted its judgment of 5th September 2005, that for the avoidance of any doubt, its judgment meant that

(a) there should be foreclosure of the mortgaged property followed by sell; and

(b) an account of the proceeds of the sale be rendered to the Defendant

The facts of the case leading to this appeal are that the Plaintiff, by an Originating Summons For Possession and Reconveyance, pursuant to Order 88/1 of the Rules of the High Court, applied to the High Court claiming for the delivery by the Defendant to the Plaintiff of possession of the mortgaged property; an order that the said mortgage be enforced by registration of ownership of the said property to the Plaintiff; and recovery of the principal due on the sum of US$5,000.00, fixed interest of US$2,500.00 and further interest there on accruing.

The Summons was supported by an affidavit There was also an affidavit in opposition to the Summons. The learned trial Judge considered the affidavit evidence and the arguments by the parties.

The court found that it was common cause that in May, 2002, the Defendant entered into a mortgage arrangement with the Plaintiff to secure a loan of US$ 5,000.00 and fixed interest of US$2,500.00. The court found that in terms of the mortgage Deed, the Mortgagee's right to take possession and title to the mortgaged property was only to be exercised after payment of the secured sum had been demanded and the Mortgagor had defaulted for one month. The court was satisfied that the Plaintiff was within his rights and that he properly demanded the payment of the secured sum. The court

was further satisfied that the right of possession was properly exercised upon the Defendant's failure to settle the loan. The court rejected the Defendant's contention that he had made an offer to the Plaintiff which offer was refused.

Subsequent to the judgment of the Court; the Defendant applied, by way of a Summons to interpret that judgment pursuant to Order 30 Rule 11(a) of the High Court Rules. In the Summons, the Defendant set out the questions to be determined by the court as follows: Whether by virtue of the judgment dated 5th September 2003 the Plaintiff was entitled to change the title of the mortgaged property into his name and create a subsequent mortgage; and whether in view of the court's order for the sale of the mortgaged property, the Defendant was not entitled to change of the proceeds upon sale of the property and deduction by the Plaintiff of the judgment sum and costs.

The Summons to interpret the judgment was supported by an affidavit in which one, Patrick Steven Phiri, deposed that on the 5th September, 2003; the Court delivered a judgment that the Defendant pays the Plaintiff the judgment sum of US$5,000 together with fixed interest of US$2,500, and further interest within 60 days from the date, failure of which the mortgaged property was going to be foreclosed and sold without further notice. He further deposed that due to financial constraints, the Defendant failed to pay the judgment sum within the period directed; that upon searching the records at the Lands and Deeds Registry, he learnt that the Plaintiff had changed the title of the mortgaged property into his name and created a mortgage over the property in favour of a Company called Reema Investments Limited for the sum of US$200,000.00. He further deposed that the last time the Defendant did a valuation of the mortgaged property in 1997, it was valued at Two Hundred and Ten Million Kwacha (K210,000,000.00); and that the Defendant was seeking the Court's interpretation of the said Judgment

The Plaintiff also filed an affidavit in opposition to the Summons to

interpret the Judgment He deposed that the Defendant and himself executed a Deed of a legal mortgage which he registered with the Lands and Deeds Registry on 16th May 2002; that the said Deed provided that the Defendant demised the property to him for the unexpired residue of its lease; that the Defendant covenanted to deliver possession and pass title to him in the event of default; and that his right to take possession and title was subject to a demand and default for one month.

The Plaintiff further explained in his affidavit in opposition that he commenced an action after default by the Defendant, claiming the divers orders set out in his Originating Summons. The Plaintiff also explained that he had been advised and verily believed mat the judgment allowed him to pursue any of the remedies, foreclosure and sell; that the Defendant did not make any payment before or after the Judgment; that after the expiration of 60days, he applied for and was granted leave to issue the writ of possession; that he elected to foreclose the mortgage, pursuant to it's own terms and the judgment, by having the property transferred to himself; and that he had not contravened the Judgment of the court in any manner.

The learned trial Judge considered the affidavit evidence for and against the Summons to interpret the Judgment He also considered the arguments. After setting out the questions for interpretation (supra); the learned Judge noted that according to the Defendant, the Plaintiff was only entitled to foreclose and sell the mortgaged property; that according to the Defendant, the Plaintiff was not entitled to convey the property unto his name; and that the Defendant's contention was that the Plaintiff should have sold the property at a market price and thereafter deduct the judgment debt plus interest and costs and that the balance of the proceeds should have been accounted for and paid back to the Defendant

The court took note of the Defendant's submissions that even where a decree absolute for foreclosure had been granted, equity demanded that such be

re-opened if there is justification such as, where the judgment sum is insignificant to the value of the property as was the case in this matter, that the Dependant's position was that the open market value of the mortgaged property in 1997 was K210 million as per the Valuation Report, while the judgment debt plus interest only accounted to US$7,500; and that the amount borrowed and the value of the property was just too wide.

The court noted that the Plaintiff's Counsel was not in attendance at the time of hearing the application; but took into account his affidavit and the skeleton arguments denying that the Plaintiff had not contravened the judgment of the Court; but that he had merely elected to foreclose the mortgage as per the term of the Judgment and transferred the property to himself.

In dealing with the first question for determination, the learned Judge first set out the passage in the judgment which was to be interpreted. He then pointed out that in his view, the Judgment of the court was quite clear and an unambiguous; that it should be construed in the ordinary sense to mean that the Mortgagee is at liability to exercise his right to foreclose and sell the property in the event of default and failure by the Mortgagor to redeem the mortgaged property. The learned Judge agreed with the Plaintiff that under a legal mortgage by demise, the mortgagee becomes the absolute owner of the mortgage term at law soon after the date fixed for redemption has passed. The court, however, noted that notwithstanding that the legal right to redeem is gone, equity may interfere with the right and allow the mortgagor to redeem the property.

The trial Judge men referred to **Meggary's Manual of the Law of Real Property (4th Edition) 1969 paragraphs 473-474** under the subtitle **"Opening a foreclosure absolute"**. He observed that the Defendant had exhibited a Valuation Report which showed the open market value of the mortgaged property as at 1997 to be K210 million. The court pointed out that apart from the marked disparity between the value of the property and the amount lent; the Valuation Report described the property as measuring 163.7328

hectares in extent; and that the farm would offer good security for any Bank loan owing to the demand for such properties.

The learned trial Judge was, however, satisfied that there was justification for the mortgagee to have complied with the court Order to sell the mortgaged property; but that it would have been inequitable to order that the property be conveyed to the mortgagee as its value was unproportionately much higher than the judgment debt; and that to order otherwise would have been tantamount to unjust enrichment on the part of the mortgagee.

The learned Judge rejected the Plaintiffs argument not to interfere with the legal rights of the parties under the mortgage as being inequitable and unacceptable.

In dealing with the second question for determination; the learned Judge stated that his understanding of that question was that upon the sale of the mortgaged property on the open market, the Plaintiff (Mortgagee) was required to account to the Defendant (Mortgagor) the proceeds of the sale; that he was required to deduct the judgment debt, interest and whatever costs the Plaintiff might have incurred from the sale price and the balance thereof to be accounted for and to be paid to the Defendant

The learned Judge concluded his ruling of 20 June, 2005 on interpretation of judgment as follows:

> "For the avoidance of any doubt, the judgment of the court should be considered to mean that
>
> (a) there should be foreclosure of the mortgaged property followed by sell; and

(b) an account of the proceeds of sale to be rendered to the Defendant"

The Plaintiff appealed to this court against the whole Ruling of 20th June, 2005. He filed three grounds of appeal; namely:

1. That the learned Judge erred in law by proceeding to review its judgment on an application for interpretation;
2. That the learned Judge erred in fact and in law by ordering sale of the mortgaged property contrary to the express terms of the mortgage agreement between the Appellant and the Respondent; and
3. That the court erred by hinging its decision on the Appellant's remedy on the adequacy of consideration.

The parties filed written heads of argument augmented by oral submissions based on the three grounds of appeal

The gist of the written heads of argument on ground one is that the Defendant had applied to interpret the Judgment of the court allegedly under Order 30 rule 11(a) of the High Court Rules which applies to matters that can be determined in Chambers; but does not make reference to interpretation; that the learned Judge did not interpret the meaning of the terms foreclosure and sale; but addressed himself to the court's powers to open a foreclosure absolute and to the Valuation Report

It was submitted that the trial Judge erred in law by concerning himself with the fairness of the agreement; but that he should have restricted himself to the application before him and elaborated what he meant in his judgment; that by addressing himself to the powers of the court to reopen a foreclosure and the apparent inequities of the agreement between the parties, the court proceeded to deal with new matters not before it, when it made its substantive judgment; and that this amounted to review and not interpretation of judgment It was

finally submitted that the court misdirected itself by proceeding with the review when the application before *it* was for interpretation of judgment.

In his oral arguments and submissions on ground one, Mr. Cornhill, on behalf of the Plaintiff, pointed out mat the trial Judge failed to appreciate that foreclosure and sale are two distinct remedies; that foreclosure is a mortgagee's right pursuant to a mortgagee to assume ownership of a mortgagor's estate; and that sale was disposal of the mortgaged property to recover money lent

The summary of the written brief response to ground one is that the trial Judge did not review its substantive judgment but merely interpreted its judgment; and that the court did not deviate from the orders made in the substantive judgment; but merely explained what was meant by "foreclosure" and "sell".

In his short oral response, Mr. Mambwe, pointed out that the ruling appealed against was merely an interpretation and not a review.

We have carefully considered the arguments and submissions on ground one and the judgment of the trial Judge dated 20th June, 2005: The application that was before the learned Judge was to interpret its judgment of 5 September, 2003. There were specific questions to be determined. Before answering the first question, the trial Judge set out the passage from the judgment of 5th September, 2003, which the Defendant sought to be interpreted. The passage set out reads as follows:

> **"I accordingly enter judgment in favour of the Plaintiff in the sum claimed plus interest as agreed between the parties. I further direct that the Defendant do pay the Judgment debt in full within 60 days from the date hereof. If the Defendant should fail to liquidate the debt at the expiry of the above stated period, then**

the Defendant shall deliver the mortgaged property Subdivision 8 of Subdivision A of Farm No. 8a, Mazabuka to the Plaintiff who shall be at liberty to foreclose and sell the property without any further notice".

Thereafter, the learned Judge stated as follow:

"The above judgment of the Court is, in my view, quite clear and an unambiguous. It should be construed, in the ordinary sense to mean that the mortgagee is at liberty to exercise his right to foreclose and sett the property in the event of default and failure by the mortgagor to redeem the mortgaged property. I do agree with the Plaintiff that under a legal mortgage by demise the mortgagee becomes the absolute owner of mortgage term at law as soon as the day fixed for redemption is past".

We totally agree with the trial Judge mat the passage the Plaintiff sought to be interpreted was quite clear and unambiguous. It meant mat the mortgagee was at liberty to exercise his right to foreclose and sell the property in the event of default and failure by the mortgagor to redeem the mortgaged property; and that under the legal mortgage by demise the mortgagee becomes absolute owner of the mortgage term at law as soon as the day fixed for redemption has past To this extent, the trial Judge interpreted his judgment

However, by proceeding to address himself to the courts powers to open a foreclosure absolute and the Valuation Report exhibited by the Defendant, the trial court fell into error because he went into issues of review. The trial Judge should have restricted himself to the application, for interpretation before him; which he did; but gratuitously went further by reviewing his judgment by dealing with new matters which were not before him in the substantive judgment

Equally, it was unnecessary to deal with the second question on the issue of an account of the proceeds of sale to be rendered to the Defendant

The Defendant, if he so wishes, can bring a separate action claiming the balance over the judgment debt and could not claim the balance over the judgment debt in an application to interpret the judgment. The second question for interpretation was, therefore, misconceived.

In the result, we are satisfied that the trial Judge interpreted the judgment as per the application before him. There was no application before the trial Judge for review. The attempt to review the judgment was misconceived.

Since the gist of the application before the trial Judge was to interpret the judgment, which he did, ground one of appeal must fail. It is, accordingly, dismissed.

On account of what we have discussed in ground one, we propose to deal with grounds two and three together. The complaint in ground two is that the court erred in ordering the sale contrary to the express terms of the agreement And in ground three, the complaint is mat the Court erred in hinging its decision on adequacy of consideration. These complaints have been adequately dealt with when discussing ground one.

On the facts of this case, which were not in dispute, the mortgagee was at liberty to exercise his right of foreclosure and sale as the mortgagor had failed and defaulted to redeem the mortgaged property.

The issues of adequacy of consideration as discussed by the trial Judge were new matters not raised in the main judgment and not the subject of the interpretation application. Both grounds two and three must, therefore, fail. They

are, accordingly, dismissed.

All the grounds having failed, the whole appeal fails. It is, accordingly, dismissed with costs, to be taxed in default of agreement

E.L.Sakala
CHIEF JUSTICE

F.N.M.Mumba SUPREME
COURT JUDGE

T.A. KABALATA
ACTING SUPREME COURT JUDGE