SCZ Judgment No. 32/2014

IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 138/2009**

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

BETWEEN:

AGAPE GARDENS LIMITED **1ST APPELLANT**

MERCY SICHINGA SIAME **2ND APPELLANT**

SIMEO BENSON SIAME **3RD APPELLANT**

AND

COFFEE BOARD OF ZAMBIA **1ST RESPONDENT**

DEVELOPMENT BANK OF ZAMBIA **2ND RESPONDENT**

Coram: Mwanamwambwa, Ag. DCJ, Wood, JS and Lisimba Ag. JS

On the 8th May, 2014 and 24th July, 2014

For the 1st Appellant: No Appearance

For the 2nd Appellant: In Person

For the 3rd Appellant: No Appearance.

For the 1st Respondent: Mrs. C.M Chakanika, Messrs Muleza Mwiimbu and Company.

For the 2nd Respondent: Mr. M.A Musukwa, Messrs AMC Legal Practitioners.

JUDGMENT

Wood, JS, delivered the Judgment of the Court.

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CASES REFERRED TO:

1. **Werner v Jacob (1881-1882) 20 Ch. D 220.**
2. **Standard Chartered Bank v Walker (1982) 3 All ER 938.**
3. **Cuckmere Brick Company v Mutual Finance Limited (1971) Ch.D 949.**
4. **Finance Bank Limited v Africa Angle Limited and 2 Others (1998) Z.R.237.**

LEGISLATION REFERRED TO:

1. **Development Bank of Zambia (Amendment) Act No. 11 of 2001.**
2. **Coffee Act, Cap 228 of the Laws of Zambia.**
3. **Conveyancing and Law of Property Act, 1881.**

OTHER MATERIALS REFERRED TO:

1. **Megarry's Manual of the Law of Real Property, 6th Edition.**
2. **Halsbury's Laws of England, Fourth Edition, Re-issue, Volume 32.**
3. **Black's Law Dictionary, Eighth Edition.**

Briefly the facts of this appeal are that on 11th December, 1996, a loan agreement was executed between the 1st appellant and the 2nd respondent pursuant to which the 1st appellant was granted the sum of US$677,599.00 as a loan to meet part of the cost of establishing a rose farming enterprise in Lusaka. The loan was secured by the following:

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1. A mortgage on Stand No. 479 of Subdivision A of Farm No. 378a Avondale, Lusaka;
2. A mortgage on Subdivision 1 of Subdivision B of Farm No. 2303 Lusaka;
3. A specific charge over the 1st respondent's assets including machinery and equipment; and
4. A guarantee by the 2nd and 3rd respondents.

On 23rd June, 2005, the 2nd respondent transferred the loan and the security documents to the 1st respondent by way of Deed of Transfer of Mortgage. On 11th July 2007, the 1st respondent commenced an action against the appellants in which it alleged

that the appellants had failed or neglected to pay back the loan. The appellants, on the other hand denied owing the 1st respondent and instead counter-claimed that the taking possession of and selling Subdivision 479 of Subdivision A of Farm No. 378a Avondale, Lusaka and other assets by the respondents without a court order was wrongful, null and void. To this effect, the appellants sought a declaration that the mortgage debt had been paid off and

accordingly demanded special damages in the sums of ZMW119, 595.00 and US$22,500.00.

On 18th February, 2008 the 2nd respondent made an application for non-joinder in view of the appellants' counter-claim on grounds that it would be directly affected by the outcome of the proceedings.

A trial was conducted after the parties agreed to deem the proceedings as having been commenced by writ of summons and not by originating summons. This was no doubt appropriate in the

circumstances. At the end of the trial, the learned trial Judge found in favour of the respondents and dismissed all arguments relating to whether or not the respondents could sell the mortgaged property in the absence of a court order as well as the argument that the property in issue had been sold below market value. The learned trial Judge also dismissed the argument relating to whether or not the respondents were entitled to rely on the provisions of Section 11A (2) of the Development Bank of Zambia (Amendment) Act No.11 of 2001, which transferred to and vested the non-performing portfolio of the 2nd respondent, which no doubt this debt was, in the

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Government. In arriving at this decision, the learned trial Judge relied on a letter from the then Secretary to the Treasury dated 9th August, 2005, stating that the ownership of the funds relating to the loan in issue was with Government, through the 1st respondent and found that the respondents had *locus standi* in the matter. He accordingly entered judgment in favour of the 1st respondent in the sum of US$1,661,065.03, together with interest. The learned trial Judge, however, allowed the counter-

claim in respect of US$2,000.00 and ZMW34,195.00. We have not seen any cross-appeal in respect of this portion of the judgment.

The appellants were dissatisfied with the judgment of the court below and filed five grounds of appeal. The first two grounds of appeal are in connection with the effect of Section 11A (2) of the Development Bank of Zambia (Amendment) Act No.11 of 2001 and will be dealt with as one. In these two grounds of appeal, the appellants stated that the learned trial Judge was wrong at law by failing to find that with effect from 29th November, 2002, all assets, liabilities, rights and obligations of the 2nd respondent relating to

the non-performing portfolio of the 2nd respondent, namely the mortgage, vested in the Government of the Republic of Zambia pursuant to the provisions of Section 11 A of the Development Bank of Zambia (Amendment) Act, No. 11 of 2001. That as a result, he was wrong at law in finding that the respondents had sufficient *locus standi* in these proceedings.

The third and fourth grounds of appeal are also connected and will be dealt with together. In these two grounds of appeal, the appellants stated that the learned trial Judge was wrong at law by finding that a Deed of Transfer had to be executed between the respondents to formalise the assignment of the security offered by the appellants to the 2nd respondent, when the said Deed of Transfer was under the law to be executed by the Minister of Finance and National planning on behalf of the Government, which was the owner of the assets in dispute. The appellants contended that the learned trial Judge misdirected himself when he found that the Deed of Transfer was not null and void.

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Grounds five and six were alternative grounds of appeal. Ground five was that the learned trial Judge misdirected himself by finding that the respondents were not in breach of their duty of care to the appellants, by selling the assets cheaply in 2005 owing to wear and tear, which property was in good condition in

June, 2002, when the 2nd respondent took possession of the appellants' rose flower project. Ground six was that the learned trial Judge was wrong at law by finding that the appellants owed the 1st respondent US$1,661,065.03 as principal when the mortgaged property, valued at US677,599.00 in December, 1996, was sold in 2005 for a total sum of only ZMW 476,005.00.

In their heads of argument filed on 26th April, 2013, the appellants argued that the mortgage being a liability of the 2nd respondent vested in the Government by virtue of Section 11 A (2) of the Development Bank of Zambia (Amendment) Act No. 11 of 2001, which provides that:

"With effect from the date of the commencement of this Act, all assets, liabilities rights and obligations of the Bank relating to the non-

performing portfolio of the Bank and in existence immediately before that date shall, without further assurance vest in the Government."

The appellants submitted that according to this section, all assets, liabilities, rights and obligations of the 2nd respondent

relating to the non-performing portfolio vested in Government. They argued that this also meant that when the Deed of Transfer was being executed in 2005, the 2nd respondent did not transfer anything to the 1st respondent, since all liabilities for the non-performing portfolio at that time had vested in Government, in accordance with the Act.

The appellants took the view that the letter from the Secretary to the Treasury dated 9th August, 2005, was an acknowledgement that the funds which were the subject of the loan facility belonged to Government and not to the 1st respondent. This was because at the time the letter was written, the Development Bank of Zambia (Amendment) Act, No. 11 of 2001, was already in effect and the 1st respondent could not, therefore, possibly be a party to these proceedings. They contended that the money belonged to the Government and that the Attorney General should have been the

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correct party to sue and not the respondents. The appellants argued that while the 2nd respondent had legal capacity to sue or be sued by virtue of Section 3 of the Development Bank of

Zambia Act, Chapter 363 of the Laws of Zambia, it had no reason to commence an action against them as its non-performing portfolio vested in the Government.

The appellants submitted that the respondents had no *locus standi* to commence an action against them, since the money that they had borrowed did not belong to either of the parties, as it had reverted to the Government. In reference to the 2nd respondent, the appellants cited Section 11 A (3) of the Development Bank of Zambia (Amendment) Act No. 11 of 2001, which states that:

"Notwithstanding subsection (2), all proceedings pending on the date of the commencement of the Act by or against the Bank in respect of any matter relating to the non-performing portfolio of the Bank may be continued by or against the Bank."

This subsection took into account these proceedings since they were commenced in 2007, after the amendment to the Act was already in force. This section also meant that if there were any

proceedings pending, they could be continued. The appellants argued that this section did not empower the 2nd respondent to commence new proceedings or allow new proceedings to be commenced against it in relation to the non-performing portfolio. The appellants contended that if the 2nd respondent had suffered any loss as a result of their default, the Government accordingly indemnified it by virtue of Section 11A (4) of the Development Bank of Zambia (Amendment) Act No. 11 of 2001, which reads as follows:

"The Bank shall be indemnified by the Government against all liability of the Bank which the Bank incurred before the commencement of this Act arising from any suit or other legal proceedings and from any claim or demand in respect of any matter relating to the non-performing portfolio."

As such, the 2nd respondent had failed to show that it had sufficient interest in the matter.

With regard to the letter dated 9th August, 2005 from the Minister of Finance and National Planning, the appellants submitted that the learned trial Judge erred by recognizing the effect of the letter and refusing to acknowledge the effect of the

Act. They argued that in addition, the letter itself acknowledged that the

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ownership of the funds was with the Government through the 1st respondent. In the circumstances, the 1st respondent, which was a body corporate pursuant to Section 3 of the Coffee Act, Cap 228 of the Laws of Zambia, could not lay claim to the funds through these proceedings, as it was a distinct and separate entity from Government.

In response, counsel for the 1st respondent, Mrs. Chakanika, submitted that the learned trial Judge arrived at the correct decision when he concluded that the provisions of Section 11 A of the Development Bank of Zambia (Amendment) Act No. 11 of 2001, was of no effect as the letter from the Secretary to the Treasury stated that the ownership of the money was with the Government through the 1st respondent. That by signing the Deed of Transfer of the Mortgage, the 1st respondent acquired the benefit of the mortgage and was consequently entitled to foreclose on account of the failure by the 1st appellant to pay back

the loan. Her argument was that the Deed of Transfer was, therefore, in order, even though

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it was not signed by the Minister of Finance and National Planning. She urged us to dismiss the appeal on all grounds as it has no merit.

In his additional heads of argument in opposition to the appeal, Mr. Musukwa who was counsel for the 2nd respondent, submitted that the issues raised in grounds one and two of the appeal were not pleaded in the court below nor raised as issues at trial and could, therefore, not be raised on appeal. Mr. Musukwa relied on Order 18 r 11 of the Rules of the Supreme Court, Volume 1, 1999 in support of his submission. It reads:

> **"An objection in point of law must always be taken clearly and explicitly. An allegation which wears a doubtful aspect, and may be either a traverse or an objection is embarrassing and will be struck off."**

In the alternative, Mr. Musukwa argued that even if the law had been pleaded, the appeal lacked merit as the 2nd respondent was still mandated to manage the Government's non-performing

portfolio by virtue of Section 11A (5) of the Development Bank of Zambia (Amendment) Act No. 11 of 2001, which reads as follows:

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"The Minister shall, in writing give directions to the Board for the management and realization by the Bank of the non-performing portfolio on such terms and conditions as may be agreed in writing between the Minister and the Board."

A further alternative argument advanced by Mr. Musukwa was that Section 11A of the Development Bank of Zambia (Amendment) Act No. 11 of 2001, did not apply in this case as the funds in issue never belonged to the 2nd respondent, as it was merely acting as an agent for the Government. He contended that the funds were borrowed by Government on behalf of the 1st respondent and the 2nd respondent had to hand over the loans and securities to the 1st respondent when instructed to do so.

With regard to the issue of *locus standi,* Mr. Musukwa submitted that the appellants did not plead the issue in the court below to the extent to which it was being argued in the appeal. He contended that the pleading relating to *locus standi* in the

court below was that the 2nd respondent could not bring this action because the loan had been satisfied from the proceeds of the sale of the appellants' property by the respondents.

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We are grateful to the parties for their submissions. The main argument advanced by the appellants is that the 2nd respondent lost the right to commence or continue with these proceedings as a result of the enactment of the Development Bank of Zambia (Amendment) Act No. 11 of 2001, which provides as follows in Section 11 A:

"11A. (1) For the purpose of this section, the non-performing portfolio of the Bank consists of:

(a) All loans advanced by the Bank and financial instruments issued by the bank and, in each case, in respect of which any payment of the principal or interest is, on the commencement of this Act, in arrears in excess of one hundred and eighty days; and

(b) The amount of the equity investment by the Bank in any company or other entity which, for three years or more immediately before the commencement of this Act, has not made a declaration of dividends.

(2) With effect from the date of the commencement of this Act, all assets, liabilities, rights and obligations of the Bank relating to the non-performing portfolio of the Bank

and in existence immediately before that date shall, without further assurance, vest in the Government.

(3) Notwithstanding subsection, (2) all proceedings pending on the date of commencement of this Act by or against the Bank in

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respect of any matter relating to the non-performing portfolio of the Bank may be continued by or against the Bank.

(4) The Bank shall be indemnified by the Government against all liability of the Bank which the Bank incurred before the commencement of this Act arising from any suit or other legal proceedings and from any claim or demand in respect of any matter relating to the non-performing portfolio.

(5) The Minister shall, in writing give directions to the Board for the management and realization, by the Bank, of the non-performing portfolio on such terms and conditions as may be agreed between the Minister and the Board."

The Development Bank of Zambia (Amendment) Act No. 11 of 2001 came into operation on 29th November, 2002, by virtue of Statutory Instrument No. 84 of 2002, while the Act itself was assented to on 8th November, 2001. The Deed of Transfer of Mortgage executed by the respondents is dated 23rd June, 2005. The letter written by the Secretary to the Treasury is dated 9th

August, 2005. These dates are significant as they are all before the commencement of this action which was on 11th July, 2007.

A close reading of Section 11A of the Development Bank of Zambia (Amendment) Act No. 11 of 2001 leaves no doubt as to what

happened to the non-performing portfolio of the 2nd respondent. It was vested in the Government. The word vested, according to Black's Law dictionary, Eighth Edition means:

"Having become a completed, consummated right for present or future enjoyment; not contingent; unconditional; absolute."

This meant that all assets, liabilities, rights and obligations of the 2nd respondent relating to the non-performing portfolio were on 29th November, 2002, conferred upon the Government absolutely. However, Section 11A (5) of the Development Bank of Zambia (Amendment) Act No. 11 of 2001, gave the Minister authority to direct the Bank on how to manage the non-performing portfolio. The respondents contended that the

Government transferred the loan, which was a non-performing portfolio, from the 2nd respondent to the 1st respondent. We agree with the respondents. There is correspondence on the record before us which shows that the Government instructed the 2nd respondent to transfer the loan to

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the 1st respondent. In a letter dated 16th April, 2004, from the 2nd respondent addressed to the 1st respondent, the 2nd respondent transferred the non-performing assets of the coffee project to the 1st respondent in order to comply with the instruction from the Minister of Finance and National Planning. Further, on 20th April, 2004, the then Minister of Finance and National Planning wrote a letter to the appellants in which he advised that the Coffee Project portfolio under which they had obtained the loan had been transferred from the 2nd respondent to the 1st respondent.

The evidence on record shows that the appellants were fully aware that the Government had instructed the 2nd respondent to transfer the non-performing assets to the 1st respondent. There is

a letter on the record of appeal before us dated 8th July, 2004, which the 3rd appellant wrote to the 1st respondent with suggestions on how best to proceed with the project in light of the decision by the Minister of Finance and National Planning to transfer the rose

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farming project portfolio from the 2nd respondent to the 1st respondent. An excerpt from the letter reads as follows:

"We believe that the decision by the Hon. Minister of Finance and National Planning to transfer the Rose Project portfolio from DBZ to the Coffee Board was meant to give chance for a fresh look at this problem and see how these projects could be structured in order not to lose the invested capacity by making them operational."

This letter clearly showed that the appellants were aware that the Government had transferred the loan to the 1st respondent. The letter from the then Secretary to the Treasury dated 9th August, 2005, in response to an appeal from the rose growers was merely a confirmation of the Minister's instruction to

transfer the non-performing assets to the 1st respondent. We agree with the appellants' argument that the letter by the Secretary to the Treasury could not indeed supersede legislation. In our view nonetheless, the letter by the then Secretary to the Treasury was not intended to supersede legislation, it was merely communicating the position that Government had taken on the non-performing assets.

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On the totality of the correspondence that we have referred to, we are satisfied that the Minister of Finance and National Planning issued the instruction to transfer the non-performing assets from the 2nd respondent to the 1st respondent. We are also satisfied that the instruction by the Minister was in line with Section 11A (5) of the Development Bank of Zambia (Amendment) Act No. 11 of 2001.

The appellants also argued that the Deed of Transfer of Mortgage executed by the respondents was null and void as there was nothing for the 2nd respondent to transfer since the non-

performing portfolio had reverted to Government. Having found that the Minister of Finance and National Planning had instructed the 2nd respondent to transfer the loan facility to the 1st respondent, our considered view is that the Deed of Transfer of Mortgage executed between the respondents was valid. The respondents had to execute the Deed of Transfer of Mortgage in order to formally transfer the security for the loan facility.

The appellants submitted that the 1st respondent had no *locus standi* to commence proceedings against them as the Deed of

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Transfer of Mortgage executed between the respondent was invalid. Having found that the Deed of Transfer of Mortgage was duly executed, it follows that the 1st respondent had *locus standi* to commence proceedings against the appellants. With respect to the 2nd respondent, the appellants submitted that it had had no *locus standi* to commence an action against them as the loan in issue had reverted to Government by virtue of Section 11A(2) of the Development Bank of Zambia (Amendment) Act No. 11 of 2001. The 1st respondent is the party that originally commenced

the action against the appellants for the recovery of the loan. On 3rd October, 2007, the appellants filed a defence and a counter-claim which contained allegations against the 2nd respondent which was not a party to the proceedings at the time. On 18th February, 2008, the 2nd respondent filed a summons for non-joinder on grounds that it would be directly affected by the outcome of the proceedings in view of the counter-claim made by the appellants. Having filed a counter-claim against the 2nd respondent, the appellants cannot then question the 2nd respondent's *locus standi* to these proceedings as it had a right to be heard. The 2nd respondent had to defend itself in

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view of the allegation in the counter-claim, and the only way it could have done so was to join the proceedings.

Mr. Musukwa submitted that the issues that were raised in grounds one and two of the appeal were not raised in the appellants' pleadings or at trial. We do not agree. In his Judgment at page 21, lines 15 to 30 of the record of appeal, the learned trial Judge dealt with the issue of *locus standi* since the appellants had

raised it as a defence. On that basis, we find no merit in this argument.

It follows from what we have said above that there is no merit in grounds one to four of the memorandum of appeal.

The issues that were raised in grounds five and six of the appeal were similar. We will therefore deal with these two grounds of appeal as one. The appellants acknowledged that a mortgagee in possession can exercise the power to sell under Section 9 of the Conveyancing and Law of Property Act, 1881, but argued that the mortgagee had a duty to sell at a price that is sufficient to cover the amount due. The appellants contended that the respondents were

aware of the sum due and should have sold the mortgaged property at a price that was sufficient to cover the outstanding sum. They submitted that the respondents breached their duty of care to the appellants when they sold the mortgaged property, which was in good condition, at a low price. The appellants also argued that the respondents breached their duty of care to the

appellants when they sold the mortgaged property without having it valued. They contended that the respondents did not exercise the power of sale in a prudent way on account of the low price at which the assets were sold. They further stated that the respondents had a duty to obtain the best possible price and to this effect referred us to the authors of **Megarry's Manual of the Law of Real Property,** 6th Edition in which the following is stated at page 478:

"Further a mortgagee is under duty to take reasonable care to obtain a proper price so that he will be liable to the mortgagor if he advertised the property for sale by auction without mentioning a valuable planning permission……."

The appellants also relied on the case of **Werner v Jacob**[1] in which the court held that:

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"If a mortgagee exercises his power of *sale bona fide* for the purpose of realizing his debt and without collusion with the purchaser, the court will not interfere even though the sale be very disadvantageous unless the price is so low as in itself to be evidence of fraud."

The appellants contended that this is one such case in which the learned trial Judge should have interfered with the sale, as the sale price was too low.

The appellants contended that the respondents were in breach of their duty of care on account of the low price at which the assets were sold. In paragraph 659 of the Halsbury's Laws of England, 4th Edition Re-issue, Volume 32, the following is stated under duty of a mortgagee in exercise of the power of sale:

"A mortgagee is not a trustee for the mortgagor as regards the exercise of the power of sale. He is not obliged to exercise his power of sale even if advised to do so or if the asset is depreciating however disadvantageous a sale might be to the mortgagor. He is not obliged to delay in the hope of obtaining a higher price, or if redemption is imminent………

He can decide if and when to sell on the basis of his own interests. He owes a duty in equity to exert the power in good faith for the purpose of

obtaining repayment and to take reasonable precautions to secure a higher price."

It further reads that:

"If a mortgagor seeks relief promptly, a sale will be set aside if there is fraud, or if the price is so low as to be in itself evidence of fraud, but not on the ground of undervalue alone."

The 2nd respondent took possession of property No. F/378a/A/479, which was the site for the rose farming project on 28th June, 2002. This was in order, as the Development Bank of Zambia (Amendment) Act No. 11 of 2001, by which the non-performing portfolio reverted to Government only came into effect on 29th November, 2002. The 2nd respondent advertised the property for sale on 16th January, 2003 and on 13th June, 2005. The 2nd respondent's witness, Marvis Mate Chaila, testified that except for the van that was sold for ZMW23,000.00, the 2nd respondent did not sell the assets as it failed to get a suitable offer.

The assets in question were sold by the 1st respondent. We have noted from the record of appeal before us that the 1st respondent sold the green house structure for the sum of

US$63,000.00 and property No. F/378a/A/479 for the sum of ZMW160,000.00. The 1st respondent's witness, Enock Mbewe, testified that the 1st respondent ran an advertisement for the sale of the assets in the Post Newspaper and the Times of Zambia for three days. On the record before us there is only one advertisement that was placed by the 1st respondent and it specifically mentioned the sale of the green house structure which covered two hectares of the property. There is no mention of the sale of property No. F/378a/A/479 in that advertisement. The only proof of sale of the property is the registration of the assignment with the Lands and Deeds Registry dated 27th February, 2007. The circumstances under which the sale was conducted are not clear.

In their affidavit in opposition, the appellants claimed that the property in issue had an open market value of not less than ZMW 350,000.00, although they did not produce a valuation report to that effect. The respondents did not dispute this claim. It is settled law that a mortgagee in possession is entitled to sell the mortgaged property in order to recover its money and the sale

need not be at an open market value for as long as it is able to show that it took

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the necessary steps to obtain a proper price for the property. In this case, there is no proof that the 1st respondent advertised the sale of the property in a paper with wide circulation in a bid to receive a proper price for the assets.

In the case of **Standard Chartered Bank v Walker**[2] Lord Denning, at page 942 held that:

"If a mortgagee enters into possession and realises a mortgaged property, it is his duty to use reasonable care to obtain the best possible price which the circumstance of the case permit. He owes this duty not only to himself (to clear off as much of the debt as he can) but also to the mortgagor so as to reduce the balance owing as much as possible and also to the guarantor so that he is made liable for as little as possible on the guarantee."

Further, in the case of **Cuckmere Brick Company v Mutual Finance Limited**[3], Lord Bowen and Lord Fry stated that it was the duty of a mortgagee, when realizing the mortgaged property by sale, to behave as though he was selling his own property so that the mortgagor may receive credit for the value.

In that case, the mortgagee's auctioneers forgot to mention in their advertisement that there was planning permission for 100 flats on the mortgaged

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land, which disclosure would have increased the value of the land. It was held that:

"A mortgagee when exercising his power of sale owed a duty to the mortgagor to take reasonable care to obtain a proper price"

The failure by the 1st respondent to advertise the sale of property No. F/378a/A/479 showed that it did not exercise care to obtain a proper price for the assets. The appellants have asked us, as they did in the court below, to interfere with the sale on account of the low price at which the assets were sold. The 1st respondents sold almost half of the assets given as security and yet the money realised did not reduce the appellants' indebtedness in any meaningful way. At the time of the sale, the amount owing was US$1,661,065.03 and only the sum of US$105,953. 67 was realised from the sale.

In the case of **Finance Bank Limited v Africa Angle Limited and Two Others**[4], the respondents asked the trial court to order a re-evaluation of the mortgaged property to determine its true value and for an account to be rendered, after the sale of the mortgaged

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property failed to offset the mortgage debt. The trial court ordered a re-evaluation of the mortgaged property. In that case, we held that:

"It is not unreasonable for a court to order re-evaluation of a property where a mortgagor claims that the price obtained on a sale by a mortgagee was insufficient."

It is our considered view that this is a proper case in which we should order a re-evaluation of the property to determine the open market value at the time it was sold. If the value exceeds what the property was sold for, credit should be given to the appellants and their indebtedness reduced accordingly. We hereby order the re-evaluation of property No. F/378a/A/479 and that the date of the re-evaluation should be the date on which the assignment was registered at the Lands and Deeds Registry. In

the event that the value of the property is less than the open market value, the mortgagee is entitled to exercise its rights under the mortgage.

We have also noted that the learned trial Judge deducted the sum of US$43,000.00 that the appellants did not draw when computing what was due to the 1st respondent. Any interest that

was charged on this sum should also be deducted from the outstanding balance.

It follows from what we have said above that grounds five and six of this appeal are allowed. The parties shall bear their respective costs.

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M.S.MWANAMWAMBWA

ACTING DEPUTY CHIEF JUSTICE

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A.M.WOOD
SUPREME COURT JUDGE

....
M.LISIMBA
ACTING SUPREME COURT JUDGE