IN THE COURT OF APPEAL FOR ZAMBIA HOLDEN AT NDOLA
(Civil Jurisdiction)

CAZ Appeal No. 208/2019

REPUBLIC OF ZAMBIA
COURT OF APPEAL
26 FEB 2020
REGISTRY
P.O. BOX 50067, LUSAKA

B E T W E E N :

THOMAS SINKALA **APPELLANT**

AND

ENGEN PETROLEUM ZAMBIA LIMITED **RESPONDENT**

CORAM : Mchenga DJP, Chishimba and Majula, JJA
19th February, 2020 and 26th February, 2020

For the Appellant : Mr. A. Tembo of Messrs Tembo Ngulube and Associates
For the Respondent : Mr. Kawana of Messrs Corpus Legal Practitioners

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J U D G M E N T

CHISHIMBA, JA, delivered the Judgment of the Court

CASES REFERRED TO:

1. **Wilson Masauso Zulu v. Avondale Housing Project Limited (1982) Z. R. 172**
2. **Anderson Kambela Mazoka & Others v. Electoral Commission of Zambia & Attorney General (2005) ZR 140 (SC)**
3. **Attorney General v. Marcus Kampumba Achiume (1983) ZR 1**
4. **Roland Leon Norton v. Nicholas Laston (2010) 2 ZR 358**
5. **Maamba Collieries Limited v. Godfrey Mudenda Ng'andu SCZ Appeal No. 79 of 2005**
6. **Nkongolo Farms Ltd v. ZANACO & Others SCZ No. 19 of 2007**
7. **Wilson Masauso Zulu v. Avondale Housing Project Limited (1982) Z. R. 172**
8. **Intermarket Banking Corporation Ltdv. Priscilla Kasonde SCZ Judgment No. 44 of 2014**
9. **Eddie Christopher Musonda v Laurence Zimba SCZ Appeal No 41 of 2012**
10. **Galaunia Farms Limited v National Milling Company Limited (2002) ZR**

11. **Thames Guaranty Limited v. Campbell [1985] Q.B. 210**
12. **African Banking Corporation Limited Vs Plinth Technical Works SCZ No. 28 of 2015**
13. **Magic Carpet Travel & Tours vs Zambia National Commercial Bank Limited (1999) ZR 61**

LEGISLATION AND OTHER WORKS REFERRED TO:

1. Phipson on Evidence, 17th Edition, paragraph 6-06, at page 151
2. Halsbury's Laws of England 4th Edition, Volume 32 Paragraph 401
3. Magarry and Wade: The Law of Real Property 7th Edition (London, Sweet and Maxwell 2008)
4. Chitty on contract: General Conditions

INTRODUCTION

1. This is an appeal against the Judgment of the High Court delivered by Justice I. Z. Mbewe holding that the Appellant executed the third party mortgage and that there was no fraud or misrepresentation as alleged, as well as the refusal to set aside the mortgage. Further the holding that the Appellant was advised to seek independent legal advice by the Respondent.

FACTUAL BACKGROUND

2. The Respondent and Lokambe Energy Solutions Limited (1st Defendant) had entered into a Marketing Licence Agreement (MLA) for the 1st Defendant to operate Chinama Fueling Station at a monthly fee. The parties agreed that fuel and lubricant products would be and were in fact supplied on credit terms and paid from proceeds of sale of the products. The Appellant

authorized the 1st Defendant to utilize its Land Record title as security for the credit facilities granted. A third party mortgage dated 12th June, 2015 was allegedly executed in respect of Plot No. 30013/1080 Kamwala South by the Appellant.

3. Upon default, the Respondent terminated the MLA agreement on 2nd March 2016. The Respondent then commenced an action against the Lokambe Energy solutions (1st Defendant) and the Appellant who was 2nd Defendant.

They sought the following reliefs;

a) Payment of all monies and contractually agreed interest due and owing to the Plaintiff and having been advanced to the 1st Defendant under a supply agreement between the Plaintiff and the 1st Defendant, and the Third- Party Mortgage Deed entered into between the Plaintiff and Defendants dated 12th June 2015.

b) An Order that the Defendants pay to the Plaintiff the total sum of ZMW3,079,486.00 being the outstanding sum as at 3rd November 2016, secured by the Third party mortgage Deed in respect of the mortgaged property dated 12th June 2015.

c) Delivery by the 2nd Defendant to the Plaintiff of vacant possession of the mortgaged property.

d) An Order of foreclosure and sale of mortgaged property and Legal costs.

4. The 1st Defendant in its defence, did not essentially deny being indebted, save to state that the amounts were incorrect; the Respondent not having taken into account the alleged fuel shortage deliveries and withholding tax sums applicable. The 1st Defendant further alleged that the credit supply terms secured

by the third party mortgage were removed and substituted with advance payments from 1st October, 2015. The directive from Tazama pipeline allegedly waived all agreed trade terms subject of the 3rd party mortgage. That in any event, the mortgage was only valid from 15th February to 15th October 2015.

5. The Appellant (2nd Defendant) in his affidavit in opposition conceded entering into a written agreement with Lokambe Energy Solutions Limited, authorizing it to pledge his property as security in respect of the supply of fuel and lubricant products on credit. The property was to be used as collateral for a period of 12 months subject to renewal and the secured sum was up to the limit of K1,500,000.00.

6. According to the Appellant, although he surrendered the land record title to Lokambe Energy Solutions Limited, he was not a party to the purported 3rd party mortgage. He alleged that he did not execute the mortgage deed and that the signature appended to the third party mortgage purporting to be his was forged.

7. The Appellant further averred that at no time was he advised to seek independent legal advice by the Respondent before executing the alleged third party mortgage on 12th June 2015. In any event the security was for a limited period only.

8. To support his claim that the signature on the 3rd party mortgage was a forgery, the Appellant called an expert witness who testified that the Forensic Sciences Department, had examined the collected specimen signatures of the Appellant. The investigation revealed and concluded that the signature on the 3rd Party Mortgage Deed was a forgery and not the Appellant's. The forensic handwriting expert stated in his witness statement that the purported signature on the mortgage deed is a simulated forgery.

9. The learned trial court ordered that the matter proceeds as if began by way of writ and the affidavits on record stood as pleadings.

DECISION OF THE LOWER COURT

10. The trial court held that Lokambe Energy Solutions Limited was indebted to the Respondent in the sum of ZMW 3,079,456 with interest and entered judgment accordingly.

11. In respect of the Appellant (2nd Defendant), the court below held that the signature appended on the third party mortgage was not a forgery. In arriving at this conclusion, the learned trial judge considered the evidence of the expert witness and ruled that it

was not binding on the court. The court below further considered the other available evidence on record and compared the disputed signature on the third party mortgage with the signature on the jurat contained in the Appellant's affidavit in opposition dated 17th April 2018. The learned trial judge observed that the two signatures were the same and drew the inference that the signature appearing on the third party mortgage is the Appellant's.

12. According to the lower court, the Appellant was aware of all the material facts surrounding the third party mortgage and the creation of the mortgage on the subject property.

13. The court below rejected the contention by the Appellant that the third party mortgage was cancelled when the credit facilities were terminated and substituted by advance payments. The trial court held that the third party mortgage is valid and enforceable against the Appellant.

14. As to the specific period and amount covered by the mortgage, the court held that the third party mortgage was a continuing security for the credit facility and is devoid of any time period. The third party mortgage was to be discharged upon payment of all credit facilities and that the stipulated security sum in the 2nd

schedule to the mortgage is K1, 500,000 and not the sum of K 100,000.

15. It was the lower court's finding that there was no undue influence by the Respondent exerted on the Appellant to execute the third party mortgage. Further, that there was no misrepresentation of facts made by Lokambe Energy Solutions Limited to the Appellant with regard to the nature of the agreement and that there was a valid agreement between the parties.

16. The court below granted the reliefs of foreclosure, possession and sale of the property pledged as security.

GROUNDS OF APPEAL

17. The Appellant, being dissatisfied with the judgment, has appealed raising the following grounds of appeal;

    (i) The Court below erred in fact and in law when it held that the Appellant executed the Third party mortgage dated 12th June, 2015.

    (ii) The Court below erred in fact and in law when it found and held that the Respondent had advised the Appellant to seek independent legal advice on the nature and ramifications of a Third party mortgage on the Appellant before he signed the Third party mortgage dated 12th June, 2015.

    (iii) The Court below erred in fact and in law when it held that the Appellant sought independent legal advice based on the Respondent witness' assumption that he had done so, all of which is contrary to the Supreme Court decisions of Intermarket

Banking Corporation Ltdv. Priscilla Kasonde SCZ Judgment No. 44 of 2014 and Nkongolo Farms Ltd v. ZANACO & Others SCZ No. 19 of 2007.

(iv) The Court below erred in law when it placed the burden of proof on the Appellant to prove that he had not been advised to seek independent legal advice before he executed the Third party mortgage dated 12th June, 2015.

(v) The Court below misdirected itself when it completely misapprehended the Appellant's argument on the duty imposed by the Law on the Respondent to ensure that the Customer did not misrepresent facts to the Appellant before he allegedly signed the Third party mortgage dated 12th June, 2019.

ARGUMENTS BY THE PARTIES

18. The Appellant filed heads of argument dated 25th November, 2019. The Appellant began by making reference to the burden of proof, incumbent upon the Respondent to prove that the Appellant executed the third party mortgage and that he had been advised to seek independent legal advice prior to the execution. We were referred to a passage from **Phipson on Evidence, 17th Edition, paragraph 6-06, at page 151** where the learned authors opine that the burden of proof lies upon the party who substantially asserts the affirmative of the issues.

19. In addition, the cases of ***Wilson Masauso Zulu v. Avondale Housing Project Limited*** *(1)* and ***Anderson Kambela Mazoka & Others v.***

Electoral Commission of Zambia & Attorney General [2] were cited as authority that a party must prove his case in order to be entitled to judgment in his favor.

20. Under ground 1, the Appellant submits that there was no evidence adduced before the lower court showing that any person witnessed the Appellant append his signature on the mortgage deed, which he only had sight of in March, 2018. It was further submited that the lower court had erroneously relied on the letter dated 29th May, 2015 by the Appellant authorizing use of his title deeds, as well as an agreement between the Appellant and Lokambe Energy Solutions Limited in concluding that the Appellant indeed had executed the mortgage deed in question.

21. The Appellant contended that the trial court ignored the evidence by the Appellant that he only saw the third party mortgage in March 2018 and immediately reported the matter to the Police. Further, that the Respondent's witness (PW) conceded at trial that he did not see the Appellant execute the third party mortgage. We were urged to reverse the finding made by the court below that the Appellant executed the third party mortgage in question as there was no evidence to support such finding. As authority, the case of ***Attorney General v. Marcus Kampumba***

Achiume [3] was cited on instances when the appellate court can reverse findings of fact made by a court below, such as where there is unbalanced evaluation of the evidence and misapprehension of facts.

22. It was argued that the mere fact that the Appellant was aware of the creation of a mortgage on the subject property or intention there of is not sufficient to warrant a finding that the Appellant executed it. The letter on record merely shows that the Appellant authorized Lokambe Energy Solutions Limited to place a mortgage on the property and is not evidence that the Appellant indeed executed the said third party mortgage. Having not executed the third party mortgage the Appellant cannot be bound by its terms. We were referred to the case of ***Roland Leon Norton v. Nicholas Laston*** [4]. The Appellant argues in a nutshell, that he cannot be bound by a contract to which he is not a party.

23. With regard to grounds 2, 3 and 4 the Appellant submits that the Respondent failed to adduce evidence that he was advised to seek independent legal advice before he allegedly signed the third party mortgage dated 12th June, 2015. Reference was made to the evidence by the Respondent's witness who testified that he was not aware whether or not the Appellant was advised to seek

independent legal advice regarding the pledging of his property as security. The said witness stated that the Respondent's Finance Manager was in a better position to know whether or not that advice was given. The said Finance Manager was not called to testify. This, according to the Appellant, was fatal to the Respondent's case. To buttress the above contention, we were referred to the case of ***Maamba Collieries Limited v. Godfrey Mudenda Ng'andu*** [5].

24. The Appellant went on to submit further that the trial court did not make any finding on the issue whether or not independent advice was given but merely concluded that the Appellant was not unduly influenced to execute the third party mortgage. Further, that the trial court misapprehended the facts when it arrived at this finding. The Appellant referred us to the cited case if ***Anderson Kambela Mazoka & Others v. Electoral Commission of Zambia & Attorney General*** [2] in support of the argument that the Respondent failed to adduce sufficient evidence to prove that the Appellant was advised to seek independent legal advice.

25. According to the Appellant, the Respondent failed to discharge the duty imposed on it to advise the Appellant to seek independent legal advice. As authority the case of ***Nkongolo***

Farms Ltd v. Zambia National Commercial Bank & Others [6] was cited on the responsibility placed on a bank to advise the surety to obtain independent legal advice and explain the implications of the transaction. We were urged to set aside the third party mortgage dated 12th June, 2015.

26. In relation to ground 3, the Appellant assails the court's version of the evidence by PW1, that discussions were held with the 2nd Defendant before he executed the third party mortgage leading to the 2nd Defending surrendering the said title deed to the plaintiff. According to the Appellant, though he released the title to the Respondent and the 1st Defendant, the surrender of the title was not precipitated by the Respondent's assumption that he had been advised to seek independent legal advice before signing the mortgage. Therefore, the court below fell in error, having arrived at the decision based upon the assumptions made by the Respondent's witness.

27. In ground four, the Appellant reiterated that the duty to prove that the Appellant was advised to seek legal advice fell squarely upon the Respondent, as creditor. We were invited to have sight of the case of ***Nkongolo Farms Ltd*** [6] *(supra)* that espouses the principle of the duty placed on a creditor.

28. Under ground 5, the Appellant continued to argue on the duty imposed on a creditor to ensure that a borrower does not exercise undue influence and make false representations to a surety. As authority, we were drawn to the attention of the case of ***Intermarket Banking Corporation Limited v. Priscilla Kasonde*** [8]. According to the Appellant, the Respondent as a creditor did not discharge its duty to ensure that the 1st Defendant did not make any false representations to the Appellant.

29. It was contended that the Appellant entered into an agreement with Lokambe Energy Solutions Limited to use his property as security for a debt that would accrue from 1st April, 2015 for a period of 12 months subject to renewal. Further, that it was not the Appellant's intention to provide security for Lokambe Energy Solutions Limited for debt which had already accrued.

30. It was argued that the third-party mortgage, under clause 1 sought to bind the Appellant to the Marketing License Agreement, that he was not a party to. Further, that clause 15 of the Third-party mortgage provided that the mortgage would be a continuing mortgage contrary to the Appellant's intention that exposure of his property as security for debts accrued was limited to the period 1st April, 2015 to 30th may, 2016.

31. The Appellant argued that while this information was known to the 1st Defendant, it was not the intention of the Appellant to be bound by the provisions of clause 1 and 15 of the third party mortgage. Therefore, that the Respondent failed to discharge its duty of ensuring that Lokambe Energy Solutions Limited did not misrepresent the nature of the transaction to the Appellant.

32. The Respondent filed heads of arguments dated 10th February 2020. On the issue of the execution of the third party mortgage, the Respondent, began by making reference to the Appellant's affidavit in opposition to Originating Summons. Particularly paragraph 4 where the Appellant deposed that he authorized Lokambe Energy Solutions to use his Land Record Card to secure a mortgage as security for the supply of fuel and lubricant products on credit. Further that he received consideration for the use of the collateral. The Respondent contends that the Appellant was engaged in discussions before the third party mortgage was executed, and that the execution was witnessed by Lymvwa Lemba as per deposed affidavit on record.

33. It was submited that since ground 1 is premised on a question of fact and the judge having had the benefit of observing the demeanor of witnesses at trial, we ought not to interfere with the

findings unless there was misapprehension of facts. The case of ***Eddie Christopher Musonda v Laurence Zimba*** [9] ***and Wilson Masauso Zulu*** [1] ***(supra)*** were cited on reversal of findings of fact made by the learned trial judge on appeal.

34. The Respondent contends that it is inconceivable that anyone would have forged the Appellant's signature on the mortgage when he had already agreed to enter into the transaction and had received consideration.

35. In any event, an equitable mortgage was created by the surrender of the title deed to the Respondent. We were referred to the definition of a mortgage in **Halsbury's Law of England, 4th Edition**.

36. In response to grounds 2,3 and 4, the Respondents submits that there is an obligation placed on a lender to ensure that there is no undue influence exerted on a guarantor/borrower and that the said guarantor understands the transaction. Further that the advice to the guarantor to seek independent legal advice is a method of ensuring that the guarantor/borrower is aware of the transaction and is not itself what validates the guarantee/mortgage.

37. A mortgagor who fully understands the nature of the transaction cannot seek to invalidate the mortgage merely because they were not advised to seek legal advice in writing. The case of ***Intermarket Banking Corporation Zambia Limited Vs Priscila Kasonde*** [8] (supra) was cited on the law imposed on a creditor to take steps to ensure that a debtor does not exercise undue influence or make false representations to a surety and the duty to ensure adequate understanding by the surety of the transaction in question.

38. The gist of the argument by the Respondent is that a borrower who understands the nature of the transaction and voluntary enters into it cannot escape liability. Further such a borrower is precluded by estoppel from claiming that he was not advised to seek independent legal advice before pledging his property. The case of ***Galaunia Farms Limited v National Milling Company Limited*** [10] was cited on the principle of estoppel.

39. The Respondent maintained that, the Appellant authorized the use of his title deed to secure credit facilities to the tune of ZMW K1,500,000. Having previously entered into mortgage, the Appellant was aware of the transaction and cannot be heard to argue that he did not sign the mortgage and was not advised to

seek independent legal advice. The Respondent argued that the Appellant was advised to seek legal advice during his interactions with Respondent. There being no legal requirement that the interactions between the creditors and borrowers should be in writing, the Appellant cannot insist on documentary evidence.

40. As regards the alleged misrepresentation of facts to the Appellant, the Respondent submits that there was no such misrepresentation. The Appellant had authorized use of the mortgaged property for credit facilities granted by the Respondent to Lokombe Energy Solutions Limited. The exposure period of 12 months was renewable subject to further consideration between the Appellant and Lokambe. It was further submited that in any event, the said Lokambe Energy Solutions Limited defaulted on the credit facilities within 12 months of signing the mortgage. Therefore the monies subject to the proceedings were for the period agreed upon by the Appellant. The Respondent urged the court to dismiss the appeal.

41. The Appellant filed heads of argument in reply dated 17th February, 2020. Much of which are a repetition of the main arguments. It was submited that there is uncontroverted

evidence on record showing that the Appellant did not sign the third party mortgage; namely the evidence by the Respondent's witness that he did not see the Appellant sign the mortgage. Further that the evidence of one Iyamvwa Lemba was discounted by the lower court, therefore it cannot be called upon to assist the Respondent's case at this stage.

42. In respect of the argument of an equitable mortgage by the Respondent, the Appellant contends that the dispute is based on a legal third party mortgage and not on the basis of an equitable mortgage. Therefore, the arguments relating to the creation of an equitable mortgage are unfounded.

43. As regards the Respondent's responses to grounds 2, 3 and 4, the Appellant reiterated that there is a duty placed on a creditor to advise a surety to have adequate understanding of the nature and effect of the transaction in question. The said duty had not been discharged by the Respondent. Reference was made to the Appellant's evidence during cross examination to the effect that he had never dealt with a third party mortgage and therefore did not understand the nature and effect of a third party mortgage.

44. In response to the contentions by the Respondent to ground 5, the Appellant argued that the evidence on the record shows that

the Respondent had failed to discharge its duty of ensuring that the Lokambe made no false representations to the Appellant. Further, that the Appellant only authorized the Lokambe to use his property for debt that would accrue for a year beginning 1st April, 2015. This, according to the Appellant, did not cover any debt that had already accrued before the third party mortgage was executed. In addition, that had the Respondent been aware of this information, it would not have prepared the mortgage with the inclusion of clause 15 providing for a continuing mortgage.

45. It was contended that clause 1 of the mortgage sought to bind the Appellant to the Marketing Licence Agreement to which the Appellant was not privy. Further, that the agreement sought to have the Appellant's property secure debt that had already accrued to Lokambe before the third party mortgage was executed. The Appellant went on to argue that the contents of clauses 1 and 15 of the mortgage deed are at variance with the agreement the Appellant had with Lokambe. This, according to the Appellant, shows that there was misrepresentation, on the part of Lokambe.

DECISION OF THE COURT

46. We have considered the appeal, the authorities cited and submissions advanced by Learned Counsel. The Appellant has raised five grounds of appeal. In our view, the issues raised for determination are as follows;

(i) Whether the Appellant had executed the third party mortgage

(ii) Whether the Appellant was advised to seek independent legal advice and if not, the effect of the breach of duty by the creditor

(iii) Whether there was misrepresentation of facts to the Appellant by the Respondent prior to the alleged execution of the 3rd party mortgage, which the Respondent was under a duty to ensure there was no such breach.

47. Evaluation of the pleadings and evidence adduced in respect of the third party mortgage is as follows; the Respondent deposed that at the time of execution, it had explained the consequences of offering the property as security and advised the Appellant to seek independent legal advice. It is not in dispute that the deponent of the '*affidavit in opposition to further affidavit in opposition*' Iyamvwa Lemba was not called as a witness to testify at trial and his evidence was discounted by the court below. This matter was treated as if began by way of writ.

48. PW1 testified that its' finance manager had advised the Appellant to seek independent legal advice before executing the third party

mortgage and that the Appellant deposited the original copy of land record in respect of plot number 30013/1080.

49. The Appellant testified that he granted Lukambe Energy Solutions Limited authorization to use his title in respect of plot number 30013/1080 as security for credit facilities. The Appellant stated that even though he made the above authorization, he never signed the third party mortgage and the signature appended thereon was a forgery. DW2 produced a report by the Forensic Department stating that the signature in issue was forged.

50. The learned trial court judge considered the alleged issue of forgery in respect of the third party mortgage and whether the Appellant had executed the mortgage. After considering the forensic expert opinion evidence and other available evidence on record, namely the comparison of the signature in issue and the signature of the Appellant in the jurat in his affidavit in opposition, the learned trial judge opined that the signatures looked similar. Coupled with the evidence to the effect that the Appellant was aware of all material facts surrounding the mortgage, the court below drew an inference that the signature on the third party mortgage is the Appellant's.

51. The issue is whether the learned trial court erred by rejecting the handwriting expert opinion report of forged signature and drawing an inference that the Appellant executed the third party mortgage in issue. It is trite that expert evidence is opinion evidence and cannot take the place of substantive evidence. The opinion evidence of an expert witness is not binding on the court and is considered together with other relevant facts in reaching a final decision in the matter. Therefore, a court is not bound to accept the evidence if it finds good reasons for not doing so.

52. We are of the view that the court below was on firm ground in rejecting the expert opinion evidence and drawing the inference that the Appellant executed the third party mortgage for the following reasons; the court below had compared the similarity of the signature of the Appellant in the deed in issue, with the jurat signature contained in the affidavit deposited by the Appellant which appear the same. Coupled with the relevant fact that the Appellant had authorized the 1st Defendant to use his title deeds as collateral for the credit facilities advanced for a period of 12 months.

53. There was documentary evidence by the Appellant, namely a letter dated 29th may 2015, authorizing Lokambe Energy

Solutions Limited "***to proceed and put up a Mortgage on Land Record Holding Number 30013/1080 Kamwala South being collateral for credit facilities granted..... By Engen Petroleum Zambia Limited to the value of ZMW 1,500,000".*** These were more or less the terms of the third party mortgage.

54. We are therefore, of the view that the Appellant had executed the third party mortgage and that the learned trial judge was on firm ground to hold accordingly.

55. Even assuming for arguments sake that third party mortgage deed in issue was not executed by the Appellant, there is evidence on record, by the Appellant admitting to having deposited the land record relating to the property in issue to the Respondent. The Appellant has attempted to argue that the issue before the court was the third party mortgage and not the deposit of title deeds resulting in an equitable mortgage. The issue of an equitable mortgage is a point of law that can be raised at any point. It is trite that a deposit of title deeds for use as collateral in return for credit facilities advanced to borrower creates an equitable mortgage. See the case of ***Magic Carpet Travel & Tours vs Zambia National Commercial Bank Limited*** [13]. The deposit of title is an acknowledged method of creating an equitable mortgage. In the case of **Thames Guaranty Limited v. Campbell** [11] the court stated that;

> ***"A deposit of title deeds by the owner of freeholds or leaseholds with his creditor for the purpose of securing either a debt***

antecedently, or a sum of money advance at the time of the deposit operates as an equitable mortgage or charge by virtue of which the depositee acquires, not merely the right of holding the deeds until the debt is paid, but also an equitable interest in the land itself. A mere delivery of the deeds will have this operation without any express agreement, whether in writing or orally to the conditions of or purpose of the delivery, as the Court would infer the intent and agreement to create a security from the relation of debtor and creditor subsisting between the parties unless the contrary were shown and the delivery would be sufficient part performance of such agreement..."

56. Reverting back to the issue, we are of the view that the court below was on firm ground in holding that the Appellant did execute the mortgage in issue. As regards the nature of a mortgage, the learned authors of **Megarry and Wade: The Law of Real Property 7th Edition** state as follows at paragraph 24001, on page.1077,

"...When one person lends money to another he may be content to make the loan without security for the debt or he may demand some security for the repayment of the money. In the former case, the lender has a right to sue for money if it is not duly paid, but that is all, and if the borrower becomes insolvent because the lender has a claim to the security which takes precedence over other creditors. The most important kind of security for a debt is the mortgage. The essential nature of a mortgage in its traditional form is that it is a conveyance of a legal or equitable interest in property, with a provision for a redemption i.e., that upon payment of a loan or

the performance of some other obligation stipulated in the mortgage, the conveyance shall become void or the interest shall be reconveyed.

57. We therefore hold that there was a third party mortgage executed by the Appellant and find no merit in ground one.

58. Having held that the Appellant had executed the third party mortgage, the second issue to be determined is whether the Appellant was advised to seek independent legal advice and informed of the consequences of the transaction. The Appellant contends that he was not advised to seek independent legal advice nor was the implication of the transaction explained to him.

59. A third party mortgage arises when security for the borrowing is given by a third party individual or entity for the liability of the borrower. The issue is whether that relationship gives rise to a duty as between the creditor and the prospective third party mortgagor to explain the meaning and effect of the mortgage transaction and advice to the mortgagor to seek independent advice. The purpose of requiring independent legal advice is to ensure that there is an understanding of the nature and consequence of the mortgage transaction with potential adverse results.

60. There is a duty imposed on creditors to explain to a surety the effects, implications and consequences of execution of a mortgage or guarantee transaction. As well as advising the surety to seek independent legal advice, especially where no pecuniary benefits are being received or derived by the surety. The duties owed to a mortgagor in a third-party mortgage transaction by a creditor are limited to disclosing to the prospective mortgagor any matters peculiar to the transaction, such as facts which the third-party mortgagor cannot reasonably be expected to know.

61. In the cited case of ***Nkongolo Farms Limited*** (6) (supra), the Supreme Court stated that the law imposes on a creditor a duty to take steps to ensure that not only does a borrower or debtor not exercise undue influence but also has a duty to ensure that the surety has adequate understanding of the nature and effect of the transaction.

62. In the case of ***African Banking Corporation Limited Vs Plinth Technical Works*** (12), the Supreme Court in resolving the issue whether the bank had discharged its duty to ensure that the 2nd Respondent had adequate understanding of the nature and effect of the third party mortgage stated as follows;

"From the evidence and even if there was no evidence that the Appellant had advised the 2nd Respondent to seek independent advice, it is discernable that the 2nd Respondent is an adult of full capacity, who is well educated and is highly literate and well exposed, having executed similar contracts or mortgage with the appellant bank previously ....and he cannot be heard to argue that the Appellant did not ensure that his consent to execute was obtained with undue influence".

63. In the case before us, though there is no evidence that the Appellant was advised to seek independent legal advice or the consequences of the transaction explained, we are of the view that the Appellant was aware of the consequences of pledging his property as security. We refer to the agreement for usage of the Land Record Card between the 1st Defendant and the Appellant authorizing a mortgage to be placed on the Holding Number 30013/1080 Kamwala South for Engen Petroleum Zambia (Respondent) for a duration of twelve months. The Appellant as mortgagor received a pecuniary benefit consideration of ZMW 220,000.00. The contract was renewable yearly subject to agreement of the parties therein.

64. In the event of foreclosure of the property by the creditor (Respondent), Mr. Fordwell Kusaloka, the Managing Director of Lukambe Energy Solutions (1st Defendant) pledged his property

Subdivision 3 of Farm Number 610 Roma Park as collateral to the Appellant. We have reproduced paragraph 4 of the above mentioned agreement which stipulated as follows;

> "***Mr. Fordwell Kusaloka agrees and pledges to Mr. Thomas Sinkala property Subdivision 3 FARM No 610 situated in Lusaka Foxdale Area, Next to Roma Park, off Zambezi Road as collateral, should Engen Petroleum reposess property on land Record No. 30013/1080 Kamwala South and it will automatically be taken that Mr. Fordwell Kusaloka would have sold and transferred ownership of his property ..... to Mr. Thomas Sinkala NRC 710110/1/1 accordingly***".

65. The Appellant in his evidence stated that he is familiar with a mortgage deed and had dealt in real estate before and conceded authorizing the 1st Defendant to use his property as security in return for consideration of ZMW 220,000 per year.

66. We are of the view that, even though there is no evidence that the Appellant was advised to seek independent legal advice, he was aware of the effects, implications and consequences of execution of the third party mortgage or indeed the depositing of his title deeds for use as collateral. The Appellant even obtained pecuniary benefits from the transaction.

67. We therefore, cannot set aside the third party mortgage regardless of the fact that there was no documentary evidence to

show that he was advised to seek independent legal advice. We find no merit in grounds 2, 3 and 4.

68. In ground five, the issue for determination is whether the Respondent breached the duty imposed by the law to ensure that the 1st Defendant Lukambe Energy Solutions (Debtor) did not misrepresent facts to the Appellant prior to execution of the third party mortgage. Simply put, whether there was misrepresentation of facts by the 1st Defendant to the Appellant inducing him to execute the mortgage transaction in issue.

69. Representation is defined by **Chitty on Contract**: **General Principles, as *"a statement of fact, past or present, as distinct from a statement of opinion or intention"*. Halsbury's laws of England 4th Edition** paragraph 1005 volume 31 states that:

> ***"A representation is a statement made by a representor to a representee and relating to way of affirmation, denial description or otherwise to a matter of fact. The statement may be oral or in writing or arise by implication from words or conduct..."***

70. For an action for misrepresentation to succeed, a party must show that a representation was made by another party to him of

a statement either oral, in writing or by conduct which is relied upon to his detriment.

71. The alleged misrepresentation made by the 1st Defendant to the Appellant which the Respondent was under a duty to ensure the debtor did not exercise undue influence or make false representation to it as surety are as follows;

(i) that the 1st Defendant represented to the Appellant that the security was for a period of 12 months beginning 1st April, 2015 to 30th May, 2016 and not a continuing one.

(ii) that it was not security for debts that had already accrued before the third party mortgage was signed but for credit accrued after the third party mortgage was executed.

(iii) that Marketing License Agreement sought to bind the Appellant to an agreement he was never part of and to secure debts already accrued at the date of the mortgage.

72. In a nutshell, the Appellant's contention is that clauses 1 and 15 in the third party mortgage provided for terms that the Appellant never intended to be bound to, therefore, the Respondent failed to discharge its duty of ensuring that the 1st Defendant did not make false representations about the nature of the transaction to the Appellant.

73. The record will show that the Appellant authorized the 1st Defendant to put up a mortgage on his Holding Number 30013/1080 Lusaka being collateral pledge for credit facilities

pledged as security was correctly described in the schedule. The mortgage further stipulated that it was a continuing security and the maximum sum secured was stipulated as K 1, 500,000 with interest.

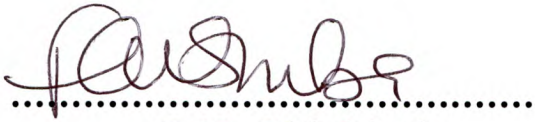
76. The duty imposed is not a blanket one but limited to disclosure to the prospective third party mortgagor any matters which are peculiar to the transaction and facts which the third-party mortgagor cannot be reasonably expected to know and which are unusual. The Appellant was aware that he was securing credit facilities obtained by the 1st Defendant. We do not find any misrepresentations made or duties owed by the Respondent creditor which were breached. It is trite law that when a document containing contractual terms is signed, then in the absence of fraud and misrepresentation the party signing it is bound.

77. Having failed to establish one of the five defences, that is fraud, misrepresentation, duress, undue influence or non est factum, the Appellant who lawfully executed the third party mortgage cannot now dispute the terms contained therein.

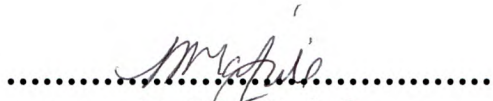
78. We therefore decline to set aside the third party mortgage which is enforceable. There being no merit in the appeal, we uphold the decision of the lower court and hereby dismiss the appeal.

Costs are awarded to the Respondent to be taxed in default of agreement.

C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT
COURT OF APPEAL



F.M. Chishimba
COURT OF APPEAL JUDGE



B. M. Majula
COURT OF APPEAL JUDGE