IN THE SUPREME COURT OF ZAMBIA **Appeal No. 208/2015**
HOLDEN AT KABWE

(Civil Jurisdiction)

BETWEEN:

MPONGWE FARMS LIMITED **APPELLANT**

AND

DAR FARMS AND TRANSPORT LIMITED **RESPONDENT**

Coram: **Malila, Kajimanga and Musonda, JJS**
on the 5th April, 2016 and 21st September, 2016

For the Appellant: Mr. J. Banda and Mr. K. Wishimanga of Messrs A. M. Wood & Company

For the Respondent: Mr. M. Haimbe of Messrs Malambo & Company

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JUDGMENT

Malila, JS, delivered the judgment of the court.

Cases referred to:

1. *Rahim Obadiah v. The People (Z) Nadhim Quasmi v. The People (1977) ZR 160 (Reprint)*
2. *Fidelitas Shipping v. W/O Exportables (1955) 2 ALL ER*
3. *Bank of Zambia v. Jonas Tembo & Others (2002) ZR 103*
4. *Valentine Shula Musakanya & Edward Jack Shamwana v. The Attorney General (1981) ZR 1*
5. *Re Robinson's Settlement, Gant v. Hobbs (1912) 1Ch. 717*
6. *Magnum (Z) Limited v. Quadri (Receiver/Manager) and Grindlays Bank International (Z) Limited(1981) ZR 141*

7. *The Rochdale Canal Co. v. King (1851) 2 Sim NS 78*
8. *City Express Services Limited v. Southern Cross Motors Limited, (Appeal No. 198 of 2006)*
9. *Anderson Mazoka and Others v. Levy Mwanawasa and Others (2005) ZR 138*
10. *Goldsworthy v. Brickell (1987) 1 All ER 853*
11. *Avalon Motors Limited (In Receivership) v. Benard Leigh Gadsden Motor City Limited (1998) ZR 26.*
12. *Lyons Brooke Bond (Z) Ltd v. Tanzania Road Services Ltd (1977) ZR 426*
13. *Admark Limited v. Zambia Revenue Authority (2006) ZR 43*
14. *Carrer Joel Jere v. Shamayuwa and Attorney General (1978) ZR 204*
15. *Mweempe v. Attorney General, Intonation Police and Another (Appeal No. 15/208)*
16. *Noakes Company v. Rice (1900-3) All ER*
17. *Brown v. Dunn, 6 R. 67 (HL)*
18. *Clement Chuunya and Hilda Chuunya v. J. J. Hakwenda (2002) ZR 11*
19. *Construction Sales and Services Limited and Others v. Standard Bank Zambia Limited (1990-1992) ZR 157*
20. *Wilson Masauso Zulu v. Avondale Housing Project (1982) ZR 172*
21. *The Rating Valuation Consortium and DW Zyambo & Associates (suing as a firm) v. Lusaka City Council and Zambia National Tender Board (2004) ZR 109*

Other works referred to:

1. *Halsbury's Laws of England 3rd Edition Volume 13*
2. *Halsbury's Laws of England 4th Edition Reissue Volume 16(2)*
3. *Halsbury's Laws of England, 5th Edition Volume 11*
4. *Supreme Court Practice, 1999 Edition (White Book)*
5. *Statute of Limitations Act, 1939*
6. *Blacks Law Dictionary, Eighth Edition, 2004*
7. *Fisher and Lightwoods, Law of Mortgages, 13th Edition*
8. *Phipson on Evidence, Common Law Library No. 10, 14th Edition*
9. *Snell's Principles of Equity*
10. *Laws of England (eds.) Viscount Simonds, Vol.14, para. 117 London Butterworths & Company (1956)*
11. *Land Act, 1995 Cap. 184 of the Laws of Zambia*
12. *Statutory Instrument No. 28 of 2010*
13. *Lands (Ground Rent, Fees and Charges)(Amendment)Regulations, Statutory Instrument No. 41 of 2011*
14. *Lands (Ground Rent, Fees and Charges) Regulations, Statutory Instrument No. 44 of 2006*

15. Re Pauling's Settlement Trust (1962) 1 WLR 86
16. Re Pauling's Settlement Trust (No.1) (1964) Ch. 303F
17. Re Loftus (2007) 1 WLR 591

This appeal contests a judgment of the High Court given on the 6th October, 2015, in terms of which both the appellant's claim and the respondent's counter claim were dismissed, with the learned judge seemingly making no clear orders as to the rights or the respective legal positions of the parties. Both the appellant and the respondent are aggrieved by that judgment and have thus launched the present appeal and cross-appeal.

Both the appeal and the cross-appeal bristle with points of difficulty and interest. The contest between the parties involves a series of complex pignorative contracts affecting Farm No. 4809 Ndola ("the Suit Property"),concluded on a back to back arrangement. Principally the issues raised in the lower court concerned the rights of an unpaid seller of land; the rights of a mortgagor and those of a mortgagee; the right to transfer an interest in a mortgage; a mortgagee's right to repossess the mortgaged property; and a mortgagor's right of redemption. Illegality of contract, limitation of action in a mortgage claim

and kindred issues, were also raised for the determination of the lower court.

The action was commenced by the appellant by way of writ of summons, seeking among other things, an order that the purported transfer of rights and interest in a mortgage dated 14th July, 1997, to the respondent by three entities namely, Zambia State Insurance Corporation Limited, Development Bank of Zambia and Nederlandse Financierings Maatchappi Voor Ontwikkle Lingslanden N.V. (in this judgment hereafter referred to collectively as the "Lenders"), was null and void *ab initio* and that the respondent had no estate or interest in the Suit Property; an order of possession of the Suit Property, and damages for trespass to property.

In the alternative, the appellant sought a number of relief specified in the writ, including: an account of what, if anything, is due under the mortgage dated 14th July, 1997 subsisting between the appellant and the respondent as successor to, or transferee of the said mortgage; an account of the rent and profits in respect of the property comprised in the said

mortgage; an order that the appellant may be at liberty to redeem the property comprised in the mortgage; a declaration that the appellant is entitlement to the Suit Property discharged from all claims under the mortgage and delivery up by the respondent to the appellant of possession of the Suit Property. The appellant also sought an inquiry as to whether the Suit Property had deteriorated since the respondent had been in possession, and the extent of any such deterioration, and damages.

It is important for us to set out the background facts that prompted the action in the lower court and which have animated this appeal and cross appeal so as to contextualize the points of law that were ably debated before us by the learned counsel for the parties. Those facts, as summarized by the learned trial judge in his judgment, appear quite involved. At the risk of oversimplification, we now propose to set out those facts as follows: The appellant had entered into what, on the face of it, appeared like a loan arrangement with the Lenders under which a sum of US$500,000.00 was advanced to the appellant by the Lenders, which loan was secured by a

mortgage dated the 14th of July, 1997 and made between the appellant on the one hand, and the Lenders on the other. Subsequently, by deed of transfer of mortgage dated 26th March, 2002, the Lenders entered into an agreement with the respondent under which the Lenders transferred their rights and interest in the mortgage to the respondent for a consideration of US$626,000.00.

Earlier, on the 13th October, 1998 the appellant had entered into an agreement titled "debenture over assets of the company incorporating a second mortgage over Farm No. 4809, Ndola, in favour of Barclays Bank to secure the sum of Four Hundred and Eighty Five Thousand United States Dollars (US$485,000)." The respondent defaulted on its obligation under this facility, prompting Barclays Bank Plc to invoke the default provisions under the second mortgage and to appoint Joint Receivers and Managers of the respondent, namely, George Sokota and Nobert Chiromo of Messrs Delloite and Touche. That receivership remained in effect from the 27th August, 1999 up until the 10th August, 2011 when it was terminated.

It would appear that at some point, the respondent took possession of the Suit Property under the guise of being either a licencee of the Lenders, or a mortgagee in possession, and proceeded to undertake a number of activities on the Suit Property, including keeping thousands of cattle and growing cash crops such as maize and soya beans. As at the time of commencement of the action in the lower court, the respondent was alleged to have been in occupation of the Suit Property for about nine years.

In the lower court it was the appellant's contention that the purported transfer of the mortgage by the Lenders to the respondent was illegal and null and void *ab initio*, and that the respondent acted and continued to act in violation of the provisions of the Banking and Financial Services Act, chapter 387 of the laws of Zambia. The appellant consequently deemed the respondent to be a trespasser on the Suit Property and that it had continued to be such a trespasser at the time of the commencement of the action.

In the alternative, the appellant claimed that it was the mortgagor of the Suit Property of which the respondent became mortgagee as successor to the Lenders, and therefore, both parties are bound by the provisions of the mortgage deed, including clauses 2 and 24. The former clause obliged the appellant, as borrower, to pay to the Lenders the principal sum with interest thereon, provided that the appellant could, at any time, redeem the mortgage. Clause 24 equally provided for the right of redemption.

According to the appellant, the respondent had negligently failed to collect rent and profits for the Suit Property and has instead used the Suit Property wrongfully and illegally for its own benefit. And further, that the respondent has illegally used its status as purported mortgagee in possession to enter upon the Suit Property and unleash thousands of cattle to graze on the said property. According to the appellant, the respondent has had use of the said property through both grazing for around five thousand animals and cropping on a substantial area, the rent and profits for which should have been in excess of any amounts purportedly due from the

appellant under the mortgage. It is on this basis that the appellant made the claim in the lower court against the respondent for the relief that we alluded to earlier on in this judgment.

The respondent stoutly opposed the appellant's claim and, in the process, put up a defence and counter claim in which, while admitting the existence of the legal mortgage between the appellant and the Lenders dated the 14th of July, 1997, it denied that the said mortgage was intended to secure repayment to the Lenders of the sum ofUS$500,000.00 as alleged. The respondent averred, instead, that by a contract dated 10th February, 1996 and made between the appellant on one part and the Lenders on the other part, it was agreed that the Lenders would sell and the appellant would purchase the Suit Property for the price of US$800,000.00 upon the terms and conditions set out in the contract of sale. The respondent further averred that the said contract ofsale entailed that the purchase price was to be paid in four installments of US$150,000.00 on exchange of contracts; US$150,000.00 on or before the 14th of February, 1997; US$250,000.00 on or before

the 31st day of July, 1998, and finally US$250,000.00 on or before the 31st of July, 1999. It was a further term of the agreement that in the event of default in payment, the Lenders would be entitled to repossess the property and to dispose of it as the Lenders saw fit.

According to the respondent, it was also agreed under paragraph 9 of the said contract of sale that the Lenders would, on completion, remove the encumbrances over the Suit Property dated 28th December, 1990, being a mortgage made in favour of the Lenders by a company known as Lukanga Investments Development Limited pursuant to which the Suit Property was being sold to the appellant by the Lenders as mortgagee in possession, and would then assign the Suit Property to the appellant in consideration of which the appellant would, before completion, execute the mortgage as security in favour of the Lenders for the repayment of the balance of the purchase price in the sum of US$500,000.00. In order to facilitate the registration of the mortgage, the Lenders executed a deed of assignment in favour of the appellant and

discharged the encumbrances over the Suit Property. The mortgage was duly registered on the 15th of July, 1997.

It was also the respondent's case that under paragraph 11 of the contract of sale, the appellant was to be granted possession of the Suit Property upon receipt by the Lenders of the initial payment of US$300,000.00 and that, upon fulfillment of this condition, the appellant took possession of the Suit Property as licensee in terms of the general conditions in the contract of sale. Subsequent to the registration of the mortgage, the appellant defaulted on its obligation to pay the Lenders the balance of the purchase price, thereby entitling the Lenders to take possession of the Suit Property in exercise of their powers under the contract of sale and the mortgage.

Furthermore, under the general conditions of sale, the appellant's inability to remedy the default resulted in the contract becoming void by operation of law, and that from that point on, the appellant could not claim any right nor assert any claim under the contract of sale as an intended owner of the property. The respondent, therefore, denied most emphatically

that the appellant enjoyed the equity of redemption or any rights at all under the mortgage.

According to the respondent, consideration having failed and the contract having become void, the registration of the property in the applicant's name which was effected on 15th of July, 1995, ought to have been reversed and the certificate of title in the appellant's name cancelled and the Lands and Deeds Register rectified so as to remove the erroneous entries that purport to show that the appellant was the legal owner of the Suit Property.

The respondent admitted that it entered into the deed of transfer with the Lenders dated 22nd February, 2002 and that it was the Lenders' intention that the Lenders would, for due consideration paid, assign to the respondent, not only the debt owed by the appellant to the Lenders, but also the Lenders' interest in the Suit Property, however, such interests arose, that is to say, whether under the mortgage or otherwise.

The respondent contended that the Banking and Financial Services Act, chapter 387 of the laws of Zambia, only prohibits the transfer of regulated business, and that any part of the deed of transfer that does not relate to regulated business is not tainted by illegality and is, therefore, severable from the rest of the agreement and is enforceable between the parties.

As regards the challenge that the respondent was a trespasser, the respondent argued that the appellant was a licensee of the Lenders prior to the Lenders' possession of the Suit Property and that subsequent to the possession, the appellant has never held the requisite interest in the Suit Property to sustain the appellant's claim that the respondent is a trespasser.

By way of a counter claim, the respondent sought a declaration that consideration having failed, the appellant did not gain any legal or beneficial ownership in the Suit Property, and therefore, that the appellant cannot now claim interest or benefit therein. Furthermore, the respondent sought a declaration that the appellant, having failed or neglected to

make good its default under the terms of the contract of sale, the contract became void in keeping with the Law Association of Zambia General Conditions of Sale and by operation of law as a consequence of which good title to the Suit Property did not pass to the appellant.

The respondent further sought a declaration that the Lenders, having lawfully repossessed the Suit Property, were at liberty to dispose of it to the respondent in the Lenders' capacity as unpaid vendor under the contract. The respondent argued that the appellant's only entitlement is to repayment of the deposit paid towards the purchase of the Suit Property, less any lawful deductions. The respondent further prayed for an order that it was lawfully in possession of the Suit Property, having paid due consideration for the purchase of the Lenders' interest in the Suit Property.

After hearing the parties and assessing the evidence, and given the nature of the issues raised, the learned trial judge, in a long judgment covered in 131 pages, but reminiscent of a 'no contest' verdict, dismissed the appellant's claim as lacking

merit. He also, for the same reason, dismissed the respondent's counter-claim. The appellant has now appealed against the dismissal of its claim on the basis of seven grounds structured as follows:

> **"1. The learned trial judge misdirected himself in law and in fact when he held that the appellant's claim for an account was statute barred in accordance with the Statute of Limitations Act, 1939, the issue of the statute of limitations in that regard being *res-judicata.***
>
> **2. The learned trial judge misdirected himself in law and in fact when he held that the claim for an account was statute barred in accordance with the Statute of Limitations 1939 because time runs from the date the mortgagee takes possession of the mortgaged property, which holding is contrary to the law on taking accounts over mortgaged property.**
>
> **3. The learned trial judge misdirected himself in law and fact by accepting the defences of acquiescence and laches to defeat the appellant's claims despite the weight of evidence adduced and/or equitable principles against such defences.**
>
> **4. The learned trial judge misdirected himself in law and fact when he dismissed all the plaintiff's claims and failed to consider the fact that the respondent had entered upon the appellant's property as mortgagee and used the appellant's property for its benefit.**

5. **The learned trial judge misdirected himself in both law and fact when he failed to make a finding that all the amounts due under the mortgage had been fully paid and that the appellant was entitled to possession of the property despite unchallenged evidence in the court below.**

6. **The learned trial judge misdirected himself in both law and fact when he dismissed the appellant's claims for redemption and all ancillary reliefs such as possession, damages for trespass and otherwise despite the unchallenged evidence that the mortgage had been fully paid.**

7. **The learned trial judge misdirected himself in law and in fact when he failed to consider and uphold the appellant's claim that all ground rent due to the Government of the Republic of Zambia during the entire period the respondent was in possession of Farm 4809 be paid by the respondent."**

For its part, the respondent launched a cross-appeal contesting the dismissal of its counter claim and has enlisted six grounds framed thus:

"1. **The learned trial judge erred in both law and fact when he held that the appellant was not to pay the third parties the sum of US$500,000 but would in lieu execute a mortgage in favour of the third parties as payment of the said sum without having regard to the evidence on record to the effect that the mortgage was intended as security for the payment of the balance of the purchase price under the**

contract of sale and the fact that a mortgage is, in and of itself, not a mode of payment but a security only.

2. The learned trial judge erred in law and in fact when he held that the appellant paid the purchase price in full thereby completing the transaction between the third parties and the appellant and as such that no issues of either breach or recession of the contract took place or could be entertained and when he consequently concluded that the contract of sale had no role to play in the determination of the dispute between the appellant and the respondent.

3. The learned trial judge misdirected himself when he held that the appellant became the beneficial owner of the property without having regard to the effect of the appellant's breach of the terms of the contract of sale on the transaction as a whole.

4. The court below erred in law and in fact when it held that the third parties cannot be held to say that they equally took possession of the property when Barclays Bank took possession thereof and went on to find as a fact that the third parties only took possession shortly before 30th November, 2000 without having regard to the evidence on record and the principle of law relating to continuous and uninterrupted possession between successive occupants of property.

5. **The learned trial judge erred in law and in fact when he held that the respondent could not rely on the statutory limitation period and when he failed to consider the effect of section 16 of the Limitation of Actions Act, 1939.**

6. **The learned trial judge erred in law and in fact when he dismissed the respondent's defence to the effect that the appellant's claim for redemption of the mortgage was statute barred and when he wholly dismissed the respondent's counter-claim notwithstanding the evidence before him and the law relating to the respondent's aforesaid defence and counter-claim."**

It is clear from the grounds of appeal and those of the cross-appeal as we have set them out above, that the contestation between the parties has been redefined and narrowed. Some of the issues that were argued in the lower court have not been raised on appeal. For example, there is no ground of appeal or cross-appeal regarding the transfer of the mortgage by the Lenders being null and void for contravening the Banking and Financial Services Act.

Mr. Haimbe, for the respondent, suggested that the cross-appeal has put forth for determination matters which, in the event of their being successful, would effectively extinguish the arguments raised in the main appeal, and hence his preference

for considering the arguments under the cross-appeal before those brought forth under the main appeal. We do not think that the sequence in which the grounds and arguments are considered is of any significance. We choose to deal with the main appeal first and the cross-appeal later, as this is the order in which the parties filed their respective documents.

The learned counsel for the parties filed very copious heads of argument, replete with authorities and judicial *dicta* from within the jurisdiction and far afield. The voluble nature of the issues nominated and debated by counsel in this case makes the prolixity which characterises this judgment inevitable. In order, however, to give a consummate consideration of the parties' arguments, we put forth the respective submissions of counsel relative to each ground of appeal, or cross-appeal, as the case may be, and immediately thereafter ventilate out views on the arguments respecting each such ground before moving to the subsequent ground.

We need to point out that in the lower court, this matter was dealt with by two different High Court judges. It was first allocated to the judge we shall hereafter refer to as the "initial judge." Regrettably, for reasons which are irrelevant for the present purpose, the initial judge could not continue to hear the matter and hence its reallocation to another judge who proceeded to hear the matter and render his judgment which is now being assailed. We shall in this judgment henceforth refer to the latter judge as the "trial judge."

In regard to ground one, the appellant contended that it was a misdirection on the part of the learned trial judge to hold that the appellant's claim for an account was statute barred in terms of the Statute of Limitations Act, 1939 despite the issue of the Statute of Limitation being *res judicata.*

Mr. Banda, learned counsel for the appellant, argued that the issue of limitation of action had been raised as a point in *limine* together with another issue in the court below when the matter was being handled by the initial judge. That judge, according to Mr. Banda, pronounced himself unambiguously

on the issue as is reflected in the record of appeal. The issue of limitation having been determined by the initial judge, it was not, according to Mr. Banda, open to the trial judge to reopen and pronounce himself on it. The only course available to the respondent, if dissatisfied with the ruling on the limitation of action question, was to appeal. The learned counsel referred us to a passage in **Halsbury's Laws of England**, 5th Edition Vol.11, paragraph 1166 which reads as follows:

> **"... the law discourages relitigation of the same issues except by means of an appeal. It is not in the interest of justice that there should be a retrial of a case which has already been decided by another court, leading to the possibilities of conflicting judicial decisions or that there should be collateral challenge to judicial decisions ..."**

Mr. Banda submitted that what the trial judge did when he reopened and determined an issue upon which the initial judge had made a decision, was to undermine the settled position that there is only one High Court and, therefore, a High Court judge cannot be seen to overrule another High Court judge. The learned counsel relied on the case of **Rahim Obadia v. The People (Z) Nadhim Quasmi v. The People**[1] to buttress

this submission. He fervidly prayed that we uphold ground one of the appeal.

The learned counsel for the respondent, in not so few words, impugned the appellant's arguments under ground one of the appeal. In so doing, the learned counsel argued that the trial judge was within his rights to determine the issue of limitation of the appellant's claim for an account as, unlike the initial judge, the trial judge had the benefit of hearing the evidence relating to that question, which evidence was not available to the initial judge. Mr. Haimbe contended that the reason for the initial judge's refusal to sustain the preliminary objection was because he was not satisfied that paragraph 11 of the statement of claim cited by the respondent in its application, proved that the cause of action for an account arose "nine years ago."

After referring to a passage from the judgment of Lord Denning in **Fedelitas Shipping v. W/O Exportables**[2], Mr. Haimbe submitted that re-litigating the same issue, which is abhorred, entails that the issue should have been distinctly determined

by the court. In the present case, the court determined the question on an allegation in paragraph 11 of the statement of claim as opposed to a fact established on the merits.

The learned counsel for the respondent also referred to a passage in **Halsbury's Laws of England** 4th Ed. Reissue, Vol. 16(2) where an exception to re-litigating an issue is couched in the following terms:

> **"If, however, there is a matter subsequent which could not be brought before the court at the time, the party is not estopped from raising it."**

It was Mr. Haimbe's short point on this ground that the trial judge, who heard the evidence of the parties, was better positioned to decide the issue whether the claim for an account was statute barred or not, and did indeed properly make that determination. We were implored to dismiss ground one of the appeal.

We have benefitted immensely from the submissions of the learned counsel on this ground of appeal. As regards the question whether the plea of *res judicata* is available to the appellant in regard to the claim for an account, it is significant

to revert to the chronology of events. As indicated earlier in this judgment, the appellant had claimed, in the originating process for, among other things, an account of what was due under the mortgage and of the rents and profits in respect of the property comprised in the mortgage. The respondent sought to challenge this by way of a preliminary issue filed pursuant to Order 14A rule 1 and Order 33 rule 3 of the **Supreme Court Practice**, 1999 edition (White Book) as read together with section 2(2) of the **Limitations Act**, 1939. At the time of the challenge, the matter was still being handled by the initial judge. The initial judge, in dealing with the preliminary issue whether the claim for an account and inquiry was statute barred or not, made the following observation at R10 (page 240 Vol.1 of the record of appeal):

> **"In determining whether an action is statute barred in line with the section highlighted above[section 2(2) of the Limitations Act], one must first determine when the cause of action arose. In attempting to do so, the defendant has referred to paragraph 11 of the statement of claim and stated that by the said paragraph it is clear the plaintiff's cause of action arose more than six year ago... In my considered view, the said paragraph does not suggest that the plaintiff's cause of action arose nine years ago. All that the paragraph is stating is that the period that the defendant has been in occupation of the property and**

how it has utilized the land. The plaintiff does not by the said paragraph indicate when the dispute arose with the defendant or that it arose nine years ago, neither has the defendant proved to my satisfaction that the plaintiff's cause of action arose nine years ago."

The matter, as we have intimated already, was reallocated to the trial judge. After hearing the parties, the trial judge delivered his judgment in which he, among other things, stated at J130 that:

"it would be totally unconscionable to permit the plaintiff to assert his beneficial rights especially also in view of the fact that the plaintiff's action for the defendant to account is statute barred as it is the plaintiff's wish to rely on the action to account as a means of having paid the mortgage loan."

It is this holding by the trial judge that has so befuddled the appellant that it assigns error and misdirection on the part of the trial judge in pronouncing himself on an issue that was raised by the respondent through a preliminary issue tabled before the initial judge, which issue had been duly determined by the learned initial judge.

As the record of appeal plainly shows, the question of limitation of action in respect of the appellant's claim was not raised again by the respondent before the trial judge. Weunderstood Mr. Banda to have been making a very short point, namely that the issue whether the statute of limitation applied to the appellant's claim for an account was decided, rightly or wrongly by the initial judge, being a judge of equal jurisdiction with the trial judge. Therefore, the latter could not reopen the question which had, in the circumstances, become *res judicata*. The thrust of Mr. Haimbe's argument, on the other hand, is that the focus by the initial judge in dealing with the preliminary issue was only with regard to paragraph 11 of the statement of claim, and therefore, that he did not consider the totality of the circumstances, which the trial judge had the opportunity to do.

Res judicata is defined on page 1336 of **Blacks Law Dictionary**, (eighth edition) by Bryan A. Gardner thus:

> **"(Latin "a thing adjudicated") 1. "An issue that has been definitively settled by judicial decision. 2. An affirmative defence barring the same parties from litigating a second law**

suit on the same claim, or any other claim arising from the same transaction or series of transaction and that could have been – but was not – raised in the first suit."

Our understanding of this authoritative definition is that *res judicata* puts to rest and entombs in eternal quiescence every justiciable issue and question actually adjudicated upon or which should have been raised in the initial suit. And, the law is fairly settled and defined beyond peradventure in a plethora of cases decided by this court, that for a party relying on the defence of *res judicata* to succeed, he must satisfy the following five conditions, namely: (i) that the parties or their privies are the same in both the previous and the present proceedings; (ii)that the claim or issue in dispute in both actions is the same; (iii) that the *res* (or the subject matter of the litigation)in the two cases are the same; (iv) that the decision relied upon to support the plea of estoppel is valid, subsisting and final and; (v) that the court that gave the previous decision relied upon to sustain the plea, is a court of competent jurisdiction. In **Bank of Zambia v. Jonas Tembo & Others**[3], we referred to some of these conditions. In **Valentine**

Shula Musakanya & Edward Jack Shamwana v. The Attorney General[4] we stated that:

> **"res judicata is a strict rule of law and the parties are bound by any decision made by a competent court."**

Can it then be said in the present case that the issue whether the claim for an account by the appellant was or was not time barred, had been determined by the initial judge such that it was not competent for the appellant to resurrect the same before the trial judge?

We have pointed out already that the initial judge had made a determination on the question of the Statute of Limitation, 1939 in regard to the appellant's claim for an account and an inquiry. Whether or not the initial judge was right or conclusive in his treatment of that issue is not in contention in the present appeal. As was usefully suggested by the learned counsel for the appellant, both the initial judge and the trial judge have equal jurisdiction. A trial judge cannot act, directly or indirectly, as an appellate judge in dealing with a matter decided in the same cause by another judge of equal

jurisdiction. Such an issue can only be reopened by way of a properly filed application for review or by way of appeal.

We have perused the record of appeal in our effort to ascertain what prompted the learned trial judge to deal with a matter that had been determined by the learned initial judge. We are unable to find anything by way of a fresh application before him to justify his re-opening of the issue of the Statute of Limitation in regard to the claim for an account. We note, however, that in the closing submissions of counsel for both parties in the lower court, the issue of the Statute of Limitation was raised. The respondent's learned counsel submitted (at page 965 of the record of appeal) that:

> **"a claim that the Plaintiff's action is statute barred is without basis and ought to be dismissed."**

The respondent's learned advocates, for their part, submitted before the lower court (paragraph 4.3 page 995, volume III of the record of appeal) that:

> **"Neither an account nor the equity of redemption are available as remedies for the plaintiff by reason of being statute barred,"**

We can only surmise that the learned trial judge was enlivened by these submissions to consider the matter of a claim for an account which had already been dealt with by his learned brother, the initial judge.

We find that the trial judge's foray on the issue of time limitation in regard to the appellant's claim for an account and an inquiry, just like the brilliant submissions of the learned counsel for the parties on them, outside the contours set by the parties in their pleadings, are liable to be discountenanced. We entertain no doubt, whatsoever, that the trial judge lacked the *vires* to pronounce himself on an issue which the initial judge had already determined. What readily comes to our mind is the witty aphorism, which was popular in the heyday of the Roman amphitheatre and the Latin days of the law, namely *cuccurit sed prêt viam* – a good showing outside the permissible campus of the contest!

For the avoidance of doubt, we hold that the question whether the appellant's claim was, or was not, time barred was determined by the initial judge, and the trial judge, therefore,

should not have made a second decision on it. It was *res judicata*. Ground one of the appeal accordingly succeeds.

As regards ground two of the appeal, which equally deals with limitation of action, the appellant's learned counsel contended that the trial judge fell into error when he held that the claim for an account was statute barred in accordance with the Statute of Limitations 1939. The learned counsel, quite appropriately, indicated in his submission that ground two is premised on the assumption that the issue of the claim for an account being statute barred was not, after all, *res judicata*. We understood the learned counsel to have been arguing ground two in anticipation that we could rule against the appellant under ground one.

Both Mr. Banda and Mr. Haimbe made very extensive and fairly decent arguments on this ground of appeal for which we are grateful. However, given that we have already held that the effect of the Statute of Limitation on the principal claim of the appellant was dealt with by the initial judge who held that the claim was not statute barred, and given also that there has

been no appeal before us against that ruling, save for the concern raised under ground five of the cross-appeal, we do not intend to isolate and evaluate the arguments of the learned counsel on this point. This would amount to nothing less than a fanciful academic peregrination designed to serve no useful purpose. We shall proceed then, on the premise that the appellant's claim for an account was not statute barred as found by the initial judge. To that extent ground two equally succeeds.

Ground three of the appeal impeaches the learned trial judge's finding that the defence of laches and acquiescence defeated the appellant's claim. Counsel for the appellant advanced two reasons for his assault of the trial judge's finding, namely (i) that under Order 18/8/2 of the Rules of the Supreme Court 1999 Edition (White Book) a party that wishes to rely on an equitable defence must specifically plead it. In *casu* the trial judge, however, considered and allowed an unpleaded defence. The learned counsel cited the case of **Re Robinson's Settlement, Gant v. Hobbs**[5] to further support his

submission. The alternative, according to the learned counsel, is to allow an amendment of the defence to include the unpleaded defence. In the present case, the respondent had applied to amend the defence and the lower court declined that application. Having rejected the application to amend the defence, the trial court, in a clear case of self contradiction, allowed the unpleaded defences of laches and acquiescence to defeat the appellant's claims. This, according to Mr. Banda, was a grave error on the part of the trial court.

The learned counsel referred us to the definition of the term 'acquiesce' in **Halsbury's Laws of England,** 3rd edition vol. 14 at paragraph 1127.Mr. Banda further argued that as the appellant was under receivership from 27th August, 1999 to 10th August, 2011, it could not under such control of the receivers be said to have acquiesced to the respondent acquiring ownership of the property.

To buttress his argument, the learned counsel cited the case of **Magnum (Z) Limited v. Quadri (Receiver/Manager) and Grindlays Bank International (Z) Limited**[6] where it was held that a

company under receivership has no *locus standi* independent of its receiver. According to Mr. Banda, the appellant was under the control of receivers appointed by the debenture holder, Barclays Bank Zambia Plc. There was no evidence led to show that the Receivers acquiesced to the respondent's occupation of the Suit Property, nor that the appellant (in receivership) played any role in the transaction leading to the respondent suffering any purported detriment. The evidence on record, according to the learned counsel, shows that Barclays Bank Plc resisted the transfer of the Suit Property to the respondent and that there was even litigation on this matter. The Receiver, being interested in recovering the sums due to it under the second mortgage over the Suit Property, could not be said to have acquiesced to allow the respondent to get the Suit Property based on the first mortgage.

The learned counsel also cited the case of **The Rochdale Canal Co. v. King**[7] where it was stated that:

> **"mere acquiescence (if by acquiescence) is to be understood only the abstaining from legal proceedings) is unimportant. Where one party invades the rights of another, that other does not in general deprive himself of the right of seeking redress**

merely because he remains passive, unless, indeed, he continues inactive so long as to bring the case within the purview of the Statue of Limitations."

Mr. Banda submitted that this authority supports the position that, for the respondent to succeed, the appellant should be shown to have stood by and performed some positive act which encouraged the respondent to suffer detriment. In the present case, the respondent did not suffer any detriment as it recouped all its mortgage debt plus interest, and made above normal profits from its occupation of the property.

The learned counsel further submitted that the respondent entered upon the property and converted to its own use, the loose assets that were found on the property, deriving considerable benefit in the process. In this sense, the respondent, who sought to invoke the court's equitable jurisdiction, did not come to court with clean hands.

The learned counsel adverted to numerous case authorities to support the position that the doctrine of laches

has no application to cases to which the **Statute of Limitation** 1939 applies either expressly or by analogy.

Mr. Banda ended his submission on this point by reiterating that the equitable defence of laches and acquiescence cannot apply to a claim for redemption if the said claim is brought within the period allowed by the Statute of Limitations. The trial judge, according to the learned counsel, found that the appellant's action for redemption was not statute barred as the appellant was within the period of limitation. The defences of laches and acquiescence could not defeat the appellant's claim. We were urged to uphold ground three of the appeal.

In responding to ground three of the appeal, Mr. Haimbe supported the position taken by the learned trial judge in regard to the defences of acquiescence and laches being available against the appellant's claim. He relied on the provisions of Order 18/8/2 of the Supreme Court Practice Rules which empower the court to give effect, in proper cases, to defences which are not pleaded. He submitted that this was

an appropriate case in which the court could give effect to such defences.

The learned counsel referred us to the case of **City Express Services Limited v. Southern Cross Motors Limited**[8] and that of **Anderson Mazoka and Others v. Levy Mwanawasa and Others**[9] in which this court affirmed the position that a trial court is not precluded from considering evidence on a matter not pleaded where such evidence has been adduced and not objected to. The learned counsel further referred us to the case of **Goldsworthy v. Brickell**[10] to support the argument that the respondent was entitled to avail itself of whatever equitable defences were available to it to defeat the appellant's claim.

Mr. Haimbe further argued that the appellant's case is heavily afflicted by laches as defined by Lord Camdem LC, as quoted in ***Snell's Principles of Equity***. In the circumstances, no amount of searching will find good faith or indeed good conscience on the part of the appellant. The appellant's conduct, according to Mr. Haimbe, is that of a person who strikes a bargain and goes back on it years later.

The learned counsel also impugned the appellant's suggestion that the respondent was seeking equity with dirty hands, arguing that this is an afterthought on the part of the appellant designed to detract the court from the real issue before it. According to Mr. Haimbe, the fact of the matter is that the equipment referred to was seized by the receiver appointed by Barclays Bank well before the respondent took possession of the property.

As regards the refusal by the trial court to allow the respondent's application to amend its defence so as to include the defence of estoppel, Mr. Haimbe submitted that the record will show that what was sought to be introduced by the proposed amendment was unrelated to the subject defences of acquiescence and laches and the application was, in any event, decided on the basis of lateness of the application.

It was the submission of the learned counsel for the respondent that the appellant, not only played a key role in procuring the transaction that gave rise to the Transfer Agreement, but was also fully aware and had been so aware for

more than a decade that the respondent had, as a consequence, taken possession of the property. In the view of the learned counsel, the appellant stood by and watched while the respondent fought interference from all manner of third parties in relation to the property, including wrongful re-entry by the Government of the Republic of Zambia and adverse possession by squatters. The appellant stood by and watched while the respondent occupied and used the property and spent colossal sums of money on the property. All this, according to Mr. Haimbe, justified the court's taking into account any equitable defences available to the respondent on the facts.

The learned counsel argued that the fact that the appellant was under receivership from 27th August, 1999 to 10th August, 2011 did not mean that the appellant could not commence an action against the respondent through the receiver; and if the receiver failed, refused or neglected to maintain an action, then the appellant, through its directors could seek redress from the court. Counsel quoted a passage from the judgment of the court in **Avalon Motors Limited (In**

Receivership) v. Benard Leigh Gadsden Motor City Limited[11]. We were urged to dismiss ground three of the appeal.

We have ruminated on the arguments advanced by the learned counsel relative to ground three. The **Blacks Law Dictionary, 2nd ed. 1989** defines the word "laches" as follows:

> **"unreasonable delay in pursuing a right or a claim, almost always an equitable one, in a way that prejudices the party against whom relief is sought – also termed sleeping on rights."**

It is, of course, beyond argument that delays in pursuing an equitable claim or remedy may well result in the relief or remedy being lost. There is equally no argument in the present appeal that the respondent did not plead the defences of laches.

Our understanding is that the doctrine of laches and those of affirmation, acquiescence and estoppel overlap considerably. On one end of the spectrum, the doctrine of laches applies to deny relief to a claimant who delays in bringing proceedings where such delay makes it impossible for a fair trial of the action to take place, for example, because evidence is lost or essential witnesses are no longer traceable.

At the other end, the doctrine of laches applies where the claimant's delay induces the defendant to act on the basis that the claim will not be asserted or pursued. It is in this latter context that laches and acquiescence overlap.

In the case of **Goldsworthy v. Brickell**[10] the court stated as follows:

> **"Sometimes laches is taken to mean undue delay on the part of the plaintiff in prosecuting his claim and no more. Sometimes acquiescence is used to mean laches in that sense. And sometimes laches is used to mean acquiescence in its proper sense, which involves a standing by so as to induce the other party to believe that the wrong is assented to. In that sense it has been observed that acquiescence can bear a close resemblance to promissory estoppels."**

In the **Laws of England,** (eds.) Viscount Simonds, Vol.14, paragraph 117 it states:

> **"The term "acquiescence" is used in two senses. In its proper legal sense it implied that a person abstains from interfering while a violation of his legal rights is in progress; in another sense it implies that he refrains from seeking redress when a violation of his rights, of which he did not know at the time, is brought to his notice. Here the term is used in the former sense; in the second sense acquiescence is an element in laches."**

In the present case, the appellant has been accused of both laches and acquiescence in the sense that it delayed in asserting its rights and stood by while the respondent was changing its position, so that the consequences of both of these is to make it unfair for the court to grant relief to the appellant. In the lower court the learned trial judge agreed with the submission of counsel for the respondent that there were laches and acquiescence in the following terms:

> **"That equity must come to the defendant's aid as the actions of the plaintiff are inequitable in view of the aforestated and in particular the length of time it took for the plaintiff to take an action even though they were within the prescribed limitation in which to bring an action redeeming of the mortgage, it would be totally unconscionable to permit the plaintiffs to asset his beneficial rights especially also in view of the fact that the plaintiff's action for the defendant to account is statute barred...in view of the aforestated, the equitable defence of acquiescence and laches succeeds."**

As we see it, the sub-issues to be determined under this ground of appeal are as follows:

1. Whether the unpleaded defences of laches and acquiescence were available to the respondent in the present case;

2. whether the defences of laches and acquiescence are available where there is a statutory limitation period?

3. whether the appellant was, on the facts of the case, indeed guilty of consenting to the respondent's action of taking possession of the property and changing its position by remaining silent and failing to object, and

4. whether the appellant was guilty of undue delay in asserting a right or bringing a suit or action against the respondent.

As regards the first sub-issue on the need to plead laches and acquiescence specifically, guidance is to be found in Order 18/8/2 of the Rules of the Supreme Court (White Book, 1999 Edition) which was quoted by the learned counsel for the appellant in his submissions. It provides as follows:

> **"Wherever a party has a special ground of defence or raises an affirmative case to destroy a claim or defence, as the case may be, he must specifically plead the matter on which he relies for such purpose."**

The explanatory notes to that rule go on to state that:

> **"The effect of the rule is, for reasons of practice and justice and convenience, to require the party to tell his opponent what he is coming to court to prove...but the rule does not prevent the court from giving effect in 'proper cases' to defences which are not pleaded."**

This rule, in our estimation, resonates with the general purpose of pleadings as we explained it in **Lyons Brooke Bond (Z) Ltd v. Tanzania Road Services Ltd**[12] namely that they assist the court by defining the bounds of the action.

In **Admark Limited v. Zambia Revenue Authority**[13], we echoed the position given in the explanatory notes to Order 18 rule 8when we held that Order 18 rule 8 of the Supreme Court Practice sets out those matters which must be specifically pleaded before they can be relied upon by a party in its defence. We held further in that case that a party may, at trial, raise a point of law, even though it was not pleaded in his defence.

Our understanding of Order 18 rule 8 is that much as it is desirable that a party should specifically plead a special defence, failure to plead it does not *ipso facto* exclude such a defence from being admitted. In a proper case, an unpleaded defence could be admitted and considered. In this regard, two situations are called to mind as constituting 'proper cases.' First, where evidence relating to the unpleaded defence is led by a party at trial and is not objected to by the other party. In

Carrer Joel Jere v. Shamayuwa and Attorney General[14] this court considered this very issue. There, counsel for the appellant contended that the defence put forward at trial was never pleaded and was never put to the plaintiff in cross-examination; and therefore, the learned trial judge should not have admitted it in evidence. We observed and held as follows:

> **"It is one of the cardinal rules of pleadings for the party to tell his opponent what he is coming to court to prove and to avoid taking his opponent by surprise. If he does not do that, the court will deal with it in one of two ways. It may say that it is open to him, that he has not previously raised it and will not be allowed to rely on it; or it may give him leave to amend by raising it and protect the other party, if necessary by letting the case stand down. Where the defence not pleaded is let in by evidence and not objected to by the other side, the court is not precluded from considering it. This is emphasized in the case of *Robinson Settlement, Grant v. Hobbs*[6].**

We strongly carried similar sentiments in **Mweempe v. Attorney General, International Police and Another**[15]. In that case, the defence of fraud put forward in evidence was not specifically and distinctly pleaded and yet, the respondent did not object to evidence on it being led by the witnesses. We held in

consequence that the trial court did not err in considering the upleaded defence.

The second instance of a 'proper case' that comes to mind where an unpleaded defence could be raised and considered, is where it questions or impeaches the jurisdiction of the court. For example, where an issue of statute of limitation or time bar, or one of *res judicata* is raised, such an issue goes to the jurisdiction of the court, the lifeline of any judicial process, and need not be specifically pleaded before it can be entertained by the court. It could be raised at anytime, consideration being had always to the cardinal rule of natural justice that both parties must be heard on the issue before the court determines it.

To revert to the case in *casu*, the question could be asked as to whether this is a proper case in which to consider the unpleaded defence of laches and acquiescence? Mr. Banda submitted that the respondent ought to have shown that this was a proper case in which the unpleaded defence could be given effect, and that having failed to satisfy that requirement,

the court is not at liberty to consider the unpleaded defence. Mr. Haimbe, on the other hand, submitted that what constitutes a proper case is a matter that lies in the discretion of the court.

We agree with Mr. Haimbe on this point. Once a party relying on an unpleaded defence has raised it, there is no additional onus on that party to prove that the defence constitutes a 'proper case' for consideration. The court will, upon hearing the other party on it, be entitled to make a determination on this purely legal point.

Given the amount of evidence led and admitted without objection in the lower court, and given also that the defences implicate the jurisdiction of the trial court to determine the dispute, it is clear from our appraisal of the position that this is a proper case in which the unpleaded defence of laches could be considered by the court. That defence is, therefore, available to the respondent in this case.

Where there is a statutory limitation period prescribed, as in the case of mortgagor's action to repossess the mortgaged

property, the position of the law on whether a plea of laches and acquiescence could be raised within the limitation period, has not been free from doubt. One view taken, and this was the view that the learned counsel for the appellant forcefully advanced, is that the doctrine of laches does not apply as the claimant has the full limitation period within which to launch proceedings. This appears also to have been the approach adopted by Wilberforce J in **Re Pauling's Settlement Trust** where it was held that the situation before him was governed by section 19 of the Limitation Act, 1939, and

> **"[t]here being an express statutory provision providing a period of limitation for the plaintiff's claims, there is no room for the equitable doctrine of laches."**

On appeal, Upjohn LJ in the Court of Appeal in **Re Pauling's Settlement Trust** agreed with Wilberforce J, on the Limitations Act and its effect on the defence of laches but held that 'acquiescence must be looked at rather broadly.' It was in **Re Loftus** that Chadwick LJ, of the Court of Appeal shed more light on the issue in the following passage:

> **"In *Re Pauling's Settlement Trusts* is authority for the proposition that, where the Limitation Act provides an express period of limitation, a claimant is not to be denied the benefit of that period by the operation of what was, in that case, understood to be the doctrine, or defence, of laches. It is not authority for the proposition that, where the Limitation Act prescribes no limitation, the defence of laches cannot be invoked. Nor, as it seems to me, is that case authority for the proposition that, where the Act prescribes a period of limitation, no defence of acquiescence (in so far as that may differ from what was, in that case, understood to be a defence of laches) can be relied upon."**

Our understanding of the current state of the law, therefore, is that it is possible in principle, to invoke laches as a defence even before the expiry of the prescribed statutory period. In strict legal theory the defence of acquiescence is even more readily available to the respondent. It would, in either case, however, require a great deal to persuade the court to overlook the statutorily ordained period for bringing an action.

Regarding the questions whether the appellant is guilty of laches, acquiescence or has waived its right to reclaim possession of its property herein, we are obliged to consider the

length of time it has taken the appellant to bring proceedings; the reason for the delay; the effect of the passage of time on the respondent's ability to defend the action; and whether such passage of time has any effect on the cogency of evidence to be called by the parties. We equally have to consider whether, by its conduct, active or tacit, the appellant led the respondent to assume that the appellant had abandoned its rights against the respondent.

Robust and fairly useful as the arguments on these sub-issues are, two matters stand out and are agreed by the parties. First, the title holder of the property is the appellant, and second, a mortgage over the Suit Property is still subsisting.

In our considered opinion, as long as that mortgage is subsisting and has not been discharged, the appellant's cause of action consisting in a discharge of the mortgage is unaffected. Similarly, unless there exists circumstances to the contrary, as long as the respondent remains in occupation of the property as mortgagee in possession, the cause of action to account on recovery of the debt through lawful realization of

the security or enforcement, is also still alive. This is a suit for redemption of a mortgaged property; and the cause of action does not, in our considered view, die until the mortgagor's equity of redemption is extinguished in accordance with the law.

After considering all the relevant material, evidence and submissions of the parties, we take this view. Where a waiver of a right to relief is made expressly by consent and the party benefiting from it has acted upon it, no difficulty arises in coming to the conclusion that waiver is effective as there is sufficient consideration to support the waiver. Where, however, waiver has to be implied from the conduct of the parties as the respondent in the present appeal is urging us to do, the court has to consider the entire circumstances of the case to establish conduct which is inconsistent with the continuance or assertion of the right. That is the law on waivers.

The facts of this case are highly unusual. The parties have been enmeshed in complex transactions affecting the Suit Property whose purpose would, to the common man, be

oblique. The respondent took possession of the Suit Property colourably under licence by the Lenders who had earlier sold the same to the appellant and conveyed title before they were paid in full. A mortgage was created to secure payment of the balance of the purchase price. The interest of the Lenders in the mortgage was subsequently sold to the respondent. The latter became the mortgagee by virtue of the transfer of mortgage to them by the Lenders for valuable consideration. The stakes were high. Expectations were raised. Even to a reasonable by stander, these transactions were anything but clear and simple. There are accusations, denials and counter allegations.

We have stated earlier on in this judgment that as long as the mortgage subsists, the mortgagor's equity of redemption remains intact. We say so because redemption of the mortgaged property is of the very nature and essence of a mortgage in equity. It is inherent in the mortgage itself and cannot be clogged or impeded upon by design, or contrivance or default, or be left to the whims of the mortgagee. In this regard,

we are content to quote Lord McNaghaton in **Noakes Company v. Rice**[16]that:

> **"Redemption is of the very nature and essence of a mortgage as mortgages are regarded in equity. It is inherently in the thing itself and it is, I think, as firmly settled now as it ever was in former times that equity will not permit any device or contrivance designed or calculated to prevent or impede redemption."**

In the final analysis, we find on the evidence available on the record, that it was the conduct of the respondent which was contrived to defeat the law and particularly the equity of redemption of the appellant. We must hasten to add that this conduct was stimulated by the pignorative agreements that were concluded by the Lenders, the appellant and the respondent along with others such as Lukanga Investments Limited. The conduct of the respondent was inconsistent with the very right of the respondent as mortgagee in possession to realize the security given in the mortgage.

The upshot of the foregoing analysis is this. The appellant's right of redemption of its property and equity of redemption subsists for as long as the mortgage subsists and

the mortgagee is in possession and has not rendered an account. Accordingly, we must add, that the cause of action could not be time-barred. The right to redeem the mortgage or equity of redemption could not be extinguished merely because the mortgagor did not seek the discharge of the mortgage earlier while the mortgagee was in possession realizing the security.

Given the position we have taken regarding the conduct of the respondent, the argument about whether or not the placing of the appellant into receivership disabled the appellant from taking timely action against the respondent's continued occupation of its land, now becomes moot. Ground three of the appeal has merit and it is upheld. The learned judge was wrong to have allowed the defence of laches and acquiescence to defeat the appellant's claim.

The learned counsel for the appellant argued grounds four, five and six compositely. The main point taken under these grounds was that the appellant presented uncontroverted evidence in the court below that the mortgage amounts had been fully repaid. There was no cross-examination of the

appellant's witnesses regarding the payment of the mortgage sum. The learned counsel referred us to **Phipson on Evidence, Common Law Library** No. 10, 14th edition, at page 245 paragraphs 12-13 and to **Brown v. Dunn**[17], on the purpose and value of cross-examination to a party's case.

Mr. Banda then made the point that a mortgagee is bound to account to the mortgagor, both for the rent and profits actually received and for rent and profits which, but for his willful default or neglect, might have been received, from the time of his taking possession. He relied for this submission on **Fisher and Lightwood Law of Mortgages** 13th Edition, 2010, paragraphs 29.55 pages 633, and paragraph 627 of volume 32, 4th edition of **Halsbury's Laws of England**. The learned counsel also invoked the spirit of equity, arguing that a mortgagee who, as such, goes into possession of the mortgaged property, will not be allowed by equity to acquire any advantage beyond securing payment of the sums due under the mortgage. The learned counsel quoted our statement in the case of **Clement Chuunya and Hilda Chuunya v. J. J. Hakwenda**[18] where we stated as follows:

> **"We reaffirm also that where a judgment creditor in possession of the debtor's property from which an income could be derived wilfully defaults by failing to realize any income from the property, the debtor can apply to court for an inquiry of the income which would reasonably have been realized and the sum found should be credited to the judgment debtor."**

To the same intent, the learned counsel also referred to the case of **Construction Sales and Services Limited and Others v. Standard Bank Zambia Limited**[19]. We were urged to allow grounds four, five and six of the appeal.

The learned counsel for the respondent responded to grounds four, five and six together. It was his first submission that the said grounds of appeal are repetitive of the earlier grounds and anchor on the claim for an account. Counsel supported the decision of the trial judge in dismissing the claim premised on an account. He contended that the claims covered by the three grounds were speculative in nature and were based on untested assumptions. It was counsel's further argument that the appellant's calculations, the subject of these grounds of appeal, were not unchallenged as the appellant argued, and that the record of appeal attests to this position.

We have considered the arguments addressed to us relative to grounds four, five and six of the appeal. The issues to be addressed, in our view, are; (i) whether the trial judge should have considered the capacity in which the respondent entered the Suit Property; (ii) whether on the facts of the case as presented before the trial judge, the debt outstanding under the mortgage subsisting between the appellant and the respondent had been extinguished, and whether the trial judge should have made a specific finding in this regard; and (iii) whether the trial judge was correct in dismissing the appellant's claim for redemption and ancillary relief.

The position of the law is settled and that is that a mortgagee in possession is obliged to employ his best endeavours to realize the mortgage debt and, thereafter, to account to the mortgagor. We accept as good law the position given by the learned authors of **Fisher and Lightwoods Law of Mortgages**, 13th Edition 2010, paragraph 29.55 at page 633 as quoted by the learned counsel for the appellant in their submissions that:

> **"The mortgagee is therefore bound to account to the mortgagor both for the rent and profits actually received and for rent and profits which, but that his wilful default or neglect, might have received from time of taking possession....the mortgagee who takes possession of the mortgaged estate is required to be diligent in realizing the amount due on the mortgage so that the estate may be redelivered to the mortgagor. He is liable to account for the rents and other profits during his possession and if he remains in occupation himself he is liable to unoccupation rent...."**

Equally, **Hasbury's Laws of England** 4th Edition Vol. 32 at paragraph 627 states as follows:

> **"The mortgagee who goes into possession becomes the manager of the charged property. He thereby assumes the duty to take reasonable care of the property. This requires him to be active in protecting and exploiting the security, maximizing the return, but without taking undue risk."**

In the case of **Clement Chuunya and Hilda Chuunya v. J. J. Kakwenda**[18], we reaffirmed that, where a judgment creditor in possession of the debtor's property from which an income could be derived wilfully defaults by failing to realize any income from the property, the debtor can apply to court for an inquiry of the income which would reasonably have been realized and the sum found should be credited to the judgment debt.

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This much of the law is clear: a mortgagee in possession is obliged to utilize the mortgage property with a view to recovering the judgment debt. This also goes hand-in-hand with such mortgagee's obligation to account. The obligation to account lies squarely with the mortgagee in possession and does not repose in the mortgagor to account for or second guess what the mortgagee may have realized during his possession of the mortgaged property, no matter how brilliant or how convincing the mortgagor's assumptions on the profits earned or realized on the property may be.

In the view we take, although the appellant adduced evidence in the lower court on what profits it assumed the respondent, as mortgagee in possession, made or is deemed to have made, it does not follow that the court should have considered and accepted that evidence merely because, from the appellant's perspective, it was not challenged by the respondent. We emphasize that the obligation to account belongs with the mortgagee in possession and that obligation to account could be enforced through an appropriate court order, rather than by way of a default procedure, as the learned

counsel for the appellant appeared to have been advocating under this ground.

To revert to the questions whether the trial judge should have considered the capacity in which the respondent entered the Suit Property, our response is in the affirmative, and we find that the learned trial judge did, in fact, consider questions regarding the capacity in which the respondent occupied the property. His conclusion was that the property was occupied by the respondent as mortgagee in possession.

Regarding the question whether, on the facts of the case presented before him, the learned trial judge should have found that the debt outstanding under the mortgage had been extinguished, we hold that for the reason we have just explained, namely, that the obligation to account rests with the mortgagee in possession, the judge should have made a proper order directing the respondent to render an account. And finally, on whether the judge was right in dismissing the appellant's claim for ancillary relief, our view is that the judge should have pronounced himself unambiguously on the need

for the respondent to account, and on the mortgagor's right of redemption. Failure to do all these things was a misdirection. To the extent specified, grounds four, five and six succeed.

In regard to ground seven, the learned counsel for the appellant raised the issue of ground rent. He contended that ground rent due from the respondent to the Government in respect of the Suit Property should have been ordered to be paid by the respondent. He relied on the case of **Wilson Masauso Zulu v. Avondale Housing Project**[20] and quoted a passage from our judgment to the effect that the trial court has a duty to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined in finality. In the present case, according to the learned counsel for the appellant, the trial judge fell far short of the duty imposed on him and, therefore, this ground ought to be allowed.

The submission of Mr. Haimbe in response to the appellant's arguments on ground seven was brief. He simply stated that all outgoings and expenses on the mortgaged property remain for the account of the mortgagor and that there

is no justification whatsoever for the claim that the appellant makes in his regard. It was his chief prayer that the main appeal be dismissed in its entirety.

Coming from a party who wishes to assert his ownership right over the Suit Property, we find the appellant's arguments on ground seven of the appeal rather unusual. The appellant complains that the trial judge misdirected himself when he failed to consider and uphold the appellant's claim that all ground rent due to the Government during the entire period the respondent has been in possession of the Suit Property should be paid by the respondent. The respondent denied that it was liable to settle the ground rent for the period that it was in such possession or occupation. The issue here, as we see it, is determinable with reference to the ownership of the property in question. Who, between the appellant and the respondent, is the owner of the property? Secondly, and not less important, is the question what is ground rent?

To answer the second question first, ground rent is a charge imposed on leasehold title holders under section 4 of the Lands Act, 1995, chapter 184 of the laws of Zambia. It is in a way a tax imposed on, and payable by leasehold title holders for holding title over State land. In terms of the **Lands (Ground Rent, Fees and Charges) (Amendment) Regulations, Statutory Instrument No. 41 of 2011** as read together with the **Lands (Ground Rent, Fees and Charges Regulations) Statutory Instrument No. 44 of 2006**, ground rent charges are promulgated from time to time. The charge is clearly targeted at leasehold title holders, or in respect of land alienated in accordance with the Lands Act, not at mortgagees, let alone, mortgagees in possession.

We stated earlier on that the appellant is the owner of the property under occupation by the respondent as mortgagee in possession. This being the case, the claim that the mortgagee in possession pays ground rent does not arise. The leasehold title holder is obliged to settle the ground rent. Indeed, it would be legally odd if a non owner of land were to be compelled to pay ground rent in respect of property that is, in truth, not his. Ground seven has no merit and we dismiss it accordingly.

We now turn to the respondent's cross appeal.

The learned counsel for the respondent argued grounds one, two and three of the cross-appeal together. The principal question for determination under these three grounds of cross-appeal, according to the learned counsel for the respondent, was whether the appellant had acquired the requisite interest in the Suit Property to sustain the claims which it had mounted in the court below. The respondent contended that the appellant, having failed to meet the consideration for the purchase of the property under the contract of sale dated 10th February, 1997 and made between the Lenders on one hand and the appellant on the other, did not acquire the necessary legal or beneficial interest in the Suit Property in order to qualify to enjoy the right to claim the equity of redemption, or indeed, any rights pursuant to the mortgage of 14th July, 1997.

The learned counsel for the respondent argued that although the respondent was not privy to the contract of sale between the Lenders and the appellant, it was entitled to raise the question of the appellant's compliance with the terms of the

contract of sale under the third party procedure set out in Order 16, rule 7 of the Rules of the Supreme Court (White Book, 1999 edition).

The learned counsel traced the offer and acceptance process between the appellant and the Lenders and noted that in the correspondence between those parties, it was stated, *inter alia*, that title to the land was to be held by the vendor until payment was received in full by the Lender. In the learned counsel's view, whatever other arrangements existed between the parties, their intention was that legal ownership of the Suit Property was to pass upon such payment being made in full. He cited the case of **The Rating Valuation Consortium and DW Zyambo & Associates (suing as a firm) v. Lusaka City Council and Zambia National Tender Board**[21] on the submission that the parties' intention is paramount and that a provisional agreement reached by the parties is legally binding.

Mr. Haimbe also pointed to clause 8 of the contract of sale which stipulated that if there was default in the payment of the purchase price, the Lenders were entitled to repossess the

property and to dispose of it in any manner they deemed fit. Equally, the learned counsel referred us to paragraph 21 of the General Conditions relating to the said contract which provided for default in payment of the purchase price.

Mr. Haimbe complained that despite evidence having been laid before him that only US$300,000 of the US$800,000 purchase price was paid, the trial judge paid no heed and did not reveal his mind as to why he came to the conclusion that the terms of the contract of sale and the payment made, was irrelevant in determining the issue before him. It was counsel's further contention that had the trial judge properly addressed his mind to the issues, he would have come to the conclusion that the contract of sale had become void when the appellant defaulted, and by extension, that title in the Suit Property did not pass to the appellant. The logical consequence of this, in the view of the learned counsel, was that the parties to that contract had reverted to the position they were in prior to the conclusion of the contract. Legal ownership, accordingly, reverted to the Lenders.

According to Mr. Haimbe, the judge in the court below was wrong to hold that the mortgage was itself a means of paying the balance of the purchase price and that it obviated the need for the appellant to make payments in accordance with the terms of the contract of sale.

The learned counsel further contended that the sums due under the mortgage comprised the balance of the purchase price, and default under the mortgage had a contemporaneous effect under the contract of sale. Mr. Haimbe contended that, on its own terms, the mortgage was given as consideration for the assignment of the property to the appellant before completion, and not as consideration in lieu of payment of the balance of the purchase price. It was intended to secure payment of the sum of US$500,000.00 rather than be a substitute for that payment. The learned counsel accused the trial judge of reading words into the mortgage to the effect that the mortgage would itself be taken as payment.

The learned counsel prayed that the part of the lower court's judgment as decided that the mortgage provided a

payment mechanism in lieu of payment, be reversed and substituted with a holding that the mortgage was security only meant to secure the balance of the purchase price.

In answer to the respondent's arguments on grounds one, two and three of the cross-appeal, the learned counsel for the appellant supported the trial judge's finding that the sale transaction had been completed and the appellant had become the beneficial owner of the Suit Property. A new relationship of mortgagor and mortgagee was thereafter created.

Mr. Banda further supported the holding of the trial court that the appellant had become the beneficial owner of the property as evidenced by the certificate of title issued in its name. Although the Lenders were entitled to rescind the contract, they elected not to do so as it was clear to them that a valid sale had been consummated. The learned counsel submitted that having lodged all necessary conveyancing documents at the Ministry of Lands, the appellant was subsequently issued with a certificate of title in respect of the property. The learned counsel then quoted section 33 of the

Lands and Deeds Registry Act, chapter 185 of the laws of Zambia on the effect of a grant of a certificate of title. He urged us to dismiss grounds one, two and three of the cross appeal.

As we understood counsel, the plinth of the respondent's case under grounds one, two and three of the cross appeal is the ownership of the Suit Property. The respondent maintains that the appellant had breached a vital term of the contract of sale of the Suit Property between the appellant and the Lenders under which the appellants failed to live up to its payment obligations.

We note that the contract of sale of the Suit Property was concluded between the appellant and the Lenders and, following a series of other transactions, property in the Suit Property was duly conveyed to the appellant and a mortgage over the Suit Property duly created in favour of the Lenders. The Lenders in turn transferred their interest in the mortgage to the respondent. The learned trial judge found as a fact that the conveyance of the property from the Lenders to the appellant was properly consummated. He also found that the

balance of the purchase price i.e. US$500,000 had become a loan recoverable from the appellant as purchaser by the Lenders as vendors of the Suit Property. That loan was secured by a mortgage concluded between the appellant and the Lenders which was subsequently transferred to the respondent.

In the circumstances as described, we have serious difficulties comprehending the basis of the respondent's claim under grounds one, two and three of the cross-appeal. The respondent was not privy to the contract of sale between the appellant and the Lenders. The respondent's position is not that of a vendor but that of a mortgagee and can, therefore, only raise issues that pertain to its peculiar status of mortgagee.

We note that the Lenders were cited as third parties in the court below. The points of dispute which concerned them as third parties in the lower court included the question whether the sale transactions of the Suit Property between them and the appellant was duly concluded. Following the court's finding on this particular issue in the manner we have explained it, the

present appeal was launched and yet, the third parties in the lower court did not appeal and are, therefore, not part of the proceedings in this appeal.

The learned counsel for the respondent has argued that the respondent was entitled to raise issues regarding the transfer of the Suit Property under the contract of sale between the third parties in the court below and the appellant owing to the provisions of Order 16 rule 7 of the Rules of the Supreme Court, White Book 1999 Edition. We have examined that Order and rule and are satisfied that the rule provides for judgment being entered in third party proceedings as between the defendant and the third party where the action is decided at or after the trial or otherwise than by trial. It also deals with execution against the third party.

We are unable to see how this provision entitles the respondent to circumvent the doctrine of privity in contract law and seek, through this appeal, to assert a contractual right belonging to a third party, in this case, the Lenders. We think, with utmost respect to the learned counsel for the appellant,

that this effort was clearly misplaced, given that the third parties are not party to the current appeal. Grounds one, two and three of the cross-appeal are without merit and they are bound to fail. They are dismissed accordingly.

Under grounds four and five of the cross-appeal which Mr. Haimbe argued compositely, the main point taken by the learned counsel was that the finding of fact by the trial judge that the third parties in the lower court (Lenders) only took actual possession of the property shortly before the 30th of November, 2002 when the Receiver for Barclays Bank Plc failed to sell the property, was wrong. Counsel contended that the court took a very narrow perspective of the question at hand despite abundant evidence before it.

The evidence before the court, according to counsel, was that the appellant lost possession in August 1999 when Barclays Bank Plc appointed a receiver over the appellant and took possession of the Suit Property. The learned counsel pointed to the evidence of a witness of the Third Party (TPW1) in the proceedings in the lower court given particularly during

cross-examination to the effect that the holder of the first ranking mortgage, the Lenders, allowed Barclays Bank Plc's appointed receiver to take possession of the property. He urged us to consider the import of the unchallenged evidence of TPW1 given during evidence in chief and his responses in cross-examination. That evidence, according to the learned counsel for the respondent, shows conclusively that there was possession of the Suit Property on the part of the respondent for the required time within the meaning of section 12 of the Limitation of Actions Act, 1939.

According to the learned counsel, Barclays Bank Plc as second mortgagee, took over the suit property upon appointment of the receiver in August 1999 and such possession was with the consent of the Lenders. The Lenders and Barclays Bank Plc then jointly attempted to sell the property without success. Subsequently, the Lenders took over possession which was then passed on to the respondent. In this sense, according to Mr. Haimbe, the chain of possession among subsequent occupiers was unbroken from the time of the take over by Barclays Bank Plc in August, 1999. The learned

counsel submitted that, in terms of section 12 of the Limitation Act, the mortgagees having been in possession for a period in excess of 12 years prior to commencement of these proceedings, the appellant's claim for redemption was statute barred and, therefore, incompetent at law.

In addition to the foregoing, it was Mr. Haimbe's submission that the trial judge failed to consider the import of section 16 of the Limitation Act despite the issue being raised by the respondent in its final submissions. The learned counsel quoted the section which enacts as follows:

> **"Subject to the provisions of section seven of this Act and section seventy-five of the Land Registration Act 1925, at the expiration of the period prescribed by this Act for any person to bring an action to recover land (including a redemption action) or an action to enforce an adrowson, the title of that person to the land or adrowson shall be extinguished."**

In the present case, the effect of extinction of the appellant's title in the Suit Property was to bar the appellant from any attempt at redeeming the property. The net result of all this was that the appellant's action was barred by section 16 of the Limitation Act including the right of redemption. The

learned counsel prayed that we uphold grounds four and five of the cross-appeal.

In response, the learned counsel for the appellant countered the arguments made on behalf of the respondent. He maintained that the respondent had been in possession of the Suit Property from February 2002 as mortgagee in possession. The action was commenced in August 2011 – approximately 9 years later, and therefore, it is not statute barred in terms of section 12 of the Statute of Limitations Act 1939.

According to Mr. Banda, even if the date of taking possession by the Lenders were considered, the period would still be within the prescribed limitation period.

We were referred to the testimony of TPW1 who stated that the Lenders took possession of the property in late October 2000. The total period up to commencement of the action would be somewhere about 10 years and 9 months – still within the limitation period. The truth, according to Mr. Banda, is that the attempt to extend the limitation period argument to the time Barclays Bank Plc took possession, and the appellant allegedly

cooperated in an effort to dispose of the property, could not be supported by the evidence on record. The evidence of TPW1 shows that when Barclays Bank Plc took possession and placed advertisements for the sale of the Suit Property, it was done without the involvement of the Lenders. In fact, Barclays Bank Plc applied for an injunction against the Lenders, an action not consistent with cooperation.

It was the further argument of the learned counsel for the appellant that tacking can only be relied upon where there is continuous, uninterrupted possession. In this case the possession of Barclays Bank Plc was interrupted by the Lease between the Lenders and Mount Isabelle Farms Limited a copy of which is in the record of appeal. In any case, the capacities in which Barclays Bank Plc and the Lenders entered upon the Suit Property were different and cannot, therefore, be relied upon to create a relationship. Counsel submitted that section 16 of the Statute of Limitation 1939 did not apply to the present case.

We have carefully considered the arguments advanced in respect of grounds four and five of the cross-appeal. We have no trepidations, whatsoever, in holding that the two grounds are destitute of merit.

The arguments by the learned counsel are clearly evidentiary in nature. The two grounds of cross-appeal themselves impeach, in the main, finding of fact by the trial judge. We do not accept the argument of the learned counsel for the respondent regarding the continuous and uninterrupted possession between successive occupants of the property in this particular case. We accept instead the version given by the learned counsel for the appellant.

Equally, we do not agree with Mr. Haimbe that the learned trial judge failed to consider the effect of section 16 of the Limitation Act of 1939. We note from the judgment of the lower court that this issue was strenuously canvassed before that court and the learned judge gave his decision on it in forthright language. The result is that we accept the arguments made on this ground by the learned counsel for the appellant. Grounds

four and five of the cross-appeal are bound to fail and we dismiss them accordingly.

In regard to ground six of the respondent's cross-appeal Mr. Haimbe made very brief submissions. They were effectively that should the court uphold some grounds of the cross-appeal, it should make consequential orders reversing the trial judge on the counter claim.

In his equally brief response, Mr. Banda merely restated that the respondent's counter claim was rightly dismissed and the ground lacked merit. He prayed that this ground, together with the others in the counter appeal, be dismissed.

Given our holding on all the grounds of appeal, ground six clearly cannot succeed. It collapses accordingly.

The net result is that the appeal succeeds and the cross appeal fails. We direct that the respondent renders an account to the appellant on the recovery of the mortgage sum. We refer

this matter to the High Court for this purpose. We order costs against the respondent.

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M. MALILA, SC
SUPREME COURT JUDGE

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C. KAJIMANGA
SUPREME COURT JUDGE

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M. C. MUSONDA
SUPREME COURT JUDGE