IN THE SUPREME COURT OF ZAMBIA **Appeal No. 145/2011**
HOLDEN AT LUSAKA **SCZ/8/213/2011**

(*Civil Jurisdiction*)

IN THE MATTER OF : **The property comprised under a first Legal Mortgage over Lot No.5876/M situate at Lusaka Province of Zamia.**

AND

IN THE MATTER OF : **An order for foreclosure and possession.**

BETWEEN:

MICHELO SPECIAL GEORGES MWIINGA
(sued as Mortgagor and Guarantor) **1ST APPELLANT**

FLORENCE KACHESA MWIINGA
(sued as mortgagor and Guarantor) **2ND APPELLANT**

AND

ZAMBIA NATIONAL COMMERCIAL BANK PLC **RESPONDENT**

CORAM: **Chibomba, Hamaundu and Kaoma, JJS**
On the 4th June, 2014 and 21st February, 2017

For the Appellants : Mr L. Kalaluka, Messrs Ellis & Co
For the Respondent: Mrs S. Wamulume, Legal Counsel

JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court

Cases referred to:

1. **Nkongolo Farms Limited V Zambia National Commercial Bank [2007] ZR 149**
2. **Union Bank (Z) Limited v Southern Province Co-operative Marketing Union Limited [1995/1997] ZR 207**
3. **Credit Africa Bank Limited (In Liquidation) v John Dingani Mudenda [2003] ZR 66**

4. **Mususu Kalenga Building Ltd & another v Richaman's Money Lenders Enterprises [1999] ZR 27**
5. **National Westminster Bank v Kitch (1996) 1 W. L. R 1316**
6. **S. Brian Musonda (Receiver of First Merchant Bank Zambia (in receivership) v Hyper Food Products Limited & two others [1999] ZR. 124**
7. **Ashley Guarantee Plc v Zacharia & Another [1993] 1 All E.R. 254**
8. **National Westminster Bank Plc v Skelton & Another(8) [1993] 1 All ER 242**
9. **Samuel Keller Ltd v Martins Bank Ltd [1970] 3 All E.R 950**

Works referred to:

1. **Law of Banking and Stock Exchange Transactions, 4th edition, volume 2**
2. **Principles of Banking, (Clarendon Press, Oxford 1997)**

This is an appeal against a judgment of the High Court which granted the respondents' claim for payment of the sum of K419,590,509.96 and foreclosure in default of payment.

The background to this appeal is not in dispute and is thus:

On the 20th of June, 2005, the respondent granted to the 1st appellant an overdraft facility whose limit was K7 million (old currency). The facility was to expire on the 30th June, 2005. The facility was secured by a legal mortgage on stand No. 5876/M and stand No. 5877/M Lusaka which belonged to the 1st and 2nd respondents. The mortgaged property was valued at K525 million.

On the 23rd of June, 2005, the above facility was enhanced and the limit was extended to K40 million. The enhanced facility was to expire on the 30th of June, 2006. The security for the enhanced facility was said to be a 1st legal mortgage to secure K90 million on the same two properties.

On the 6th of September, 2005, the overdraft facility was again enhanced. The limit was extended to K165 million. The facility was to expire on the 30th of September, 2006. It was said to be secured by a 1st legal mortgage for the sum of K45 million on stand No. 5876/M and 5877/M and a further charge on the said properties for the sum of K120 million.

There was also evidence on record to show that on the 27th of August, 2004 the two appellants had executed and registered a mortgage on stand No. 5876/M in favour of the respondent. The mortgage was to secure the sum of K30 million. The evidence on record again showed that on the 19th of September, 2005 the two appellants executed and registered a further charge on the said Stand No. 5876/M Lusaka in favour of the respondent. The recitals in that deed stated that the property was already demised to the respondent by a principal indenture dated 8th of March, 2005 to secure a sum of K40 million. The recitals went on to state that the appellants had requested a further advance of K70 million and that, therefore, the total amount now secured and recoverable was K110,000, together with interest.

Yet again, on the 23rd of March, 2006 the appellants executed and registered a second further charge on stand No. 5876/M in favour of the respondent. The recitals in that deed stated that whereas the said property was already demised to secure the sum of K100 million, the appellants had requested a further advance of K85 million and that, therefore, the total amount now secured was K185 million.

The certificate of title relating to stand No. 5876/M showed that all these deeds were endorsed in its memorials.

It is worth noting that, during that time, the 1st appellant and another person had a labour dispute with the respondent going on in the Industrial Relations Court. On the 3rd of August, 2007 judgment was entered in favour of the 1st appellant in the labour dispute. As a result of that judgment, the parties entered into a consent judgment with regard to the quantum that was not disputed. According to that judgment, the 1st appellant and his colleague were to receive an interim sum of K1,315,594,149.46 while the disputed sums would go to assessment.

On the 19th of September, 2007 the respondent wrote to the 1st appellant, informing him that his indebtedness on his overdraft and

loan accounts were K235,830,944.50 and K17,667,173.27 respectively. The 1st appellant's advocates responded to that letter, reminding the respondent that the 1st appellant had won his court case and that it involved billions of Kwacha; against which the respondent's claim was insignificant.

There was acknowledgment by the advocates representing the 1st appellant and his colleague in the labour case that the respondent did pay the interim payment of K1,315,594,149.46, into the advocates' client account on the 28th of January, 2008.

In July, 2010 the respondent commenced this action, seeking payment of the sum of K419,590,509.96 and enforcement of the securities by foreclosure on stand No. 5876/M Lusaka.

According to the affidavit in support, the overdraft facility of K7 million was secured by the legal mortgage which was produced as "OS 2." The further enhanced facility of K165 million was secured by a second further charge which was produced as "OS 8".

The appellants' response to that action was to, generally, put the respondent to strict proof of the amount it claimed to be owing. The appellants set up a counter-claim, or set off, in which the 1st appellant wanted the respondent to pay him a sum of

K1,522,153,157.14 which he alleged to be owed to him on the disputed amounts in the labour matter and from which what was owed to the respondent would be deducted.

The trial court had no difficulty in finding that the appellants did not deny owing the respondent but that their only defence was that the respondent owed the 1st appellant a substantial amount of money in respect of terminal benefits, which was more than enough to cover the debt. The trial court noted that the 1st appellant's contention was that by way of set off or counter-claim, the respondent should pay him a sum of K1,523,153,157.14.

The court rejected the 1st appellant's alleged counter-claim for being of no relevance to these proceedings in that it related to a separate and distinct labour action which was being prosecuted in the Industrial Relations Court. The court found that the appellants had no defence to the respondent's claim and entered judgment in favour of the respondent in the sum of K419,590,509.96, with interest at the agreed rate of 33% per annum from the date of commencement of the action to the date of judgment; thereafter at bank lending rate. The court ordered the appellants to settle the judgment sum within 120 days, failing which the respondent was at

fact not as the obligation to pay arose from overdraft facilities and not from a mortgage.

6. **The learned trial judge erred in law and in fact when he found in favour of the respondent on an irregular deed which was not duly executed by the 2nd appellant who is a joint owner of the mortgaged property.**

Because the issues raised in the grounds are diverse, we will dispose of each ground immediately after considering the arguments thereon.

Mr. Kalaluka, learned counsel for the appellants, argued the first and fourth grounds together. To demonstrate the kernel of the arguments on the two grounds, counsel cited paragraph 14 of the appellants' affidavit in opposition, which reads as follows:

> **"That paragraph 18 is in dispute because the 1st respondent is not aware of how the applicant arrived at the figure of K419,590,509.96 as no exhibits were filed and no schedule was exhibited in respect of interest computation to enable the respondents verify whether they were being charged penalty interest or not. The 1st respondent also demand for a statement of account for the alleged indebtedness with the applicant."**

Learned counsel went on to argue that where overdraft facilities are concerned, it is not always that the overdraft limit is reached within the period stated. That, until some money is overdrawn, the facility is not a loan in the actual sense as no monies will have passed from the bank to the customer. Even where

it is overdrawn, the loan will only relate to the sums overdrawn and not to the overdraft limit. In support of those submissions, we were referred to the following works:

1. **Law of Banking and Stock Exchange Transactions, 4th edition, volume 2; and**
2. **Principles of Banking Law, Clarendon Press – Oxford(1997)**

The authors or editors of the two works were not stated. With those arguments, learned counsel went on to submit that the overdraft facilities and the mortgages exhibited by the respondent were not evidence that the sums indicated therein were actually advanced or disbursed to the 1st appellant. Counsel argued that by finding that the appellant did not deny the debt, the trial judge, in effect, failed to analyse the affidavit evidence before him. Relying on the general rule that gives guidance as to when an appellate court can interfere with findings of fact made by a trial court, as we re-stated it in the case of **Nkongolo Farms Limited V Zambia National Commercial Bank**[1], counsel submitted that the court below failed to take into account the evidence on record.

In response to those arguments, Mrs Wamulume, learned counsel for the respondent, submitted that while the respondent adduced evidence of various credit facilities to show that money was

advanced to the appellant, the latter, on the other hand failed to show that they had not borrowed the money or that they had paid the money that they had borrowed. Counsel pointed out that the appellants kept going back to the respondent to ask for an enhancement of the facility; and that on each occasion, the appellants executed further charges. Counsel argued that it made no commercial sense for the appellants to keep on creating a charge over their property for credit facilities that they had no intention of utilizing. According to counsel, this was evidence that the appellants had utilized the overdrafts.

Coming to compound interest, counsel submitted that the respondent did indeed charge compound interest on the unpaid balance because it was agreed by the parties. Counsel relied on the case of **Union Bank (Z) Limited v Southern Province Co-operative Marketing Union Limited**[2] in which we held;

> **"A Bank has the right to charge interest at a reasonable rate on overdrafts but unusual rates such as compound interest require an agreement".**

She also relied on the case of **Credit Africa Bank Limited (In Liquidation) v John Dingani Mudenda**[3] in which we repeated the above holding.

With regard to penal interest, counsel referred us again to the **Credit African Bank Limited**[3] case where we described penal interest as interest which a Bank imposes on the borrower for late repayment. Counsel submitted that there was no evidence that the respondent ever charged such interest.

Those were the arguments on the two grounds.

We must say that we find the arguments by learned counsel for the appellants on these grounds not to be in tandem with them. For example, in the first ground, the appellants are challenging the court's finding that they did not deny the claim. In the fourth ground the appellants have a grievance with the court for not reconciling the total amount payable in order to determine whether or not the respondent had been charging penal interest.

In the court below, the appellants did not raise any issue that there was a dispute regarding the charging of compound interest by the respondent and neither did they plead any dispute regarding the charging of penal interest by the respondent. The averment in paragraph 14 of the 1st appellant's affidavit cited by their counsel did not amount to pleading those issues. In those averments, the 1st appellant was merely contending that the respondent had not

exhibited documents to enable the appellants verify whether or not penal interest had been charged.

It was clear from the evidence that the 1st appellant himself had worked for the respondent. Being a person who worked in the banking industry, the 1st appellant knew that he had a right to statements of his accounts. In those circumstances, if penal interest was being charged, that is something that he should have detected even before the action commenced. Therefore, when the action commenced he should have specifically pleaded that penal interest had been charged by the respondent. This is what would have enabled the trial court to inquire into that issue. Raising the issue in their submissions, as the appellants did, was not a plea of the issue.

Since the appellants did not plead those two issues, the trial court cannot be faulted for finding that the appellants did not deny the debt.

Finally, on these grounds of appeal, we refer to the case of **Mususu Kalenga Building Ltd & another v Richmans Money Lenders Enterprises**[4] where we said:

> **"We have said before and we wish to reiterate here that where an issue was not raised in the court below it is not competent for a party to raise it in this court"** (page 28).

In that case we declined to even consider the grounds which raised such issues. This is what we would have done in this case, except that the appellants somehow merged those issues with their contention that the trial court erred when it found that they had not denied the debt.

From what we have said above, the first and fourth grounds of appeal have no merit.

In the second ground of appeal, Mr Kalaluka submitted that the trial court erred in law and fact when it refused to grant a set-off or counter-claim. Counsel submitted that it was not in dispute that the respondent owed the 1st appellant unpaid gratuity and allowances of about K1,523.153.16 (re-based), together with interest. Counsel argued that the only logical thing to do would have been for the trial court to set off the appellants' debt from that amount. That this was more so that the appellants' obligations to pay did not arise from a mortgage but from overdraft facilities. Counsel relied on the case of **National Westminster Bank v Kitch**[5] which held that an action for payment of an overdraft, even if

secured, is not a mortgage action. That case was cited in the case of **S. Brian Musonda (Receiver of First Mechant Bank Zambia, in receivership v Hyper Food Products Limited & two others**[6].

Learned counsel went on to argue that the fact that the 1st appellant is owed a huge sum of money by the respondent is evidence enough that there are reasonable prospects of settling any balance on the overdraft facilities. That such prospects need not be related to the overdraft facility or mortgage but that a debtor can use any source to repay the debt. Counsel went on to argue that, even assuming that the respondent did not owe the 1st appellant that huge sum of money, what the appellants would have been required to demonstrate was that they could liquidate the debt within a reasonable time. For that argument, learned counsel referred us to a passage in the **S. Brian Musonda**[6] case where we said:

> **"We agree that the discretion of the court must be exercised judicially on sound considerations which would enable the judgment creditor to realize the fruits of success in the action within a reasonable time. What is a reasonable time is a question of fact in the circumstances of the case."**

Elsewhere on the same page we said;

> **"It is not contrary to law or to the rules for the court to exercise its equitable jurisdiction of affording relief where a judgment debtor**

can pay within a reasonable time even if this results in fettering the judgment creditor's freedom of inflicting a remedy of their own choice or preference in a mortgage action".

In response to the arguments by the appellants in this ground of appeal, learned counsel for the respondent supported the holding by the trial court that the alleged counter-claim had no relevance to the mortgage action. In support of that submission, counsel referred us to the case of **Ashley Guarantee Plc v Zacharia & Another**[7] and, particularly, a passage in the judgment which states:

"The general rule that subject to contractual or statutory limitations a mortgagor would not defeat a legal mortgagee's right to possession by claiming an equitable set off for an unliquidated sum exceeding the amount of the mortgage arrears applied irrespective of whether the mortgagor was the principle debtor of the mortgagee or was only a guarantor, since in each case the mortgagee had, as an incident of his estate in the land, a right to possession of the mortgaged property and in each case the cross-claims could not be unilaterally appropriated in discharge of the mortgage debt".

Counsel also referred us to the case of **National Westminster Bank Plc v Skelton & Another**[8] and particularly to a portion of the judgment by Slade L.J which states:

"The existence of a cross claim, even if it exceeds the amount of a mortgage debt will not by itself defeat a right to possession by a legal charge."

Counsel then submitted that the case of **S. Brian Musonda vs. Hyper Food Products Limited**[6] relied on by the appellants to challenge the trial court's grant of the relief of foreclosure actually is authority for the power that the court has to give time to mortgagors to pay the debt before the reliefs take effect. Counsel argued that this is what the trial court did when it gave the appellants 120 days to pay the debt owed before the respondent could exercise its liberty to foreclose, take possession of and sale the mortgaged property.

With those arguments, Counsel urged us to find no merit in the second ground of appeal.

Before we state our ratio *decidendi* in this ground of appeal, we would like to make the following observations: The sum of K1,523,153.18 which the appellants were relying on to plead a set-off was not a sum that was awarded by the court. It was merely an estimate by the 1st appellant. Otherwise, as far as the proceedings in the labour court are concerned, there was a dispute as to the quantum of a certain portion of the benefits owed to the 1st appellant. The issue was sent for assessment. Up to the time that this matter was disposed of in the court below, there was no figure assessed by the labour court. Further, in January, 2008 the 1st

appellant's advocates in the labour matter received at least a sum of K1,135,008,934.41 from the respondent, being the sum that was entered as consent judgment regarding the undisputed portion of the terminal benefits of the 1st appellant and his colleague in the labour matter. The 1st appellant made no effort to apply his portion towards liquidation of his debt, which then stood at slightly over K200 million. This was notwithstanding that in October, 2007, his advocates had written to the respondent suggesting that the 1st appellant's debt could be extinguished by the anticipated amount from the judgment that he had just obtained in the labour matter.

However, our observations aside, we are persuaded by the principle laid down in the two English authorities cited by learned counsel for the respondent that a mortgagee's right to possession of the mortgaged property cannot be defeated by a counter-claim or set-off. Infact while the two cases cited referred to instances where the mortgagee's action is for possession only, the case of **Samuel Keller Ltd v Martins Bank Ltd**[4] is more applicable to the facts in this matter.

In that case, a company known as Lawton bought from Keller Ltd, all the shares which the latter had in two companies. Keller Ltd

lent a sum of £31,000 to enable Lawton purchase the shares. The money was to be paid back in three instalments, with interest. The money was secured by a mortgage on a factory belonging to Lawton. Lawton defaulted on the first instalment and its interest. Keller, therefore, commenced an action for payment of that instalment and the interest. Lawton defended the action and counter-claimed unliquidated damages for breach of warranties on the part of Keller Ltd with regard to the state of the companies at the time of the sale of the shares. It was Lawton's claim that the anticipated damages were substantial. The mortgaged factory was subsequently sold in enforcement of a prior mortgage. The first mortgagee was paid. The second mortgagee (Martins Bank Ltd) deducted the monies owed to it and was left with a surplus of £6,000 plus which it was bound to pay over to Keller Ltd the subsequent mortgagee. However

Lawton wrote to Martins bank Ltd requesting it to pay that money in court and not to Keller Ltd on the ground that Lawton had a substantial counter-claim in the mortgage action between it and Keller Ltd. Keller Ltd then sued Martins Bank Ltd for the money. In the circumstances, Martins Bank Limited issued an interpleader summons and applied that the proceedings be stayed pending the

outcome of the action between Keller Ltd and Lawton. The application eventually ended up in the Court of Appeal. In his judgment, Russel L.J, quoted with approval a portion of the judgment of Megarry J, in the court below which says:

> **"Unless and until the mortgage in this case is discharged in the appropriate way on actual payment and acceptance of the sum due, I think that the mortgage remains a mortgage, and that the mortgagee is entitled to any surplus proceeds of sale in the hands of the bank up to the amount properly due under the mortgage. A doctrine of the discharge of a mortgage debt by the existence of unilateral appropriation of an unliquidated claim is one to which I give no countenance; I regard it as neither convenient nor just. Even where there is a claim which is both liquidated and admitted, and it exceeds the mortgage debt in amount, it may be to the interest of one party or the other, or both, that the mortgage and the mortgage debt should continue in existence. The rate of interest may be attractively high or seductively low; there may be new projects to be financed which make liquid cash preferable to the satisfaction of mortgage debts; and so on. Nor have I heard any reason why it should be the mortgagor who is to have a unilateral power to discharge the mortgage debt by appropriation without payment."** (page 953)

The Court of Appeal upheld the decision of the court below on the strength of the proposition of law contained in that passage.

We agree with the Court of Appeal in its approval of that proposition of Law. **Halsbury's Law of England 3rd edition, volume 27**

provides two instances of what constitutes a good discharge of the mortgage. These are;

(i) discharge by payment; and

(ii) discharge by accord and satisfaction

In **Volume 8** of the same edition the learned editors define accord and satisfaction. They provide;

> "Accord and satisfaction defined. **After a breach of contract has taken place the cause of action that arises from the breach may be discharged by accord and satisfaction, that is to say, by an agreement between the parties providing for the acceptance by the promise of something else than the remedy to which he is entitled by law, coupled with the consideration agreed upon.**
> **Accord and satisfaction involves an agreement, and the question whether an accord has been arrived at is one of fact, not law."** (para 349)

Going by the foregoing passage, it is clear that if the mortgage is to be discharged by way of a counter-claim, then there must be agreement between the parties. Otherwise, for as long as the agreement is absent, then the mortgage stands undischarged and the mortgagee remains at liberty to pursue and be granted the remedies available to him.

In this case, there was no accord and satisfaction because the respondent, quite rightly, refused to have the mortgage discharged

in that manner; this was obvious because the respondent seriously disputed the further amount claimed by the 1st appellant to be still owing in the labour matter, and, hence, up to the time of the judgment in the court below, the amount due if any remained undetermined.

Therefore, we find no merit in the second ground of appeal.

In the third ground of appeal, Counsel for the appellants took issue with the trial court for granting an order of foreclosure and possession of the mortgaged property for a debt of K419,590,509.98 when the value of the property was well in excess of that sum. Counsel pointed out that there was evidence on record that, although at the time of the execution of the mortgage the value of the property was indicated as K520 million, it had increased to K910 million as at 20th February, 2010. Counsel submitted that, in the circumstances, it was unconscionable to order possession and foreclosure given that the respondent owed the 1st appellant the sum of K1,523,153.16 as unpaid gratuity and allowances. Counsel did not say what the trial court ought to have done.

In response to the above arguments, Counsel for the respondent ordered that there is no legal basis for the appellant's

arguments because, according to Counsel, a mortgagee cannot be barred from exercising his legal right merely because the mortgaged property is worth more than the money borrowed. Expanding that argument further, Counsel quoted a passage from **Halsbury's Laws of England, Vol. 32, para.737**. The edition was not cited. The passage reads:

> **"Money arising from a sale is applicable in the first instance to the discharge of any prior encumbrances to which the sale is not made subject or to the payment into court of a sum to meet any prior encumbrances; the balance or the whole as the case may be is held by the mortgagee in trust to be applied, first in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale or otherwise, secondly in discharge of the mortgage money, interests and costs and other money if any due under the mortgage; and the residue to be paid to the person entitled to the mortgaged property or authorized to give receipts for the proceeds of the sale."**

Counsel submitted that, from that passage, it was clear that mortgaged property could be valued more than the money borrowed and that it could be sold by the mortgagee. That in that event, however, the mortgagee will have a duty to the mortgagor to account for the residue or balance. Counsel argued that in any event the actual price will be the market price which may well be lower than the valuation.

We have considered the arguments on this ground.

We do not seem to understand what the appellant's argument is in this ground of appeal. We can only concur with the argument on behalf of the respondent that a mortgagee cannot be barred from pursuing his legal remedies under the mortgage merely because the mortgaged property is worth more than the borrowed money. Indeed there is a remedy for that state of affairs, as we explained in **S. Brian Musonda v Hyper Food Products Limited & two others**[6]. In that judgment we said:

> **"It was also ordered that the defendant deliver possession of the mortgaged properties being Stand 4514 and 4515 Lusaka. In default of payment within sixty days, it was ordered that the plaintiff be at liberty to exercise their right of foreclosure over, or to sell the properties subject of the equitable mortgage in order to recover all outstanding sums of money. The appellant was also granted leave to issue a writ of possession. We have quoted the terms of the consent order in order to underline the fact that the mortgagee's remedies are cummulative. However, they are also in the main alternative to each other. Some of the terms of the consent order were liable to mislead if not properly construed, for instance the reference to foreclosure and sale in one breath. Foreclosure and sale are two distinct and separate remedies though admittedly both are remedies primarily for the recovery of capital in contradistinction with the taking of possession or the appointment of a receiver which are remedies primarily for the recovery of interest.**

A foreclosure decree absolute extinguishes with the taking of possession or the appointment of a receiver which are remedies primarily for the recovery of interest. A foreclosure decree absolute extinguishes the equity of redemption and vests the mortgagor's entire interest in the property in the mortgagee so that the mortgagor's property belongs to the mortgagee absolutely. Sale on the other hand is usually more appropriate where the property mortgaged is worth substantially more than the mortgage debt. We mention some of these things only in passing since, as will appear, they were peripheral to the central issues raised, although not entirely irrelevant in considering the circumstances of this case."

The judgment of the trial court did grant the respondent liberty to have possession of the property and exercise its right of sale. Therefore, the judgment did address the situation referred to by the appellants.

In our view, therefore, there is no merit in the third ground of appeal.

In the fifth ground of appeal, the arguments of learned Counsel for the appellants were that the trial court erred when it failed to consider the submissions on behalf of the appellants that this action was improperly before the court. Counsel argued, as argued earlier in the second ground, that since the property was mortgaged to secure money on an overdraft, then the action is not a mortgage action and should not have been heard as such. It was

Counsel's argument that, in those circumstances, it was not in the interest of justice to order possession.

In response to those arguments, learned Counsel for the respondent argued that the case of **National Westminster Bank v Kitch**[5] is authority for the principle only that an action will not be a mortgage action if it seeks to merely rely on other facilities. Counsel argued that, in this case, the mortgage and further charges had been exhibited and the relief sought was by virtue of the mortgage deed.

To the above arguments, we wish to state thus:

In our judgment in the **S. Brian Musonda**[6] case, we noted that the Court of Appeal in England had suggested in the **National Westminster Bank v Kitch**[5] case that facts like those that existed in the **S. Brian Musonda** case may not qualify to be a mortgage action. We left that point open and proceeded with the **S. Brian Musonda**[6] case as if it were a mortgage action, as the Court below had done. Similarly, in this case, we shall leave that point open and proceed as if it is a mortgage action; just like the Court below did. The reason why we have chosen to proceed in that manner will be seen in the portion of our judgment immediately succeeding.

Order 2, Rule 2 of the **Rules of the Supreme Court** ("White Book) provides:

> **"(1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity."**

In this case, the appellants did not make any application to the court below to set aside the proceedings which brought this matter as a mortgage action. Instead, the appellants took a fresh step and defended the action by filing, not only one but, two affidavits in opposition. Therefore, the appellants robbed the trial court of the opportunity to deal with that issue thoroughly and formally. It was not proper for the appellants to sneak-in that issue in their submissions. Therefore, the trial court was on firm ground to ignore that part of the submissions.

In the circumstances, the issue which the appellants are canvassing now was not raised in the court below. Therefore, in the same manner that we have held in the first and fourth grounds of appeal, we hold that this issue cannot be raised before us. It is for this reason that we have again left the point raised in the issue

open so that we shall deal with it in a matter in which it will have been raised and dealt with in the court of first instance.

The fifth ground of appeal, therefore, has no merit.

The appellants abandoned the sixth ground of appeal.

All in all, this appeal has no merit on all grounds. It stands dismissed, with costs to the respondent.

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H. Chibomba
SUPREME COURT JUDGE

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E. M. Hamaundu
SUPREME COURT JUDGE

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R. C. M. Kaoma
SUPREME COURT JUDGE