IN THE SUPREME COURT OF ZAMBIA APPEAL NO.105/2009
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

BETWEEN:

CHAINAMA HOTELS LIMITED	**1st APPELLANT**
SONNY PAUL MULENGA and VISMER MULENGA (Both practicing as SP MULENGA & ASSOCIATES)	**2nd APPELLANT**
ARMSTRONG ENTERPRISES LIMITED	**3rd APPELLANT**
ELEPHANT'S HEAD HOTEL LIMITED	**4th APPELLANT**

AND

INVESTRUST MERCHANT BANK (Z) LTD **RESPONDENT**

Coram: Muyovwe, Hamaundu, JJS and Lisimba, AJS
On the 2nd February, 2015 and the 22nd February, 2017

For the Appellants : Mr. L. C. Zulu, Messrs Malambo & Co
For the Respondent : Mr A. J. Shonga, S.C., Messrs Shamwana & Co

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JUDGMENT

Hamaundu, JS, delivered the Judgment of the Court

Cases referred to:

1. **S. Brian Musonda (Receiver of First Merchant Bank Zambia Ltd, in receivership) v Hyper Food Products Ltd & Others [1999] ZR 124**
2. **Galaunia Farm Limited v National Milling Corporation Limited [2004] ZR.1**
3. **Agape Gardens Limited, Mercy Sichinga Siame and Simeo Benson Siame vs. Coffee Board of Zambia & Development Bank of Zambia SCZ Judgment No 32 of 2014**
4. **Finance Bank Limited vs. Africa Angle Limited& 2 Others (1998) Z.R. 237.**
5. **Wilson Masauso Zulu v Avondale Housing Project Limited [1982] ZR 172**

6. **Setrec Steel & Wood Processing Limited & two ors V Zambia National Commercial Bank Plc – Appeal No. 39/2007**
7. **Modern Jacks Limited v Strong Engineering Limited and George Sokota (Liquidation Manager of African Commercial Bank Zambia Limited, Appeal No. 5 of 2001**,

Works referred to:

1. **Meggary's Manual of the Law of Real Property, 6th edition**
2. **Meggary and Wade, Law of Real Property, 4th edition**
3. **Dictionary of Law, 4th edition, L.B. Curzon, (Pitman Publishing, 1993)**
4. **A manual of the Law of Real Property, 2nd edition (London, Sweet & Maxwell), page 494-495**
5. **Halsbury's Laws of England, 3rd edition, Vol. 27 paras; 841, 842 etc**

When we heard this appeal, we sat with the Honourable Mr Justice Lisimba who has since retired. Therefore, this judgment is by majority.

This is an appeal against a judgment of the High Court which dismissed the appellant's action for payment of surplus money allegedly realized from the sale of a mortgaged property.

The facts in this matter, by and large, are undisputed and are these:

In 1996, the 1st appellant, Chainama Hotels Limited bought a property which was then known as *"Elephants head Hotel"* in Kabwe from the National Hotels Development Corporation. The property was situated on land referred to as KABW/1226 Kabwe. It will be hereafter referred to as Stand 1226 Kabwe. The purchase

price was a sum of K640,000,000.00 (unrebased). The 1st appellant paid a sum of K440,000,000.00 towards the purchase price, leaving a balance of K200,000,000.00. To meet the balance, the 1st appellant borrowed a sum of K200,000,000.00 from the respondent, Investrust Merchant Bank (Z) Limited. The loan was to be repaid over a period of six months from the 29th December, 1996.

As security for the loan, the 1st appellant, as tenant or lessee of Stand 1226 Kabwe, executed a mortgage in favour of the respondent in respect of that property. The 3rd appellant, Armstrong Enterprises Limited, executed a third party mortgage in respect of property known as Stand 9606 Lusaka. The 2nd appellant, a firm, provided a letter of undertaking that it would apply the proceeds of the sale of property known as Stand 6489 Lusaka and also a sum of K650,000,000.00 expected as agency fees from Tedworth of United Kingdom, towards the loan.

The 1st appellant defaulted on its loan repayments. The respondent commenced a mortgage action for foreclosure in 1997 under cause no. 1997/HP/189. In the meantime, before the action was heard, the respondent, through its advocates then, Messrs Mwanawasa & Co, advertised Stand 1226 Kabwe for sale in the

newspapers of the 23rd March, 1998. In that advertisement it was stated that the respondent was exercising the power of sale contained in the mortgage that was executed by the 1st appellant on Stand 1226 Kabwe.

On the 24th June, 1998, the Court entered judgment for the respondent in the sum of K305,114,370.38 and granted the respondent the relief of foreclosure on Stand 1226 Kabwe. That judgment was, however, stayed for a period of thirty days on the following terms;

(i) that within seven days the appellants were to indicate to the respondent the method by which they intended to apply to discharge the debt;

(ii) that the respondent would within seven days thereafter give its reaction to the proposal and, if it rejected the proposal, the appellants would be at liberty to apply to the court for a suitable order to pay in instalments; and

(iii) that whilst such application to pay in instalments remained pending the order for foreclosure would remain stayed.

There is no evidence on record to show that the appellants made the application referred to; but on the 22nd March, 1999, the

court granted the respondent possession of Stand 1226 Kabwe pursuant to the order of foreclosure it had earlier made. The recitals in the order of possession stated that the appellants had defaulted on the stipulations required of them in the judgment of the 24th June, 1998.

On the 16th September, 1999, the respondent executed a contract of sale of Stand 1226 Kabwe to Tuskers Limited for the sum of K500,000,000.00. This was followed by an assignment of the property on 16th November, 1999, from the respondent to Tuskers Limited.

In the meantime, the respondent had advertised Stand No. 9606 in the newspapers of the 19th April, 1999 for sale by mortgagee in possession. Pursuant to that advertisement, the respondent executed a contract of sale of Stand 9606 Lusaka to one Sianyinda David Shichombo at the price of K9,000,000 . This was followed by an assignment of the property on 26th November, 1999 from the respondent to Sianyinda David Shichombo.

In 2005, under cause no. 2005/HP/1031, the appellants commenced an action, seeking;

(i) to set aside the sale of the two properties;

The appellants subsequently amended their claim. This time, the appellants claimed a sum of K526,000,000.00 on the Kabwe property, being the difference between the estimated market value of K740,000,000.00 and the money which was due on the mortgage debt. On the Lusaka property, the appellants claimed damages for breach of the terms of the third party mortgage. The appellants still maintained their claim for an account to be rendered by the respondent for the proceeds of the sale. This time, the appellants alleged that by the 30th June, 1997, they had paid a total sum of K60,300,000.00 towards the loan. They charged that the judgment sum of K305,114,307.38 which was entered in the earlier matter did not take into account the money already paid. The appellants also alleged that, infact, Tuskers Limited bought the Kabwe property through money advanced entirely by its bank, the respondent. They further charged that the respondent sold the Lusaka property without serving the 2nd and 3rd appellants any notice demanding payment as stipulated by the third party mortgage.

On the 4th March, 2008, the appellants' action was consolidated with the respondent's earlier action in cause no. 1997/HP/1891.

At the hearing, the appellants and the respondent presented their case through one witness each.

The evidence of either witness did not depart significantly from the averments in their pleadings, which we have already summarised.

The trial court found as a fact the following;

(i) that the respondent sold the two properties after the appellants defaulted in repaying the loan of K200,000,000.00;

(ii) that the sum of K60,300,000 which the appellants were claiming to have paid was actually never paid to the loan account, but only reflected in the firm's current account;

(iii) that Stand 9609 was given as replacement security after the appellants secretly disposed of Stand 6489 in Olympia Park, Lusaka, without accounting for its proceeds to the respondent;

(iv) that the appellants were given notice of demand to pay the loan;

(v) that these two properties were advertised for sale before their respective disposal was effected; and,

(vi) that there was no evidence that the open market value for the Kabwe property was K740,000,000.00.

The trial court dismissed the appellants claim for K526,000,000.00 on account of the last finding of fact.

Coming to the claim for damages on Stand 9609, the trial court was alive to our holding in the case of **S. Brian Musonda (Receiver of First Merchant Bank Zambia Ltd, in receivership) v Hyper Food Products Ltd & Others**[1] that a mortgagee is under a duty to obtain the best price possible. The court held that the respondent did endeavour to obtain such prices as evidenced by the fact that it advertised the property for sale. The court rejected a valuation report which the appellants had tendered in evidence and which reflected the value of the Lusaka property as K79,000,000.00 as being inadmissible because it was not produced by the maker. For that approach, the court relied on the case of **Galaunia Farm Limited v National Milling Corporation Limited**[2].

The court further held that the appellants had not adduced evidence to support their allegation that Stand 9609 was sold by the respondent in a fraudulent and negligent manner.

As regards the claim to render an account, the trial court wondered how the appellants could put forward that claim when they already knew the prices at which the properties were sold and knew that there was still a balance outstanding.

Consequently, the trial court dismissed the appellants' action. That is what brought the appellants before this court.

The appellants have advanced six grounds of appeal. These are as follows:

1. **The learned trial judge misdirected himself in law and in fact when he held that the respondent had already rendered an account and that the appellants were aware of the outstanding amount to be cleared when the account statement produced was erroneous and did not depict the true and full proceeds of the sale of Stand No. 1226 Kabwe as the property was not sold as an outright purchase but by the instalment of K157,500,000.00 and the balance in 24 monthly instalments of K20,956,799.00 plus interest at 40% per annum, making the total in excess of K861,148,446.00 and not K500,000,000.00 indicated in the statement.**
2. **The learned trial judge misdirected himself in law and in fact when he held that the respondent obtained a proper price for the sale of Stand No. 9609 Lusaka by virtue of an advertisement in**

the Post Newspaper when the respondent admitted to not having taken the precaution of obtaining a valuation report before selling the property

3. **The learned trial judge erred in law and in fact when he held that the valuation report relating to Stand No. 9609 Lusaka placing the value at K79,000,000.00 was inadmissible for not being produced by its maker, contrary to the evidence laid before him**
4. **The learned trial judge erred both in law and in fact when he held that Stand No. 9609 Lusaka was undeveloped.**
5. **The court below erred in law and in fact when it held that there was no evidence on record to justify the amount of K740,000,000.00 to have been the open market value of Stand 1226 Kabwe at the time of the sale and consequently declining to order the payment of the difference between the estimated true market value and the debt owed.**
6. **The learned trial judge erred in law when he failed to take into account the amended statement of claim and consolidation order of causes 1997/HP/1891 and 2005/HP/1031 in determining the case but relied on the old statement of claim and the latter cause.**

At the hearing, both counsel asked for leave to file written heads of argument. We granted the application and ordered that the appellants file their head of arguments within 14 days while the respondent was to file its heads within 10 days of receipt of the appellants heads. We received the heads of argument for the appellants. We have not received those of the respondent.

As we see it, the issues that were raised by the appellants' action and which we are called upon to consider in this appeal are two, namely;

(i) whether the sale by the respondent of the two mortgaged properties ought to be set aside; and

(ii) whether, having sold the properties, the respondent was under a duty to render to the appellants an account of the proceeds and how they were applied.

Having read the appellants' heads of argument we note that the arguments on the above two issues run right through the first, second, fourth and fifth grounds of appeal. The arguments are not raised in the sequence in which the issues are. The third ground of appeal raises a procedural issue relating to the admissibility of evidence. That issue is peripheral to the two main issues. Therefore, we shall deal with the third ground of appeal after we have dealt with the first, second, fourth and fifth grounds. The sixth ground of appeal raises an issue which appears to have no significant bearing, if any, with the main issues in this case. We will dispose of it right away.

In that ground, the appellants have raised issue with the trial judge for allegedly failing to take into account the amended statement of claim and the order consolidating the two causes, 1997/HP/1891 and 2005/HP/1031, in determining the case. They also complain that the learned judge had relied on the old statement of claim.

There were arguments from learned counsel that when two cases with different causes of action merge, the effect is that all the claims reflected in the different causes should be treated as though they were commenced as one action. Counsel accused the trial judge of ignoring some of the claims in the consolidated action and argued that that was a miscarriage of justice. We were referred to an un-reported case decided in Botswana between **Magdeline Makinta v Fostina Nkwe**.

We fail to understand what this ground of appeal is about. As we have outlined in the facts, the appellants commenced this action after the respondent was granted an order of foreclosure and a further order of possession for the purpose of carrying into effect the order of foreclosure. In the end, however, the respondent opted to exercise its power of sale over the mortgaged properties. The respondent even sold the properties before the appellants' action

was commenced. The order of consolidation did not set aside the foreclosure. When the action by the appellants was subsequently consolidated with the earlier action by the respondent, that is the state of affairs that existed in the earlier case. Therefore, the action by the appellants could only be decided within the ambit of what rights, if any, were still available to the appellants after the order of foreclosure had been enforced and the respondent had elected to proceed by way of sale. The two issues which we have set out constitute the substance in which those rights could be ascertained. Therefore, the court below was on firm ground to treat the appellant's action as being one of determining two questions; namely, whether the sale ought to be set aside or the respondent should be ordered to render an account.

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

We now come back to the two main issues. As we have said, the arguments on them are to be found in the first, second, fourth and fifth grounds of appeal. Again as we have observed, the arguments are not presented in the appropriate sequence. Therefore, to avoid repetitions we shall consider the four arguments as a whole and pick out randomly from any ground arguments

which are in line with the issue we are considering. The submissions raised in those grounds can be summarized as follows:

(i) That the sale of Stand 1226 in particular was not an actual sale in that the respondent sold the property to its customer whom it, even, lent the money to buy it;

(ii) That the respondent did not obtain the proper price for the sale of Stand No. 9606 in that it neglected to have the property valued before selling it and ended up selling it for K9,000,000.00 when it was valued at K79,000,000.00; that the court erred in fact when it held that Stand 9606 was not developed; and

(iii) That the court erred when it rejected the evidence given by the appellants' witness, a renowned valuation surveyor, that the Kabwe property was valued at K740,000,000.00; thereby denying the appellants their entitlement to the difference between the price at which it was sold, that is K500,000,000, and the true value of the property.

Learned Counsel submitted in the second part of the arguments in the first ground that there was clear evidence that the sale of the Kabwe property was a sham because the respondent advanced the money to Tuskers Limited and allowed it to pay in instalments. Quoting a passage from our judgment in the case of **S. Brian Musonda (Receiver of First Merchant Bank Zambia Limited, in receivership) vs. Hyper Food Products Limited & Two Others**[1] where we stated:

"But the sale must be a true sale; a 'sale' by the mortgagee to himself, either directly or through an agent, is not a true sale and may be set aside" (page 127), Counsel urged us to extend the circumstances of the sale in this case to the pronouncement we made in the **S. Brian Musonda** case and set aside the sale.

Alternatively, Counsel argued that if the sale is not liable to be set aside then the appellants should be paid the difference between the true value of the property and what they owed the respondent. In this regard, learned Counsel in advancing arguments in the fifth ground of appeal faulted the trial court for rejecting the evidence of the value of K740,000,000.00 for the Kabwe property adduced by the appellants. Counsel argued that the evidence was given by Sonny Paul Mulenga, one of the two partners in the 2nd appellant

firm, who is a renowned surveyor and valuer. Counsel argued that the trial court should have taken judicial notice of this notorious fact and given credence to his estimation. Counsel argued that, if the court did not agree with that estimation, it should have ordered a re-valuation.

We were, therefore, urged to order a revaluation of Stand 1226 Kabwe. Counsel referred us to two cases in which, according to him, we have adopted that approach. The cases are: (i) **Agape Gardens Limited, Mercy Sichinga Siame and Simeo Benson Siame vs. Coffee Board of Zambia & Development Bank of Zambia**[3] and (ii) **Finance Bank Limited vs. Africa Angle Limited & 2 Others**[4].

With regard to the Lusaka property, Stand No. 9606 Lusaka, learned Counsel argued in the second ground of appeal that, although, in selling the property, the respondent's primary interest in the property secured by the mortgage was the realization of the amount it had lent to the appellants and any interest that remained owing, there was a duty on the respondent to ensure that the price attached to the sale and the general nature or procedure that the transaction would take were not disadvantageous to the appellants' interest in the mortgaged property.

For that proposition, we were referred to a passage in **Meggary's Manual of the Law of Real Property, 6th Edition** where the learned Authors state:

> **"Further, a mortgagee is under a duty to take reasonable care to obtain a proper price, so that he will be liable to the mortgagor if he advertised the property for sale by auction without mentioning a valuable planning permission so that the sort of purchaser likely to pay a higher price for the land with such permission failed to attend the auction".**

We were also referred to a passage in **Meggary and Wade, Law of Real Property, Fourth Edition** on the same subject. We shall not reproduce that passage.

Applying those authorities to this case, Counsel submitted that Stand No. 9606 was sold for a mere K9,000,000 when it was mortgaged to secure a sum of K60,000,000. He argued that the fact that the respondent could advance the sum of K60,000,000 to the appellants on the security of Stand 9606 meant that the property was worth more than the sum advanced. Counsel argued that this lent credence to the value of K79,000,000 which was contained in the valuation report whose admission the trial court rejected.

Still on the issue, Counsel, in his submissions in the fourth ground of appeal, attacked the trial court's finding of fact that

Stand No. 9606 was undeveloped. Counsel argued that the finding was not supported by the evidence. To illustrate that argument, Counsel pointed to the evidence of one of the witnesses at the trial who read from a valuation report that stated that there was an existing structure on Stand No. 9606. It was Counsel's argument that, while it was not in dispute that the property was not fully developed, it could not be denied that there were some structures on the site. It was argued that the trial court misapprehended the facts and, hence, on the authority of **Wilson Masauso Zulu v Avondale Housing Project Limited**[5] we should reverse the finding of fact.

With those submissions, Counsel urged us to follow our approach in the **Agape Gardens Limited**[3] case and order a re-valuation of the property so that the difference between the proper value and the sale price can be credited to the appellants' account.

The second issue, namely, whether the respondent was under a duty to render an account to the appellants regarding the sale of the properties was argued entirely in the first ground of appeal.

In that ground, we were referred to the definition **of "Order for account"** set out in the **Dictionary of Law** by **L.B. Curzon, 4thEdition, Pitman Publishing, 1993**. The definition is thus:

"Order made by the court so that sums due from one party to another resulting from transactions between parties may be investigated e.g. as between principal and agent."

Relying on the above definition, Counsel submitted that an account at law is not merely a financial document narrating figures but involves a process of investigating; for instance, how the property was sold, how much was realized from the sale, how much money was owing, how the proceeds of the sale were applied and how much money, if any, was left. It was argued that the process of rendering an account, therefore, entails more than just informing the mortgagor that he still owes money.

We were referred to the case of **Setrec Steel & Wood Processing Limited & Two Ors V Zambia National Commercial Bank Plc**[6] where we ordered an investigation of amounts owed before the Deputy Registrar with the aid of financial experts. We were also referred to a passage in our judgment in the case of **Modern Jacks Limited v Strong Engineering Limited and George Sokota (Liquidation Manager of African Commercial Bank Zambia Limited**[7], where we said:

"Where a mortgagee exercises his right of sale and that there has been some payments and a sale has in fact taken place, the mortgagee must account to the mortgagor the total sum paid under the mortgage and proceeds from the sale".

On the strength of these arguments alone, we were urged to allow the appeal.

We propose to deal with these arguments first before we go back to the third ground of appeal.

The learned author **R.E. Megarry** in his works, **A Manual of The Law of Real Property, 2nd Edition (London, Sweet & Maxwell)** says the following on the mortgagee's exercise of the power to sell:

"It should be noted that in general, the statutory power of sale is exercisable without any order of the court being required. The mortgagee may sell by public auction or private contract and has a wide discretion as to the terms and conditions upon which the sale is made. The mortgagee is not a trustee for the mortgagor of his power of sale, for the power is given to the mortgagee for his own benefit to enable him the better to realise his security. The mortgagee must, however, act in good faith in the conduct of the sale and must take reasonable care so as not, for example, to misdescribe the property. But he need not advertise the property or attempt to sell it by auction before selling by private contract, nor need he delay a sale so as to obtain a better price. Once it is shown that the sale was carried out in good faith, any question of the

mortgagee's motive for selling, such as spite against the mortgagor is immaterial. Even if the sale is at a low or unusual price (e.g. the exact amount of money due under the mortgage, with costs) the court will not interfere unless the price is so low as in itself to be a fraud. But the sale must be a sale; a 'sale' by the mortgagee to himself, either directly or through an agent is no true sale and may be set aside...

Although the mortgagee is not a trustee of his power of sale, he is a trustee of the proceeds of sale. After discharging any payments properly due, any balance must be paid to the next subsequent incumbrancer, or if none, to the mortgagor." (page 494-495)

On the same subject, the learned editors of **Halsbury's Laws of England, 3rd Edition, Vol. 27** have the following to say under the heading: **Mode of Exercise of Power**:

"Mortgagee not in fiduciary position. **A mortgagee is not a trustee for the mortgagor as regards the exercise of power of sale; he has been so described, but this only means that he must exercise the power in a prudent way, with due regard to the interests of the mortgagor in the surplus sale moneys. He has his own interest to consider as well as that of the mortgagor, and provided that he keeps within the terms of the power, exercises the power bona fide for the purpose of realizing the security, and takes reasonable precautions to secure a proper price, the court will not interfere, nor will it enquire whether he was actuated by any further motive. A mortgagee is entitled to sell at a price just sufficient to cover the amount due to him, provided the amount is fixed with due regard to the value of the property. It is sufficient if the mortgagee complies with the terms of the power and acts in good faith but good faith requires that the property shall not be dealt with recklessly;**

and if the sale is bona fide, and he charges himself with the whole of the purchase-money, he can sell on the terms that a substantial part, or even the whole, shall remain on mortgage. The mortgagee is apparently not bound to watch the market so as to sell at the highest price...

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

With those authorities, we wish to first consider whether the appellants were in a position to have the sale of either property set aside in the circumstances of this case. The learned editors of **Halsbury's Laws of England** say that if the mortgagor seeks relief promptly, a sale will be set aside if there is fraud. In this case, the sale of the two properties was concluded in 1999. The appellants only commenced this action in 2005, about six years later. This was notwithstanding the fact that the appellants were aware in 1999 that the properties were sold. Therefore, the appellants could not maintain an action to set aside the sales. Their only recourse, therefore, would be for an action for damages if the respondent was found to have conducted the sales improperly.

Coming to the contentions by the appellants, it appears that the appellants have different grievances over the sale of

either property. With regard to Stand 1226 Kabwe, the appellants complain that the respondent sold the property to its customer to whom it even lent the purchase price. The second complaint on this property is that the property was sold at an undervalue. The trial court did not specifically deal with the first part of the grievance; but went on to find that the respondent was not guilty of improper conduct because it had advertised the properties.

The allegation by the appellants that the respondent lent money to the buyer of the Kabwe property, Tuskers Limited, towards the purchase price was not disputed. Be that as it may, we do not see how such a sale can be said to be not a sale. The fact is that the buyer bought the property and the respondent from there on had no further interest in the property. The respondent, on the other hand, received the purchase price; or was credited to have received the purchase price which also went to the credit of the appellant's account on the mortgage.

With regard to the second part of the complaint that the property was undervalued, we wish to state that the

authorities we have cited state that a mortgagee is entitled to sell at a price just sufficient to recover what is due to him provided that the amount is fixed with due regard to the value of the property. The authorities also suggest that the overall consideration is that the mortgagee must act in good faith in the conduct of the sale.

In this case, although there was no duty to advertise the property, the respondent did advertise the property. There was evidence on record of the various correspondence it had exchanged with various potential buyers who had responded to the advertisement before it concluded a sale with Tuskers Limited. In the end, the property was sold at K500,000,000.00. The appellant's contention was that the property was worth K740,000,000.00. As we have seen from the authorities, there is no principle of law which compels a mortgagee to sell only at or above the value of the property. Certainly, much depends on what the potential buyers are prepared to offer. In this case, therefore, even assuming that the property was worth K740,000,000.00 we do not think that obtaining a purchase price of K500,000,000.00 constituted,

either disregard of the value of the property or reckless dealing with the property on the part of the respondent; for that is the price that the respondent was able to obtain after applying due diligence. For those reasons we are satisfied, and we agree with the trial court, that the respondent acted in good faith in the sale of the Kabwe property.

We now come to the Lusaka Property.

The appellants' complaint on this one is that the respondent sold it at a price which is far below its value.

The respondent sold this property at K9,000,000.00. The sum of money that was secured by this property was K60,000,000.00. The question is; was the price obtained for this property so low as to, of itself, be evidence of fraud? There was evidence on record that the respondent advertised for sale Stand 9606 Lusaka in a newspaper. There was *viva voce* evidence in the testimony of the appellants' witness, both in examination in chief and in cross-examination, that at the time the property was attached as security, it had no formal valuation except an estimate by the owner, which was at K65,000,000.00. The evidence was that the property was

merely additional security to the loan which had been advanced to the appellants. The evidence also was that, after the property was advertised, the highest bidder was D.M. Shichombo. That his bid was K9,000,000.00 and, hence, the respondent sold it to him.

Although, in the fourth ground of appeal, the appellants have attacked the trial court's finding that the property was undeveloped, what is clear is that, whether there was some structure on it or not, there was no formal valuation report on it at the time that it was offered as security. The passage from the witness's evidence which counsel quoted clearly stated that the value of Stand 9606 was merely estimated at K65,000,000. From the authorities we have cited, there is no duty on a mortgagee to obtain a valuation report. The respondent advertised the property, an act which is designed to cast the net wide so as to capture as many potential buyers as possible. This, in itself, raises the potential of obtaining a very good price. In the end, the highest price the respondent could obtain was K9,000,000.00. Therefore, low as the price may seem, it, in our view, does not demonstrate fraud on the

respondent's part; going by the lengths to which it went in order to try and obtain a good price for the property.

Consequently, we do not find any *mala fides* in the manner that the respondent sold Stand 9606 Lusaka.

Therefore, we find no merit in the second, fourth and fifth grounds of appeal.

We turn to the first ground of appeal which demands an account.

The learned editors of **Halsbury's Laws of England, 3rdEdition, Vol. 27,** under the heading **"General Accounts Between Mortgagor and Mortgagee"**, have this to say:

> "Nature of general accounts. **The relation of mortgagor and mortgagee is terminated by redemption, foreclosure, or the accounting for the proceeds of realization, and proceedings for any of these purposes involve the taking of an account between the mortgagor and mortgagee. In such an account the mortgagor is debited with the principal and interest, and also with the costs, charges, and expenses incurred by the mortgagee in relation to the mortgage security"** (para. 841).

The learned editors go on to say the following in the next paragraph.

> "Form of the account. **The ordinary form of judgment for foreclosure or redemption contains a direction that an account be taken of what is due to the mortgagee under his mortgage, and for the costs of the action; a judgment in an**

action to recover surplus proceeds of sale requires the like account, and also an account of the proceeds of sale" (para 842).

It is clear from the foregoing authorities that the relationship between the appellants and the respondent was to formally be terminated by the respondent rendering an account to the appellants on the sale. It is pertinent to note that the sale is not one of the events that terminates that relationship. Therefore, after the sale, the respondent was required to go one step further and render an account. We agree with submissions by learned Counsel for the appellant that the form of account is more detailed than merely making the appellants aware that, after the sale, they were still owing, as the trial court seemed to suggest. There was no evidence that the respondent rendered such an account. There being no satisfactory evidence that the respondent had rendered a formal detailed account, the court below ought to have granted judgment and ordered that an account be rendered. Therefore, we find merit in the first ground of appeal. We shall come back to this ground shortly.

We turn to the third ground of appeal. In that ground the appellants' grievance was the refusal by the trial court to place reliance on their valuation report on the ground that it was not produced by the maker. It is clear that the appellants sought admission of that valuation report in order to place the value of Stand 9606 Lusaka at K79,000,000.00 and, therefore, strengthen their claim that the respondent sold the property at a ridiculously low price. In view of the conclusions we have come to in the second, fourth and the fifth grounds, we do not think that the valuation report would have been of any relevance because the appellants did not have that valuation at the time of the mortgage and neither did they have it at the time of the sale of the property. Therefore, a discussion of the third ground of appeal is of no value to this appeal. Accordingly, the third ground of appeal falls away.

We come back to the first ground.

That ground having succeeded, we grant judgment to the appellants for an account to be rendered before the Deputy Registrar of the High Court. The two properties stand in different circumstances. The Kabwe property was the subject

of court proceedings whereby the respondent obtained foreclosure. However, the respondent opted not to foreclose but to exercise its power of sale. The Lusaka property was never the subject of the earlier court proceedings but the respondent opted to exercise its power of sale under the mortgage. Consequently, the form of account will differ slightly regarding the two properties.

We now proceed to give the following directions on the account to be rendered:

With regard to Stand No. 1226 Kabwe, an account shall be taken of what was due to the respondent under the mortgage, the costs of the action in Cause No. 1997/HP/1891, the costs incidental to the sale of the property and an account of the proceeds of sale of that property, namely, how those were applied.

With regard to Stand 9606 Lusaka, the account shall be taken of what was due to the respondent under the mortgage, the costs incidental to the sale of the property and an account of how the proceeds of the sale were applied.

The account should end up with a balance reflecting either what is still owing to the respondent or what is due to the appellants as surplus.

We wish to caution here that we have found nothing wrong with the price which the respondent obtained for both properties. Therefore, in rendering the account the parties should not engage in the futile exercise of providing valuations for the properties. The account shall proceed on the prices that the respondent obtained.

We now come to the costs of this action. We note that the principle aim of the appellants in this action was to find the respondent liable in damages to the appellants as regards the manner in which the sale of the properties was conducted. The claims comprising that purpose have failed. As for the claim that has succeeded, it might well be that the account will reveal that there was never any surplus due to the appellants. For these reasons, we order that as far as this appeal is concerned, each party will bear their own costs. As for the costs in the High Court, we order that these shall abide the outcome of the account; meaning that if it be found that

there was a surplus due to the appellants then they will have the costs of the action. If, however, it will be found that there is still money due to the respondent or that there was never any surplus then the respondent will have the costs of the action.

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E. N. C. Muyovwe
SUPREME COURT JUDGE

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E. M. Hamaundu
SUPREME COURT JUDGE