IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2014/HPC/0280

IN THE MATTER OF : **PROPERTY COMPRISED IN CERTIFICATES OF TITLE RELATING TO PLOT NO. 9; STAND NO. 8097; SUBDIVISION D4 OF SUBDIVISION Y4 OF FARM NO. 748 NDOLA RESPECTIVELY AND LOT 13135/M MASAITI.**

AND IN THE MATTER OF : **ORDER 30 RULE 14 OF THE HIGH COURT RULES CHAPTER 27 OF THE LAWS OF ZAMBIA AS READ WITH ORDER 88 OF THE RULES OF THE SUPREME COURT OF ENGLAND, WHITE BOOK, 1999 EDITION.**

BETWEEN:

STANBIC BANK ZAMBIA LIMITED **APPLICANT**

AND

JIMMY KALUNGA **1ST RESPONDENT**

KALUNGA ENTERPRISES LIMITED **2ND RESPONDENT**

Before Honourable Mr. Justice W.S. Mweemba in Chambers at Lusaka.

For the Applicant : *Mr. A. Siwila – Messrs Mambwe Siwila and Lisimba Advocates.*

For the Respondents : *Mr. C. Magubbwi – Messrs Magubbwi & Associates.*

J U D G M E N T

CASE AUTHORITIES REFERRED TO:

1. ***S. BRIAN MUSONDA (RECEIVER OF FIRST MERCHANT BANK ZAMBIA LIMITED (IN RECEIVERSHIP) V HYPER FOOD PRODUCTS LIMITED, TONY'S HYPERMARKET LIMITED AND CREATION ONE TRADING (Z) LIMITED (1999) ZR 124.***
2. ***WILLIAM JACKS AND COMPANY LIMITED V O'CONNOR (1967) ZR 109.***

3. ***WORKERS TRUST AND MERCHANT BANK LIMITED V DOJAP INVESTMENTS LIMITED (1993) ALL ER 70.***

4. ***JEOFRY KAPASHA CHISHA V EMILY HOLLAND 2008/HN/160.***

5. ***FIBROSA SPOLKA AKCYJINA V FAIRBAIRN LAWSON COMBE BARBOUR LTD (1942) UKHLA; (1943) AC 32.***

6. ***CLAYTONS CASE: DEVAYNES V NOBLE (1814-23) ALL ER.***

7. ***ON DEMAND INFORMATION PLC (IN ADMINISTRATIVE RECEIVERSHIP) AND ANOTHER V MICHAEL GERSON (FINANCE) PLC AND ANOTHER (1992) 2 ALL ER 811.***

8. ***INDUSTRIAL CREDIT COMPANY LIMITED V PLAVMARK ZAMBIA LIMITED 2003/HPC/0298.***

9. ***FIMIMOST MINING AND TRANSPORT ENTERPRISES LIMITED V LEASING FINANCE COMPANY LIMITED (2012 VOL 2) Z.R.44.***

LEGISLATION AND OTHER WORKS

1. ***ORDER 30 RULE 14 OF THE HIGH COURT RULES, CHAPTER 27 OF THE LAWS OF ZAMBIA.***

2. ***ORDER 88 OF THE RULES OF THE SUPREME COURT OF ENGLAND, WHITE BOOK, 1999 EDITION.***

3. ***SECTION 4 OF THE LANDS AND DEEDS REGISTRY ACT, CHAPTER 185 OF THE LAWS OF ZAMBIA.***

4. ***REGULATION 7 OF THE BANKING AND FINANCIAL SERVICES (COST OF BORROWING) REGULATIONS 1995 – STATUTORY INSTRUMENT 179 OF 1995.***

5. ***TIMOTHY N. PARSONS, LINGARD'S BANK SECURITY DOCUMENTS, FOURTH EDITION LEXI NEXIS, BUTTERWIORTHS.***

6. ***HALSBURY'S LAWS OF ENGLAND, FOURTH EDITION REISSUE, VOLUME 32.***

7. ***H.G. BEALE, CHITTY ON CONTRACTS, VOLUME II. 30TH EDITION,LONDON,THOMAS REUTERS (LEGAL) LIMITED, MAXWELL,2008.***

8. ***PETER BRESLAUER "FINANCE LEASE HELL OR HIGH WATER CLAUSE AND THIRD PARTY BENEFICIARY THEORY IN ARTICLE 2A OF THE UNIFORM COMMERCIAL CODE" (1992) ARTICLE 2 VOLUME 77 ISSUE 2.***

This is an application by the Applicant by way of Originating Summons pursuant to Order 30 Rule 14 of the High Court Rules Chapter 27 of the Laws of Zambia for the following remedies:

1. Payment of all monies due under Mortgage Debenture dated 16th April, 2007.
2. Delivery up and possession of Plot No.9, Stand No. 8097, Subdivision 4D of Subdivision Y4 of Farm No. 748 Ndola respectively and Lot No. 13135/M Masaiti.
3. Foreclosure and sale.
4. Further or other relief.
5. Costs.

The Application is supported by an Affidavit deposed by one MAZUBA MOOYA LUNGWE the Manager specialized Recoveries Rehabilitation and Recoveries in the Applicant Bank and Skeleton Arguments dated 11th July, 2014.

According to the said Affidavit on or about April, 2007 the Applicant Bank availed the 2nd Respondent Credit Facilities totaling K1,300,000.00 and as security the 1st Respondent surrendered his Certificates of Title relating to Plot No. 9, Stand No. 8097, Subdivision D4 of Subdivision Y4 of Farm No. 748 Ndola respectively and Lot 13135/M Masaiti for purposes of creating a Mortgage Debenture. True copies of the Certificate of Title were exhibited marked "MML1", "MML2", MML3" and "MML4".

The Respondents executed a Mortgage Debenture Deed which was subsequently registered to secure the Bank's interest. A true copy of the Mortgage Debenture was exhibited as "MML5".

The Applicant further states that by Facility Letter dated 10th October, 2007 the Applicant Bank availed the 2nd Respondent an additional Credit Facility for the sum of US$1,000,000.00. A true copy of the Facility Letter was exhibited to the Affidavit marked "MML6". That it was agreed by the parties that the Mortgage Debenture created over Plot No. 9, Stand No. 8097, Subdivision D4 of Subdivision Y4 of Farm No. 748 Ndola respectively and Lot No. 13135/M Masaiti would form part of the security for the additional credit facility.

It is stated that contrary to the Terms and Conditions of the Credit Facilities, the 2nd Respondent has not been servicing the debts regularly as a result of which the balances outstanding as at May, 2014 were totaling the sum of US$500,004.32 and will continue rising due to interest charges.

Despite reminders by the Applicant Bank to settle the debts, the Respondents have neglected, failed and/or refused to settle the same.

The Respondents opposed the Application and relied upon the Affidavit in Opposition deposed by one JIMMY KALUNGA the 1st Respondent herein and the Managing Director of the 2nd Respondent. Skeleton Arguments were filed on record on 12th November, 2015.

It is deposed that the Applicant Bank availed the 2nd Respondent Credit Facilities totaling K1,300.000.00 and as security the 1st Respondent surrendered his Certificates of Title relating to 4 properties for purposes of creating a Mortgage Debenture. However, the security created over the listed properties was exclusively for the borrowed sum of K1,300,00.00 as per the Mortgage Debenture.

It is stated that on 15th November, 2011 by letter the Respondents informed the Applicant Bank that Leasing Finance Company Limited was granting the 2nd Respondent some financing and the Applicant was to notify the said Leasing Finance Company the amounts then outstanding on the facility. The said letter is exhibited marked "JK1". That the Applicant by letter dated 17th November, 2011 to Leasing Finance Company advised the amounts then owing to the Applicant under the facility that was securitized by the Mortgage Debenture. The said letter was exhibited marked "JK2". Leasing Finance Company paid off the amounts outstanding on the Mortgage Debenture and advised such payment by letter dated 1st December, 2011.

It is further stated that upon payment being effected by Leasing Finance Company to the Applicant the indebtedness securitized by the Mortgage Debenture was paid off and there were no further monies outstanding and owing to the Applicant by the Respondents. That as the borrowing was fully paid the Mortgage Debenture was for all intents and purposes fully redeemed and the properties thereof liberated of the security.

The Respondents state that whilst admitting that the 2nd Respondent was granted the finance leases in the sum of US$1,000,000.00 for the lease and buy back of 10 Truck Horses and 10 Axle Ribless Slopper Tipper Trailers, no security or charge deed was taken out and signed by the Respondents with respect to the said Finance Lease Facility and therefore the Mortgage Debenture is not referable to the said facility.

That the security for the Lease Facility was a fixed charge over the same assets the Applicant Bank was buying and leasing to the 2nd Respondent together with a Directors Guarantee by the 1st Respondent. It is stated that this position is confirmed by a letter dated 25th July, 2011 from the Applicant Bank in which the Applicants state that they are the owners of the assets. The said letter is exhibited to the Affidavit in Opposition marked "JK4".

The Respondents state that the sum owing on the Credit Facilities is not US$500,004.32 as at May, 2014 as claimed by the Applicant Bank. That the amount claimed should be adjusted by the subtraction therefrom of the following figures:

(i)	Illegal Finance Charges	US$122,037.01
(ii)	Rentals after accidents	US$ 52,885.07
(iii)	Illegal Extension Charges	US$ 4,083.35
(iv)	Illegal Journal Debit	US$ 34,179.30

The Respondents state the following on specific Deals/Assets:

(i) Deal 0009 LA

The Lease tenure was up to 24th November, 2010 by which date the capital and interest would have been repaid. That Madison Insurance Company Zambia Limited paid the Applicant the sum of US$33,238.46 as salvage value for the damaged truck on 22nd December, 2009.

Moreover that the truck was involved in an accident on 3rd March, 2009 but the Applicant continued debiting rental installments and collected the total sum of US$64,799.80 between 5th March, 2009 and 25th February, 2011. The 2nd Respondents account was wrongly and illegally debited the sum of US$28,467.14.

(ii) Deal 0010 LA

The Lease tenure was up to 14th January, 2011 and therefore, rental charges on the deal froze on 5th February, 2010 and on that date the amount due and owing to the Applicant was US$14,507.47. "JK15 -20" was exhibited. That of this sum US$4,083.09 were extension charges which should be discounted for being non contractual.

(iii) Deal 0016 LA

This related to truck Registration No. ABK 7922 and the lease tenure was 35 months effective 19th November, 2007 up to 18th October, 2010. The Applicant was demanding US$21,750.00.

This deal was initially Deal 0001 and the account was settled on 26th July, 2010. It was changed to Deal 0016 LA on the date of settlement and the account debited with US$28,091.28. The account exhibited as "JK31- 35."

Moreover that between 26th July 2010, and 23rd December, 2012 the Applicant wrongly recovered US$12,063.20 from the 2nd Respondent thus no money was owed by the Respondents.

He also stated that there was an unexplained Journal Debit of US$34,179.30.

(iv) Deal 0017 LA

It was deposed that this deal related to Trailer Registration No. ABK 6646T and the Lease Agreement dated 19th October, 2007 was for a tenure of 35 months up to 18th October, 2010 and the Applicant was claiming US$23,313.06.

Further that the deal was initially "Deal 0003 LA" in account No. 467501033 and it was settled on 26th July, 2010 and the account was exhibited as "JK41 – 44."

The Trailer was involved in a road traffic accident on 21st October, 2010 and damaged beyond economic repair. Madison Insurance Company Zambia Limited paid the Applicant Bank US$22,420.00 as salvage value as shown on the Insurance Acceptance Form exhibited as "JK47."

According to the Deponent by reason of the accident and having received salvage value and by the Contract, the Applicant should not have charged any further rentals so the US$23,313.06 claimed was illegal. He also added that the salvage amount ought to have been paid to the 2nd Respondent because the account had been settled before the accident. Thus a sum of US$22,420.00 should have actually been reimbursed and credited to the 2nd Respondent.

(v) Deal 0018 LA

This Lease Agreement dated 19th October, 2007 related to a Benz Truck Registration No. ABK 5255 and Trailer Registration No. ABK 6648T and ABK 6645T for lease tenure of 35 months up to 18th October, 2010.

The deal was initially "Deal 0004 LA" and bore account No. 46750133. That Exhibit "JK50 – 53" was settled on 26th July, 2010.

That the deal was unilaterally and inexplicably recorded as "Deal 0018 LA" and the Applicant debited the account with US$91,158.24 and US$21,132.07 being finance charges and the statement of Account was exhibited as "JK 54 -56". Between 26th July, 2010 and 5th March, 2013 the Applicant debited and collected K73,315.92 illegally. It was deposed that this sum should be reimbursed and credited to 2nd Respondent.

In addition it was deposed that the Truck financed by the Applicant was involved in a road traffic accident on 21st October 2010, and damaged beyond repair. Madison General Insurance Company Zambia Limited paid the Applicant US$28,400.00 and the Insurance Acceptance Form was exhibited as "JK 57."

Further, that as the account had been fully settled on 26th July, 2010 the asset as at date of the accident belonged to the 2nd Respondent and therefore, the salvage value of US$28,400.00 was illegally and wrongfully appropriated by the Applicant.

(vi)Deal 0019 LA

(vii)Deal 0020 LA

(viii)Deal 0021 LA

This Lease Agreement dated 29th November, 2007 related to a Trailer Registration No. ABL 1895T for a tenure of 35 months up to 28th October, 2010.

He also stated that the Applicant was claiming US$22,014.09 but this transaction coded "Deal 0007 LA" initially was settled on 26th July, 2010 and was shown in Exhibits "JK 59" to "JK62". That it was recorded to "Deal 0021

LA" and immediately debited by the Applicant in the sum of US$28,721.28 of which US$6,659.32 constituted finance charges and the Statement of Account was marked "JK 63 to 65."

Further that the 2nd Respondent disagreed with this debit as the account was categorized as closed and the asset was involved in a road traffic accident on 3rd March, 2009 and damaged beyond economic repair. The insurer paid the Applicant US$36,000.00 on 21st December, 2009 and at the date of payment by the Insurer the sum of US$8,552.20 was outstanding on the account. This sum was paid out of the insurance sum leaving a balance of US$27,447.80 to the 2nd Respondents credit. No money was therefore owed by the 2nd Respondent to the Applicant Bank.

(ix) Deal 0022 LA

It was deposed that this Lease Agreement dated 24th January, 2008 related to a Freighter Horse Registration No. ACH 8083 for a tenure of 35 months up to 28th January, 2011 and the Applicant was claiming US$42,421.47.

Moreover that this transaction was initiated as "Deal 0011 LA" and was categorized as settled and closed on 26th July, 2010. It was then unilaterally and inexplicably recorded by the Applicant as "Deal 0022VC" and debited to the 2nd Respondents account with US$52,777.92 and of this US$12,237.36 were finance charges. That the Statement was exhibited as "JK 73" to "JK76" and at the expiry of the tenure the deal had been paid off and therefore there was no money payable to the Applicant Bank.

(x) Deal 0023 LA

The transaction was originally coded "Deal 0012 LA" and was for a tenure of 35 months from 11th February, 2008 up to 10th January, 2011.

It was marked settled on 27th June, 2010 as per exhibits "JK 77 - 79" and was rebranded as "Deal 0023 LA on 27th June, 2010. The Applicant debited the account with US$52,423.68 of which US$12,154.92 was finance charges. Upon expiry of the tenure on 10th January, 2011 the account was paid off and there was no money due and owing to the Applicant under this transaction.

It was also stated that the Applicant should reimburse the 2nd Respondent US$12,154.94 charged as uncontractual and unconsensual finance charges.

(xi) Deal 0024

This Lease Agreement dated 11th February, 2008 related to Truck Trailer Registration No. ABL 723 TT for a tenure of 35 months up to 10th January, 2011. The transaction was originating branded "Deal 0013 LA" and had a statement marked "JK 86 – JK88".

Further that on 26th July, 2010 Deal 0013 LA was marked settled and the Applicant remarked it as "Deal 0024 LA" and debited the 2nd Respondent's account with the sum of US$67,289.76 of which the sum of US$15,602.06 were finance charges and the Statement of Account was marked "JK89 – JK92."

Moreover that this deal/transaction was paid off on 26th January, 2011 so the 2nd Respondent did not owe the Applicant Bank any money as the Applicant owed the 2nd Respondent US$15,602.06.

(xii) Deal 0025 LA

(xiii) Deal 0026 LA

This Lease Agreement dated 20th February, 2008 related to a Homemade Trailer Registration No. ACJ 818 for a tenure of 35 months up to 19th January, 2011.

Here, the Applicant was claiming US$45,738.19 which the Respondent denied as on 26th July, 2010 Deal 0015 LA was marked settled by the Applicant and recoded as "Deal 0026 LA" and the Respondents Account debited with US$52,362.24 of which US$12,140.82 were finance charges.

It was also deposed that the asset was involved in a road traffic accident on 27th August, 2010 and the Insurer paid the salvage value of US$36,366.00 on 2nd November, 2010 as shown in the Insurance Acceptance Form exhibited as "JK 99."

Moreover that at the date of accident the status of the account was US$ -1,263.72 and at the expiry date of the Lease it was US$ 2.99. Therefore that no money was due and payable to the Applicant under either scenario as the rentals could not accrue on an expired lease and also upon a lease where the asset had been damaged beyond economical use and repair.

It was also deposed further that the common feature transcending through "Deals 0016 LA to 25 LA" was that these Deal numbers were not the original ones and were only rebranded by the Applicant on 26th July, 2010 upon marking all the accounts bearing original deal numbers as settled. That consequent to the rebranding the Applicant unilaterally, inexplicably and uncontractually debited the 2nd Respondents account and recovered the following illegal finance charges:

Deal 0016 LA US$6,701.15

Deal (6) 0019 LA US$17,257.22

Deal 0020 LA US$11,966.74

Deal 0021 LA US$6,659.32

Deal 0022 LA 12,237.36

Deal 0023 LA US$12,154.94

Deal 0024 LA US$15,602.06

Deal 0025 LA US$12,140.88

A total of US$122,037.01 was charged as finance charges.

It is further deposed that the other feature traversing through some deals which bloated the claimed amount was the continued charging of rentals after the accidents that rendered the leased asset economically unusable and unrepairable. The amount of US$52,585.07 was wrongfully debited to the account and in some instances recovered.

That there was also the illegal charging and recovery of the sum of US$4,083.09 under Deal 0010 LA and the sum of US$34,179.30 under Deal 0016 LA.

It was finally deposed that owing to other financial commitments which include ordinary and usual business expenses, employee emoluments, statutory impositions the 2nd Respondent will not be able to pay the sum that shall be found due and owing by a single stock payment and thus seeks leave of Court to liquidate the same in reasonable monthly installments.

The Applicant Bank filed an Affidavit in Reply on 24th March, 2016 deposed by one Reuben Matale Malindi the Credit Risk Team Leader Specialized Recoveries Rehabilitation and Recoveries in the Applicant Bank.

According to the said Affidavit all collateral indicated as security held in the Facility Letter dated 10th October, 2007 exhibited as "MML6" in the Affidavit in Support of Originating Summons for Foreclosure executed by the Respondents signified an agreement between the parties that it would be held as security for

the Credit Facility until the entire balance was settled save for the Third Party Mortgage over Plot No. 10 Ndola which was later discharged and the Certificate of Title relating to the aforesaid property released.

It is also stated that in the alternative the deponent had been advised by Counsel that by virtue of the Applicant Bank holding the Certificate of Titles relating to Plot No. 9, Plot No. 8097, Subdivision D4 of Subdivision Y4 of Farm No. 748 Ndola respectively and Lot No. 13135/M Masaiti an equitable Mortgage was created for the Credit Facility availed to the 2nd Respondent.

As regards the contents of paragraph 15 of the Affidavit in Opposition Mr. Malindi deposed as follows:

(i) Deal 0009 LA

That as at November, 2010 the rental arrears stood at US$64,848.64 and US$36,137.23 as indicated by the Respondents. Further that on or about 2nd February, 2014 a sum of US$3,509.09 was paid which reduced rentals to US$62,428.09 and not US$32,628.11 as alleged by the Respondents.

That as at 3rd March, 2009 the amount outstanding stood at US$88,473.23 and the rental arrears stood at US$18,128.28 and not US$15.147.76.

According to Mr. Malindi on the allegation that on 22nd December, 2009 Madison Insurance paid a sum of US$33,238.46 insurance being salvage value no corresponding amount of payment was reflected on the VAF Deal as the only amounts that were paid in the period between 5th March, 2009 to 25th February, 2011 were for US$3,802.00, US$13,113.85 and US$36,360.00. Based on this, the Applicant denied owing the Respondent any monies.

(ii) Deal 0010 LA

It was deposed that at the commencement of this action the 2nd Respondent was indebted to the Applicant in the sum of US$26,229.23 as per exhibit marked "MML7" of the Affidavit in Support relating to Deal 0010 LA and not in the sum of US$14,507.49 as alleged.

Moreover, that the extension charges were contractual and arose due to changes in the interest rate during the tenor of the Lease.

(iii) Deal 0016 LA

Further that due to non- servicing of the rental charges regularly by the 2nd Respondent on Deal 0001 and at the request and instance of the Respondents the Applicant restructured the Lease Facility and the Deal 0001 was closed and at closure the sum owing of US$22,200.13 was transferred to the new account under Deal 0016 LA and subsequently a finance charge of US$6,701.15 was debited to the new account as per exhibit "MML7" of the Affidavit in Support. Further that any funds collected and applied to Deal 0016 were in order as the obligation to pay by the Respondents had not fallen off.

Regarding allegations for a journal debit in the sum of US$34,179.30 Mr. Malindi deposed that there was no such entry on Deal 0016.

(iv) Deal 0017 LA

That due to non – servicing of the rental charges regularly by the 2nd Respondent on Deal 0003 and at the request and instance of the Respondents the Applicant restructured the Lease Facility for which Deal 0003 was closed and at closure the sum owing of US$20,478.85 was transferred to the new account under Deal 0017 LA and subsequently a

finance charge of US$6,181.31 was debited to the new account as per exhibit "JK44 TO JK 46" of the Affidavit in Opposition.

That as at commencement of this action the sum outstanding was US$24,423.90 and the sum of US$3,332.59 applied to the credit of the new account under Deal 0017 was in order as there is still an outstanding balance due and owing by the Respondents.

Moreover that the insurance claim of US$22,420.00 was erroneously credited to Deal 0018 as per exhibit "JK56" of the Affidavit in Opposition.

(v) Deal 0018 LA

That due to non – servicing of the rental charges regularly by the 2nd Respondent on Deal 0004 and at the request and instance of the Respondents the Applicant restructured the Lease Facility and Deal 004 was closed and at closure the sum owing of US$70,022.17 was transferred to the new account under Deal 0028 LA and subsequently a finance charge of US$21,136.07 was debited to the new account as per exhibits "JK53" and "JK54" to the Respondents Affidavit in Opposition.

That the finance charge was a contractual interest charged on a new deal or upon restructure as in this case and it entailed extending the period for payment of the facility and this further interest was charged as the Bank lost use for money for a longer period than initially agreed.

(vi) Deal 0021 LA

That due to non – servicing of rental charges regularly by the 2nd Respondent on Deal 0007 at the request and instance of the Respondents the Applicant restructured the Facility and Deal 0007 was closed and at closure the sum owing of US$22,061.96 was transferred to the new account under Deal 0021 LA and subsequently a finance charge

of US$6,659.32 was debited to the new account as per JK62 and JK63 to the Affidavit in Opposition.

That it was not correct as alleged that on or about 21st December, 2009 a sum of US$36,000.00 was received by the Bank as an insurance claim under Deal 0021 LA nor that there was a balance of US$27,447.80 due to the 2nd Respondents credit.

(vii) Deal 0022 LA

That due to non-servicing of the rental charges regularly by the 2nd Respondent on deal 0011LA and at the request and instance of the Respondents the Applicant restructured the Lease Facility and Deal 0011 was closed and at closure the sum owing of US$40,540.56 was transferred to the new account under Deal 0022 LA and subsequently a finance charge of US$12,237.36 was debited to the new account as per exhibit "JK72" and "JK73" to the Affidavit in Opposition.

That contrary to the assertion that the facility was paid off there was an outstanding sum of US$44,295.55 on Deal 0022 LA as per exhibit "JK75" of the Affidavit in Opposition.

(viii) Deal 0023 LA

That due to non – servicing of the rental charges regularly by the 2nd Respondent on Deal 0012 LA and at the request and instance of the Respondents the Applicant restructured the facility and Deal 0012 LA was closed and at closure the outstanding sum of US$40,268 was transferred to the new account under Deal 0023 LA and subsequently a finance charge of US$12,154.92 for restructuring the Lease Facility was debited to the new account as per exhibits "JK79" and "JK80" to the Affidavit in Opposition.

Moreover that there was an outstanding sum of US$42,569.75 due to the Applicant under this Deal as per exhibit "JK83" in the Affidavit in Opposition. Thus the 2nd Respondent was not due any reimbursement for US$12,154.94 recovered as finance charges which were contractual and recoverable when a deal was restructured.

(ix) Deal 0024 LA

That due to non – servicing of the rental charges regularly by the 2nd Respondent on Deal 0013 LA and at the request and instance of the Respondents the Applicant restructured the Lease Facility and Deal 0013 was closed and at closure the outstanding sum of US$51,687.70 was transferred to the new account under Deal 0024 LA and subsequently a finance charge of US$15,602.06 for restructuring the facility was debited to the new account as per exhibits "JK88" and "JK89" to the Affidavit in Opposition.

That the debiting of the finance charge of US$15,602.06 was in order because the Applicant restructured the deal and the said action was subject of an Agreement between the parties.

(x) Deal 0026 LA

That due to non – servicing of the rental charges regularly by the 2nd Respondent on Deal 0015 LA and at the request and instance of the Respondents the Applicant restructured the Lease Facility and Deal 0015 was closed and at closure the outstanding sum of US$40,221.38 was transferred to the new account under Deal 0025 LA and subsequently a finance charge of US$12,140.56 for restructuring the Lease Facility was debited to the new account as per exhibit "JK97" to the Affidavit in Opposition.

That the sum of US$36,366.00 Insurance claim was erroneously credited to Deal 0009 LA as the outstanding balance due and owing was US$47,919.95 as per exhibit "JK97" in the Respondent's Affidavit in Opposition.

It is further deposed that the Respondents Affidavit in Opposition reveals that out of the sum of US$500,004.32 being claimed by the Applicant Bank the Respondents had raised issues with a total sum of US$213,184.73 as articulated in paragraph 19 of the Affidavit in Opposition leaving a balance of US$286,819.59 uncontested for which the Court was asked to enter Judgment on Admission.

Moreover that with regard to the alleged illegal finance charges amounting to US$122,037.01 this was contractual interest charged on new or upon restructuring the facilities as the case was for all the deals in this matter, thus the money collected by the Applicant Bank was in order.

It was also stated that regarding the payments of rental charges after accidents of the leased assets amounting to the total sum of US$52,885.07 the Lease Agreement at Clause 8 obligated the Leasee in this case the 2nd Respondent to continue meeting the rental obligations after the accident and therefore the Applicant was in order to recover the aforesaid sum. The Terms and conditions of the Lease Agreement were exhibited as "JK38" to "JK40" to the Respondent's Affidavit in Opposition.

It is deposed that with regard to the alleged illegal journal debits amounting to US$34,179.30 the same were expenses incurred by the Applicant Bank in an effort to repossess the leased assets which expenses are recoverable from the Lease pursuant to Clause 11.2.2 of the Lease Agreement. That the Applicant was in order to recover the said sum of US$34,179.30.

It is stated that the Facility has been outstanding for quite sometimes now and as such the outstanding debt should be settled forthwith as opposed to installment repayments.

Counsel for the Applicant Bank filed Skeleton Arguments into Court on 11th July, 2014. He relied on Order 30 Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia which provides that:

> ***"Any mortgagee or mortgagor whether legal or equitable or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclosure or redeem any mortgage, whether legal or equitable, may take out as of course an Originating Summons, returnable in the Chambers of a Judge for such relief of the nature or kind following as may by the circumstances of the case may require; that is to say –***
>
> ***Payment of moneys secured by the mortgage or charge;***
> ***Sale;***
> ***Foreclosure;***
> ***Delivery of possession (whether before or after foreclosure) to the mortgagee or person entitled to the charge by the mortgagor or person having the property subject to the charge or alleged to be in possession of the property:***
> ***..."***

Learned Counsel also relied on the case of **S. BRIAN MUSONDA (RECEIVER OF FIRST MERCHANT BANK ZAMBIA LIMITED (IN RECEIVERSHIP) V HYPER FOOD PRODUCTS LIMITED, TONY'S HYPERMARKET LIMITED AND CREATION ONE TRADING ZAMBIA LIMITED (1)** in which it was held that:

"The Appellant commenced a typical mortgage action brought by a mortgagee. He asked for the payment of the money secured by the equitable mortgage, foreclosure, sale, delivery up of possession and further or other relief deemed appropriate by the Court. The mortgagee's remedies are truly cumulative leaving aside the fact that an equitable mortgagee's remedies are somewhat more restricted than those of a legal mortgagee, we have quoted the terms of the Consent Order in order to underline the fact that the mortgagee's remedies are cumulative".

The learned authors of **MEGARRY'S MANUAL OF THE LAW OF REAL PROPERTY** Fourth Edition were cited who state at page 479 that:

"The mortgagee's remedies are cumulative. A mortgagee is not bound to select one of the above remedies and pursue that and no other, subject to his not covering more than is due to him he may employ any or all of the remedies to enforce payment".

It is argued that the Applicant granted the 2nd Respondent a Credit Facility in the sum of K1,300,000.00 sometime in April, 2007. The 2nd Respondent's borrowing was secured by a Mortgage Debenture over Plot No. 9, Stand No. 8097, Subdivision D4 of Subdivision Y4 of Farm No. 748 Ndola respectively and Lot No. 13135/M Masaiti as shown in exhibits 'MML1" to "MML5" to the Affidavit in Support of Originating Summons.

That the Applicant granted the 2nd Respondent an additional Credit Facility as shown by Facility Letter dated 10th October, 2007. It is contended that the 2nd Respondents additional borrowing of US$1,000,000.00 was secured by among other securities the Mortgage Debenture over Plot No. 9, Stand No. 8097, Subdivision D4 of Subdivision Y4 of Farm No. 748 Ndola respectively and Lot

No. 13135/M Masaiti earlier created for the earlier Facility granted to the 2nd Respondent of K1,300,000,000.00 (now K1,300,000.00)

It was submitted that the Respondents have since defaulted in their repayment obligations contrary to the terms and conditions of the Credit Facilities. That as at the commencement of this action, the outstanding balances stood at US$500,004.32 and would continue to rise due to interest charges.

It is was also contended that the Respondents had no defence to the Applicants claim and as such the reliefs indicated in the Originating Summons should be granted.

The Respondents Counsel filed Skeleton Arguments in Opposition into court on 12th November, 2015. The Respondents opposition to the Applicant claims is in two parts. The first head relates to the claims for foreclosure, possession and sale of the Mortgaged Properties – under the Mortgaged Debenture. The second head relates to the quantum of the claim.

Regarding the Applicant's rights under the Mortgage Debenture, it is stated that the Mortgage Debenture was indeed registered to secure the Applicant Bank's interest over the borrowing of K1,300,000.00.

However, it is contended that the Mortgage Debenture does not cover the additional Credit Facility availed by the Applicant Bank to the 2nd Respondent of US$1,000,000.00 in respect of asset lease finance.

Mr. Magubbwi learned Counsel for the Respondents argued that Clauses 2.1.3, 2.1.4 and 4.3 of the Mortgage Debenture upholds their firm view that the Mortgage Debenture was in consideration of the sum K1,300,000.00 granted by way of loans only. That it is a serious legal and factual fallacy for the Applicant to purport that the Mortgage Debenture did cover the lease finance

facilities disbursed under the Credit Facility Letter or Letter of Offer – Leasing dated 10th October, 2007 exhibited as "MML6" to the Affidavit in Support of the Originating Summons.

Regarding exhibit "MML6" learned Counsel's argument is that the Letter of Offer did not create any new charge upon the properties subject of the Mortgage Debenture *vis a vis* the credit line of US$1,000,000.00. That as is common legal practice and custom the Mortgage Debenture could only have been referable to exhibit "MML6" if the Applicant had taken out a further charge which the 2nd Respondent would have signed to cover the sum of US$1,000,000.00.

The Respondents Counsel further argued that the Credit Facility Letter dated 10th October, 2010 could not by extension or otherwise have incorporated the advances under the Finance Lease Agreement into the Mortgage Debenture for two reasons. First that there is nowhere in the body of exhibit "MML6" where it states that the Mortgage Debenture in quo will cover the amounts disbursed under the Finance Lease Agreement. Secondly that if the Applicants averment was to be tenable then effectively exhibit "MML6" would be said to be creating a charge over the Respondents properties in favour of the Applicant *vis a vis* the properties marked under the Mortgage Debenture. It was contended that in that regard one could have expected the Applicant to have registered exhibit "MML6" and/or indeed some other documents that would have shown that the Respondents were creating or transferring an interest in their properties to the Applicant as security for the borrowing of US$1,000,000.00 or a part thereof. For this contention Section 4 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia was cited. Section 4 (1) provides that:

> ***"Every document purporting to grant, convey or transfer land or any interest in land, or to a lease or agreement for lease or permit of occupation of land for a longer term than one year, or***

to create any charge upon land, whether by way of mortgage or otherwise, or which evidences the satisfaction of any mortgage or charge, and all bills of sale of personal property whereof the grantor remains in apparent possession... must be registered within the times herein after specified in the Registry or in a District Registry if eligible for registration in such District Registry:".

The case of **WILLIAM JACKS AND COMPANY LIMITED V O'CONNER (2)** was cited in which it was *inter alia*, held that:

"In determining whether or not a document is required to be registered under the Lands and Deeds Registry Act, it is not necessary to determine whether the document is a valid one, but merely whether it purports to be so".

It was submitted that given the above legal position, if the Applicant predicates that exhibit "MML6" fused into "MML5" and thereby created a charge for the repayment of US$1,000,000.00 on the properties scheduled under "MML5" then "MML6" invariably is being purported or considered by the Applicant as a document creating a charge upon the scheduled properties. The Respondents contend that in light of the WILLIAM JACKS case and Section 4 (1) of the Lands and Deeds Registry Act exhibit "MML6" was required to be registered.

Mr. Magubbwi stated that "MML6" or indeed any other document was not registered to show that the Respondents had created a charge over the properties scheduled under "MML5" for the repayment of the sum of US$1,000,000.00 or any part thereof. The effect of such non registration it was submitted is defined under Section 6 of the Land and Deeds Registry Act, which is that:

"Any document required to be registered as aforesaid and not registered within the time specified in the last preceding section shall be null and void".

It was submitted that in the circumstances and in the extreme unlikely event, that it were to be agreed that exhibit "MML6" did create a charge for the repayment of the US$1,000,000.00 or a part thereof then exhibit "MML6" is null and void for want of registration and therefore of no legal effect and consequently *abinitio*.

It was further submitted that there was no charge created on the properties scheduled under exhibit "MML5" for the recovery of the sum of US$1,000,000.00 or a part thereof in respect of the Finance Lease Agreements falling under exhibit "MML6". That therefore the reliefs of foreclosure, possession and sale sought by the Applicant are not available and the claim thereof should be dismissed with costs.

The Respondents Counsel finally submitted that, in the unlikely event that the Court finds the Applicant's argument attractive that the Mortgage Debenture registered on 16th April, 2007, *ipso facto*, was effective upon exhibit "MML6", then the amount there under recoverable was the sum of K1,300,000.00 and as shown under the Affidavit in Opposition the said amount was redeemed by Leasing Finance Company Limited and therefore no further recoveries can and should thereunder be made.

As regards how much is due to the Applicant, the Respondents deny owing the sum of US$500,000.00 plus interest. The reasons and arguments given are as follows:

i) Finance charges debited on 26th July, 2010.

The Respondents contend that finance charges in the aggregate sum of US$122,037.00 were uncontractually and unconsensually debited and recovered.

The Respondents stated that at the commencement of each deal the 2nd Respondent was charged finance charges as per exhibits of the Affidavit in Opposition. That these charges were consistent with the Lease Agreements executed by the parties as the Applicant Bank had disclosed same before or at the time of giving the facility to the Respondents. Counsel for the Respondents affirmed that the finance charges referable to the exhibited Lease Agreements were legally charged by the Applicant and they were in tandem with the provisions of the Banking and Financial Services (Cost of Borrowing) Regulations 1995 i.e Statutory Instrument No. 179 of 1995.

It is argued that to the contrary, the finance charges being disputed were inexplicably, unilaterally, unconsensually and uncontractually levied as there was no disclosure thereof at any time to the Respondents. That the Respondents have not been furnished with any reason as to why the 2nd Respondent was charged with the said finance charges. It is contended and submitted that the charging and collection of the said finance charges is clearly ultra vires the provisions of Section 7 of Statutory Instrument No. 179 of 1995. That the said charges should be expunged from the amount being claimed by the Applicant.

ii) Illegal Extension Charges and Journal Debit.

It is contended that sums of US$ of US$4,083.00 and US$34,179.30 labeled only as extension charges and journal debit respectively without regard to Section 7 of Statutory Instrument 179 of 1995 should equally be expunged from the amount claimed.

iii) Rental Charge after Accidents

The third objection relates to amounts charged after the leased assets were rendered economically unusable and unrepairable by road traffic accidents.

The Lease Agreements provide that the 2nd Respondent was obliged to pay lease rentals for the leased assets regardless of whether the assets existed or not – that literally this is the effect of Clause 8 of the Standard Terms of the Lease Agreement.

Mr. Magubbwi learned Counsel for the Respondents contended and submitted that it fights the good sense of equity, justice and commerce to allow the Applicant to continue charging rentals for an asset that was damaged and whereof the Applicant had received payment for the salvage from the insurance company as indicated under the Affidavit in Opposition. That this interprets into an act of unjust enrichment on the part of the Applicant Bank which is frowned upon by the law.

It was submitted that the law frowns upon a party unjustly enriching itself at the expenses of the other. For this submission, the case **JEOFREY KAPASHA CHISHA V EMILY HOLLAND (4)** in which F.M. Chisanga J (as she then was adjudged that:

> ***"...the purchaser could not have agreed to lose the property yet pay for it in full. That would amount to unjust enrichment, as then the vendor would retain the property, as well as the purchase price such a situation is clearly insupportable at law... To allow a vendor to rescind a contract and to walk away with her property yet obtain the full purchase price would be repugnant to equity and in terorrem of the purchaser. See***

WORKERS TRUST AND MERCHANT BANK LIMITED V DAJAP INVESTMENTS LIMITED (1993) ALL ER 70 to that effect".

The Respondents also cited the reported Founding Father of the legal genre of unjust enrichment in the United States of America James Barr Ames who wrote that:

> ***"One is often bound by these same ties of justice and equity to pay for an unjust enrichment enjoyed at the expense of another, although no money has been received. The quasi contractual liability to make restitution is the same in reason, whether for example, one who has converted another's goods turns them into money or consumes them".***

The case of **FIBROSA SPOLKA AKCYJNA V FAIRBAIRN LAWSON COMBE BARBOUR LIMITED (5)** was also cited. In that case Lord Wright held that:

> ***"It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or just benefit, ... such remedies in English law are generically different from remedies in contract or tort, and are now recognized to fall within a category of the common law which has been called quasi contract or restitution".***

It was submitted that in view of the cited authorities, all rental charges, and in some respects received, after occurrence of accidents should be reversed and discounted from the claimed amount.

When the matter came up for hearing of the Originating Summons both learned Counsel for the Applicant Bank Mr. A. Siwila and learned Counsel for

the Respondents Mr. C. Magubbwi were in attendance. They both relied on the Affidavits on record as well as Skeleton Arguments.

Mr. Siwila submitted that by exhibit "MML6" to the Affidavit in Support the parties agreed that the properties listed at paragraph 6 of the Affidavit in Support of the Originating Summons were intended to be security for the asset finance facility of US$1,000,000.00. He stated that it is clear that the said properties were intended to be security thereby creating an equitable mortgage which the law recognizes under Order 30 Rule 14 of the High Court Rules.

It was his submission that the whole sum claimed of US$ 500,004.32 is due and payable because the Respondents consented to the restructuring of the asset finance facilities.

Mr. Magubbwi submitted that claims No. 2 and 3 (namely Delivery up of Possession of Properties and Foreclosure and Sale of the Properties) should not be granted because no security was created over the properties. He stated that paragraphs 5 and 6 of the Affidavit in Reply created the impression that there was mortgage security created or an equitable mortgage. However, the Respondents disagree for the following reasons:

(i) There is no legal mortgage for US$1,000,000.00.

(ii) There is no Memorandum of Deposit of Title Deeds with respect to the facility of US$1,000,000.00.

(iii) The Facility Letter exhibited as "MML6" to the Affidavit in Support does not mention creation of security.

Regarding the Applicants claim No. 1 namely payment of money due and payable by the 2nd Respondent to the Applicant Bank the same should only succeed to the extent of the admitted sum of US$286,819.59.

I have considered the Affidavit evidence, Skeleton Arguments as well as oral submissions by both Counsel for the Applicant and Counsel for the Respondents.

It is common cause that in April 2007 the Applicant Bank availed the 2nd Respondent credit facilities in the sum of K1,300,000.00 and as security the 1st Respondent surrendered his Certificates of Title relating to Plot No. 9, Stand No. 8097, Subdivision D4 of Subdivision Y4 of Farm No. 748 Ndola respectively and Lot No. 13135/M Masaiti for purpose of creating a Mortgage Debenture. The Respondents executed a Mortgage Debenture Deed which was on 16th April, 2007 registered in the Lands and Deeds Registry. The amount secured by the Mortgage Debenture was K1,300,000.00 (then K1,300,000.00) plus interest.

There is no dispute that by Facility Letter dated 10th October, 2007 the Applicant Bank availed the 2nd Respondent assets finance in the sum of US$1,000,000.00 for the purchase and lease of 10 Truck Horses and 10th Axle Ribless Slopper Tipper Trailers.

It is also not in dispute that in November 2011 the 2nd Respondent Company obtained a financing facility from Leasing Finance Company Limited to settle its indebtedness to the Applicant Bank. At the request of the 2nd Respondent the Applicant wrote to the said Leasing Finance Company Limited on 17th November, 2011 advising the amounts due from the 2nd Respondent to it (the Applicant Bank) as at that date. It is clear that Leasing Finance Company Limited paid to the Applicant on behalf of the 2nd Respondent the sum of US$50,000.00 by cheque No. 000820 and the sum of K998,000,000.00 by Bank Transfer. Exhibit "JK3" to the Affidavit in Opposition is evidence of the said payment.

What is in dispute between the Applicant Bank and the Respondents is whether the Mortgagee Debenture dated 16th April, 2007 secures the sum of US$1,000,000.00 availed to the 2nd Respondent by the Applicant Bank by Facility Letter dated 10th October, 2007. The other issue in dispute is the quantum of the Applicant Bank's claim. The Applicant's claim is for US$500,004.32 and interest thereon but the Respondents admit owing the Applicant bank the sum of US$286,819.59.

I will consider the issue of whether the Mortgage Debenture executed by the Respondents on or about 16th April, 2007 to secure the Applicant Bank's interest extends to the additional Credit Facility of US$1,000,000.00 availed to the 2nd Respondent on or about 10th October, 2007 first.

From the onset I wish to state that the assertion by learned Counsel for the Respondents that the Applicant predicates that the Facility Letter dated 10th October, 2007 (exhibit "MML6") to the Affidavit in Support of Originating Summons fused into the Mortgage Debenture dated 16th April, 2007 (exhibited "MML5") is a misconception. Exhibit "MML6" is like any other Credit Facility Letter, it is an agreement or letter in which a lender (usually a bank or other financial institution) sets out the terms and conditions on which it is prepared to make a Loan Facility or Credit Facility available to a borrower.

In *casu,* exhibit "MML6" sets out the terms and conditions on which the Applicant Bank was prepared to make the Liquidating Lease Facility of US$1,000,000.00 available to the 2nd Respondent. The terms and conditions include at page 2 security held and security required. The Credit Facility Letter dated 10th October, 2007 is not a security document and does not in my considered view purport to create any charge upon the properties which are charged by the Mortgage Debenture. However, exhibit "MML6" sets out the security already held by the Applicant Bank and the security required. I therefore accept the assertion by Mr. Reuben Matale Malindi in the Affidavit in

Reply dated 24th March, 2016 at paragraph 5 that by executing the Credit Facility Letter there was agreement between the parties that the security already held would continue to be held until the entire balance due and owing from the 2nd Respondent to the Applicant was settled.

The security held by the Applicant as at 10th October, 2007 included inter alia:

"...4 Third Party Mortgage for K464,000,000.00 over Plot No. 10, Ndola;

5 Deed of Mortgage Debenture for K1,300,000,000.00 incorporating Plot No. 9 Ndola; Plot No. 8097 Industrial Road, Ndola; Plot No. 748 Twaliculile Road, Ndola; Lot No. 13135, Masaiti, Ndola;

6 Debenture (Floating) for K1,300,000,000.00 over Company assets".

It is the Respondents contention and argument that the Mortgage Debenture was executed to cover the sum of K1,300,000,000.00 (then K1,300,000,000.00) only extended by the Applicant Bank to the 2nd Respondent in April, 2007 as a loan and not the subsequent sum of US$1,000,000.00 or prorate thereto advanced by the Applicant to the 2nd Respondent in October, 2007 in respect of asset lease finance. They refer to Clauses 2.1.3, 2.1.4 and 4.3 of the Mortgage Debenture to buttress their view that the Mortgage Debenture was executed in consideration of the sum of K1,300,000.00 granted by way of loan only. The 3 Clauses provide thus:

"2.1.3 "principal sum" shall mean the sum of KWACHA ONE BILLION THREE HUNDRED MILLION ONLY (K1,300,000,000.00) as set out in this Mortgage Debenture or such sum or aggregate of the amounts for the time being and from time to time disbursed by the Bank in accordance with this Mortgage Debenture or any other written agreement...

2.1.4 RECITAL

At the request of the company the Bank agreed to provide a facility of K1,300,000,000.00 (Kwacha One Million Three Hundred Million Only) for working capital to the Company for the Principal sum upon having the security contained in these presents.

4.3 CHARGE

For the consideration aforesaid the Company as Beneficial owner hereby

4.4.1 Charges by way of this Mortgage Debenture all the undertaking of the Company and all its fixed and floating assets including all right...

4.5.1 If the Company shall on demand or otherwise pay to the Bank the Principal sum and all other moneys and liabilities and interest thereon as set out in this Mortgage Debenture then the Bank shall at the request and cost of the Company surrender the secured Properties to the Company or as the Company shall direct or will otherwise discharge the security hereby created".

Based on the above provisions of the Mortgage Debenture, it is the Respondents contention that the borrowing secured by the Mortgage Debenture was actually paid off and the said Mortgage Debenture was thereby redeemed. They contend that the payment made by Leasing Finance Company Limited on behalf of the 2nd Respondent redeemed the Mortgage Debenture.

I do not accept the Respondents contentions. Clause 2.1.3 of the Mortgage Debenture provides that the principal sum of K1,300,000.00 secured is as set out by it or any other written agreement. The Mortgage Debenture also secures

such sum or aggregate of the amounts for the time being and from time to time disbursed by the Bank in accordance with it or any other written agreement.

In this case the Facility Letter dated 10th October, 2007 is a written contractual agreement or document which was signed by both parties and was intended to be legally binding. As already stated above the Facility Letter set out conditions pertaining to the Asset Finance Facility or Liquidating Lease Facility of US$1,000,000.00. One such condition agreed to by the parties was that the sum of US$1,000,000.00 would be secured by security already held. The security held by the Applicant Bank on the date of signing the Asset Finance Agreement included the properties charged by the Mortgage Debenture dated 16th April, 2007 and the Third Party Mortgage over Plot No. 10 Ndola. That the Mortgage Debenture secures the sum of US$1,000,000.00 is in line with Clause 2.1.3 of the Mortgage Debenture.

The fact that the Mortgage Debenture secures the sum of US$1,000,000.00 is clear from the Clause on Security at page 4 of the Mortgage Debenture which states that:

> ***"SECURITY***
>
> ***Mortgage debenture for K1,300,000,000.00 plus interest over:***
>
> - ***Residential Plot No. 9 Ndola***
> - ***Commercial Plot No. 8097, Industrial Area Road, Ndola***
> - ***Residential Plot No 748 Twaliculile Road, Ndola. Owner's valuation K200,000,000.00***
> - ***Lot No. 13135/M Masaiti***
> - ***All Company moveable and fixed assets present and future.***
>
> ***In addition and without prejudice to any security already held by the bank, the bank requires the security to cover all banking facilities granted to the Borrower, whether direct or contingent and howsoever arising."*** *(Emphasis mine)*

It is clear from the provisions of Clause 2.1.3 and the Clause on Security that the Mortgage Debenture was intended to cover all banking facilities granted to the 2nd Respondent by the Applicant Bank. The Mortgage Debenture is in an all moneys form.

Regarding security documents in all moneys form, the learned author of LINGARD'S BANK SECURITY DOCUMENTS at paragraph 5.3 page 78 states that:

> ***"Security documents preferably will secure all moneys and liabilities from time to time owing to the bank. Restriction to a particular facility is only desirable if the facility is provided by a syndicate of banks or as an interim measure whilst a rescue package is negotiated. If security is restricted to a particular loan as from time to time varied or extended, further security will have to be taken before the bank grants other facilities. Anything which weakens flexibility or causes delay and expense is to be deplored.***
>
> ***Security documents in all moneys form should be drawn sufficiently widely to cover all possible types of facilities including acceptance credits, bank guarantees and all types of bonds and indemnities".***

I am of the considered view that the Mortgage Debenture dated 16th April, 2007 covers the lease finance facilities of US$1,000,000.00 availed by the Applicant Bank to the 2nd Respondent.

The Respondents argument and contention that the payment made by Leasing Finance Company on or about 1st December, 2011 to the Applicant Bank of US$50,000.00 and K998,000,000.00 discharged the Mortgage Debenture

would have been true if the Applicant Bank lent the money (K1,300,000,000.00) on current account by way of fluctuating overdraft and the security taken was not expressly stated to be a continuing security. If this had not been done, the Rule in **CLAYTONS Case** (6) would apply, and so payments in would be treated as payments towards the discharge of the Mortgage debt and payments out would constitute unsecured advances.

The operation of the **Rule in CLAYTONS Case** was excluded by Clause 6 of the Mortgage Debenture aforesaid which states that:

> ***"This security shall be a continuing security to the Bank notwithstanding any settlement of account or other matter or thing whatsoever and shall not prejudice or affect any security which may have been created by any deposit of Title Deeds or other documents which may have been made with the Bank prior to the execution hereof relating to the secured property or to any properties or any other security which the Bank may now or at any time hereinafter hold in respect of moneys hereby secured or any of them or any part thereof".***

As the Mortgage Debenture dated 16th April, 2007 executed by the 1st and 2nd Respondents contains a Continuing Security Clause the security is not discharged by the payments made by Leasing Finance Company Limited on behalf of the 2nd Respondent. In this respect the Mortgage Debenture would not have been discharged even if the 2nd Respondents Loan Account or Current Account with the Applicant Bank was in credit. The learned author of **LINGARD'S SECURITY DOCUMENTS** at paragraph 10.26 page 234 states that:

> ***"Bank security documents should contain a continuing security Clause to avoid the contention that the security is discharged if,***

subsequently to its creation, the accounts of the customer are in credit".

Clause 4.5.1 of the Mortgage Debenture referred to above provides for how the security thereby created is to be discharged. When the 2nd Respondent pays to the Applicant Bank the Principal sum and all other moneys and liabilities and interest thereon as set in the Mortgage Debenture then the Applicant Bank shall at the request and cost of the 2nd Respondent surrender the secured properties to the 2nd Respondent or will otherwise discharge the security.

The Respondents have not adduced any evidence to show that after the payment made by Leasing Finance Company Limited to the Applicant Bank they requested the Applicant to surrender the secured properties to the 2nd Respondent and to discharge the security created by the Mortgage Debenture as required.

The Record shows that in consideration for the payments made by Leasing Finance Company Limited to the Applicant Bank the 2nd Respondent only asked the Applicant to surrender to the said Leasing Finance Company Limited Original Title Deed together with duly executed discharge documents in respect of Stand No. 10 President Avenue, Ndola. The letter dated 17th November, 2011 from the Applicant to Leasing Finance Company Limited advising the amounts owing by the 2nd Respondent to the Applicant as at that date also only gave an undertaking for release of title for Plot No. 9 Ndola. Further the letter from Leasing Finance Company to the Applicant Bank dated 1st December, 2011 advising the payments made to the Bank only requested that the Original Certificate of Title No. 56462 for Plot No. 10 President Avenue, Ndola and the relevant discharge documents be handed directly to Leasing Finance Company by the Applicant. The said letters are exhibited to the Affidavit in Opposition marked as "JK1", "JK2" and "JK3" respectively.

I am satisfied that the Mortgage Debenture dated 16th April, 2007 secures the sum of US$1,000,000.00 availed by the Applicant Bank to the 2nd Defendant pursuant to the Liquidating Lease Facility Agreement dated 10th October, 2010. However, the amount recoverable under the Mortgage Debenture is limited to the equivalent of K1,300,000.00 and interest thereon.

Regarding the amount due and owing by the 2nd Respondent to the Applicant Bank, I have considered the Affidavit evidence and the Account Statements exhibited to the Affidavit in Support of the Originating Summons and the Affidavit in Opposition. I have also considered the responses in the Affidavit in Reply.

It is common cause that the finance charges charged by the Applicant at the commencement of each Deal were consistent with the Lease Agreements executed by the parties and that same were disclosed to the 2nd Respondent and therefore in accordance with the provisions of Regulation 7 of the Banking and Financial Services (Cost of Borrowing) Regulations, 1995 i.e Statutory Instrument No. 179 of 1995.

The Respondents however, dispute finance charges that the Applicant Bank levied on 26th July, 2010 in the aggregate sum of US$122,037.00. They contend that these finance charges were unilaterally, unconsensually and uncontractually levied as there was no disclosure thereon at any time to the Respondent. It is argued that the said charges are in contravention of the law and should be expunged from the amount being claimed by the Applicant.

In the Affidavit in Reply the Applicant Bank states that a finance charge is a contractual interest charged on a new finance leasing deal or upon restructure as in this case. That upon restructuring the period for payment of the facility is extended and as such further interest is charged as the Bank loses its use for money for a longer period than initially agreed.

It is contended by the Applicant Bank that due to non-servicing of the rental charges regularly by the 2nd Respondent on Deals 0001, 0003, 0004, 0007, 0011, 0012, 0013 and 0015 and at the request and instance of the Respondents the Applicant Bank restructured the initial Deals aforesaid which were closed and at closure the outstanding sums transferred to new accounts under Deals 0016LA, 0017LA, 0018LA, 0021LA, 0022LA, 0023LA, 0024LA and 0025LA respectively. That subsequently finance charges for restructuring these asset finance facilities were debited to the respectively new accounts.

A perusal of the Vehicle Asset Finance Account Statements exhibited to the Applicant's Affidavit in Support and Respondent's Affidavit in Opposition show that there was no regular servicing of the rental charges by the 2nd Respondent on most of the Asset Deals. The Account Statements reveal that the rental charges were not paid as they fell due. Late payment charges and Extension charges are evidence of the 2nd Respondents failure to pay rental charges in accordance with the Finance Lease Agreements. In addition to this some of the Account Statements have debits for unpaid cheques.

Under paragraph 15 of the Affidavit in Opposition the Respondents have stated with regard to Deal 0009 LA that:

> ***"The lease tenure of this deal was up to 24th November, 2010 by which date ideally and commercially the capital and interest on the deal, expressed in rental terms, would have been repaid (amortized) ... as at 25th November, 2010 the rental arrears outstanding on the account was US$36,137.23 of which on the 5th February, 2013 a sum of US$3,509.09 was paid leaving an paid balance of US$32,628.14".***

This statement by the 1st Respondent is an admission that the 2nd Respondent was not paying the rental charges as and when they fell due. If the 2nd Respondent had serviced the rental charges as agreed between the parties all the rental charges for Deal 0009 LA would have been paid by 24th November, 2010. That the 2nd Respondent neglected and failed to pay rental charges as and when they fell due is true for Deal 0010LA, 0016LA, 0017LA, 0018LA, 0021LA, 0022LA, 0023LA, 0024 and 0026LA.

In order to determine whether or not the Applicant Bank was entitled to restructure the various Finance Leases and charge finance charges for restructuring the facilities it is necessary to define a Finance Lease. Finance Lease or Equipment Lease is a way of providing finance whereby the leasing company (the lessor or owner) buys the asset for the user (hirer or lessee) and rents it to the lessee for an agreed period. Ownership of the asset remains with the lessor at all times. The agreement is structured so that the lessee pays off the whole value of the asset. An important feature of a finance lease is that if the lease is terminated for whatever reason before its expiry date the lessor is entitled to recoup its capital investment and also its finance charges.

A finance lease is defined by the learned authors of Chitty on Contracts, Volume II,30th Edition, Sweet and Maxwell, 2008 at paragraphs 33- 081 as:

> ***"Finance Leasing. In the light of various tax advantages, a form of long- term financing has developed, which is known as finance leasing. In a Finance leasing, the lessee selects the equipment to be supplied by a manufacturer or dealer, but the lessor (a finance company) provides the funds, acquires title to the equipment and allows the lessee to use it for all (or most) of its expected useful life. During the period of the lease, the usual risks and rewards of ownership are substantially transferred to the lessee, who bears the risks of loss, destruction and depreciation of the leased equipment (fair wear and tear only excepted) and of its obscolence***

or malfunctioning. The lessee also bears the costs of maintenance, repairs and insurance. The regular rental payments during the primary period of the lease are calculated to enable the lessor to amortize its capital outlay and to make a profit from its finance charges. At the end of the primary leasing period, there will frequently be a secondary leasing period during which the lessee may opt to continue the lease at a nominal rental, or equipment may be sold and a proportion of the sale of proceeds returned to the lessee as a rebate of rentals. The lessee thus acquires any residual value in the equipment, after the lessor had recouped its investment and charges. If the lease is terminated prematurely, the lessor is entitled to recoup its capital investment (less the realizable value of the equipment at the time) and its expected finance charges (less an allowance to reflect the accelerated return of capital). The bailment which underlies finance leasing is therefore only a device to provide the finance company with a security interest (its reversionary right); a finance lease is similar in function to outright purchase or hire purchase."

This passage from Chitty on Contracts was also discussed in the English Case of **ON DEMAND INFORMATION PLC (IN ADMINISTRATIVE RECEIVERSHIP) AND ANOTHER V MICHAEL GERSON (FINANCE) PLC AND ANOTHER (7).**

I have also considered the definition of a Finance Lease and its unique characteristics from the Journal Article of the Cornell Law Review by Peter Breslauer who in his article called **"Finance Lease Hell or High Water Clause and Third Party Beneficiary Theory in Article 2A of the Uniform Commercial Code" (7)** stated as follows:

"A finance lease differs fundamentally from the bilateral transactions which form the basic subject matter of both Articles 2

and 2A. A finance lease involves three parties: a lessor, a lessee, and a supplier, each of whom must meet certain specific conditions. With three parties present, and two contracts (one between supplier and lessor, denominated the "supply contract, and one between lessor and lessee, the "lease contract), the sequence of events leading to contract formation can be quite varied.

Article 2A contains three major provisions detailing the characteristics of, and obligations, under a finance lease. First, section 2A- 103(l) (g) defines a finance lease and describes the structural relationships between lessor, lessee, and supplier. Second, section 2A- 407 details the nature of a lessee's obligation to pay rent. This section enacts a standard provision in a finance lease known as a "hell or high water clause," which makes the lessee's obligation to pay rent "irrevocable and independent. This assurance of payment is a major incentive to the lessor to provide the funds necessary for a finance lease transaction.

Finally, section 2A-209 is the source of the most important warranties extended to the lessee. Article 2A greatly restricts the scope of potential warranties provided by the lessor to the lessee, unlike those provided under the typical bilateral lease.' This restriction follows from the finance lessor's limited role in the overall set of transactions-a role inconsistent with the assumption of extensive warranty obligations. Section 2A-209, however, balances this restricted scope by providing that a lessee's warranties under a finance lease stem from the supplier of the goods rather than the lessor. This is accomplished by making the lessee a beneficiary of any promises and warranties the supplier has made to the lessor in the supply contract.' As a result, the

lessee assumes a position close to that of a buyer, looking directly to the supplier in matters of warranty rather than to the lessor...

THE STATUTORY FINANCE LEASE UNDER ARTICLE 2A

Building on existing leasing practices, the finance lease structure of Article 2A carefully balances several complementary rights and duties among the parties. There are three basic requirements for the creation of a finance lease: (1) the lessor must not select, manufacture, or supply the goods;(2) the lessor must not lease the goods from inventory; and (3) the lessee must have access to the supply contract, or to information concerning warranties contained in the supply contract. The first two requirements sharply restrict the lessor's relationship to the leased goods, specifically with respect to their selection, manufacture, supply, and prior ownership.

The third requirement concerns the notice that a finance lease lessee must receive with respect to the benefit of warranties established by Article 2A between the supplier and the lessee. Once the statutory requirements are met, the finance lease becomes effective, with Article 2A relieving the lessor of many duties it would otherwise bear under a "normal" bilateral lease ...

The restricted role played by the lessor in a finance lease essentially the provision of funds for the purchase or lease of goods from the supplier-has implications on each of the parties' obligations under the two contracts. The lessor's obligations differ significantly from those found in the "usual" bilateral lease transaction and in view of the lessor's role, Article 2A seeks to ensure that the lessor receives its payments due from the lessee. This is accomplished by the "hell or high water" clause of section 2A-407, which makes the lessee's payment obligation "irrevocable

and independent" upon the lessee's acceptance of the goods."

(Emphasis mine)

The Article points out that whilst Section 2A-407 Of the Code would appear to put the lessee in a weak position, Article 2A balances it with Section 2A-209, which makes the lessee the beneficiary of the promises and warranties made to the lessor in the supply contract. In so doing, Article 2A erects a unified structure of rights and obligations over both the supply contract and the lease contract.

While what Peter Breslauer says applies to finance leases or equipment leases governed by the American Uniform Commercial Code the underlying principles articulated also apply to finance leases or equipment leases governed by English common law.

The passage I have cited above from Chitty on Contracts at paragraph 33-081 was also considered by C.Kajimanga J (as he then was) in ***INDUSTRIAL CREDIT COMPANY LIMITED V PLAVMARK ZAMBIA LIMITED*** *(8) and R. Kaoma, J (as she then was) in* ***FIMIMOST MINING AND TRANSPORT ENTERPRISE LIMITED V LEASING FINANCE COMPANY LIMITED*** *(9). They both held that when a finance lease is terminated before its expiry date, the lessor was entitled not to future rentals, but to recoup its capital investment and finance charges. I concur with their holdings. I have no doubt that when a finance lease is prematurely terminated the lessor is entitled not to future rentals, but to recoup its capital investment (less the realizable value of the equipment at the time) and its expected finance charges (less an allowance to reflect the accelerated return of the capital).*

The standard terms and conditions of the Agreements signed between the Applicant Bank and the 2nd Respondent show that they were finance lease agreements.

From the foregoing it is clear that for each Deal the Applicant Bank was entitled to be paid in full its capital investment and also its finance charges.

For instance with respect to Deal 0016 LA which was initially Deal 0001 LA the lease tenure of the Truck Registration No. ABK 7922 was 35 months from 19th November, 2007 up to 18th October, 2010. At the date of closure i.e 26th July, 2010 the Applicant Bank was entitled to terminate the Lease Agreement because the 2nd Respondent was in breach of the Agreement for not paying when due the monthly rentals charges and interest on the outstanding arrears. If the Applicant Bank had terminated the Lease Agreement on 26th July, 2010, the 2nd Defendant would have been obligated to pay the sum owing of US$22, 200.13 immediately.

Rather than terminate the Lease Agreement, the Applicant Bank agreed to restructure the Lease Facility and close Deal 0001 and transfer the sum of US$22,200.13 owing at closure to the new Account under Deal 0016LA. Having restructured the Lease Facility the Applicant Bank was entitled to charge a finance charge on the sum of US$22,200.13. It is trite that when a credit facility is restructured the lender is entitled to charge interest thereon. In this instance the Applicant charged the 2nd Respondent a finance charge on the sum of US$22,200.13 because the period within which this sum would be repaid was extended. That is to say the Applicant Bank would not have use of its money for a longer period than initially agreed.

The learned authors of **HALSBURYS LAWS OF ENGLAND** at paragraph 106 page 53 state that:

> ***"Interest is the return or compensation for the use or retention by one person of a sum of money belonging to or owed to another".***

In *casu,* the Applicant Bank was entitled to charge interest or finance charges on the amounts due from the 2nd Respondent to it on 26th July, 2010 on the various restructured Deals because rather than having the amounts owing

being paid forthwith the 2nd Respondent was allowed to continue to have the use or retention of those sums for extended periods.

I do not accept the Respondents contention that the finance charges on the restructured asset deals were inexplicably, unilaterally, uncosensually and uncontractually levied by the Applicant bank. As the 2nd Respondent did not have the money to immediately pay the outstanding sums as at 26th July, 2010 in the aggregate sum of US$307,481.51 I believe the assertion by Mr. Malindi in the Affidavit in Reply that Deals Nos. 0001, 0003, 0004, 0007, 0011, 0012, 0013 and 0015 were restructured at the request and instance of the Respondents.

The 1st Respondent states in the Affidavit in Opposition that the amounts owing on Deals 0001, 0003, 0004, 0007, 0011, 0012, 0013 and 0015 were settled off on 26th July, 2010 and therefore no more money is payable to the Applicant. No evidence has been adduced by the Respondent to show that the amounts owing on the said Deals on 26th July, 2010 were paid to the Applicant. It would appear that the Respondents assert that because the Statements of Account of these Deals were marked as "Settled" therefore the amounts should be taken to have been paid. The position taken by the Respondents fly in the teeth of the facts on the Record. It is clear that these Accounts were marked "settled" because the sums owing on date of closure i.e. 26th July, 2010 were transferred to the new Accounts following the restructuring of the initial Deals. I find that the sums owing on the said initial deals totaling US$307,481.51 were not paid by the Respondent to the Applicant Bank on 26th July, 2010 the date of closure of the old Deal Accounts.

It is common cause that the Lease Agreements signed between the parties in relation to the initial Deals contained an Annual Finance Charge Rate which was linked by a margin of 2% per annum above the Stanbic Bank Zambia Limited base rate from time to time. This Finance Charge rate was based on

the Rate contained in the Facility Letter dated 10th October, 2007 executed by the parties. This Finance Charge Rate of Foreign Currency Base + 2% (13% per annum) is the rate which applies to both the initial Deals and the Restructured Deals.

The learned authors of **HASBURY'S LAWS OF ENGLAND,** 4TH EDITION, VOLUME 32 paragraph 108 page 54 state that:

> ***"Interest is payable at common law***
>
> ***(i) Where there is express agreement to pay interest,***
>
> ***(ii) Where an agreement to pay interest can be implied from the course of dealings between the parties; or from the nature of the transaction or a custom or usage of the trade or profession concerned".***

Given the fact that in a finance lease the lessor is entitled to not only recoup its capital investment but also its finance charges, I find and hold that the agreement to pay interest or finance charges by the 2nd Respondent is implied from the course of dealings between the parties as well as the nature of the transaction between them namely Liquidating Finance Leasing. I am therefore of the firm view that the 2nd Respondent agreed to pay finance charges on the restructured Deals at the Rate stipulated in the Credit Facility Agreement dated 10th October, 2007.

The Finance Charges debited to the respective Deal Accounts on 26th July, 2010 were legally charged by the Applicant and cannot be expunged from the amount being claimed by the Applicant. The Respondents state that these finance charge are an aggregate sum of US$122,037.00. I have computed these and I arrive at a sum of US$92,813.05.

The Respondents contend that the sums of US$4,083.00 and US$34,179.30 labeled as extension charges and journal debit respectively were without regard to Regulation 7 of Statutory Instrument No. 179 of 1995. The Applicant Bank says that the sum of US$34,179.30 relates to expenses incurred by the Applicant in an effort to repossess the leased Assets which are expenses recoverable from the lessee pursuant to Clause 11.2.2 of the Lease Agreement levied.

Clause 11.2.2. of the Lease Agreement does indeed allow the Applicant to recover from the 2nd Respondent expenses incurred by the Applicant in the repossession, sale, transportation, valuation or storage of the goods. The Journal debit of US$34,179.30 was therefore properly and legally levied.

As regards the extension charges of US$4,083.00 the Applicant Bank says that these are contractual and arise due to changes in the interest rate during the tenor of the Lease. They were therefore properly and legally levied.

The Respondents also objected to the rental amounts charged after the leased assets were rendered economically unusable and unrepeatable by road traffic accidents. As rightly pointed out by Counsel for the Respondents the 2nd Respondent was obliged to pay lease rentals for the leased assets regardless of whether the assets existed or not. This is in fact the effect of Clause 8 of the Standard Terms of the Lease Agreement. Clause 8.4 of the Lease Agreement provides that:

"8.4 The Lessee shall pay all amounts due at the time and in the manner herein provided and continue to pay the same on the occurrence and during the subsistence of;

8.4.1. Any accident involving the goods, whether such accident was of the Lessees making or otherwise, or

8.4.2 Any event or effect that was not or could not have been anticipated or controlled by the parties".

It is the Respondents contention and submission that allowing the Applicant to continue charging rentals for an asset that was damaged and whereof the Applicant had received payment of the salvage value from the insurance company is against equity, justice and commerce. That this amounts to unjust enrichment which is frowned upon by the law. The case of **JEOFFREY KAPASHA CHISHA V EMILLY HOLLAND (4)** and **FIBROSA SPOLKA AKCYJNA V FAIRBAIRN LAWSON COMBE BARBOUR LIMITED (5)** were relied on. It was submitted that all rental charges charged and in some respects received after occurrence of accidents should be reversed and discounted from the claimed amount.

As indicated above an important feature of a finance lease is that if the lease is terminated for whatever reason before its expiry date the lessor is entitled to recoup its capital investment and also its finance charges. This means that a lessor will recover all of the cost of the asset plus its finance charges irrespective of whether the asset is damaged and even if insurance monies have been paid to it. However, any insurance monies which exceed the cost of the asset and the lessors finance charges must be paid to the lessee.

Clause 8 of the Lease Agreement is therefore in line with how finance leases are structured.

The concept of unjust enrichment or unjust benefit as articulated by the Respondents does not apply to finance leasing transactions before the lessee pays off the whole value of the asset and the lessors finance charges.

In view of the foregoing, I do not accept the Respondents submission that all rental charges charged and in some instances received after the occurrence of

accidents to some assets should be reversed and discounted from the amount claimed.

From the evidence adducted by the Applicant and the Respondents I am satisfied that the Applicant Bank has proved its case on the balance of probabilities.

I accordingly enter Judgment against the Respondents for the payment of the sum of US$500,004.32 being the sum owing as at 11th July, 2014 with interest as agreed between the parties of 13% per annum.

It is further Ordered that the said sum be paid within sixty days from date hereof. In the event of default the Applicant Bank shall be at liberty to foreclosure on the Mortgaged Properties namely Plot No. 9, Stand No. 8097, Subdivision D4 of Subdivision Y4 of Farm No. 748 Ndola respectively and Lot 13135/M Masaiti, have vacant possession and exercise its power of sale of the said Mortgaged Properties.

Costs to the Applicant Bank to be taxed in default of Agreement.

Leave to appeal is hereby granted.

Dated the 10th day of March, 2017.

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WILLIAM S. MWEEMBA
HIGH COURT JUDGE