

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

2024/HPC/0106

IN THE MATTER: ORDER 30 RULE 14 OF THE HIGH COURT ACT CHAPTER 27 OF THE LAWS OF ZAMBIA AS READ WITH ORDER 88 OF THE RULES OF THE SUPREME COURT PRACTICE OF ENGLAND 1999 EDITION.

AND

IN THE MATERR OF: PROPERTY COMPRISED IN CERTIFICATE OF TITLE NO. 91774 RELATING TO STAND NO. 24408, LUSAKA.

AND

IN THE MATTER OF: AN APPLICATION FOR THE DELIVERY OF POSSESSION OF STAND NO. 24408, LUSAKA, TO THE APPLICANT AS MORTGAGEE WITH POWER OF SALE TO RECOVER DEFAULT AMOUNT OF DEBT AND INTEREST THEREON.



BETWEEN:

**ZAMBIA INDUSTRIAL COMMERCIAL
BANK LIMITED**

APPLICANT

AND

**MORGAN KASEBA T/A MUMENA
ENTERPRISES
KADABA TRUST FOUNDATION LIMITED
SHARON WALUBITA KASEBA
KAMPELO KASEBA
MUSINDABA KASEBA
YEWO KASEBA
LUKOBA KASEBA**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT
5TH RESPONDENT
6TH RESPONDENT
7TH RESPONDENT**

Delivered before the Honourable Mrs. Justice K. E. Mwenda-Zimba on the 16th day of April, 2024.

For the Applicant : Ms. M.N. Siansima and Ms. M. Mukwanya of TMN Legal Practitioners
For the 1st Respondent : No appearance
For the 2nd to 7th Respondents : Mr. C. Ngoma and Mr. N. Chibolela of Ngoma Legal Practitioners

JUDGMENT

Cases referred to:

1. National Drug Company Limited and Zambia Privatisation Agency v. Mary Katongo Appeal No 79 of 2001. (Unreported)
2. Robinson Sikombe v. Access Bank Zambia Limited Appeal No. 240 of 2013
3. Lackson Mwabi Mwanza v. Sangwa Simpasa, Chisha Lawrence Simpasa (2011) 1 ZR 436.
4. Kanjala Hills Lodge Limited and Another v. Stanbic Bank Zambia Limited (2012) 2ZR 285.
5. Reeves Malambo v. PATCO Agro Industries Limited Appeal No. 20 of 2007.
6. Chilola Intertrade and 2 Others v. Citizen Economic Empowerment Commission CAZ Appeal No. 282 of 2022. (Unreported)
7. Barclays Bank Plc v. O'Brian and Another (1993) 4 All ER 417.
8. CIBC Mortgages Plc v. Pitt and Another (1993) UKHL 7.
9. Nkongolo Farms Limited v. Zambia National Commercial Bank Plc and 2 Others (2007) ZR 149.
10. Intermarket Banking Corporation Zambia Limited v. Priscilla Kasonde (2014) 3 ZR 121.
11. Pulse Financial Services Limited (T/A Entrepreneurs Financial Centre) v. Elaine Munga and 2 Others CAZ Appeal No. 133 of 2019.
12. African Banking Corporation Limited (T/A Bank Abc) v. Plinth Technical Works Limited and 5 Others (2015) 2 ZR 458.
13. Angel Musonda v. Pulse Financial Services Appeal No. 132 of 2017. (Unreported)
14. L'Estrange v. Graucob (1948) 2KB 394.
15. North West Leicester District Council v. East Midlands Housing Association (1981) 3 ALL ER 364.
16. Wilton v. Farnworth (1948) 76 CLR 646.
17. Curtis v. Chemical Cleaning and Dyeing Co (1951) 1 KB 805.
18. Tijem Enterprises Limited v. Children International Zambia Limited 2010/HPC/0121.
19. Indo Zambia Bank Limited v. Leonard Witika & 2 Others (2018) 1 ZR 503.
20. Credit Africa Bank v. George K Kalunga and Terry Simwanza Appeal No. 144/1997. (Unreported)
21. Credit Africa Bank Limited (In Liquidation) v. John Dingani Mudenda (2003) ZR 66.

Legislation referred to:

1. The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia, Section 66.
2. Conveyancing and Law of Property Act, 1881, Section 20.
3. The Banking and Financial Services Act No. 7 of 2017, Section 110.
4. The Banking and Financial Services (Classification and Provisioning of Loans) Directives 2020, Directive 9.

Other works referred to:

1. Megarry and Wade: The Law of Real Property 7th edition. London: Sweet and Maxwell (2008), paragraph 24-001.
2. Cheshire, Fifoot and Furmstone's, Law of Contract, 13th edition, Butterworths (1996) at page 29.
3. Halsbury's Laws of England, Volume 76 at paragraph 848.
4. Chitty on Contracts Vol. 1, 26th edition, Paragraph 772.
5. Catherine Elliot and Frances Quinn: Contract Law, 7th edition, Pearson Education Limited (2009).

1.0. INTRODUCTION

1.1 The dispute in this matter revolves around a third party mortgage and personal guarantees offered as security for a loan obtained by a relative of guarantors and directors of a company limited by guarantee.

1.2 The respondents do not dispute the fact that money was borrowed. The 3rd to 7th respondents contend that there was undue influence in the manner the third party mortgage was procured by the 1st respondent, who is the husband to the 3rd respondent, and father to the 4th to 7th respondents. Further, they argue that the applicant ought to have informed them of the need to obtain independent legal advice before they signed the security documents.

2.0. BACKGROUND

2.1. On 9th February, 2024 the applicant filed an originating summons seeking the following reliefs:

1. payment of all monies due under the third party legal mortgage dated 18th January 2022;

2. payment of all monies due under the third-party further charge dated 4th February 2022;
3. payment of all monies guaranteed to be paid under the personal guarantee deeds executed by the 3rd, 4th, 5th, 6th and 7th Respondents dated the 13th and 31st January 2022;
4. delivery up and possession of Stand No. 24408, Lusaka;
5. foreclosure and sale of Stand No. 24408, Lusaka;
6. costs; and
7. further or other relief.

2.2. On 14th March, 2024, the 3rd to 7th respondents filed a notice of motion for determination of questions of law. I noted that the issues raised were essentially an opposition to the originating summons. Therefore, it was agreed with both counsel that this application be treated as part of the opposition to the originating summons.

3.0. THE APPLICANT'S CASE

3.1. The affidavit in support of originating summons was deposed by Chisanga Malasa, a Credit Analyst-Collections and Recoveries in the applicant bank. It was as follows: by a facility letter of 13th January, 2022 the applicant availed the 1st respondent a short-term revolving loan facility amounting to ZMW180,000.00. A further amount of ZMW40,000.00 was availed by a facility letter dated 28th January, 2022. The facility was guaranteed by the 3rd to 7th respondents who each executed personal guarantees.

- 3.2. It was deposed that the credit facilities were secured by a third party mortgage and further charge, over Stand No. 24408, Lusaka executed by the 1st and 2nd respondents.
- 3.3. Chisanga Malasa deposed that the 1st respondent had defaulted, neglected and/or failed to service the debt. That as at 6th February, 2024 the balance outstanding was ZMW361,134.44. Reliance was placed on copies of the loan statements marked as exhibits “**CM8**” and “**CM9**”, a copy of the facility letter, personal guarantees, certificate of title, mortgage deed, further charge as “**CM1**” to “**CM5**”, respectively.
- 3.4. In the skeleton arguments of even date, counsel cited the following authorities:

1. National Drug Company Limited and Zambia Privatisation Agency v. Mary Katongo;⁽¹⁾
2. Robinson Sikombe v. Access Bank Zambia Limited;⁽²⁾
3. Lackson Mwabi Mwanza v. Sangwa Simpasa, Chisha Lawrence Simpasa;⁽³⁾
4. Kanjala Hills Lodge Limited and Another v. Stanbic Bank Zambia Limited;⁽⁴⁾
5. Reeves Malambo v. PATCO Agro Industries Limited;⁽⁵⁾
6. Megarry and Wade: The Law of Real Property, 7th edition, London: Sweet and Maxwell (2008), paragraph 24-001;
7. Lands and Deeds Registry Act, Section 66; and
8. Conveyancing and Law of Property Act, Section 20.

- 3.5. She argued that the respondents have no defence to the applicant’s claim.

4.0. THE 1ST RESPONDENT'S CASE

- 4.1. On 14th March, 2024, Mr. Morgan Kaseba, the 1st respondent filed his affidavit in opposition. He did not dispute the existence of the loan in the sum of ZMW220,000.00 owed to the applicant. He pointed out that he had not made any payment for a period exceeding 90 days from the disbursement of the said loan which classifies the same as non-performing.
- 4.2. As such, non-performing loans do not incur interest further than what applied as of the 90th day.
- 4.3. In the skeleton arguments of even date, he referred me to **Section 110 of the Banking and Financial Services Act No. 7 of 2017** and the reasoning in the case of **Chilola Intertrade and 2 Others v. Citizen Economic Empowerment Commission.**⁽⁶⁾

5.0. THE 3RD TO 7TH RESPONDENT'S CASE

- 5.1. On 14th March, 2024, the 3rd to 7th respondents filed their affidavit in opposition to the originating summons. It was jointly sworn by the 3rd to 7th respondents herein. The 3rd respondent disclosed that she is the wife to the 1st respondent while the 4th to 7th respondents are the children of the 1st respondent. That the 2nd respondent is a company limited by guarantee and registered owner of Stand No. 24408 Lusaka.

- 5.2. It was their position that the 1st respondent has been in charge of their finances since they were young. That they are trustees in the 2nd respondent while the 5th Respondent is a director, shareholder and trustee in the 2nd respondent.
- 5.3. They swore that at a family meeting of 31st December, 2021, the 1st respondent informed them that there were some documents that he needed them to sign from the applicant for which he was a witness. The said documents included a letter of consent that was prepared by the 1st respondent without their knowledge and they were shown where to sign. This was the facility letter marked as exhibit **“SKMYL2”**. Further, that the 1st respondent also made the 3rd to 7th respondents sign a letter of consent he had prepared which was marked as exhibit **“SKMYL3”**.
- 5.4. It was averred that on the 11th and 13th of January, 2023 the 1st respondent called for two more family meetings where he asked them to sign more documents without further elaboration or their effect. They signed out of obligation and trust in the 1st respondent. In this regard, they referred me to a copy of a facility letter marked as exhibit **“SKMYL4.”**
- 5.5. That following these series of meetings and signing exercises, they never heard from the 1st respondent and were surprised at how his desperation about financing subsided.

5.6. On 12th February, 2024, they were surprised to be served with Court documents from the applicant's advocates seeking relief directed at the 2nd respondent's property. They were of the view that the 1st respondent took advantage of the respect they have for him and knew that they would not question his request.

5.7. On 14th March, 2024, Mr. C. Ngoma and Mr. N. Chibolela, filed skeleton arguments in support of the notice of motion for determination of questions of law. They argued that the 1st respondent, being the biological father of the 4th to 7th respondents, entails that this relationship falls within the category of relationships founded on reposed trust and confidence as the children have placed financial matters in the hands of the 1st respondent from birth. In support of this position, counsel relied on the following authorities:

1. **Barclays Bank Plc v. O'Brian and Another**,⁽⁷⁾
2. **CIBC Mortgages Plc v. Pitt and Another**,⁽⁸⁾
3. **Nkongolo Farms Limited v. Zambia National Commercial Bank Plc and 2 Others**,⁽⁹⁾ and
4. **Intermarket Banking Corporation Zambia Limited v. Priscilla Kasonde**.⁽¹⁰⁾

5.8. They argued that the transaction entered into by the 1st respondent did not confer any benefit on the operations of the 2nd respondent as can be seen from the fact that the 2nd respondent is neither a party to nor privy to the contract that

the 1st respondent submitted to the applicant. They added that this is compounded by the fact that the 1st respondent was looking for immediate financing for a contract. This desperate situation presented a significant risk that the applicant would take steps that are wrong to obtain consent.

5.9. They also argued that since the 1st respondent is the father to the 4th to 7th respondents, an obligation arose on the part of the applicant to explain to the sureties on the effects, implications and consequences of execution of 3rd party mortgages and guarantees and to seek independent legal advice to help them understand the nature of their commitment. They argued that the absence of evidence showing that the applicant advised the 3rd to 7th respondents to seek independent legal counsel demonstrates a failure to discharge the legal obligation arising as a consequence of the relationship between the 1st respondent and the 3rd to 7th respondents. In support of this position, they relied on the cases of Pulse Financial Services Limited (T/A Entrepreneurs Financial Centre) v. Elaine Munga and 2 Others⁽¹¹⁾ and Intermarket Banking Corporation Zambia Limited v. Priscilla Kasonde.⁽¹⁰⁾

5.10. Mr. Ngoma and Mr. Chibolela added that the security is rendered unenforceable as a consequence of failing to explain its effect and implications to the sureties.

6.0. THE APPLICANT'S REPLY TO THE RESPONDENTS' OPPOSITIONS

- 6.1. In the affidavit of 25th March, 2024, James Sakala, a Credit Manager in the applicant bank, deposed that it is a misconception for the 3rd to 7th respondents to turn around at this stage and claim that they neither had knowledge of the documents they executed nor what they mean when they were fully aware of the implications and consequences of executing the security documents.
- 6.2. In the affidavit in reply of 28th March, 2024, sworn by Chisanga Malasa, it was revealed that placing of the loan in non-accrual status did not suspend the 1st respondent's obligations. Further, that the family meetings and the relationship amongst the respondents cannot in anyway be attributed to the applicant. That the 3rd to 7th respondents all executed 3rd party acknowledgements and undertakings attached to the facility letter on record confirming and agreeing to the use of Stand No. 24408, Lusaka as security for the credit facility availed to the 1st respondent. Further, that they confirmed that the transaction contemplated in the facility letter was for the benefit of the trust and its beneficiaries. It was his position that they gave the undertakings voluntarily and intending to be legally bound without any duress, incentive or undue influence. He

averred that the 2nd to 7th respondents all signed letters of consent indicating their willingness to use the subject property as security for purposes of the 1st respondent obtaining a credit facility from the applicant.

6.3. In the skeleton arguments, counsel added that the respondents are no strangers to mortgages as they had previously pledged the same property to Ecobank Zambia Limited, Intermarket Banking Cooperation and Finance Building Society. She submitted that the respondents are knowledgeable on the effect and implications of mortgages having executed similar documents before. To support her position, counsel placed reliance on the case of African Banking Corporation Limited (T/A Bank Abc) v. Plinth Technical Works Limited and 5 Others.⁽¹²⁾

6.4. Counsel also referred me to various authorities on contract law and the state of non-performing loans as follows:

1. Cheshire, Fifoot and Furmstone's Law of Contract, 13th edition, Butterworths (1996) at page 29;
2. Chitty on Contracts, Vol. 1, 26th edition, paragraph 772;
3. Angel Musonda v. Pulse Financial Services,⁽¹³⁾
4. L'Estrange v. Graucob;⁽¹⁴⁾
5. North West Leicester District Council v. East Midlands Housing Association;⁽¹⁵⁾
6. Wilton v. Farnworth;⁽¹⁶⁾
7. Catherine Elliot and Frances Quinn: Contract Law;
8. Curtis v. Chemical Cleaning and Dyeing Co.⁽¹⁷⁾
9. Tijem Enterprises Limited v. Children International Zambia Limited;⁽¹⁸⁾

10. The Banking and Financial Services (Classification and Provisioning of Loans) Directives 2020;
11. Indo Zambia Bank Limited v. Leonard Witika & Others;⁽¹⁹⁾
12. Credit Africa Bank v. George K Kalunga and Terry Simwanza;⁽²⁰⁾
and
13. Credit Africa Bank Limited (In Liquidation) v. John Dingani Mudenda.⁽²¹⁾

- 6.5. She argued that the parties are bound by the contract. That a bank can charge interest if there is an agreement between the bank and the customer or there is evidence of acquiescence. She argued that the 1st respondent is contractually bound to pay interest as placing a loan in non-accrual status does not suspend the obligations under the contract.
- 6.6. In relation to the 3rd to 7th respondents, she argued that it is clear that a person is bound by what he or she signs and the fact that he or she does not understand its contents is not a vitiating factor capable of releasing the signatories from liability that arises as a consequence. She relied on the case of L'Estrange v. F Graucob⁽¹⁴⁾ to support her position.
- 6.7. That a party can only be relieved of the duties in a contract when there has been misrepresentation, fraud or some other special circumstances. Their failure to read and understand the terms of the facility letter, consent letter and agreements as to undertake personal guarantees of the debt is negligence on their

own part. In this regard, she referred me to the cases of Curtis v. Chemical Cleaning and Dyeing Co⁽¹⁷⁾ and Wilton v. Farnworth.⁽¹⁶⁾

7.0. CONSIDERATIONS, FINDINGS AND CONCLUSION

7.1. I have considered the originating summons, the parties' affidavits, skeleton arguments and authorities cited.

7.2. From the affidavits, the following issues are not in dispute:

1. the 1st respondent procured a short-term revolving loan facility from the applicant company amounting to ZMW180,000 and a further facility amounting to ZMW40,000.00.
2. a facility letter, third-party mortgage and further charge relating to Stand No. 24408, Lusaka were executed by the 1st and 2nd respondents and the applicant and registered at Ministry of Lands to secure the applicant's interest.
3. the 3rd to 7th respondents executed letters of consent and personal guarantees.

7.3. What is in dispute is whether the applicant can enforce the terms of the facility following the default by the 1st respondent to fulfil his obligations towards the applicant.

7.4. As a starting point, the 1st respondent did not dispute his indebtedness. However, he argued that the applicant is not entitled to charge interest on a non-performing loan. He placed reliance on **Section 110 of Banking and Financial Services Act, No. 7 of 2017** which states that-

“110 (1) A financial service provider shall recover the following amounts from a borrower on a non-performing credit facility:

a) the principal amount owing when the credit facility becomes non-performing;

b) any interest in arrears due in accordance with credit facility agreement but not exceeding the principal amount owing when the loan becomes non-performing; and

c) expenses incurred in the recovery of amount owed by the borrower;

(2) This section does not apply to interest awarded in terms of a Court order or judgment and accruing after the making of the order or judgment.” [underlining for emphasis only]

7.5. A non-performing loan is defined by the **Banking and Financial Services Act** in the following terms:

“nonperforming loan means a loan in respect of which payment of principal or interest is in arrears for more than ninety days.”

7.6. The aspect of application of interest on a non performing loan has previously been adjudicated upon by the Supreme Court. In the case of **Credit Africa Bank Limited v. Kalunga & Another**⁽²⁰⁾ the Supreme Court held that the placing of a loan on non-accrual status does not suspend the legal obligations under the loan agreement. The principle was repeated by the same Court in **Indo Zambia Bank Limited v. Leonard Mwelwa Witika, Doris Mwelwa and Suriah Mwanza**,⁽¹⁹⁾ where the Court held as follows:

“In terms of Statutory Instrument No. 142 of 1996, the fact that the 1st respondent’s debt had been put in a non-performing or non-accrual status did not suspend his obligation to pay interest under the loan agreement. The Statutory Instrument was never intended to be a magic wand in the hands of defaulting litigants that would encourage customers of banks to deliberately default so that they did not pay interest.”

7.7. From the aforementioned cases, it is clear that the applicant is within its rights to charge interest on a non-performing loan according to the terms of the agreement for as long as it does not exceed the principal amount owing when the loan becomes non-performing.

7.8. In relation to the 3rd to 7th respondents, it was their position that the personal guarantees they signed cannot be enforced as they were unaware of the implications of the documents they were made to sign by the 1st respondent. They argued that the 1st respondent appeared desperate for funding and they placed their trust in him when signing the documents and did not know what they were signing. Counsel for the 2nd to 7th respondents argued that the 1st respondent exerted undue influence on the 3rd to 7th respondents. That the failure by the applicant to advise them to seek independent legal advice renders the security unenforceable.

7.9. The learned authors of **Halsbury’s Laws of England, Volume 76 at paragraph 848**, say the following on undue influence:

“848. Onus on person benefited. In cases where a confidential relationship such as will raise the presumption of undue influence is claimed to have existed, the party seeking relief does not have to prove that actual fraud or coercion, or even direct persuasion, was employed; he has merely to prove the existence of the relationship and that the transaction is one that calls for explanation, and then the onus falls on the person benefited by the transaction proving that the power conferred by the relationship was not abused. To discharge that onus it must be shown not merely that the person liable to be influenced knew what he was doing but also that he entered into the transaction only as a result of an independent and informed judgment, or alternatively only after full, free and informed thought about it...”

7.10. In this matter, the 3rd respondent is the wife to the 1st respondent whilst the 4th to 7th respondents are his children. I have perused the letter of consent exhibited as **“SKMYL 4”** signed by the 3rd to 7th respondents. It is in the following terms:

“RE: LETTER OF CONSENT

Reference is made to the above mentioned subject matter.

We the undersigned directors of Kadaba Trust Foundation Limited write to consent that MUMENA ENTERPRISES use the title deed of stand number 24408 in Lusaka Province as security for the purpose of obtaining a loan facility amounting to ZMW180,000.00 to be used for transportation and customs clearing costs of goods that have docked in the port of Dar-es-Salaam in Tanzania as they execute contract number MOD/MPC/ZAF/006-21 dated 22nd February, 2021 for THE SUPPLY AND DELIVERY OF OFFICE FURNITURE with MINISTRY OF DEFENCE.

Your consideration in this matter will be highly appreciated.

Yours for and on behalf of Kadaba Trust Foundation...”

7.11. Further, the facility letter signed as exhibit “**SKMYL2**” has a portion titled “Third Party Acknowledgments and Undertakings” and it is signed by the 3rd to 7th respondents. It says that-

“Third Party Acknowledgements and Undertakings

We, the trustees and the beneficiaries of the Kadaba Trust Foundation Limited who is the third party security provider(s) hereby confirm the Facility Letter dated on or about 13th January, 2022. We further confirm that we have read the contents of this Facility Letter and fully acknowledge and understand the contents thereof and in consideration of the Bank agreeing to make the facility available to the Borrower, we:

1. Acknowledge, understand, confirm and agree that our Security (being Stand No. 24408, Lusaka) will be security for this Facility Letter and that this Facility Letter may be amended, varied, replaced or supplemented from time to time without further notice to or acknowledgment from ourselves and in particular that the rate or rates of interest (including the default rate or rates) referred to in the Facility Letter and the methods of calculation thereof may change from time to time;
2. Confirm that we verily believe the transaction contemplated in the Facility Letter is to the benefit of the Trust and its beneficiaries; and
3. Confirm that we have given the undertakings set out above voluntarily and intending to be legally bound without any duress, incentive, or undue influence whatsoever.”
[underlining for emphasis only]

7.12. The above letter of consent was signed by each of the 3rd to 7th respondents, as directors and trustees of the 2nd respondent, a company limited by guarantee. They signed the letter in their capacity as directors and trustees and not as owners of the property. The property in actual fact belonged to the 2nd respondent. I find it difficult to believe that the 3rd to 7th respondents did not, at any particular point, read the contents of the letters of consent considering they did this as part of the business of the company and not in their personal capacities.

7.13. In addition, none of the respondents have alleged fraud or misrepresentation on the part of the 1st respondent. If anything, he explained to them as evidenced by their affidavit in opposition that he required financing for a contract he desired to fulfil. I reject the 3rd to 7th respondent's assertion that they did not read a 7-line letter of consent.

7.14. My views above apply as regards the Third Party Acknowledgments and Undertakings. This document clearly states that the 3rd to 7th respondents fully acknowledged and understood the contents. They added that the transaction contemplated in the facility letter was to the benefit of the Trust and its beneficiaries. Further, that the undertaking was made voluntarily.

7.15. I must add that the 3rd to 7th respondents are adults and directors and trustees in a company. Even if the 1st respondent is their husband and father, respectively, there is no evidence that he exerted undue influence on them as directors and trustees. Counsel argued that this relationship falls within the category of relationships founded on reposed trust and confidence as the children have placed financial matters in the hands of the 1st respondent from birth. He relied heavily on the case of **Barclays Bank Plc v. O'Brian and Another**.⁽⁷⁾ In that case, the Court dealt with a case in which the bank brought possession proceedings against the husband and the wife to enforce payment under the guarantee secured by a second charge over their matrimonial home which was signed by both husband and wife.

7.16. I have noted that the **Barclays** case⁽⁷⁾ cited above mainly dealt with the relationship between husband and wife. In the **Barclays** case, the property in issue was matrimonial property while in the present case, the property belongs to a company limited by guarantee. Additionally, the 3rd to 7th respondents signed as either directors or trustees or both in the 2nd respondent.

7.17. In my view, this relationship is outside the personal relationship of wife or children. Considering the above and my discussion above, I am of the view that the 3rd to 7th respondents signed the documents from an independent and informed judgment.

7.18. In fact, there is evidence from the Certificate of Title and print out from the Ministry of Lands, exhibits “**CM3**” and “**CM6**”, respectively, that the 3rd to 7th respondents are no strangers to mortgages as they have previously pledged the same property, via third party mortgages, to Ecobank Zambia Limited, Intermarket Banking Corporation as well as Finance Building Society and as such they needed no elaboration of the documents they signed. I agree with counsel for the applicant when he cited African Banking Corporation Limited (T/A Bank Abc) v. Plinth Technical Works Limited and 5 Others⁽¹²⁾ in this regard. In that case, the Supreme Court put it this way-

“From this evidence, and even if there was no evidence that the appellant had advised the 2nd respondent to seek independent legal advice, it is discernible that the 2nd respondent is an adult of full capacity who is well educated, and who is highly literate and well exposed, having executed similar contracts or mortgages with the appellant bank previously. The 2nd respondent may not have benefitted from pledging his property as security, but he signed the mortgage deed voluntarily and willingly and without any pressure from the appellant or his uncle and, he cannot be

heard to argue that the appellant did not ensure that his consent to execute the mortgage was obtained without undue influence.”

7.19. As noted above, the 3rd to 7th respondents are adults who are directors and trustees in the 2nd respondent. I have no doubt that having offered the same property as security via third party mortgages thrice before, they are aware of the risks of mortgaging a property and understand its implications. Further, no evidence of fraud or misrepresentation was adduced by them. I am therefore of the view that the 3rd to 7th respondents were aware of the effects of their actions and signed the letters of consent and undertaking freely and voluntarily. I have also ruled out the possibility of undue influence as a result. I, therefore, dismiss the 3rd to 7th respondents’ contention in this regard. I find that there was no undue influence and that they understood the implications of offering the subject property as security for the loan obtained by the 1st respondent.

7.20. Having stated the above, I will discuss the remedies available to a mortgagee. The remedies available to a mortgagee were outlined as follows in the case of Reeves Malambo v. PATCO Agro Industries Limited⁽⁵⁾ that-

“...the mortgagee was at liberty to exercise his right to foreclose and sell the property in the event of default and failure by the mortgagor to redeem the mortgaged property.”

7.21. In the case of Lackson Mwabi Mwanza v. Sangwa Simpasa, Chisha Lawrence Simpasa⁽³⁾ the Court put them this way-

“The following remedies are available for enforcing a legal mortgage:

- (a) **The right of foreclosure** – a legal mortgagee has the right to foreclose. Foreclosure is the name given to the process whereby the mortgagor’s equitable right to redeem is declared by the Court to be extinguished and the mortgagee is left as owner of the property both at law and in equity. An order of the Court is essential for a foreclosure.
- (b) **The right of sell** – Formerly a mortgagee’s power of sale depended upon an express power being inserted in the mortgage. But subject to any contrary intention in the mortgage a statutory power of sale is now implied in all mortgages made after 1881 by deed...
- (c) **The right to take possession-** Since a legal mortgage gives the mortgagee a legal estate in possession he is entitled subject to any agreement to the contrary, to take possession of the mortgaged property, as soon as the mortgage is made, even if a mortgagor is guilty of no default...
- (d) **The right to appoint a receiver** – In order to avoid the responsibilities of taking possession and yet achieve substantially the same result, well drawn mortgages provide for the appointment of a receiver with extensive powers of management of the mortgaged property...”

7.22. It is therefore clear that an applicant is entitled to an order for foreclosure, delivery, possession and sale of the mortgaged property in the event of default. The Court also pointed out that the remedies are cumulative as espoused in the Mwanza v. Simpasa⁽³⁾ case.

7.23. In the case herein, it is not in dispute that the 1st respondent has defaulted on his loan obligations to the applicant company. It is also not in dispute that the aforementioned loan was secured by a third-party mortgage executed over Stand 24408, Lusaka between the applicant and 1st and 2nd respondents and the personal guarantees made by the 3rd to 7th respondents. I have also considered the loan statements exhibited as “**CM8**” and “**CM9**” to the affidavits in support. I note further that there is no dispute as regards the application of interest on the loan statements.

7.24. Having dismissed the respondents’ arguments above, I find that the applicant has proved its case on a balance of probabilities. I accordingly enter judgment in its favour for the sum claimed of ZMW361,134.44 as at 6th February, 2024. I order that the said Judgment sum shall carry interest at the contractually agreed rate of 28.5% per annum from date of the originating

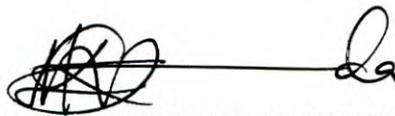
summons to date of this Judgment and thereafter at the current Bank of Zambia Policy Rate until full payment.

7.25. Considering a mortgagor's right to redemption, I order that the Judgment sum plus interest be paid within 90 days from today failing which the applicant will be at liberty to foreclose, possess and sell the mortgaged property being Stand No 24408, Lusaka.

7.26. I further order that should the sale of the mortgaged asset not fulfil the Judgment sum plus interest due and owing, the applicant will be at liberty to enforce the personal guarantees by the 3rd to 7th respondents.

7.27. I award costs to the Applicant to be taxed in default of agreement.

Delivered at Lusaka this 16th day of April, 2024.



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K. E. Mwenda-Zimba
HIGH COURT JUDGE