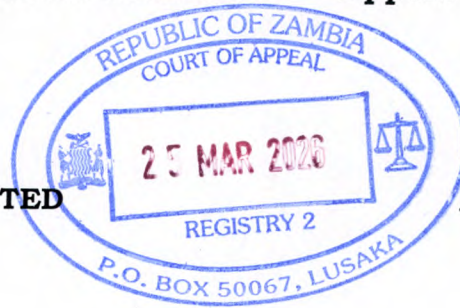


**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT NDOLA
(Civil Jurisdiction)**

Appeal No. 322/2024

BETWEEN

FIRST CAPITAL BANK LIMITED



APPELLANT

AND

NETWORLD LOGISTICS LIMITED

1ST RESPONDENT

BRYAN SIKALUBYA PHIRI (Sued in capacity

Principal debtor and/or primary obligator)

2ND RESPONDENT

LYSIANNE CHABU LOMBE

(Sued debtor and/or primary obligator)

3RD RESPONDENT

CORAM: Siavwapa JP, Chishimba and Patel, JJA

On 17th and 25th March 2026

For the Appellant: Mr. K. Wishimanga of Messrs AMW Legal Practitioners

For the 1st Respondent: Mr. C. Makanda and Mr. C.E Daka of MLS Legal Practitioners

For the 2nd and 3rd Respondent: No Appearance

JUDGMENT

Chishimba JA, delivered the Judgment of the Court.

CASES REFERRED TO:

- 1. Kasabi Industries Limited v Intermarket Banking Corporation Limited (SCZ Appeal No. 168 of 2009)**
- 2. Y.B and F Transport v Supersonic Motors Limited (2000) Z.R. 22**
- 3. Mutale v Zambia Consolidated Copper Mines Limited (SCZ No.12 of 1994)**

4. **Kuta Chambers (Sued as a Firm) v Concillia Sibulo Selected Judgment No.36 of 2012.**
5. **Magic Carpet Travel and Tours v Zambia National Commercial Bank (1998/HP/2036)**
6. **Cavmont Bank Zambia Limited v Cereal Millers and Farms Limited and Others (CAZ Appeal No. 277 of 2021)**
7. **Great Lenders Services Ltd and Others v Indo Zambia Bank (CAZ Appeal 219 of 2020)**
8. **Cosmos Co-operative Bank Ltd v. Central Bank of India (Civil Appeal No. 1565 of 2025)**

OTHER WORKS

1. **Harpum, Stuart Bridge and Martin Dixon, the learned Authors of Megarry and Wade: The law of Real Property (7th Edition) (London, Sweet and Maxwell 2008**
2. **John Mc Ghee, Snells Equity, (31st Edition) (Thomson Reuters (Legal) Limited 2005)**
3. **Halsbury Laws of England, 4th Volume 32**
4. **Fisher and Lightwood's Law of Mortgages (3rd Edition) at paragraphs 1.17, 1.18 and 1.20**

1.0 INTRODUCTION

- 1.1 This appeal is against the part of the Judgment delivered by Hon. Mr. Justice K. Chenda on 13th July, 2024. The Court below found that the third-party mortgage was void for want of registration and refused to order foreclosure of the property in issue. The appeal deals with the creation of an equitable mortgage where the formalities required at law to create a legal mortgage fail, and how equity treats the transaction. The appeal also addresses whether an equitable mortgage can be

created only by the deposit of title deeds or a memorandum of deposit of title deeds.

2.0 BACKGROUND

2.1 The Appellant, by a Banking Credit Facility Offer Letter dated 2nd February, 2023, advanced a loan facility in the sum of USD500,000 to the 1st Respondent. The facility was granted for the purpose of financing the purchase of trucks and trailers intended for the 1st Respondent's transport business. The facility was secured by various instruments, including a debenture over the movable assets of the 1st Respondent, personal guarantees executed by the 2nd and 3rd Respondents, and mortgages over certain immovable properties.

2.2 The 1st Respondent subsequently defaulted in the repayment of the disbursed loan facility. This resulted in the Appellant commencing proceedings in the Court below against the Respondents seeking the following relief:

(i) Payment by the 1st Respondent of all sums due and owing under the Banking Facility Letter dated 2nd February 2023 which currently stands at USD510, 224.65 and all continuing interest thereto. The aforesaid sums respectively comprise of:

- a) The sum of USD454,052.21 being the principal amount owing as of 10th May, 2024; and
 - b) The sum of USD56, 172.44 being the interest outstanding as of 10th May, 2024.
- (ii) An order that the Debenture be enforced by delivery and subsequent sale of the Assets under the Banking Facility letter, the Debenture and Financing Statements namely:
- a) Shackman Truck Registration Number BCF 5650ZM;
 - b) FAW Horse Registration Number BCF 3589ZM;
 - c) FAW Horse Registration BCF 3588 ZM;
 - d) FAW Horse Registration BCF 3922 ZM;
 - e) FAW Horse Registration BCF 3923 ZM;
 - f) Trailer Registration Number BCF 6077 ZM;
 - g) Trailer Registration Number BCF 6079 ZM;
 - h) Trailer Registration Number BCF 6075 ZM;
 - i) Trailer Registration Number BCF 6081 ZM; and
 - j) Trailer Registration Number BCF 5491 ZM;
- (iii) Payment by the 2nd and 3rd Respondent of the sums guaranteed under the Personal Guarantees;
- (iv) An Order for the enforcement of the Third-Party Legal Mortgage in respect of Subdivision 311 of Subdivision B of Farm 378a;
- (v) An order for the foreclosure and sale of the Property known as Subdivision 311 of Subdivision B of Farm 378a (referred to as "the Property");
- (vi) An Order for delivery of the Property by the Respondents or any person holding such possession to the Applicant;
- (vii) An order the foreclosure of the property known as Subdivision 4 of Subdivision Y3 of Farm 748;
- (viii) An order that the property known as Subdivision 4 of Subdivision Y3 of Farm 748 be conveyed to the Appellant;

(ix) An Order for recovery of all fees and charges incurred and to be incurred by the Appellant in enforcing the security herein;

(x) An order for costs pursuant to Order 88/5/17 of the Rules of the Supreme Court of England 1999 Edition;

(xi) Further or other relief that the Court may deem fit.

3.0 DECISION OF THE COURT BELOW

3.1 Upon consideration of the facts and evidence before it, the Court below found that the 1st Respondent had obtained a loan facility from the Appellant under the Banking Credit Facility Offer Letter dated 2nd February, 2023 and that the facility had been disbursed. The Court further found that the 1st Respondent had defaulted in meeting its repayment obligations under the facility agreement. On that basis, it entered judgment in favour of the Appellant for the sum of USD 510,224.65 as at 10th May, 2024, together with interest from 10th May, 2024 until the date of judgment and thereafter at the Secured Overnight Financing Rate (SOFR) until payment in full.

3.2 The Court ordered that the 1st Respondent should settle the judgment sum within 150 days, failing which the Appellant would be at liberty to enforce the registered third-party legal

mortgage over Subdivision 311 of Subdivision B of Farm No. 378a by taking possession, foreclosing and selling the property. The Court further ordered that if there remained any shortfall after realisation of that security, the 2nd and 3rd Respondents would be liable under the personal guarantees to satisfy the outstanding balance.

3.3 In respect of the order sought for enforcement of the Debenture by delivery and subsequent sale of assets, the Court held that the Appellant had not registered an enforcement notice in respect of the movable assets secured under the debenture and financing statement. The Court found that the Appellant's claim to enforce its rights over the trucks and trailers was prematurely brought before the Court.

3.4 The Court also addressed the reliefs sought under (vii) and (viii), the alleged third-party mortgage over Subdivision 4 of Subdivision Y3 of Farm No. 748. The learned trial judge held that the said mortgage had not been registered under the Lands and Deeds Registry Act and was therefore void for want of registration. The Court further held that there was no

evidence that the certificate of title had been deposited with the Appellant so as to create an equitable mortgage. The Court below declined to recognise or enforce any security over that property.

4.0 GROUND OF APPEAL

4.1 Aggrieved by the decision of the Court below holding that the third-party mortgage over property known as subdivision 4 of Subdivision Y3 of Farm 748 was void for want of registration, the Appellant launched an appeal raising the following ground:

- 1. The Court erred in law and in fact when it refused to find that an equitable mortgage over property known as subdivision 4 of Subdivision Y3 of Farm 748 was created in favour of the Appellant contrary to the evidence on the record.**

5.0 APPELLANT'S HEADS OF ARGUMENT

5.1 The Appellant filed its Heads of Argument on 12th November, 2024, in support of the sole ground of appeal. The gist of its argument was that the learned trial judge erred in law and in fact when it failed to find that an equitable mortgage had been created over the property known as Subdivision 4 of Subdivision Y3 of Farm 748 in favour of the Appellant.

5.2 The Appellant structured its arguments around four principal issues, namely:

- (i) the nature and form of an equitable mortgage;
- (ii) whether the unregistered third-party mortgage created a mortgage over the property;
- (iii) whether the Appellant was entitled to enforce that mortgage; and
- (iv) whether the Appellant was entitled to costs.

5.3 Regarding the nature and form of an equitable mortgage, the Appellant referred to the learned authors of **Megarry and Wade: The Law of Real Property (7th Edition)** where a mortgage is described as a conveyance of a legal or equitable interest in property subject to a proviso for redemption upon repayment of the debt.

5.4 Reliance was also placed on **Snell's Equity (31st Edition)**, where a mortgage is defined as a conveyance of an interest in property given as security for the payment of a debt. In particular, where a transaction fails to create a legal mortgage due to a defect in formality, equity may nevertheless treat the transaction as creating an equitable mortgage on the basis that equity regards as done that which ought to be done.

- 5.5 Reference was also made to **Halsbury's Laws of England (4th Edition)**, which describes an equitable mortgage as a contract creating a charge on property without transferring a legal estate, but which is nonetheless enforceable in equity.
- 5.6 Further, according to **Fisher and Lightwood's Law of Mortgages (3rd Edition)**, whether a transaction constitutes an equitable mortgage depends upon the intention of the parties ascertained from their conduct and surrounding circumstances. It was submitted that a document that fails to create a legal mortgage due to lack of formality may nonetheless operate as an equitable mortgage.
- 5.7 Relying on these authorities, the Appellant submitted that the absence of registration or deposit of title deeds does not necessarily negate the existence of an equitable mortgage since such a mortgage may arise wherever the parties demonstrate an intention to create security over property.
- 5.8 Regarding whether the unregistered mortgage created a third-party mortgage over the property, the Appellant submitted that it was common cause that the 1st and 2nd Respondents executed a third-party mortgage over the

property in favour of the Appellant. The property in issue had not yet been transferred into the name of the 2nd Respondent at the time the mortgage was executed.

5.9 The Appellant argued that the Respondents had undertaken to complete the conveyance of the property from ZSIC Life Plc and thereafter provide the title deed so that the Appellant could perfect its security. Reference was made to correspondence from the Respondents' advocates confirming that once title was issued, the same would be forwarded to the Appellant to enable it to perfect its security over the property.

5.10 According to the Appellant, the conduct of the parties demonstrated a clear intention to create a charge over the property. That the court below therefore erred in adopting a narrow approach by concluding that no equitable mortgage existed merely because the mortgage was not registered and the title deed had not been deposited. It was further contended that a transaction that has the intent but not the form of a mortgage, the Court of equity will treat as a mortgage.

- 5.11 In support of this submission, the Appellant referred to Black's Law Dictionary page 1102, where the learned authors state that in applying the doctrine of equitable mortgages, doubts should ordinarily be resolved in favour of the transaction being treated as a mortgage. Therefore, the Court below ought to have held that an equitable mortgage was created.
- 5.12 It was therefore contended that the unregistered third-party mortgage, together with the surrounding documentation, demonstrated the parties' intention to create security over the property.
- 5.13 As to whether the appellant was entitled to enforce the equitable Third-Party Mortgage against the property, it was contended that once it is established that an equitable mortgage existed, the Appellant was entitled to enforce the same. The Court below had already found that the 1st Respondent was indebted to the Appellant and had defaulted in its repayment obligations under the Banking Facility Letter.

- 5.14 The Appellant's position was that the 1st Respondent's default entitled it to enforce the equitable mortgage created by virtue of the unregistered Third-Party Mortgage by way of foreclosure. In this regard reliance was placed on **Kasabi Industries Limited v Intermarket Banking Corporation Limited**⁽¹⁾, where it was held that although an equitable mortgagee does not have a power of sale, the mortgagee may obtain a court order for foreclosure, which extinguishes the mortgagor's right of redemption and results in the property being conveyed to the mortgagee.
- 5.15 The Court was therefore urged to hold that the Appellant was entitled to enforce by way of foreclosure, the equitable mortgage created by the unregistered Third-Party Legal Mortgage.
- 5.16 The Appellant also sought costs on the general principle that costs follow the event. In support of this proposition counsel referred to the cases of **Y.B and F Transport v Supersonic Motors Limited**⁽²⁾, **Mutale v Zambia Consolidated Copper Mines Limited**⁽³⁾ and **Kuta Chambers (Sued as a Firm) v Concillia Sibulo**⁽⁴⁾, where the courts affirmed the principle

that a successful party should ordinarily be awarded costs unless there are good reasons to depart from that rule. Therefore, the appeal should be allowed with costs to the Appellant.

6.0 RESPONDENTS' HEADS OF ARGUMENT

6.1 The Heads of Argument by the Respondent were expunged from the record on account of not having been served on the Appellant.

7.0 AT THE HEARING

7.1 The Appellant relied on the Heads of Argument on record. We asked the learned Counsel to address the Court on whether evidence was adduced regarding the intention of the parties to create an equitable mortgage to warrant a foreclosure order. The learned Counsel drew our attention to pages 84 to 94 of the record of appeal i.e. the Third-Party Mortgage. The email at page 96 and the letter from Messrs Magubbwi and Associates at pages 166 to 167.

8.0 ANALYSIS AND DECISION OF THE COURT

8.1 We have considered the appeal, the authorities and the arguments by the Appellant as well as the Judgment of the

Court below. The facts in this appeal are as stated in paragraphs 2.1 and 2.2, which we shall not rehash. The Appellant is not assailing the entire judgment. It primarily challenges the decision of the Court below, holding that there was no evidence of the deposit of the certificate of title in respect of the property known as Subdivision 4 of Subdivision Y3 of Farm 748 so as to create an equitable mortgage.

- 8.2 The central issue for determination is whether the Court was on firm ground to have found that there was insufficient evidence to show that an equitable mortgage was created over the property in question. An equitable mortgage is a contract; essentially, a security enforceable under the equitable jurisdiction of the court. It does not convey any legal estate or interest to the mortgagee/creditor. A deposit of title deeds, for the purpose of securing a debt advanced at the time of the deposit, operates as an equitable mortgage. The lender acquires an equitable interest in the property itself. We refer to the case of **Magic Carpet Travel and Tours v Zambia National Commercial Bank**⁽⁵⁾ as authority that an equitable

mortgage is created by the surrender of title deeds to the lender as security for repayment of a loan.

8.3 We reiterated this position in **Cavmont Bank Zambia Limited v Cereal Millers and Farms Limited**⁽⁶⁾. Further, as per authority cited by the Appellant, i.e. Snell's Equity, where a transaction fails to create a legal mortgage because the formalities required at law have not been satisfied or are insufficient for the transfer of a legal interest, equity may nonetheless treat the transaction as creating an equitable mortgage on the basis that equity regards as done that which ought to be done. It is therefore settled that an equitable mortgage may arise where the conduct of the parties demonstrates an intention to create security over property, even though the transaction may fall short of the formal requirements necessary to create a legal mortgage.

8.4 In the case of **Great Lenders Services Ltd and Others v Indo Zambia Bank**⁽⁷⁾, we noted the common law principle that an equitable mortgage can be created by either depositing title deeds or by an agreement to create a mortgage. We went on to opine as follows:

“In casu the legal mortgages were clearly null and void for want of registration and the only way for the said deeds to be given efficacy was for the applicant to obtain leave of the court to file them out of time. This was not done.

However, even though the legal mortgage deeds were void for non-registration, the facts reveal that the title deeds securing the loan facilities are in the possession of the Respondent Bank. It goes without saying that the manner in which the bank came into possession of the title deeds was for purposes of creating a mortgage. In this regard, we are inclined to agree with the Respondent’s submission that there are still equitable mortgages on the two pieces of land.

The lower Court was therefore entitled to proceed to hear the matter under Order 30 Rule 14 HCR which provides for both legal and equitable mortgages.”

8.5 In the present case, it is not disputed that at the time the Third-Party Mortgage was executed, the property had not yet been registered in the name of the 2nd Respondent. The evidence adduced on record in the lower Court is that the Third - Party Mortgage between the 2nd Respondent and the Appellant at pages 84 to 94 of the record was duly executed by the parties, save that it was not registered. Cardinal is the email at page 96 of the Record of Appeal from the 2nd Respondent’s Advocates Messrs Magubbwi, authored by Mr.

Chimuka Magubbwi, addressed to the Appellant's advocates.

The email is dated 29th January, 2024 and reads as follows:

“As per our tele conversation of today, I hereby confirm that ZSIC has forwarded all documents requisite for transferring title to Bryan Sikalubya Phiri and we are immediately proceeding with registration thereof. Once the title deed is procured in our clients' names, we shall forward the same to yourselves for you to perfect your security over the subject property. Be accordingly informed and assured.”

8.6 The contract of sale of the property subject of the Third - Party mortgage appears at page 155 of the Record of Appeal between ZSIC Life PLC and the 2nd Respondent. There was also adduced at page 195, a letter dated 27th November, 2023 from Messrs Magubbwi and Associates to the Appellant, on the subject matter, i.e. the purchase of subdivision number 4 of subdivision Y3 of Farm number 748 Kansenshi Ndola. The letter advised of the payment of the full purchase price to ZSIC Life PLC.

8.7 Messrs Maggubwi, under paragraph 5 of the said letter, wrote as follows:

“At this point, we are instructed to make an undertaking that as soon as the title deed is processed and issued in our client's names, we shall facilitate creation and registration of a charge

upon the property in favour of your bank in respect of the facility availed to our client.”

8.8 We had earlier alluded to the principle of law that an equitable mortgage can be created when parties intend to secure a debt by using property as security, but fail to complete the formal legal requirement. There must be an intent by the lender and borrower to create a mortgage as security for the loan. The Court, at this point, looks to the intention of the parties rather than the form of the document.

8.9 We are agreed that the effect of the unregistered Third-Party Mortgage is that it is void for want of registration. The issue does not end here. The Appellant's position is that, notwithstanding the failure of the Third-Party Mortgage for want of registration, the conduct of the lender, borrower and the 2nd Respondent, including the undertaking given in respect of the property, demonstrates an intention to create an equitable mortgage.

8.10 In our view, from the evidence adduced and the circumstances of this case, there was an equitable mortgage created. The intention of the parties was to create a third-

party equitable mortgage by deposit of certificate of title. It is trite that equity regards as done that which ought to be done. The 2nd Respondent agreed to create a mortgage on the property that was in the process of being conveyed into his name. Evidence was adduced to that effect. We refer to the emails and undertaking by the lawyers for the 2nd Respondent as well as the Third-Party Mortgage.

8.11 We also refer to a recent decision of the Supreme Court of India in the case of **Cosmos Co-operative Bank Ltd v Central Bank of India**⁽⁸⁾, which is of persuasive value which gave clarity on the distinction between a legal mortgage and an equitable mortgage. The Court in that case stated thus:

“...there may be instances where parties agree to mortgage a property as security, but no formal charge or conveyance of any proprietary interest in the said property has taken place, still the same may be recognised as a mortgage. This is popularly understood as an ‘equitable mortgage’ where although under the law the formalities required for creating a legal charge or mortgage over a property are patently absent, yet the said property would be in equity deemed to have been mortgaged and as such may be apportioned or appropriated by the lender on the strength of mere intention of the parties to create a mortgage. In other words, where under the law no mortgage or charge is said to have been

created over a property i.e., no conveyance of a right or interest over the subject property has been effected, yet if the intention of parties to create a mortgage is clear, equity would demand that such intention is not only respected but given some effect to and the said property be deemed to have been mortgaged so as to enable the lender to assert its rights over the same, it is known as an 'equitable mortgage'.

...

34. The aforesaid may be better understood through the well-known maxim of '*Quod fieri debuit pro facto censetur*' which means that 'what ought to have been done is considered as done'.

...

40. In fact, the English Courts have gone to the extent of saying that the title deeds are not the only documents a deposit of which may create an equitable charge upon the subject property, and that even a promissory note or an agreement for purchase of the subject property can create an equitable mortgage..."

8.12 We have set out the relevant portions of the above authority as they bear directly on the issues arising in the present appeal. The above decision reinforces the Appellant's contention that, at common law, an equitable mortgage is traditionally created through the deposit of title deeds or by the parties having an intention to create a mortgage.

8.13 In that regard, an equitable mortgage may arise where the conduct of the parties demonstrates a clear intention to

create or perfect a security over property, notwithstanding the failure to deposit a certificate of title.

8.14 Put differently, there are other means by which an equitable mortgage may be created aside from the depositing of title deeds (memorandum of deposit of deeds). It can be created where a formal mortgage (legal mortgage) intended to be legal fails to meet the legal formalities on ground such as failure to register it. Further, an equitable mortgage may be created, with regard to future acquired property, where, for example, there is a contract of sale and an intention to create an equitable mortgage is shown. We hold that an equitable mortgage was created in respect of the property in issue, in the circumstances of this case.

8.15 For the foregoing reason, we find merit in the appeal and hold that the lower Court erred by dismissing the relief sought for an order for foreclosure and conveyance of subdivision 4 of subdivision Y3 of Farm 748 to the Appellant. We set aside the said decision of the lower Court to that effect and substitute it with an order for foreclosure and conveyance of the above mentioned property to the Appellant.

9.0 CONCLUSION

The appeal has merit. We set aside the decision of the Court to the effect stated above. Costs to the Appellant to be taxed in default of agreement against the 1st and 2nd Respondents.




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M. J. Siavwapa

JUDGE PRESIDENT



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F.M. Chishimba

COURT OF APPEAL JUDGE



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A.N Patel S.C

COURT OF APPEAL JUDGE