**APPEAL NO. 139 OF 2005**

**IN THE SUPREME COURT FOR ZAMBIA SCZ APPEAL NO. 8/166/05**

**HOLDEN AT LUSAKA**

**(CIVIL JURISDICTION)**

**BETWEEN**

**KIDDAX LIMITED 1ST APPELLANT**

**NARESH CHAVDA 2ND APPELLANT**

**(T/A Beaumont Motors)**

**AND**

**ZAMBIA NATIONAL COMMERCIAL BANK PLC**

**Coram: Sakala, C. J.,Chibesakunda and Chibomba, JJS.**

 **On 1st July, 2010 and 17th January, 2012**

**For the Appellants : Mr. W. Mweemba of Mweemba and Company.**

**For the Respondent: Mr. Z. Muya of MSM Legal Practitioners.**

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**Sakala, CJ., delivered the Judgment of the Court**

The delay in delivering this Judgment, which was caused by a heavy backload of pending Judgments, is deeply regretted. This is an appeal against the Judgment of the High Court entered in favour of the Respondent in the sum of K234,520,120.36, being an amount the Appellants allegedly owed as at 31st August, 2001. The Respondent was also awarded interest at the current deposit rate from the date of the writ to the date of the Judgment; and thereafter at the current lending rate as fixed by the Bank of Zambia.

The brief history of the case leading to this appeal is that some time in May, 1999, the Respondent granted the 2nd Appellant a loan facility secured by a Third Party Mortgage Deed with the 1st Appellant. The 2nd Appellant had three accounts on which overdraft facilities were extended to the Appellants. The total balance as at May 2001 was K210,193,869-80. According to the Respondent, this debt has not been settled.

Sometime in August 2001, the Respondent commenced proceedings by way of an Originating Summons against the Appellants claiming for an order of foreclosure of the Appellants’ interests in Plot No. 150 Mufulira, the Appellants having defaulted in repaying the loan, which was secured by a Mortgage Deed dated 2nd September, 1999; and for an Order that the Respondent be entitled to a right of possession of Plot No. 150, Mufulira and to exercise thereon a right of sale so as to recover the loan advanced to the Appellants.

The Originating Summons was supported by an affidavit sworn by the Manager of the Respondent setting out the above history of the case. There was also an affidavit in opposition in which the Appellants disputed the Respondent’s claims.

To complete the history of the matter, when the Originating Summons came up for hearing on 27th March, 2002, Counsel, then appearing for the Appellants, asked the court to order for a reconstruction of the account to determine what was owed by the Appellants. On that day, the court reserved its Judgment.

On 17th May, 2002, the court delivered its Judgment in which it ordered that an account be taken to indicate the amount paid and not paid by the Appellants.

On 31st October, 2002, the Respondent took out a Summons To Render Account. The Summons was supported by an affidavit setting out the amounts owed. There was also a detailed affidavit in opposition disputing the claims. After several adjournments, the Summons To Render account came up for hearing on 26th of April, 2005.

On 3rd June, 2005, the court delivered its Judgment on the Summons To Render Account. In that Judgment, the court found that the account had been rendered; and that the Respondent had given detailed documentation of the Appellants’ indebtedness; and that the documentation had not been challenged. The court concluded that the Respondent had proved its case upon a balance of probabilities and entered Judgment for the Respondent for the sum claimed in the Originating Summons. Hence, the appeal to this court.

The Appellants filed a Memorandum of appeal containing two grounds. These are:-

1. That the Learned Judge in the Court below erred in law and fact when he held that the Respondent had rendered accounts as ordered by the court on 21st August 2001 ignoring the fact that the application to render an account did not comply with the provisions of order 43 of the Rules of the Supreme Court.
2. The Learned Judge in the Court below misdirected himself in law and fact when he held that the documentation presented by the Respondent in support of its claim had in the main not been challenged by the Appellants when there were several challenges and arguments raised by the Appellants in their affidavits in opposition to originating summons and summons to render account respectively.

On behalf of the Appellants, Mr. Mweemba relied on written heads of argument, based on the two grounds of appeal filed with the court. Mr. Muya, Counsel for the Respondent, who had not filed heads of argument was granted leave to proceed with the appeal; but to file heads of argument after the appeal had been heard.

At the time of writing this Judgment, the written heads of argument on behalf of the Respondent had not been filed with the court. Mr. Muya, however, made brief oral submissions at the hearing of the appeal, which we have taken into consideration in our Judgment.

The short summary of the written heads of argument on ground one is that the trial Judge erred in law and fact when he held that the Respondent had rendered an account.

On ground two, the gist of the written heads of argument is that the trial Judge misdirected himself in law and fact when he held that the documentation presented by the Respondent in support of its claim had in the main not been challenged by the Appellants; when there were several challenges and arguments raised by the Appellants in their affidavits in opposition to the Originating Summons and Summons to Render Account.

We were urged to allow the appeal and refer the matter back to the High Court for a proper account to be rendered.

In his short oral response, Mr. Muya contended that the Originating Summons was heard and Judgment delivered, that Summons to Render Account was also heard and Judgment delivered. He submitted that there was no appeal against the Judgment on rendering account.

In his short reply, Mr. Mweemba submitted that the determination of the Originating Summons depended on rendering of account; but that no account was rendered.

We have considered the affidavit evidence on record, the Judgment appealed against dated 3rd June, 2005 and also the Judgment dated 17th May, 2002, which Judgment was not appealed against. However, in that Judgment the court concluded as follows:-

***“In the circumstances, I will order that an account be taken to indicate the amount paid and not paid by the Defendant in terms of Order 43 of the Rules of the supreme Court of England and Wales(The White Book). No order as to costs is made.”***

It was common cause that pursuant to the Judgment of 17th May, 2002, on 31st October, 2002, the Respondent issued Summons To Render Account.

The Summons was heard on 26th April, 2005. And Judgment was delivered on 3rd June, 2005.

On a careful consideration of the record, it seems that there might have been a misunderstanding, when the court was delivering its Ruling of the 3rd of June, 2005. That Ruling, which was on the Summons to Render Account also dealt with the issues raised in the Originating Summons, which was not heard.

According to the record, on the 17th May, 2002, the court ordered that an account be taken. Following this ruling, the Respondent took out a Summons to Render Account. The Summons was heard. The Judgment on the Summons to Render Account was delivered on 3rd June, 2005. This is the Judgment appealed against. It must be observed that at the time of delivering the Judgment of 3rd June, 2005, the Originating Summons was still on record; but unheard. However, in the Judgment of 3rd June, 2005, the court accepted on the affidavits supporting the summons to Render Account that the Respondent had given detailed documentation of the Appellants indebtness. Having come to this conclusion, the court proceeded to pronounce Judgment on the Originating Summons and entered Judgment on the reliefs sought in the Originating Summons; but without hearing the parties on the Originating Summons.

In the result, the court determined the Originating Summons without hearing the parties.

For different reasons, we agree with the Appellants that this appeal should be sent back to the High Court to determine the Originating Summons and make findings of fact thereon.

We, therefore, allow this appeal and order that the matter goes back to the High Court at Lusaka to hear the Originating Summons. Costs will abide the outcome of the hearing of the Originating Summons.

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E. L. Sakala

**CHIEF JUSTICE**

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L. P. Chibesakunda

**SUPREME COURT JUDGE**

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H. Chibomba

**SUPREME COURT JUDGE**

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