**353**

 **SCZ Judgment No. 17 of 2012**

**IN THE SUPREME COURT FOR ZAMBIA Appeal No. 46/2010**

**HOLDEN AT LUSAKA**

(Civil Jurisdiction)

**BETWEEN:**

**KANJALA HILLS LODGE LIMITED 1ST APPELLANT**

**VERONICA NAMAKAU JAYETILEKE 2ND  APPELLANT**

**AND**

**STANBIC ZAMBIA LIMITED RESPONDENT**

***Coram: Chibesakunda, Phiri and Muyovwe JJS***

 ***On the 10th August, 2011 and 24TH April, 2012***

For the Appellant: Mr. H.A. Chizu, Messrs Chanda Chizu and

Associates

For the Respondent: Mr. L. Mwanabo, Messrs Lewis Nathan

 Advocates

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**JUDGMENT**

**MUYOVWE, JS, delivered the Judgment of the Court.**

**Cases referred to:**

1. **Newplast Industries Limited vs. Commissioner of Lands and Attorney General (2001) Z.R 51**
2. **Re Wells (1933) CH. 29**

**354**

1. **G. and C Krelinger Vs. New Pantagonia Meat and Cold Storage Company Limited (1913) AC 25**
2. **Colgate Palmolive** **(Z) INC – Vs. Chuuka Appeal No. 181/2005**
3. **Printing and Numerical Registering Company vs. Sampson (1875) 19 Eq. 462, 464**
4. **Godfrey Miyanda vs. Attorney General, cases** (**1985) Z.R 185**
5. **Chuuya vs. J.J. Hangwenda (2002) Z.R. 11**
6. **Development Bank of Zambia vs. Jet Cheer Development (Z) Ltd (2000) Z.R. 144**
7. **Mukabo vs. Zambia State Insurance Corporation Ltd (2005) Z.R. 125**

**Legislation referred to:**

1. **Order 30 of the High Court Rules Cap 27 of the Laws of Zambia**
2. **Order 14A of the Rule of the Supreme Court**
3. **Order 88/5/14 Rules of the Supreme Court**
4. **Order 88/5/13 of the Rules of the Supreme Court**
5. **Order 20/11 of the Rules of the Supreme Court**

**Other Materials referred to:**

1. **Megarry’s Manual of Law of Real Property 6th Edition at page 474**
2. **Osborn’s Concise Law Dictionary 17th Edition at page 134**

This is an appeal against the decision of the Lusaka High Court which ordered that the Appellants liquidate the judgment debt within 60 days and that should they fail to do so, they should surrender vacant possession of both Plot No. 2644/72 Livingstone and Plot No. 5031, Chipata to the Respondent who would exercise its right of foreclosure and sale.

 **355**

The brief background is that on 2nd April, 2009 by Originating Summons, the Respondent commenced an action against the Appellants pursuant to **Order 30 Rule 14 of the High Court Rules**.

According to the affidavit evidence filed in the Court below, the Respondent by a Term Loan Facility Letter dated 27th December, 2005 availed a medium term loan facility in the sum of US$240,000 to the 1st Appellant. The purpose of the medium term loan facility was to finance the construction of property on Plot No. 5031, Chipata. This offer was accepted by the 1st Appellant. The final payment was to be repaid by 31st December, 2010. The aforementioned Facility letter was varied by another letter dated 20th November, 2006 which, inter alia, pushed the repayment period to 31st December, 2011. For security, the 1st Appellant offered Plot No. 2644/72 Livingstone owned by the 2nd Appellant and a Third Party mortgage was created on the property. Further, an equitable mortgage was created over Plot No. 5031 Chipata.

 **356**

The Respondent, further, stated that the 1st Appellant was indebted in the sum of US$275,235.96 on Account No. 0232034859001. That on account No. 0240034859001 and 0140034859001 the 1st Appellant was overdrawn in the sum of ZMK 4,520,649.81 and US$41,469.75 respectively. That the 1st Appellant having defaulted in its payment obligations demand was made on both Appellants but they failed to settle their debt and that they, therefore, had no defence to the claim.

The Appellants, on 2nd July, 2009, filed a Summons to determine matter on a point of law pursuant to **Order 14A** **of the Rules of Supreme Court**. After hearing both parties, the learned Judge delivered his Ruling on 18th November, 2009 in which he dismissed the Appellants’ application to have the matter determined on point of law.

The Appellants then filed their Affidavit in Opposition sworn by Athony Elmo Vinijha on 25th November, 2009. He stated, inter alia, that the loans were obtained through a Facility Letter and not

 **357**

a mortgage. On this basis, he challenged the mode of commencement of the action. He averred that it was wrong for the Respondent to apply for foreclosure and also questioned the interest charged. He also averred that the matter was brought to Court prematurely in that the Respondent disbursed the funds late and that this was a breach of contract. He claimed that the matter ought to have been deemed to have been commenced by Writ of Summons and not by Originating Summons.

In his judgment, the learned Judge, after considering the affidavit evidence, skeleton arguments and the documents filed by both parties, found that the Appellants were owing the sums claimed and that there was no dispute as to the amounts owing. He also found that the main bone of contention by the Appellants is that: the action was prematurely commenced before the redemption date and the inclusion of Plot No. 5031, Chipata which was not on title and that the amounts on the overdrawn accounts were ordinary loans which should not have been considered in the mortgage action.

 **358**

With regard to the argument, that the Respondent had commenced the action prematurely, the learned Judge addressed his mind to Clause 13 of the Facility Letter dated 27th December, 2005. The learned Judge found that Clause 13 empowered the Respondent “to immediately call on the facility should the Appellants fail to make payments by the due date of any amount due in terms of the loans or any other facilities that the Plaintiff Bank has accorded the Defendant.” The Court below found that the correspondence between the parties showed that the Appellants had defaulted. The learned Judge also found that in spite of several reminders, the Appellants lamentably failed to discharge their obligations as per agreement. The Court below, therefore, found that the Respondent acted within its right to terminate the facility and to commence legal action.

As regards the inclusion of Plot 5031, Chipata in the mortgage action, the Court below considered the fact that the Respondent had given the Appellant an opportunity to sell the property at a reserve price of K140,000,000. In the opinion of the learned Judge

 **359**

the fact that the said Plot was not on title could not preclude the Respondent from recovering its debt by way of sale. That **Order 30 Rule 14** applied to the property in question as the provision extended to both legal and equitable mortgages. That both Facility Letters (variation and the mortgage deed) confirmed the Appellants’ intention to create a Legal Mortgage over Plot 5031, Chipata.

The learned trial Judge also considered the argument put forward by the Appellants that the overdrafts were not covered by the mortgage deed. The Court found that the mortgage deed covered all moneys and liabilities owed by the Appellants.

After considering the facts before him, the trial Judge concluded that the Appellants were indebted to the Respondent and that they had no defence to the action. The Court below, therefore entered judgment in favour of the Respondent in the sum of US$316,705.71 and ZMK4,520,649.81 plus interest as agreed by the parties. The learned Judge ordered that the Appellants liquidate the judgment sum within 60 days and in default thereof the Respondent should take possession, foreclose and sell the

 **360**

mortgaged properties being Plot No. 2644/72, Livingstone and Plot No. 5031, Chipata.

Dissatisfied with this judgment, the Appellants appealed to this Court advancing, the following grounds of appeal:

1. **The Court erred in law by entering judgment for the Plaintiff in the sum of US$316,705.71 and ZMK4,520,649.81 in a matter commenced by Originating Summons.**

1. **The Court below erred in law in making a further judgment by adding a paragraph for an order for the Defendant to liquidate the judgment in 60 days**
2. **The Court below erred in law and fact by ordering for vacant possession of both No. 2644/72 Livingstone and Plot No. 5031 Chipata notwithstanding the fact the Appellants still had a right equity of redemption.**
3. **The Court below misdirected itself to enter judgment and make order for possession and for foreclosure in a matter which had a loan term running up to 31st December, 2011**
4. **The Court below misdirected itself by proceeding to Order for possession and foreclosure without taking into account the likelihood of the counterclaim pleaded by the Defendant**

 **361**

1. **The Court below erred in law in proceeding with judgment and making order for possession and foreclosure without taking into account the revelation of the possible sale by the Appellant to redeem the mortgage**
2. **The Court below erred in law by considering a facility letter as a legal mortgage.**

In support of ground one, Mr. Chizu, learned Counsel for the Appellants argued that an Originating Summons is used for Chamber matters where there are no contentious issues. That **Order 30** is clear. He argued that in the Court below, the Appellants questioned the sums claimed by the Respondent thereby showing that there were contentious issues involved in the matter. Further, that the sums claimed arose from a purported mortgage which mortgage was seriously contested. He submitted that this was revealed before the Court below in the Application to have the matter determined on a point of law and also in the Affidavit in opposition of the Originating Summons. Mr. Chizu submitted that serious contentious issues which included alleged breach of contract by the Respondent, unjustified interest charges, and late release of funds contrary to the agreement were raised in the Court

 **362**

below. Therefore, the Respondent having delayed releasing the funds, should not have rushed to apply for foreclosure on the property before the due date. Counsel contended that the Respondent should have instead extended further the period in which to pay from 31st December, 2011 to another date.

Mr. Chizu contended that this matter being a Commercial Court action, and there being contentious issues, it ought to have been commenced and determined by a Writ of Summons pursuant to the **High Court Amendment Rules (1999)** and **Order 53 Commercial Court Action Practice.** He relied on the case of **Newplast Industries Limited vs. Commissioner of Lands and Attorney-General¹** where it was held that the mode of commencement of an action is generally provided by the relevant statute.

Turning to ground two, Counsel submitted that the Court below erred in law in making a further judgment by adding a paragraph on the last page of the judgment. This paragraph reads as follows:

 **363**

**“I therefore Order that the defendants do liquidate the above judgment debt within 60 days from the date hereof. In the event that the defendants should fail to do so within the stipulated period of time, then they should surrender vacant possession of Plot No. 2644/72 Livingstone and Plot No. 5031, Chipata to the Plaintiff who shall exercise its right of foreclosure and sale.”**

Counsel contended that the addition of the above quoted paragraph on the last page of the judgment was procedurally or legally wrong in that the judgment had been delivered but was later amended by the inclusion of another paragraph without any formal application by any of the parties.

On ground three, Mr. Chizu argued that there was evidence that the loan obtained was to be repaid by 31st December, 2011 and that since this was a long term loan which was based on a business plan, the Appellants believed that they had a long period within which to pay back the loan once their Lodge was fully functional. Counsel submitted that at the commencement of this action and by the date of delivery of the Judgment in question and to the date of arguing this appeal, the final due date had not been reached.

 **364**

Therefore, the Appellants still had both the legal and equitable right to redeem the mortgage as that legal right would only be lost on 31st December, 2011. And even then, he argued, the Appellants could still be entitled to an equity of redemption. Therefore, that it was wrong for the trial Court to make an order for foreclosure. Counsel argued that equity of redemption is one of the rights a mortgagor enjoys. In support of this argument Mr. Chizu relied on the cases of **Re Wells²** and **G. and C Krelinger vs. New Pantagonia Meat and Cold Storage Company Limited³.**

Further, Counsel submitted that the Court below went against the rules of equity when he ordered that the Appellants give vacant possession as this interfered with the Appellants’ right of redemption.

In support of ground four, Counsel submitted that the final date of payment was a fundamental clause which enticed the Appellants into the said agreement. That, therefore, the parties should abide by what they had agreed upon and contracted. He cited the case of **Colgate Palmolive** **(Z) INC – vs. Chuuka** in which

 **365**

the case of **Printing and Numerical Registering Company vs. Simpson5** was cited with approval by the Supreme Court. That the Respondent’s argument on the default clause should not be accepted because this is a wrong interpretation of the agreement and that the Court below fell into error when it ordered foreclosure.

With reference to Clause 13 of the Facility Letter dated 27th December, 2005, Counsel argued that this Clause is not a fundamental term of the contract. He argued that the Clause does not provide for foreclosure or sale and that it is in fact ambiguous as it merely states that when there is default, the amount owing becomes due as a mere debt. That, therefore, this argument fortifies the Appellants’ argument in Ground One that the mode of commencement was wrong due to the fact that there are contentious issues in this case.

In support of ground five, Mr. Chizu contended that the Appellants, in their Affidavit in Support of Summons to determine matter on a point of law, raised issues of breach of the agreement

 **366**

 and also indicated their intention to counterclaim more than K850 million from the Respondent. According to Mr. Chizu, the revelation of a counterclaim entailed that the Judgment by the Court below be stayed or suspended until the resolution of the counterclaim. He submitted that this is so because Plot 2644/72, Livingstone on which a legal mortgage was created is a dwelling house. Counsel cited **Order 88/5/13** and **Order 88/5/14 of the Rules of the Supreme Court** and argued that in the circumstances of this case and based on these authorities, it was wrong for the Court below to order possession and foreclosure.

In support of ground six, Counsel argued that there was evidence in the Court below which showed that there was an agreement to allow the Respondent to sell the property in question. Mr. Chizu cited **Order 88/5/13** which partly states that:

**“One way in which the borrower may show that he is likely within reasonable period to pay off the mortgage is by showing that the house is likely to be sold and the mortgage paid off out of the proceeds of sale…”**

 **367**

Mr. Chizu submitted that the law recognises the fact that it is better for the sale to be effected by the borrower rather than the mortgagee and that in this regard, the Order for possession and foreclosure ought to have been deferred.

In support of ground seven, it was submitted that the Facility Letter which the Court below relied on as covering all monies and liabilities due and owing by the Appellants was not a legal mortgage. That it was merely an intention to create a mortgage and that it cannot be used to foreclose on Plot 5031, Chipata especially that the Appellants had no title on this Plot. We were also referred to the arguments and authorities cited in the Court below appearing on pages 93-124.

Suffice to note, that the arguments on pages 93-124 of the Record of Appeal relate to the Application in the Court below to have the matter determined on a point of law, which application was dismissed by learned trial Judge in the Court below.

 **368**

We were also referred to the Appellants’ arguments contained on pages 172-188 of the Record of Appeal presented in the Court below. These arguments have been repeated before us in this appeal. We, however, note the cases cited in the Court below which Counsel would like us to consider in support of Ground Seven. These are the cases: **Godfrey Miyanda vs. Attorney General6**, **Chuya vs. J.J. Hangwenda7; Development Bank of Zambia vs. Jet Cheer Development (Z) Ltd8** and **Mukabo vs. Zambia State Insurance Corporation Ltd9.**

Mr. Mwanabo, Counsel for the Respondent also filed his Heads of Argument.

In response to ground one, he argued that the Respondent was in order to commence the action by Originating Summons pursuant to **Order 30 Rule 14.** That the parties executed a legal Third Party Mortgage over Plot No. 2644/72, Livingstone and that the Respondent was entitled to an equitable mortgage over Plot 5031, Chipata. It was submitted that under the High Court Rules, there is

 **369**

no provision for the commencement of mortgage actions by Writ of Summons. It was submitted that the said Rule provides for the filing of affidavit evidence by both parties and that this is an indication that matters brought under the said provision are contentious. According to Mr. Mwanabo, the **New Plast Industries Limited case¹** is in fact in support of the Respondent’s position.

He argued, further, that the Appellants raised the same ground in the Court below in their Application to have issues determined on points of law. That if the Appellants were serious about factual disputes in this matter, they would have made an application to that effect in the Court below. Further, that the Appellants submitted themselves to the proceedings in the Court below when they filed an affidavit in opposition to the Originating Summons. And also by attending the hearing of the matter without making any application for the matter to be deemed as if it was commenced by Writ of Summons. Further, the Appellants did not appeal against the Ruling of the Court below on their Application to determine issues on points of law. That, therefore, the issues they

 **370**

raise at this stage relating to the same should not be entertained. That this ground has no merit and should be dismissed.

In response to ground two, it was submitted that **Order 20/11** provides for amendment of Judgments and that the Court has inherent powers to amend or vary its Orders and Judgments to make its meaning plain. Mr. Mwanabo, further, argued that the Judgments in issue bear the same date and are the same and that it is possible that the first judgment was mistakenly released by the Judge’s Marshal. That there is no evidence that the Judge had become functus officio by the time the judgment was released.

In relation to ground three, Counsel submitted that it is clear from the Record of Appeal that the Respondent was entitled to recall the loan in issue, in case of default by the Appellants. Mr. Mwanabo submitted that this issue was adequately addressed by the Court below in its Judgment and that the Appellants did not dispute having defaulted servicing the debt in issue. That the Appellants cannot rely on the equity of redemption because their

 **371**

hands are not clean. Mr. Mwanabo referred us to **Megarry’s Manual of the Law of Real Property at page 474**where the learned Authors said:

**“The right to foreclose does not arise until the legal right to redeem has ceased to exist i.e. until the date for redemption has passed or until breach of a condition which had to be complied with to keep alive the legal right of redemption, once this has happened, the mortgagee may commence foreclosure proceedings …..”**

He contended that, therefore, the action was rightly commenced.

Further, it was submitted that the Appellants had clearly defaulted in their loan repayments and that the default extinguished the equity of redemption in their favour and that, therefore, the authorities cited by Appellants on this issue cannot be of any assistance to them going by the facts of this case.

Turning to ground four, Counsel relied on his submissions under ground three. Further, that Clause 13 of the Facility Letter shows that the Respondent was at liberty to exercise all other

 **372**

remedies under the Laws of Zambia and that it should be read together with all the documents referred to therein.

In response to ground five, Mr. Mwanabo argued that the Appellants did not raise the alleged counterclaim formerly as they merely expressed the desire to lay a counterclaim. He submitted that there is no law that stops anyone from raising a counterclaim in actions commenced by Originating Summons. And that the submission that the property in Livingstone is a dwelling house is an attempt by Counsel to give evidence from the bar as the issue was not referred to in any of the Appellants’ affidavits. That this statement should be expunged from the proceedings before this Court. Mr. Mwanabo submitted that properly read **Order 88/5/14** will show that a counterclaim is not a defence and that even where the property involves a dwelling house; it is still not a defence but Counsel contended that the Court can enter judgment and that what is suspended is only possession of the property.

 **373**

In response to ground six, it was contended that the record shows that prior to this action, the Respondent had allowed the Appellants to sell the property in Chipata but that the Appellants failed to do so. Mr. Mwanabo submitted that the documents referred to by the Appellants which reveal an intended sale, were filed by the Respondent in order to show that the Appellants did acknowledge their indebtedness and that Plot 5031, Chipata was always considered as part of security for the loan in issue. According to Counsel, the documents were also filed to counter the Appellants’ argument that Plot 5031, Chipata, was not the subject of the mortgage.

In response to ground seven, Counsel submitted that the lower Court was in order to find that there was an equitable mortgage over Plot 5031, Chipata and the parties agreed that as soon as title is issued over the said property, a mortgage was to be created. He cited inter alia **Order 30 Rule 14** and **Megarry’s Manual of the Law of Real Property** Page 468-469and **Osborne’s Concise Legal Dictionary** Page 134citing the maxims of equity which state that:

 **374**

 **“Equity looks at the intent rather than form and Equity looks on that as done which ought to be done.”**

In conclusion, Mr. Mwanabo submitted that the appeal has no merit as the Appellants do not dispute their indebtedness; that the issues raised are an afterthought because the Appellants had always made promises to settle the debt by selling Plot 5031, Chipata. That there is no evidence of any single payment to show that the debt was being serviced. That the money in issue has not been repaid not even partly.

That the judgment of the lower Court should, therefore, be upheld and the Appeal should be dismissed with costs.

We have perused the Record of Appeal and considered the judgment of the Court below, together with the arguments advanced in the respective Heads of Argument and the authorities cited herein.

 **375**

In ground one, the gist of the argument is that the matter being a contentious one, it should not have been commenced by Originating Summons and that the Court should not have entered judgment.

This matter was brought pursuant to **Order 30 Rule 14** which provides:

**“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 summons be specified, and as 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 by any other person in, or alleged to be in possession of the property;**

 **376**

**Redemption;**

**Reconveyance;**

**Delivery of possession by the mortgagee.**

From the outset, we agree with Mr. Mwanabo’s submission that there is no law which prevents the entering of judgment in a matter commenced by Originating Summons. **Order 30 Rule 14** is crystal clear in its wording and is self explanatory and it makes provision for the commencement of mortgage actions. In our view, simply because a matter is heard by way of affidavit evidence does not mean that it is a non-contentious matter. Mr. Chizu seems to suggest that only contentious issues are commenced by Writ of Summons. This is highly misleading as there is no rule which states that commercial actions must be commenced by Writ of Summons. In practice, at the hearing of a matter commenced by Originating Summons, the Judge can hear viva voce evidence if he/she considers it necessary having regard to the affidavit evidence presented by both parties. In this case, the learned Judge felt this was not necessary and rightly so. In any event, the reason

 **377**

why litigants come to Court is because there are contentious issues between them which they have failed to resolve outside Court.

We note that the Appellants raised the issue of late disbursement of funds and the issue of the redemption date in their Application to have the matter determined on a point of law. This application was dismissed on 18th November 2009. A perusal of the Record shows that the Appellants did not appeal against the said Ruling. Therefore, the Appellants cannot have another bite at the cherry and since this was a mortgage action brought under **Order 30 Rule 14**, late release of funds is not a valid excuse for default or failure to make timely repayments.

In arguing ground one, Mr. Chizu relied heavily on our decision in the **New Plast Industries Limited case1**  where we held that:

**“It is not entirely correct that the mode of commencement of any action largely depends on the reliefs sought. The correct position is that the mode of commencement of any action is generally provided by the relevant statute.**

 **378**

Quite obviously the above case is not helpful to the Appellants as this matter was properly commenced by the Respondent. The Facility Letter of 27th December, 2005 later varied in 2006 clearly reveals the intention of the parties to create legal mortgage over the properties offered by the Appellants as collateral for the amount advanced to them. The agreement shows that the interest rate would be charged at 4% per annum above the Respondent’s United States Dollar Currency Base Rate prevailing from time to time. At that time it was standing at 11%. Although Counsel argued vigorously over what he terms the Respondent’s rush to apply for foreclosure, the Appellants did not show that they had a defence to the claim and offered no evidence to show that they made any payment to liquidate their indebtedness. Indeed, they did not dispute owing the amounts claimed. Therefore, we find the learned Judge was on firm ground when he found that the Appellants were truly indebted to the Respondent and when he entered judgment in the sum of US$316,705.71 with interest in favour of the Respondent. The fact that the matter was commenced by

 **379**

Originating Summons could not prevent the Court below from entering judgment. Ground one, therefore, fails.

Turning to ground two which relates to the issue of the two similar judgments released by the Court below, it is not in dispute that the only difference between the two judgments is the last paragraph which reads as follows:

**I therefore Order that the defendants do liquidate the above judgment debt within 60 days from the date hereof. In the event that the defendants should fail to do so within the stipulated period of time, then they should surrender vacant possession of both Plot No. 2644/72, Livingstone and Plot No. 5031, Chipata to the Plaintiff who shall exercise its right of foreclosure and sale.**

We must state that it is unacceptable for a Court to release two judgments in the same case and on the same date. In this case, as argued by Mr. Mwanabo, it is possible that the two judgments were released erroneously. However, the error having been detected as it must surely have been, the learned Judge should have called all parties to explain the anomaly rather than

 **380**

leaving them to speculate as to how they ended up with two judgments. Nevertheless, after perusing the two Judgments, we hold the view that the addition of the last paragraph in one of the judgments did not prejudice the Appellants in any way as the added paragraph gives guidance on how the judgment debt should be settled considering that this was a mortgage action. We say so because in a mortgage action, the Court must indicate the payment period and spell-out the consequences of any further default by the borrower. Further, the addition was to the advantage of the Appellants as it gave them respite of paying the judgment debt in 60 days instead of it being payable immediately. We find no merit in this ground.

We will now deal with ground three and four together as they are inter-related. The gist of the Appellant’s argument in the two grounds is that the trial Court should not have ordered foreclosure and possession of the properties in issue as the Appellants still had the right of redemption. This, according to Counsel, is in view of the fact that the loan was running up to 31st December, 2011. In our view, a perusal of the Judgment reveals that the trial Judge was

 **381**

alive to the fact that the redemption date was 31st December, 2011. The trial Judge dealt with this issue in both the Ruling on Application to determine the matter on a point of law and in the main Judgment. The learned trial judge made reference to the Facility letter dated 27th December, 2005 and had this to say:-

**“This Clause empowers the Plaintiff to immediately call on the Facility should the Defendants (Borrowers) fail to make payment by the due date of any amount due in terms of the loans or any other facilities that the Plaintiff Bank has accorded the Defendants. Whether the Defendants have defaulted on the Facility is evidenced by several correspondence marked Exhibits “SN8”, SNB81, SNB82 and SNB83”. These are all letters of demand which the Plaintiff wrote to the Defendants to settle the loans. Despite all these reminders, the Defendants have totally failed to discharge their obligations to the Plaintiff. There is therefore over-whelming evidence to prove and justify that the Plaintiff acted within its rights to terminate the Facility and commence legal action against the Defendants”.**

We totally agree with the trial Judge. The fact that the agreement between the parties provided for a default clause is clear indication that the Respondent was entitled to invoke it on default.

 **382**

And the Appellants cannot claim that they were not aware of the contents of the agreement.

To argue that the default was a result of the Appellant having a long business plan and their belief that they had a long repayment period is not being sincere. We do not expect a prudent business person to sit back and make no payment simply because the loan has a long term repayment period. This is tantamount to burying one’s head in the sand. In our view, it is irrelevant that at the time of commencement of these proceedings, the due date was way off. The Appellants having defaulted in their repayment obligation cannot hide behind the right of redemption. This view is buttressed in **Atkins Court Forms Vol.28** where the learned authors have stated at page 8 that:

**“When the mortgagor defaults, the mortgagee is entitled to pursue all his remedies concurrently”**

Since the right of redemption is an equitable right, the Appellants’ conduct is certainly contrary to the maxim that he who comes to equity must come with clean hands.

 **383**

Further, the learned Authors of **Megarry’s Manual of the Law of Real Property** have also stated that once there is a breach of a condition which had to be complied with to keep alive the legal right of redemption, the mortgagee may commence foreclosure proceedings.

Therefore, in this case the Respondent was entitled to commence an action by Originating Summons for payments of sums due, for foreclosure, sale and possession. We certainly cannot fault the lower Court as it was on firm ground when it made an Order for foreclosure, sale and possession of the mortgaged properties as the Appellants by their default had lost the right of redemption. ground three and four, therefore, fail.

With respect to ground five, where it is contended that the Court below should not have proceeded to Order foreclosure and possession as it did not take into account the likelihood of a counter-claim pleaded by the Appellants. Reference was made to **Order 88/5/14** which provides, inter alia, that because a

 **384**

mortgagee is entitled to possession of the mortgaged premises, a counterclaim is no defence to the claim for possession. It states, further, that if the mortgage is of a dwelling house, a counterclaim can be ground for a Court to suspend possession until after determination of the counterclaim.

The Appellants argued that the Court below should have stayed or suspended the Order of foreclosure since Plot 2644/72 is a dwelling house. We have considered the above arguments. A perusal of the Record shows that there was no counterclaim. We agree with Mr. Mwanabo that it was up to the Appellants to raise the counterclaim formally. For the Respondent to merely argue that the Court should have taken into account “the likelihood of the counterclaim” is not sufficient ground for suspending possession and foreclosure. Indeed, this was a ploy by the Appellants to evade payment. In any event, as Mr. Mwanabo submitted, learned Counsel for the Appellants is precluded from giving evidence from the Bar as it is not stated in any affidavit that the Livingstone property is a dwelling house. We find no merit in Ground five.

 **385**

Turning to ground six, which states that the Court below erred in proceeding with judgment and making an Order for possession and foreclosure without taking into account possible sale by the Appellants to redeem the mortgage, our response is that the Appellants were given the opportunity to sell the property but failed. The Record of Appeal shows at page 163 that the deadline for offers as per advertisement in the Post Newspaper was 31st December, 2009. However, Mr. Jayetileke, one of the Directors in the 1st Appellant Company, after discussions with the Respondent’s advocates, wrote to them on 10th February, 2009 confirming that there were three potential buyers and that he expected to receive firm offers within 10 days. The Respondent took no action and only commenced this action on 4th April, 2009. Certainly, the Appellants were given sufficient time to sell the property. Notably, the judgment appealed against was delivered on 30th December, 2009.

The Appellants lost their opportunity to sell and they cannot blame the Court for proceeding to enter judgment and order

 **386**

possession and foreclosure. We find no merit in ground six and it fails.

With respect to ground seven, the argument is that the Court should not have considered the Facility letter as a legal mortgage and that it was only an intention to create a mortgage over Plot 5031, Chipata, which is not even on title and should not have been used to foreclose on the said Plot. It is trite that an equitable mortgage can be created even on a piece of land which is not on title.

The learned authors of **Halsbury’s Laws of England** at Page 171 state that:

**“In equity a mortgage is created by a contract evidenced in writing for valuable consideration to execute, when required, a legal mortgage or by a contract so evidenced and for valuable consideration that certain property shall stand as a security for a certain sum.”**

The Appellants acquiesced to the conditions in the Facility Letters and they are bound by the terms of both Facility Letters.

 **387**

**Clause 10:8** of the variation to the Facility letter dated 27th December, 2005 reads as follows:

**“By signing this letter the Borrower makes an irrevocable undertaking to create a First Legal Mortgage for US$240,000,000.00 (United States Dollars Two Hundred and Forty Thousand Only) over Plot No. 5031, Chipata when the certificate of title is issued and that pursuant to this objective, it shall cause its Lawyers to undertake to the Bank to submit the certificate of title to the Bank upon issue for the purpose of creating and registering the Legal Mortgage”**

Clearly, the Respondent could not lend the Appellants US$240,000 without collateral. And we bear in mind the fact that the whole purpose of the loan was for the Appellants to develop Plot 5031, Chipata. The intention of the parties to eventually have a legal mortgage created over Plot 5031 is made clear by Clause 10:8 cited above. Without a shadow of doubt, it is obvious that there was an agreement which created an equitable mortgage over Plot 5031, Chipata. The transaction shows that the Respondent ensured that

 **388**

its interests were protected and its net was cast in such a way that even the Legal mortgage over Plot No. 2644/72, Livingstone covered

all monies and liabilities due and owing by the Appellants. We agree with the trial Judge that **Order 30 Rule 14** applies to Plot 5031, Chipata. We can only conclude that Counsel misapprehended the Judgment of the Court below as there is nowhere in the Judgment where the learned Judge stated that the facility letter was a legal mortgage. In the premises, ground seven also fails.

In sum, we hold the view that the Court below was on firm ground when it entered judgment in favour of the Respondent. The spirited arguments advanced by Counsel for the Appellants cannot assist the Appellants who appear to be bent on avoiding honouring their obligation of paying back the moneys they borrowed from the Respondent. As the lower Court found, the Appellants have no defence to the claim and they did not come to Court with clean hands and they cannot expect to be protected by the Court.

 **389**

We find no merit in this appeal and it is dismissed with costs to the Respondent to be taxed in default of agreement.

**………………………………..**

**L.P. CHIBESAKUNDA**

**SUPREME COURT JUDGE**

**.................................…… .………………………………..**

**G.S. PHIRI E.N.C. MUYOVWE**

**SUPREME COURT JUDGE SUPREME COURT JUDGE**