

IN THE HIGH COURT FOR ZAMBIA

2017/HP/0904

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

KASNI INVESTMENTS LIMITED

1ST PLAINTIFF

SAVIOUR KAYULA

2ND PLAINTIFF

AND

BARCLAYS BANK ZAMBIA PLC

DEFENDANT

**BEFORE HONOURABLE MADAM JUSTICE P. K. YANGAILO ON
THE 5TH DAY OF MARCH, 2018**

For the Plaintiffs: Mr. M. Mukupa - Messrs. Isaac & Partners

*For the Defendant: Mr. Mr. R. Mwanza - Messrs. Robert &
Partners*

RULING

CASES REFERRED TO:

1. *Kelvin Hang'andu vs. Mulubisha (2008) Volume 2 ZR 82;*
2. *Oliver Neves Luambula vs. Genesis Finance Zambia Limited and Comfort Select Investments Limited - Appeal No. 145 of 2016;*
3. *Mukumbuta Mukumbuta vs. Another vs. Masaka (2003) ZR 55;*
4. *Savenda Management Services Limited and Eagle Trading International vs. Barclays Bank Zambia Plc - 2015/HPC/0039 (unreported);*
5. *BP Zambia Plc. vs. Interland and Motors Limited (2001) ZR 37;*
6. *Thames Launches Limited vs. Trinity House Corpn of Deptford Strond (1961) 1 All ER 32;*
7. *Amber Louise Guest Milan Trbonic vs. Beatrice Mulako Mukinga and Attorney General - 2010/HP/0344;*

8. *Bank of Zambia vs. Tembo and Others (2002) ZR 103; and*
9. *Bakewell Bakeries Limited vs. Steyn Jempa - 2012/HPA/002.*

LEGISLATION AND OTHER WORKS REFERRED TO:

1. *The Rules of the Supreme Court, 1999 Edition, Volume 1 London, Sweet & Maxwell;*
2. *The English Law (Extent of Application) Amendment Act No. 14 of 2002;*
3. *The Supreme Court Practice, 1999 Edition, Volume 2, London, Sweet & Maxwell;*
4. *Black's Law Dictionary, Brian A. Garner, 9th Edition, Thomson and West;*
5. *Stroud's Judicial Dictionary of Words and Phrases, Volume 3, 7th Edition, London, Thomson Sweet and Maxwell, 2006; and*
6. *Halsbury's Laws of England, Volume 16.*

The Plaintiffs herein commenced an action by way of Writ of Summons on 8th June 2017, claiming the following reliefs: -

- 1. An Order for Specific Performance of the Settlement Agreement;**
- 2. Damages for negligence by the Defendant for damage to the properties known as Subdivision A of Stand No. 5264, Ndola and Lot No. 115, Kaniki prior to the conclusion of the Settlement Agreement;**
- 3. Damages for loss of business earnings, inconvenience, lost opportunities and loss of use of the subject properties from the date the full settlement sum was paid until delivery of vacant possession;**
- 4. An order for the immediate delivery of possession of Lot No. 115, Kaniki by the Defendant to the Plaintiffs on account of the 1st Plaintiff having paid the full settlement sum;**
- 5. An order for mesne profits from 17th March, 2016 until vacant possession is delivered up on Lot No. 115, Kaniki and Subdivision A of Stand No. 5264, Ndola from the Defendant to the Plaintiffs;**
- 6. An Order that the Defendant carries out reasonable repairs to the said properties known as Stand No. 5263, Ndola and Lot 115, Kaniki with respect to fixtures and fittings that were**

damaged and stolen during the period the properties were under the Defendant's possession;

7. An Order that the Defendant immediately settles the outstanding third party liabilities that accrued on the properties known as Stand No. 5264, Ndola and Lot 115, Kaniki.

Reacting to the Plaintiffs' action, the Defendant has applied by way of Summons for summary disposal of the matter on point of law pursuant to ***Order 14A Rule 1 and 2, Order 33 Rule 3 of The Rules of the Supreme Court¹*** and ***The English Law (Extent of Application) Amendment Act²*** on the following ground: -

1. *That the Plaintiffs' claims regarding damages for negligence, loss of business and earnings, inconvenience, lost opportunities, an order for delivery, mesne profits, an order for carrying out of repairs and for settlement of outstanding third party liabilities are claims occurring after the mediation settlement order having stemmed from the indebtedness in which Subdivision A of Stand 5264, Ndola and Lot 115, Kaniki, Ndola were pledged as security to the Defendant and which indebtedness was settled under Mediation Settlement Order dated 9th March, 2011 under Cause No. 2010/HK/366 entailing that this matter has been wrongly commenced and ought to be disposed of as the issues in this case, if meritorious, should have been brought under Cause No. 2010/HK/366 as per ***Order 45 Rule 11 of The Rules of the Supreme Court¹***.*

The application is supported by an Affidavit in Support deposed by the BEENE KAOMA, a Recoveries Manager in the employ of the Defendant filed herein on 14th November, 2017. The facts of the matter as deposed in the Affidavit are, *inter alia*, as follows: -

1. *That the 2nd Plaintiff who is a Director in the 1st Plaintiff, was guarantor and is registered proprietor of Stand 5264, Ndola. He was third party mortgagor of the said property, while the registered proprietor of Lot 115 Kaniki, Ndola is the 1st Plaintiff, which was mortgagor over the same property;*
2. *On or about 18th June 2008, at the 1st and 2nd Plaintiffs' request, the Defendant by way of a term loan facility, advanced to the 1st Plaintiff the principal amount of K150,000,000.00 (un-rebased) which said sum was to be repaid over a period of 24 months and secured by way of legal mortgage over Lot 115, Kaniki, Ndola;*
3. *On or about 17th February 2009, the 1st Plaintiff obtained a second term loan facility from the Defendant for the principal amount of K780,000,000.00 (un-rebased) which said sum was to be repaid over a period of 36 months which was agreed to be secured by way of a third party mortgage by the 2nd Plaintiff over Subdivision A of Stand No. 5264, Ndola and by a personal guarantee by the 2nd Plaintiff;*
4. *As a result of the facilities and accommodation availed to the 1st Plaintiff and the agreement that the facilities be secured in the manner set out by paragraphs above, the Defendant caused to be registered in its favour legal mortgages on Subdivision A of Stand No. 5264, Ndola and Lot 115, Kaniki, Ndola. Copies of the facility letters and mortgages are exhibited marked "BK1" to "BK4";*
5. *The Plaintiffs as at 29th October 2009, remained indebted to the Defendant to the tune of K1,203,423,604.64 (un-rebased) which amount continued to attract interest and led to the termination of the facilities;*
6. *The Plaintiffs, following default, in or about August 2010, without disputing indebtedness to the Defendant, took out an action against the Defendant under Cause No. 2010/HK/366 "in the matter of term loans and facility letters dated 18th June 2008 and 17th February 2009" and "in the matter of mortgages over Plot 5264,*

Ndola and Plot 115, Kaniki, Ndola" essentially concerning issues to do with the paragraphs above claiming, inter alia: -

- i. An account of/over the facilities;*
- ii. An inquiry over interest.*

Copies of Originating Summons, Affidavit in Support of Originating Summons under Cause No. 2010/HK/366 are exhibited marked "BK5";

- 7. The action mentioned in the preceding paragraph by the Plaintiffs resulted into the parties settling issues around the facility letters, indebtedness of both the 1st and 2nd Plaintiffs secured by Subdivision A of Stand No. 5264, Ndola and Lot 115 Kaniki, Ndola through a Mediation Settlement Order dated 9th March, 2011;*
- 8. That the said Mediation Settlement Order for liquidation of the debt touching the facility letters dated 18th June, 2008; 17th February, 2009; and mortgages on Subdivision A of Stand No. 5264, Ndola and Lot 115, Kaniki, Ndola, inter alia, provided that: -*
 - i. The Applicant (1st Plaintiff) shall pay to the Respondent (Defendant) the sum of K1,100,000,000.00 (One Billion One Million Kwacha only) as full and final settlement of the matter;*
 - ii. The Applicant (1st Plaintiff) is granted leave to settle the said judgment sum in or before the 31st day of December, 2011;*
 - iii. There shall be no further interest charged on this judgment sum and the only amount payable by the Applicant (1st Plaintiff) shall be the K1,100,000,000.00 (One Billion One Million Kwacha only);*
 - iv. At the request of the Applicant (1st Plaintiff), the Respondent (Defendant) may exercise its discretion on release one of the secured property upon the payment of at least 50% of the Judgment sum provided that such discretion shall be guided by the value of the remaining*

- secured property. The Applicant (1st Plaintiff) shall bear the costs of any such valuation to be undertaken;*
- v. The parties shall bear their own costs - in that, being a mediation the parties must settle their own legal fees and costs;*
 - vi. If there shall be a default in the payment of the full Judgment sum by the 31st day of December, 2011 the Respondent (Defendant) shall be at liberty to enforce the securities.*

The Mediation Settlement Order is exhibited marked "BK6";

- 9. That it is not and cannot be in dispute that the Plaintiffs failed to honour the terms of the said Mediation Settlement Order;*
- 10. Following default by the 1st Plaintiff and 2nd Plaintiff as guarantor, the Defendant proceeded in 2012 to take possession of the mortgage property Subdivision A of Stand No. 5264, Ndola and Lot 115, Kaniki, Ndola with a view to sell the properties;*
- 11. That following takeover of the mortgaged properties the Plaintiffs did not settle indebtedness to the Defendant so as to free Subdivision A of Stand 5264, Ndola and Plot 115, Kaniki, Ndola from the hands of the Defendant;*
- 12. On 16th March 2016, almost 6 years down the line, the Plaintiffs duly paid the Defendant the full Mediation Settlement Order sum of K1,100,000,000.00 (un-rebased) to free Subdivision A of Stand No. 5264 and Lot 115, Kaniki, Ndola which possession was carried out under Cause No. 2010/HK/366;*
- 13. That a look at the Plaintiffs' Statement of Claim in the matter herein reveals that the Plaintiffs' claims in casu are matters occurring after Judgment being the Mediation Settlement Order of 9th March 2011 and it will also be noted that: -*
 - i. The Plaintiffs' claims relate to either Subdivision A of Stand 5264, Ndola or Lot 115, Kaniki, Ndola which properties were subject of litigation under Cause No. 2010/HK/366*

and nothing precluded the Plaintiffs from bringing the claims in the matter under that cause;

- ii. The Plaintiffs' claims and the commencement of the matter in casu, draws its genesis to how the Defendant allegedly handled Subdivision 5264, Ndola and Lot 115, Kaniki, Ndola following exercise of the Defendant's power to take possession of the above two properties consequent to the Mediation Settlement Order reached under Cause No. 2010/HK/366;*
- iii. The Plaintiffs' liquidation of the debt under the Mediation Settlement Order in Cause No. 2010/HK/366 as regards non-payment of interest on the principal sum was as per Mediation Settlement Order.*

14. That determining this matter before another Court will be tantamount to condoning of forum shopping and tolerating breach of clear provisions of Court rules.

The Defendant also filed herein its skeleton arguments in respect of application for summary disposal of matter on point of law, in which the Court's attention was drawn to **Order 14A Rules 1** and **2** and **Order 33 Rule 3** of **The Rules of the Supreme Court**¹, which provide as follows: -

"Order 14A Disposal of Case on Point of Law

1. Determination of questions of law or construction

(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that -

(a) such question is suitable for determination without a full trial of the action, and

- (b) *such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.*
- (2) *Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.*

Order 33 Rule 3 Time, etc. of trial of questions or issues

The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated."

It is submitted by the Defendant that a look at the Plaintiffs' Statement of Claim will reveal that the Plaintiffs' claims arose after the Mediation Settlement Order dated 9th March, 2011 under Cause No. 2010/HK/366 and that the same are anchored on "*the Plaintiffs having suffered loss, inconvenience and damages*" arising from the Defendant's takeover of subdivision A of Stand 5264, Ndola and Lot 115, Kaniki, Ndola sanctioned under Cause No. 2010/HK/366. That it is further exemplified by the Plaintiffs' claims in their Statement of Claim. My attention was drawn to ***Order 45 Rule 11*** of ***The Rules of the Supreme Court***¹, which is couched in the following terms: -

"Matters occurring after judgment: stay of execution, etc.

Without prejudice to Order 47, rule 1, a party against whom a judgment has been given or an order made may apply to the Court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the

date of the judgment or order, and the Court may by order grant such relief, and on such terms, as it thinks just."

On the basis of the provision cited above, the Defendant contends that nothing precludes the Plaintiffs to raise issues under Cause No. 2010/HK/366 that they have raised herein. It is further contended that the Mediation Settlement Order still subsists and issues occurring after it was settled cannot be opened in the manner being attempted by the Plaintiffs through commencement of a new action. That the Court cannot entertain this action as it is wrongly before it. To fortify their argument, the Defendant referred to the case of ***Kelvin Hang'andu vs. Malubisha***¹, where it was held that: -

"Once a matter is before Court in whatever place, if that process is properly before it, the Court should be the sole Court to adjudicate all issues involved before it, all interested parties have an obligation to bring all issues in that matter before that particular Court..." (Defendant's emphasis)

The Court was referred to the Case of ***Oliver Neves Luambula vs. Genesis Finance Zambia Limited and Comfort Select Investments Limited***², where the Supreme Court held that: -

"The Appellant's remedy does not lie in ... or stopping the sale of the repossessed property. His remedy could have been sought under the earlier action."

The Court was also referred to the case of ***Mukumbuta Mukumbuta & Another vs. Masaka***³, where the principle governing consolidation of actions was enunciated as follows: -

"Common questions of law on facts and rights or reliefs arising out of the same transaction be consolidated in one action."

On the foregoing, the Defendant strongly contends that it is wrong for the Plaintiffs having not set aside the Mediation Settlement Order, to commence this new action. My attention was further drawn to an unreported case of **Savenda Management Services Limited and Eagle Trading International vs. Barclays Bank Zambia Plc⁴**, in which the High Court disposed of a matter in a similar manner.

On 25th January 2018, the Plaintiffs filed herein an Affidavit in Opposition to the application for summary disposal of matter on point of law, deposed to by SAVIOUR KAYULA, a Director in the 1st Plaintiff company, in which it is averred *inter alia*, as follows: -

1. *That on the 10th day of August 2010, the 1st Plaintiff issued originating process under Cause No. 2010/HK/366 at the Kitwe District Registry of the High Court of Zambia;*
2. *That the issues for determination in this matter were inter alia: -*
 - a. *An account or scrutiny to be undertaken on the two loan facilities availed to the Plaintiff by the Defendant pursuant to facility letters dated 18th June, 2008 and 17th February, 2009;*
 - b. *A determination of the legality of the recall or termination of the term loan by the Defendant and an Order as to the propriety or lawfulness of the Defendant's intention to enforce the securities held;*
 - c. *A declaration that the placing of a caveat on Plot No. 1459 was illegal as it was not property offered as security for any of the facilities and an order that the said caveat be removed.*
3. *That the action under Cause No. 2010/HK/366 was on 14th February, 2011 referred to mediation;*

4. *That it was an express term of the settlement agreement that in default of the Plaintiff to settle the outstanding amount by an appointed date, the Defendant would be at liberty to foreclose and enforce the securities;*
5. *That by the Plaintiff's default, the Defendant took possession and did make an attempt to enforce the securities for the recovery of the outstanding amounts by way of public offer and same did not yield any positive results;*
6. *That by taking possession of the property the Defendants had enforced the terms of the consent agreement made on the 9th day of March, 2011 by way of a Mediation Settlement;*
7. *That after failing to dispose the mortgaged properties by way of public sale adverts, the Bank took responsibility and possession of the mortgaged properties and the Plaintiffs were neither appraised of the status of the properties nor ever granted access to the mortgaged properties;*
8. *That subsequent to the Defendants failure to recover the outstanding amounts by way of public sale of the securities, the Plaintiff and the Defendants between November, 2015 and February, 2016 entered into a settlement agreement for the Plaintiff to settle the outstanding amount;*
9. *That based on the settlement agreement the said sum of One Million, One Hundred Thousand Kwacha (K1,100,000.00) was paid by the Plaintiff on the 14th day of March, 2016 as full and final settlement of the loan. A copy of the settlement letter is exhibited marked "SK2";*
10. *That at the time of issuing originating process under Cause No. 2010/HK/366, the properties under question were still in possession of the Plaintiffs and the Defendant took possession of the property after foreclosure in the year 2012;*
11. *That the issues relating to the state of repair of the properties in the current action were not contemplated by the Plaintiff at the time of*

- issuing initial process under Cause No. 2010/HK/366, but only came to light after having access to the properties in question;
12. That in any case the Defendants were under an obligation to keep the mortgaged properties in a good state of repair during the tenure of the loan facility;
 13. That the claims made under Cause No. 2010/HK/366 were only for purposes of reconciling the Plaintiffs position of indebtedness and facilitate the re-payment of the outstanding sums and not to the state of repair or any third party liability;
 14. That the issues raised in the first action are totally different from those raised in the current action and should be heard and determined on their merits;
 15. That the case currently before this Court is purely based on claims for loss, inconvenience and damages to property during the time the Defendant as mortgagee in possession was in charge of the properties;
 16. That the issues in this matter arise from a different set of facts from the action under Cause No. 2010/HK/366 and have not been heard or determined by any Court of competent jurisdiction.

The Plaintiffs filed herein skeleton arguments, in which the Court was referred to **Paragraph 17 A-23** of **The Rules of the Supreme Court**³, which states as follows: -

"a judgment by consent is binding until set aside... a court has no power to vary a consent judgment or order made previously in that court and therefore the only means open to a party to set aside a consent judgment or order on the ground of fraud or mistake is to bring a fresh action for that purpose."

It is submitted by the Plaintiffs that the parties to this action had entered into a consent agreement to liquidate outstanding balance on the loan overdraft by paying One Million One Hundred Thousand Kwacha (K1,100,000.00) and in default the

Defendant was at liberty to foreclose and sale of the securities. The Plaintiff contends that the Defendant did make attempts to sell the securities but to no success, thus it had exercised its rights as laid down in the Consent Agreement dated 14th February, 2011 and therefore it cannot use its failure to dispose of the securities as a means of preventing the Plaintiffs from enforcing their rights on matters that only came to their knowledge after paying off the loan and taking over their property as these are matters that could not have been anticipated by them.

The Plaintiffs submit that the issues raised under the current action are not related to those raised under Cause No. 2010/HK/366 and that in the interest of justice, the cause *in casu*, should be determined on its merits. In support of this submission, the Court's attention was drawn to the case of ***B.P. Zambia Plc. vs. Interland and Motors Limited***⁵, where the Supreme Court stated that: -

"A party in dispute with another over a particular subject should not be allowed to deploy his grievances piecemeal in scattered litigation and keep on hauling the same opponent over the same matter before various courts. The administration of justice would be brought into disrepute if a party managed to get conflicting decisions or decisions which undermined each other from two or more different judges over the same subject matter."

The Court's attention was further drawn to the case of ***Thames Launches Limited vs. Trinity House Corpn of Deptford Strond***⁶, where it was stated that: -

"I understand the principle to be that if there are two courts which are faced with substantially the same question, it is desirable to be sure that that question is debated in only one of those two courts, if by that means justice can be done."

The Plaintiffs argue that if this Court were to apply the test set out in authorities on *res judicata*, it will definitely come to the conclusion that the principle of *res judicata* cannot and does not apply to this matter as the issues that form the basis of the Plaintiffs' claims have never been adjudicated upon and arise from the omissions of the Defendant as mortgagee in possession.

My attention was drawn to **Page 1425** of **Black's Law Dictionary**⁴ where it is stated that: -

"The phrase res judicata refers to an issue that has been definitively settled by judicial decision... The three essential elements are

- i. an earlier decision on the issue;***
- ii. a final judgment on the merits; and***
- iii. the involvement of the same parties, or parties in privity with the original parties."***

My attention was further drawn to **Page 2379** of **Stroud's Judicial Dictionary of Words and Phrases**⁵ where it is stated that: -

"This plea (of res judicata) cannot be entertained but on the production of the record of the Court on which it is founded or on some valid reason being given for its non-production."

The Plaintiffs referred to the case of **Amber Louise Guest Milan Trbonic vs. Beatrice Mulako Mukinga and Attorney General**⁷, where Justice Matibini, as he then was, cited the Supreme Court

case of ***Bank of Zambia vs. Tembo and Others***⁸ in considering the phrase of *res judicata* by making reference to a passage from **Paragraph 1254** of ***Halsbury's Laws of England***⁶, which highlights the essentials of *res judicata* as follows: -

"In order that a defence of res judicata may succeed it is necessary to show that not only the cause of the action was the same, but also that the Plaintiff has had an opportunity of recovering and but his own fault might have recovered in the first action, that which seeks to recover in the second. A plea of res judicata must show either an actual merger, or that the same point had been actually declared between the same parties where the former judgment has been for the defendant, the conditions necessary to conduct the Plaintiff are not less stringent. It is not enough that the matter alleged to be concluded might have been put in issue or that the relief sought might have been claimed. It is necessary to show it was actually so put in issue or claimed."

On the basis of the cited authorities, the Plaintiff argues that the doctrine of *res judicata* is not an absolute rule of law and that the Courts have discretion. Further, that there are exceptions to the general rule and one such exception, which aptly applies to the instant case, is the legal procedure in which Consent Judgments are allowed to be challenged on grounds of fraud and undue influence. It is the Plaintiffs' argument that the failure by the Defendant to reveal the state of the property at the time of entering into a Consent Agreement with the Plaintiff to settle the outstanding amount flies in the teeth of the exceptions to *res judicata*, thus the Plaintiffs wish to rely upon that failure and

humbly prays to this Court to allow this action to proceed on its merits.

The Plaintiffs further argue that this action does not fall within the ambit of multiplicity of actions as its claims are not in any way related to those raised under Cause No. 2010/HK/366. In support of this argument, my attention was drawn to the case of ***Bakewell Bakeries Limited vs. Steyn Jempa***⁹, where the High Court hearing an appeal shed more light on the phrase of multiplicity of actions as follows: -

"The multiplicity of actions in this context meant commencement of a number of actions based on the same claim in different courts with a view of hoping to get a favourable result in at least one of them in what is termed forum shopping. From the facts of the present case, I am not satisfied that this was the position as one action was dismissed on a technicality being failure to restore in time and a fresh action commenced and so it is not as if there are two parallel actions at present."

It has been further argued by the Plaintiffs that the Defendant was under a duty to disclose the state of the property during the final settlement agreement and to keep the properties in good state of repair while they were in their custody. On the basis of the cited authorities, the Plaintiffs submit that their claim is competent and properly before this Court. They pray that the Defendant's claim to multiplicity of actions or abuse of Court process be dismissed with costs for lack of merit.

When this matter came up for hearing on 1st February 2018, both Counsel for the parties herein opted for the Court to proceed to

determine the preliminary issue raised on the Affidavits and skeleton arguments filed herein.

I have considered the preliminary issue raised by the Defendant together with the Affidavit in Support and Affidavit in Opposition. I have also considered the skeleton arguments and list of authorities filed herein by both Counsel for which I am grateful.

The application for summary disposal of matter on point of law is brought pursuant to **Order 14A Rules 1 and 2** and **Order 33 Rule 3 of The Supreme Court**¹, which I have cited above. These provisions gives the Court discretion to, *inter alia*, determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings and upon such determination, the Court may dismiss the cause or matter or make such order or judgment as it thinks just based on the particular circumstances.

The issue that remain to be determined is whether the Plaintiffs have the right to commence a new action for claims occurring after a Mediation Settlement Order under Cause No. 2010/HK/366 and which claims stem from the Plaintiffs' indebtedness in which Subdivision A of Stand 5264, Ndola and Lot 115, Kaniki, Ndola, pledged as security to the Defendant, was settled through a Mediation Settlement Order in the said Cause No. 2010/HK/366.

It is not in dispute that in Cause No. 2010/HK/366, the Plaintiffs' indebtedness in which Subdivision A of Stand 5264, Ndola and Lot 115, Kaniki, Ndola, pledged as security to the Defendant, was settled through a Mediation Settlement Order,

which sanctioned the Defendant the liberty to foreclose, take possession of the said mortgaged properties, which were pledged as security by the Plaintiffs in Cause No. 2010/HK/366 and have the power of sale, upon failure by the Plaintiffs to discharge the Judgment sum. It is also not in dispute that the parties in Cause No. 2010/HK/366 are also the parties in the action before me and that the claims in the action before me occurred subsequent to the said Mediation Settlement Order reached in Cause No. 2010/HK/366.

As submitted by the Defendant, the issues in the matter before this Court are issues that flow from the Mediation Settlement Order. Thus these issues cannot be said to be separate and distinct from the issues under Cause No. 2010/HK/366 as both causes of action have their genesis in the credit facility which the Defendant availed the Plaintiffs and for which the Plaintiffs pledged Subdivision A of Stand 5264, Ndola and Lot 115, Kaniki, Ndola as security.

It is the view of this Court that the claims before this Court are post-judgment claims, which cannot be brought under a new action. I refer to **Order 45, Rule 11** of **The Rules of the Supreme Court**¹, which the Defendant referred this Court to and which I cited above. The provision gives a party against whom an order has been given the liberty to apply to the Court under the same cause for relief on the ground of matters which have occurred since the date of the order and the Court may grant such relief on such terms as it thinks just. Therefore, I find that the action before me is not where the Plaintiffs can seek the

remedies sought, but that these remedies can be sought under Cause No. 2010/HK/366, which is the action in which issues related to and flowing from the properties pledged as security were determined. Any matters arising from the Mediation Settlement Order should be brought under Cause No. 2010/HK/366.

Allowing this matter to proceed before this Court, would therefore be allowing multiplicity of actions and would go against the spirit of **Order 45 Rule 11**. As seen from the cases cited above and the many authorities that were referred to this Court by the parties, the Court has on many occasions expressed its displeasure of multiplicity of actions over the same subject matter.

Accordingly, I find that the application for summary disposal on Point of Law has merit and is hereby granted. The matter is accordingly dismissed with costs to the Defendant to be taxed in default of agreement.

Leave to appeal is granted.

Delivered on the 5th day of March, 2018.



P. K. YANGAILO
HIGH COURT JUDGE