IN THE SUPREME COURT OF ZAMBIA **Appeal No. 208/2015**
HOLDEN AT LUSAKA **SCZ/8/300/2015**
(Civil Jurisdiction)
B E T W E E N :

MPONGWE FARMS LIMITED **APPELLANT**

AND

DAR FARMS AND TRANSPORT LIMITED **RESPONDENT**

Coram: **Wood, Malila and Kabuka, JJS on 6th February, 2018 and 28th February, 2018.**

For the Appellant: Mr. K. Kaunda of Messrs Ellis & Company

For the Respondent: Mr. K. Wishimanga of Messrs A. M. Wood & Company

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RULING

Malila JS, delivered the ruling of the court.

Cases referred to:

1. *Anderson Kambela Mazoka & Others v. Levy Mwanawasa & Others (2005) ZR 138*
2. *Nyampala Safaris (Z) Ltd. v. Zambia Wildlife Authority & Others (2004) ZR 49*
3. *Shoprite Holdings & Another v. Lewis Chisanga Mosho & Another (SCZ Judgement No. 40/2014)*
4. *Finsbury Investments Ltd and Others v. Antonio Ventriglia & Another, SCZ Judgment No. 17/2013.*
5. *R v. Bow Street Metropolitan Stipendiary Magistrate and Others ex-parte Pinochet Ugarte (No. 2) (1999) 1 ALL ER 577.*

6. *Chibote Limited, Mazembe Tractor Company Limited and Others v. Meridien BIAO Bank (In liquidation, SCZ Judgment No. 11 of 2003).*
7. *Zambia Revenue Authority v. Hitch Trading Co. Limited (SCZ Judgment No. 40 of 2000)*
8. *Trinity Engineering (Pvt) Limited v. Zambia National Commercial Bank Limited (1995-1997) Z.R. 166*
9. *Nyimba Investments Limited v. Nico Insurance (Zambia) Limited (SCZ/8/150/2012)*
10. *Standard Charted Bank Zambia Plc v. Wisdom Chanda and Christopher Chanda (Appeal No. 92 of 2009)*
11. *Trevor Limpic v. Mawere (SCZ/8/123/2015)*
12. *Access Bank (Z) Ltd. v. Group Five/ZCON (SCZ/8/52/2014)*
13. *Attorney-General v. Kang'ombe, (1973) ZR 114*
14. *Nahar Investment Ltd. V. Grindlays Bank International (Z) Ltd, (1984) ZR 81*
15. *London Street Tramways v. London County Council, (1898) AC 375*
16. *Finsbury Investments & Another v. Antonio Manuela Ventrigria (Appeal No. 11 of 2009)*

Legislations referred to:

1. *Lands and Deeds Registry Act, Cap 185 ss. 7, 66*
2. *Order 48(5) of the Rules of the Supreme Court, Chapter 25 of the Laws of Zambia*
3. *Halsbury' Laws of England 4th ed.*
4. *Supreme Court Rules (1999) edition of the White Book*
5. *Supreme Court Act, Chapter 25 of the Laws of Zambia*

The current motion was expressed to have been taken out pursuant to rules 48(5) and 78 of the Supreme Court Rules, Chapter 25 of the Laws of Zambia, and the inherent jurisdiction of the Supreme Court. It calls upon this court to reopen the appeal proceedings which culminated in our judgment of 21st September

2016, with a view to revisiting that judgment. Our said judgment was given in favour of the respondent against the applicant.

The dispute between the parties arose from a series of transactions affecting Farm No. 4809, Ndola (the Suit Property) belonging to the respondent. The respondent had mortgaged the Suit Property to a consortium of Lenders (the Lenders or Third Parties) who in turn entered into a deed of transfer of mortgage with the applicant dated 20th March, 2006. By that deed, the Lenders transferred their rights and interests in the mortgage to the applicant for a consideration of US$626,000.00.

In our judgment now under challenge, we held that the applicant became the mortgagee of the Suit Property, and as the applicant had entered and used the Suit Property as mortgagee in possession, the applicant was obliged to render an account to the respondent whose equity of redemption in the property continued to subsist. We referred the matter to the High Court for purposes of the rendering of the account. The applicant is now back before this court on a motion.

The grounds for this motion are two-fold namely, first, that in passing its judgment aforesaid, this court overlooked, through forgetfulness, the provisions of sections 7 and 66 of the Lands and Deeds Registry Act, chapter 185 of the Laws of Zambia, and second, that the court did not reveal its mind on the status of the second mortgage and the rights of the Lenders (who were the Third Parties in the lower court) and thus did not resolve all issues in the appeal in finality.

It is the applicant's fervid prayer that upon reopening the appeal, the applicant be affirmed as the mortgagee in possession, and thereupon be granted an order allowing the applicant to compute the outstanding debt of the respondent on the basis of the sum of US$626,000 plus interest compounded as per mortgage deed. The applicant also seeks an order allowing it the liberty to foreclose and sell the mortgaged property. Finally, the applicant prays that it be allowed by order, to recover the costs and expenses incurred in protecting, through court action, the Suit Property from squatters and from the State.

The motion is supported by an affidavit sworn by Bonaventure Chibamba Mutale SC, Advocate for the applicant. In the affidavit, the deponent essentially recites the claims as presented in the lower court and as captured in the judgment of that court. He also summarises the claim on appeal which resulted in our judgment that has given rise to the present motion. More pertinently, the deponent states in paragraph 11 that:

> **I have perused the record and reached a conclusion that it is necessary for the appeal to be reopened.**

There were also filed together with the motion, the applicant's heads of argument and list of authorities.

The respondent stoutly opposed the motion and to this end, filed an affidavit in opposition sworn by John William Kelly Clayton as well as heads of argument. We shall revert to the arguments for and against the substantive motion later in this judgment.

Prior to the hearing of the motion, the respondent filed a notice to raise a preliminary objection supported by an affidavit. Two pertinent issues were raised in that objection, namely first, whether, having refused, neglected or ignored to carry into effect the order

contained in our judgment of 21st September 2016, the applicant could properly bring this motion before us. Second, whether, in the absence of leave from court to file the motion, the applicant's motion was properly before the court.

In respect of the first ground of objection, it was contended that the applicant had wilfully disregarded the judgment of this court which directed it to render an account to the respondent on the recovery of the mortgage debt. According to counsel for the respondent, the application before the court should not be heard in light of the wanton breach of the order contained in the judgment of this court now the subject of complaint by the applicant. He quoted paragraph 516 of **Halsbury' Laws of England 4th ed**. (reissue) paragraph 516 Vol. 9(1) where it is stated that:

> **The general rule is that a party in contempt cannot be heard or take proceedings in the same cause until he had purged his contempt, nor while he is in contempt can he be heard to appeal from any order made in the cause.**

In regard to the second point of objection, Mr. Wishimanga contended that the present motion was taken out pursuant to, among other provisions, under Order 48(5) of the rules of the

Supreme Court, chapter 25 of the Laws of Zambia. That rule provides that an application under it should be by way of a motion or summons and should be made within 14 days of the decision complained of. The decision complained of in this case was made in September 2016. The applicant has come by way of a notice of motion filed in June 2017, some nine months after the judgment complained of, but has not shown the court that leave to file the motion out of time was obtained. The learned counsel added that the situation would have been different had the applicant proceeded only under rule 78 of the Supreme Court Rules which does not prescribe the time within which an application ought to be made.

It was contended that having chosen to proceed under rule 48(5), the applicant is bound to follow the requirements under that rule especially the requirements as to time of filing the motion. According to Mr. Wishimanga, the motion was palpably incompetent and ought to be dismissed on this basis alone.

The preliminary objections were strenuously resisted by the respondent. An affidavit in opposition sworn by Demetre Vangelatos as well as skeleton arguments in opposition were filed. Mr. Kaunda,

learned counsel for the applicant, started by attacking the very rule cited in taking out the preliminary objection. He submitted that the motion to raise objection was taken out under rule 19 of the Supreme Court Rules which provides that:

> **(1) A respondent shall, where the respondent intends to take a preliminary objection to any appeal, not less than seven days prior to the hearing of the appeal, give notice thereof to the court and to the party to the appeal.**

He argued that the wording of rule 19 clearly indicates that it can only be invoked where there is an appeal pending hearing by the Supreme Court. In the present case, the applicant's notice of motion does not involve an appeal, but an application to open an appeal. Accordingly, argued Mr. Kaunda, rule 19 of the Supreme Court Rules has no application to the proceedings. Counsel also contended that as the respondent had filed an affidavit in opposition to the actual motion along with heads of argument on the merits of the applicant's motion, the preliminary objection had been overtaken and thus ought to be dismissed.

The learned counsel then made a different argument, namely that the respondent's affidavit contains assertions of law contrary to the provisions of rule 41/5/1 of the White Book. In counsel's view,

paragraphs 7, 8, 9 and 11 of the respondent's affidavit contain extraneous matter by way of arguments and ought to be struck out with costs.

Mr. Kaunda next responded to the issue of leave to file the notice of motion. He submitted that no leave was required to be obtained as contended by Mr. Wishimanga since the motion was also brought pursuant to the inherent jurisdiction of the court. He cited section 8(1) and (2) of the Supreme Court Act which allows the court to, where the Supreme Court Act and rules are silent, follow as nearly as may be, the Supreme Court Practice 1999 (White Book) and the law and practice in the Court of Appeal in England in force up to 31st December, 1999. According to Mr. Kaunda, under the practice obtaining in the United Kingdom, there is no prescribe period as regards the exercise of inherent jurisdiction.

In respect of the argument premised on contempt of this court's judgment, Mr. Kaunda submitted that the respondent's argument was untenable and misconceived. Neither the applicant, nor any of its directors has been convicted of contempt of court. The record does not furthermore show that any contempt proceedings had been

commenced against the applicant. Counsel quoted Order 45 rule 7(1) and (4) of the Rules of the Supreme Court (White Book) 1999 edition, regarding the prerequisites to commencement of contempt proceedings. After referring to various other authorities, Mr. Kaunda submitted that the respondent in this case did not demonstrate that the requirements for commencement of contempt proceedings had been met. We were urged to dismiss the respondent's preliminary objections for being misconceived.

Mr. Wishimanga made somewhat detailed remarks in rejoinder. In regard to the argument that rule 19 of the Supreme Court rules applied only to appeals and not to motions, counsel for the respondent submitted that rule 2 of the Supreme Court Rules, chapter 25 of the laws of Zambia, defines a respondent as including any person served with a notice of appeal, an application or a notice of motion, etc. It was Mr. Wishimanga's contention that rule 19 should be read *mutatis mutandis* to include a preliminary objection raised to such notice of motion.

In responding to the argument that the respondent's right to object was overridden by its filing of an affidavit in opposition to the motion and arguments against the substantive motion, Mr. Wishimanga submitted that no action taken by the respondent to resist the motion took away the jurisdiction of the court to determine the preliminary point raised in respect of that motion. The preliminary issue, according to Mr. Wishimanga, has an effect on the motion and should thus be pronounced upon by the court.

Mr. Wishimanga dismissed as without basis the submission that the respondent's affidavit, particularly the paragraphs specified by Mr. Kaunda, contained extraneous matters by way of legal arguments. Mr. Wishimanga contended that had Mr. Kaunda properly considered the authority he cited, i.e. Order 41/5/1 of the Rules of the Supreme Court (White Book) he would have realised that there is an exception to swearing affidavits which contain statements of fact and belief where such affidavit is used in an interlocutory procedure.

After hearing the submissions on behalf of both parties on the preliminary objection, we deferred our decision on it and directed the parties to proceed to argue the merits of the main motion. We undertook to deliver a combined ruling on the preliminary issue and the motion later. This approach is consistent with our practice in various cases including **Anderson Kambela Mazoka & Others v. Levy Mwanawasa & Others**[1], **Nyampala Safaris (Z) Ltd. v. Zambia Wildlife Authority & Others**[2], **Shoprite Holdings & Another v. Lewis Chisanga Mosho & Another**[3].

Mr. Kaunda then proceeded to advance arguments in favour of the applicant's motion. He relied chiefly on the heads of argument filed on behalf of the applicant. In those heads of argument, it was contended that this court has power to revisit its judgment. Counsel quoted various portions of our judgment in the case of **Finsbury Investments Ltd and Others v. Antonio Ventriglia & Another**[4]. In that case we referred with approval to the House of Lords case of **R v. Bow Street Metropolitan Stipendiary Magistrate and Others ex-parte Pinochet Ugarte**[5] as well as to our decision in **Chibote Limited, Mazembe Tractor Company Ltd, Minestone Zambia Limited, Minestone Estates Limited v. Meridien BIAO Bank (Z) Limited**[6].

Having argued the case about the power of this court to reopen its decision, the appellant's learned counsel then turned to the grounds upon which the present motion was launched.

The gist of the appellant's argument is that our judgment was made *per incuriam* as it did not take into account sections 6 and 77 of the Lands and Deeds Registry Act. Counsel went to great lengths defining the term *'per incurriam'* and to that end quoted numerous authorities. We think with respect that the meaning of the term *per incuriam* was not the issue in contention.

Section 7 of the Lands and Deeds Registry Act provides for priority in registration of documents as follows:

> **(1) All documents required to be registered as aforesaid shall have priority according to date of registration; notice of a prior unregistered document required to be registered as aforesaid shall be disregarded in the absence of actual fraud.**
>
> **(2) The date of registration shall be the date upon which the document shall first be lodged for registration in the Registry or, where registration is permitted in a District registry, in such District registry.**

Section 66, on the other hand, enacts as follows:

> **(1) A power of sale of the whole or any part or parts of any property subject to a mortgage shall become exercisable by a mortgagee**

if the mortgage is made by deed and the mortgage money payable thereunder has become due and the mortgage is not redeemed before sale, and every such power of sale shall be with and subject to the powers and obligations and other provisions relating to sales by mortgagees contained in the Conveyancing and Law of Property Act, 1881 of the United Kingdom, or any statutory modification thereof applicable in Zambia, but neither the Registrar nor any person purchasing for value from such a mortgagee shall be bound or concerned to see whether all or any of the provisions of that Act have been complied with or whether any money remains due under the mortgage.

(2) A mortgagee exercising the said power of sale shall have power by deed to transfer to the purchaser the whole estate or interest of the mortgagor in the property the subject of the mortgage freed from the right of redemption by the mortgagor and freed from all estates, interests and rights to which the mortgage has priority but subject to all estates interests and rights which have priority to the mortgage.

The submission on behalf of the applicant is that the Lenders in the lower court, who had transferred their interest in the mortgage over the Suit Property to the applicant, had the power to sell and did sell the Suit Property to the applicant; that they had met all the requirements of a mortgagee in possession exercising its right of sale, and were, therefore, not barred by any prior interest. It follows that the judgment of this court that the Lenders were not the vendors but

merely transferees of an interest in a mortgage flies in the teeth of sections 7 and 66 of the Lands and Deeds Registry Act.

To an intent not at all clear to us, counsel for the applicant submitted that there can be no estoppel against a statute and cited numerous authorities to support that submission.

Mr. Kaunda did not leave matters there. He put forth an alternative plea. This was that in the event that we revisited our judgment but still affirmed that the applicant was a mortgagee in possession and not the owner of the Suit Property, we should order and direct that the applicant computes the outstanding debt from the respondent plus interest and that it recovers the resultant amount from the respondent, or alternatively exercises its rights of foreclosure and sale of the Suit Property.

In his supplementary oral submissions, Mr. Kaunda, reiterated that the applicant's position is that it was the owner of the property and not merely a mortgagee in possession.

Mr. Wishimanga, relied on the heads of argument already filed in opposing the motion. The first issue that he addressed in the heads of argument was that the affidavit in support of the motion

was sworn by counsel seized with the conduct of the matter on behalf of the applicant. This, according to counsel for the respondent, is irregular and has been disapproved in a number of cases by this court, including **Zambia Revenue Authority v. Hitch Trading Company Limited**[7]. The affidavit itself, according to Mr. Wishimanga, is devoid of facts upon which the motion is premised. In these circumstances, counsel urged us to dismiss the motion.

Notwithstanding the foregoing preliminary submission, Mr. Wishimanga went on to argue that rule 78 of the Supreme Court Rules, chapter 27 of the Laws of Zambia, under which the present motion was also expressed to have been taken, was a wrong rule to invoke. That rule could only be relied upon where there is a clerical error or accidental slip or omission which the applicant seeks to have corrected. He referred to Order 20/11/1 of the Rules of the Supreme Court (1999) edition of the White Book, which equally explains the use of the slip rule. More pertinently, he emphasised the portion of the explanatory notes to the rule where it is stated as follows:

> **The error or omission must be an error in expressing the manifest intention of the court; the court cannot correct a mistake of its own in law or otherwise, even though apparent on the face of a rule or statute...If the order as drawn correctly expresses the intention, it**

cannot be corrected under this rule or the inherent jurisdiction, even if the decision of the court is procured by fraud or misrepresentation.

Counsel contended that this rule cannot be invoked where, as in the present case, the applicant attacks the judgment for an alleged forgetfulness on the part of the court, of certain laws which could, in the prior proceedings, have formed part of the applicant's defence and counter claim and/or ground of cross appeal. He submitted that the applicant failed to present any and all defences that were available to it in the lower court and now seeks to use this motion to sneak in a defence at this late stage. Counsel referred to our judgment in **Trinity Engineering (Pvt) Limited v. Zambia National Commercial Bank Limited**[8] where we pointed out that rule 78 of the Supreme Court Rules, chapter 25 of the laws of Zambia, cannot be used to set aside or reopen a final judgment of the court.

Mr. Wishimanga also referred us to the cases of **Chibote Limited, Mazembe Tractor Company Limited, Minestone (Zambia) Limited, Minestone Estates Limited v. Meridien BIAO Bank (Zambia) Limited (in liquidation)**[6] and **Finsbury Investments Limited & Others v. Antonio Ventriglia & Another**[4] in which we explained the rare circumstances in which we would reopen an appeal with a view to varying it.

Counsel stressed that the situation before us does not fall within the exceptional circumstances referred to in those cases.

The learned counsel also quoted our decision in **Nyimba Investments Limited v. Nico Insurance (Zambia) Limited**[9] where we pointed out that rule 78 of the Supreme Court rules was not intended to be used routinely as an avenue for any dissatisfied party to have the appeal and the judgment reviewed. He further cited the case of **Standard Charted Bank Zambia Plc v. Wisdom Chanda and Christopher Chanda**[10], where we emphasised that section 78 does not provide a pathway for challenging the final decision of this court even if it were wrong.

Having made the foregoing arguments, Mr. Wishimanga proceeded to advance an alternative argument to fortify the respondent's position in the event that we did not agree with him on his objections to the motion thus far. He referred us to the applicant's cross appeal which we determined in the judgment now being assailed. He pointed out that the applicant had made no attempt, not even a feeble one, to challenge through that cross appeal, the finding of the High Court regarding the transfer of the

mortgage. The applicant, according to Mr. Wishimanga, is attempting to do so through the current motion. More purposefully perhaps, the learned counsel quoted a passage from the High Court judgment exhibited in the record of motion where the learned judge stated as follows:

> **...it is evident that at the time of execution of the transfer of the mortgage, the Third Parties were mortgagees in possession of the property and were therefore in a position to exercise their rights under clause 19 of the mortgage deed, to rent or lease out the property, to appoint a receiver or to exercise any statutory power of sale. However, for some reason best suited to the Third Parties, they did not exercise the aforestated rights, but they instead opted for a transfer of the mortgage for a consideration of US$626,000.00. My understanding of the transfer, especially in view of clause 1 and 2 of the transfer of mortgage aforestated, is that the Third Parties transferred and assigned their rights at the time which they held under clause 19 of the mortgage deed with emphasis in particular on the right to exercise the statutory power of sale incidental to the mortgage while the equity of redemption was retained as subsisting.**

The learned counsel went on to recite other long passages from the High Court judgment. We do not find it necessary to repeat those quotations here. The short point counsel was making, however, is that the High Court judge made a specific finding on the nature of

the transaction from which the applicant became interested in the Suit Property, and that there was no appeal in respect of that finding.

The learned counsel also pointed out that in its judgment on appeal this court did make a full determination on the capacity of the parties to the various transactions affecting the Suit Property. He quoted the statement we made in our said judgment in the process of dismissing the applicant's cross appeal that:

> **The conduct of the respondent was inconsistent with the very right of the respondent as mortgagee in possession to realise the security given in the mortgage.**

As regards sections 7 and 66 of the Lands and Deeds Registry Act relied upon by the applicant, Mr. Wishimanga submitted that these sections do not in any way suggest that once a mortgagee has been clothed with the power of sale then any subsequent transfer should be regarded as a sale. In the present instance, there was no sale of the mortgaged property to the applicant by the Lenders. What happened was a mere transfer of an interest in a mortgage.

In Mr. Wishimanga's submission, the import of the applicant's argument is that the court ought to have determined any issues regarded as outstanding between the Lenders as Third Parties and

the respondent. This court, according to Mr. Wishimanga, did pronounce itself clearly on that particular question. The learned counsel fervidly prayed that we dismiss the motion for lacking merit.

We are grateful to both counsel for their submissions from which we have benefited immensely. We wish to deal first with the preliminary objection raised by counsel for the respondent.

The first point of objection concerns the propriety of a party who has not complied with a judgment taking out a motion such as the present one. Mr. Wishimanga alleges that as the applicant has failed to carry into effect the judgment of this court, it cannot properly bring out a motion. Mr. Kaunda of course thinks otherwise.

In our judgment now under challenge, we did direct the applicant to render an account to the respondent on the recovery of the mortgage sum. This was in full realisation that the applicant had been in possession of the Suit Property for a considerable period using its status as transferee of the original mortgagee's rights under the mortgage concluded between the respondent and the Lenders. We referred the matter to the High Court for purposes of rendering

such account. No time-line was given for this purpose in our judgment.

At the hearing of the motion, Mr. Wishimanga confirmed that the applicant had not rendered any account, neither had the respondent taken any action by way of activating the process of rendering the account in the High Court. The applicant has now come back to this court to have its dissatisfaction with the judgment reconsidered.

We think that in these circumstances, the objection on behalf of the respondent is not well taken. Our judgment, as we have described it, was not self-executing nor did it impose any timeline for either party, especially the applicant, to take any action. It was incumbent upon the party in whose favour the judgment was given to take active and timely action to actualise the judgement or make it executable. As it is, it is indeed difficult to identify a particular aspect of the judgment which has been breached by the applicant.

The fact that we referred the matter to the High Court to deal with the issue of accounting by the applicant as mortgagee in

possession means that any further action with regard to carrying our judgment into effect now resides with the High Court.

There are no contempt proceedings commenced against the applicant for failure to obey our judgment, nor indeed would any such proceedings be properly taken before us in the circumstances. We are thus unable to accept the ground of objection to the motion premised merely on the failure by the applicant to carry into effect the judgment of this court whose order was not time bound.

On the issue of leave to file a motion if 14 days have elapsed, we entirely agree with Mr. Wishimanga that in terms of rule 48(5), any motion in respect of a judgment should be filed within 14 days. That position of the law is incontrovertible. However, as we indicated at the outset, the motion was taken out not only in terms of rule 48(5); it was also commenced pursuant to rule 78 and the inherent jurisdiction of this court. While rule 48(5) prescribes what ought to be done, and when such action ought to be undertaken, the inherent jurisdiction of the court represents a body of default powers which enables a court to fulfil, properly and effectively, its role as a court of law. Inherent jurisdiction is at the disposal of this court in addition

to detailed rules, and allows us to take certain steps with regard to the conduct of proceedings. What is clear is that there is no time frame prescribed for the invocation of a court's inherent jurisdiction, nor is the trigger for the exercise of such jurisdiction left to prescription by the rules. In other words, inherent jurisdiction may be exercised either on application by a party to proceedings, or upon the court moving itself when the situation and the ends of justice warrant.

Our view is that the arguments that were so passionately advanced by Mr. Wishimanga regarding compliance with the time prescribed in rule 48(5) become moot when measured against inherent jurisdiction. In the result, this objection too must fail. Having so decided, we find it unnecessary to comment on the arguments put forth by Mr. Kaunda regarding rule 19 of the Supreme Court Rules and those touching on the affidavit filed in opposition, nor do we see any real need to dwell on Mr. Wishimanga's complaint that counsel for the applicant swore an affidavit.

We now turn to considering the substantive motion before us. Having read the heads of argument and having carefully considered the oral arguments of the parties' respective advocates concerning the substance of the motion, two observations can be made. First, although the motion, and especially the voluminous nature of the documents in support, creates the impression that the motion is unremittingly complex, it is in fact determinable on the very narrow point of the capacity in which the applicant stood relative to the respondent after the transfer of the mortgage to the applicant by the Lenders. The question is whether the applicant became the buyer and, therefore, owner of the Suit Property or merely a mortgagee with the respondent as mortgagor?

The second observation is that the articulation of the issues for determination by the movant of the motion is anything but satisfactory. As we have pointed out in the earlier parts of this judgment, the applicant's prayer is that if we reopen the appeal, we should affirm the applicant as the mortgagee in possession and grant it the right to foreclose and sell in the event that the respondent does not pay the debt due on the mortgage. And yet, it is the same

applicant who has argued, through Mr. Kaunda, that the applicant became the buyer, not the mortgagee of the Suit Property and hence the resort to sections 7 and 66 of the Lands and Deeds Registry Act. These are irreconcilable positions which make the applicant's motion plainly incredible.

The vast amount of paper work in this motion and the written copious written submission seem to us more of a sales pitch than an attempt at articulation and analysis. This should have a direct implication of the costs of this motion.

Section 66 of the **Lands and Deeds Registry Act** which this court is alleged to have forgotten in coming up with its judgment, relates to the power of sale reposed in a mortgagee. This power is exercisable by a mortgagee who retains his rights as such in the property subject of a mortgage. In this case, the Third Parties in the lower court, that is to say the Lenders, had transferred their rights in the mortgage to the applicant. The transaction between the Lenders and the applicant was one of sale and transfer of rights in the mortgage and nothing more. This was a factual point that was made very clear in the High Court judgment and from which no appeal was made to us. Thus,

the applicant became the new mortgagee, with the respondent remaining the mortgagor.

Of course, the Lenders as previous mortgagees, were perfectly entitled within the known bounds of the law to exercise their power of sale as such mortgagee in terms of section 66. They elected instead to transfer their mortgage to the applicant for valuable consideration. The applicant thus assumed the position of mortgagee, not owner of the Suit Property. It thus acquired the rights and powers which the original mortgagee had, including the power to sale on obtaining an appropriate order. This implied a corresponding right of redemption on the part of the respondent as mortgagor. We agree entirely in this regard with the submissions of Mr. Wishimanga.

As regards the claim that the court did not pronounce itself on the status of the second mortgage and the rights of the Lenders thereby neglecting to put to rest all issues in dispute, the position is that the Lenders were not party to the appeal before the court. It was the rights of the applicant as mortgagee and those of the respondent as mortgagor that were in dispute in the appeal. These were

pronounced upon fully. With respect, we think the motion thus lacks merit and is liable to be dismissed.

Perhaps a more pertinent reaction to this motion should be from a broader judicial policy perspective. And this is that, to the extent that the motion seeks to have a Supreme Court's final judgment reopened and reargued, it cannot easily succeed. The general position we adopt is that final judgments of this court will rarely ever be reopened and changed for the all-important reason of safeguarding the integrity of the judicial process itself. Finality of litigation is a public virtue to be embraced at all times. The rationale for the principle of finality is to avoid the spectre of repeated efforts at litigation.

In the case of **Trevor Limpic v. Mawere**[11] we stressed as we did in **Chibote Limited, Mazembe Tractor Company Limited and Others v. Meridien BIAO Bank** [6] that reopening an appeal after a final judgment of the court will very seldom be done, and even then, on satisfaction of clearly set out criteria.

In the present case, the reason given for the request for us to reopen the appeal is that it was made in forgetfulness of section 7

and 66 of the **Lands and Deeds Registry Act**. It was not. The question of registration and priority ranking of documents was never raised as an issue either before the lower court in the pleadings, at the trial or in the arguments of counsel. The High Court, therefore, did not deal with the issue and, not surprisingly, said nothing about either section in its judgment. On appeal, the issues for determination were defined by the grounds of appeal and those of cross appeal. These were expatiated upon by the arguments deployed before us at the hearing. At no point was either section 7 or section 66 of the **Lands and Deeds Registry Act** ever raised.

There is no doubt that portions of our judgement of 21st September 2016, have continued to cause considerable annoyance to the applicant. This is not unexpected. As we stated in **Access Bank (Z) Ltd. v. Group Five/ZCON**[12], by their very nature, judgments hardly ever give universal satisfaction to all parties to them. It is undoubtedly not unusual that one side or the other, and sometimes both, would discommend a judgment when it is delivered, but this does not afford ground to reopen litigation. It does not *a priori* entitle the dissatisfied litigant to litigate endlessly. There is public interest

in litigation being brought to an end, a point we have explained in numerous cases such as **Attorney-General v. Kang'ombe**[13] and **Nahar Investment Ltd. v. Grindlays Bank International (Z) Ltd**[14]. After all the Supreme Court is not final because it is infallible, rather because it is final in the hierarchy of the courts. As Lord Halsbury LC remarked in the case of **London Street Tramways v. London County Council**[15]:

> **...of course I do not deny that cases of individual hardship may arise and there may be a current of opinion in the profession that such and such a judgment was erroneous; but what is that occasional interference with what is perhaps abstract justice as compared with the inconvenience – the disastrous inconvenience – of having each question subject to being reargued and the dealings of mankind rendered doubtful by reason of the different decisions, so that in truth and in fact there would be no real final court of appeal? My Lords, *'interest rei publicae'* that there should be *'finis litium'* at some time, and there could be no *'finis litium'* if it were possible to suggest in each case that it might be reargued because it was not an ordinary case, whatever that might mean.**

For judgments given by the Supreme Court, especially, apart from the narrow instances in which the rules of court allow for reopening of a matter as we articulated them in **Finsbury Investments & Another v. Antonio Manuela Ventrigria**[16], there is great good sense in bringing closure to court matters even if neither party is entirely satisfied.

The motion is without merit and is dismissed with costs. Our inclination for the future is to order costs against counsel personally who delight in taking up motions which are frivolous or so patently doomed to fail.

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A. M. Wood
SUPREME COURT JUDGE

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Dr. M. Malila SC
SUPREME COURT JUDGE

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J. K. Kabuka
SUPREME COURT JUDGE