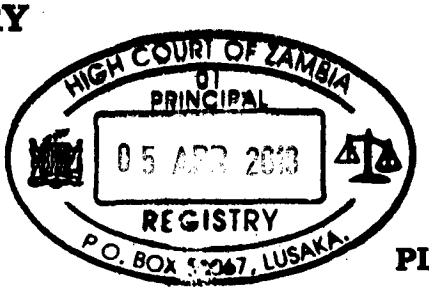
IN THE HIGH COURT FOR ZAMBIA **2015/HP/2097**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)



B E T W E E N:

GBZ EMERGENCY CALL CENTRE **PLAINTIFF**

AND

WILLIAM CHISHA KAPELA **DEFENDANT**

Before Honourable Mrs. Justice M. Mapani-Kawimbe on the 5th day of April, 2018

For the Plaintiff	:	*Mr. H. Kabwe, Messrs Hobday Kabwe & Co.*
For the Defendant	:	*Mr. A. Mbambara, Messrs Mbambara Legal Practitioners*

J U D G M E N T

Cases Referred To:

1. *Edman Banda v Charles Lungu, Selected Judgment No. 22 of 2017*
2. *Kalusha Bwalya v Chardore Properties and Haruperi Appeal No. 222/2013*
3. *Union Bank Zambia Limited v Southern Province Cooperative Marketing Union Limited (1995-1997) Z.R 207*
4. *Cope v Rowland (1836) 2 M & W 149*
5. *Robson Sikombe v Access Bank Zambia Limited[6] SCZ Appeal No. 240/2013*
6. *The Rating Valuation Consortium and D.W. Zyambo & Associates (Suing as a firm) v the Lusaka City Council and Zambia National Tender Board (2004) Z.R. 109 (S.C.)*
7. *Lackson Mwabi Mwanza v Sangwa Simpasa,Chisha Lawrence Simpasa, 2005/HP/0500*

Legislation Referred To:

1. *Money Lenders Act, Chapter 398*

The Plaintiff issued a Writ of Summons endorsed with claims for:

(i) *Payment of K200,000.00 owed to the Plaintiff.*
(ii) *An order of possession and foreclosure on Stand No. 27121, Libala South*
(iii) *Interest on the outstanding amount in (i) above*
(iv) *Costs*

The Statement of Claim discloses that on 15th May, 2015, the Defendant borrowed K130,000 from the Plaintiff and promised to repay the loan with interest by 15th August, 2015. He pledged and surrendered his certificate of title No. 69738 for Stand No. 27121 as collateral.

On 29th June, 2015, the Defendant borrowed an additional K10,000 from the Plaintiff and volunteered K5,000 as interest. This raised his debt to K145,000. He promised to settle the debt by 15th August, 2015. The Defendant further borrowed K10,000 on 28th July, 2015 and again volunteered K5,000 as interest. His debt rose to K160,000, which he promised to settle by 15th August, 2015. The Defendant failed to pay the K160,000 and he entered into a final agreement with the Plaintiff where he committed to pay K200,000

by 10th September, 2015. Despite several reminders, the loan was not repaid.

The Defendant settled a Defence and Counterclaim where he admits that he executed a loan agreement with the Plaintiff Company. He only borrowed K80,000 and deposited his title deed as security. He was not given copies of the agreements and was made to sign documents, which were not explained to him. The Defendant avers that he paid back the K80,000 vide a cheque dated 19th November, 2015 issued by his Advocates to the Plaintiff's Advocates. He denies that he borrowed additional money from the Plaintiff. He disputes the compound interest charged by the Plaintiff Company and desires it to return his certificate of title having settled his debt in full.

The Defendant counterclaims:

(i) Return of his certificate of title relating to Stand No. 27121, Lusaka.
(ii) Costs
(iii) Further and other relief as the Court may deem fit.

At trial, **Geofrey Benjamin Zulu** testified as **PW1**. His evidence was that on 14th May, 2015, the Defendant went to his house to borrow money for his project. He told the Defendant to meet him at his office on 15th May, 2015. On that date, he lent the Defendant K130,000 in cash. In return, the Defendant surrendered his title deed as collateral and promised to settle his debt after three months.

PW1 testified that as the loan was still subsisting, he reluctantly lent the Defendant an additional sum of K10,000 in June, 2015. The Defendant volunteered K5,000 as interest and by that addition, he owed the Plaintiff K145,000. PW1 testified that in July, 2015, the Defendant borrowed another K10,000 and told him that his title deed was sufficient security for the loan, considering the money that he had borrowed. According to PW1, the Defendant signed a consent letter where he re-pledged the collateral and granted PW1 authority to sell his property if he defaulted. A further agreement was signed factoring the cumulative amounts of the loan.

PW1 told the Court that he signed several agreements with the Defendant, the first of which was on 15th May, 2015 where he borrowed K130,000. In that agreement the Defendant pledged his title deed No. 69738 for house No. 2712, Libala South as collateral. The Defendant's second loan was evidenced by his letter acknowledging the additional payment of K10,000 from PW1. He also volunteered K5,000 as interest. At that point, the balance due to the Plaintiff rose to K145,000.

PW1 testified that the Defendant borrowed another K10,000 from the Plaintiff and again volunteered K5,000 as interest. As of July, 2015, the Defendant's debt stood at K160,000 representing a principal of K150,000 and K10,000 interest. According to PW1, all the transactions between the parties were all documented and signed for. They were also witnessed by the Plaintiff Company's representatives, while the Defendant did not call witnesses.

PW1 also testified that the Defendant owed the Plaintiff K180,000 and K20,000 interest as at 20th August, 2015. The Defendant never settled the debt in spite of his promises. The

Defendant however, paid the Plaintiff K80,000 in November, 2016 and a balance of K120,000 remained outstanding at the time of trial. He prayed to Court to order the Defendant to pay the K120,000 with interest and costs. In the alternative, he beseeched the Court to authorise the Plaintiff to sell the Defendant's house, which was pledged as security.

In **cross-examination**, PW1 testified that he gave the Defendant the money as a well-wisher and friend. The Defendant had failed to secure a loan from all other sources. PW1 stated that the parties agreed on the loan terms at his house but payments were made at his office. It was PW1's evidence that he is the Director of the Plaintiff and is trading as a sole proprietor.

PW1 maintained that the Defendant owes the Plaintiff K120,000 and not K200,000 in view of the K80,000 payment of 19th November, 2015. PW1 stated that the loan agreement forms for the Defendant were prepared by his office. However, this was after the parties discussed and agreed on the content and rate of interest. He denied that the loan of K130,000 included interest.

PW1 also maintained that the Defendant borrowed two amounts of K10,000 and volunteered to pay K5,000 interest on each of the amounts amount. It was further his evidence that on 15th August, 2015, the Defendant borrowed K30,000 through a gentleman's agreement. The Defendant then volunteered to pay back K200,000 as full and final settlement of his debt. The amount included all the borrowed money and interest. When quizzed about his Money Lender's Certificate, PW1 stated that it was not in Court but he had a copy of the same.

PW1 admitted that the Plaintiff Company was registered as a charitable organization at PACRA, but also had a Money Lender's licence. PW1 did not know that it was illegal for a charitable organization to engage in money lending. He denied that he only lent the Defendant K60,000 and that he charged him 50% interest. He stated that the rate applied by the Plaintiff was 4%.

In **re-examination**, PW1 maintained that the Plaintiff has a Money Lender's licence, which was issued by the Subordinate Court. He insisted that he initially lent the Defendant K130,000

cash and not K60,000. The loan agreements between the parties were only executed after agreeing on the content. Negotiations for the loans were usually held at his house and the Defendant freely deposited his title deed as collateral.

PW2 was **Sangwani Kabaghe** the Plaintiff Company Manager. He testified that the Defendant borrowed K130,000 from the Plaintiff and an agreement form was signed, which he witnessed. The Defendant collected K90,000 from the office and K40,000 from the bank.

PW2 testified that later on PW1 instructed him to advance the Defendant K10,000 upon which he volunteered to pay K5,000 as interest. His debt rose to K145,000 in August, 2015. PW2 also testified that the Defendant borrowed another K10,000 from the Plaintiff and further volunteered another K5,000 as interest. The transactions were documented and PW2 either signed on behalf of the Plaintiff or witnessed the agreements. As at 28th July, 2015, the Defendant owed the Plaintiff K160,000.

According to PW2, the Defendant borrowed another K30,000 from the Company and the principal amount rose to K180,000 with interest at K10,000. The Plaintiff applied K10,000 interest on the sum of K190,000 and the Defendant was required to pay K200,0000, PW2 repeated PW1's evidence on the structure of the Defendant's loan adding that the Defendant pledged his title deed No. 69738 as collateral. He also repeated the evidence on record, that the Defendant paid the Plaintiff K80,000 and had a balance of K120,000. He prayed to Court to order the Defendant to pay the money owed to the Plaintiff with interest and costs.

In **cross-examination**, PW2 testified that he had been in the Plaintiff's employment for seven years. He was familiar with the organization but did not know when it was registered. He admitted that the Company was registered under PACRA as a charitable organization and also with the Subordinate Court as a Money Lender. PW1 did not produce evidence of the Money Lender's Certificate but stated that the Plaintiff was in money lending in 2015. PW2 reiterated that the parties signed all the agreement forms and the Defendant pledged his title deed as collateral. He

added that the agreement forms were prepared in advance and a debtor would fill in and sign the form upon borrowing.

PW2 testified that the Plaintiff dictated the rate of interest and not a borrower. In this case of the Defendant, he agreed the rate of interest with PW1. He added that the Plaintiff charged interest at 4%. Further, PW2 stated that PW1 always gave him instructions on the Defendant's borrowings. He also stated that it was illegal to lend money without a Money Lender's licence. It was his evidence that the Defendant paid the Plaintiff K80,000 and was still holding on to his title deed.

In **re-examination**, PW2 stated that the Plaintiff required a debtor to read the loan agreement form before execution. He also stated that the Defendant read the agreement form and surrendered his title deed. The Plaintiff was registered as a money lender when the Defendant secured the loans.

The Defendant, **William Chisha Kapela** testified as **DW1**. His testimony was that he met PW1 through Mr. Mwale his mechanic

on 14th May, 2015. He needed to borrow money to build clinics in Mwinilunga, for which he was subcontracted. His first meeting with PW1 was at his house where he explained his circumstances. PW1 told him that he only lent money to persons who had houses or comprehensive motor vehicle insurance covers.

DW1 testified that before PW1 lent him money, he inspected his house and told him to see him at his office on 15th May, 2015. On the appointed day, DW1 wanted Mr. Mwale to accompany him as a witness, but PW1 told him that there was no need. DW1 filled in a loan form for K130,000 at the Plaintiff's offices. He was told that the loan attracted 50% interest. Thereafter, he went with PW1 to Cavmont Bank where PW1 withdrew money. He was only given K60,000 cash.

DW1 stated that the tenure of his loan was three months that is from 15th May to 15th August, 2015. He was however given a discount on interest and it came to K70,000. All in all, he borrowed K60,000 with interest of K70,000 bringing his borrowing to K130,000.

DW1 testified that whilst executing his project, he ran out of money. He went back to PW1 to borrow K20,000 however, on 28th June, 2015, PW1 only lent him K10,000. PW1 charged 50% interest, which came to K5,000. The amount was added to his earlier borrowing and he owed the Plaintiff K145,000. DW1 further testified that he experienced another cash crisis whilst in Mwinilunga and ended up borrowing a further K10,000 from PW1. Interest was again calculated at 50% (K5,000) and his loan rose to K160,000 on 29th July, 2015.

DW1 also testified that he was supposed to settle K160,000 by 15th August, 2015, but chose not to because of the exorbitant rate of interest that was applied. DW1 went on to state that he signed the agreement forms because he did not want his contract to be terminated by the principal contractor. On 30th August, 2015, PW1 made him sign a further agreement at his house because he had defaulted on the repayments. In that agreement, DW1 obliged himself to pay K200,000 as full settlement of the loans. DW1 insisted that he only collected K80,000 from PW1 and the accumulation to K200,000 resulted from compound interest.

It was DW1's evidence that he paid the Plaintiff K80,000 and he never borrowed K30,000 as alleged by PW1. There were documents to support PW1's claims. DW1 admitted that he agreed to pay K5,000 interest on each of the two K10,000 payments. He was only willing to pay interest on the K80,000. On his counterclaim, DW1 testified that he wanted the Plaintiff to return his title deed before paying interest. He prayed for costs and other reliefs the Court would deem fit.

In **cross-examination**, DW1 accepted that he owed the Plaintiff interest on the principal sum of K80,000. He paid the K80,000 after the Plaintiff commenced this action. DW1 admitted that he consented to the rate of interest at 50% on K60,000 and the two installments of K10,000. His acknowledgment note on his loans at page 3 of his Bundle did not include interest and was not witnessed by PW1 or any of his assistants. He however, stated that that the acknowledgment note was written at PW2's direction as proof of the loan facility.

DW1 admitted that he filled and signed the loan agreement forms and related documents on record. He pledged his title deed as security and did not have documents to show that he only received K60,000. DW1 did not know if PW1 had a money lender's licence. He reiterated that he was willing to settle the interest due on the loan, from the time that he was given the money up to the time he paid K80,000.

In **re-examination**, DW1 testified that he only became aware that he was sued after he paid the K80,000. He agreed to pay 50% interest on K80,000 and was willing to do so from 15th May to 18th November, 2015. He denied that he owed the plaintiff K200,000. He filled in the agreement forms that were prepared in advance by the Plaintiff.

Learned Counsels for the parties filed written submissions for which I am indebted. Learned Counsel for the Plaintiff beseeched the Court to consider, whether it is legally permissible for a person who is neither licensed as a money lender nor appropriately licensed as a financial institution to avail a loan to another person

for a profit? Counsel submitted that the Plaintiff was perfectly entitled to lend DW1 the money and to recover a profit. Hence, the balance of K120,000, was due to the Plaintiff with interest and costs. He submitted that if DW1 defaulted, then the Court could grant the Plaintiff an order for possession and foreclosure to recover the outstanding balance.

Counsel buttressed his submission by citing the case of **Edman Banda v Charles Lungu**[1], where the Supreme Court held that a person who was neither a licensed money lender nor a financial institution was perfectly entitled to avail a loan to another person and to recover a profit thereon.

Counsel went on to submit that PW1 was prevented from relying on extraneous explanations because the parties had executed loan agreements. He called in aid the case of **Kalusha Bwalya v Chardore Properties and Haruperi**[2], which he argued was on all fours with the present case. In that case, the Supreme Court held that a party who gave intention to mortgage a house in default of payment of a loan could be visited by foreclosure. He

prayed to Court to find in favour of the Plaintiff and to grant it the reliefs sought.

In response, Learned Counsel for the Defendant submitted that the Plaintiff was not a duly registered money lender but a charitable organization. Hence, the legality of the contract came into question and he invited the Court to pronounce itself on the issue. Counsel stated that the Defendant gullibly signed the agreements and was told that the interest rate was 50%. It was his argument that the transaction was rendered illegal because of the compounded interest applied for a period of six months.

Counsel further submitted that it is trite law that interest cannot be compounded to the detriment of a party unless the said party consciously and expressly consented to the same according to the case of **Union Bank Zambia Limited v Southern Province Cooperative Marketing Union Limited**[3]. Counsel contended that the Plaintiff did not show after the initial borrowing of K130,000 that DW1 expressly agreed to the 50% compound interest thereby raising his debt to K200,000 over a period of five months.

Counsel went on to submit that the Plaintiff purported to be a money lender but never provided any licence or certificate which legally enabled it to do money lending business. As such, under the Companies Act and the Money Lenders Act the Plaintiff's business activities were illegal and void *abinitio*. He added that money lenders are not allowed to dictate interest rates according to section 3(3) (b) and (c) of the Money Lenders Act and this made the loan agreements illegal.

Counsel further submitted that a contract entered into against established statutory or common law principles is illegal and *void abinitio*. The Plaintiff was registered as a business name carrying out charitable work and yet it engaged in money lending without a legal licence. He cited the case of **Cope v Rowland**[4], where an Act made it illegal for stock brokers to sell without a licence. Cope set up a business in London without obtaining a licence. When he sued Rowland's for payments for work done, he failed to recover. He prayed to Court to dismiss the Plaintiff's claims.

I have closely considered the pleadings, evidence adduced and submissions filed herein. The facts of this case are largely not in dispute and can be recapped briefly in the following: The Plaintiff is registered as a charitable organization at the Patents and Companies Registration Agency. It lent DW1 money through loan agreements and at the material time, there was no proof that it was a licenced money lender. DW1 borrowed K200,000 from the Plaintiff as follows: on 15th May, 2015, a sum of K130,000; on 29th June, 2015 a sum of K10,000, where he volunteered to pay K5,000 as interest. By that date, his borrowing rose to K145,000 and he promised to settle the debt by 15th August, 2015. On 28th July, 2015, DW1 borrowed another K10,000 and offered to pay K5,000 as interest. His debt increased to K160,000, and he promised to pay back the money by 15th August, 2015.

On 10th September, 2015, DW1 executed a final agreement with the Plaintiff and committed to pay K200,000 as full and final settlement. The borrowings were all evidenced by loan agreements or notes signed by DW1 and the Plaintiff's representatives. In

addition, DW1 pledged his title deed for Stand No. 27121 as collateral.

On 19th November, 2015, DW1 paid the Plaintiff K80,000, and averred that the principal sum borrowed had been settled. He disputed the balance of K120,000, which he alleged resulted from compound interest. The dispute between the parties is whether DW1 is indebted to the Plaintiff in the sum of K120,000? Therefrom, I find that three issues arise for determination as follows:

(1) Whether it was legally permissible for the Plaintiff who was not a licenced money lender under the Money Lenders Act to have availed DW1 a loan for profit?

(2) Whether the loan agreements between the Plaintiff and DW1 were illegal and void *abinitio*?

(3) Whether the parties agreed on compound interest for the loans?

Section 2 of the Money Lenders Act defines a money lender as:

"money-lender" includes every person whose business is that of money-lending or who advertises or announces himself or holds himself out in any way as carrying on that business, but shall not include-

(a) any pawnbroker in respect of business carried on by him in accordance with the provisions of any law for the time being in force in relation to pawnbrokers; or
(b) any body corporate in so far as it is empowered to lend money by any Act or by any British Act; or
(c) any person bona fide carrying on the business of banking or insurance or bona fide carrying on any business not having for its primary object the lending of money, in the course of which and for the purposes whereof he lends money; or
(d) any building society registered under the Building Societies Act; or
(e) any body corporate for the time being exempted under section two A..."

It is not in dispute that the Plaintiff Company is registered at the Patents and Companies Registration Agency as a Charitable organization. For the purposes of section 2 of the Money Lenders Act, the Plaintiff company is not a money lender as its business is not that of a money lender nor does it advertise or announce itself as one. The fact however, remains that the Plaintiff lent DW1 money for a profit when it was not licenced as a money lender. The question therefore, is what is the effect of the loan agreements that the parties executed?

To resolve the issue, I wish to call in aid the instructive case of **Edman Banda v Charles Lungu**[1]. In that case, the Supreme Court faced with the same question on whether it is legally permissible for a person who is not a licenced money lender under the Money Lenders Act to avail a loan for profit in reference to its decision in the case of *Neighbours City Estates Limited v Mark Mushili Appeal No. 47/2013* stated thus:

> **"The lending or borrowing in question between the Appellant and the Respondent in that case was caught by the provision of the Money Lenders Act and that as the Respondent had not been appropriately licenced, the transaction was illegal. Notwithstanding this conclusion, the question of losses or gains remaining where they had fallen did not arise because we upheld the alternative argument, which Counsel for the Respondent had advanced and which was to the effect that the agreement between the parties was of the nature of an ordinary contract which we accordingly upheld on the footing that the borrowed money (which had since been repaid) was to attract interest at the average short term rate from the date of the writ up to the date of the Judgment and thereafter at bank lending rate until full payment."**(underlining my own)

Counsel for the Defendant contended that because the Plaintiff was inappropriately licenced, its business activities with DW1 were illegal and void *abinitio*. On the other hand, the Plaintiff contended that it is legally permissible for a person who is not appropriately licenced as a money lender to avail a loan for a profit.

The guidance given by the Supreme Court in the **Edman Banda**[1] case in my view, resolves the issue. I am therefore, inclined to agree with the Plaintiff, that where a person is not appropriately licenced as a money lender, a borrowing can be considered as an ordinary contract. The effect is that a person who is not a money lender can lend money and recover a profit or interest on it. There is no illegality in such an arrangement. It therefore, accords that the Plaintiff Company was perfectly entitled to enter into the loan agreements with DW1 for a profit and it is entitled to recover its money.

It was contended by DW1 that the loan agreement forms were prepared in advance and without his input, but he signed them. In fact, Counsel for the Defendant contended that DW1 gullibly signed the loan agreements, which had an interest rate of 50%. By dictating a rate of interest, Counsel argued that the Plaintiff contravened section 3(3)(b) and (c) of the Money Lenders Act, which criminalises the imposition of arbitrary interest. As a result, the loan agreements were rendered illegal and void *abinitio*.

From the record, the parties executed several loan agreements or notes, which appear at pages 1, 3, 4, 5, 6 and 7 of the Defendant's Bundle. These were signed by DW1 and the Plaintiff's representatives. In the case of **Robson Sikombe v Access Bank Zambia Limited**[5], the Supreme Court held *inter alia* that:

> **"The law is trite that a party is bound by the terms of an agreement that he voluntarily enters into. We do not wish to undertake the difficult task of explaining very elementary principles of the law of Contract in this regard."**

In **Rating Valuation Consortium and D.W. Zyambo & Associates (Suing as a firm) v the Lusaka City Council and Zambia National Tender Board**[6] the Supreme Court, stated that:

> **"What should guide the court in analyzing business relationships should be whether or not the parties conduct and communication between them amounted to an offer and acceptance. What is regarded as an important criterion is for the court to discern a clear intention of the parties to create a legally binding agreement between themselves. This can be discerned by looking at the correspondence and the contract of the parties as a whole. .....Where in construing a statute, the contract is rendered illegal and unenforceable or void by a provision in a statute, the court will not enforce such a contract..."**

From the various loan agreements and notes on record, it is quite clear that the parties intended to create legally binding agreements and are bound by them. After carefully analyzing the

evidence, I find that DW1 willingly executed the loan agreements and by his own admission agreed to pay "interest". He did not adduce evidence to show that he opposed the loan agreements or notes and interest applied thereon. In any case, since the Plaintiff is not a money lender within the context of the Money Lenders Act, a fact that has been verifociously contended by the Defendant, I find that the provisions of the Money Lenders Act do not apply to it. In the result, there is nothing illegal in the agreements that it entered into with DW1.

As regards the issue of compound interest, DW1 alleged that the Plaintiff levied the interest but did not adduce proof to support his claims. In fact, the contrary seems to be established from the facts, because he approached the Plaintiff on subsequent occasions for loans on the conditions that were previously availed by it. If at all compound interest was charged, I find by his conduct and frequent return to the Plaintiff Company on the same terms that, DW1 consciously and expressly agreed to payment of compound interest.

DW1 testified that he only borrowed K80,000 from the Plaintiff. DW1 later contended that after settling the principal sum of K80,000 he was absolved from paying compound interest and was only liable to pay simple interest from the date of the loan to the date of payment. He however, did not show evidence that he only received K80,000 and not the K200,000 as claimed by the Plaintiff.

Accordingly, I find that the loan agreements or notes between the parties confirmed the financial arrangements between them. DW1 accepted the conditions of the loan agreements and cannot turn around to renegade on his commitments to pay when he has derived a benefit. If anything, he should have been aware of the adverse consequences of his actions, which have now exposed him to the repayment of the loans. He must therefore, settle the outstanding balance of K120,000.

DW1 conceded in his evidence that he pledged his title deed for Stand no. 27121 as security for the loan agreements. The loan agreements validate this fact in the following:

"I Kapekala M. Chisha do hereby surrender my title deed No. 69738, House No. 27121 as collateral in lieu of amount....." In addition, DW1 issued a further note of undertaking at page 7 of the Defendant's Bundle, that if he failed to settle the amount due, then the Plaintiff could repossess and sell his house to recover its money. The issue that arises is whether the Plaintiff can exercise mortgage rights over DW1's house which was pledged as security.

Counsel for the Plaintiff referred me to the **Kalusha Bwalya[2]** case where the Respondents lent the Appellant USD 26,250.00 and in return, the Appellant deposited his title deeds with the Respondents. The parties executed a contract of sale and a deed of assignment over the Appellant's house. When the Appellant defaulted the Respondents sold the house. Counsel went on to submit that the **Kalusha Bwalya[2]** case was on all fours as the present one, because DW1 freely pledged his house as collateral. Thus, the Plaintiff had a right to foreclose his property if he defaulted in settling the outstanding debt.

In the case of **Lackson Mwabi Mwanza v Sangwa Simpasa,Chisha Lawrence Simpasa[7],** Dr. Matibini, J as he then was, quoted the observations of Silomba, J., in *Magic Carpet Travel and Tours Limited v Zambia National Commercial Bank Limited (10)*; at page 64 as follows:

> **"...The position at common is that once a borrower has surrendered his title deed to the lender as security for the repayment of a loan, an equitable mortgage is thus created, the borrower in such a relationship cannot deal with the land without the knowledge and approval of the lender whose interest in land takes precedence."....**

Dr. Matibini J went on to state that:

> **"..Thus, in light of the fact that the defendants deposited the Certificate of Title relating to Stand No. 3664, Lusaka, as collateral and did not execute and register a mortgage deed, the resulting mortgage is an equitable mortgage. What remedies therefore are available to an equitable mortgagee. An equitable mortgagee can either foreclose, or have a receiver appointed by a Court, in a proper case. In the instant case, although the parties agreed that in the event of a failure to pay back the money, the property in question would be sold in order to recover the loan advanced, the plaintiff being an equitable mortgagee has no power of sale. He has instead the power to foreclose..."**

I find that the loan agreements and other acknowledgment notes sufficiently prove that DW1 deposited his title deeds with the Plaintiff Company as security. The result is that DW1 created an equitable mortgage, in favour of the Plaintiff. Thus, the Plaintiff is

entitled to an order of possession and foreclosure on Stand no. 27121 as a matter of right and course.

I therefore, hold that DW1 should liquidate the judgment sum of K120,000 with interest from the date of writ up to the date of judgment at the average short term deposit rate within the next ninety (90) days. In default, the Plaintiff is at liberty to foreclose Stand no. 27121.

The Defendant's counterclaim is for the release of the Certificate of Title for Stand no. 27121, Lusaka and costs. For the reasons given above, I find that it has no merit and accordingly fails.

Costs are for the Plaintiff to be taxed in default of agreement.

Dated this 5th day of April, 2018.

Mapani

M. Mapani-Kawimbe
HIGH COURT JUDGE