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IN THE COURT OF APPEAL OF ZAMBIA **CAZ APPEAL NO. 49/2020**
HOLDEN AT KABWE
(Civil Jurisdiction**)**

BETWEEN:

TRANSQUIC SERVICES ZAMBIA LIMITED	**1ST APPELLANT**
NGANGA YALENGA	**2ND APPELLANT**
SAMSON ZULU	**3RD APPELLANT**
PRUDENCE SALAMO	**4TH APPELLANT**

AND

AFRICAN BANKING CORPORATION ZAMBIA LIMITED **RESPONDENT**
(T/A ATLAS MARA)

CORAM: KONDOLO SC, CHISHIMBA, SICHINGA SC, JJA
On 14th October, 2020 and on 2nd November, 2020

For the 1st, 3rd & 4th Appellants: No Appearance
For the 2nd Appellant : In person
For the Respondents : Mr. G. Pindani of Messrs. Chonta Musaila & Pindani Advocates

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J U D G M E N T

KONDOLO SC, JA delivered the Judgment of the Court

CASES REFERRED TO:

1. **Isaac Lungu v Mbewe Kalikeka Appeal No. 114 of 2013**

2. **New Plast Industries v Commissioner of Lands and Attorney General (2001) ZR 51**
3. **African Banking Corporation (Z) Limited v Plinth Technical Works Limited and 5 Others Selected Judgment No. 28 of 2015**
4. **Corpus Legal Practitioners v Mwanandani Holdings Limited SCZ Judgment No. 50 of 2014**
5. **Chishala Karabasis Nivel (Male) and Another v Laston Geoffrey Mwale Selected Judgment No. 40 of 2018**
6. **ZCCM Investments Holdings PLC v Muyangwa Mufalali and 141 Others Selected Judgment No. 14 of 2017**
7. **Miyanda v The High Court (1984) Z.R. 62**
8. **S. Brian Musonda (Receiver of First Merchant Bank Zambia Limited (in Receivership) v Hyper Food Products Limited, Tony's Hypermarket Limited, Creation One Trading (Z) Limited, SCZ Judgment No. 16 of 1999 Appeal No. 18 of 1999**
9. **Alex Lwando, Julie Kamikambi Lwando v Mathews Mwansa Mulenga CAZ Appeal No. 151/2017**

LEGISLATION REFERRED TO:

1. **The High Court Act (Amendment) Act No. 7 of 2011, Laws of Zambia**
2. **The Rules of the Supreme Court 1999 Edition (Whitebook)**

The background to this appeal is that the 1st Appellant obtained a medium-term loan amounting to K3,050,000.00 with a tenor of 36 months. The loan was secured by; a Third Party Mortgage for K2,600,000.00 over Subdivision No. 7 of Subdivision Y of Farm No.

842 Tafuna Drive, Ndeke, Kitwe; a fixed debenture for K3,800,000.00 over the New Man HB4 Marcopolo Viago Semi Luxury Coach to be purchased; and personal guarantees of the 3rd and 4th Appellants. An amendment was made to the securities and by an Addendum dated 11th May, 2018 the initial third-party mortgage was replaced by another over a small holding on Lot. No. 18020/M Silverest area, Chongwe, Lusaka.

The 1st Appellant failed to meet its obligations and defaulted on the loan by failing to pay its loan installments promptly and when it did make payments the same were erratic, less than, or below the scheduled figure of K84,722.23 per month and sometimes skipped payments. Demand letters were sent to the 1st Appellant on 1st February and 27th March 2019 but to no avail.

These events prompted the Respondent to commence an action by Writ of Summons and accompanying Statement of Claim on 3rd May, 2019, claiming the following:

i) **Payment of all monies which as at 28th February, 2019 stood at a total sum of K3,149,141.23 due and owing to the Plaintiff Bank under a Medium-Term**

Loan Facility availed to the 1st Defendant on or around 6th march, 2018 and secured by a third-party mortgage over Lot. No. 18030/M Silverest, Chongwe owned by the 2nd Defendant, a Debenture crating a fixed charge over the 1st Defendant's assets, a charge over the movable 70-seater New Man HB4 Marcopolo Viago 6x2 semi-luxury coach Registration No. BAJ 961 ZM and personal guarantees by the 3rd and 4th Defendants;

ii) **An order for foreclosure, possession and sale of the said Lot No. 18030/M Lusaka owned by the 2nd Defendant;**

iii) **An Order for delivery of possession and disposal by sale of the collateral namely 70-seater New Man HB4 Marcopolo Viago 6 x 2 Semi-Luxury Coach Registration No. BAJ 961 ZM**

iv) **An Order that the 3rd and 4th Defendants honour their respective personal guarantees in the event that the proceeds of the sale of the said mortgaged and**

charged properties are not adequate to pay off the outstanding debt plus interest and costs;

v) **An Order for interim preservation of the said charged 70-seater New Man HB4 Marcopolo Viago 6x2 semi-luxury coach Registration No. BAJ 961 ZM;**

vi) **Compound interest on the claimed amount at the agreed rate of 25% per annum as revised from time to time plus other usual bank charges;**

vii) **Legal costs of and incidental to this action;**

viii) **Any other relief the Court may deem fit.**

The 1st, 2nd and 3rd Appellants filed in a consolidated defence in which they stated that the facility was not secured by a fixed charge and they denied having repeatedly failed to pay as they had been paying save for three (3) months, due to economic hardship that the country was facing. The 2nd Appellant also filed his defence in which he averred that the amounts owing or paid where not specified and in any event he had, sometime in November, 2018 informed the Respondent that he no longer wished to have his property as security

to the loan and that the Respondent should take steps to discharge the property or secure the semi -luxury coach.

In view of the fact that the 1st, 3rd and 4th Appellants admitted to defaulting on the loan for three (3) and the 2nd Appellant not denying that he signed the third-party mortgage securing the loan, the Respondent applied for Judgment on Admission which was granted on 27th August 2019.

The learned Judge, Chenda J, ordered that the sum of K3,149,141.23 due be paid with interest at the agreed rate under Clauses 6.1. and 6.2. of the facility letter which interest was to run from 28th February, 2019 to the date of payment. The court further ordered as follows;

1. *That the Plaintiff is at liberty to forthwith reposses and sell the charged motor vehicle registration number BAJ961 ZM*
2. *That should there be any balance owing on the judgement sum and interest after fulfilment of the aforesaid Orders, then the 3rd and 4th Defendants as guarantors must pay the same within thirty (30) days from the date of written demand by the Plaintiff, in default of which the Plaintiff shall be at*

liberty, additionally, to foreclose on, repossess and sell the property known as Lot No. 180/M Lusaka pursuant to the Third Party Mortgage exhibited as "ZM 3b" in the Plaintiff's affidavit of 30th July, 2019.

3. *That subject to the aforesaid, the Plaintiff is at liberty to enforce its rights under the debenture exhibited as "ZM 1c" in the Plaintiffs Affidavit of 30th July, 2019; and*
4. *That the 1st Defendant shall bear the Plaintiffs costs of and occasioned by this action.*

Discontented with the Judgment, the 2nd Appellant, by a memorandum of appeal filed on 25th September, 2019, assailed the Judgment on two (2) grounds, namely;

1. **The learned Judge in the Court below erred in law and fact when he proceeded to grant the reliefs sought by the Plaintiff in a matter commenced by Writ of Summons when the procedure for foreclosure in mortgage actions is commencement by Originating Summons.**

2. **The court erred in law when it ordered that the Respondent be at liberty to seize and sell forthwith the motor vehicle registration number BAJ 961 ZM despite the same court having given a period of ninety (90) days in which the 1st Appellant ought to pay the judgment sum to the Respondent.**

At the hearing of the appeal the 2nd Appellant argued ground 1 as the sole ground of appeal. The filed heads of argument were supplemented by oral submissions. The gist of the arguments was that mortgage actions can only be commenced by way of originating summons and not by writ of summons and statement of claim.

It was submitted that even though **Order 88 of the Rules of the Supreme Court 1999 Edition** (the "**Whitebook**") provides that mortgage actions can be commenced by either originating summons or writ of summons the law applicable in Zambia is **Order 30 rule 14 of the High Court Rules** which provides that a mortgagee can only enforce its rights via originating summons. It was further submitted that litigants are not at liberty to choose which law to

apply between the High Court Rules and the Whitebook because it is settled law that the Whitebook should only be resorted to where there is a lacuna. The case of **Isaac Lungu v Mbewe Kalikeka** (1) and **Section 2(1) of the High Court Act** were called in aid.

The 2nd Appellant further argued that the mode of commencement is not determined by the reliefs sought but will generally be determined by statute as per **New Plast Industries v Commissioner of Lands and Attorney General** (2).

The 2nd Appellant further submitted that in the Appellants Cross Appeal it was claimed that the lower Court erred by not ordering enforcement of the judgement debt in line with mortgage actions but the Appellants had in the main appeal argued that the matter in the lower court was not a mortgage action. We were urged to nullify the proceedings in the lower court on the basis that the mode of commencement was wrong.

In response, the Respondent argued, both in the heads of argument and *viva voce* arguments, that the reliefs in relation to delivery of possession of the 70-seater luxury Coach and its disposal together with the order to compel the 3rd and 4th Appellants to honour the guarantees were reliefs that that could not be brought under

Order 30 rule 14 of the **High Court Rules** which is reserved for mortgage actions. To buttress this argument the case of **African Banking Corporation v Plinth Technical Works Limited** [3] was cited in which the Supreme Court stated that a debenture and personal guarantees do not strictly fall under a mortgage action. The Appellant further cited the case of **Corpus Legal Practitioners v Mwanandani Holdings Limited** [4], the facts of which shall be discussed later in this judgement.

It was submitted that the mode of commencement of this matter was the correct mode and had the Respondent severed the reliefs and filed a separate action it would have amounted to multiplicity of actions. Moreover, the action filed was not a mortgage action because of the Debenture and the personal guarantees. In any event **Order 88 of the Whitebook** provides for commencement by way of Originating Summons or Writ of Summons. In reinforcing his argument, the Respondent's Counsel directed us to the case of **Chishala Karabasis Nivel (Male) and Another v Laston Geoffrey Mwale**[5] in which the Supreme Court held among other things that **Order 6 of the High Court Rules** is the anchor provision when it

comes to commencement of actions and that it is mandatory to commence an action by writ of summons save for circumstances specified in that rule. A party employing originating summons must demonstrate that his use of such procedure is required or permitted under a rule of statute or involves matters that can be determined in chambers.

Counsel for the Appellant pointed out that the 2nd Appellant subjected himself to the proceedings in the lower Court without any objection as permitted under **Order 11 Rule 4 High Court Rules**, which allows a Defendant who wishes to challenge any Court process served on him is to file a conditional memorandum of appearance to challenge jurisdiction. The remainder of the Respondent's argument border on the merits of the Judgment on Admission and we shall not reproduce them.

In rejoinder, the 2nd Appellant argued that the issue before the Court was merely one of jurisdiction i.e. whether in our jurisprudence it is possible to obtain an order of foreclosure of a mortgage in a matter commenced by writ of summons. He emphasized that it is not the nature of reliefs that determines mode of commencement and

submitted that all the reliefs sought are available under **30 rule 14 of the High Court Rules** as the order covers both mortgages and charges which includes debentures.

The Appellant filed a cross appeal challenging aspects of the Judgment on Admission appealed against. We shall proceed by firstly addressing the main appeal which challenges the jurisdiction of the lower Court to determine a matter of this nature in proceedings commenced by writ of summons as opposed to originating summons as provided under **Order 30 Rule 14 of the High Court Rules**.

The Record of Appeal, the submissions of both the 2nd Appellant and the Respondent have been given the necessary consideration.

Before we deal with the real bone of contention, we shall attend to a pertinent issue raised by the Respondent relating to raising new issues on appeal. It was argued that the 2nd Appellant did not invoke **Order 11 Rule 4 High Court Rules** but proceeded to file a defence which was no a defence at all therefore leading to Judgment on Admission. We are alive to the principle that issues not raised in the lower court cannot be raised for the first time on appeal. This

however, does not apply when the jurisdiction of a court is brought into question.

In the case of **ZCCM Investments Holdings PLC v Muyangwa Mufalali and 141 Others** (6) it was argued that the Appellant had an opportunity to raise the issue of want of jurisdiction in the Industrial Relations Division of the High Court but did not do so. The Supreme Court however, allowed the issue of jurisdiction to be raised on appeal and in so doing cited the case of **Miyanda v The High Court** (7) in which it held inter alia as follows;

> "***the legal position that an issue cannot be raised for the first time on appeal does not apply where the issue is questioning the very authority or jurisdiction of the Court to have heard the matter, in the first place. For in the absence of jurisdiction to hear a matter the ensuing decision is a complete nullity and no appeal can lie against it on the merits.***"

We shall equally proceed to hear the sole ground of appeal albeit being raised for the first time on appeal.

The mode of commencement in relation to mortgage actions is undoubtedly set out in **Order 30 Rule 14** of the High Court Rules repeatedly cited in the submissions from both parties. The parties are in agreement that mortgage actions must be commenced by way of originating summons but as we see it, the contention is with regard to the claims under the debenture and the personal guarantees.

The cases of **African Banking Corporation (Z) Limited v Plinth Technical Works Limited and 5 Others** [3] and **Corpus Legal Practitioners v Mwanandani Holdings Limited** [4] are quite instructive.

In the **Plinth Case (supra)** the Appellant Bank provided the Respondents with two facilities which were secured by a debenture, a third-party mortgage and two personal guarantees. The Respondents defaulted and the Appellant commenced proceedings by way of originating summons for payment of all monies due and owing to the Appellant on the two facilities; foreclosure, possession, and sale of the mortgaged property and an order that the 3rd to 6th respondents honour their personal guarantees.

The learned Judge then found that a claim by a mortgagor or mortgagee would only fall within the realm of a 'mortgage action', if and only if, such mortgagor or mortgagee relies on the mortgage in making his claim and the mere fact that the moneys claimed are secured by a mortgage does not of itself bring the action within the definition of a mortgage action. That an originating summons issued under **Order 30, rule 14 of the High Court Rules** and **Order 88, rule 1 of the Supreme Court Practice (Whitebook)** cannot be used to make any claim which does not arise under a mortgage and that where a party seeking to enforce a mortgage also claims reliefs which do not arise under the mortgage, the appropriate course of action is 'generally' to commence the proceedings by way of writ of summons.

On that basis the lower Court found that the claim as it related to the personal guarantees and the debenture had nothing to do with any mortgage and fell outside the scope of the remedies which could be granted in the action, as such it would be incompetent to consider the merits of the said claim; and that the appellant was at liberty to engage alternative court process to enforce the guarantees and the

debenture and the court declined to enter Judgment against the Respondents who had issued the personal guarantees.

On appeal the main argument by the Respondents was that the trial Judge was on firm ground because the claim for enforcement of the personal guarantees could not be made under a mortgage action as a personal guarantee is neither a mortgage nor a charge so as to entitle a beneficiary of the guarantee to remedies of a mortgagee or charge holder. That because the Appellant did not rely on the mortgage to enforce the personal guarantees, none of the reliefs provided for under **Order 30, rule 14 of the High Court Rules** can be used to enforce a guarantee and so **Order 6 rule 1 of the High Court Rules** becomes applicable meaning that relief from the personal guarantees should have been pursued by writ of summons.

The Supreme Court stated that it was alive to the general rule that joinder of parties, whether as plaintiffs or as defendants is allowed where the right to relief is in respect of or arises out of the same transaction or series of transactions; and there is some common question of law and fact (**Order 15 r. 4 of the Whitebook)**

And in the same way, any number of causes of action, whether joint or separate, may be joined in one action, subject to the power of the court to order that the action be confined to those causes of action that can be conveniently disposed of together or that any cause of action be excluded or that separate trials be held, if the joinder of causes of action or of parties, as the case may be, may embarrass or delay the trial or is otherwise inconvenient (**Order 15, R.5 of the Whitebook**)

That the principal objective of these provisions is to ensure that a multiplicity of actions is avoided where all issues can be brought together properly and conveniently and dealt with in one action. It was further stated that even though a debenture and personal guarantees do not, strictly speaking, fall under a mortgage action, the question that was before the court below was really one of construction of the documents executed by the parties to secure the facilities granted to the 1st Respondent.

That the rights to relief claimed arose out of the same transaction or series of transactions as the facilities were secured by the third-party mortgage, personal guarantees and the debenture

and the Court's decision on the construction of the written instruments would have satisfied the proceedings then at issue and avoided a multiplicity of actions. The Court recalled what it said in the **Corpus Legal Practitioners Case** where the Respondent company, which was the plaintiff in the Court below, took out a Writ of Summons and Statement of Claim seeking a declaratory order to nullify a contract, for the sale of Lot No. 2558/M, Siavonga. The Plaintiff company applied to amend the writ of summons and of relevance to this case is an amendment which added a claim for removal of a caveat. The Defendants opposed the application but the lower Court granted the application. The Defendants appealed to the Supreme Court, the relevant grounds of appeal for our purposes was ground 2 which read as follows;

1. **That the Learned Judge in the Court below erred in law and in fact when he allowed the amendment of the statement of claim by including a claim for the removal of a caveat which must be removed through an action commenced by originating summons and not by writ of summons.**

The Supreme Court stated that:

"In the Rural Development Corporation Limited Case[1], we discussed the procedure under Section 81 of the Lands and Deeds Registry Act when we held that:

> ***'Although S. 81 of the Lands and Deeds Registry Act ... provides no procedure for the removal of a caveat, an originating summons is the proper form for commencing proceedings for removal of a caveat.'***

From the above, it is clear that the correct mode of commencing proceedings, seeking an Order for the removal of a caveat, is by Originating Summons. However, we must hasten to mention here that the Rural Development Corporation Limited Case[1] is distinguishable from the present case in the sense that the relief sought by the Appellant, for the removal of the caveat in this case, is not the only claim which the Respondent is seeking in the Court below. In our view, the position of the law, as stated in the Rural

Development Corporation Limited Case[1] envisages a situation and is only applicable where the sole claim in an action is for an Order for the removal of a caveat.

We take the further view that, looking at the circumstances of this case, to insist that the claim for the removal of the caveat must be brought in a separate action, commenced by way of Originating Summons, would amount to asking that the different claims in this case, although involving the same parties and arising from the same set of facts, be severed and brought in separate actions. In turn, this would amount to multiplicity of actions, a practice which we have always frowned upon.

For the reasons we have given, we find no basis to fault the decision by the Judge in the Court below to allow the amendment of these proceedings, which were commenced by way of writ of Summons, to include the relief of an order for the removal of a caveat. Ground two has no merit and we dismiss it."

Having considered the facts of the matter before us it is clear that the correct mode of commencing actions with regard to the third-party mortgage and the debenture is by originating summons as provided by **Order 30 Rule 14 of the High Court Rules**. However, as stated in the **Plinth Case (supra)**, strictly speaking, claims for personal guarantees do not fall under mortgages. **Halsbury's Laws of England, fourth Edition, paragraph 101, page 56** states as follows; "*A guarantee is an accessory contract by which the promisor undertakes to be answerable to the promise for the debt, default or miscarriage of another person, whose primary liability to the promise must exist or be contemplated*"

The wording of **Order 30 Rule 14** clearly does not provide for enforcement of personal guarantees. In our view, because a personal guarantee is a promise to pay a debt, the primary process for enforcing it is by writ of summons as provided by **Order 6 of the High Court Rules** which provides as follows;

(1) Except as otherwise provided by any written law or these Rules every action in the High Court shall be commenced

by writ of summons endorsed and accompanied by a full statement of claim.

(2) Any matter which under any written law or these Rules may be disposed of in chambers shall be commenced by an originating summons.

However, as stated in the **Plinth Case (supra)** with regard to personal guarantees where there are no triable issues and determination of the claim mostly involves construction of the instrument, such a matter may be commenced by originating summons. This is in tandem **Order 30 rule 11 High Court Rules** (business to be disposed of in chambers). In the case **Chishala Karabasis Nivel (Male) and Another v Laston Geoffrey Mwale Selected Judgment No. 40 of 2018** the Supreme Court guided that a party employing originating summons to move the court ought to be in a position to demonstrate that his use of such procedure is required or permitted under a rule or statute, or involves matters that can be determined in chambers. In the circumstances of the **Plinth Case** the Court found that the personal guarantee could be enforced

together with the claims for enforcing the mortgage and the debenture.

Similarly, we see nothing wrong with the Appellant, *in casu*, having commenced this action by writ of summons because as stated in the **Corpus Legal Practitioners Case**, where the law prescribes a specific mode of commencement for a particular type of action and that claim is pursued together with other claims by some other mode of commencement, the action for which a specific mode is prescribed can still be determined together with the other claims, so as to prevent a multiplicity of actions. The appeal is consequently dismissed.

We now move to determination of the cross appeal. The Respondent raised three (3) ground of appeal as follows:

1. ***That the lower Court erred in law and in fact by ordering that the Plaintiff shall be at liberty to foreclose on, repossess and sell the property known as Lot No. 18030/M Lusaka in default of settlement of the judgment sum and interest by the 3rd and 4th Defendants as guarantors and that instead the said Order***

numbered (ii) ought to be varied to the extent and in the manner herein after appearing:

"that the Plaintiff shall be at liberty, additionally, to foreclose on, repossess and sell the property known as Lot No. 18030/M Lusaka pursuant to the Third Party Mortgage exhibited as "ZM3b" in the Plaintiff's Affidavit of 30th July, 2009 and that should there be any balance owing in the Judgment sum and interest after fulfilment of the aforesaid Orders, then the 3rd and 4th Defendants as guarantors must pay the same forthwith."

2. ***That the lower Court erred in law and in fact by holding that should there be any balance owing on the Judgment sum and interest after fulfilment of the aforesaid Orders, then the 3rd and 4th Defendants (i.e. Appellants) as guarantors must pay the same within thirty (30) days from date of written demand by the Plaintiff (Respondent) and that instead the said Order numbered (ii) ought to be varied to the extent and manner herein appearing:***

" that the Plaintiff shall be at liberty additionally, to foreclose on, repossess and sell the property known as Lot No. 18030/M Lusaka pursuant to the Third Party Mortgage exhibited as "ZM3b" in the Plaintiff's Affidavit of 30th July, 2009 and that should there be any balance owing in the Judgment sum and interest after fulfilment of the aforesaid Orders, the 3rd and 4th Defendants as guarantors must pay the same forthwith."

3. ***That the lower Court misdirected itself in law and in fact by ordering that the 1st Defendant (i.e. 1st Appellant only) shall bear the Plaintiff's (Respondent's) costs of and occasioned by this action and that instead the said Order numbered (iv) ought to be varied to the extent and in the manner hereinafter appearing:***

"that the Defendants shall bear the Plaintiff's costs and occasioned by this action".

Mr. Pindani in support of the Cross appeal argued, both orally and in his written arguments that, a mortgagee's remedies are cumulative meaning that a mortgagee is not bound/restricted to

select one mode of enforcing the Judgment but can employ simultaneous methods to recover the debt. He placed reliance on the case **S. Brian Musonda (Receiver of First Merchant Bank Zambia Limited (in Receivership) v Hyper Food Products Limited, Tony's Hypermarket Limited, Creation One Trading (Z) Limited** [8]. He went on to submit that the sequence of enforcement in the Judgment of the lower Court was a departure from the norm of primarily letting the successful mortgagee to be at liberty to foreclose, take possession and sale straight away after the expiry of the moratorium period of 90 day or equity of redemption.

With regard to personal guarantees, Counsel for the Respondent submitted that they are equally binding and enforceable contracts but are only enforced after the principal debtors or main security is disposed of and the proceeds are not adequate to pay the entire judgment debt. Citing the learned authors of Halsbury's Laws of England on the definition and function of guarantees, it was argued that guarantees are a security of last resort, after exhausting all other available security. Therefore, the lower Court erred when it

ordered that the guarantors be pursued to settle the Judgment debt instead of the mortgage.

It was further contended that the lower Court, having ordered a 90 days moratorium period, ought not to have granted an additional 30 days for the guarantors to settle the judgment debt because the equity of redemption had been extinguished.

In ground 3, it was submitted that costs are in the discretion of the Court but generally are awarded to a successful party. In this case the lower Court did not exercise its discretion judiciously when it denied the Respondent costs as against the 2nd, 3rd and 4th Appellants. It was argued that the Debenture and the Guarantees provided for costs incurred by the Respondent towards realization of the security including enforcement.

In Response, Mr. Yalenga briefly submitted that there is no law that prescribes what the Appellant was postulating. He however, agreed with the position with regard to guarantors but submitted that the authorities cited by the Respondent do not suggest that a Court cannot order that the guarantors be called upon prior to the sale of the mortgaged property.

With regard to the issue of costs, it was argued that costs are discretionary and simply because costs are mentioned in other instruments does not mean that the Court is constrained to award costs to the appellant [sic]. The 1st Appellant was the primary obligor and the security was to be resorted to upon its default and it follows that the borrower is the losing party against whom an order for costs ought to be made.

We have considered the Cross appeal, the proposals by the Respondent as well as the arguments from both parties. We shall address grounds 1 and 2 of the cross appeal together and ground 3 on its own.

With regard to grounds 1 and 2, it is notable that under the cross appeal the Respondent's arguments are those one would advance if this were a typical mortgage action. In ground 1of the main appeal, the Respondent argued that, *"we wish to state from the outset that the action as commenced in the Court below by Writ of Summons and Statement of Claim* ***is not a mortgage action*** *within the strict meaning of mortgage actions."* (emphasis ours). The argument was

advanced in support of the manner in which the Respondent commenced the action.

We agree that the action was not a typical mortgage action but an action to recover a debt that was secured by separate instruments namely a debenture, a third-party mortgage and two personal guarantees, all executed by the Respondent with different parties and independent of each other except for the fact that they were all collateral for the same debt. Each of the securities specified the manner in which it could be enforced.

The debenture at clause 13.2 (page 55, record of appeal) shows that the Chargee (the Respondent) was at liberty to enforce the debenture without first having recourse to any of its other rights.

The guarantees have a similar provision which states at clause 3.3 (page 87, record of appeal) that the Guarantor as principal obligor irrevocably and unconditionally agreed to indemnify the lender in full, on demand, for failures by the borrower to fully and promptly perform its obligations under the facility.

Similarly, clause 2 of the third-party mortgage states that the mortgage shall not merge with other securities.

The above provisions demonstrate that the securities were independent of each other and ranked *pari pasu* and could therefore be pursued and enforced in no particular order. On this basis we cannot fault the trial Judge for not ordering that the Respondent must firstly, foreclose on, repossess and sell the mortgaged property and only thereafter pursue the personal guarantees.

Unlike in the matter before us, the case cited by the Respondents, **S. Brian Musonda (Receiver of First Merchant Bank Zambia Limited (In Receivership) v Hyper Food Products Limited & Others** [8] was a typical mortgage action. In any event the cited case described a Mortgagee's remedies as being 'truly cumulative'. The Respondent also cited the book, **The Law of Real Property, R.E Megarry and H.W. Wade 6th Edition p. 1212 paragraph 19-083** as follows;

> ***"The Mortgagee's remedies are cumulative.***
>
> ***A mortgagee is not bound to select any one of his remedies and pursue that exclusively: subject to his not recovering more than is due to him, he may select any or all of the remedies available to him"***

We observe that even though this was not a typical mortgage action, the mortgagee did, in any event, pursue and was granted, in this action, all the remedies available to it. We also note that none of the authorities cited state that personal guarantees are security of last resort after exhausting all other available security. The authorities simply state that guarantors only become liable after the principal borrower has defaulted. *In casu*, the principal borrower defaulted and the guarantors immediately became liable, the mortgagee sued and was granted relief to execute the debenture, the third-party mortgage and the personal guarantees which, as we earlier explained, ranked *pari pasu*. The three securities were all securing the same debt and having granted all the reliefs sought and this not being a typical mortgage action, we cannot fault the trial Judge for the sequence in which he ordered that enforcement must occur.

Regarding the submissions on the equity of redemption having been extinguished after 90 days, in our view, the import of the trial Judge's order is that the moratorium period was actually 120 days i.e. the initial 90-day period plus the additional 30-days. We again

find no reason to fault the trial judge because the 120-day period within which the Mortgagor could exercise his equity of redemption was not unreasonable. Grounds 1 and 2 of the cross appeal are consequently dismissed.

On ground 3 on the issue of costs, it is trite that costs are granted in the Court's discretion and that ordinarily a successful party is entitled to an award for costs. In the case of **Alex Lwando & Julie Kambikambi Lwando v Mathews Mwansa Mulenga** [9], in consonance with Supreme Court authorities, we held that a successful party should only be denied costs where he has acted in such a way, that awarding him costs would be undesirable.

We note that the trial Judge did not proffer any reasons as to why only the 1st Appellant was condemned in costs excluding the 2nd, 3rd and 4th Appellants when they were all unsuccessful litigants before the high Court. The trial Judge should have advanced reasons for reprieving the 2nd, 3rd and 4th Appellants (Defendants) because the 2nd Appellant filed his defence on 31st May, 2019 while the 3rd and 4th Appellants filed a consolidated defence with the 1st Appellant (1st Defendant) on 29th May, 2019 challenging the Respondent's action

against them. In the premises, costs ought to have been granted against all the Appellants and ground 3 accordingly succeeds.

The overall effect of our decision is that the main appeal is dismissed and the cross appeal is allowed only on ground 3.

Costs in this Court are awarded to the Respondent as against the 2nd Appellant, being the only Appellant and costs in the lower Court are awarded to the Respondent as against the 2nd Appellant and the 1st, 3rd and 4th Defendants.

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M.M. KONDOLO SC
COURT OF APPEAL JUDGE

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F.M. CHISHIMBA
COURT OF APPEAL JUDGE

.....

D.L.Y. SICHINGA SC
COURT OF APPEAL JUDGE