

**IN THE HIGH COURT OF ZAMBIA**  
**AT THE PRINCIPAL REGISTRY**  
**HOLDEN AT LUSAKA**  
*(Civil Jurisdiction)*

**2005/HP/0500**

BETWEEN:

**LACKSON MWABI MWANZA**

**PLAINTIFF**

**V**

**SANGWA SIMPASA**  
**CHISHA LAWRENCE SIMPASA**

**1<sup>ST</sup> DEFENDANT**  
**2<sup>ND</sup> DEFENDANT**

*Before the Hon. Mr. Justice Dr. P. Matibini, SC, this 12<sup>th</sup> day of May, 2011.*

*For the Plaintiff: Mr. S. Mambwe of Messrs Mambwe Siwila and partners.*

*For the Defendants: No appearance.*

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**JUDGMENT**

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***Cases referred to:***

1. *Birch v Wright* [1786] 1 T.R. 378.
2. *James v James* (1873) L.R. 16 Eq 153.
3. *Santley v Wilde* [1899] 2Ch 474.
4. *Woakes and Company Limited v Rice* [1902] A.C. 24.
5. *Four-Maids Limited v Dudley Marshall (Properties) Limited* [1957] Ch. D. 317
6. *Western Bank Limited v Schidler* [1977] Ch. D. 1.
7. *Thames Guaranty Limited v Campbell* [1985] Q.B. 210,
8. *Lombard North Central Plc v Butterworth* [1987] Q.B. 527.
9. *In United Bank of Kuwait Plc v Sahib* [1997] Ch. D. 107.
10. *Magic Carpet and Tours Limited v Zambia National Commercial Bank Limited* (1999) Z.R. 61.
11. *Musonda (Receiver of First Merchant Bank Zambia Limited v Hyper Foods Products Limited and Others* (1999) Z.R. 124.

**Legislation referred to:**

1. *Conveyancing and Law of Property Act 1881 s. 20.*
2. *Lands and Deeds Registry Act, Cap 185 20.*
3. *High Court Act, Cap 27, s14, Orders 10, rule 30 and 35 rule 3.*

**Works referred to:**

1. *Charles Harpum, Stuart Bridge, and Martin Dixon, Megarry and Wade The Law of Real Property, Seventh Edition (London, Sweet and Maxwell, 2008).*
2. *John Mc Ghee, Snells Equity, Thirty First Edition (Thomson Reuters Legal Limited, 2005).*
3. *Coote on Mortgages 9<sup>th</sup> edition, (1927) Volume. One*
4. *E. Mc Hendrick, Contract Law: Text, Cases and Materials, 2<sup>nd</sup> Edition (New York, Oxford University Press, 2005).*

On 16<sup>th</sup> May, 2005, the plaintiff issued a writ of summons out of the principal registry endorsed with the following claims:

1. The sum of seventy million (K 70. 000, 000=00) being money advanced to the defendants and the defendants pledged stand number 3664 Lusaka as collateral; or
2. Alternatively, an order for possession of the house situated on stand number 3664, Lusaka;
3. Interest on any sum awarded at current bank lending rate;
4. Costs occasioned by or incidental hereto; and
5. Any other relief the Court shall deem fit.

The writ of summons was accompanied by a statement of claim. In the statement of claim, the plaintiff averred as follows: that on or about the 31<sup>st</sup> August, 2004, the plaintiff lent to the two defendants the sum of seventy million kwacha (K 70, 000, 000=00) to be repaid to the plaintiff within ninety days. In consideration to the loan, the defendants offered the property situated on stand number 3664 Olympia Park, Lusaka, as collateral in the event that the defendants failed to redeem the monies borrowed. To argument the security, the defendants surrendered the original certificate of title relating to stand 3664 Olympia Park, Lusaka, to the plaintiff.

The 1<sup>st</sup> defendant did not enter any appearance, or file a defence. As a result, on 18<sup>th</sup> November, 2005, the plaintiff entered judgment in default of appearance against the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant filed a defence. The 2<sup>nd</sup> defendant averred in defence that he does not know the plaintiff and has had no dealings with him. The 2<sup>nd</sup> defendant contends in the main that the 1<sup>st</sup> defendant acted fraudulently, and without his consent at the time he procured the loan from the plaintiff.

The 2<sup>nd</sup> defendant was initially represented by Mr. Mutofwe of Messrs Douglas and Partners. However, on 15<sup>th</sup> July, 2010, when Mr. Mutofwe appeared before me together with Mr. Mambwe, counsel for the plaintiff, he indicated to me that he was unable to locate the whereabouts of the 2<sup>nd</sup> defendant. As a result, Mr. Mutofwe elected to withdrawal from the record. Accordingly on 1<sup>st</sup> September, 2010, he filed a notice of withdrawal.

Following the notice of withdrawal, Mr. Mambwe applied for an adjournment to enable him serve the Notice of Hearing on the 2<sup>nd</sup> defendant through substituted service. I allowed the application for an adjournment to enable him file an application for substituted service pursuant to Order 10, rule 30 of the High Court Rules. On 19<sup>th</sup> July, 2010, Mr. Mambwe duly filed an *ex parte* application for leave to serve the Notice of Hearing by substituted service. The notice for substituted service was published in the *Times of Zambia* on 6<sup>th</sup> August, 2010. The notice indicated that this action would be tried on 3<sup>rd</sup> September, 2010 at 10:00 hours.

Thus, on 3<sup>rd</sup> September, 2010, when matter was called, Mr. Mambwe confirmed that the Notice of Hearing had since been served through substituted service. Mr. Mambwe further confirmed that an affidavit was filed into Court on 19<sup>th</sup> August, 2010, attesting to the publication of the Notice of Hearing in the *Times of Zambia* on 6<sup>th</sup> August, 2010. In the circumstances, Mr. Mambwe asked for leave to proceed with the trial in the absence of the 2<sup>nd</sup> defendant. In making this application, Mr. Mambwe relied on Order 35, rule 3 of the High Court Rules. Order 35, rule 3 is in the following terms:

*“If the plaintiff appears, and the defendant does not appear or sufficiently excuse his absence, or neglects to answer when duly called, the Court may upon proof of service of notice of trial proceed to hear the cause and give judgment on the evidence adduced by the plaintiff or may postpone the hearing of the cause, and direct notice of such appointment to be given to the defendant.”*

I allowed the application, and the matter proceeded to trial.

The plaintiff; Lackson Mwabi Mwanza, was the only person that testified in the trial. And I will continue to refer to him as the plaintiff. The plaintiff testified that on 24<sup>th</sup> August, 2004, he was approached by an estate agent who intimated to him that he had a client who was selling a property. The estate agent informed the Plaintiff that the client in question was in dire need of money. In fact, the client was even ready to contract a loan that could be repaid within a month, after selling the property.

In response, the plaintiff requested the estate agent to give him time to mobilize the sum of K 70 million which the defendants were asking for as a loan. The terms of the loan would be that the defendants would surrender the certificate to stand 3664, Lusaka, as collateral for the loan. In the event that the property was not sold, the plaintiff would be offered the option to purchase the property. The plaintiff testified that towards the end of August, 2004, the defendants came back to the plaintiff, as agreed, and presented the certificate of title to the plaintiff, which is registered in the defendant's name. The plaintiff went ahead to prepare the loan agreement.

The loan agreement which is in the plaintiff's bundle of documents is expressed in the following terms:

*Kangwa Simpasa and  
Chisha Lawrence Simpasa  
P.O Box 32079  
Lusaka.*

*31<sup>st</sup> August, 2004.*

*Lackson M. Mwanza  
House No. 10942/254  
Kuomboka.  
Lusaka.*

*We Kangwa Simpasa and Chisha Lawrence Simpasa of above address today 31<sup>st</sup> August, 2004, have borrowed K70, 000 000=00 (Seventy million kwacha) from Mr. Lackson Mwanza to be paid back on 31<sup>st</sup> September, 2004. We have put on house No. 3664, in Olympia as surety.*

*In the event of failure to pay back the money, the house will be sold to recover the money since the tile deeds and all documents have been surrendered to Mr. Mwanza.*

**BORROWER**

Sign:.....  
KANGWA SIMPASA  
NRC NO: 682153/11/1  
CELL: 097-603519

Sign:.....  
CHISHA LAWRENCE SIMPASA  
NRC NO: 235619/42/1  
CELL: 097-818986

**WITNESS:**

Sign.....  
NRC NO: 380716/52/1

**LENDER**

Sign:.....  
Mwanza M. Lackson  
NRC NO: 451858/11/1

**WITNESS:**

Sign:.....  
NRC NO: 249390/74/1

The plaintiff further testified as follows: that the loan agreement stipulated that the K 70, 000, 000=00, would be paid towards the end of September, 2004. The defendants did not however settle the loan by the end of September, 2004. Hence the decision to sue the defendant. The plaintiff still has custody of the original certificate of title. Thus in the circumstances, the plaintiff urged me to order that the money be paid back with interest, or alternatively, that I should order that the property be registered in the name of the plaintiff. I took the greatest care to observe closely the demeanor of the plaintiff. The plaintiff gave evidence in a straight forward and perfectly frank manner. The plaintiff therefore struck me as a witness of truth. At the close of the trial, I invited Mr. Mambwe to file written submissions.

On 10<sup>th</sup> December, 2010, Mr. Mambwe filed written submissions in support of the plaintiff's claim. Mr. Mambwe submitted as follows: that the plaintiff's claim is essentially two pronged. Firstly, the plaintiff is claiming for the payment of the sum of K 70, 000, 000=00,

together with interest at the bank lending rate. Secondly, the plaintiff is praying in the alternative for an order that he should take possession of the secured property. These alternatives will be considered seriatim. Mr. Mambwe maintains that it is not in dispute that on or about 31<sup>st</sup> August, 2004, the plaintiff lent the defendants the sum of K 70, 000, 000=00. The loan was to be repaid within a period of ninety days. In support of this contention, Mr. Mambwe referred me to the loan agreement dated 31<sup>st</sup> August, 2004, entered into by the plaintiff and the defendants. And as part of the loan agreement, the defendants pledged stand number, 3664 Olympia Park, Lusaka, as security for the debt.

Mr. Mambwe argued that what appears to be in contention however, is the fact that the 2<sup>nd</sup> defendant was not properly guided by the 1<sup>st</sup> defendant before entering into the loan agreement with the plaintiff. The 2<sup>nd</sup> defendant contends in his defence that the 1<sup>st</sup> defendant acted fraudulently, and without his authority or consent. Thus, by his defence, Mr. Mambwe noted that the 2<sup>nd</sup> defendant is inviting me to disregard the loan agreement because he did not at any rate consent to it.

Mr. Mambwe contends however that it is trite law that in a civil matter he who alleges must prove. And therefore the onus was on the 2<sup>nd</sup> defendant to prove that the 1<sup>st</sup> defendant acted fraudulently and to his detriment. Mr. Mambwe further contends that the 2<sup>nd</sup> defendant can only seek redress against the 1<sup>st</sup> defendant, and not against the plaintiff. Mr. Mambwe also submitted that the onus is of course on the plaintiff to prove his case on a balance of probability. And in this respect, Mr. Mambwe also contends that the plaintiff has shown that there was a loan agreement between himself, and the defendants from which the contractual obligations arose. Thus, Mr. Mambwe urged me to uphold the doctrine of sanctity of contract. In this regard, Mr. Mambwe urged that the parties in this matter should be treated as being masters of their own bargains. In aid of this submission, Mr. Mambwe drew my attention, to E Mc Handrick, Contract Law: Text Cases and Materials, 2<sup>nd</sup> Edition, (New York, Oxford University Press, 2005), where the learned author observes that the Court should not indulge in *ad hoc* adjustments of terms which strike them as unreasonable or imprudent. Mr. Mambwe argued that parties must be held to their bargains, and the Court should not lightly retrieve contractors from performance of their contractual obligations. Thus Mr. Mambwe urged me to order that the contract in issue should be enforced by ordering the defendants to pay the sum of K 70, 000, 000=00, together with interest at current lending rate.

The second limb of Mr. Mambwe's submission is in the alternative. Mr. Mambwe submitted in the alternative that the property in issue should be placed under possession of the plaintiff, and sold to enable the plaintiff recover the sum of K 70, 000, 000=00, together with interest. Mr. Mambwe contends that the failure by the defendants to repay the loan within ninety days from the date of the loan agreement was a breach of a material term of the contract. Mr. Mambwe drew my attention to the case of *Lombard North Central Plc v*

*Butterworth [1987] Q.B. 527*, where Mustil L. J. observed that: "A stipulation that time is of the essence in relation to a particular contractual term denotes that timely performance is a condition of the contract."

Mr. Mambwe contends that the failure to repay the loan goes to the root of the contract and entitles the plaintiff to take possession of the secured property in order to recover the loan. Mr. Mambwe further contends that where a lending is secure, a lender should not have his other remedies such as the power to sell the secured property shut out by the Court. And such a lender should have unfettered liberty to enforce his security. In this respect, Mr. Mambwe drew my attention to the case of *Musonda (Receiver of First Merchant Bank Zambia Limited (in receivership) v Hyper Foods Products and Others (1999) Z.R. 124*, where the erstwhile Chief Justice Ngulube observed that: "The mortgagee's remedies are truly cumulative." Mr. Mambwe submitted that I should allow these cumulative and speedy remedies to enable the plaintiff to take possession of the secured property and realize the fruits of his security.

I am indebted to Mr. Mambwe for his solo submissions and arguments in this matter. As a starting point it is instructive in my opinion to determine the legal nature of the relationship that subsists between the plaintiff and the defendants. Charles Harpum, Stuart Bridge and Martin Dixon, the learned authors of Megarry and Wade: The Law of Real Property Seventh Edition. (London, Sweet and Maxwell 2008) state as follows at paragraph 24 – 001, on page.1077:

"1 **General nature of a mortgage.** when one person lends money to another he may be content to make the loan without security for the debt or he may demand some security for the repayment of the money. In the former case, the lender has a right to sue for money if it is not duly paid, but that is all, and if the borrower becomes insolvent because the lender has a claim to the security which takes precedence over other creditors. The most important kind of

*security for a debt is the mortgage. The essential nature of a mortgage in its traditional form is that it is a conveyance of a legal or equitable interest in property, with a provision for a redemption i.e. that upon payment of a loan or the performance of some other obligation stipulated in the mortgage, the conveyance shall become void or the interest shall be reconveyed. The borrower is known as the “mortgagor,” the lender as the “mortgagee,” (see Santley v Wilde [1899] 2Ch 474 and Nockes and Company Limited v Rice [1902] A.C. 24).*

Further, John Mc Ghee, Snells Equity, Thirty First Edition, (Thomson Reuters (Legal) Limited 2005) defines a mortgage as follows at paragraph 34-02 at page 778:

*“A mortgage is a conveyance of some interest in land or other property as a security for the payment of a debt or the discharge of some other obligation for which it is given. Where a legal estate is transferred, the mortgage is a legal mortgage. Where only an equitable interest is transferred, whether because the mortgagor has merely an equitable interest, or because he uses a form insufficient for the transfer of a legal interest, the mortgage is called an equitable mortgage. On satisfying the obligation in respect of which the mortgage was given the mortgagor has a right to redeem, that is to recover full ownership in the property...”*

Similarly, Nigel P Grovells, Land Law Text and Materials, Third Edition (Thomson Sweet and Maxwell, 2004) makes the following observations at page 891:

*“Where one person lends money to another he may be content to rely on the personal obligation of the borrower to repay the loan. If the borrower fails to repay the loan in accordance with the agreement between the parties, the lender can sue the borrower to recover what is due; and provided that the borrower remains solvent and has assets at least in equal in value to the amount of the loan (and his other liabilities), this right to sue is sufficient protection, for the lender. However, if the borrower cannot repay the loan because he is insolvent the lender will become one of the general creditors of the borrower and along with them, will recover at best only a proportion of the original loan.*

Nigel P. Grovells goes on to observe as follows at page 891:

*“The potential consequences for the lender are obvious and, especially where the amount is substantial (for example, where the loan is made to finance the purchase of land or some major business venture), a lender will normally refuse to accept the risk of excessive reliance*

*on the personal obligation of the borrower. Instead he will require the borrower to provide security for the repayment of the loan such security may be personal or real.”*

Clearly, from what has been explained above, the plaintiff and the defendants by their loan agreement created a relationship of “mortgagor” and “mortgagees.” Or lender and borrowers respectively. The question that therefore arises is this: what principal rights and obligations ensue from the relationship of mortgagor and mortgagee. As stated earlier on, the essential nature of a mortgage in its traditional form is that it is a conveyance of a legal or equitable interest in property with a provision for redemption. That is to say, upon repayment of a loan or the performance of some other obligation stipulated in the mortgage, the conveyance shall become void or the interest shall become reconveyed. Thus, a principal right that arises when a mortgage is created is the right to redeem and reconvey the property; the subject matter of the security on payment of the principal and interest. The right to redeem the property that is subject of the security is inviolable.

The creation of a mortgage is also accompanied by the creation of remedies. The remedies available depend of course on whether the mortgage created is a legal mortgage or an equitable mortgage. Nigel P. Grovells (supra) summarises the purpose of the various remedies available as follows:

*“In addition to the personal remedy against the mortgagor for breach of the personal covenant to repay the loan, the mortgagee has a number of remedies against the mortgaged land. Foreclosure and sale are directed primarily at the recovery of the loan and termination of the mortgage transaction. The appointment of a receiver is directed primarily at the recovery of interest payable on the loan and possession of the mortgaged property although originally used as a means of securing the payment of interest and still in theory available for that purpose (See *Western Bank Limited v Schidler* [1977] Ch. D. 1), is now sought almost exclusively as a preliminary remedy to the exercise of the power of sale so that the mortgagee may sell the property with vacant possession. (See *Four Maids v Marshall Dudley Limited Properties Limited* [1957]. Ch. D. 317.”*

The following remedies are available for enforcing a legal mortgage:

- (a) **The right of foreclosure** – a legal mortgagee has the right to foreclose. Foreclosure is the name given to the process whereby the mortgagor’s equitable right to redeem

is declared by the Court to be extinguished and the mortgagee is left as owner of the property both at law and in equity. An order of the Court is essential for a foreclosure.

- (b) **The right of sell** – Formerly a mortgagee’s power of sale depended upon an express power being inserted in the mortgage. But subject to any contrary intention in the mortgage a statutory power of sale is now implied in all mortgages made after 1881 by deed. However, a legal mortgage often provides for a power of sale in a mortgage deed. This power is carefully drafted so as to allow the mortgagee to take only what is due to him out of the proceeds of the sale and only to exercise the power in proper circumstances.

Although the power of sale arises when the mortgage money has become due, in terms of s. 20 of the Conveyancing and Law of Property Act 1881, it does not become exercisable until:

- (i) Notice requiring payment of the mortgage money has been served on the mortgagor or one of several mortgagors and default has been made in payment of the mortgage advance or part thereof for three months after service; or
- (ii) Some interest under the mortgage is in arrears and unpaid for two months after becoming due; or
- (iii) There has been a breach of some provision contained in the mortgage deed or the Conveyancing and Law of Property Act on the part of the mortgagor, or of some person concurring in making the mortgage to be observed or performed other than and besides a covenant for payment of the mortgage money or interest thereon.

Furthermore, section 66 of the Lands and Deeds Registry Act provides for the power of sale when the mortgage money becomes payable. The power of sale under section 66 is exercisable according to section 20 of the Conveyancing and Law of Property Act of 1881, referred to above.

- (c) **The right to take possession-** Since a legal mortgagee gives the mortgagee a legal estate in possession he is entitled subject to any agreement to the contrary, to take possession of the mortgaged property, as soon as the mortgage is made, even if a mortgagor is guilty of no default. (See *Birch v Wright [1786] 1 T.R. 378*). It is said that a mortgagee “*may go into possession before the ink is dry on the mortgage*”. (See *Four-Maids Ltd v Dudley Marshall (Properties) Ltd [1957] Ch. D. 317*). When a mortgagee takes possession

of the property, he is under an obligation to account not only what he has received during the time he is in possession, but also what he ought to have received under the mortgage deed.

(d) **The right to appoint a receiver** – In order to avoid the responsibilities of taking possession and yet achieve substantially the same result, well drawn mortgages provide for the appointment of a receiver with extensive powers of management of the mortgaged property. Typically, a receiver is responsible for the collection of rents and profits. Although a receiver is appointed by the mortgagee, he is in fact an agent of the mortgagor.

For a detailed reading of the preceding remedies, reference can be made to Megarry and Wade. The Law of Real Property, (Supra) at pages 1098 to 1124.

According to Megarry and Wade, The Law of Real Property (supra, at pages 1125 to 1127), the extent to which the remedies referred to above are exercisable by an equitable mortgagee is as follows:

1. **To foreclose:** Foreclosure is the primary remedy of an equitable mortgagee since he has not legal estate. The Court order absolute will direct the mortgagor to convey the land to the mortgagee unconditionally, i.e. free from any right to redeem (see *James v James (1873) L.R. 16 Eq. 153*).
2. **To sell:** The statutory power of sale applies only where the mortgage was made by deed; an equitable mortgagee has no power of sale.
3. **To take possession:** it is generally said that an equitable mortgagee has no right to take possession because he has no legal estate.
4. **To appoint a receiver:** an equitable mortgagee has always had the right to have a receiver appointed by the Court in a proper case.

It is also instructive to note that the mortgagee's remedies are cumulative. A mortgagee is therefore not bound to select any one of the remedies and pursue that particular remedy exclusively. A mortgagee is at liberty to employ one or all of the remedies to enforce payment. For instance, if he sells the property for less than the mortgage advance or debt, he may still sue the mortgagor upon the personal covenant for payment of the balance. Be that as it may, foreclosure puts an end to other remedies, since if the mortgagee takes the whole security, he cannot also claim payment.

The following findings may therefore be made in the instant case: The plaintiff loaned the defendants the sum of seventy million kwacha (K 70, 000=00), on or about 31<sup>st</sup> August, 2004. The loan agreement is evidenced by an agreement dated 31<sup>st</sup> August, 2004.

agreement was executed by the plaintiff and the defendants. In this respect I do not therefore accept the contention by the 2<sup>nd</sup> defendant that the 1<sup>st</sup> defendant acted fraudulently and without his consent. Following the contraction of the loan, the defendants surrendered to the plaintiff certificate of title number L 623 relating to stand number 3664, as collateral for the loan. The loan was due to be paid back on 31<sup>st</sup> September, 2004. The defendants have since defaulted in paying back the loan.

In view of the foregoing, the plaintiff is seeking the Court's assistance to recover the money in question from the defendants together with interest at current lending rate. Alternatively, the plaintiff has prayed for an order for possession of stand number 3644, Lusaka. A question that therefore arises is this: what type of remedy is the plaintiff entitled to in the circumstances of this case? The answer to this question depends largely on the nature of the relationship that was created between the plaintiff and the defendants. I have already held that the transaction between the plaintiff and the defendants resulted in a mortgage. However, I did not go further to state or classify the type of mortgage that was created. The learned authors of Snells Equity (supra) state in paragraph 35 – 20 at page 788 that:

*“Where a mortgage is created but the mortgagee gets no legal estate, his mortgage is an equitable mortgage. This will occur either because the mortgagor has only an equitable interest or because the mortgage is not created with the formalities required for a legal mortgage.”*

The learned authors of Snell's Equity (Supra) go on to state in paragraph 35 – 22 at p 788 as follows:

*“If the parties deliberately abstain from any attempt at conveying a legal estate and agree for a mortgage effectual in equity only, the resulting mortgage will be equitable. So also a purported attempt to create a legal mortgage which fails for some lack of formality will be treated in equity as an agreement to create a mortgage and, on the principle that equity treats as done that which ought to be done, such an agreement will ordinarily be treated as creating a equitable mortgage.”*

The deposit of title is an acknowledged method of creating an equitable mortgage.

In *United Bank of Kuwait PLC v Sahib (1997) Ch. D.10*, Chadwick, J stated at 123-127 as follows:

A convenient statement of the rule is to be found in Coote on Mortgages 9<sup>th</sup> Edition, (1927) Volume 1. Page 86 in a passage cited by the Court of Appeal in *Thames Guaranty Limited v Campbell [1985] Q.B. 210, 232 – 23*;

*“A deposit of title deeds by the owner of freeholds or leaseholds with his creditor for the purpose of securing either a debt antecedently, or a sum of money advance at the time of the deposit operates as an equitable mortgage or charge by virtue of which the depositor acquires, not merely the right of holding the deeds until the debt is paid but also an equitable*

*interest in the land itself. A mere delivery of the deeds will have this operation without any express agreement, whether in writing or orally to the conditions of or purpose of the delivery, as the Court would infer the intent and agreement to create a security from the relation of debtor and creditor subsisting between the parties unless the contrary were shown and the delivery would be sufficient part performance of such agreement.....”*

It is also instructive to refer to the observation of Silomba, J in *Magic Carpet Travel and Tours Limited v Zambia National Commercial Bank Limited* (1999) Z.R. 61 at page 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 take precedence.”*

Thus, in light of the fact that the defendants deposited the certificate of title relating to stand number 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. In this regard, It is instructive to heed the observation of the erstwhile Chief justice Ngulube in the case of *Musonda (Receiver of First Merchant Bank Zambia Limited (in Receivership) v Hyper Food Products Limited and Others* (1999 Z.R. 124 that:

*“Foreclosure and sale are two distinct and separate remedies though admittedly both are remedies primarily for the recovery of capital in contradistinction with the taking of possession or the appointment of a receiver which are remedies primarily for the recovery of interest. A foreclosure decree absolute extinguishes the equity of redemption and vests the mortgagor’s entire interest in the property in the mortgagee. So that the mortgagor’s property belongs to the mortgagee absolutely. Sale on the other hand is usually more appropriate where the property mortgaged is worth substantially more than the mortgage debt...”*

Thus the net effect of the authorities considered above, is that an equitable mortgagee does not have the power to sell property. He has however, the power to foreclose. That is to say,

he is entitled to a declaration that the mortgagor's interest be extinguished and the equitable mortgagee be left to be the owner of the property both at common law and in equity.

I therefore consider that on the facts of this case, the proper order for me to make, is foreclosure. Accordingly I order that stand number 3664, Lusaka, is foreclosed. And the lawful owner is henceforth the plaintiff. I further direct the defendants convey the property in dispute to the plaintiff. In the event that the defendants refuse or neglect to comply with this direction, then the conveyance shall be undertaken by the Registrar of the High Court on behalf of the defendants as provided for in section 14 of the High Court Act.

Costs follow the event.

Leave to appeal is hereby granted:

**Dr. P. MATIBINI, SC  
HIGH COURT JUDGE**