Malawi Judiciary

IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

MSCA CIVIL APPEAL NO. 35 OF 2011
(Being Commercial Case No. 169 of 2009)

BETWEEN:

OPPORTUNITY BANK ....APPELLANT

AND

CHALANDA T/A MTUPANYAMA HOLDINGS ....RESPONDENT

BEFORE: HONOURABLE THE CHIEF JUSTICE DR A S E MSOSA, SC
HONOURABLE JUSTICE A TEMBO SC, JA
HONOURABLE JUSTICE DR. JANE M. ANSAH SC, JA

Mr Mpaka:.......................Counsel for the Appellant
Mr Msuku:.......................Counsel for the Respondents
Mr Balakasi:....................Recording Officer

JUDGMENT

Ansah SC, JA

This matter is between Opportunity Bank who is the Appellant and its client the Respondent, Mr Martin Chalanda t/a Mtupanyama Holdings. The Respondent commenced these legal proceedings in the High Court Commercial Division which heard the case and, on 1st July 2011, delivered a Judgment in favour of the Respondent and dismissed the Appellants counter-claim. Being dissatisfied with the Judgment the Appellant has lodged this appeal.

The grounds of appeal are as follows:

1. ***"The Court below erred in fact and in law when it held that the parties agreement was for an ordinary loan as opposed to an overdraft facility notwithstanding the parties' express agreement at pleading and evidence levels as to the nature of the facility;***

2. ***The Court below erred in fact and law when it held that, the parties agreement, as to the requirement of a charge over title number Alimaunde 43/317 as a condition precedent to availability of the respondent's access to the next K15 million facility, had been waived or varied notwithstanding the want of pleading and proof of any such waiver or variation on the part of the respondent and notwithstanding want of any variation to the existing charge in respect of the amount secured or at all;***

3. ***The Court below erred in fact and in law when it held that the Appellant was liable to the Respondent in the manner directed notwithstanding the Respondent's breaches of agreement with the Appellant; and the want of proof, causation and privity of appellant to any such damage as alleged and awarded;***

4. ***The Court below erred in law and in fact when it held that the Appellant's realisation of security over title number Alimaunde 28163 was illegal notwithstanding due statutory notice to the respondent prior to the sale; at the true market value in the circumstances; the absence of any legal obligation on the part of***

the Appellant to sell by public auction; and without bad faith or pleading and proof thereof by the Respondent;

5. ***The Court below erred in fact and in law when it held that the Appellant could not have recourse to its claims herein notwithstanding the inadequacy of security after due realisation and the Court not having dealt with claims conclusively with finality and on the merits in commercial cause number 20 of 2008.***

6. ***The decision of the court below was against the logic and total weight of the evidence generally and on each of the points of appeal herein above."***

By this appeal the Appellant seeks the following reliefs:-

i. ***"An order reversing the decision of the Court below in its entirety, dismissing the respondent's action as taken out and granting the appellant's counter -claim with costs here and below;***

ii. ***Any other order which, to this Honourable Court, shall appear just, proper and fair in the circumstances herein".***

This Court is called upon to determine the parties competing claims. These are the Respondent's claim against the Appellant's counter-claim. The determination will be based on issues raised by the Appellant.

Background

The summary of the facts in this matter as can be seen from the court record are as follows:

The Appellant and the Respondent were in a Bank, customer relationship. By a mutual written agreement dated 12th August 2005 the Appellant agreed to advance a loan facility to the Respondent in the sum of MK30,000,000.00 (Thirty Million Kwacha). The agreement was to run up to 31st November 2005. At the time of the agreement the Appellant was aware that the loan was for the fulfilment of the Respondent's contract for the supply of maize which he had with the National Food Reserve Agency (NFRA).

It was agreed that the Respondent will offer as security two properties, namely a warehouse known as title number Alimaunde 28/63 and a residential house known as title number 43/317. However, only one property, title number Alimaunde 28/63 was used as security. The Appellant therefore, made available to the Respondent the sum of MK15,000,000.00 (Fifteen Million Kwacha) only although the agreement was for the sum of MK30,000,000.00 (Thirty Million Kwacha). Later, the sum of MK2,000,000.00 (Two Million Kwacha) was made available to the Respondent.

It is in evidence that by reason of the Respondent's default, the loan facility was extended twice. At first it was extended to run up to 31st August 2006 and then up to 31st October 2006. The Respondent's default continued and the Appellant sought to exercise its power of sale over property title Alimaunde 28/63. The sale was stopped at the instance of the Respondent who obtained an injunction. The injunction was vacated by a consent order which stipulated that the Respondent should pay off the amount owned by 24th September 2007. The Respondent again failed to pay off the debt.

In March 2008, the Respondent through Knight Frank advertised for sale the property Alimaunde 28/63. The highest offer was K24,500,000 . This was an offer made by Central Enterprises. The Respondent who knew Mr Kakhobwe of Central Enterprises asked if he could consider to increase the offer since the property was worth more than MK40,000,000.00. Sadly this did not materialise as Mr Kakhobwe communicated to the Respondent that Central Enterprises was no longer interested in buying the property.

On its part the Appellant through Lipimbi Property Service advertised the same property for sale in May 2008 and the same Central Enterprises who had made an offer when the Respondent advertised the property and withdrew the offer, made yet another offer and this time of MK 18,000,000.00 . The Appellant accepted the offer of MK 18,000,000.00 and concluded a sale agreement.

In November 2008 the Respondent got the property valued and he says that it was valued at MK48,000,000.00. The Respondent says that he found a buyer namely, Central Medical Stores who were sitting tenants, for that amount and when he went to get the title deeds from the Appellant, he was informed that the property was sold to Central Enterprises.

It is in evidence that the Respondent refused to yield possession. The Appellant and the buyer Central Enterprises took out Order 113 action for summary possession and the Court expunged the affidavits and dismissed the application.

Consideration of Grounds of Appeal

We now come to the grounds of appeal. We must state that we are indebted to the High Court Judge, Honourable Justice Kapanda as he then was for an elaborate Judgment that has been very helpful to us. Indeed as the Honourable Judge said, this matter rests more on the facts and evidence and we bear in mind the fact that the learned Judge in the court below had the advantage of observing the demeanour of witnesses as they gave evidence.

GROUND 1: Was the parties' agreement an ordinary loan or an overdraft facility?

The Appellant in ground 1 has argued at length that the parties ' agreement was for an overdraft loan and not an ordinary loan. The Appellant submits that the Respondent in cross-examination actually agreed that the agreement between the parties was for an overdraft. The Appellant's submission reads as follows:

> ***"as Mr Chalanda's explanation in re-examination, appears at page 314 of the record, was that an overdraft facility is a form of a loan. A loan, in line with this description by Sheldon above can be an ordinary loan or an overdraft loan or to use the respondent's own words at page 341, a 'mortgage loan'."***

Counsel for the Appellant argued that *"**the mere fact that a party refers to an overdraft loan facility as a loan does not change the overdraft facility into an ordinary loan facility."***

Further, the Appellant contends that if it was accepted that the loan was an overdraft then it should have been easy for one to understand that when the Respondent accessed the additional K2,000,000.00 on 21st June 2006, bringing the debit balance to K10,079,438.80, the account was within the marked limit of K15,000,000.00 and was properly secured by the security that had at that time been perfected.

The Appellant further argues that the significance of the issue of whether the loan was an overdraft rests on a fundamental point that if it was an overdraft, the Respondent was entitled to continue to draw to its limit (but not beyond). But, if it was a loan, the Respondent had no such right. The Appellant submits that, the reason the Respondent was allowed to access the extra amount is that the account debit balance was K8,079,438.80.

On the other hand the Respondent in response argues that this ground of appeal is misleading; in that it suggests that the court made a finding that the facility the Respondent was given was an 'ordinary' loan when the court found that the facility was a loan. The Respondent contends that this accords with both the pleadings and the evidence which clearly show that an overdraft facility is a loan, the word loan being generic. The Respondent contends further that, what was in issue was not the type of arrangement, but rather the terms thereof. The Respondent argues further that the question before the court was and still remains; were the terms of the arrangement breached?

The available evidence in the court record suggests that this is a straight forward point, therefore, we need not spend a lot of time on it. To begin with, we agree with the Respondent that it is clear from the pleadings and evidence that what is in issue is not the type of facility but whether the terms of the agreement were breached. We observe that although the agreement documentation shows that it was an overdraft, both parties in their correspondence referred to the facility as a loan. This is not surprising for two reasons. First the term 'loan' is wide and refers to other types of loans. Therefore when the Respondent in his pleadings made reference to a loan and not an overdraft it was in line with what the Appellant had been referring to as the loan facility. Secondly, at page 236 of the court record there is the Respondent's un-contradicted evidence that at the time when the loan facility was given, the Appellant did not have overdraft facility running account. This piece of evidence was not contradicted anywhere. We believe this is why the Appellant itself in its correspondence referred to the loan facility as a loan and not an overdraft. Indeed it does not lie in the mouth of the Appellants now to say that the loan facility was not a loan. In fact the Appellant in arguing this ground did not contend that the facility was not a loan but that it was not an 'ordinary loan'. We observe that what the court below said, at page 749 of the court record, was that the facility was a loan. It did not use the word 'ordinary loan' as argued by Appellants. The Honourable Judge concluded this question by saying;

> ***"I therefore find and conclude that the facility it gave to the claimant was for all intents and purposes a loan".***

We agree with the finding of the court below that the facility was a loan. We observe that the Appellant further argues that the failure to acknowledge the difference between an overdraft and an ordinary loan caused the court below to find that there was a breach of contract by the Appellant. This point will be dealt with when we are considering the second ground of appeal below.

GROUND NO. 2: Waiver or Variation of the Contract

With regard to the law of contract, it is common knowledge that a contract is a creature of the parties ' will, hence it can be varied at any time during its lifetime by the parties agreeing to vary the contract or by waiver of the party for whose benefit a term was inserted. Both parties have made lengthy submission on this point.

In a nutshell, the Appellant submits that there was no variation of the contract which the parties entered on 12th August 2005. The Appellant argues that the relevant pleadings in clause 4 clearly stated ***"that, it was an express agreement of the parties that the remaining sum of K15,000,000. 00 would be advanced to the respondent only if the respondent's property on Title Number Alimaunde 43/317 situated at Area 43, Lilongwe was charged in favour of the Appellant which charge was never drawn up and perfected to date..."*** The Appellant argues that this pleading is with reference to clause 1 and 7. Exhibit MSC 1, which is the Appellant's letter to the Respondent dated 12 August 2005 reads;

"Mtupanyama will access only MKJ 5,000,000.00 at present. When the security for the house in Area 43 is perfected, a total overdraft facility of MK30,000,000.00 will be granted". And paragraph 7 reads:

> ***"the security for the overdraft and any other amounts owing to us shall be the following properties which have been offered for security;***
>
> ***(a) A warehouse located in Kanengo on title number Alimaunde 28/63***
>
> ***(b) A residential house located in Area 43 on title number Alimaunde 43/317. "***

Hence the Appellant is arguing that the Honourable Judge erred both on facts and law. That notwithstanding; the Appellant agree that Respondent accessed the sum of MK2,000,000, after the first MK15,000,000.00. However, according to bank statements, the entry of MK2,000,000.00 appears in June 2006 , yet the date by which the Respondent drastically reduced its debit was 31st January 2007 and this is 6 months before the facts forming the basis of the alleged understanding or oral agreement came into existence. Therefore, the allegation that the contract was varied is not true. They submit that the only truth is the appellant's stand that the facility was extended beyond 31st November 2005.

In response, the Respondent contends that there was variation or waiver. The Respondent argues that upon observing that the security was enough to cover the whole loan, the parties agreed to vary the agreement as in the circumstances there was no need for a second security, because at that time, the balance on the loan had come to MK7,000 ,000.00 and the security was valued at MK27,000,000.00. This contention the Respondent argues is supported by the evidence of DW1 who at page 337 of the court record agreed with the respondent, when he said that further advancements were based on the existing security and in fact made a further advancement of MK2,000 ,000.00 . The respondent argues that DW1 expressly testified that the Appellant was willing to advance further sums as long as it would be within the value of the existing security. It is also the Respondent's evidence that the Appellant at one of the meetings the parties had agreed to vary the agreement. At the meeting, the appellant indicated that it was ready to release the remaining MK15,000,000.00 if the respondent liquidated all the outstanding interest at the time which was at K654,000.00 and the respondent did liquidate it on 6th April 2006 as evidenced by exhibit P5. The respondent contends that the Appellant refused to release the 15 Million Kwacha and instead was willing to give 5 Million Kwacha. It is the respondent's case that even the 5 Million Kwacha was not released instead the Appellant released 2 Million kwacha only.

Going through what the parties have submitted in this appeal, we find that there are issues that are not in dispute. The parties agree that there was a contract that was entered into on *12th* August 2005 and it was to run for three months. To be exact, it was valid up to 31st November 2005. The parties are also in agreement regarding the need for two securities and that the appellants released 15 Million Kwacha and withheld the other 15 Million until a charge was created for the second security. They also agree that a further MK2,000,000.00 was advanced on 21st June which was within the marked limit of MK15 ,000,000.00 as it was covered by the security that was already available.

The parties disagree in part in respect of the oral variation of the contract in regard to which the appellant maintains that there was no variation.

We begin with the time factor. It is not disputed that although the agreement was signed by the appellant on 18th August 2005 and it was to expire in November, the appellant signed the documents on 11th November 2005, when the agreement was supposed to expire. Therefore it is not surprising that the parties carried on business as usual well beyond November 2005 despite the fact that the agreement had expired according to the written agreement. The Respondents continued paying their instalments liquidating the loan and the Appellant continued accepting the payments and even disbursed more money. Indeed the agreement was not varied by conduct as was held in the case of **Freitas vs Parkinson (1996) MLR** where Justice Mwaungulu as he then was at page 227 said that;

> ***"If the plaintiff changed from ordinary to metallic paint it must be shown that by that change there was waiver or rescission or variation of the original contract. To constitute waiver, the negotiations for variation of the terms of the contract must be shown that it was the intention of the parties that there should be variation or abandonment of the contract. The act must be mutual."***
> ***..."for if an earlier contract has been agreed to be abandoned by the parties one party cannot rely on its terms his conduct being now governed by the new agreement. In Thornhill v Neats 91834) 8 CB NS 831, in an action for work and labour, the defendant pleaded that the work was done under an agreement in writing whereby the plaintiffs agreed to build for him six houses and completely finish and give the premises to him on or before 20th March 1859, under a penalty of $1 for each house and every week the works should remain incomplete and possession withheld from the defendant after that date, the amount of penalty out of the monies due under the contract. The defendant claimed 12 months. The plaintiff replied that before the penalties were due there was an agreement that the work will be finished within reasonable time. The court held that the original contract has been abandoned and substituted by the subsequent agreement."***

Looking at the available evidence, we observe that the date of expiry of the facility was varied twice. When the parties first entered into the agreement, the date of expiry of the facility was 31st November 2005. It is in evidence that it was extended to 31st August 2006 and then 31st October 2006. We also observe that DW1, at pages 340 to 34 l conceded that there was variation. In cross examination he responded to counsel's question that ***"in other words, 15 Million was secured by the charge that already existed."*** Then at page 340 DW1 also said that ***"...and then in 2006 April he came to the Bank and after discussions, this was another part of allowing to get some money."*** In answer to a follow up question as to what was the security for the extra money given to the Respondent, DW1 said that ***"within the 15 million charge".*** This supports the Respondent's submission that the agreement covered the MK15,000,000.00. If the agreement was not varied the appellant would not have submitted that when the respondent accessed the additional MK2,000 ,000.00 on 21st June 2006, bringing the debit balance of MK10,079,438.80 , the account was within the marked limit of MKl5,000,000 .00 and was properly secured by the security that had at that time been perfected.

We also observe that according to the Respondent's evidence as contained in paragraph 11 of his witness statement and confirmed by MSC 5, the outstanding interest as on 13th June 2006, was paid in full. This was a condition put by the Appellant in order for the Respondent to access the remainder of the 15 Million Kwacha. We note that the Appellants did not deny the assertion by the Respondent that it requested the Respondent to pay the interest that had accrued so that the Respondent could access the remaining MK15,000,000.00. The Appellant, having caused the Respondent to pay the interest, cannot now deny that the agreement was varied or that there was a waiver.

The evidence further shows that the Appellant gave the Respondent an extra MK2,000,000.00 as part payment secured by the same security which was already in place. We find as a fact that the contract/agreement was varied.

There is no dispute as to the sufficiency of the security which was already in place. As of January 2006, the loan had been reduced to 7 Million Kwacha. The value of the charge which was already in place was 27 Million Kwacha. Even if an addition of I 5 Million Kwacha was made, it would have been within the security. In cross examination the question put to DW1 was **"what you are saying is that there was a charge of MK15,000,000 and because there was that charge the bank was willing to assist giving more money without seeking for further security, because it was within the security"** and DW1's response was **"that was the agreement with the customer".** It is clear thus, that the Appellant was willing to advance more money as long as the value was within the existing security and it is clear that the need for the other security was waived .We observed that the Appellant tried to refute the fact that there was a waiver by arguing that, when it gave the MK2,000,000.00 to the Respondent, according to the evidence of DW1, it was a separate agreement from the earlier agreement, DW1 rather confirmed that it was the same agreement when he testified that the extra MK2,000,000.00 was given using the same security that was already in place. We conclude that there was a waiver on the need for further charge in order for the Respondent to access the remaining money.

It is clear that the original written agreement was subsequently varied in terms of time and there was a waiver with regard to security in that the single security was taken to be enough to cover 30 Million Kwacha. This ground of appeal also fails and is dismissed.

Ground 3. The court below erred in fact and law when it held that the Appellant was liable to the Respondent in the manner directed notwithstanding the Respondent's breaches of agreement with the Appellant; and the want of proof, causation and privity of Appellant to such damage as alleged and awarded;

This ground is dealing with basically three issues. These are privity, causation and proof of the Respondent's loss *vis a viz* the Appellant's liability for the Respondent's losses of profits on the NFRA contract and interest on the NBS loan.

It is the Appellant's argument that it did not cause the Respondents to borrow from NBS. The Appellant's contention is that; 24th November 2005 was the date when OIBM made the facility available to the Respondents. This followed the perfection of the security title number Alimaunde 28/63 which the Respondents had given. This according to the agreement between the parties, entitled the Respondents to access the sum of MK15,000,000.00 of the agreed total sum of MK30,000,000,00. The balance awaited the surrender of the second property. The Appellant contends that the Respondents instead of giving the second security to the Appellants, in December 2005 they went to NBS to borrow. The Appellant submits that in December 2005 there was no breach on its part. The Appellant was ready to disburse the remaining MK15,000,000.00. Further, it is the Appellant's argument that the Respondent's borrowing from NBS could not have been foreseeable to the Appellant contrary to what the trial Judge at page 756, 1st paragraph said that ***"...it should obviously have been within the contemplation of the Defendant bank that their failure to discharge their part of the contract would entail the Plaintiff seeking alternative sources of funds"*** The appellant submits that the Honourable Judge failed to take into consideration the fact that the Appellant at that time was ready to disburse the remaining MK15,000,000.00 upon the Respondents' submission of the second security. Further, the Appellant contends that the Respondents did not suffer any loss since the NBS' loan interest was at 27% and OIBM's interest was at 31% plus a facility fee of 1.5% and draw down fee of 0.05%.

In response the Respondents argue that at the time when the parties entered into an agreement that the Appellant will advance a loan of MK30 ,000,000.00, the Appellant was aware that the Respondents were in business and the purpose for the loan was disclosed to them and the same was made part of the contract. The Appellant, contrary to the agreement only disbursed the total sum of MK17,000,000.00. That being the case the Respondents contend that it was apparent that there would be a shortfall as such, alternative means had to be sought to cover the gap. The Respondents therefore, contend that it was clear that the repayment of the loan interest inclusive, was dependent on the purchase of the farm produce and resale. Their inaction would result in the non-fulfilment of the purpose and therefore inability to repay the loan thereby increasing the interest. The Respondents submits that the Appellants are liable to pay the interest on the NBS loan.

We have carefully gone through the evidence on the court record as ground of appeal number three is mainly based on facts. What comes out is that the parties indeed entered into a contract for a loan of MK30,000,000 .000 which was going to be secured by two properties. The Respondents surrendered one property, hence half the requested money was given to the Respondents, for the property they gave covered the half of the MK30,000,000.00. We observe that the Respondents claim damages for trading losses because they contend they accessed only MK15,000,000 .00 advance from the Appellant and not the full MK30,000,000.00. At page 736 of the court record , the honourable trial judge as he was then said ***"he could not fully discharge the contract with NFRA ...[Farm produce had become scarce and prices gone up resulting in his business incurring a loss...He was forced to surrender part of the contract to a third party and to pay them [MK5. 778m]"***

From the quoted paragraphs, the respondents are actually saying that they borrowed from NBS for no other reason other than because OIBM did not advance the full MK30m. Further the respondents have given the actual date when they accessed the first loan from NBS, being "in or around December 2005". Looking at the available evidence, we are of the view that there is no casual link for the NBS loan and OIBM's conduct and the Respondents' alleged loss of profits according to the undisputed evidence of the parties. To begin with, the Overdraft Facility was signed by the parties on 12 August 2005 and from 17 August 2005, the Respondent started to use the Overdraft Facility. The trial Judge correctly stated at page 733 of the Record that: 'On the pleadings, it is important that it is not in issue as to when the plaintiff accessed the available facility.' Secondly, the charge of the Respondent's property Alimaunde 28/63 to OIBM was signed by OIBM on 11 November 2005. Thirdly, OIBM made the first MK15,000,000.00 available in August 2005. There is no allegation of breach against OIBM concerning that first MK15,000,000.00 advance.

It is noteworthy that at all times, OIBM was willing/waiting for the respondents to access the remaining MK15million of the MK30m Facility when the Respondents charged another property to OIBM as indicated in the agreement. In fact this was a term of the Overdraft Facility of 12 August 2005 as shown at page 27 paragraph 1 of the court record and OIBM did not at any time, resile from that offer. We note however, that under the 12 August 2005 Facility Agreement, the Respondents were not obliged to borrow the remaining MK15million from OIBM; nor to charge property 43.317 to OIBM. They had the option, during the currency of the facility (which initially expired on 30 November 2011) of getting the remaining MK15million balance of the MK30 million Overdraft Facility if they charged the second property (43/317) to OIBM. The Respondents chose not to borrow from OIBM or to charge their second property to it. Within the time frame of OIBM's facility, the Respondents chose to borrow on the same security from NBS Bank.

We also observe that the available evidence does not support the respondents' claim that they failed to purchase produce because they did not access the remaining MK15,000,000.00 from OIBM. We note that the respondents in May 2006 after they had approached the Appellants and did not receive as they had hoped to, got another loan of MK10,000,000.00 from NBS. However, the respondents did not buy produce during this harvest time when produce was in abundance and cheaper until October 2006. Even the produce they bought does not reflect the amount of money that was accessed from the two banks, namely OIBM and NBS. The reason why the respondents did not buy enough produce is clearly stated in their pleadings, at page 8 of the court record, where the respondents said that the OIBM K15million "was largely used for logistics such as acquisition of storage facilities". This is contrary to the purpose indicated for the OIBM loan at page 27 of the court record, and this evidence contradicts respondents' claim that their efforts to buy produce was frustrated by the appellants.

The evidence further reveal that the respondents during the 2005/2006 season bought maize during harvest time and off season, the total cost was about half a million only. One wonders what happened to the MK l 0,000,000.000 and the MK2,000,000.00 from NBS and OIBM respectively. We disagree with the trial Judge with what he said at page 755 of the court record that;

> *"As I understand it, from exhibit p1 and (also exhibited as Exhibit D1) which is the agreement between the parties, the Plaintiff was to use the loan facility to purchase farm produce for resale. The Defendant surely knew very well the purpose for which the Plaintiff needed the money. Further, it is noted that Mr Steven Mgwadila testified that when the Defendant agreed to make further advances to the Plaintiff following which the MK2, 000, 000.00 was advances, it was done because the Plaintiff had a contract with NFRA and that the money was meant for him to acquire the farm produce to honour the contract with the NFRA. It was as a result undoubtedly within the contemplation of the parties, and in particular the Defendant, that any breach of the contract would deprive the Plaintiff of the profit s under the sale of the farm produce. This Court therefore finds and concludes that the Defendant is liable for these profits that were lost as a result of the breach.*

We conclude by saying that there is no casual link between the respondents ' failure to buy maize with the Appellants' refusal to release the required MK15,000,000.00 .

With regard to the claim for interest on the NBS loan, we need not go further. Since the evidence has shown that there was no casual link between the Respondents' failure to buy produce and the Appellant's refusal to advance the next MK15,000,000.00 . We disagree with the trial judge when he said that;

> ***"I make this award of interest since as already observed above, the Defendant bank knew the purpose for which the loan was obtained by the Plaintiff. In fact, Mr. Mgwadila testified that at the time the Defendant bank agreed to advance further sums to the Plaintiff, it was made aware of the fact that the Plaintiff had a standing contract with the NFRA. Thus, with the standing contract, it should obviously have been within the contemplation of the Defendant bank that their failure to discharge their part of the contract, and therefore breach of the same necessitated the Plaintiff seeking alternative sources of funds. As it were, the fact that the Plaintiff approached the Defendant bank for funding was a clear indication that the Plaintiff had no ready funding. It was therefore clearly contemplated that the Plaintiff would be seeking alternative loan. Indeed, the Claimant did obtain such loan which was repayable with interests."***

To begin with to say that the respondents suffered loss whatsoever in respect of their NBS borrowings is unfounded. The available evidence shows that NBS interest rate was lower than OIBM's interest rate. In fact the respondents gained in obtaining a loan from NBS than OIBM. Further, we are wondering why the respondents are claiming for refund of interest only. We note that even if they had obtained the loan from OIBM they would have still paid interest. We find that there is no justification for the claim of interest. In conclusion ground of appeal number 3 succeeds.

We now come to grounds 4 and 5 where the Appellant is contending that the Court below erred in law and facts.

In fact when it held that the appellant's realisation of security over title number Alimaunde 28/63 was illegal notwithstanding due statutory notice to the

Respondent prior to the sale; at the true market value in the circumstances; the absence of any legal obligation on the part of the appellant to sell by public auction; and without bad faith or pleadings and proof thereof by the respondent.

To begin with the question of legality is premised on the following three issues:

(1) That there was no notice to the chargor;

(2) That the sale was by private treaty and;

(3) That it was undervalued.

Want of Notice to the Chargor

The parties agree in general to what transpired with regard to the sale of the Respondent's property. They are in agreement that the Appellant indeed wrote a demand letter on 11th January 2007 calling for the payment of the entire outstanding monies together with interest within 14 days. It is also not in dispute that as a result of this letter of demand, proceeded to put the house up for sale but the Respondent obtained an injunction that the Appellant should not sell the property. Following that it is on record that the injunction was dissolved by the parties ' consent order in which the Respondent was to pay off the money by 30th November 2007, but he did not.

In May 2008, the Appellant seeing that nothing was paid put up an advert in the newspaper for the sale of the property and in July it was sold. That notwithstanding there are areas of disagreement and to prove its case the Appellant has drawn the court's attention to particular facts of the case. The Appellant contends that the loan facility which parties entered into had an expiry date of 31st November 2005 and it did expire on that date. Contrary to the terms of the agreement, at the time of expiry, the Respondent was in default in that the loan was still outstanding and even at the trial the money was still owing. The Appellant pointed out that the Respondent was in continuous default although the facility was extended to 31st August 2006 and to 31st

October, 2006. That being the case, the appellant issued a letter of final demand on 11th January 2007 giving the Respondent 14 days within which to pay the whole outstanding amount failure of which the security will be sold. Making reference to the case of ***Bishop Mnkhumbwe v National Bank of Malawi Civil Cause No. 2702 of 2000*** the Appellant argues that the facts of this case are akin to the case at hand. In that case, the chargor was given a written notice to pay up within 21 days, from 15th December 1998. Following the letter of demand the chargor had some discussions and indulgence from the chargee which did not materialise into a settlement of the account, and the chargee realised security in 21 months, later, on 17th August 2000. The court in the **Mnkhumbwe case** decided in favour of the chargee in that the letter of demand issued about 2 years earlier was sufficient and the discussions the chargor had with the chargee did not affect its validity.

The Respondent is arguing that no evidence was given to show that the Appellant ever gave the Respondent the required statutory notice in writing. Further, the Respondent is arguing that the consent order to set aside the injunction would not suffice as a notice although the respondent was aware of the Appellant's intention to sell the property. The respondent is calling our attention to what was held in the case of **George Duncain Chidzankufa v Nedbank Malawi Limited, Commercial Case No 1 of 2008** in that case, the Defendant argued that non-compliance with the Bill of Sale Act would be waived because the plaintiff had consented to the bill of sale and had in fact obtained the money despite non-compliance with the Act. In that case, it was held that where there is strict requirement to comply with an Act of Parliament, parties cannot agree to ignore a statutory requirement. The Respondent therefore submits that the consent order cannot take the place of the requirement for a demand letter in writing as is required by section 68 of the Registered Land Act.

Our view on the issue of the validity of the letter of demand dated 11th January 2007 is that although the Respondents submit that they are not aware of any demand letter, the same is not true. It is the Respondents that even exhibited exhibit P13 which is the letter of demand written by the appellants to the respondents. It is also clear that following exhibit P13, there was an injunction order that was obtained by the Respondents to restrain the Appellants from excising their right to sell the property. It is also clear from the facts that the injunction was set aside by a consent order. We are of the view that as argued by the Appellants, there was a valid notice. We agree that the facts of this case are close to the facts in the Bishop Mnkhumbwe case and we quote with approval what the trial Judge said:

> ***"Section 60 (2) never requires the mortgagee to stipulate to the mortgager to pay within three months. A notice requiring immediate or intimating money be paid before the expiration of*** **three months from the date of service is effective. It is equally effective if it requires the mortgagor to pay at the end of the period since the three months begins to run immediately** ***... Baker v Illingworth (1908) 2 Ch 20.***
>
> ***The chargee can demand immediate payment or within a short time. The mortgagor, however, has three months to pay. The chargee has three months before resorting to remedies*** **... Metters v brown (1863) 33 LJ Ch. 97.**
>
> ***The indulgence, unless the charger acts to his detriment, should not be a waiver of notice obliterating the chargee's rights. This is supported by the decision of Pearson J approved by Cotton, Lindley and Lope LJJ Poole vs Trutee v Whetham (1886) 33Ch D 111.***

The Notice of 15th December 1998 is unaffected by the subsequent arrangements for payment. If they affected the notice, in my judgment, these arrangements only suspend the notice revived when the mortgagor defaulted on those arrangements. The mortgagee was not obliged to give another notice...

Section 68 never obliges the chargee to state the time to pay before invoking the remedies. Subsection 1 describes the notice. The chargee may in writing require the chargor to pay the money owing. That is all the charge is to do. The section never requires the chargee to suggest the time to pay. Consequently, the chargee may require the chargor to pay immediately or within a given time.

Consequently, a notice stipulating immediate payment, not time or less time to pay is effective. The remedies, however, cannot be invoked within three months of notice. A notice therefore demanding immediate payment and giving ten days for chargor to pay is effective three months after the ten days. The notice would be effective though it never states the charge would only resort to his remedies ...after three months."

Our conclusion on this point is that the Appellant's demand notice of 11th January 2007 exhibit P13 is a valid notice. The subsequent meetings and undertakings by the Appellant to allow the Respondent time within which to pay off the loan was not a waiver. The Respondents did nothing to their detriment. In fact it was to their benefit that the Appellant allowed the Respondents an extension of time. The subsequent arrangement did not affect the demand notice. The Appellant was not obliged to write another letter of demand. This ground succeeds.

Private Sale and Undervalue (Legality of Sale)

This brings us to the next two issues on legality of the sale. These are sale by private treaty and sale of the property at below its value. The Appellant submits that the allegation of bad faith presupposes that there is an obligation to sell the charged property by a mode of sale other than private treaty. It argues that the pleading does not by itself disclose what is wrong with the sale by private treaty. They argue further that on pure legal analysis, the choice of the modes for exercising power of sale is regulated by Registered Land Act section 71 of the Registered Land Act which reads:

> ***"A Chargee exercising his right of sale shall act in good faith and have regard to the interest of the chargor, and may sell or concur with any person in selling the charged land, lease or charge or any part thereof, together or in lots, by public auction for a sum payable in one amount or by instalments, subject to such reserve price and conditions of sale as the Registrar may approve, with power to buy in at the auction and to resell by public auction without being answerable for any loss accessioned thereby."***

The Appellant submits that this section has been adequately discussed and adjudicated upon in the cases of <u>Bishop Munkhumbwe Case Civil Cause no 2702 of 2000, National Bank of Malawi and Leasing and Finance Limited v George Sadik</u> as approved by the Supreme Court in the case of <u>NBS v Henry Mumba MSCA Civil Appeal No 26 of 2005.</u> In these cases it was held that a chargee is not under an obligation to realise security by public auction only. The Honourable justices of Appeal in the Henry Mumba case said;

> ***"Accordingly, we are of the view that a construction of section 71(1) that allows a charge to sale either by private treaty or by***

> ***public auction... is better than the one that restricts the sale to be by public auction only and therefore, that is what the legislature must have desired...***
>
> ***What we have said above also takes care of the next question, namely whether by selling that property by private treaty ...the Appellant (chargee) acted in bad faith ... it seems to us that the question does not arise now because, we have said, the Appellant (chargee) was at liberty to sell in the way he did (i.e. by private treaty)".***

It is the Appellant's contention that the Judge's finding in the court below was erroneous in that it did not follow the law as enunciated in the Henry Mumba case.

The Respondents strongly disagree with the Appellant's arguments. They contend that the way the Appellant and its agents conducted themselves is the basis for impeaching the sale between the Appellant and the third party, as both clearly acted with malice and clearly against the interests of the Respondents as chargor. It is their case that when the Respondent obtained the loan and used the property as security, it was valued at MK.27,000,000.00 (Twenty Seven Million Kwacha) according to the valuation report exhibit P4 at page 47 of the court record and that the valuation was done by Mr Amos Chinkhadze who is DW2. They submit that DW2's testimony at page 390 of the court record was that valuation of assets can go up or go down. He testified further that in 2008 there was nothing unusual that the property should go up in value. Contrary to what DW2 said, he, on behalf of the Respondents proceeded to sale the property without fresh valuation. It is the Respondents' argument that when they had the property valued in 2008, it was valued by a Government department at MK48,000,000.00 (Forty eight million kwacha and another Government department Central Government Stores was prepared to buy it at that price.

It is also contended that when DW2 was asked to comment on the value of MK48,000,000.00, his opinion was that the value was on the higher side. He however, indicated that he personally would put the value at around MK27,000,000.00, and yet he proceeded to sale at MK18,000 ,000.00.

The Respondent also submit that bad faith is again shown by the way the property was described in exhibit D12 at page 176 of the record. The property was wrongly described by reducing its hectorage and not disclosing other buildings within the property, the ablution block to be exact. The property was described as being 0.15 when it is actually 0.25. It was reduced by almost half and it is strange to see that this was done by DW2 a man who had valued the property twice and even more revealing is that when DW2 wrote the letter of offer to the purported buyer, he described the property correctly as it is. The Respondent also highlighted DW2's admission at page 184 of the court record that he gave wrong information to the public. The wrong description of the property is even confirmed by the purported buyer, Mrs Kakhobwe. She testified that it was a small advert in the classified ads and the only description of the property was "warehouse in Area 28" nothing else.

Section 71 (1) of the Registered Act, Cap 58:1 makes prov1s1on for the chargee's right of sale. As submitted by the Appellant, indeed this section has been adjudicated upon by this court. We agree with the appellant that according to Mumba Case, the charge is not obliged to sale by private auction. That said, when the charge is exercising his right of sale by private treaty or auction, the section puts an obligation on him to sale in good faith and have regard to the interests of the charger. This is in fact what this court said in the Mumba Case that:

> ***"A closer reading of section 71 (1) shows that it is effectually in two parts. There is the part that says a chargee exercising his power of sale SHALL act in good faith and have regard to the***

> ***interests of the chargor,...The word shall has been used in this p art of section. Therefore, there can be no option or negotiation regarding this part of the section and we believe that this is what the court said in the Gondwe case when it said that the most important provision of this section is that the charge must always have regard to the chargor's interests in the charged property by ensuring, the court added, that those who deal with the charged must do so with full regard to the rights of other persons in such property. "***

Going through the evidence captured in the court record it is clear that the Honourable judge's finding is not based on just one issue, namely, the issue of sale by private treaty as contended by the appellants. The Honourable Judge looked at the totality of the circumstances surrounding the realisation of the security, including the conduct of the people involved. The issue is not private sale of the property as the Appellant would want us to believe, rather it is the manner in which that private sale was conducted without due regard to the interest of the charger.

To begin with, we agree with the trial Judge that the sale between the Appellant and the buyer, Central Enterprises was tainted with malice and against the interest of the Respondents for the below reasons. When in 2005 the charger obtained the loan from the Appellant, the property was valued by Mr Amos Chinkhadze who is DW2 at MK27,000,000.00. Three years later, the same property was sold by the same Mr Chinkhadze at less than MK27,000,000.00 at MK18,000,000 .00 to be exact and to the person , Central Enterprises who had earlier on in April 2008 offered to buy the same property at MK24,000,000.00. We also note that the Appellant did not have the property revalued in 2008 before the sale. We appreciate what Mr Chimkhadze said in his evidence that valuation of assets fluctuates in that it can go up or go down depending on market forces. In our opinion, that knowledge should have compelled DW2 to re value the property before the sale. It is surprising that such a man with such knowledge should sale the property without any fresh valuation where there is a possibility that the property may have gone up and worse still at less than his own valuation of 2005.

We also observe that bad faith is shown in the description of the property Exhibit D12 in the advert. The hectorage was reduced, some buildings on the property were omitted no wonder the offers were less than the value of 2005. The wonders never cease! The letter of offer to the purported purchaser written by the same agent properly described the property as it is. We believe if the supposed error was in reverse, in that the letter of offer to the third party had hectorage which was less than advertised, the purchaser would have queried it and most likely would have revisited its offer or indeed rescinded the offer. It is apparent that the way the property was advertised would not have attracted high offers. It appears to us that wrong description of the property was a calculated act to attract below the value offers and so we believe.

We also observe that the Government valuation exhibit P18 valued the property at MK48,000,000.00. Although Mr Amos Chinkhadze said that the valuation was on the high side, and he also said he would place it at M27,000,000.00. The question is if that is his view why did he sell the property at less than the suggested value? Our conclusion is that he did that because he did not take the interest of the charger into consideration.

Coming to the purchaser, Mrs Kakhobwe of Central Enterprises, is on record that by her letter dated 4th April 2008 Exhibit P17, on behalf of Central Enterprises made an offer of MK24 ,000,000.00 for the property in question and in that letter she quoted the plot number of the property. It is also on record that the Respondent approached both her and her husband and explained to them that they were selling the property under pressure at a lower price than the estimated value in excess of MK40,000,000.00 and that a few days after such a meeting, her husband informed the Respondents that the company was not interested in the property therefore it was no longer buying it. Surprisingly barely a few weeks after the cancellation of the offer, the same company by its letter dated 27th May made an offer of MK18,000,000.00 for the same property it was not interested in.

We also observe that when Central Enterprises made its offer, it quoted the plot number of the property. We believe the purported purchaser was fully aware of the property which it was offering to buy at MK18,000,000.00 that it was the same property which it had, only a few weeks ago offered to purchase at MK24, 000,000 .00 and then had communicated to the Respondent that it was not interested in the property and therefore, withdrew its offer.

Our opinion is based on the fact that in both letters of offer, Mrs Kakhobwe of Central Enterprises quoted the plot number which was the same. One wonders what made Central Enterprises to be re-interested in the property again. The conduct of Central Enterprises clearly shows bad faith. It is clear that both the seller, the Appellant through its agents and the purchaser Central Enterprises knew exactly what they were on about. They did not act in good faith and obviously in total disregard to the interest of the charger.

The Appellant contend that the property was sold to Central Enterprises and yet the letter of offer the Appellant wrote to the purported purchaser stipulated certain conditions of sale which included "payment of 50% to be made within 7 days from the date of offer..." There is no evidence that 50% was indeed paid within 7 days. DW1 in his testimony said that the amount of MK8,000,000.00 was paid in March 2009 and this is less than the down payment of 50% that was required according to the letter of offer. We observe that the Respondent found a buyer Central Medical Stores at a much higher value in November 2008. The Respondents told the Appellant about the buyer they had found. The Appellant by then, had not received any money from its purported purchaser Central

Enterprises and this was contrary to the condition of sale. It is shocking that the Appellant, together with Central Enterprises the purported buyer obtained an injunction restraining the Respondent from selling the property, instead of facilitating the sale transaction with the buyer that the Respondent had identified since Central Enterprises at that time had paid nothing and one would think that the offer had lapsed.

We also observe that according to the minutes of a meeting between the Appellant and Respondent dated 3rd February 2007, it was agreed that if the situation ever reached the point of selling the warehouse, the Respondent was should be free to help the Appellant in selling the property. Thus, when the Respondent advertised through Knight Frank in early 2008 and subsequently identified the buyer Central Medical Stores who was willing to buy at MK24,000,000.00, the Respondent promptly informed the Appellant m pursuance to what was agreed.

Looking at the circumstances of the case, we are persuaded to conclude that the sale was in bad faith, therefore, illegal. Moreover, the property that was sold according to the advert was not the Respondent's property according to the description thereof. Further, the sale was contrary to Section 71 (1) of the Registered Land Act, in that the interest of the chargor were not taken into consideration and the behaviour of the Appellant left a lot to be desired. It is clear that the Appellant sold the property to the third party in bad faith. We agree with Honourable Judge in the court below that both the chargee and the purported purchaser acted maliciously, therefore, the sale agreement between the two cannot stand. It should be nullified and it is hereby nullified.

Ground Number 5

The Court below erred in fact and in law when it held that the Appellant could not have recourse to its claims herein notwithstanding the inadequacy of security after due realisation and the Court not having dealt with claims conclusively with finality and on the merits in Commercial Cause Number 20 of 2008.

The Appellant's submission on this ground is that the Judge below erred when he held that the Appellant's counterclaim was the subject of any of the ruling by Honourable Judge Mtambo in Commercial Case No. 70 of 2009. The Appellant contend that its counterclaim was and is as follows:

"1 For a declaration that the caution registered by the plaintiff on Title Number Alimaunde 28/63 was irregular and should be discharged;

2 For an account and remittance of all rentals received by the Respondents for the property (that) was sold to the date of judgment;

3 For the payment of the shortfall should the indebtedness of the plaintiff to the defendant by the date of judgment exceed the sum of MK18,000,000.00 ;

4 For the payment of the sum of MK15, 192,666.41 with interest at the defendant bank's commercial lending rate from 30th September 2009, and;

5 for the payment of the sum of MK442,100.43 being interest paid to Central Enterprise from 30th September 2009 to date of judgment , and

6 Any other relief(s) the court shall deem fit and appropriate in the circumstances;

7 Costs of this action."

The Doctrine of *res judicata is* for the purpose of stopping an abuse of court process. In that a matter that has already been adjudicated upon should not be re-litigated. It has been held that it is an abuse of court process to bring a matter with the same or similar issues for litigation when it has already been dealt with by a competent jurisdiction. In the case of Stephenson vs Garnet (1898) 1 QB at page 680, the dictum of Smith LJ is instructive. It says:

> ***"The issue now sought to be raised in this action has been determined by a court of competent jurisdiction and as the cases... show that it would be an abuse of the process of the Court to allow a suitor to litigate over again the same question which has already been decided, and to dismiss an action as frivolous and vexatious, yet it ought to do so when, as here, it has been shewn that the identical question sought to be raised has already been decided by a competent court."***

In the case of the Rev. Oswald Joseph Reichel vs the Rev. John Richard Magrath, [1889] 14 AC 665 the action was for a declaration that the Appellant was a Vicar was dismissed on the ground that the Appellant himself had resigned. In a subsequent action by the Vicar that had been appointed to replace him for an injunction restraining the Appellant from depriving him the use of a thing he was entitled to use, the Appellant raised issues similar to the ones he raised in his action for a declaration that he was a vicar. The court said that:

> ***"I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again. It cannot be denied that the only ground upon which Mr Reichel can resist the claim by Mr Magrath to occupy the vicarage is that he (Mr Reichel) is still a Vicar of Sparsholt). If by hypothesis he is not a vicar of Sparsholt and his appeal absolutely fails, it surely must be in the jurisdiction of the Court of justice to prevent the defeated litigant raising the very same question which the Court has decided in a separate action. I believe there must be an inherent jurisdiction***

> ***in every Court of Justice to prevent such abuse of its procedure and I therefore think this appeal must likewise be dismissed."***

Lord Blackbum indorsing the above principle in the case of **Locker vs Ferryman (1877] 2 App. Case, 519** said:

> ***"The object of the rule of res judicata is always put upon two grounds the one public policy, that is in the interest of the state that there should be an end to litigation and the other, the hardship on the individual, that he should be vexed twice for the same cause."***

In the present case, the Appellant's counter claim is based on the purported sale of the property in question to the third party. The Appellant's own paragraph 22 of the defence states that ***"The defendant states that the plain tiff has remained in possession of the property despite the sale."*** Further, one of the Appellant's prayers is "**for the payment of the sum of K442, 100.43 being interest paid to Central Enterprises on their deposit..."** from the quoted paragraphs, it is clear that the Appellant's counterclaim is based on its sale of the premises to the third party, Central Enterprises an issue that was already adjudicated upon by the Commercial Court in case 70 of 2009. Honourable Justice Mtambo in his ruling started by saying that:

> ***"This is an application by the Plaintiffs/Applicant for summary possession of land under Order 113 of the Rules of the Supreme Court (RSC). The story is that the Defendant obtained a loan of 15 Million Kwacha from the 1st Plaintiff and created a charge...Alimaunde 28/163 ...after rejecting some payments made by the defendant...1st Plaintiff sold the property ... the 2nd Plaintiff through Mr Kakhobwe previously discussed the purchase of the property at MK27,800,000. 00 with the Defendant but later went***

> ***behind the Defendant's back to purchase it from the 1st Plaintiff at a substantially low price. Naturally the Defendant felt that there was some impropriety in the manner and price of sale and entered a caution at the Lands registry ... preventing the completion of the sale of the property to the 2nd Plaintiff. The 1st Plaintiff took out these proceedings so that they are able to have vacant possession to pass to the 2nd Plaintiff."***

Further the Honourable Justice Mtambo said that:

> ***"And although the affidavit alleges that the property in question was sold by the 1st Plaintiff to the 2nd Plaintiff, no document evidencing the sale is exhibited."***

The application in that case was dismissed. In this case, it is clear from what has been quoted above that the issue before the court below was the sale of the property by the Appellant to the third party Central Enterprises who were the 2nd Plaintiff in the case in the Court below. We agree with the trial Judge Honourable Justice Kapanda as he was then that the issues raised in the counter claim were already adjudicated upon therefore the counter claim was and is caught by the doctrine of *res judicata.* Indeed we agree with what was stated by Lord Halsbury in the case of **Rev. Osward Joseph Reichel vs The Rev. John Richard Magrath,** that it would be a scandal to the administration of justice if the Appellants would be allowed to litigate the same issue twice. To consider the Appellant's counter claim would be a scandal indeed to the administration of justice.

We are also mindful of the fact that the purported sale between the Appellant and the third party as stated earlier in this judgment was illegal therefore any claim based on the sale cannot stand. We dismiss this ground of appeal.

Conclusion.

There are 6 grounds of appeal in this case the Appellant succeeds on ground 3. In our considered view, there was no causal link between the respondents' loses and the alleged refusal to make available to the respondents the remaining sum of MK15,000,000.00. When the Respondents went to NBS in December 2005, the Appellants were not approached. In fact the Appellants were waiting to receive the remaining security in order to complete the agreement. The Appellants at all times were ready to release the remaining sum upon fulfilment of the condition as per the parties' agreement. Further, as it has been proved by the Appellants, the Respondents' borrowing from NBS was beneficial to the Respondents in that they were liable to pay less interest than they would have paid had they borrowed from the Appellants. Contrary to the Respondents claim, they did not suffer any loss, they were not inconvenienced in any way. Ground 3 succeeds. The appellant also succeeds partly on ground 4. It is our finding that on the issue of the validity of the letter of demand dated 11th January 2007 is that although the Respondents submit that they are not aware of any demand letter, the same is not true. The Respondents are the ones that even exhibited the letter of demand and it is marked exhibit P13. This exhibit P13 written by the appellants to the respondents is a valid letter of demand and so we hold. That said, the other part of ground 4 regarding legality of the sale of the charged property is dismissed. It is our considered finding that the sale fell short of the required standard according to the law. The sale was made without taking the interests of the charger into consideration. We therefore, nullify the purported sale of the charged property between the Appellants and the third party.

As discussed above, all the other grounds of appeal that is ground 1, 2, 5 and 6 are dismissed and we make declarations and orders as follows:

1. We agree with the trial judge that there existed a valid agreement between the Appellant and the Respondents to advance the sum of

MK30,000,000.00 upon the respondents surrendering two properties to the appellants;

2. One property only was delivered and charged and the sum of MK15,000,000.00 was advanced;
3. The Respondents without the know ledge of the Appellants borrowed the sum of MK10,000,000.00 from NBS Bank and delivered the second property for the purpose of securing that loan;
4. There is no causal link between the Respondents' borrowing from NBS Bank and the Appellant 's refusal to disburse the other MK15,000,000.00 therefore, the Appellants were not in breach of the agreement and are not liable to damages for loss of business and profits. Further the Appellants are not liable to pay NBS loan interest incurred by the Respondents;
5. The agreement was subsequently varied in particular with regard to the time frame within which the Respondents had to pay the loan in full and also the need for a further charge;
6. The Appellants are not in breach of the agreement to advance a further MK15,000,000.00 to the respondents;
7. There was a valid letter of demand written by the Appellants to the Respondents;
8. The sale of the charged property was made m total disregard of the interests of the Respondents;
9. The property was sold at a very low sale price to the third party despite the offer by of a purchaser namely; the Government Medical Stores who were ready to buy the same property at a much higher price;

We therefore make orders as follows;

1. That the Respondents are liable to pay the outstanding loan in full plus interest;
2. That the Appellants are free to sale the charged property in order to realise the outstanding monies advanced to the Respondents plus interest;

3. That the charged property should be sold by the Appellants but, at no less price than the value as per Ministry of Lands valuation or even more;
4. . That the interest on the Appellant's loan should be calculated up to the date of the purported sale of the charged property to the third party;
5. That Respondents will be involved in the sale of the charged property as per the parties' agreement.

Cost

With regard to costs, we entirely agree with the trial judge that as most of the Appellant's grounds of appeal have been dismissed including the ground on the Appellant's counter claim , we believe we are enjoined not to tamper with the discretion of the trial judge. The Appellants are to pay the costs of the appeal and all other costs occasioned by this action.

MADE this 26th day of February 2015, at Blantyre.

Signed...

HONOURABLE CHIEF JUSTICE DR A S E MSOSA, SC

Signed ....

HONOURABLE JUSTICE A K TEMBO SC, RTD

Signed ………………………………………………

HONOURABLE JUSTICE DR JANE M ANSAH SC, JA