

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

1999/HP/1570



B E T W E E N:

KAYUNI SOCIAL SERVICES DEVELOPMENT
ASSOCIATION

PLAINTIFF

AND

THE ATTORNEY GENERAL
MUBILA SIANYAMA MWILU

**1ST DEFENDANT
2ND DEFENDANT**

IN THE MATTER OF:

**Order XLIII, Rule 1 of the High
Court Act, Chapter 27 of the Laws
of Zambia**

IN THE MATTER OF:

An Application for Interpleader

AND IN THE MATTER BETWEEN:

THE SHERIFF OF ZAMBIA
HAMANGABA MOOMPO
JOSIYA HAMALMBO
SIMON SIMUCHEKA
ENOCK MWEEMBA

**INTERPLEADER
1ST CLAIMANT
2ND CLAIMANT
3RD CLAIMANT
4TH CLAIMANT**

**Before Honourable Mrs. Justice M. Mapani-Kawimbe on the 14th day of July,
2017**

For the 2nd Defendant:

Mrs. L. Mushota, Messrs Mushota Associates

For the 1st Claimant:

Mr. S.L. Chisulo, SC, Messrs Chisulo & Co

For the 2nd, 3rd & 4th Claimants:

*Mr. W. Muhanga, Messrs AKM Legal
Practitioners*

R U L I N G

Cases Referred To:

1. *The Attorney General v Marcus Kampumba Achiume* (1983) Z.R 1 (S.C)
2. *The Attorney General v EB Jones Machinda* SCZ No. 26 of 2002
3. *Kanda v Government of Malaya* (1962) AC. 322
4. *Mwaba v The Attorney General* (1993) ZR 166
5. *Nkongolo Farms Limited v Zambia National Commercial Bank Limited Kent Choice Limited (In Receivership) and Charles Haruperi* (2005) ZR 78
6. *Salmon v Salmon and Company* (1897) A.C 22
7. *Mohammed A. Omar v Zambia Airways Corporation* (1986) ZR 23

Legislation Referred To:

1. *Sheriff's Act Chapter 37*

This is an appeal against the Ruling of the Learned Deputy Registrar delivered on 11th February, 2016. The grounds of appeal are stated herebelow:

1st Claimant:

1. **The Learned Deputy Registrar erred in law and fact when she did not take into account the evidence on record relating to five herds of cattle branded "29Px" which died whilst in custody of the Undersheriff upon being seized from the 2nd Claimant's premises.**
2. **The Learned Deputy Registrar erred when she failed to order compensation in favour of the 1st Claimant relating to the value of the five herds of cattle which died whilst in the custody of the Undersheriff despite ruling that the 1st Claimant had proved on the balance of probabilities that herds of cattle branded "29Px" belonged to him.**

2nd, 3rd and 4th Claimants:

- (1) **The Learned Deputy Registrar having earlier determined various questions of law and fact in her Ruling dated 4th June, 2015, which included ownership of the seized animals erred when she later adjudged in her Ruling dated 11th February, 2016, that the**

Claimants failed to prove ownership of the animals seized on the failure to produce Brand Certificates before Court, as that could not be the only evidence to prove ownership and that contradicted her earlier decision.

- (2) That the Learned Deputy Registrar erred when she failed to order compensation in favour of the 1st Claimant should have ordered compensation to be paid by the Plaintiff for wrong execution of loss of 5 herds of cattle in the custody of the undersheriff.
- (3) The Learned Deputy Registrar contradicted herself when she failed to take judicial notice of her earlier decision in the same matter regarding the same facts.
- (4) The Learned Deputy Registrar erred when she failed to apply the same principle of requiring to produce brand certificates to prove ownership of the animals when she held that animals seized belonged to Plaintiff Kayuni Social Services Development Association.
- (5) The Learned Deputy Registrar erred when she held that animals seized belonged to Plaintiff Kayuni Social Services Development Association despite having found as a matter of fact that animals were seized from the claimants' premises and in light of the evidence before her and considering the circumstances under which the animals were seized.
- (6) Any other grounds as may be advanced at the hearing of the appeal

The 2nd Defendant filed a cross appeal fronting the following grounds:

- (1) The Learned Deputy Registrar admitted into evidence a flawed exhibit in the Affidavit of the 1st Claimant filed on 24th March, 2015, and on its basis ruled that the animals seized in execution were his and not the Association's, therefore he should get them back.
- (2) The Deputy Registrar erred in law and in fact when she ordered release of cattle seized in execution of a judgment without due regard to the cost of shepherding, feeding and treatment incurred by the 2nd Defendant.

In advancing the 1st Claimant's first ground of appeal, Learned State Counsel submitted that the Deputy Registrar in her Ruling dated 11th February, 2016, at R7 stated that:

“The 1st Claimant has proved on a balance of probabilities that all the 9 herds of cattle branded “29Px” seized belong to him.”

State Counsel placed reliance on the case of **The Attorney General v Marcus Kampumba Achiume**¹ where it was held *inter alia* that:

“(ii) The appellate Court will not reverse findings of fact made by a trial Judge unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of evidence, no trial Court acting correctly can reasonably make.”

Learned State Counsel submitted that the findings of the lower Court were assailable and could be disturbed. Learned State Counsel further submitted in ground 2 of the appeal, that the Deputy Registrar having found that the 9 herds of cattle branded **“29Px”** belonged to the 1st Claimant should have ordered the 2nd Defendant to compensate him for the wrongful execution and loss of 5 herds of cattle in the custody of the Undersheriff. He cited the case of **The Attorney General v E B Jones Machinist Ltd.**², where the Supreme Court held in interpreting the provision of subsection 2 of section 14 of the Sheriff's Act that:

“It follows from this subsection that the Sheriff and his officers in executing Court process are agents of the party issuing the process notwithstanding how or by which institution the Sheriff and his officers are appointed.”

In advancing the 2nd, 3rd and 4th Claimant's grounds of appeal, Learned Counsel globally submitted that it was appreciable and never in dispute that the 2nd Defendant was entitled to recover damages from the Plaintiff. However, the contention was that the 2nd Defendant was not entitled to recover from third parties and their private properties who were never part of the proceedings.

Counsel submitted that persons who once served as trustees, members, directors or managers of the Plaintiff Association could not be made to bear the damages awarded to the 2nd Defendant. He added that if such recovery was possible, then there should have been a Court Order condemning the claimants to personal liability.

Counsel submitted that the 2nd Defendant and his Counsel's subsequent enforcement of judgment mislead the Court and the Sheriff of Zambia into issuing a *fifa* by inserting without any Court Order, names of persons who were not a party to the proceedings and whose property was later seized, namely the 2nd, 3rd and 4th Claimants.

Learned Counsel contended that the *fifa* contradicted the judgment of Kakusa J., which was only enforceable against the Plaintiff's property and not the claimants who had no opportunity whatsoever to be heard or defend themselves. Counsel cited the case of **Kanda v Government of Malaya**³, where Lord Denning stated that:

"If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case, which is made against him. He must know what evidence has been given and what statements have been made affecting him and then be given a fair opportunity to correct or to contradict them..."

Counsel also cited the case of **Mwaba v The Attorney General**⁴ at page 166, where Ngulube C. J. as he then was, stated thus:

"...we must now comment on the forum and direction taken by these proceedings. Although the motion ostensibly questioned whether there was dignity and leadership in the exercise by the President of his Constitutional power to appoint the two ministers, the blows were landing on the two individuals who have never been heard, and who stood to be condemned and unheard, and stripped of office. No Court of justice can be called upon to make a declaration which is a discretionary remedy when obvious injustice would be visited upon persons who have not been heard but who could be directly affected by the declaratory order."

It was further submitted on behalf of the 2nd, 3rd and 4th Claimants that the Learned Deputy Registrar erred when she found that the animals seized belonged to the Plaintiff Association without any evidence on record. It was argued that such a finding unsupported by evidence contradicted her earlier Ruling dated 4th

June, 2015, where she decided that the animals were unlawfully seized. Counsel called in aid a number of authorities where the Supreme Court on appeal reversed findings of fact, such as the case of **Nkongolo Farms Limited v Zambia National Commercial Bank Limited Kent Choice Limited (In receivership) and Charles Huruperi⁵**.

Learned Counsel contended that the burden to prove that the animals belonged to the Plaintiff Association lay with the 2nd Defendant and not the Claimants. By shifting the burden of proof, the Deputy Registrar misdirected herself when she expected the Claimants to produce branding certificates, as opposed to the 2nd Defendant. Counsel also called in aid the case of **Salamon v Salamon and Company Limited⁶** to reinforce his submission on the division between directors and a company. Counsel argued that the Plaintiff Association members could not be rendered liable to indemnify it against the debts it incurred.

Learned Counsel went on to state that the law on interpleading does not provide a time limit to lay claims under the Act. He referred the Court to section 15 of the Sheriff's Act, which provides that:

“15 (1) Where any goods in the possession of a judgment debtor at the time of seizure by an officer are sold by such officer without any claim having been made to the same:-

(a) The purchase of the goods so sold shall acquire a good title to those goods; and

(b) No person shall be entitled to recover against such officer of any person acting under his authority for any sale of such goods, or for paying over the proceeds of such sale prior to the receipt of a claim to the said goods, unless it is proved that the person from whom recovery is sought had notice or might, by making reasonable inquiry, have ascertained that the goods were not the property of the judgment debtor;

Provided that nothing in this section contained shall affect the right of any claimant who may prove that at the time of sale he had title to any goods so seized and sold to any remedy to which he may be entitled against any person other than an officer or person acting under the authority of such officer.”

Counsel further referred to section 14(2) of the Sheriff's Act, which provides that:

“In every case of execution, all steps which may legally be taken therein shall be taken on the demand of the party who issued such execution, and such party shall be liable for any damage arising from any irregular proceeding taken at his instance.”

In the Supplementary Affidavit in Support, the 2nd, 3rd and 4th Claimants exhibited brand certificates for their animals. Counsel prayed to the Court to reverse the findings of the lower Court and for costs.

Learned Counsel for the 2nd Defendant submitted that while an appeal from the Deputy Registrar to a Judge in Chambers entailed a

re-hearing. This was stated in the case of **Mohammed A. Omar v Zambia Airways Corporation**⁷, where the Supreme Court held that:

“an actual hearing of the application” appealed against from the Deputy Registrar .. and the Judge should have regard to contents of Supplementary Affidavits.”

Counsel contended that the appeal was limited to the Ruling of 11th February, 2016, and not the earlier one of 4th June, 2015. Learned Counsel insisted that the authenticity of the uncertified branded certificates did not meet the primary rules of evidence, which require original documents to be produced. She argued that a copy or duplicate being secondary evidence could be admitted if it was certified as a true copy of the original or by the evidence of the authority that issued it. None was called in evidence.

Counsel submitted that the 1st Claimant failed to prove that the cattle marked **“29Px”** belonged to him. Further, that the 1st Claimant never claimed the animals within the statutory period of five days. She added that branding was a permanent feature for identification purposes and there was no guarantee that a branded animal belonged to the person who branded it. Counsel contended that the 1st Claimant had 14 cattle of which 5 died. All things being equal, the 1st Claimant could not claim 12 herds of cattle.

In ground 2 of the 1st Claimant's appeal, Counsel submitted that there was no evidence to support the claim for compensation. She urged the Court to find that the cattle belonged to the Plaintiff and to reverse the finding of the Deputy Registrar, based on an unauthenticated document.

In respect of the 2nd Claimant, Counsel submitted that he never gave evidence in Court and sent his son, Musala Hamalambo who testified that the bailiffs seized 47 cattle from his father's farm. They bore various brands namely **"GK 3"** **"...H"** **"29Px"** and **"TR 22."** According to Counsel, the witness did not adduce evidence on ownership except that the cattle were seized at his father's farm.

Counsel submitted that had the 2nd Claimant been present in Court, then he would have explained how many herds were marked with the brands **"GK 3"** **"29Px"**, **"TR 22"** and **"... H"**. Further, he would have explained the reason for the different brand marks on the cattle. She also argued that the 2nd Claimant never laid claim with the Sheriff within the required five days of seizure, nor at all, to date. Counsel contended that the 2nd Claimant like the other Claimants,

never disputed that the animals belonged to the Plaintiff Association and equally failed to prove ownership by way of interpleader. She asserted that the burden of proof lay with the 2nd Claimant to prove that the animals belonged to him and not the Plaintiff Association.

In respect of the 3rd Claimant, Learned Counsel submitted that his evidence was that the Undersheriff seized 27 herds of cattle from his farm, Plot 7, which were branded **SS 5**. Others had different marks because he bought them already branded. Counsel submitted that the 3rd Claimant testified that he stopped handling the Plaintiff Association's affairs in 1999, while on 5th December, 2006, he filed an Affidavit in Support of Summons for Leave for Committal for Contempt of Court, which he deposed to as Chairman of the Plaintiff Association.

Counsel submitted that the 3rd Claimant never stopped handling the affairs of the Plaintiff Association together with the 2nd Claimant who was Secretary at the time. She further submitted that the 2nd and 3rd Claimants were not credible witnesses and that the judgment of Kakusa J. (deceased) was to the point regarding the 2nd Claimants' governance of the Plaintiff Association. In that judgment, Kakusa J

stated that the Plaintiff Association executive's selfish and personal interest made them personally liable, and as such, the Court had power to lift the veil of the Plaintiff Association.

In respect of the 4th Claimant, Counsel submitted that he testified that the Undersheriff seized 9 herds of his cattle and a non-runner vehicle. He did not claim to have a brand mark for the cattle and consequently failed to prove his claim. All in all, Counsel submitted that all the Claimants failed to prove that they owned the cattle.

With respect to ground 3 of the appeal, Learned Counsel quoted the judgment of Kakusa J. at J17 where he stated the following:

"For this court one thing is settled: personal interest of PW2 (Josia Hamalambo (PW2))...."

What PW2 did not say in his Affidavit and in his evidence in-chief, was that he had his personal animals on this land and that he was cultivating approximately four hectares of this land, averments contained in the 2nd Defendant's Affidavit of 22/03/2001 at paragraph 11 which states partly:

Mr Josia Hamalambo is using more than four hectares of part of Lot No. 39....

"It is personal interest at issue which caused the halting of the issuance of the title deeds to the 2nd Defendant and had the Learned Judge who considered the application for injunction known that PW2 was partly *protecting personal interest*, the injunction would have been refused or at least heard inter parties. This injunction (10) was injurious to the 2nd Defendant. *It cannot be maintained*. Be it under Order 28 of the High Court Rules, Cap 27, or Order 29 of the Rules of

the Supreme Court 1999, or the numerous Zambia authorities including the over cited American Cynamid Co. v Ethicon Ltd – the common thread is that – there must be full disclosure and a Plaintiff ought not to obtain this equitable relief to create new conditions only favourable to the Plaintiff.”

Counsel submitted that the principle of requiring the production of the authenticated brand certificates reacted against the claimants. Further, the Claimants should have disclosed to the bailiffs or the Undersheriff where the Plaintiff Association property lay, otherwise it would be assumed that the Plaintiff was a fictitious person and that the Claimants were the physical persons, behind it.

In traversing ground 4 of the appeal, Learned Counsel adopted her arguments in ground 3 and maintained that the Claimants' unauthenticated brand certificates were inadmissible.

2nd Defendant's Cross-Appeal:

In advancing ground 1 of the cross-appeal, Learned Counsel repeated her arguments on the authenticated documents and urged the Court to reverse the finding of the Deputy Registrar. In ground 2 of the cross-appeal, Counsel submitted that the Deputy Registrar was well aware that there was a cost to sheparding and feeding the

animals and should grant the 2nd Defendant costs. She urged the Court to dismiss the appeal.

I have paid the closest attention to the grounds of appeal, cross-appeal and the submissions of the parties. I am indebted to the Learned Counsels for their submissions. In my considered view, there is one central issue cutting across the appeal and cross-appeal and it is whether the 2nd Defendant rightfully executed his Writ of *Fifa* on the Claimants property.

Although nine grounds of appeal have been collectively raised by the parties, they all seem to canvass the issue identified by the Court. They do not seem to raise new issues when carefully considered. The issues are all woven on the execution of the Writ of *Fifa* and I shall therefore deal with all the grounds of appeal at the same time.

The facts in this matter are substantially not in dispute. Briefly stated, they disclose that the Plaintiff sued the 2nd Defendant for illegally occupying Lot No. 39A, in Kayuni Settlement, Monze. This land was allocated to the 2nd Defendant who was a sitting tenant by the Government. The Court's judgment of 1st December, 2009,

declared the 2nd Defendant as the rightful owner of the property and awarded him damages against the Plaintiff. After the damages were assessed, the 2nd Defendant issued a Writ of Fife and executed the Claimant's which they have disputed and forms the basis of this appeal.

The evidence adduced shows that the 2nd Defendant seized the 1st Claimant and the 2nd Claimant's cattle from the 2nd Claimant's farm Plot No. 27. The 3rd Claimant's animals were seized from his farm. The 4th Claimant's cattle were never seized but was told that he had no right to dispose them. The 3rd Claimant testified that he was never a member of the Plaintiff Association.

There was no evidence led to show that the 2nd Defendant executed from the Plaintiff Association. It was contended on behalf of the 2nd Defendant that the Plaintiff was probably a fictitious entity and that the Claimants were the persons behind the Association. On the other hand, the Court's Judgment was very clear where Kakusa J, as he then was stated that:

“(b) the 2nd Defendant will take possession, as already said of Lot No. 39A; and recover damages to be assessed by the Learned Deputy Registrar and recover costs from the Plaintiff and the same are to be agreed or taxed if not agreed.”

In my opinion, the Court ordered the 2nd Defendant to recover damages and costs from the Plaintiff. Thus, the burden of proof lay with the 2nd Defendant to locate the Plaintiff's property which was liable to execution. In obiter dictum Kakusa J. stated that the 2nd Claimant had personal interest but never made a formal Court Order condemning the 2nd Claimant or other Claimants to personal liability for the Plaintiff's damages and costs. In other words, the Claimants personal property who may or have not served as executives of the Plaintiff Association was not affected by the Judgment of the Court. The fact that the cattle were found on their personal property leads me to safely conclude that the animals seized by the Undersheriff belonged to the Claimants. The Deputy Registrar should have considered that the explanation given on the branding marks was probable and should have considered this fact in her Ruling. In the case of **Salamon**⁶ Lord Herschell stated that:

"In a particular sense, a company may in every case be said to carry on business for and on behalf of its shareholders, but this certainly does not in point of law constitute the relation of principal and agent between them or render the shareholders liable to indemnify the company against the debt it incurs."

Based on that authority, I am inclined to state that the Claimants who might have held office in the Plaintiff Association were

not personally liable to indemnify the Association against its debts. In any event, the Claimants were not party to proceedings. I have no hesitation in holding that the Claimants animals were wrongly seized and should be returned to them. If any of the animals have died, the Learned Deputy Registrar must assess the damage to be borne by the 2nd Defendant.

I have carefully examined the Sheriff's Act and find that there is no time limit for laying claims against goods seized by the Sheriff. The Claimants' appeal is allowed and the Ruling of the Learned Deputy Registrar is set aside. It is otiose for me to consider the cross-appeal in view of my decision.

Leave to appeal is granted.

Dated this 14th day of July, 2017


M. Mapani-Kawimbe
HIGH COURT JUDGE