

MPANDE NCHIMUNYA v STEPHEN HIBWANI MICHELO (1997) S.J. (S.C.)

SUPREME COURT

B. BWEUPE, D.C.J., CHAILA AND MUZYAMBA, JJ.S.
5TH AUGUST, 1997 AND 22ND SEPTEMBER, 1997.
S.C.Z. JUDGMENT NO. 12 OF 1997.

Flynote

Practice - Statement of claim - Statement of claim not disclosing cause of action - Plaintiff not entitled to judgment even if statement not set aside or defendant renders defence.

Practice - Execution - Seizure of third parties goods in terms of execution regularly issued - Execution not unlawful.

Headnote

Unlike in cases of irregularity on a writ or in the service of a writ which can be deemed to have been waived if no immediate steps or not steps are taken to set it aside, if a statement of claim discloses no cause of action then the plaintiff is not entitled to judgment, even where the defendant does not apply to strike out the statement of claim or renders a defence. Where goods of a third person in the possession of a judgment debtor are seized in execution of a judgment and the execution is regularly issued, then the seizure or execution cannot be said to be unlawful.

On 9th December, 1992, a writ of *Fieri Facias* was issued by the Court to enforce the Judgment and 8 herds of cattle and one calf were seized from Samson Munahimba. The plaintiff then brought an action in the High Court against the defendant claiming that the cattle which were seized in execution of the judgment were his. There were pleadings leading to trial and one issue which was raised by the court at the hearing of this appeal is whether the statement of claim disclosed any cause of action

Held:

- (i) The allegation of wrongful seizure not having been repeated in the statement of claim is deemed abandoned and cannot be relied upon. There was therefore no cause of action disclosed.
- (ii) It is immaterial therefore that the defendant never applied to strike out the statement of claim or that he rendered a defence. The plaintiff was therefore not entitled to judgment
- (iii) Where a writ of execution is regularly issued and goods of a judgment debtor are seized then the question of wrongful execution or seizure does not arise. This is so even where goods of a third person in possession of a judgment debtor are seized in execution thereof

Authority referred to:

1. Order 18 rule 15 subrule 10 R.S.C. 1995 Edition

Case referred to:

William David Carlisle Wise v E.F. Harvey Limited [1985] Z.R. 179

For the Appellant: Mr. H. Silweya of Silweya and Company

For the Respondent: Mr. R.H. Nketani of R. H. Nketani and Company

Judgment

MUZYAMBA, J.S.: delivered the judgment of the court.

This is an appeal against a High Court order for the return of 8 herds of cattle and one calf taken in execution of a Judgment or their value to be assessed by the Deputy Registrar. For convenience we will refer to the appellant as defendant and respondent as plaintiff for that is

what they were in the court below.

Briefly the facts of this case are that in 1979 the plaintiff entrusted some of his cattle to Ethoni Kibwani who in turn entrusted them to Samson Munahimba. The latter was sued in the Choongo Local Court by the Defendant for damages for receiving stolen cattle and was ordered to give the defendant 18 herds of cattle as compensation. On appeal to Monze Subordinate Court the compensation was reduced to 14 herds of cattle. On 9th December, 1992, a writ of *Fieri Facias* was issued by the Court to enforce the Judgement and in so enforcing the judgment 8 herds of cattle and one calf were seized from Samson Munahimba. The plaintiff then brought an action in the High Court against the defendant claiming that the cattle which were seized in execution of the judgement were his. There were pleadings leading to trial and one issue which was raised by the court at the hearing of this appeal is whether the statement of claim disclosed any cause of action.

Mr. Nketani conceded that the statement of claim did not disclose a cause of action. He however argued that the writ did partially disclose a cause of action and that since the defendant knew what case he was meeting in court the appeal should be determined on merits. We propose to deal with this issue before we turn to the defence which was set up.

The endorsement on the writ reads:

"The plaintiff's claim is for the return of eight (8) cattle and one (1) calf which were wrongly seized from Mr. Munahimba on 15th December, 1992, under a court order or their value, costs and further or other relief."

Particulars:

15.12.92 8 Cattle seized
15.12.92 1 Calf seized"

The allegation of wrongful seizure in the writ, which according to Mr Nketani partially disclosed a cause of action, was not repeated in the Statement of Claim. Order (1) provides in part:

"Changes to claim indorsed on writ - Para (2) applies only where the writ is not indorsed with a statement of claim, and the defendant has been duly served and has given notice of intention to defend and statement of claim, separate from the writ, has been served on him or his solicitor. A general endorsement on the writ consists only of "a concise statement of the nature of the claim made or the relief or remedy required in the action begun thereby.

Hence the plaintiff is permitted in his subsequent statement of claim, to alter, modify or extend his original claim to any extent, and to claim further or other relief, without amending his writ. A defect in a writ may be cured by a proper statement of claim which may operate in the same way as the obtaining of the leave to amend. If, in his statement of claim, the plaintiff drops all mention of any cause of action mentioned or any relief claimed on the writ, he will be deemed to have elected to abandon it".

It is quite clear from this order that the allegation of wrongful seizure not having been repeated in the statement of claim is deemed abandoned and cannot be relied upon. There was therefore no cause of action disclosed. In *Wise* case (2) at page 181 this court said:

"(i) Pleadings serve the useful purpose of defining the issues of fact and of law to be decided; they give each party distinct notice of the case intended to be set up by the other: and they provide a brief summary of each party's case from which the nature of the claim and defence may be easily apprehended;

(i) A cause of action is disclosed only when a factual situation is alleged which contains facts upon which a party can attach liability to the other or upon which he can establish a right or entitlement to a judgement in his favour against the other".

That was a case in which a counter-claim did not disclose a cause of action and an application to strike it out was refused by the trial court. It is quite clear from this decision that if a statement of claim disclosed no cause of action then the plaintiff is not entitled to judgement. Unlike in cases of irregularity on the writ or in service of the writ which can be deemed to have been waived if no immediate steps or no steps are taken to set aside the writ or its service there can be no waiver in case of non disclosure of a cause of action because there is

simply nothing to try or prove. It is immaterial therefore that the defendant never applied to strike out the statement of claim or that he rendered a defence. The plaintiff was therefore not entitled to judgement and the appeal would succeed on this ground.

We now turn to the defence that was set up. It is common cause that the cattle in issue were seized in execution of a judgement. The writ of execution was properly issued and directed to the proper judgement debtor, Samson Munahimba, who according to the plaintiff was keeping his cattle. The defence set up was that since the cattle were seized in execution of a judgement the plaintiff ought to have taken out inter-pleader summons in terms of rule 53, part V of the Subordinate Court Act, Cap. 28

We wish to say from the outset that where a writ of execution is regularly issued and goods of a judgement debtor are seized then the question of wrongful execution or seizure does not arise. This is so even where goods of a third person in possession of a judgement debtor are seized in execution thereof. What then is the course open to a third person in those circumstances? The answer lies in Order XLI rules 53 to 56 of the Subordinate Court Act, Cap 28, and there is a similar provision in the High Court Rules. These provides as follows:

"53 If and claim shall be made to or in respect of any goods or chattels, or in respect of the proceeds or value thereof, by any person (in this Order called the claimant) and shall be delivered in writing to the Under-Sheriff having the conduct of the execution, the Under-Sheriff shall forthwith deliver notice of such claim in the prescribed form to the party issuing the execution and all proceedings upon the execution shall be stayed until such claim is disposed of.

54 The party issuing the execution shall, within five days of his receiving the notice in the last proceeding rule mentioned inform the Under-Sherrif in writing whtether he admits or does not admit a claimant's claim. Provided that the party issuing the execution may admit the claimant's claim in one part and not admit it in the other part.

55 Where the whole or any part of the claimant's claim is admitted by the party issuing the execution, the Under-Sheriff shall forthwith abandon the execution in respect of all the goods and chattels in respect of which the claimant's claim is so admitted.

56 Where the whole or any part of the claimant's claim is not admitted by the party issuing the execution, the Under-Sheriff shall make application to the clerk of the court to issue, and the clerk of court shall issue, a summons calling before the court the claimant and the party issuing execution, and the court shall hear and determine the claimant's claim, and make such order between the parties in respect thereof, and of the costs of the proceedings, as it shall think fit, and shall also adjudicate between such parties, or either or them, and the Under-Sheriff with respect to any damage or claim or to damages arising or capable of arising out of the execution, and make such order in respect thereof, and of the costs of the proceedings, as shall seem fit; and such orders shall be enforced in like manner as any order in any suit brought in the court, and have a like force and effect; and, upon the issue of the summons, any suit which shall have been commenced in any court in respect of the claimant's claim, or of any damages arising out of the execution, shall be stayed."

These rules are quite specific. They need no elaboration. We therefore agree with Mr Silweya that the plaintiff ought to have taken out inter-pleader summons in the Monze Magistrate's court where the execution was issued instead of bringing an action against the defendant. Had he done so the matter would no doubt have been resolved as provided for by the rules. We wish to reiterate here what we said earlier on that where goods of a third person in possession of a judgement debtor are seized in execution of a judgement and the execution is regularly issued then the seizure or execution cannot be said to be wrongful. This action was therefore not maintainable at law. The appeal would succeed on this ground too.

The net result is that the appeal is allowed. The judgement of the court below is set aside. Costs to the appellants to be taxed in default of agreement.

In passing off we wish to say that all hope is not lost for the plaintiff because it is still open to him to bring an action against the trustee of his cattle, Ethoni Hibwani and/or Samson Munahimba from whom his cattle were seized for replacement of his cattle or their value.

Appeal Allowed
