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IN THE COURT OF APPEAL OF ZAMBIA

APPEAL NO. 80 OF 2018

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

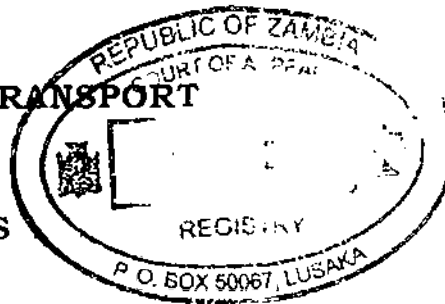
EAGLE CHARALAMBOUS TRANSPORT

LIMITED

PHILIPPOS CHARALAMBOUS

AND

PERCY MULENGA AND 51 OTHERS



1<sup>st</sup> APPELLANT

2<sup>nd</sup> APPELLANT

RESPONDENTS

CORAM: Chashi, Lengalenga and Siavwapa, JJA

ON: 22<sup>nd</sup> August and 3<sup>rd</sup> October 2018

For the 1<sup>st</sup> and 2<sup>nd</sup> Appellants: C. Kaela, Messrs G. M. Legal Practitioners

For the Respondents: E. Sichone, Legal Aid Counsel – Legal Aid Board

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## J U D G M E N T

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CHASHI, JA delivered the Judgment of the Court.

Cases referred to:

1. *Salomon v Salomon* (1897) AC, 22
2. *Richards v Jenkins* (1887) 18 QBD, 451
3. *Usher v Martin* (1889) 24 QBD, 272

Legislation referred to:

1. *The Supreme Court Practice (White Book) 1999*
2. *The High Court Act, Chapter 27 of the Laws of Zambia*
3. *The Lands and Deeds Registry Act, Chapter 187 of the Laws of Zambia*

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This appeal emanates from the Ruling of the High Court, Industrial and Labour Division which was delivered on 2<sup>nd</sup> November 2017.

The brief facts giving rise to the matter, which was before the court below for consideration, are that, the Respondents, former employees of the 1<sup>st</sup> Appellant who were the complainants in the court below, were vide Judgment dated 14<sup>th</sup> August 2013, awarded payment of redundancy package, salary arrears, leave days and interest on the amounts and costs.

The 1<sup>st</sup> Appellant then appealed to the Supreme Court, which appeal was dismissed.

On 15<sup>th</sup> August 2017, the Respondents issued a writ of possession in enforcement of the Judgment directed at the following properties:

- (1) House No. 39, Ndola Road, Mufulira
- (2) House No. 4 Kumasi Road, Mufulira
- (3) Plot No. 189, Freedom Way, Mufulira

The Sheriff accordingly seized the properties together with the household goods which were found thereon.

On 11<sup>th</sup> September 2017, the 2<sup>nd</sup> Appellant, a shareholder and director in the 1<sup>st</sup> Appellant, filed a notice of claim in respect to properties (1) and (2) above stated. The notice was accompanied by an interpleader summons with an affidavit in support. Exhibited in the affidavit were the following documents:

- (1) A power of attorney by the 2<sup>nd</sup> Appellant in favour of Michael Andrew Daka in which the 2<sup>nd</sup> Appellant stated that he owns House No. 4 Kumasi Road, Mufulira and that, since he has no

bank account in Zambia, he directed that, the tenancy be drawn in the name of the 1<sup>st</sup> Appellant.

- (2) Certificate of title number 7971 relating to Plot No. 707, Mufulira in the 2<sup>nd</sup> Appellants name and a note from Mufulira District Council forwarding the said certificate to the 2<sup>nd</sup> Appellant's Advocates.

In opposing the application, the Respondents averred that, no proof had been shown that House No. 4 Kumasi Road, Mufulira is owned by the 2<sup>nd</sup> Appellant. The Respondents went on to exhibit a rates statement from Mufulira Municipal Council, dated September 2017 which showed that the property was registered in the name of the 1<sup>st</sup> Appellant. As regards House No. 39 Ndola Road, Mufulira, the Respondents produced a lands and deeds print out, dated 30<sup>th</sup> December 2015, showing that the property belongs to Mufulira Township Management Board.

In reply, the 2<sup>nd</sup> Appellant averred that, House No. 4 Kumasi Road, Mufulira is also known as Plot No. 668 Mufulira and belongs to the 2<sup>nd</sup> Appellant and to that effect produced a lands and deeds print out showing a third-party mortgage registered in favour of Industrial Credit Company Limited which was subsequently by deed of assignment of debt and security on 23<sup>rd</sup> September 2010 assigned to Africa Alpha Realisation Limited.

After considering the affidavit evidence and acknowledging the principle of separation of legal entities as held in the case of **Salomon v Salomon** and referring to Order 71 of *The Rules of The Supreme*

**Court<sup>1</sup>(RSC)** and Order 43 of **The High Court Rules<sup>2</sup>**and also the case of **Richard v Jenkins<sup>2</sup>**where it was held inter alia as follows:

*“The burden of proof is on the claimant to prove his title to the goods or the possession thereof at the time of seizure.If he can only show that they belonged to a third person the execution creditor is still entitled to succeed.”*

The learned Judge in the court below, then went on to interrogate the documentary evidence in respect to each of the two properties in issue. As regards House No. 39 Ndola Road, Mufulira, the learned Judge made a finding that, although the 2<sup>nd</sup> Appellant was claiming that the property is also known as Plot No. 707, Mufulira, there was nowhere in the documents which were produced by the 2<sup>nd</sup> Appellant where it shows that Plot No. 707 Mufulira is one and the same as House No. 39, Ndola Road, Mufulira. Whereas on the other hand, the Respondents have in their affidavit in opposition exhibited a lands and deeds printout relating to property number 39 Mufulira, showing that the property is in the name of Mufulira Township Management Board and has a certificate of title No. 2362 and not 7671 as alleged by the 2<sup>nd</sup> Appellant.

As regards House No. 4, Kumasi Road, Mufulira, the learned Judge was of the view that the 2<sup>nd</sup> Appellant had not produced proof of ownership. Whereas on the other hand the Respondents produced a rates statement showing that the property which is also known as Plot 068 Mufulira belongs to the 1<sup>st</sup> Appellant.

The learned Judge then referred to the lands and deeds printout appearing at pages 117-118 of the record of appeal (the record) and

referred to the assignment of the debt and security and opined that the property is now held and belongs to Africa Alpha Realisation Limited and not the 2<sup>nd</sup> Appellant.

The learned Judge dismissed the 2<sup>nd</sup> Appellants claims for being destitute of merit and ordered that the seized properties vest in the Respondent as they do not belong to the 2<sup>nd</sup> Appellant.

Disenchanted with the Ruling, the Appellants have appealed to this Court advancing two grounds of appeal couched as follows:

- (1) That the learned Judge erred in law and fact when he failed to distinguish between house numbers as designated by the local authorities and stand numbers as designated by the Ministry of Lands.
- (2) That the learned Judge erred in law and fact when he upheld the granting of the writ of possession which do not belong to the Judgment debtor.

At the hearing of the appeal, both Mr. Kaela, Counsel for the Appellants and Mr. Sichone, Counsel for the Respondents relied on their respective heads of argument.

In arguing the first ground of appeal, the Appellants implored this Court to take judicial notice of the fact that house numbers as designated by local authorities and stand numbers as designated by Ministry of Lands are different. That the learned Judge failed to take judicial notice of such notorious fact.

As regards the second ground of appeal, it was submitted that, it is trite law that execution of Judgments can only be done on property

which belongs to the Judgment debtor and not any other random third party's property as suggested by the learned Judge.

In response to the first ground of appeal, it was submitted that, the learned Judge distinguished the property numbers for the local authority against those designated by Ministry of Lands and did categorically differentiate the same in passing his Ruling. That he took judicial notice of facts in the matter and ably elaborated as to what numbers are as per Ministry of Lands and went further to analyse the evidence advanced by the parties.

In respect to the second ground of appeal, it was submitted that the learned Judge evaluated the evidence advanced by the parties and referred to a number of authorities which guided him in arriving at the decision.

We have carefully considered the submissions by Counsel and the Ruling being impugned.

In our view, the two grounds of appeal are intertwined and we shall therefore address them as one.

The issue they raise is whether the two properties which were the subject of the writ of possession belonged to the 2<sup>nd</sup> Appellant and whether the 2<sup>nd</sup> Appellant discharged that burden of proof.

The starting point in addressing the issue is Order 17/5/12 (RSC) which sets the requisites as follows:

- (1) The burden of proof is on the claimant to prove his title to the goods or to the possession thereof at the time of seizure.
- (2) If he can only show that they belonged to a third person, the execution creditor is still entitled to succeed. As shown in the

**Richards**<sup>2</sup> case the execution creditor can defeat the claimant by showing that there is a better title to the goods in a third party.

- (3) The claimant need not prove that the goods are his absolute property; it is sufficient if he shows a right to possession or such title or interest in the goods that the sheriff ought not to have seized them.
- (4) Where the claimant has only an equity of redemption in the goods, he proves a sufficient interest to entitle him to succeed in the issue as against the execution creditors, the mortgagee not being a party as was held in the case of **Usher v Martin**<sup>3</sup>.

Although the learned Judge did not specifically state that there is a distinction between house numbers as designated by the local authority and stand numbers as designated by the Ministry of Lands, a perusal of the Ruling being impugned clearly shows that the learned Judge was alive to that fact.

The learned Judge examined certificate of title number 7971 which was produced by the 2<sup>nd</sup> Appellant in relation to Plot No. 707, Mufulira and made a finding that it did not show that the same relates to House number 39, Ndola Road, which was seized by the Sheriff. The Learned Judge was of the view that, in as much as a certificate of title is proof of ownership in accordance with Section 33 of *The Lands and Deeds Registry Act*<sup>3</sup>, the 2<sup>nd</sup> Appellant had only proved that he is the owner of Plot No. 707 Mufulira which property, was not in issue. The learned Judge opined that the 2<sup>nd</sup> Appellant had not called any evidence to show that he owns House No. 39, Ndola Road, Mufubra upon which execution was levied.

We agree with Counsel for the Appellant that street house numbers do differ from property numbers provided by the Ministry of Lands.

However, there is evidence on record by way of a lands and deeds printout at page 3 of the record of appeal which added more to the confusion in the matter, that there is also a property known as property number MUF/39 in the name of Mufulira Township Management Board. This property according to the printout has a different certificate of title number 2362 and acreage.

Furthermore, the 2<sup>nd</sup> Appellant conceded that House No. 39, Ndola Road, Mufulira which was seized was in the name of Mufulira Township Management Board, who according to the 2<sup>nd</sup> Appellant were the previous owners of the property.

The 2<sup>nd</sup> Appellant failed to prove that Plot No. 707 Mufulira is the same as House number 39, Ndola Road Mufulira and that House No. 39, Ndola Road, Mufulira which was seized belonged to him.

The burden was on the 2<sup>nd</sup> Appellant to prove his title to the goods or to the possession thereof at the time of seizure, which burden he failed to discharge.

We see no basis to fault the learned Judge for his finding on this property.

We now turn to House No. 4 Kumasi Road, Mufulira. The learned Judge found that the 2<sup>nd</sup> Appellant had not produced any certificate of title to show proof of ownership.

He however acknowledged from the rates statement that the property is also known as property number MUF/668 and belonging to the 1<sup>st</sup> Appellant as shown at page 112 of the record.



However, the learned Judge went on to consider the lands and deeds printout at page 117 of the record which showed that the 1<sup>st</sup> Appellant and the 2<sup>nd</sup> Appellant and Mufulira Central Bakery Limited obtained a third-party mortgage from Industrial Credit Company Limited which was secured by House No. 4 Kumasi Road, Mufulira. That later on, Industrial Credit Company Limited transferred the debt and security to Africa Alpha Realisation Limited by way of a deed of assignment of debt and security. The learned Judge then made a finding that the property is now held by Africa Alpha Realisation Limited and not the 2<sup>nd</sup> Appellant.

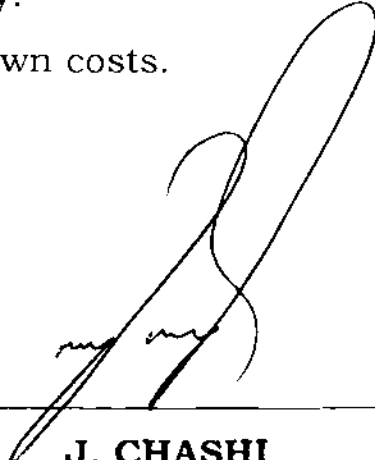
Entry number 4 on the printout shows that this property is owned by the 2<sup>nd</sup> Appellant who holds certificate of title number L3466. Entry number 5 shows that the property was mortgaged to Industrial Credit Company Limited who subsequently assigned the debt and security to Africa Alpha Realisation Limited. What therefore was assigned was the debt and security and not the property.

The finding by the court below that the property is now held by Africa Alpha Realisation Limited and not the 2<sup>nd</sup> Appellant is therefore perverse as it is against the evidence on record. The learned Judge therefore erred by holding that the property belonged to a third party.

House No. 4 Kumasi Road, Mufulira belongs to the 2<sup>nd</sup> Appellant who has an equity of redemption in the property. The 2<sup>nd</sup> Appellant showed proof of a sufficient interest to entitle him to succeed against the Respondent. This property should therefore not have been a subject of seizure by the Sheriff.

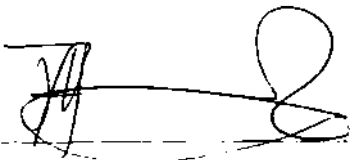
The sum total of this appeal is that it partially succeeds. House No. 4 Kumasi Road, Mifulira, also known as property No. MUF/668 shall forthwith be released to the 2<sup>nd</sup> Appellant together with the household goods seized therein, if any.

Each party shall bear its own costs.




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**J. CHASHI**  
**COURT OF APPEAL JUDGE**



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**F. M. LENGALENGA**  
**COURT OF APPEAL JUDGE**



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**M. J. SIAVWAPA**  
**COURT OF APPEAL JUDGE**