

**IN THE COURT OF APPEAL FOR ZAMBIA
HOLDEN AT KABWE**

Appeal No. 74/2019

(Civil Jurisdiction)

BETWEEN:

SARAH SAKACHOMA

AND

**15 MCC AFRICA CONSTRUCTION
AND TRADE LIMITED**



APPELLANT

RESPONDENT

Mchenga DJP, Chishimba and Majula, JJA
On 20th May 2020 and 16th July, 2020

For the Appellant : Dr. O.M.M. Banda of O.M.M. Banda & Company
For the Respondent : Mr. D. Banda of Mak Partners

JUDGMENT

MAJULA JA, delivered the Judgment of the Court.

Cases referred to

1. *Issac Tantameni C. Chali (executor of the estate of the late Mwalla Mwalla vs Liseli Mwalla (1997) SJ 22 (SC)*
2. *Wilson Masauso Zulu vs Avondale Housing Project Limited (1982) ZR 172*

1.0 Introduction

1.1 The appeal concerns the ruling of the learned High Court Judge Sharpe Phiri which set aside a writ of *feri facias* (hereinafter referred to as 'writ of *fifa*') for irregularity. The

background facts are that on 31st May 2016, the appellant (Sarah Sakachoma) commenced an action by way of writ of summons against 2 defendants (Yuan Ming Li and Jian Wei Young) seeking, *inter alia*, payment of the sum of K150,000.00 being the value of replacement of a Nissan Murano which was damaged in a traffic accident allegedly caused by the 1st defendant.

- 1.2 The defendant consequently failed to enter an appearance, prompting the plaintiff to obtain judgment in default of appearance and defence on 5th September 2016. Thereafter the plaintiff issued a writ of *fifa* on 11th November 2016 which was executed by the Sherriff of Zambia on the respondent's business premises known as Stand No 23506, Lusaka East MFEZ Kasisi Road, off airport Road, Lusaka.
- 1.3 Beleaguered with this state of affairs, on 18th November 2016, the respondent filed a notice of claim for the goods taken in execution by the bailiffs under the said *writ of fifa*. The claimant subsequently issued interpleader summons on 28th November 2016 and the goods were ultimately returned. It would appear that the default judgment was set aside on 19th April 2017. The defendants in the court below were then ordered to file their defence within 14 days.
- 1.4 The defendants again failed to file a defence within the requisite period. This impelled the plaintiff to enter another judgment in default on 31st May 2017. A *writ of fifa* was then

issued on 13th June 2017 and then subsequently re-issued on 7th July 2017. The latter was executed on the respondent's premises situated at Zambia China Corporation Zone, behind Levy Mwanawasa Hospital, Chainama Hills Lusaka.

- 1.5 A notice of claim was filed by the respondent who also applied to set aside the writ of *fifa* for irregularity before the Deputy Registrar. In a Ruling delivered on 28th September 2017, the Deputy Registrar declined to set aside the writ of *fifa* on the basis that the claimant did not have *locus standi* to bring the said application.
- 1.6 Dissatisfied with the said Ruling, the appellant (who was the plaintiff in the court below) appealed to a Judge at chambers against the portion of the ruling ordering the release of floor tiles contending that there was no evidence before the Deputy Registrar suggesting that the said tiles belonged to the respondent.
- 1.7 The respondent equally cross appealed on the portion of the ruling of the Deputy Registrar which directed the release of the remainder of the executed goods to the respondent as well as the order granting the appellant the right to sale the executed goods.
- 1.8 The matter was heard by Judge Sharpe-Phiri. After appraising the evidence and submissions of counsel that was presented to her, the learned Judge delivered her ruling on 18th June 2018, in which she set aside the *writ of fifa* for irregularity and

ordered the release of all goods taken in execution. In specific terms, she found that the execution of the *writ of fīfa* was wrongful for being levied on the wrong address.

2.0 Grounds of appeal

2.1 Disconsolate with the ruling of the learned Judge, the appellant has now appealed to this court on the following grounds of appeal:

1. *The court below misdirected itself in both law and fact when it set aside the writ of fieri facias for irregularity when the respondent did not have the requisite locus standi to make an application for setting aside of the said writ of fieri facias;*
2. *The court below erred in law and in fact when it held that the writ of fieri facias was irregular on account of having been executed on the premises of the respondent against the evidence on record showing that the address in question was the address that had been given by the 1st defendant; and*
3. *The court below misdirected itself in law and in fact when it ordered the release of the goods seized to the respondent despite there being no evidence on record to prove that the respondent were the owners of the goods in question.*

3.0 Appellant's of argument

- 3.1 In support of ground one, it was submitted by Dr. Banda that the court below misdirected itself in law and fact when it set aside the *writ of fifa* for irregularity at the instance of the respondent who was not a party to the proceedings in the court below. It was further argued that the respondent lacked the *locus standi* to apply to set aside the *writ of fifa* and neither did the court below have the jurisdiction to set it aside at the behest of the respondent.
- 3.2 We were referred to a statement by the lower court judge in her ruling which read as follows:

"The said Order 45 Rule 11 of the White Book provides that:

'Without prejudice to Order 47, rule 1, a party against whom a judgment has been given or an order made may apply to the Court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and the Court may by order grant such relief, on such terms, as it thinks just.'

The foregoing provision entitles a party against whom a judgment has been given or an order made to apply to the court for a stay of execution of the judgment or order or other relief that the court may order. In the present case,

the evidence is clear that the default judgment was obtained against the 1st and 2nd defendant and not the claimant. Therefore, the claimant could not invoke this provision as it was not a party to the action against whom a judgment or order was given.”

- 3.3 The learned counsel went on to argue that the court below did acknowledge the fact that the respondent was not a party to the action and could not invoke the provisions of Order 45 rule 11 of the White Book but, however, relied on Order 3 rule 2 of the **High Court Rules** to find that it had jurisdiction to grant. It was contended that this reasoning was flawed on account of the fact that Order 3 rule 2 only applies to an interlocutory order for parties.
- 3.4 Counsel further observed that the claimant should have proceeded by way of interpleader proceedings in order to prove its claim of ownership of the goods seized in execution and not to apply to set aside the *writ of fisa*.
- 3.5 The learned counsel also cited the case of **Issac Tantameni C. Chali (executor of the estate of the late Mwalla Mwalla vs Liseli Mwalla¹** for the proposition that a court is precluded from considering the interest of non-parties.
- 3.6 The thrust of the submission with respect to ground two was that the finding by the court below to the effect that execution was effected on the respondent's business premises was not supported by the evidence on record. Counsel posited that

execution was in fact levied on the 1st defendant's residential address that he stated in his affidavits in the lower court. We were accordingly called upon to set aside the said finding in line with the holding by the Supreme Court in ***Wilson Masauso Zulu vs Avondale Housing Project Limited***².

- 3.7 Turning to ground three, it was contended that the court below misdirected itself when it ordered for the release of goods seized despite there being no proof of ownership by the respondent. Counsel noted that the court below in her ruling appears to have based her decision on the allegation that the goods seized belonged to either the respondent or Government of the Republic of Zambia. It was argued that the said allegation was never substantiated. Counsel for the appellant ultimately implored us to allow the appeal with costs.

4.0 Respondent's arguments

- 4.1 In response to ground one, Mr. Banda on behalf of the respondent submitted that the respondent in this case had the necessary locus *standi* to make an application for setting aside the Writ of *fifi*. In support of this argument, we were referred to the definition of locus *standi* as espoused in 'Concise Dictionary of Law' where it reads:

"the right to bring an action or challenge some decision".

- 4.2 Mr. Banda went on to argue that although the respondent was not a party to the action, they were affected by the goods that

were taken in execution by the Bailiffs at the behest of the appellants. Counsel contended that the court below was therefore on firm ground to invoke the provisions of Order 3 rule 2 and hold that the execution was wrongful.

4.3 In response to ground two and three, Mr. Banda submitted that the writ of *fifa* that was executed by the Bailiff contained an address which did not belong to the defendants but was a business premise for the respondent. That the respondent cannot therefore be faulted and made to suffer loss they did not deserve.

4.4 We were accordingly urged to dismiss the appeal for lack of merit.

5.0 **Our Decision**

5.1 In this appeal, there are three issues that have been raised for our determination, namely; firstly, whether or not the respondent had locus *standi*, secondly whether the *writ of fifa* was irregularly issued, and thirdly whether the release of the good seized to the respondent was wrong in law and fact.

5.2 We take the view that we should first deal with the question regarding the displeasure with the trial Judge's finding that the *writ of fifa* was irregular.

Irregularity of Writ of *Fifa*

5.3 We have examined the evidence on record as well as the judgment by the trial Judge. The starting point in order to

answer the question as to whether the trial Judge could be faulted for finding that the *writ of fifa* was irregular is **Halsbury's laws of England Volume 17** page 274 at paragraph 457 which was also alluded to by the trial Judge. It states as follows:

“An execution is wrongful where the indorsement on a writ directs the sheriff to levy at a wrong address or on the goods of a person other than the execution debtor.”

It is plain from this provision that the execution of the *writ of fifa* at a wrong address or on the goods of a person other than the execution debtor is wrongful.

- 5.4 What can be gleaned from the facts of this case is that after the appellant was involved in an accident with the 1st defendant in the court below, she proceeded to commence proceedings against the 1st defendant, who was the person she had the collision with. The 2nd defendant was added by virtue of being the owner of the Mercedes Benz which was being driven by the 1st defendant at the time of the accident. Service of process was effected and there was judgment in default that was entered against the defendants. The address that was reflected on the writ of summons was plot number 8 Jesmondine Lusaka.
- 5.5 Following the entry of judgment in default, the plaintiff went ahead and issued a writ and precipe of *fifa* on 13th June 2017. What is noticeable from the record is that this *writ of*

fifa did not have a physical address of the defendants. What transpired subsequently on the 7th of July 2017 was that the writ and precipe of *fifa* was re-issued and what was endorsed thereon was the physical address being C/O Zambia China Corporation Zone, behind Levy Mwanawasa Hospital, Chainama Hills Lusaka. This was with respect to the 1st defendant. As regards the 2nd defendant the physical address that was endorsed was plot number 8 Jesmondine Lusaka. This was the basis upon which the Sheriff of Zambia derived their power to levy execution on the property at Chainama Hills, behind Levy Mwanawasa Hospital.

- 5.6 The foregoing is what triggered the respondent to file an application to set aside the *writ of fifa*. The respondent claims that these were their business premises and did not belong to either the 1st or 2nd defendants. That being said, the view we take is that the onus was on the appellant to prove that the premises as well as the goods that were seized were for the 1st or 2nd defendant. In this instance it is not in dispute that the Sheriff of Zambia executed the *fifa* on business premises. We cannot agree more with the trial Judge when she stated as follows:

“The plaintiff did not demonstrate a connection between the claimant and the 1st defendant and it is unclear why execution was levied on a company and business premises when the action is between private individuals. It

is trite law that a company exists as a separate legal entity.”

- 5.7 We see no basis upon which we can assail the Judge’s finding in the court below that the execution of the *writ of fīfa* was wrongful. In light of the foregoing, we hold that this ground of appeal lacks merit and we accordingly dismiss it.

Locus standi

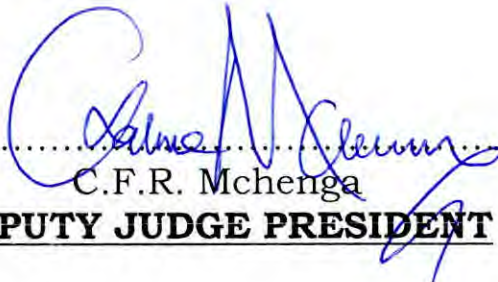
- 5.8 In light of what we have stated in ground two regarding the *writ of fīfa* having been wrongfully executed, we consider that the issue of locus standi is irrelevant. Simply put whether or not the respondent had a locus standi to apply to set aside the *writ of fīfa* is immaterial.


Release of the goods seized


- 5.9 On account of our holding in the preceding paragraphs, it only stands to reason that the execution having been wrongful; the goods should be returned to the respondent. The appellant has failed to prove that the goods seized belonged to the defendants in this matter and it is trite law that a party who asserts must prove their case in line with ***Wilson Masauso Zulu vs Avondale Housing Project***². This ground of appeal must therefore fail.

6.0 Conclusion

- 6.1 Having found that all the three grounds of appeal are destitute of merit, the entire appeal is dismissed with costs for the respondent.


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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT


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F. M. Chishimba
COURT OF APPEAL JUDGE


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B.M. Majula
COURT OF APPEAL JUDGE