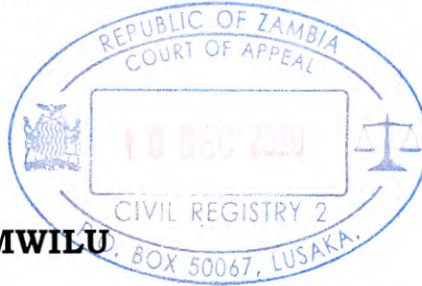


IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT NDOLA
(Civil Jurisdiction)

APPEAL NO. 36/2019

BETWEEN:

MUBILA SIANYAMA MWILU



APPELLANT

AND

**KAYUNI SOCIAL SERVICES DEVELOPMENT
ASSOCIATION
HAMANGABA MOOMPO
JOSIYA HAMALAMBO
SIMON SIMUCHEKA
ENOCK MWEEMBA
GIFT HATILA**

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

4TH RESPONDENT

5TH RESPONDENT

6TH RESPONDENT

CORAM: Chisanga, JP, Mulongoti and Ngulube, JJA.
20th November, 2019 and 10th December, 2020.

For the Appellant: *L. Mushota, Messrs Mushota and Associates*

For the Respondents: *S. Chisulo, SC, Messrs Sam Chisulo and Company,
W. Muhanga, Messrs AKM Legal Practitioners*

J U D G M E N T

NGULUBE, JA delivered the judgment of the Court.

Cases referred to:

1. *Liswaniso Sitali and others vs Mopani Copper Mines Plc (2004) Z.R.176*

2. *Attorney-General vs Marcus K. Achiume* (1983) Z.R.1
3. *Mpande Nchimunya vs Stephen Hibwami Michelo* Judgment No. 12 of 1997
4. *Salomon vs Salomon and Company Limited* (1897) AC 22
5. *Joseph Gordon Butterfield vs Attorney-General* (1938) 2 ALL ER 626
6. *Taylor vs Davies* (1920) AC 636
7. *African Banking Corporation Zambia v Mubende Country Lodge Limited* Supreme Court Judgment No 18 of 2020
8. *Beale v. Overton* (1837) 2 M. & W. 534;
9. *H. Stevenson & Son v. Brownwell* (1912) 2 Ch. 344, CA

Legislation referred to:

1. *High Court Rules Chapter 27 of the Laws of Zambia*
2. *The Sheriffs Act Chapter 37 of the Laws of Zambia*
3. *Land (Perpetual Succession) Act, Chapter 186 of the Laws of Zambia*

INTRODUCTION

1. This is an appeal against a Ruling of the Honourable Mrs. Justice M Mapani-Kawimbe, High Court Judge delivered on 14th July, 2017, in which the court found that the appellant wrongly executed the writ of *fifa* on the respondents' property as they were not personally liable to indemnify the 1st respondent against its debts. The court further found that the 2nd to 6th respondents were not party to the proceedings and ordered the return of the animals that were wrongly seized from them. The court went on to state that there is no time limit in the Sheriff's Act for laying claims against goods seized by the Sheriff.

BACKGROUND

2. In 1999, the 1st respondent herein commenced an action against the appellant and the Attorney-General, seeking the following reliefs-

- (i) A declaratory order that the 1st respondent, who was the plaintiff in the lower court, is the legal owner of Lot number 39, Kayuni settlement, Monze;
 - (ii) A declaratory order that settlement advisors and workers provided by the Government occupying houses on the settlement be restrained from purchasing the said houses; and
 - (iii) That the court may give any further or other declaratory relief that the court would deem fit.
3. The matter was commenced by originating summons issued by the 1st respondent which was registered as a corporate body on 24th September, 1992. The parties subsequently agreed that the matter would be treated as one commenced by writ and it proceeded as such. The facts of the case are that the Government repossessed land in Monze from an absentee landlord. The land was later under the control and management of a Government appointed agent, a company called Family Farms Limited. Subsequently, the said piece of land was subdivided into several settlements or lots.
4. The appellant was a civil servant for many years and was seconded to work under Family Farms Limited as a settlement advisor and by virtue of this appointment, he occupied a Government house on lot number 39. The 1st respondent was incorporated under the Land (Perpetual

Succession) Act of the Laws of Zambia under the name "Kayuni Social Services Development Association Registered Trustees." Its objectives were to promote and protect the interests of its members and to improve the welfare of its members socially and economically. The association also had the objective of assisting its members in acquiring farm land and supporting the development and the operations of the association. It was in the process of being allocated Lot 39 at the time when the dispute arose.

5. Lot 39 comprised of unexhausted improvements which included a school, a clinic, houses and other amenities which were wholly owned by the 1st respondent. A dispute arose when the appellant applied to buy the house that he occupied on lot number 39 following the government policy to sell houses to sitting tenants and he was offered the said house. Subdivisions were made, resulting in Lot 39 being split into Lot 39 and Lot 39A which was offered to the appellant to purchase. The 1st respondent's contention is that the government policy on the sale of government houses was not supposed to apply to the houses on lot number 39, as it belonged to it.
6. The 1st respondent commenced an action against the appellant and the Attorney-General because the members of the association did not want the house on Lot 39A to be sold to the appellant.

CONSIDERATION OF THE DISPUTE BY THE TRIAL COURT

7. The learned trial Judge found that since Lot 39 and lot 39A were government property, the said Lot 39A was rightly offered to the appellant who was a sitting tenant. The learned trial Judge found that the appellant was entitled to buy the house on Lot 39A and directed that he be issued with title deeds for the said house. The court awarded damages for the loss of use of the property to the appellant, to be assessed by the deputy registrar.
8. On 13th September, 2013, the learned deputy registrar delivered a ruling on assessment of damages in favour of the appellant which was perfected on the assets of the 1st respondent as well as those in the custody of the registered trustees of the 1st respondent. The 1st respondent and the five claimants appealed against the said ruling to a Judge in chambers while the appellant filed a cross-appeal.
9. Mrs. Justice Mapani – Kawimbe considered the appeal and found that the award for damages made by the trial Judge was against the 1st respondent and not the registered trustees of the association. The court was of the view that under the Sheriff's Act, there is no time limit for laying claims against goods seized by the Sheriff. The court accordingly allowed the appeal and set aside the ruling of the learned Deputy Registrar. The court found it otiose to consider the cross-appeal.

GROUND OF APPEAL TO THIS COURT

10. Dissatisfied with the Ruling of the learned High Court Judge, the appellant appealed to this court, advancing eight grounds of appeal couched as follows-

1. *The court below erred in fact and in law in holding that the animals seized from the claimants were not the 1st respondent's animals, when the appellant showed that after the property on Stand No.39A Monze in Southern Province was awarded to him, the association members removed the animals to their own holdings, and by so doing, the animals did not cease to belong to the association.*
2. *The court below erred in fact when it held that the 3rd claimant was never a member of the Association against the judgment of the retired Justice Kakusa made on 1st December, 1999 when evidence on record shows that he was one of the Association's trustees.*
3. *That the Judge in the court below erred in law when she held that the appellant led no evidence to show that he executed on the 1st respondent association, when an association is a fictitious person and as a corporate body its properties were held by the trustees on behalf of the association per the association's certificate of incorporation under the Land (Perpetual Succession) Act, and that the land on which the animals were, having been awarded to the appellant by the court, the trustees and members moved the said*

animals to their farms which farms were allocated to them by the association

4. *That the court below erred when it held that the animals claimed by and awarded to the 2nd and 4th claimants were seized from their farms, when these two have continued to use the land that was awarded to the appellant by Judge Kakusa.*
5. *That the court below erred in law and in fact when it stated that the deputy registrar should have considered the explanation given on brand marks, when brand marks are not the only marks used to identify cattle, and the copies of brand marks produced were challenged for non-authenticity.*
6. *That the High Court judge erred in alluding to claimants not being liable to indemnifying the association when it is the claimants who were and are in possession of the association's property as well as the appellant's property moved along with the association's property, the association's business having been conducted previously on Lot 39A, the appellant's property.*
7. *The Court below erred in law and in fact for not recognizing the failure by the claimants to show proof that the animals did not belong to the association or point to the sheriff the association's property, thereby making it abundantly clear that the animals belonged to the association.*

8. *That the court below erred at law and in the total sum, in reviewing the judgment of the late Judge Kakusa which was not successfully appealed against, and the appellant having succeeded and awarded damages, was interested in the association's property which was moved from his land Lot 39A Monze upon the land being awarded to him.*

ARGUMENTS PRESENTED BY THE PARTIES

11. In arguing ground one, it was submitted that the learned Judge in the court below erred when she did not consider the evidence of the appellant that when Judge Kakusa delivered the Judgment which was in favour of the appellant, the trustees and managers of Kayuni Social Development Association moved its property to their personal farms. Counsel contended that the tracing of the 1st respondent's properties to the agents, directors and managers was therefore in order.
12. On ground two, it was submitted that the 3rd respondent did not show by way of evidence that he ceased to be a member of the association and that if indeed he was no longer a member of the association, he would not have been called as a witness during the trial of the matter.
13. In relation to ground three the appellant relied on the arguments in ground one, which were that the 1st respondent's trustees moved the property to their personal farm and that the claimants had the obligation to inform the court, the appellant and the Sheriff where they had

relocated the offices of the 1st respondent. It was argued that the trustees were under an obligation to inform the court where the property of the 1st respondent was as well as to file returns relating to any changes relating to the trustees and the registered address of the association.

14. On ground four, the appellant adopted the arguments in grounds one, two and three. Regarding ground five, counsel submitted that the third respondent had his personal animals on the land, and was cultivating approximately four hectares of the land, which belonged to the appellant. Counsel submitted that the court would not have come to its conclusion if it had properly considered and evaluated the evidence on record. She prayed that ground four of the appeal succeeds.
15. On ground five, counsel submitted that the 2nd respondent swore an affidavit on 24th March, 2015, with an exhibit purporting to be a duplicate of a brand certificate for a brand mark 29 PX issued to him in 1998 but it bore the date stamp 10th February, 2015. The 2nd respondent claimed that he had lost the original certificate. Counsel submitted that a copy of a document is secondary evidence and is admissible only when certified as a true copy of the original or other testimony such as the authority that issued it is adduced. Counsel submitted that because the document was not authenticated, it was in

admissible. She referred to the case of **Liswaniso Sitali and Others vs Mopani Copper Mines Plc**¹ in this regard.

16. It was contended that the 2nd respondent did not prove that the cattle mark "29 PX" or other brands belonged to him and not the 1st respondent. Further, that the 2nd respondent did not claim the animals that he now wants within the five days statutory period, or at all and only came as a claimant as an afterthought. Referring to the case of **Attorney-General Vs Marcus K. Achiume**², where the Supreme Court held that an appellate court cannot reverse findings of fact made by a trial Judge unless they are perverse or made in the absence of any relevant evidence or upon a misapprehension of facts, we were urged to allow ground five of the appeal.
17. On ground six, it was submitted that the 2nd to 6th respondents clothed as the 1st respondent relocated and moved the association's movable property out of Lot 39A. Counsel submitted that the 2nd to 6th respondent are personally liable as trustees of the 1st respondent, whose trust has been breached by the trustees. Counsel referred to the case of **Mpande Nchimunya vs Stephen Hibwami Michelo**³ where the Supreme court held that-

"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 when goods of a third person in possession of a Judgment debtor are seized in execution thereof."

We were urged to allow this ground of appeal.

18. Regarding ground seven, we were referred to **Order XLII of the High Court Rules**¹ which provides that goods taken in execution shall not be sold until the end of five days next after such goods were seized unless the goods are perishable or on the request of the party whose goods are seized. It was argued that the respondents did not appeal the decision of the trial court or that of the deputy registrar on assessment of damages. We were urged to allow this ground of appeal. On ground eight, counsel submitted that since the issues relating to this ground had been argued in the other grounds, they should be noted as adequately argued. We were urged to allow the appeal with costs to the appellant.
19. The 2nd to 6th respondents filed combined heads of argument in reply and argued all the grounds of appeal together. In their view, it was contended that the main issue for determination, relates to execution of the judgment of the Court below by the appellant on the 2nd to 6th respondents despite the judgment of the court having been made against the 1st respondent only. It was contended that regarding the issue of ownership of the animals seized by the appellant at the time of

execution, it was wrong at law and it raises the following questions to be determined by this Court:

- (i) Whether liability of a body corporate such as Kayuni Social Services Development Association Registered Trustees as was the case herein, can extend to its executive members, former executive trustees, and other members or managers of the said body corporate and under what circumstances;
 - (ii) Whether it was within the law to have issued a Writ of Fida and subsequently seal the same and direct it to persons who were not parties to the suit and who were merely members of a body corporate against whom or to which a judgment was legally obtained.
 - (iii) Whether it was lawful to subsequently seize properties in form of animals which belonged to persons who were not parties to the suit and who were merely members of a body corporate against whom or to which a judgment was legally obtained; and
 - (iv) Whether it was lawful to sell or intend to sell the said goods wrongfully seized.
20. It was contended that all the above questions can be ably answered by the principle established in the case of **Salomon vs Salomon and Company Limited**⁴ where Lord Herschell observed as follows:

“In a popular 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 debts it incurs.”

21. It was further contended that, similarly, the 1st respondent's members cannot be held liable to indemnify the Association against the debts it incurred. That the claims of its creditors should be against the Association's property and not that of its members and that the writ of *fifa* was issued against the 1st respondent and therefore, property that had to be seized under such writ had to belong to the 1st respondent. It was submitted that in *casu*, the animals that were seized belonged to the claimants and the Judge of the Court below rightly held so when she established that there was wrongful execution on the 2nd to 6th respondents.
22. In addition, it was submitted that it was only right to hold that the animals seized did not belong to the 1st respondent considering the circumstances under which the said animals were seized in that the animals were not seized from the 1st respondent's premises and neither was there any evidence to show that the said animals belonged to the 1st respondent. It was submitted that given the circumstances, the

Judge in the Court below was right to afford the respondents the protection that comes with corporate entities of separate legal personality from its members and consequently it could own property in its own name distinct from that of its members.

23. At the hearing of the appeal, Mrs. Mushota, Counsel for the appellant relied on the record of appeal and the appellant's heads of arguments and authorities. She submitted that the Lands Perpetual Succession Act as well as the Certificate of Incorporation are clear that the property of the trust is held by the trustees and applied for the purpose of the trust. She submitted that after the court below found the 1st respondent liable to the appellant and apportioned the land in dispute between the appellant and the 1st respondent, all the trustees, chairman, and members of the 1st respondent abandoned it. None of them gave an address to which they moved the assets of the 1st respondent and they refused to participate in the proceedings for assessment of damages. They all refused to accept by way of service the judgment on assessment for damages.
24. Further, Counsel submitted that it was well after the judgment on assessment was executed, that the 2nd to 6th respondents came up as claimants purporting that the assets which had been seized by the sheriff belonged to them. Counsel emphasized that the claimants brought their claim after the five (5) days stipulated by law for anybody

who has such a claim against the sheriff over goods seized by them can make a claim. She stated that the restriction on the number of days required for the claimants to bring their claim before the Sheriff of Zambia is contained in Order 42 Rule 6 of the High Court Rules(supra) and not the Sheriff's Act. To sum up her arguments counsel stated that there are two issues for determination, namely, the respondents' liability and the failure of the claimants to claim their goods within the stipulated time frame.

25. In response, Mr. Muhanga, restated the contents of the heads of arguments already summarised above. He pointed out that the issues in this appeal started when the appellant decided to insert the phrase **"sued through the executive"** on the writ of *fifa* who were never parties to the proceedings. He emphasized that the ruling of the lower court placed liability on the 1st respondent who is a body corporate and not the individuals who were introduced on the writ of *fifa* so that their personal property can be seized.
26. On behalf of the 2nd respondent, State Counsel Chisulo submitted that his client who is a nephew to Mr. Josiah Hamalambo, the 3rd respondent herein had nothing to do with the 1st respondent association as he was neither a member nor a trustee of the said association. He submitted that his client had no connections with the association and that his cattle were seized from the 3rd respondent's premises. State Counsel

Chisulo submitted that the 2nd respondent was the only claimant who managed to provide a brand mark for his cattle. We were urged to dismiss the appeal for lack of merit.

DECISION OF THIS COURT

27. We have considered the arguments in support of and against the appeal. The issues raised in this appeal are whether the respondents are liable as executive members, former executive trustees and managers of the 1st respondent. The court must also determine the issue whether it was lawful to issue a writ of *fifa* against the 2nd to 6th respondent when the Judgment was entered against the 1st respondent, a body corporate. The third issue for determination is whether it was lawful to seize property in the form of animals which belonged to members of the 1st respondent, against whom Judgment was obtained. The fourth issue for determination is whether it was lawful to sell the goods which were seized.
28. We note that while the 1st respondent was incorporated under the Land (Perpetual Succession) Act, (now Cap 186) of the Laws of Zambia as Kayuni Social Services Development Association Registered Trustees, the 1st respondent was wrongly cited in the court below as Kayuni Social Services Development Association.
29. A trust is an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called

the trust property), for the benefit of persons (who are called the beneficiaries or *cestuis que trust*), of whom he may himself be one, and any one of whom may enforce the obligation. Any act or neglect on the part of a trustee which is not authorised or excused by the terms of the trust instrument, or by law, is called a breach of trust¹. Trusts may be created expressly or by construction while others are a creation of statute.

30. A trustee holds legal title to the trust property and owes a fiduciary duty to the beneficiaries who hold equitable title. A trustee's fiduciary duties include a duty of loyalty, duty of prudence, and subsidiary duties. A trustee must not commingle trust property with his own personal property and must account for the trust property that he holds as well as all his actions that relate to the trust. Trustees must act fairly and impartially between the beneficiaries of the trust and must use care and skill as is reasonable in the circumstances. The trustees are also duty bound to act gratuitously and not to traffic with or otherwise profit by the trust property.
31. Apart from having numerous duties, trustees also exercise general powers expressly confided to them by the trust deed, without interference by the court and subject to any restrictions contained in the deed, and to the provisions of any statute requiring the consent of the court, do such reasonable and proper acts for the realisation or

protection of the trust property. Also, for the protection and support of the reputation of a beneficiary who is incapable of taking care of himself, as the court would sanction if applied to. In addition, trustees have powers to sell, mortgage, exchange or partition the trust property, powers to conduct a sale, issue receipts, and powers to pay the attorney appointed by the beneficiary.

32. Despite having all these powers, trustees are also liable for breach of trust. The measure of a trustee's responsibility for a breach of trust is as follows-

a) Where the breach consists merely of negligence, the measure is the actual loss suffered by the beneficiaries, whether as regards capital or income, without regard to any loss which would have been sustained if the trustee has strictly performed the trust.

b) Where the breach consists in using trust money for his own private purposes, the trustee must not only replace the capital but account for the actual income which he has made by the use of the money, or at the option of the beneficiaries pay interest at such a rate, as the court may determine to fairly represent the profit usually made by the employment of money for purposes similar to those for which he has used it.

33. The actual loss for which the trustee is liable includes not only the direct loss attributable to the breach, but all loss which happens before the

fund is properly reinvested in authorised securities. The liability is not lessened by the fact that the trustee was himself the voluntary creator of the trust. If a trustee has, in breach of trust, converted trust property into some other form, the property into which it has been so converted becomes subject to the trust. If all the beneficiaries are *sui juris*, they can collectively elect to adopt the breach, and take the property as it then stands, but failing such election, the property must be reconverted. In that case any gain accrues to the trust estate, and any loss falls on the trustee.

34. If a trustee has mixed trust money with his own, or has, partly with his own and partly with trust moneys, purchased other property, then the beneficiaries cannot elect to take the whole of the mixed fund or the entire property so purchased. If, however, the mixed fund can be traced (into whatever form it may have been converted), the beneficiaries will be entitled to a first charge on it. Further, if there is an increase in the value of property paid for partly with trust money, the trustee must not only repay the amount of trust money originally expended (with interest if appropriate) but also account for that proportion of the total profit which corresponds with the proportion borne by the trust moneys included in the original expenditure to the total of the original expenditure.

35. The author Underhill's Law of Trusts and Trustees observed that where it appears to the court that a trustee is or may be personally liable for any breach of trust, but that he
- a) has acted honestly,
 - b) has acted reasonably, and
 - c) ought fairly to be excused for the breach and for omitting to obtain the directions of the court in the manner in which he committed such breach, then the court may relieve him, either wholly or partly, from personal liability for the breach. The onus of proving honest and reasonableness is cast upon the trustee, and whether a trustee acted reasonably and honestly is a question of fact depending on the circumstances of each case, no general principle or rule being possible.
36. The Court of Appeal of New Zealand observed in the case of **Joseph Gordon Butterfield and Attorney-General**⁵ that if a trustee had misappropriated the trust property to their own person benefit and title, the beneficiaries may trace the property and claim a share attributed to the trust property.
37. A trustee acts as the legal owner of trust assets and is responsible for handling any of the assets held in trust. Where one is not appointed as a trustee but takes it upon themselves to act as such and interferes with the administration of the trust by possessing and administering trust

property, they can be held responsible for any losses the trust suffers as if they were a regularly appointed trustee. Such a person is also known as a *trustee de son tort* (a trustee of his own wrong), which in ***Taylor v Davies***⁶, was described by Viscount Cave as those who:

“Though not originally trustees, had taken upon themselves the custody and administration of property on behalf of others; and though sometimes referred to as constructive trustees, they were, in fact, actual trustees, though not so named.”

38. To be held liable, a “*trustee de son tort*” does not have to receive the trust property for their own use, and it is not necessary to show that they acted dishonestly; liability will arise even if they acted with good intentions. It is the assumption of control followed by conduct in breach of trust which is key. Instead of prosecuting this person, the courts may hold him or her to be a constructive trustee and, thereby, impose the liabilities of an actual trustee in accounting for his or her acts.
39. In casu, the first question to be considered is whether the respondents are to be held liable as executive members, former executive trustees and managers of the 1st respondent. According to the trust deed, the tenure of office of trustees is twelve months and from the inception of the trust, five trustees were appointed namely, Simon Munkanda, Simon

Simucheka, Jethrow Mudenda, Robert Hangala and F. Dimbwe. Further, the trust deed states that trustees are to be chosen among members. No evidence was led to show that trustees other than the first trustees were ever appointed. However, from the evidence on record, it is clear that there was some form of succession which took place over time.

40. For example, the affidavit in support of the originating summons was sworn by Josia Hamalombo the 3rd respondent in his capacity as a committee member and a former chairperson. Further, Gift Hatila swore the affidavit in opposition to summons to discharge stay of execution dated 4th November, 2011 in his capacity as chairperson. Also, Simon Simucheka the 4th respondent was the deponent to the affidavit in support of exparte summons for leave to commence committal proceedings in his capacity as chairperson.
41. The trust deed did not provide for a creation of an executive committee, therefore we shall take it that the executive committee members who were involved in commencing process took upon themselves the responsibility of safeguarding the perceived interests of the trust and qualified to be described as trustees, per *Taylor v Davies* supra. It is clear that the 3rd, 4th and 6th respondents assumed responsibilities of trustees. Simon Simucheka was one of the original trustees, his tenure of office having expired twelve months after the registration of the trust.

However, it seems like he continued meddling in running the affairs of the trust. As discussed above, the behaviour of the three individuals named in paragraph 40 above does prove that they qualify to be named *as de son tort trustees*. They meddled with the trust property and are liable to be followed personally for the loss the trust may have incurred.

42. We will next consider the standing of the 2nd and 5th respondents. We note that it was established that the 2nd respondent was neither an executive member, nor a member of the 1st respondent. He cannot be said to have wrongly assumed duties of a trustee and he did prove that the cattle in question were his by providing a brand certificate. On the other hand, the appellant has argued that the brand certificate exhibited was secondary evidence which was not certified as a true copy of the original. We note that this argument was not raised in the court below and therefore we shall not entertain it. The 5th respondent is a member of the 1st respondent and he failed to provide any proof that the cattle he was claiming were his.

43. Enforcement of judgments is provided for in Order 42 of the High Court Rules. Order 42 rule 1 provides that-

“All property whatsoever, real or personal, belonging to a party against whom execution is to be enforced, and whether held in his own name or by another party in trust for him or on his behalf (except the wearing

apparel and bedding of himself or his family and the tools and implements of his trade, if any, to the value of five hundred Kwacha or, in the case of a farmer, one million Kwacha) is liable to attachment and sale in execution of the decree.”

44. Further Order 42 rule 6 provides that-

“No sale of goods taken in execution shall be made until the end of five days next after such goods were seized, unless such goods are perishable, or on the request of the party whose goods are seized. Where the property seized is of a value estimated to exceed Fifty Thousand Kwacha, the sale shall be advertised at least once in a newspaper circulating in the district where the sale is to take place.”

45. We note that this provision does not state what is to happen after 5 days but most importantly, it relates to the sale of goods and not interpleader.

In the case of **African Banking Corporation Zambia v Mubende Country Lodge Limited**⁷ the Supreme Court observed as follows-

Furthermore, Black’s Law Dictionary, 8th Edition defines ‘interpleader as

“a suit to determine a right to property held by adisinterested third party (called a stakeholder) who

is in doubt about ownership and who therefore deposits the property with the court to permit interested parties to litigate ownership. Typically, a stakeholder initiates an interpleader both to determine who should receive the property and to avoid multiple liability."

From the quotation in the preceeding paragraphs, there can be no doubt that interpleader proceedings are a mechanism employed by a disinterested stakeholder (the sheriff of Zambia to be specific) to facilitate litigation of ownership of property seized by the sheriff in execution of a judgment when an interested party lays a claim to such property. Therefore, the essence of interpleader proceedings is precisely that and no more.

46. Order 17 Rule 3 Subrule 11 of the White Book 1999 edition provides for what would happen after the stipulated 5 days by providing that-

"In addition to the matters which, under this rule, must be deposed to, the applicant should not be guilty of delay, and he should explain any undue lapse of time. An applicant who delays his application is liable to be mulcted in costs; and it is too late for a defendant to apply after judgment has been given against him in the action."

In case of *Beale v. Overton*⁸ it was held that the applicant should not be guilty of delay, and he should explain any undue lapse of time while in the case of *H. Stevenson & Son v. Brownwell*⁹ it was held that an applicant who delays his application is liable to be mulcted in costs; and it is too late for a defendant to apply after judgment has been given against him in the action

47. Given the forgoing, the learned Judge misdirected herself in holding that there is no time limit for laying claims to the Sheriff of Zambia of the seized goods. Order 42 rule 6 of the High Court Rules cited above is very clear that would be claimants have five days in which to lodge claims with the sheriff over the ownership of the seized goods. The claimants herein had five days to claim for their goods which they did not do. Also it must be noted that the seized goods were cows which couldn't be kept for a long time. While the 2nd respondent had a good claim for his cattle, the same ended when he failed to lodge his claim with the Sheriffs of Zambia within five days of the same having been seized.
48. The net total of our findings are that, the 3rd, 4rd and 6th respondents are *de son tort trustees* and are personally liable, thus making it lawful for the appellant to issue a writ of *fifa* against them. The 2nd respondent proved that he was not a member of the 1st respondent and proved that the animals he was claiming were his. However according to Order 42 rule 6 he was too late to make his claim. The 5th respondent failed to

prove that the animals he is claiming for were his. The 1st respondent was wrongly cited in the court below. The ruling of the court below is set aside. The appeal accordingly succeeds and costs are awarded to the appellant to be taxed in default of agreement.



.....
F.M CHISANGA
JUDGE PRESIDENT, COURT OF APPEAL.



.....
J. Z. MULONGOTI
COURT OF APPEAL JUDGE.



.....
P.C.M NGULUBE
COURT OF APPEAL JUDGE.