IN THE SUPREME COURT OF ZAMBIA APPEAL NO.76/2016
HOLDEN AT NDOLA SCZ/050/2016
(CIVIL JURISDICTION)

BETWEEN:

EURO AFRICA KALENGWA MINES LIMITED APPELLANT

AND

LUNGA MINERALS AND EXPLORATION LIMITED RESPONDENT

CORAM: Phiri, Kaoma and Musonda, JJS

On: 7th March, 2017 and 28th March, 2017

For Appellant: Mr. C.L. Mundia, SC - C.L. Mundia and Company

For Respondent: Mr. B.C. Mutale and Mr. S. Chikuba – BCM Legal Practitioners

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JUDGMENT

Kaoma, JS delivered the Judgment of the Court

Cases referred to:

1. **Turnkey Properties v Lusaka West Development Company Limited and others (1984) Z.R. 85**
2. **Lisulo v Lisulo (1998) Z.R. 75**
3. **Mumba and others v Zambia Red Cross Society (2006) Z.R. 137**
4. **Robert Lawrence Roy v Chitakata Ranching Company Ltd (1980) Z.R. 198**
5. **Bank of Zambia v Jonas Tembo and others - SCZ Judgment No. 24 of 2002**

Statutes and works referred to:

1. **Lands and Deeds Registry Act, Cap185, section 33**
2. **Mines and Minerals Development Act, section 52 (1) (b)(i)**
3. **Rules of the Supreme Court (White Book), Order 29/1A/33**
4. **High Court Rules, Cap 27, Orders 2 rule 1(d) , 12(2) and 39 (1)**
5. **translegal.com**

The mining area known as Kalengwa mine situate in Mufumbwe District of North-Western Province, of the Republic of Zambia, has been the subject of legal proceedings dating as far back as 2007. This Court has had occasion to determine two appeals relating to the same mine. These involved the appellant, Euro Africa Kalengwa Mines Limited and Hetro Mining and Ore Dealers Limited (hereinafter referred to as "Hetro Mining").

This is the third appeal to come before us over the same subject matter and we wish to register our concern at this turn of events. This particular appeal is against the refusal by the High Court to review its decision made on 14th January, 2016 declining to set aside an interlocutory injunction granted to the respondent on 4th December, 2015.

The facts leading to this appeal are set out in detail in the two earlier appeals. We restate them here, in brief, particularly to show the correlation between this appeal and the two previous appeals. In 2003, Hetro Mining was granted a small scale mining licence No. SML 142 and prospecting permit number PP 67 over Kalengwa mine (the subject matter of this appeal), valid for 5 years. In August, 2007 the Director of Mines refused to renew the said licence for reasons that are clearly stated in the two earlier

appeals. Instead, the appellant was granted a prospecting licence which covered a substantial area which had been under mining licence No. SML 142. Hetro Mining alleged that the Director of Mines flouted the law and commenced judicial review proceedings in the High Court at Kitwe under Cause No. 2007/HK/492, citing the Attorney General as respondent. The appellant was joined to the proceedings as an interested party.

The defence by the Attorney General and the appellant was that the Minister of Mines revoked SML 142 because the consent letter that was obtained by Hetro Mining from Zamanglo Prospecting Limited before being granted the licence was not valid and that the area in issue was covered by Prospecting Licence PLLS 59 held by African Minerals Limited.

In a judgment dated 28th January, 2010 the High Court dismissed the application for judicial review holding that there was no illegality, irrationality and unreasonableness and that the Director of Mines complied with the law since SML 142 was null and void ab initio because it was unlawfully granted in respect of an area covered by an already existing and valid licence PLLS 59.

Hetro Mining appealed to this Court under Appeal No. 16A/2011.

On 26th February, 2010 Hetro Mining had obtained a mineral processing licence over the same mining area it had held under SML 142. On 16th March, 2010 the Director of Mines revoked the licence on the basis that Hetro Mining's application for judicial review had failed. Hetro Mining appealed to the Minister of Mines against that decision. On 31st March, 2010 Hetro Mining commenced judicial review proceedings at the Ndola High Court and applied for an order of mandamus to compel the Minister to render a decision on its appeal. It also obtained an injunction restraining the appellant from going to Kalengwa mine and accessing the copper ore stockpile thereon. On 15th May, 2011, the Minister rendered his decision on the appeal and upheld the Director's decision making the judicial review proceedings academic.

On 15th September, 2011 we dismissed Appeal No. 16A/2011, agreeing with the High Court that SML 142 was null and void ab initio and was therefore properly cancelled.

Despite that, on 7th November, 2011 Hetro Mining raised a preliminary issue in the judicial review proceedings at Ndola, asking the court to determine, inter alia, whether the appellant had a legal claim to the stockpile on Kalengwa mine. The High

Court essentially held that the appellant had no right to the stockpile while Hetro Mining had and directed the Director of Mines to give the latter a period of at least two years to process the stock pile.

The High Court also took the view that our decision in Appeal No. 16A/2011 that SML 142 was null and void was made under the mistaken view that the area covered by the two licences (SML 142 and PLLS 59) was one and the same.

The appellant appealed to this Court on five grounds. We heard the appeal on 11th July, 2013 although the judgment was rendered on 25th March, 2015. For the reasons we gave in our judgment, we only considered the second ground of appeal which faulted the High Court for being oblivious to the fact that the action was an abuse of court process. The appellant's argument was that Hetro Mining abused the process of the court by commencing several actions involving the same parties and over the same subject. Conversely, Hetro Mining argued that no judgment of the court had made any pronouncement on the stockpile or its processing licence.

We allowed the appeal, holding that the preliminary issue was an abuse of court process and should not have been

entertained. We ordered Hetro Mining to vacate Kalengwa mine with immediate effect and the appellant was at liberty to move in and take possession. Consequently, in May, 2015 the appellant took possession of Kalengwa mine under a writ of possession.

On 9th November, 2015 the respondent, Lunga Minerals and Exploration Limited commenced an action against the appellant seeking several reliefs in form of declarations and orders concerning Kalengwa mine and the appellant's repossession of the mine. The respondent also sought an order of mandatory injunction directing and ordering the appellant to yield back possession of the properties and all of the respondent's assets at the mine back to the respondent and not to interfere with its peaceful and quiet enjoyment of its properties. The respondent also filed an ex-parte application for mandatory injunction.

It was asserted in the statement of claim and in the affidavit in support of mandatory injunction, among other things, that the respondent is the holder of a prospecting permit No. 18361-HQ-SPP over Kalengwa mine and certificate of title No. 302681 relating to Farm No. 31479 over which it also has the prospecting permit. The Prospecting Permit annexed to the affidavit which is at page 27 of the record of appeal shows that it was issued on

30th April, 2013 for a period of 5 years while the certificate of title at page 29 shows that it was issued on 7th May, 2014.

The High Court decided to hear the application for injunction interpartes on the 23rd of November, 2015. Because the respondent alleged that it had problems serving court process on the appellant at the registered office, the hearing was rescheduled to 4th December, 2015 and the respondent was granted leave to serve the court process by substituted service.

When the matter came up for hearing on 4th December, 2015 the appellant was not present and there was no affidavit in opposition. Upon being satisfied that service of process was effected on the appellant, the court proceeded to hear the application and promptly granted an interlocutory injunction directing the appellant to cease any prospecting or mineral processing and not to sell or destroy the respondent's properties until the determination of the matter. However, the court declined to grant a prayer by the respondent to eject the appellant from the mine on the basis that doing so would substantially determine the very matter that the proceedings were supposed to determine.

The appellant did not enter appearance and defence. On 11th December, 2015 the respondent obtained a default judgment under the hand of the Deputy Registrar despite the nature of the reliefs sought. On 23rd December, 2015, the appellant made an application before the Judge to stay and to set aside the default judgment. The appellant asserted that the default judgment was irregular and untenable as the respondent misled the court by not disclosing that the subject matter of the action, namely the mine tenement had already been determined by the High Court and this Court.

It was also asserted that the allegation by the respondent that it owned farm No. 31479 outside the appellant's Kalengwa mine tenement was malicious and false as the alleged farm was illegally acquired by the respondent when there were already judgements of the High Court and this Court and that this Court's judgment of 25th March, 2015 granted immediate possession of the mine tenement that included the purported farm to the appellant, and the respondent that claimed the purported farm was evicted through a writ of possession.

The Judge referred the applications to the Deputy Registrar who had granted the default judgment. A new application was

filed before the Deputy Registrar on the same grounds. The appellant also filed a notice of motion to raise preliminary issues on points of law.

On 24th December, 2015 the Deputy Registrar stayed the default judgment and on 8th January, 2016 set aside the judgment. On 13th January, 2016 the appellant entered appearance and defence raising the same issues and also filed a counterclaim.

On 23rd December, 2015 the appellant had also filed an ex-parte application to set aside the interlocutory injunction. The application was heard interpartes on 6th January, 2016. The substance of the application was the same as the application to set aside the default judgment. The appellant also averred that the respondent never disclosed that it had a certificate of title to the farm it now claims and that even if it did (a fact denied), this Court on 25th March, 2015 ordered Hetro Mining to vacate the mining area with immediate effect.

The respondent opposed the application, arguing that the matter before the court was different from the other matters which were determined by the High Court and this Court; that this Court had not made a determination regarding the

respondent's prospecting permit and certificate of title over Kalengwa mine; and that the other matters were between Hetro Mining and the appellant.

It was also argued that irrespective of their shareholding structure and directorship, Hetro Mining and the respondent are at law two separate entities.

In a ruling dated 14th January, 2016 the learned High Court Judge rejected the appellant's argument that there was an abuse of court process by reason of institution of a multiplicity of actions on matters that were already determined and refused to set aside the injunction. He was satisfied that the respondent had met the requirements for the grant of an injunction. Thus, the Judge dismissed the application with costs.

On 27th January, 2016 the appellant applied for review of the ruling. The grounds to support this application were the same as in the earlier applications. However, the appellant also alleged that the respondent had begun to use the injunction to plunder and steal the resources at the mine and had created favourable conditions for itself contrary to the ruling and the injunction.

According to the appellant, the removal of copper ore from the mine was a new development that warranted review of the ruling, and discharge of the injunction under Order 29/1A/33 of the White Book. The appellant also attacked the certificate of title held by the respondent alleging that it was irregularly obtained.

The respondent opposed the application on the basis that no new issues or fresh evidence were raised to warrant review of the court's decision and that the other matters raised, including the legitimacy of the certificate of title, could only be impeached at trial. The appellant also refuted the allegation that it was involved in the theft of copper ore from the mine.

In the ruling dated 19th February, 2016 the learned Judge declined to review his earlier decision. The appellant has now appealed raising six grounds of appeal as follows:

i. **The learned Judge in the court below erred in law and in fact by his failure to discharge his injunction on review when he erroneously arrived at the conclusion that the Learned Deputy Registrar's judgment in default of appearance was still in force when it had been vacated by a ruling dated 24th December, 2015.**

ii. **The learned Judge in the court below erred in law and in fact when he arrived at the conclusion that the appellant's application for review was an attempt to set aside the Deputy Registrar's judgment in default of appearance when such order had long been set aside.**

iii. **The learned Judge in the court below erred in law and in fact when he failed to properly analyse the evidence before him as to theft of copper ore and copper stock piles by the respondent**

which occurred after the grant of his injunction to the respondent herein.

iv. **The learned Judge in the court below erred in law and in fact when he decided that the circumstances under which the certificate of title had been irregularly obtained by the respondent could have been discovered had the appellant conducted a diligent search.**

v. **The learned Judge in the court below erred in law and in fact when he refused to vacate his injunction which the respondent used to illegally and forcefully evict the appellant's agents and servants on account that the Deputy Registrar had granted the respondent herein a judgment in default of appearance when it had been vacated by a ruling dated 24th December, 2015.**

vi. **The learned Judge in the court below erred in law and in fact when he failed to properly analyse the evidence before him that the respondent's Directors herein are materially the same Directors who have in the past laid unsuccessful claim to the subject matter of this appeal in total contravention and blatant disregard of Supreme Court judgments in favour of the appellant.**

In support of the above grounds, Mr. Mundia, SC on behalf of the appellant relied on the written heads of argument which he augmented with oral submissions. Clearly, grounds 1, 2 and 5 are repetitive and State Counsel has argued them together in his written heads of argument. The essence of the arguments is that the High Court Judge misdirected himself when he concluded that the default judgment was still in operation and that he did not want to interfere with it, when the judgment was properly set aside on 8th January, 2016 by the Deputy Registrar pursuant to Order 12(2) of the High Court Rules, Chapter 27.

In support of ground 3, State Counsel contends that following the grant of the interlocutory injunction, the respondent, its directors, agents and servants decided to chase away the appellant's employees and or agents from Kalengwa mine site on 9th December, 2015. Further, that a truck load of copper ore, stolen by the respondent from the mine was intercepted by the appellant's agents, and yet the injunction never allowed the respondent to remove any copper ore or to do any other act that would be detrimental or beneficial to either of the parties.

It is argued that the respondent has created conditions favourable to itself and that this new development justifies the need for review to the extent of setting aside the injunction. State Counsel relies on the case of **Turnkey Properties v Lusaka West Development Company Limited and others**[1]. According to State Counsel, the interception of the truck load of copper ore by the Police clearly shows that the respondent wants to use criminal activities to plunder the resources belonging to the appellant, a fact that was fully established by the High Court and this Court in three judgments.

Relying on Order 29/1A/33 of the White Book, State Counsel contends that the evidence concerning the truck load of stolen copper ore indicates a material change of circumstances which militates against the sustenance of the injunction, especially that an injunction is an equitable remedy and those that come to equity must do so with clean hands.

In respect of ground 4, State Counsel submits that the matter involving the appellant and Hetro Mining and the present matter are founded on the same subject matter except that the respondent by this action is trying to undermine the judgments of this Court. According to State Counsel, at no time has the respondent satisfied the legal requirements to be issued with a certificate of title over Kalengwa mine because Mufumbwe District Council has never processed any documentation relating to the purported Farm No. 31479 nor has the respondent ever been allocated the said farm in the area falling under the jurisdiction of the Mukumbi Kizela Royal Establishment.

In ground 6, State Counsel submits, that the respondent company, Hetro Mining and another company called Tunta Mining Limited have the same directors; therefore, the subject matter of this action, namely Kalengwa mine tenement is res

judicata, the matter having been determined by the High Court and this Court. He contends that it was after this Court's judgment that the appellant issued a writ of possession; therefore, it is malicious for the respondent to allege that the appellant took possession of the mine tenement illegally or that it has a prospecting licence on its farm when the purported farm is alleged to have been obtained in 2014.

In his oral arguments, State Counsel added that the issues raised in this matter have already been determined by the High Court and this Court and that counsel for the respondents are aware of the previous judgments and for that reason, the respondent and its advocates should be condemned in costs.

The respondent has not filed any written heads of argument. Instead counsel filed a notice of motion to raise preliminary issue to dismiss the appeal on the basis that the record of appeal was filed out of time without leave of this Court. The appellant opposed the motion arguing that the record was properly filed in accordance with Order 2 rule 1(d) of the High Court Rules. We considered the preliminary issue at the hearing of the appeal and dismissed it for lack of merit as we were satisfied that the record of appeal was filed in time.

Mr. Chikuba, co-counsel for the respondent then applied for leave to file written heads of argument in open court. When he was asked as to why he did not file the heads of argument earlier, despite having received the appellant's heads of argument last year, his response was that he did not think it was necessary because they had filed a notice of motion.

The application was opposed by State Counsel Mundia. We declined to grant leave because no plausible reason was given for not filing the heads of argument earlier. However, we heard counsel for the respondent on the issue of costs. The gist of the response is that the prayer to award costs against the advocates is unfounded in law and should not be sustained.

We have considered the record of appeal and the appellant's arguments. This appeal has arisen from a failed application for review. Therefore, the question that arises upon this appeal is whether there was sufficient ground on which the High Court Judge could review his decision refusing to set aside the injunction. The appellant's application was premised on Order 39 (1) of the High Court Rules which provides that:

> **"Any judge may, upon such grounds as he shall consider sufficient, review any judgment or decision given by him (except where either party shall have obtained leave to appeal, and such appeal is not withdrawn), and upon such review it shall be lawful for him to open and rehear the case wholly or in part, and to take**

fresh evidence, and to reverse, vary or confirm his previous judgment or decision ..."

It is obvious from the cases of **Roy v Chitakata Ranching Company Ltd**[2], **Lisulo v Lisulo**[3] and **Mumba and others v Zambia Red Cross Society**[4] that the power to review under Order 39 Rule 1 is discretionary and that there must be sufficient grounds to exercise that discretion. One such ground is that some evidence that existed at the time of the hearing was not made available to court on the ground that even after a diligent search it could not be found.

In this case, the reasons advanced by the appellant for seeking review were threefold: first, that the ownership of Kalengwa mine had already been determined by the High Court and this Court in two separate judgments; second, that new developments had taken place since the grant of the injunction as the respondent through its directors, agents, servants or related subsidiary and group companies were using the injunction to plunder and steal copper ore from the mine; and third, that the certificate of title held by the respondent over Kalengwa mine was fraudulently or irregularly obtained.

We shall deal with the grounds of appeal as argued by State Counsel. Grounds 1, 2 and 5, relate to the default judgment. It is

correct as argued by State Counsel that the learned Judge stated in his ruling that he was aware that the Deputy Registrar entered judgment in default of appearance in favour of the respondent and made an order entitling them to possession of the mine.

The Judge also said the application could not be used by the appellant to attack the Deputy Registrar's order; and that the appellant must find an appropriate way of dealing with it or seeking redress. For that reason, the Judge refused to comment on the claim by the appellant that its employees were illegally ejected from the mine.

We agree entirely with the argument by State Counsel that it was erroneous for the learned High Court Judge to treat the default judgment, which had been set aside by the Deputy Registrar on 8th January, 2016 as if it was still subsisting and as if it still entitled the respondent to possession of the mine. In any case, the default judgment had been stayed by the Deputy Registrar on 24th December, 2015. However, the Judge did not decline to review his decision because he believed that the default judgment was still subsisting.

The record shows that the learned Judge went further to identify the issue for decision as whether the appellant had

presented new evidence which could not have been discovered after a diligent search at the time he heard the application to discharge the injunction. In our view, therefore, grounds 1, 2 and 5 are academic and have no bearing on the outcome of the application which the Judge was called upon to consider.

In respect of ground 3 of the appeal, it is quite clear that the Judge did not deal with the allegation of theft of copper ore. However, as admitted by State Counsel, the alleged new development of theft of copper ore from Kalengwa mine occurred after the decision of the court refusing to set aside the injunction.

As we have held in the cases we referred to earlier, the evidence must have existed at the time of the hearing of the application and was not made available to court on ground that even after a diligent search it could not be found. Evidence that comes into existence for the first time after the hearing is not sufficient ground for review.

State Counsel also argued that the Judge should have discharged the injunction under Order 29/1A/33 of the White Book. It is crucial to understand that the application was not for discharge of the injunction on the basis of material change in the circumstances. It was for review under Order 39 (1) and different

considerations apply. The appellant ought to have appealed the refusal to set aside the injunction or applied for discharge of the injunction under Order 29/1A/33 or even issued contempt proceedings since the argument was that the removal of copper ore from the mine was in contempt of the injunction order. In our view, the matter was not suitable for review on ground of fresh evidence. Therefore, ground 3 lacks merit and is dismissed.

Coming to ground 4 and the certificate of title currently held by the respondent, the ruling appealed against shows that the learned Judge referred to the letters from Mufumbwe District Council and from Chief Chizela, questioning the issuance of the certificate of title to the respondent, without their knowledge and or consent. The Judge observed that the certificate of title whose veracity was being challenged was one of the documents the respondent filed when applying for the injunction and related to a mine the latter occupied at the time the application was made.

The Judge was of the view that the appellant could not claim that the circumstances in which the certificate of title was obtained could not have been discovered if it had conducted a diligent search and opined that to allow the appellant to raise the

issue at that stage would be giving them a second bite at the cherry. Hence, he refused to review the decision on that ground.

The circumstances surrounding the issuance of the certificate of title are questionable. However, we are satisfied that the certificate of title was in existence at the time of the hearing of the application to set aside the injunction. In fact, it was referred to by the appellant in its affidavit and by State Counsel in his oral arguments, but only to the extent that the certificate of title was issued in 2014 when there were High Court and Supreme Court judgments. State Counsel fell short of questioning the actual circumstances in which the certificate of title was issued. We find that the learned Judge was on firm ground when he refused to review his decision on that ground as the issue surrounding the certificate of title did not constitute fresh evidence. Ground 4 must equally fail and is dismissed.

We turn lastly to ground 6 and the appellant's argument that since the respondent and Hetro Mining have the same directors, the subject of this matter, namely Kalengwa mine, is res judicata. We have discussed the doctrine of res judicata in a number of cases, one such case being **Bank of Zambia v Jonas Tembo and others**[5]. We held in that case that in order that a

defence of res judicata may succeed it is necessary to show that not only the cause of action was the same, but also that the plaintiff has had an opportunity of recovering, but for his own fault might have recovered in the first action that which he seeks to recover in the second and that a plea of res judicata must show either an actual merger, or that the same point had been actually decided between the same parties.

In this case, res judicata was raised by the appellant in all its applications in the court below, including the application for review. The learned High Court Judge did not deal with the issue in the ruling appealed against. However, in the ruling of 14th January, 2016 the Judge had observed that the application was anchored on the fact that in 2011, this Court ordered Hetro Mining to vacate Kalengwa mine; that the respondent was not a party to those proceedings; and that the respondent's claims are premised on a certificate of title and prospecting licence which were issued after this Court's decision. The Judge also considered the provisions of section 33 of the Lands and Deeds Registry Act and section 52 (1) (b)(i) of the Mines and Minerals Development Act. The question is whether res judicata was

sufficient ground on which the learned High Court Judge should have reviewed his decision and discharged the injunction.

There is no dispute that the respondent was not a party to the earlier proceedings and the argument by the respondent that it is a legal entity separate and distinct from its shareholders and directors has merit. However, as we have demonstrated above, the subject matter of this appeal has already been adjudicated upon by this Court in two final judgments and in the judgment of 25th March, 2015 we ordered Hetro Mining to vacate the disputed mine with immediate effect and we allowed the appellant to take possession of the mine, which was done under a writ of possession. For the respondent to now challenge possession based on our judgment is pure arrogance particularly that the people behind the respondent and Hetro Mining are the same people that have made unsuccessful claims to the mine in the two previous appeals.

The view we take is that our judgments and Kalengwa mine are res judicata, meaning that it is finally decided. Res judicata bars re-litigation of matters that have already been determined in adjudication. Specifically, res judicata precludes only subsequent suits on the same cause of action between the same parties after

a final judgment on the merits as we stated in **Bank of Zambia v Jonas Tembo and others**[5], but it can also mean a matter that is final such as a claim or cause of action that is settled or a judgment, award or other determination that is considered final and bars re-litigation of the same matter (see translegal.com).

In this case, the issue of fact affecting the status of Kalengwa mine has been determined in a final manner as a substantive part of a judgment of this Court, and the same issue cannot come directly in question in subsequent civil proceedings between any parties whatsoever.

There was an argument by counsel for the respondent that the licence held by the appellant over Kalengwa mine had in fact expired at the time the respondent applied for its licence; that it expired on 1st November, 2011 according to the print-out at page 44 of the record of appeal. This argument, which is being raised for the first time is misconceived. The print-out itself shows the status of the licence as "Active (Pending Renewal)". Besides, our judgment of 25th March, 2015 gave possession of the mine to the appellant and that cannot be questioned by anyone.

We are convinced that the move by the respondent (a company directly associated with Hetro Mining), to commence a

third action concerning Kalengwa mine, when we have already pronounced ourselves twice on the status of the mine, is simply meant to circumvent and undermine the final judgments of this Court. Public policy demands that our judgments must be respected and the learned High Court Judge should have considered the effect of our judgments as to the disputed mine.

In any case, Mr. Chikuba informed us at the hearing of the appeal that the area covered by the respondent's prospecting permit is different from the Kalengwa mine area, despite the claim in the writ and statement of claim that Kalengwa mine is situate within the respondent's titled area. Therefore, we do not see the justification for continuance of the injunction especially that an injunction is an equitable remedy. Accordingly, ground 6 succeeds. In the event we vacate the interlocutory injunction.

Costs are always in the discretion of the court. Even if the appeal has only partial merit, we have been constrained to award the costs of this appeal to the appellant as against the respondent because the latter has disregarded our previous decisions about the ownership of Kalengwa mine when its directors are well aware of those decisions but want to hide

under the doctrine of separate legal entities. However, we are not persuaded that counsel should equally be condemned in costs.

G.S. PHIRI
SUPREME COURT JUDGE

R.M.C. KAOMA
SUPREME COURT JUDGE

M. MUSONDA
SUPREME COURT JUDGE