

BETWEEN:

**LC AND DK LIMITED (In Receivership) 1ST APPELLANT
ANGEL POULTRY LIMITED 2ND APPELLANT**

AND

LOVEMORE CHIKUNI CHINYAMA RESPONDENT

CORAM : Chishimba, Ngulube and Siavwapa JJAs

On the 23rd September, 2021 and 30th December, 2021

For the 1st Appellant : Ms. N. Mbuyi – Messrs Paul Norah Advocates

For the 2nd Appellant: Mr. M. Chambaila – Messrs Ituna Partners

For the Respondent : Mr. B. Batakhathi & Mr. I. Simbeye – Messrs
Muyatwa & Partners

J U D G M E N T

Chishimba JA, delivered the Judgement of the Court.

CASES REFERRED TO:

- 1) London Ngoma and others v LCM Company Limited and Another (1999) ZR 75
- 2) Vangalatos and Another v Metro Investments Limited SCZ Ruling No. 21/2013
- 3) Zambia Seed Company Limited v Chartered International (Pvt) Limited SCZ Judgment No. 20/1999 SCZ Appeal No. 121/1998
- 4) Elias Mumeni and 43 Others v Esau Phiri and Others CAZ Appeal No. 63/2017
- 5) Mike Hamusonde Mweemba v Kamfwa Obote Kasongo & Zambia State Insurance Corporation Limited (Intended Joinder) (2006) Z.R. 101

- 6) Sachar Narendra Kumar v Joseph Brown Mutale SCZ Judgment No. 8/2013
- 7) Finance Bank Zambia Limited Plc v Lamasat International Zambia Limited SCZ Appeal No. 175/2017
- 8) John Mukoma Kasanga and Others v Development Bank of Zambia and Others CAZ Appeal No. 59/2020 and 94/2019
- 9) Continental Restaurant & Casino limited v Arida Mercy Chulu (2000) ZR 128
- 10) Philip Mhango v Dorothy Ngulube & Others (1983) ZR 61
- 11) Tap Zambia Limited v Percy Limbusha & Others SCZ Appeal No. 31/2015. Selected Judgment No. 47 of 2017
- 12) Attorney General v Tall & Another (1995 - 1997) ZR 54
- 13) Simbeye Enterprises Limited & Investrust Merchant Bank (Z) Limited v Ibrahim Yousuf (2000) ZR 159
- 14) Abel Mulenga and Others vs Chikumbi and Other (2006) ZR 33

LEGISLATION CITED:

- 1) The High Court Rules Chapter 27 of the Laws of Zambia
- 2) The Rules of the Supreme Court of England, 1999 Edition
- 3) The Sheriff's Act, Chapter 37 of the Laws of Zambia
- 4) Halsbury's Laws of England, 4th Edition (Vol 16)

1.0 INTRODUCTION

- 1.1 This is an interlocutory appeal against the ruling of Justice S. M. Wanjelani dated 15th October, 2020 in which she ordered the joinder of the respondent to the proceedings and refused to grant a stay of execution of the writ of possession. Instead the court set aside the writ of possession on the basis of irregularity and granted damages for wrongful execution of the same.

2.0 **FACTUAL BACKGROUND**

2.1 The 1st appellant had obtained a loan facility for a certain sum. As security, fixed and floating debenture charges were executed over all assets of the company. The relevant security executed on 17th May, 2013, by the respondent being a third party mortgage in favour of Development Bank of Zambia (herein after referred to as DBZ), in respect of Subdivision C of Subdivision No. 30 of Farm No. 397a, Lusaka. This was followed by a further agricultural charge, on the mortgaged property on 14th January, 2014.

2.2 Upon default in paying the principal and interest, DBZ appointed one Siakamwi Chikuba as receiver of the 1st appellant in a letter dated 9th October, 2018. A deed of appointment was subsequently executed.

2.3 In a letter dated 7th January, 2019, the receiver/manager of the 1st appellant wrote to the directors of the company notifying them of his appointment and requesting them to avail him a statement of affairs of the company.

2.4 In enforcing the mortgage, the mortgaged property was put on sale. On 18th August, 2019, Dr. Webby Chipili made an offer to buy the property. The sale never materialized. Upon discovering

that the respondent had begun removing the poultry farming equipment which was subject of the agricultural charge, the receiver gave the respondent notice to vacate the property within 21 days. The respondent did not vacate the said property.

2.5 The property was subsequently sold for the sum of K5, 000, 000.00 to the 2nd appellant on 15th September, 2020. A deposit of K2, 000, 000.00 was paid as part of the contract terms. An attempt by the 1st appellant to render vacant possession of the property to the 2nd appellant on 18th September, 2020, failed due to resistance from the respondent.

2.6 When vacant possession could not be yielded, the 2nd appellant sued the 1st appellant for specific performance for sale of subdivision C of subdivision number 30 of Farm No. 397(a) Lusaka, possession or in the alternative refund of the sum of two million kwacha paid as deposit. Thereafter, the 1st and 2nd appellants entered and concluded a consent judgment dated 25th September, 2020. The terms being that the seller would surrender vacant possession to the 2nd appellant, in default, execution by writ of possession. Subsequently, as per the terms of the consent judgment, the 2nd appellant issued and executed

a writ of possession on 2nd October, 2020 for vacant possession of the sold property.

2.7 Thereafter, the respondent as mortgagor/owner of property sought leave to be joined to the proceedings, and applied for a stay of execution of the writ of possession pending setting aside execution for irregularity.

3.0 **EVIDENCE AND ARGUMENTS IN THE HIGH COURT ON JOINDER AND STAY OF EXECUTION**

3.1 In his combined affidavit in support of the above applications, the respondent stated that he is the owner of the mortgaged property and exhibited a certificate of title in that regard. That he was served with a writ of possession by bailiffs on 5th October, 2020 but had not been served or notified in respect of the proceedings before the court regarding the subject property. On this basis, he sought to have the writ of *feri facias* and writ of possession set aside for irregularity.

3.2 The 1st appellant opposed the application in its affidavit stating that the mortgaged property was the only asset that was pledged as security for all the loans obtained and that the securities gave the receiver power to take over the property in the event of a default. As execution had already taken place, the writ could

not be stayed. The 1st appellant further stated that the matter, having been concluded by a consent judgment, the only available recourse for the respondent was to commence a fresh action.

3.3 In its skeleton arguments in support of the applications, the respondent argued that in terms of **Order 14 Rule 5(1) of the High Court Rules Chapter 27 of the Laws of Zambia**, he ought to be joined to the proceedings as he is the registered owner of the mortgaged property. The case of **London Ngoma and others v LCM Company Limited and Another** ⁽¹⁾ was called in aid to support his contention that he had sufficient interest and *locus standi* in the proceedings which he had not been aware of.

3.4 In its skeleton arguments, the 1st appellant submitted that a judgment having been entered by the court and execution effected, the court was *functus officio*, and could not stay execution of the writ of possession. Reliance was placed on the case of **Vangalatos & Another v Metro Investments Limited** ⁽²⁾ where the court could not stay execution of a judgment because execution had already been effected.

3.5 With respect to the consent judgment between the 1st and 2nd appellant, it was submitted that in terms of **Order 13 Rule**

9(10) of the Rules of the Supreme Court of England, 1999 Edition and the case of **Zambia Seed Company Limited v Chartered International (Pvt) Limited** ⁽³⁾, a consent judgment could only be set aside by commencing a fresh action. Therefore, the respondent ought to have commenced a fresh action as opposed to applying to have the writ of possession set aside.

3.6 It was further submitted that though the respondent sought an equitable relief, he had come to court with unclean hands in view of the default. The decision in **Elias Mumeno and 43 Others v Esau Phiri and Others CAZ Appeal** ⁽⁴⁾ was cited where we stated that inequitable conduct by the applicant is usually a bar to equitable relief.

4.0 **DECISION OF THE HIGH COURT**

4.1 The learned Judge considered the applications before her in the combined ruling. With respect to the application for joinder, the learned Judge referred to the case of **Mike Hamusonde Mweemba v Kamfwa Obote Kasongo & Zambia State Insurance Corporation Limited (Intended Joinder)** ⁽⁵⁾ where it was held that a court can order a joinder if it appears to the Court or judge that all persons who may be entitled to or claim

some share or interest in the subject matter of suit or who may be likely to be affected by the result require to be joined.

4.2 The court further made reference to the case of **Sachar Narendra Kumar v Joseph Brown Mutale** ⁽⁶⁾ in which the Supreme Court held that joinder may be granted even after judgment has been delivered. On this basis, taking into account that the respondent is the registered owner of the mortgaged property and had thereby shown sufficient interest and *locus standi*, and was not aware of the proceedings, the court below ordered that the respondent be joined to the proceedings.

4.3 The court proceeded also to consider whether or not to stay execution of the writ of possession and to set aside the same for irregularity. The court noted that the writ of possession had already been executed and as such, there was nothing to stay. The learned Judge made known her disapproval of both Counsel's conduct in the matter. Namely that the respondent suppressed material facts such as that he had pledged the property as security for loans obtained by the 1st appellant a company in which he was a shareholder and director. In addition, the securities in issue had also been registered in the

memorials of his certificate of title and that they had failed to repay the loans.

- 4.4 The court with regard to the application to set aside the writ of execution for irregularity, made reference to **Order 45 Rule 3(2a) of the RSC**. That it is a fundamental requirement that leave must be obtained to enforce a judgment or order giving possession of land and that the person in actual possession of the land be served with notice of the proceedings. There being no evidence that the 2nd appellant obtained leave of court prior to issuing and executing the writ of possession or that the persons in possession were notified of the proceedings, the court set aside the writ of possession and awarded the respondent damages.

5.0 **GROUND OF APPEAL**

- 5.1 Being aggrieved with the decision of the court below, the appellants have advanced the following six grounds of appeal as follows:

1) The court below erred and misdirected itself in law and fact when it set aside the writ of possession on the grounds that leave to issue a writ of possession should have been sought when the appellants right to possession of the mortgaged property was entrenched in his appointment as receiver, with inherent rights to possession of the mortgaged property without notice and

further, clause 3 of the consent judgment clearly had already given leave for a writ of possession to be filed in the event the defendant (1st appellant) failed to give the plaintiff (2nd appellant) vacant possession;

- 2) The court below erred in law and fact when it did not consider evidence before it that the Claimant (respondent) was a defaulter who was notified of the receiver's possession of the mortgaged property;*
- 3) The court below having found that the company was an undischarged debtor and the claimant (respondent) having pledged the property as security through several securities including a third party mortgage which property had been repossessed, erred in law when it held that the claimant be joined to the matter when the claimant did not have sufficient interest nor locus standi in the matter as (the) receiver had already been appointed by the bank in accordance with the securities;*
- 4) The court below further misapprehended the facts and the law in allowing a joinder of the respondent when the respondent did not set out any relief arising from the matter in the court below ;*
- 5) That the court below erred when it awarded damages to the claimant which were not pleaded nor was there any evidence of such damage sustained before the court; and*
- 6) That the court erred and misdirected itself in fact and law when it allowed the claimant to introduce new facts and issues that were not raised in the affidavit in opposition hence not allowing the appellant to respond to them.*

6.0 1ST APPELLANT'S HEADS OF ARGUMENTS

6.1 Heads of arguments were filed on behalf of the 1st appellant dated 31st December, 2020. Ground one and two were argued

together. The 1st appellant submitted that in terms of **Order 45 Rule 3(1)(a) and (2) of the RSC**, leave of court in this matter is not required where an action stems from a mortgage deed in which the receiver has power to take possession of the mortgaged property. Further that, clause 3 of the consent judgment between the 1st and 2nd appellant, endorsed by the court below granted leave for a writ of possession to be issued in event of default.

6.2 It was contended that the 1st appellant, by virtue of a deed of appointment dated 7th December, 2018, was given power to take possession of the mortgaged property. A third party mortgage dated 17th May, 2013 conferred the 1st appellant with the right to take over the property upon being appointed and also to sell the said property. Consequently, by letter dated 7th January, 2019, the respondent was informed of the appointment of the receiver. At a meeting held subsequently, it was agreed that the receiver takes over the mortgaged property and that the respondent would have access as a licensee until a buyer is found.

6.3 The 1st appellant contends that in terms of clause 2.1 of the deed of appointment, clause 8 of the third party mortgage and

clause 5 of the agricultural charge, the receiver was given power to take possession of the mortgaged property and for that purpose, to take out proceedings in the name of the borrower. He would further sell the property provided the borrower was given seven days' notice of the intention to sell.

6.4 The case of **Finance Bank Zambia Limited Plc v Lamasat International Zambia Limited** ⁽⁷⁾ was cited where the court stated that:

“A debenture holder has a right to exercise its contractual right pursuant to the debenture upon clear default.”

And further that:

“A debtor cannot restrain the appointment of a receiver by a creditor pursuant to a debenture, where there is a clear default by the debtor. The default disentitles the applicant from seeking the aid of equity.”

6.5 Ground three and four were also dealt with simultaneously. It was contended that the facts in question relate to an issue already resolved and any question seeking to reverse the consent judgment is intended to re-litigate the facts already determined by the court below. The case of **John Mukoma Kasanga and Others v Development Bank of Zambia and Others** ⁽⁸⁾ was cited where we made a distinction on when a

party can join a matter even after judgment. At pages 19 to 20 of that judgment, we said:

“We also wish to state that it is our considered view that the legal requirement that a person wishing to challenge a consent Judgment should commence a fresh action is not restricted to one who was a party to the action settled by consent Judgment. What determines whether or not a person is entitled to challenge a Judgment is the effect the said Judgment has on that person. Once that is established, then, in a Judgment ensuing from a trial, a none-party affected by it can apply to be joined post judgment if they were not aware of the proceedings. In this case, the person is not required to commence a fresh action in order to challenge the Judgment.

For a consent Judgment however, apart from establishing that the Judgment affects the person and they were not aware of the proceedings, the law categorically requires that the affected person must institute a fresh action to challenge the Judgment.

This position is supported by the case of Zambia Seed Company Limited v Chartered International (PVT) Limited S.C.Z Judgment No. 20 of 1999 and National Movement against Corruption v Sofrum Safaris and Others SCZ Judgment No. 16 of 2007.”

6.6 It was further contended that the respondent does not have a proper relief to be sought from the court that would justify his joinder to the proceedings. This is because the respondent

personally mortgaged the property and has not denied his indebtedness to the bank. Therefore, to join him to the proceedings would only protract the litigation and waste the court's time which would ultimately order foreclosure of the property.

6.7 It was also argued that the respondent's interest in the property has been diluted due to the fact that, in his capacity as director and shareholder of the 1st appellant, he pledged the mortgaged property as security in his personal capacity to secure the debt of the company. Having failed to pay back to the bank, the respondent has no interest to protect in the proceedings. Therefore, a joinder should not have been granted.

6.8 In relation to ground five, it was submitted on behalf of the 1st appellant that in order for a court to award damages to a party, the same must be specifically pleaded and proved before the court. This was not the case in the court below. The cases of **Continental Restaurant & Casino limited v Arida Mercy Chulu** ⁽⁹⁾ and **Philip Mhango v Dorothy Ngulube & Others** ⁽¹⁰⁾ were cited which espouse the principle that a party claiming a special loss must prove that loss and do so with evidence which

makes it possible for the court to determine the value of that loss with a fair amount of certainty.

6.9 It submitted that the court cannot grant a relief which has not been specifically pleaded and as such, the court below should not have awarded damages to the respondent in the absence of proof.

6.10 Lastly, in ground six, the 1st appellant contends that the lower court erred when it allowed the respondent to introduce facts and issues at paragraph 6 of his affidavit in reply (at page 213 of the record of appeal) which were not raised in his affidavit in opposition. The court below placed reliance on the same when it held that the appellants were guilty of forum shopping. As such, the appellants were not given an opportunity to defend themselves or explain why there was another action before another court.

6.11 We were urged to set aside the ruling of the court below and uphold the appeal.

7.0 **RESPONDENT'S HEADS OF ARGUMENTS**

7.1 On 23rd August, 2021, the respondent filed heads of argument. With respect to grounds one and two, the respondent submitted that it is not in dispute that no leave of court was sought prior

to the issuance of the writ of possession as can be discerned from the manner in which the ground is framed, which appears to suggest that the consent order executed between the appellants ousted the requirement of seeking leave to issue a writ of possession.

7.2 With respect to paragraph 3 of the consent judgment, the respondent contends that the question to be resolved by this court is whether the paragraph in issue can be construed as ousting the legal requirement for prior leave before issuing a writ of possession. The respondent took the view that the said consent judgment in issue is in fact merely an agreement between the parties. Therefore, when seeking such leave, the applicant must demonstrate that every person in actual possession has received notice of the proceedings.

7.3 It was contended that it is clear that the requirement to obtain leave cannot be substituted by clause 3 of the consent judgment. Citing the case of **Tap Zambia Limited v Percy Limbusha & Others** ⁽¹¹⁾, it was submitted that any irregularly issued process is liable to be set aside, the execution creditor is entitled to an order for restitution and that damages resulting

from such wrongful execution ought to be ordered to be assessed and paid by the execution creditor.

7.4 The court took into account the evidence before it and found that there was no evidence that the respondent was notified of the proceedings and impending execution in form an application for leave. Therefore, the lower court was on firm ground to set aside the writ of possession and the resultant execution.

7.5 In response to grounds three and four, the respondent relied on its arguments and authorities advanced in the court below with respect to joinder. In particular, reliance was placed on **Halsbury's Laws of England, 4th Edition. Vol. 16. para. 1040 and 1541, Attorney General v Tall & Another ⁽¹¹⁾ and Simbeye Enterprises Limited & Investrust Merchant Bank (Z) Limited v Ibrahim Yousuf ⁽¹²⁾.**

7.6 It was submitted that the cited authorities state the position of the law with respect to an interested party affected by a consent judgment executed by parties to the exclusion of such interested party. That such an affected party's recourse is in joining the proceedings and have his cause heard whilst the consent judgment should either be stayed or set aside as per

the case of **John Mukoma Kasanga and Others v Development Bank of Zambia and Others** ⁽⁸⁾.

7.7 In response to ground five, the respondent reiterated its authorities submitted in the court below. It was further submitted that damages arising from a wrongful execution are consequential in nature as per the case of **Tap Zambia Limited v Percy Limbusha & Others** ⁽¹¹⁾ where the Supreme Court, after citing section **14(2) of the Sheriff's Act, Chapter 37 of the Law of Zambia** stated:

“It is clear, therefore, that a writ of execution which is improperly or irregularly issued ought to be set aside at any stage so that, in an appropriate case, liability should attach to the party on whose demand the irregular execution process has been issued.”

7.8 Therefore, once an execution levied is declared unlawful, consequential damages ought to be assessed and the issue of quantum is one which can be dealt with at assessment. In any event, the respondent contended that it did pray for damages arising from wrongful execution. We were urged to dismiss the appeal with costs for lack of merit.

8.0 **OUR DECISION**

8.1 We have considered the appeal, the arguments advanced and authorities cited by learned counsel for the parties. We propose to approach this appeal by first dealing with the issues on joinder raised in grounds 3 and 4 then moving on to the other grounds. The argument in grounds three and four is that the respondent had in sufficient interest in the matter to have warranted joinder by the court below to the proceedings between the appellants.

8.2 The facts not in issue are that the 1st appellant had obtained a loan from DBZ, several forms of security were executed such as agricultural fixed and floating debenture charges, the relevant security being a third party mortgage executed by the respondent as mortgagor. The respondent was also a director/shareholder in the 1st appellant company. Upon default, the 1st appellant was placed under receivership. The appointed receiver subsequently sold the property to the 2nd appellant. Pursuant to a consent order entered into between the 1st and 2nd appellant a writ of possession for vacant possession was executed.

- 8.3 The 1st appellant's contention in respect of the order for joinder made by the lower court is that the respondent has insufficient interest in the matter even though he was the title holder to the property. This is on the basis that the respondent had pledged his property as security by executing a third party mortgage, and failed to discharge the loan. Therefore, he has no *locus standi* to be joined to the proceedings between the appellants.
- 8.4 It is trite that a court can order a joinder where it appears to the court that all persons who may be entitled to or claim some share of interest in the subject matter of the suit or who may be likely to be affected by the result require to be joined. **Order 14 Rule 5 of the High Court Act** as read with **Order 15 Rule 6 subtitle 4** of the **White Book** empowers the court where it thinks fit to order any persons to be added as a party.
- 8.5 The case of **Mike Hamusonde Mweemba** (supra) the court stated that a court can order a joinder of it appears to the judge that all persons who may be entitled to or claim some share or interest in the subject matter of the suit or who may be likely affected by the result. In the case of **Abel Mulenga and Others vs Chikumbi and Other** ⁽¹⁴⁾, the court stated that in order for a

party to be joined to an action, the party ought to demonstrate that they have an interest in the subject matter of the action.

- 8.6 The issue is simply whether the respondent had demonstrated that he had sufficient interest to be joined to the suit. Sufficient interest is the overriding and governing principle in respect of applications for joinder.
- 8.7 From the facts of the case namely that the respondent is the registered owner of the property, pledged as security for the loan, executed in favour of the lender subject of the writ of possession, we are of the view that the respondent had shown sufficient interest to be joined to the proceedings. The personal interest or identifiable stake that the respondent has in the matter was demonstrated, which in our view was proximate enough to stand apart from anything that is merely peripheral. The respondent has not only a stake but legal interest in the subject matter of proceedings which he is likely to be affected by.
- 8.8 We therefore hold that as title holder of the mortgaged property, it is undisputable that the respondent would be affected by the suit in which a consent judgment was entered into with a

default clause providing for possession of the mortgaged property pledged by the respondent as security.

8.9 We therefore cannot fault the learned judge in the court below for joining the respondent as a party to the suit. We find no merit in grounds three and four for the above reasons.

8.10 Grounds one and two are challenging the setting aside of the writ of possession by the court below. The 1st appellant has taken the view that leave to issue the writ of possession was entrenched in the receiver's deed of appointment which vested him with the inherent right to take possession of the mortgaged property without notice, and further that clause 3 of the consent judgment granted leave for a writ of possession to be filed in the event the respondent failed to give vacant possession.

8.11 It is trite law that leave to issue a writ of possession ought to be sought in cases which seek to enforce a judgment for possession of land. **Order 45 Rule 3(2) and (3)(a) of the RSC** provide as follows:

3. - Enforcement of judgment for possession of land

(2) A writ of possession to enforce a judgment or order for the giving of possession of any land shall not be issued without the leave of the Court except where the judgment

or order was given or made in a mortgage action to which Order 88 applies.

(3) Such leave shall not be granted unless it is shown -

(a) that every person in actual possession of the whole or any part of the land has received such notice of the proceedings as appears to the Court sufficient to enable him to apply to the Court for any relief to which he may be entitled, and

(b)

The rationale for seeking leave is to ensure that the person in actual possession of the land subject of the mortgage being enforced, is made aware of the proceedings and availed an opportunity to seek any relief from the court to which he may be entitled to.

8.12 The 1st appellant contended that by virtue of the powers contained in the deed of appointment the receiver was clothed with the power of possession without notice. They place emphasis clause 3 of the consent judgment that it provided for leave to issue a writ of possession in the event of a default. The said clause 3 is couched in the following terms:

“3. THAT should the defendant fail to give vacant possession as herein above agreed, the Plaintiff should be at liberty to execute by filing a writ of possession.”

8.13 The 1st appellant further contends that the respondent was given notice by the receiver of the possession of the property by letter to the board of directors of the company dated 7th January, 2019 and notice of the appointment of the receiver. The respondent, apart from being the registered owner and mortgagor of mortgaged property, is also a board member of the 1st appellant, and as such was, argued to have been aware of the possession of the property. To further show that the respondent was personally notified of the appointment of the receiver, reference was made to the letter dated 8th July, 2020 at page 175 of the record of appeal, in which the 1st appellant alluded to his appointment as Receiver and also raised concerns of asset stripping at the premises.

8.14 Before determining whether the writ of possession was irregularly issued warranting the setting aside by the court below, we must ascertain whether the respondent was aware of the proceedings between the 1st and 2nd appellant. The said proceedings sought specific performance of the sale of subdivision C of S/S No.30 of Farm No. 397 Lusaka and possession of the said property.

8.15 In our view, the respondent was not aware of these proceedings which culminated into consent judgment for the possession of property belonging to the respondent pledged as security for a loan.

8.16 The 1st appellant contends that the deed of appointment as Receiver/Manager empowered it to exercise all powers over or in respect of the security Assets. This is not in dispute, as a receiver has such power amongst other. But does this power extend to taking possession of the property without following the law, such as taking out proceedings against the borrower/mortgagor?

8.17 Our view is that the above power did not entitle the 1st appellant to arbitrarily issue a writ of possession without obtaining leave of court. The 1st appellant ought to have not only notified the respondent of the proceedings but sought leave to issue a writ of possession by instituting foreclosure proceedings against the mortgagor of the property.

8.18 The essence of justice entails that a person cannot be liable for on order judgement unless he had been given fair notice of the proceedings to enable him appear and defend himself. The respondent had *locus standi* to challenge the execution of the

writ of possession. In fact the 1st appellant was fully aware that it needed leave of court to obtain possession of the mortgage property. We say so because under cause No. 2020/HP 966, the 1st appellant (in receivership) commenced an action against the respondent seeking amongst other reliefs, possession of the mortgaged property.

8.19 The point not comprehended by the 1st appellant is that regardless of the fact that there was default in the repayment of the loan, and the property was mortgaged as security, the respondent was not aware of the proceedings subject of the consent order depriving him of his property. The issue whether the respondent made out a good defence at this stage is not relevant. The key issue being that the respondent was not aware of the proceedings. Whilst in the suit subject of appeal, the 1st appellant issued a writ of possession without leave in respect of the same subject matter.

8.20 We therefore cannot fault the court below for holding that the writ of possession was irregularly issued, compounded by the fact that no leave of court was obtained before executing. We accordingly hold that the writ of possession was irregularly issued.

- 8.21 The fifth ground attacks the award of damages occasioned by the execution. The 1st appellant argues that the said damages were neither pleaded nor proved. Having held earlier on in grounds one and two that the writ of possession was irregularly issued and by implication not lawfully executed, we cannot set aside the award of damages. We find no merit in this ground.
- 8.22 In ground six, the 1st appellant contends that the respondent introduced new facts in paragraph 6 of his combined affidavit in reply at page 213 of the record of appeal to which it had no opportunity to challenge and the lower court took into account the facts deposed therein.
- 8.23 The said paragraph six deposed that the respondent was served with an amended writ of summons under Cause No. 2020/HP/966 by the 1st appellant on 5th October, 2020, being the day the respondent applied for joinder. In that cause, the parties are Siakamwi Chikuba (suing in his capacity as receiver of LC & DK Limited) and the respondent herein, Lovemore Chikuni Chinyama.
- 8.24 Among the claims endorsed therein, are an injunction to restrain the respondent from interfering with the receivership work; possession of the mortgaged property; an order to return

all secured items as per the fixed and floating debenture over all assets of the company.

8.25 The respondent did not advance any arguments in opposition with respect to ground six.


8.26 We accept that, while these facts were introduced in the affidavit in reply, the 1st appellant was at liberty to have applied to expunge from the affidavit rather than wait until the ruling was rendered and raising the issue on appeal.

8.27 The learned Judge, in her ruling, condemned the parties' conduct of not disclosing that there was another matter before the court, which could have led to conflicting decisions being rendered by courts of equal jurisdiction in view of the claims sought.

8.28 We take the view that the facts deposed to in paragraph six aforestated even if expunged have no relevance or impact on the outcome of the appeal as regards the issues in contention namely the joinder and setting aside of the writ of possession subject of this appeal. For the forgoing reasons, we find no merit in ground six.

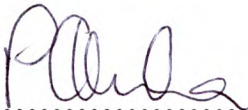
9.0 CONCLUSION

- 9.1 Having found no merit in the grounds raised, we accordingly uphold the judgment of the lower court and dismiss the appeal.
- Costs to the responded to be taxed in default of agreement.


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F. M. Chishimba

COURT OF APPEAL JUDGE


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P. C. M. Ngulube

COURT OF APPEAL JUDGE


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M. J. Siavwapa

COURT OF APPEAL JUDGE