

**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)



2023/HP/2047B

BETWEEN:

**JOHN MUKOMA KASANGA
LUNZUA BEVERAGES LIMITED**

**1st PLAINTIFF
2nd PLAINTIFF**

AND

**AGRITECH ZAMBIA LIMITED
MEMWAZI AUCTIONEERS LIMITED**

**1st DEFENDANT
2nd DEFENDANT**

(By original action)

AND

BETWEEN:

AGRITECH ZAMBIA LIMITED**PLAINTIFF**

AND

**LECHWE EXPRESS LOGISTICS LIMITED
LUNZUA BEVERAGES LIMITED
JOHN MUKOMA KASANGA
MARK JOHN FODEN
GEORGE MICHAEL ROBERTS
CALEB AMOS MULENGA**

**1st DEFENDANT
2nd DEFENDANT
3rd DEFENDANT
4th DEFENDANT
5th DEFENDANT
6th DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS 11th
DAY OF APRIL, 2024**

For the Plaintiffs & 2nd & 3rd Defendants on the counterclaim : Mr. H.A Chizu, Messrs Chanda Chizu & Associates

For the 1st Defendant and Plaintiff on the counterclaim : Mr. Daudi Banda and Mr. Eugene Sakala, Messrs Abigail & Chama Advocates

For the 2nd Defendant : No appearance

For the 1st, 3rd, 4th, 5th & 6th Defendants on the counterclaim : no appearance

R U L I N G

CASES REFERRED TO:

1. *Salomon v Salomon and Company* 1897 AC 22
2. *Dunlop Pneumatic Company Limited v Selfridge Limited* 1915 AC 847
3. *Bellamano v Ligure Lombarda Limited* 1976 ZR 267
4. *Ashmore v British Coal Corporation* 1990 2 ALL ER 981 CA
5. *Development Bank of Zambia and another v Sunvest Limited and another* 1995-1997 ZR 187
6. *Bank of Zambia v Jonas Tembo and another* 2002 ZR 103
7. *Pivar v Graduate School of Figurative Art* 290 AD 2d 212, 212 (1st Dept 2002)
8. *Thompson Lloyd v Ewart Limited* 2008 ZR 32
9. *African Life Financial Services Limited v Faith Simbao and another* 2011 Vol 2 ZR
10. *Nissan Motor Acceptance Corp v Scialpi* 94 AD 3d (2d Dept 2012)
11. *Midlands Breweries Limited v Heinrich Fruehauf (PTY) Limited* 2013 Vol 2 ZR 133
12. *Bernard Kutalika v Dainess Kalunga Appeal No 73 of 2013*
13. *Attorney General v Seong San Company Limited* 2013 Vol 2 ZR 371
14. *Gaedonic Automotives Limited and Patrick Chisenga Mundundu v Citizens Economic Empowerment Commission* SCZ No 39 of 2014
15. *Genger v Genger* 2016 N.Y Slip Op 30602 (sub Ct N. Y 2016)
16. *Aupie Agro Forms Limited v Easchl Transport and Logistics* 2017/HPC/0462

LEGISLATION REFERRED TO:

1. *The High Court Rules, Chapter 27 of the Laws of Zambia*
2. *The Rules of the Supreme Court of England, 1999 Edition*
3. *Law of Distress Amendment Act 1886*
4. *Law of Distress Amendment Act 1906*

OTHER WORKS REFERRED TO:

1. *Halsbury's Laws of England, 4th Edition, Vol 13*
2. *Halsbury's Laws of England, 4th Edition, Volume 37*
3. *Halsbury's Laws of England, 5th Edition, Volume 13*

1. INTRODUCTION

1.1 Agritech Zambia Limited, the 1st Defendant in this matter, filed an application on 5th December, 2023, raising the following preliminary issues:

- i. *Whether John Mukoma Kasanga and Lunzua Beverages Limited have locus standi to bring a claim directly*

against a landlord where the goods were seized pursuant to the common law right of a landlord to levy distress for unpaid rent;

- ii. Whether the commencement of these proceedings is an abuse of the Court process, in view of the proceedings under cause number 2022/HP/0688 on the same or similar issues, which were dismissed under the aforesaid action; and*
- iii. Further and alternatively, the application for stay of sale of goods is incompetent before this Court, in the absence of John Mukoma Kasanga and Lunzua Beverages Limited paying into Court, the sum representing the rental arrears.*

1.2 The application was supported by an affidavit and a List of Authorities and Skeleton Arguments. John Mukoma Kasanga and Lunzua Beverages Limited, in opposing the application, filed an affidavit in opposition and a List of Authorities and Skeleton Arguments in opposition on 6th February, 2024.

2. BACKGROUND

2.1 John Mukoma Kasanga and Lunzua Beverages Limited, as plaintiffs, commenced this matter on 16th November, 2023, by Writ of Summons, which is accompanied by a statement of claim and the other requisite documents claiming:

- i. A declaratory Order that the detention of John Mukoma Kasanga and Lunzua Beverages Limited's goods is wrongful and unlawful;*
- ii. An Order to declare the advertisement process and the sale null and void, and the same to be set aside;*

- iii. *An Order to compel Agritech Zambia Limited and Memwazi Auctioneers Limited to release John Mukoma Kasanga and Lunzua Beverages Limited's goods.*
- iv. *Damages against Memwazi Auctioneers Limited for unlawful or wrongful advertisement and sale;*
- v. *An Order against Agritech Zambia Limited and Memwazi Auctioneers Limited to pay for the value of the goods to be assessed;*
- vi. *Damages and compensation against Agritech Zambia Limited and Memwazi Auctioneers Limited for John Mukoma Kasanga and Lunzua Beverages Limited's loss of use of their goods;*
- vii. *Damages for conversion and/or trespass;*
- viii. *Interest on the money found due;*
- ix. *Costs.*

2.2 When the originating process was filed, John Mukoma Kasanga and Lunzua Beverages Limited, also applied ex-parte, to stay the sale of the goods that were seized. That Order was granted on 16th November, 2023. Agritech Zambia Limited entered appearance and filed its' defence and counterclaim, as well as the other documents on 1st December, 2023.

2.3 On 11th January, 2024, Agritech Zambia Limited applied ex-parte for leave to serve Lechwe Express Logistics Limited, the 1st Defendant on the counterclaim, by substituted service, as it no longer operates at its' registered address. The application was also made to serve George Michael Roberts, the 5th Defendant on the counterclaim, on the basis that he had refused to give his contact details, on being asked to do

so by phone. The application was granted on 25th January, 2024.

3. SUBMISSIONS AT THE HEARING

SUBMISSIONS BY COUNSEL FOR AGRITECH ZAMBIA

- 3.1 In making the application, Counsel for Agritech Zambia Limited stated that they had raised Three (3) questions in the application. In that regard, he stated that the first question, related to whether John Mukoma Kasanga and Lunzua Beverages Limited have locus standi to bring the action directly against the landlord, who enjoys a common law right to levy distress for unpaid rentals.
- 3.2 Counsel stated that the second question was in relation to whether these proceedings are an abuse of the Court process, in view of the proceedings under cause number 2022/HP/0688, when the claims were dismissed under that action. The third question was stated as being, whether the stay of execution was competent, in view of the fact that John Mukoma Kasanga and Lunzua Beverages Limited had not paid into Court, the amount representing the rental arrears.
- 3.3 In respect of the first question, the submission was that the dispute in this matter, arose from a landlord and tenant relationship between Agritech Zambia Limited and Lechwe Express Logistics Limited. Counsel stated that Lechwe Express Logistics Limited fell behind in the payment of rentals during the duration of the lease. Thus, Agritech Zambia Limited levied distress at the premises thrice, the last being on 23rd November, 2023.

- 3.4 Counsel's further submission was that, distraining for rent is a common law remedy, that entitles a landlord to levy distress, and to seize any moveables on properties, regardless of ownership. As authority, the case of ***African Life Financial Services Limited v Faith Simbao and another*** ⁽⁸⁾ was relied on, as well as ***Halsbury's Laws of England, 5th Edition, Volume 13 at paragraph 928.***
- 3.5 It was also submitted, that where goods of a third party are subject to distress, the appropriate person to make an application is the tenant, unless the third party is a protected party. ***Paragraph 950 of Halsbury's Laws of England*** was cited as authority in support of the submission.
- 3.6 Counsel added that where distraint has taken place, and a party wishes to stop the sale, they must take out proceedings in replevin, in the County Court, being the Subordinate Court for payment, as stated in ***paragraph 1045 of Halsbury's Laws of England.*** It was submitted that John Mukoma Kasanga and Lunzua Beverages Limited had not done so, and neither had they provided security for rent as required. The contention was further that they had no locus standi to commence the proceedings.
- 3.7 As regards the second question, Counsel submitted that Lechwe Express Logistics Limited who was the tenant, commenced an action under cause number 2022/HP/0688, in which the reliefs sought were essentially the same as those sought in this matter. The submission was that one of the reliefs that Lechwe Express Logistics Limited sought in that cause, was to restrain Agritech Zambia Limited from

seizing the goods, and an Order of interim injunction. However, that matter was dismissed with costs.

- 3.8 Counsel further submitted that the director of Lechwe Express Logistics Limited, John Mukoma Kasanga, was aware of those proceedings, and he participated in the said litigation. It was noted that John Mukoma Kasanga now sought to re-litigate the matter using Lunzua Beverages Limited, in which he is also a director.
- 3.9 The submission was that they seek to restrain Agritech Zambia Limited from seizing the goods and staying sale of the goods, which is similar to the injunction that was sought in cause number 2022/HP/0688. Therefore, the action is an abuse of the Court process.
- 3.10 It was contended that John Mukoma Kasanga should have joined the action under cause number 2022/HP/0688, as an interested party. However, he waited for more than Seven (7) months to institute these proceedings, under the guise of Lunzua Beverages Limited.
- 3.11 On the last question, it was Counsel's submission, that proceedings in replevin, claiming a re-delivery of the goods must be commenced by Writ of Summons. It was noted that an application to stay execution was made, which made no specific reference to the provision of the law that was relied on, in making application.
- 3.12 Counsel stated that assuming that the application could be brought, it should have been preceded by John Mukoma Kasanga and Lunzua Beverages Limited paying the sum of the rental arrears into Court, which had not been done. On that basis, the prayer was that the matter be dismissed.

**RESPONSE BY COUNSEL FOR JOHN MUKOMA KASANGA
AND LUNZUA BEVERAGES LIMITED**

- 3.13 In response, Counsel submitted that they strongly opposed the application, and relied on the affidavit in opposition and the List of Authorities and Skeleton Arguments in opposition, which were filed on 6th February, 2024.
- 3.14 The response to the first question was that John Mukoma Kasanga and Lunzua Beverages Limited have locus standi in these proceedings, for the simple reason that the seized property belongs to them, and it was in the possession of Lechwe Express Logistics Limited, in a warehouse that belongs to Agritech Zambia Limited, which Lechwe Express Logistics Limited was renting.
- 3.15 Counsel also submitted that undisputed proof had been exhibited, which showed ownership of the property, hence John Mukoma Kasanga and Lunzua Beverages Limited have locus standi in the proceedings. It was added that as the goods were in the custody of a third party, the proper mode of commencement of the action was by Writ of Summons. Counsel noted that the matters in issue are controversial, as Agritech Zambia Limited had even brought in other parties, by the so-called original action, who were not party to this action.
- 3.16 With regard to the action being an abuse of the Court process, it was Counsel's submission that John Mukoma Kasanga and Lunzua Beverages Limited were not parties to the action in cause number 2022/HP/0688, as shown by the affidavit which was filed by Agritech Zambia Limited. He argued that there must be distinction between companies

that have separate legal personality, from the directors and shareholders.

- 3.17 The case of ***Salomon v Salomon*** ⁽¹⁾ was stated as having been cited as authority in support, in the List of Authorities and Skeleton Arguments in opposition. It was argued that, it therefore followed, that where a company is in rental arrears, then a company that is doing business with the said company is not equally in rental arrears. Counsel stated that they were alive to the common law right to distrain for rentals on property found at the premises.
- 3.18 However, his submission was that the question that arose, was whether the property found at the premises when distrained, and the owner coming out in the open before the sale, should the landlord ignore the rights of the owner and sell the property?
- 3.19 The view taken, was that common law rights are subject to statute, and statute had prescribed how a challenge to someone who distrains for rent should be done. It was stated that where a notice of claim is filed to goods that are seized, interpleader summons, are taken out, as prescribed in ***Order 17 (1), Order 17/1/2 and Order 17/2A of the Rules of the Supreme Court of England, 1999 Edition.***
- 3.20 Counsel submitted that the said procedure is technical, and it requires the person who is executing, being the landlord, Memwazi Auctioneers Limited, in this case, to issue interpleader proceedings before the sale is done. The submission was further that the said procedure was not followed, and Counsel for Agritech Zambia Limited had argued that only a bailiff could do so. The position taken by

Counsel, was that to the contrary, a reading of the Order, reveals that it provides that any person or a stakeholder, can take out the application.

- 3.21 He added that in this case, the stakeholder who executed is Memwazi Auctioneers Limited, who ignored the statutory provisions. Counsel still in submission, argued that statutory provisions override the common law, and that in any case, the properties were subject to statutory provisions, especially where the owner denies being a tenant under the ***Landlord and Tenant (Business Premises) Act***.
- 3.22 Therefore, it was wrong for Memwazi Auctioneers Limited to proceed with the sale, without considering the rights of John Mukoma Kasanga and Lunzua Beverages Limited.
- 3.23 On the last question, Counsel submitted that it involved whether a stay of execution could be claimed without paying the rental arrears into Court. He stated that their response to that question, was that John Mukoma Kasanga and Lunzua Beverages Limited, were on terra firma in trying to protect their rights, as their goods were threatened to be sold illegally, and without being accorded an opportunity to be heard, using the general provisions of the law, which empower a Court to intervene.
- 3.24 It was also submitted that John Mukoma Kasanga and Lunzua Beverages Limited contended that they do not owe Agritech Zambia Limited, so how do they pay, when the matter is subject of litigation? Counsel denied that the application was for an Order of interim injunction, as argued by Counsel for Agritech Zambia Limited.

3.25 The prayer was that the preliminary issues be dismissed so that the matter could be heard on its' merits, especially that a lot of parties had been brought into the action, which demonstrated that there are a lot of issues, which could only be resolved by the matter being commenced by Writ of Summons.

REPLY BY COUNSEL FOR AGRITECH ZAMBIA LIMITED

3.26 In reply, Counsel stated that it had been contended that there a lot of issues in controversy in this matter, that could not be resolved by preliminary determination. However, it was Counsel's submission that under **Order 14A of the Rules of the Supreme Court of England**, a matter may be decided, without looking at the complexity of the issues. Counsel also took the view, that the question of whether a landlord can distrain any goods or chattels found on their premises, is one that would, once determined, dispose of a matter.

3.27 It was reiterated that the case of **African Life Financial Services Limited v Faith Simbao and another** ⁽⁸⁾ and **Halsbury's Laws of England**, make it clear, that the right is sacrosanct. Counsel added that the Court should not be bothered to determine a matter where rent is due, and the law provides a process outside the Court for the recovery by distraining.

3.28 Counsel still in reply, stated that supposing that John Mukoma Kasanga and Lunzua Beverages Limited were protected persons under the **Law of Distress Amendment Act 1886 and 1906**, they had failed to establish what sort of protected persons they were.

- 3.29 It was also submitted that John Mukoma Kasanga and Lunzua Beverages Limited, had argued that they had no relationship with Agritech Zambia Limited. The contention however, was that John Mukoma Kasanga and Lunzua Beverages Limited had also not shown what relationship they had with Lechwe Express Logistics Limited. Thus, they were strangers, who were trespassing on Agritech Zambia Limited's premises, and were not protected by the law.
- 3.30 In respect of the propriety of the notice of claim, Counsel's submission was that although distress accrues as a common law right, the procedure to exercise it and claim protection under it, is found in **Section 1 of the Law of Distress, Amendment Act 1908**. The argument was that it is not a notice of claim that is sent, but a declaration, stating that the tenant has no interest in the chattels, the amount due from the individual claiming ownership, undertaking to pay the landlord, and that the inventory is correct.
- 3.31 However, no such declaration had been filed. Counsel also submitted that while they appreciated the arguments on the separate legal personality of companies, no differentiation between the directors and shareholders had been made. It was stated that a shareholder is separate from a company but a director, by virtue of their position, is an agent of a company. Thus, any notice on an agent, is notice on a company.
- 3.32 Accordingly, Counsel submitted that Lunzua Beverages Limited had notice of the proceedings under cause number 2022/HP/0688, as its' director John Mukoma Kasanga is a director in the company, that was a party in that cause.

However, despite the notice, John Mukoma Kasanga sat back and waited for Nine (9) months before commencing this action.

4. DECISION OF THIS COURT

4.1 I have considered the preliminary issues that have been raised pursuant to **Order 33 Rules 3 and 7** and **Order 14A of the Rules of the Supreme Court of England, 1999 Edition. Order 33 Rule 3 of the Rules of the Supreme Court of England** states that:

“The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.”

4.2 The provisions of **Order 33 Rule 7 of the said Rules of the Supreme Court of England** are:

“If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such Judgment therein as may be just.”

4.3 On the other hand, **Order 14A of the Rules of the Supreme Court England**, states that:

“(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that -

(a) such question is suitable for determination without a full trial of the action, and

(b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.

(2) Upon such determination the Court may dismiss the cause or matter or make such Order or Judgment as it thinks just.”

4.4 I will deal with the questions that have been raised one by one.

WHETHER JOHN MUKOMA KASANGA AND LUNZUA BEVERAGES LIMITED HAVE LOCUS STANDI IN THESE PROCEEDINGS?

4.5 Mordecai Siwakwi in deposing to the affidavit filed in support of the application, stated that the cause of action in this matter arose from a landlord and tenant relationship between Agritech Zambia Limited and Lechwe Express Logistics Limited, as shown by the tenancy agreement which was exhibited as ‘MS1’.

4.6 Mordecai Siwakwi also averred that Lechwe Express Logistics Limited fell behind in rentals, and Agritech Zambia levied distress Three (3) times, being on or about 5th May, 2022, 13th July, 2022 and 23rd November, 2023.

- 4.7 It was also stated that on or about 6th May, 2022, Lechwe Express Logistics Limited commenced proceedings under cause number 2022/HP/0688, seeking quiet possession, a rental account and an Order of injunction, restraining Agritech Zambia Limited from seizing goods at the premises. The Originating Notice of Motion that was filed in that cause was exhibited as 'MS2'.
- 4.8 The averment was that as evidenced, by exhibit 'MS4', that matter was dismissed. It was contended that as advised by the advocates for Agritech Zambia Limited, which advice Mordecai Siwakwi verily believed to be true, the rightful claimant, where goods are distrained, including those for a third party, is the tenant, and not strangers to the tenancy.
- 4.9 The case of ***African Financial Services Limited v Faith Simbao and others*** ⁽⁹⁾ as well as the provisions of ***paragraphs 950 and 908 of Halsbury's Laws of England, 5th Edition, Vol 13, (2007 re-issue)*** were relied on. The contention was that, distraining for rent is a common law remedy that entitles a landlord to seize whatever moveable's they find on the premises.
- 4.10 ***Paragraph 928 of the said Halsbury's Laws of England*** was stated as providing as follows:

“Under the common law, a landlord can prima facie seize and distrain for rent in arrears, all goods and chattels found on the premises out of which the rent issues. The goods and chattels may be the property of the tenant, or of a stranger, the landlord being entitled to have recourse to all the

chattels actually on his tenant's premises without reference to their ownership."

4.11 The provisions of ***paragraph 950 of Halsbury's Laws of England*** were also quoted, as stating that:

"Where a stranger's goods, (even those of a lodger or a subtenant) which are lawfully on the premises, are lawfully distrained by the landlord for rent due from someone else, the owner of the goods is entitled to be reimbursed their value from the person from whom the rent was due."

4.12 The argument was that the correct party to commence an action is the tenant, and not a third party, unless such a third party is a protected person. In that regard, the provisions of ***paragraph 1045 of Halsbury's Laws of England*** were stated as being:

"The tenant before sale, if he wishes to avoid the sale, must take out proceedings in replevin and by adoption of the principles state in the text two concurrent claims on the same point avoided."

4.13 Further reliance was placed on ***Paragraph 1081 of the said Halsbury's Laws of England*** which provides as follows:

"Replevin is a process to obtain a delivery to the owner of chattels which have been wrongly distrained or taken from him, upon his finding sufficient security for the rent and the costs of the claim and undertaking that he will pursue a claim against the distrainer to determine the right to distrain. The term 'replevin', is applied both to the

redelivery of the goods and the claim in which the right is tried. Wherever the object of proceedings is to procure the restitution of the specific chattels taken instead of compensation in damages, the proper course is an action of replevin; as an alternative, damages can be recovered in trespass."

- 4.14 It was argued that John Mukoma Kasanga and Lunzua Beverages Limited, in the Writ of Summons and statement of claim, seek inter alia, return of the goods that were seized. However, it was contended that this is not an action in replevin, by the tenant or by a third party that had paid a security deposit of the rentals due.
- 4.15 The argument was further that replevin proceedings are commenced in the County Court, which in this jurisdiction is the Subordinate Court, in line with paragraph **1084 of Halsbury's Laws of England**. Consequently, the contention was that John Mukoma Kasanga and Lunzua Beverages Limited lack locus standi to commence these proceedings.
- 4.16 In the affidavit in opposition, John Mukoma Kasanga deposed that himself and Lunzua Beverages Limited were not party to the tenancy agreement or any Court action. He also averred that a dispute had been disclosed from an interest in the goods. Therefore, it was wrong for Agritech Zambia Limited, to use a self-help remedy to sell the goods belonging to John Mukoma Kasanga and Lunzua Beverages Limited, through a warrant of distress which was challenged through a Notice of Claim, which was exhibited as 'JMK6'.

- 4.17 It was also his averment, that the correspondence which was exhibited as 'JMK7', revealed that a dispute was disclosed. Thus, the matter was properly commenced by Writ of Summons.
- 4.18 In the List of Authorities and Skeleton Arguments in opposition, John Mukoma Kasanga and Lunzua Beverages Limited, maintained that they have locus standi to commence these proceedings. They contended that Agritech Zambia Limited and Memwazi Auctioneers Limited claimed to have levied execution Three (3) times. However, there was no proof of the Notice and warrants of distress having been issued as required by the law. Therefore, the distress was illegal and unlawful.
- 4.19 It was also reiterated that John Mukoma Kasanga and Lunzua Beverages Limited, did not have a tenancy agreement with Agritech Zambia Limited, but rather, the goods were left with Agritech Zambia Limited which operated a warehouse as a business. The argument was that once John Mukoma Kasanga and Lunzua Beverages Limited disclosed their interest in the goods, it became wrong for Agritech Zambia Limited and Memwazi Auctioneers Limited to proceed with the sale of the goods.
- 4.20 Also, in argument, the contention was that once Agritech Zambia Limited and Memwazi Auctioneers Limited proceeded with the sale of the goods that did not belong to the tenant, the matter fell within the ambit of tort, whose relief is granted in an action that is commenced by Writ of Summons. It was stated that the only persons who would be

restricted in commencing the action, would be the landlord and tenant.

- 4.21 Further in argument, it was contended that companies have separate legal personalities at law, which is separate from the directors and shareholders.
- 4.22 Indeed, the affidavit evidence on record shows that John Mukoma Kasanga and Lunzua Beverages Limited challenged the seizure of the goods after Agritech Zambia Limited distrained on Lechwe Express Logistics Limited for rentals due. The Notice of Claim which was exhibited as 'JMK6' to the affidavit in opposition, was made pursuant to the ***Law of Distress Amendment Act, 1888***.
- 4.23 It is not in contention, that the distraining was done pursuant to a tenancy agreement between Agritech Zambia Limited and Lechwe Express Logistics Limited. What is also not in dispute, is that the right to distrain for unpaid rentals is a common law right. Under that right, a landlord has a right, prima facie to seize and distrain for rent in arrears, all goods and chattels found on the premises out of which the rent issues.
- 4.24 Those goods and chattels may be the property of the tenant or of a stranger, and the landlord is entitled to have recourse to all chattels actually on his tenant's premises without reference to ownership.
- 4.25 The issue that arises therefore, is whether John Mukoma Kasanga and Lunzua Beverages Limited, who were not party to the tenancy agreement between Agritech Zambia Limited and Lechwe Express Logistics Limited, can maintain an

action against Agritech Zambia Limited, the landlord and Memwazi Auctioneers Zambia Limited, the distrainor?

- 4.26 The arguments as advanced by Agritech Zambia Limited were that it is only the tenant, pursuant to **Section 1 of the Law of Distress Amendment Act 1908** who can maintain an action in replevin, as John Mukoma Kasanga and Lunzua Beverages Limited were not protected persons under that Act.
- 4.27 On the other hand, John Mukoma Kasanga and Lunzua Beverages Limited, argued that it was their goods that were seized, and therefore, they have an interest in the matter. It was further their argument, that as the goods were auctioned by Memwazi Auctioneers Limited after they had filed a notice of claim to the goods, under **Order 17 of the Rules of the Supreme Court of England**, that was wrongful, and constituted an action in tort, whose determination can only be done in a matter that is commenced by Writ of Summons.
- 4.28 John Mukoma Kasanga and Lunzua Beverages Limited also argued that Agritech Zambia Limited had joined a number of parties in the counterclaim, entailing that the matter is contentious. Thus, being a contentious matter, it could only have been properly commenced by Writ of Summons.
- 4.29 It was their argument, that this case is distinguishable from the case of **African Life Financial Services Limited v Faith Simbao and others** ⁽⁹⁾, as in that case, the claimant was not only in possession of a flat, but the due process of interpleader after a Notice of Claim was filed, was also followed.

- 4.30 However, that was not the position in this case, as after John Mukoma Kasanga and Lunzua Beverages Limited filed the Notice of Claim, what should have happened procedurally, was for the Bailiffs or whoever had levied execution, to issue interpleader summons, so that the question of ownership of the goods could have been determined, before proceeding with the sale.
- 4.31 **Order 17/1, Order 17/1/2, Order 17/2 and Order 17/2A of the Rules of the Supreme Court of England** were referred to on the procedure, with the stakeholder's interpleader being argued, as should have been employed in this matter.
- 4.32 In respect of commencing an action in replevin, which had been argued by Agritech Zambia Limited, John Mukoma Kasanga and Lunzua Beverages Limited contended that in the case of ***Pivar v Graduate School of Figurative Art*** ⁽⁷⁾ it was noted that in a replevin action, a plaintiff seeks the return of property, and not monetary damages, while in the case of ***Genger v Genger 2016 N.Y Slip Op*** ⁽¹⁵⁾ the Court stated that the objective of replevin, is the recovery of property, and the alternative relief or remedy, is the fixation of its' value, a claim to recover property is the general.
- 4.33 The case of ***Nissan Motor Acceptance Corp v Scialpi*** ⁽¹⁰⁾ was further relied on, as having held that to prevail in a replevin action, a plaintiff must establish that the defendant is in possession of property to which the plaintiff claims a superior right. The argument was that this is what John Mukoma Kasanga and Lunzua Beverages Limited seek to do in this matter.

4.34 **Order VI Rule 1 of the High Court Rules, Chapter 27 of the Laws of Zambia**, provides for the commencement of actions. It states as follows:

“Except as otherwise provided by any written law or these Rules, an action in the High Court shall be commenced, in writing or electronically by writ of summons endorsed and accompanied by-

(a) A statement of claim;

(b) List and description of documents to be relied on at trial;

(c) List of witnesses to be called by the Plaintiff at trial; and

(d) Letter of demand whose receipt shall be acknowledged by the Defendant or an affidavit of service attesting the service of the letter of demand, which shall set out the claim and circumstances surrounding the claim in detail.”

4.35 Therefore, going by the above, unless as provided by any written law or the High Court Rules, proceedings in the High Court are commenced by Writ of Summons. The argument by Agritech Zambia Limited was that proceedings in replevin have to be taken out in the County Court, which is the Subordinate Court, in line with the **Law of Distress Amendment Act 1908**.

4.36 **Replevin** is defined in **Black’s Law Dictionary by Bryan A. Garner, 9th Edition, West Publishing Co, Thomas Reuters, 2009 at page 1413** as:

"1. An action for the repossession of personal property wrongfully taken and detained by the Defendant, whereby the Plaintiff gives security for and holds the property until the Court decides who owns it.

2. A writ obtained from a Court authorising the retaking of personal property wrongfully taken or detained- also termed (in sense 2) writ of replevin."

4.37 *Paragraph 373 of Halsbury's Laws of England, 4th Edition, Volume 13*, states the meaning of replevin as follows:

"Replevin is a process to obtain a redelivery to the owner of chattels which may have been wrongfully distrained or taken from him, upon his finding sufficient security for the rent and costs of the action and undertaking that he will pursue an action against the distrainer to determine the right to distrain. The term replevin is applied both to the redelivery of the goods and the action in which the right is tried. Wherever the object of proceedings is to procure the restitution of specific chattels taken instead of compensation in damages, the proper course is an action of replevin, as an alternative, damages can be recovered in an action of trespass."

4.38 As to when replevin is available, *paragraph 374 of the said Halsbury's Laws of England, 4th Edition, Volume 13*, provides that:

“Replevin is not available where the distress was originally lawful, but whenever there has been a distress that is wholly illegal and not merely irregular or excessive, the tenant has his remedy in replevin. Thus, it lies where the relationship of landlord and tenant did not exist, where there was occupation but no demise at a fixed term, where no rent was in fact due or where rent due was released before distress, or where the tenant has satisfied the rent by payments on behalf of the landlord necessary to protect his own possession, or where the rent distrained for is not due though other rent is due, where the title of the person distraining has expired, and he is not entitled to rent, where the entry was illegal, where the goods have been detained after tender of rent and costs before the impounding; or where the things distrained are privileged. It may be resorted to in order to obtain return of all goods and cattle which may be lawfully distrained, but not of fixtures, animal ferae naturae in a wild state and other things which from their nature cannot be the subject of distress.”

- 4.39 From the above, what is noteworthy, is that proceedings in replevin are not available where the distress was lawful. In this matter, the assertion is that Lechwe Express Logistics Limited who was the tenant of Agritech Zambia Limited, fell behind in rentals, and distress was levied on goods which

included those being claimed by John Mukoma Kasanga and Lunzua Beverages Limited.

4.40 It has been seen that the right to distrain for unpaid rentals is a common law right, under which the distrainor has a right to levy distress on all goods found on the premises, including those for third parties.

4.41 **Paragraph 250 of Halsbury's Laws of England, 4th Edition, Volume 37**, states that:

“When a stranger's goods (even those for a lodger or sub-tenant) which are lawfully on the premises, are lawfully distrained by the landlord for rent due from someone else, the owner of the goods is also entitled to be reimbursed their value from the person from whom the rent was due.”

4.42 What is also worthy of note, is that the common law right to levy distress for unpaid rentals has been modified by statute, thereby giving a measure of protection to certain undertenants, lodgers and any other persons who are not tenants on the premises, and who do not have a beneficial interest in the tenancy of the premises or of any part of them.

4.43 Thus **Section 1 of the Law of Distress Amendment Act 1908** is as follows in provision:

“1. If any superior landlord shall levy, or authorise to be levied, a distress on any furniture, goods, or chattels of-

(a) any under tenant liable to pay by equal instalments often than every actual or customary quarter of a year a rent which would return in any whole year the full

annual value of the premises or of such part thereof as is comprised in the under tenancy or

(b) any lodger; or

(c) any other person whatsoever not being a tenant of the premises or of any part thereof, and not having any beneficial interest in any tenancy of the premises or of any part thereof,

for arrears of rent due to such superior landlord by his immediate tenant, such under tenant, lodger, or other person aforesaid may serve such superior landlord, or the bailiff or other agent employed by him to levy such distress, with a declaration in writing made by such under tenant, lodger, or other person aforesaid, setting forth that such immediate tenant has no right of property or beneficial interest in the furniture, goods, or chattels so distrained or threatened to be distrained upon, and that such furniture, goods, or chattels are the property or in the lawful possession of such under tenant, lodger, or other person aforesaid, and are not goods or live stock to which this Act is expressed not to apply ; and also, in the case of an under tenant or lodger, setting forth the amount of rent (if any) then due to his immediate landlord, and the times at which future instalments of rent will become due, and the amount thereof, and containing an undertaking to

pay to the superior landlord any rent so due or to become due to his immediate landlord, until the arrears of rent in respect of which the distress was levied or authorised to be levied have been paid off, and to such declaration shall be annexed a correct inventory, subscribed by the under tenant, lodger, or other person aforesaid, of the furniture, goods, and chattels referred to in the declaration ; and, if any under tenant, lodger, or other person aforesaid, shall make or subscribe such declaration and inventory knowing the same or either of them to be untrue in any material particular, he shall be deemed guilty of a misdemeanour.”

4.44 It will further be seen that under **Section 2 of the said Act**, it states that:

“If any superior landlord or bailiff or other agent employed by him after being served with the above mentioned declaration and inventory, and in the case of an under tenant or lodger after such undertaking as aforesaid has been given, and the amount of rent (if any) then due has been paid or tendered in accordance with that undertaking, levy or proceed with a distress on the furniture, goods, or chattels of the under tenant, lodger, or other person aforesaid, such superior landlord, bailiff, or other agent shall be deemed guilty of an illegal distress, and the under tenant, lodger, or other person aforesaid, may apply to a

justice of the peace for an order for the restoration to him of such goods, and such application shall be heard before a stipendiary magistrate, or before two justices in places where there is no stipendiary magistrate, and such magistrate or justices shall inquire into the truth of such declaration and inventory, and shall make such order for the recovery of the goods or otherwise as to him or them may seem just, and the superior landlord shall also be liable to an action at law at the suit of the under tenant, lodger, or other person aforesaid, in which action the truth of the declaration and inventory may likewise be inquired into."

4.45 Therefore, in line with the above, John Mukoma Kasanga and Lunzua Beverages Limited, being any other persons who were not party to the tenancy, should have served on the superior landlord, being Agritech Zambia Limited or the bailiff, Memwazi Auctioneers Limited or other agent employed by Agritech Zambia Limited, a declaration in writing made by them, setting forth that Lechwe Express Logistics Limited, the tenant had no right of property or beneficial interest in the furniture, goods, or chattels so distrained, and that such furniture, goods, or chattels was their property or in their lawful possession, and was not goods or live stock to which the Act expressly applied.

4.46 Further, they should have annexed to the declaration, a correct inventory, of the furniture, goods, and chattels referred to in the declaration.

- 4.47 A perusal of exhibit 'JMK6' to the affidavit in opposition, being the Notice of Claim, shows that it states that John Mukoma Kasanga and Lunzua Beverages Limited claimed the goods that were specified in the schedule that was annexed, which were taken under a warrant of execution.
- 4.48 The Notice further required that admission or dispute be made to the title to the goods within Seven (7) days from receipt of the Notice, and that if the claim was admitted to the Bailiff/Sheriff, they would only be liable to pay the fees or expenses incurred prior to the receipt of the Notice.
- 4.49 The Notice of Claim is clearly not a declaration, as required by **Section 1 of the Law of Distress Amendment Act, 1908**, as while an inventory of the goods that were seized was attached to the said Notice, there was no declaration that was made by John Mukoma Kasanga and Lunzua Beverages Limited that Lechwe Express Logistics Limited had no right of property or beneficial interest in the furniture, goods, or chattels so distrained, and that such furniture, goods, or chattels was their property or in their lawful possession, and that the said goods and chattels were not goods or live stock to which the Act expressly applied.
- 4.50 The Notice of Claim therefore did not comply with a declaration, as required by **Section 1 of the Law of Distress Amendment Act 1908**, and it was accordingly irregular.
- 4.51 As regards the argument by Agritech Zambia Limited that proceedings ought to have been taken out by Lechwe Logistics Express Limited, the tenant, for redelivery of the goods that were distrained, **paragraph 375 of Halsbury's**

Laws of England, 4th Edition, Volume 13 states that proceedings in replevin is Two (2) parts, as follows:

1. That is firstly, that the tenant gives security that they will prosecute an action for replevin, whereupon the goods are restored;
2. and secondly, an action being undertaken, in which the right to the goods is tried;

4.52 That paragraph further states that the action must be brought by the owner of the goods, that is the person who has the property, absolute or qualified in the goods. Then in *paragraph 376 of the said Halsbury's Laws of England*, it provides that the proceedings are commenced in the County Court, in the district in which the goods subject to replevin have been seized, irrespective of the value of the goods seized.

4.53 That this, is as per *Section 104 of the County Courts Act, 1959* and *Order 2 Rule 8 of the County Court Rules*. It has been seen from *Section 2 of the Law of Distress Amendment Act 1908* which has been cited above, that where there is illegal distress, proceedings are taken out before the Magistrate.

4.54 No such proceedings were ever taken out by John Mukoma Kasanga and Lunzua Beverages Limited in the Subordinate Court for illegal distress, pursuant to *Section 2 of the Law of Distress Amendment Act 1908*, after the Notice of Claim was issued.

4.55 Under *paragraph 382 of the said Halsbury's Laws of England, 4th Edition, Volume 13*, there is provision, that an action for damages lies for any wrongful distress, whether

it is illegal, irregular or excessive. The paragraph states that persons who may bring such actions may be the tenant, or the owner of the goods, or of a person having the mere enjoyment and use of the chattels.

- 4.56 It will further be seen that **paragraph 335 of Halsbury's Laws of England**, states that a tenant has a right to replevy goods before the sale.
- 4.57 The evidence shows that Lechwe Express Logistics Limited commenced proceedings under cause number 2022/HP/0688 by Originating Notice of Motion. The reliefs claimed in that matter, were for an Order of quiet enjoyment of the premises, known as Plot No 5190 Luanshya Road in the Light Industrial area, and an Order of injunction, restraining Agritech Zambia Limited from evicting, harassing, seizing Lechwe Express Logistics Zambia Limited's good, and from interfering with the quiet possession of the premises.
- 4.58 In the affidavit filed in support of that application, admission was made that rentals were due and owing to Agritech Zambia Limited, by Lechwe Express Logistics Limited. Exhibit 'MS4' to the affidavit in support of the application, shows that the matter was dismissed, on the basis that the matter was improperly before the Court, as a wrong mode of commencement had been employed, and the Court had no jurisdiction to hear and determine the matter.
- 4.59 Therefore, Lechwe Express Logistics Limited did not take out any proceedings in replevin, on the basis that the distress was not lawful. I have stated that proceedings are available for wrongful and illegal distress, and in this matter, that is

what is contended, on the basis that a notice of claim was issued under **Order 17 of the Rules of the Supreme Court of England**, after the goods were seized.

4.60 I have also stated that the said Notice of Claim was irregular. John Mukoma Kasanga and Lunzua Beverages Limited argued that while Agritech Zambia Limited had stated that it levied distress Three (3) times, there were no notices and warrants that had been exhibited to evidence the same, and despite a claim being raised to the goods seized in execution, the goods were sold. As to whether such a claim would be successful, depends on the facts and the evidence surrounding the matter, as well as the law.

4.61 Otherwise, such a claim can be made. Therefore, the first limb of the preliminary application fails, and it is dismissed.

WHETHER COMMENCING THIS ACTION IN VIEW OF THE PROCEEDINGS UNDER CAUSE NUMBER 2022/HP/0688 IS AN ABUSE OF THE COURT PROCESS?

4.62 In deposing to the affidavit filed in support of the application, Mordecai Siwakwi, averred that Lechwe Express Logistics Limited which is the entity that had the tenancy with Agritech Zambia Limited, commenced proceedings under cause number 2022/HP/0688, and that the said proceedings were exhibited as 'MS2'. However, by the Order which was exhibited as 'MS4', the proceedings were dismissed.

4.63 It was also his averment, that exhibit 'MS5' being the printout from the Patents and Company Registration Agency (PACRA) for Lechwe Express Logistics Limited and Lunzua

Beverages Limited, revealed that they have a common shareholder and director, being John Mukoma Kasanga.

- 4.64 In the List of Authorities and Skeleton Arguments, **Order 18 Rule 19/15 of the Rules of the Supreme Court of England** was cited, as explaining the term abuse of the Court process. The case of **Ashmore v British Coal Corporation** ⁽⁴⁾ was also relied on, stating that *Stuart Smith LJ* in that matter, defined abuse of Court process, as including the words frivolous and vexatious, which generally refer to a groundless action, with no prospects of success, often raised to embarrass or annoy the other party to the action.
- 4.65 It was also stated that *Stuart Smith LJ*, noted in that matter, that it would be an abuse of the Court process, to relitigate the same issues, since it would defeat the whole purpose of having test claims.
- 4.66 The case of **Development Bank of Zambia and another v Sunvest Limited and another** ⁽⁵⁾ was also cited as authority, and it was argued that in this case, the tenant Lechwe Express Logistics Limited, commenced an action against Agritech Zambia Limited, under cause number 2022/HP/0688, which was dismissed.
- 4.67 The contention was further that this action was commenced under the guise of the director of the tenant, John Mukoma Kasanga and a related company, Lunzua Beverages Limited, seeking the same or similar reliefs that were claimed in cause number 2022/HP/0688. Therefore, this action is an abuse of the Court process.
- 4.68 In response, John Mukoma Kasanga and Lunzua Beverages Limited argued that the case of **Development Bank of**

Zambia and KPMG Peat Marwick v Sunvst Limited and Sun Pharmaceuticals Limited ⁽⁵⁾ does not apply. This contention was made on the basis, that the parties in this matter, and those in cause number 2022/HP/0688, are not the same.

- 4.69 The argument was further that the claims that were made in cause number 2022/HP/0688 are not the same, as those that have been made in this matter.
- 4.70 The case of **Bank of Zambia v Jonas Tembo and another** ⁽⁶⁾ was cited as authority for the principle of res judicata. Thus, John Mukoma Kasanga and Lunzua Beverages Limited argued that they could not be covered by the same blanket as those parties in cause number 2022/HP/0688, as they are independent entities. Pushing the argument further, it was stated that the legal position is that once a company is incorporated, it becomes an independent legal entity. Consequently, it has legal personality.
- 4.71 The provisions of **Section 16 of the Companies Act No 10 of 2017** were cited as further authority for this, as well as the case of **Salomon v Salomon and Company** ⁽¹⁾. Other cases relied on as authority, were **Thompson Lloyd v Ewart Limited** ⁽⁸⁾ and **Midlands Breweries Limited v Heinrich Fruehauf (PTY) Limited** ⁽¹¹⁾.
- 4.72 The argument was that the tenancy agreement must be enforced specifically between the parties that executed it, and that such enforcement must not be on a party that was not party to it. It was argued that John Mukoma Kasanga and Lunzua Beverages Limited were strangers to the tenancy agreement, and the doctrine of privity of contract is a

common law principle, that stipulates that a contract cannot confer rights or impose obligations upon any person who is not party to it, with there being a few exceptions to the Rule.

4.73 Cited as authority in that regard, were the cases of ***Attorney General v Seong San Company Limited*** ⁽¹³⁾, ***Aupie Agro Forms Limited v Easchl Transport and Logistics*** ⁽¹⁶⁾ and ***Dunlop Pneumatic Company Limited v Selfridge Limited*** ⁽²⁾.

4.74 The explanatory notes in ***Order 18/19/18 of the Rules of the Supreme Court of England*** state as follows as regards abuse of the Court process:

“Para. (1)(d) confers upon the Court in express terms powers which the Court has hitherto exercised under its inherent jurisdiction where there appeared to be “an abuse of the process of the Court.” This term connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation. See also “Inherent jurisdiction”, para. 18/19/26.

The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed but depend on all the relevant circumstances and for this purpose considerations of public policy and the interests of justice may be very material.”

4.75 *Stuart Smith LJ* in the case of *Ashmore v British Coal Corporation* ⁽⁴⁾ noted that:

“With all respect to Stephenson LJ, I do not agree that the claim can only be struck out as being an abuse of process if it is a sham, not honest or bona fide. On the contrary, I prefer the views of the other members of the Court that it is dangerous to try and define fully the circumstances which can be regarded as an abuse of process, though these would undoubtedly include a sham or dishonest attempt to relitigate a matter. Each case must depend on all the relevant circumstances.”

4.76 Therefore, the question that arises, is whether in the circumstances of this case, there is an abuse of the Court process in commencing these proceedings, Lechwe Express Logistics Limited having commenced an action against Agritech Zambia Limited under cause number 2022/HP/0688?

4.77 The contention by Agritech Zambia Limited, was that this action is an abuse of the Court process, as Lechwe Logistics Express Limited, a company in which John Mukoma Kasanga is a director, commenced proceedings against Agritech Zambia Limited seeking the same or similar reliefs, as in this matter, and that matter was dismissed.

4.78 John Mukoma Kasanga and Lunzua Beverages Limited on the other hand, argued that companies that are incorporated at law, are separate legal personalities from their shareholders and directors.

- 4.79 The Order that was issued in cause number 2022/HP/0688 where Lechwe Logistics Express Limited commenced proceedings against Agritech Zambia Limited which was exhibited as 'MS4' to the affidavit in support of the application, as already seen, shows that the matter was dismissed on the basis that the matter was improperly before the Court, as a wrong mode of commencement had been employed, and the Court had no jurisdiction to hear and determine the matter.
- 4.80 The Court further found that it is trite, that a company has to be represented by Counsel in legal proceedings, which was not the position in that case. Therefore, the matter under cause number 2022/HP/0688 was dismissed before it was heard.
- 4.81 The Supreme Court in the case of **Bank of Zambia v Jonas Tembo and others** ⁽⁶⁾ held that:
- “(i) In Order that a defence of res judicata may succeed, it is necessary to show that the cause of action was the same, but also that the Plaintiff had an opportunity of recovering and but for his own fault might have recovered in the first action that which he seeks to recover in the second.***
- (ii) A plea of res judicata must show either an actual merger or that the same point had been actually decided between the same parties.”***
- 4.82 There was no decision that was made on the merits in cause number 2022/HP/0688, such that it can be said that by commencing this action, John Mukoma Kasanga and Lunzua Beverages Limited are abusing the Court process, as

the matter is res judicata, going by exhibit 'MS5' to the affidavit filed in support of the application, being the PACRA print outs, which show that John Mukoma Kasanga is a director and shareholder in both Lunzua Beverages Limited and Lechwe Express Logistics Limited, and he was aware of the decision in that matter.

- 4.83 In the case of **Gaedonic Automotives Limited and Patrick Chisenga Mundundu v Citizens Economic Empowerment Commission** ⁽¹⁴⁾, the Supreme Court held that:

“The view that we take of this Appeal is that the Plaintiff can commence a fresh action after dismissal of the earlier action under the 60 days Rule of the Commercial Court Rules. The simple reason is that the matter was not adjudicated upon or determined on its merits, as the parties were not heard.”

- 4.84 Similarly, in this matter, as the action in cause number 2022/HP/0688, was not heard on the merits when it was dismissed, commencing this action, is not an abuse of the Court process. That limb of the application therefore fails.

WHETHER THE APPLICATION TO STAY SALE OF THE GOODS SEIZED IN EXECUTION IS COMPETENT IN THE ABSENCE OF JOHN MUKOMA KASANGA AND LUNZUA BEVERAGES LIMITED PAYING THE SUM REPRESENTING THE RENTAL ARREARS INTO COURT?

- 4.85 In support of the application, the provisions of **Halsbury's Laws of England**, earlier referred to, were reiterated. The gist of the application, was that an action before the Subordinate Court should have been commenced in

replevin. It was also noted that John Mukoma Kasanga and Lunzua Beverages Limited, had not cited the provision of the law, pursuant to which the application to stay sale of the goods was made.

- 4.86 It was further argued that even assuming that John Mukoma Kasanga and Lunzua Beverages Limited could make the application, before they could do so, they should have paid the rent arrears into Court.
- 4.87 It was also argued that **paragraph 1099 of Halsbury's Laws of England**, provides that injunctions are granted to restrain distress, only if an applicant pays the amount disputed into Court.
- 4.88 Further, that **paragraph 1081 of the said Halsbury's Laws of England**, requires that when replevin proceedings are commenced to redeliver goods, an applicant should provide sufficient security for the rent and costs of the claim, as well as making an undertaking, that they will proceed with a claim against the distrainor, to determine the right to distrain.
- 4.89 The opposition to this question, was that the application for a stay was supported by the law, as this Court has powers under **Order 3 Rule 2 of the High Court Rules** to make any interlocutory Orders, in the interests of justice. It was further argued, that this Court is empowered pursuant to **Order 29/2 of the Rules of the Supreme Court of England** to preserve property.
- 4.90 As regards the contention that in applying, John Mukoma Kasanga and Lunzua Beverages Limited were required to pay the rent arrears into Court, the response was that the said

requirement, only applies to a tenant who has a tenancy agreement or relationship with the landlord. Thus, a third party who has no relationship with the landlord cannot be expected to pay rent into Court, which he/she is not owing.

4.91 As seen from the first question that was raised, the third question also revolves around the procedure that is prescribed to challenge the distraining for rent where the goods distrained belong a third party, who is not party to the tenancy agreement between the landlord and the tenant.

4.92 **Paragraph 376 of Halsbury's Laws of England, 4th Edition Volume 13** states that:

"The Registrar, at the instance of the party whose goods are seized, must cause the goods to be replevied to that party upon that party giving security to prosecute an action against the distrainer, either in the High Court or the County Court."

4.93 This is pursuant to **Section 104 (2) and 105 (1) of the County Court Rules, 1959**. I have noted that no proceedings in replevin were ever instituted in the Subordinate Court. **Section 1 of the Law of Distress Amendment Act 1908**, requires in the case of an under tenant or lodger, in making a declaration when their goods are seized in execution, to set forth the amount of rent (if any) then due to his immediate landlord, and the times at which future instalments of rent will become due, and the amount thereof, and containing an undertaking to pay to the superior landlord any rent so due or to become due to his immediate landlord, until the arrears of rent in respect of

which the distress was levied or authorised to be levied have been paid off.

- 4.94 This requirement does not apply to any other person who claims the goods or chattels that are seized in execution. I have noted that John Mukoma Kasanga and Lunzua Beverages Limited have based this action on wrongful and unlawful distress, on the basis that no Notice and warrants were issued before the distress was done and proceeding with the sale after being notified of the claim to the claims to the goods that were seized.
- 4.95 Therefore, the requirement to give security for the rent due did not arise, as it was not a condition precedent to such a claim.
- 4.96 The argument was that no specific rule was cited in making the application to stay execution of the sale. However, the summons that were filed in support of the application, reveal that **Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia** was relied on, in applying for a stay of the sale of the goods that were seized in execution.
- 4.97 In respect of the use of that Order, the Supreme Court in the case of **Bernard Kutalika v Dainess Kalunga** ⁽¹²⁾ had this to say:

“It is our considered view that an injunction ought to be prompted by an application. A Judge cannot exercise the discretion to grant an injunction in a vacuum for it is trite law that a Court must not grant a party relief which he has not sought, or which is more than he has sought. In saying so, we are not unmindful of the provisions of Order III (2)

of the High Court Rules Chapter 27 of the Laws of Zambia. That order provides that:

“Subject to any particular rule, the Court or Judge may, in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitle to the benefit not the order or not.”

This provision in our view presupposes an application in the first place. Only after a court has been moved would it have the power to do what is envisioned in Order III of the High Court Rules. In any case, this order stipulates a general rule that does not absolve a party seeking an injunction from applying in the normal way and proving his case as required by the rules of the court.”

4.98 Therefore, it was necessary to cite the provision of the law that had been relied on, in moving the Court to stay the sale of the goods seized in execution. The action before Court is founded in tort, and in such an action, the rules that are vested in the Court to stay execution are applicable. Such power to stay, is inherent in the Court’s discretion. Therefore, if the inherent jurisdiction of the Court was relied on in making the application, that should have been stated in the summons filed in making the application.

4.99 *Practice Direction No 1 of 2002* states that:

“All applications brought to Court should indicate the Act and Section or Order and Rule under which

the application is brought, failure to which the application shall not be accepted for filing or entertained."

4.100 Further, in the case of *Bellamano v Ligure Lombarda Limited* ⁽³⁾ the Supreme Court noted that:

"It is always necessary, on the making of applications, for the summons or notice of application to contain a reference to the order or rule number or other authority under which relief is sought."

4.101 *Halsbury's Laws of England, 4th Edition, Volume 37* in describing the phrase inherent jurisdiction of the Court, puts it this way:

"Unlike all other branches of law, except perhaps criminal procedure, there is a source of law which is peculiar and special to civil procedural law and is commonly called "the inherent jurisdiction of the Court". In the ordinary way the Supreme Court, as a superior Court of record, exercises the full plentitude of judicial power in all matters concerning the general administration of justice within its territorial limits, and enjoys unrestricted and unlimited powers in all matters of substantive law, both civil and criminal except insofar as that has been taken away in unequivocal terms by statutory enactment. The term "inherent jurisdiction" is not used in contradistinction to jurisdiction of the Court exercisable at common law or conferred on it by

statute or rules of Court, for the Court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or rules of Court. The jurisdiction of the Court which is comprised within the term "inherent" is that which enables it to fulfil itself, properly and effectively, as a Court of law. The overriding feature of the inherent jurisdiction of the Court is that it is a part of the procedural law, both civil and criminal, and not a part of substantive law; it is exercisable by summary process, without a plenary trial; it may be invoked not only in relation to parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in the litigation between the parties...and it may be exercised even in circumstances governed by rules of Court. The inherent jurisdiction of the Court enables it to exercise (1) control over process by regulating its proceedings by preventing the abuse of process and by compelling the observance of process (2) control over persons ..."

- 4.102 The third question succeeds only to the extent that the provision of the law that was relied on, in making the application was not cited, **Order 3 Rule 2 of the High Court Rules**, not being a substantive provision. Otherwise, this Court has inherent jurisdiction to grant a stay, looking at the circumstances of a case.

5. CONCLUSION

5.1 The questions raised having failed, the matter shall come up for Orders for directions on 30th April, 2024 at 15:00 hours. Costs shall be in the cause, and leave to appeal is granted.

DATED AT LUSAKA THE 11th DAY OF APRIL, 2024

S. Kaunda

**S. KAUNDA NEWA
HIGH COURT JUDGE**

