

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

2010/HP/448

BUKOMO MINING LIMITED

AND

LUIRI GOLD MINES LIMITED**ALAN MWANZA****GODFREY MANDA****NELSON SIKOCHI****DAVID MWEENE****AMYBIN KALENDA****CHARITY LUPIYA LUTANGU****Addendum or rider attached for the 8th to 14th Defendants****PLAINTIFF****1st DEFENDANT****2nd DEFENDANT****3rd DEFENDANT****4th DEFENDANT****5th DEFENDANT****6th DEFENDANT****7th DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 28th DAY OF
SEPTEMBER, 2017**

For the Plaintiff : *Mr H. Silweya and Mr F. Chunga, Silweya
and Company*

For the 2nd and 4th Defendants : *Mr C. Nhari, Nhari Advocates*

For the 1st, 5th to 14th Defendants : *Mr C.P. Chula, Chibesakunda and
Company*

J U D G M E N T

CASES REFERRED TO:

1. *The Attorney-General V E.B. Jones Machinists Limited SCZ No 26 of 2000*
2. *Zambia Consolidated Copper Mines V Eddie Katalayi and Max Chilongo SCZ No 2 of 2001*

LEGISLATION AND OTHER WORKS REFERRED TO:

1. *The Rules of the Supreme Court, 1999 edition*
2. *The High Court Rules, Chapter 27 of the Laws of Zambia*
3. *Halsbury's Laws of England, 4th Edition, Volume 17*

The Plaintiff commenced this action by way of originating summons on 1st April, 2010, which by a ruling of the court dated 18th April, 2011, was deemed to have been commenced by writ of summons, claiming;

- 1. To be owner of the residential houses, the administration block, leach pad and ore stock pile, formerly belonging to Dunrobin Gold Mines Limited and acquired by the Plaintiff by auction sale from the Sherriff of Zambia appearing on the location Map REF. SHEET 1527A/1 attached to the Plaintiff's mineral processing licence No 102031- HQ-MPL issued pursuant to the Mines and Minerals Development Act No 7 of 2008.*

By a consent order dated 9th June 2011, the parties agreed to file a statement of claim, defence and a reply to the defence. In the statement of claim filed, that Plaintiff states that it holds a Mineral Processing Licence No 102031 HQ MPL pursuant to Section 84 of the Mines and Minerals Development Act No 7 of 2008. That the Plaintiff bought the areas and or properties or assets at a Sherriff's auction sale at ZMW448, 000.00, and that by virtue of the sale of the items by the Sherriff of Zambia and Section 86 of Act No 7 of 2008, the Plaintiff became entitled to exclusive possession of the area located on the survey map on sheet No 1527/A1 dated 9th December, 2009, as a farm in Chief Shakumbila's area in Mumbwa District of Zambia.

The statement of claim also states that pursuant to Section 86 of Act No 7 of 2008, the properties that were permanently affixed to the area bought, being the dumps of unprocessed gold commonly known as the leach pad, office blocks and other structures, as well as the houses constructed by an absentee gold miner called Dunrobin Mine, were acquired at the auction sale. It is also stated that the Plaintiff intended to erect a sophisticated gold processing plant on the acquired premises, and it has suffered huge loss on account of failure to take possession of the area covered by its' processing licence.

That it was only after the auction sale was conducted that the Plaintiff discovered that there were encumbrances as the area was occupied by the fourteen Defendants without title, and they are consequently squatters. The statement of claim further alleges that the Plaintiff is an innocent purchaser for value of the land publicly auctioned, and advertised, whether the land was on title or not. It is stated that efforts to gain vacant possession of the land has proved futile, with the Defendants indicating that the Plaintiff should shift the leach pad and other items to another destination.

The Plaintiff claims that the Defendants be evicted from the area over which it holds the gold processing licence, and that it be paid damages for loss of business occasioned as a result of the failure by the Defendants to vacate the area and assets purchased by the Plaintiff at the auction sale, and acquired under the Mines and Mineral Development Act No 7 of 2008.

The 1st, 3rd and 5th to 14th Defendants in the defence filed on 15th April, 2013 state that if the auction sale was done, the same was done irregularly, as the sale of land cannot be done by the Sherriff through a writ of fieri facias. That execution of a judgment through a writ of fieri facias is limited to the seizure of goods and chattels, and not interests in land. Further that as the said land is not on title, it could not have been sold by the Sherriff of Zambia.

The Defendant also states that it is the holder of a Large Scale Mining licence over an area that includes the property which the Plaintiff claims to have an interest through a sale conducted by the Sherriff, and that its rights existed well before the purported sale. That pursuant to the Mines and Minerals Development Act of 2008, the 1st Defendant's Large Scale Mineral Processing Licence is valid for twenty five years, and confers on it exclusive rights to carry on mining and prospecting operations in the mining area, and to do all acts necessary for the carrying out of its operations.

It is stated that its licence has not been revoked in terms of the Act, and therefore the Defendant retains exclusive rights over the land in question,

which rights the Plaintiff cannot purport to disturb. Further that the Plaintiff has not shown that it holds surface rights over the said property, and consequently cannot claim to evict the Defendant in this matter.

The 2nd and 4th Defendants in their defence filed on 6th May, 2013 essentially deny that the Plaintiff is entitled to the reliefs sought, as they allege that the sale that was done by the Sherriff of Zambia was illegal, null and void. Further that by virtue of the default judgment dated 4th April, 2003 under cause number 2002/HP/421 they have an interest in the property, and that at no point did they consent to the sale of the properties that they occupy by the Sherriff of Zambia.

The 2nd and 4th Defendants deny that the Plaintiff is an innocent purchaser for value, as at the time of the alleged auction, the 2nd and 4th Defendant's occupied the property, and the Plaintiff should have enquired as to their interest in the property. The 2nd and 4th Defendants also deny that the Plaintiff has suffered any loss or damage.

At the hearing the Plaintiff called two witnesses, while the 1st, 3rd and 5th to 14th Defendants called one witness, and the 2nd to 4th Defendants also called one witness. PW1 was David Britz. He testified that he is the managing director of the Plaintiff, and that they bought property from the Sherriff. That the day after the said purchase he had gone with the Sherriff to the 1st Defendant who was occupying the offices at the premises that they had bought, and asked them to vacate the property, as the Plaintiff had bought the leach pad. However a year passed without the 1st Defendant vacating the property, prompting the Plaintiff to sue so that the offices and houses occupied which it had bought could be vacated.

Reference was made to page 6 of the Plaintiff's bundle of documents stating that it is the receipt for ZMW448, 000.00, and which shows that the Plaintiff bought the leach pad and other items. That at page 3 of the said bundle of documents is the seizure form that was issued by the Sherriff listing the items

seized as the leach pad, two pumps and pipes, assorted electrical cables, lights, transformer, and four blocks of offices. He stated that the items were seized as a result of a default judgment obtained against Dunrobin Mine. That at page 4 of the Plaintiff's bundle of documents are the items that were listed for sale after the seizure, so that the workers of Dunrobin mine could be paid what they were owed.

Further in his evidence, PW1 told the court that he belonged to the Mumbwa Mining Community, and that through that Community he had met the Committee for Dunrobin, and he had made an offer to the Sherriff of Zambia to purchase the items that had not been sold at the auction. He referred to the documents at pages 2 and 5 of the Plaintiff's bundle of documents stating that there were two auctions that were conducted, with the first being at Dunrobin Mine in Mumbwa. That at that auction all the small items were sold leaving the big items.

That he then bought the leach pad and the block of offices, and obtained a processing licence to process the ore that he had bought from the Sherriff. That the land bought comprises buildings, and he presumed that he had bought the land on which the buildings are. Further in evidence, PW1 testified that the Chief allowed him to put up the processing plant, and the Council approved the conversion of the land from customary tenure, into statutory land, as seen on the letter at pages 20 and 22 of the Plaintiff's bundle of documents. He also stated that pages 38 and 39 shows the sketch plan and coordinates done by the Ministry of Agriculture, while the mineral processing licence is at page 24 of the bundle of documents.

When cross examined, PW1 told the court that he is a registered director of the Plaintiff Company, and he agreed that some of the items were not sold at the auction, and he expressed interest in them. He also agreed that he bought the items that were not sold at the public auction, and stated that the Sherriff had shown him the items on the seizure form which were at pages 3 and 4 of the

Plaintiff's bundle of documents, after three auctions had taken place. He told the court that the document at page 3 is dated 3rd August, 2008, but could not say if it was the date of the seizure. He told the court that the seizure was done in 2003 when the default judgment was obtained.

When referred to page 2 of the Plaintiff's bundle of documents, PW1 testified that it does not make reference to the forty three (43) houses or the four (4) blocks of offices, and that at page 5, it is the leach pad that is being sold. He stated that he engaged the Sherriff to buy the items on 30th April, 2009. That after he bought the items he had applied to the Chief to obtain title to the land, as it is customary land, and it is not titled. PW1 also in cross examination testified that the Ministry of Mines told him that he needed to obtain title to the land, if he was to get a processing licence. He added that he did not obtain title to the land as he needed to transfer twenty five (25) percent of the shareholding to a Zambian, and he was not sure that he would get the shares back. He agreed that a mineral processing licence could be obtained without owning the surface rights, and that he knew that the 1st Defendant had a mining interest and mining licence at the time. PW1 stated that the Plaintiff's mineral processing licence had been taken away.

He also told the court that he had gone to where the houses are located with one of the members of the mining association before he bought the houses, and that the houses were occupied at the time. However he did not ask the occupants what their interest in the houses was, and that he only dealt with those occupants that had worked for Dunrobin mine. PW1 stated that when he bought the property in 2009, he did not see the document at page 35 of the Plaintiff's bundle of documents.

In re-examination, PW1 testified that he did not know when his licence was cancelled, as he had not seen the letter of cancellation.

PW2 was Watson Nyirenda. His evidence was that he used to be employed by Dunrobin Mine in Mumbwa, and that he worked there from 1997 until 2000.

PW2 stated that in 2009 the Plaintiff came in after Dunrobin Mine left without paying the 83 workers. He explained that they engaged Shepande and Company, who sued and obtained a default judgment and execution was done, and thereafter the seized properties were sold. PW2 further explained that there was a Committee that was chaired by Allan Mwanza and the Secretary was Nelson Sikochi, and they had worked with the lawyer during the auction sale.

He also stated that they were paid after the sale, and he signed for the money which was part payment in 2003. That he was paid the rest of the money in 2004 after they passed a vote of no confidence in the committee that was headed by Mwanza, as they were paid very little money after the first sale. PW2 went on to tell the court that Raphael Himoonga became the chairperson, and he was elected as secretary, and after they met, they saw the Sherriff whom they informed that there were assets namely the leach pad, block of offices and houses, and the same were seized by the Sherriff.

He testified that after that they received a number of people who would ask about the sale, and after several prospective buyers, one buyer went and they took him to the Sherriff where an agreement was reached, and the properties were sold and were paid for. It was PW1's evidence that the workers were briefed about the sale, and they agreed. That thereafter a list of all workers to be paid was prepared which is at pages 7 to 8 of the Plaintiff's bundle of documents, and that he signed on number 34.

Still in his testimony, PW2 told the court that they were paid ZMW3, 600.00 across the board, and Allan Mwanza declined to get the same, without giving reasons why.

In cross examination, PW2 agreed that the document at pages 1 and 2 of the 2nd and 4th Defendant's bundle of documents is the default judgment that they obtained against Dunrobin mine. That claim number 9 was that the sitting tenants were to be offered to buy the houses. When referred to pages 4 and 5 of the 1st, 3rd, 5th to 14th Defendant's bundle of documents, he testified that it was

the default judgment that they used to obtain the writ of fieri facias. He agreed that the said document does not refer to non-sitting tenants to buy the property. That the seizure forms at pages 8 and 9 were used to sell the houses, and are dated 3rd August, 2006, while the document at page 11 is dated 30th April, 2009.

PW2 could not recall if there was a seizure notice in 2009, and that the payment made by the Plaintiff came after two failed auction sales. That the first auction was done here in Lusaka as the equipment was here, while the second one was done in Mumbwa for the moveable assets, and that the sale for the immovable assets was done at the mine, as well as for the third sale. He stated that there were no other bidders when the Plaintiff bought the property. PW2 further stated that he did not have the 2009 advertisement for sale of the properties before court, and he denied that the Plaintiff bought the leach pad as shown at page 10.

That he was working for the Plaintiff but stopped as PW1 told him that he needed to find the money, but stated that he was aware that PW1 had begun the process of obtaining title for the land from the Chief, and that he had obtained consent, which had since been withdrawn.

DW1 was Quinton John White the General and Country Manager of the 1st Defendant. He stated that he manages the 1st Defendant and maintains the licence. It was his evidence that they operate from traditional land, and they bought the surface rights from Senior Chief Shakumbila which were endorsed by the Mumbwa Council. DW1 told the court that the said rights extend over the operation areas of Dunrobin and Matawa, the two historical mines within their mining licence.

He further stated that he is aware of the Plaintiff, as he was told that there was a dispute between the said Plaintiff and the 1st Defendant and others in 2011. However he had not directly dealt with the Plaintiff, its management or employees. DW1 went on state that he was aware that the Plaintiff was granted

a mineral processing licence over the area where they hold a Large Scale Mining Licence which gave the Plaintiff rights to process the leach pad, but that the licence had since been cancelled.

It was explained that the leach pad was blasted from Dunrobin which ceased operations in 2001, and that the ore was crushed and spread out in layers with impermeable plastic at two metre intervals on which cyanide was placed to dissolve the gold. He denied any knowledge that the Plaintiff had title to the land where they hold the large Scale Mining Licence, stating that they did do due diligence, and found that no one owned the land. DW1 told the court that there are structures on the land that mining area covers which is 32 square metres, over which are villages and other structures.

DW1 in cross examination testified that the 1st Defendant does not own the leach pad, and that the 2015 Act states that the President owns the minerals. He told the court that the State owns the leach pad and it issues licences which give rights to recover the minerals upon payment of royalties. He agreed that when he visited the mine in Mumbwa he found people there, but declined that the employees of the Plaintiff had ever approached him. DW1 stated that he tried to speak with PW1 but was unsuccessful, and that in 2011 he did not find Dunrobin mine operating.

He further testified that in 2003 the 1st Defendant was granted the mining licence which covers Dunrobin and Matawa, and that the Plaintiff's processing licence was only granted in 2010. He expressed ignorance on whether the 1st Defendant had obtained an injunction against the people at the mine, and he denied that the 1st Defendant had ever claimed the dump. DW1 told the court that to his belief the Plaintiff was only granted surface rights by the Chief, which they had also been given. He clarified that their surface rights cover a different area, and denied that they had torn up the barriers that the Plaintiff had put up.

It was also stated that the 1st Defendant denied that the Plaintiff has rights over the dump, as its mineral processing licence was cancelled, and that there is a letter from the government to that effect. DW1 testified that he was aware of the Sherriff's auction, but denied that the 1st Defendant had purchased the properties, as there was no legal title to it.

He went on to state that the leach pad was not their business, but acknowledged that there are structures on the site which are occupied by the 1st Defendant. He equally acknowledged that there are residences at the site, and his testimony was that the 1st Defendant has no interest in them. That they use the old buildings to store their minerals, but that they do not have title to them, and that no one has demonstrated title to them. DW1 also testified that the 1st Defendant's operational area is approximately the same area that Dunrobin had covered, according to the surface rights that they were granted, save for where the leach pad is.

That their interest is in the buildings, and not the leach pad, and he agreed that he did meet PW1 at a traditional ceremony that was held in July 2011. It was added that this was after he was appointed General Manager at the beginning of July, 2011, having started working for the 1st Defendant in February, 2011. DW1 acknowledged having been made aware of the problems of the area and the people, but stated that the same did not have an effect on development of the mine.

The last witness was Allan Mwanza, a miner at the 1st Defendant. This witness told the court that he used to work for Dunrobin Mine in Mumbwa from 1997 until 2001. That when that mine stopped operating, it was taken over by the 1st Defendant. He further testified that there was a matter before court involving **WARREN SILILO AND 83 OTHERS V CHRIS HARVEY AND DUNROBIN**, under which the former workers had sued Dunrobin in 2002 claiming salary arrears and benefits. That a default judgment was obtained in 2003 which directed

that the sitting tenants being the former workers of Dunrobin Mine had the right to buy the houses.

DW2 went on to testify that management wanted to evict the former workers but they obtained an injunction restraining the eviction, and that the default judgment was not challenged after it was obtained. It was stated that a writ of fieri facias was filed after the judgment was obtained, and the Sherriff seized movable assets among them the plant, cars, motors and generators among others.

Further in his evidence, DW2 told the court that he represented the workers as Chairman General, and he ensured that the claims filed were met. DW2 denied that he had authorised sale of his house, stating that as a sitting tenant he should have been consulted on whether he wanted to buy the house. Further that the judgment states that the houses would only be sold to the sitting tenants, and no other person. He also stated that he was not aware that any other writ of fieri facias or indeed any other document was filed which authorised the Sherriff of Zambia to sell the houses for the sitting tenants. That the Sherriff first sold the goods seized in 2003, and that the sale of the houses was done in 2009 to which he and Nelson Sikochi did not consent.

It was DW2's evidence in cross examination that he was instrumental in the first execution under which the writ of fieri facias was issued, and the bailiff seized property. He agreed that he had identified the Dunrobin assets, and the bailiff seized them, and he thereafter signed the seizure forms, as shown at page 8 of the 2nd and 4th Defendant's bundle of documents. DW2 stated that both movable and immovable assets were seized, and that among the immovable assets were the workshop, 43 houses, and a block of four offices.

He agreed that his house was among the 43 houses that were seized, but his evidence was that he had argued against the seizure, as there are dots indicated where the houses are recorded. He went on to further state that the Sherriff endorsed that the houses, block of flats and workshop were not

collected during the seizure. He agreed that it makes sense that immovable items cannot be collected. It was stated that DW2 agreed that Mr Himoonga later replaced him as a chairperson of the workers committee, and he expressed ignorance that Mr Himoonga, as chairperson, had convened a meeting on 1st May, 2009.

DW2 explained that he did not collect the money, as he did not see the writ of fieri facias that was issued in respect of the judgment that they obtained, but agreed that there was sale after the judgment. He testified that a writ of fieri facias is valid for twelve months, and that he did not see the writ of fieri facias for the second sale.

I have considered the evidence. It is common cause that a writ of fieri facias was issued in 2003 following a default judgment that was obtained after Dunrobin mine of Mumbwa had been sued by its former workers, and the Sherriff of Zambia seized goods and sold them. It is also not in dispute that after the sale, a number of items were not sold, and the Plaintiff bought the leach pad and other items among them 43 houses and a block of four offices from the Sherriff of Zambia in 2009.

The issue for determination is whether the Plaintiff is entitled to the ownership and possession of those items as claimed? At pages 1 to 3 of the 2nd and 4th Defendant's bundle of documents is the writ of summons that was filed under cause number 2002/HP/0421 between Warren Muyenga Sililo and 83 others versus F.C. Chris Harvey and Dunrobin Mine Limited. In that writ, the Plaintiffs claimed retrenchment benefits, repatriation allowance, leave days, one month's notice, salary arrears, transport allowance, lunch allowance, medical allowance, sitting tenants to be offered to purchase the mine houses, interest and costs.

The writ was not defended, and on or about 1st April, 2003, a default judgment was entered for the reliefs claimed, as seen at pages 4 and 5 of the 2nd and 4th Defendant's bundle of documents. The Plaintiff bought the leach pad and other

items from the Sherriff of Zambia among them 43 houses, and block of four houses in 2009. This was after the initial writ of fieri facias was issued, and the Sherriff had acted on it. There is a writ of fieri facias at pages 6 to 7 of the 2nd and 4th Defendant's bundle of documents, but the date of this document is not reflected on it. This is possibly because it is a photocopy, and the date stamp on the original may not have been very clear. However from the evidence that was adduced during the trial, the said writ of fieri facias was issued in 2003.

At page 8 of the 2nd and 4th Defendant's bundle of documents is a seizure form for the re-issued writ of fieri facias which is dated 3rd August, 2006, and shows that the leach pad, block of offices, 43 houses and a workshop convey were seized among other items.

As can be seen from the evidence the contention is that the Sherriff could not sell the immovable assets that were seized using a writ of fieri facias.

Order XLII of the High Court Rules, chapter 27 of the Laws of Zambia provides that;

“1. All property whatsoever, real or personal, belonging to a party against whom execution is to be enforced, and whether held in his own name or by another party in trust for him or on his behalf (except the wearing apparel and bedding of himself or his family and the tools and implements of his trade, if any, to the value of five hundred Kwacha or, in the case of a farmer, one million Kwacha) is liable to attachment and sale in execution of the decree”.

The said Order in rules 3 and 4 goes on to state as follows;

“3. On any levy on the property of any person to satisfy an order or judgment of Court for the payment of money, the real property of such person shall only be sold if the personal property is insufficient.

4. In any proceedings by way of elegit any inquisition shall be conducted without oath by the Sheriff, Deputy Sheriff or Under-Sheriff, sitting without a jury, but he may in his discretion sit with assessors, and shall have all the powers of the Court for the summoning of such assessors and payment of their proper fees and expenses, and the High Court may at the request of any party to any such proceedings issue subpoenas for the attendance of witnesses, for payment of whose fees and expenses the Sheriff, Deputy Sheriff or Under-Sheriff may at his discretion make provision by order against any party to such proceedings.”

Going by the above provisions, the former workers of Dunrobin mine as Judgment Creditors against it, were entitled to issue a writ of fieri facias to enforce the judgment by way of seizure and sale of personal property first. It was only after the sale of the personal property failed to realise the entire judgment sum that they could proceed to sell any real property belonging to Dunrobin mine. The evidence on record shows that indeed after the first seizure and sale, the former workers of Dunrobin were not paid their claims in full. Both PW2 and DW2 told the court that there were two other seizures of property that were done after the first sale, and that even the proceeds of sale of property seized on these two occasions did not realise the entire sums claimed.

In terms of how many times a writ of fieri facias may be issued, Order XLII Rule 9 of the High Court Rules, Chapter 27 of the Laws of Zambia provides that;

“9. A writ of execution if unexecuted shall remain in force for one year only from its issue, unless renewed in the manner hereinafter provided; but such writ may, at any time before its expiration, by leave of the Court or a Judge, be renewed by the party issuing it for one year from the date of such renewal, and so on from time to time during the continuance of the renewed writ, either by being

marked with a seal of the Court bearing the date of the day, month and year of such renewal, or by such party giving a written notice of renewal to the Sheriff, signed by the party or his advocate, and bearing the like seal of the Court; and a writ of execution so renewed shall have effect, and be entitled to priority, according to the time of the original delivery thereof".

Therefore according to the law, a writ of fieri facias may be issued only once to realize a judgment debt and that it is valid for a period of one year, but it may be renewed by the court before it expires, if it has not been executed. Order 47/2/1 of the Rules of the Supreme Court of England 1999 edition goes further to provide that;

"The general rule of practice is summed up in the maxim "One judgment, one execution," i.e. judgment creditor cannot issue a series of small executions upon his judgment, making in the aggregate the amount of the judgment debt; upon one judgment he can issue only one execution . For this reason assignees of part of a judgment debt cannot issue execution.

If however, the judgment or order is for the recovery or payment of money, and at the same time for the recovery of property other than money, the appropriate writs for the enforcement of the two parts of the judgment or order may issue simultaneously or successively".

In this case it has been seen that the Sherriff did more than one execution, and sold real property purportedly using a writ of fieri facias. There is no evidence on record to show that the first writ was ever renewed before it expired, and in fact what is on record is that property was seized after the writ of fieri facias was issued, and was sold, and the former workers of Dunrobin mine including PW2 and DW2 were partially paid their dues from the proceeds of the sale. The writ of fieri facias having been executed, it could not be renewed to allow for

further execution. What could legally have been done subsequently, was to sell the items seized under that execution that were not sold at the first auction, as they would have already been seized.

The record further shows that seizure forms as evidenced at pages 8 and 9 of the 2nd and 4th Defendant's bundle of documents were completed on 3rd August, 2006, indicating that other goods were seized on that date after the writ of fieri facias was issued in 2003, and goods seized and sold under it. At page 10 of the 2nd and 4th Defendant's bundle of documents is an advertisement for the sale of the goods seized from Dunrobin Mine dated Saturday 28th April, 2007, and another one at page 2 of the Plaintiff's bundle of documents, which is dated 12th August, 2006.

The advertisement at page 2 of the Plaintiff's bundle of documents shows that the leach pad of gold, water pumps, assorted scrap, two transformers, two fuel tanks and two control towers would be sold at Dunrobin mine. The document at page 10 of the 2nd and 4th Defendant's bundle of documents shows that the leach pad would be sold. There is no evidence to show under what court document the Sherriff sold the 43 houses and block of four offices to the Plaintiff, which were seized using a seizure note as evidenced at pages 8 and 9 of the 2nd and 4th Defendant's bundle of documents.

Forms 44, 46, and 47 under the High Court rules provide for sale of real property by way of elegit, and no such form was tendered before this court by the Plaintiff to show that it was used to sell the houses and block of offices to it. What can be deciphered from the record is that the Sherriff seized these real assets under a writ of fieri facias, which may not have been renewed in accordance with the law. As such the sale of the houses and block of flats was done contrary to the law.

Halsbury's Laws of England Volume 17, 4th edition at paragraph 459 states that an irregular execution happens where any of the requirements of the rules of the court have not been complied with, and in such a case the proceedings

may be set aside or amended or otherwise dealt with in such a manner and upon such terms as the court thinks fit. Thus the question that arises is how should the irregularity seen in the sale of the houses and block of offices to the Plaintiff be treated?

Section 14 of the Sherriff's Act, Chapter 37 of the Laws of Zambia states that;

“14. (1) The Sheriff shall not be liable to be sued for any act or omission of any Sheriff's officer, police officer or other person in the service of any writ or the execution of any process which shall have been done, or omitted to have been done, or which may have occurred either through disobedience to or neglect of the orders or instructions given by the Sheriff.

(2) In every case of execution, all steps which may legally be taken therein shall be taken on the demand of the party who issued such execution, and such party shall be liable for any damage arising from any irregular proceeding taken at his instance.

The Plaintiff in the submissions filed argued that by virtue of Section 14 (1) of the Sherriff's Act, the Sherriff is indemnified from any acts done, and that in this case the Sherriff acted on the Judgment Creditor's instructions who included DW2. Therefore any omission or acts done which are contrary to the law ought to be made good by the Judgment Creditors.

In my understanding, Section 14 of the Sherriff's act as rightly argued by the Plaintiff, indemnifies the Sherriff from any wrongs done during process of execution, with the indemnifier being the Judgment Creditor from whom the Sherriff obtains instructions. This position was confirmed in the case of ***THE ATTORNEY-GENERAL V E.B. JONES MACHINISTS LIMITED SCZ No 26 of 2000*** where the Supreme Court after reciting the provisions of Section 14 (2) of the Sherriff's Act quoted above stated that ***“it follows from this sub-section that the Sheriff and his officers in executing court process are agents of***

the party issuing the process notwithstanding how or by which institution the Sheriff and his officers are appointed”.

Therefore the sale that was done by the Sherriff under cause number 2002/HP/0421 which sold the Plaintiff the leach pad, block of offices, and the 43 houses using a writ of fieri facias though irregular cannot be set aside on the basis of Section 15 of the Sherriff's Act which provides that;

“15. (1) Where any goods in the possession of a judgment debtor at the time of seizure by an officer are sold by such officer without any claim having been made to the same-

(a) the purchaser of the goods so sold shall acquire a good title to those goods; and

(b) no person shall be entitled to recover against such officer of any person acting under his authority for any sale of such goods, or for paying over the proceeds of such sale prior to the receipt of a claim to the said goods, unless it is proved that the person from whom recovery is sought had notice or might, by making reasonable inquiry, have ascertained that the goods were not the property of the judgment debtor:

Provided that nothing in this section contained shall affect the right of any claimant who may prove that at the time of sale he had a title to any goods so seized and sold to any remedy to which he may be entitled against any person other than an officer or person acting under the authority of such officer.”

The 1st Defendant as can be seen from the evidence given by DW1 stated that it holds mining rights over the area where Dunrobin used to operate, and where the Plaintiff bought the houses, leach pad and the block of offices. DW1 also told the court that they were granted the Large Scale Mining Licence in 2003, which was before the Plaintiff bought the said houses, block of offices, and the

leach pad. The Plaintiff's mineral processing licence which is at page 24 of its bundle of documents was issued to it on 1st March 2010, with a commencement date of 26th February, 2010.

Section 86 of the Mines and Minerals Development Act No 7 of 2008 states the rights of a holder of a mineral processing licence. It provides that;

***“A mineral processing licence confers on the holder of the licence exclusive rights to carry on mineral processing in the mineral processing area of the minerals specified in the licence and to do all such other acts and things as are necessary for, or reasonably incidental to the carrying on of those operations.*”**

In his testimony PW1 told the court that after he bought the leach pad, houses and block of offices, he was told that he needed to obtain a licence in order to be able process the leach pad as required by the Mines and Mineral Development Act. Further that he needed the consent of the Chief of the area. That he had then obtained the consent of the chief to have title to the land which was approved, as seen on the documents at pages 20 and 21 of the Plaintiff's bundle of documents dated 26th November, 2009 and 2nd December, 2009 respectively. PW1 testified that he did not proceed to obtain title to the land as the law requires that the Plaintiff should have twenty five (25) percent Zambian shareholding, and he was not sure that he would get his shares back once he did this.

In effect the Plaintiff could not acquire title to the land that it bought as it did not meet the requirements of the law. DW1 testified that no one has demonstrated that they own the said land, as it is under customary tenure in the hands of the chief.

DW1 further in his testimony referred to the Mines and Minerals Development Act of 2008 stating that the President owns the land and the minerals, and that the only rights that the 1st Defendant has over the same is to take away the minerals upon payment of royalties.

The Mines and Minerals Development Act No 7 of 2008 in Section 3 provides that;

“3. (1) All rights of ownership in, searching for, mining and disposing of, minerals wheresoever located in the Republic are hereby vested in the President on behalf of the Republic.

(2) The provisions of this section have effect notwithstanding any rights, title or interest which any person may possess in or over the soil in, on or under which minerals are found.

Section 4 of the said Act provides that the right of prospecting for, mining and disposing of minerals shall be acquired and held under and in accordance with that Act. To this effect Section 130 states that;

“130. (1) Subject to subsection (2), a holder of a licence or permit who requires the exclusive or other use of the whole or any portion of the prospecting or mining area for the purpose of the licence or permit may, in accordance with the laws relating to such acquisition, acquire a lease thereof or other right to use the same upon such terms as may be agreed between such holder and the owner or occupier of the land.

(2) A holder of a licence or permit shall not purchase or obtain a lease of or other rights over any land specified in paragraph (a), or in paragraphs (c) to (h), of subsection (1) of section one hundred and twenty-seven, except with the consent of the appropriate authorities mentioned in that section”.

It is not in dispute in this matter that the mine in issue is located in a village in Mumbwa district, and going by the provisions cited above, the Plaintiff needed to obtain the consent of the chief before it could apply to obtain a lease or other rights over the land over which it obtained the mineral processing licence, as provided in Section 27 (c) of the Act. The said Section provides that;

127. (1) A holder of a licence or permit shall not exercise any rights under this act or the licence or permit-

(c) upon land occupied as a village, without the written consent of the chief and the local authority for the district in which the village is situated;"

This was not done, and as already seen, PW1 stated that this was on the basis that he would have to give twenty five (25) percent shareholding in the Plaintiff to a Zambian, and he was not sure that he would get his shares back once he did so. The Plaintiff in the submissions argued that it was a bonafide purchaser for value without notice of any adverse claim, and relied on the case of **ZAMBIA CONSOLIDATED COPPER MINES V EDDIE KATALAYI AND MAX CHILONGO SCZ No 2 of 2001**, as authority.

I do agree with the principles espoused in that case, and the evidence on record shows that PW1 did in fact engage with the former Dunrobin workers committee and that is how he bought the properties. It is true that no adverse claim was laid to the same when he interacted with the committee. However there is no evidence on record to show that the Plaintiff conducted any due diligence with regard to ascertaining who held title to the property, before it bought it. On that basis it cannot be said that the Plaintiff was a bonafide purchaser for value. However the issue is whether the Plaintiff can legally own the said properties?

It has been seen that the Plaintiff does not meet the requirements of law as admitted by PW1 to hold property in its name, as twenty five percent of its shareholding is not owned by a Zambian. Consequently, while the Plaintiff bought the 43 houses and block of offices under an irregular execution, which has never been set aside, it has no legal title to the same. Further despite having bought the leach pad, it could only access it if it had mineral processing rights. As already seen, the evidence of DW1 was that it does not have, as the licence was cancelled. In the submissions the Plaintiff asked me to discount

the evidence given by DW1 that its mineral processing licence has been cancelled, as he had no documents to that effect. DW1 raised a defence and the onus was on the Plaintiff to rebut that defence, and it has not done so, as PW1 in cross examination admitted that the licence was in fact cancelled. Therefore the Plaintiff is not entitled to the reliefs sought.

On that basis the claim will fail, and it is dismissed with costs to the Defendants to be taxed in default of agreement. Leave to appeal is granted.

DATED THE 28th DAY OF SEPTEMBER, 2017

S. Kaunda

**S. KAUNDA NEWA
HIGH COURT JUDGE**