IN THE SUPREME COURT OF ZAMBIA SCZ/8/03/2020

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

JONATHAN VAN BLERK — APPELLANT

AND

THE ATTORNEY GENERAL — 1ST RESPONDENT

LUSAKA CITY COUNCIL — 2ND RESPONDENT

LEGACY HOLDINGS LIMITED — 3RD RESPONDENT

KWIKBUILD CONSTRUCTION LIMITED — 4TH RESPONDENT

BANTU CAPITAL CORPORATION LIMITED — 5TH RESPONDENT

NATIONAL PENSION SCHEME AUTHORITY — 6TH RESPONDENT

Coram : Wood, Malila and Kabuka JJS

On 15th December, 2020 and 17th May, 2021.

For the Appellant : Mr. L.E. Eyaa- Messrs Linus E. Eyaaa and Partners, Mr. S Mbewe - Messrs Keith Mweemba Advocates

For the 1st Respondent: Mr. F. K. Mwale – Principal State Advocate, Attorney General's Chambers

For the 2nd Respondent: Mrs Y.M. Muwowo - Council Advocate

For the 3rd Respondent: No Appearance

For the 4th Respondent: Mr. R.M. Simeza, SC with Mr. L. Mwamba - Messrs Simeza Sangwa & Associates

For the 5th Respondent: Mr. S. Sikota, SC with Mr. K Khanda - Messrs Central Chambers, Mrs. M. Sitali Messrs Ellis and Company

For the 6th Respondent: Mr. E.C. Banda with Mr. H. Zulu –essrs ECB Legal Practitioners

1. **REPORTABLE:** 2. **OF INTEREST TO OTHER JUDGES:**

JUDGMENT

Wood JS delivered the judgment of the Court.

Cases referred to:

(1) Shamwana and others v. The People [1985] Z.R. 41
(2) Nkumbula v. Attorney General (1972) Z.R. 204
(3) Zambia National Holdings Limited and another v. Attorney General [1993-1994] Z.R. 115
(4) Mpongwe Farms Limited (In Receivership) and others v. Attorney General (2004/HP/0010)
(5) William David Carlisle Wise v. Attorney General (1990/1992) 2R 124 (HC)
(6) R v. Secretary of State for Transport and others, ex-parte de Rothchild [1989] 1 All ER 993
(7) Prest v. Secretary of State for Wales [1982] 81 LGR 193
(8) Westminster Corporation v. L & NW Railway [1905] AC 426
(9) Kedar Nath Yadav v. State of West Bengal & others (Civil Appeal No. 8438 of 2016)
(10) City of Norwood v. Horney, 110 Ohio St. 3d 353, 2006-Ohio-3799
(11) Midland Bank Trust Co Ltd and another v. Green and Others [1979] 2 All ER 45
(12) Lazarous Estate v. Beasley [1956] 1 All ER 341
(13) United States v. Throckmorton, 98 U.S 61 [1878]
(14) HIH Casualty and General insurance Ltd v. Chase Manhattan Bank [2003] 2 Lloyds Rep 61
(15) Takhar v. Gracefield Developments Limited & Others [2019]

UK SC 13

(16) Ampthill Peerage [1977] AC 547

(17) Sphere Drake Insurance Plc and Another v. Onon Insurance Company Plc [1999] EWHC 286

(18) Cole v Langford 2 QB [1898] 36

(19) Royal Bank of Scotland Plc v. Highland Financial Partners LP [2012] EWCA

(20) Simpson Motor Sales v. Hendon Corporation [1964] AC 1088

(21) Town Council of Awendo v. Nelson Odur Onyango & 13 others [2014] eKR

(22) Attorney General v. Kakoma (1975) Z.R.212

(23) Nevers Sekwila Mumba v. Muhabi Lungu 92014) 3 Z.R. 351

(24) B.P. Zambia PLC v. Interland Motors Limited SCZ Judgment No. 5 of 2001

(25) Sussex Peerage (1884) 8 ER 1034

(26) Anderson Kambela Mazoka and others v. Levy Patrick Mwanawasa (2005) Z.R. 138 SC

(27) Smith v. East Elloe Rural District Council (1956) A.C. 736

(28) Regina v. Secretary of State for the Environment Ex parte Ostler (1977) Q.B. 122

(29) Stanbic v. Bentley Kumalo and others Appeal No. 132 of 2014

(30) Matilda Mutale v. Emmanuel Munaile (2007) Z.R. 118 (SC)

(31) Bank of Zambia v. Jonas Tembo and others (SCZ Judgment No. 24 of 2002)

(32) R v. Hare [1934] 1KB 354

(33) Pickstone v. Freemans Plc [1989] AC 66

(34) Westminster v. Haywood (No.2) 2 All ER 634

(35) Nistarini Dassi v. Nundo Lall Bose and Anr (1899) ILR 26

(36) Cal Sankaran Govindan v. Lakshmi Bharathi & Others 1974 AIR 1764, 1975 5CR (1)57

(37) Punjab Beverages Pvt. Ltd v. G.T. Agencies (2008) ISI ILR 496

(38) Trevor Limpic v. Rachel Mawere and others Appeal No. 121/2006

(39) Hildah Ngosi (suing as Administrator of the Estate of Washington Ngosi) v. The Attorney General and Lutheran Mission (Zambia) Registered Trustees Appeal No. 145/2010

Legislation referred to:

(1) Sections 5,6 and 14 of The Lands Acquisition Act, Cap 189 of the Laws of Zambia
(2) Section 13 of the Court of Appeal Act No. 7 of 2016
(3) Section 25 and Rule 58 and of the Supreme Court Rules, Cap 25.

Other works referred to:

(1) Order 59/11/17 of the Rules of the Supreme Court
(2) Atkins Court forms, Vol. 15, paragraph 28
(3) Halsbury Laws of England 2nd ed Vol. 22 at page 790

Introduction

1. Section 14 (1) of the Lands Acquisition Act, Cap 189 has been caught in the maelstrom of this appeal. The Act itself is a very powerful piece of legislation steeped in the principle of eminent domain. Its application has been a cause of much debate and indeed litigation. There is no question that the State has far reaching powers under the Act. However, what is in issue in this appeal is whether or not given the finality of section 14 (1)

of the Act, a litigant can use misrepresentation or fraud as a chink in the armor of the legislation to argue that a judgment of this Court or indeed any other court should be set aside on the ground that the judgment was obtained by fraudulent misrepresentation, given the glaring evidence that it was not in the public interest nor for the public benefit after all, but was meant to benefit private entities. In a nutshell, that is what this appeal is all about.

The Background Facts and Procedural History

2. The background facts which are undisputed and the record of what transpired leading to the present appeal are well captured in the Judgment of the Court of Appeal as well as in the Statement of Claim filed in the High Court in cause No. 2017/HP/2193.

3. The appellant was at all material times the owner of Farm No. 4300 Lusaka, which covers an area in extent 557.8759 hectares. He occupied the farm and used it for agricultural purposes.

4. In April, 1987, pursuant to section 3 of the Lands Acquisition Act 1970, Chapter 189, Volume 12 of the Laws of Zambia (hereinafter 'the Act') the state compulsorily acquired a portion of the appellant's land in extent 351.2142 hectares on the ground that it was desirable or expedient in the interest of the Republic to do so. That section provides that:

> **"Subject to the provisions of this Act, the President may, whenever he is of the opinion that it is desirable or expedient in the interest of the Republic so to do, compulsorily acquire any property of any description"**

5. The State went on to give notices of intention to acquire property and to yield possession in terms of sections 5, and 6 respectively, of the Act, representing that the portion of the land in question was urgently required in the interest of the Republic for public purposes.

6. It is common cause that the motivating purpose intimated for the compulsorily acquisition of the land in question, and in keeping with the spirit of section 3 of the Act, was to use the land for a public purpose, namely, the construction by the 2nd respondent of a housing complex on part of the land to alleviate a housing shortage in the City of Lusaka, while part

of the land was to be demarcated and allocated to public service workers who needed such residential plots. However, following the compulsory acquisition, the land remained idle for a considerable period of time.

7. Compensation for the acquired land was discussed and eventually settled, the appellant being given K540,000 [un-rebased] as compensation. However, the appellant was not quiescent about the motivation for the compulsory acquisition. He mounted a legal challenge in the High Court against the compulsory acquisition, for it is to that court that is given the duty of determining whether or not the compulsory acquisition was duly carried out for a public purpose in accordance with the Act and the Constitution.

8. After facing initial technical hitches, which are largely irrelevant for purposes of this appeal, the appellant's challenge was subsequently considered by the High Court. The grievance was dismissed after the High Court (Hon. Mr. Justice G.S. Phiri as he then was) formed the view on the evidence presented to it, that the compulsory acquisition had

been undertaken by the State for a legitimate public purpose. The appellant appealed to the Supreme Court which upheld the High Court judgment.

9. For its part, the Lusaka City Council did not undertake the development of the intimated housing complex on this portion of the land following the compulsory acquisition.

10. Rather than use the land compulsorily acquired for the stated public purpose, the 1st and 2nd respondents, in or around September, 2006, created two independent plots on a portion of Farm No. 4300 purportedly compulsorily acquired. The first plot was numbered Subdivision 'B' of Farm No. 4300 measuring 189.5160 hectares (hereinafter 'F/4300/B'). The second plot was numbered Subdivision 'C' of Farm No. 4300 measuring 120.7995 hectares in extent (hereinafter 'F/4300/C').

11. The appellant later came to learn that immediately after creating the two plots on the portion of F/4300, F/4300/B was leased to a private entity called Legacy Holdings Limited

(the 3rd Respondent) which intended to use the land for the construction of an up-market hotel and luxurious golf course.

12. Legacy Holdings Limited later abandoned the portion leased to it and the State repossessed it.

13. Following the State re-entry on F/4300/B, Bantu Capital Corporation Limited (the 5th respondent) purportedly acquired a direct lease from the 1st respondent in June 2011. The lease under which the 5th Respondent held the land stipulated, among other things, that the lessee was not to assign, sublet, mortgage or change the land use without the consent of the President. In breach of those conditions, the 5th respondent made several sub-divisions of the land for purposes of sale and construction.

14. The 5th respondent subsequently sold and assigned part of F/4300/B numbered as Subdivision 2 of subdivision 'B' of Farm 4300 to another private entity called Nyimba Investments Limited. The 5th respondent also took a mortgage on the security of the land numbered Sub-divisions 11 and 12

of subdivision 'B' of Farm No. 4300 and the remaining extent of F/4300/B now only measuring 12.7824 hectares from 189.5160 hectares and advertised to sell part of the land to the 6th respondent.

15. On the other hand, immediately after its creation, the 1st respondent on 21st September, 2006, proceeded to grant a direct lease of F/4300/C to yet another private entity, Kwikbuild Construction Limited (the 4th respondent). The lease under which the land was let to the 4th respondent stipulated, among other things that the lessee was not to assign, sublet, mortgage or change the land use without the consent of the President. In breach of those conditions, the 4th respondent also subdivided the land into several subdivisions for purposes of sale and construction.

16. Stirred by these actions and developments, the appellant was now more than ever convinced that the compulsory acquisition of his land was not, after all, done for a public purpose or in the interest of the Republic contemplated in section 3 of the Act and the Notices served on him. He was particularly

bothered that the 1st Respondent had, in the challenge of the compulsory acquisition in the High Court and the Supreme Court, maintained that the appellant's land had been compulsorily acquired in the interest of the Republic – for a public purpose.

17. The events that unfolded later as referred to in the preceding paragraphs, however, confirmed that the land had been acquired for nondescript private purposes not contemplated in sections 3 and 5 of the Act.

18. That appellant formulated the view that the 1st respondent, had during the hearing of the compulsory acquisition challenge before the High Court, presented incorrect facts as to the basis for the compulsory acquisition. There was an intentional perversion of the truth regarding the real purpose of the acquisition thus inducing the appellant and, more importantly, the High Court to believe that the compulsory acquisition could be situated within the spirit of section 3 of the Act. In other words, the judgment of the High Court dismissing the challenge to the compulsory acquisition was

procured by a fraudulent misrepresentation of facts upon which the acquisition was grounded. Section 4 of the Act envisages that the public purposes, that motivates the President to resolve that it is desirable or expedient in the interests of the Republic to acquire the property, must exist at the time such a resolve is formulated; it cannot be triggered by future purposes.

19. As that judgment was subsequently endorsed on appeal by the Supreme Court, the appellant thus attempted to move the Supreme Court by motion to revisit its judgment. That motion was, however, subsequently withdrawn upon a proper realization that a judgment procured by fraud and misrepresentation can only be set aside by a fresh action commenced for that purpose, which action should be directed against the original High Court judgment.

20. A fresh action was thus commenced in the High Court in 2010 under cause No. 2010/HP/0749 challenging the compulsory acquisition and the earlier judgment of the High Court as having been founded on fraudulent misrepresentation. That

action was dismissed on account of non-attendance (although the appellant had his bundles of documents and pleadings on record with the 1st to 4th respondents having filed their respective defences). An application for review was denied by the High Court with the court stating as follows:

> **"... the remedy lies....in recommencing the action. It is stated in Atkins Court forms, Vol 15, paragraph 28:**
>
> > **'...dismissal of an action or counterclaim is not a bar to a fresh action on the same or substantially the same facts, and does not operate as an estoppel or res judicata, even where the plaintiff consented to the (dismissal) order, since the Court has not determined or adjudicated upon the case on its merits. Clearly, from the above, the Plaintiff is at liberty to recommence an action."**

21. Hence, another action was commenced in 2016 under cause No. 2016/HP/ 607. That new action equally suffered numerous technical contests.

22. At the suggestion of the 1st respondent, an ex-curia settlement was initiated. As a result, the appellant discontinued his action. The intended out-of-court settlement, collapsed. The appellant was once again motivated to commence a fresh

action under cause no. 2017/HP/ 2193. This action, too was fervently challenged by the 2nd, 4th and 5th Respondents as being *res-judicata* and an abuse of court process. The High Court (Hon. Mr. Justice M. Zulu) agreed with the challenge and in consequence dismissed the action on that basis. In his ruling dated 6th April 2018, the judge stated as follows at R18:

> **"It is apparent that following the decision of the government to compulsorily acquire Farm 4300 Lusaka, the 1st Plaintiff sought legal redress and commenced various actions to recover similar relief that he now seeks in this action. The issues raised were determined by the High Court under case No. 1997/HP/272 and on appeal by the Supreme Court under case SCZ/8/190/2002. The 1st Plaintiff's claims that these judgments were obtained by fraudulent misrepresentation is merely an attempt to circumvent the law and have this court overturn the decision of the Supreme Court. This is unacceptable.... The issue of whether or not the 1st Plaintiff has discovered that there was fraud in the judgment of this court and the Supreme Court is inconsequential as this court cannot through this action indirectly reopen the issue of the compulsory acquisition.... which was already decided by the Supreme Court.**
>
> **Having established that this matter is re-judicata and an abuse of court process, this action is at an end and is accordingly dismissed."**

23. Being discontented with the decision of the High Court of Hon. Mr. Justice M. Zulu, the appellant appealed to the Court of Appeal of Zambia.

24. The latter court held that the landowner could, in the circumstances he found himself, bring out an action as he in fact did, to set aside a judgment that had been procured by fraud even if that judgment had been confirmed by a higher court on appeal such as this Court. In the words of the Court of Appeal:

> **"In our considered view, It is inconsequential that an appellate court has heard and determined the matter. The reason is that the law will not allow a fraudster to deceive the court into deciding in his favour, whether it be a court of first instance or an appellate court. Fraud is fraud, never mind the level of the court deceived by a party of a matter."**

25. The Court of Appeal, however, dismissed the appellant's appeal with costs. At the same time, it also reversed the High Court's decision refusing to hear cause No. 2017/HP/2193 because, according to the Court of Appeal, the basis upon which Hon. Mr. Justice M. Zulu, declined to hear that cause

was erroneous. On the other hand, the Court of Appeal concluded that in terms of section 14 (1) of the Act the decision of the Supreme Court, in an appeal challenging a compulsory acquisition, is final between the parties to the proceedings notwithstanding the appellant's allegations of fraudulent misrepresentation. On that basis, the Court of Appeal dismissed the appellant's appeal.

The ground of appeal before this Court

26. The appellant's ground of appeal as amended in the memorandum of appeal is as follows:

1. It was a misdirection for the lower Court to hold that a compulsory acquisition of privately owned land premised on misrepresentation and fraud cannot be assailed on account of the finality envisioned in section 14 (1) of the Lands Acquisition Act, 1970.

The appellant's arguments on appeal

27. In the copious heads of arguments submitted on behalf of the appellant by his learned counsel, it is argued that the main

issue for determination in effect questions whether in a democratic country which places a premium on free enterprise and where the rule of law requires that governmental actions and decisions are taken transparently and in good faith, the right to question executive action can be gagged. Was the Court of Appeal correct in holding that a compulsory acquisition, which admittedly was justified on fraudulent grounds in the High Court, cannot be reviewed by reason of the finality envisioned in section 14(1) of the Lands Acquisition Act?

28. The appellant has asked this court to decide on a delicate issue touching on the compulsory acquisition by the State in the interest of the Republic for purposes of delivering services, of a portion of the appellant's privately-owned land known as Farm No. 4300, Lusaka that was lawfully held by him on a 100-year lease.

29. According to the appellant's learned counsel, this appeal does not, in any way, question the power of eminent domain of the State or indeed the necessity of compulsory land acquisition

powers in the interest of the Republic. To the contrary the issues raised in the appeal relate narrowly to the question whether a party can get away with misleading the court in the interpretation and application of the legislation that gives the State such exceptionally grand powers, the exercise of which could have far-reaching, and in some cases non-remediable consequences for those whose lands are expropriated.

30. In the submission of counsel, the nature of the compulsory acquisition power and the way it is used is invariably sensitive and could be disruptive to those affected. The exercise of the power could displace families from their homes, farmers from their fields and neighbourhood, and investors from their business and yes, it could also significantly fetter the land tenure system and affect the fundamental right to property.

31. It was also submitted that the power of compulsory acquisition can also be abused when prompted by improper motives, when unfair procedures are used and when inequitable compensation is given. It is in this sense that the exercise of the power can reduce land tenure security, increase tension

between government and citizens, and reduce public confidence in the rule of law. Its arbitrary use could also create opportunities for corruption.

32. In the appellant's counsel's view, although the issue for determination in the present appeal relates to fraudulent misrepresentation within the statutory scheme of compulsory land acquisition under the Lands Acquisition Act, more particularly sections 3, 5 and 6 and as those sections dovetail with section 14 dealing with finality of court challenges, they have underlying grave constitutional ramifications which this court, though not being asked to interpret the Constitution, can hardly ignore.

33. Counsel contended that the Zambian Constitution has always manifestly evinced a particular recognition for the protection of private property rights in several provisions which are a matter for judicial notice. Article 10 of the Constitution as amended in 2016, for example, provides that the government shall create an economic environment which encourages individual initiative and self-reliance among people so as to promote

investment employment and wealth. Sub-article (3) proclaims that the government shall promote local and foreign investment and guarantee such investment, and further that:

> **"[4] The government shall not compulsorily acquire an investment except under customary international law and subject to article 16 (1)."**

34. It was further submitted by counsel that the issue at play in this appeal cannot be considered in isolation from the overall socio economic and constitutional governance contexts.

35. Counsel also submitted that it is indispensably important to point out that this Court has legitimate authority to look at, and take judicial notice of the contents of cause Nos. 1997/HP/272 with SCZ/08/190/2002, 2010/HP/0479, 2016/HP/0607, vis-à-vis decisions of other Courts. This was the position taken by this Court in the case of **Shamwana and others v. The People**[1] when this court held that:

> **"... a Judge has power not only to look at his own record, but also those of another Judge and to take judicial notice of their contents."**

36. It was also submitted that before the issue raised by the ground of appeal was considered, it is imperative to identify

the legal premise for challenging the decision to compulsorily acquire private land, for if there is no legitimate basis for any challenge, the whole attempt to impugn the High Court judgment, even if it were to be allowed by this Court, would be of no more than academic value.

37. The appellant intimated through the submissions by his counsel, that he is fully alive to the fact that compulsory acquisition is lawful in this country as it is in many others, but that it is not the source of compulsory acquisition powers that is an issue in this appeal; rather the exercise of that power that poses a challenge of legal significance that the appellant was raising in the lower court.

38. It was submitted that Article 16 (1) of the Constitution and section 3 of the Lands Acquisition Act are clear in their direction. Article 16 (1) of the Constitution states that:

> **"Except as provided in this article, property of any description shall not be compulsorily taken possession of, and interest in or right over property of any description shall not be compulsorily acquired unless under the authority of an act of parliament which provides for payment of adequate compensation for the property or interest or right to be taken possession of or acquired."**

39. The appellant admitted that section 3 of the Land Acquisition Act confers on the President a rather wide discretionary power to compulsorily acquire property when it is in the interest of the Republic to do so. Quite what informs the President's consideration that any property should be acquired in the interest of the Republic is nowhere stated in the Act.

40. More purposely, counsel for the appellant pointed out that section 3 of the Act uses the words whenever the President *'is of the opinion that it is desirable or expedient in the interest of the Republic to do so'* he may compulsorily acquire land. They recalled that in the case of **Nkumbula v. Attorney General**[2] it was held that:

> **"...the words 'in the opinion of the President' made the matter one of the subjective decision of the President and thus cannot be challenged unless it can be shown that the person vested with the power acted in bad faith or from improper motives or on extraneous consideration or under a view of facts or the law which cannot reasonably be entertained."**

41. Counsel for the appellant observed that it is neither the place nor role of the courts to determine whether the President was of the opinion that it is desirable or expedient to compulsory

acquire property; that the courts are neither suited nor equipped for that task which falls exclusively on the decision maker. They, however, have a duty both under Article 16 (1) of the Constitution and section 3 of the Act, to determine whether the compulsory acquisition of land, as in the instant case, was duly carried out in the interest of the Republic, that it to say for a public purpose.

42. Although the President has wide discretion, it is, according to counsel for the appellant, not a discretion to be used arbitrarily. It must be exercised reasonably, fairly and justly. In particular, the claims of public interest will be relevant factors in the exercise of such discretion as will be the motivation and the conduct of the acquiring authority prior to, during, subsequent to, and after the actual exercise of that discretion. In **Nkumbula v. Attorney General**[2], which they had cited earlier on in their submissions, the court held that:

> **"What is in the public interest or for the public benefit is a question of balance; the interest of the society at large must be balanced against the interest of the particular section of society or of the individual whose rights or interest are in**

issue, and if the interest of the society at large are regarded as sufficiently important to override the individual interest then the action in question must be held to be in the public interest or for the public benefit."

43. Counsel posited that notwithstanding the rather opaque reference to the interest of the Republic made by the Act, the issue whether a compulsory acquisition is in the interest of the Republic squarely lies within the remit of the court to decide. He drew our attention to the case of **Zambia National Holdings Limited and Another v. Attorney General**[3] where we held that the President's decision to compulsorily acquire property could be challenged by the landowner both as to its legality and its arbitrariness. In particular, counsel quoted the following passage from our judgment in that case:

> **"It was not in dispute that the Lands Acquisition Act gives the power to the President to resolve in his sole judgment when and if it is desirable or expedient in the interests of the Republic to acquire any particular land. Quite clearly, a provision of this type does not mean that the President's resolve cannot be challenged in the courts both as to legality and other available challenges whereby arbitrariness and other vices may be checked. There was no dispute on the law that the exercise of statutory power could be challenged if based on**

bad faith or some such other arbitrary, capricious or ulterior ground not supportable within the enabling power."

44. The learned counsel for the appellant stressed that judicial control of compulsory acquisition powers derives from the general control of the court over bodies exercising public powers, powers of statutory nature and the legislature in this country has not ousted the courts' power in this regard.

45. They also contended that the prevailing concept is that an acquiring authority must act within its powers, and must not abuse it, and must furthermore, comply with the procedure set out for the exercise of that power. They quoted for, we believe, purely persuasive purposes, the High Court decision in the case of **Mpongwe Farms Limited (in receivership) and others v. Attorney General**[4] where the judge quite pertinently observed that:

> **"The state itself passes the legislation and devises statutory procedures to govern compulsory acquisition of property. For whatever purpose such property is acquired, the state must follow that law and procedure. This is what the rule of law entails."**

46. In their further submission, counsel for the appellant contended that judicial oversight of the exercise of compulsory acquisition powers encompasses several factors which are relevant to any consideration of the question whether the circumstances giving rise to a compulsory acquisition make the acquisition legally proper or not. These are: acting for an improper propose, acting in bad faith, failing to have regard to relevant consideration or being influenced by irrelevant considerations.

47. They went on to submit that although the Lands Acquisition Act does not define what is meant by 'in the interest of the Republic,' this does not give the state or the acquiring authority a blanket power to acquire property without consideration of the interest of the Republic. Interests of the Republic clearly imply a public purpose. They submitted that the non-exhaustive list as to what public interest encompasses include the interest of defence, public safety, public order, public morality, public health or town and country planning.

In other words, the intended development of property acquired should be for the promotion of the public benefit.

48. Granted that the law limits the goals for which the state may acquire property against the owner's will in order to use the property, it follows, according to the learned counsel for the appellant, that the court should play a visible and crucial role in promoting proper legal limits to the power of the state to expropriate property so that the exercise of the power is at all times informed by reasonableness, transparency, fairness and absence of arbitrariness.

49. Counsel suggested that what constitutes public use of compulsorily acquired property will depend upon the facts surrounding the subject. Our attention was drawn to what counsel referred to as a significantly persuasive High Court judgment in the case of **William David Carlisle Wise v. Attorney General.**[5] The court held in that case that the compulsory acquisition of two farms belonging to a private company and the subsequent leasing of them to a different

private company, was not for a public purpose but undertaken with a clear profit motive. Bwalya J. pertinently noted that:

> **"The Lands Acquisition Act, Cap 296 of the Laws of Zambia empowers the President of the Republic of Zambia, whenever he is of the opinion that it is desirable or expedient in the interest of the Republic so to do, compulsorily to acquire any property of any description that is the general thrust of this Act. The Act does not stipulate the purpose or purpose for such compulsory acquisition. I should hasten to say that the silence of the act on the question of the purpose or purpose for which the state may compulsorily acquire property upon payment of compensation does not per se give the state a blanket compulsory acquisition without any cause or purpose....there can be no compulsory acquisition without cause or purpose.**
>
> **Furthermore, in common law jurisdictions, the purpose for compulsory acquisition of property upon payment of compensation must be a public one and what constitutes public use frequently and largely depends upon facts surrounding the subject. It has been said that the letting of private property not for public use but to be leased out to private occupants for the purpose of raising money is an abuse of the power of eminent domain and maybe redressed by action at law like any other illegal trespass done under an assumed authority. The issue of public use is a judicial question and one of law to be determined on the facts and circumstances of each case."**

50. In their effort to persuade us to accept their argument on the need for the courts to check the power of compulsory acquisition, the learned counsel for the appellant referred us to numerous foreign authorities. They quoted a passage from the judgment of Slade LJ in the English case of **R v. Secretary of State for Transport and others, ex-parte de Rothchild**[6] at page 934 as follows:

> **"... it has to be recognized that the compulsory purchase [compulsory acquisition] of land involves a serious invasion of the private proprietary rights of citizens. As Purchas LJ, described them in Chilton v. Telford Development Corporation (1987) 3 ALL ER 992 at 993, the power of compulsory purchase of an acquiring authority are of a draconian nature. The power to dispossess a citizen of his land against his will is clearly not to be exercised lightly and without good and sufficient cause."**

51. Turning to another English case of **Prest v. Secretary of State for Wales**[7] counsel quoted from the judgment of Lord Denning at page 198 as follows:

> **"I regard it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is expressly authorized by parliament and the public interest decisively so demands.... If there is any**

reasonable doubt on the matter, the balance must be resolved in favour of the citizen."

52. They also quoted a passage from the judgment of Watkins LJ in the same case where at page 211 he stated that:

> **"The taking of a person's land against his will is a serious invasion of his proprietary rights. The use of statutory authority for the destruction of those rights requires to be carefully scrutinized. The courts must be vigilant to see to it that authority is not abused. It must not be used unless it is clear that the Secretary of State has allowed those rights to be violated by a decision based upon the right legal principles, adequate evidence and proper consideration of the factors which sway his mind into confirmation of the order sought."**

53. From the case of **Westminster Corporation v. L & NW Railway**[8] the learned counsel quoted from Lord McNaughton's statement that:

> **"It is well settled that a public body invested with a statutory power...must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably."**

54. Moving to India, the learned counsel for the appellants cited the case of **Kedar Nath Yadav v. State of West Bengal & others**[9]they considered to sit almost on all fours with the

present case. There, West Bengal Industrial Development Corporation had compulsorily acquired land ostensibly for a public purpose. The land was, however, used to build a Tata Motor Factory. The Supreme Court of India examined the question what constitutes a legitimate 'Public purpose' and distinguished between acquisition by the government for public purposes grounds and for the benefit of private companies. It is stated at page 81-82 as follows:

> **"Such acquisition, if allowed to sustain, would lead to the attempt to justify any and every acquisition of land of the most vulnerable section of the society in the name of public purpose' to promote socio economic development."**

55. In the **Kedar Nath Yadav** case, the Court held that the acquisition of land to build a Tata Motor Factory did not constitute a legitimate public purpose but instead benefited a private company and thus directed that the land be returned to the original owners.

56. Likewise, in the American case of **City of Norwood v. Horney**[10], it was held that when the State takes private property for transfer to another private individual rather than for use by the state itself then judicial review of the State's

acquisition will become all the more important. In particular, the court held at pages 5, 28, 30 and 33 as follows:

> **"Courts shall apply heightened scrutiny when reviewing statutes that regulate the use of eminent domain powers... "[t]here is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use....there can be no doubt that our role – though limited- is a critical one that requires vigilance in reviewing state actions for the necessary restraint, including review to ensure that the State takes no more than necessary to promote the public use, and that the State proceeds fairly and effectuates takings without bad faith, pretext discrimination, or improper purpose.**
>
> **Similarly, when the State takes an individual's private property for transfer to another individual or to a private entity rather than for use by the state itself then judicial review of the taking is paramount. A primordial purpose of the public use clause is to prevent the legislature from permitting the State to take private property from one individual simply to give it to another. Such a law would be flagrant abuse of legislative power."**

57. The learned counsel also submitted that although the compulsory acquisition by the State of the appellants land in extent of 351.2142 hectares, in the present case, was stated to be for a public purpose or in the interest of the Republic, the concatenation of circumstances attendant on that compulsory

acquisition suggests otherwise and this court has a duty to allow an inquiry into the circumstances by setting aside the High Court Judgment.

58. It was also submitted that fraud is one of the two grounds assigned for a collateral attack upon a judgment, the other being want of jurisdiction; that the record shows that the judgment of the High Court in question as confirmed by this court was obtained by a fraudulent misrepresentation of facts as to the purpose to which the land was to be put. Though bearing the form of a judgment, the High Court decision dismissing the challenge of the compulsory acquisition is in truth absolutely void.

59. Counsel then focused his submission on the law on setting aside a judgment obtained by fraud. They quoted from the learned authors of **Halsbury Laws of England 2nd ed vol. 22** at page 790 where at paragraph 1669 they state as follows:

> **"A judgment which has been obtained by fraud either in the court or one or more of the parties, can be impeached by means of action which may be brought without leave and is**

analogous to the former chancery suit to set aside a decree obtained by the fraud."

60. Our attention was drawn to the timeless words of Denning LJ in **Midland Bank Trust Co Ltd and another v. Green and Others**[11], when restating his earlier position in **Lazarous Estate v. Beasley**[12] that fraud 'vitiates judgment, contract and all transactions whatsoever.' He further held that:

> **"No court in this land will allow a person to keep an advantage which he had obtained by fraud. No judgment of a court, no order of Minster, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything.**
> **By fraud here, I do not mean only the sort of fraud which is actionable in deceit. I mean the sort of fraud as was spoken by Sir Edward Coke when he condemned conveyances made in fraud of creditors: see Twyne's case. Fraud in this context covers any dishonest dealing done so as to deprive unwary innocents of their rightful dues."**

61. Reference was also made to the old case of **United States v. Throckmorton**[13]**,** where a plaintiff in a land claim, finding that he had no evidence to sustain the claim, procured the signature and the antedating of a false document of title and secured the perjured testimony of two witnesses. Delivering

the judgment of the Court, Justice Miller said at paragraph 65, among other things, that:

> **"There is no question of the general doctrine that fraud vitiates the most solemn contracts, documents and even judgment. There is also no question that many rights originally founded in fraud become.... No longer open to inquiry in the usual and ordinary methods... If the court has been mistaken in law there is a remedy by writ of error. If the jury has been mistaken in the facts the remedy is by motion, for new trial. If there has been evidence discovered since the trial, a motion for a new trial will give the appropriate relief. But all these are part of the same proceedings, relief is given in the same suit, and the party is not vexed by another suit for the same matter...But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to the suit, there was, in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise or compromise or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff, or where the attorney regularly employed corruptly sells out his interests to the other side - these and similar cases, which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree and open the case for a new and fair hearing... In all these cases and many others which have been examined relief**

has been granted on the ground that, by some fraud practiced directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all his case to the court."

62. Counsel for the appellant entirely agreed with the Court of Appeal when it held that:

> **"It is well established that when a fraud has been perpetrated on the court, misleading it into a finding in favour of a party who has by fraud led evidence that misrepresents the facts, such judgment can be set aside. In Delasala v Delasala [1979] 2 All ER 1146.**
> **'...it was stated....where a party seeks to challenge a judgment or order that finally disposes of the issues raised between the parties on the ground that it was obtained by the fraud or mistake, the only way of doing so is by bringing a fresh action to set aside.'**

63. Counsel also quoted **Order 59/11/4** of the White Book, 1999 edition which is to the same effect and states as follows:

> **"Judgment obtained by fraud - there is jurisdiction to set aside a judgment for fraud on a motion for a new trial, but as a rule an action must be brought for the purpose, and if for special reasons a motion is permitted, the charge of fraud must be made with the same particularity as in an action and as strictly proved and the same rules apply as to burden of proof and admissibility of evidence (Hip Foong Hong V Neotia [1918] A.C 888, Pp. 893-4, P.C.; Jonesco v Beard [1930] AC 298, Pp.300-1, H.L.; Stern v. Friedman [1953] 1 W.L.R 969;**

[1953] 2 All E.R 565). Where it is alleged that a judgment was obtained by fraud, the appropriate course would normally be to bring a fresh action to set aside that judgment because, in such cases there will usually be serious and difficult issues of fact to be determined, and therefore a first instance court is the most appropriate forum (Robinson v. Robinson [1982] 2 All ER 699, C.A)."

64. We were reminded by counsel that in its judgment the Court of Appeal had referred to plethora of authorities to buttress this same point and approvingly quoted from Judge Wilberforce's judgment in the case of **Ampthill Peerage** at page 569 and also Lord Buckmaster in **Jonesco v. Beard** among other authorities.

65. More pertinently, according to counsel, the Court was in agreement with the phrase 'fraud is a thing apart' when it quoted Lord Bingham in **HIH Casualty and General Insurance Ltd v. Chase Manhattan Bank**[14] that:

"...fraud is a thing apart. This is not a mere slogan. It also reflects an old legal rule that fraud unravels all."

66. Turning to the position in the UK, counsel referred us to the judgment of the UK Supreme Court in **Takhar v. Gracefield Developments Limited & Others**[15] which affirmed that where

a judgment is procured by fraud, an action lies to set it aside or for rescission of that judgment. Lord Sumption (with whom Lord Hodges, Lord Lloyd-Jones and Lord Kitchin agreed) stated in paragraphs 59-61 that an action to set aside an earlier judgment for fraud is not a procedural application but a cause of action in its own right, deriving from the court's equitable jurisdiction to reverse transactions procured by fraud by means of an original bill in equity. That cause of action is independent of the cause of action asserted in the earlier proceedings; it relates to the conduct of the earlier proceedings, and not to the underlying dispute. It follows that *res judicata* cannot therefore arise in either of its classic forms.

67. Reverting to the case of **United States v. Throckmorton**[13], counsel cited the following passage from that judgment:

> **"The fraud for which a bill to set aside a judgment or a decree between the same parties, rendered by a court of competent jurisdiction, will be sustained are those which are extrinsic or collateral to the matter tried, and not a fraud which was in issue in the former suit.**
>
> **The case where such relief has been granted are those in which, by fraud or deception practiced on the unsuccessful party, he has been prevented from exhibiting fully his case, by**

reason of which there has never been a real contest before the court of the subject matter of the suit."

68. Again, the appellant's learned counsel agreed fully with the Court of Appeal in its review of relevant case authorities on the effect of fraud on a judgment. The point that counsel for the appellant made is that if a claimant can establish a right to have the judgment set aside for fraud, there can be no question of cause of action or issue estoppel. In other words, *res-judicata* cannot arise. This is a point, in the submission of counsel for the appellant, that was made very clear by the UK Supreme Court in **Takhar v. Gracefield Developments Limited & others,**[15] a case we have alluded to earlier in this judgment.

69. The case of **Ampthill Peerage**[16] was also cited by the learned counsel to buttress the submission made by the appellant. In that case it was stated that for a judgment to be set aside on account of fraud, it must be shown that there was a 'conscious and deliberate dishonesty' in relation to the relevant evidence in the action which is relevant to the judgment. Reference was also made to the case of **Sphere Drake Insurance Plc and**

Another v. Onon Insurance Company Plc[17], where it was stressed that the relevant evidence, action, statement or concealment, must be 'material'. Accordingly, dishonesty must be causative of the impugned judgment being obtained in the terms it was.

70. The case of **Cole v. Landford**[18] was also cited by counsel for the appellant. There, the fraud presented was nothing but perjury in the evidence offered at the previous trial. The Queen's Bench Division was so clear that the judgment should be set aside.

71. It was also submitted that the principles that govern applications to set aside judgments for fraud were summarized by the English Court of Appeal in **Royal Bank of Scotland Plc v. Highland Financial Partners LP**[19] and endorsed by the Supreme Court in the **Takhar v. Gracefield Developments** case as follows:

> **(a) "there has to be a 'conscious and deliberate dishonesty' which is relevant to the judgment sought to be impugned.**
> **(b) The relevant dishonest evidence or action must be 'material' in that the fresh evidence would have entirely**

changed the way in which the first court came to its decision.

(c) The materiality of the new evidence is to be assessed by reference to its impact on the evidence supporting the original decision, nor its likely impact if the claim were to be retried on honest evidence."

72. According to counsel, in the present appeal, the compulsory acquisition having undeniably been premised on a fraudulent misrepresentation as to the public purpose to which the acquired land was to be put, this court is called upon to facilitate the careful monitoring of the exercise of the power of eminent domain by allowing the proceedings challenging the compulsory acquisition for fraud to proceed. In this way, submitted the learned counsel, the court will be playing its critical role in constitutional governance.

73. Counsel for the appellant recalled that in challenging the compulsory acquisition in the High Court before Mr. Justice G.S. Phiri in cause No. 1997/HP/272, the 1st appellant's only witness, Mr. Fortune Kachamba (then Senior Legal Officer in the office of the Commissioner of Lands), testified that from the record available to him, the President resolved to acquire

the property for a public interest. In its defence the 1st respondent had pleaded that the Lusaka City Council needed the acquired portion of the appellant's land in order to build a Housing Estate Complex and to demarcate the rest for residential stands for allocation to civil servants.

74. The witness also testified that the purpose for which the land was compulsorily acquired could not be effected because the appellant did not surrender the certificate of title to facilitate the marking off and the High Court Judge accepted this and partially based his decision on it.

75. Counsel submitted that as the High Court Judge noted in his judgment, the witness conceded that at the time of the acquisition the State had no plans for the acquired portion but that the acquisition itself was nonetheless done in public interest. This led the learned High Court Judge, in his judgment, while agreeing that the land was acquired for a public purpose, to state that:

> **"In my view, his failure to surrender the title deeds in this case was crucial so the issue at hand rather than the failure by the state to utilize the acquired portion of the farm. I say so because had the plaintiff surrendered his title deeds in 1987**

when the compulsory acquisition took place, the court would have been able to determine whether the acquisition was desirable or expedient as a matter of evidence. As the situation stands, the defendant's explanation that the plaintiff did not cooperate appears to me to be borne out by the evidence. Thus, I am unable to agree with the plaintiff that there was no need for the President to compulsorily acquire the land in question or that the President acted in bad faith. The net result is that on a balance of probabilities, I dismiss the plaintiffs' claims against the President decision and enter judgment for the defendants."

76. It was the further submission on behalf of the appellant that although this is not an appeal against that judgment of the High Court, it is important to point out that grave error characterized that judgment as a result of the fraudulent misrepresentation of facts surrounding the acquisition of the land in question by the acquiring authority. That the learned High Court Judge was wrong to mix two distinct factors - the compulsory acquisition and the subsequent non - surrender of the certificate of title because, firstly, Part V of the Act deals with how land compulsorily acquired should be transferred to the State. The transfer must, according to counsel, be done by the previous owner in a prescribed form within two months after publication of the notice of acquisition. There is set out

what is to be done in the event that the previous land owner fails or neglects to transfer the acquired land. The minster would in such instances apply to the Registrar who would make an entry in the Registrar recording the compulsory acquisition.

77. Counsel quoted section 20 of Lands Acquisition Act which provides that:

> **"Where a transfer to the President under this Act is registered in accordance with the provisions of any law or where an entry is made in the register in terms of section nineteen, such transfer or entry shall vest the land in question in the President free from all adverse or competing rights, title, trusts, charges, claims or demands whatsoever, but subject to any terms and conditions contained in such transfer or entry."**

78. They submitted that it was thus wrong for the High Court Judge to have held that the only reasons the land remained idle for a long period after it had been compulsorily acquired was because the appellant had not surrendered the certificate of title. In counsel's reading of section 20 of the Act as quoted above, neither possession nor transfer of interest in the acquired property is dependent on the physical handover of the certificate of title. Consequently, the surrender of title

deeds would not have assisted the court to determine whether the acquisition was desirable or expedient in the interest of the Republic for public purposes.

79. Counsel added that the only reason the acquired land remained idle, was because the acquiring authority had, as the 1st respondent's witness testified, no plans or purpose for the land at the time it was compulsorily acquired. This negates any notion that it was required for a public purpose. It in fact confirms bad faith.

80. The second reason for the appellant's belief that the learned High Court judge was wrong to mix the compulsory acquisition and the subsequent non - surrender of the certificate of title was that the question before the High Court was not whether the President had formed the opinion that it was desirable or expedient to compulsorily acquire the land in issue, rather it was whether the acquisition was in the public interest – whether the land was acquired for a public purpose. According to the learned counsel for the appellant, in determining this latter question, it was necessary to consider the surrounding circumstances so as to determine whether

there were some extra-legal concerns or even personal animus was at play. This, submitted the learned counsel, is where, the fraudulent misrepresentation of facts by the 1st respondent unduly influenced the High Court.

81. Counsel then argued on the holding of the Court of Appeal as regards section 14 (1). They quoted a passage from the judgment of the court as follows:

> **"...It seems to us that section 14 (1) cited above is conclusive, in so far as the compulsory acquisition is concerned...It is obvious to us that the language of section 14 refers to any action that may be invoked by a party whose land has been compulsorily acquired. If that be the position, as we think it is, then any action cannot be brought on the same subject matter, as section 14 decisively stipulates that no other steps challenging the compulsory acquisition may be taken, after the matter has been heard by the High Court, and if appealed against, the Supreme Court. The Supreme Court's decision is final."**

82. It was contended that there are in this case two competing public policy considerations, the first being the important one against re-litigation – finality of litigation and the second being the fraud principle - that an individual should not profit from a judgment obtained through misrepresentation, fraud or dishonesty which in effect deceives not only the other party

but also the court and ultimately the rule of law. Counsel submitted that in weighing these two considerations against each other, the Court of Appeal appears to have preferred finality of litigation and thereby misdirected itself.

83. Counsel further submitted that the court totally misapprehended the issue when it proceeded from the premise that the present challenge in cause No. 2017/HP/2193 to the judgment obtained in the High Court regarding the compulsory acquisition challenged was barred by section 14 of the Act. According to counsel, section 14 falls under Part III of the Act entitled 'compensation'. As amended by Statutory Instrument No. 110 of 1992, Part III now has four related sections all dealing with the issue of compensation.

84. Thus, section 10 enacts that where any property is acquired by the President under that Act the Minister shall pay compensation and in appropriate cases the person entitled to compensation may be granted alternative land in lieu of or in addition to monetary compensation.

85. Counsel also submitted that section 11 dealing with disputes appears to introduce a level of confusion which may have clouded the Court of Appeal's otherwise excellent analysis of the issue involved and the applicable law. It states as follows:

> **(1) If within six weeks after the publication in the Gazette under section seven of the notice to yield up possession, there remains outstanding any dispute relating to or in connection with the property, other than a dispute as to the amount of compensation, the minister or any person claiming any interest in the property may institute proceedings in the court for the determination of such dispute.**
>
> **(2) Where any dispute arises as to the amount of compensation, the Minister or any person claiming to be entitled to compensation may, and shall if such dispute is not settled within the aforementioned period of six weeks, refer such dispute to the court which shall determine the amount of compensation to be paid.**
>
> **(3) Repealed by statutory Instrument No. 110 of 1992**
>
> **(4) The existence of any dispute as aforesaid shall not affect the right of the President and persons authorized by him to take possession of the property.**

86. They quoted the repealed sub-section (3) of the section 11 which reads as follows:

> **"No compensation determined by the National Assembly under this Act shall be called in any court on the ground that it is not adequate."**

87. Counsel submitted that the scope of judicial intervention in compulsory acquisition disputes is not given by the Lands Acquisition Act. It is a judicial obligation that exists independently of the act and is not governed exclusively by the Act. When section 11 (1) provides for any dispute relating to or in connection with the property other than a dispute as to the amount of compensation, it in essence envisages a combination of disputes one of which related to compensation. In that case all that the section does is to proclaim that where there is a compensation related dispute and non-compensation related one, all raised together, a party would be at liberty to take a non - compensation related dispute to court.

88. They further posited that section 12 sets out the principles of assessment of compensation while section 13, which was

deleted by S.I No. 110 of 1992, provided for a right of appeal to the National Assembly against the amount of compensation determined by the Minister. Section 14 on the other hand deals with the effect of a decision and states that the decision of the court (or in the case of an appeal, the Supreme Court) shall be final and conclusive as between all the parties to the proceedings in question. Notably, section 14 is the last section under Part III dealing with compensation.

89. According to the appellant's learned counsel, the Court of Appeal was quite plainly wrong to have held that the finality contemplated in section 14 (1) of the Land Acquisition Act relates to any dispute brought in connection with compulsory acquisition. A contextual reading of section 14 clearly shows that it is matters relating to compensation that the section covers.

90. Counsel contended that to begin with, that section comes under the part dealing with compensation and is clearly intended to be related to the issue of compensation. Second, as the Act stood before the amendment of 1992, compensation

was in the first place determined by the Minster with a likely appeal to the National Assembly under the repealed section 13 before an appeal to the court whose decision was to be final. The court was also to determine any outstanding dispute aside those of compensation. According to counsel, finality as stressed in section 14(1) is merely intended to indicate closure of the grievance procedure against compensation in the hierarchy from the decision of the Minister, particularly in light of the previous reference to the National assembly; that there is no other conceivable reason that the section would have stated that a decision of the Court is final and in the case of an appeal, that of the Supreme Court would be final; that the finality here is procedural in the sense that the matter touching on compensation would not be determined by another body after a decision of the Court, but not that a decision of the Court is not open to challenge for having been procured by fraudulent misrepresentation.

91. The learned counsel argued that when considered in isolation, section 14(1) really adds nothing to dispute settlement. Disputes relating to compulsory acquisition determined by the

Supreme Court are final in any event, not because of section 14(1). They are final notwithstanding section 14(1). Yet decisions determined by Courts below the Supreme Court are potentially appealable and thus not final in the sense that they cannot be reconsidered by another Court.

92. They also submitted that the Court of Appeal understood section 14(1) as a bar to an action; an estoppel of some sort; that the action is *res judicata* the moment it is determined by a Court. The Court misdirected itself in holding that the finality in section 14(1) of the Lands Acquisition Act entails that a judgment obtained by misrepresentation or fraud cannot be assailed. The finality contemplated in that section does not extend to situations where the judgment of the Court was obtained by fraud. The judgment of the UK Supreme Court in **Takhar v. Gracefield Developments Limited**[15] was relied upon in this regard.

93. In the **Takhar**[15] case the UK Supreme Court guided that an application to set aside a judgment for fraud is a fresh cause of action that is independent of the cause of action asserted

previously. Such an application is not barred by the doctrine of cause of action estoppel, that is to say, the form of *res judicata* which prevents a party from bringing new proceedings based on the same cause of action, nor is it indeed barred by an issue estoppel which is a form of *res judicata* which prevents a party form re-litigating an issue which has been determined by an earlier judgment.

94. The learned counsel clarified that in the present appeal, there are essentially two distinct causes of action. The first relates to challenging the compulsory acquisition. Once judicially determined, that cause of action and the issues covered in the judgment cannot be raised again. The other cause of action related to setting aside a judgment obtained by fraud. The focus of cause No. 2017/HP/2193 and the issues it raised are confined to setting aside a judgment the substance of which was not the focus of the initial action in cause No. 1992/HP/272.

95. The relief sought by the appellant in the High Court under cause no. 2017/HP/2193 culminating in the Court of Appeal Judgment now being impugned was:

1. A declaration that the judgment of the High Court of Judicature for Zambia under Cause No. 1997/HP/272 and the Supreme Court of Zambia under Cause No. SCZ/9/190/2002 respectively were procured by fraud;
2. A declaration that the acquisition of a portion of Farm No. 4300 Lusaka, is null and void, ultra vires the provisions of the Lands Acquisition Act, 1970; and
3. A declaration that the Plaintiff is the original and rightful owner of the Farm 4300 Lusaka.

96. It was submitted on behalf of the appellant that the respondents have never denied the material facts surrounding the compulsory acquisition of the property in issue, nor has any one of them challenged the appellant's claim that there was fraudulent misrepresentation as to the real reasons for the compulsory acquisition of 351.2142 hectares. The opposition the respondents have put forth, together with the

arguments running through their respective cases are technical in substances such as *res judicata,* purchaser for value without notice, and abuse of court process.

97. Counsel quoted from the judgment of the Court of Appeal where it found and acknowledged that:

> **"At that meeting the Attorney General acknowledged the error of issuing the acquired portion to private entities, particularly 3rd, 4th and 5th Respondents who equally defrauded the Government by breaching their leases. It was agreed that the 1st Appellant discontinues the matter to pave way for an ex-curia settlement in light of the irregularities."**

98. The learned counsel reiterated that the relief the appellant sought in the High Court was for the Court to set aside the judgment obtained through fraudulent misrepresentation and thus order a restoration to the appellant of the land that was compulsorily acquired. This relief is, according to counsel, not without precedent. They cited the case of **Simpson Motor Sales (London) Limited v. Hendon Corporation**[20], where it was held, obiter, that it was proper in some cases to interfere with the enforcement by an acquiring authority of its legal

rights. An equitable right in the landowner exists based on the view that to permit the acquiring authority to continue to enforce any of its compulsory acquisition rights would in the real sense be against good conscience.

99. Counsel quoted Lord Evershed, in the same case where he explained [at page 1127] that for such a result;

> **"...it would be necessary to show one or both of the following: that there had been on the part of the corporation [acquiring authority] something in the nature of bad faith, some misconduct, some abuse of powers; that there has been on the part of the Simpsons some alteration of their position."**

100. They also drew our attention to the Kenyan case of **Town Council of Awendo v Nelson Odur Onyango & 13 others**[21] where it was strongly suggested by the Court that the original owner is entitled to pre-emptive rights in cases where the public interest that prompted the compulsory acquisition fails. The Court observed that:

> **"If, after land has been compulsorily acquired the public purpose or interest justifying the compulsory acquisition fails or ceases, the Commission may offer the original owners or their successors in title, pre-emptive rights to re-acquire the**

land upon restitution to the acquiring authority the full amount paid as compensation."

101. Counsel prayed that in the event that this appeal is allowed, the matter would have to be sent back to the High Court to hear the action to set aside the Judgment and with such setting aside, the subsequent Supreme Court Judgment would logically collapse as well since its foundation would have been swept away.

102. Given the exceptional circumstances of this case and its public policy ramifications, granted also the years it has taken to get to where the parties are, it was the submission of counsel for the appellant that the appropriate course for the court to take, bearing in mind the enormous amount of evidence before it contained in the record of appeal, is to rehear the matter on the Record and make a determination on the basis of what is before it. This course, according to counsel, has been taken by this Court in many cases previously.

103. Adverting to the case of **Attorney-General v. Kakoma**[22] where this court, decided not to send a matter back to the trial court

on the issue of damages, counsel quoted Baron DCJ (as he then was), where he stated as follows:

> **"... the learned Judge's whole approach to the question of damages was wrong and cannot be supported. The question is whether we should send the matter back so that damages may be assessed on proper principles or whether, since we have all the relevant facts before us, we are not in just as good a position as the trial Judge to resolve this issue. In my view we are. I believe we would be doing the parties no service whatever if we were to involve them in the expense which would be incurred if the matter were to be sent back on the issue of damages."**

104. Counsel also invited us to consider our decision in **Nevers Sekwila Mumba v. Muhabi Lungu**[23] in which in declining to send a matter back to the High Court, stated that the Court had sufficient powers under **section 25(1) of the Supreme Court Act** to determine an issue [mandatory injunction] that would otherwise be sent to the High Court for determination. We there stated that:

> **"...What the appellant's supplementary heads of arguments are urging us to do, is to exercise one of the many powers vested in this court by section 25 (1) of the Supreme Court Act, Chapter 25 of the Laws of Zambia. Those powers could, where we consider necessary, be exercised even without the appellant urging us, through his submission to do so... we are**

> **satisfied that we have sufficient power to deal with the matter in the manner suggested by the learned counsel for the appellant. We are also not unmindful that under section 25 (1) of the Supreme Court Act, Chapter 25 of the Laws of Zambia, we have vast power to determine a matter in place of the High Court."**

105. The appellant's contention was simply that this Court has sufficient power under section 25 (1) of the Supreme Court Act, of the Laws of Zambia to determine the dispute in finality as this matter has now taken three decades.

106. On the basis of the forgoing submission, counsel urged us to uphold the sole ground of appeal.

Responses to the appeal

107. All the respondents submitted heads of argument through their learned counsel. Generally, the arguments in these heads of arguments were focused and relatively brief.

108. An abridged version of each of the respondents key arguments are set out in the following paragraphs.

The 1st respondent's arguments on appeal

109. In opposing the appeal, the 1st respondent's case was focused principally on the issue of finality of the decision on compulsory acquisition as envisaged under section 14 of the Lands Acquisition Act as well as on the technical or procedural flaws that the 1st respondent believed afflicted the appellant's action.

110. Counsel conceded that a judgment procured by deceiving the court can be set aside by a fresh action but nevertheless anchored its argument on the need for finality and closure of litigation. The 1st respondent also stressed a procedural issue, namely that there was need to raise a motion for a fresh action in accordance with Order 59/11/17 RSC prior to such action being commenced. Since this procedure was not complied with, the appellant's matter before the High Court was, according to the 1st respondent's counsel, incompetent. The 1st respondent cited the cases of **B.P. Zambia PLC v. Interland Motors Limited** [21] **and Bank of Zambia v Jonas Tembo and others**[24] to support the submission that it would be an abuse

of process to re-litigate the same matter before different judges. Our attention was also drawn to the meaning and effect of a defence of *res judicata*. The 1st respondent has, on the strength of the authorities cited, argued that the High Court was on firm ground when it dismissed the appellant's action relating to fraudulent misrepresentation.

111. From portions of the appellant's amended heads of argument it was apparent that the appellant believes that the finality contemplated in section 14(1) of the Lands Acquisition Act is concerned *"with matters relating to compensation that the section covers"* and compulsory acquisition. According to counsel for the 1st respondent, this train of thought begs the question as to how matters of compensation could arise in the absence of a compulsory acquisition.

112. The learned counsel for the 1st respondent questioned how the finality of this decision of Court, as captured in section 14 of the Act, can be interpreted to be limited only to the by-product of a compulsory acquisition, that is compensation to the exclusion of the substantive matter which is the compulsory

acquisition itself, granted that matters of compensation arise out of compulsory acquisition.

113. Counsel submitted that the mere fact that the appellant is relying on a contextual reading of section 14 (1) to maintain the argument that the section only applies to compensation related matters reveals that a literal reading of the section confirms otherwise as the section is not limited to matters of compensation and is inclusive of matters relating to the compulsory acquisition of land. To support this argument, counsel relied on the **Sussex Peerage**[25] case in which Lord Tinda CJ stated that:

> **"If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such a case, best declare the intention of the law giver."**

114. Additionally the 1st respondent's learned counsel referred to the oft-cited paragraph on statutory interpretation in **Anderson Kambela Mazoka and others v. Levy Patrick Mwanawasa**[26] which essentially agrees with what was stated in the **Sussex Peerage**[25] case. According to the learned

counsel, the wording of section 14 of the Act is precise and unambiguous, the words used therein ought to be expounded in their natural and ordinary sense.

115. The 1st respondent's counsel supported the lower court's reliance on the case of **Smith v. East Elloe District Council and others**[27] contending that, while the facts of the case may not be on all fours with the case in casu, there are some similarities that justify the lower court's reliance on it. In the **Smith**[25] case, the Acquisition of Land (Authorization Procedure) Act, 1946, Sch 1, Part 4, para 16 precluded the questioning in any legal proceedings of a compulsory purchase order. The court held that para 16 ousted the jurisdiction of the courts to try challenges to the compulsory purchase. Counsel argued that in the present case, section 14 (1) of the Lands Acquisition Act states with certainty that "The decision of the Court (or, in the case of an appeal, the Supreme Court) shall be final and conclusive as between all the parties to the proceedings in question." In similar vein, section 14 does in fact oust the jurisdiction of any other court to re-try any matter relating to a compulsory acquisition as the decision of

the Supreme Court is final and conclusive. This provision is clear and conclusive. The provision is devoid of any exceptions, provisos nor is it drafted "subject to" any other provision.

116. As further authority for the argument he was making in regard to finality to challenges of compulsory acquisition the learned counsel cited, by way of analogy, the case of **Regina v. Secretary of State for Environment Ex Parte Ostler**[28] (which dealt with the expiry of the time limit within which an aggrieved party could seek judicial intervention). The court in that case held that Parliament had by the relevant provisions of Schedule 2 to the Act of 1959 and Schedule 1 to the Act of 1946 given a person aggrieved by a confirmed scheme or order, six weeks in which to question its validity in the High Court and that after that period had expired, the court could not entertain any proceedings to question its validity on any ground whatsoever. Counsel reasoned that similarly in this matter, section 14 (1) of the Lands Acquisition Act precludes any further litigation once a matter pertaining to compulsory acquisition and related issues had been decided by the courts.

117. According to the learned counsel for the 1st respondent the lower court was thus on firm ground in holding that in terms of the legislation a matter heard and determined by the courts could not be re-tried on any ground whatsoever as "section 14 (1) of the Act underscores the necessity of putting such matters to rest in the public interest." The lower court did not therefore falter in arriving at its interpretation and application of section 14 (1) to the case at hand.

118. The learned counsel further submitted that the purpose of section 14 (1) of the Act is not to rehash the final jurisdiction of this Court but rather to direct that there must be finality to proceedings and this directive is necessitated by the need to put such matters to rest in the public interest.

119. Additionally, counsel posited that the initial matter resulting in this appeal is in fact statute barred according to section 4(3) of the Limitation of Actions Act 1939 of England which applies to Zambia by virtue of the British Acts Extension Act Chapter 10 of the Laws of Zambia. The facts clearly indicate that the contested compulsory acquisition took place in 1987 which is

33 years ago. As such the matter cannot be sustained. The reality is that the fresh action which is the subject of these proceedings was only commenced in 2017. The twelve-year window within which any such action should have been brought in accordance with the Limitation of Actions Act of 1939 is closed.

120. The final point made by counsel for the 1st respondent attacked the very assertion by the appellant that the judgments on compulsory acquisition which the appellant was challenging, were obtained by fraudulent misrepresentation. According to counsel, this argument lacks merit as the action by the State to re-allocate the property in dispute to other entities for other developments that would benefit the general public is indicative of public interest within the meaning of section 3 of the Lands Acquisition Act.

The 2nd respondent's arguments on appeal

121. In its brief heads of argument the 2nd respondent gave a brief background leading to this appeal which is not substantially

different from the appellant's summary of the facts as we have captured it earlier in this judgment.

122. The 2nd appellant substantially agreed with the holding of the Court of Appeal that the matter could not be re-litigated by virtue of section 14(1). It was contended on behalf of the 2nd respondent that section 14(1) should be given a literal interpretation as there were no ambiguities in its provision. It does not have a condition precedent being a standalone provision and furthermore does not require further interpretation. The implication of the provision therefore is that the decision of the Court is final and having gone as far as this Court in cause number SCZ/08/190/2002 when it was first litigated on, it need not be reopened.

123. In concluding the 2nd respondent's argument, the learned counsel relied on Article 16 of the Constitution which sets out the guidelines for compulsory acquisition of property and argued that all the requirements for compulsory acquisition were met and urged us to dismiss the appeal.

The 3rd respondent's arguments on appeal

124. The 3rd respondent, quite understandably, did not appear nor did it file any heads of argument

The 4th respondent's arguments on appeal

125. Like the 2nd respondent, the 4th respondent began its heads of argument by giving a background leading to this appeal. That background is similar to the background given by the appellant which we have already set out in this judgment.

126. Counsel for the 4th respondent argued that even though the appellant has attacked the President's use of power under section 3 of the Act, the exercise of that power was not an issue for determination in this appeal. The appellant further attacked the judgment of the High Court presided over by Mr. Justice Gregory Phiri (as he then was) which dismissed the appellant's challenge to the compulsory acquisition which judgment was upheld by this Court in Appeal No. SCZ/8/190/2002. Again, according to the 4th respondent's learned counsel, the issues raised in the High Court judgment

and upheld on appeal cannot be the subject of debate in this matter as they are *res judicata.*

127. Counsel dismissed as misplaced, the appellant's argument that the Court has a duty under Article 16 (1) of the Constitution and section 3 of the Act to determine whether the compulsory acquisition was duly carried out in the interest of the Republic and thus for a public purpose.

128. Counsel contended that the question as to what is in the public interest was already determined by the High Court in the 1997 cause and cannot be raised in this Court. Justice Gregory Phiri found that the President acted in the public interest. The question of whether or not the President acted in the public interest was therefore put to rest in the said action.

129. With regard to the argument by the appellant that section 14 applies to disputes relating to compensation and therefore inapplicable in this case, the 4th respondent's learned counsel argued that section 14 (1) cannot be read in isolation. It can only be properly understood if it is read together with section 11 of the Act which deals with disputes. The import of section

11 is, according to counsel for the 4th Respondent, clear and does not call for any exotic interpretation. Essentially what it says is that if within six weeks of publication in the Gazette of the notice to yield up possession there remains outstanding any dispute relating to or in connection with the property, other than the amount of compensation, the Minister or any person claiming an interest may institute proceedings for determination of the dispute.

130. According to counsel, the key words in section 11(1) are 'any dispute relating to or in connection with the property'; that those words encompass any dispute to do with the property. He submitted that the wording of section 11 is very wide and it covers any dispute relating to or in connection with the property and are not limited to compensatory disputes alone as suggested by the appellant. Counsel considers the section as excluding disputes to do with the amount of compensation as that is covered in section 14 (2).

131. The learned counsel argued that if the intention of Parliament was to limit disputes under this section to compensatory

disputes the word 'compensation' would have been used instead of the word 'property.' The use in the Act of the word 'property' rather than of compensation defeats the appellant's argument that section 11 is limited to disputes relating to compensation.

132. He further submitted that section 11 covers two types of disputes namely; any disputes relating to or in connection with the property and disputes relating to the amount of compensation. Disputes relating to or in connection with the property are covered under subsection (1) whilst disputes relating to the amount of compensation are covered under subsection (2). The action that was initially taken out by the appellant to challenge the compulsory acquisition falls within 'any disputes relating to or in connection with the property' covered under section 11(1) of the Act. Section 14 deals not only with the effect of decisions of the Court made in disputes under section 11 but also speaks to the finality of decisions made in disputes under section 11.

133. Counsel reasoned that since section 11 covers disputes relating to or connected to the property as well as to disputes relating to the amount of compensation, it follows that section 14 (1) refers to decisions made in these disputes namely disputes relating to or connected to the property (such as an action challenging the compulsory acquisition itself) or disputes relating to the amount of compensation. In each of these instances, the decision of the High Court (or on appeal, the Supreme Court) is final.

134. Counsel also recalled that the judgments which the appellant sought to challenge in the action before the High Court arose from the challenge against the compulsory acquisition. The appellant's action having been dismissed by the High Court and the Supreme Court on appeal, means that there is already a decision of the Court on this dispute which is final and conclusive with respect to the compulsory acquisition of the appellant's property. In the submission of counsel, the appellant cannot therefore bring an action challenging the decision to the High Court or the Supreme Court as section 14 is an absolute bar to such action. This is irrespective of

whether the challenge is founded on alleged misrepresentation or fraud.

135. The learned counsel for the 4th respondent urged us to be cautious when addressing the issue of the alleged misrepresentation or fraud as the alleged misrepresentation has not been established or proved since no court has to date made any such finding against any of the parties to the appeal. He contended that even assuming such finding had been made, the alleged misrepresentation has nothing to do with the other respondents who were not party to the action that gave rise to the alleged misrepresentation. In any event, section 14, he maintained, raises an absolute bar against all such actions.

136. Counsel argued that the rationality of the finality enshrined in section 14(1) was explained in the case of **Smith v. Elloe District Council and others**[27] and in the case of **R v. Secretary of State for Environment ex parte Ostler**[28]**.** In the former case, the appellant brought an action to challenge a compulsory acquisition order made by the Council but the

action was dismissed on the basis of section 15 of the Acquisition of Land (Authorization Procedure) Act which provided that the order cannot be questioned in any legal proceedings after 6 weeks from the date of the order. On appeal, the appellant inter-alia argued that the section cannot apply in instances where fraud is raised. To put this argument into context, the argument presented on appeal was as follows:

"There are several reasons why section 15 cannot cover cases of challenge on the ground of fraud or malafides. It should be given its ordinary meaning, which does not cover such cases. It is inappropriate to deal with such cases. There is a distinction between nullity due to fraud or mala-fides...

A compulsory purchase order made mala fide is not a compulsory purchase order at all and so paragraph 16 does not refer to it because such an order is a nullity vitiated from the beginning, a nullity in more than the sense of an act done ultra vires."

The Court in that case held that:

> **"My Lords, I think anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the Court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal. But it is our plain duty to give the words of an Act, their proper meaning and, for my part, I find it quite impossible to qualify the words in the paragraph in the manner suggested. It may be that the legislature had not in mind the possibility of an order made in good faith being capriciously or wantonly challenged. This is a matter of speculation. What is abundantly clear is that the words used are wide enough to cover any kind of challenge which any aggrieved person may think fit to make. I cannot think of any wider words. Any addition would be mere tautology."**

The Court went on to observe that:

> **"...Paragraph 16 provides that save as aforesaid a compulsory purchase order shall not be questioned in any legal proceedings whatsoever either before or after it has been confirmed.**
>
> **If the words of these paragraphs are held to have their ordinary meanings, then an order can never be questioned or attacked in any court on the ground that it was obtained by corrupt or fraudulent means, no matter how serious or how wide the conspiracy by which it has been obtained."**

137. According to counsel, the decision of the Court in **Smith v East Alloe**[27] was applied with approval in the case of **Reg v. Environment Secretary Ex-parte Oslter**[28]. He submitted that even though the Court was dealing with a slightly different provision from ours, the principle is the same, namely the need to provide finality to decisions such as those made under the Lands Acquisition Act. The rationale is that such decisions must not remain in doubt for far too long.

138. Counsel for the 4th respondent also submitted that section 14(1) of the Lands Acquisition Act ought to be given the same effect as the section that was interpreted in the cases he had cited. Thus, once the Court (or this Court) has rendered its decision on a challenge to a compulsory acquisition, that decision is final and conclusive and cannot be the subject of determination before another court on any ground, not even that of corruption or fraud. Section 14(1) does not, in counsel's view, give any exceptions to its application.

139. Counsel further contended that although the cases he cited involved an attempt to challenge an administrative order via

judicial review, the issue that arose in those cases was the interpretation of the Acquisition of Land (Authorization Procedure) Act. The point made in those cases was that there are particular instances when even fraud cannot be raised as a cause of action. His fervid submission was that the Court of Appeal cannot be faulted for holding that the action in this case cannot be re-litigated.

140. Counsel added that even assuming that section 14(1) was not applicable (which is not the case), the appeal herein still ought to fail because the appellant's action is statute barred in terms of section 4(3) of the Limitations Act which provides that:

> **"No action shall be brought by any person to recover any land after expiration of 12 years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person."**

The definition of the phrase 'to recover land' has been defined to include an action for possession. The learned authors of Halsbury's Laws of England have written the following at page 451 in the 4th edition Re-issue Volume 28:

> **"The Limitation Act prescribes a normal limitation period of 12 years from the date on which the right of action accrued**

for actions for the recovery of land, with longer periods in a number of special cases.

An action to recover land is an action to obtain any land by judgment of a court and is not limited to actions which claim possession."

141. As regards fraud, counsel referred to section 26 of the Limitation Act which provides that time begins to run from the time the fraud is discovered a position affirmed by this Court in the case of **Stanbic v. Bentley Kumalo and others**[29]. There, the appellant's cause of action for fraud accrued when he discovered the alleged fraud in 2006 and thereafter filed a motion before this Court to re-open the case which was however abandoned. The cause of action was said to have accrued in 2006 when he discovered the fraud. The present action is thus statute barred since it arose more than 12 years before the challenge was mounted.

142. Responding specifically to the appellant's argument that due to the exceptional circumstances, public policy ramifications, the years it has taken, and the enormous amount of evidence before this Court in the record of appeal, this Court should rehear the matter on the record and make a determination on

the basis of what is before it, the 4th appellant learned counsel opposed the appellant's prayer for the following reasons:

(1) Other than the numerous pleadings filed by the appellant, the respondents have never had the opportunity to file their pleadings in response;

(2) The allegation that the 4th respondent breached the conditions of its lease by subdividing the land into several subdivisions is imaginary as it is unsupported by the evidence. The issues the appellant is raising were never tried and determined by the High Court. It therefore cannot be seriously argued that the respondents have never denied nor challenged the various allegations made by the appellant;

(3) The record shows that the action in the High Court was dismissed in limine following the objections taken by the respondents. The action has never been heard on the merits. The request for this Court to rehear and determine the matter on record would result into an injustice. The submission that there is an enormous

amount of evidence on record is certainly not supported by the record itself. This Court cannot rehear a matter that has never been heard by the court of first instance;

(4) Suffice to mention that the issue raised by the appellant is fraud which the law requires to be specifically pleaded and proved at trial. This case has however never gone to trial for one to assert that there is enormous evidence of fraud. What the appellant is referring to as evidence are allegations in his own pleadings which have not as yet been tested and proved at trial;

(5) The prayer is therefore untenable. In the unlikely event that the appeal herein succeeded, the only thing this Court can do is refer the matter back to the High Court for it to be heard on the merits.

(6) The cases of **Nevers Sekwila Mumba v Muhabi Lungu**[23] and **Attorney General v Kakoma**[22] are not applicable because in the **Kakoma**[22] case, the issue on appeal was an award of damages on assessment. The lower court heard the matter and evidence was led and submissions

filed by the parties. This Court could therefore substitute its own decision because the matter was heard by the lower Court and there was sufficient material to warrant a determination. In the **Muhabi Lungu**[23] case, the issue was the grant of an injunction. This Court in that case granted a mandatory injunction based on the evidence on record. Notably, the matter was one capable of being determined on affidavit evidence which evidence was before Court. In this case the matter has never been heard on the merits. The respondents have not reacted to the appellant's pleadings and no evidence was led to support their respective positions.

The 5th respondent's arguments on appeal

143. In the heads of argument filed on behalf of the 5th respondent, the learned counsel started by pointing out that by the provisions of Article 16(1) of the Constitution and section 3 of the Lands Acquisition Act of 1970, the President has discretionary power to compulsorily acquire property when it is in the public interest to do so. Unquestionably so, the

President retains the discretion to determine compulsory acquisition of land. Referring us to the case of **Nkumbula vs. Attorney General**[2] counsel quoted the following passage from the judgment of the court:

> **"The words in the opinion of the President made the matter one of the subjective decisions of the President and thus cannot be challenged unless it can be shown that the person vested with the power acted in bad faith or from improper motives or on extraneous considerations or under a view of facts or the law which cannot reasonably be entertained."**

144. According to the learned counsel for the 5th respondent, the above holding in the **Nkumbula**[2] case outlines the parameters upon which a compulsory acquisition initiated by the person occupying the Presidency at the material time can be challenged. None of these parameters speak of the purported fraud.

145. Counsel submitted that the exercise of the President's discretion in section 3 of the Lands Acquisition Act denotes public interest as the Republic comprises citizens. What is in the public interest as explained in the **Nkumbula**[2] case would include the appellant as a lessee and the 5th respondent who

purchased the land after it had been re-entered by the State. The land had now been conveyed to the 6th respondent which entity is an institution of the State.

146. Counsel contended that section14 (1) of the Lands Acquisition Act states that the **"decision of the court (or, in the case of an appeal, the Supreme Court) shall be final and conclusive as between the parties to the proceedings in question" is clear on finality.** Where this Court has decided on a matter relevant hereto, statute directs that such decision shall be final and conclusive between the parties.

147. The learned counsel submitted that the appellant appears aggrieved with this piece of legislation and has called in aid numerous cases to substantiate his claim. However, the remedy lies not in overlooking the law as laid down but in petitioning the legislative organ to vary such law. This Court cannot vary what the provision entails but can only pronounce it as it is.

148. Counsel posited that the interpretation of the Court of Appeal in light of section 14(1) of the Lands Acquisition Act cannot be

faulted as it correctly reflects the law as it presently exists. Section 14(1) is a provision of law couched in mandatory terms and its intention leaves no room for any other interpretation other than that the decision of the Court, be it the High Court, or in case of an appeal the Supreme Court shall be final and conclusive on the parties concerned. There is no known amendment to this provision of law and therefore it stands as good law.

149. Counsel adverted to the position on the interpretation of statutory provisions as was stated by this Court in **Anderson Kambela Mazoka and others vs Levy Patrick Mwanawasa and others**[26] when we held that:

> **"It is trite law that the primary rule of interpretation is that words should be given their ordinary grammatical and natural meaning. It is only if there is ambiguity in the natural meaning of the words and the intention cannot be ascertained from the words used by the legislature, that recourse can be had to the other principles of interpretation."**

150. He further called our attention to the case of **Matilda Mutale vs Emmanuel Munaile**[30] where we held that:

> **"The fundamental rule of construction of Acts of Parliament is that they must be construed according to the words expressed in the Acts themselves. If the words of a statute are precise and unambiguous, then no more can be necessary than to expound on those words in the ordinary and natural sense. Whenever a strict interpretation of a statute gives rise to an absurdity and unjust situation, judges can and should use their good sense to remedy it by reading words in it, if necessary, so as to do what Parliament would have done had they had the situation in mind."**

151. Continuing with his arguments on statutory interpretation, counsel submitted that statutory provisions are to be considered in consonance of the whole and the intention of the legislature. Where there are apparent grey areas, the Court may read into the same certain provisions in order to arrive at a just interpretation or intention of the legislature. However, the reading in should not go against what is the generally apparent intention in terms of what it clearly provides. The contents of section 14(1) do not contain any matter that raises ambiguity to invite this apex Court to read anything into them

other than the holding of the Court of Appeal which states that:

> **"Similarly, in the instant appeal, the legislature having stipulated that a matter heard and determined by the Supreme Court would have been conclusively dealt with, it is not competent to re-open it on any ground whatsoever. Section 14(1) underscores the necessity of putting such matters to rest in the public interest, once a matter has been in the High Court, and an appellate Court/s."**

152. Counsel for the 5th appellant then moved to the argument premised on the Limitation Act. He argued that the present appeal cannot be sustained in as far as it challenges the said acquisition of land. He quoted section 4(3) of the Limitation Act 1939 of England which is applicable to Zambia which provides that:

> **"No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to some person through whom he claims to that person."**

Section 26 of the Limitation Act of 1939 further provides that:

> **"26. Postponement of limitation period in case of fraud or mistake. Where in the case of any action for which a period of limitation is prescribed by this Act, either**

(a) The action is based upon the fraud of the defendant or his agent or any person who he claims of his agent, or

(b) The right of action concealed by the fraud of any such person.

(c) The action is for relief from the consequences of a mistake, the period of limitation shall not begin to run until the plaintiff has discovered the fraud or mistake, as the case may be, or could with reasonable diligence have discovered it; provided that nothing in this section shall enable any action to be brought to recover, or enforce any charge against, or set aside any transaction affecting any property which-

(1) In the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have the reason to believe that any fraud had been committed or..."

153. Counsel recounted that the action which is the subject of these proceedings was brought on 15th December, 2017 by which time the twelve-year period envisaged by the Limitation Act of 1939 had expired. The action cannot therefore be sustained. He added that the 5th respondent, until recently, held good title to Subdivision B of Farm No. 4300 Lusaka, having paid consideration in the sum of K14, 153,233,825.00 (un-rebased) to the 1st respondent for the land in question. Counsel added that the title that the 5th respondent enjoyed in

respect of the property described as Subdivision B of Farm 4300 has now been conveyed to the 6th respondent. Therefore, even if fraud has been perpetrated in this action, the 5th respondent knows none of it and the process brought or sought to be brought before Court is caught up by section 26 of the Limitation of Actions Act of 1939 and cannot be sustained.

154. Counsel for the 5th respondent reiterated his submission that the appellant's argument that the judgment of the High Court and that of the Supreme Court were procured by fraudulent misrepresentation by the 1st respondent lacks merit and must not be entertained as the same is untenable under prevailing laws. The action by the State to allocate the land in dispute to entities such as the 5th respondent who are on record that the area was proposed for, inter alia, a housing estate where the general public would have access, advances the public purpose for which the State compulsorily acquired the vast piece of land as opposed to watching it remain undeveloped in the hands of a single citizen. Counsel added that the deprivation of vast land of one person who actually was

compensated in favour of several citizens who would have an opportunity to acquire property thereon is what serves public interest. In any event, the interest that the 5th respondent had, has now been conveyed to the 6th respondent.

155. Counsel referred to Order 59 rule 11 of the Rules of the Supreme Court 1999 edition which provides for the powers of the court as they relate to new trials. It states that:

> "11. (1) **On the hearing of any appeal the Court of Appeal may, if it thinks fit, make such order as could be made in the pursuance of an application for a new trial or set aside a verdict, finding or judgment of the court below.**
>
> (2) **The Court of Appeal shall not be bound to order a new trial on the ground of misdirection, or of the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the judge at the trial was not asked to leave to them, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage has been thereby occasioned.**
>
> (3) **A new trial may be ordered on any question without interfering with the finding or decision on any other question; and if it appears to the Court of Appeal that any such wrong or miscarriage as is mentioned in paragraph (2) affects part only of the matter in controversy, or one or some only of the**

> **parties, the Court may order a new trial as to that part only, or as to that party or those parties only, and give final judgment as to the remainder."**

156. Counsel submitted that the appellant unadvisedly placed reliance on Order 59/11/17 of the Rules of the Supreme Court which states as follows:

> **"3. Judgment obtained by fraud – There is jurisdiction to set aside a judgment obtained by fraud on a motion for a new trial, but as a rule an action must be brought for the purpose, and if for special reasons a motion is permitted, the charge of fraud must be made with the same particularity as in an action and as strictly proved, and the same rules apply as to the burden of proof and admissibility of evidence *(Hip Foong Hong v. Neotia* [1918] A.C. 888 at 893 – 4, PC: *Jonesco v. Beard* [1930] AC 298 at 300-1, HL; *Stern v. Friedman* [1953] 1 W.L.R. 969; [1953] 2 All E,R, 565). Where it is alleged that a judgment was obtained by fraud, the appropriate course would normally be to bring a fresh action to set aside that judgment, because, in such cases, there will usually be serious and difficult issues of fact to be determined, and therefore a first instance court is the most appropriate forum (*Robinson v. Robinson* [1982] 2 All E.R. 699, CA)."**

157. In the learned counsel's view, there is need for a motion to be placed before the appellate court, which motion must be determined for permission to bring a fresh action to be granted. This is so because without the need to seek

permission from the appellate court that hears a matter where fraud is later claimed or purported, any litigant would merely revert to the court of first instance, commence a matter and allege fraud so as to have a second bite at the cherry. It has not been demonstrated that such a motion was made and determined in this Court for the appellant to claim that the matter in *casu* is competently before this Court.

158. The learned counsel added that the foregoing notwithstanding, the action would still be unsustainable because of section 26 of the Limitation of Actions 1939 Act. These arguments clearly demonstrate that the initial court was on firm ground to hold that the appellant's claim that the judgments were obtained by fraudulent misrepresentation was a mere attempt to circumvent the law and seek to be reheard on settled matters.

159. According to counsel for the 5th respondent, as there was no motion permitting the appellant to commence a fresh action based on allegations of fraud, the High Court would have no jurisdiction to adjudicate over the compulsory acquisition of a portion of Farm No. 4300, Lusaka that this Court settled in

2005. It follows, therefore, that the 5th respondent is not in any contravention of the lease terms purported to be contrary to the High Court judgment under Cause No. 1997/HP/272 and the judgment of this Court under Cause No. SCZ/8/190/2002.

160. Counsel contended that the appellant's action would by law be caught up by the principle of *res judicata.* Counsel cited the case of **Bank of Zambia vs. Tembo and others**[31] and quoted the following passage from our judgment:

> **"In order that a defence of res judicata may succeed it is necessary to show that not only was the cause of action the same, but also to show that the plaintiff has 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. A plea of *res judicata* must show either an actual merger, or that the same point that had been actually decided between the same parties."**

161. It was also contended that as the appellant was paid K540,000.00 as compensation for the action that deprived him the land in question and his efforts to have that acquisition reviewed in court having been unsuccessful means that the appellant is merely seeking a second bite at the cherry. This,

as was held in **B.P. Zambia Plc v. Interland Motors Limited**[24] is an abuse of process.

162. Based on the foregoing submissions, we were urged to dismiss the appeal.

The 6th respondent's arguments on appeal

163. The learned State Counsel for the 6th respondent intimated to us that the 6th respondent joined the other respondents in restating the facts leading to this appeal and the various applications made and rulings and judgments delivered. He argued that the issue of the reasons behind the compulsory acquisition was ably dealt with by the High Court and this Court as can be seen from the earlier judgment of this Court which found that by conduct and actions, the appellant had prevented the respondents from effecting their intentions and also found that from the facts that the President had not acted unreasonably.

164. State Counsel contended that even if the issues of fraud and misrepresentation were legitimate, the intention of the State behind the acquisition is something that has already been

deliberated upon and settled. As can be clearly discerned from the earlier judgment, this Court confirmed as a fact that the intentions at the point of acquisition were pure but could not be effected because of the appellant's own conduct. The appellant cannot now claim fraud and misrepresentation as the intention of the state was delayed by his own conduct.

165. State Counsel for the 6th respondent did not agree with the appellant's interpretation of section 11(1) of the Act because in his reading of section 11(1) of the Act reveals that it provides for what should happen in the event that there remains outstanding any dispute relating to or in connection with the property, other than a dispute as to the amount of compensation, and that in such a case, the Minister or any person claiming any interest in the property may institute proceedings in court for the determination of such dispute.

166. According to the learned State Counsel, Section 11(1) does not in any way relate to a dispute regarding compensation as this is provided for under section 11(2). It follows therefore that even if Part III of the Act falls under the heading of

compensation, the same ordinarily also applies to other disputes relating to compulsory acquisition other than those that border on compensation by virtue of section 11(1) of the Act.

167. The learned State Counsel submitted that the appellant commenced an action under cause No. 1997/HP/272 challenging the compulsory acquisition of a portion of his farm by the State, not relating to compensation, but mainly to the intention behind the acquisition which he considered to have been ultra vires the provisions of Lands Acquisition Act. Clearly that dispute fell squarely under section 11 (1) of the Act and the High Court having made a determination which was later confirmed by this Court, that brought the matter to its finality as provided for in section 14 (1) and indeed cannot be re-opened for any reason whatsoever. This, according to the learned counsel, is supported by section 10 of the Interpretation and General Provisions Act Cap 2 of the Laws of Zambia which stipulates that:

> **"10. When a written law is divided into Parts or other subdivisions the fact and particulars of such divisions and**

subdivisions shall, with or without express mention thereof in such written law, be taken notice of in all courts and for all purposes whatsoever."

168. He also referred to the case of **R v Hare**[32], where Avory J at pages 355-356 stated that:

> **"Headings of sections and marginal notes form no part of a statute. They are not voted on or passed by Parliament but are inserted after the Bill has become law. Head notes cannot control the plain meaning of the words of the enactment, though they may, in some cases, be looked at in the light of preambles if there is any ambiguity in the meaning of the sections on which they can throw light."**

169. Reference was further made to the case of **Pickstone v. Freemans Plc**[33], where Lord Oliver of Aylmerton said that the explanatory notes attached to a statutory instrument although it was not of course part of the instrument, could be used to identify the mischief which it was attempting to remedy. This position was reaffirmed in **Westminster City Council v. Haywood (No. 2)**[34], at page 645, para 19 per Lightman J.

170. The issue, in counsel's submission, is not so much with the heading under which section 14(1) falls, but the spirit of the Act and whether an Act can seemingly provide blanket

protection to the issue of compensation and leave the issue of compulsory acquisition itself unprotected. The entire idea of the Act, which can be discerned from its preamble, is to provide protection to the State. He further contended that the danger with accepting the appellant's argument is that it misses the spirit of section 14(1) which is that a judgment based on the Act relating to the issue of compensation and deliberated upon by the High Court and confirmed by this Court is not, by virtue of section 14(1) of the Act, subject to be set aside.

171. The learned State Counsel contended that the appellant cannot concede that the statute protects compensation and a judgment under a dispute relating to compensation is not amenable to be set aside after this court has pronounced on it and argue at the same time that the main purpose of the Act, which is compulsory acquisition, does not benefit from such protection.

172. The learned State Counsel for the 6th respondent then made an argument grounded in equitable principles, namely that the

judgments, which were obtained earlier, cannot be set aside on the ground that the matter is *res judicata*. The appellant cannot therefore re-litigate a claim he has lost, even if he is now able to show that the earlier decision was wrong. But even assuming that the question of setting aside a judgment obtained by fraud was to be entertained, the certificates of title for the 5th respondent and Nyimba Investments Limited, from which the 6th respondent acquired title, had no encumbrances whatsoever from the appellant. The 6th respondent therefore acquired the properties without notice of any encumbrance and after conducting a due diligence exercise. In other words, it was a bona fide purchaser for value without notice of any equitable interest and had good title to the properties it had acquired.

173. The 6th respondent concluded its heads of argument by urging us to dismiss the appeal with costs for lack of merit.

The appellant's reply

174. In reply to the 1st 2nd 5th and 6th appellants' heads of argument, counsel for the appellant stressed the following:

(1) It was erroneous to invoke section 14(1) of the Act to dismiss cause No. 2017/HP/2193 because this provision cannot be invoked when an aggrieved party to a dispute on compulsory land acquisition commences a cause of action premised on fraud that is independent of the cause of action asserted in the original proceedings.

(2) The respondents have raised four issues in their arguments namely:

(a) Motion for a fresh action;

(b) Res judicata, re-litigating a matter, abuse of court process, matter being statute barred;

(c) Re-allocation of the disputed land to other entities as being indicative of public interest within the meaning of section 3 of the Lands Acquisition Act, 1970; and

(d) The principle of a bon fide purchaser for valuable consideration.

175. The appellant's learned counsel also argued in his reply that all these arguments do not help the respondents at all as there

is no need for a fresh motion; it being settled law that *res judicata* as an estoppel is inapplicable in a cause of action to set aside a judgment in earlier proceedings for fraud as was held in **Takhar v. Gracefield Developments Limited**[15] ; the fact that the disputed land has been re-allocated is not indicative of public interest within the meaning of section 3 of the Lands Acquisition Act nor was there a bona fide purchaser for valuable consideration as the evidence shows that it was anything but.

176. The learned counsel further submitted that the American case of **City of Norwood v. Horney**[10]**,** held that public use clause entails that private property should not be taken from one private party to another. Furthermore, the case of **Kedar Nath Yadav v. State of West Bengal & others**[9] draws the distinction between acquisitions by government for public purposes grounds and acquisition for the benefit of private companies and went on to hold that the acquisition of land to build a Tata Motor Factory did not constitute a legitimate public purpose but instead benefitted a private company. The court thus directed that the land be returned to the original

owners. By way of emphasis, the learned counsel again referred to the case of **William David Carlisle Wise v Attorney General**[5] in which the High Court noted that:

> **"...the letting of private property not for public use but to be leased out to private occupants for the purpose of raising money is an abuse of the power of eminent domain."**

177. It was counsel's submission that the fact that the 6th respondent purchased subdivisions 1-13 of Subdivision B of Farm 4300 Lusaka from the 5th respondent at great cost was not a bar to the transaction being reversed as the authorities show that transactions of this nature have been reversed and the original owner reinstated as was the case in the **Kedar**[9] case. In **HH Casualty and General Insurance Ltd v. Chase Manhattan Bank**[14] Lord Bingham noted that:

> **"...once fraud is proved, it vitiates judgments, contracts and all transactions whatsoever..."**

Consideration by this Court and decision

178. We have considered the documents in the record of appeal, the parties' respective heads of argument, and have paid close attention to the various authorities cited by all the parties. We

note from the various arguments that there is really no dispute regarding the facts leading to this appeal as outlined by the appellant. We shall, therefore, for the sake of brevity not repeat them in detail but shall where necessary, refer to them when the need arises. Nevertheless, it is necessary to summarize the chronological sequence of events in order to have an understanding of the real dispute at hand.

179. The appellant was prior to 1987, the registered proprietor of Farm No. 4300 Lusaka which was 557.8759 hectares in extent. In April 1987, the State compulsorily acquired a portion of the appellant's land in extent 351.2142 hectares on the ground that it was desirable or expedient in the interest of the Republic to do so pursuant to the provisions of the Lands Acquisition Act. The land was required for a public purpose, namely, the construction by Lusaka City Council of a housing complex to alleviate a housing shortage in the City of Lusaka, while part of the land was to be demarcated and allocated to public service workers who needed such residential plots.

180. Following the acquisition, the land remained idle for a considerable period of time. Compensation was discussed and settled at K540, 000.00 [un-rebased]. The appellant initially mounted legal proceedings under cause number 1994/HP/5399 to challenge the compulsory acquisition. This cause was dismissed on a technicality. A fresh action under cause 1997/HP/272 was then commenced. Phiri J, as he then was, dismissed the action. Undeterred, the appellant appealed to this Court under cause No. SCZ/8/190/2002. This Court agreed with Phiri J, that the compulsory acquisition had been undertaken by the State for a legitimate public purpose and dismissed the appeal.

181. The 2nd respondent did not undertake the development of the intimated housing complex. The 1st respondent, on the other hand, in or around September, 2006 created two independent plots on a portion of Farm No. 4300 which it had compulsorily acquired. The first plot was numbered Subdivision 'B' of Farm No. 4300 ('F/4300/B') in extent 189.5160 hectares and the second plot was numbered Subdivision 'C' of Farm No. 4300 ('F/4300/C') in extent 120.7995 hectares.

182. F/4300/B was leased to the 3rd respondent for the construction of an up-market hotel and luxurious golf course. The 3rd respondent abandoned it and the 1st repossessed the land. The 5th respondent then purchased F/4300/B for K14, 115,000,000.00 (un-rebased) from the 1st respondent. The 1st respondent acknowledged receipt of this payment through the Permanent Secretary of the Ministry of Lands on 13th June, 2011. The lease under which the 5th respondent held the land stipulated among other things, that the lessee was not to assign, sublet, mortgage or change the land use without the consent of the President. In breach of those conditions, the 5th respondent made several subdivisions of the land for purposes of sale and construction.

183. The 5th respondent sold and assigned Subdivision 2 of Subdivision 'B' of Farm No. 4300 to Nyimba Investments Limited. The 5th respondent mortgaged subdivisions 11 and 12 of Subdivision 'B' of Farm No. 4300. The Remaining Extent of F/4300/B measuring 12.7824 hectares was sold to the 6th respondent.

184. F/4300/C on the other hand was leased by the 1st respondent to the 4th respondent on 21st September, 2006. The terms of the lease stipulated, inter alia, that the lessee was not to assign, sublet, mortgage or change the land use without the consent of the President. In breach of those conditions, the 4th respondent also subdivided the land into several subdivisions for purposes of sale and construction. We must mention at this juncture that the 1st respondent was aware of these breaches. We say so because the 1st respondent in a letter dated 27th April, 2017 (ref MOJ/102/38/98/16) produced in the Record of Appeal, instructed the Commissioner of Lands to cancel the certificates of title issued to the 4th and 5th respondents for breach of their respective lease agreements.

185. Arising out of the above developments, the appellant formed the view that the compulsory acquisition of his land had not been done in the public interest and for a public purpose after all, but was for the benefit of private entities. The appellant thus decided to commence a fresh action under cause 2010/HP/0749 challenging the judgment which endorsed the compulsory acquisition as legitimate. The reason for the

challenge was that the said judgment was procured through fraudulent misrepresentation of the actual reasons for the compulsory acquisition. That action was, however, dismissed for non-attendance.

186. Another action was commenced under cause 2016/HP/607 which suffered numerous technical contests. An *ex-curia* settlement was attempted but it collapsed. A fresh action was launched under cause No. 2017/HP/2193. A Stalingrad defence was marshalled by the respondents which culminated in Zulu J, erroneously agreeing with the respondents that the action was an abuse of process since it was *res judicata,* the issue involved having, in his opinion, been decided earlier in the High Court by Phiri J and on appeal, by this Court.

186. The appellant, being unhappy with Zulu J's holding, escalated the matter by appealing to the Court of Appeal. The Court of Appeal agreed with the appellant's position that a judgment procured by fraudulent misrepresentation could be set aside even if it had been confirmed by a superior court but held that section 14 (1) of the Act proclaimed finality even for a

judgment obtained by fraudulent misrepresentation. The appellant has now appealed to this Court against that holding.

187. The facts as summarized above are not in dispute. What is however hotly contested is the interpretation to be assigned to section 14 (1) and its effect on a judgment obtained by fraudulent misrepresentation; whether the finality contemplated in section 14(1) relates to any dispute brought in connection with compulsory acquisition; whether the matter was *res judicata;* whether the matter is time barred; whether respondents who were assigned the property were innocent purchasers for value without notice and had good title and whether in the event the appeal is allowed this Court could set aside the judgments obtained or should remit it to the High Court to conduct a fresh inquiry as to whether: (i) the High Court judgment in cause no. 1997/HP/272 was procured by fraudulent misrepresentation; and if so, (ii) the legal soundness of the compulsory acquisition based on the real reasons for the compulsory acquisition.

188. The appellant has made detailed arguments which we have already summarized. The gist of those arguments in paraphrase is that:

(1) There is no dispute that the State has power to compulsorily acquire

property in accordance with the Lands Acquisition Act for a public purpose, but it should not deviate from its intended purpose;

(2) The finality envisaged in section 14(1) does not cover judgments

obtained by fraudulent misrepresentation;

(3) A contextual reading of section 14 clearly shows that it is matters

relating to compensation that the section covers.

(4) There is no dispute with the factual matrix that the land was later assigned to individual corporate entities who breached the terms of their leases and ultimately subdivided and assigned them to third parties;

(5) The appellant discovered these facts after the High Court

and Supreme Court had delivered judgments in favour of the 1st and 2nd respondent and is thus not time barred.

(6) Given the factual milieu, the appellant can and should be allowed to continue with its fresh action launched on the ground that the compulsory acquisition was tainted by fraud and as such the judgments obtained should be set aside;

(7) The principle of *res judicata* does not apply to judgments obtained by fraudulent misrepresentation;

(8) This Court has authority by virtue of section 25 of the Supreme Court Act Cap 25 as interpreted through its earlier decisions to decide this appeal without remitting it back to the High Court granted that the matter started 33 years ago. The appellant's learned counsel did not take an insistent position on this issue leaving the question to be determined in the discretion of this court.

189. The respondent made pointed arguments which we have summarized earlier in this judgment. Their consolidated arguments can be summarised as follows:

(1) Section 14(1) of the Lands Acquisition Act Cap 189 of the Laws of

Zambia is final and conclusive as between the parties to the proceedings in question;

(2) This matter was heard by both the High Court and Supreme Court and

both Courts decided in favour of the respondents that the land was acquired in the public interest for the public benefit;

(3) Section 14(1) cannot be impugned by a fresh action even on grounds

of fraudulent misrepresentation;

(4) Section 14 covers compensation and other disputes;

(5) The matter was therefore *res judicata* and cannot be relitigated;

(6) There was need for a motion for a fresh action before commencing cause No. 2017/HP/2193;

(7) The appellant's claim was time barred under the Limitation of Actions
Act (UK) of 1939.

(8) Third parties had, at considerable cost acquired rights to the land which could not be reversed;

(9) There was need for finality to litigation and the appellant should not be allowed to continuously haul back the respondents to court over the same issue which had been determined in finality;

(10) The intentions at the point of acquisition were pure but could not be effected because of the appellant's own conduct in refusing to surrender the certificate of title to mark off the land. The lapse of time could have changed and that cannot now be the subject of a legal challenge;

(11) The matter has not been tried and cannot be determined by this Court on the basis of section 25 of the Supreme Court Act Cap 25 and is, in any event, distinguishable from the authorities cited by the appellant.

190. We take the view that even though all the parties to this appeal have advanced numerous detailed arguments in support of their respective positions, the starting point should be the meaning to be assigned to section 14 (1) of the Lands Acquisition Act. Section 14 (1) states as follows:

> **"14(1) The decision of the Court (or, in the case of an appeal, the Supreme Court) shall be final and conclusive as between all the parties to the proceedings in question."**

191. There is no doubt that this matter has been decided at various levels of our courts not once or twice but five times and we are now being asked to make a decision the sixth time. The first judgment was the Phiri J judgment (as he then was). The second judgment was the Supreme Court judgment. The third was the Sharpe-Phiri J ruling (which dismissed the case on grounds of non-appearance). The fourth was the Mathew Zulu J judgment (which dismissed the case on the erroneous ground that it was *res judicata),* and the fifth was that of Court Appeal which, although it could have dealt with the question of *res judicata* in the Mathew Zulu J judgment and the overall interpretation of section14 (1), gave leave to the appellant so

that this Court can conclusively interpret the meaning of section 14(1) in the context of a fresh claim arising out of fraudulent misrepresentation.

192. Given all these judgments, a literal interpretation of section 14(1) means that after the Phiri J. judgment and the Supreme Court judgment upholding it, the matter should have been finally and conclusively determined without any room for further litigation. The matter did not end there as the appellant has now brought in a new claim arising out of fraudulent misrepresentation after the judgments were entered in favour of the 1st and 2nd respondents.

193. The appellant's emboldened argument is simply that the subsequent evidence which is unchallenged, shows that the compulsory acquisition was not done in the public interest for the public benefit because private corporate entities were allocated the land in issue instead, which was contrary to the notice given to the appellant at the time of the compulsory acquisition.

194. The core issue that we have to decide is whether the finality and conclusiveness envisaged in section 14 of the Act extends to a cause of action which seeks to impugn judgments obtained on the basis of fraudulent misrepresentation. In addressing this issue, we are mindful that an allegation that a judgment was obtained by fraudulent misrepresentation is not a matter that can be taken lightly; it should be entertained only in the clearest of circumstances.

195. We are clear in our mind that fraud is a deceptive act done intentionally by one party in order to influence or induce another party to believe or accept the existence of a certain state of affairs when the actual state of affairs is otherwise. A misrepresentation on the other hand is a representation of a misstatement innocently or negligently which wrongfully persuades another party to accept the existence of a given state of affairs. Both instances involve untruthfulness.

196. In the case before us, the appellant's claim is that the 1st respondent made a representation to him and to the High Court that his land was compulsorily acquired in the public

interest for purposes of putting up a housing estate for civil servants.

197. Whether the 1st respondent had from inception set out to deceive or not becomes, in our estimation, as will be seen in the later part of this judgment a matter for a trial court to determine.

198. The question which then follows is this. Is a judgment obtained in those circumstances liable to be set aside? The fact that a judgment was obtained through fraud or collusion is universally held sufficient reason for vacating such judgment either during or after the time at which it was rendered and opening the door for another hearing of the matter. We are in no doubt that the Court of Appeal came to the correct conclusion when it held, albeit obiter that a judgment obtained through fraudulent misrepresentation is liable to be set aside.

199. More significantly, the Court of Appeal held that the legislature, having stipulated that a matter heard and determined by the Supreme Court would have been

conclusively dealt with, it is not competent to re-open such matter on any ground whatsoever including fraudulent misrepresentation. However, when granting leave to appeal, the Court of Appeal agreed with the argument that this Court should consider the import of section 14 (1) of the Act and pronounce it with finality.

200. The respondents argued that the appellant should have complied with Order 59/11/17 RSC which requires a party to file a motion first before an action can be commenced to set aside a judgment on grounds of fraud.

Order 59/11/17RSC states as follows:

> **"There is jurisdiction to set aside a judgment for fraud on a motion for new trial, but as a rule an action must be brought for the purpose, and if for special reasons a motion is permitted, the charge of fraud must be made with the same particularity as in an action and strictly proved, and the same rules apply as to the burden of proof and admissibility of evidence. Where it is alleged that a judgment was obtained by fraud, the appropriate course would normally be to bring a fresh action to set aside that judgment, because in such cases, there will usually be serious and difficult issues of fact to be determined, and therefore a first instance court is the most appropriate forum."**

201. The wording of the Order shows that a notice of motion to set aside a judgment obtained by fraud can be deployed and if, for special reasons it is permitted, the charge of fraud must be made out with the same particularity as in an action and strictly proved. The appropriate course would normally be to bring a fresh action to set aside. The order does not specifically state that a party should proceed by first filing a notice of motion. A motion is permitted if there are special reasons for doing so. It is not therefore a condition precedent that a party should file a notice of motion prior to commencing an action. We do not therefore accept the argument advanced by the respondents that the appellant should have filed a motion prior to commencing the action to set aside.

202. Much has been said about *res judicata* by the respondents. The thrust of the respondents' argument on this point is that this matter has been heard and determined before and is accordingly *res judicata*. As such it cannot be heard and determined again. We accept that where the same parties have litigated the same matter and a decision made, the parties cannot open that matter and relitigate the same issues.

We, however, are of the considered view that the respondents are missing the point when they argue that this matter is *res judicata.*

203. The issue that the appellant is seeking to determine is whether or not the 1st and 2nd respondent obtained the earlier judgments by fraudulently misrepresenting that the compulsory acquisition was done in the public interest and for benefit of the public when in fact not. This claim was of course not in issue in the earlier proceedings. It only surfaced long after the judgments of Phiri J and this court were delivered.

204. *Res judicata* cannot therefore be deployed to terminate such proceedings as what is being impugned is the very process of how that judgment was obtained. We fully agree with the Court of Appeal on this point as well as the numerous authorities cited by the learned counsel for the appellant in this regard. Allowing *res judicata* to be used as a shield in such circumstances would go against the values of a judicial

system as judgments should be obtained in an open and transparent manner and not through deception.

205. Once the deception is exposed it unravels the judgment itself. In **HIH Casualty and General Insurance Ltd v Chase Manhattan Bank**[14] Lord Bingham of Cornhill famously stated that:

> **"...fraud is a thing apart. This is not a mere slogan. It also reflects an old legal rule that fraud unravels all... once fraud is proved, 'it vitiates judgments, contracts and all transactions whatsoever' Lazarous Estates Ltd v Beasley (1956) 1 All ER 341 at 345 (1956) 1 QB 702 at 712, per Denning LJ. Parties entering into a commercial contract will no doubt recognize and accept the risk of errors and omissions in the preceding negotiations, even negligent errors and omissions. But each party will assume the honesty and good faith of each other; absent such an assumption they would not deal."**

206. Our views are similar to the views expressed by the Supreme Court of England in the leading case of **Takhar v Gracefield Developments Ltd and others**[15] where Lord Kerr held that an action to set aside an earlier judgment for fraud is not a procedural application but a cause of action in its own right (deriving from the court's equitable jurisdiction to reverse transactions procured by fraud by means of an original bill in

equity). That cause of action was independent of the cause of action asserted in the earlier proceedings; it related to the conduct of the earlier proceedings, and not the underlying dispute. If a claimant can establish a right to have the judgment set aside for fraud, there can be no question of cause of action nor issue estoppel; res judicata cannot arise.

207. The Supreme Court of England also held that a failure to exercise due diligence where fraud might otherwise have been discovered is not enough to sustain a judgment resulting from that fraud. It is not for the victim of a fraud to be perpetually on guard against dishonesty. Allowing a fraudulent party to benefit from the passivity or lack of diligence of their opponent was "antithetical to any notion of justice". In any event, in obtaining judgment the defrauder had perpetrated a wrong on not only their opponent but on the court and on the rule of law.

208. The Court in that case went on to state that the general principle was: "where it can be shown that a judgment has been obtained by fraud, and where no allegation of fraud had

been raised at the trial which led to that judgment, a requirement of reasonable diligence should not be imposed on the party seeking to set aside the judgment." (Lord Kerr at paragraph 54.)

209. There are numerous persuasive Indian decisions on setting aside a judgment obtained by fraud and they appear to be unanimous on the point that such a judgment is liable to be set aside. This can be seen from a perusal of cases such as **Nistarini Dassi vs Nundo Lall Bose and Anr**[35] ("A judgment or decree obtained by fraud upon a court binds not such court nor any other..."), **Sankaran Govindan vs Lakshmi Bharathi & Others**[36] ("A judgment obtained by fraud does not operate as res judicata."), **Punjab Beverages Pvt. Ltd vs G.T. Agencies**[37] ("The fact that a judgment was obtained through fraud or collusion is universally held sufficient reason for opening or vacating such judgment either during or after the term at which it was rendered").

210. We must hasten to mention that in our search for precedential case authorities we have not come across a similar matter

such as we are faced with in this appeal, namely whether a judgment obtained by fraudulent misrepresentation can be set aside when there is a provision in a statute such as section 14(1) which stipulates that once a matter has been decided by the High Court or if appealed against by this Court, then it is at an end.

211. As the situation confronting us is sui generis we have to resort to the principle that a statute cannot be used as an instrument of fraud. Bearing this principle in mind can it really be argued that section 14(1) covers all situations and is not subject to challenge? We think not. We say so because fraud unravels all without exception. If we accepted the respondents' argument that the appellants efforts are *fait accompli* and nothing can be done by a litigant who discovers that a judgment was in fact obtained by fraudulent misrepresentation, then we would in effect be upending the time-honored principle of not using a statute as an instrument of fraud. Further, section 14(1) is not drafted so as to exclude actions arising out of judgments obtained through fraudulent misrepresentation.

212. We have very carefully considered the argument advanced by State Counsel Simeza and the two English authorities of **Smith v Elloe District Council & Others**[27] **and Reg v. Environment Secretary *Ex Parte* Oslter**[28] with regard to the interpretation of a statute which ousts the jurisdiction of a court. It is crucial to note that while we agree with their lordships' interpretation in **Smith v East Elloe Rural District Council and others**[27], the ouster and finality of the matter in that case hinged on the six weeks period stipulated in the Acquisition of Land (Authorization Procedure) Act 1946 within which a party could challenge a compulsory acquisition of property for a public purpose.

213. Paragraph 16 of Part IV of the Schedule to the Acquisition of Land (Authorization Procedure) Act, 1946 is very explicit. It leaves no room for any other interpretation. It states that:

> **"Subject to the provisions of the last foregoing paragraph, a compulsory purchase order... shall not... be questioned in any legal proceedings whatsoever..."**

214. Section 14 (1) of our Act, on the other hand, while making court decisions final and conclusive, does not exclude setting aside judgments obtained by fraudulent misrepresentation.

We doubt very much that it was the intention of Parliament to shut out even genuine grievances by parties seeking to challenge the compulsory acquisition of their land on grounds that a judgment was obtained by fraudulent misrepresentation.

215. Furthermore, in **Regina v Secretary of State for the Environment *Ex parte* Ostler[28],** the compulsory purchase order was made to carry out a road to relieve traffic congestion in the town centre which was no doubt in the public interest and for the benefit of the public which is in stark contrast to what happened in this matter after the compulsory acquisition. Their Lordships, particularly Lord Reid's dissenting judgment in **Smith v Elloe District Council & Others[27]** seems to have accepted that where fraud is alleged, an aggrieved party should be accorded an opportunity to be heard. The English cases should therefore be distinguished on that basis with the present appeal.

216. In the course of his oral arguments State Counsel Sikota advanced the submission that the 5th respondents had paid the

sum of $3,500,000.00 for the land which it has since conveyed to another party and it was not aware of the alleged fraud and as such was protected by section 26 of the Limitation Act of 1939. This is an argument that carries considerable moral force. We must say at once, however, that where a transaction is mired in provable vitiating factors the consideration paid by a party matters not and it does not make a transaction irreversible. We say so because we held in the cases of **Trevor Limpic v. Rachel Mawere and others**[38] and **Hildah Ngosi (Suing as Administrator of the Estate of Washington Ngosi) v. Attorney General and Lutheran Mission (Zambia) Registered Trustees**[39] that it is irrelevant that a third party has spent considerable sums of money on a property which does not belong to it. One can no longer argue that possession is 9 tenths of the law and hope to maintain ownership on the basis of possession if that property was not properly acquired.

217. By parity of reasoning, if in the present case the compulsory acquisition were to be adjudged to have been done in transgression of the law or for motives other than for public interest, public good and public benefit, the consideration paid

by an affected party would assume the back seat in considering the propriety of the acquisition.

218. Much has been said about the appellant's claim being statute barred by virtue of the Limitation Act of 1939. In our considered view, nothing could be further from the truth. While we accept that the history of the present appeal can be traced back to 1987 and that the action to set aside the judgment was only commenced sometime in 2017, we do not accept that the claim is time barred. We say so because time should be reckoned from when the appellant became aware that the land had been leased to third parties.

219. The record shows that in so far as F/4300/B is concerned, the Permanent Secretary acknowledged receipt of the sum of K14,145,233,825 on 13th June,2011. The Certificate of title in favour of the 5th respondent is dated 1st July, 2011. In view of the fact that a search could have been conducted shortly after 1st July, 2011, the appellant was not out of time when he filed his writ in 2017 as section 4(3) of the Limitation of Actions Act 1939 stipulates that:

> **"No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the**

right of action accrued to some person through whom he claims to that person."

220. Section 26 of the same Limitation of Actions Act referred to above postpones the limitation period in case of fraud or mistake. The period of limitation shall not begin to run until the plaintiff has discovered the fraud or mistake. The appellant is assumed to have discovered the fraud sometime in 2011 when payment was made and a certificate of title issued in respect of F/4300/B. 2011 to 2017 (when he filed his writ of summons) is six years and it cannot therefore possibly be argued that the appellant's action is statute barred. The lease and the certificate of title relating to F4300/C are both dated 21st September, 2006. The same reasoning applies as twelve years had not elapsed when the appellant commenced his action in 2017.

221. Further, a perusal of the section 26 of the Limitation Act of 1939 shows that section 26 (c)(1) has an exception in that a purchaser should show that it did not at the time of the purchase know or have reason to believe that any fraud had been committed. State Counsel Sikota has, apart from stating

the law on the subject, not attempted to show us how he was going to develop the argument that the 5th respondent was oblivious to the controversy and litigation in connection with the land which was very much in the public domain.

222. The 6th respondent cannot also avail itself of this argument as it purchased the land, according to State Counsel Banda, in 2019 long after the writ of summons had been issued. There is no dispute that the 6th respondent is a statutory body, and by extension a public body but we should not lose sight of the fact that it purchased the land from a private corporate entity which cannot by any stretch of imagination be described as a public body. The fact that the land eventually ended up with the 6th respondent which is a public body, does not in any way legalize the transaction.

223. We must at this point state that if property is compulsorily acquired for a public purpose and it later turns out that it was not after all for a public purpose, that compulsory acquisition can be set aside and the property restored to the original owner. The Kenyan authority of **Town Council of Awendo v. Nelson**

Odur Onyango & 13 Others[20] is a case in point. It was observed in that case that:

> **"If, after land has been compulsorily acquired the public purpose or interest justifying the compulsory acquisition fails or ceases, the Commission may offer the original owners or their successors in title, pre-emptive rights to re-acquire the land upon restitution to the acquiring authority the full amount paid as compensation."**

224. In our estimation, there is therefore ample authority that land can, subject to certain conditions such as paying back the money which was paid as compensation, be restored to the original owner.

225. The respondents have advanced a rather interesting argument bordering on the alleged delay by the appellant in surrendering his title deeds to facilitate marking off and ultimately the implementation of the 1st and 2nd respondents' reason for the compulsory acquisition of the land. On the face of it this seems to be an attractive argument but it is not. Even though this argument is underpinned by the earlier decision of this Court, it does not take into account the effect of the various provisions of the Act.

226. A perusal of section 28 of the Act shows that a party who does not comply with a compulsory acquisition notice is liable to be fined or imprisoned for hindering or obstructing the process. Section 17 provides that where there is a notice to acquire land, it is transferred to the President. Under section 20, transferred land vests in the President. These provisions do not appear to have been raised in the earlier proceedings but they illustrate the point that once land is compulsorily acquired, a certificate of title means very little to the title holder. The developments that occurred clearly vindicate our view in this regard. As it turned out the 1st respondent did in the end transact over the property without securing the appellant's title deeds to facilitate marking off.

227. We thus find incredible the suggestion by the 1st respondent that the appellant's own conduct was responsible for paralyzing the 1st respondent's efforts to actualize its intentions as stipulated in the compulsory acquisition notice. The 1st respondent had all the provisions of the law which it could have deployed to acquire the land. In any event, as we have pointed out and the respondents' own evidence shows,

the land was eventually subdivided without the appellant surrendering his title deeds.

228. Another point which animated numerous submissions was the relationship between section 11 and 14 of the Act. The appellant was quite resolved in maintaining that the Court of Appeal was plainly wrong to have held that the finality contemplated in section 14 (1) of the Act relates to any dispute in connection with compulsory acquisition because a contextual reading of section 14 clearly shows that it is matters relating to compensation that the section covers. The respondents, on the other hand, were of the view that the correct interpretation is that section 14 of the Act is not limited to matters of compensation and is inclusive of matters relating to the compulsory acquisition of land. As we have stated elsewhere in this judgment section 14 (1) which is in issue in this appeal covers both disputes relating to or in connection with the property and disputes relating to compensation.

229. There is much to be said about section 14 and the ambit of the finality it envisages. While we appreciate the rival arguments that have been advanced by the parties, we think a pertinent question that would help a more thoughtful consideration of the merits or otherwise of the opposing arguments on this issue is whether it is usual for statutes to provide for finality of disputes generally. Put differently, assuming the Act did not provide for finality in section 14, is it conceivable that any dispute brought under the Lands Acquisition Act would go on *ad infinitum* even after the Supreme Court has decided on it? We think not. Finality of the decisions of the Supreme Court is a matter for the Constitution which creates the Court and is not ordinarily to be prescribed in legislation subsidiary to it.

230. While we make no determination on this one matter as our ultimate decision does not turn on it, we find significantly persuasive the arguments of the appellant that the finality in section 14 was instigated by the somewhat protracted procedure for compensation which involved the Minister, the National Assembly and the court thus necessitating a provision that once the issue of compensation had done the

rounds and finally came for determination in court, such determination would be final.

231. The appellant has argued that this Court has power to determine this matter by virtue of section 25 of the Supreme Court Act and past precedents he has cited. His argument in a nutshell is that we have sufficient documentation to make a decision and sees no need to remit this matter to the High Court for a trial as the dispute started 33 years ago. State Counsel Simeza has countered this argument by distinguishing this case from the cases cited by the appellant. He also pointed out that even though the current proceedings are on appeal, the respondents have not to date filed their respective defences as the matter was beset with numerous applications. Further, the appellant's claim arises out of alleged fraudulent conduct which must be distinctly alleged and distinctly proved, as it is not allowable to leave fraud to be inferred from the facts.

232. Section 25 of the Supreme Court Act stipulates that:

> **"25. (1) On the hearing of an appeal in a civil matter, the Court-**

(a) **"Shall have power to confirm, vary amend or set aside the judgment appealed from or give such judgment as the case may require;"**

These are very wide powers indeed which must be exercised with reference to other rules, regulations and precedents. We accept the argument by the appellant that we have in the past (for instance in the case of **Attorney-General v. Kakoma**[19] and in the case of **Nevers Sekwila Mumba v. Muhabi Lungu**[20]) decided appeals on the basis of the evidence before us without referring them to the court of first instance and that section 25 of the Supreme Court of Zambia Act allows us to do so, but we take the view that it would be inappropriate to do so for the reasons advanced by State Counsel Simeza specifically in relation to the claim that there was fraudulent misrepresentation on the part of the 1st respondent. State Counsel Simeza raised numerous arguments as to why we should not determine this matter, he pointed out that the issues raised by the appellant were never tried and determined by the High Court. The matter in the High Court was discussed following suggestions taken by the respondents and as such the matter was not heard on the merits. He

submitted that for this Court to rehear and determine the matter on record would result in injustice. The alleged fraud being claimed by the appellant needed to be specifically pleaded and proved at trial. These are in our view valid arguments. We therefore dismiss the appellants' submission that we should decide this case on the basis of the evidence on record, as there is a clear need to hear and determine the issues being raised by the parties.

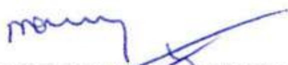
233. We should not lose sight of the fact that this matter started 33 years ago and that we do not expect litigants to have the patience of Job while waiting for their cases to move at a glacial pace in our courts. In any event, public policy demands that the judicial process must be sensitive to, among other things, speed and reduced litigation costs.

234. It is regrettable that this litigation has taken so long. While the respondents cannot be blamed for defending their clients' rights by adopting a Stalingrad defence, they should accept some responsibility for contributing to the uncertainty and delay in connection with this saga. They could have for

instance realized that numerous authorities show that a judgment obtained by fraud or fraudulent misrepresentation can be set aside and that *res judicata* in such instances is not a defence and that the action was not time barred based on the documentary evidence. Arguments on these fairly straight forward legal issues expended unnecessary time, costs and energy.

235. For the reasons we have given above we allow the appeal and order that this matter should be remitted to the High Court where it will take its normal course. We however, express the hope that the High Court judge who will be allocated this matter will deal with it expeditiously. Costs to abide the outcome in the court below.

A. M. WOOD
SUPREME COURT JUDGE



M. MALILA
SUPREME COURT JUDGE

J. K. KABUKA
SUPREME COURT JUDGE