IN THE SUPREME COURT OF ZAMBIA APPEAL NO 132/2014
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

IN THE MATTER OF: **ORDER 53 OF THE RULES OF THE SUPREME COURT (RSC 1999 EDITION)**

IN THE MATTER OF: **AN APPLICATION BY SABLE TRANSPORT LIMITED**

IN THE MATTER OF: **A DECISION BY THE COMMISSIONER OF LANDS NOT TO RENEW THE LEASE RELATING TO FARM F/4169 LUSAKA**

BETWEEN:

SABLE TRANSPORT LIMITED **APPELLANT**

AND

COMMISSIONER OF LANDS **1ST RESPONDENT**

THE ATTORNEY GENERAL **2ND RESPONDENT**

ZAMBIA AIRPORT CORPORATION LTD **INTERVENING PARTY**

CORAM: **MAMBILIMA CJ, KAOMA AND KAJIMANGA JJS; on 9th May, 2017 and 4th August, 2017**

For the Appellant:	**Mr. Mutemwa Mutemwa, SC of Mutemwa Chambers and Mr. K. Kaunda, of Ellis and Company.**
For the 1st and 2nd Respondents:	**No Appearance**
For the Intervening Party:	**Mr. S. Chisulo, SC of Sam Chisulo and Company and Mrs. S. Chatora, Legal Counsel, Zambia Airports Corporation Limited**

JUDGMENT

MAMBILIMA, CJ, delivered the Judgment of the Court.

CASES REFERRED TO:

1. **ASSOCIATED PROVINCIAL PICTURE HOUSES LIMITED V WEDNESBURY CORPORATION [1947] 2 ALL ER 680**
2. **COUNCIL OF CIVIL SERVICE UNIONS AND OTHERS V MINISTER FOR THE CIVIL SERVICE [1984] 3 ALL ER 935 at page 951**
3. **DERRICK CHITALA (SECRETARY OF THE ZAMBIA DEMOCRATIC CONGRESS) V ATTORNEY-GENERAL (1995-1997) ZR 91**
4. **FREDERICK TITUS JACOB CHILUBA V ATTORNEY GENERAL (2003) ZR 153**
5. **ROY CLARKE V ATTORNEY GENERAL (2004) ZR 277 HC at page 291**
6. **KHALID MOHAMMED V ATTORNEY GENERAL (1982) ZR 49**
7. **MAY VIJAYGIRI GOSWAMI V DR MOHAMED ANWAR ESSA AND COMMISSIONER OF LANDS (2001) ZR 31**
8. **GILLICK V WEST NORFOLK AND WISBECH AREA HEALTH AUTHORITY AND ANOTHER (1985) 3 ALL ER 402**
9. **WILSON MASAUTSO ZULU V AVONDALE HOUSING PROJECT LIMITED (1982) ZR 172**

LEGISLATION REFERRED TO:

a. **LANDS ACT, CHAPTER 184 OF THE LAWS OF ZAMBIA, SECTION 10 (1) AND (2)**
b. **RATINGS ACT, CHAPTER 192 OF THE LAWS OF ZAMBIA, SECTION 2**
c. **LAND SURVEY ACT, CHAPTER 188 OF THE LAWS OF ZAMBIA SECTIONS 5, 32 AND 34**
d. **CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016, ARTICLE 16**

WORKS REFERRED TO:

(i) **PHIPSON ON EVIDENCE, HODGE M. MALEK AND OTHERS, 17TH EDITION, SWEET AND MAXWELL/THOMSON REUTERS COMMON LAW LIBRARY LONDON 2010 PARA 6-06 AT PAGE 151**

(ii) **HALSBURY'S LAWS OF ENGLAND VOLUME 61 5TH EDITION LORD MACKAY OF CLASHFERN LEXIS NEXIS PARA 643 AT PAGE 483**

This appeal arises from a judgment of the High Court, dated 14th April, 2014, dismissing the Appellant's application for an order of certiorari, to quash the decision of the Commissioner of Lands not to renew the lease for Farm 4169 Lusaka, for a term of 99 years.

The facts of this case are straight forward and substantially not in dispute. Galaunia Farms Limited was granted a state lease for Farm 4169 for a term of 30 years, effective from 1st July, 1980. The lease for the farm, situated near the Lusaka International Airport, was restricted to agriculture, grazing and purposes ancillary thereto.

On 18th December 2001 Galaunia Farms Limited sold the farm, along with other properties, to the Appellant for a consideration of K3, 000,000.00. The Appellant was issued with a certificate of title No. 26013 for the unexpired term in 2004 and at the time of the sale, there were eight years remaining on the lease. When the lease expired, the Appellant applied to the Commissioner of Lands to be issued with title for a term of 99 years, but the Commissioner of Lands declined to renew the lease on the ground

that the land was required for the expansion of the Lusaka International Airport. The letter, conveying the message declining to renew the lease was couched in the following terms-

> "**The Managing Director**
> **Sable Transport Limited**
> **P.O Box 4**
> **SINDA**
>
> **Dear Sir,**
>
> **RE: Farm 4169**
>
> **Kindly refer to the matter above.**
>
> **Farm 4169 with extent of 508.8296 hectares situated in Lusaka Province is part of land earmarked for expansion of the International Airport. The state granted a 30 year lease to Galaunia Farms (Private) Limited effective 1st July, 1980 for agricultural grazing purposes and purposes ancillary thereto. This was done with the full understanding that should the state be in need of the same, the lease shall be terminated or upon affluxion, Commissioner of Lands was not to renew it without consulting the Department of Civil Aviation.**
>
> **The Department of Civil Aviation and National Airports Corporation Limited have embarked on a project of expanding the International Airport and therefore need to utilise F/4169. Following the expiration of the lease by affluxion of time, I do wish to inform you that the lease shall not be renewed and you are therefore, requested to surrender the expired lease for purposes of cancellation in the deeds register, within fourteen days from the date hereunto...**
>
> **Barnaby B. Mulenga**
> **Commissioner of Lands**"

The Appellant sought a review of this decision in the Court below. Among the reliefs prayed for were: (1) a declaration that the decision of the Commissioner of Lands not to renew the lease is

irrational and therefore, null and void; (2) an order of certiorari to remove into the High Court and quash the said decision; and, (3) an order of mandamus directed at the 1st Respondent, to renew the lease for a period of 99 years. The sole ground upon which the Appellant was seeking these reliefs is irrationality.

The Appellant's Managing Director, Mr. Iqbal Yakub Alloo, contended, in an affidavit verifying the originating notice of motion for judicial review, that the 1st Respondent's decision was irrational and unreasonable because the land in issue was on the western side of the Airport road, adjacent to Ndeke Village Meanwood Housing Development, and hence unsuitable for aviation activities. Further, that the National Airports Corporation Limited (NACL) had cleared all illegal settlements on the land on the eastern and northern boundaries of the airport which could have been used for the planned expansion. The other contention was that the 1st Respondent had assured the Appellant that the certificate of title for Galaunia Farms Limited was still valid for another eight years and that upon its expiry, Galaunia Farms Limited would be given an opportunity to apply for an extension of the lease. This letter is dated 15th November, 2002 and it reads as follows-

"Mr I. Y. Alloo
Sable Transport Limited
P/B RW 219X
LUSAKA

Dear Sir,
RE: FARM ENCROACHMENT – CHAKUNKULA FARM 32a

We refer to (y)our letter dated 15th October 2002
We have received confirmation from the Department of Civil Aviation that the one year lease granted to Dr. M. Mphande was erroneously issued as Galaunia Farms have title to the land.

The Galaunia Farms Limited title is still valid for a further eight years at which time they will have an opportunity to apply for an extension of their lease.

N. N. Inambao
COMMISSIONER OF LANDS"

According to Mr. Alloo, this letter created a legitimate expectation in the Appellant that the lease would be renewed. That there was never any understanding that once the State needed the farm, the lease would be terminated or that upon effluxion of time, the 1st Respondent would not renew the lease. He also averred that the Appellant had since mortgaged the property to financial institutions for sums of K3, 000,000.00, US$57,780.00 and K6, 000,000.00 respectively.

The 1st Respondent opposed the application for judicial review. The Acting Principal Legal Officer, Mrs. Sara Mulwanda-Chanda, deposed in an affidavit in opposition that the land in question was

earmarked for the expansion of the airport by the Department of Civil Aviation (DCA) and that that was the reason why Galaunia Farms Limited was granted a state lease for a term of 30 years. She averred that the land could not be reserved for the DCA because, at the time, it was against public policy to reserve land for a government entity.

Mrs. Mulwanda-Chanda further deposed in her affidavit that when the airport expansion project was approved, the Commissioner of Lands undertook in August 1984, to inform all titleholders around the airport area who would be affected by the expansion, that their leases would not be renewed. That accordingly, Galaunia Farms Limited was informed, through a letter dated 21st September, 1989 that Farm 4169 would not be offered to them and that it would remain the property of the DCA. Galaunia Farms were advised to refrain from making any improvements or developments on the land. The said letter read as follows-

"The General Manager
Galaunia Farms (Private) Limited
P.O Box 30087
LUSAKA

RE: DEPARTMENT OF CIVIL AVIATION: LUSAKA INTERNATIONAL AIRPORT FARM 4169

I would like to inform you that at the meeting held on 15th September, 1989, it was decided that the area earmarked for your grazing near the Lusaka International Airport should not be offered to you. The area will remain the property of the Department of the Civil Aviation who will utilise it for other important national purposes.

In view of the foregoing, you are requested to refrain from making any physical improvements or developments of any kind to the area.
J. L. Kwangala
Chief Lands Officer
For: Commissioner of Lands"

It was also averred that the DCA, in a letter dated 19th March, 2003, complained to the Commissioner of Lands about the sale of the property to the Appellant and the construction of a fence on the land, which was contrary to the terms of the lease and aviation safety standards. The said letter stated as follows-

"The Commissioner of Lands
Lands Department
P.O Box 30069
Lusaka

Encroachment on Lusaka International Airport Reserve Land Lot No. 947/M.

The Department is the Title deed holder of Lot No. 947M. However, it has sadly come to our attention that our reserve land which is on lease to Galaunia Farms for grazing rights only has been sold to another farmer who has since started erecting an electrified fence on our land, which is in the aircraft approach and take off areas thereby endangering the operations of aircraft and this is contrary to the International Civil Aviation Safety standards.

Our greatest concern is the allegation that the new owner has been issued with a title deed by your office. In view of this development we are requesting that:
(i) encroachment on our land be stopped immediately;
(ii) electrified fence on our land be removed immediately;

(iii) lease agreement with Galaunia Farms be declared null and void for selling land that does not belong to them, thereby abrogating lease terms;
(iv) the title deed issued to the new owner be revoked immediately; and
(v) the issuance of title to the new owner be investigated.

For ease of reference find enclosed correspondence and maps on the extension of airport boundaries and why this land should be reserved for future airport developments and airport security.

Submitted for your quick redress

Robinson Misitala
Acting Director
Department of Civil Aviation"

The Appellant denied that it contravened any conditions in the lease, insisting that there was nothing in the lease or the certificate of title to show that the farm was earmarked for the DCA. Further, that the Appellant had not erected an electrified fence but was merely repairing the existing fence. That since the Commissioner of Lands had consented to the assignment of the property, the Appellant should be deemed to be a purchaser for value without notice of intention not to renew the lease. That, in the alternative, the Appellant was amenable to swap part of the land provided it was compensated.

During the substantive hearing of the application for judicial review, Counsel for the Appellant relied on the provisions of Section

10 (1) and (2) of the **LANDS ACT**[a] Chapter 184 of the Laws of Zambia (hereinafter referred to as **"the Act"**) to further demonstrate the legitimate expectation that the Appellant had that the lease would be renewed. These provisions state-

> **(1) The President shall renew a lease, upon expiry, for a further term not exceeding ninety-nine years if he is satisfied that the lessee has complied with or observed the terms, conditions or covenants of the lease and the lease is not liable to forfeiture.**
>
> **(2) If the President does not renew a lease the lessee shall be entitled to compensation for the improvements made on the land in accordance with the procedure laid down in the Lands (Acquisition) Act."**

Counsel argued that Section 10 (1) of the Act is expressed in mandatory terms, meaning that the President is obliged to renew a lease when there is no breach of the terms, covenants and conditions of the lease, as in the Appellant's case, and, that by refusing to renew the lease, the 1st Respondent had acted ultra vires the Act.

Counsel contended that the 1st Respondent's decision was unreasonable because it was based on irrelevant considerations. That also, it was done in bad faith because there was evidence on record that the Ministry of Commerce, Trade and Industry intended to offer the same property to a third party to establish a Chinese

Trade Centre. To support his submissions the Appellant called in aid, the case of **ASSOCIATED PROVINCIAL PICTURE HOUSES LIMITED V WEDNESBURY CORPORATION**[1] where it was stated-

> **"It is true the discretion must be exercised reasonably. Now what does that mean? ...For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and is often said, to be acting unreasonably."**

Counsel representing the 1st Respondent argued in response, that the Commissioner of Lands was empowered by law to either renew or cancel a lease and that in this case, the Commissioner of Lands was justified to refuse to renew the lease because the Appellant failed to observe the covenant in the lease not to undertake any construction on the property.

Further, that there was correspondence clearly showing that the Government required the land upon expiry of the lease for the development of airport infrastructure. That the Appellant ought to have been aware that this requirement was communicated to the vendor, Galaunia Farms Limited, and as such the decision could not be said to be unreasonable within the meaning ascribed in the case of **ASSOCIATED PROVINCIAL PICTURE HOUSES LIMITED**[1].

After considering the evidence before her, the learned Judge reminded herself that the underlying objective of the remedy of judicial review is the power of the Court to ensure that the exercise of administrative authority by public officers is done within the confines of the law. That judicial review is different from an appeal in that it is concerned only with the legality of the decision under review or the decision making process itself, and not the merits of the decision.

The learned Judge then made a finding of fact that Farm 4169 was earmarked for expansion of the Lusaka International airport although the Court was not privy to the intended expansion plans because no evidence was led to suggest how the exercise would be carried out, and more particularly whether or not the expansion would extend to the west, east or northern side of the existing airport. The learned Judge also found that the letter purporting to give the Appellant assurance that the lease would be renewed was not only addressing encroachment of another property known as Farm 32a, but also could not, by any stretch of imagination, amount to an assurance that Galaunia Farms Limited would be granted an extension of the lease for a further term of 99 years.

That above all, Galaunia Farms were fully aware that Farm 4169 was assigned to the DCA for the purposes of expansion of the airport and that the issue of the mortgages it obtained on the land had no bearing on the renewal of the lease as the Appellant could easily provide alternative collateral as security to financial institutions.

As regards the Appellant's alternative claim for compensation, the Court below held that Section 10 (2) of the Act clearly provides that when a lease comes to an end and the President does not renew it, an applicant is entitled to compensation for the improvements made on the land. That in this case there was no evidence on record to show that the Appellant had made any improvements on the land or that the mortgages it obtained were used to develop the property. That besides, compensation was a matter that the Appellant should properly take up with Galaunia Farms Limited who, despite knowing the conditions attached to the land, went ahead with the sale.

The Court below then decided that the question left for its determination was whether the 1st Respondent's decision fell within the category of irrationality as identified in the passage of Lord

DIPLOCK in the case of **COUNCIL OF CIVIL SERVICE UNIONS AND OTHERS V MINISTER FOR THE CIVIL SERVICE**[2] where he said:-

> **"By irrationality, I mean what can by now be succinctly referred to as Wednesbury unreasonableness...It applies to a decision that is so outrageous in its defiance of logic or acceptable moral standards that no sensible person, who had applied his mind to the question to be decided, could have arrived at it."**

The Court below also alluded to the definition adopted by this Court in the case of **DERRICK CHITALA (SECRETARY OF THE ZAMBIA DEMOCRATIC CONGRESS) V ATTORNEY GENERAL**[3] when we said-

> **"...the decision is such that no person or body properly directing itself on the relevant law and acting reasonably could have reached that decision."**

The learned Judge's assessment was that since she had dismissed the Appellant's grounds as untenable largely because Galaunia Farms Limited was fully aware that the 1st Respondent had no intention of renewing the 30-year lease upon expiry, it was hard to comprehend that the Appellant was not aware of the existence of the terms of the lease prior to its purchase of the land. The learned Judge was also of the view that if the Appellant or its advocates had conducted due diligence, they surely would have

discovered the communication between the Ministry of Lands and Galaunia Farms Limited. That this notwithstanding, the Appellant ought to have been put on alert on learning that the lease on the property it intended to buy had only eight years remaining and had extraordinary stipulations as to land use. And that since the Appellant had chosen not to conduct a search, it had only itself to blame and could not be deemed to be an innocent purchaser for value.

On this premise, the Court below came to the conclusion that the 1st Respondent's decision was properly arrived at and that it was made within the confines of the law, and was, therefore, not unreasonable or outrageous as envisioned by Lord DIPLOCK. That there was a clear and proper paper trail of the events from the time Galaunia Farms Limited acquired the land. That the 1st Respondent simply followed what had been agreed upon earlier and properly directed his mind, taking into account all relevant considerations.

All in all, the Court held that the Appellant had not sufficiently demonstrated that the 1st Respondent's action was irrational and dismissed the application with costs.

The Appellant was dissatisfied with this determination and has now appealed to this Court, advancing eight grounds, namely-

1. **That the Court below erred in law and in fact when it concentrated on the merits of the decision not to renew the lease herein, instead of concentrating on the legality or decision making process.**

2. **That the learned High Court Judge misdirected herself when she found that both the Appellant and Galaunia Farms were aware that the first Respondent will not renew the lease herein without supporting evidence.**

3. **That the learned trial judge erred in fact and in law when she held that the lease had extraordinary stipulations simply because it was zoned for agricultural, grazing and purposes ancillary thereto.**

4. **That the learned High Court Judge misdirected herself in law when she held that Farm 4169, Lusaka was earmarked for expansion of the airport whilst ignoring evidence which showed that the Ministry of Commerce Trade and Industry intended to give the same land to a third party for the establishment of the Chinese Trade Centre.**

5. **That the High Court erred by assuming that the airport expansion incorporates Farm 4169 when there is no evidence to that effect.**

6. **That the High Court erred in fact and in law when it held that the letter of 24th August, 1984, had communicated to Galaunia Farms that the lease would not be renewed when in fact (t)he said letter does not relate to the land in issue herein, but relates to Lot No. 947/M.**

7. **That the Court below erred in law and in fact when it found that there is no compensation due, notwithstanding that there were agricultural developments on the land in issue or alternatively instead of the referring matter for assessment.**

8. **That the High Court erred in law and in fact when it found that there was no compensation due without referring the matter for assessment of damages.**

Before the hearing of the appeal on 6th April 2017, Mr. Mutemwa SC, filed a notice of motion, on behalf of the Appellant on

7th March 2017, seeking leave to adduce further evidence. The application was supported by an affidavit in which one, Igbal Yakub Alloo, the Appellant's Managing Director, deposed inter alia, that the Zambia Airports Corporation Limited (ZACL) had placed a request for expression of interest in the Daily Nation Newspaper of 9th December, 2015, indicating that the Corporation had acquired Farm 4169 and wished to develop it to enhance its non-aviation revenue. That in the said advertisement, ZACL was also seeking the services of a consultant to advise on how best a combination of different types of business activities could be placed on the newly acquired land to maximise revenue generation. Mr. Alloo deposed further that the advert confirmed the Appellant's position that ZACL and the Department of Civil Aviation did not need Farm 4169 for the expansion of the Airport but for different types of businesses which are not aviation businesses. That in furtherance of the advertisement, ZACL placed a billboard on the farm's frontage, sometime in February 2017, inviting tenants to lease retail stores, restaurants and a filling station. That the expansion of the airport is being undertaken on the eastern side of the airport, adjacent to the old one. According to the Appellant, the advert in the Daily

Nation newspaper and the billboard were issued and made after the Judgment appealed against had been delivered and there was no way that the Appellant could have known about them, to produce the documents in the Court below, and hence the application.

The Appellant urged us to admit the evidence because it was relevant in view of the reason given by the 1st Respondent not to renew the lease for Farm 4169. That in addition, the documents confirmed the Appellant's contention that the property was not needed for the expansion of the airport, as the extension being undertaken is on the eastern side of the airport road, adjacent to the old airport. It was pointed out that besides, there were already two shopping centres or business parks in the same area, namely, Garden City and Waterfalls Shopping Centre.

The Respondents did not file any affidavit in opposition despite having been served with the Notice of Motion on 9th March, 2017. Counsel for the Respondents filed a Notice of Non-Attendance. At the hearing of the appeal in Kabwe, on 6th April 2017, Mr. CHISULO, SC, placed himself on record and applied viva voce, on behalf of ZACL, for it to be joined as an Intervening Party to these proceedings solely for the purpose of responding to the new

evidence that the Appellant was seeking to adduce through the Motion. Mr. MUTEMWA, SC, objected to the application, arguing that ZACL had no greater interest to hold in this matter than the State. He argued that since the Attorney General was already a party to the matter, ZACL, being a government entity, was adequately represented.

In our brief Ruling, we decided to allow ZACL to be joined as an Intervening Party because it was clear to us that it was directly affected by the evidence that the Appellant sought to produce and further, that the entity is a corporate sole, with the right to sue and to be sued; and, it would be in the interest of justice to afford the Company an opportunity to respond to the motion. However, owing to the likelihood of straying into the merits of the main appeal, and by consent of the parties, we allowed the Appellant's application to adduce fresh evidence and adjourned the matter to 9th May 2017, at Lusaka, to hear arguments in the main appeal.

At the hearing of the appeal, Mr. MUTEMWA, SC, relied entirely on the Appellant's submissions filed on 6th August, 2014 and Heads of Argument in Reply which he said were in response to the arguments filed by the Respondents. In the said heads of

argument, Counsel argued the first, second and third grounds of appeal together. He combined the fourth and fifth grounds of appeal and also argued the seventh and eighth grounds of appeal together. The sixth ground of appeal appears to have been abandoned.

The kernel of the Appellant's arguments in support of the first, second and third grounds of appeal was that the learned Judge erred when, after properly directing herself on the remedy of judicial review, she delved into the merits of the decision. For this submission, he referred us to the case of **FREDERICK JACOB TITUS CHILUBA V THE ATTORNEY GENERAL**[4] where we held that the remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision making process. According to Counsel, the Court below went at large, analysing and reviewing the merits of the case, even requiring the Appellant to satisfy the Court that the airport expansion was not extended to Farm 4169.

It was also submitted that the Court below substituted its own reasoning for that of the 1st Respondent when it concluded that the lease was not renewed because the Appellant and Galaunia Farms

Limited had advance notice. Counsel submitted that this was against another principle established in the case of **FREDERICK TITUS CHILUBA**[4] that it was not part of the purpose of judicial review to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question.

Counsel repeated the Appellant's arguments that were advanced in the Court below on legitimate expectation. He stated that there was no evidence to support the lower Court's finding that both the Appellant and Galaunia Farms knew that the lease would not be renewed or that the contents of the 1st Respondent's letter dated 21st September, 1989 were ever brought to the Appellant's attention, notwithstanding that the property referred to therein was Lot No. 947/M. Counsel submitted that in fact, the 1st Respondent ought to have been found wanting for not making full disclosure as to the chances of renewal of the lease.

On the Court's finding that the extraordinary stipulations in the lease should have put the Appellant on notice, Counsel implored us to take judicial notice that all smallholdings which are not zoned for residential, mining or commercial purposes, almost

always have stipulations that land use is for agricultural, grazing and purposes ancillary thereto.

With regard to the fourth and fifth grounds of appeal, Counsel referred us to a portion of the judgment of the Court below appearing on page 16 of the record of appeal in which the Judge said:-

> **"The evidence before me indicates Farm 4169, Lusaka has been earmarked for expansion of the airport. At this stage, we are not privy to the intended expansion plans for the airport and there is no evidence before me to suggest how this exercise will be carried out, more particularly whether or not the expansion will extend to the west, east or northern side of the existing airport."**

According to Counsel, the lower Court, in this passage, contradicted itself in that, while in one breadth it held that Farm 4169 had been earmarked for the expansion of the airport, in another, it conceded that it was not privy to the expansion plans and that there was no evidence to suggest how the exercise would be carried out. It was Counsel's contention that upon finding that there was no evidence as to how the expansion will be carried out, the Court ought to have found for the Appellant. That since the Respondents were substantially asserting that the expansion plans extended to Farm 4169, the burden rested on them to prove that assertion. That on its part, the Appellant adduced evidence, which was

uncontroverted, showing an intention by the Ministry of Commerce, Trade and Industry to offer the same land to third parties to build a Chinese Trade Centre. For this submission, Counsel referred us to the learned authors of **PHIPSON ON EVIDENCE**[i], who state that:-

> **"The burden of proof rests upon the party, whether Plaintiff or Defendant who substantially asserts the affirmative of an issue."**

Submitting in support of the seventh and eighth grounds of appeal, Counsel for the Appellant submitted that should this Court find that the Respondent did not act unreasonably or without impropriety, it should find that the Appellant was entitled to compensation or at least to have the matter referred to the Deputy Registrar for assessment. That even if the land was reserved for agricultural grazing or ancillary purposes, there is need for compensation for whatever developments were on the land. That the evidence established that there were fences erected and being repaired and according to the Appellant, that was sufficient evidence of improvements to entitle the Appellant to compensation. Reliance was placed on Section 2 of the **RATING ACT**[b] which defines improvement as ***"any work due, services provided or materials used, on land by expenditure of money or labour"***.

Counsel submitted that in the same respect, the Appellant should be deemed to have expended money and labour which presupposed some improvements. In this respect, Counsel pointed to the mortgages of K3,000,000.00; US$57,780.00 and K6,000,000.00 which, in his view, could not have been obtained without sufficient security.

In response to the Appellant's submissions, the Respondents filed written heads of argument. On the first, second and third grounds of appeal, Counsel submitted that the Court below was on firm ground when it seemingly delved into the merits of the case. That the central question the Court had to determine was whether the decision maker applied his mind to all the circumstances of the case taking into account all the relevant considerations to decide whether the decision was reasonably arrived at.

While Counsel conceded that judicial review was concerned only with the decision making process, he contended that there was a fine line between the merits of a case and the decision making process and that, in this case, the Court inevitably had to look at all the facts or the substance of the matter on record in order to determine how the decision by the 1st Respondent was arrived at.

Counsel submitted that the learned Judge was equally on firm ground when she found that Farm 4169 was earmarked for expansion because the fact of the matter was that it was earmarked for expansion of the airport from as far back as 1984, and that there was communication to Galaunia Farms Limited to the effect that Farm 4169 would remain the property of DCA and would not be offered to them. That had the Appellant conducted due diligence they would have discovered these facts.

Counsel submitted further, that no legitimate expectation was created in this case in that an opportunity to apply for an extension of lease did not guarantee a positive response but was a matter of procedure, and that such application was subject to approval or denial. That at any rate, the 1st Respondent was not bound to grant the extension. Counsel invited us to visit the case of **ROY CLARKE V ATTORNEY GENERAL**[5] a High Court decision where the doctrine of legitimate expectation was discussed. The Judge stated that-

> **"Where a body has in the past come to a decision, it must be consistent in the future in the decision making process. This has been described as legitimate expectation, but is more commonly understood as consistency. Legitimate expectations arise from past conduct. Previous decisions do not necessarily bind an authority and a change in circumstances or giving fair notice of a change in policy can allow a public body to distinguish its current policy and decision-making from the past."**

In response to the fourth and fifth grounds of appeal, Counsel submitted that the fact that the Court was not privy to the expansion plans of the airport did not take away the fact that Farm 4169 was earmarked for expansion. Further, that assertions that the Ministry of Commerce, Trade and Industry had intentions to offer the property to a third party had no bearing on the outcome of the case and neither was it a consideration for the Commissioner of Lands to arrive at his decision. That in fact, by introducing this element, the Appellant was, in essence, seeking to have the Court delve into the merits of the case.

Coming to the sixth, seventh and eighth grounds of appeal, Counsel for the Respondents submitted that the learned Judge was on firm ground when she held that there was no evidence of improvements to entitle the Appellant to compensation. That apart from repairing broken fences, the Appellant had failed to show the nature of improvements for which it seeks to be compensated. He relied on the case of **KHALID MOHAMMED V THE ATTORNEY GENERAL**[6] wherein it was stated that ***"a Plaintiff must prove his case and if he fails to do so, the mere failure of the opponent's***

defence does not entitle him to judgment." That, in this case, the burden of proof rested with the Appellant. That the fact of the matter is that the land in question is prime and it can attract financial institutions to give loans such as the ones given to the Appellant. Counsel urged us to dismiss this appeal with costs as it was ill-conceived and lacked merit.

Mr. Chisulo SC, on behalf of the Intervening Party, relied on the submissions filed by the Respondents both in this Court and in the Court below. He augmented them with oral submissions in response to the Appellant's alternative claim for compensation. He submitted that the claim for compensation had exposed the Appellant as to what they really wanted to get out of this appeal. That from the speed and rate at which the Appellant rushed to mortgage the land for a sum of K3 billion, it was clear that the Appellant was only seeking to recover the purchase price before expiry of the lease.

Mr. Chisulo SC, submitted further, that the fact that the Appellant offered part of the land in question to the Ministry of Commerce, Trade and Industry for development of a Chinese Trade Centre and requested for alternative land in return, was an

indication that the Appellant simply wanted to make money on the property. He argued that the Appellant's claim was defeated by the provisions of Section 10 (2) of the Lands Act because there were no improvements on the farm. And that even if the Appellant had made any improvements on the land, they would have done so in breach of the terms of the lease.

In reply to the Respondent's and Intervening Party's submissions, Mr. Mutemwa, SC submitted that the Respondents and the Intervening Party as public institutions acted unfairly towards the Appellant because they did not adhere to the principles of fair play. That in the absence of approved survey diagrams, it was not for the Court to speculate that the boundary of Lot 947/M would extend to Farm 4169. That in fact, by purporting to extend the boundary in his letter of August 1984, the Commissioner of Lands had usurped the powers and functions of the Surveyor General contrary to the provisions of Sections 5, 32 and 34 of the **LAND SURVEY ACT**[c].

As regards compensation, Mr. Mutemwa SC submitted that where land is acquired by way of re-entry or non-renewal of lease, the State is bound to pay compensation based on the market value

whether or not the leaseholder has breached any conditions of the lease and whether or not there are any improvements on the land. He relied on the case of **MAY VIJAYGIRI GOSWAMI V DR MOHAMED ANWAR ESSA AND COMMISSIONER OF LANDS**[7] where we ordered payment of compensation at market value for deprivation of property. Counsel also invited us to look at Article 16 of the **CONSTITUTION OF ZAMBIA**[d] which provides for adequate compensation for any compulsory acquisition. He submitted that assertions that the Appellant wanted to make capital out of the property was unfair. He urged us to allow the appeal with costs to the Appellant both in this Court and the Court below.

We have considered the evidence on record, the judgment appealed against and the submissions of Counsel. We have also taken time to state the facts and background giving rise to the dispute in this case in great detail to put the arguments and issues that have arisen in the proper context. From the pleadings and submissions of the parties in this case, three issues have emerged for our determination. These are:-

(i) Whether the decision of the 1st Respondent not to renew the lease for Farm 4169 for a term of 99 years was irrational or wednesbury unreasonable;

(ii) whether the learned Judge in the Court below delved into the merits of the decision;

(iii) whether the Appellant is entitled to compensation.

We shall deal with the grounds of appeal in the manner and order in which they have been argued by the Appellant; that is, the first, second and third grounds of appeal together, the fourth and fifth grounds, ending with the seventh and the eighth grounds.

In the main, the Appellant's arguments in support of the first, second and third grounds of appeal are that the learned Judge in the Court below, delved into the merits of the decision. Further, that the Judge substituted the Court's opinion for that of the 1st Respondent when she attributed the reason for the refusal to renew the lease to the prior notice given by the Appellant to Galaunia Farms Limited that Farm 4169 was earmarked for the expansion of the airport yet there was no evidence adduced to support this finding.

Counsel for the Respondents, on the other hand, canvassed that the issue at stake is whether the decision maker applied his mind to all the relevant circumstances. That in order to do so, it was inevitable for the Court to look at all the facts and substance of the matter. Further, that there is correspondence on record, demonstrating that the decision not to renew the lease was communicated to the vendor, Galaunia Farms Limited by the 1st Respondent. That on this premise, the decision making process could not be said to be irrational.

Authorities abound in which courts have pronounced themselves on the issue of irrationality in decision making. The frequently quoted definition of irrationality by Lord DIPLOCK, in the case of **COUNCIL OF CIVIL SERVICE UNION V MINISTER FOR CIVIL SERVICE**[2] sums it all. An administrative action is said to be irrational if the decision is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it. We adopted this reasoning in the case of **DERRICK CHITALA**[3] cited to us by Counsel for the Appellant, when we held that-

"In law, a decision can be so irrational and so unreasonable as to be unlawful on wednesbury grounds- See Associated Provincial Picture Houses Limited v Wednesbury Corporation [1947] 2 ALL ER 680. The principle can be summarised as being that the decision of a person or body performing public duties or function will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the court concludes that the decision is such that no such person or body properly directing itself on the relevant law and acting reasonably could have reached that decision."

In other words, the decision being called into question must be so absurd that no reasonable person or body, properly directing its mind could take such a view. The Court must reach a conclusion that the decision maker must have taken leave of his senses when he made that decision.

Furthermore, before making a determination whether the decision is irrational or unreasonable, the Court is required to examine the nature of the statutory power and the relevant considerations that a statutory authority should take into account. These principles are echoed in the opinion of Lord BRIDGE of Harwich, in the case of **GILLICK V WEST NORFOLK AND WISBECH AREA HEALTH AUTHORITIES AND ANOTHER**[8] where he stated that-

"Such a review must always begin by examining the nature of the statutory power which the administrative authority whose action is called in question has purported to exercise, and asking in light of that examination, what were and what were not

relevant considerations for the authority to take into account in deciding to exercise that power. It is only against such a specific statutory background that the question whether the authority acted unreasonably, in the wednesbury sense, can properly be asked and answered."

What constitutes a relevant consideration in any case will depend on the wording and context of the statutory provision. The learned authors of **HALSBURY'S LAWS OF ENGLAND VOLUME 61 5TH EDITION**[ii] state in paragraph 623 at page 483 that in some contexts, a decision maker should have regard to the general public interest.

In the case in ***casu***, the statutory power to renew or not to renew a lease is drawn from Section 10 (1) of the Act. The said provision, which we have reproduced above in our Judgment, empowers the President, under the hand of the Commissioner of Lands, to-

"...renew the lease upon expiry for a further term not exceeding 99 years, if <u>he is satisfied</u> the lessee has complied with or observed the terms, conditions or covenants or that the lease is not liable for forfeiture". (underlining ours)

There is thus, a discretion granted to the Commissioner of Lands to renew a lease on condition, among others, that the lessee has complied with the terms of the lease. Where the President does not renew the lease under Section 10(1) of the Act, the provisions of

Section 10 (2) take effect. The lessee is entitled to compensation for any improvements made on the land.

Against these provisions of the law, the issue to be decided is whether the 1st Respondent properly and lawfully exercised his powers under the Act. A perusal of the record shows that Farm 4169 had a 30-year lease with a specific clause prohibiting land use ***"for any purpose other than for agricultural and grazing purposes and purposes ancillary thereto."*** According to the drawing on page 105 of the record of appeal, this piece of land is on the western side of the airport. The area on which the airport sits is in Lot No. 947/M. The DCA holds the Title to Lot 947/M.

It would appear that as far back as 1984, a decision was taken that Lot 947/M should remain the property of the DCA. However, the DCA requested, and was granted permission to extend its boundaries for its purposes. Upon granting the request, the Commissioner of Lands wrote inter alia, that: ***All persons who hold titles within the land will not have their titles renewed when they expire. I have further taken time to inform all the people who will be affected by this decision.*** This decision was communicated in a letter dated 24th August, 1984 under the title

"Extension of Lusaka International Airport Boundary Lot No. 947/M."

This letter was followed by yet another letter dated 21st September, 1989 where the Commissioner of Lands, in very clear terms, expressed the intention of Government to Galaunia Farms Limited as regards Farm 4169. The relevant part states:-

> **"I would like to inform you that at the meeting held on 15th September, 1989, it was decided that the area earmarked for your grazing near the Lusaka International airport should not be offered to you. The area will remain the property of the Department of Civil Aviation who will utilise it for other important national purposes.**
>
> **In view of the foregoing, you are requested to refrain from making any physical improvements or developments of any kind to the area."**

From this correspondence, it is abundantly clear that the Commissioner of Lands had no intention of renewing the lease on Farm 4169. We find that Galaunia Farms Limited was fully aware that the lease for Farm 4169 would not be renewed long before they sold the property to the Appellant in December, 2001.

More significantly, there is evidence that when the Appellant bought the land from Galaunia Farms Limited, they abrogated the terms of the lease by erecting a fence around the property. A letter of complaint, from the Acting Director of the DCA to the

Commissioner of Lands, dated 19th March 2003, which we have reproduced above, reads in part:-

> ***"The Department is the Title Deed holder of Lot No. 947/M. However, it has sadly come to our attention that our reserve land which is on lease to Galaunia farms for grazing rights only has been sold to another farmer who has since started erecting an electrified fence on our land, which is in the aircraft approach and take off areas, thereby endangering the operations of aircraft and this is contrary to the International Civil Aviation Safety Standards."***

The DCA requested, among others, that the encroachment be stopped; the electrified fence be removed; and, that the issuance of the title deed to the new owner not only be revoked but also investigated.

In our view, these are the relevant considerations that the 1st Respondent had to take into account in order to arrive at a decision as to whether to renew the lease in this case. They are the considerations that the learned Judge in the Court below also reviewed when she stated in her Judgment-

> **"I find as a fact that Galaunia Farms were fully aware that Farm 4169 was assigned to the Department of Civil Aviation for purposes of expansion of the national airport. The correspondence on record shows that there had been clear communication between the Ministry of Lands and Galaunia Farms. As such the argument that there was no understanding that the 1st Respondent would not renew the lease over Farm 4169 Lusaka is unfeasible."**

The overriding consideration, undoubtedly, was the expansion of the airport, which was a matter of public interest and for which DCA had to be consulted in the event of renewal. The Commissioner of Lands in arriving at his decision undoubtedly also had to consider the wider public interest. The 1st Respondent had made it clear that the land would remain the property of the DCA to utilise for **"other important national purposes"**. The letters on record thus show that even though the land was leased to Galaunia Farms Limited, it belonged to the DCA and as owners, they could deal with it in any way that they deemed fit, whether for aviation or non-aviation purposes.

From the foregoing, we find no basis to conclude that there was irrationality or unreasonableness on the part of the 1st Respondent not to renew the lease for Farm 4169. It cannot, by any stretch of imagination, be argued that the 1st Respondent had taken leave of his senses when he made the decision not to renew the lease because there was a consistent pattern as to the treatment of the land in question.

Also, we are of the considered view that the failure or omission by Galaunia Farms Limited to make full disclosure as to the terms and conditions attached to the title, including the decision not to renew the lease to pave way for the expansion of the airport, does not in any way render the decision of the 1st Respondent irrational. And neither was it the responsibility of the 1st Respondent to disclose all the material circumstances of the lease as Counsel for the Appellant seems to suggest.

We have stated in a plethora of cases that, it is incumbent upon a purchaser of land to conduct due diligence for any encumbrances prior to buying land. In this particular case, we find that the Appellant took a very long shot when it applied for a further term of 99 years as there was no assurance, whatsoever, from the 1st Respondent that the lease would automatically be renewed, even for a term of 30 years. Even assuming that the lease could have been renewed, there was an overriding policy requirement for the land to remain the property of the DCA and to be used for **"national purposes"**.

The 1st Respondent had informed Galaunia Farms as far back as 1989 that the land in issue will remain the property of the DCA to be utilised for ***"other important national purposes."*** In 1984, the DCA was granted permission to extend its boundaries. That decision affected many titles, including that of Galaunia Farms Limited and the 1st Respondent then undertook not to renew the titles of those affected. Against this background, the issue of legitimate expectation does not arise. Being within the vicinity of the International airport, it is not surprising that Farm 4169 had restrictions as to land use. A legitimate expectation can only arise where a public body or officer has acted in a consistent manner so as to induce an expectation that it will not deviate from such conduct. The underlying consideration is that a public body or officer will act in a predictable manner in similar circumstances. In this case, on the contrary, the position of the 1st Respondent was well known even before the Appellant bought the land and even the letter of 15th November 2002, to Mr. Alloo did not guarantee that the lease could be renewed. From the foregoing, we cannot fault the learned Judge for holding that the 1st Respondent's decision was not irrational or unreasonable in the Wednesbury sense.

In the first ground of appeal the Appellant contends that the learned Judge in the Court below concentrated on the merits of the decision instead of the legality or decision making process. Now, the sole ground relied on by the Appellant to impugn the decision of the Court below was irrationality. The learned Judge inevitably had to review all the facts that led to the making of the decision in order to ascertain whether the 1st Respondent acted within the confines of the law. The applicable law conferred a discretion on the President, through the Commissioner of Lands, to decide whether or not to renew any lease. In exercising this discretion, the Commissioner of Lands had to take into account relevant considerations. As we have stated above, this land was reserved for the DCA, for the expansion of the airport. Galaunia Farms Limited, the original lessee was only allowed to use the land for grazing purposes and they were informed before they sold the land that their lease would not be renewed. All these relevant factors had to be considered in order to determine whether the decision maker properly exercised the discretion.

Under the ground of irrationality, a decision that can very well be within the four corners of a statute can be vitiated if the decision

maker rendered a decision which defies logic and which no reasonable person directing his/her mind to the same considerations could have made. In such a case, the line between merits of a decision and the process leading to the making of such a decision can be blurred. We would, therefore, agree with Counsel for the Respondents that in a case such as this one, there is a fine line between the merits of the case and the decision making process. The distinction however, is that in reviewing a decision on the ground of irrationality, the Court is not determining whether the decision maker was right or wrong but whether relevant considerations were called to mind. In this case, the tenure of the lease and the correspondence exchanged between the parties were all relevant considerations to inform the decision of the Court as to whether the 1st Respondent acted in a rational manner given the nature of the power and the circumstances surrounding its exercise. On the basis of what we stated above, we find no merit in the first, second and third grounds of appeal.

We now move to the fourth and fifth grounds of appeal. Under these two grounds of appeal, the Appellant contends that the lower Court erred by holding that Farm 4169 was earmarked for the

expansion of the airport when there was evidence that the Ministry of Commerce, Trade and Industry intended to give the same piece of land to a third party to establish a Chinese Trade Center, and further erred, by assuming that the expansion would incorporate Farm 4169. According to the Appellant, the Court also contradicted itself when it found that Farm 4169 was earmarked for expansion and yet conceded that there was no evidence to suggest how the exercise would be carried out. Further, that since the Respondents affirmatively asserted that the expansion extended to the property, the burden rested on them to prove that assertion.

In response, Counsel for the Respondents argued that the fact that the Court was not privy to the expansion plans of the airport did not take away evidence that Farm 4169 was earmarked for expansion.

In our view, the argument about the alleged failure by the Respondents to prove that Farm 4169 was earmarked for expansion is not helpful at all to the Appellant's case. Neither is the fresh evidence that Mr. Mutemwa, SC introduced. The letter from the Commissioner of Lands to Galaunia Farms Limited dated 21st September, 1989, and appearing on page 95 of the record of appeal,

shows that this land was the property of the DCA who ***'will utilize it for other National purposes.'*** This does not exclude non-aviation businesses. Farm 4169 was given to Galaunia Farms Limited for grazing purposes. Galaunia Farms Limited were told that the land would not be offered to them at the expiry of the lease. Similarly, the argument that another Ministry, namely Commerce, Trade and Industry had intention to offer the same land to a third party is neither here nor there because, in our view, there was nothing to show that this issue formed part of the considerations taken into account by the 1st Respondent not to renew the lease. For this reason, the fourth and fifth grounds must also fail.

As regards the seventh and eighth grounds of appeal, Mr MUTEMWA SC submitted that the Appellant was entitled to compensation. He relied on Section 2 of the **RATINGS ACT**[b] to demonstrate that the Appellant had made improvements to the land as it expended labour and money. He also referred us to Article 16 of the Constitution of Zambia and our decision in the **MAY VIJAYGIRI GOSWAMI**[7] case on deprivation of property.

Counsel for the Respondents rejects the Appellant's argument that it was entitled to compensation. The learned Counsel for the

Respondents submitted that the lower Court was on firm ground when it held that there can be no question of compensation if no improvements were made on the land. That apart from repairing broken fences, the Appellant failed to show what improvements it seeks to be compensated for.

We accept, as the learned Judge did, that Section 10 (2) of the Act provides for compensation for improvements where a lease is not renewed because the President has refused to do so. In this case, we find that the Appellant is not entitled to compensation for two reasons. Firstly, the land in question belonged to the DCA and it was leased to Galaunia Farms Limited with a clear stipulation that the land was to be used only for agricultural and grazing purposes as the land was earmarked for the expansion of the airport.

In the letter of 21st September, 1989, Galaunia Farms Limited were ***'requested to refrain from making any physical improvements or developments of any kind to the area.'*** Therefore, any development other than agricultural grazing use would have been a breach of the lease.

Secondly, the Court made a finding of fact that there was no evidence of any improvements on the land. The Appellant's own evidence was that it had not embarked on any construction on the property except to mend broken fences. Although there was evidence that the Appellant had mortgaged the property to financial institutions, there was no evidence to suggest that the money from the mortgages was used to develop the property. The Judge found that there can be no question of compensation if improvements were not made to the land in question. As an Appellate Court we are careful not to reverse findings of fact unless it can be demonstrated, as we stated in the case of **WILSON MASAUTSO ZULU V AVONDALE HOUSING PROJECT LIMITED**[9], that the findings in question are either perverse or made in the absence of any relevant evidence or upon misapprehension of the facts. We do not find that any of these factors taken into account by the Judge can fall into these categories. There is, therefore, no merit in the seventh and eighth grounds.

On the totality of the evidence on record, we find that there is no merit in this appeal and we dismiss it accordingly. We award

costs to the Respondents both in this Court and in the Court below, to be taxed in default of agreement.

I.C. Mambilima
CHIEF JUSTICE

R.M.C. Kaoma
SUPREME COURT JUDGE

C. Kajimanga
SUPREME COURT JUDGE