

**IN THE COURT OF APPEAL OF ZAMBIA**      **APPEAL NO. 338/2023**  
**HOLDEN AT LUSAKA**  
*(Civil Jurisdiction)*

**BETWEEN:**

**JONATHAN VAN BLERK**

**APPELLANT**

**AND**

**THE ATTORNEY GENERAL**

**1<sup>ST</sup> RESPONDENT**

**LUSAKA CITY COUNCIL**

**2<sup>ND</sup> RESPONDENT**

**KWIKBUILD CONSTRUCTION LIMITED**

**3<sup>RD</sup> RESPONDENT**

**BANTU CAPITAL CORPORATION LIMITED**

**4<sup>TH</sup> RESPONDENT**

**NATIONAL PENSION SCHEME AUTHORITY**

**5<sup>TH</sup> RESPONDENT**

*Coram: Makungu, Muzenga and Chembe, JJA*  
*On the 18<sup>th</sup> day of June and 30<sup>th</sup> July, 2024.*

*For the Appellant: Mr. L.E. Eyaa of Messrs Linus E. Eyaa with Mr. S. Mbewe & Mr. B. Mweemba of Keith Mweemba Advocates.*

*For the 1<sup>st</sup> Respondent: Miss N. K. Chongo Principal State Advocate with Miss A. Chisanga also Principal State Advocate.*

*For the 2<sup>nd</sup> Respondent: No appearance.*

*For the 3<sup>rd</sup> Respondent: Mr. R. M. Simeza with Mr. M. Nkunika of Messrs Simeza Sangwa & Associates.*

*For the 4<sup>th</sup> Respondent: Mr. B.C. Mutale SC with Miss M. Mukuka both of Ellis & Co & Mr. S. Sikota, SC of Central Chambers.*

*For the 5<sup>th</sup> Respondent: Mr. E.C. Banda SC & Mr. H. Zulu both of ECB Legal practitioners.*

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**JUDGMENT**

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**MAKUNGU JA**, delivered the Judgment of the Court.

**Cases referred to:**

- Attorney General v. Marcus Kapumba Achiume (1983) Z.R. 1*
- Midland Bank Trust Co. Limited and Another v. Green and Others (1979) 3 ALL ER 45*

3. *Jonathan Van Blerk v. Attorney General and 5 Others* SCZ/8/03/2020
4. *M/S Royal Orchid Hotels Limited and Others v. G. Jayarama Reddy and Others* (Civil Appeal No. 7588 of 2005)
5. *Khalid Mohamed v. Attorney General* (1982) ZR 49
6. *Briess and Others v. Wooley and Others* (1954) 1 ALL ER 909
7. *ZISC Life Limited v. Walubita Nawa* (2019/HP/A040) (Judgment dated 4 April, 2020)
8. *Takhar v. Cranefield Developments Limited and Others* (2019) UK SC 13
9. *Zambia Extracts Oils and Colorants Limited and Another v. Zambia State Insurance Fund Board of Trustees* (Selected Judgment No. 31 of 2016)
10. *Owens Bank Limited v. Bracco* (1992) AC 443

**Legislation referred to:**

1. Sections 3 and 4 (2) of the Lands Acquisition Act, Chapter 189 of the Laws of Zambia.
2. Sections 3, 5, and 6 of the Lands Acquisition Act, 1970 (Repealed).

**Other authorities referred to:**

1. Bryan A. Garner. (2004) *Black's Law Dictionary*. 8<sup>th</sup> edition. Thompsom West.

## **1.0 INTRODUCTION**

1.1 This is an appeal by the plaintiff, now appellant, from the judgment of the Honorable Mrs. Justice Kaunda Newa of the High Court on 22<sup>nd</sup> August 2023, at Lusaka, in Cause Number 2017/HP/2193. The respondents herein were cited as defendants numbered 1 to 5, respectively. The judgment was entirely against the appellant.

1.2 The case raises the question of whether both the High Court judgment under Cause No. 1997/HP/27 dated 22<sup>nd</sup> July 2002 and the Supreme Court judgment under Cause No. SCZ/8/190/2002 dated 5<sup>th</sup> May 2005, were obtained by fraud and should therefore be set aside.

## **2.0 BACKGROUND**

2.1 The background of the matter was aptly given by the lower court in the judgment appealed against, as follows:

The plaintiff, Jonathan Van Blerk, was the initial owner of the entire land known as Farm 4300 Lusaka, which extends over 557.8759 hectares. In 1987, the President of the Republic of Zambia compulsorily acquired 351.2142 hectares of that land under the Lands Acquisition Act of 1970. Dissatisfied with the decision, he commenced an action before the High Court under Cause Number 1997/HP/272, against the Attorney General and the Lusaka City Council, challenging the compulsory acquisition.

2.2 In a judgment delivered on 22<sup>nd</sup> July 2002, the High Court held that the compulsory acquisition of the land was lawful.

2.3 Dissatisfied with that judgment, the plaintiff appealed to the Supreme Court (SCZ/B/190/2002) and lost the appeal in a judgment delivered on 5<sup>th</sup> May 2005.

2.4 In 2017, he commenced Cause No. 2017/HP/2193 in the High Court against the Attorney General, the Lusaka City Council, Legacy Holdings Limited, Kwikbuild Construction Limited, and Bantu Capital Corporation Limited, by Writ of Summons accompanied by a statement of claim in which he claimed:

- (i) A declaration that the judgments of the High Court of the Judicature for Zambia and the Supreme Court of Zambia under cause numbers 1997/HP/272 and SCZ/8/190/2002 respectively were procured by fraudulent misrepresentation.*
- (ii) A declaration that the acquisition of the portion of Farm 4300 Lusaka is null and void and ultra vires the provisions of The Lands Acquisition Act, 1970 (Repealed) as read with the Lands Acquisition Act, Chapter 198 of the Laws of Zambia.*
- (iii) A declaration that the plaintiff is the original and rightful owner of Farm 4300 Lusaka*
- (iv) An order that the 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Defendants surrender their Certificates of Title to the Commissioner of Lands for*

*rectification/cancellation under Section 11 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia.*

*(v) An injunction, restraining the defendants from subdividing to carry out construction works and build on the property, which activities are likely to compromise the environmental quality of the said Farm;*

*(vi) Costs and*

*(vii) Any other relief the Court may deem fit.*

2.5 The National Pensions Scheme Authority was joined to the proceedings by the Supreme Court on appeal concerning preliminary issues that were raised. The Supreme Court directed the High Court to proceed to hear Cause Number 2017/HP/2193. The plaintiff filed an amended Writ of Summons and Statement of Claim, in which Legacy Holdings Limited was not cited as a party. Therefore, there are only five (5) defendants in this matter.

2.6 In a ruling dated 27<sup>th</sup> January 2022, the lower court struck out Jonathan Van Blerk's claims that did not relate to the setting aside of the judgment on the grounds of fraud.

### **3.0 STATEMENT OF CLAIM**

- 3.1 The Plaintiff, stated that he owned Farm No. 4300 Lusaka before 1987. On 22<sup>nd</sup> April 1987, the Minister of Lands and Natural Resources issued a notice to acquire 351.2142 hectares of his farm for public use, under **sections 5 and 6 of the Lands Acquisition Act, 1970**. The land was being used for farming at the time.
- 3.2 Dissatisfied, he initiated proceedings in the High Court on 9<sup>th</sup> October 1994, under Cause Number 1994/HP/5399, but the action was dismissed on the same day due to procedural errors. The Plaintiff then initiated a new action under Cause Number 1997/HP/272 against the Attorney General and the Lusaka City Council, presided over by Hon. Mr. Justice G.S. Phiri. During this case, Fortune Kachamba, a Senior Legal Officer at the Ministry of Lands, testified that the land was acquired in the public interest, although the Government had no immediate plans for it, contrary to the stated reasons for the acquisition.
- 3.3 Hon. Mr. Justice G.S. Phiri delivered a judgment on 22<sup>nd</sup> July 2002, based on the evidence presented by the Attorney General and the Lusaka City Council, finding that the President of Zambia acted in the public interest.

3.4 The Plaintiff, dissatisfied with the decision, appealed to the Supreme Court on 12<sup>th</sup> August 2002, under cause No. SCZ/08/190/2002. On 5<sup>th</sup> May 2005, the Supreme Court ruled that the President acted reasonably and that the Lusaka City Council acquired the land to establish a housing estate. The alleged particulars of fraud were as follows:

- i. "The High Court and Supreme Court Judgments under cause number 1997/HP/272 and cause number SCZ/08/190/2002 respectively were to the effect that the said portion of Farm 4300 Lusaka was acquired for public use, but instead the Commissioner of Lands and the Lusaka City Council issued the said land to Kwikbuild Construction Limited and Bantu Capital Corporation Limited for private use.***
- ii. Numbering of portions of the acquired piece of land with individual plots Nos. F/43000/B and F/4300/C and giving them to private entities/companies.***
- iii. Allocation of a portion of land that was compulsorily acquired and numbered as F/4300/B and F/4300/C to private companies who have since subdivided the same***

*and sold subdivision 1-13 of F/4300/B for their own benefit to the National Pension Scheme Authority.*

*iv. Allocation of the portion of land compulsorily acquired and numbered F/4300/C to a private company which has since subdivided the same into several subdivisions.*

3.5 The plaintiff claimed that he has in consequence, suffered loss and damage. He contended that “public purpose” has to be within the law.

#### **4.0 DEFENCE**

4.1 All the defendants filed defences on the merits, denying all the plaintiff’s allegations and providing lengthy explanations. We will not recapitulate these defences for reasons that will be made clear later in this judgment.

#### **5.0 EVIDENCE AT TRIAL**

5.1 At the trial, only Jonathan Van Blerk testified. None of the defendants called any witnesses but informed the court they would file written submissions.

5.2 In his testimony, the plaintiff provided the history of the case as stated in this judgment. He further testified that Fortune Kachamba, the then Senior Legal Officer in the Ministry of



Lands, stated in the disputed High Court judgment that the acquisition was in the public interest, even though the state had no plans for the land.

5.3 Additional evidence indicated that the land was intended for a housing project by the Lusaka City Council for community benefit, although it was delayed. Title deeds for the 3<sup>rd</sup> to 5<sup>th</sup> defendants over portions of the acquired land were produced as evidence.

5.4 He stated that the land has since been subdivided into numerous plots, some of which were sold and developed, but not for public benefit.

5.5 He revealed that Kwikbuild Construction Limited and Bantu Capital Corporation were given title deeds on 26<sup>th</sup> September 2006, and 1<sup>st</sup> July 2011, respectively, as shown in the land register. Bantu Capital Corporation later assigned the land to Nyimba Investments Limited, which was issued a Certificate of Title on 30<sup>th</sup> February 2015. Nyimba Investments then sold the land to the National Pension Scheme Authority in February 2020, and a Certificate of Title was issued to the National Pension Scheme Authority.

5.6 The plaintiff informed the court that the fraud became apparent in 2011. The plaintiff testified that at the time of his testimony, Lamasat Ltd was developing a shopping mall on the disputed land. He concluded by requesting the setting aside of both the High Court and Supreme Court judgments due to their reliance on incorrect information.

## **6.0 CROSS-EXAMINATION**

6.1 The plaintiff underwent cross-examination by counsel for all defendants except the Lusaka City Council. During cross-examination by the Attorney General, the plaintiff clarified that he originally owned 740 hectares of land, with 351 hectares compulsorily acquired by the state, leaving him with 390 hectares. He sold 80% of this remaining land. The plaintiff pointed out a housing shortage in Lusaka due to urban population growth.

6.2 Furthermore, the plaintiff highlighted that the notice of intention to acquire the property stated it was compulsorily acquired in the interest of the Republic.

6.3 He testified that the High Court's judgment found him obstructive for refusing to surrender his Certificate of Title to

the State for marking off. He stated that he barred State access to the land from 1997 to 2005. The Supreme Court upheld this stance, noting it included an injunction he had obtained. He further testified that at this stage, fraud had not yet occurred.

6.4 He noted that the land was acquired under UNIP's rule during President Kenneth Kaunda's tenure in 1987 and remained the same during the 2005 MMD rule under President Levy Mwanawasa.

6.5 Additionally, he revealed that one of the lease conditions for Bantu Capital Corporation Limited, in its 2011 title, under Clause 5, was to construct residential houses, aligning with the government's plan to build houses for the public.

6.6 The plaintiff admitted to receiving K547,000.00 (unrebased) in 1987 as compensation for the acquisition of his land.

6.7 Under cross-examination by counsel for Kwikbuild Construction Limited, he testified that the fraud occurred after the High Court's judgment.

6.8 It was evident from a letter by the Commissioner of Lands to the Lusaka Urban District Council dated 8<sup>th</sup> September 1987, and another letter by the Development Secretary of Lusaka City Council to the District Executive Secretary dated 11<sup>th</sup> April

1988, that the land was compulsorily acquired for planning a housing estate for public use. Since these letters predated the High Court judgment of 2002, the plaintiff confirmed that Fortune Kachamba's testimony regarding the land's use was accurate. He agreed that Kwikbuild Construction Limited had no impact on either judgment, as the company was incorporated only on 1<sup>st</sup> June 2006. Even Bantu Capital Corporation, registered on 11<sup>th</sup> February 2011, had nothing to do with either of the judgments in question.

6.9 Under cross-examination by counsel for Bantu Capital Corporation Limited, the plaintiff stated that the National Pension Scheme Authority was not sued but was joined in the proceedings by order of the Supreme Court.

## **7.0 DECISION OF THE COURT BELOW**

7.1 The relevant findings and holdings by the court below appear in the grounds of appeal set out below:

## **8.0 GROUNDS OF APPEAL**

8.1 The appeal is based on the following six (6) grounds:

- 1. "The trial Judge misdirected herself in law and fact when she held (at page J86 paragraph***

*9.100) that 'as it is, Jonathan Van Blerk has not proved that there was fraud in the procuring of the High Court Judgment in cause number 1997/HP/272 and the Supreme Court Judgment under cause number SCZ/8/190/2002 while glossing over the admissions by the Attorney General and the Lusaka City Council that the land in question was later allocated to private companies.*

*2. The trial Judge misdirected herself in law and fact when she held (at page J86 paragraph 9.99) that the observations that were made by the Supreme Court in SCZ/8/03/2020, that where property is compulsorily acquired for a public purpose, but it later turns out that it was not after all, for a public purpose, that compulsory acquisition can be set aside, and the property returned to the original owner, would only have been properly advanced, had in this matter, the contention that the Judgment was fraudulently obtained succeeded, and the Judgments of the*

*High Court and the Supreme Court been set aside, and trial in cause number 1997/HP/272 been reopened.*

*3. The trial Judge misdirected herself in law and fact when she held (at page J85 paragraph 9.97) that 'in view of the fact that Jonathan Van Blerk in cross examination, in this matter admitted that he engaged the Lusaka Urban District Council then, and now Lusaka City Council, over use of the land until it was re-planned, does not make Fortune Kachamba's testimony with regard to the reason for the compulsory acquisition as having been 'false or fraudulent' without determining when exactly fraud happened under the circumstances of the case before her.*

*4. The trial Judge misdirected herself in law and fact when she held (at pages J85-J86 paragraph 9.97) that 'at the time, the possible actualization of the intention of the acquisition was in the process of being carried out, but had been*

*delayed by Jonathan Van Blerk's failure to surrender the Certificate of Title for marking off.'*

5. *The trial Judge misdirected herself in law and fact when she held (at page J86 paragraph 9.98) that 'the claim that Fortune Kachamba's testimony was fraudulent cannot stand' without taking into account the admissions by the Attorney General and the Lusaka City Council that the land in question was later, after procuring the High Court Judgment in cause number 1997/HP/272 and the Supreme Court Judgment under cause number SCZ/8/190/2002, allocated to private companies.*
6. *The trial Judge misdirected herself in law and fact when she held (at page J87 paragraph 10.1) that costs go to respondents without taking into account the circumstances of the cause before her."*

## **9.0 THE APPELLANT'S HEADS OF ARGUMENT ON GROUNDS 1, 3 AND 5**

- 9.1 In the appellant's heads of argument filed on 27<sup>th</sup> October 2023, the 1<sup>st</sup>, 3<sup>rd</sup>, and 5<sup>th</sup> grounds of appeal were argued together, while grounds 2, 4 and 6 were argued separately.
- 9.2 Regarding grounds 1, 3, and 5, the appellant argued that the trial judge overlooked evidence showing that the 1<sup>st</sup> and 2<sup>nd</sup> respondents admitted to allocating the land to private companies, despite representing to the High Court and Supreme Court that the compulsory acquisition of the appellant's land was for public purposes or the interest of the Republic. This discrepancy, the appellant claimed, amounted to fraud relating to the power of eminent domain. The appellant relied on the case of **Attorney General v. Marcus Kapumba Achiume**<sup>1</sup> to support the submission that the lower court's finding that there was no fraud should be overturned, as the Judge's evaluation of the evidence was not balanced.
- 9.3 The appellant contended that the compulsory acquisition of his land was not for public purposes or the interest of the Republic, as contemplated in **sections 3 and 4(2) of The Lands Acquisition Act, Chapter 189 of the Laws of Zambia**.<sup>1</sup>



Instead, it was for private purposes, which do not fall within the ambit of **sections 3, 5, and 6 of the Lands Acquisition Act, 1970.**<sup>2</sup> The appellant referred to the official Verbatim Report No. 139 dated 11<sup>th</sup> January – 20<sup>th</sup> March 2008, where the Hon. Deputy Minister of Lands, during a parliamentary debate in the National Assembly, answered questions on the Baobab land ownership (the land in question).

- 9.4 In his speech, the Deputy Minister mentioned that the Government of the Republic of Zambia had re-planned Farm 4300, into subdivisions B and C, which in 2006 were leased to Legacy Holdings Zambia Limited and Kwikbuild Corporation Zambia, respectively, which are the current title holders for the two subdivisions. The Government was at liberty to terminate the agency with Lusaka City Council as it deemed fit.
- 9.5 Furthermore, the developers were building houses for the benefit of indigenous Zambians, who would have the opportunity to buy them. The developers would sell the houses for profit and save the meager resources of Lusaka City Council.
- 9.6 Counsel for the appellant cited the case of **Midland Bank Trust Co. Limited and Another v. Green and Others**<sup>2</sup> to argue that the 1<sup>st</sup> and 2<sup>nd</sup> respondents acted dishonestly and fraudulently

to deprive the appellant of land ownership. The appellant also referenced **Jonathan Van Blerk v. Attorney General and Others**,<sup>3</sup> and **Black's Law Dictionary, 8th edition**, for the definition of fraud.

9.7 Additionally, an Indian case, **M/S Royal Orchid Hotels Limited and Others v. G. Jayarama Reddy and Others**,<sup>4</sup> was cited where the court condemned the compulsory acquisition of land not used for public purposes.

9.8 It was further argued that the lower court erred by dismissing the claim of fraudulent testimony by Fortune Kachamba, despite admissions from the 1<sup>st</sup> and 2<sup>nd</sup> respondents that the land was allocated to private companies after obtaining the judgments. We were urged to allow grounds 1, 3, and 5 of the appeal.

## **10.0 HEADS OF ARGUMENT IN OPPOSITION**

10.1 On 17<sup>th</sup> June 2024, the court rejected the 1<sup>st</sup> respondent's request to file heads of argument late due to insufficient reasons.

10.2 During the appeal hearing, Mr. Eyaa, counsel for the appellant, requested the expulsion of the 4<sup>th</sup> and 5<sup>th</sup> respondents' heads of

argument as they were filed late without leave of court. The 4<sup>th</sup> respondent received the appellant's heads of argument on 31<sup>st</sup> October 2023 and filed theirs on 14<sup>th</sup> June 2024. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not file any heads of argument.

10.3 The 3<sup>rd</sup> and 4<sup>th</sup> respondents opposed the application to have their heads of argument expunged, indicating their intent to seek extensions for filing and arguing for their right to be heard as an appeal calls for a rehearing of the matter.

10.4 The 5<sup>th</sup> respondent opposed the application, noting a brief delay in filing its heads of argument and citing **Order 13 Rule 5 (2) of the Court of Appeal Rules** which stipulates that objections should be made within 14 days of receipt of the other party's heads of argument.

10.5 The Court ruled that the 4<sup>th</sup> respondent's late filing breached **Order 10 Rule 9 (16) of the Court of Appeal Rules** and expunged their heads of argument. The 3<sup>rd</sup> respondent's filing was deemed too late, and permission was denied. Mr. Eyaa's objection to the 5<sup>th</sup> respondent's heads of argument was rejected for procedural non-compliance. Consequently, only the 5<sup>th</sup> respondent's heads of argument remain on record.

**11.0 5<sup>TH</sup> RESPONDENT'S HEADS OF ARGUMENT ON THE 1<sup>ST</sup>, 3<sup>RD</sup>  
AND 5<sup>TH</sup> GROUNDS OF APPEAL**

- 11.1 In its written arguments, the 5<sup>th</sup> respondent stated that the court's focus should be on whether the judgments confirming the compulsory acquisition of the appellant's land were obtained by fraud or fraudulent misrepresentation, rather than the propriety or public interest of the acquisition itself.
- 11.2 The 5<sup>th</sup> respondent's counsel opposed the 1<sup>st</sup>, 3<sup>rd</sup>, and 5<sup>th</sup> grounds of appeal, arguing that the appellant failed to show how the trial court inadequately evaluated the evidence. Instead, the appellant merely reproduced parts of the 1<sup>st</sup> and 2<sup>nd</sup> respondents' pleadings and evidence, which consistently claimed the acquisition was for a public purpose.
- 11.3 Counsel maintained that the lower court had indeed considered the evidence and provided a balanced assessment, as reflected in the judgment. He cited **Khalid Mohamed v. Attorney General**,<sup>5</sup> emphasizing the principle that the burden of proof lies on the claimant. The appellant's reliance on alleged weaknesses in the defence did not suffice to prove his case, as the lower court concluded.

- 11.4 Regarding Fortune Kachamba's testimony, the lower Court noted that the execution of the acquisition was delayed due to Jonathan Van Blerk's failure to surrender the Certificate of Title. Counsel argued that the appellant could not claim the State misled the court when it was his actions that hindered the State's plans.
- 11.5 Additionally, counsel cited **Briess and Others v. Woolley and Others**,<sup>6</sup> which held that setting aside a judgment due to fraud requires proof of fraud at the relevant time.
- 11.6 Counsel pointed out that the court found that the compulsory acquisition was conducted in the public interest and that the judgments confirming it were not obtained by fraud.
- 11.7 The appellant has not demonstrated that the lower court's findings were unreasonable or based on misrepresentations of facts, therefore they cannot be overturned.
- 11.8 It was emphasized that merely making a false statement does not necessarily constitute fraudulent misrepresentation. Counsel referenced the case of **ZISC Life Limited v. Walubita Nawa**,<sup>7</sup> where the High Court outlined the elements of fraud: a false representation of an existing fact, made with the intent to

deceive the other party into acting on it, resulting in damage to that party.

11.9 In light of these principles, counsel argued that the appellant failed to address the Supreme Court's finding that his actions obstructed the State's implementation of the land acquisition's intended purpose. This behavior, counsel suggested, exemplifies a litigant approaching equity with compromised integrity.

11.10 Consequently, the 5<sup>th</sup> respondent asserted that the 1<sup>st</sup>, 3<sup>rd</sup>, and 5<sup>th</sup> grounds of appeal, when considered together, lack merit and should be dismissed outright.

## **12.0 ANALYSIS AND DETERMINATION OF THE 1<sup>ST</sup>, 3<sup>RD</sup> AND 5<sup>TH</sup> GROUNDS OF APPEAL**

12.1 We have carefully considered the record of appeal, the appellant's and 5<sup>th</sup> respondent's heads of argument.

12.2 It is common ground that 351.2142 hectares of the appellant's Farm Number 4300 Lusaka was compulsorily acquired under the Lands Acquisition Act 1970, he was left with about 389 hectares. The reason given for the acquisition was that the land

would be used for public purposes. The appellant was compensated for the acquired land.

12.3 The appellant became aggrieved by the acquisition and commenced several court cases against the State and other interested parties since 1997. One of the cases was dismissed and another discontinued. The appellant's attempts to regain ownership of the land through court process failed by May 2005. This appeal relates to the High Court Judgment in cause No. 2017/HP/2193 refusing to set aside the judgment under cause No. 1997/HP/272 delivered in July, 2002 and the Supreme Court judgment in Appeal No. 138 of 2002 delivered in May, 2005 on grounds of fraud.

12.4 The appellant contends that both the High Court and Supreme Court judgments were obtained by means of fraudulent misrepresentation and should be set aside.

12.5 The 5<sup>th</sup> respondent opposed the appeal and stated in the main that there was no fraud involved in obtaining both judgments. The crucial questions are firstly, whether the appellant had proved his case in the court below and secondly, whether this appeal has any merit.

12.6 The appellant heavily relied on the evidence adduced by Fortune Kachamba in Cause No. 1997/HP/272, to the effect that the land was acquired by the State for public purpose. The appellant's contention is that, that was far from the truth, because according to him, fraud became manifest in 2011. That there was a deviation in the use because the land was renumbered F/4300/B and F/4300/C and allocated to the 3<sup>rd</sup> and 4<sup>th</sup> respondents which are both private companies. The said companies hold title to their pieces of land. They have since subdivided it and sold subdivisions 1 – 13 of F/4300/B for their own benefit to the 5<sup>th</sup> respondent.

12.7 In the **Takhar case**,<sup>8</sup> the Supreme Court unanimously allowed the appeal on setting aside a judgment procured by fraud. The decision was based on the common law rule articulated by the House of Lords in **Owens Bank Limited v. Bracco**<sup>9</sup> that:

***“The unsuccessful party who has been sued to judgment is not permitted to challenge that judgment on the ground that it was obtained by fraud unless he is able to prove that fraud by fresh evidence which was not available to him and could***



***not have been discovered with reasonable diligence before the judgment was delivered.”***

12.8 The Court expounded that:

***“The person who applies to set aside an earlier judgment on the basis of fraud does not have to demonstrate that the evidence of fraud could have been obtained with reasonable diligence in advance of the earlier trial.”*** Lord

Sumption said *inter alia* that:

***“The standard of proof for fraud is high, but once it is satisfied, there are no degrees of fraud which can affect the right to have the judgment set aside.”***

12.9 In the case of **Toubia v. Schwenke (2002) NSWCA 34: (2002) 54 NSWLR 46** cited in the **Takhar case**, it was stated *inter alia* that:

***“Where the action seeks the judicial rescission of a judgment, the plaintiff must prove that he and the court were deceived and he can only do this by showing that he has discovered the truth since the trial. Where this is done, and the fresh facts are material, fraud is established.”***

12.10 Our understanding of the said common law principles, on setting aside a judgment procured by fraud, is that the plaintiff must show that the fraud existed at the time of the trial and before the judgment was delivered. He must adduce fresh evidence that was not available to him at the time. Nevertheless, there is no need to prove that he took due diligence in advance of the earlier trial.

12.11 We have looked at the case of **M/S Royal Orchid Hotels Limited and Others v. G. Jayarama Reddy and Others**,<sup>4</sup> herein after referred to as the Royal Orchid Hotels case.

12.12 In brief, the facts of that case were that the Tourism Development Corporation not part of the government acquired 3.7 acres 4 juntas of land belonging to the petitioners on the ground that it would be for public purposes. The land was sought to be acquired to establish a Golf - Cum - Hotel Resort near Bangalore by the Corporation. The State issued the notifications of acquisition. Instead of utilizing the acquired land for the purpose specified in the notifications or for any other public purpose, the Corporation transferred the same to private parties. One Dayanaida Pai, a real estate developer, who was said to have entered into agreements with the Landowners

for purchase of the land comprised in several survey numbers for putting up a group housing scheme and obtained approval for it, appeared to be the person behind the move by the Corporation for the acquisition of land for the execution of tourism related projects including Golf-cum-Hotel Resort. This is the reason why his role prominently featured in the meeting of senior officers of the Bangalore Development Authority and the Corporation held on 13/1/1987 to discuss the steps to be taken to secure possession of the acquired land. The court condemned the compulsory acquisition of land holding that it was not going to be used for public purpose because it ended up in private individuals possession.

12.13 The **Royal Orchid Hotels case** and other foreign cases referred to in this matter are not binding on this Court but merely persuasive. Nevertheless the common law principles referred to therein are applicable to this appeal. We note that the facts of the case are quite different from the facts of this matter. Further, there was evidence in that case that one Dayanaida Pai, a real estate developer authorized the acquisition of the land by the Corporation which meant that the Corporation had no intention in the first place to use the land for public purpose.

12.14 In the present case, the land was acquired by the State pursuant to the Lands Act Chapter 184, as read with Statutory Instrument No. 7 of 1964 and Gazette Notice No. 1345. There was no evidence that at the time of trial, fraud was involved and that the intentions of the President were that the acquired land should not be used for public purpose but to allocate the same to private entities for their businesses.

12.15 In marked contrast to this case, in the Royal Orchid Hotels case, there was proof that fraud existed before the trial due to the involvement of Mr. Dayanaida Pai the real estate developer in the process of acquisition.

12.16 We have also considered the case of **Briess and Others v. Wooley and Others** <sup>6</sup> which both the lower court and the 5<sup>th</sup> respondent relied on. In brief, the **Briess case** was about a fraudulent misrepresentation made in the course of pre-contractual discussions by a shareholder in a company. He was subsequently authorized by the other shareholders to continue negotiations as their agent, and in due course, the contract was concluded. The Court held that the shareholders were ***“liable in damages to the other contracting party, notwithstanding that the representation had been made***

*by the shareholder before he began to negotiate on their behalf. Further, where there is an interval between the time when the representation is made and the time when it is acted on, and the representation relates to an existing state of things, the representation is deemed to be repeated throughout the period. However, a representor can modify or withdraw a prior representation at any time before the agreement is concluded and if false when made but true when acted upon there is no misrepresentation.”*

12.17 The **Briess case** also indicates the legal principle that *“the representation must be false at the time that it is made and time that it is acted upon by the representee who suffered damages.”*

12.18 This case is different from the present in that fraud existed before and during trial, but not in this case.

12.19 It is imperative for this Court to look at the definitions of “public purpose” and “fraud” or “fraudulent misrepresentation.” According to **section 4(2) of the Lands Acquisition Act,**<sup>1</sup> public purpose includes:

“(a)For the exclusive use of the Government or the general benefit of the people of Zambia.

b. ....

c. ....

12.20 The list is not exhaustive but the description under (a) is relevant to this matter. So the other question to be determined is whether the appellant showed that the 1<sup>st</sup> respondent's witness, Fortune Kachamba's testimony in the High Court that the compulsory acquisition was to enable the Lusaka City Council create a housing complex and to create plots for the civil servants in public interest was untrue or fraudulent misrepresentation before or at the time of the trial.

12.21 We shall determine this question in light of the definition of fraud in the case of **Jonathan Van Blerk and Others**<sup>3</sup> and **Black's Law Dictionary**.

12.22 In the said case, fraud was defined as ***"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."***

12.23 **Black's Law Dictionary** defines fraudulent misrepresentation as ***"A false statement that is known to be false or is made recklessly – without knowing or caring whether it is true***

*or false – and that is intended to induce a party to detrimentally rely on it.*” We also adopt the elements of fraud expounded in the High Court case of **ZISC Life Limited v. Walubita Nawa.**<sup>7</sup>

- 12.24 We are guided in several cases cited herein, including **Takhar v. Gracefield Developments Limited and Others** *supra* that to prove fraud in obtaining a judgment, there must be evidence of conscious and deliberate dishonesty in relation to the evidence that was given at the original trial, and that the evidence was relevant to the judgment that was obtained.
- 12.25 The standard of proof is certainly higher than a balance of probability.
- 12.26 The appellant heavily relied on the evidence of Fortune Kachamba that *“the acquisition was for the public interest although at the time the state had not yet made specific plans for it.”* The appellant alleged that Kachamba’s evidence was false because later, the acquired land was allocated to private companies for their own benefit.
- 12.27 We are of the view that the appellant did not demonstrate or prove that Fortune Kachamba had at the time of testifying at the trial in cause No. 1997/HP/272, been dishonest or that he

recklessly lied on oath in relation to the purpose for which the land was acquired, in order to influence the appellant and the Court to believe that the land was compulsorily acquired for public purpose when in fact not. Further, that his intention was to persuade the appellant to rely on it to his prejudice.

12.28 During the trial, it was not disputed that there was a letter from the Commissioner of Lands to Lusaka Urban District Council dated 8<sup>th</sup> September 1987 and another letter from the Development Secretary – Lusaka City Council to the District Executive Secretary dated 11<sup>th</sup> April 1988, stating that the land was acquired for planning of a housing estate and stands to be offered to the public. Taking into account both letters, we cannot fault the lower court for its finding that Fortune Kachamba did not make a false misrepresentation at the time.

12.29 We note that many years had elapsed between the trial in cause No. 1997/HP/272 in 1997 or 1998 and the allocation of the land in question to private entities such as the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in 2006 and 2011 respectively.

12.30 During that period, the government had changed from UNIP to MMD. The compulsory acquisition was under a different Republican President (Kenneth Kaunda) and the allocation of



land to private entities was under a different Republican President (Levy Mwanawasa).

12.31 The 2<sup>nd</sup> and 3<sup>rd</sup> respondent companies were in fact incorporated long after both impugned judgments had been delivered. The point we are making is that, Fortune Kachamba merely told the lower court the state of affairs which existed at the material time. He could not have known what the future held, hence there was no *malafides*. The 5<sup>th</sup> respondent also acquired an interest in a portion of the land in question long after the said judgments.

12.32 Since the Supreme Court merely dealt with the record of proceedings from the High Court, we take the view that on appeal, the fact that there was no evidence of *malafides* on the part of the said witness did not change.

12.33 Hence taking into account the definitions of fraud in the case of **Jonathan Van Blerk and Others**, *supra* and **Black's Law Dictionary**, and the facts of this matter, we hold that there was no proof of fraud on the part of the 1<sup>st</sup> and 2<sup>nd</sup> respondent in obtaining both the High Court and Supreme Court judgments.

12.34 The argument by the appellant that the High Court glossed over the undisputed evidence that the acquired land was later given

to private companies contrary to the reasons given for the acquisition cannot stand because the court was well aware of the history of the matter which was summarized in the judgment.

12.35 In any case, allocation of the land to private entities does not *per se* prove that Fortune Kachamba made fraudulent misstatements under the circumstances of this particular case.

12.36 We further hold that if at all there was any fraudulent misrepresentation made by Fortune Kachamba the 1<sup>st</sup> respondent's witness, the appellant did not rely on it to his detriment because he was compensated for the acquisition. In cause No. SCZ/08/190/2002, it was held that there was ***“evidence that the amount for compensation for the unexhausted improvements at the time was agreed upon by the parties after evaluation of the improvement. This to us is the market value at the time. The 1<sup>st</sup> respondent did agree to pay interest on the compensation paid for the delay in effecting the same. This has not been done because from the evidence of the 1<sup>st</sup> respondent, the appellant was allowed to utilize the land on which he paid no rent.”***

12.37 For the foregoing reasons, we hereby dismiss the 1<sup>st</sup>, 3<sup>rd</sup> and 5<sup>th</sup> grounds of appeal for lack of merit.

### **13.0 APPELLANT'S HEADS OF ARGUMENT ON GROUND 2**

13.1 On the 2<sup>nd</sup> ground of appeal, the appellant contended that: ***“in the context of fraud in compulsory land acquisition, it was wrong for the trial court to hold that the observations that were made by the Supreme Court in SCZ/8/03/2020, that where property is compulsorily acquired for a public purpose, but it later turned out that it was not after all for a public purpose, that compulsory acquisition can be set aside, and the property returned to the original owner, would only have been properly advanced, had in this matter, the contention that the judgment was fraudulently obtained succeeded, and the judgments of the High Court and Supreme Court been set aside, and trial in cause no. 1997/HP/272 been re-opened.”***

13.2 Counsel argued that since the appellant had proved that the purpose for which the property was compulsorily acquired turned out to be untrue, the said observations made by the Supreme Court and related authorities are applicable to the

facts of this case. We were therefore urged to allow the 2nd ground of appeal.

#### **14.0 THE 5<sup>TH</sup> RESPONDENT'S HEADS OF ARGUMENT ON GROUND 2**

14.1 The 5<sup>th</sup> respondent submitted on ground 2, as follows: There was nothing wrong with the guidance given by the lower court. That the trial Judge had indicated in the Ruling dated 27<sup>th</sup> January 2022, that the only question for determination in the action before her was whether the impugned judgments were obtained by fraud. In the same ruling, the court further directed that in the event that it found that the judgments were obtained by fraud, then there would be a retrial to determine the validity of the compulsory acquisition. That ruling was not appealed against.

14.2 We were urged to dismiss the 2<sup>nd</sup> ground of appeal on the ground that it was misconceived.

#### **15.0 OUR ANALYSIS AND DETERMINATION OF GROUND 2**

15.1 We find that the lower court's guidance was right in view of its ruling dated 27<sup>th</sup> January 2022, which was not appealed against,

and our reasoning under grounds 1, 3 and 5 of the appeal. Hence ground 2 is bereft of merit and dismissed.

#### **OUR ANALYSIS AND DETERMINATION OF GROUND 4**

15.2 The 4<sup>th</sup> ground of appeal relates to the lower court's holding that possible actualization of the intention of the acquisition was in the process of being carried out but was delayed by the appellant's failure to surrender his Certificate of Title for marking off.

15.3 We shall not recapitulate the arguments on this ground because this ground is in our view *otiose* considering our determination of grounds 1, 3 and 5 of the appeal.

#### **16.0 THE APPELLANT'S HEADS OF ARGUMENT ON GROUND 6**

16.1 The appellant argued that the lower court did not exercise its discretion to award costs judiciously because costs should not have been awarded to the respondents and yet the appellant lost out on his property.

#### **17.0 5<sup>TH</sup> RESPONDENT'S HEADS OF ARGUMENT ON GROUND 6**

17.1 The 5<sup>th</sup> respondent's arguments to counter ground 6 are as follows:

Costs are in the court's discretion and a successful litigant is entitled to costs unless there are compelling reasons why the same should not be awarded. Further that the discretion to award costs must be exercised judiciously. Generally costs follow the event. In this regard, the case of **Zambia Extracts Oils and Colorants Limited and Another v. Zambia State Insurance Fund Board of Trustees**<sup>9</sup> was cited.

17.2 Counsel argued that the appellant has not shown what wrong the respondents did in the action or conduct of it to be deprived of costs. The appellant has cited no authority for his argument because there is no authority that where a party has financially benefitted from the subject matter of the action, then they should not be awarded costs if they succeed in the action or appeal. Thus counsel urged us to dismiss the 6<sup>th</sup> ground of appeal and the entire appeal.


## **18.0 OUR ANALYSIS AND DETERMINATION OF GROUND 6**


18.1 The law on costs as established in the case of **Zambia Extracts Oils and Colorants Limited and Another v. Zambia State Insurance Fund Board of Trustees (selected Judgment No. 31 of 2016)** *supra* should be followed. In this case, the award


of costs was made on the basis that judgment was in the respondents' favour. The costs followed the event and there was no reason to deprive them of costs. Hence the lower court cannot be faulted. As a result, ground 6 also has no merit and it is dismissed.

## 19.0 CONCLUSION

19.1 All being said, the appeal is dismissed in its entirety for lack of merit. Costs are awarded to the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents to be taxed in default of agreement.

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**C.K. MAKUNGU**  
**COURT OF APPEAL JUDGE**

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**K. MUZENGA**  
**COURT OF APPEAL JUDGE**

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**Y. CHEMBE**  
**COURT OF APPEAL JUDGE**