

**IN THE COURT OF APPEAL  
FOR ZAMBIA  
HOLDEN AT LUSAKA**  
(Civil Jurisdiction)

**CAZ Appeal No. 140/2019**



**B E T W E E N :**

MUTEMWA MUTEMWA, SC  
JUDITH LUNGOWE AONGOLA  
MWASHEKABO MUTEMWA  
MWANGALA MUTEMWA  
INONGE MUTEMWA

**1<sup>ST</sup> APPELLANT**  
**2<sup>ND</sup> APPELLANT**  
**3<sup>RD</sup> APPELLANT**  
**4<sup>TH</sup> APPELLANT**  
**5<sup>TH</sup> APPELLANT**

**AND**

NEW FUTURE FINANCIAL COMPANY LIMITED  
CHINA HUA SHUN ZAMBIA INVESTMENTS LIMITED

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

**CORAM : Kondolo, Chishimba and Mulongoti, JJA**  
**26<sup>th</sup> August, 2020 and 2<sup>nd</sup> September, 2020.**

For the Appellant : Mr Siyumbawo of Messrs Mutemwa Chambers  
For the Respondents : Mr L. Mumba of Messrs Ferd Jere & Company and  
Ms M. Bah of Messrs Nkulukusa & Co.

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**J U D G M E N T**

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**CHISHIMBA, JA, delivered the Judgment of the Court**

**CASES REFERRED TO:**

1. ANZ Grindlays Bank (Zambia) Limited v. Christine Kaona (1995/1997) ZR 85
2. Zambia Seed Company Limited v. Chartered International (PTY) Limited SCZ Judgment No. 20 of 1999
3. Embassy Supermarket v. Union Bank Zambia Limited (in Liquidation) SCZ No. 25 of 2007
4. S.P. Chengalvaraya Naidu v. Jagannath (1994) 1 SCC 1
5. Lazarus Estate Limited v. Beasle (1956) 1 QB 702
6. Lusaka West Development Company Limited and Others v. Turnkey Properties Limited (1984) ZR 86

7. Mbaimbai Mukamambo Brighton v. The Attorney General and 2 Others SCZ Appeal No. 134 of 2017
8. Ody's Oil Company Limited v. The Attorney General, Constantinos James Popoutsis SCZ Judgment No. 4 of 2012
9. Valsamos Koufou v. Anthon Greenberg (1982) ZR 30 (HC)
10. Nkhata and Four Others v. The Attorney General (1966) ZR 124 (CA)
11. The Attorney General v. E. B. Jones Machinists Limited
12. Societe Nationale Des Chemis De Our Du Congo (SNCC) v. Joseph Nonde Kasonde SCZ Judgment No. 19 of 13
13. Henderson v. Henderson (1843-1860) ALL ER 378
14. Bank of Zambia v. Tembo & Others SCZ Judgment No. 24 of 2002
15. Wilhelm Roman Buchman v. The Attorney General (1994) SJ 76 (SC)

#### **LEGISLATION AND OTHER WORKS REFERRED TO:**

1. The Rules of the Supreme Court of England (White Book) 1999 Edition.
2. The Property Transfer Tax Act, Chapter 340 of the Laws of Zambia
3. The Penal Code, Chapter 87 of the Laws of Zambia
4. Halsbury's Laws of England, volume 16 paragraph 1529
5. Strouds Judicial Dictionary of Words and Phrases Volume 3, 7<sup>th</sup> Edition
6. Kerr on Fraud and Mistake by Sidney Edward Williams (Sweet and Maxwell, 1929).

#### **INTRODUCTION**

- 1.0 This is an appeal against the ruling of the High Court delivered by Justice C. Lombe-Phiri, upholding the preliminary issues raised by the Respondents and dismissing the Appellant's action.
- 1.1 The appeal addresses the issue as to whether a fresh action can be commenced to challenge and set aside a consent judgment under the circumstances of this case.

#### **FACTUAL BACKGROUND**

- 2.0 The Appellants had obtained a loan of about US\$ 250,000 from the 1<sup>st</sup> Respondent and executed forward purchase contracts of sale of subdivision C of Farm No. 87 (a) and the remaining extent of subdivision No. 6 of subdivision division C of Farm 87 (a) Lusaka pledged as security. In the event of default, the said properties would be realized. Deeds of Assignment were executed by the Appellant to the 2<sup>nd</sup> Respondent. There was default on the part of the Appellants and the properties were transferred to the 2<sup>nd</sup> Respondent and certificates of title issued. The 2<sup>nd</sup> Respondent then issued process to claim vacant possession of properties against the Appellant.
- 2.1 On 21<sup>st</sup> December 2017, under the said cause 2017/HP/2018 the 1<sup>st</sup> Respondent and the Appellants executed a consent judgment, one of the terms was for summary possession of the properties pledged as security in the event of default of payment of the agreed debt of US\$ 800,000 and legal costs of US\$ 30,000 by the 31<sup>st</sup> of March 2008. The other terms of the consent order stipulated that upon payment of the sums stated above, the transfer of properties would be rescinded and reversed.

2.2 The Appellants then commenced a fresh action against the Respondents seeking to set aside the consent judgment entered and executed under cause number 2017/HP/2108.

2.3 The basis of the grounds to set aside the consent order being on account that the 2<sup>nd</sup> Respondent was not privy to the loan agreement between the Appellants and the 1<sup>st</sup> Respondent. Further, that the Respondents fraudulently transferred ownership of the properties in question to the 2<sup>nd</sup> Respondent. In addition, that the consent judgment be set aside on account of unilateral mistake on the part of the Appellants.

### **PRELIMINARY ISSUES RAISED BEFORE THE LOWER COURT**

3.0 Following the commencement of the fresh action by the Appellants, the Respondents made an application by way of notice to raise preliminary issues. The Respondents sought the determination, of the following issues;

- (i) ***Whether proceedings herein can be commenced or sustained on a defective writ that does not contain all the Plaintiffs' postal and electronic address in view of rules contained in the Rules of the Supreme Court of England as read together with the High Court (Amendment) Rules, 2012 Statutory Instrument No. 27 of 2012***
- (ii) ***Whether the action is barred on the principle of res judicata as the issues it seeks to have determined were raised via preliminary***

***issue under cause number 2017/HP/2108 and determined conclusively via a consent judgment dated 21<sup>st</sup> December 2017.***

- 3.1 The appeal before us is based on the second preliminary issue raised regarding the consent judgment which, according to the Respondents, determined all the issues before the court conclusively.
- 3.2 The 1<sup>st</sup> Respondent in its affidavit in support of Notice of Motion to raise preliminary issues stated that it commenced an action under cause number 2017/HP/2108 against the Appellants and all other unknown persons in occupation of the properties in which the 2<sup>nd</sup> Respondent sought possession. That the 1<sup>st</sup> Appellant on 11<sup>th</sup> December 2017, in that cause, filed an application to determine the matter on a point of law as he challenged the transfer of the properties to the 2<sup>nd</sup> Respondent because he had contracted with the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Appellant alleged that the property transfer certificates used to effect the transfer were forged and that the requisite tax had not been paid.

- 3.3 On 21<sup>st</sup> December 2017 the Appellants and the 2<sup>nd</sup> Respondent executed the aforementioned consent judgment and the terms earlier stated.
- 3.4 The Appellants in opposing the preliminary issue raised relied on their affidavit in opposition. They deposed that they discovered a purported fraud by the Respondents involving the non-payment to Zambia Revenue Authority (ZRA) of property transfer tax (property transfer tax) and forgery of the property transfer tax certificate (property transfer tax certificate). On the basis of the discovered fraud, the Appellants seek to challenge the consent judgment.
- 3.5 The Appellants denied that the issues sought to be determined in the action were determined in an earlier cause. That the fraud by the Respondents vitiated the consent judgment. It was further argued that estoppel does not operate against statute. In addition, that the Consent judgment ought to be set aside as it illegally allowed the transfer of property from the Appellants to the 2<sup>nd</sup> Respondent.

**ARGUMENTS ADVANCED IN COURT BELOW**

4.0 The Respondents, in a nutshell, argued that the issues raised in this cause had been determined and cannot be relitigated. Therefore, the action was barred on the principle of *res judicata* as the issues were determined by the preliminary issue raised under cause number 2017/HP/2108 and the consent judgment dated 21<sup>st</sup> December 2017. Further that the issues regarding ownership of the properties in question were conclusively dealt with in the earlier cause. The Respondents in the court below relied on the case of **ANZ Grindlays Bank (Zambia) Limited v. Christine Kaona** <sup>(1)</sup> where the court discussed the principle of *res judicata*.

4.1 The Appellants contended that the Respondents employed illegal means to effect the transfer of property from the Appellants to the 2<sup>nd</sup> Respondent by using forged property transfer tax certificates to effect the transfer. The Appellants relied on the case of **Zambia Seed Company Limited v. Chartered International (PTY) Limited** <sup>(2)</sup> to buttress the argument that a consent judgment can only be set aside by commencing a fresh action.

**DECISION OF THE COURT BELOW:**

5.0 The lower court found that the issues that the Appellants sought to raise were already determined in cause number 2017/HP/2008. The court below stated that since the consent judgment was entered into by the parties, it is presumed that the same was entered into freely and voluntarily and thus the courts are reluctant to entertain an appeal or a challenge of such judgment.

5.1 The lower court further found that the reason for challenging the consent judgment; namely, that a wrong party was cited in the proceedings is not sufficient to warrant setting it aside. With regard to the alleged fraud, the lower court was of the view that this was known to the Appellant prior to executing the consent judgment. That it was an issue that could have been resolved under the earlier cause. Further, that the issues raised regarding fraud have more to do with the delivery of possession as agreed by the parties in the consent judgment.

5.2 The lower court concluded that allowing the action to set aside a consent judgment relating to issues that could have been exhaustively dealt with under an earlier cause would be going against the principle of *res judicata*. Consequently, the court

below upheld the 2<sup>nd</sup> preliminary issue raised by the Respondents and dismissed the Appellant's action.

### **GROUND OF APPEAL**

6.0 Being dissatisfied with the above ruling, the Appellants have appealed to this court on the following grounds that;

- (i) The learned trial Judge in the court below erred in law and in fact, when she dismissed the Plaintiff's action to set aside the Consent Judgment of 21<sup>st</sup> December, 2017, for the reason that it embraced illegally secured transfers of the Plaintiffs' properties by the Defendants to themselves, on account of res judicata, when evidence on record shows that the Plaintiffs did, in fact, raise the issue of the illegal transfers, aforesaid, but the same was inadvertently omitted from the impugned Consent Judgment, and, therefore, there was no determination of the issue.*
- (ii) The Learned Trial Judge in the Court below erred in law and in fact, by failing to direct her mind that in view of the illegality relating to the transfer of the properties to the Respondents; which has not been denied by the Respondents, the consent judgment entered between the parties was void ab initio.*

### **THE ARGUMENTS BY THE PARTIES**

7.0 The Appellants filed heads of arguments dated 9<sup>th</sup> of August 2019, and heads of arguments in reply on 20<sup>th</sup> August. It is contended in ground 1 that the property transfer tax (PTT) certificates obtained by the Respondents were forged and thus illegal. Further that the Respondents paid property transfer tax

to ZRA on the pretext that it was the 1<sup>st</sup> Appellant who had paid the same when in fact not. In fact the duty to pay property transfer tax lies with the seller in line with the provisions of **Section 4 (1) of the Property Transfer Tax Act, Chapter 340 of the Laws of Zambia.**

7.1 The Appellants argued that the Respondents disregarded the law with impunity when they falsified documents showing that the 1<sup>st</sup> Appellant had paid property transfer tax to Zambia Revenue Authority. We were referred to the case of ***Embassy Supermarket v. Union Bank Zambia Limited (in Liquidation)*** <sup>(3)</sup> where the court stated that where a statute places a duty on an individual or officer no other person ought to perform that duty unless it is provided for under the law and that a defendant cannot rely on a document which is issued without proper authority.

7.2 It was contended that by dismissing the action that sought to set aside the consent judgment, the lower court essentially approved the Respondents' illegal act of falsifying property transfer tax documentation. In essence, the lower court's

decision to dismiss the action approved that the Respondents could retain the title deeds which was fraudulently obtained.

7.3 The Appellants argued that the principle of *res judicata* cannot be used to legalize or preserve a consent judgment that is tainted with illegality. We were referred to the Indian Supreme Court decision in **S.P. Chengalvaraya Naidu v. Jagannath** <sup>(4)</sup> where the Court held that the principal of finality of litigation cannot be used to perpetuate fraud by dishonest litigants, who seek to retain the illegal gains indefinitely.

7.4 It was argued that the fact that the Appellants did not come to court with clean hands when they filed into court the impugned consent judgment to be executed by the court being fully aware that it contained objectionable clauses. We were referred to the case of **Lazarus Estate Limited v. Beasley** <sup>(5)</sup> in which it was stated that no court will allow a person to keep an advantage which he has obtained by fraud “*that fraud unravels everything.*” The Appellants went on to argue that the Respondents committed a fraud on the court below when they presented a consent judgment with the full knowledge that the transfers of properties were fraudulently procured. To buttress

this argument, the Appellants referred us to a portion from **Kerr on Fraud and Mistake** where the learned authors state that fraud vitiates everything, even Judgments and Orders of Court.

7.5 It was the Appellant's argument that the fraudulent documents indicate that tax was paid to ZRA when in fact not. The properties were transferred from the Appellants to the 2<sup>nd</sup> Respondent based on forged documents. The Respondents committed criminal acts under **Section 36 of the Penal Code** and also evaded tax. The fact that the 1<sup>st</sup> Appellant was not registered for property transfer tax was acknowledged by ZRA in a letter in response to a query by the 1<sup>st</sup> Appellant. This showed that the Appellants did not pay property transfer tax.

7.6 It was submitted that, the doctrine of *res judicata* cannot be used to promote or shield lawlessness. That the Appellants' action merely sought to ensure that the offending paragraph five of the consent judgment was expunged so that it reflects the correct position. The court was referred to the objectionable property transfer tax certificates, the 1<sup>st</sup> Appellant's letter of verification and the response from Zambia Revenue Authority.

7.7 It was argued that the Appellants had raised the issue of the illegal transfers prior to the execution of the consent judgment. Therefore, it is unfathomable why the lower court disregarded the issue of unilateral mistake raised by Appellants. That the issue of unilateral mistake was brought to the attention of the Court under paragraph 2 of the Appellant's writ of summons while the issue of inadvertent omission is contained under paragraph 18 of the affidavit appearing at page 190 of the record of appeal.

7.8 With regard to circumstances under which a consent order may be set aside, we were referred to the cases of **Lusaka West Development Company Limited and Others v. Turnkey Properties Limited** <sup>(6)</sup> and **Mbaimbai Mukamambo Brighton v. The Attorney General and 2 Others** <sup>(7)</sup> in which it was stated that a consent judgment can be set aside on grounds of fraud, mistake or if it is against public policy.

7.9 It was contended that having raised the issue of the illegal transfers of properties earlier, the inclusion of the same in the consent order was as a result of a mistake or omission by the Appellant. That paragraph 5 of the consent judgment reflects illegalities perpetrated by the Respondents.

7.10 The Appellants submits that in light of paragraph 5 of the consent judgment, the transfer of the properties cannot be rescinded or reversed as no actual transfer took place from the Appellants to the 2<sup>nd</sup> Respondent. Therefore, the consent order is incapable of enforcement as it is vitiated by the illegal transfers of property.

7.11 Under ground 2, the Appellants argued that the consent judgment was void *abi nitio* the same having been tainted with illegality. The said transfer of the properties was done without the seller paying property transfer tax as required by law. Further, that the consent judgment contains clauses premised on the illegal transfers of property.

7.12 According to the Appellants, the fact that the Respondents employed illegal means in obtaining property transfer tax certificates that any action taken after that fact was null and void. That not even the principle of *res judicata* can validate the impugned consent judgment. We were referred to the case of ***Ody's Oil Company Limited v. The Attorney General, Constantinos James Popoutsis*** <sup>(8)</sup> where it was held that the courts will not enforce a contract which is tainted with illegality as this would be against public policy.

7.13 It was argued by learned Counsel that the lower court fell in error when it ordered the preservation of the consent judgment, which was signed by unilateral mistake on the part of the Appellants. According to the Appellants, even without the mistake made by them, the consent judgment would not have been enforceable in light of the highlighted illegalities. We were referred to the case of **Valsamos Koufou v. Anthon Greenberg** <sup>(9)</sup> where the High Court held that an agreement to commit a crime is illegal and not enforceable by the courts.

7.14 The Appellants maintained that the appeal ought to be allowed because the only way to challenge a consent judgment is by commencing a fresh action. Reference was made to the cited case of **Zambia Seed Company Limited v. Chartered International (PVT) Limited** <sup>(2)</sup> (**Supra**).

7.15 The Appellants' contended that the court below did not consider the fact that the Respondents committed illegalities against public policy when transferring the properties. It is for this reason that we must interfere with the findings made by the lower court in line with the guidance by the Supreme Court in **Nkhata and Four Others v. The Attorney General** <sup>(10)</sup>.

7.16 In conclusion, the Appellants submit that dismissal of their action by the lower court on the principle of *res judicata* amidst overwhelming evidence of illegalities perpetrated by the Respondents amounts to using the doctrine of *Res judicata* as an engine of fraud. We were referred to the case of ***The Attorney General v. E. B. Jones Machinists Limited*** <sup>(11)</sup> where the court stated that the doctrine of estoppel cannot be invoked to render a transaction valid which the legislature has prohibited on grounds of public policy. The court cannot exercise its jurisdiction for an act that is proscribed by statute. We were urged to allow the appeal as not doing so would perpetuate criminal activities.

7.17 The Respondents filed heads of arguments dated 12<sup>th</sup> May 2020. It was submitted that the Appellants had brought out the issues regarding the alleged illegalities well before the consent judgment was executed. That the 1<sup>st</sup> Appellant is hiding under the guise that he omitted to raise the issue of illegal transfers from the impugned consent judgment and that therefore there was no determination of the issues.

1.18 The Respondents argued that an inadvertent mistake is not a ground upon which a consent judgment can be set aside. That the issue is not whether or not the consent judgment ought to be set aside but whether the Appellant's action was properly dismissed due to the principle of *res judicata*.

7.19 Respondents contended that even assuming that the Appellants made an inadvertent mistake, where a party does not bring out a pertinent legal issue prior to executing a consent judgment, the same falls under *res judicata*. In support of this argument, we were referred to the case of ***Societe Nationale Des Chemis De Our Du Congo (SNCC) v. Joseph Nonde Kasonde*** <sup>(12)</sup> where the Court held that *res judicata* extends to the opportunity to claim matters which existed at the time of instituting the first action and giving the judgment.

7.20 In response to ground one, the Respondents submits that the court below properly applied the law relating to *res judicata* when dismissing the Appellant's claim. That the Appellants' appeal is merely an attempt to relitigate issues that were or may have been determined in the first action. We were referred to the

case of ***Henderson v. Henderson*** <sup>(13)</sup> where the court discussed the principle of *res judicata*.

7.21 The Respondents maintained that the Appellants have not brought any thing new that was not known to them at the time the consent judgment was executed. We were referred to an extract from **Halsbury's Laws of England** where the learned authors explain the application of the doctrine of *res judicata*, that it applies to all matters which existed at the time of rendering judgment and which the party had an opportunity to bring before the Court.

7.22 The Respondents contended that the Appellants had an opportunity to address the purported illegalities before the consent judgment was executed. That the appeal before the Court is not concerned with the merits of allegations of fraud but whether or not the matter was *res judicata*. The definition of the phrase *res judicata* as defined by **Strouds Judicial Dictionary of Words and Phrases Volume 3, 7<sup>th</sup> Edition**, was referred to as well as the decision of the Supreme Court in ***Bank of Zambia v. Tembo & Others*** <sup>(14)</sup> where it was held that the defence

of *res judicata* will succeed if it is shown that the Plaintiff had an opportunity make his claims in the first cause.

7.23 According to the Respondents, there are no circumstances that warrant the setting aside of the lower court's Ruling. The Appellants have taken lightly the fact that the consent judgment was executed voluntarily and the parties were all represented by Counsel. Further, that the Appellants have neglected to mention the fact that the illegal transfer was subsequently corrected as the property transfer tax was paid into court under cause number 2017/HP/2108 and was later paid by the Appellants to ZRA with the attendant penalties.

7.24 In response to ground 2, the Respondents contend that the issues hereunder were not raised in the court below. That the appeal seeks to challenge the decision to dismiss the action for being *res judicata* as opposed to whether or not the executed consent judgment is valid. We were referred to the case of **Wilhelm Roman Buchman v. The Attorney General** <sup>(15)</sup> where the court held that a matter not raised in the lower court cannot be raised before a higher court as a ground of appeal. The Appellants in response filed heads of arguments in reply dated

20<sup>th</sup> August, 2020, in which they reiterate the arguments advanced in their heads of arguments. We will not recite the arguments and authorities cited, suffice to state that we have considered them.

**DECISION OF THE COURT:**

8.0 We have considered the appeal, the judgment, the heads of argument by respective Counsel and the authorities cited. We will deal with grounds of appeal together as they are interrelated. The undisputed facts are that the Appellants obtained a loan of about USD 250,000=00 from the 1<sup>st</sup> Respondent. As security for the advanced sums of money, the Appellants executed Forward Purchase Contracts of Sale of Subdivisions C of Farm 87a and Subdivision of Subdivision C of Farm 87a.

8.1 Deeds of Assignment of properties were executed by the Appellant in favour of the 2<sup>nd</sup> Respondent. The said Assignments were duly registered on the 4<sup>th</sup> of December, 2017. Thereafter the 2<sup>nd</sup> Respondent issued Originating Summons for Summary Possession of land against the 1<sup>st</sup> Respondent and

Others in occupation of the security properties. This was under cause 2017/HP/2108.

8.2 On the 21<sup>st</sup> of December, 2017, the Appellants and the 2<sup>nd</sup> Respondent executed a consent judgment. The pertinent terms being that judgment was entered in favour of the 2<sup>nd</sup> Respondent for the payment by the Appellants of the sum of US\$ 800,000 and US\$30, 000 costs by the 31<sup>st</sup> of March, 2018. Upon payment, the transferred properties would be rescinded and reversed. The Appellants did not discharge their obligations stated above.

8.3 The Appellants then commenced a fresh action seeking to set aside the consent judgment and to set aside the transfer of their properties to the 2<sup>nd</sup> Respondent on the basis of unilateral mistake on their part and fraud.

8.4 It is trite that a consent judgment can be set aside on grounds that can invalidate a contract such as fraud, mistake or on account of illegality by the commencement of a fresh action. See the cited case of ***Zambia Seed Company Limited v Chartered International PUT Limited (supra)***.

8.5 The issue for determination is whether the Appellant could challenge the consent judgment in issue by commencement of a fresh action to set it aside.

8.6 The thrust of the contention by the Appellants is that the action dismissed by the lower court cannot be said to have been *res judicata* in the face of patent illegalities on the part of the Respondents in the transfer of the properties to the 2<sup>nd</sup> Respondent. Further, that dismissing the action would amount to the court condoning illegal transactions. The Appellants also argue that the dismissed action is the only avenue available to the Appellants to challenge the consent judgment. That the consent judgment was executed by a unilateral mistake by the Appellants.

8.7 The Respondents on the other hand have argued that the issues raised by the Appellants in the new action were *res judicata*. That the consent judgment conclusively dealt with all the issues. Further, that the Appellants had an opportunity to raise the issue of illegal transfers before the lower court. A fact they were aware of at the time the consent judgment was executed. In any event, the transfer has since been normalized as the

property transfer tax was paid into court by the Respondents and paid to ZRA by the 1<sup>st</sup> Appellant with the attendant penalties. In a nutshell, the Respondents argued that the lower court was on firm ground by holding that the issues raised were *res judicata*.

8.8 The Appellant in the fresh action sought to set aside the consent judgment on the basis that the wrong party was cited in the proceedings subject of the order. The other ground is the alleged fraud in obtaining the property transfer tax certificate and the payments made to ZRA. Can the above grounds be considered to be the basis for commencing a fresh action to challenge and set aside the consent judgment?

8.9 In the court below, the issue of the wrong party being cited in the proceedings was raised. The court held that the said issue was not a ground for setting aside the consent judgment because a party can be added at any time even after consent judgment. We agree with the holding by the court to that effect because it is trite that a party can be added to proceedings even after a consent judgment. See the cited case of ***London Ngoma (supra)***.

8.10 On the issue of fraud and illegality, the Appellants contend the following, that the PPT certificates used to transfer the properties from the Appellants to the 2<sup>nd</sup> Respondents were forged and illegal. The Appellants as transferors never applied for PPT as obligated under **Section 4 (1) of the Property Transfer Tax Act**. That the Respondents falsified documents purporting to show that the 1<sup>st</sup> Appellant did pay the requisite tax. Further that no tax was paid to ZRA. Therefore, the consent judgment was tainted with illegality, is unenforceable and void abinitio.

8.11 It is not in dispute that property transfer tax was obtained by the Respondents and the correct amount appears not to have been paid. Can the issues relating to the obtaining of property transfer tax and under payments to ZRA be grounds for setting aside a consent judgment?

8.12 In our view, there are two issues that must be differentiated, that is the issue of enforcement of a judgment and the setting aside of a consent judgment by commencement of a fresh action.

8.13 The issues pertaining to obtaining of property transfer tax, and payments due to ZRA, go to the manner of enforcement of the consent judgment executed by the parties. The consent judgment stipulated that in the event of default, the 2<sup>nd</sup> Respondent would have vacant possession of the properties. These properties were already transferred to the 2<sup>nd</sup> Respondent by virtue of the executed forward purchase agreements.

8.14 Where the alleged property transfer tax certificate is obtained by fraud and the property transfer tax is not paid, that is a matter for Zambia Revenue Authority to deal with by either cancellation of the PPT certificate or by demanding that the requisite property transfer tax amount be paid. The record will show that ZRA was not even a party to this matter nor applied to be joined on as a party to the proceedings.

8.15 We hold the firm view that the grounds raised by the Appellants of fraud and illegality in the circumstances of this case cannot be the basis to seek to challenge the consent judgment and set it aside. The tax issues raised were matters between ZRA and the Respondents who are alleged to have committed the tax evasion and fraud. They cannot be used as a means to set aside

a consent judgment which gave vacant possession to the 2<sup>nd</sup> Respondent upon default of payment of the sums owed by the Appellants.

8.16 On the issue of *res judicata* with regard to whether these claims could have been raised in the earlier cause instead of the commenced fresh action, the Appellants contend that the issues of illegality/fraud/tax evasion were not raised on account unilateral mistake, hence their failure to object to the inclusion of paragraph 5 of the impugned consent order. Paragraph 5 of the said order provided that the transfer of the properties shall upon receipt of payment be rescinded and reversed and that the properties shall revert back to the Appellants. This is the clause that the Appellants by unilateral mistake failed to object to or inadvertently included in the consent judgment.

8.17 All the above contentions arise from the alleged illegalities and fraud in respect of tax obligations that the Appellants were aware of and could have raised in the earlier action. In fact the 1<sup>st</sup> Appellant did seek verification of the purported tax clearance certificates on 7<sup>th</sup> of December, 2017 and a response was received on 19<sup>th</sup> December, 2017. ZRA stated that the 1<sup>st</sup>

Appellant was not registered for property transfer tax. As regards issues of validity of the property transfer tax clearance certificate dated 8<sup>th</sup> August, 2017 in respect of the properties, ZRA had submitted the matter to their Investigation Department to establish what transpired. This response falls on square with our views that these are matters for ZRA to deal with and cancel the property transfer tax certificates or demand for payment of the shortfall tax if at all and not the basis to set aside the consent judgment.

8.18 The record shows that the 1<sup>st</sup> Appellant in fact obtained consent to assign but now raises issues related to property transfer tax due to ZRA. We cannot fault the lower Court for holding that the alleged issues of fraud in the obtaining of property transfer tax were known to the Appellants prior to the entry of the consent judgment and could have been settled under cause 2017/HP/2108.

8.19 The learned authors of **Halsbury Laws of England Volume 16 (4<sup>th</sup> Edition)**, at page 861, regarding res judicata state that;  
*“The doctrine applies to all matters which existed at the time of giving the Judgment and which the party had an opportunity of bringing before the Court. If, however, there are matters subsequent*

***to which could not be brought before the Court at the time, the party is not estopped from raising it”***

8.20 The Supreme Court in the cited case of ***Societe Nationale Des Chemis De Pur Du Congo (SNCC) Vs. Joseph Nonde Kakonde SCZ*** ***Selected Judgment Number 19 of 2013*** made the following observation;

***“Res judicata is not only confined to similarity or otherwise of the claims in the 1<sup>st</sup> case and the 2<sup>nd</sup> one. It extends to the opportunity to claim matters which existed at the time of instituting the 1<sup>st</sup> action and giving the Judgment.”***

8.21 In the case of ***Henderson Vs. Henderson (1843-1860) ALL E.R. 378*** the court discussed the principle of res judicata in the following terms;

***“where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires that the parties to that litigation to bring forward their whole cases, and will not, except in special circumstances, permit the same parties to open the same subject of litigation, in respect of the matter which might have been brought forward as part of the subject in content, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies except, in special cases, not only to points on which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time”***

8.22 We are of the view that the Appellants had the opportunity, in the first action, to raise the issues raised in the fresh action.

The Appellants do not dispute the fact that they had made an application to raise the issue regarding the alleged fraudulent transfers in the first action and opted to enter a consent judgment.

8.23 Further, the 1<sup>st</sup> Appellant paid the property transfer tax after the Respondent paid into court the property transfer tax together with the attendant penalties. According to the Respondents, the transfers were normalized under the first action.

8.24 In the circumstances, we are of the view that the lower court properly found that the issues raised by the Appellants were , as they were determined by the consent judgment and that the Appellants had an opportunity and did in fact raise the issues of fraud in the earlier action before opting to execute a consent judgment. Commencing a fresh action in these circumstances is merely an attempt by the Appellants to relitigate the matters already determined and resolved.

8.25 We find no merit in the grounds of appeal and accordingly  
dismiss the appeal. Costs to the Respondents to be taxed in  
default of agreement.

.....  
**M. M. Kondolo, SC**  
**COURT OF APPEAL JUDGE**

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**F.M. Chishimba**  
**COURT OF APPEAL JUDGE**

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**J. Z. Mulongoti**  
**COURT OF APPEAL JUDGE**