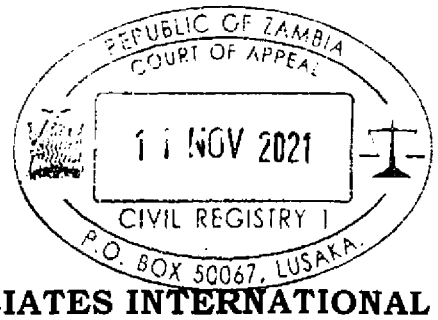
IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 244/2020**

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

S. P. MULENGA ASSOCIATES INTERNATIONAL **1ST APPELLANT**
SONNY PAUL MULENGA **2ND APPELLANT**

AND

FIRST ALLIANCE BANK ZAMBIA LIMITED **RESPONDENT**

CORAM: ***CHASHI, NGULUBE AND SIAVWAPA, JJA.***
On 19th October, 2021 and 11th November, 2021.

For the Appellants: *Mr. J. Ilunga, of Messrs Ilunga & Company.*

For the Respondent: *Mr. G. Pindani, of Messrs Chonta, Musaila and Pindani Advocates.*

J U D G M E N T

NGULUBE, JA, delivered the Judgment of the Court.

Cases referred to:

1. *Bank of Zambia vs Tembo and Others (2002) ZR 103.*
2. *Societe Nationale Des Chemis De Pur Du Congo (SNCC) vs Joseph Nonde Kasonde, SCZ Judgment No. 19 of 2013.*
3. *MCC Proceeds Inc. vs Lehman Brothers International (Europe) (1998) 3LRC 599 at 632.*
4. *Paul Mumba vs Zambia Revenue Authority, SCZ Judgment No. 10 of 2016.*
5. *Musakanya and Another vs Attorney General (1981) Z.R. 221.*
6. *Davies Banda & 32 Others vs Ndola City Council and Others, SCZ Selected Judgment No. 23 of 2016.*
7. *Henderson vs Henderson (1843 – 1860) ALL ER 378.*

8. *B. P. Zambia Plc vs Interland Motors Limited (2001) ZR 37.*

Legislation referred to:

1. *The Limitation Act 1939.*

INTRODUCTION

1. This is an appeal against a ruling delivered by the Honourable Lady Justice K. E. Mwenda-Zimba of the Commercial Division of the High Court, on 10th August, 2020, which dismissed the appellants' action for being res judicata, statute barred, and amounting to a multiplicity of actions and an abuse of the court process.

BACKGROUND

2. The background to this appeal is that the appellants commenced an action on 28th February, 2020, seeking a refund of all monies which were illegally, wrongfully and fraudulently debited from the first appellant's bank account number 300022006, by the respondent. They further sought interest, exemplary damages, any other relief the court could deem fit and costs.

3. The respondent raised a preliminary objection on a point of law to dismiss the action for being res judicata, statute barred, and amounting to a multiplicity of actions and an abuse of the court process. The application was accompanied by an affidavit in

support, which explained the history of this case and the other legal battles which the parties have had before the courts of law.

4. The respondent explained that the first appellant obtained a loan from the respondent on 7th December, 1995, which was secured by a mortgage on stand number 10445, Lusaka. However, the first appellant failed to liquidate the loan in accordance with the terms of the mortgage. The respondent then commenced an action under cause number 1997/HP/930 which culminated into a judgment that was delivered by the Honourable Mr. Justice G. Phiri on 25th September, 1997, in which it was held that the appellants were indebted to the respondent in the sum of K230, 913, 254.19.

5. The appellants sought leave to appeal against the judgment, out of time, but Mr. Justice Phiri refused to grant leave to appeal on 27th January, 1999. Despite being disenchanted by the ruling, the appellants did not immediately challenge it. They instead took out an action against the respondent in 2002, under cause number 2002/HPC/0364, which was dismissed after a protracted trial.

6. The appellants having been dissatisfied with the ruling under cause number 1997/HP/930, in which Mr. Justice Phiri refused

to grant leave to appeal out of time, moved the Supreme Court with an application for special review, nine years after delivery of the ruling. On 4th February, 2009, the Supreme Court however dismissed the appellants' application for special review, for lack of merit.

7. On 17th September, 2013, the respondent entered into a consent judgment with the appellants and three other parties, under cause number 1997/HP/930. The parties in that consent judgment agreed that the respondent would "release and deliver" to the appellants' advocates, the certificate of title relating to stand number LUS 10443, Lusaka, but the respondent was not to discharge the mortgage on the property until full payment of the costs under cause number 2002/HPC/0364, within ninety days, less what had already been paid. The respondent accordingly released the certificate of title to the appellants' advocates but the discharge of the mortgage was still waiting for the payment of costs as agreed and the amount due had now accrued interest.

8. In a nutshell, the respondent explained that this matter had been a subject of various court proceedings, initially in 1997, 2002 and later in 2017. Therefore, it was evident that the

appellants were now abusing the court process by commencing an action based on matters which were previously determined by competent courts of record. It was further alleged that this matter is statute barred as it had been brought more than six years after the purported fraud was discovered in 2011 as was alleged by the appellants in their statement of claim. The respondents were therefore seeking to have the matter dismissed for illegality, being an abuse of the court process and statute barred.

9. The appellants opposed the preliminary objection by way of an affidavit in opposition, in which they stated that this action was necessitated by acts of fraud and deceitful conduct on the part of the respondent. They stated that the facts, claims, issues and matters raised in the writ of summons and the statement of claim had not been decided upon by any court of competent jurisdiction in any case involving the parties in this case. According to the appellants, the acts of fraud upon which the cause of action is premised were only discovered after 2011 and the action was within the twelve-year period of limitation.

DECISION OF THE HIGH COURT

10. The lower court started by addressing the question of whether this action is res judicata and amounts to a multiplicity of actions and an abuse of the court process. The court found that on 29th September, 1997, the Honourable Mr. Justice Phiri under cause number 1997/HPC/930 entered 'an order upon judgment' in favour of the respondent against the appellant and three others, in the sum of K230,913,254.19. It further stated that on 31st March, 2006, the Honourable Lady Justice H. Chibomba had equally ruled, in a judgment under cause number 2002/HPC/0364, that the respondent wrongfully and unilaterally debited the first appellant's account numbers 300022006 and 300022065, with a sum of K160 million as interest at a rate not disclosed in the mortgage deed. The court noted that in this case, the appellants are seeking a refund of all monies which were illegally, wrongfully and fraudulently debited from the first appellant's account number 300022006 by the respondent.

11. The lower court went on to find that the parties in the present case were the same as those in cause number 2002/HPC/0364. Further that, they were also parties to the first action under

cause number 1997/HPC/930. The court below found that there were two judgments that had been rendered in relation to the transactions pertaining to the mortgage account between the parties, which is subject of the current proceedings. Both judgments were never set aside and were still in force.

12. The court considered that the appellants in cause number 2002/HPC/364 claimed the sum of K184,620,199.59 as being an overpayment that was received by the respondent from the appellant. It observed that in the present case, they were alleging that between June 1996 and March 1997, the respondent unilaterally and wrongfully debited the first appellant's account with a sum of K160,770,780, and that between November, 1998 and September, 1999, the respondent had again wrongfully debited the first appellant's account with a sum of K54,334,432.00.

13. Therefore, the lower court opined that the transactions subject of the present case, would, with reasonable diligence by the appellants, have been discovered and litigated in the earlier action. This is because the account from which the appellants' claim that monies were illegally, wrongfully and fraudulently debited was the same account which was subject of the alleged

wrongful deductions in the earlier matter which was decided by Lady Justice Chibomba. It accordingly held that the appellants had the opportunity to seek the remedies being sought, in the earlier action, but for their own fault, they failed to do so.

14. The court also found that this action arose from the mortgage action which led to the judgment delivered by Mr. Justice Phiri on 29th September, 1999, which was entered in favour of the respondent in the sum of K230,913,254.19, which judgment had not been set aside. Therefore, if it was to allow this action and enter judgment in favour of the appellant, that would effectively be re-litigating and overturning that judgment, as it would have been essentially saying that the respondent was not entitled to the monies awarded by the court in that judgment. The court therefore refused to proceed in that direction for as long as there were these binding judgments on the same subject matter between the parties.

15. The court below dismissed the contention by the appellants in this case that there was an element of fraud that had been introduced, because of the two judgments which were still in force. It took the view that fraud could have been a vitiating factor had the judgments been set aside. The fact that the

judgments were still binding meant that this action could not proceed while seeking an order that would contradict the earlier judgments. Therefore, the court held that this action is res judicata and amounts to a multiplicity of actions and an abuse of the court process.

16. On the issue of whether this action is statute barred, the lower court found that a mortgage deed falls within the definition of a specialty and not a simple contract. It relied on ***Section 2(3) of the Limitation Act*** which says that an action upon a specialty shall not be brought after the expiration of twelve years from the date on which the cause of action accrued. On this basis, the court found that for specialties, time begins to run from the date the action accrued and in this case, the action accrued between 1995 and 1996.

17. The court referred to ***Section 26 of the Limitation Act, 1939*** which provides that the period for limitation shall not begin to run until the plaintiff has discovered the fraud or mistake, as the case may be, or could with reasonable diligence have discovered it. In this case, the appellants claimed to have discovered the fraud in 2011. However, the fraud is alleged to have occurred between 1995 and 1996, but discovered after twenty-four years. It

observed that the appellants' claim in cause number 2002/HPC/0364 was based on wrong debits on their account and they must have examined their account to have made the allegations. Therefore, they ought to have discovered the fraud earlier, with reasonable diligence.

18. The lower court expressed the view that a period of twenty-four years was too long, for the appellants who had actively pursued this issue, to claim that they only discovered the fraud many years later. It took the view that if indeed the fraud was discovered in 2011, this action should have been taken out earlier, as the appellants could have, with reasonable diligence, discovered the alleged fraud earlier. The court held that this matter is statute barred.

THE APPEAL TO THIS COURT

19. Dissatisfied with the ruling of the court below, the appellants appealed to this Court advancing five grounds of appeal as follows –

1. ***That the learned trial judge erred in law and in fact when she ruled that the matter was res judicata, multiplicity of actions and abuse of court process on the premise that two previous judgments had been rendered in relation to the transaction relating to the***

mortgage entered into by the parties when it was not shown that the specific matter(s) raised in the action herein had previously been put in issue and adjudicated upon;

2. *That the learned trial judge erred in law and in fact when she ruled that the appellants had an opportunity to seek the current remedies in the earlier action under Cause 2002/HPC/364 but for their own fault, failed to do so when it was evident that the acts of fraud on account number 300022006 being complained of were only discovered in or around 2011 way after the said cause under 2002/HPC/364;*
3. *That the learned trial judge misdirected herself in law and in fact when she ruled that if the proceedings herein were to be allowed and judgment entered in favour of the appellants, the same would in effect amount to re-litigating and overturning the earlier judgment when, in fact, the cause of action in the present proceedings were distinct to any other proceedings relating to issues at court surrounding the mortgage or debt by the same parties;*
4. *That the learned trial judge erred in law and in fact when she held that the cause of action in the current matter accrued between 1995 and 1996 and therefore statute barred when acts of fraud on account number 300022006 being complained of were only discovered in or around 2011; and*
5. *That the learned trial judge erred in law and in fact when she held that the appellants ought to have discovered the fraud earlier with reasonable due diligence despite the pleaded facts and documents*

wherein the fraud was only discovered upon a police inquiry in or around 2011.

20. When this appeal came up for hearing, Mr. Ilunga on behalf of the appellants relied on the heads of argument filed in support of the appeal which he augmented with oral submissions. On behalf of the respondent, Mr. Pindani also relied on the heads of argument which counsel augmented with oral submissions.

THE APPELLANTS' CONTENTIONS

21. In support of the first ground of appeal, the appellants' counsel cited the case of ***Bank of Zambia vs Tembo and Other***[1], in which the Supreme Court held that a plea of res judicata must show either an actual merger, or that the same point had actually been decided between the same parties. Mr. Ilunga further referred to the case of ***Societe Nationale Des Chemis De Pur Du Congo (SNCC) vs Joseph Nonde Kasonde***[2], where the court explained that the doctrine applies to all matters which existed at the time of giving judgment and which the party had an opportunity of bringing before the court and that if, there are matters subsequent to which could not be brought before court at the time, the party is not estopped from raising it.

22. We were also referred to the English case of ***MCC Proceeds Inc. vs Lehman Brothers International (Europe)***[3], where Hobson LJ stated as follows as regards the doctrine of res judicata:

> ***"The cause of action and property to which it relates is different. If the claims made in the present action had any substance (which they have not), the present proceedings are a convenient and appropriate way in which to pursue them. To shut out the plaintiffs would be unjust and not just."***

23. On the facts of this case, counsel submitted that this action is anchored on discovery of concealed transactions and fraudulent transfer of funds from the appellants' accounts by the respondent, after an investigation was carried out by the police between 2011 and 2013. According to counsel, this was never in issue in any prior proceedings involving the parties to this case, including cause number 2002/HPC/0364. It was his submission that the appellants' earlier claim under cause number 2002/HPC/0364 for wrongfully and unilaterally debiting account No. 300022006 was different from the one in the present action because the former related to a claim for overpayment of interest. He clarified that the claim in this case is for refund of all monies fraudulently debited from the account which came to light after police investigations.

24. Counsel argued that the facts and circumstances of this case create a distinct cause of action capable of being pursued separately by the appellants. According to him, the facts giving rise to the cause of action as pleaded came to light way after all the judgments in the earlier proceedings were delivered. It is his submission that it will be unjust to shut out the appellants from proving their case.

25. As regards ground two, Mr. Ilunga cites the case of ***Paul Mumba vs Zambia Revenue Authority***[4], in which the Supreme Court held that res judicata means that an issue has been adjudicated upon and in order for a defence of res judicata to succeed, it is necessary to show not only that the cause of action was the same but also that the plaintiff has had no opportunity of recovering in the first action that which he hopes to recover in the second.

26. According to counsel, it was clear from the facts that the appellants had no opportunity in the earlier causes to raise the issues raised before this court, and to later recover that which they are now seeking. He submitted that the judgment under cause number 2002/HPC/0364 was delivered on 31st March, 2006, which was before the matters being complained of in this

case were known. It was his submission that the appellants had no opportunity in the previous actions, to seek the remedies being sought in this case.

27. On ground three, Mr. Ilunga argued that the commencement of this matter does not amount to re-litigation as the facts before this court are different from those under cause number 2002/HPC/0364. He cited the case of ***Musakanya and Another vs Attorney General***[5], where the court stated that if a party brings an action against another for a particular cause and judgment is given on it, there is a strict rule of law that he cannot bring another action against the same party for the same cause. But that within one cause of action, there may be several issues raised which are necessary for the determination of the whole case and the rule is that once an issue has been raised and distinctly determined between the parties, then as a general rule neither party can be allowed to fight that issue all over again. The same issue cannot be raised by either of them in the same or subsequent proceedings except in special circumstances.

28. Counsel contends that in as much as the claim arises from the same mortgage deed, the claims and remedies being sought are distinct. There is a manifest difference in the reliefs sought in

cause number 2002/HPC/0364 and this case. He argues that it would not amount to overturning decisions of the other courts of equal jurisdiction, if the appellants receive judgment in their favour in this case.

29. On grounds four and five, Mr. Ilunga referred to ***Paragraph 975 of Halsbury's Laws of England*** which states that a claim upon a specialty may not be brought after the expiration of twelve years from the date on which the action accrued. He submitted that a specialty is defined by ***Paragraph 975 of Halsbury's Laws of England*** to include a bond, a deed, a covenant and a statute. He went on to refer to ***Section 2 (3) of the Limitation Act*** which says that an action upon a specialty shall not be brought after the expiration of twelve years from the date on which the cause of action accrued. He further cited ***Section 26 of the Limitation Act***, which provides for postponement of the limitation period in case of fraud or mistake. The said provision provides that the period of limitation shall not begin to run until the plaintiff has discovered the fraud or mistake, as the case may be, or could with reasonable diligence have discovered it.

30. Therefore, counsel argues that the fraud or deceitful conduct pleaded in the statement of claim was only discovered in or

around 2011 and therefore this action was commenced within the twelve-year limitation period. He submitted that the lower court erroneously computed the time to have begun running in or around 1995 and 1996, when in fact the cause of action accrued in 2011. It is his further submission that given the nature of the case, the appellants would not have discovered the fraudulent transactions in or around 1995 and 1996, even with due diligence, as they were only discovered after investigations by the police.

31. The appellants' counsel prayed that this appeal be allowed and the record must be remitted back to the High Court for trial, as in the case of ***Davies Banda & 32 Others vs Ndola City Council and Others***[6].

RESPONDENTS' CONTENTIONS

32. In opposing the first ground of appeal, the respondents' counsel submitted that in order for a plea of res judicata to succeed, it must be demonstrated that a judgment should have earlier been pronounced between the parties. It is his argument that the parties are precluded from re-litigating matters on which findings of fact have earlier been made by the court and they formed the basis of the judgment. He submitted that res judicata

supports the notion that there should be an end to litigation, and it extends to the opportunity to claim on a matter which existed at the time of the initial commencement of the action.

33. Mr. Pindani submitted that this claim has been subject of many proceedings in the High Court and judgments had been pronounced which are still in force. He cited the case of ***Henderson vs Henderson***[7], in which the court held that:

> ***"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 contention, 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."***

34. It was counsel's contention that this action is barred for being res judicata, because the alleged fraud could have been considered under cause number 2017/HPC/0261.

35. On the second ground of appeal, Mr. Pindani submits that the ***Limitation Act 1939*** exists for the sole purpose of excluding stale claims and elaborates a timeline within which certain actions can be presented before the courts of law. It is his argument that since the appellants claim to have discovered the purported fraud in 2011, their claim should have been brought under cause number 2017/HPC/0261, as they were aware of the alleged fraud at the time of commencing the said action. However, they discontinued the matter at their own peril.

36. On ground four, Mr. Pindani submitted that the case of ***Musakanya and Another vs Attorney General***[5], should be read together with ***Section 26 of the Limitation Act*** which states that a claim for fraud becomes actionable for a period of six years after its discovery. He further submitted that once the fraud is discovered, ***Section 2 of the Limitation Act*** begins to apply, which provides as follows:

"2. ...

(i) The following actions shall not be brought after the expiration of six (6) years from the date on which the cause of action is accrued. That is to say: -

(a) Action founded on a simple contract or tort;

(b) ...

(c) ...

(d) Actions to recover any sum recoverable by virtue of any enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture."

37. He submitted that a claim for fraud is also subject to the ***Limitation Act 1939***, which is six years after its discovery. He contends that since the appellants claim to have discovered the purported fraud in 2011, the action was already statute barred when it was commenced. He stressed that the earlier judgments in cause numbers 1997, 2002/HPC/0364 have not been stayed or overturned by the High Court.

38. Mr. Pindani submitted that the mortgage deed between the parties was created by a loan agreement in which the first appellant was availed with a loan agreement of K100 million. He submitted that according to the ***Limitation of Acts, 1939***, a contract and a mortgage have different periods of limitation. It was his argument that the prime consideration where such documents exist in relation to one transaction, is the loan agreement without which, the mortgage deed would not exist. It

was further contended that the appellants' claim for a refund of monies which were illegally, wrongfully and fraudulently debited from the first appellants' account, can only be claimed pursuant to an agreement and not a mortgage deed.

39. On ground five, Mr. Pindani submitted that the claim in this matter was diligently pursued by the appellants under cause numbers 1997/HP/930, 2002/HPC/0364 and 2020/HPC/0134, which concerned the same parties and were based on the same account and loan agreement. As such, the appellants ought to have discovered the fraud earlier.

40. In a nutshell, Mr. Pindani submitted that this appeal should be dismissed in its entirety with costs to the respondent.

CONSIDERATION OF THE MATTER BY THIS COURT AND VERDICT

41. We have considered the evidence on record, the heads of argument filed by counsel for the parties, the oral submissions and the authorities to which we were referred. We shall address grounds one, two and three together, as they all revolve around the issue of whether this action is res judicata and its commencement amounts to a multiplicity of actions and an abuse of the court process. We shall also, deal with grounds four

and five together as they both relate to the question of whether this action is statute barred.

42. This appeal has been brought before us to challenge the decision of the court below, because there were two previous judgments relating to the mortgage deed that was entered into by the parties. The appellants contend that the lower court erred, because it was not shown that the specific matters raised in this action had previously been put in issue and adjudicated upon.

43. We wish to make it plain that res judicata means that an issue has been adjudicated upon. The rationale for res judicata is that there must be an end to litigation. Its purpose is to support the good administration of justice in the interest of both the public and the litigants by preventing abusive and duplicative litigation. The twin principles of res judicata are often expressed as being: (1) the public interest that courts should not be clogged by re-determinations of the same disputes and (2) the private interest that it is unjust for a man to be vexed twice with litigation on the same subject matter. It is critical, therefore, that parties to litigation bring forward their whole cases at once.

44. In the case of ***Paul Mumba vs Zambia Revenue Authority***[4], the Supreme Court held that in order for a defence of res judicata to

succeed, it is necessary to show not only that the cause of action was the same but also that the plaintiff has had no opportunity of recovering in the first action that which he hopes to recover in the second. The appellants in this matter are seeking a refund of all monies which were illegally, wrongfully and/or fraudulently debited from the first appellants' account number 300022006 by the respondent.

45. The appellants under cause number 2002/HPC/364, had earlier claimed a sum of K184,620,199.59 as being an overpayment that was received by the respondent from the appellant. The Honourable Lady Justice Chibomba delivered a judgment under this case number, where she brought out the fact that the respondent wrongfully and unilaterally debited the first appellant's account numbers 300022006 and 300022065, with a sum of K160 million as interest at a rate not disclosed in the mortgage deed. It is clear from the foregoing that the issues of wrongful and unilateral debits on account number 300022006 were already decided.

46. We have considered the appellants argument that the acts of fraud on account number 300022006 being complained of in this matter were only discovered in or around 2011, way after

cause number 2002/HPC/0364 was commenced. In our considered view, this contention cannot stand because it is clear from the appellants' statement of claim that the alleged wrongful debits occurred between 1996 and 1999, way before cause number 2002/HPC/0364 was commenced. The fact that the alleged acts of fraud on account number 300022006 were discovered in or around 2011, after police investigations, does not make it a distinct cause of action, as long as it arises out of the same subject matter.

47. We agree with the lower court that the appellants had the opportunity to seek the current remedies in the earlier action under cause number 2002/HPC/364, but they failed to do so out of their own fault. In the case of ***Societe Nationale Des Chemis De Pur Du Congo (SNCC) vs Joseph Nonde Kakonde***[2], the Supreme Court held that:

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

48. We are fortified by the case of ***Henderson vs Henderson***[7], where the court discussed the principles 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 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."***

49. The earlier judgments by the Honourable Mr. Justice Phiri and the Honourable Lady Justice Chibomba were both in favour of the respondents and there is no evidence that they have been set aside. They still remain in force. We therefore appreciate the trepidation of the court below that if this action was to be allowed to proceed and judgment was entered in favour of the

appellants, that would amount to re-litigating and overturning the earlier judgments.

50. In the case of ***B. P. Zambia Plc vs Interland Motors Limited***[8], the Supreme Court stated that it would be an abuse of the court process if the same parties re-litigate the same subject matter from one action to another or from one judge to another judge. This will be so especially when the issues would have become res judicata or when they are issues which should have been resolved once and for all by the first court as enjoined by ***Section 13 of the High Court Act***. The Supreme Court opined that in terms of the section and in conformity with the court's inherent power to prevent abuses of its processes, a party in dispute with another over a particular subject, should not be allowed to deploy his grievances piecemeal, in scattered litigation and keep hauling the same opponent over the same matter before various courts. The administration of justice would be brought into disrepute if a party managed to get conflicting decisions or decisions which undermine each other from two or more different judges over the same subject matter.

51. We, accordingly, uphold the finding of the lower court that this matter is res judicata and that its commencement amounts to a

multiplicity of actions and an abuse of the court process. We find no merit in grounds one, two and three. We hereby dismiss them.

52. Coming to grounds four and five, which relate to the issue of whether this matter is statute barred, it is not in dispute that this action emanates from a mortgage deed between the parties. We have been referred to ***Paragraph 975 of Halsbury's Laws of England***, which defines a specialty to include a bond, a deed, covenant and a statute. It follows therefore that a mortgage deed is a specialty. This implies that it falls within the ambit of ***Section 2(3) of the Limitation Act***, which states that an action upon a specialty shall not be brought after the expiration of twelve years from the date on which the cause of accrued.

53. On behalf of the appellants, Mr. Ilunga contends that fraud was pleaded in this case and has invoked ***Section 26 of the Limitation Act 1939***, which deals with postponement of limitation period in case of fraud or mistake. It provides that the period of limitation shall not begin to run until the plaintiff has discovered the fraud or mistake, as the case may be, or could with reasonable diligence have discovered it. It is Mr. Ilunga's argument that

since the fraud was discovered in or around 2011, this action was commenced within the twelve-year limitation period.

54. We agree with Mr. Pindani that the appellants diligently pursued their cases arising out of the mortgage deed and they could have discovered the alleged fraud with reasonable diligence. It is our considered view that ***Section 26 of the Limitation Act 1939*** does not apply to this action and it is therefore statute barred. We accordingly dismiss grounds four and five, for lack of merit.

55. For the foregoing reasons, we hereby dismiss this appeal for lack of merit. We award costs to the respondents, to be taxed in default of any agreement.

J. CHASHI
COURT OF APPEAL JUDGE

P. C. M. NGULUBE
COURT OF APPEAL JUDGE

M. J. SIAVWAPA
COURT OF APPEAL JUDGE