IN THE SUPREME COURT FOR ZAMBIA APPEAL No. 71/2007
HOLDEN AT KABWE/LUSAKA
SCZ/8/291/2009
(*Civil Jurisdiction*)

BETWEEN:

BARCLAYS BANK ZAMBIA PLC	**APPELLANT**
AND	
ERZ HOLDINGS LIMITED	**1ST RESPONDENT**
(In Liquidation)	
FRANCIS XAVIER NKHOMA	**2ND RESPONDENT**
D. L. GAMBIR	**3RD RESPONDENT**
AMIR DEWAN	**4TH RESPONDENT**
DAVID KOMBE	**5TH RESPONDENT**
KENNETH NCHIMA	**3RD PARTY**

Coram: Sakala, CJ., Chibesakunda and Mwanamwambwa JJS.

13th April, 2010 and 20th February 2012

For the Appellant: Mr. K N Makala of Messrs Makala & Company

For the 1st 2nd Respondents: Mr. S. Mwambwe of Messrs Mambwe Siwila and Company.

For the 3rd, 4th, and 5th Respondents: Non Appearance.

For the 3rd Party : Mr. W. Mutofwe of Messrs Douglas and Partners

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JUDGMENT

Chibesakunda, JS., delivered the Judgment of the Court.

Cases referred to:

1. LONDON NGOMA AND OTHERS VS. LCM COMPANY LIMITED AND ANOTHER [1999] Z.R. 75 AT 78.
2. THE ATTORNEY GENERAL VS TALL 1995 - 1997 ZR 54
3. MBILISHI AND ANOTHER V TYRE KING ENTERPRISES LTD, SUPREME COURT APPEAL NO. 132 OF 2003.
4. JENKINS V ROBERTSON (1867)LR 1 SC & DIV 117 HL (A SCOTTISH CASE.

Legislation referred to:

5. ORDER 67 OF THE SUPREME COURT RULES CAP 25.
6. ORDERS 14A AND 33 OF RSC 1999 ED
7. ORDER 39 OF THE HIGH COURT RULES CAP 27
8. HALSBURY LAWS OF ENGLAND 4TH EDITION AT PARA. 988 AT PAGE 883
9. BLACK'S LAW DICTIONARY 8TH ED. BY BRYAN A. GARNER

This is an appeal against a High Court Ruling, on a Notice to raise preliminary issues taken out by the 3rd, 4th and 5th Respondents pursuant to **Order 14A(a) of the SCR[6]**, in a claim by the Appellant, as amended, for:

(i) A declaration that the Appellant has a proprietary right of possession over the properties enumerated in the addendum ("the Properties") in preference to all other creditors of the 1st and 2nd Defendants.

(ii) A declaration that the 1st Respondent lacked the requisite authority to consent to the granting of an order for the sale of the Properties as specified in the Statement of Claim herein or to deal with the Properties in such a manner as would prejudice the interest of the Appellant in the Properties.

(iii) An Order that the 1st Respondent yields and delivers up possession of the Properties known as Plot No. 822 Kitwe and Stand No.3916 Ndola to the Appellant.

(iv) An Order that the 3rd, 4th and 5th Respondents yield and deliver up possession of the Properties known a Stand No. 9002 Lusaka Plot No. 3066, Lusaka and Plot No. 580 Kabwe respectively to the Appellant.

(v) An Order for the rectification of the Registrar of Lands and Deeds registry as specified in the Statement of Claim.

(vi) Payment of all monies due to the Appellant under the respective covenants in the third party mortgage executed by the 1st and 2nd Respondents in favour of the Appellant

(vii) Payment of all monies due to the Appellant secured by way of guarantee and executed by the 2nd Respondent.

(viii) Further or other relief as the Court may deem fit.

(ix) Costs.

Before this claim was heard by the lower court, the 3rd, 4th and 5th Respondents took out a notice to raise a preliminary point, seeking the court to make a ruling. The notice reads:

"NOTICE OF INTENTION TO RAISE PRELIMINARY ISSUE PURSUANT TO ORDER 33 RULE 3 RSC AS AND TOGETHER WITH ORDER 13A RULE 1 RSC

TAKE NOTICE that the 3rd, 4th and 5th Defendants herein intended (sic P. 36) to raise a Preliminary issue on the point of law on the Hearing of the application on the following ground

i) That the Plaintiff did not have any cause of action at the time of commencement of the proceedings, on the 23rd day of October, 2002 and to date on (sic see p. 36 of the supplementary record) cause of action lies as against the 3rd, 4th and 5th Defendants in light of their Admission, in the Affidavit dated 4th April, 2006 in support of an application for leave to amend pleadings." Sic

The brief facts of this case, as stated in the affidavits, are that, the 3rd, 4th and 5th Respondents were former employees of the 1st Respondent. The 3rd Respondent was employed as a Financial Director. He retired on the 30th of December, 2000. He was owed US$163,767.39. The 4th Respondent was employed as Chief Internal Auditor and after retirement, he was owed a sum of US$54,809.52. The 5th Respondent was employed as Managing Director of AFRA Insurance Company Limited by the 1st Respondent by virtue of being a Holdings Company. He was owed, at the time of his termination of contract, US$76,715.00.

After their contracts of employment came to an end, the 1st Respondent failed to pay the three Respondents their terminal benefits. Each of the three Respondents then sued the 1st Respondent in cause number 2001/HP/0135, claiming a sum of US$315,201.00 or its Kwacha equivalent being salary, gratuity, leave pay arrears and wages.

On 30th April, 2001, a consent Judgment was entered before Kakusa J (see page 71 of the Supplementary Record). The 1st Respondent failed to pay this judgment debt. So, the three Respondents took out summons for interim attachment of plots number 3066 Lusaka, 9002 Lusaka and 580 Kabwe, as settlement of the owed debt (see p. 23 of the record of Appeal). This application was granted. The three Respondents next took out a writ of possession with respect to the three properties. This was granted on the 5th of July, 2001 (see p. 56 of the Supplementary Record). At page 49, the lower court made another order substituting the property to be attached in favour of the 5th Respondent to be plot number 580 situated in Kabwe in the Central Province of the Republic of Zambia.

The other part of the history of this case, according to the amended statement of claim filed by the Appellant Bank, is that, in consideration of the Appellant Bank granting banking facilities to a Company known as ERZ Motors Limited/Southern Delta, now in receivership, the 1st and 2nd Respondents, on the 23rd of February 2000 created a legal mortgage over the properties known as plot number 856 Lusaka and stand number 89 Kabulonga, respectively, in favour of the Appellant Bank as securities for money owed to it by ERZ Motors Limited/Southern Delta, (now the 1st Respondent) and 2nd Respondents. Also as further security for payment of monies owed to the Appellant Bank, one Francis Xavier Nkhoma (now deceased), the 2nd Respondent, on the 28th of October, 1999 executed a deed of guarantee in favour of the Appellant Bank. According to the amended statement of claim, the case for the Appellant Bank as per paragraphs 8 and 9 of the amended statement of claim at page 46, was that;

“8. Sometime in 1999, the 1st Defendant did as beneficial owner, charge by way of equitable 3rd party mortgage to the Plaintiff, the properties known as Stand No. 3066 Lusaka, Stand No. 9002 Lusaka, Plot No. 580 Kabwe, lot No. 822 Kitwe and Stand No. 3916 Ndola (“the Properties”) with the repayment of monies owing by ERZ properties Limited to the plaintiff.

10. The said EZR Properties Limited failed and/or neglected to honour its obligations to the plaintiff in consequence of which the plaintiff became entitled to possession of the Properties pursuant to the equitable 3rd Party mortgages mentioned in paragraph No. 8 above.”

The 1st Respondent then went into liquidation. After the 1st Respondent went into liquidation, the Appellant Bank appointed a Receiver to recover K1.2.billion as debt owed by the 1st Respondent. The Receivership came to a close. The debt of K1.2billion was not totally liquidated. The Appellant Bank wanted

to fall back on these properties; number 3066, 9002 Lusaka and plot number 580 Kabwe. These properties by then had been sold to the 3rd, 4th, 5th Respondents and the third party on the basis of the consent Judgment.

It is common ground that the title deeds of the three properties were, at the time of sale, in the possession of the Appellant Bank. It is also common cause that the 1st, 3rd, 4th and 5th Respondents were parties to cause number 2001/HP/0135, which as already stated, ended in the parties entering a consent Judgment. Only the Appellant Bank was not a party to cause number 2001/HP/0135. Because these properties number 3066 and 9002 Lusaka and plot 580 Kabwe were sold to 3rd, 4th, 5th Respondents and because of the claim by the Appellant that they had an equitable interest in the three properties mentioned above, the Appellant Bank sued the 1st, 2nd, 3rd, 4th and 5th Respondents in this claim quoted at J2 and J3 of this judgment. This is the matter which was before Musonda J (as he was then) and now before this court.

The Respondents' case before the High Court was that the issue of the ownership of the three properties had been determined by the consent judgment. It was no longer an issue. Mr. Chanda, Counsel for the 3rd, 4th and 5th Respondents, inapplying to the court to decide on that preliminary point, argued that there was no cause of action against his clients because the ownership of three properties number 3066 Lusaka, stand number 9002 Lusaka and plot number 580 Kabwe, had already been adjudicated upon in the consent judgment. The issue of the ownership of these properties had already been put to rest. He explained that the security created related only to number 856 Lusaka and stand number 89 Kabulonga. He submitted that the Appellant in its Affidavit had conceded to this fact that ownership of the three properties had been determined and that the Appellant Bank was trying to recover what it was unable to recover from the two properties which had been sold.

Mr. Chisenga, for the 3rd party, also echoed the same sentiments as Mr. Chanda and argued that it was incorrect to submit that there was an equitable mortgage in favour of the

Appellant Bank on the three properties as there was no legal mortgage on these three properties. Further, he argued that the security executed on 4th of April, 2006 was only limited to plots 586 Lusaka and stand 89 Kabulonga, Lusaka. He went on to say that it was common ground that the proceeds of sale, recovered by the "Receiver" to try to redeem the total debt owed to the Appellant Bank, were not adequate. It was because of this that the Appellant Bank tried to fall back on the three properties claiming that there was an equitable mortgage which was not supported by memorandum of deposit of title deeds. Counsel, in addition, argued that even placing of caveats by the Appellant Bank on the three properties, did not **per se** create an equitable mortgage.

Mr. Ngulube, Counsel for the 1st and 2nd Respondents, augmenting the arguments by Mr. Chanda and Mr. Chisenga, argued that as the consent Judgment by Kakusa J had not been set aside, by law, it is not possible for the Appellant Bank to proceed with the claim against the 3rd, 4th and 5th Respondents. The consent judgment acted as an estoppel. He further argued

that the consent Judgment by Kakusa J had been registered on the 3rd of May, 2001 and this is why the Registrar of Lands allowed the properties to be sold as they were not encumbered. This point is tandem with the fact that it is common ground that there was no registration and also with the fact that as the legal mortgage was not registered, the Registrar of Lands was never a party to the proceedings before Musonda J (as he was then). According to Counsel, this cause of action established that there was no equitable mortgage on these properties. The only evidence which was before the court was to the effect that the three properties were used as security for a legal mortgage for the amounts of K160,000,000, K300,000,000 and K40,000,000, respectively. Mr. Ngulube also argued that the issue relating to the equitable mortgage interest in the three properties in question was never canvassed before Kakusa J.

The case for the Appellant Bank before the High Court was that the three properties were erroneously sold to the three Respondents because even though they were sold consequentially to the consent judgment, they were subject to an

equitable mortgage. Ms. Simuzhiya, Counsel for the Appellant Bank argued that the taking to court of the five Respondents in this matter was not an after thought. According to Counsel, the three properties were subject to a mortgage before the consent judgment before Kakusa J was entered. That was so because the title deeds of the three properties stand number 3066, number 9002 Lusaka and plot number 580 Kabwe had been surrendered as security to the Appellant Bank, thus creating an equitable mortgage. The act of surrendering the title deeds, on its own, was sufficient to create an equitable mortgage. At law, according to Counsel, it was not necessary to draw up a memorandum of deposit in order to create an equitable mortgage. Therefore, the Appellant Bank had a proprietary right in the properties in question. It was explained that the three properties in question had a legal mortgage created against them for the debts of K160,000,000, K300,000,000 and K40,000,000, respectively. These properties were not securities for the debts of K250,000,000 and US$750,000. These two debts were secured by number 856 Lusaka and plot number 89 Kabulonga. However, as already admitted in paragraph 9 of the Appellant's Affidavits

filed on 4th April, 2006, these two properties' values, when disposed of by the Receiver were not adequate to satisfy the two debts (that is the amount of K250,000,000 and US$750,000). Even though the interest created by the legal mortgage in properties number 3066 and 9002 Lusaka and 580 Kabwe, was not registered, nonetheless, there was still an equitable mortgage because the title deeds had been deposited at the Appellant's Bank and the Appellant Bank placed caveats on the properties in question. So the consent judgment erroneously vested these properties in the 3rd, 4th, and 5th Respondents. Counsel argued that it was not necessary to have a memorandum of deposit. She nonetheless, conceded to the argument that the issues now being canvassed were not canvassed before Kakusa J. She further went on to point out that the title deeds were still in the hands of the Appellant Bank.

Musonda J (as he was then) relying on the doctrine of **res judicata** ruled:

"It is clear that the subject matter is the same, but the parties different, but a decision which concerned the same properties was made and was final before Judge Kakusa. What was open to the current plaintiffs' is to seek to join proceedings before Judge Kakusa and seek a review under Order 39 of the High Court Rules, and not to commence fresh proceedings before a different Judge or impugn the consent Judgment and seek its setting aside."

Aggrieved by this decision, the Appellant Bank has come to this Court raising four grounds of appeal:-

(1) The lower Court erred in law when it held that as no memorandum of deposit of title deeds was executed and therefore an equitable mortgage did not exist in respect of Stand No. 3066 Lusaka, Stand No. 9002 Lusaka and Stand No. 580 Kabwe.

(2) The lower Court erred in law when it held that the matter of the subject properties was res *judicata albeit* the Appellants herein not have been a party to any proceedings in which entitlement to rights to the subject properties was determined.

(3) The lower Court erred in law when it held that proceedings before it must abate in light of the preliminary issue which affected only the 3rd, 4th and 5th Respondents, without having adjudicated on the liability of the 1st and 2nd Respondents with respect to the principal debt and interest thereon out of which the suit in the court below arose.

(4) The lower Court erred in law when it when it awarded costs to the Respondents.

Before this Court, Mr. Makala, Counsel for the Appellant Bank assured the Court that Mr. Chanda, for the 3rd, 4th and 5th Respondents, was aware of the court sitting on the 13th March, 2010 as he was the one who had applied for the matter to be listed for the Kabwe Sessions. Mr. Mambwe agreed with Mr. Makala that Mr. Chanda was aware of the court sitting in Kabwe on that day, the 14th of April, 2010. He further assured the court that the arguments on behalf of the 1st and 2nd Respondents would cover the interest of the 3rd, 4th and 5th Respondents. He, therefore, urged the court to proceed in the absence of Mr. Chanda as according to him, the issues before the Court concerned his clients much more than Mr. Chanda's clients (3rd, 4th and 5th Respondents). With that information, the court

proceeded to hear the appeal in the absence of both Counsel and 3rd, 4th and 5th Respondents.

Before this Court, Counsel for the Appellant, after seeking leave to file heads of argument out of time in Court, which leave was granted, informed the Court that, he was abandoning grounds 1 and 4. He then informed the Court that, he was going to rely on his written heads of argument on grounds 2 and 3.

Augmented by very brief oral submissions, Counsel on ground 2, (which in this Judgment is ground 1), argued that the learned trial Judge erred in law when he held that the issues, relating to the ownership of these properties, plot 3066, 9002 Lusaka and 580 Kabwe were ***res judicata*, albeit** the Appellant Bank was not party to the proceedings in which the consent Judgment was entered. Counsel argued that the learned trial Judge started on the right course by defining the doctrine of ***res judicata****;* but erred when making findings of fact as he did not take into account the following important points (1) That the parties before him were different from those before Kakusa J in

cause number 2001/HP/0135, (2) That the Appellant Bank was not party nor was it represented in the proceedings before Kakusa J, in cause number 2001/HP/0135, (3) The subject matters in these two causes of action were totally different. In the first cause of action, cause number 2001/HP/0135, the 3rd, 4th and 5th Respondents were claiming their unpaid terminal benefits, whereas in the current cause of action, the claim was for mortgage redemption for the monies loaned to the 1st and 2nd Respondents. The subject matters in the two causes of action were unrelated. To buttress this point, Counsel cited the learned Authors of **Halsbury Laws of England 4th Edition[8],** when they say:

> "**Although a judgment by consent may well create an estoppel between the parties, it is at least doubtful whether a judgment in rem obtained by consent of the parties can ever be conclusive against persons who are not, and do not claim through, the parties to it…. It has been stipulated that a judgment by consent cannot effect *res judicata* so as to bind the public or absent parties,**"

Counsel therefore submitted that applying these principles, the Court below should not have invoked this doctrine of ***res judicata.*** In the view of Counsel, the Judgment of Kakusa J, which the court below characterized as final, was not final as it was a consent Judgment.

Coming to ground 2, (which was ground 3 originally), Counsel moreless repeated the same arguments as in ground one. Moreover, he added that the lower Court erred in abating the entire proceedings without adjudicating on the liability or otherwise of the 1st and 2nd Respondents who were not affected by the claims of ***res judicata*** *by* 3rd, 4th and 5th Respondent. According to Counsel, the Court should not have left hanging the Appellant's claim against the 1st and 2nd Respondents, a clear disregard of the principle that the trial Court must tackle all matters in controversy.

In response, Mr. Mambwe relied also on his written heads of argument which dealt with all the 4 grounds of appeal (although we will not restate his arguments on grounds 1 and 4 as these

were abandoned by the Appellant Bank at the hearing of the Appeal). He argued that the learned trial Judge was on firm ground in holding as he did that the ownership in respect of stand number 3066 Lusaka, stand number 9002 Lusaka and stand number 580 Kabwe was subject to the doctrine of **res judicata**. Counsel cited a portion of the learned trial Judge's Judgment where he says:

> "**However, I need not go into the niceties of whether an equitable Mortgage was created or not as the Court of equal jurisdiction had signified a Consent Order vesting the properties into the 3rd, 4th and 5th Defendants and their interests were registered**."

and argued that this statement by the learned trial Judge was not the basis of his making the decision that he made on the ownership of the three properties in question. It was an ***obiter dictum.*** Counsel defined the doctrine of ***obiter dictum*** and argued that the learned trial Judge's decision, as can be seen at page 3, was based on the fact that the ownership of the three

properties had already been decided on by Kakusa J's consent judgment. Counsel defined the phrase obiter ***dictum*** *as* meaning:

> "**A Judicial Comment made while delivering a Judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential...."**

Counsel then contended that the basis of the ruling of the learned trial Judge is found at page 17, line 3 to 9 of the record where the learned trial Judge says:

> "**It is clear that the subject matter is same, but the parties different, but a decision which concerned the same properties was made and was final before Judge Kakusa. What was open to the current Plaintiff's is to seek to join proceedings before Judge Kakusa and seek a review under Order 39 of the High Court Rules and not to commence fresh proceedings before a different Judge or impugn the Consent Judgment and seek its setting aside**."

Counsel argued therefore that statement, quoted from the Judgment of the learned trial Judge by Counsel, for the Appellant Bank, was not necessarily the basis of the decision that the issue of ownership of the properties in question, was subject to the doctrine of **res judicata** even though the Appellant Bank was not party to the proceedings before Kakusa J. According to Counsel, the basis for that holding by the learned trial Judge, was (1) The fact that the subject matter of the appeal was the same even though the parties were different (2) The consent judgment was entered and executed under cause number 2001/HP/0135 before Kakusa J and the parties to this cause number 2001/HP/0135 were the 1st Respondent on one hand and the 3rd, 4th and 5th Respondents on the other, concerning the ownership of the properties No. 3066, Lusaka, No. 9002 Lusaka and No. 580 Kabwe. So that issue had been put to rest. Counsel further argued that looking at the facts of the case, the Appellant Bank's only option, after the consent judgment, ought to have been to invoke the provisions of **Rule 67 of the SCR[5]** and in line with the **ratio decidendi** in the case of **London Ngoma and Others v LCM Company Limited[1]** ,which is to seek to join

proceedings before Kakusa J even if it would have been after the consent judgment. So Counsel urged this Court to dismiss this ground of appeal.

On ground 2, Counsel argued that the learned trial Judge was on firm ground on abating the entire proceedings of the Appellant Bank as against the 3rd, 4th and 5th Respondents. Quoting a portion of the lower Court Judgment, which reads:

> **"Speaking for myself to grant the orders sought will undermine Judge Kakusa J's, the plaintiff is at liberty to impugn the Consent Judgment, if there was a misrepresentation before the same Judge who signified the Consent Judgment. The proceedings before me therefore must abate."**

Counsel argued that in his view, the learned trial Judge, in ordering the abating of proceedings before him, was entirely or specifically referring to the issues which had already been determined in the consent Judgment before Kakusa J. The subject matter before Kakusa J was to determine the ownership of stand

number 3066 Lusaka, stand number 9002, Lusaka and stand number 580 Kabwe.

Coming to the preliminary point raised by the Respondents, Counsel argued that looking at the context of the application by the three Respondents before Musonda J (as he was then), the issues raised were related to the ownership of the three properties in question. There were no other issues raised against the 3rd, 4th and 5th Respondents. The issues relating to the liability or otherwise of the 1st and 2nd Respondents were not raised in the application pursuant to **Order 14A**[6]. These issues remained unresolved. Counsel therefore contended that the Appellant misconstrued the ruling to mean that the entire proceedings were abated. The entire proceedings were never abated against the 1st and 2nd Respondents. Counsel therefore urged this court to dismiss this ground of appeal as well.

Mr. Mutofwe for the 3rd party submitted that the grounds of appeal which were abandoned (1 and 4) were the grounds which affected his client, as a third party, a bonafide purchaser of stand

number 3066, Lusaka. He argued that the third party bought this property by way of auction as a result of the consent judgment. These were the arguments before this court.

We have looked at the record of appeal. We have also considered the issues raised by both sides. We have looked at the submissions as well as the authorities cited. The notice at p. 26 of the main record, reads as follows:

> **"NOTICE OF INTENTION TO RAISE PRELIMINARY ISSUE PURSUANT TO ORDER 33 RULE 3 RSC AS READ TOGETHER WITH ORDER 13A RULE 1 RSC**
>
> **TAKE NOTICE that the 3rd, 4th and 5th Defendants herein intended to raise a Preliminary issue on the point of law on the Hearing of the application on the following ground**
>
> **i)That the Plaintiff did not have any cause of action at the time of commencement of the proceedings, on the 23rd day of October, 2002 and to date on cause of action lies as against the 3rd, 4th and 5th Defendants in light of their Admission, in the Affidavit dated 4th April, 2006 in support of an application for leave to amend pleadings."**
>
> **Sic (see p 36 of the supplementary record of Appeal)**

we note, however, that in the Heads of Argument, Counsel refers to **Order 14 A of the Rules of the Supreme Court**[6] as well. We also note that **Order 33 of the Rules of the Supreme Court**[6] is couched in a similar manner as Order 14A of RSC. Order 33 says:

> **"The Court may order any question or issue arising in a cause or matter whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter and may give directions as to the manner in which the question or issue shall be stated.**

Order 14A also says

> **"(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that-**
>
> **(a) such question is suitable for determination without a full trial of the action, and**

(b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or nay claim or issue therein.

(2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

(3) The Court shall not determine any question under this Order unless the parties have either –

(a) **had an opportunity of being heard on the question, or**

(b) **Consented to an order or judgment on such determination.**

Looking at the notice which we quoted at J3 of our Judgment, we are therefore, satisfied that in reality, Counsel was seeking the court's determination of the question of ownership of the three properties in question pursuant to Order 14A of RSC[6]

Coming to the issue raised in the notice, it is not in dispute that prior to the Appellant Bank, commencing these proceedings, the consent judgment was entered and later registered on 3rd May, 2001, in cause number 2001/HP/0135 before Kakusa J, between

the 1st Respondent on one hand and 3rd, 4th, 5th Respondents and the third party on the other hand relating to paying the 3rd, 4th and 5th Respondents their terminal benefits. The consent order reads:

> **"UPON HEARING both parties, and UPON the Defendant admitting owing the Plaintiffs the claimed amount, and BY CONSENT of the Parties,**
>
> **IT IS HEREBY BY CONSENT ADJUDGED that Judgment be and is hereby entered for the Plaintiff in the adjusted sum of US$349,693.12 together with costs to be taxed in case of default to agree, AND IT IS FURTHER ADJUDGED that of the admitted amount the 1st Plaintiff is owed US$194,299.62, the 2nd Plaintiff US$67,247.50 and the 3rd Plaintiff is owed US$88,146.00.**
>
> **IT IS FURTHER BY CONSENT AGREED and ORDERED (see p. 70 of the supplementary record of appeal) that payment of the above admitted amount will be paid over the period of 24 months on a Pro-rata basis effective month-end of May, 2001.**

IT IS FURTHER BY CONSENT ORDERED agreed that in the event of default on payment of any one monthly installment, the whole amount outstanding shall fall due, and the Plaintiffs will be at liberty to execute and that there be costs to the Plaintiff."

Dated the 5th day of April 2001(see p 70 supplementary record)

It is also common ground that subsequent to this consent judgment, the 3rd, 4th and 5th Respondents applied for attachment of properties number 3066 Lusaka, plot number 9002 Lusaka and plot number 3708 Ndola. This application was granted (see page 58 of the supplementary record). Plot number 3066 Lusaka was attached in favour of the 3rd Respondent; plot number 9002 Lusaka was attached in favour of the 4th Respondent, plot number 3708 Ndola was attached in favour of the 5th Respondent. It is also common ground that on further application the court made a subsequent order of possession of the three properties by the three Respondents. There was a further application to substitute plot number 3708 Ndola with plot number 508, Kabwe, the property which was granted in favour of the 5th Respondent. This application was equally granted (see page 49 of the

supplementary record). These orders have not been impugned. For as long as these orders have remained so, the parties to the consent judgment are estopped from disputing these orders. The consent judgment and the subsequent orders have created an estoppel in as far as ownership of these properties by the three Respondents is concerned as against the 1st Respondent.

Connected to this issue is the argument by the Appellant Bank that the learned trial Judge erred in invoking the doctrine of **res judicata**. The portion of the learned Judge's judgment which is being challenged is the portion which reads:

> **"It is clear that the subject matter is same, but the parties different, but a decision which concerned the same properties was made and was final before Judge Kakusa. What was open to the current Plaintiff's is to seek to join proceedings before Judge Kakusa and seek a review under Order 39 of the High Court Rules, and not to commence fresh proceedings before**

a different Judge or impugn the Consent Judgment and seek its setting aside".

The doctrine of **res judicata** has been defined by Black's Law Dictionary[9] as:

"An issue that has been definitively settled by judicial decision. (Cases: Judgment 540,584, 585. C.J.S Judgments ss 697-700, 702 -703, 749, 752) 2. An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit. The three essential elements are (1) an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parities, or parties in privity with the original parties Restatement.

There are three essential elements for this doctrine to apply, these are: (1) An earlier judicial decision on the issues (2) A final judgment on the merits (3) The involvement of the same parties or other parties in privity to the original parties.

Applying these elements in this case, we are satisfied that (1) there was a definite judicial decision through a consent judgment on the ownership of the three properties in question (2) the consent judgment was a final judgment on merits as the parties consented to that judgment (3) there was involvement of the 1st, 3rd, 4th and 5th Respondents in this consent judgment. The Appellant Bank claimed an interest through the mortgage arrangements between it and 1st Respondent. We hold therefore that although it was common ground that the Appellant Bank was not a party to the proceedings before Kakusa J, that it was not represented, nonetheless the issue of ownership of the three properties in question was decided and it was a final decision. That decision has not been impeached. So the learned trial Judge was on firm ground to have invoked the doctrine of **res judicata.** Our view is even buttressed by the fact that the possession of

equitable interests of the Appellant Bank in the properties in question was never brought to the attention of Kakusa J. In addition, it is common ground that the claim by the Appellant Bank was never registered. So on record, the three properties were not encumbered and this is why the transfer of the properties to the three Respondents was even registered by the Registrar of Lands.

As regards the Appellant Bank's claim of equitable interests in the three properties in question, (1) According to the learned authors of **Halsbury**[8]:

> "**Consent judgment in rem**. **Although a judgment by consent may well create an estoppel between the parties, it is at least doubtful whether a judgment in rem obtained by consent of the parties can ever be conclusive against persons who were not, and do not claim through, the parties to it, except so far as may be necessary to protect the title of a person <u>who purchases the 'res' on the faith of the judgment</u>. It has been stipulated that a judgment by consent cannot effect res judicata so as to bind the public or absent parties."**

(our own emphasis)

In line with this school of thought, the question is whether or not this judgment can act as an estoppel to the Appellant Bank as it was not a party to cause number 2001/HP/0135. The parties to cause number 2001/HP/0135 were 3rd, 4th, 5th Respondents as Plaintiffs and the 1st Respondent as the Defendant. The answer, according to the learned authors of Halsbury, as quoted supra is that (1) the three Respondents can seek refugee in the argument that swapping of the judgment debts with three properties made them to be bonafide purchasers of the properties in question on the 30th April, 2001 through the consent judgment. (2) Although we agree that at law equitable mortgages were created by depositing title deeds with the Appellant Bank, the fact that these claimed equitable interests by the Appellant Bank, were never registered neither were they canvassed before Kakusa J, we are satisfied that the three Respondents at the time of acquiring three properties in question could not have been aware of the existence of this claim by the Appellant Bank. So they were bonafide purchasers of the three properties. Therefore, although

the Appellant Bank was not a party to the proceedings before Kakusa J and the subject matters before the two Judges (that is Kakusa J and Musonda JS) were totally unrelated, but because the three Respondents were bonafide purchasers of these properties, we agree with Musonda JS that the ownership of the three properties in question was already adjudicated upon and settled through the consent judgment. We hold therefore, that the learned trial Judge was on firm ground to have invoked the doctrine of **res judicata**.

The next question is whether the Appellant Bank can impugn Kakusa J's judgment in this current cause of action. In the endorsement on the writ, there is no claim to set aside Kakusa J's consent judgment. The Appellants' bank has not tried to impugn the consent judgment nor the subsequent orders of attachment nor possession. According to the endorsement on the writ, which we have quoted at J2 or our judgment, the Appellant bank is mainly seeking the declaratory orders thus indirectly seeking to impugn the consent judgment. It is trite law that a party seeking to set aside a consent judgment has to commence a fresh action.

In addition, a party seeking to impugn a consent judgment has to establish that the consent judgment was obtained by fraud or that that party was not a party to those proceedings. Therefore, this cause of action currently before us was not set in motion to impugn the consent judgment. It would appear that the Appellant bank, by seeking the declaratory orders, was seeking by the same token to set aside this consent judgment. As per our several authorities, no relief can be granted by any court if such relief has not been pleaded.

With that conclusion, we agree with Counsel for the Respondents that the only legal option which was open to the Appellant Bank was to have invoked the provisions of order 67[5], and in line with **London Ngoma and Others v LCM Company Limited** case, to have applied to join the proceedings before Kakusa J even after the consent judgment had been entered but before execution and registration of the consent Judgment. We, therefore, find no merit on ground 1.

As regards the arguments in ground 2 that the lower Court left the issues relating to the 1st and 2nd Respondents' liabilities unresolved, we agree that there were other issues as tabulated in the endorsement on the writ which the lower court did not resolve in the consent judgment. However, we hold that the lower court in the notice to raise preliminary issues was only called upon to deal with the issues raised in that notice filed by the 3rd, 4th and 5th Respondents. These issues related to the ownership of the three properties in question. These are issues which the lower court dealt with and rendered a final judgment on.

So, looking at the pleadings before the Court, we are satisfied that there were issues which remained unresolved after the consent judgment, which issues have to still be resolved by the High Court. In sum total, we have found partial merit in the appeal. We find that, Claims i,ii,iv and v in the writ of summons were adequately resolved in the consent judgment. Claims iii, vi and vii were not resolved. We, therefore, sent back this matter to the High Court for these unresolved matters to be heard before

another judge. We leave cost in the cause to abide by the out come of the trial at the High Court level.

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E. L. Sakala
CHIEF JUSTICE

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L. P. Chibesakunda M. S. Mwanamwambwa
SUPREME COURT JUDGE **SUPREME COURT JUDGE**