

ROBERT NJANJI

Versus

ADDITIONAL SHERIFF N.O

And

KENN BONGANI SAMBO

And

PEOPLE'S OWN SAVINGS BANK

And

HOLLANDS AUCTIONEERS [PVT] LTD

And

THE REGISTRAR OF DEEDS N.O

IN THE HIGH COURT OF ZIMBABWE
NDLOVU J
BULAWAYO 07 MAY & 28 NOV. 2024

Exception & Special Plea.

T. Mamvula, for the Plaintiff.

S. Mutandi with N.H Barnabas, for the 2nd Defendant.

J. Mugova, for the 3rd Defendant.

No appearance for the 1st, 4th & 5th Defendant.

NDLOVU J: This dispute has come from far away. The parties have been in court several times, on the same dispute.

This time, the second and third Defendants have taken Special Pleas [*prescription and res judicata*] and Exceptions [*vague and embarrassing/alien cause of action and lack of authority to vindicate on behalf of other persons*] to the Summons issued by the Plaintiff, in which the Plaintiff is seeking the following relief.

- 1. An order setting aside the sale and transfer of the Plaintiff's property namely stand 473 Marvel Township 2 of Marvel A also known as House number 473 Murchison Road, Killarney, Bulawayo to the 2nd Defendant on common law grounds or Equitable Considerations on account of an irregular, improper, or fraudulent sale of the Plaintiff's property by the 1st Defendant through the 4th Defendant at the 3rd Defendant's instance. If is being ordered that Plaintiff's title under Deed of transfer 1848/2003 be reinstated or restored (see Plaintiff's Declaration)***
- 2. An order that the Plaintiff reimburses the 2nd Defendant a sum of US\$41,500.00 within 90 days from the date of granting of this order.***
- 3. Upon reimbursement of the US\$41,500.00 the 2nd Defendant failing him the Sherriff of Zimbabwe, shall sign all transfer papers within 24 days to transfer the property back to the Plaintiff under Deed of Transfer 1848/2003 at the Plaintiff's cost.***
- 4. There be no order as to costs if the Relief Sought is not opposed.***

Special Pleas

Prescription. The prosecution of the special plea of prescription has been incompetently done in that the 3rd Defendant has not activated a trial in its prosecution but chose to proceed by motion proceedings. The special plea is therefore dismissed.

Res judicata. The following are common cause facts.

HC 1207/20 and ***HC 1350/20*** were two applications by the Plaintiff that were consolidated. They culminated in ***HB 113/22*** a judgment by ***Kabas J*** on 28 April

2022. Both applications sought declarators. In *HC 1207/20*, filed on 24 July 2020, the applicant therein and Plaintiff herein sought the following order: -

- “1. The sale and transfer of the applicant’s property namely stand 473 Marvel Township 2 of Marvel A also referred to as house number 473 Murchison Road, Killarney Bulawayo to the 1st respondent at the instance of the 2nd respondent through the 3rd respondent transferred through the 3rd respondent be and is hereby set aside and be declared a legal nullity and or voidable at the instance of the applicant on account of common law grounds of fraud, corruption, irregularity and other grounds as expounded in the founding affidavit.***
- 2. The applicant be and hereby directed to reimburse the 1st respondent all his legal and other costs paid to any of the other respondents for the direct and other costs incurred in connection with the sale (the purchase price) and transfer of the property.***
- 3. The 1st respondent be and is hereby declared to be a mala fide (sic) purchaser of the applicant’s property being stand number 473 Marvel Township 2 of Marvel A also referred to as house number 473 Murchison Road, Killarney, Bulawayo.***
- 4. The respondents jointly and severally be and are hereby ordered to reverse the transfer of the applicant’s transfer (sic) being stand number 473 Marvel Township 2 of Marvel A also referred to as house number 473 Murchison Road Killarney Bulawayo within 60 days of granting of the order with all the relevant respondents signing all transfer papers, failing which the Additional Sheriff for Bulawayo be and is hereby ordered to sign all transfer papers at the 4th respondent’s offices and other statutory bodies.***
- 5. The 5th respondent be and is hereby directed as a statutory body to take an active interest in this matter and all the issues raised with the cooperation of the application (sic) as the complainant to make sure that the issues of fraud, forgery and corruption are investigated if need be prosecuted accordingly.***

6. *There be no order as to costs unless any of the respondents oppose the relief sought, in which case costs ought to be paid on an attorney-client scale.”*

In *HC 1350/20*, filed on 18 August 2020, the Plaintiff herein sought the following order: -

- “1. *The transfer of the applicant’s property namely stand number 473 Marvel Township 2 of Marvel A also referred to as house number 473 Murchison Road, Killarney Bulawayo to the 1st respondent at the through (sic) the 3rd respondent the 4th respondent offices (sic) be and is hereby set aside and be declared a legal nullity and or on account of the fact that there was an extant court order by this Hon. High Court under HC 249/16 granted by the Hon. Justice BERE at the time of the purported transfer.*
2. *The respondents jointly and severally be and are hereby ordered to reverse the transfer of the applicant’s transfer (sic) being stand number 473 Marvel Township 2 of Marvel A also referred to as house number 473 Murchison Road, Killarney Bulawayo, within 60 days of granting of the order with all the relevant respondents signing all transfer papers failing which the Additional Sheriff for Bulawayo be and is hereby ordered to sign all transfer papers at the 4th respondent’s offices and other statutory bodies.*
3. *The 5th respondent be and is hereby directed as a statutory body to take an active interest in this matter and all the issues raised with the cooperation of the applicant as the complainant to make sure that the issues of the illegal transfer are investigated, if need be, prosecuted accordingly.”*

HISTORY OF THE DISPUTE.

The genesis of this dispute is as follows: -

The Plaintiff obtained a loan from the 3rd Defendant. He secured the loan by registering a mortgage bond against his immovable property better known as

Stand No. 473 Marvel Township 2 of Marvel A also referred to as house number 473 Murchison Road, Killarney Bulawayo, [the property]. The loan was not serviced as per agreement leading to the 3rd Defendant successfully obtaining a judgment against the Plaintiff. The judgment declared the immovable property executable.

The 1st Defendant sold the property at a judicial sale and the 2nd Defendant was declared the highest bidder. 1st Defendant proceeded to confirm the sale after dismissing an attempt to set the sale aside in terms of the High Court Rules by Plaintiff. The Plaintiff challenged the 1st Defendant's decision under *HC 249/16* and sought to have the sale set aside. The 3rd defendant opposed the application whilst the 1st Defendant did not.

Plaintiff proceeded to set the matter down on the unopposed roll citing only the 1st Defendant who had not opposed the application, leaving out the 3rd Defendant. *Bere J [as he then was]* erroneously granted the application. In the meantime, the 3rd Defendant filed its application under *HC 1095/16* seeking the dismissal of *HC 249/16* for want of prosecution. This application was granted by *Makonese J*. The property was subsequently transferred into the 2nd Defendant's name on the strength of *Makonese J*'s judgment.

The Plaintiff then brought a then *Rule 449/norw Rule 29* application to rescind *Makonese J*'s Order in *HC 1095/16*, whilst the 3rd Defendant also brought a similar application to rescind *Bere J*'s order under *HC 249/16*.

In granting the 3rd Defendant's application rescinding the *HC 249/16 Bere J*'s Order *Moyo J* had this to say on 28 September 2017: -

“First respondent (herein) then set the matter down on the unopposed roll ... without notice to the applicant (herein). ... That set down was thus irregular as applicant (herein) had opposed that application and had vested interests in the matter.

The order was therefore erroneously granted and one wonders why first respondent (herein) would snatch a judgment and then seek to cling to it. This is one application that need not have been opposed as the facts are crystal clear that the order obtained by the first respondent (herein) in HC 249/16 was not only premature and irregular, but it was clandestinely obtained. First respondent (herein) acted with mala fides and dishonesty in obtaining the order in HC 249/16, and as if that was not enough, first respondent still opposed this application, displaying an attitude which shows that the judgment was snatched deliberately, for there is no justification in clinging to a judgment one is not entitled to and was obviously granted in error.”

The Plaintiff was justifiably mulcted with punitive costs.

The attempt by the Plaintiff to vacate *Makonese J's* Order dismissing *HC 249/16* for want of prosecution caused *Dube-Banda J* to ride on the chiding the Plaintiff had received from *Moyo J*, without a discount. The learned Judge had this to say on 22 October 2020:

“It is the order that was obtained by deception, cheating and undermining the system of this court that applicant anchors this application upon. Applicant asks this court to rescind the order in HC 1095/16 on the grounds that when it was granted, he had already been granted an order in HC 249/16. If it was not for the cheating, the order in HC 249/16 could not have been granted on the 12th May 2016.”

The Court concluded that Plaintiff's hands were wanting in cleanliness and correctly declined the invitation to have its hands soiled by allowing Plaintiff to benefit from an illegally obtained order.

This background to the dispute is critical in deciding whether or not the special plea of *res judicata* entered by the 2nd and 3rd Defendants avails in this matter.

The meaning of *res judicata* is trite. *Res judicata* basically means that a matter has previously been adjudicated upon and judged on the merits by a competent court of requisite jurisdiction and no party thereto can relitigate the same matter for the same cause of action between the same parties.

The 2nd and 3rd Defendant, contend that HB 113/22 dealt with and settled the very same issues as are being raised in this action. The relief sought is substantially the same. Their argument is meritorious. Each time the Plaintiff has initiated litigation around this matter, the complaint has always been about an alleged impropriety of the sale of his house to the 2nd Defendant by the 1st Defendant. He has always sought that that sale be set aside. The parties have always substantially remained with cosmetic changes and relining from time to time. He has always failed for one reason or another.

Before *Kabasa J*, several points *in limine* were taken by the Respondents. One of the points *in limine* taken was the argument by both sides that *there were material disputes of fact* in the dispute. *Kabasa J* traversed the issues giving rise to material disputes of fact. The highlighted and acknowledged the existence of the material disputes of fact in this dispute. The Court went further and traversed the law and options available to a court faced with the situation it was facing in that consolidated application for a Declaratoy Order.

The options are that the court can:

1. *take a robust approach and resolve the dispute on the papers. [option not taken]*

2. *permit the leading of oral evidence in terms of the Rules of this court.*
[option not taken]
3. *refer the matter to trial. [option not taken]*
4. *dismiss the application altogether if the applicant ought to have foreseen that such dispute would arise.*

Musevenzo v Beji and Another HH 268/13

Masukusa v National Foods Ltd & Anor 1983[1] ZLR 232

This court through ***Kabasa J*** upheld the point *in limine* taken and took the 4th option and reasoned as follows:

“The applicant has brought a number of applications over this same dispute. The disputes between the parties were therefore obvious as the allegations of impropriety, fraud, corruption and irregularity levelled against the respondents have been vehemently contested.... He ought to have known better. I am therefore not inclined to opt for any of the options except a dismissal of the application.” Pages 12-13 of the cyclostyled judgment.

The court went on to conclude by saying. ***“In light of the nature of the points in limine and my determination on each one, the most appropriate disposition is a dismissal of the consolidated application.”*** The operative part of the judgment by Kabasa J reads, in part, as follows

“1.

2. The application for a declarator in HC 1207/20 and HC 1350/20 is hereby dismissed.

3.....”

An Appeal against the *Kabasa J's* Judgment above was dismissed with costs by the Supreme Court on 11 November 2022, *Civil Appeal No. SCB 57/22*

This matter is therefore *res judicata*. The special plea is accordingly upheld.

Vague and embarrassing or alien cause of action.

A reading of the Plaintiff's Declaration does not disclose a cause of action let alone a known cause of action in this jurisdiction.

The exception was properly taken and it accordingly succeeds.

Locus Standi.

The Plaintiff also contends that the immovable property had another mortgage bond registered in favour of ZB Bank and so the bond in favour of the 3rd Defendant could not be cancelled without the consent of ZB Bank. The ZB Bank is capable of speaking for itself.

The *exception taken* therefore has merit and equally succeeds

Costs.

The Plaintiff has been all over the place in terms of litigation, dragging the Defendants with him and putting them out of pocket. Plaintiff's conduct is deserving of censure by way of costs.

In the result I make the following order: -

1. The points exceptions taken by the 2nd and 3rd Defendant, be and are hereby upheld.
2. The Special Plea of Prescription taken by the 3rd Defendant be and is hereby Struck Off.
3. The Special Plea of taken by the 2nd and 3rd Defendant be and is hereby upheld.
4. The Plaintiff shall pay costs of suit on a legal practitioner and client scale.

NDLOVU J

Thomas Nelson Attorneys, Plaintiff's legal practitioners
Sandi & Matshakaile Attorneys, 2nd Defendant's legal practitioners
Mawere Sibanda Commercial Lawyers c/o Titan Law, 3rd Defendant's legal practitioners