

FUNGAI TSIKWA  
versus  
MUSHAWEDU HOUSING COOPERATIVE SOCIETY  
and  
EMMANUEL MUCHEMEDZI

HIGH COURT OF ZIMBABWE  
**DUBE JP & FOROMA J**  
HARARE, 22 January 2025 and 9 June 2025

*TR Rabvukwa*, for the applicant.  
*PR Zvenyika*, for the first and second respondent.

FOROMA J: In this appeal, the Appellant filed a notice of appeal in which the following three grounds of appeal were raised.

- (1) The *court a quo* erred and, misdirected itself in finding that the application for a stay of proceedings before it was *res judicata* when no such application had ever been made before it.
- (2) A fortiori, the court *a quo* erred and grossly misdirected itself at law by equating a special plea for jurisdiction to an application for a stay of proceeding when one is a defence and the other is an appellation and legal principles applying on the two are entirely different.
- (3) In any event the court *a quo* grossly erred and misdirected itself in not finding that the Respondent's claim being founded on the determination by the Registrar of Cooperative Societies dated 2 August 2023 which determination is the subject of review proceedings at High Court, trial could not fairly proceed in the circumstances.

We summarize the factual background to the matter briefly. The Appellant is a representative of one Brenda Mukupe by virtue of a power attorney granted to her. She occupies property the subject of a disputed ownership between Brenda Mukupe and first and second

respondents in different courts on account thereof. The immediate cause of action leading to this appeal is a claim for the eviction of Brenda Mukupe and appellant from the property in dispute.

Pursuant to a reference of the dispute to the Registrar of Co-operatives (the Registrar) for resolution the appellant and Brenda Mukupe were ruled by the Registrar of Co-operatives to have no legal basis for their claim that the disputed property did not belong to first and second respondents. The Appellant on behalf of Mukupe disputed the Registrar's findings and allegedly instituted an application for a review of the Registrar's determination in the High Court. In one of the court disputes for ejectment by first and second respondents, Appellant filed a plea that the Magistrate's court lacked jurisdiction to deal with the matter on account of the appellant having instituted review of the determination of the Registrar which review was pending in the High Court. The defence was dismissed by the magistrate's court which ordered that the case proceed to trial.

Pleadings in the ejectment case were pursued up to trial stage. Just before the trial of the matter for the eviction of appellant was about commence appellant filed a written application for a stay of the proceedings and trial pending determination of the review application by appellant pending in the High Court. In opposition to the application for a stay made to the magistrate's court, respondents raised the defence of *res judicata* which the court *a quo* upheld and dismissed the application for a stay hence the appeal *in casu*. We deal with the grounds of appeal *seriatim*.

1. The special plea of *res judicata*

The special plea of *res judicata* conveys an objection to a re-hearing of the same case either by the same court or by different courts (both of competent jurisdiction) as the issue would have been competently disposed of by the court that first pronounced itself finally without that court's decision being impugned on appeal.

In this ground of appeal, Appellant disputes that the dismissed defence of lack of jurisdiction by the court *a quo* is the same as an application for stay of proceedings to justify the raising of the defence of *res judicata*. We agree with the Appellant that the two may practically have similar consequences when upheld but in law they involve different principles. For a party raising a special plea of *res judicata* to succeed such party it is required to prove the following:

1. that the parties are the same
2. the cause of action is the same
3. the relief sought is the same

An objection to the court's jurisdiction (*res judicata*) if successful defeats finally the action objected to in the court where the action has been instituted yet an application for a stay of proceedings if successful achieves a temporary stay only and does not necessarily defeat the stayed action. It is in this sense that the effect is the same but clearly the principles are different. For purposes of illustration the special plea of *res judicata* involves two courts sitting to determine the same dispute which for convenience can be called earlier and latter court. Once the earlier court has validly exercised its jurisdiction any latter court which may also be the earlier court at law cannot exercise its own jurisdiction on the same dispute. Whereas an application for a stay of trial proceedings is dilatory in nature and entirely dependent on the court's discretion it does not entail the determination of the substantive dispute. Its objective is only a temporary delay in processing the dispute to its trial or determination pending determination of a pending claim in another court in order to prevent an injustice.

It is clear therefore that the two are legally separate and different. While a stay of proceedings is likely to be affected by a successful pending review it is not automatic that the mere institution of review proceedings results in a stay of the proceedings subject of review.

Actually, special pleas do not concern themselves with the merits of the cause instituted. The learned author Herbstern and Van Winsen, *The Civil Practice of Superior Courts of South Africa 5<sup>th</sup>* edition correctly summarizes the nature of special pleas as follows "They merely seek to interpose some defence not apparent on the face of the pleadings."

In the circumstances, the court *a quo* indeed erred at law in considering that the special plea of lack of jurisdiction which is a dilatory plea is the same as an application for a stay of proceedings. In fact, an application for a stay has no effect on the substantive dispute at all except and until it has been granted.

Clearly therefore once it is accepted that neither the court *a quo* nor any other court of competent jurisdiction entertained any earlier application for a stay of proceedings as between the parties the conclusion becomes inescapable that the upholding of the special plea of *res judicata* was an error and a misdirection at law. The matter however does not end there.

The respondents opposed ground number three of the appeal strenuously contending that the applicant was merely engaging in *dilatory* tactics. Despite the Respondent highlighting that no application for review was pending before the High Court on account of the appellant not having

served the alleged review application on the Registrar of Co-operatives (i.e. third respondent whose determination appellant sought to have the High Court review) appellant failed to prove in its answering affidavit that it (appellant) had indeed served the third respondent with the application for review.

In the circumstance’s appellant fails on ground three as the court *a quo* indeed could not have found that the appellant had indeed validity filed an application for a review of the third respondent’s resolution of the property ownership dispute. We cannot fault the substantive decision of the court *a quo* dismissing the application for a stay of execution as it is clear that the High Court would not entertain a review application where an intended party was not served with the application.

The decision is typical of the court having arrived at the correct decision but for the wrong reasons.

The appellant’s appeal can therefore not succeed. It is therefore dismissed with costs.

**FOROMA J:**.....

**DUBE JP:**..... **Agrees**

*Rusinhama Rabvukwa Attorneys, for the applicant*  
*Mucherewesi and Zvenyika Legal Practitioners, for the respondent.*