JOUBERT CRUSHERS AND TRANSPORT (PRIVATE) LIMITED
versus
WESTON MANYARARA
(In his capacity as the Executor Dative of the Estate Late David Manyarara having been duly appointed as such by the Master of the High Court under DR MRE 33/19)
and
THE MASTER OF THE HIGH COURT OF ZIMBABWE

HIGH COURT OF ZIMBABWE
SIZIBA J
MUTARE, 12 May 2025 & 21May 2025

SPECIAL PLEAS

Advocate *B. Mudhau*, for the plaintiff
Mr *P Makombe*, for the first defendant
No appearance for the second defendant

SIZIBA J**:**

1. The rationale behind the dilatory special plea of *lis pendens* at law is very simple. It is meant to prevent litigants from having their cause being decided twice or more by courts of law. Such a waste of time, energy and resources would be unfair to the busy schedule of courts. It would also be an unjustified and unfair expense to both litigants. Such a scenario may also result in embarrassingly conflicting judgements by courts over the same facts and legal principles. See *Mabhena* v *Job Sibanda and Associates* HB 116/24. The requirements of this special plea are closely related but slightly different to those of the special plea of *res judicata* in that there must be another pending matter, between the same parties, on the same cause of action, in respect of the same subject matter. The court has a discretion on whether or not to uphold the special plea of *lis pendens*. See *Manyika* v *Leabridge Investments (Pvt) Ltd* HH 305–22. Courts will ordinarily frown upon litigants who are bent on pursuing similar relief before them simultaneously.

2. Where a case that is already before the courts will impact the relief or cause of action sought in the next matter which the party wants to bring and which relates to the same parties, the golden rule must be to wait first until the first matter is concluded before filing the next matter. This may not be a hard and fast rule depending on the facts and the cause of action as well as the relief sought. This consideration resonates well not only with established legal principles but with common sense, logic, convenience and orderliness in the administration and pursuit of justice. Furthermore, where, as in this context, there are important issues of facts and law that are pending for decision by a higher court that may have a bearing on the present claim regarding the relief sought by the plaintiff, it would be proper and ideal to shelve the matter until such issues are decided by the superior court so as to avoid not only conflicting judgments but also a violation of the *stare decisis* doctrine of judicial precedents in the event that the case before the superior court and the present one are dealt with at the same time. It is because of these considerations that I find merit in the defendant's special plea of *lis pendens*. The question of whether or not the Estate Late David Manyarara must be reopened, never mind for what purpose it is being reopened, is the key issue and a common denominator not only in this matter but in the pending appeal before the Supreme Court under SC522/24.

FACTUAL BACKGROUND OF THE MATTER

3. Sometime in December 2023, the plaintiff filed an application before this court under case number HCMTC479/23 which was titled '*Court application for re-opening of Estate Late David Manyarara DR MRE 33/19 and ancillary relief*'. In that application, the plaintiff sued the first and second respondents herein and prayed the court to reopen the estate aforementioned so as to lodge its claims of US$1 300 and US$160 000 against the said estate or in lieu thereof to have the first defendant transfer to it 45 hectares of the remainder of Subdivision A of Subdivision D of Dora held under Deed of Transfer number 8776/89 measuring 282/1724 hectares. It was alleged that the plaintiff and the late David Manyarara (hereinafter referred to as the deceased) had entered into three separate agreements regarding varying hectares of land and the purchase price was also not similar and it was paid in full in all such agreements.

4. In the judgment of this court which is subject of the appeal at the Supreme Court and which was delivered on the 9th of August 2024 by my sister CHAREWA J, it was confirmed that the deceased had died on the 18 March 2016 and that the Estate was finalized on 7 July 2022. The judgment also confirms that the plaintiff conceded that the original agreement of sale between itself and the deceased contravened the provisions of the Regional, Town and Country Planning Act [*Chapter 29*:*12*]. The applicant then had to confine itself to the agreement relating to the alleged loans of US$1300 and US$160 000 which it claimed and the 45 hectares in lieu thereof.

5. Furthermore, the court went on to find that the applicant had not shown good cause for the estate to be reopened. It found that the applicant was negligent in not lodging his claims at the right time when the account lay for inspection. The court also found that the loans were advanced to the Executor rather than the deceased and hence the Estate had no obligation or involvement in such a claim. The application was thus accordingly dismissed.

6. The plaintiff's grounds of appeal under SC 522/24 are basically assailing the refusal by this court to reopen the estate and they are couched as follows:

"GROUNDS OF APPEAL

1. The court a quo erred and grossly misdirected itself at law in failing to make a finding that by not apprising appellant each and every process in the administration of estate late David Manyara, first and second respondents had administered the estate contrary to the provisions of an extant order of the Magistrates Court in case number 1066/18 which warranted ***the reopening of the estate****.*

2. Alternatively; the court a quo erred and grossly misdirected itself in failing to find that 1st respondent failure to comply with an extant Magistrates Court order granted under case number 1066/18 relating to the registration and administration of the estate constituted a good ground ***for reopening the estate*** *of David Manyarara.*

3. The court a quo erred and grossly misdirected itself at law, when ***it refused to re-open the estate*** *late David Manyarara on the basis of the existence of material dispute of facts yet first and second respondents did not adduce any evidence in support of the alleged fraud or forgery to warrant such a finding.*

4. The court erred and grossly misdirected itself at law by opting to dismiss the application on the basis of alleged existence of material dispute of facts in the absence of an allegation that it was reasonably foreseeable that the matter would be riddled with material dispute of facts as regards the authenticity of acknowledgment of debt for the sum of USD 81 300 enforced against first and second respondents.

5. The court a quo erred and grossly misdirected itself at law in concluding that there were no special circumstances warranting ***the reopening of the estate late*** *David Manyarara yet such circumstances had been established that first respondent had fraudulently or deliberately omitted in the estate account the loan agreement which had been advanced to the estate by appellant which he had knowledge of.*

6. The court a quo erred and misdirected itself at law when it dismissed appellant's claim for ***the reopening of estate late*** *David Manyarara on the basis that first respondent had not sought and obtained prior approval and authorisation by the third respondent to borrow money yet there is no such obligation on the part of the first respondent when it comes to borrowing money.*

7. The court a quo erred and grossly misdirected itself at law in finding that appellant required condonation and extension of time to seek an order ***reopening the estate of the late*** *David Manyarara when the law allows proceedings for reopening of an estate to be filed within three years*." (Emphasis added)

7. It is common cause that the above appeal is still pending before the Supreme Court. The present claim by the plaintiff against the same defendants was filed on 7 November 2024 and the prayer thereof in terms of the summons is as follows:

"a. Payment in the sum of US$ 448 000.00 or the equivalent in local currency at the prevailing rate on the date of payment being the amount equivalent to the extent which first defendant was unjustly enriched at the expense of the Plaintiff.

b. Interest at the rate of 5% per annum on the sum of US$ 448 000.00 or the equivalent in local currency at the prevailing rate on the date of payment from the date of this summons to the date of payment in full.

c. Second respondent be and is hereby ordered ***to reopen the estate of the late David Manyarara DR MRE 33/19*** *in order to enable plaintiff to lodge its claim of unjust enrichment against the estate.*

d. Costs of suit." (Emphasis added)

8. The nub of the plaintiff's case in the present claim is that since the original agreement of sale with the deceased was in contravention of the law, it is entitled to the amount claimed on the basis of unjust enrichment in respect of the 22, 4 hectares such that the Estate should not retain both the property and the purchase price to its prejudice.

9. The plaintiff's claim was met by an array of Special Pleas from the 1st defendant which included *res judicata* and *lis pendens*, prescription, material non joinder of the beneficiaries, that the first and second defendants are now *functus officio*, that the estate is now insolvent and the claim is now moot, that the claim is incompetent and that an improper procedure was adopted.

PRELIMINARY ISSUES

10. During the hearing of the matter, first defendant's counsel withdrew the Special Plea relating to prescription. He also did not insist much on the Special Plea of *res judicata* but he talked much on *lis pendens*. He also applied to amend the Special Plea by inserting a prayer at the end that the Special Plea be upheld and that the plaintiff's claim be dismissed. Counsel for the plaintiff was opposed to the amendment on the basis that the Special Plea was in violation of a peremptory requirement in terms of r 42(2) which mandated that form 11 must be used. This argument went as far as saying that the Special Plea was a nullity which could not be amended nor condoned on the basis of the decision in *Jensen* v *Acavalos* 1993 (1) ZLR 216 (SC). This argument is wholly without merit. The fate of a fatally defective Notice of Appeal cannot be equated to the defective or irregular pleadings filed before this court. The requirements of a Notice of appeal and the requirements of pleadings in terms of the rules of this court are materially different. Rule 41(10) of the High Court Rules, 2021 is wide in its formulation and it provides as follows:

> *"The court or a judge may, notwithstanding anything to the contrary in this rule, at any stage of the proceedings before judgment, allow either party to alter or amend any pleading or document, in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties."*

11. In addition to the above rule, r 36 provides a procedure of dealing with irregular steps taken by parties in non compliance with the peremptory or permissive rules of this court. To then suggest that any pleading that does not comply with a particular form provided in the rules is a nullity just like a fatally defective Notice of Appeal is an

argument that is very much misleading and which can never be entertained by this court. This court has wide powers to allow an amendment of any pleading at any stage of the proceedings before judgment so as to determine the real controversy or issue before it. In this case, the real controversy is not the format of the Special Plea but whether such Special Plea has merit or not. The court cannot be bound and tied up by the issues of form over substance. The court exists to judge and determine the case or controversy brought by the parties before it. Since the first defendant suffers no prejudice by the amendment sought, I shall allow the amendment sought as prayed.

APPLICATION OF THE LAW TO THE CASE

12. During the hearing, both counsel appreciated and agreed that if this court finds that the plea of *lis pendens* should be sustained, such would dispose of the matter without the need to decide the other issues before this court at the present moment. The submission by Mr *Mudhau* was that the pending case before the Supreme Court has no bearing on the present matter because the purpose of reopening the estate in that matter is to lodge claims relating to loans advanced to the first defendant whereas the purpose of reopening the estate in the current claim is to lodge a claim for unjust enrichment against the estate. I am not persuaded by this argument. The grounds of appeal in the case before the Supreme Court clearly assail the refusal by this court to reopen the estate on diver's reasons which go beyond the consideration of the loans which were advanced to the first defendant. For example, there is a question relating to the alleged failure by the defendants to comply with an order of the magistrates' court and also the question of whether the plaintiff had negligently failed to lodge its claim when the account lay for inspection. What is inescapable is that before any claims can be lodged, the estate must be reopened first both in respect of the pending case before the Supreme Court and the one presently before this court. It is of interest therefore what the higher court may have to say about the issue of whether the estate at issue should be reopened either in relation to the plaintiff's loans or to any extent that will allow plaintiff's claim for unjust enrichment to be lodged. Thereafter, this court may then entertain this claim either on the merits or resolve it on the basis of any Special Plea that may be brought or raised in light of the pronouncements made by the higher court.

13. In conclusion therefore, I find merit in the Special Plea of *lis pendens* and it must be upheld. The first defendant has prayed for the dismissal of the plaintiff's claim. The present claim must indeed be put on hold until the matter that is pending before the Supreme Court is concluded. The plaintiff created this anomaly by unnecessarily limiting the purpose for which the estate of the deceased must be reopened but the claim to be made is ancillary and dependent on whether the estate can be opened or not in the first place. The first defendant did not pray for costs in its prayer and as such none can be awarded in its favor. I will therefore make the following order:
    (a) Plaintiff's preliminary point regarding the alleged invalidity of the first defendant's Special Plea be and is hereby dismissed.
    (b) The first defendant's Special Plea of *lis pendens* be and is hereby upheld.
    (c) The plaintiff's claim be and is hereby dismissed.
    (d) There shall be no order as to costs.

Chikore & Chigwaza, plaintiff's legal practitioners
Makombe & Associates, first defendant's legal practitioners