RINOS TERERA
versus
CK HOLLAND t/a HOLLANDS
and
LAUREEN TATENDA MVUDUDU
and
MAUREEN MAZVITA MIDDLETON
and
GEORGE LENTAIGNE INGRAM LOCK
and
ZIMBABWE HOUSING COMPANY (PRIVATE) LTD
and
THE REGISTRAR OF DEEDS N.O

HIGH COURT OF ZIMBABWE
MANYANGADZE J
HARARE, 10 February & 23 June 2022

Opposed Matter

Mr T J Madotsa, for plaintiff
Mr T Maanda, for 1st and 4th for defendants
Mr *B Majamanda,* for 5th defendant

MANYANGADZE J: This is a matter in respect of which the plaintiff issued summons against the defendants seeking, *inter alia*, nullification of an agreement of sale entered into between the second and third defendants on the one hand, and the fifth defendant on the other hand.

The matter has come onto the opposed matters roll after the first and fourth defendants raised a special plea and an exception. These are that;

(i) The plaintiff's claim is *res judicata.*

(ii) The summons and declaration do not disclose a cause of action against them.

The fifth defendant raised the same special plea i.e the plaintiff's claim is *res judicata.*

The facts forming the background to the matter are largely common cause. In July 2014, the plaintiff entered into an agreement of sale of an immovable property with the second and third defendants, represented by the fourth defendant by means of a power of attorney. The immovable

property is known as Lot Number 17 Weirmouth Smallholdings of Weirmonth Mutare, measuring 7, 2769 hectares (the property).

The first defendant facilitated the sale in its capacity as an estate agent.

Sometime in February 2016, the second and third defendants entered into another sale agreement with the fifth defendant over the same property. Again, the sale was facilitated by the first defendant, after cancellation of the first agreement. The circumstances surrounding cancellation of the first agreement are not clear on the papers filed of record.

The plaintiff alleges that there was never a cancellation of the first agreement or he was not made aware of such a cancellation. As far as he is concerned, the second sale was fraudulent and invalid.

The plaintiff sought a declaratur in the Mutare High Court in terms of which he wanted the second sale nullified. His application was dismissed. His application for condonation of late noting of an appeal against the High Court judgment was dismissed by the Supreme Court.

Subsequent to the aforementioned processes, the plaintiff instituted the instant proceedings. He basically seeks the same relief that was denied by the High Court sitting at Mutare. This has prompted the first, fourth and fifth respondents to raise the special plea of *res judicata.*

The law on *res judicata* is well established in the authorities. The parties have referred the court to some of the case authorities where the principles were clearly laid out. Basically, four requirements must be met before a plea of *res judicata* can succeed.

The matter in respect of which judgment has been rendered must:

(i) Concern the same parties

(ii) Involve the same subject matter

(iii) Be founded in the same cause of action

(iv) Result in a final and definitive judgment

See – *Wolfenden* v *Jackson* 1985 (2) ZLR 313

- *Towers* v *Chitapa* 1996 (2) ZLR 261
- *Banda & Ors* v *ZISCO* 1999(1) ZLR 340 (S)
- *Flowerdale Investment (Pvt) Ltd & Anor* v *Bernad Construction (Pvt) Ltd & Ors* 2009 (1) ZLR 110(S)

It is significant to note that the plea can be raised not only in respect of the *ratio decidendi* of a judgment, but an issue decided as part of the *ratio decidendi*. In this regard, the first and fourth defendant referred the court to *Amler's Precedents of Pleadings* 5th edition 1999, at p 355:

> "A party to previous litigation is not only prevented from disputing the correctness of a judgment in the sense that he may not again rely upon the same cause of action, but he is also prevented from disputing an issue decided by the previous court. The rule is that where the decision set up as *res judicata* necessarily involved a judicial determination of some question of law or issue of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without at the same time determining that question or issue in a particular way, such determination, though not declared on the face of the recorded decision, is deemed to constitute an integral part of it as effectively as if it had been made so in express terms" (underlining added).

The defendants went on to refer to GILLESPIE J's remarks in *Towers* v *Chitapa*, *supra* where the same point was expressed, in the following terms;

> "this approach has been approved by the Supreme Court in Zimbabwe; although subsequent to that approval further doubt appeared to be cast on the issue by the same court. Any doubt must now, however, be regarded as having been dispelled by the decision in *Kommissaris van Binnelandinkomste* v *Absa Bank Bpk*.
> In this case the elements of the defence of *res judicata* were explained as consisting of an identity of the plaintiff, the defendant, thing in contest and cause of action. It was held that the latter two requirements in particular ought in the appropriate case to be interpreted expansively so as to permit the possibility of a defence of *res judicata* being invoked in respect of an issue determined as part of the *ratio decidendi* of their earlier decision, a defence that may conveniently be termed issue estoppel, despite the fact strictly speaking, a different cause of action and different relief may be sued for in both cases. The defence ought only to be allowed, however, with caution, and only where the underlying requirement that the same question should arise in both cases is satisfied." (underlining added)

The parties are, in the main, in agreement on the requirement and principles of *res judicata* as set out in the authorities. What needs to be resolved is the application of these principles to the instant case.

In substantiating the claim of *res judicata*, the respondents pointed out that the plaintiff's application for a declaratur was dismissed on the following grounds.

- Prescription
- *Res judicata*
- Misjoinder
- Estoppel

The first and fourth defendants' contention is reflected clearly in paragraph 11 of their heads of argument, wherein is stated;

> "… the judgment by MWAYERA J was conclusive as against all the world in whatever it settled. It held that the claim was prescribed. It held that the fact and issue of ownership of the property was pronounced upon in an earlier judgment and was therefore *res judicata.* It determined the status of the property, or the right or title to the property. It is binding on the plaintiff and the second and third defendants."

Indeed, a look at MWAYERA J's judgment in *Rinos Terera* v *George Lentaigne Ingram Lock*, HMT 72/20 shows that the issues the plaintiff is raising were affectively disposed of.

On prescription, the learned judge stated, at p 4 of the cyclostyled judgment:

> "Despite the fact that the cause of action arose back then the plaintiff did not bring any claim up until 9 June 2020 after sale and transfer has long been concluded. Whichever way one were to calculate the time lapse from 2015 or 2017 the claim is stale. In terms of the Prescription Act *[Chapter 8:11*] s 5(d) the claim should be brought to surface within 3 years of cause of action. The legislature's intention among others is to ensure certainty and finality of matters. The remarks by MATHONSI J, as he then was, in *John Conrad Trust* v *The Federation Kushanda Pre-School Trust* HH 503/15 are apposite. The court stated:
> *"*…. there should be legal certainty and finality in the relationship of parties after the lapse of a certain period of time. It should be against public policy for one who had a complete cause of action to sit on it and not litigate upon it *ad infinitum."*

On *res judicata*, the judge stated, at p 5 of the cyclostyled judgment:

> "The requirement for successful invocation of *res judicata* is that the proceedings relied upon are involving the same parties or their privies and that the cause of action is the same. See *Wotlfendon* v *Jackson* 1985 (2) ZLR 313. The plaintiff is seeking to assert his rights in order to challenge the ownership which is vested in the Third Defendant. This was determined in HC 1377/19 an unchallenged default judgment and also HC 2042/19 which gave effect to the execution and eviction of the Plaintiff. This court is empowered to have recourse to its own court records and decisions for administration of justice. It is therefore a fact that ownership was determined in favour of Third Defendant thus rendering the matter *res judicata."*

If the court upheld the plea that the matter was prescribed and was also *res judicata*, as it did, such a matter cannot be brought back in the same court. The matter was between the plaintiff and the defendants, who are also parties to the instant matter. The subject matter is the same, being validity of the agreement of sale between second and third defendants and the fifth defendant. The relief sought is the same.

The matter went all the way to the Supreme Court, by way of an application for condonation of late noting of appeal, in the matter *Joseph Terera* v *George Lantaigne Ingram Locks & Ors* under

Case No. SC 62/21, judgment No. SC 93/21. The Supreme Court noted, at page 4 of the cyclostyled judgment:

> "in upholding the special pleas the court *a quo* stated thus:
>
> > "considering the totality of the submissions it is clear that the cancellation of the sale agreement between the plaintiff and the first and second defendant's principals was communicated as early as 2015. Further communication in 2016 and subsequent sale of the property to third defendant, culminating in transfer in 2016 was to the knowledge of the plaintiff. The plaintiff despite the knowledge did not take action until June 2020 when he issued summons. The defendant's special plea that the plaintiff's claim must be dismissed on the basis of prescription, estoppel, non-joinder and misjoinder is well supported by the facts of this matter. The special plea must succeed".

It will be noted from this excerpt from the High Court judgment, cited by the Supreme Court, the issues the plaintiff has raised and is pursuing in this court, were dealt with and disposed of. This includes his averment that cancellation of the sale agreement in question was not communicated to him.

As already indicated, there was an application for condonation of late noting of the appeal. The application was dismissed by the Supreme Court, in the matter *Joseph Terera* v *George Lantaigne Ingram Locke & Ors*, *supra*.

Among other factors considered by the Supreme Court, was the fact that the intended appeal had no prospects of success. CHITAKUNYE AJA (as he then was) commented, at p11 of the cyclostyled judgment:

> "cleary the applicant has lamentably failed to establish an arguable case on appeal for which I can grant the order sought. <u>There are no prospects of success at all</u>." (underlining added)

With this emphatic and definitive pronouncement on the prospects of the matter, made by the apex court, it boggles the mind why the plaintiff has opened the same matter in the High Court. CHITAKUNYE AJA went on to emphasize the need for finality in litigation. The learned Judge registered his displeasure at the plaintiff's litigious nature and ordered costs on the legal practitioner and client scale. In doing so, the Judge made the following remarks, at p12 of the cyclostyled judgment;

> "The respondent's counsel, in seeking costs on the higher scale, alluded to the litigious nature of the applicant in spite of extant court orders against him which he has not challenged and the fact that the property in question was transferred to the third respondent in 2016 to his knowledge. Transfer to the third respondent was effected more than three years ago yet the applicant still drags respondents to court on unsustainable claims. In this regard they submitted that the applicant has been constantly in and out of the courts in a plethora of matters some of which were referred to as case numbers HC 1236/17, HC 8602/17, HC 1377/19, HC 2042/19 MUTP 3015-16/18, Mutare Magistrates Court 2102/17, not to mention open files before the ant-corruption court, the Law Society of Zimbabwe and the Judicial Service Commission Secretariat. The applicant clearly is

> very litigious and unrelenting despite advice that his complaints were not sustainable. It is in the interests of justice that court proceedings be brought to finality. Competent orders affording real rights to the third respondent remain extant as the applicant has not appealed against them. They thus submitted that applicant be mulcted with costs on a higher scale"

Given this background, there is no basis whatsoever why this matter has been reinstituted. I find the plea of *res judicata* unassailable. The plaintiff's claim must be dismissed on that basis alone. That renders it unnecessary to go into the exception which is that the claim discloses no cause of action. That analysis would in my view, be superfluous, it having been held that the matter is *res judicata.*

On costs, the highly litigious nature of the plaintiff has been clearly highlighted. An award of costs on a higher scale is warranted.

In the circumstances,

IT IS ORDERED THAT;

1) **The plaintiff's claim be and is hereby dismissed.**
2) **The plaintiff bears the defendants' costs on an attorney and client scale**.

Madotsa & Partners, plaintiff's legal practitioners
Maunga Maanda & Associates, first and fourth defendant's legal practitioner'
Khupe and Chijara Law Chambers, fifth defendant's legal practitioners