

SHELTER KAMUPARIRO
versus
FORTUNE MUSENDO
and
MUNICIPALITY OF CHITUNGWIZA

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 19 January 2017 & 22 March 2017

Trial

J Koto, for the plaintiff
J.T Mawire, for the 1st defendant

MATANDA-MOYO J: The plaintiff issued summons against the defendants for the following relief:

1. That the plaintiff be and is hereby declared the rightful owner of Stand number 454 Unit Seke, Chitungwiza.
2. That the transfer of Stand 454 Unit C Seke, Chitungwiza into Gideon Musendo's name be and is hereby nullified.
3. That the 2nd defendant cede rights, title and interest in the property aforementioned back to the plaintiff within seven (7) days of this order failure of which the Sheriff be and is hereby empowered to signal documents necessary to effect cession to the Plaintiff
4. That the 1st defendant and all those claiming occupation though her be evicted from house no 454 Unit F Seke Chitungwiza and
5. That the 1st and 2nd defendants pay costs of suit on an attorney client scale.

The first respondent filed an appearance to defend and opposed the order sought. Before trial the parties agreed that the matter proceed by way of a stated case. The facts agreed by the parties are as follows:

House number 454 Unit F Seke, Chitungwiza (hereinafter referred to as the property) is owned by and belongs to second defendant as it has no title to date. The second defendant gave occupation of the property to one Moses Mutandwa under a lease to buy agreement

Moses Mutandwa died and his heir Gordon Madzima assumed occupation of the property under the same terms and conditions the house was held by the late Moses Mutandwa. In 1992 Gordon Madzima sold the property to first defendant's deceased husband Gideon Musendo. The said late Gideon Musendo pursuant to the agreement took occupation of the property. On 13 March 1993 Gordon Madzima entered into another sale agreement with the plaintiff for the sale of the same property. Gordon Madzima alleged to have cancelled the earlier agreement of sale with the late Gideon Musendo. Gordon Madzima failed to give vacant possession of the property to the plaintiff. The second defendant also refused to enforce the sale agreement between Gordon Madzima and the plaintiff on the basis that it had not consented to the sale of the property, it being the owner of that property.

The plaintiff under HC case number 9232/93 approached this court seeking the agreement of sale between him and Gordon Madzima to be declared valid and to compel Gordon Madzima to transfer the right, title and interest in the property to herself. The order was granted in default by the High Court on 27 April 1994. The second defendant was not cited as a party to the proceedings. In compliance with the court order the second defendant on 7 June 1994 issued the plaintiff with a certificate of occupation and ownership card for the property. Rates and water bills were transferred into the plaintiff's name.

The plaintiff sought to evict the first defendant from the property in the magistrates court under case number 155/94. The order was granted. The first defendant appealed to the Supreme Court and the order was set aside and the first defendant's deceased husband was granted leave to defend the eviction proceedings. The first deceased's husband was also advised to seek rescission of HC case number HC 9232/93. The matter before the magistrate court was later dismissed. The first defendant's deceased husband remained in occupation of the property.

On 11 December 2002, the first defendant's deceased husband 'applied' to the second defendant for allocation of the property. In September 2006 a lease to buy was entered into between the second defendant and the first defendant's deceased husband for the property. On 4 September 2006 the second defendant issued the first defendant's deceased husband with a certificate of occupation of the property.

The plaintiff persists in its claim as per summons. The first defendant opposed the claim on the basis that Gordon Madzima could not have legally sold the property to the plaintiff without the second defendant's consent. Both parties are claiming costs on a higher scale.

The issues referred for determination are;

- (1) Whether the matter is *res judicata* and
- (2) Who between the plaintiff and the first defendant is the rightful owner of Stand 454 Unit F Seke.

Whether the matter is *res judicata*

It is common cause that there is a default judgment by this court under HC 9233/93 which ordered that the right in the property be transferred to the plaintiff. Such default judgment had not been rescinded and is extant. The principle of *res judicata* is simply a term used for a matter already judged, a case in which there has been final judgment and is not a subject of appeal. Generally the legal doctrine is meant to preclude continued litigation of a case on same issues between the same parties. The matter especially is barred from being heard against either in the same court or in a different court. A court will use the principle of *res judicata* to refuse to rehear and reconsider the matter. The principle prevents litigants from multiplying judgments and subsequently causing confusion.

In order to succeed a party claiming *res judicata* must show that the earlier judgment is identical to the present in the following;

- (1) Same parties
- (2) Same cause of action
- (3) Same relief sought

See *Kommissaris van Binnelands Inkoruste v Absa Bank Bpk* 1995 (1) SA 653 A at 6690-671 B where the court held that the defence of *res judicata* requires careful scrutiny as it has the potential of causing great unfairness and great injustice. Each case should be determined on its own facts. As pointed out by *De Villiers CJ in Bertram v Wood* (1893) 10 SC 177 at 180

“Unless carefully circumscribed (the defence of *res judicata*) is capable of producing great hardships and even positive injustice to individuals.”

The basis of the plaintiff’s assertion that the matter is *res judicata* is premised on the fact that the matter was determined under HC 9233/93. However the parties before the High Court then were the plaintiff and the seller. For the plaintiff to succeed he must prove that the same parties herein were the same parties in HC 9233/93, she must show that the first defendant is a privy of the later seller, who was the defendant then. The privy must derive

title from the Party See – *Shokkos v Lampert NO 1963 (3) SA 421 (W)* and *Commuters Group and Others v Transport Limited and Ors 2006 (6) Sa 68 (C)*. The parties must be the same or must be identified with those who were parties to the proceedings. See also *Thembekile Molaudzi and The State CCT 42/15*.

From the evidence before me the first defendant is wife to the late buyer. The first defendant cannot be said to be the privy to the seller. I am therefore unable to find that the same parties as in HC 9233/93 are the same parties before me presently.

The plaintiff must also show that this present matter is premised on the same cause of action as in HC 9233/93. What was before this court in 1993 was for the determination of the validity of the agreement of sale between the plaintiff and the seller. Herein the cause of action is for this court to determine the true owner of the property as there was a double sale. The causes of action in the two matters are different.

Consequently the relief sought is different. The plaintiff herein seeks transfer of property from the first defendant to herself. I am thus of the view that the defence of *res judicata* is inapplicable herein.

Assuming I am wrong in that respect and assuming the defence is available I am of the view that the doctrine should not be applied rigidly as an inflexible or immutable rule.

In the Canadian case of *Arutim Capital Inco. v Appliance Recycling Centers of America 2014 ONCA 62* it was held that the purpose of *res judicata* should be balanced between public interest in finality of litigation with the public interest of ensuring a just result on the merits. The doctrine should not be mechanically applied where to do so would create an injustice. In *Donyluk v Ainsworth Technologies Inc 2001 SCC 44; [2001] 2 SCR* at paragraphs 80 – 81 the court held;

“As a final and most important factor, the court should stand back and taking into account the entirety of the circumstances, consider whether application of issue estoppel in the particular case would work an injustice. Rosenberg JA conceded that the appellant had received neither notice of the respondent’s allegations nor an opportunity to respond.....”

In order to depart from the norm it should be clear that a significant injustice will be occasioned and that there is no effective alternative remedy. The doctrine of *res judicata* in this case ought to be relaxed in the interest of justice.

The decision relied upon by the applicant is a default judgment. A default judgement is given in favour of the plaintiff where the defendant has not responded to a summons or failed to appear in court.

It is imperative that the full facts of the matter were not ventilated at the time. Judgment was not on the merits.

In order to come to my conclusion, I have considered that the HC case number 9232/93 although extant was not between the same parties. That case was between the plaintiff and the late Gordon Madzima. The second defendant herein was not a party to it and neither was the first defendant. At the time of the summons in 1993 the plaintiff was aware that the first defendant and her family occupied the property under the strength of an agreement of sale. Although the late Gordon Madzima allegedly informed the plaintiff that such agreement was cancelled, a prudent person would have cited the defendants. It was clear then that the defendants were interested parties.

I am also of the view that the cause of action is different. No court order is inexistence, which order defines the rights of the current parties to the property. HC 9232/93 determined rights and title as between the plaintiff and the late Gordon Madzima. To blindly apply the principle of *res judicata* would obviously create unfairness and injustice between the current parties. There is need to relax and flexibly apply the principle. Doing so would lead to the result that the rights as between the parties in *casu* are still to be determined. Accordingly I am of the view that the doctrine of *res judicata* is inapplicable in this matter.

Who is the rightful owner of the property?

I shall move on to determine who between the plaintiff and the first defendant is the true owner of the property. It is common cause that the first defendant was the first purchaser. The late Gordon Madzima sold the property to the first defendant's husband in 1992. The sale agreement with the plaintiff was only entered into in 1993. There has been placed before me no proof of the cancellation of the agreement of 1992. The inescapable conclusion is that there was a double sale. I agree with the legal position enunciated by the parties in respect of the double sales found in *Chimphonda v Rodriques and Ors* 1997 (2) ZLR 63 ZLR 63 (H) that:

“In a double sale situation where the second buyer had knowledge of the first sale of the property, either at the time of the sale or at the time it took transfer of the property, then, unless there are special circumstances affecting the balance of equities, the first buyer can recover the property from the second buyer. In such instance, the second buyer's only remedy is an action for damages against the seller. In deciding whether there are special circumstances affecting the balance of equities, the court must bear in mind that the primary right of the wronged buyer is the remedy of specific performance which will be granted unless there is some equitable reason disqualifying him from obtaining such relief.”

See *Crundall Brothers (Pvt) Ltd v Lazarus NO & Anor* 1991 (2) ZLR (S), *Guga v Moyo* 2000 (2) 458 (S) that once the second purchaser has knowledge of the prior sale, then the first purchaser in the absence of special circumstances affecting the balance of equities is entitled to recover the property from the second purchaser. The second purchaser's rights are limited to claiming damages from the seller. Applying the above principles to the present case, the first defendant's late husband was the first purchaser. The plaintiff at the time of the purchase of the property knew of the existence of the sale agreement between the seller and the first defendant's late husband.

It is clear that from 1992 to date the first defendant and her family have been in occupation of the property. The plaintiff has not been able to get vacant possession of the property.

The plaintiff even attempted to evict the first defendant from the property. The plaintiff failed in that regard as far back as 1994. The evidence tends to point to the fact that the plaintiff has been aware all along that the first defendant was also claiming ownership of that property. The plaintiff did nothing then to have the parties rights determined by a competent authority.

It is common cause that the plaintiff in 1994 sued the seller and got judgment to have the property transferred to her. Later on it is also common cause that the first defendant got certificate of occupation to the property. The doctrine of notice decrees that if the latter purchaser at the time took transfer knew that the property had been sold to another, then the property must be transferred back to the other. Herein it is apparent that the plaintiff knew at the time she applied to court for rights in the property that the property had been sold to the first defendant's late husband. The plaintiff conceded that point in the statement of agreed facts. It follows then that when the plaintiff attempted to take transfer it was a form of fraud. In the case of *Riley v Slipe* NO [2008] ZANHC 22 the court quoted with approval an earlier judgment which held that "it is a species of fraud to attempt to secure a *res* (an item of property) which is known to have been promised to another. The same applies with full force in the present matter. The plaintiff fraudulently obtained an order under HC 9233/93, having known that the property had earlier on been sold to another. See also *Crundall Brothers (Pvt) Ltd v Lazarus N.O and Anor* 1991(3) SA, 812. Having found as above it is obvious there are no special circumstances affecting the balance of equities. The first purchaser ought to succeed to be declared the true owner of the property. The plaintiff bought the property when

the first defendant was already in occupation of the property. The balance of equities cannot weigh in her favour.

This court has not been favoured with any evidence showing that the late Gordon Madzima cancelled the agreement of sale between himself and the late Musendo. Without such evidence the agreement of sale between the late Madzima and late Musendo is valid. Consequently the late Musendo is the first purchaser and there being no special circumstances favouring the plaintiff, it is my finding that the first defendant is the true owner of the property. The plaintiff can always adopt the option of suing for damages.

Consequently the plaintiff's claim is dismissed with costs.

Koto and Company, plaintiff's legal practitioners
Mawire J.T & Associates, 1 defendant's legal practitioners