

NTOMBIZODWA NHOWE
versus
MONICA GONDO
and
SHINGIRIRAI FIBION NHOWE
and
CITY OF HARARE
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
KATIYO J
HARARE, 18 July 2022 & 14 October 2022

Opposed Application – *res judicata*

Advocate T Magwaliba, for the applicant
K Gama, for the 1st respondent
CM Mushayi, for the 3rd respondent

KATIYO J: Applicant appeared before me and I gave an order that the application was *res judicata*. The applicant now requested reasons for the order.

On 27 April 2022 the applicant made an application to this court for cancellation of deed of transfer No.7167/18 made to Monica Gondo (the first respondent) by Shingirirai Fibion Nhowe (the second respondent) over a certain property known as Stand 40715 Harare Township which is a subdivision of 13687 Salisbury measuring 1028 square meters. This was done in terms of Section 8 of the Deeds Registries Act [*Chapter 20:05*].

Brief Background

Applicant was married to the second respondent from 1986 to 2012. A divorce order was granted in 2012 which resulted in the applicant being granted a certain immovable property Stand No.13687 Harare Township. The applicant approached this court in a separate application seeking an application for declarator that was granted in her favor by my brother Judge MSITHU J. The first respondent in this matter then noted an appeal in the Supreme Court against MSITHU J's judgement. The appeal was successful thereby setting aside MSITHU J's judgement in HC3715/19.

The first respondent has now raised special plea of *res judicata* in the present application.

The Law

Res judicata is defined as a term used for a matter already judged or a case in which there has been final judgment and is not a subject of an appeal. MUREMBA J in *Mundangepfufu & Anor v Chisepo* 2017 ZWHHC 188 defined *res judicata* as follows:

The special plea of *res judicata* means that the same matter has been decided in another court of competent jurisdiction and may not be pursued further by parties. The matter would have been judged on the merits and as such it may not be relitigated. This plea is a declinatory plea meaning that it is meant to quash or put an end to the proceedings.

This doctrine is meant to prevent continued litigation of a case on same or similar 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.

Requirements of *res judicata* were clearly provided for in case of *Wolfenden v Jackson* 1985 (2) ZLR 313 (SC); *Towers v Chitapa* 1996 (2) ZLR 261 (H); *Farai Chitsinde and Nyasha Chitsinde v Stanny Musa and the Registrar of Deeds and the Deputy Sheriff* HH 274/10 as follows:

1. Same parties
2. Same cause of action
3. Same relief sought

When the applicant first approached this court in case HC 3715/19 she had the same parties as in this matter with the exception of her son who was later removed as party to the proceedings as he had no legal right over this property. Secondly the applicant's cause of action arose from the sale of a property by the second respondent to the first respondent in matter HC 3714/19 that was also the cause of action. Lastly the relief that is being sought by the applicant is the same as the one in HC 3715/19 and looking at the draft orders of these files the only deference is the wording of these orders but their effect are the same. The order in case HC 3715/19 was crafted as follows:

The agreement of sale entered into by and between first and fourth respondent be and is hereby declared to have been concluded in *fraudem legis* and is hereby set aside.

1. The issuance of the Compliance Certificate by the second respondents be and is hereby declared to have been fraudulently done and is hereby set aside for breach of suspensive conditions duly granted and the condition precedent of clause 3 of the subdivision permit
2. There being no proper Compliance Certificate on the subdivision of stand number 13687 under Deed of Transfer 6830/88, the transfer of rights ,title and interest in the subdivision known as Number 40715 Harare Township from the fourth respondent to the first respondent by the third respondent be and is hereby set aside.
3. The transfer of Number 40715 Harare Township having been irregular the subsequent eviction proceedings/court order under case HC 2162/19 is declared to have been erroneously instituted and is hereby set aside.
4. The first, second and fourth respondents to bear costs of suite on the attorney to client scale one paying the others to be absolved

And in this current application the applicant is seeking the following order:

1. The application for cancellation for Deed of Transfer be and is hereby granted.
2. Deed of Transfer Registered No.7167/18 pertaining to certain piece of land situated in the District of Salisbury namely Stand Number 40715 Harare Township of Stand Number 137554 Salisbury measuring 1028 square meters registered in favour of the first respondent be and is hereby cancelled.
3. Deed of Transfer Registered No. 6830/88 pertaining to Stand Number 13687 Salisbury Township of Stand Number 137554 Salisbury Township registered in the name of the second respondent be and is hereby revived.
4. The fourth respondent is hereby ordered to transfer the property specified in paragraph three above into applicants name in compliance with the provisions of this court's order under HC 9350/12.
5. The first to fourth respondent be and are hereby ordered to pay costs of suite on attorney client scale jointly and severally the one paying the other to be absolved.

The issues that are being raised by the applicant in this matter have already been dealt with and if this court were to give this application a chance it would result in a similar conclusion as was reached by my brother judge MSITHU J. This statement is supported by REYNOLDS J in *Madondo v Fyfe and Ors* 1988 (1) ZLR138 (H) REYNOLDS J where he also dealt with the special plea of *res judicata*. At 140 E and he stated that:

“It is trite that, in order for the special plea of *res judicata* to succeed, it must be established that the judgment given in the prior action concerned the same subject matter; was founded on the same grounds and was either a judgment *in rem*, or was between the same parties or their privies.”

More so author Isaacs in his book, *Beck's Theory and Principles of Pleading in Civil Actions* 5 ed (p 171) provided a clear indication with regard to when a respects a previous judgment may be *res judicata* 171, he states as follows:

“The previous judgment is only *res judicata* as regards matters between the parties which the judgment actually affects and when the plea is raised, it therefore becomes essential to determine whether the present claim is actually affected by the previous judgment.”

The applicants claim is being affected by the previous judgements as what she is currently claiming was dismissed in the Supreme Court on appeal. The applicant failed to prove how the relief being sought is different from the previously determined matter. Litigation should always come to a finality and there is no use in clogging the courts with stale issues that have already been dealt with. For the above reasons I find that the applicant brought back the same matter to this court which was already heard as HC 3715/19 and therefore this matter is *res judicata*. **I therefore order as follows:**

1. Point *in limine* on *res judicata* be and is hereby upheld.
2. Each party to bear its own costs.

Stansilous & Associates, applicant's legal practitioners
Gama and Partners, first respondent's legal practitioners
Gambe Law Group, third respondent's legal practitioners