S. MAKONYERE
versus
ALFRED MUCHINI
and
THE SHERIFF
and
THE MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
GUVAVA J
HARARE, 14 February 2013

FAMILY LAW COURT

Opposed Application

*T .Mpofu,*for the Applicant
P. Nyeperai, for the Respondent

GUVAVA J: This is a matter in which I stayed my decision pending the determination of an appeal in case number CA197/07. The appeal was determined on 5 October 2011 but the respondent in this case promptly noted an appeal with the Supreme Court against the judgment of HLATSHWAYO J. The parties submitted that the determination of the matter again be stayed pending the decision of the Supreme Court. By letter dated 29 October 2012 the parties advised that the appeal before the Supreme Court had been removed from the roll by consent of both parties. Thus, as there is no longer an appeal before the Supreme Court, I can now determine the application before me.

The facts of this matter are mainly common cause and may be summarised as follows: The applicant in this case was the executor dative of the estate of the Late Alvin Roy Adams who passed away on 9 July 2004. (The deceased) The deceased was survived by his wife and three children who are all majors. Upon his death he left an immovable property being a certain piece of land in the District of Victoria, Lot 13 of Glynham, measuring 1,8629 ha also known as 21 Glynham Road, Masvingo which was registered in his name. A year after deceased's death his wife sold the property to the first respondent for the sum of $350 000 000. The agreement of sale was drawn up by Messers Mwonzora and Associates who represented both the deceased's wife and the purchaser. The full purchase price was paid to the legal practitioners. The respondent was thereafter granted vacant possession of the property pending registration and transfer.

The deceased's estate was subsequently registered and the applicant appointed as executor dative of the deceased's estate. He instituted proceedings out of this court seeking to evict the respondent from the property. He submitted to the court that the sale to the respondent was illegal as it was effected without the Masters' consent and the deceased's wife did not have the requisite authority to sell as she was not the executor of the estate. The first respondent opposed the application on the basis that the surviving spouse sold the property as she was in a dire financial position. He submitted that in such circumstances a sale may be carried out without the master's consent and before the registration of the estate in terms of section 41 of the Administration of Estates Act [*Cap 6:01]*. The respondent also filed a counter claim for the transfer of the property into his name.

At the commencement of the proceedings the applicant's counsel applied to substitute the applicant so that it becomes Chantelle Adams who has been appointed as the new executor of the estate. The amendment was admitted by consent. The applicant also raised a point *in limine*. It was argued that the first respondent's defence and counterclaim must be dismissed as it was res judicata as it was based on a point that had been raised before the Magistrate's Court and dismissed.The respondents opposed the point raised and submitted that there was no final judgment as they had appealed against the magistrate's decision and the appeal was still pending. The respondent also submitted that the issue of *res judicata* had been improperly raised by the applicant as it was only raised in the answering affidavit.

The plea of *res judicata* is a special plea and it has to be specifically pleaded by a party relying upon it. In this case the applicant referred to it in his opposing affidavit to applicants counter application in paragraph 10. He subsequently filed an answering affidavit where he elaborated the point. Whilst the applicant raised the point very inelegantly in the opposing affidavit there can be no doubt that it was dealt with fully in the answering affidavit. In my view the issue is clearly before the court and as it raises an issue of the jurisdiction of the court it seems to me that it must be determined.

The principle of the *res judicata* has been expressed in the case of *Wolfenden v Jackson* 1985 (2) ZLR 313 as follows:

> "The origin of the doctrine is to be found in the civil authorities, which laid down two requirements for its successful invocation, namely, that the proceedings relied upon must be between the same parties or their privies, and that the same question,

eademquestio, must arise. (See *Bertram G v Wood* (1893) 10 SC 177 at 180) In Roman-Dutch law the requisites were divided into three. *Voet* 44.2.3 says that there must also be the same cause of action."

The approach has also been adopted in our court. In the case of *Towers v Chitapa* 1996 (2) ZLR 261 GILLESPIE J stated as follows:

"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 BinnelandseInkomste 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 the 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."

In this case there can be no doubt that the parties in the matter determined by the Magistrates Court were the same. The issue before the court is the same in so far as the first respondent based his claim for an interdict on the interpretation of section 41 of the Administration of Estates Act. In the claim for an interdict the respondent was seeking to establish that he had a clear right to the property as it had been sold to him in circumstances provided for by the Administration of Estates Act. In this case the respondent is again seeking to assert his rights through the use of the same provision in order to challenge the applicant's right to evict him. In my view therefore the cause of action is the same and the point *in limine* raised by the applicant should be upheld.

Accordingly the first respondents Notice of opposition and counter–claim are hereby dismissed. In the premises there is no basis to deny the applicant the relief sought.

The applicant had not sought an order of costs in the application. I will thus not make an order for costs.

I therefore make the following order:

1. The first respondent and all those claiming through him vacate Lot No 3 Glynham, Masvingo within seven (7) days of the grant of this order failing which the second respondent be and is hereby ordered to evict the respondent and all those claiming through him.
2. There shall be no order as to costs.

Chadyiwa& Associates, Applicant's legal practitioners

Costa &Madzonga, 1st respondents' legal practitioners