HH 82-2009
HC 10215/08
Ref: Harare Mag Court 8113/09
HC 16425/99
HC 6392/03

STEPHEN PASIPANODYA
(In his capacity as the executor in the estate
of the late Edna Pasipanodya)
versus
TRACY RUWIZHI
(In her capacity as the executrix in the estate
of the late John Ruwizhi.)
and
THE DIRECTOR OF HOUSING MUNICPALITY OF CHITUNGWIZA.

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 30 March 2009 and 22 July 2009.

Mrs *Wood,* for the plaintiff
F Katsande, for the first defendant

BHUNU J: During their life time both parties who are now deceased were engaged in vicious litigation over the occupation and sale of a certain piece of immovable property known as 11192 Rusununguko, Zengeza 4 Chitungwiza.

The late Edna Pasipanodya sued the late John Ruwizhi in the Harare Magistrates' court under case number 8113/086

The issues for determination in that case were:

1. Whether the plaintiff entered into a lease agreement or sale agreement as alleged by the defendant;
2. What were the terms of the agreement;
3. If the agreement was one of sale, whether the plaintiff has refused to receive the balance of the purchase price;
   (ii) what amount has been paid to date;
4. If the agreement was one of lease, what was the quantum of rentals;
   (ii) whether the defendant has failed to pay such rentals; and
5. Whether the plaintiff gave the defendant notice to vacate the premises.

The plaintiff's case was dismissed at the Harare Magistrates court in default of appearance.

Thereafter the plaintiff instituted an *ex p* application against the defendant at Chitungwiza Magistrates court on 18 November 2003 under case number 291/99 seeking a *rule nisi* for the defendant's eviction from the said premises.

At that hearing both parties were represented by counsel. The defendant raised the special plea of *res judicata* arguing that the matter had already been determined by the Magistrates court at Harare.

The hearing magistrate upheld the defendant's special plea and dismissed the plaintiff's application on 10 September 1999 after hearing full argument from both counsel.

Undaunted by this initial setback the plaintiff issued summons against Betty Ruwizhi on 13 November 2003 in her capacity as the dully appointed executrix in the estate of the late Edna Ruwizhi seeking session of rights and title in the disputed property.

The defendant has at this late juncture in the course of trial in this court, applied to amend its plea so as to incorporate the special plea of *res judicata* relying heavily on the case of *Muchakata* v *Nether Burn Mine* 1996 (2) ZLR 153. Counsel for the defendant has submitted that what he is proposing to raise is a point of law which can be raised at any time. I have no problem in accepting that submission as the correct proposition of law.

The application has however been strenuously opposed on the grounds that there are no reasonable prospects of the special plea succeeding at the trial. The applicant complained bitterly that the application is a time wasting gimmick because the defendant continues to occupy the premises without paying any rentals. So the longer it takes to finalise these proceedings the better it suits the defendant to the loss and prejudice of the plaintiff.

I take the view that the decision of the magistrate at Chitungwiza did not in any way alter the Harare Magistrate's decision. In essence, the Chitungwiza magistrate was simply saying that he had no jurisdiction to hear and determine the matter as it had already been determined by his colleague. That in effect leaves us with the Harare magistrate's determination as the single active and binding decision between the parties in the Magistrates court.

The plaintiff's counsel has however convincingly argued that default judgments in the Magistrates court do not give rise to the special plea of *res judicata*. For that proposition of law she pointed to order 33 rr 4 and 5 of the Magistrates Court Rules which provide that:

4. Failure by party to appear

(1) If a plaintiff or applicant does not appear at the time appointed for the trial of the action or the hearing of the application, the action or application may be dismissed with costs.

(2) If a defendant or respondent does not appear a judgment against him, not exceeding the relief claimed, may be given with costs.

5. Effect of withdrawal or dismissal of action or decree of absolution

(1) The withdrawal or dismissal of an action or a decree of absolution from the instance shall not be a defence to any subsequent action.

(2) If a subsequent action is brought for the same or substantially the same cause of action before payment of the costs awarded on such withdrawal, dismissal or decree of absolution, the court may on application, if it thinks fit and if the costs have been taxed and payment thereof has been demanded, order -

Order 33 r 4 as read with r 5 makes it clear that a default judgment in the Magistrates court does not amount to a final judgment giving rise to the special plea of *res judicata* in subsequent proceedings involving the same parties for the same or substantially similar cause of action. Rule 5 is couched in peremptory terms in so far as it provides that, "the withdrawal or dismissal of an action or a decree of absolution from the instance shall not be a defence to any subsequent action.

The rule accords with common law in so far as its provisions are to the effect that the defence of *res judicata* is unavailable where the matter has not been previously determined on the merits. See Hoffman and Zeffert, *South African Law of Evidence* 3rd ed p 344 and a host of other decided cases including *Munemo* v *Maswera* 1987 ZLR (1) 20 (SC) and *Maparura* v *Maparura* 1988 (1) ZLR 234 (HC)

In this case although the Chitungwiza magistrate dismissed the *ex p* application after hearing argument his judgment was not the operative judgment. As I have already pointed out the operative judgment was the Harare magistrate's default judgment. That judgment having

been issued in default of appearance, that is to say, on account of the plaintiff's failure to appear at that hearing, the defendant is specifically prohibited by operation of law from raising the special defence of *res judicata.*

Even if I was to assume that the Chitungwiza judgment was the operative judgment, the special plea of *res judicata* will still not be available to the defendant for the simple reason that the Chitungwiza magistrate did not determine the cause of action on the merits. He simply declined to hear the matter and dismissed the application on the basis that the matter had already been determined by the same court.

That being the case the defendant is striving to amend her plea in such a way as to incorporate an incompetent and prohibited defence at law. That can only amount to a shear waste of time which is prejudicial to the plaintiff as the intended plea is incurably bad at law.

In the result it is ordered that the application for amendment of plea to incorporate the defence of *res judicata* be and is hereby dismissed with costs being costs in the cause.

Byron Venturas & Partners, plaintiff's legal practitioners.
F M Katsande & Partners, 1st defendant's legal practitioners.