TAWIRA MADANIRE (1)
and
CHIUTE FADZAI MADANIRE (2)
versus
NORMAN MUGIYA (1)
and
JOHN TRANOS MATUKUTIRE (2)
and
RATIDZAI MATUKUTIRE (3)
and
REGISTRAR OF DEEDS (4)

HIGH COURT OF ZIMBABWE
DEMBURE J
HARARE: 7 & 12 March 2025

Civil trial

B Hwachi, for the 1st & 2nd plaintiffs
T T G Musarurwa, for the 1st defendant
L Michael for the 2nd defendant
No appearance for the 3rd & 4th defendants

DEMBURE J:

[1] This civil trial matter was heard on 7 March 2025. The first and second defendants raised a point of law that the matter is *res judicata* in that there is a prior extant court order that settled the issue of ownership of the property in question. It was argued that the trial cannot be held to determine the same issue already determined by this court. It was further argued in the alternative that the matter is moot and the court ought to decline to exercise its jurisdiction over the matter. After hearing oral submissions from the parties' legal practitioners, the court reserved its judgment *sine die*.

FACTUAL BACKGROUND

[2] On 3 March 2020, the plaintiffs instituted this action against the defendants claiming the following relief:

> "(i) An Order declaring Plaintiffs to be the lawful owners of an undeveloped stand known as stand 1246 Good Hope Township of Lot 16 of Good Hope, measuring 2035 square metres.
> (ii) For Ejectment of the 1st Defendant together with all those who claim right of occupation through him from stand 1246 Good Hope Township of Lot 16 of Good Hope, measuring 2035 square metres.
> (iii) 1st, 2nd and 3rd Defendants to pay costs of suit on a higher scale, one paying the other to be absolved."

[3] The plaintiffs averred that on 9 June 2018, they entered into a verbal agreement of sale with the second and third defendants in terms of which they purchased an undeveloped piece of land known as stand 1246 Good Hope Township of Lot 16 of Good Hope, measuring 2035 square metres *("the property").* They further alleged that the parties eventually reduced the agreement into writing which was signed on 15 August 2018 after the full purchase price had been paid.

[4] It was also the plaintiffs' case that they paid the purchase price for the property in the sum of US$71,225.00 in terms of the contract. They further averred that they discharged all their contractual obligations by paying the full purchase price through the nominated bank account. They also contended that they could not develop the property after the defendants advised them that they had to obtain a certificate of compliance first. They also pleaded that they were surprised to discover on 8 February 2020 that the first defendant was constructing a building structure on their stand. The first defendant, they further alleged, claimed to have purchased the same stand from the second defendant.

[5] The claim was contested by the first and second defendants. They initially filed an exception which was unsuccessful. In the plea, the first and second defendants subsequently filed, it was contended for the second defendant that he was not aware of any verbal contract but that he only entered into a written contract with the plaintiffs on 15 August 2018. The second defendant further averred that the plaintiffs failed to pay the purchase price resulting in the agreement being cancelled. The plea also stated that the second defendant sold the property to the first defendant after the plaintiffs had failed to pay and the agreement was cancelled.

[6] It was pleaded for the first defendant that he was an innocent purchaser who purchased the property without knowledge of the dispute between the second defendant and the plaintiffs or the prior sale.

[7] On 19 September 2022, a pre-trial conference was held before MUNANGATI-MANONGWA J where the matter was referred to trial on the following issues:

> "(a) Whether or not the plaintiffs performed in terms of the agreement of sale they entered into with the 2nd Defendant over the sale of stand No. 1246 Good Hope Township of Lot 16 of Good Hope.
> (b) Whether or not Plaintiffs breached the same agreement of sale?
> (c) Whether or not the agreement of sale was lawfully cancelled?
> (d) Whether or not Plaintiffs are the legitimate purchasers of stand No. 1246 Good Hope Township of Lot 16 of Good Hope?
> (e) Whether or not the 1st Defendant lawfully acquired stand No. 1246 Good Hope Township of Lot 16 of Good Hope?
> (f) Whether or not 1st Defendant is an innocent and legitimate purchaser of stand No. 1246 Good Hope Township of Lot 16 of Good Hope?"

[8] On 18 November 2022, the matter was set down for a trial before MHURI J. The plaintiffs failed to attend the hearing. A default judgment was granted dismissing the matter with costs for want of prosecution. The plaintiffs sought reinstatement of the matter in Case No. HC 391/23 but the application was later withdrawn.

[9] Meanwhile, the first defendant in this matter lodged his own application in Case No. HC 583/23 against the second and fourth defendants and the Sheriff of the High Court of Zimbabwe seeking an order to compel the transfer of ownership of the property in question into his name. The application was unopposed. A default judgment was entered in favour of the first defendant (the applicant) against the second defendant (the first respondent), the fourth defendant (the second respondent) and The Sheriff of the High Court (the third respondent) on 15 March 2023. The court order was handed down by MUNANGATI-MANONGWA J. The terms of the said order were that:

> "1. The 1st respondent be and is hereby ordered to sign all relevant papers to effect transfer of stand 1246 Lot 16 Good Hope, Harare, measuring 2035 square metres into the applicant's name within 10 days of the date of this order.
> 2. If the 1st respondent fails to comply with paragraph 1 above, the 3rd respondent is ordered to sign all relevant papers to effect transfer of the property into the applicant's name.
> 3. There is no order as to costs."

It is common cause that this order is still extant and that it relates to the same property which is the subject of these proceedings.

[10] After withdrawing the application for reinstatement, the plaintiffs went on to file an application for condonation for the late filing of an application for rescission of default judgment in Case No. HC 5454/23. When this application was heard before MUNANGATI-MANONGWA J the existence of the default judgment entitling the first defendant to obtain transfer of the property was placed before the court. In its judgment, in the said matter HC 5454/23, the court declined to determine the issue of the effect of the extant court order compelling the transfer of the property into the first defendant's name as it reasoned that it was an issue the court could not decide at that stage. The court granted the application for condonation and authorised the plaintiffs, the applicants therein, to file their application for rescission of the default judgment in this case within ten days of the date of the order.

[11] The plaintiffs subsequently filed the said application for rescission of the default judgment granted on 18 November 2022 in Case No. HCH 3449/24. On 5 November 2024, this court granted the application for rescission of the default judgment. The order was granted in default of the defendants. This matter was eventually set down for trial before me.

[12] At the hearing, a point of law was raised by the first and second defendants that the matter is *res judicata*. The first defendant's legal practitioner also raised an alternative point of law that the matter, even if not *res judicata*, is now moot and the court should decline to exercise its jurisdiction over the matter.

ISSUES FOR DETERMINATION

[13] The first issue arising for determination was whether the matter is *res judicata*. The second issue which exercised my mind and which arose from the alternative argument or legal point raised by the first defendant's legal practitioner was whether the matter is moot. The two issues were largely centred on whether this court can determine the question of ownership of the property in the face of an extant order of this court ordering the transfer of the same property into the first defendant's name.

SUBMISSIONS FOR THE FIRST DEFENDANT

[14] Mr *Musarurwa* submitted that this matter is *res judicata*. He argued that there is a default judgment issued by this court in the case of *Norman Mugiya* v *John Tranos Matukutire and Registrar of Deeds and Sheriff of the High Court of Zimbabwe* under Case No. HC 583/23. The judgment was issued on 15 March 2023 by Honourable MUNANGATI-MANONGWA J. It was ordered that the first respondent be and is hereby ordered to sign all relevant papers to effect transfer of stand 1246 Lot 16 Good Hope, Harare, measuring 2035 square metres into the applicant's name within ten days of the date of this order. Paragraph 2 allowed the Sheriff to sign those papers if he failed to do so within ten days. In para 3 there was no order as to costs. The applicant in that matter is the first defendant and the first respondent is the second defendant in this matter. The property in question is the same in this matter. The only striking difference is that the plaintiffs were not parties to those proceedings.

[15] It was further argued that a matter is deemed to be *res judicata* when it has been finalised by the court and involves the same parties and the same subject matter. The purpose of the rule is to provide for finality to litigation. What this order did was to order the second defendant herein to transfer ownership to the first defendant and that decision remains extant.

[16] Mr *Musarurwa* also submitted that from these current proceedings, the plaintiffs have an interest in the subject matter and the scenario is provided for in the rules. Where a default judgment is given in a matter where another party has an interest the rules allow for that party to seek that decision to be rescinded and the party to be joined to the proceedings. This is the procedure the plaintiffs ought to have followed. The court should withhold its jurisdiction to entertain the matter as long as the judgment or court order remains extant.

[17] Counsel also, in respect of the argument that the same point was raised and dismissed before MUNANGATI-MANONGWA J, maintained that there was no judgment on the issue. In any case, the application was merely for condonation where the court simply looks at whether the matter is arguable. The point could be raised at trial. The plaintiffs are not out of the court. They can seek rescission of the default judgment.

[18] Mr *Musarurwa* submitted that in the alternative if the matter is not *res judicata* then it is now moot. The extant court order means that this court cannot determine the issue it is

asked to determine since there is now an extant judgment speaking to the ownership of the same property. He urged the court to decline to exercise its jurisdiction over the matter and struck the matter off the roll.

SUBMISSIONS FOR THE SECOND DEFENDANT

[19] Ms *Michael* adopted the arguments advanced for the first defendant. She added that the plea of *res judicata* is being raised on the premises of a judgment *in rem* issued in Case No. HC 583/23. Counsel referred the court to the case of *Towers* v *Chitapa* 1996 (2) ZLR 261 (H) where it was held that a plea of *res judicata* can be premised on a default judgment. It was submitted that the court held that the fact that a defendant was not a party to the judgment was immaterial if either the judgment was *in rem* or relates solely to the status of the thing in question. Reference was also made to the case of *Madondo* v *Fyfe & Ors* 1988 (1) ZLR 138 (H). It was argued that this was a judgment *in rem*. Counsel further argued that the point must succeed where the judgment *in rem* is extant and has not been set aside. The judgment determined the issue of transfer of ownership. Her argument was that if the order says you are entitled to transfer it simply means that you are the owner and that you should get transfer.

SUBMISSIONS FOR THE FIRST AND SECOND PLAINTIFFS

[20] *Per contra,* Mr *Hwachi* submitted that the same point *in limine* was raised in the application for condonation in Case No 5454/23 and was dismissed. He submitted that the point was dismissed by MUNANGATI-MANONGWA J. It was further argued that this is a delaying tactic and forum shopping. I hasten to state that in the judgment issued by this court in the matter referred to in HC 5454/23 and handed down before MUNANGATI-MANONGWA J on 25 July 2024 the court refrained from deciding the point on the effect of the extant court order compelling transfer of the property to the first defendant. Further, the point of *res judicata* raised related to the Supreme Court matters in *John Tranos Matukutire* v *Makwasha* SC 92/21 and *John Tranos Matukutire* v *Munatsi* HH 440/23. This is what is clear from pp 2-3 of the said judgment handed down on 25 July 2024. It appeared to me that both Mr *Hwachi* and Mr *Musarurwa* were not aware that a full written judgment was actually issued in the said matter.

[21] Mr *Hwachi* further argued that counsel for the first defendant conceded that the parties are not the same. The issues in that order are not the same. He, however, conceded that the said court order exists and is still extant. He argued that the applicant sought a compelling order and the issue of ownership was not determined. It was further argued that the court did not determine the merits as it was a default judgment. Counsel also submitted that the order was obtained by collusion between the first and second defendants. When the court queried on how the present claim can be sustainable in the face of an extant court order Mr *Hwachi* insisted that the ownership dispute remains unresolved. He insisted that the court must proceed with the trial and the evidence will reveal the real dispute before the court. He also argued that the matter is not moot. When the court further enquired on whether the court granting an order compelling transfer could have issued the order if it was not satisfied that the applicant (the first defendant herein) was entitled to such ownership, Mr *Hwachi* insisted that the real ownership dispute had not been resolved. This court has the competence to determine this matter. He also stated that the argument about the judgment *in rem* was rejected by MUNANGATI-MANONGWA J. There was an order for condonation after the court considered that the plaintiffs had good prospects of success on the merits.

1. **WHETHER THE MATTER IS *RES JUDICATA***

THE LAW ON *RES JUDICATA*

[22] The special plea or defence of *res judicata* is premised on the principle that there must be finality to litigation. It is successfully raised where a matter that has already been determined in prior proceedings is brought again. It arises where the court would have finally determined the matter involving the same parties before the court. However, where the judgment was *in rem* it will equally affect non-parties. The court would have exercised its jurisdiction fully and finally and, therefore, become *functus officio* and cannot be asked to re-open the same dispute again. It is one of the essential requirements that there must be a final resolution of the matter during the prior proceedings when one pleads *res judicata*. See *Banda & Ors* v *ZISCO* 1991 (1) ZLR 340 (S); *O'Shea* v *Chiunda* 1999 (1) ZLR 334 (S).

[23] The principles governing the plea of *res judicata* were restated in *Tongogara Rural District Council* v *Ndiripo* SC 19/23 where it was held that:

> "The concept of *res judicata* basically means that "the matter has already been decided" and cannot be redecided. In the case of *Sibanda v Sheriff of the High Court* HB22-22 at p 6, the concept was lucidly defined as follows:
>
> > "The gist of the plea is that the matter or question raised by the other side had been finally adjudicated upon in the proceedings between the parties and that it therefore cannot be raised again."
>
> In *Wolfenden v Jackson* 1985(2) ZLR 313 at 313B-C GUBBAY JA (as he then was) articulated the special plea of *rei judicata* as follows: -
>
> > "the exception *rei judicatae* is based principally upon the public interest that there must be an end to litigation and that authority vested in judicial decisions be given effect to even if erroneous. See *Le Roux en' Ander v Roux* 1967 (1) SA 446(a) at 461H. **It is a form of estoppel and means that where a final and definitive judgement is delivered by a competent court the parties to that judgment or their privies (or in the case of a judgment *in rem*, any other person) are not permitted to dispute its correctness."**
>
> See *Munemo* v *Muswera* 1987 (1) ZLR 20 (SC)
> The effect of successfully raising a plea of *res judicata* was enunciated in *Anjin Investments (Pvt) Ltd* v *The Minister of Mines and Mining Development & Ors* CCZ-6-18 to be that it precludes the court from re-opening a case that has been litigated to finality. **Nonetheless, there are certain requirements which must be met in order for a plea of *res judicata* to prevail. These are essentially that:**
>
> **(1) the two actions must be between the same parties;**
> **(2) the two actions must concern the same subject-matter;**
> **(3) the two actions must be founded upon the same cause of action; and,**
> **(4) there must be a final judgment or determination of the matter in the first action.**
>
> See *Flowerdale Investments (Pvt) Ltd & Anor v Bernard Construction (Pvt) Ltd & Ors* 2009 (1) ZLR 110 (S)." [My emphasis]

[24] Furthermore, in *Zhanje* v *Gambe* HH 381/24 DUBE JP had this to say:

> "All the requirements must be met and are to be considered cumulatively. Where any one requirement is not met, the defence fails. Once all the requirements are met, a plea of *res judicata* will be successful entitling the court to dismiss the subsequent matter…"

APPLICATION OF THE LAW ON *RES JUDICATA* TO THE FACTS

[25] Applying the above principles, the question relating to *res judicata* is resolved as follows:

The two actions must be between the same parties.

As rightly conceded by Mr *Musarurwa*, the parties in the matter HC 583/23 and the present matter are not exactly the same. This is clear by looking at the two records. The plaintiffs were never parties to the suit instituted by the first defendant against the second and fourth defendants. Ms *Michael* argued that since the judgment was *in rem* it would bind everyone including non-parties. It is correct that one of the requirements of *res judicata* is that there must be the same

parties to that judgment or their privies (or in the case of a judgment *in rem*, any other person). See *Wolfenden* v *Jackson supra*. I will consider whether the judgment is one in *rem* when I deal with the requirement that there must be a final judgment or determination on the merits.

The two matters must concern the same subject matter

[26] The proceedings under HC 583/23 and this action concern the same subject matter which is the ownership of a piece of land or immovable property known as stand 1246 Good Hope Township of Lot 16 of Good Hope, measuring 2035 square metres. While the second requirement was met that is not the end of the matter since all the requirements are looked at cumulatively. They all must be satisfied.

The two matters must be founded on the same cause of action

[27] The prior application was filed by the first defendant and the relief sought was an order for the transfer of the property in question into the first defendant's name from the second defendant. The claim was founded on the contract of sale concluded between the first and second defendants. It was based on the fact that the first defendant paid the purchase price in full and was entitled to transfer of the property. The court ordered the transfer of the property into the first defendant's name. In the present suit, while the claim is based on a contract of sale, it concerns the contract between the plaintiffs and the second and third defendants. The plaintiffs averred that they duly performed their contractual obligations by paying the full purchase price in terms of the contract. They sought to be declared the lawful owners of the same property and the ejectment of the first defendant therefrom.

[28] The court was never called upon to consider the plaintiffs' cause in the previous case. It only considered the cause of the first defendant as against the second defendant. The causes of action in the two matters are different. The plaintiffs never brought any case before and their cause was never determined. No doubt the plaintiffs did not bring any action for ownership the second time round. The facts on which their cause of action is based were not considered and determined in the previous proceedings. The plaintiffs had never brought the same matter which had been heard and finalised. It is clear, therefore, that the third requirement was not met.

There must be a final judgment or determination of the matter in the first action

[29] It is common cause that the first judgment issued in Case No. HC 583/23 was a default judgment. It was not a final judgment or a judgment on the merits. It is trite that a default judgment is not a final judgment. There are no reasons required for a default judgment. Since it is not a final and definitive judgment a default judgment is never appealable. See *Zvinavashe* v *Ndlovu* 2006 (2) ZLR 372(S) at 375B. In *The Premier Soccer League* v *Freddy Mangoma & Anor* HH 291/17 at pp 5-6 CHITAKUNYE J (as he then was) had this to say:

> "Generally, a court becomes *functus officio* after it would have given a final and definitive judgement on a matter. A default judgement is not such a judgment as it is not a judgement on the merits. In *Ronald Itai Chawhanda* v *Sizalobuhle Angel Dube and Another* HB 6/07, Ndou J had this to say on the status of a default judgment:
>
> > "The judgement was not given on the merits, so it cannot be final. It is a general principle of our law that once a court has duly pronounced a final judgment, it has itself no authority to correct, alter or supplement. The court becomes *functus officio*, its jurisdiction in the case having been fully and finally exercised its authority over the subject matter ceases.
> > *West Rand Estates Ltd* v *New Zealand Insurance Co. Ltd* 1926 AD 173 at 176; *Firestone SA (Pty) Ltd* v *Gentiruco AG* 1977 (4) SA 298(A) and *Sayprint Textiles (Pvt) Ltd & Another* v *Girdlestone* 1984 (2) SA 572 (ZH).
> > There are, however, a few exceptions to this general rule e.g the rule does not apply to interlocutory orders or corrections made pursuant to the provisions of the Rules of this court."
>
> **As the default judgement was not a final judgement on the merits, it follows that the court *a quo* was not *functus officio*...**" [My emphasis]

[30] The law is settled that a plea of *res judicata* requires that a matter be shown to have been dealt with conclusively, on the merits. The court summarised this requirement in *Toro v Vodge Investments (Pvt) Ltd & Ors* SC 15/17 as follows:

> **"For the plea to be upheld, the matter must have been finally and definitively dealt with in the prior proceedings.** In other words, the judgment raised in the plea as having determined the matter must have put to rest the dispute between the parties, by making a finding in law and/or on fact against one of the parties on the substantive issues before the court or on the competence of the parties to bring or defend the proceedings. The cause of action as between the parties must have been extinguished by the judgment." [My emphasis]

See also *Wolfenden* v *Jackson supra.*

[31] There is no doubt that the prior judgment was a default judgment. As alluded to above, it is not a final and definitive judgment on the subject matter in dispute. Ms *Michael* argued that the judgment was *in rem* and the plea of *res judicata* was applicable even though it

was a default judgment and did not involve the plaintiffs as parties thereto. A judgment *in rem* as opposed to a judgment *in personam* also commonly referred to as *inter partes*, was defined in *Barlow v Regent Estates Co Ltd* [1949] 2 All ER 118 (referred to by Hoffmann & Zeffert; *The South African Law of Evidence*, 4th ed, p 388) as follows:

> "A judgment of a Court of competent jurisdiction determining the status of a person or thing, or the disposition of a thing (as distinct from a particular interest in it of a party to litigation.)
> A judgment *in rem* is a **judgment which is conclusive as against all the world in whatever it settles as to the status of a person or property, or as to the right or title to the property and as to whatever disposition it makes of the property itself, or of the proceeds of its sale. All persons regardless whether or not they are parties to any legal proceedings are bound by a judgment *in rem* and as such are estopped from averring that the status of persons or things, or the right or title to property is other than what the Court has by its judgment declared or made it to be**." [My emphasis]

[32] The law is clear that to have the status of a judgment *in rem* the judgment must be a conclusive or a final judgment. Thus, a judgment *in rem* is a final and binding judgment that concerns a specific property or status, such as ownership of land or the validity of a marriage. Because it affects the entire world, anyone who later claims an interest in that property or status is bound by the judgment, even if they weren't a party to the original case. The judgment *in casu* is not final and definite. In my view, the argument that it can create the basis of estoppel or *res judicata* is misplaced. The Supreme Court decisions cited above fully settle the requisites for a special plea of *res judicata*. This court is bound to follow the principles of law upon which those decisions were based by the rule of *stare decisis*. The requirement that the judgment must be final and definitive was not met. All the requirements of *res judicata* were not satisfied. The matter cannot, therefore, be said to be *res judicata*. The plea of *res judicata* is, accordingly, devoid of any merit and is hereby dismissed.

2. WHETHER THE MATTER IS MOOT

[33] The alternative argument by Mr *Musarurwa* was that the matter was moot given the now extant court order compelling transfer of the property into the first defendant's name. Mr *Musarurwa* argued that the court cannot competently determine the claim in the face of an extant order of this court ordering the transfer of the property in the name of the first defendant. On the other hand, Mr *Hwachi* argued that the dispute about ownership was not decided and this court can competently determine the issue of ownership in this case. He

argued that the matter is not moot but there is a real dispute about ownership of the property which can still be resolved on trial.

THE LAW ON THE DOCTRINE OF MOOTNESS

[34] It is settled law that a court will not decide a case if the dispute has become academic or no longer presents a live controversy arising from changed circumstances or the occurrence of some events outside the record. The doctrine of mootness imposes a limitation on justiciability. The law on mootness was remarkably restated in *Ndewere* v *President of Zimbabwe NO & Ors* SC 57/22 where MAKONI JA stated as follows:

> "[37] A matter is moot if the dispute becomes academic by reason of changed circumstances, thus making the jurisdiction of the court unsustainable.
> [38] The issue was comprehensively dealt with by the Constitutional Court in *Thokozani Khupe & Anor v Parliament of Zimbabwe & Ors* CCZ 20/19 at p 7, where it held as follows:
>
> > "**A court may decline to exercise its jurisdiction over a matter because of the occurrence of events outside the record which terminate the controversy. The position of the law is that if the dispute becomes academic by reason of changed circumstances the Court's jurisdiction ceases and the case becomes moot…** The question of mootness is an important issue that the Court must take into account when faced with a dispute between parties. It is incumbent upon the Court to determine whether an application before it still presents a live dispute as between the parties. The question of mootness of a dispute has featured repeatedly in this and other jurisdictions. The position of the law is that a court hearing a matter will not readily accept an invitation to adjudicate on issues which are of 'such a nature that the decision sought will have no practical effect or result'".
>
> [39] The above principle was followed in *MDC & Ors v Mashavira & Ors* SC 56/20 at p 33 where it was stated:
>
> > "…a court may decline to exercise its jurisdiction over a matter because of the occurrence of events outside the record which terminate the controversy between the parties. … [I]f the dispute becomes academic by reason of changed circumstances, the case becomes moot and the jurisdiction of the court is no longer sustainable"
>
> [40] In *ZIMSEC v Mukomeka and Anor* SC 10/20 at pp 6– 7, Patel JA (as he then was) set out a two–stage approach in determining whether or not an appeal is moot. The learned Judge, cited the Supreme Court of Canada, in *Borowski v Canada (Attorney General)* [1989] 1 SCR 342, where it was held that:
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> > "It is first necessary to determine whether the requisite tangible and concrete dispute has disappeared rendering the issues academic. If so, it is then necessary to decide if the court should exercise its discretion to hear the case."
>
> [41] In respect of the second stage of an inquiry on mootness, Patel JA held at p 7 that:
>
> > "The next step in the analysis is to decide whether or not the court should exercise its discretion to hear the case. In that respect, courts are guided by the rationale and

> policy considerations underlying the doctrine of mootness – *Borowski*'s case, *supra*. The overriding consideration is whether or not it is in the interests of justice to hear a moot case. The factors to be taken into account in that regard were lucidly enunciated by the Constitutional Court of South Africa in *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) at para 11: '… discretion must be exercised according to what the interests of justice require. A prerequisite for the exercise of the discretion is that any order which this Court may make will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity, and the fullness or otherwise of the argument advanced.'" [My emphasis]

APPLICATION OF THE LAW ON MOOTNESS TO THE FACTS

[35] In *casu*, I must take judicial notice of the court order or judgment that this court has since issued concerning the same property. This is also what flows from the provisions of s 24(1) of the Civil Evidence Act [*Chapter 8:01*]. There have been changed circumstances affecting the justiciability of this case or events which have occurred outside the record to render this matter moot. It is common cause that on 15 March 2023 in Case No. HC 583/23, in an application filed by the first defendant (as applicant) against the second defendant (first respondent), fourth defendant (second respondent) and the Sheriff of the High Court (third respondent); (*Norman Mugiya* v *John Tranos Matukutire and 2 Others*), this court issued a default judgment in favour of the first defendant. The said default judgment reads:

> "1. The 1st respondent be and is hereby ordered to sign all relevant papers to effect transfer of stand 1246 Lot 16 Good Hope, Harare, measuring 2035 square metres into the applicant's name within 10 days of the date of this order.
> 2. If the 1st respondent fails to comply with paragraph 1 above, the 3rd respondent is ordered to sign all relevant papers to effect transfer of the property into the applicant's name.
> 3. There is no order as to costs."

[36] This default judgment is still extant. A clear reading of the said court order shows that the property subject to this action must be transferred into the first defendant's name. The plaintiffs in this action seek an order that they be declared the lawful owners of the same property and the ejectment of the first defendant therefrom. The issuance of this order is a development that has terminated the controversy that is before me. It is no longer a live issue for this court to consider this remedy in the face of an extant court order entitling the first defendant to the transfer of ownership of the property.

[37] Mr *Hwachi* referred to the said court order as the 'purported order' and argued that it was obtained through collusion between the first and second defendants. I was quick to remind him that a court order is still valid and has the force of law unless and until it is set aside or reversed. Whether the plaintiffs believe that the order is erroneous does not matter. It is trite that a court order has the force of law and remains valid unless and until it has been reversed or set aside. This position was confirmed in *Econet Wireless (Pvt) Ltd* v *Minister of Public Service, Labour & Social Welfare & Ors* SC 31/16 at p. 6 where it was held that:

> "What this means is that all questioned laws and administrative acts enjoy a presumption of validity until declared otherwise by a competent court. Until the declaration of nullity, they remain lawful and binding, bidding obedience of all subjects of the law.
> The doctrine of obedience of the law until its lawful invalidation was graphically put across by *Lord Radcliffe in Smith* v *East Elloe Rural District Council* [1956] AC 736 at 769 when he observed that:
> "**An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of illegality on its forehead. Unless the necessary procedures are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."** [My emphasis]

[38] The compelling order still stands and remains valid unless set aside or reversed. It has not been set aside or varied. The court order relates to the same property claimed by the plaintiffs. The court in granting an order compelling transfer of the property was satisfied that the first defendant was entitled to such transfer or to obtain ownership of the property. The court, in the face of that judgment, cannot be asked to consider a claim for ownership of the same property by a different person unless the said order is set aside or varied. The plaintiffs cannot seek the eviction of the same person whom the court has directed must get transfer of the property or title. The matter has become moot.

[39] Applying the principles enunciated in *Ndewere* v *President of Zimbabwe NO & Ors supra,* even after finding that the matter is now moot, I must proceed to the second rung of the enquiry which is whether it would be in the interests of justice that I still determine the matter. It is, therefore, settled law that the principle of mootness is not an absolute bar to the justiciability of the matter. The court has the discretion to hear a moot case if it is in the interests of justice to do so. See *MDC & Anor* v *Mashavira & Ors supra*. PATEL JA (as he then was) went on to outline the circumstances when the court may still hear a moot case and where it is in the interests of justice to do so at p 34 where he said:

> "This may arise where the court's determination will have some practical effect, either on the parties concerned or on others, and the nature and extent of such practical effect, or because of the importance or complexity of the issues involved – *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC), at para 11. In short, the court may exercise its discretion to hear a moot issue by reason of its significance, practical or otherwise, and the need for an authoritative determination on that issue in the interests of justice."

[40] In this case, my view is that it is not in the interests of justice for this court to hear this moot matter. There is no practical effect that would be achieved given the extant order of this court already directing that the property should be transferred into the first defendant's name. The court cannot issue an order conflicting with its own existing order. The central issue in this matter concerns ownership of the property in terms of which the plaintiffs seek to be declared the lawful owners. There is nothing to declare once the rights relating to ownership of the same property have already been granted to the first defendant. The issue of who should get ownership or transfer of the property cannot be heard in the presence of the court order in Case No. 583/23 compelling the very transfer of the same property into the first defendant's name. There is nothing significant or of importance to make this court ignore its own extant order. Hearing this matter will achieve nothing except to create chaos and uncertainty in the administration of justice.

[41] As already alluded to above, the court order still stands and can only be set aside through the adoption of the correct procedure to set aside a default judgment. The order cannot be ignored. It strikes at the heart of the plaintiffs' claim for ownership and ejectment of the first defendant from the same property. I do not agree with Mr *Hwachi* that there is a real dispute to determine in the face of this court order. It is also incorrect that the same point that there is an extant court order was resolved in the matter Case No. HC 5454/23. At p 3 of the judgment in HC 5452/23, MUNANGATI-MANONGWA J declined the request to determine the issue as it was not appropriate to do so at that stage.

[42] The plaintiffs are not without a remedy even though this matter has become academic due to the issuance of the extant court order in question. As correctly argued by Mr *Musarurwa*, they are interested parties in the matter where a default judgment was granted affecting their interests in the property. They are at liberty to seek the rescission of the default judgment and to be joined to those proceedings to lay their claim to the property. Their

matter cannot create a live dispute outside the rescission of this default judgment in question. As long as it exists, the court cannot be asked to issue another order contrary to the extant order over the same property which the court has already ordered to be registered or transferred into the first defendant's name. In the premises, there is no basis for this moot matter to be heard.

DISPOSITION

[43] The legal point of mootness is upheld. This court cannot ignore an extant court order impacting the dispute before it. The order compels transfer into the name of the first defendant and the effect of such an order cannot be ignored. The plaintiffs have ignored this order to their own peril. The plaintiffs cannot be heard to say yes, we are aware of the order but proceed and determine our ownership rights to the same property. The issuance of the said default judgment was a changed circumstance which rendered this matter merely academic.

[44] The matter has clearly been overtaken by events. The court declines to exercise its jurisdiction over this matter on the principle of mootness. It is not in the interests of justice to hear this matter. In *Ndewere* v *President of Zimbabwe N.O & Ors supra* at p 22, the court in deciding the effect of mootness on a matter, held as follows:

> "From the above authorities, it is settled that where the court makes a finding that an appeal is moot and declines to exercise its discretion to hear the appeal in the interests of justice, the court declines jurisdiction and dismisses the matter. That is the fate that befalls the present appeal."

I fully associate myself with the remarks made in the above case which are part of binding precedent. In the premises, the matter ought to be dismissed.

[45] As for costs, the general rule is that costs shall follow the cause. However, in this case, there was no prayer for costs made by the first and second defendants' legal practitioners. Given that no one claimed for these costs, I will depart from the general rule and issue no order as to costs. That would be an appropriate order of costs in the circumstances.

[46] In the result, it is ordered as follows:

The matter is dismissed with no order as to costs.

DEMBURE J:……

Nyikadzino, Simango & Associates, plaintiffs' legal practitioners
Mugiya & Muvhami Legal Practitioners, first defendant's legal practitioners
Takaindisa Law Chambers, second defendant's legal practitioners