

**IN THE HIGH COURT OF TANZANIA
(DODOMA SUB REGISTRY)
AT DODOMA**

CIVIL REVIEW NO. 2 OF 2023

*(Arising from ruling of this Court in Pc. Civil Appeal No. 13 of 2022 (HC Dodoma),
Originating from Matrimonial Appeal No. 4 of 2014 in the District Court of
Dodoma and Matrimonial Cause No. 26 of 2013 in Primary Court Makole)*

SAMWEL ODAMA..... APPLICANT

Versus

PRISCA OURE..... RESPONDENT

RULING

Date of last order: 15th February, 2024.

Date of Judgment: 15th March, 2024.

E.E. KAKOLAKI, J.

By way of memorandum of review the application herein has moved the Court to review its own decision in PC. Civil Appeal No. 13 of 2022 (Hon. Mambi, J), dated 17/03/2023, dismissing his appeal. It is his ground of review that, the Court erred in law and fact in deciding that the appeal before it is res judicata whilst is apparent on face of record that, at no point in time the decision in Matrimonial Appeal No. 4 of 2014 of Dodoma D/Court was ever challenged and that is why the High Court granted him extension of time for the appeal against it to be determined.

To understand the gist of applicant's grievances it is imperative to have the chronological story of the disputed matter. Before Makore Primary Court the

above respondent unsuccessfully instituted Matrimonial Cause No. 25 of 2011 for divorce decree as on 17/02/2012 vide its decision the trial court refused to grant the same. Aggrieved the respondent appealed to the District Court of Dodoma, through Matrimonial Appeal No. 13 of 2012 challenging the said decision where she lost the battle as the appeal was dismissed on 16/10/2012 for want of grounds for grant of divorce. Undauntedly, the Respondent returned to Makore Primary Court and successfully filed a fresh petition, this time for divorce and distribution of matrimonial properties vide Matrimonial Cause No. 26 of 2013 as the divorce decree was issued, matrimonial properties divided and an order for procuring children for court's assessment as to their custody issued. Disgruntled the applicant unsuccessful appealed to the District Court in Matrimonial Appeal No. 4 of 2014 as the appeal ended up dismissed while upholding the Primary Court's decisions, the decision which was appealed to this Court in PC Matrimonial Appeal No. 02 of 2015 which was also dismissed by Hon. Kalombola, J for want of merit.

Tirelessly the applicant attempted to challenge this Court's decision in PC Matrimonial Appeal No. 02 of 2015 to the higher court but noted after filing a Notice of Appeal to the Court of Appeal that, the intended impugned

decision wrongly quoted the lower court's decisions appealed against as Matrimonial Cause No. 25 of 2011 and Matrimonial Appeal No. 13 of 2012, the decisions which never issued orders for divorce and division of matrimonial properties, instead of Matrimonial Appeal No. 4 of 2014 and original Matrimonial Cause No. 26 of 2013. As upon such discovery the said appeal would mean academic exercise, the applicant filed Misc. Civil Application No. 36 of 2020 before this Court for extension of time within which to file the Appeal to this Court against the decision of the District Court for Dodoma in Matrimonial Appeal No. 4 of 2014 and original Matrimonial Cause No. 26 of 2013 (Makore Primary Court), the application which was granted by Mambi, J on 24/11/2021. Following that extension of time an appeal was filed to this Court in PC Civil Appeal No. 13 of 2022 against the decision of the District Court of Dodoma in Matrimonial Appeal No. 4 of 2014 and original Makore P/Court Matrimonial Cause No. 26 of 2013. It is in after hearing of that appeal this Court dismissed it on the ground that, it was res-judicata for being decided by Kalombora, J in PC Civil Appeal No. 02 of 2015, the decision which is subjected to review under the present application.

At the hearing both parties were heard viva voce as the applicant hired the service of Mr. Fred Kalonga learned advocate while the respondent enjoying the services of Ms. Neema Ahmed, learned counsel.

In support of the application Mr. Kalonga contended that, the decision of this Court in PC Civil Appeal No. 13 of 2022 was improperly arrived at as the decision before Kalombora J, blessed the decision of District Court of Dodoma in Matrimonial Appeal No. 13 of 2012 arising from Matrimonial Cause No. 25 of 2011 which never decided on the subject matter or dispute between the parties. Therefore, the appeal in PC Civil Appeal No. 13 of 2022 was competent as it was originating from Matrimonial Appeal No. 04 of 2024 before Dodoma District Court and Matrimonial Cause No. 26 of 2013 before Makore Primary Court that decided on parties dispute, the dispute which was never decided by this Court before Kalombora, J. He took the view that, by allowing the same to be heard on merit parties rights will be decided once and conclusively. For that reason he prayed Court to allow this application and mend the decision of this Court dismissing the appeal by setting it aside so as to let parties be heard on the merit of the appeal.

In rebuttal Ms. Ahmed submitted that, the application is incompetent as it has been wrongly preferred. While agreeing with applicant's submission to

the extent that PC Matrimonial Appeal No. 2 of 2015 was decided by Kalombora J, she was quick to note that the learned counsel for the applicant in his submission omitted to mention the fact that, in the course of pursuit of his right of appeal against the above cited decision, the applicant filed Misc. Civil Application No. 12 of 2018 before this Court for extension of time to file an application for certificate on point of law to appeal to the Court of Appeal. It is in the course of hearing of that application before Masaju, J where the respondent raised the issue of clerical error on the citation of the decision appealed against in PC Matrimonial Appeal No. 02 of 2015, that had cited Matrimonial Appeal No. 13 of 2013 and original Civil Case No. 25 of 2011 before Makore Primary Court as decision for which the said appeal was arising from. She however retorted that, the contents of the judgment in PC Matrimonial Appeal No. 02 of 2015 were referring to the decision over divorce decree and division of matrimonial properties contrary to what is submitted by Mr. Kalonga.

Ms. Ahmed went on to argue that, Masaju, J in his ruling in Misc. Civil Application No. 12 of 2018 advised that if there was clerical error in the judgment of this Court by Kalombora J, then the same could be rectified upon application by the party. It is from that piece of advise she submitted

that, the application for review ought to have been made by the applicant against the decision in PC Matrimonial Appeal No. 02 of 2015 decided by Kalombora J, instead of the path taken by him to apply for extension of time within which to appeal against the decision of the District Court in similar matter which was decided on by this Court. She therefore held the view that, the ground raised by the applicant does not legally fit to be a ground for review as it was discussed and held in the **Chandrakant Joshubai Patel Vs. R**, [2004] TLR 218, where an error apparent on face of record was defined to be one that can be seen by one who runs and reads, an obvious and patent mistake and not something which cannot be established by a long drawn process of reasoning on points which they may be conceivably be too opinion. And further viewed that, the line of demarcation between an error simplified and an error on the face of record, may be sometimes thin. According to her an error is apparent on the face of the record when it is obvious and self-evident and does not require an elaborate argument to be established.

Basing on such definition she submitted that, the ground raised by the application does not indicate whether there was an error apparent on the face of record. What is presented she argued, is his dissatisfaction with the

decision of Mambi, J of 17/03/2023, which dissatisfaction could be addressed by way of appeal and not review. She said in the case of **Joshubai** (supra), an Indian case was cited stating that, a review is by no mean an appeal in disguise whereby an erroneous decision is reheard and corrected by lying only on patent error like the situation obtained in the present matter. She therefore prayed the Court to dismiss this application with costs as the applicant has been bring a series of applications before the Court which are unmerited.

In rejoinder Mr. Kakonga referred the Court to the case of **Joshubai** (supra) whereby the case of **Atilio Vs. Mbowe** was cited and stated that, the principle underlying a review application is that the Court would not have acted on certain fact if all the circumstances were known. To his submission therefore, this is a fit case for review as had the learned judge followed the chronological order of the cases referred in the decision before Kalombora, J would have held otherwise. According to him in Misc. Civil Application No. 36 of 2020, this Court was satisfied that, fresh appeal was competent and that is why the applicant was granted with extension of time to appeal. In other words Mambi, J would not have vacated his earlier decision of allowing the applicant to appeal against the decision which he later on held to be res-

judicata. In the circumstances he prayed this Court to grant this application as prayed.

From the rivalry submission of both parties and perusal of all decisions of this Court, District Court of Dodoma and Makore Primary Court as referred by the parties, the only issue which this Court is called to answer is whether the applicant has demonstrated grounds exhibiting that there exist circumstances under which can be moved to exercise its jurisdiction to review its own decision. The law is settled as adumbrated in **National Microfinance Bank Vs. Leila Mringo and Others**, Civil Application No. 316/12 of 2020 (CAT) Tanzlii that, review is by no means an appeal in disguise as under the provisions of section 78(1)(a) of the Civil Procedure Code, [Cap. 33 R.E 2019] (the CPC), it will only be preferred by the party aggrieved with the decree or order of the Court or against the judgment of the same Court when no appeal is allowed or is allowed but has not been preferred on justifiable cause. Apart from the above grounds, other circumstances under which review application can be preferred as described in Order XLII Rule 1(1)(b) of the CPC are, where there is manifest error on the face of record that has resulted miscarriage of justice or where the decision was reached by fraud or where the party was wrongly deprived of

the right to be heard. See also the case of **Chandrakant Joshubhai Patel Vs. R** [2004] TLR 218. In the case of **Transport Equipment Ltd Vs. Dervan P. Valambhia**, Civil Application No. 18 of 1993 (CAT) it was held that, Court will exercise its inherent jurisdiction to review its own decision only where the following circumstances exist:

- (a) Where there is a manifest error on the face of record which resulted in miscarriage of justice, or*
- (b) Where the decision was attained by fraud; or*
- (c) Where a party was wrongly deprived of the opportunity to be heard.*

Having reviewed the law under which review can be preferred, I now turn to consider the above raised issue. From Kalonga's submission this Court (Mambi, J) would not have gone against its decision granting the appellant extension of time to appeal against the decision in Matrimonial Appeal No. No. 04 of 2014, on the question or dispute which later on came to find to the contrary to be res judicata for allegedly being decided on in PC Civil Appeal No. 02 of 2015 (Kalombola, J (as she then was), the decision which was premised on Matrimonial Appeal No. 13 of 2012 and original Matrimonial Cause No. 25 of 2011 and not Matrimonial Appeal No. 04 of 2014 and original Matrimonial Cause No. 26 of 2013 appealed against in PC Civil No. 13 of

2022. Contrary view is aired by Ms. Ahmed in that, this review is an appeal in disguise as there is no any error apparent of face of record warranting the Court exercise its jurisdiction to review its own decision as the decision of the District Court in Matrimonial Appeal No. 4 of 2014 impugned in PC. Civil Appeal No. 13 of 2022 is the same which was considered and decided on merit in PC. Civil Appeal No. 02 of 2013, despite of wrong citation of challenged decision as Matrimonial Appeal No. 13 of 2012 and original Matrimonial Cause No. 25 of 2011. In her views, the appellate court was justified to find the appeal before it in PC. Civil Appeal No. 13 of 2022 was res judicata to PC. Civil Appeal No. 02 of 2015.

It is true and I agree with Ms. Ahmed that, the applicant has failed to demonstrate that there exist circumstances under which this Court can exercise its jurisdiction to grant the application. I arrive to that conclusion for two good reasons. **One**, he has not explained to the Court whether the decision subject of this application is not appealable or is appealable but was prevented from so appealing for any justifiable cause. **Secondly**, apart from the fact that, the two lower court cases wrongly referred in PC. Civil Appeal No. 02 of 2015 as Matrimonial Appeal No. 13 of 2012 and original Matrimonial Cause No. 25 of 2011, were from applicant's own memorandum

of appeal in which this Court followed suit, my reading and understanding of the judgment by Kalombora, J (as she then was), establishes to this Court's satisfaction as rightly found by Mambi, J in PC. Civil Appeal No. 13 of 2022, that the decision therein was substantially premised on the impugned decision in Matrimonial Appeal No. 04 of 2014 and original Matrimonial Cause No. 26 of 2013. I so view as the grounds of appeal therein were substantively challenging the decision of District Court of Dodoma in Matrimonial Appeal No. 04 of 2014 for endorsing the respondent's decision to re-institute a fresh case in the Makore Primary Court on the matter already determined by the same court instead of advising her to appeal against it to this Court as well as its act of blessing division of matrimonial properties, the decision which was never made in Matrimonial Appeal No. 13 of 2012 and original Matrimonial Cause No. 25 of 2011, as Mr. Kalonga would want this Court to believe.

In view of the above unquestionable facts, the granting of extension of time to the applicant by this Court in Misc. Civil Application No. 36 of 2020 to file an appeal to this Court, in my humble view does not negate the obvious fact that, the appealed against decision in PC. Civil No. 13 of 2022 which is Matrimonial Appeal No. 04 of 2014 was subject of appeal in PC. Civil Appeal

No. 02 of 2015 and substantially decided on merit by Kalombola J (as she then was). Had the applicant paid his ears and closely followed this Court's advice rendered by my brother Masaju, J, in Misc. Civil Application No. 12 of 2018 and seek for correction of clerical errors of the judgment in PC. Civil Appeal No. 02 of 2015, he would have pursued his appeal to the Court of Appeal against the same decision instead of preferring fresh appeal on the same matter. Since the applicant ignored such advice I do not see how he can successfully claim that the said clerical errors suffered him miscarriage of justice as he still have avenue pursue to pursue the appeal after correction of said clerical errors.

In the circumstances and for the foregoing, I find the application is devoid of merit and the same is hereby dismissed with costs.

Order accordingly.

Dated at Dodoma this 15th March, 2024.



E. E. KAKOLAKI
JUGDE
15/03/2024.

The Ruling has been delivered at Dodoma today on 15th day of March, 2024, by video conference in the presence Mr. Frank Kalonga, for the applicant,

who is present in person, Ms. Neema Ahmed, for the Respondent who is present in person and Ms. Verardina Matikila, Court clerk.



E. E. KAKOLAKI
JUGDE
15/03/2024.

