

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

PC CIVIL APPEAL No. 26 OF 2019

(From Kinondoni District Court in Civil Application No. 59 of 2018)

SALAH NDOSI.....APPELLANT

Versus

JANE FILBERT SABILA.....RESPONDENT

RULING

13/06/- 22/10/2019

J. A. DE-MELLO, J;

This Ruling, is in respect of the **Preliminary Objections** on **Point of Law** to the effect that;-

- 1. That, this Appeal is incompetent and bad in law as it is Res Judicata to Civil Appeal No. 13 of 2017 filed in the District Court of Kinondoni and determined by J. Mushi RM on 26/09/2017.**
- 2. That, Misc Application No. 59 of 2018 is also incompetent and bad in law as it is Res Judicata to Civil Appeal No. 13 of 2017 filed in the District Court of Kinondoni and determined by Hon J. Mushi RM on 29/09/2017.**

Counsel Samson Russumo, represented the Respondent, whereas; the Appellant enjoyed the legal services of **Counsel Erick Kelvin**.

With the **Leave** of the Court, the Appeal was disposed of by way of written submissions. Both Counsels complied with the schedule fixed.

It is **Counsel's Russumo** contention that, this Appeal is **Res Judicata** to **Civil Appeal No. 13 of 2017** and **Civil Application No. 59 of 2018** filed in the **District Court of Kinondoni**, with no attempt if at all to appeal against both decisions. Further that, being aggrieved by the decision of the **Primary Court of Kinondoni in Civil Case No. 106/2016**, he filed **Civil Appeal No. 13 of 2017** in the **District Court of Kinondoni** which was determined on **26/09/2017** and thereafter, filed in the same Court **Civil Application No. 59 of 2018**, seeking for the call of the record of **Civil Case No. 106/2016** from the **Primary Court**, instead of appealing against the decision in **Civil Appeal 13 of 2017**. In both decisions, the Appellant was challenging the **Judgment and Decree in Civil Case 106/2016**, hence rendering this Appeal Res - Judicata. Referenced to **section 9 of Civil Procedure Code Cap. 33 R.E. 2002** and, the case of **Ram V. Def Malik vs. Lionne Albert Kalo Callow (1958) EA 99** in support of his contention, as he prayed for the dismissal of the Appeal with costs.

In response, **Counsel Kelvin** shared his side of understanding as to what transpired from **Kinondoni Primary Court** up to **District Court**, emphasizing that, this Appeal is competent in law and, not **Res Judicata to Civil Appeal No. 13 of 2017**. He averred that, the Appellant was not aggrieved by the decision made under **Civil Appeal No. 13 of 2017** as she adhered by paying **TShs. 12,500,000/=** by way of installments but rather, aggrieved with the decision of execution proceedings dated **9th March 2018** by **Hon. Mshigwa**. Thus it is from that decision, which forced the Appellant to approach the **District Court** by **Revision in Civil Application No. 59 of 2018**. Further stated that, this Appeal originates from the decision of the

District Court dated 2nd October 2018 in Civil Application No. 59/2019, with nothing to do with **Civil Appeal No. 13 of 2017** for the reason that in **Civil Appeal No. 13 of 2017** the Appellant was appealing against the decision of **Hon. Kihyo dated 24th April 2017** hence not Res Judicata to fall within the circumstances provided under **section 9 of the Civil Procedure Code (supra)**. With regard to the **2nd objection**, **Counsel Kelvin** was of the view that **Civil Application No. 59 of 2018** was competent before the Court and not **Res Judicata** to **Civil Appeal No. 13 of 2017** these being two different matters whereas the issues determined in **Civil Appeal No. 13 of 2018** were not in dispute or determined by the **Civil Application No. 59 of 2018**, while in **Civil Application No. 59 of 2017** the Appellant approached the District Court challenging by way of Revision the decision of the Primary Court dated **9th March 2018 by Hon. Mshigwa**. He therefore prayed for dismissal of the grounds of objection, with costs for want of merits.

In rejoinder, **Counsel Russumo** did not submit much rather than reiterating his earlier submissions in chief.

It is **Res Judicata** that the Respondent suggests and, for determination by this Court. To be able to establish this, a careful perusal has to be ascertained from the decision of the **Trial Primary Court of Kinondoni in Civil Case 106/2016**, the Ruling of the **District Court of Kinondoni** dated 02/10/2018 in **Land Application No. 59 of 2018** and the decision of the **District Court of Kinondoni in Civil Appeal No. 13 of 2017** which Counsel for the Respondent alleges to have been determined in the same Court by the same **Resident Magistrate J. Mushi on 26/09/2017**.


However and you will agree with me that this Appeal is not **Res judicata** to both **Civil Application No. 59 of 2018**, as well as to **Civil Appeal No. 13 of 2017**. Record from the **Trial Primary** and **District Courts**, shows that **Civil Application No. 59 of 2018** was filed by the Appellant to move the District Court to Revise the execution proceedings of **Kinondoni Primary Court** before **Hon. A.P. Mshigwa** as to its its correctness, legality and procedural propriety.

Therefore, the Respondent's allegations that, this Appeal is **Res Judicata** to **Civil Appeal No. 13 of 2017** and, **Civil Application No. 59 of 2018** are misconceived as there is no proof of the said decision in **Civil Appeal No. 13 of 2017** attached by the Respondent to prove the existence of such proceeding.

It is therefore, my settled view that, as far as the said decision in **Civil Appeal No. 13 of 2017** was not attached and, there is no Court record on the same, I declare this Appeal is competent before this Court.

In view of this, I accordingly dismiss the objections raised by the Respondent and, order the Appeal to proceed on its merit.

Costs to follow event, as I order.


J. A. DE-MELLO
JUDGE
22/10/2019