

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

CIVIL APPEAL No. 59 of 2021

*(Originating from matrimonial cause No. 12/2021 in the Resident Magistrate court of
Arusha at Arusha)*

SOPHIA WILLIAM.....APPELLANT

VERSUS

WILLIAM MOLLEL.....RESPONDENT

JUDGMENT

26th July & 09th September 2022

TIGANGA, J.

In this appeal, the appellant appealed against the ruling of the District Court of Arusha in Matrimonial Cause No. 12 of 2021 in which she was the petitioner petitioning for the decree of divorce, division of matrimonial properties, costs and any other relief as the court may deem fit and just to grant. However, before the petition was heard on merits, the respondent successfully raised the preliminary objection on point of law that, the proceedings before that court were res judicata as the same matter had already been heard and determined in Matrimonial Cause No. 128 of 2014



before the Primary Court of Arusha. Following that objection, the trial District Court upheld the preliminary objection and dismissed the case on that base. Following that ruling, the appellant appealed to this Court advancing two grounds of appeal as indicated herein bellow.

1. That, the trial District Court erred in law and in fact for entertaining Res judicata as a point of preliminary objection on point of law hence reached into erroneous ruling in favour of the respondent.
2. That, the trial District Court erred in law and in fact for not scrutinizing properly that, the decision of the trial primary court in matrimonial Civil Case No. 128 of 2014 was set aside by the same District Court in Civil Appeal No. 23/2015 hence reached into a bad ruling and order in favour of the respondent.

He also prayed that,

- i. The ruling and order of the trial District Court to be set aside and this appeal be allowed.
- ii. The Matrimonial Cause No. 12 of 2021 for petition of divorce be heard on merits by another Magistrate.
- iii. That, the Respondent bare costs of this appeal



The appeal was argued orally by the parties. In support of the appeal, the appellant submitted that, he filed the Matrimonial Cause No. 12 of 2021 before the Court of Resident Magistrate following the nullification of the decision of the Primary Court on the ground that the dispute did not begin in the reconciliation board which was supposed to reconcile the parties. He further submitted that, she reported the matter before the marriage reconciliation board but the board failed to reconcile them, hence she filed the matter before the Court of Resident Magistrate in which, it was objected on the ground that, the matter was res judicata.

The appellant further submitted that, the Court of Resident Magistrate misdirected itself by believing that the case had already been heard by the Primary Court of Arusha while in fact that decision was nullified by the District Court on appeal, hence she prayed this court to allow the appeal.

In opposition of the appeal, the respondent submitted that, it is true that the matter is res judicata since it was originally determined before the Primary Court of Arusha vide Matrimonial Cause No. 128 of 2014, the Primary Court dissolved the marriage and divided the properties among the parties. He further submitted that, he appealed against the Primary Court decision vide Civil Appeal No. 23 of 2015 before the District Court in which the said

Court found that the appellant failed to prove her case, hence the court quashed and set aside the decision of Arusha Urban Primary Court.

He further submitted that the appellant did not appeal against the decision in Civil Appeal No. 23 of 2015 instead she filed a fresh Matrimonial Cause No. 12 of 2021 before the District Court of Arusha. He further submitted that, he objected the matter basing on the fact that the matter was res judicata and the objection was sustained. In his view this appeal should also be dismissed in its entirety with costs for it lacks merit.

In rejoinder, the appellant reiterated his submission in chief, and asked the court to base its decision on the findings that Civil Appeal No. 23 of 2015, by Hon. Kisinda RM which dismissed the appeal. That, marked the end of both parties' submissions. Hence this ruling.

Gathering from the ground of appeal and the submissions made by the parties, the issue for determination before this court is whether this appeal is meritorious?

In determining this matter, I find it logical to start with the issue of res judicata. Having passed through the lower courts' records I find that the matter started as Matrimonial Cause No. 128 of 2014 before Arusha Urban

Primary Court in which the appellant was the Petitioner suing the respondent for the dissolution of the marriage and division of matrimonial properties. Before that court, the appellant herein succeeded. However, the respondent was aggrieved by the decision, he filed Civil Appeal No. 23 of 2015 before the District Court of Arusha, in which he challenged the decision of Arusha Urban Primary Court in Matrimonial Cause number 128 of 2014 a result of which the decision of the Primary Court was quashed and set aside.

After some years of silence, the same matter was filed afresh before the District Court of Arusha vide Matrimonial Cause No. 12 of 2021 in which the respondent successfully raised the preliminary objection on the ground that, the case was barred in law by the doctrine of res judicata to Matrimonial Cause No. 128 of 2014 before Arusha Urban Court.

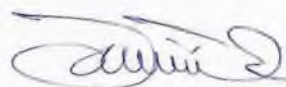
That being the background of the matter before the Primary Court, the District Court and the Court of Resident Magistrate, regarding the dispute at hand, I now turn to the task of deliberating upon the appeal, and submission by the parties in this appeal. In the course of my deliberation, I find for reasons of similarity of the grounds of appeal, one issue can be framed, that is it was correct for the trial court to hold and rule that the case between the parties was resjudicata, to Primary Court Matrimonial Cause No. 128 of 2014

whose proceedings were quashed and set aside in Civil Appeal No 23 of 2015?

As highlighted herein above, there is no dispute that the matter in dispute between the parties in Matrimonial Cause No. 128 of 2014 before Arusha Urban Primary Court is similar to Matrimonial Cause No. 12 of 2021 filed before Resident Magistrate's Court of Arusha. This can be gathered by looking at the nature of the claim in both cases, the parties involved and the grounds from which the claim based. Looking at it wholesomely one may think that section 9 **of the Civil Procedure Code**, [cap 33 R.E 2019] applies. For purposes of clarity the provision provides as follows;

*"No court shall try any suit or issue in which the matter directly and subsequently in issue has been directly and substantially in issue in a former suit between the same Parties or between the same parties or between parties under whom they or any of them claim litigating under the same title in a court of competent jurisdiction to try such subsequent suit or the suit in which such issue has been subsequently **raised and has been heard and finally decided by such court**" [Emphasis added]*

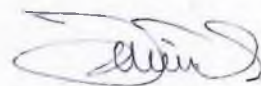
However, though these matter are similar, it is indisputably on record that, the decision in Matrimonial Caues No. 128 of 2014 was appealed



against and the appellate District Court found in its judgment passed and dated on 23rd September 2015 that, the marriage dispute between the parties was dissolved in error and so is the Division of matrimonial assets allegedly acquired during their marriage. Having so found, the District Court went ahead and quashed the judgment and set aside all the orders passed in Matrimonial Cause No. 128 of 2014. While I was asking my self the meaning of the words quash and set aside. I felt it fit to seek the assistance from Oxford Advanced Learner Dictionary, which define it to mean; to "*reject something and to declare it to be no longer valid.*"

The other dictionary consulted on these legal terms is an online English Law Dictionary, Merriam- Webster, accessed on 09th September 2022 vide [https://www.meriam-webster . com](https://www.meriam-webster.com) which define the term to mean "*to make it void.*"

In the case of **Esther Ignas Luambano v. Adriano Gedam Kipalile**, Civil Appeal No. 91 of 2014 (unreported) the Court quoted with approval its decision in **Peniel Lotta v. Gabriel Tamaki and two others**, Civil Appeal No. 61 of 1999 (both unreported) where it was stated as follows:



"The scheme of section 9 therefore contemplates five conditions which when co-existent, will bar a subsequent suit

The conditions are:

(i) The matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit.

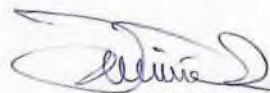
(ii) The former suit must have been between the same parties or privies claiming under them.

(iii) The parties have litigated under the same title in the former suit

(iv) The court which decided the former suit been competent to try the subsequent suit.

(v) The matter in issue must have been heard and finally decided in the former suit."

I find it clear that all ingredients are similar in both cases as provided under section 9 of the Civil Procedure Code. It is clear that the matter was not finally determined in the former suit because on appeal, the matter was quashed and set aside. The order which in effect, declared the the decision to be no longer valid or make it void as stipulated in the above reffered dictionaries. That, consequently returned the parties to their original



positions of husband and wife respectively and have their alleged division of matrimonial asset invalidated, thereby returning to the common bucket owned by both parties as husband and wife. That said, I find that the matter was not res judicata it has never been conclusively determined.

That being the case, the appeal is found to be meritorious and thus allowed. The decision of the Court of Resident Magistrate which ruled the case to be res judicata is quashed and set aside. I consequently the matrimonial cause No. 12 of 2021 to proceed before another Magistrate of competent jurisdiction from where it was before raising and sustaining the preliminary objection.

It is accordingly ordered.

DATED at ARUSHA on the 09th September 2022.



A handwritten signature in blue ink, appearing to read "J.C. Tiganga", is written over a horizontal line.

J.C. TIGANGA

JUDGE.