

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB- REGISTRY OF DAR ES SALAAM**

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 126 OF 2022

SALOME KAHAMBA APPLICANT

VERSUS

SIRIL AUGUSTINE MALLYA RESPONDENT

**(Application for stay of execution of decree of the District Court of
Kinondoni at Kinondoni in Civil Case No. 141 of 2017)**

RULING

31st March and 1st April, 2022

KISANYA, J.:

Salome Kahamba, filed an application for an order of stay of execution of the judgment and decree of the District Court of Kinondoni in Civil Case No. 141 of 2017 pending hearing of an application for extension of time to file application for restoration of appeal against the said judgment and decree which is pending in this Court.

Before the hearing of this application, Mr. Sisty Massawe, learned advocate who appeared for the respondent raised a preliminary objection on the following points of law. *One*, this Court has no jurisdiction to hear and determine the application at hand. *Two*, the application is *res-judicata*. Mr.

Johnston Fulgence, learned counsel who represented the applicant informed the Court that he was ready to address this Court against the objection.

Elaborating on the first limb of objection, Mr. Masawe submitted to the effect that the applicant intended to seek an order of stay of execution of the decree of the District Court of Kinondoni while an appeal against the said decree was dismissed for want of prosecution. Making reference to Order XX1, rules 4 and 9 of the CPC, the learned counsel argued that execution of decree may be stayed by the executing court or a court to which the decree is transferred for execution. In that regard, he submitted that the application was improperly filed in this Court because there is no application for execution that is pending before it.

Submitting on the second limb of objection, Mr. Massawe contended that the application was res-judicata because similar matter was heard by the District Court of Kinondoni in Misc. Civil Application No. 223 of 2021 which dismissed it for want of merit. He submitted further that this Court is barred to determine this application under section 9 of the CPC. He, therefore, prayed that this application be dismissed with costs.

Replying, Mr. Johnston learned Counsel conceded to the second limb of objection and prayed that the suit be struck out without an order as to costs.

As regards the first limb of objection, the learned counsel for the respondent submitted that it was devoid of merits. It was his submission that the provision of Order XXI, Rule 24(1) of the CPC empowers this Court to determine the matter at hand.

Having considered the submissions made by the learned counsel for both parties and examined the chamber summons and affidavit, the main issue is whether points of objection are meritorious.

I prefer to start with the second limb of objection. Both counsels are at one that this application is res-judicata. As rightly submitted by Mr. Massawe, the principle of re-judicata is provided for under section 9 of the CPC. Its ingredients were stated in the case of **Peniel Lotta vs Gabriel Tanaki and 2 Others**, Civil Appeal No. 61 of 1999 (unreported) as follows:

- (1) The matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit;*
- (2) The former suit must have been between the same parties or privies claiming under them;*
- (3) The parties must have litigated under the same title in the former suit;*
- (4) The court which decided the former suit must have been competent to try the suit; and*

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

It is settled position that the foresaid ingredients must be met cumulatively. Thus, the principle of res-judicata cannot apply if one ingredient is not met.

According to Mr. Massawe, the present suit is res-judicata on the account that it was determined by the District Court of Kinondoni in Misc. Civil Application No. 223 of 2021. He produced the copy of judgment and chamber summons to support his contention. The applicant conceded that fact. However, both parties did not demonstrate how the ingredients of res-judicata fit in the case at hand. Having gone through the judgment and chamber summons of the former suit, I have noticed the following:

One, it is not clear whether the matter in the suit at hand was an issue in the former suit. As indicated earlier, the applicant prays for an order of stay of execution of the judgment and decree of the District Court of Kinondoni in Civil Case No. 141 of 2017 pending hearing of an application for extension of time to file application for restoration of appeal against the judgment and decree which is pending in this Court. The chamber summons in the former suit

referred to by Mr. Masawe was vague. It did not indicate whether the stay was pending determination of the said application filed in this Court.

Two, the judgment referred to by Mr. Masawe shows that the former suit was, among others, incompetent before the court and that it was filed out of time. Thus, the court which decided the former suit was not competent to try the matter before it for being time barred and incompetent before it.

In the light of the above, I am of the view that the second limb objection is devoid of merit. The principle of res-judicata does not apply in the circumstances of this case.

On the first limb of objection, it is common ground that there is no appeal against the decree sought to be extended that is pending before this Court. What is pending before the Court is an application for extension of time within which to apply for restoration of the appeal. Therefore, Mr. Massawe is of the view that the Court has no jurisdiction to try the matter. On the other hand, Mr. Johnston contends that Order XXIX, rule 24(1) of the CPC empowers this Court to determine the matter. Indeed, that provision was cited in the Chamber Summons. It stipulates:

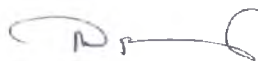
"The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to

enable the judgment debtor to apply to the court by which the decree was passed or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution or for any other order relating to the decree or execution which might have been made by such court of first instance or appellate court if execution had been issued thereby, or if application for execution had been made thereto.(Emphasize supplied).

In my considered view, the above cited provision empowers the court to which the decree is sent for execution to stay the execution, *inter alia*, to enable to judgment debtor to apply for stay of execution in the appellate court. As rightly argued by Mr. Massawe there is no decree which has been brought to this Court for execution. Therefore, this court has no jurisdiction to try the matter in view of the provision cited in the chamber summons. It follows that, the application is incompetent before the Court

In the event, the application is struck out. Considering the circumstances of the case, I make no order as to costs.

DATED at DAR ES SALAAM this 1st day of April, 2022.



S.E. Kisanya
JUDGE

