THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

DODOMA DISTRCT REGISTRY

AT DODOMA

PC. CIVIL APPEAL NO. 13 OF 2022

(Originating from Matrimonial Appeal No. 4 of 2014 of Dodoma District Court at Dodoma and Matrimonial Cause No. 26 of 2013 of Makole Primary Court)

BETWEEN

SAMWEL ODAMA.....APPELLANT

AND

PRISCA OURE.....RESPONDENT

RULING

Date of Ruling: 17/03/2023

Mambi, J.

This ruling emanates from the preliminary objections raised by the respondent. Earlier on, the appellant in this case appealed against the decision of the District Court of Dodoma in Matrimonial Appeal No. 4 of 2014 which originated from Makole Primary Court in Matrimonial Cause No. 26 of 2013. It is upon this appeal, the respondent raised two points of preliminary objections to wit;

1. That, the appeal is bad for being barred by the principle of res-judicata
2. That the appeal is improper before this Honourable Court for being brought under the wrong legal title contrary to Rule 37(1) of the Law of Marriage (Matrimonial Proceedings) Rules.

This matter was disposed by way of written submissions whereby the respondent was represented by Neema Ahmed and the appellant by Fred Kalonga both learned advocates.

Submitting in support of the first point of preliminary objection, Ms. Neema gave a brief history in relation to the marriage wrangles of the parties in this case. The learned counsel stated that in 2011 the respondent petitioned for divorce against the appellant at Makole Primary Suit vide **Matrimonial Cause No. 25/2011** where the petition was dismissed on ground that their marriage was still reparable. Ms. Neema added that the respondent being dissatisfied with the decision of the trial Court she appealed to the Dodoma District Court vide **Matrimonial Appeal No. 13/2012**; where the District Court in its decision upheld the decision of the trial Court.

The learned counsel went on narrating that in 2013 the respondent once again petitioned for divorce against the appellant at Makole Primary Court vide **Matrimonial Cause No. 26/2013**. She arguged that at that time round the respondent succeeded whereby the trial Court granted a divorce and an ordered for equal distribution of matrimonial properties. Ms. Neeama stated that it was upon this decision the appellant appealed against at the Dodoma District Court vide **Matrimonial Appeal No. 04/2014** whereby the District Court upheld the decision of the trial Court.

The appellant dissatisfied once more, appealed at this Court vide (**PC) Matrimonial Appeal No. 02/2015** to the High Court of Dodoma whereby her ladyship Kalombola, J dismissed the appeal by upholding the decisions of the two lower courts.

The learned counsel further submitted that the appellant having lost the appeal at this Court he lodged a notice of appeal to the Court of Appeal

on 22/03/2016 and relaxed but on 26/01/2018 he filed an application for extension of time within which to apply for a certificate on point of law vide **Misc. Civil Application No. 12/2018**. The same was dismissed by this Court under hon Masaju, J.

Having briefly narrated, Ms. Neema submitted that the present appeal before this Court was already decided by this Court by Hon. Kalombola, J in (PC) Matrimonial Appeal No. 02/2015 thus making this appeal res-judicata. Furthermore, Ms. Neema submitted that the argument by the appellant counsel on clerical errors on the numbers of original cases in Matrimonial Appeal No. 2/2015 during the hearing of Misc. Civil Application No. 12/2018 can be rectified by way of applying for review before this Court and not by way of an appeal.

With regard to the second point of preliminary objection Ms. Neema contended briefly that Rule 37(1) of the Law of Marriage (Matrimonial Proceedings) Rules makes mandatory for an appeal before this Court to be commenced by way of memorandum of appeal and not by way of petition of appeal. It was her view that this appeal was incompetent before this Court and prayed for this Court to dismiss it. The learned counsel referred this Court to the decision of this Court in **T.G Word International Ltd vs Carrier Options Africa (Tz) Ltd,** Civil Appeal No. 23/2022.

Responding against the first point of preliminary objection, Mr. Kalonga for the appellant submitted that this appeal is not res-judicata for it seeks to challenge the decision in Matrimonial Appeal No. 04/2014 at Dodoma District Court which arose from Matrimonial Cause No. 26/2013 at Makole Primary Court and not to challenge the decision in Matrimonial

Appeal No. 13/2013 at Dodoma District Court which originated from Civil Case No. 25/2011 at Makole Primary Court.

The learned counsel contended that it is in Matrimonial Cause No 26/2013 where the trial Primary Court granted the respondent a divorce and an order for division of matrimonial properties and the appellant appealed at Dodoma District Court vide Matrimonial Appeal No. 04/2014 where the District Court upheld the trial Primary Court decision. He argued that the appellant being aggrieved by the decision of the District Court hence this appeal.

Mr. Kalonga went on arguing that the contention by the counsel for the respondent that the appeal in this Court vide (PC) Matrimonial Appeal No. 02/2015 before Hon. Kalombola, J. resolved the matter is incorrect as the said judgment dismissed the appeal by upholding the decision of Dodoma District Court in Matrimonial Appeal No. 13/2012 which originated from Matrimonial Case No. 25/2011 at Makole Primary Court. The counsel added that these two decisions, the lower courts never granted divorce nor divided the matrimonial properties.

Mr. Kalonga contended that the grievances of the appellant are on the decision of Dodoma District Court in Matrimonial Appeal No. 4/2014. He argued that the appellant appealed before Hon. H. H. Kalombola in Matrimonial Appeal No. 2/2015 where instead of citing that the appeal was arising from Matrimonial Appeal No. 4/2014 at Dodoma District Court originating Matrimonial Cause No. 26/2013 at Makole Primary Court; the judge wrongly cited that the appeal was arising from Matrimonial Appeal No. 13/2013 originating from Matrimonial Cause No. 25/2011 at Makole Primary Court.

Mr. Kalonga further contended that the only remedy available to the appellant is to appeal against the right decisions and not review.

With regard to the second point of preliminary objection, Mr. Kalonga submitted that since it is by petition or memorandum which are used to file appeals, it was his view that, mistakes concerning naming the same amounts to technical or drafting errors which do not go to the root of the matter and the respondent would not be prejudiced by the same.

I have had a benefit of going through the submission in support and against the preliminary objections and the records before me. From the parties' submissions it appears that the counsels from both parties concedes that there was an appeal at this Court against the decision of the Dodoma District Court in Matrimonial Appeal No. 04/2014 which originated from Makole Primary Court in Matrimonial Cause No. 26/2013. Furthermore, both counsels are in agreement that there has never been an appeal before this Court against the decision of the Dodoma District Court in Matrimonial Appeal No. 13/2013 which originated from Matrimonial Case No. 25/2011.

However, it is the appellant's counsel, Mr. Kalonga who states that despite the fact that there was an appeal against the decision of the District Court in Matrimonial Cause No. 04/2014, there was an error by this Court in citing the original cases.

Looking into the records, it is clear that there was an appeal before this Court, that is Matrimonial Appeal No. 02/2015. In the judgment of this Court (by Hon. H. H. Kalombola, J), the court cited that the said appeal was arising from the decision of the District Court of Dodoma in Matrimonial Appeal No. 13/2013 and original Civil Case No. 25/2011 of Makole Primary Court.

The question is, if the appellant in that appeal (Matrimonial Appeal No. 2/2015) who is also the appellant in this (Pc Civil Appeal No. 13/2022) appeal appealed against the decision of the Dodoma District Court in Matrimonial Appeal No. 04/2014 which arose from Makole Primary Court in Matrimonial Case No. 26/2013 but the presiding Judge made an error in citing the originating cases what are the probable recourse for the appellant?.

It is my strongest view that, the recourse available to the appellant was to file review in this court for the same court to review its decision in order to rectify the error(s) on the face of the record if any and not to file another appeal (as he has done). In my, view filing an appeal on the same matter with the same parties in the same court the appellant is caught by the principle of res-judicata. Before I make the final conclusion as to whether the matter was *res judicata,* let me first briefly highlight the concept on the doctrine of res judicata as found in our law, case studies and other writings and books. Generally, the doctrine of *res judicata* which has its genesis from the common law is founded under the law and some case laws. There are also various scholars who have clearly addressed the object and rationale for the doctrine and how does it apply. Indeed the doctrine of *res judicata* is the legal principle that is based on three maxims namely:

a) *Nemo debet bis vexari pro una et eadem causa* (**no man should be vexed twice for the same cause**);
b) *Interest reipublicae ut sit finis litium* (it is in the interest of the state that **there should be an end to a litigation**); and
c) *Res judicata pro veritate occipitur* (**a judicial decision must be accepted as correct**). *See Takwani C.K on "Civil*

Procedure with Limitation Act, 7th Edition, 2014 pages 29-167, New Delhi India.

The principle and the doctrine of res judicata can also be founded on the whole concepts of ***justice, equity and good conscience*** which require that a party who has once succeeded on an issue should not be harassed by multiplicity of proceedings involving the same issue. Reference can be made to the persuasive authority in ***Lal Chand v. Radha Krishan, (1977)2 SCC 88: AIR 1977 SC 789.*** Indeed the principle embodies the rule of conclusiveness and operates as a bar to try the same issue once again by avoiding vexatious litigation.

Indeed, the first limb of this legal doctrine is mainly based on the legal principle that *judgment of a court of concurrent jurisdiction, directly upon the point, is, as plea, a bar, or as evidence conclusive, between the same parties, upon the same matter, directly in question in another court.* The second limb is to the effect that the *judgment of a court of exclusive jurisdiction, directly on the point is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose.* This was also underscored in the persuasive decision of the foreign court in ***Gulam Abbas v. State of U.P., (1982) 1 SCC 71 at pp. 90-93: AIR 1981 SC 2198 at pp. 2212-13).*** In our country the doctrine of res judicata is enshrined under section 9 of the Civil Procedure Code, Cap 33 [R.E.2019]. Section 9 of the Civil Procedure Code provides that:

> *"No court **shall** try any suit or issue in which **the matter directly and substantially** in issue has been directly and substantially in issue in a former suit between **the same parties** or between parties under whom they or any of them claim litigating **under the***

same title *in* ***a court competent*** *to try such subsequent suit or the suit in which such issue has been subsequently raised and has* ***been heard*** *and* ***finall****y decided by such court".*

Reading between the lines on the above provisions, it is clear that the section embodies the doctrine of *res judicata* or *the rule of conclusiveness of a judgment, as to the points decided either of fact, or of law, or of fact and law, in every subsequent suit between the same parties*. The plain meaning of the law is that once a matter is finally decided by a competent court or tribunal, no party can be permitted to reopen it in a subsequent litigation and in the absence of such a rule there will be no end to litigation. See also a persuasive decision of the court in Takwani *C.K on "Civil Procedure with Limitation Act, 7th Edition, 2014*. See also ***Satyadhyan Gosal V. Deorijin Debi, AIR 1960 sc 941: (1960) 3 scr 590***.

Now, coming back to our issue at hand, is the matter at hand res-judicata? I have considerably gone through the records from lower courts and this court and found that the matter was conclusively determined by this court and the appellant was required to appeal against the decision of this court to the court of appeal or seek for review in this court instead of instituting the fresh case. It should be noted that, this Court under Hon. Kalombora, J in its decision in Matrimonial Appeal No. 02/2015 upheld the decisions of the lower courts which granted divorce to the parties and finally ordered for distribution of their matrimonial properties.

Now, since this court had already decided the matter conclusively, the appellant was bared by section 9 of the Civil Procedure Code, Cap 33 [R.E.2019] to re-open the same case unless by way of an appeal to the Court of Appeal. In my view, this is against the rule of conclusiveness

which operates as a bar to try the same issue on the same subject matter and same parties once again by avoiding vexatious litigation. In this regard, this court is also bared to try this appeal in which **the matter directly and substantially** in issue had been directly and substantially in issue in a former appeal by this court between **the same parties** litigating **under the same title** to try such subsequent suit or the suit in which such issue has been subsequently raised and has **been heard** and **finall**y decided by this court. Likewise, reading between the lines it is clear, from the above provision (section 9 CPC, Cap 33) the word **"shall"** under the provision implies mandatory and not option and that is the legal position under the Interpretation of Laws Act, Cap 1 [R.E.2019].

It is trite law that when a matter, whether on a question of fact or a question of law, has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. The Court in ***MARATO s/o MATIKU v WANKYO SANAWA 1987 TLR 150 (HC)*** had once observed and held that:

> *"Where grounds relied in the later petition are the same as those dismissed previously, then the petition is res judicata"*

It is also well established principle that the doctrine of *res-judicata* is conceived in the large public interest which requires that all litigation must, sooner than later. I am also aware that for res judicata to apply not only must it be shown that the matter directly and substantially in issue in the contemplated suit is the same as that involved in a former suit between the same parties but also it must be shown that the matter was finally heard and determined by a competent court. See ***GEORGE***

SHAMBWE v TANZANIA ITALIAN PETROLEUM CO. LTD., 1995, TLR 20 (HC). There is no doubt that and I hold so that the principle of *res judicata* is based on the need of giving a finality to judicial decisions. This implies that **once a *res* is *judicata*,** it shall not be adjudged again. This means that the finality principle applies as between past litigation and future litigation. Indeed section 9 of our Civil Procedure Code contains in statutory form, with illuminating explanations very salutary principle of public policy.

I have no reason to depart from the rule of conclusiveness of a judgment, as to the points decided either of fact, or of law, or of fact and law, in every *subsequent suit between the same parties* rather than supporting this rule of justice to avoid endless litigations. It is trite law that judgment of a court or tribunal of exclusive jurisdiction like this court, directly on the point is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose. See ***Lal Chand v. Radha Krishan, (1977)2 SCC 88: AIR 1977 SC 789.*** I am of the settled mind that no man should be vexed twice for the same cause and it is in the interest of the justice and public policy that there should be an end to a litigation. See ***GEORGE SHAMBWE V. TANZANIA ITALIAN PETROLEUM CO. LTD [1995] TLR*** 20.

There is no doubt that as I alluded earlier, when a matter, whether on a question of fact or a question of law, has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. In other words the doctrine of res judicata is operative in this case. This

means as I observed earlier, the appellant have wrongly moved this court for appealing against the matter in this court which is res-judicata contrary to section 9 of the Civil Procedure Code, Cap 33 [R.E.2019] and I hold so. Conversely, the appeal before this court has also been wrongly filed. Addressing the principle of res judicata, the Court of Appeal in ***ESSSO TANZANIA LIMITED v DEUSDEDIT RWEBANDIZA KAIJAGE 1990 TLR 102 (CA)*** observed that:

> *"The question of jurisdiction* ***had already been finally decided by the Court of Appeal*** *during a previous appeal on the point,* ***the learned High Court judge could not reopen the matter by making it one of the issues to be decided by him. The question was and is res judicata"***

Having found that this appeal is res-judicata, the question which follow is what should this court do next? Reference can also be made to the decision of the court of Appeal of Tanzania in ***the Director of Public Prosecutions v. ACP Abdalla Zombe and8 others*** Criminal Appeal No. 254 of 2009,

CAT (unreported) where the court held that:

> *"this Court always first makes a definite finding on whether or not the matter before it for determination is competently before it. This is simply because this Court and all courts have no jurisdiction, be it statutory or inherent, to entertain and determine any incompetent proceedings."*

Reference can also be made to the decision of the court in ***Joseph Ntongwisangue another V. Principal Secretary Ministry of finance & another Civil Reference No.10 of 2005*** (unreported) where it was held that:

> *"In situation where the application/appeal proceeds to a hearing on merit and in such hearing the application/appeal is found to be*

not only incompetent but also lacking in merit, it must be dismissed. The rationale is simple. Experience shows that the litigations if not controlled by the court, may unnecessarily take a very long period and deny a party in the litigation enjoyment of rights granted by the court.

In light of the foregoing discussion this Court finds that the first point of preliminary objection has merit and is hereby sustained. I am of the settled mind that the purported appeal is incompetent and cannot stand as a valid appeal. In the circumstance and from the reasons stated above I find there is no proper appeal before this court. In the premises the purported appeal is accordingly dismissed.

No orders as to the costs.

A. J. MAMBI

JUDGE

17/03/2023

Ruling delivered in Chambers this 17th day of March, 2023 in presence of both parties

A. J. MAMBI

JUDGE

17/03/2023

Right of appeal explained.

A. J. MAMBI

JUDGE

17/03/2023