

**IN THE HIGH COURT OF TANZANIA
TEMEKE SUB-REGISTRY
(ONE STOP JUDICIAL CENTRE)
AT TEMEKE
PC CIVIL APPEAL NO. 21 OF 2022**

(Originating from Civil Revision No. 29 of 2020 of Temeke District Court and Matrimonial Cause No. 88 of 2009 of Temeke Primary Court).

TOPQUEEN MWASOMOLA APPELLANT

VERSUS

NOVATUS ERNEST MPANDA..... RESPONDENT

EX PARTE JUDGMENT

Date of last order: 27.06.2023

Date of Judgment: 16.08.2023

OMARI, J.

The Appellant, Topqueen Mwasomola knocked the doors of this court preferring an Appeal because she is dissatisfied with the decision in Civil Revision No. 29 of 2022 rendered on 24 March, 2022 by the Temeke District Court. She has three grounds of appeal to wit:

1. That the trial magistrate clearly and grossly erred in law and facts for failing to exercise his revisionary powers vested in him when he upheld the decision of the Temeke Primary Court which entertained the



objection proceedings to the finality knowingly the objection is *res subjudice* during that time.

2. That the trial magistrate clearly and totally misdirected in his ruling by revising the decision of the trial court on issue of execution process not being determined to become *res judicata* while the order sought to be revised by the Appellant was on issue of objection proceedings which was *res judicata* and issue estoppel.
3. That the trial magistrate erred in law and facts in upholding the decision of Temeke Primary Court which excluded the land Plot No. 191 Block C in Hai District, Kilimanjaro Region from being the matrimonial asset which was subjected for division knowingly that the issue of ownership have been determined in favour of Appellant as per documentary evidence submitted therein.

On the basis of the three grounds the Appellant seeks this court to allow the appeal with costs, that she be allowed to proceed with execution over the disputed land after being declared matrimonial property and any other order or relief that this court may deem fit and just to grant. When the matter was called for hearing the Respondent did not appear. On 07 March, the Appellant told this court that her attempts to serve the Respondent were



unyielding and prayed for substituted service through a newspaper. At the next date set for orders on 29 May, 2023 the Respondent was still missing in action. After informing the court that she had published the notice of hearing in a newspaper and sending the same to the Respondent through the *Mtaa* Chairperson the Appellant prayed to be allowed to disposed the Appeal by way of written submission and for this court to determine the Appeal *ex parte*. The prayer was granted and the matter was disposed by way of written submission.

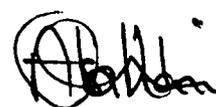
In her submissions the Appellant narrated the historical background of this matter in what she referred to as the sequence of events leading to this Appeal. I shall go back to the historical background at a later stage of this judgment.

Submitting on the first ground of appeal the Appellant invited this court to consider her Affidavit submitted in support of her application for revision specifically paragraph 5 and the decision of the trial court and that of the district court. The Appellant contended that the trial court had failed to exercise its duty under Rule 70 (1) of the Civil Procedure (Primary Courts) Rules GN. No. 310 of 1964 (the Rules) by not properly investigating the parties interests over the property in dispute. She further argued that the



issue of ownership of the disputed land which is Plot No. 191 Block C Bomang'ombe in Hai District in Kilimanjaro was not determined, yet the district court only dealt with the issue of *res judicata* leaving aside the apparent illegalities. The Appellant made reference to the Court of Appeal case of **Adelina Koku Anifa and Another v. Byarugaba Alex**, Civil Appeal No. 46 of 2019 where the Court of Appeal held it is not proper to close eyes on illegalities as a court has the duty to ensure proper application of the law by subordinate courts. The Appellant then went on to submit that this court as the second appellate court will undoubtedly address the anomalies that were she has pointed out *inter alia* not taking judicial notice of the earlier and on-going proceedings related to the matters contrary to **B.9532 CPL. Edward Malima v. Republic**, Criminal Appeal No. 15 of 1989. The Appellant ended her submission on the first ground stating that she was expecting the court to invoke its powers under Rule 12 of the Rules being that it did not she is praying for this court to find the ground meritorious.

On the second ground of Appeal the Appellant began her submission by pointing out that the first appellate court misapprehended her application for revision on the point of principle of *res judicata* thus, delivering a ruling that

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is not certain as the Appellant was seeking a revision of the objection proceedings involving two principles of *res judicata* and *res subjudice* but the decision centred on *res judicata* leaving *res subjudice* untouched. She further argued that the objection proceedings were premature since the ownership dispute was yet to be determined and there were pending proceedings in the District Land and Housing Tribunal of Moshi District vide Land Application No. 136 of 2019. The Appellant then went on to explain the basis of her complaints as regards to *res judicata* and issue estoppel as regards the objection proceedings. She concluded her submission on this ground by submitting that the district court's determination of only one issue of *res judicata* and leaving that of *res subjudice* was a violation of her right to be heard as per Article 13(6) of the Constitution of the United Republic of Tanzania, 1977 and prayed that the ground to be meritorious.

On the third ground of Appeal the Appellant prayed for this court to adopt all facts submitted in the first ground of appeal and in addition submitted that this point emanates from the facts in paragraph 5 in the revision where she prayed for the district court to invoke its powers stipulated under Rule 4 (c) of the Rules of Evidence (Primary Courts) Regulations GN. No. 22 of 1964 and presume proceedings before other courts as correct and valid decisions



and pay heed to the decision of Land Application No. 136 of 2019. The Appellant prayed for this court to revisit the said decision as the district court failed to do so. She then concluded that all the three grounds of appeal are meritorious so this Appeal should be allowed with costs and the decisions of the lower courts be set aside and declared null and void so that the excluded property on Plot No. 191 Block C Bomang'ombe in Hai District is subjected to distribution of matrimonial property.

Having considered the submission by the Appellant the only issue for my determination is whether this Appeal is meritorious or otherwise and what would be the way forward.

First and foremost, I need to put clarity on the fact that what was before the District Court of Temeke in Civil Revision No. 29 of 2020 was an application for revision and not an appeal as the Appellant seems to be referring to it with averments like the first appellate court. Having pointed this out it is pertinent to go back to the record to see what orders the Appellant prayed for in the district court. In her Chamber Summons the Appellant prayed to be heard for orders *inter alia* that:

'That, this Honourable court maybe pleased to grant an order for calling and examine the record of



Matrimonial Cause No.88/2009 originating from Temeke Primary Court on objection proceedings raised therein for the purpose of satisfying itself as to the correctness, legality or propriety of the decision pronounced on 08/09/2020 by Hon.H.N.Maira-RM and thereafter revise the unjust decision by quashing it.'

This is what the chamber summons that moved the district court under section 22 (1) of the Magistrates' Courts Act Cap 11 RE 2019. Furthermore, in the infamous paragraph 5 of the Appellant's Affidavit in support of her Application in the district court she deponed as follows:

'That for the third time, the Respondent wrongly raised another objection proceedings at Temeke Primary Court claiming the very house in dispute to be excluded from being one of the matrimonial properties knowingly his objection has been over ruled by the appellate court as per copies of judgments which attached herewith at paragraph 4 of the affidavit and the same there is pending Land Application No. 136 /2019 over the ownership of the disputed house at Moshi District Land and Housing Tribunal as per copy of first page of Land Applicatiin which annex and marked as "Annex TM-02" to form part of this Application.'



I find it necessary to also go on to reproduce the contents of paragraph 6 of the Appellant's Affidavit that was in support of her Application in the District Court wherein she deponed:

'That, irregularly and illegally, the trial magistrate Hon. H.N.Maira-RM of Temeke Primary Court entertained the objection proceedings raised by the Respondent during the said execution stage knowingly that the said objection was offending the principle of res – judicata to make the said objection an incurably defective in administration of justice as per appended copy of the ruling which marked as "Annex TM-2" to form part of this application.'

Having gone through the Application and established what the Appellant sought the district court order through her chamber summons and the supporting Affidavit I am of the considered view it is also prudent to elucidate on the principle of *res judicata*. The principle of *res judicata* is provided for in Rule 11 of the Rules as:

'Where in any proceeding before a court, the court is satisfied that the issue between the parties has already been decided by the court or by any other court of competent jurisdiction in another proceeding between the same parties, the court shall not try the issue but try other issues, if any, involved in the proceeding.'

The same is also provided for under section 9 of the Civil Procedure Code, Cap 33 RE 2019 (the CPC) as follows:

'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 finally decided by such court.'

The said principle was further expounded by this court in the case of **Tanzania International Container Terminal Services Ltd v. John Lemomo and Others** Misc. Civil Application No. 430 of 2019 where it stated:

'It is not contested that Section 9 of the Civil Procedure Code, Cap (33 R.E 2019) prohibits the court to try: First, any suit or issue in which the matter has been direct directly and substantially in issue in a former suit. Second, such suit is between the same parties. Third, the parties under whom they or any of them claim litigating under the same title. Four, the suit is in a court competent to try such subsequent suit or: five, the suit in which issue has been subsequently raised and has been heard and finally decided by such court.'



Based on the above provisions and the case cited, there are five conditions that must be established for the principle of *res judicata* to apply, these are; that the subject matter must have been between the same parties or their successors in title and that the subject matter in dispute must be directly and substantially at issue in all proceedings. The other conditions are that, the litigants in the subsequent suit must have been heard under the same titles in the previous suit, that the suit must have been heard to the end and decided and that the previous suit must have been decided and determined by a court of competent jurisdiction. This is what the learned district magistrate had to determine.

In my considered view through its decision in the Ruling dated 24 March, 2022 the district court combed through the record, the parties Affidavits and ensuing submissions then made quite an articulate summary of what transpired in seeking to determine the application before him. The learned magistrate then admitted that he has been called to look at the record of Matrimonial Cause No. 88 of 2009 for the purpose of satisfying himself on the correctness, legality or propriety of the decision pronounced on 08 September, 2020 by Hon. H.N. Maira -RM in relation to the raised objection proceedings; where the Applicant contents that the same is *res judicata*. The

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learned magistrate went on to caution himself as quoted on page 9 of the typed Ruling he stated as follows:

'My duty is therefore, per the prayers made in the Chamber Summons and the averments made in the supporting affidavit, is not to determine the ownership of Plot No 191 Block C in Hai district Kilimanjaro Region; but only if the impugned decision by Hon. Maira-RM, dated 08/09/2020, is res judicata.'

Being mindful of what prayers were before him the learned magistrate went on ahead and to explain what the principle of *res judicata* is citing Rule 11 of the Rules. The learned magistrate then turns to look at what actually transpired which he does from page 11 of the Ruling through to page 14 which I see no need to repeat other than observing that the only disparity between the learned magistrates account and that of the Appellant is that the Appellant seems to understand that Land Application No. 136 of 2019 was decided in her favour yet the record depicts it was dismissed for want of prosecution.

The learned magistrate then cited **George Shambwe v. Tanzania Italian Petroleum Co. Ltd.** [1995] 20 where it was held:

'For re 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.'

The learned magistrate then went on to state that the Civil Appeal No. 40 of 2019 quashed the execution proceedings by Hon. B. Pilla-RM and set the same aside, more over this court vide PC Civil Appeal No. 180 of 2015 over turned the trial courts decision of 26 February, 2015 and that of the district court. Then the decision of Maira RM cannot be said to be *res judicata* since the previous decisions were quashed and set aside therefore non-existent to make *re-judicata*. The only existing decision was then that of Maira RM of 08 September, 2020. The ensuing objection proceedings cannot be considered *res judicata* either since the High Court's quashing and setting aside of the two lower courts decisions did not bar any further objection proceedings during the execution. This therefore renders the first and third grounds of appeal meritless.

As for the Appellants contention that the district court did not deal with the second issue of *res subjudice* the records depict that the same is nowhere in her chamber summons and or affidavit and it is trite law that parties are bound by their pleadings as provided under Order VI Rule 7 of the CPC and as it was discussed and held in the Court of Appeal cases of **Salim Said Mtomekela v. Mohamed Abdallah Mohamed**, Civil Appeal No. 149 of 2019 and **Barclays Bank (T) LTD v. Jacob Muro**, Civil Appeal No. 357 of 2019 among many others. The learned

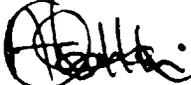


trial magistrate did what the Appellant prayed for in her chamber summons and confined to para 5 to 7 of her Affidavit none of which are depicting anything related to *res subjudice*. Therefore, the issue of *res subjudice* and issue estoppel cannot arise and the second ground of appeal is also meritless.

In the circumstances and, in view of the foregoing, I find this Appeal is devoid of merit and it is consequently dismissed. Each party to bear its own costs.

It is so ordered.




A.A. OMARI
JUDGE
16/08/2023

Judgment delivered and dated 16th day of August, 2023.


A.A. OMARI
JUDGE
16/08/2023

