

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
TEMEKE SUB-REGISTRY
(ONE STOP JUDICIAL CENTRE)
AT TEMEKE

CIVIL APPEAL No. 47 OF 2023

(Originating from Matrimonial Cause No. 166 of 2022 from District Court of Temeke,
One Stop Judicial Centre at Temeke)

JOYCE MKARIZIKI.....APPELLANT

VERSUS

REVOCATUS KILASARA.....RESPONDENT

JUDGMENT

09th October & 13th November, 2023

BARTHY, J:

In this matter the appellant aggrieved by the decision of the District Court of Temeke, One Stop Judicial Centre at Temeke (to be referred to as the trial court), delivered on 5th April 2023, she appealed to this court raising three grounds of appeal;

- 1. That, the trial magistrate erred in law and fact by misapplying the principal of res judicata hence ended up dismissing the matrimonial dispute presented before him.*
- 2. That, the trial magistrate erred in law and fact by holding that the cause of action between the parties is failure to consummate and that the said cause of action was conclusively determined.*

3. That the trial magistrate erred in law and fact by holding that the application is res judicata without taking into account that no competent application between the parties ever determined by court and dissolved the marriages between the parties.

The appellant is seeking for order of this court to restore Matrimonial Cause No. 166 of 2022 and allow hearing of the matter on its merits. Additionally, the appellant prays the costs of this appeal be borne by the respondent.

At the hearing of the matter the appearance was Ms. Glory Venance, advocate for appellant and respondent appeared in person. In consensus, the parties agreed to dispose the matter by way of written submission.

According to the order of this court, the appellant was to file his submission in chief on 17th October 2023, a reply submission was to be filed on 25th October, 2023 and rejoinder submission was to be filed on 03rd November, 2023. However, the respondent failed to adhere to the filling schedule as he did not file his reply submission as ordered without any just cause.

Failure to lodge written submissions after being so ordered by the court, is tantamount to failure to prosecute or defend one's case. See the case of **National Insurance Corporation of Tanzania Ltd &**

another v. Shengena Limited, Civil Application No. 20 of 2007 and **Patson Matonya v. The Registrar Industrial Court of Tanzania & another**, Civil Application No. 90 of 2011 (*both unreported*). In both cases, among many others, the court held that;

"...failure by a party to lodge written submissions after the Court has ordered a hearing by written submissions is tantamount to being absent without notice on the date of hearing".

In the **Shengena case**, the court also observed that;

"The Applicant did not file submission on due date as ordered. Naturally, the court could not be made impotent by a party's inaction. It had to act. ... it is trite law that failure to file submission(s) is tantamount to failure to prosecute one's case".

The above position was also stated and upheld in the case of **Godfrey Kimbe v. Peter Ngonyani**, Civil Appeal No 41 of 2014, Court of Appeal of Tanzania, at Dar es Salaam.

In the instant appeal the respondent has failed to file his submission to oppose the appeal, this does not give the appellant an automatic win; the appellate court has the duty first to ascertain as to whether or not the appeal has merit.

The appellant, represented by Ms. Glory Venance, argued the appeal. The appellant recounted the history of the case, highlighting the dismissal of Matrimonial Petition No. 14 of 2020 due to the expiration of the Marriage Conciliation Board Certificate. Subsequently, Matrimonial Petition No. 166 of 2022 was filed, leading to the current appeal.

Ms. Venance addressed each ground of appeal, emphasizing that the lower court's decision was flawed. Regarding the first ground, the appellant invoked section 9 of the Civil Procedure Code, arguing that *res judicata* should only apply when a matter has been fully determined. It was her argument that, no conclusive determination had been made by the lower court. To bring point home she cited the case of **Gerard Chuchuba v. Rector Itaga Seminary** [2002] TLR 123.

Concerning the second ground, Ms. Venance contested the trial magistrate's assertion that the cause of action was the failure to consummate, arguing that the earlier petition (Matrimonial Petition No. 14 of 2020) was not determined on its merits.

On the third ground, the appellant reiterated the argument made in the first ground and underscored the absence of any conclusive determination by a competent court.

Having considered in length the arguments of the appellant's side and having carefully examined the trial court records, in determining the merit or otherwise of this appeal, the court will address all grounds of appeal together as they are centred on one issue whether the trial magistrate erred in law and fact by holding that the application is *res judicata*.

The records of the trial court reveal that, Matrimonial Petition No. 14 of 2020 before the Resident Magistrate Court of Dar es Salaam at Kisutu, was dismissed based on expiration of the certificate of the conciliation board.

In the circumstances of this case, it is irrelevant to determine as to whether the principles underlying the application of *res-judicata* were considered by the trial court in the findings of matrimonial cause No. 166 of 2022.

At this juncture it is also immaterial to consider if Matrimonial Petition No. 14 of 2020 and Matrimonial Petition No. 166 of 2022 involved same parties, same cause of action and it was determined by court of competent jurisdiction. As per the case of **Gerald Chuchuba v. Rector, Itaga Seminary** (supra) where it was held that;

Before the doctrine of res-judicata is applied the following essential elements must be shown to exist: that the judicial

decision was pronounced by a court of competent jurisdiction, that the subject matter and the issues decided are substantially the same as the issues in the subsequent suit, that the judicial decision was final, and that it was in respect of the same parties litigating under same title... [Emphasis is supplied].

As the pertinent question to be addressed by this court is whether matrimonial cause No. 14 of 2020 was *res-judicata* to matrimonial cause No. 166 of 2022. Being mindful that Matrimonial Cause No. 14 of 2020 was dismissed by the trial court.

It is now an established principle that once a matter is dismissed, it cannot be refiled as the court becomes barred by the principle of *res-judicata*. This position was emphasized in the case of **Barclays Bank Tanzania Limited v. Phylisiah Hussein Mcheni** (Civil Appeal 19 of 2016) [2021] TZCA 202.

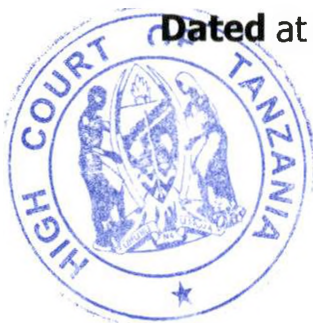
A clear distinction has been drawn as to what is the remedy when the matter is said to be dismissed and struck out. This was discussed in length in the case of **Yahya Athumani Kissesa v. Hadija Omar Athumani & 2 others**, Civil Appeal No. 105 of 2016 cited with approval in the case of **Charles Luhemeja v. Republic** (Criminal Appeal No. 10

of 2020) [2023] TZCA 125 (20 March 2023) where the court among other things pointed out that, where the matter is incompetent before the trial court, the remedy is to struck it out and not dismiss the matter. As the dismissal order implies the matter was determined on merit to its finality.

Therefore, since the matter has been dismissed, no similar suit can be entertained by the same court for the reason being *res-judicata*.

For the foregoing reasons, I find that this appeal is bound to fail entirely, in the upshot I dismiss the appeal with no order as to costs.

It is so ordered.



Dated at **Dar es salaam** this 13th of November, 2023

A handwritten signature in blue ink, appearing to read "G. N. Barthy".

G. N. BARTHY

JUDGE

Judgment was delivered in the presence of Mr. Frank Kirian, the learned advocate for the appellant, and the respondent in person. The appellant was absent. Ms. Bernadina, the record management assistant, appeared to assist the court, and Hon. Martin Mushi conducted researched for this matter.