

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM SUB REGISTRY

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 430 OF 2023

**(Arising from the Judgement of the District Court of Kinondoni in Civil
Case No. 143 of 2018 dated 12th February 2021)**

**BOARD OF TRUSTEES ST. ALOYSIUS
GIRLS NURSERY & PRIMARY SCHOOLAPPLICANT**

VERSUS

AMOS VEDASTUS MASUNGA.....1ST RESPONDENT

GWANTWA KONERD MWALYAMBILE.....2ND RESPONDENT

RULING

Date of last Order: 30th April 2024

Dat of Ruling: 3^d May 2024

MTEMBWA, J.:

Under section **14(1) of the Law of Limitation Act, Cap 89, RE 2019**, the Applicant has preferred this Application seeking for extension of time to file an appeal against the decision of the District Court of Kinondoni in **Civil Case No. 143 of 2018** dated 12th February 2021. The same was supported by an Affidavit of Mr. Walter Massawe, the learned counsel for the Applicant.

Brifefly, sometimes in 2018, the Respondents herein preferred a suit against the Applicant for the claim of payment of Tsh. 11,308,000.00/= being special damages for unlawful acts; payment of general damages resulting from unlawful acts; interest thereof at 30% per annum from the date of Judgement to the date of full payment of the decretal sum and costs of the suit. In her Written Statemen of Defense dated 19th October 2018, the Applicant resisted the claims. Consequently, the matter was set for hearing. Having evaluated the evidence adduced during hearing, the matter was decided in favour of the Respondents herein.

Dissatisfied, the Applicant preferred an appeal to this Court in **Civil Appeal No. 297 of 2021**. According to the records, on 1st June 2023, at the Applicant's request through her counsel, the matter was withdrawn with no order as to costs. On 14th August 2023, the Applicant filed this Application seeking for extension of time to file an appeal out of time as prefaced above. The Respondents resisted the Application and in addition filed a Notice of preliminary objections grounded on the following;

1. *The Applicant's Application is incompetent for contravening **Order XXIII Rule 1 (2) of the Civil Procedure Code, Cap 33, RE 2019.***
2. *That, the jurat of attestation is fatally defective for contravening **section 10 of the Oaths and Statutory Declarations Act Cap 34 RE 2029.***
3. *That, the Applicant's Application is fanciful, frivolous and vexatious which abuses the Court process.*

Previously, this matter was presided over by Hon. Kakolaki, J who has been reportedly to have been transferred to another duty station. As such, it was reassigned to me for final determination. According to the records, on 9th November 2023, parties agreed to argue the preliminary objections by way of written submissions. The Respondents managed to comply with the order while the Applicant was prevented by an electronic filing system error. Considering the genuity of the reason, I extended time for the Applicant to file the Submissions in reply out of time. The rejoinder submissions by the Applicant were filed following the event.

In the conduct of the preliminary objections, **Mr. Emmanuel Anthony Matondo**, the learned counsel argued for and on behalf of the Respondents whereas **Mr. Juvenalis Ngowi**, the learned counsel, argued for and on behalf of the Applicant.

Taking the podium, Mr. Matondo submitted that, having been dissatisfied by the decision of the trial Court in **Civil Case No. 143 of 2023**, the Applicant thought it wise to appeal to this Court vide **Civil Appeal No. 297 of 2023**. He added that, the said appeal was withdrawn on 1st June 2023 by the Applicant without an order for leave to refile it. As such therefore, bringing back this Application is a blatant contravention of ***Order XXIII Rule 1 (3) of the Civil Procedure Code RE 2019***. Mr. Matondo was of the views that, since the Applicant did not seek for leave to refile it, she is barred from bringing it back.

Mr. Matondo continued to note that, at the time, the Applicant counsel prayed for two orders; ***one***, to withdraw the Appeal and, ***two***, with no order as to costs. That, the orders requested for were accordingly granted by this Court. To bolster his argument, Mr. Matondo cited the case of ***Jennings Bramly Vs. A & F Contractors Limited and Another [2003] 2 EA 452*** cited in the case of ***CRDB Bank PLC & Another Vs. Aziz Mohamed Aboud & Another, Miscellaneous Commercial Cause No. 277 of 2015, High Court of Tanzania (Commercial Division) at Dar es Salaam (unreported)***.

Arguing on the second limb of the preliminary objection, Mr. Matondo submitted that, the jurat of attestation is incurably defective thereby rendering the Application incompetent. He added that, in the Jurat of attestation, it must be shown therein that, the commissioner for oaths knows the deponent personally or he has been so introduced by another person known personally to him or her. To fortify, he cited ***section 10 of the Oaths and Statutory Declaration Act, Cap 34, RE 2019.***

It was the argument by Mr. Matondo further that, the jurat of attestation did not meet the requirements under the cited law as it did not indicate whether the deponent (Mr. Walter Massawe) was known to the commissioner for oaths or not. To buttress further, he cited the cases of ***Paul Mboriko Tarimo Vs. Resident Director Norman (T) Limited, Miscellaneous Civil Application No 75 of 2012 (Unreported)*** and ***Seth Japhet Vs. Nicholas Mero Msh, Civil Application No. 457/05 of 2017, Court of Appeal of Tanzania.***

On the third limb of the preliminary objection, Mr. Matondo argued that, the Application is fanciful, frivolous and vexatious and the abuse of the Court process. He added further that, the

Applicant happened to appeal to this Court in Civil Appeal No. 297 of 2021 which was later on withdrawn without leave to refile. He said, bringing back this Application where leave to refile the Appeal was not sought and ultimately granted is an abuse of the Court process which should be discouraged. He cited the case of ***Jolly Investment Limited Vs. Tanzania Port Authority, Misc. Land Application No. 523 of 2018, High Court of Tanzania (Land Division) at Dar es Salaam (unreported)***.

Lastly, Mr. Matondo reminded this Court of the everlasting public policy that litigation must come to an end. He cited the cases of ***Halima Hamis Rajab Budda Vs. Abubakar Hamis, Misc. Civil Application No 34 of 2022, High Court of Tanzania at Arusha*** and ***Stephene Masatu Wasira Vs. Joseph Sinde Warioba & Attorney General (1999) TRL 332***. He thus implored this Court to sustain the objections.

In rebuttal, Mr. Ngowi submitted that, the application has been so filed because **Civil Appeal No. 297 of 2021** was withdrawn on the pretext that an important and necessary document (a letter requesting for Judgement and Decree) was lacking in the Court file. It was therefore difficult for the Court to exclude the time

used to apply for the said documents for purposes of determining whether the appeal was filed within time. He added that, the issue concerned was failure of the Applicant to attach the said letter to the Memorandum of Appeal.

Mr. Ngowi further submitted that, the cited ***Order XXIII of the Civil Procedure Code (supra)*** was cited out of context as it deals with withdrawal of suits and not applications for extension of time. He added that, the grounds of appeal in **Civil Appeal No. 297 of 2021** were never determined on merits. Mr. Ngowi noted further that, the applicant never made any prayer or submissions intending to abandon, adjust, or withdraw any ground of appeal in the said appeal. In view of Mr. Ngowi, the withdrawal of the said Appeal is as good as there has been no appeal filed before and the remedy available therefore is to apply for extension of time.

It was contended that, a line of difference must be drawn between the situation where there is a prayer to withdraw grounds of appeal and a prayer to withdraw the appeal for technical reason. Mr. Ngowi observed that, the first category attracts leave to refile whereas the second one does not. He noted that, a party

may bring a fresh appeal at any time subject to the law of limitation.

Replying to the second preliminary objection, Mr. Ngowi contended that, the jurat of attestation complied with the requirements of ***section 10 of the Oaths and Statutory Declaration Act (supra)***. He noted further that, by drawing a dash in the jurat of attestation means the commissioner for oaths personally knew the deponent (Mr. Walter Massawe). He distinguished the cited cases of ***Paul Mboriko Tarimo Vs. Resident Director Norman (T) Ltd (supra)*** and ***Seth Japhet Vs. Nicholas Mero (supra)***. He pointed out that, the objection raised is immaterial in view of the overriding principle. He cited the case of ***Charles S. Kimambo versus Clement Leonard Kusudya & Another, Civil Appeal No. 477/03 of 2018.***

Replying to the third objection Mr. Ngowi submitted that, the Respondent did not indicate specifically the provision of the law which has been contravened. In that stance, it was argued that, the raised objection does not comply with the requirement related to what amount to preliminary objections. He reiterated his submissions in reply to the first limb of objection. He then

distinguished the cited cases of ***Jolly Investment Limited Vs. Tanzania Port Authority, (supra)*** and ***Halima Hamis Rajab Budda Vs. Abubakar Hamis (supra)***. Lastly, he implored this Court to dismiss the preliminary objections with costs.

In rejoinder, Mr. Matondo argued that, the counsel for the Applicant misdirected himself on the applicability of ***Order XXIII of Civil Procedure Code (supra)***. He cited the case of ***Kuringe Real Estate Co. Limited Vs. Bank of Africa & 2 others, Misc. Commercial Application No. 81 of 2020*** where also the cases of ***Tanzania Motor Service Limited & Another Vs. Mehar Singh T/A Tiiker Singh, Civil Appeal No 115 of 2005, Court of Appeal (Unreported)*** and ***Mzee Mjengi Josephat Abdarahaman Ngwao Vs. the Guadian Limited, Misc. Civil Application No 279 of 2015 (unreported)*** were referred to. That, the import of the cited cases is that the word "suit" may be construed to mean "application".

Mr. Matondo further submitted in length on how the jurat of attestation contravened with ***section 10 of the Oaths and Statutory Declaration Act (supra)*** of course is a replica of the submissions in chief. I will not therefore drag myself into such

discussion. He was of the views in addition that, the overriding principle cannot apply considering the circumstances. He cited the cases of ***Martin D. Kumaliya and 117 Others Vs. Oron and Steel Limited, Civil Application No. 70/18 of 2018*** and ***Commissioner General (TRA) Vs. Pan African Energy (T) Limited, Civil Application No. 206 of 2016.***

In the end, Mr. Matondo beseeched this Court to find out that, the raised preliminary objections have merit and proceed to sustain them with costs.

Having considered the rival arguments by the parties, the pertinent issue to be determined first is whether the Applicant is legally justified to file this Application seeking for an order of extension of time to file an appeal. According to Mr. Matondo, this Application is an abuse of court process since the Applicant withdrew an appeal filed earlier on without leave to refile. Mr. Ngowi did not at all find purchase of the argument. Reliance was placed to his prayer to withdrawal the appeal in **Civil Appeal No. 297 of 2021**. To tackle the issue before me, I will first appreciate the proceedings and resultant order of withdrawal in Civil Appeal No. 297 of 2021 dated 1st June 2023.

On 1st June 2023, the counsel for the Applicant was recorded as follows;

My Lord, it has come to the attention of the appellant that the letter requesting for certified copy of the Judgement and decree dated 19th February 2021 is not attached to the appeal, a failure of which exclude us on the right for exclusion of time under the law of Limitation Act, (Cap. 89 R.E 2019) I therefore pray to withdraw the Appeal in order for the appellant to attach the necessary documents to render it appropriate before the court. I pray the appeal be withdrawn with no order as to costs.

Following the prayer, the counsel for the Respondents did not object. He was recorded however as follows;

My Lord, as for the prayer to withdraw the appeal and that of waiving the costs, we have no objection. But this should not be taken as a prayer to be granted leave to file another appeal. That is all.

The Applicant's counsel did not opt to rejoin. Having gathered the parties' submissions on the prayer, the Court observed as follows at page 3 of the typed script of the proceedings;

In view of the prayer made by the counsel for the appellant to have the appellant's appeal be marked withdrawn with no order as to cost on the ground that the appeal herein was filed without attaching letter requesting for copy of judgement an

decree, the letter which court have entitled the appellant exclusion of time in computation time within which to appeal, a prayer being not objected to by the Respondent's counsel, I hereby grant the prayer and the appeal is hereby marked withdrawn with no order as to costs.

From the records, it is crystal clear and unambiguous that the counsel for the Applicant prayed for leave to withdraw **Civil Appeal No. 297 of 2021** with no order as to costs. The Respondent's counsel had no objection only seemed to have reminded the Applicant's counsel of the need to pray for leave to refile should the need be. Consequently, the Court granted what was asked for by the Applicant's counsel. From the records, leave to have the appeal refiled was not asked for and ultimately was not granted. In the circumstances, I agree with Mr. Matondo that, at the instance of the Respondent's counsel, Civil Appeal No. 297 of 2021 was marked withdrawn with no order as to costs but leave to refile it was not granted.

Mr. Matondo implored this Court to find out that, by filing this Application, the Applicant is in blatant contravention of ***Order XXIII Rule 1 (3) of the Civil Procedure Code (supra)***. Mr. Ngowi was of the views that, the cited provisions of the law is

inapplicable considering the fact that this is not a suit but an application for extension of time. For easy reference, I will reproduce ***Order XXIII Rule 1 (3) of the Civil Procedure Code (supra)***;

(1) *At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.*

(2) *Where the court is satisfied-*

(a) that a suit must fail by reason of some formal defect; or

(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of a claim.

(3) *Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-rule (2), he shall be liable for such costs as the court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim.*

From the above quoted law, it is apparent clear that, a party may withdraw his suit or claim any time or abandon part

thereof for reason of some formal defects or where there are sufficient reasons to do so. Upon being satisfied and upon such terms, the Court may so permit with liberty to refile in respect to the same subject matter or part thereof. When no permission is granted, he or she shall be liable for such costs as the court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim.

To appreciate the raised preliminary objection grounded on the said cited law, the word “suit” needs to be ascertained to see if it can be construed to mean “application”. This is where Mr. Ngowi’s defense rests.

In ***Burafex Limited (Formerly known as Ametaa Limited) Vs. Registrar of Titles, Civil Appeal No 235 of 2019 (HC)***, this Court, when faced with a challenge of what the term suit constitutes, had this to say;

A proceeding of a civil nature of various forms such as petition, application, appeal, review, revision or as referred in the Civil Procedure Code filed in a court of law between two or more parties for determination of rights and duties of such persons.

In ***Hon. Attorney General Vs. Reverend Christopher Mtikila, Civil Appeal No. 20 of 2007, Court of Appeal at Dar es Salaam***, the Court noted;

Legal dictionaries provide almost identical definitions. These are:

- (i) *"Any legal proceeding of a civil kind brought by one person against another; action": P.G. OSBORN'S CONCISE LAW DICTIONARY, 5th edition at page 305;*
- (ii) *"Any legal proceeding by a party or parties against another in a court of law /": BLACK'S LAW DICTIONARY, 8th edition at page 1475; and*
- (iii) *"A process instituted in a court of justice for recovery or protection of a right, the enforcement of a claim or the redress of a wrong": the LAW LEXICON THE ENCYCLOPAEDIC LEGAL & COMMERCIAL DICTIONARY.*

At pages 9 and 10, the Court noted further that;

It is eminently clear from these definitions that suits are proceedings of a civil nature in a court of law involving two or more parties on a dispute or claim which needs to be adjudicated upon, to determine or declare the rights of the disputing parties. The procedure for instituting and conducting such proceedings in a court of law is governed either by the C.P.C. or as provided under any other written law.

From the definitions above, the word suit may be construed to include appeals, applications, petitions to mention but few. The test would be whether there is a dispute which need to be adjudicated by the Court of law between the parties with the view to declare their rights. The procedure for instituting and conducting such proceedings in a court of law is governed either by the CPC or any other written law. As such, the withdrawal of **Civil Appeal No. 297 of 2021** was governed also by Order XXIII of CPC.

As said before, the Applicant did not seek for leave to refile the Appeal. It follows therefore that, she is prevented from bringing it afresh without leave of this Court. Explaining of the import and dictate of Order XXIII of CPC, Mulla in his Book titled **"the Code of Civil Procedure"**, 19th Edition Volume 3, had this to say at page 2948;

The second suit after withdrawal of the first suit (without permission to file a fresh suit) is barred, not because of the principle of res judicata but because whoever waives, abandons or disclaims a right will lose it.

In ***Equity for Tanzania Limited (EFTA) vs Salimu Kasimu Msangi, Civil Appeal No. 21 of 2022 [2023] TZHC 18034*** this Court observed that;

Thus, since the counsel for the appellant prayed to withdraw the matter and never sought leave to refile, and similarly, the court's order did not allow the appellant to refile a fresh appeal, she is undoubtedly precluded from instituting a fresh appeal. The argument by the appellant that the reason for the withdrawal was well known to the court does not give an automatic guarantee for refiling. Leave to refile must have been specifically prayed for and granted. And it is worth noting that a prayer for leave to refile is not an automatic right but a court discretion and can only be exercised when the withdrawal order is made and not after

Mr. Ngowi placed reliance to the principles of overriding objective, which calls for the court to avoid technicalities and deal with substantive justice. With respect I am unable to associate myself to such assertion. My stand is fortified by the decision of the Court of Appeal in ***Mondorosi Village and others v Tanzania Breweries and another, Civil Appeal No. 66 of 2017***, where the court held that overriding objective principle cannot not be applied blindly against mandatory provisions of procedural law.

The question would be whether it is legally justified to end the matter here considering the fact that an appeal has not been filed. Although the preliminary objections were raised at a very early stage, I am of the settled mind that in determining the propriety of the Application for extension of time, this Court should not detain or limit itself to the reasons for the delay. The Court must go further and determine the implications or the end results of the main Application if time is extended. The order would not be issued if it will serve no purposes or abuse Court processes.

In this matter, even if time is extended, the Applicant will go nowhere for reasons advanced above. I am confidently guided by the decision of ***Reuben Lubanga Vs. Moza Gilbert and 2 Others, Civil Application No. 533 of 2021, Court of Appeal of Tanzania at Dar es Salaam (Unreported)*** where the Court observed;

It is equally the law that, in deciding whether or not to grant an extension of time, the Court should not limit itself to the delay. Instead, it has to consider as well the weight and implications of the issues involved in the intended action and whether the same is prima facie maintainable. This is because, the order being equitable, it cannot be granted where it will serve no purpose or where it is a mere abuse of the court process.

That said, the first preliminary objection is hereby sustained.
Since it disposes the matter at once, I see no reason to determine other objections. To that end, The Application, therefore, is hereby struck out with costs.

I order accordingly.

Right of appeal explained.

DATED at DAR ES SALAAM this 3rd May 2024.



**H.S. MTEMBWA
JUDGE**