

“ORIGINAL”

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT TANGA**

**MISC. LAND APPLICATION NO. 49 OF 2021
(Arising from Land Case No. 9 of 2015)**

HALIMA SAID SALIM.....APPELLANT

VERSUS

**TANGAMANO TRANSPORT SERVICES
COMPANY LIMITED.....1ST RESPONDENT**

THE HONORABLE ATTORNEY GENERAL.....2ND RESPONDENT

THE COMMISSIONER FOR LANDS.....3RD RESPONDENT

THE TANGA CITY COUNCIL.....4TH RESPONDENT

AUGUSTINO BAZILIO KATYEGA.....5TH RESPONDENT

RULING ON PRELIMINARY OBJECTIONS

Mansoor, J:

29/07/2014

The Applicant applied for extension of time to lodge the Notice of Appeal out of time. She applied under Section 11 (1) of the Appellate Jurisdiction Act, Cap 141 R: E 2019. The application has been taken by Dennis Msafiri Advocate at the instance of



the Applicant and supported by the Affidavit of Halima Said Salim, the applicant. The Judgement sought to be appealed against was delivered by Hon. Judge Amour Khamis on 21st June 2017. The applicant initiated the appeal, and the notice of appeal was lodged on 23rd June 2017 citing Tangamano Transport Services Company Limited as the only respondent in the intended appeal. The applicant also applied for leave to appeal against the said decision, and she was granted the leave on 5th September 2018. Eventually, the applicant lodged the appeal before the Court of Appeal, it was registered as Civil Appeal No. 243 of 2018. The appeal was withdrawn by the Applicant on 16th September 2020. Then the applicant applied for rectification of the decree and intimated a fresh appeal process. On 29th September 2020, the applicant filed a Misc. Land Application No. 61 of 2020 for extension of time to file an appeal, but the same was struck out on 01st October 2021 for being incompetent.

The applicant states in the affidavit that she has taken steps for lodging a competent appeal, but the efforts were stumbled

due to errors and mistakes made by the Court as well as the counsels who were representing her. She states in the affidavit that the judgement sought to be appealed against contains illegalities, and it is worthy the determination by the Court of Appeal.

Against the application, the 2nd, 3rd, and 4th respondents raised two preliminary objections that the application is frivolous, vexatious and an abuse of the court processes as it contravenes the principles of finality to litigations. The argument by the counsel for the respondent is that since the Appeal at the Court of Appeal was withdrawn by the Appellant and since he did not obtain leave to re-file the appeal, the applicant is precluded from initiating the appeal processes afresh. The counsel for the respondents argues that the litigation must come to an end, and keeping on re-filing the appeal, which was withdrawn, without leave of the court to re-file it is an abuse of the court processes. The counsels for the respondents referred the Court to the case of **Overseas Infrastructure Alliance (India) PVT Limited and**

Pratibha Industries Ltd Consortium Versus (DAWASA), Misc. Civil Application No. 237 of 2020, High Court of Tanzania at Dar es Salaam, where it held that "*institution of multiplicity of actions on the same subject matter against the same opponent on the same issues is an abuse of the court processes...*"

The second ground of objection raised by the respondents is that the Court is *functus officio* since the Applicant had filed Application No. 61 of 2021, and the application was struck out. The Counsel referred to section 9 of the Civil Procedure Code, Cap 33 R: E 2002.

The Applicant responded that the preliminary objection raised are frivolous, misconceived, and devoid of merits. He argues that once the appeal is withdrawn, the appeal ceases to exist, and there is no requirement of getting an order of the Court to Refile it.

It is true as submitted by the Counsel for the Applicant that Civil Appeal No. 243 of 2019 was withdrawn under Rule 102 (1) of the Court of Appeal Rules, 2009, with leave of the Court

of Appeal. Under Rule 102 (1) of the Court of Appeal Rules, 2009, there is no requirement of obtaining leave to re-file the Appeal. It is also true as submitted by Counsel for the respondent that Rule 4 (1) of the Court of Appeal Rules provides for practice and procedure of the Courts in connection with the Appeals, intended appeals, and Revisions from the High Court. It is also true that the High Court has been conferred powers to extend time to file Notice of Appeal under section 11 of the Appellate Jurisdiction Act, Cap 141 R: E 2019. It is true that the provisions of Order XXIII of the Civil Procedure Code are not applicable in the appeals before the Court of Appeal, the Code applies to all proceedings in the High Court, Courts of Resident Magistrate and the District Courts as provided in section 2 of the Civil Procedure Code, Cap 33 R: E 2019.

There was no abuse of the Court processes practiced by the Applicant by applying for extension of time to file the Notice of Appeal.

It is true that the Applicant appealed to the Court of Appeal, appeal No. 243 of 2018. This appeal was withdrawn 16th September 2020. The contention on behalf of the Applicant is that he is entitled as of right to withdraw the appeal, citing Rule 102 (1) of the Court of Appeal Rules, 2009. The respondents ought to have objected to withdrawal before the Court of Appeal if they contend that the applicant had no absolute right to withdraw the appeal, and if the provisions of Order XXIII, r. 1 (1) of the Code of Civil Procedure, could be stretched to apply to an application for withdrawal of an appeal before the Court of Appeal. The Court of Appeal is guided by the principles contained in Rule 102 (1) of the Court of Appeal Rules, when considering an application for withdrawal of the appeal before it. The Court of Appeal has given permission to withdraw the appeal and there are no requirements under Rule 102 (1) of the Court of Appeal Rules, for granting a permission to refile the appeal.

The applicant then made an application for extension of time to file the Notice of Appeal. The application was struck out for

being incompetent. Thereafter, he filed this application which is similar to the application which was struck out. The applicant who was the appellant in the appeal before the Court of Appeal had an absolute right to withdraw the appeal and therefore after the withdrawal application, the Court of Appeal had permitted the withdrawal. There was no abuse in the process. As such, the preliminary objection being misconceived, it is hereby overruled.

Regarding the second limb of the preliminary objection that this court is functus officio, again this argument is totally out of context. Misc. Land No. 61 of 2020 was struck out by this Court. The Court did not determine the application to its finality, it did not hear the application at all, and the application was struck out for being incompetent. See the case of **Omahe Garani vs Wambura Francis, Misc. Land Appeal No. 31 of 2020, HC, Musoma.**

The court has not discharged its duties and did not determine Application No. 61 of 2020 to finality. The Court cannot be functus officio unless it has decided on a particular matter, a

decision arrived at on merits. For a court to be *functus officio*, a decision must be final, and this was well expounded in the case cited by the Counsel of the respondent, the case of **Mariana Guest House Limited vs Mbaraka Zarara and another, Civil Appeal No. 51 of 1998, Court of Appeal**, when it said, and I quote:

"Briefly, the doctrine of res judicata comes into play where the matter in issue in a subsequent suit (i) has been directly and substantially in issue in a previous suit, and (ii) has been heard and finally decided in the previous suit.

And finality means, as held in the above cited case as follows:

"...for a decision to be said to be final it must also be a decision on the merits of the controversy."

Obviously, the Court did not determine Misc. Land Application No. 61 of 2020 on merits and there was no final decision made after determination of issues in controversy in that application. The Court is not *functus officio* to determine the

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present application, and the 2nd limb of objection being unmeritorious, is hereby overruled.

Consequently, the preliminary objections raised by the respondents are dismissed, with costs.

DATED and DELEIVRED at TANGA this 29TH day of JULY 2022



A handwritten signature in blue ink, appearing to read "Mansoor", is written over the printed name.

MANSOOR

JUDGE

29TH JULY 2022