

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA AT ARUSHA

MISC CIVIL APPLICATION NO.34 OF 2022

***(C/f Civil Appeal No.27 of 2020 at the District Court of Arusha at Arusha,
Originating from Probate Cause No.84/2004 at Arusha Urban Primary
Court)***

HALIMA HAMISI RAJABU BUDDA.....1ST APPLICANT

ZAINABU HAMISI RAJABU BUDDA.....2ND APPLICANT

FATUMA HAMISI RAJABU BUDDA.....3RD APPLICANT

REHEMA HAMISI RAJABU BUDDA.....4TH APPLICANT

UMMY HAMISI RAJABU BUDDA.....5TH APPLICANT

VERSUS

ABUBAKARI HAMISI.....RESPONDENT

(Administrator of the estate of the late Hamisi Rajabu Budda)

RULING

Date of last Order:14-7-2022

Date of Ruling:11-8-2022

B.K.PHILLIP,J

This application is made under section 25 (1) (b) of the Magistrates' Courts Act, (Henceforth "MCA"). The applicants pray for the following orders;

- i) That this Honourable Court be pleased to grant extension of time for filling a petition of Appeal.
- ii) Costs of and incidental to this application be provided for.
- iii) Any other order(s) as the Honourable Court may deem fit.

The application is supported by an affidavit sworn by the learned advocate Kapimpiti Mgalula, the applicants' advocate. Upon being served with the application, the learned Advocate for the respondent, Mr. Mnyiwala Mapembe, filed a Counter Affidavit sworn by the respondent, together with a point of preliminary objection, to wit;

-That , this application contravenes Order XXIII Rule 1(3) of the Civil Procedure Code Cap 33 R.E 2019. (PC) Civil Appeal 42/2021 was marked withdrawn without leave to re-file by the High Court of Tanzania, Arusha (Hon. D.C Kamuzora, J) on 23.02 .2022.

This Ruling is in respect of the point of preliminary objection stated herein above. The same was argued viva voce.

Mr. Mapembe's submission was as follows; That, on 26.5.2021 the Applicants herein filed (PC) Civil Appeal No.42/2021 (Henceforth " the Appeal).On the 23.2.2022, following the prayer made by the applicants' advocate, this Court (Hon . Kamuzora ,J) marked the aforesaid Appeal withdrawn without costs. There was no order to re-file the Appeal. He contended that this Application is misconceived and contravenes the provisions of Order XXIII Rule 1(3) of the Civil Procedure Code, ("CPC") since the applicants are seeking extension of time to re-file the Appeal that was marked withdrawn with no order to re-file it. The order of this Court for the withdrawal of the appeal marked the end of the case, contended Mr. Mapembe.To cement his arguments he cited the case of **Mechmar Corporation (Malaysia) Berhad (In liquidation) Vs VIP Engineering & Marketing Limited and 3 others, Civil Application**

No. 190 of 2013 and, Deusdedit Laurent Kadege Vs Domina Simeo Kadege and Richard T. Mwafunga T/A Yono Auction Mart, Civil Application No. 26 of 2005, (both unreported).

Furthermore, Mr. Mapembe submitted that Order XXIII of the CPC is applicable in Appeals too. He referred this Court to a text book titled "Sarkar's The Law of Civil Procedure" 11th Edition, Reprint -2009 (Henceforth "Sarkar's The Law of Civil Procedure"). He urged this Court to strike out this application without costs since it involves family matters.

In response to Mr. Mapembe's arguments, Mr. Kapimpiti strongly objected to the point of preliminary objection. Explaining, on what happened to the Appeal, Mr. Kapimpiti submitted that he was representing the applicants in the said Appeal and the respondent was represented by Mr. Mapembe. Upon being served with the petition of Appeal, Mr. Mapembe raised a point of preliminary objection that the Appeal was time barred. He conceded to the point of preliminary objection and prayed to withdraw the Appeal so as to make an application for extension of time for filing afresh another appeal after obtaining extension of time as required under the law. Mr. Mapembe did not object to the prayer. Consequently, the appeal was marked as withdrawn. Mr. Kapimpiti contended that this application is proper and competent since the Appeal which was marked withdrawn was time barred. The applicants are required to file an application for extension of time to file their appeal pursuant to section 25 (1) (b) of the MCA.

It was Mr. Kapimpiti's contention that Order XXIII is applicable in suits only. It has nothing to do with appeals. Moreover, he faulted Mr. Mapembe's interpretation of Order XXIII on the ground that an appeal filed out of time cannot be re-filed. He argued that an appellant to an appeal that is time barred cannot pray for an order for withdrawal of the appeal with leave to refile it because such an appeal is improper before the Court. A time barred appeal can only be dismissed pursuant to section 3 of the Law of Limitation, contended Mr. kapimpiti. He maintained that his prayer to withdraw the appeal without asking for leave to refile it was proper. He cited the case of **Robert Mutemankamba Vs Deogratias D. Lugazia , (PC) Civil Appeal No.1/2019** (unreported), to bolster his position.

Commenting on the case cited by Mr. Mapembe, Mr. Kapimpiti, distinguished the same from the facts of this application on the ground that the Appeal that was withdrawn was not proper before the Court. With regard to the literature in Sakar's The Law of Civil Procedure, Mr. Kapimpiti was of the view that the same is not applicable in this application because our CPC is self explanatory .There is no need of making reference to the literature aforesaid. He prayed the point of preliminary objection to be dismissed with costs.

In rejoinder, Mr. Mapembe reiterated his submission in chief and contended that the CPC is *in pari materia* with the India Code of Civil Procedure. Therefore, as regards the interpretation of the provisions of the CPC, the literature in Sakar's Law of Civil Procedure is applicable and is a good authority. He went on arguing that the case of **Robert** (supra) is

distinguishable from the facts of this case because in that case there was no order for withdrawal of the appeal. The point of preliminary objection was heard and the appeal was dismissed for being time barred. He insisted that Order XIII of the CPC is applicable in this matter since it provides that withdrawal of a suit can be made in case of defects. In the case in hand the applicants' Appeal had defects, that is why Mr. Kapimpiti prayed to withdraw it.

Having analyzed the rival submissions made by the learned advocates, what I have gathered is that this Court is called upon to determine the following issues; whether Order XXIII of the CPC is applicable in Appeals and whether this application is tenable before this Court. Now, let me start by identifying facts not in dispute. One, the applicants herein had filed in this Court Civil Appeal No.42 of 2021 (the Appeal). Two, Mr. Mapembe raised a point of preliminary objection that the appeal was time barred. Three, Mr. Kapimpiti conceded to the point of Preliminary objection and prayed for withdrawal of the appeal. Four, this Court marked the appeal withdrawn.

It is not in dispute that provisions of Order XXIII of the CPC refers to suits and provides that if a suit is withdrawn without leave to refile it, the plaintiff is precluded from instituting a fresh case in respect of the same subject matter. For easy of reference let me reproduce the provisions of Order XXIII of the CPC hereunder.

"XXIII 1 (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 satisfied-

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

(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the same 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.**

4. Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others"

(Emphasis is added)

According to the literature in Sarkar's The Law of Civil Procedure referred to this Court by Mr. Mapembe, the author states that the provisions Order XXIII Rule 1 and 3 of the India Code of Civil Procedure which is *in pari materia* with Order XXIII rule 1 and 3 of the CPC, apply in the same manner to withdrawal of appeals. I had opportunity to read the literature in a text book titled "Mulla on the Code of Civil Procedure Act of 1908", 15th Edition, Vol. III, 1997 (Henceforth "Mulla on the Code of Civil Procedure Act) at page 2091 -2092, the author states that Order XXIII of the India Code of Civil Procedure apply to appeals since an appeal is a continuation of a suit. It is noteworthy that Mr. Kapimpiti did not refute Mr. Mapembe's contention that our Civil Procedure Code is in *pari*

materia with the India Code of Civil Procedure. Therefore, the literatures in Sarkar's The Law of Civil Procedure and Mulla on the Code of Civil Procedure are relevant and very persuasive when we are making interpretation of the provisions of the provisions of the CPC.

In addition to the above, in the case of **CRDB –PLC and Leonard Mususa, Receiver Manager of Morogoro Canvass Mills (1998) Ltd Vs Mohamed Aboud and another, Commercial Cause No.277 of 2015**, this Court held that the provisions of Order XXIII Rule 1(3) of the CPC are applicable to suits as well as applications. On the strength of the holding of this Court in the above cited case and the literatures in Sarkar's The Law of Civil Procedure and Mulla on the Code of Civil Procedure, I am of a settled view that Mr.Kapimpiti's contention that the provisions of Order XXIII of the CPC are applicable to suits only is misconceived. I am inclined to agree with Mr. Mapembe that the provisions of Order XXIII of Rule 1(3) of the CPC are applicable to appeals too, since an appeal is a continuation of a suit. Not only that the purpose of Order XXIII Rule 1(3) of the CPC is to curb abuse of the Court processes and Appeals are not exceptional.

Having said the above the next pertinent question is; whether under the circumstances, Mr. Kapimpiti was required to pray for and obtain leave to re-file their appeal, as submitted by Mr. Mapembe. First, I wish to make it clear that upon making a prayer for withdrawal of application or suit leave to re-file the same is not automatic. Order XXIII Rule 1(2) (b) provides clearly that leave to re-file a suit is under the Court's discretion. It can granted when the Court finds that the matter in question is bound

to fail due to formal defect(s) or existence of other grounds. The grounds on which the Court can grant leave to re-file suit under Order XXIII Rule 1 (2(a) (b)) of the CPC are not exhaustive.

Upon perusing the Courts records, in particular the order of this Court by (Hon Kamuzora J,) which is attached to this application, I have noted that Mr. Kapimpiti told this Court the following;

"The matter is scheduled for mention today. We were served with preliminary objection. After consulting with the counsel for the respondent we concede to the preliminary point. We pray to withdraw the appeal so that we can file the proper application for extension of time. Since this suit is concern with relatives, we pray costs to be waive."

Mr. Mapembe, did not object to Mr. Kapimpiti's prayer and the Court entered an order for withdrawal of the appeal without costs.

As I have alluded herein above, I do not need to over emphasis that Order XXIII of the CPC helps to curb abuse of the Court's processes whereby people can file cases in Court and withdraw them, and re-file the same as they wish. Not only that , it also helps to make sure that cases come to an end, since it is in the interests of justice that case should come to an end. In the case of **Stephen Masato Wasira V. Joseph Sinde Warioba & the Attorney General, [1999] TLR 332** at page 342 the Court of Appeal emphatically held;

"The law of this country like laws of other civilized nation recognizes that like life, litigation has to come to an end. Those who believe litigation may

continue as long as legal ingenuity has not been exhausted are clearly wrong"

I entirely agree with Mr. Kapimpiti's argument that an appeal that has been filed out of time has to be dismissed pursuant to section 3 of the Law of Limitation Act. Thus, had it not been for Mr. Kapimpiti's prayer to withdraw the appeal, the same would have been dismissed. Of course a party is at liberty to withdraw his/her case for whatever reason. However, if he wishes to re-file it he/she has to seek and obtain leave of the Court. In the matter in hand, I am in agreement with Mr. Mapembe that since Mr. Kapimpiti conceded to the point of preliminary objection raised by Mr. Mapembe and intended to withdraw the appeal, then he was supposed to pray to withdraw the appeal with leave to file it after obtaining extension of time, if at all he did not want to mark the end of the matter. Thereafter the Court would have exercised its discretion either to dismiss the appeal or to grant the prayer for withdrawal with leave to re-file it. The fact that Mr. Kapimpiti prayed to withdraw the appeal so as to make an application for extension of time cannot be equated to a prayer to re-file the appeal. To my understanding a Court of law has to be properly moved to enable it to make the orders sought. Under the circumstances, this Court could not make an order for re-filing the appeal without being moved by the applicants' advocate. All in all, the Court did not grant the applicants the leave to re-file the appeal.

In addition, in his arguments Mr. Kapimpiti seemed to suggest that in order to rescue an appeal filed out of time from being dismissed a party can pray to withdraw it and thereafter he/she will have an automatic right

to re-file it upon obtaining extension of time to file it because once it is withdrawn it is as good as it has not been filed. With due respect to Mr. Kapimpiti, in my opinion that notion is wrong because withdrawing a matter does not change the fact that it was once filed in Court. Had it been so a defective / incompetent suit /application could be withdrawn and then re-filed without the leave of the Court. Similarly, Mr. Kapimpiti's contention that an appeal filed out of time is incompetent and is as good as it has never been filed in Court is not correct. That is why the law provides for procedure for withdrawing matters in Court and obtaining leave of the Court to re-file them.

In the upshot, since the application in hand is for extension of time to file the appeal that was marked withdrawn without leave to re-file it, I find the preliminary objection meritorious. Thus, I hereby strike out this application. Since the Advocate for the respondent has not prayed for costs, each party will bear his own costs.

Date this 11th day of August 2022



A handwritten signature in black ink, appearing to read "B.K. Phillip", with a horizontal line extending to the right.

B.K.PHILLIP

JUDGE