

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA**

MISCELLANEOUS CIVIL APPLICATION NO. 25 OF 2022

*(From the High Court of Tanzania at Mbeya, DC Civil Appeal NO. 23 of 2020,
originating from the District Court of Mbeya,
Misc. Civil Application No. 10 of 2020)*

JONAS JOSHUA BUSHAMBALI.....APPLICANT

VERSUS

EQUITY FOR TANZANIA LTD (EFTA).....RESPONDENT

R U L I N G

Dated: 15th November & 29th December, 2022

KARAYEMAHA, J

It is discerned from the record before me that the applicant was aggrieved by the decision of the High Court (Ebrahim, J) in respect of DC Civil Appeal No. 23 of 2020. He therefore formed an intention to appeal to the court of appeal. Prior travelling to the Court of Appeal, he had in terms of section 5(1)(c) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2019] (henceforth AJA), to seek leave of the High Court to appeal to the Court of Appeal. It was that mandatory requirement which triggered the applicant to lodge Misc. Civil Application No. 11 of 2022

which I had an advantage to entertain. However, prior getting to the merit of it, the applicant, having satisfied himself that it was time barred, withdrew it. This Court acceded to the prayer and marked the matter withdrawn with costs. Still desirous to pursue his right through appeal, the applicant knocked on the doors of this Court armed with Misc. Civil Application No. 25 of 2022 asking this court to exercise its discretion under section 11(1) of AJA and enlarge time within which the applicant may apply for leave to appeal to the Court of Appeal out of time. One major ground was set out in the affidavit sworn by Jonas Joshua Bushambali supporting the application. It was that, a copy of the impugned judgment was supplied to him on 22/07/2022 after being certified on 19/07/2022. By then he was already late to file application for leave which is required to be filed within 30 days after the judgment was passed.

The application has been valiantly opposed by the respondent, through his counter affidavit filed in court alongside with a notice of preliminary objection (henceforth the PO). The latter raises one ground that:

- 1. That following withdrawal of the Miscellaneous Civil Application No. 11 of 2022 for leave to appeal to the Court of Appeal on 6/7/2022 by the*

applicant with no leave to refile the same application the present application is untenable, superfluous and an abuse of the court process.

With the parties' consensual resolution, the Po was argued by way of written submissions which were filed consistent with schedule drawn by the Court on 12/10/2022. The applicant was represented by Mr. Ezekiel Mwampaka, learned Counsel and the respondent enjoyed the legal services of Mr. Alex Job Giryago, learned Counsel.

In their respective submissions, parties unanimously held the view that the present application is identical to application No. 11 of 2022 which was withdrawn by the applicant before it was heard on merit. It is again unanimously accepted that the withdrawal was without leave to re-file a fresh similar application. It was due to this uncontested fact that has made Mr. Giryago to argue vehemently that ever since the withdrawal was without leave to re-file a fresh application, subsequent undertakings of similar nature offended the provisions of Order XXIII rule 1(3) of the Civil Procedure Code Cap. 33 R.E. 2019 (henceforth the CPC), that defers re-filing of a suit or application if no leave to re-filing it is granted. To cement his stance, Mr. Giryago referred me to decisions in cases of **Jennings-Bramly vs. A & F Constructors Ltd & another** [2002] 2 EA 452, **East African Development Bank vs Blue Line**

Enterprises Limited, Misc. Civil Cause No. 177 of 2007 (unreported) which cited the case of **CRDB Bank PLC & another vs. Aziz Mohamed Abood & another**, Misc. Commercial Cause No. 277 of 2015, (HC-Commercial Division) (unreported), **Tanzania Ports Authority and Attorney General vs Leighton Offshore PTE Limited**, Misc. Commercial Application No. 144 of 2020, (HC-Commercial Division) (unreported) and **Kuringe Real Estate Co. Limited vs. Bank of Africa (T) Limited & others**, Misc. Commercial Application No. 18 of 2020, (HC-Commercial Division) (unreported). All these cases underscored the position that the absence of any order of this court to have the withdrawn application re-instituted, the applicant is precluded from re-filing a fresh application of same nature.

In response, while Mr. Mwampaka concedes that no leave to re-file a fresh application was sought for and granted and further that the former and present applications are identical, he was insistent that the nature and circumstances of this case are different. The difference he talks about is that while in cited cases there were no Pos which resulted into dismissal or striking out of applications, in the present matter there was a Po whose determination would end up making Application No. 11 of 2022 dismissed for being time barred.

Mr. Mwampaka further held the view that this matter should be treated differently bearing in mind that each case has to be decided basing on its own peculiar facts and circumstances. The learned counsel seems to implore on this court to exercise its discretionary powers without being bound by decisions which decided cases of different facts. He supported his proposition by citing the case of **Kalma Enterprises Ltd vs. Naseer Salehe & others**, Land Appeal No. 33 of 2022, HC-Morogoro (unreported) in which the decision of **UAP Insurance TZ Ltd vs. Noble Motors Ltd**, Civil Application No. 260 of 2016 was referred to and the case of **Bakari Abdallah Masudi vs. Republic**, Criminal Application No. 123 of 2018 CAT-Mtwara (unreported).

I have anxiously considered the submissions from rival parties and the record as a whole. It is worth noting at this juncture that the uncontested factual issue is that on 06/07/2022, Application No. 11 of 2022 was withdrawn at the applicant's instance and that there was no leave granted to re-file it by the applicant through similar proceedings. It is also apparent that parties are having no varying feelings on the applicability of the provisions of Order XXIII Rule 1(3) of the CPC. I have read Mr. Mwampaka's submission and I don't scan any element of denying the applicability of the provisions of Order XXIII Rule 1(3) of the

CPC to suits as well as to applications including the present one. Similarly, Mr. Mwampaka does not deny that the present application is contextually identical to Application No. 11 of 2022. The obvious point at issue is the peculiarity of this application which behooves Mr. Mwampaka to urge this court not apply the principles annunciated in **Jennings-Bramly** (supra), **East African Development Bank** (supra), **CRDB Bank PLC & another** (supra), **Tanzania Ports Authority and Attorney General** (supra) and **Kuringe Real Estate Co. Limited** (supra).

I share Mr. Mwampaka's views that each case should be determined on its own peculiar facts and circumstances for no facts in one case are identical to facts in another case. See. **Bakari Abdallah Masudi** (supra). Nevertheless, I don't think that peculiarity of the case depends on whether the court asked parties to consider whether the matter was time barred and whether there was a PO or not. On this point I expected the learned counsel to demonstrate '**exceptional circumstances or peculiarity of the case**'. By exceptional circumstances, in my considered opinion, it means, the reasons must be exceptional to the general phrase of 'sufficient reasons' which is lower in proof than exceptional circumstances. Some examples of exceptional

circumstances, that can be advanced and get tested by the court against the mandatory conditions stipulated under Order XXIII Rule 1(3) of the CPC may be; **one**, if the withdrawal order was obtained by fraud, misrepresentation or undue influence; **two**, if the court had no jurisdiction to entertain the matter; and, **three**, if there was a clear violation of the provisions of the law, to mention but a few. In the instant application, none of the above exceptional circumstances were demonstrated in this application, save that, the applicant generally alleged that, the application was withdrawn upon the respondent filing the Po that the initial application was time barred. This, at any degree of imagination, cannot be termed as exceptional circumstance in this matter.

Now, having gone through the cited precedents, being satisfied that there are no exceptional circumstances to sideline Order XXIII Rule 1(3) for the CPC and the parties' submissions what comes out clearly is that the position obtaining in our jurisdiction is that a party who withdraws an application and is desirous to re-file it must apply for leave first. The provisions of Order XXIII Rule 1(3) of the CPC say it all. It provides:

"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."

The tenor and import of the cited provision are that after a party has withdrawn a suit, or as far as this matter is concerned, an application is precluded from instituting a fresh one without obtaining permission.

The foregoing passage is similar to several decisions of the Court of Appeal of Tanzania, including **Jennings-Bramly** (supra) wherein it was stated:

"A party who withdraws a suit without first securing leave to institute a fresh suit thereby bars himself from instituting a fresh suit. The court's discretion to grant leave to institute a fresh suit as envisaged under Order XXIII, rule 1(2) can only be exercised at the time when the withdrawal order is made and not after."

See also **East African Development Bank** (supra), **CRDB Bank PLC & another** (supra), **Tanzania Ports Authority and Attorney General** (supra) and **Kuringe Real Estate Co. Limited** (supra).

In the present matter, the applicant did not pray for leave to re-institute the application the time he prayed to withdraw the former application. As matters stand, the court did not make orders to that effect. Therefore, in the absence of any order of this court allowing the withdrawn application to be re-instituted, the present application has no legal base to stand on. Consequently, I hold the view that the subsistence of the withdrawal order dated 6th July, 2022, serves as a preclusion or hindrance to any subsequent preference of applications of similar nature by the applicant.

In a nutshell, the po by the respondent is ultimately sustained and the present application is hereby dismissed with costs.

It is so ruled.

DATED at MBEYA this 29th day of December, 2022



A handwritten signature in black ink, appearing to read "J. M. Karayemaha".

J. M. Karayemaha
JUDGE