

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

MISC. CIVIL APPLICATION NO. 33 OF 2022

(From the decision of the High Court of Tanzania at Mbeya in Civil Appeal No. 12 of 2019 and Original Resident Magistrates' Court of Mbeya in Civil Case No. 46 of 2018)

TWALIB LUBANDAMO..... APPLICANT

VERSUS

MACHEMBA TANGIMU GAMANO.....RESPONDENT

RULING

Date of last Order: 23/02/2023

Date of Ruling: 29/03/2023

NDUNGURU, J.

This ruling is a result of the point of preliminary objection raised by the respondent. On 19th day of October 2022, the respondent filed the Notice of Preliminary Objection through the service of Rwela Law Advocates to the effect that;

1. That, the application is not maintainable as the same abuse Court process.

In accordance with a well-established practice, once a preliminary point of objection is raised, the Court is duty bound to entertain it first and make a decision thereon before proceeding to hear the substantive matter.

When the matter was placed before me for hearing of the preliminary points of objection, Mr. Chapa Alfredy, learned advocate appeared for the applicant whereas Mr. Dickson Mbilu, learned advocate appeared for the respondent. Upon the parties request the Court allowed the preliminary points of objection to be dispose of by way of oral submission.

In support of the preliminary objection, Mr. Mbilu argued that, the application No. 33 of 2022 the applicant is praying for time to file notice of appeal and leave to appeal to the Court of Appeal of Tanzania. Again, Mr. Mbilu submitted that, it be remembered that the applicant had once filed the similar application in this same Court. But later filed an application to withdraw the same. In addition to that, Mr. Mbilu argued that, the

application to withdraw was filed was filed in 2021 and in the notice to withdraw the applicant stated that the applicant does not intend further to institute the herein cited appeal.

Also, the counsel for the respondent submitted that, surprisingly the applicant was filed the application for extension of time and later he had withdrawn the same. He added that, the act of the applicant withdrawing the application and then refile is the abuse of Court process. To buttress his argument, he cited the case of **Olga William Mwamyalla Versus Mogas Tanzania Limited (Formerly known as Mgs Interational (T) Limited & another, Land Case No. 8 of 2020, High Court of Tanzania at Dar es Salaam District Registry at Dar es Salaam (unreported).**

He continued to argue that, the applicant has no legal justification to refile this application but annoy the respondent and waste Court's time and expenses that is abuse of Court process. In conclusion, Mr. Mbilu prayed that, the objection be sustained with costs.

In rebuttal, Mr. Chapa vehemently disputed that; the objection raised is not a legal objection. He referred this Court to the case of **Mukisa**

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(1969) EA 700. He went on to submit that, the notice filed was withdrawn under Rule 89 (1) of the Court of Appeal Rules, 2009. He added that, the said Rule gives two conditions that the notice can be withdrawn at any time before filing an appeal and secondly, when filed the notice to withdraw, the same must be served to the respondent. Again, Mr. Chapa argued that, it does not prohibit refiling.

Also, Mr. Chapa stated that, in the notice withdrawn, the applicants were three but in the present application the applicant is only one. Again, he submitted that, in the circumstance, there are two different scenarios. He continued to submit that, the application for withdraw was granted by the Court of Appeal of Tanzania but never give an order for not refiling the application/notice. In addition to that, Mr. Chapa argued that, what was withdrawn is the notice of appeal before Court of Appeal of Tanzania not Misc. Application.

Furthermore, Mr. Chapa contended that, the applicant is praying for extension of time which the Court has discretion to grant or not basing on the reasons contained in the affidavit and whether a misuse or not of the

Court process will depend on the reason contained in the affidavit. Also, he stated that, the case cited by the counsel for the respondent bears different circumstances to the case at hand thus it is distinguishable. He added that, page 3 of the said case shows that the said case was dismissed by three judges for want of prosecution. He went on to argue that, the Court had advised the plaintiff to file objection proceedings and not fresh suit as he did.

In addition to that, Mr. Chapa contended that, it is why the Court held to be the abuse of Court process. Again, if the Court trace the withdrawn application will be dealing with Court of Appeal of Tanzania "Rules". Finally, he prayed that, the objection be overruled with costs.

In rejoinder, the counsel for the respondent that, the objection raised is a legal objection. Also, he argued that, it is not that every objection must be stated to be made under which provision. He added that, the case law is one of the source of law. Again, Mr. Mbilu argued that, it is they position that this is a legal objection and there is no need to discuss Rule 89 (1) of the Court of Appeal of Tanzania in order to

determine the objection at hand. He further stated that, this is because abuse of Court process does not need to be looked at the Rule cited.

He continued to contend that, even if there is a matter before Court of Appeal of Tanzania but abuse of Court process can be discussed in another Court, because Court system is only one. Also, Mr. Mbilu argued that, determining this objection at this moment is quite proper because objection can be raised at any time. He added that, the fact that the Rule does not prohibit refile but in his notice to withdraw the applicant said "*he does not intend further...*" and he did not pray for leave to refile when withdrawing it; that is why they say this is an abuse of Court process. Again, Mr. Mbilu argued that, the act of being the one applicant in filing application does not add anything. In conclusion, he prayed that, the objection be sustained and the application be struck out with costs.

Having carefully gone through the long submission from the counsel for both sides and the Court record, I wish to point out that, the issue calling for determination is whether the point of the preliminary objection raised by the counsel for the respondent is hold water or not.

At the outset, I wish to invoke the principle in the case of **Mukisa Biscuit Manufacturing Co. Ltd Versus West End Distributors Ltd (1969) EA 700** which, in my view, gave the exhaustive definition of the term "*preliminary objection*".

In the case of **Biscuit Manufacturing Co. Ltd (supra)** the Court inter alia stated that;

*"A preliminary objection is in the nature of what used to be a demurrer. It raises a **pure point of law** which if argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion". (The bold is mine)*

In the first place, I feel profoundly to state that, the preliminary objection raised by the counsel for the respondent meets the qualities sets in the case of **Biscuit Manufacturing Co. Ltd (supra)**, I hold so because it is a pure points of law and not talk about factual matter.

Turning to the gist of the respondent's objection, it is well established principle that, Courts are enjoined to ensure that they protect themselves from any possible abuse of its powers or procedures in the conduct of

proceedings. They must, as a matter of implicit obligation, guard against actions of unscrupulous parties who turn the Courts into a theatre for endless, repetitive and frivolous litigations, and actions which are known as an abuse of Court process. See the case of **JV Tangerm Construction Co. Limited & Technocombine Construction Limited (A Joint Venture) Versus Tanzania Ports Authority & another, Commercial Case No. 117 of 2015, High Court of Tanzania at Dar es Salaam (Commercial Division)** (unreported).

Also, in the case of **Graham Rioba Songwe & 2 others Versus Fina Bank Limited & 2 others, Petition No. 82 of 2016 (unreported) the High Court of Kenya (Constitutional & Human Rights Division)** inter alia at page 5 the Court observed that;

"The concept of abuse of Court/judicial process is imprecise. It involves circumstances and situation of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party

improperly uses the issue of the judicial process to the irritation and annoyance of his opponents”.

On that regards, my determination will be guided by the principles of the law cited above. The Court record is reveals that, the applicant filed a notice of appeal and an application for leave to appeal to the Court of Appeal of Tanzania through Misc. Civil Application No. 58 of 2020, against the decision of this Court in Civil Appeal No. 12 of 2019. Further, on 4th day of March 2021 the Misc. Civil Application No. 58 of 2020 was struck out by this Court. Thereafter, on 8th day of March 2021 the applicant was filed an application for extension of time to file notice of appeal and leave to appeal to the Court of Appeal of Tanzania through Misc. Civil Application No. 9 of 2021 and the same was struck out by this Court for being incompetent.

Also, it is true as submitted by the counsel for the applicant that, on 13th day of September, 2022 the notice of appeal in Civil Appeal No. 12 of 2019 was withdrawn under Rule 89 (1) of the Court of Appeal of Rules, 2009, with leave of the Court of Appeal of Tanzania. As result the applicant filed the present application. Further, this Court has been conferred with powers to extend time to file notice of appeal and leave to appeal to the

Court of Appeal of Tanzania under section 11 (1) of the Appellate Jurisdiction Act (Cap 141 R.E. 2019).

Therefore, it is my considered view that, the action taken by the applicant to lodge the present application before this Court do not amounts to an abuse of the Court process. Further, the notice to withdraw notice of appeal in Civil Appeal No. 12 of 2019 and order of the Court of Appeal of Tanzania in respect of notice to withdraw the said notice of appeal did not have the effect of preventing the applicant from filing the present application. Indeed, there was no abuse of the Court process practiced by the applicant by applying for extension of time to file the notice of appeal and leave to appeal to the Court of Appeal of Tanzania.

Basing on the discussion above, this Court finds that the preliminary objection being misconceived and raised without merits. Consequently, is hereby overruled. No order as to costs because the matter is not finalized.

It is so ordered.




D.B. NDUNGURU

JUDGE

29/03/2023