IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MOSHI SUB REGISTRY)
AT MOSHI

MISC. LAND APPLICATION NO. 47 OF 2022
(Originating from the decision of this court in Land Case No. 08 Of 2016)

MS. ASLAM AKBAR KHAN
(As administrator of Estate of the
Late Gulfiroz Begum) ..... **APPLICANT**

VERSUS

MS ASHRAF AKBAR KHAN.....1ST RESPONDENT
MS MAWALLA TRUST LIMITED.....2ND RESPONDENT
MS FRESHO GROUP OF
COMPANIES LIMITED .....3RD RESPONDENT

RULING

Last Order: 19th April,2023
Date of Ruling: 16th May, 2023

MASABO, J.: -

This is a ruling on a preliminary point of objection raised by the 2nd and 3rd respondent. Before I dwell on the preliminary objection, I will provide a brief summary of the checkered history of this application. It landed in this court for the first time as Land Case No. 08 of 2016, the applicant herein being the plaintiff while the respondents were the defendants. The suit was struck out after the court sustained a preliminary objection raised by the defendants and whose hearing proceeded *ex- parte* the applicant. Aggrieved by the *ex parte* order, the applicant filed Misc. Land Application No. 56 of 2017 praying to have the court *ex-parte* order set aside. The same was struck out for being preferred under a wrong provision of the law. Desirous of restoring his application, she came back to the court with Misc. Land Application No. 18 of 2018 seeking for leave for extension of time within which to restore her application as the time within which to

file an application for setting aside the *ex parte* order had already lapsed. The application was later on withdrawn for it contained omnibus prayers. The applicant then filed Misc. Land Application No. 22 of 2019 praying for extension of time to file the application to set aside the *ex-parte* order. The same was determined and she was granted 14 days reckoned from 27th November 2020 when the ruling was delivered. The applicant did not file her application within the days granted. She filed the same on 14th December 2020 and after a while she withdrew it and retreated on the ground that it was time barred. Later on, still determined to pursue her right, she came back with Misc. Application No. 32 of 2022. The application ended successfully on 25th April 2022 after she was granted an extension of 21 within which to file her application hence the present application in which he is praying to set aside the *ex-parte* ruling and order in Land Case No. 08 of 2016.

When the matter came for first mention, Ms. Juliana Mushi, Advocate representing the 1st respondent, declared that she does not intend to contest the application. Upon the 2nd and 3rd respondents filing their counter affidavits, they accompanied it with a notice of preliminary objections with the following three points:

1. The application is time barred;
2. The application intended to be filed is *res judicata* following the withdrawal order dated 20th August, 2021 before Mkapa J. and in alternative the application is misconceived as this court is *functus officio.*
3. The Application is defective for failure to attaching a Ruling and order granting extension of time.

During the hearing which proceeded in writing, all parties had representation. The applicant enjoyed the services of Mr. Abdallah Ally, the 1st respondent was represented by Ms. Juliana Mushi, the 2nd by Mr. Wilbard John Massawe and the 3rd by Mr. Ngereka Eliamini Miraji, all learned counsels.

In their joint submissions, Messrs Massawe and Miraji, counsels for 2nd and 3rd respondents abandoned the last point and submitted on the first two points. On the first point, they argued that the present application was time barred as it was filed on 21st September 2022 which was five (5) days late from date of the ruling which was 26th August 2022. They argued that as there is nothing in the application suggesting that the copy of the ruling and drawn order were received at a later date which would have justified the application of section 19(2) of the Law of Limitation Act to rescue the application, the application should be dismissed for being time barred. They cited the case of **Alex Senkoro and Three Others vs Eliambuya Lyimo** (as Administrator of the estate of Frederick Lyimo, Deceased), Civil Appeal No. 16 of 2017, CAT (unreported) at page 11, arguing that the exclusion of the time spent in obtaining a copy of decree or judgment is automatic as long as there is proof on record of the dates of critical events for the reckoning of the prescribed limitation period. They argued that as the affidavit on this application is silent on this aspect, the application should be dismissed with costs.

On the second ground, the learned counsels argued that this matter is a *res judicata* as the record indicate that a somewhat similar application was

filed and entertained by this court before Hon. Mkapa J via Misc. Land Application No. 79 of 2020 in which the 3rd and 4th respondents had raised a preliminary objection that it was time barred. The applicant's counsel conceded and stated that he had no interest to pursue the application as it was time barred. They further argued that the similarity of facts, parties and prayers in Misc. Land Application No. 79 of 2020 and the present application are sufficient to bring into play and fully satisfy the conditions of *res judicate* as set out under Section 9 of the Civil Procedure Code [Cap 33 R.E 2019] and the warranted remedy is the dismissal of this suit with costs.

They proceeded that the act of the counsel in Misc. Land Application No. 79 of 2020 conceding to the preliminary objection should have naturally triggered the consequences under section 3(1) of the Law of Limitations Act, [Cap 89 R.E 2019]. They supported the argument with the case of **Hashim Madongo and two others vs Minister for Industry and Trade and Two others**, Civil Appeal No. 27 0f 2003 (unreported). They argued that Hon. Mkapa J erroneously marked the application withdrawn instead of dismissing it as was the case in **Hashim Madongo** (supra) where the Court of Appeal substituted an order which struck out an earlier application with a dismissal order as it was the correct remedy.

The counsels further argued that even if the withdrawal order was to be left undisturbed still, it is not open for the applicant to refile the same without an order of the court or a good explanation considering that when withdrawing the application, she unequivocally declared her intention not to pursue the application further. They fortified this stance with the case

of **Mechmar Corporation (Malaysia) Berhad in Liquidation) vs VIP Engineering and Marketing Limited and 3 others**, Civil Application No. 190 of 2013, CAT at page 18-19 where the Court of Appeal cited the decision of **(Rani) Kulandai Pandichi and Another vs Inran Ramaswami Pandia Thevan, AIR 1928 Mad. 416** where it was held that where a person withdraws his suit, he is precluded from filing fresh one on the same cause. In the foregoing, they argued that, the applicant is barred from filing a similar application. In further fortification, they cited the decision of this court in **Kurwa Guchenya and 18 others vs Grumeti Reserves Limited** Misc. Labour Application No. 13 of 2021 (unreported) where it was held that, withdrawal of mater operates as a bar to fresh suit on the same cause of action.

In reply to the first objection Mr. Ally, the learned counsel for the applicant, argued that the same was wrongly raised as it was not on point of the law but facts which ought to be ascertained hence inconsistent with the principle in **Mukisa Biscuit Manufacturing Co. Ltd vs West Distributors Ltd** [1969] EA 696. He further argued that the 2nd and 3rd respondents have misdirected themselves by arguing that the time limit ought to run from 26/8/2022, the date when the ruling in Misc. Application No. 32/2022 was delivered while the court explicitly stated in the said ruling that the time would be computed from when the applicant was supplied with the copy of ruling and drawn order. Accordingly, the duration of 21 days ought to have been computed from 2nd September 2022 when the applicant was availed with the copy of the ruling and when this is done it would follow that, the time expired on 21st September 2022 and not 16th September 2022. Thus, when the applicant filed the present

application, she was well on time and the preliminary objection is thus devoid of merit.

On the second objection, Mr. Ally argued that, the respondents were intentionally impending this court from timely dispensing justice. He maintained that a similar objection was raised and determined in Misc. Land Application No. 79 of 2020 and overruled as seen under page 13 of the said ruling. Thus, re-litigating the same is an abuse of court process. Mr. Ally proceeded that, for the doctrine of *res judicata* to apply, the conditions set out under section 9 of the Civil Procedure [Code Cap 33 R.E 2019] must be met. He also referred to **Mulla on Code of Civil Procedure Act V of 1908,** Vol.1, Fourteenth Edition page 80 and **C.K. Takwani in Civil Procedure Code,** Sixth Edition, 2009 at page 77 where the authors stated four conditions for a matter to qualify as *res judicata.* He further cited **Mariana Guest House Ltd. Vs Mbaraka Zarara and Another**, Civil Appeal No. 51/98 CAT (unreported) as cited in **Halima Said Salum vs Tangamano Transport Services Company Ltd and 4 others,** Misc. Land Application No. 49/2021 HC, Tanga pg. 8 where it was held that the doctrine of *res judicata* comes into play where the matter in issue in a subsequent suit was directly and substantially in issue in previous suit and it was heard and finally decided in the previous suit. He added that, it was also held in this case that for a decision to be final, it must be on merits of the dispute.

Mr. Ally finalized his arguments by stating that the limitation of time goes to the root of the jurisdiction of the court in determining a certain matter and therefore a matter filed out of the prescribed time frame is deemed

incompetent and the court lacks jurisdiction to determine it. He stated that this was the position in **Tanzania Road Agency and Another vs Jonas Kinyagula,** Civil Appeal No. 471 of 2020 CAT, Kigoma (unreported). He argued that, Misc. Application No. 79 of 2020 was withdrawn for being time barred and so it cannot be said that it was determined to its finality by a competent court so as to bar the applicant from prosecuting the current application. He prayed the court dismiss the objections with costs.

In rejoinder, the counsels for respondents argued that since the applicant has admitted that Miscellaneous Land Application No. 79 of 2020 was indeed time barred, the principle in **Hashim Madongo's case** should be applied and the application be deemed dismissed regardless of the wording used the former application which was as good as dismissal. The present application is both, a res judicata and an abuse of court process. Besides, they argued that Misc. Land Application No. 32 of 2022 was on the issue of time extension and therefore it was not the same as the application at hand which is a *res judicata.*

Messrs Massawe and Miraji further challenged the applicant's for attaching a letter to her submission showing that she was availed with the copy of the ruling at a later date. They reasoned that the attachment is unacceptable as it was calculated to preempt the preliminary objection they have raised. Besides, they argued the letter was signed by an unknown individual not the deputy registrar of this registry. Lastly, they argued that the attachment was legally wrong as it amounts to filing evidence in the course of written submission which is not legally permitted

as held in **The Registered Trustees of the Archdiocese of Dar es Salaam vs the Chairman Bunju Village & 4 others,** Civil Appeal No. 147 of 2006 (unreported) at page 7. In the foregoing, they prayed that the objections be upheld and the application be dismissed with costs.

I have considered the submissions of both parties. I will resolve the two objections as two issues; **one,** whether the application is time barred and two; whether the application is incompetent. Before I deal with these two issues, I have observed with great concern that the applicant appended a letter to his submission trying to demonstrate when the ruling was availed to her. As correctly argued by the respondent's counsels, attachment of evidence to written submissions is legally unacceptable save where the said attachment is a copy of a ruling, a judgment, statute or an extract from a book. As the letter attached to the application is not under the purview of the above, I concur with the respondent's counsels and expunge it from the record.

Back to the first issue on whether this application is time barred, the following passage extracted from the ruling of Hon. Simfukwe, J in Misc. Land Application No. 32 of 2021 as delivered on 26th August 2022 provides a good reference for takeoff. It reads: -

> "For the foregoing reasons, this court is of settled opinion that there are enough materials presented to this court to grant extension of time sought in the chamber summons. Therefore, I hereby grant 21 days to the applicant to file his application as sought. Time shall commence to run from the date of being supplied with a copy of this ruling and drawn order. No orders as to costs."

Undeniably, as per this ruling, the period of 21 day was meant to run from the date on which the applicant was availed with the copy of the ruling and drawn order. The explicit exclusion of the time within which the applicant was waiting to be furnished with the copy of the ruling and drawn order is in tandem with the provision of section 19(2) of the Law of Limitation Act [Cap 89 RE 2019] which provides that the time within which the applicant was waiting to be furnished with the copy of the ruling or drawn order must be excluded from the computation of time.

Thus, the reckoning date in respect of this point of objection ought to have been the date on which the ruling was made available to the applicant and not the date of the ruling. In their submission, the respondent's counsels have implored me to find that since the applicant's affidavit accompanying the application is silent on this issue, the date of the ruling should be deemed the reckoning date. This argument which I respectfully decline, appears inconsistent with the trite law in our country as regards the burden of proof. Needless to cite any authority, the law is settled that 'he who alleges must prove'. Impliedly, therefore, the respondents being the ones asserting that the reckoning time should be the date of the ruling which presupposes that the copy of the ruling was availed to the applicant on the said date, they were duty bound to prove this fact but they did not. All they have is a mere lamentation based on assumptions to which no court can make a finding.

The argument that the applicant's affidavit ought to disclose the date he obtained the ruling is without merit as the application before this court is not for extension of time. It is for setting aside the ex parte order. The

issue for determination in the application and to which the affidavit must pay homage is whether there are good reasons for setting aside the *ex parte* order and ruling, not the duration at which the application was filed which would have naturally required deposition as to why the application was not filed earlier. The authority in **Alex Senkoro and Three Others V. Eliambuya Lyimo (as Administrator of the estate of Frederick Lyimo, Deceased)** (supra), was thus cited out of context as it does not resonate with the facts at hand.

On the second limb of the preliminary objection, two sub issues have been raised the first being that the application is *res judicata* and the second is that upon withdrawing Misc. Land Application No. 79 of 2020 after he conceded to the preliminary objection raised by the respondents, the applicant is precluded from instituting a fresh application on the same course as, subsequent to the withdraw order he obtained no order for re- institution of the same and besides, while praying for the withdrawal, her counsel explicitly stated that he no longer intends to pursue the application. I prefer to start with this point which raises one pertinent question whether, the withdraw of a suit or an application precludes the applicant from reinstituting a fresh application on the same cause of action.

Order XXIII rule 1(1) to (3) of the Civil Procedure Code [Cap 33 RE 2019] deals with withdrawal of cases and provides thus;

> 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 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.

My reading of this provision suggests that when a plaintiff or the applicant withdraws the matter without obtaining a leave to reinstitute it, he is precluded by law from instituting a fresh suit/application in respect of the same cause of action. This court has on numerous cases held so. In **Tanzania Venture Capital Fund Ltd vs Igonga Farm Ltd,** Commercial Case No. 14 of 2000 HC (Commercial Division) at Dar es Salaam (Nsekella. J as he then was) held that, a suit withdrawn without leave to file it afresh cannot be re-instituted afresh in respect of the same subject matter (Also see **Maynard Lugenj vs Municipal Director of Kinondoni Municipal Council,** Misc. Land Application No. 561 of 2021 and **Halima Hamisi Rajab Budda &4 others vs Abubakari Hamisi**, Misc. Civil Apoplication No. 34 of 2022, HC at Arusha. In the later case, Philip J. while dealing with an issue similar to the present one remarked,

"As I have alluded to herein above, I do not need to over emphasize that Order XXIII of the CPC helps to curb abuse of the court processes whereby people can file cases in court and that, it also helps to make sure that the cases come to an end.

In the case of **Stephen Masato Wasira v Joseph Sinde Warioba& The Attorney General** [1999] TLR 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 the legal Ingenuity has not been exhausted are clearly wrong."*

Inspired by these authorities and the authorities cited by Messrs Massawe and Miraji as to the purview of Order to XXIII rule 3 of the Civil Procedure Code to which I fully subscribe, I have come to the conclusion that, as correctly submitted by the two counsels, the application is improperly before this court as the applicant is precluded by law from filing the same as he did not obtain a leave to reinstitute the application. Worse still, as evidenced in the withdraw order, Mr. Kamazima who was then representing the applicant, explicitly made a declaration of his intention not to pursue the matter further. In the foregoing, entertaining the present application will go contrary to the public policy that litigation must come to an end.

The 2nd limb of the preliminary objection is, on the basis of the foregoing finding, upheld and the application is struck out with costs.

DATED and DELIVERED at Moshi this 16th day of May 2023

J.L. MASABO

JUDGE