

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TANGA DISTRICT REGISTRY

AT TANGA

CIVIL APPEAL NO. 21 OF 2022

EQUITY FOR TANZANIA LIMITED (EFTA)APPELLANT

VERSUS

SALIMU KASIMU MSANGI RESPONDENT

(Appeal from the judgment of the District Court of Korogwe at Korogwe in Civil Case No. 03 of 2021)

RULING

10/05/2023 & 12/06/2023

NDESAMBURO, J.:

The appellant was dissatisfied with the decision of the District Court of Korogwe rendered on the 18th of July 2022 in favour of the defendant. Aggrieved with the decision, she lodged Civil Appeal No. 16 of 2022 before the High Court of Tanga. On the 31st of October 2022, the High Court marked the appeal withdrawn with no costs following the prayer made by the appellant. Still protesting the decision of the District Court, the appellant lodged the current appeal.

However, after being served with the memorandum of the appeal, the respondent raised a preliminary objection based on two points of law, namely:

- i. The appeal is time-barred.*
- ii. The appeal contravenes Order XXIII Rule 3 of the CPC Cap 33 R.E 2019 (CPC).*

By consent, the preliminary objection was argued by written submissions, and each party dully complied with the scheduling order. Ms. Patricia Erick, a learned counsel, represented the appellant, whereas the respondent enjoyed the service of Ms. Jackline Kulwa, also a learned counsel.

In submitting the first limb of the preliminary objection, Ms. Kulwa averred that the impugned judgment was delivered 18th of July 2022, and the present appeal was filed on the 9th day of November 2022. She submitted that according to item 2, Part II of the schedule to Law of Limitation Act, Cap 89 R.E 2019 (LLA), the time limit to file an appeal to this court is 45 days. She thus argued that the appeal is time-barred as, counting from the date of judgment, a total of 113 days have elapsed.

Regarding the second limb of the preliminary objection, the counsel stated that before lodging the instant appeal, the appellant had filed Civil Appeal No. 16 of 2022 before this court. When the appeal came for mention, the appellant prayed for withdrawal. The

High Court heeded to the prayer and marked the appeal withdrawn with no order for leave to refile. Thus, based on that order, the appellant was precluded from filing a fresh appeal.

To strengthen her argument, she cited Order XXXIII Rule 1(3) of the CPC and the case of **CRDB Bank PLC and others v Aziz Mohamed Aboud and Morogoro Canvass Mills (1998) LTD**, Misc. Commercial Cause No. 277 of 2015 (unreported), where the Court of Appeal held that:

"The applicant did not pray for leave to re-institute the application the time they prayed for the withdrawal of the former application and the court therefore did not make any order to the effect. In the absence of any order of this court to have the withdrawal application re-instituted, if the applicant so wishes, the present application cannot legally stand."

Based on her reasoning and the cited authority, it was her submission that the present appeal before this court is incompetent for being time-barred and for being filed without leave of the court. She thus beseeches the court to dismiss the appeal with costs.

In reply to the first limb of the preliminary objection, the counsel for the appellant believed that the instant appeal was not time-barred.

She argued that the time limit to file an appeal from the District Court is 90 days, not 45 days, as submitted by the respondent. Accordingly, she referred this court to section 2 and Order XXXIX Rule 1(1) of the CPC.

She further submitted that since Order XXXIX Rule 1(1) of the CPC does not provide a limitation of time to file an appeal, then part II, item 1 of the schedule to the LLA, comes into play. Therefore, the present appeal falls under the time limit of 90 days.

To support her argument, she cited the case of **Bukoba Municipal Council v New Metro Merchandise**, Civil Appeal No. 374 of 2021, where the Court of Appeal held that since the provisions of XXXIX Rule 1(1) of the CPC do not provide a time limit in filing an appeal to the High court against the decision of the District Court, then in terms of item number 1, Part II of the Schedule to the LLA, a 90 days limitation period is prescribed for lodging an appeal under the CPC.

In further expounding that the appeal is not time-barred, the counsel submitted that they noted an error in the impugned judgment where the appellant's name was cited as Equity for Tanzania instead of Equity for Tanzania Limited (EFTA). Following the noted

irregularity, the appellant prayed to withdraw Civil Appeal No. 16 of 2022 so that she could seek a correction of the typo error. Accordingly, the corrected judgment, decree, and proceedings were delivered on the 7th of November, 2022, and the present appeal was filed on the 9th of November, 2022.

The counsel relied on the provisions of section 19(2) and (3) of LLA, which provides an automatic exclusion of time for the party securing copies of judgment and decree. In addition, she banked on the decision of the Court of Appeal in **Bukoba Municipal Council v New Metro Merchandise** (supra). Accordingly, based on the above argument, it was her submission that the first appeal was within time, and so is the instant appeal.

The counsel further submitted that under section 21 of the LLA, there is also an automatic exclusion of time of proceedings bona fide in court without jurisdiction, as was confirmed in the case of **Geita Gold Mining Limited v Antony Karangwa**, Civil Appeal No. 42 of 2020. She thus submitted that the appellant was equally entitled to withdraw a suit, file a fresh one, and still benefit from the exclusion granted under section 21 of the LLA.

Submitting on the second limb of the preliminary objection, she argued that since the court could not entertain the appeal with the error noted, the appellant had to withdraw the previous appeal purposely to go and correct the error committed by the District Court. She argued that when the appellant prayed to withdraw the appeal, she clarified that the withdrawal was intended to correct the noted anomaly.

From her submissions, she finally prayed that this court applies the overriding objective principle and allows the appeal to be determined on merit.

In rejoinder, the counsel for the respondent conceded that the time limit for filing an appeal of this nature is 90 days and not 45 days as was early submitted. However, she disputed that the appellant could not shield herself from the provisions of section 19(1) of the LLA. She argued that the appellant exercised such a right when she filed Civil Appeal No. 16 of 2022 before this court. She reiterated that once a party decides to withdraw the matter and file a fresh one, it is subject to the law of limitation by Order XXII Rule 2 of the CPC.

The counsel further averred that the appellant is also not covered under section 21 of the LLA as she decided to withdraw the matter on her own accord.

Re-joining on the second limb of the preliminary objection, the counsel corrected the mistake committed in his submission in chief. She submitted that it was a typo error and meant Order XXIII Rule 1(3), as it was quoted correctly. She repeated her submission in chief and finally prayed this court to find the preliminary objection with merit and dismiss the appeal for being incompetent with costs.

Having gone through the submissions by both parties, the court re-opened the hearing and invited the learned counsel to address whether the provision of Order XXIII Rule 1(3) applies to the instant appeal, that is, whether the appellant, having withdrawn her appeal without an order of the court to refile is precluded from instituting a fresh appeal.

The respondent was firm that the provision of Order XXIII Rule 1(3) precluded the appellant from instituting a fresh appeal since the instant appeal was initiated without the leave of the court to refile a fresh appeal.

The learned counsel submitted that the appeal is defined by Legal Dictionary, 23rd E.D, 2013 S.L Salwan as:

"An application by a party to a suit to an appellate court asking it to set aside or reverse a decision of a lower or subordinate court."

From the definition above, the learned counsel submitted that an appeal being a suit, a party can apply before the court to withdraw the application as per Order XXXII Rule 1 of CPC.

She further averred that an appeal is a continuation of a suit; therefore, the appeal court is competent to grant permission to withdraw it as elaborated by the book of Mulla on the Code of Civil Procedure, 16th E.D. In respect of Order XXII Rule 3, Mulla, in the same book, the author stated the following:

"An appeal is a continuation of a suit, and the appellant court is also competent to grant permission of withdraw of a suit...."

She cemented her submission with the case of **Halima Hamisi Rajabu Budda and four others v Abubakari Hamisi**, Misc. Application No. 34 of 2022.

She urged the court to sustain the preliminary objections and dismiss the appeal with costs using the cited authorities.

At this juncture, I wish to revert to the scheduling order placed by the court in the presence of both parties concerning filing submissions concerning the issue laid before the parties.

The respondent was ordered to file the written submissions on or before 19th April 2023, which was readily conformed to, a reply by the appellant was to be filed on or before 03rd May 2023, and a rejoinder (if any) was to be filed on 10th May 2023. The court noted that until the close of business on 03rd May 2023, the appellant had not filed any submission at the registry. The appellant's reply submission was subsequently presented for filing on 04th May 2023, which is one day after the day ordered.

It is a long-established practice in our courts that once a party has knowingly decided to ignore/or disregard the order of the Court for filing the written submission without good cause, s/he forfeits her/his right and has to bear the consequence. Default to file submissions as per the schedule of the Court has the same effect as the non-appearance of a party.

Borrowing the wording from the case of **Zaina H. Lyelu v Basola Lumato and another (Dc) Civil Case No. 8 of 2009**, this court, in dealing with a similar situation, stated:

Now, what is the effect of a court order that carries instructions which are to be carried out within a predetermined period? Obviously, such an order is binding. Court orders are made in order to be implemented; they must be obeyed. If orders made by courts are disregarded or if they are ignored, the system of justice will grind to a halt or it will be so chaotic that everyone will decide to do only that which is convenient to them. In addition, an order for filing submission is part of the hearing. So if a party fails to act within prescribed time he will be guilty of in-diligence in like measure as if he defaulted to appear...This should not be allowed to occur. Courts of law should always control proceedings, to allow such an act is to create a bad precedent and in turn invite chaos."

Likewise, in **P3525 LT Idahya Maganga Gregory v The Judge Advocate General**, *Court Martial Criminal Appeal No. 2 of 2002 (unreported)*, the Court held:

"It is now settled in our jurisprudence that the practice of filing written submissions is tantamount to a hearing and; therefore, failure to file the submission as ordered is equivalent to non-appearance at a hearing or want of prosecution. The attendant consequences of failure to file written submissions are similar to those of failure to appear and prosecute or defend, as the case may be..... Similarly, courts have not been soft with the litigants who fail to comply with court orders, including failure to file written submissions within the time frame ordered."

In a bid to abide by this practice which is jealously embraced and guarded by the court, this court will not accept to consider the written submission filed after the ordered date has passed. Therefore, this court will disregard the appellant's written submission filed after the scheduled date.

The court is now left with a task to determine two issues: whether the appeal is time-barred and whether Order XXIII Rule 3 of the CPC was contravened. This court will first determine the second limb of the preliminary objection, as determining the first limb depends on the second limb of the preliminary objection.

From the record and submissions made by the parties, it is undisputed that before lodging the instant appeal, the appellant had lodged Civil Appeal No. 16/2022. However, the appeal was marked withdrawn on 31/10/2022 by the instance prayer of the appellant.

In the second limb of the preliminary objection, the respondent complains that the appeal contravenes Order XXIII Rule 1(3) of the CPC as before the institution of the instant appeal, the appellant had instituted another appeal which was marked withdrawn without leave to refile.

It is not disputed that the provisions of Order XXIII Rule 1(3) of CPC precluded a plaintiff having withdrawn his suit without leave to institute a fresh case regarding the same subject matter. Accordingly, the provision of the above Order is reproduced as hereunder:

"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 court record reveals that on 31/10/2022, Ms. Patricia Eric, a learned counsel for the appellant, prayed to withdraw the appeal without costs to allow her to approach the trial court to correct the name of the defendant/appellant. The counsel for the respondent never objected to the prayer made. Accordingly, the High Court granted the prayer and entered the following order:

"The appeal is marked withdrawn, with no costs."

As noted above, Order XXIII Rule 1(3) of the CPC allows a plaintiff to withdraw or abandon the whole or part of the claim, but if he wishes to refile the claim or the same subject matter, s/he must seek leave of the court. On the day the matter was marked withdrawn, the proceedings do not reflect that Ms. Patricia prayed for leave to refile the appeal. The court headed to the prayer, and as a practice, the court could not grant what was not prayed for. (See **Hotel Travertine & 2 others v National Bank of Commerce** (2006) T.L.R. 133).

The pertinent question is whether Order XXIII Rule 1(3) of the CPC applies to the current situation. The respondent learned counsel thinks so, while the appellant's learned counsel thinks the opposite.

The learned counsel for the respondent has argued that the provision of Order XXIII Rule 1(3) applies to the withdrawals of appeal and has cited the book of Mulla on the Code of Civil Procedure to support her contention. She also cited the High decision of **Halima Hamisi Rajabu Budda** (supra).

To answer the above question, the term suit needs to be ascertained. In **Burafex Limited (Formerly known as Ametaa Limited v Registrar of Titles**, Civil Appeal No 235 of 2019 (HC), the High Court, when faced with a challenge of what the term suit constitutes, came up with a definition of the term suit. In that case, a term suit was defined as:

"A proceeding of a civil nature of various forms such as petition, application, appeal, review, revision or as referred in the Civil Procedure Code filed in a court of law between two or more parties for determination of rights and duties of such persons.

Furthermore, the Court of Appeal in the case of **Tanzania Motor Services Ltd v Mehar Singh t/a Thaker Singh**, Civil Appeal 115 of 2005, adopted a broader definition of the word "suit" with guidance from the Law Lexicon, The Encyclopaedic & Commercial

Dictionary, 2002 (Reprint) at page 1831 and had the following to state: -

"The term "suit" is a very comprehensive one and is said to apply to any proceeding in a Court of Justice by which an individual pursues a remedy which the law affords him. The modes of proceedings may be various, but if the right is litigated between the parties in the Court of Justice, the proceeding is a suit".

The above position was also approved in another Court of Appeal decision of **Tanzania Posts Corporation v Jeremiah Mwandi, Civil Appeal No. 474 Of 2020** (unreported).

From the above authorities, it can be concluded that the appeal is also a continuation of the suit and has a broad meaning which covers appeals. Therefore, the provision of Order XXIII Rule 1(3) of CPA also applies to the appeal.

The book of Mulla, The Code of Civil Procedure, 19th Edition Volume 3, explaining principles of Order 23 on page 2948, states

"The law confers no right which a person does not desire- invito beneficium non datur. The second suit after

withdrawal of the first suit (without permission to file a fresh suit) is barred, not because of the principle of res judicata but because whoever waives, abandons or disclaims a right will lose it."

Thus, since the counsel for the appellant prayed to withdraw the matter and never sought leave to refile, and similarly, the court's order did not allow the appellant to refile a fresh appeal, she is undoubtedly precluded from instituting a fresh appeal. The argument by the appellant that the reason for the withdrawal was well known to the court does not give an automatic guarantee for refiling. Leave to refile must have been specifically prayed for and granted. And it is worth noting that a prayer for leave to refile is not an automatic right but a court discretion and can only be exercised when the withdrawal order is made and not after. See **Jennings Bramly v A and F Contractors Ltd and another** [2003] 2 EA 425.

There is an argument by the appellant who urged the court to apply the principles of overriding objective, which calls for the court to avoid technicalities and deal with substantive justice. However, the said principle cannot apply to the current situation. My stand is fortified by the decision of the Court of Appeal in **Mondrosi Village**

and others v Tanzania Breweries and another, Civil Appeal No. 66 of 2017, where the court held that overriding objective principle could not be applied blindly against mandatory provisions of procedural law.

Therefore, since the appellant never pleaded and granted leave to refile, she is precluded under Order XXIII Rule 1(3) (supra) from bringing a fresh appeal. Having so reasoned, the second limb of the preliminary objection is merited. In this circumstance, this court finds no reason to determine the first limb of the preliminary objection.

Consequently, the appeal is dismissed. Accordingly, no order as to costs is made.

It is so ordered.

DATED at TANGA this 12th day of June 2023.




H. P. NDESAMBURO

JUDGE