

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**TANGA SUB-REGISTRY**

**AT TANGA**

**MISC. LABOUR APPLICATION NO. 04 OF 2023**

**YASIN SELEMAN JUMA ..... APPLICANT**

**VERSUS**

**TANGA CEMENT PLC ..... RESPONDENT**

*(Arising from the Labour Revision No. 01 of 2023 of the High Court, Labour Division at Tanga,  
Originating from Labour Dispute No. CMA/TAN/100/2020/41 of CMA at Tanga.)*

**RULING**

*05/06/2024 & 05/06/2024*

**NDESAMBURO, J.:**

Yasin Seleman Juma, the applicant in this matter, filed an application in this court seeking an extension of time through a chamber summons under Rule 24(1), (2), (a)–(f), and (3)(a)–(d), and Rule 56(1) of the Labour Courts Rules GR 106 of 2007, as well as Sections 19(1) and 21(2) of the Law of Limitation Act, Cap 89 R.E 2019. This application is made by notice of application and supported by an affidavit affirmed by him.

Tanga Cement Plc, the respondent, responded by filing a counter-affidavit and a notice of preliminary objection on a point of law against the application. The preliminary objection was based on the following:

*That, this application is untenable for seeking to file an application for revision which was earlier on withdrawn without leave to refile, thus res judicata.*

The brief facts of this application are as follows: The applicant was an employee of the respondent. On the 20<sup>th</sup> of April 2020, while discharging his duty as an operator, it is alleged that he drove the machine at an excessive speed, collided with a motor vehicle from the rear, and caused damage to the machine. As a result, the applicant was suspended from his job and later summoned to appear before the disciplinary committee. After a hearing, his employment was terminated based on the committee's findings.

Being aggrieved by what he regarded as unfair termination, the applicant successfully challenged his termination at the Commission for Mediation and Arbitration (CMA). The CMA concluded that the termination was unfair and awarded the applicant three months'

salary. Dissatisfied with the CMA's decision, the applicant lodged Labour Revision No. 01 of 2023 before this court. However, this application was withdrawn at the applicant's request on the 6<sup>th</sup> of June 2023. Following the withdrawal, the applicant filed the current application seeking an extension of time to file a revision against the CMA's decision.

As previously noted, the applicant's application faced a preliminary objection. By consent, the preliminary objection was argued through written submissions, with each party complying with the scheduling order. The applicant was represented by Ms. Deborah Msacki, a learned counsel, and David Kapoma, a Personal Representative (PR), while the respondent was represented by Ms. Elizabeth Mleneta, Mr. Ally Hamza, Mr. Erick Dengah, and Mr. Nuhu Mkumbukwa, all learned counsel.

In supporting the preliminary objection, Mr. Mkumbukwa argued that the applicant had previously filed Labour Revision No. 01 of 2023 before this court, which was marked as withdrawn. However, the withdrawal was granted without leave to refile.



The learned counsel strongly asserted that it is a well-established legal principle that once a matter has been withdrawn without leave to refile, such withdrawal bars subsequent proceedings of the same nature. He cited the case of **Kurwa Guchanya and 18 others v Grumeti Reserves Limited**, Misc Labour Application No. 13 of 2021, where it was held:

*"It is the holding of this court that the filing of this application is legally unjustified as the same was withdrawn with no leave to re-file".*

Additionally, he cited the case of **Prof. Philip Odoyo Bwathondi and Another v Abadallah Said Mashaka and 6843 Others**, Misc. Land Application No. 206 of 2023, where it was emphasised that leave to refile a suit is at the discretion of the court and must be requested by the party withdrawing the matter. A party is at liberty to refile the matter only if leave to refile was granted.

Mr. Mkumbukwa further argued that determining this application for an extension of time and allowing it would be an exercise in futility, as it would permit an incompetent application for revision to be filed after that. He cited the cases of **Restituta Frank Msongole**

**v Maiko Shoo**, Civil Application No. 473/17 of 2022, **Israel Malegesi and Another v Tanganyika Bus Service**, Civil Application No. 172/08 of 2020, both from the Court of Appeal, and **Phoenix Tanzania Insurance Co. Ltd v Jilala Julius Kakenyeli**, Misc. Civil Application No. 28537 of 2023 from this court, to support his position.

Consequently, based on his submission, the learned counsel prayed for the court to find merit in the preliminary objection and dismissed the application.

In response to the preliminary objection, Mr. Kapoma argued that the current application is tenable and that the objection raised by the respondent's counsel is vague and does not involve a point of law relevant to the application at hand. According to him, the wording of the preliminary objection does not impact the applicant's application, as there is no connection between the current application and the previously withdrawn Revision No. 01 of 2023.

He conceded that the withdrawal of Labour Revision No. 01 of 2023 was without leave to refile. Still, he contended that the assertion

that the current application is res judicata to Revision No. 01 of 2023 is premature and should be raised only if the instant application is granted.

Mr. Kapoma explained that he sought to withdraw the previous application to apply for an extension of time, acknowledging that the initial application was lodged out of time. He argued that his withdrawal request effectively included an implicit leave to refile, which the High Court granted. To support his argument, he referenced page 1028 of Black's Law Dictionary, 10<sup>th</sup> Edition, defining "leave of court" as "judicial permission to follow a non-routine procedure" and "leave to" as "permission asked for or granted." He linked these definitions to the present application, suggesting it had the effect of a leave to refile.

He disputed the relevance of Order XXIII Rule 1, 2(b) of the Civil Procedure Code, Cap 33 R.E 2019 to this application. Instead, he invoked Section 51 of the Labour Institution Act Cap 300 RE 2019 to support his position. He further asserted that Rule 55(1) and (2) of



the Labour Court Rules GN No. 106 of 2007 cure the situation where leave to refile was not granted.

Regarding res judicata, Mr. Kapoma argued that the elements of res judicata do not apply in this case. He stated that no judicial decision was pronounced, the subject matter and issues decided were not substantially the same, there was no final decision, and no issue was raised, heard, and decided on finality.

In conclusion, Mr. Kapoma, based on his reasoning and cited authorities, urged this court to dismiss the preliminary objection raised by the respondent, without costs.

In rejoinder, the respondent's counsel disputed the assertion that the preliminary objection was vague, insisting that it was based on a point of law. He argued that this application emanated from Labour Revision No. 01 of 2023 and Labour Dispute No. CMA/TAN/100/2020/41, the latter forming the basis of the previously withdrawn application and the current one. Hence, he maintained that the current application has a symbolic nature to the previous application.

He emphasized that Mr. Kapoma, in his request before the honourable judge to withdraw the application, did not seek leave to refile. He cited Order XXIII Rule 1(3) of Cap 33, which bars subsequent proceedings of the same nature if a matter is withdrawn without leave to refile. He argued that the current application falls within the ambit of subsequent proceedings as mentioned by the rule. To support his argument, he referenced the definitions of "proceedings" and "subsequent" from Black's Law Dictionary, 9<sup>th</sup> Edition, to demonstrate that the applications are essentially the same.

He also argued that the provisions of Rules 55(1) and (2) of GN No. 106 of 2007 cannot rectify the situation and are irrelevant to the matter before this court.

In conclusion, he reiterated his prayer that the preliminary objection be sustained and the application be dismissed with costs.

After reviewing the submissions from both parties, including legal authorities and the record, the task of this court is to determine whether the preliminary objection raised by the respondent has a legal basis to warrant the dismissal of the current application. This



court will, therefore, review the application to determine whether the current application, which seeks to file a revision previously withdrawn without leave to refile, is untenable and subject to the principle of *res judicata*.

However, before determining the above-posed question, this court wishes to first address the issue raised by the applicant that challenges the preliminary objection as vague and not involving a point of law. Moreover, the applicant asserts that there is no connection between the current application and the previously withdrawn Revision No. 01 of 2023. Mr. Mkumbukwa opposes this assertion.

Having reviewed the preliminary objection, there is no doubt that the objection raised by the respondent primarily concerns a matter of law, as it questions the applicability of Order XXIII Rule 1(3) of Cap 33. Therefore, the preliminary objection aligns with the holding in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd** [1969] E.A 696.

Additionally, the application before this court, as rightly pointed out by Mr. Mkumbukwa, is related to Labour Revision No. 01 of 2023. In that matter, the applicant sought a revision of the decision in Labour Dispute No. CMA/TAN/100/2020/41. The applicant withdrew that application and is now seeking an extension of time to file a revision against the decision of the CMA. In that sense, therefore, it cannot be said that the applications have no connection.

Coming back to the preliminary objection, based on the record and submissions provided by both parties, it is evident that before commencing the present application, the applicant had lodged Labour Revision No. 01 of 2023. However, on the 6<sup>th</sup> of June 2023, the applicant voluntarily withdrew the application. The counsel for the respondent never objected to the prayer made. Accordingly, this court granted the prayer and entered the following order:

*"The matter is marked withdrawn".*

As noted above, Order XXIII Rule 1(3) of Cap 33 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 Mr. Kapoma prayed for leave to refile the application. 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).

It is a trite law that if a party is not granted the leave to re-file his/her case, is precluded from reinstating the same case again. This is clearly stated in Order XXIII Rule 1(3) of Cap 33 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 this court held:

*"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. Therefore, in the absence of any of this court to have the withdrawal application re-instituted, if the applicant so wishes, the present application cannot legally stand."*



The record of Labour Revision No. 01 of 2023, specifically on page 2 of the typed proceedings, clearly shows that the applicant prayed to withdraw his application, and the matter was marked as withdrawn. However, no leave to refile was granted. I do not agree with Mr. Kapoma's assertion that the High Court implicitly granted leave to refile simply because the applicant's intention for withdrawing the matter was to apply for an extension of time. The record of Labour Revision No. 01 of 2023 is crystal clear: no leave to refile was granted. Leave to refile must have been explicitly prayed for and granted. It is important to note that a prayer for leave to refile is not an automatic right but a court's discretion and can only be exercised when the withdrawal order is made, not afterwards. See **Jennings Bramly v A and F Contractors Ltd and another** [2003] 2 EA 425.

The applicant has argued that the provisions of Order XXIII Rule 1(3) of Cap 33 are irrelevant to this application. However, based on the above authorities that have interpreted this rule, it is indeed relevant. The rule precludes a party who has withdrawn or abandoned the whole or part of a claim from refileing the claim or the same subject matter if she/he has not obtained leave of the court. Similarly,

the application cannot be cured by the provisions of Rule 55(1) and (2) of GN No. 106 of 2007, as suggested by Mr. Kapoma.

From the aforementioned, this court is satisfied that the respondent's argument is valid: the current application is untenable as the applicant had previously withdrawn Labour Revision No. 01 of 2023 without obtaining leave to refile. Consequently, he is precluded from refiling this application. This court, therefore, upholds the preliminary objection. Given this finding, there is no necessity to address the issue of res judicata. Accordingly, I proceed to dismiss the entire application with no order as to costs.

It is so ordered.

**DATED** at **TANGA** this 5<sup>th</sup> day of June 2024.



  
H. P. NDESAMBURO

**JUDGE**