

IN THE HIGH COURT OF TANZANIA

TEMEKE SUB-REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

MISC. CIVIL APPLICATION NO. 318 OF 2024

MECK DAUDI KASANE.....APPLICANT

VERSUS

AMOS GOIMANG'OMBE.....RESPONDENT

RULING

Date of last order: 13/05/2024

Date of Ruling: 24/06/2024

OMARI, J.

The Applicant is seeking an order of extension of time within which to file an appeal to this court. The Respondent contested the Application; however, he also filed a notice of a Preliminary Objection with two grounds to wit:

1. That this honourable court has no jurisdiction to extend the time for re-filing the appeal since in PC Civil Appeal No. 17 of 2023 it marked the appeal withdrawn and did not grant leave to the Applicant to re-file it.



2. That the Application is legally misconceived and abuses the court process.

The Preliminary Objection was argued by way of written submission. The Respondent's submission was drawn and filed by Dr. Lucas Charles Kamanija while those of the Applicant were drawn and filed by Barnaba Luguwa both are learned advocates.

Dr. Kamanija commenced his submission with a prelude of what he referred to as material facts of the case then went on to submit on the first point of the objection. He stated that this court in the cases of **Jennings Bramley v. And F Contractors Ltd and Another** [2003] 2 EA 452 and **CRDB Bank PLC and Others v Aziz Mohammed Aboud and Another**, Misc. Commercial Cause No. 277 of 2015 it was held that a person who withdraws a suit without first securing leave to institute a fresh suit in respect of the same subject matter has barred himself. Dr. Kamanija went on to point out that according to the Court of Appeal in the case of **Honourable Attorney General v. Reverend Charistopher Mtikila** (Civil Application No. 20 of 2007) [2008] TZCA 57 a suit includes an appeal. Counsel contended that on the basis of the authorities supplied this court has no jurisdiction to extend



the time for “re-filing” Civil Appeal No. 17 of 2023 which was marked withdrawn and there was no leave to refile it.

Submitting on the second ground of the Preliminary Objection, counsel cited this court’s decision in the case of **Twalib Lubandamo v. Machemba Tangimu Gamano** (Misc. Civil Application No.33 of 2022) [2023] TZHC 20334 and stated that the Application is an abuse of the court process and a waste of time since the same was marked withdrawn at the free instance of the Applicant and there was no order to re-file it. Dr. Kamanija then concluded by praying that the Application be dismissed with costs.

When it was his turn Mr. Luguwa began his submission by contesting the reference to the case of **Honourable Attorney General v. Reverend Charistopher Mtikila** (*supra*) since all proceedings of a civil nature are governed by the Civil Procedure Code, Cap 33 R.E 2019 (the CPC) and that Order XXXIII Rule 1 of the CPC allows withdrawal of suits and that the requirement of leave to refile is limited to suits which as per section 22 of the CPC an appeal is not a suit. Counsel submitted further that appeals are governed by Order XXXIX of the CPC and that provision imposes no duty to seek leave to reinstate an appeal when it is withdrawn on defects. He also argued that they could not have sought the time to re-file the appeal from

the Dar es Salaam District Registry since it does not have the jurisdiction to try the appeal, thus, cannot have the jurisdiction to grant and deny leave to refile the appeal. This, according to counsel makes the first ground of the Preliminary Objection baseless.

Submitting on the second ground of the Preliminary Objection Mr. Luguwa questioned the argument that his client was abusing the court's process since the withdrawal was done after the hearing was completed and the parties were awaiting judgment. According to counsel what his client has done is to come to the proper registry thus, not abuse of process. Counsel then prayed that the Preliminary Objection should be found unmeritorious and the hearing of the Application should move ahead.

By way of a rejoinder Dr. Kamanija reiterated what he submitted in chief pointing out the Applicant did not contest that PC Civil Appeal No.17 of 2023 was withdrawn with no leave to refile. Likewise, the Applicant did not contest the second ground of the Preliminary Objection that the Application is an abuse of court process. He then went on to refute Mr. Luguwa's contention that an appeal is not a suit. He cited the case of **Hassan Abdallah Kitingi and 3 Others v. Temeke Municipal Council**, Misc. Civil Application No. 432 of 2020 [2021] TZHC 7638 where this court referred to the case of



Burafex Ltd. (formerly known as Ametaa Ltd.) v. Registrar of Titles,

Civil Appeal No. 235 of 2019 in which an appeal was described to be proceedings that is a suit. Therefore, PC Civil Appeal No.17 is a suit.

Having gone through counsel's arguments for and against the grounds of the Preliminary Objection what remains is the determination of whether the grounds of the Preliminary Objection are meritorious to sustain it or otherwise.

I shall commence with the first ground in which the Respondent's counsel is alleging that this court has no jurisdiction to extend the time for the Applicant to file their appeal since there was no leave to refile the withdrawn appeal. Both parties do not dispute that the appeal was withdrawn for being filed at the wrong registry. The Respondent's counsel is of the view that since the Applicant did not crave for leave to refile the appeal when withdrawing it then he has barred himself from instituting a fresh appeal as was held in **Jennings Bramley v. And F Contractors Ltd and Another** (*supra*) and **CRDB Bank PLC and Others v Aziz Mohammed Aboud and Another** (*supra*). This is the core of the Preliminary Objection.



From the Applicant's Affidavit in support of his Application, it is discernible that the parties have been involved in litigation since 2021 when Probate and Administration Cause No. 71 of 2021 was filed at Manzese Primary Court which resulted in Civil Appeal No. 68 of 2021 at the District Court of Kinondoni at Kinondoni. It would seem that a further appeal was lodged and the same was set for judgment, however, on 05 October, 2023 it was marked withdrawn for being filed in the wrong registry. The Respondent does not contest any of these facts. What he is at issue with is the fact that the Applicant never sought and got leave to refile the said appeal. The Applicant is contesting this for two reasons; the first is that an appeal not a suit in the context of section 22 and Order XXXIX of the CPC therefore there is no duty to seek leave to reinstate an appeal withdrawn on defects. On this one I am averse to Mr. Luguwa's understanding that an appeal is not a suit. As rightly pointed out by Dr. Kamanija this court in the case of **Burafex Ltd. (formerly known as Ametaa Ltd.) v. Registrar of Titles**(*supra*) where in describing what is a suit it was stated:

"a suit is a proceeding of civil nature in various forms such as petition, application, appeal, review, revision or as referred in the Civil Procedure Code (supra) filed in a Court of Law between two or more



parties for determination of rights and duties of such person” (Emphasis supplied)

This being the case, then an appeal is a suit and is subject to the same rules and procedures that govern the withdrawal of suits. However, the second reason for the Applicant’s contestation of the first ground of the Preliminary Objection is that the High Court Dar es Salaam District Registry does not have the jurisdiction to try the appeal, thus, cannot have the jurisdiction to grant and deny leave to refile the appeal. I agree with this contention, if the High Court Dar es Salaam District Registry had no jurisdiction to entertain the appeal then it had no jurisdiction to do anything else as it would also be a nullity as all proceedings conducted by a court without jurisdiction are a nullity as was decided in the case of **Desai v. Warsaw** (1967) EA 351. It is for this reason that I find the first ground of the Preliminary Objection is unmeritorious.

Having found as above I shall not belabour on the second ground of the Preliminary Objection which is based on the assertion that the Application is legally misconceived and abuses the court process. This is based on the fact that the Applicant could have not sought leave to refile the appeal in the High Court Dar es Salaam District Registry which had no jurisdiction to



entertain the appeal. I therefore find the second ground of the Preliminary Objection unmeritorious.

Having found both limbs of the Preliminary Objection raised by the Respondent untenable they are hereby dismissed; the matter is to be heard on merit. I make no order as to costs.

It is so ordered.




A.A. OMARI
JUDGE
24/06/2024

Ruling delivered and dated 24th day of June, 2023.




A.A. OMARI
JUDGE
24/06/2024