

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

LAND APPEAL NO. 56 OF 2018

*(Originating from the decision of District Land and Housing Tribunal for Temeke, at
Temeke Application No. 241 of 2014)*

EMMANUEL ELIAZRY APPELLANT

VERSUS

EZIRONK K. NYABAKARI RESPONDENT

RULING

S.M. MAGHIMBI, J:

The appellant in this case was an unsuccessful applicant in Application No. 241/2014 ("The application") at the Temeke District Land and Housing Tribunal ("the Tribunal"). Aggrieved by the decision of the tribunal delivered on the 24/06/2016, the appellant initially lodged in this court Land Appeal No. 121/2016 which was struck out on 02/08/2017 and the appellant was granted leave to appeal hence the current appeal. When the matter came before me on the 23/09/2019, I noticed that the current appeal is filed out of the time prescribed by law and I hence asked the appellant's advocate to address the court on the issue of time limitation having noted that the appellant never got any extension of time to refile the current appeal.

On the 21/11/2019 Mr. Hamza appeared before the court and submitted that the previous appeal was struck out on the 02/08/2017 and he refiled the current appeal on the 15/08/2017 arguing that since leave to refile was granted by the court; it was an automatic extension of time. He was then, on his own prayer, granted time to come and address the court with precedents that the grant of leave to refile was an automatic extension of time.

On the 03/12/2019, Mr. Hamza continued his submissions that in his research, he came across Land Case No. 35/2015 and Land Case No. 53/2016 both at Dar Registry in which Land Case No. 35/2015 the court marked the suit withdrawn and went further to granted leave to refile. Further that in Land Case No. 53/2016 the court granted an order to withdraw the suit and went further to order that the withdraw of the suit is subject to time limitation therefore the wording in Land Case No. 53/2016 was clear that the party was subject to time limitation while no subjection was imposed in Land Case No. 35/2015 hence automatic extension.

Mr. Hamza submitted further that pursuant to her order dated 02/08/2017, Hon. Wambura, J did struck out the appeal and granted leave to refile the same contrary to position in Land Case No. 53/2016. That she categorically granted leave to re-file the appeal without going to the law of limitation hence it was an automatic leave to refile. He concluded that the current appeal is within time.

In alternative, Mr. Hamza prayed that if this court is of a different opinion, then the appellant is given leave to withdraw the appeal with leave to

refile. He further prayed that costs of this appeal are not imposed on his client.

I will begin with the date that the decision that is appealed against was delivered. The records show that the said decision was delivered on the 23/06/2016. A Land Appeal No. 121/2016 was filed on time but the same was Struck Out on 02/08/2017 with leave to refile. Mr. Hamza's contention is that the words "leave to refile" in the order connotes an automatic extension of time. With due respect to the learned Counsel, that is not the position of the law. Order XXIII Rule Rule 2 of the Civil Procedure Code, Cap. 33 R.E 2002 (The CPC) provide:

2. In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted.


From the provisions of the law, leave to refile under Order XXIII Rule 2 simply refers to a leeway for a party who has withdrawn a matter pending in court, to refile the same matter without it being subject to the doctrine of res judicata. Leave to refile emanated as a cure to an effect to withdraw the matter where a party may be intending to refile the same matter but ought to withdraw the current one for reasons of incompetence or otherwise. This is simply because the effect of withdrawing the matter finalizes the matter and if leave is not granted, then the party is barred from instituting the same matter again, it ends litigation.

It is pertinent to note that on the 02/08/2017 the suit was struck out, by a suit/appeal being struck out, it means the party concerned was at liberty to file a fresh matter should he still be interested. Therefore even if the court did not use the word "with leave to refile", the matter that was struck out could have been refiled. However, the effect of striking out the suit is that the position of the parties goes back to the same position as if no appeal was ever filed in court. Hence for the purpose of time limitation, the computation of time starts on the date that the decision was pronounced, that is the 23/06/2016. The appellant ought to have used the grounds of the appeal being struck out as a reason for extension of time and not to file this appeal without time being extended.

The phrase "leave to refile" is oftenly used to refer that the party is not barred to bring a fresh suit/application following a withdrawal of another matter of the same nature. It has never meant to include an extension of time. Once a suit is struck out or withdrawn with leave to refile, the party becomes subjected to time limitation, whether or not such words were used in the order of the court. On that note, upon the striking out of the Land Appeal No. 121/2016 on the 02/08/2017, the position of the parties went back to the 23/06/2016 when the judgment of the tribunal was pronounced as if the said Land Appeal No. 121/2016 was never filed in this court. And that is when the computation of time for the purpose of limitation begun. The current appeal was filed on the 20/04/2018 which is almost two years later and no extension of time was ever granted to the appellant.

In conclusion, in order to have refilled this appeal, the appellant ought to have been either within time or have sought and actually be granted an extension of time by this court. Since none of these conditions prevailed, the appeal beforehand is time barred hence Mr. Hamza's prayer to withdraw the appeal at this stage cannot be granted. The appeal is hereby dismissed with no order as to costs.

Dated at Dar es Salaam this 14th day of February, 2020

A handwritten signature in black ink, appearing to be 'S.M. Maghimbi', written over a horizontal dotted line.

S.M MAGHIMBI.

JUDGE.