

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 561 OF 2021

(Arising from the High Court of Tanzania in Land Appeal No.122 of 2017, originating from the District Land and Housing Tribunal in Application No.25 of 2012)

MAYNARD LUGENJA APPLICANT

VERSUS

MUNICIPAL DIRECTOR OF

KINONDONI MUNICIPAL COUNCIL 1ST RESPONDENT

MICHAEL LEMA BATHROMEO 2ND RESPONDENT

RULING

Date of last Order: 24.02.2022

Date of Ruling: 25.02.2022

A.Z. MGEYEKWA, J

Against the application for extension of time to file an application for leave to appeal to the Court of Appeal of Tanzania filed by the applicant, the 2nd respondent has filed a preliminary objection to the effect that this application is unmaintainable for offending Order XXIII Rule 3 of Cap.33 [R.E 2019].

The application was argued before this court on 24th February, 2022 during which the applicant was represented by Mr. Wilson Ogunde, learned counsel, the 1st respondent enjoyed the legal service of Mr. Salehe Mohamed, learned Solicitor represented the 1st respondent, and the 2nd respondent was represented by Mr. Goodchance Lyimo, learned counsel.

As the practice of the Court, I had to determine the preliminary objection first before going into the merits or demerits of the application. That is the practice of the Court founded upon prudence which I could not overlook.

Arguing for the preliminary objection, the 1st respondent, speaking through Mr. Salehe Mohamed, learned Solicitor was brief and straight to the point. Mr. Salehe launched the onslaught by submitting that the application for extension of time to file an appeal is unpaintable in the eyes of the law as a similar application in Misc. Land Application No. 678 of 2020 was withdrawn in June, 2021 with no order allowing the applicant to refile a fresh application. To buttress his contention, he referred this court to Order XXIII Rule 1 (3) of the Civil Procedure Code Cap.33 and the cases of **CRDB PLC & Leonard Musa v Aziz Mohamed Aboud & another**, Commercial Cause No. 277 of 2015 and **East Africa Development Bank v Blueline Enterprises Ltd**, Misc. Civil Cause No.

177 of 2017. The learned Solicitor for the 1st defendant submitted that Order XXIII Rule 1 (3) of the Civil Procedure covers applications as well. Stressing on the point, Mr. Salehe stated that since there was no specific order for refiling the instant application, thus, this application is incompetent.

On the strength of the above submission, he urged this court to dismiss the application with costs.

Responding to Preliminary Objection, Mr. Ogunde, learned counsel for the applicant opposed the preliminary objection. In his submission, he stated that the order of this court in Misc. Land Application No. 678 of 2020 dated 24th June, 2021 shows what transpired on that particular date. He went on to argue that the applicant's counsel made a prayer to the court for leave to withdraw his application because there were some discrepancies and file the same afresh. The learned counsel for the applicant submitted that the respondents did not object to the applicant's Advocate prayer.

Mr. Ogunde went on to state that the issue for discussion was whether such application could be made under Order XXIII of the Civil Procedure Code Cap.33 and whether the respondents were entitled to costs since the prayer was raised by the applicant. He added that Hon. Mteule stated

that the cited Order was inapplicable this she exercised the power of this court and allow the withdrawal with costs. He further submitted that the applicant said that he is going to withdraw the application with liberty to refile and no objection as raised by the respondents.

On the strength of the above submissions, the learned counsel for the applicant beckoned upon his court to overrule the preliminary objection for being short of merit with costs.

In her rejoinder, Mr. Salehe reiterated his submission in chief. He claimed that Mr. Ogunde is misleading this court. Since the 1st respondent objected the applicant's prayer to clear the discrepancies. He valiantly argued that the order of this court did not grant the applicant's prayer to refile it was only to withdraw the application. Stressing on the point, Mr. Salehe contended that the law state that there must be a specific order to refile, in absence of such order any subsequence filing is incompetent.

In conclusion, the learned counsel for the 1st respondent beckoned upon this court to uphold the preliminary objection and dismiss the application with costs.

Having heard the submission of both learned counsels for and against the preliminary objections, I have to say that the issue for determination is *whether the preliminary objection is meritorious.*

I have gone through the court records and as submitted by both learned counsels, the records reveal that the applicant filed an application in respect to Misc. Land Application No.678 of 2020. On 24th June, 2021 when the matter was called for hearing, Mr. Jovin Tembo, the learned counsel for the applicant prays for leave under Order XXIII of the Civil Procedure Code Cap.33 to withdraw the application without costs and file another correct application. Mr. Salehe objected the applicant's Advocate prayer for the reason that the cited Order does not allow withdrawal a refiling. This court issued an order which for ease of reference I reproduce it hereunder:-

“The application is marked withdrawn. Costs to the 2nd respondent.”

The main issue of controversy is whether the present application contravenes Order XXIII Rule 1 (3) of the Civil Procedure Code [R.E 2019]. In the instant preliminary objection, there is no dispute that this order requires the court to issue leave to refile. What is disputed is whether this court accepted the applicant's prayer to withdraw and refile a correct application. For ease of reference, I reproduce Order XXIII Rule 1 (3) of the Civil Procedure Code Cap.33 hereunder:

“2. Where the court is satisfied- (a) that a suit must fail by reason of some formal defect; or 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.” [Emphasis added].*

Guided by the above Order XXIII Rule 1 (3) of the Civil Procedure Code Cap.33. Reading the records of the court, the applicant’s Advocate prayed to withdraw and file a correct application. The case of CRDB Bank PLC (supra) is distinguishable since in the said case they did not pray for leave to refile. Therefore he secured leave to institute a fresh suit. However, this court issued an order to withdraw the application without leave to refile. In other words, this court did not grant the applicant's prayer as per the applicant's request.

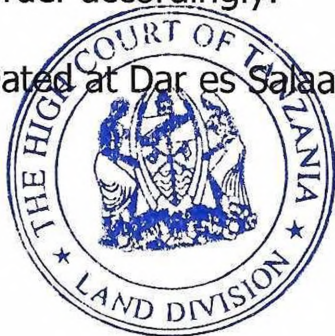
It is worth noting that this court has the discretion to grant leave to institute a fresh suit as envisaged under Order XXIII Rule 1 (2) of the Civil Procedure Code Cap.33 [R.E 2019]. See the case of **Jennings Bramly v**

A and F Contractors Ltd and another [2003] 2 EA 425. I cannot assume that this court entered into an error. In case the applicant found that there was some clerical error, then the best way was for the applicant to file an application for review.

In the upshot, I find that the preliminary objection by Mr. Salehe is meritorious and holds a sway. I proceed to strike out the application. Each party to shoulder his own costs.

Order accordingly.

Dated at Dar es Salaam this date 25th February, 2022.

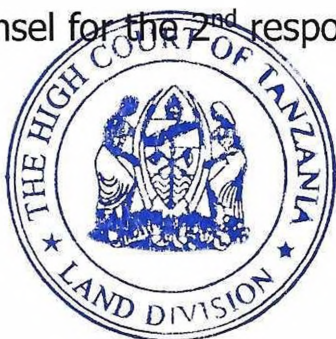



A.Z.MGEYEKWA

JUDGE

25.02.2022

Ruling delivered on 25th February, 2022 in the presence of Mr. Sylvester Korosso, learned counsel for the applicant, Mr. Mwambalaso, learned counsel for the 1st respondent, and Mr. Goddchance Lyimo, learned counsel for the 2nd respondent.




A.Z.MGEYEKWA

JUDGE

25.02.2022