

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

REFERENCE NO. 25 OF 2023

(Arising from the Ruling of Bill of Costs No.165 of 2021 dated on 14th April, 2023- Hon. Chugulu , DR. Taxing Officer)

GIDION FARES OPANDA..... APPLICANT

VERSUS

MOHAMED OMARY MASOUD.....RESPONDENT

RULING

13th October 2023 & 25th October, 2023

L. HEMED, J.

This is an application for Reference made under Order 7(1) of the Advocates Remunerations Order, 2015 Government Notice No.263 of 2015). The Applicant is challenging the Ruling of the Taxing Officer – Hon. Chugulu DR, in Bill of Cost No.123 of 2021 delivered on 14th April 2023 awarding the Respondent herein, the amount of Tshs. 1,720,000/= as costs incurred in prosecuting Misc. Land Application No. 345 of 2021.

The instant application was filed on 28th August 2023. The respondent contested it by filing the counter affidavit. Through his advocate, Mr. Peter

Alfred Bana lodged Notice of preliminary objection against the application on the following points:

- "1. That, Civil Reference No.25 of 2023 was filed on 28th August 2023 is time barred.*
- 2. That, Civil Reference No.26 of 2023 was filed on 28th August 2023 is incompetent for want of leave for extension of time.*
- 3. That the affidavit sworn by the applicant is defective as it contains matters of law, legal opinions and hearsay.*
- 4. That the affidavit sworn by the applicant is unmaintainable for being vexatious and abuse of court process for impeaching the court records and attacking the judicial officers like Hon. Judges who have been condemned and they cannot defend themselves in this application."*

The 1st and 2nd limbs of objection were argued jointly. I have opted to start with them. The counsel for the respondent argued that Rule

7(1) & (2) of the Advocates Remuneration Order of 2015 requires a person aggrieved by the decision of Taxing Officer to file reference to a Judge of the High Court within 21 days from the date of the decision. He asserted that this application having been filed on 28th August 2023 is hopelessly time barred.

It was submitted by the counsel for the respondent to be aware of the previous application No.11 of 2023 which was withdrawn on 27th June, 2023 with leave to refile. However, he was of the view that leave to refile granted by this court did not waive time limitation. To cement the arguments he cited decision of the High Court- Commercial Division in **Vision Control and Superintendence Limited vs MSK Refineries Limited**, Commercial Case No.24 of 2023, that leave to refile does not exclude the application of limitation of time. He finally, asked this court to find the application time barred and it be dismissed accordingly.

The applicant who argued the application in person contended that the application is proper before this court as it was filed with leave to refile. It was the view of the respondent that there was no need for leave of extension of time because leave to refile was granted. He

supported his argument by citing the decision of this court in **Mynard Lugenja vs Municipal Director of Kinondoni Municipal Council & Michael Lema Bathromeo**, Misc. Land Application No. 561 of 2021, that the court has discretion to grant leave to institute a fresh suit.

The question that needs to be answered is whether the application at hand is time barred and needed leave for extension of time before refiling it. Of course, withdraw of suits, appeals and application is governed by Order XXIII Rule 1 of the Civil Procedure Code, [Cap 33 RE 2019] which provides thus:-

*"1-(1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, **withdraw his suit or abandon part of his claim.***

*(2) Where the court is satisfied- (a) that a **suit must fail** by reason of some formal defect; or (b) 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]

How the above provision does relates to the application at hand?

According to various literatures, particularly Sarkar's on The Law of Civil Procedure, it is stated that the provisions of Order XXIII Rule 1 of the Indian Code of Civil Procedure, which is in *pari material* with Order XXIII Rule 1 of the Civil Procedure Code of Tanzania, apply in the same manner in withdrawing appeals as well as applications.

I had an opportunity to go through the book titled Mulla on The Code of Civil Procedure Act V of 1908, 15th Ed, Vol.III, at page 2091 the author has highlighted on the scope of application of the said Order XXIII Rule 1 of

the Indian Code of Civil Procedure that it applies as well to appeals and applications like the one at hand. I have also noted that this Court in **CRDB-PLC and Leonard Mususa, Receiver Mmanager of Morogoro Canvass Mills(1998)Ltd vs. Mohamed Aboud and another**, Commercial Cause No.277 of 2015 observed that the provisions of Order XXIII Rule 1(3) of the Civil Procedure Code, Cap 33 are applicable to suits as well as applications. I subscribe to this position and make a conclusion that the entire Order XXIII Rule 1 apply as well to the instant application!

It is undisputed fact that the applicant herein had formerly lodged Reference No.11 of 2023 before withdrawing it on 27th June 2023 with leave to refile it. He refiled it on 28th August 2023 without leave for extension of time. I must state clearly at the outset that leave to refile granted to a party when withdrawing a suit, appeal or application under Order XXIII Rule 1 of the CPC is only intended to salvage such party from being precluded from instituting a fresh suit, application or appeal in respect of such subject matter as provided under Order XXIII Rule 1(3) of the CPC. In other words, leave to refile does not act as a waiver of time limitation. Leave to refile, is granted subject to limitation of time whether or not expressly stated in the order.

This Court in **Emmanuel Eliazry vs Ezironk K. Nyabakari**, Land Appeal No.56 of 2018 had this to observe-

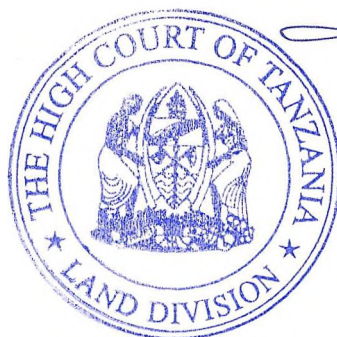
"The phrase "leave to refile" is oftenly used to refer that the party is not barred to bring a fresh suit/application following a withdrawal of another matter of the same nature. Once a suit is struck out or withdrawn with leave to refile, the party becomes subjected to time limitation, whether or not such words were used in the order of the court."

The above cited position is the proper one, I subscribe to it. In the matter at hand, the impugned Ruling was delivered on 14th April, 2023, the 1st Reference was lodged timely but was withdrawn on 27th June, 2023 with leave to refile. Nothing was done until on 28th August 2023 when the instant matter was lodged. Order 7(1) of the Advocates Remuneration Order, 2015, GN. No.263 of 2015 requires the matter like the one at hand to be presented in Court within 21 days. From, 14th April, 2023 to 28th August 2023 it is almost five(5) months, hopelessly time barred! Even if we assume that the time limit has to be computed from 27th June 2023 to 28th August 2023, there are 62 days elapsed!

In the final analysis, I am at one with the counsel for the respondent that leave to refile a matter withdrawn is not an automatic extension of time. A party who withdraws his matter with leave/liberty to refile should be aware that refiling of it is subject to the time limitation provided in the Law of Limitation Act, Cap.89 or any other written law and that computation of time is made without considering time spent in the matter withdrawn.

In the upshot, I find the 1st and 2nd limbs of preliminary objection worth of being sustained. The instant matter is hopelessly time barred. The fact that the 1st and 2nd limbs of objection suffices to dispose the application, I find no need to determine the other limbs of objection as doing so will amount to an academic exercise. The application is hereby dismissed with costs. It is so ordered.

DATED at **DAR ES SALAAM** this 25th October, 2023.




L. HEMED

JUDGE