

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM

MISC. APPLICATION NO. 316 OF 2021

BETWEEN

SHAIZAD AZAD BHANJI..... APPLICANT

VERSUS

EZRA TIMOTHY KANGA 1ST RESPONDENT

GROUP 7 PTY LTD.2ND RESPONDENT

RULING

S.M. MAGHIMBI, J.

The applicant has moved this court under the provisions of Rule 24(1),(2)(a),(b),(c),(d),(e), (f), Rule 24(3)(a),(b),(c),(d), 24(11) and Rule 56(1) of the Labour Court Rules, 2007 GN. 106 of 2007 and Section 14 (1) of the Law of Limitation Act, Cap. 89 R.E. 2019. He is moving the court for the following orders:

1. That, the Honourable Court be pleased to grant the Applicant extension of time within which to file an application for Revision against the Ruling and subsequent orders delivered by the Honourable W.S. Ng'humbu, Deputy Registrar on 9th day of June 2020 in Labour Execution No. 433 of 2019.

2. That, the Honourable Court be pleased to make such any other orders as it may deem fit.

The application was supported by an affidavit of the applicant dated 26th August, 2021. On the 07th October, 2021 while filing their notice of opposition, the respondents also lodged a notice of preliminary objection on point of law that:

1. The Application is not maintainable since similar application was instituted by the Applicant SHAIZAD AZAD BHANJI on 21st September, 2020 on 02nd December 2020 and on 04th November, 2020 at the instance of the Applicant SHAIZAD AZAD BHANJI it was marked by the Court withdrawn unconditionally. Thus the Applicant SHAIZAD AZAD BHANJI is precluded from bringing a fresh Application on the same subject matter seeking the orders.

On the date of the hearing, Mr. Hemedi Omari, personal representative representing the respondents submitted that the application is not maintainable because the same was instituted by the applicant on 21st September, 2020 and on November 2020 at the instance of the applicant it was marked withdrawn unconditionally. He then argued that

the applicant is precluded from bringing the same application on the same subject matter seeking for orders relied upon. That the applicant made an application to withdraw the application at his own will on 04/11/2020 and prayed for leave to refile, however, the court granted the prayer to withdraw the application but it did not grant leave to refile. That because the application was withdrawn in court, the court should not proceed to determine this matter praying that the application is dismissed.

In reply, Mr. Waisara submitted that the main issue in question is leave, that the applicant was not granted leave to refile the application. He based his explanation by citing the case of **Emanuel Eliazari Vs. Ezironki Nyabakae, Land Appeal No. 56/2018**, at page 3 of the decision the court held:

"Leave to refile simply refers to a leeway to a party who has withdrawn the matter to refile the same without being subject to the doctrine of res-judicata. It emanate as a cure to an effect to withdraw the matter where a party may be intending to refile the same matter but ought to withdrawn the current one for reasons of incompetence or otherwise."

He then submitted that the concept of res judicata is explained at Order 9 of the Civil Procedure Code, Cap. 33 R.E 2019 ("The CPC") which bars the court to try a suit which a matter directly or substantially in issue is directly a matter in the suit in which such issue has been raised and finally determined by that court. That from the principle of res judicata, the former suit must have been heard and determined by the court. He then argued that the principle does not apply in this application and Misc. Appln No. 252/2020 which was before Honorable Muruke, J because it was not heard on merits or finally determined. Therefore because the conditions of res judicata have not been met, then the applicant will not be precluded from bringing a new application. To support his argument, he again referred to the cited case of **Emanuel Elzary** (supra) where the court held at page 4:

"The phrase leave to refile is oftently used to refer that the party is not barred to bring a fresh suit or application following the withdrawal of another matter of the same nature. It has never meant to preclude an extension of time. Once a suit is struck out or withdrawn with leave to refile, a party becomes subject to limitation

of time whether or not such words were used in the order of the court."

On that principle, he argued that because this is an application for extension of time to file revision on the grounds of illegality, the applicant is not denied his right to bring an application.

In the alternative, Mr. Waisara submitted that the court may also use its inherent powers in the interest of justice where it can extend time to bring an application even though there was an application that was withdrawn without leave to refile. He supported this submission by citing the case of **University of Dar-es-salaam Vs. Dorothy Humbwe, Misc. Labor Application No. 348/2020**, whereby this court cited the decision of the Kenyan C A in the case of **Githere Vs. Kimungu, 1976-1985 EALR 101**, where the court held:

"the Court should lean towards exercising its discretion in such a way that no party is shut out from being heard. And accordingly a procedural error or even a blunder on a point of law on the part of an advocate including that of his clerk, such a failure to take prescribed procedural steps or to take them in due time should be

taken with a human approach and not without sympathy for the parties. And in a proper case such mistake may be ground to justify the court in exercising its discretion to rectify the mistake if the interest of justice dictates because the door of justice is not closed merely because a mistake has been made by a person of experience who ought to have known better."

He then submitted that because the application No. 252/2020 was withdrawn due to an error on the part of the advocate, the prayer is that the applicant should not be denied a right to be heard. He urged the court to use its discretion under Section 95 of the CPC to allow this application to be heard on merits.

In rejoinder, Mr. Hemedi argued that the advocate has brought about the issue of res judicata while the applicant has not spoken of that issue and they were only talking of the procedures to bring matters to court. On the submission that this application emanates from Misc. Application No. 252/2020, his reply was that the decision in that application is not in the affidavit and has never been attached to the affidavit that is before this court.

On the cited case of **University of Dar-es-salaam** (Supra), Mr. Hemedi submitted that the decision was talking about the main case and had no relation with the current objection because at page 11 of the decision, Hon. Arufani held that the court has formed justifiable reason to use its discretionary power to grant the application sought. That when you look at that decision, it had targeted the main case that was lodged in court and the court granted the applicant a chance to bring an application for review therefore the case is not applicable in our situation.

On the right to be heard, his reply was that the court is not concentrating on technical grounds as this right is valid only when the party has brought a proper application. That because the applicant could not make a reply to the objections raised, he reiterated his prayer that the court sustains their objection and dismiss this application.

I have gone through the objections and the submissions thereto. Indeed as held in the cited case of **Emanuel Elzary** (Supra), leave to refile is an order telling the party that he is not barred to bring a fresh suit or application following the withdrawal of another matter of the same nature. That is why when a party withdraws a matter which he intends to

refile; he has to seek leave of the court to allow him to do so. At this point it is important to explain the effect of withdrawal of a matter.

Withdrawal of the suit, just like any other mode of disposal of the suit, brings the matter to finality. It is the claimant's declaration that they no longer intend to prosecute their case. This may be due to many reasons like having lost interest, the matter is settled, matter is overtaken by events, just to name a few. It may also connote a litigant who wishes to withdraw a matter so that he can bring a proper one; which is the situation at hand. Under such circumstances, where withdrawal is for the intention of bring a proper application, then the applicant ought to seek for and obtain a leave to refile the matter because in the absence of leave, withdrawal brings a matter to an end.

As for the records of this court, the order of Hon. Muruke J is to the effect that the application was withdrawn without leave to refile being granted. This bars the applicant to bring an application of the same nature as it will be barred by the previous one since leave had not been granted. The matter has come to an end.

On those findings, I find the first objection to suffice to dispose this application. Having the application withdrawn without leave to refile being granted, the application beforehand cannot be entertained. Consequently, it is hereby dismissed.

Dated at Dar es Salaam this 22nd day of April, 2022.



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

S.M. MAGHIMBI
JUDGE