

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[LAND DIVISION]

AT ARUSHA

MISC. LAND APPLICATION NO. 98 OF 2020

(Originating from the District Land and Housing Tribunal for Arusha at Arusha, in
Misc. Application No. 320 of 2019)

ZACHARIA FRANCIS MBATA.....APPLICANT

VERSUS

CRDB BANK PLC.....1ST RESPONDENT

NKAYA COMPANY LIMITED.....2ND RESPONDENT

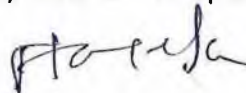
FLOTEA AUGUSTINO TARIMO.....3RD RESPONDENT

RULING

22.03.2022 & 29.04.2022

N.R. MWASEBA, J.

The applicant before this Court is seeking to be granted extension of time within which to file a revision out of time against the decision of the District Land and Housing Tribunal (Tribunal) in Misc. Application No. 320 of 2019. The application was supported by a sworn affidavit of the applicant himself. On his side, the 3rd respondent filed Counter affidavit objecting the application.

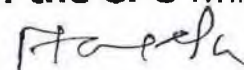


Prior to the hearing of the application, the counsel for the 3rd respondent raised one point of preliminary objection as follows:

- i. That the applicant's application is incompetent in law for failure by the applicant to comply with the requirement of Order XXII Rule 1 and 3 of the Civil procedure Code, Cap 33 R.E 2019 which bars a person who withdraw a suit without a leave to refile, to institute a fresh suit in respect of such subject matter or such part of claim.

At the hearing of the raised preliminary objection, the applicant appeared in person, unrepresented while the 3rd respondent received legal service of Mr. Ombeni Kimaro, learned advocate. The 1st and the 2nd respondent never entered appearance for the reason best known by themselves. For the interest of justice since the applicant was a layman with no representation, the hearing proceeded by way of written submissions.

Supporting their preliminary objection, Mr. Kimaro argued that the applicant herein withdrew the Application No. 156 of 2018 without leave to refile, therefore, the current application has no leg to stand as the applicant has no leave to refile another application as he had withdrawn the first one. He cited **Order XXIII Rule 3 of the CPC** which reads:



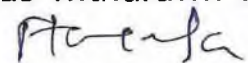
"1-(1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.

(2) Where the court is satisfied-

(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."

He proceeded that the law prohibits institution of a new suit or fresh suit where the suit was withdrawn without leave to refile. As the present application emanates from Misc. Application No. 320 of 2019 which originated from Application No. 156 of 2018 which was withdrawn with



no leave to refile, the current application cannot stand. He cited the case of **Jinning- Bramly Vs. A and F Contractors Ltd and Another** [2003] 2 EA 452.

Though the applicant wanted to challenge the withdraw order which was given without leave to refile, the same cannot be entertained unless the leave of the court is sought and obtained. Thus, based on their submission they prayed for the preliminary objection to be sustained with costs.

In reply to the submission made by the counsel for the 3rd respondent, the applicant argued that the preliminary objection is misconceived for being preferred under the wrong provision of the law. He added that in his notice of preliminary objection the counsel for the 3rd respondent referred this court to **Order XXII Rule 1 and 3** the mistake which he rectified in his submission by citing **Order XXIII Rule 1 ad 3 of the CPC**. It was his submission that the counsel for the 3rd respondent was supposed to correct the alleged mistake after obtaining the leave of the court for the purpose of having the record cleared.

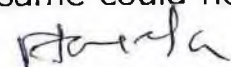
Without prejudiced to the cited flaw, the applicant submitted that in this application the applicant is only seeking for extension of time to file application for revision in respect of Misc. Application No. 320 of 2019. The counsel for the 3rd respondent is only misguided since Misc.

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Application No. 320 and the current one are two different applications and the Application No. 320 of 2008 was instituted in the same tribunal for the purpose of restoring Land Application No. 156 of 2008 which was fraudulently withdrawn without the applicant's knowledge. Further to that the preliminary objection is pre-empting the court from deciding on the merit of the intended application the act which is against the law.

He submitted further that the cited case of **Jennings- Bramly** (supra) is distinguishable since its decision is clearly that a part is not barred to institute a case that was withdrawn without securing leave to refile so long as the prayer are dissimilar. Thus, the two applications are based on quite different prayers and prayed for the preliminary objection to be dismissed with costs for being devoid of merit.

In his rejoinder, the counsel for the 3rd respondent added that in the preliminary objection the enabling provision does not apply for it to stand, therefore, even if there is clerical errors, it does not affect the preliminary objection. Thus, even the argument that there was a need to reconcile, the proper provision of the law has no basis as it is not a requirement of the law (See the case of **Mohamed Iqbal Vs. Esrom M. Maryogo**, Civil Application No. 141/01 of 2017). He insisted that as the application traces its root from restoring Application No. 156 of 2018, the same could not



be entertained because there was no leave to refile. Since the applicant is trying to use the backdoor to refile the application, he is barred by **Order XXIII Rule 1 and 3 of the CPC.**

He added that if the court will look at the pleadings (Chamber summons and its annexures together with counter affidavit and its annexures) it will find the similarity between the previous application and the current one. Thus, the proper remedy for the applicant herein is not to seek remedies for restoration but to refile the application if he thinks there was something which was not done by his advocate. They maintained their prayer for the preliminary objection to be upheld with costs.

Having gone through the submissions of parties, the issue for determination is whether the preliminary objection is meritorious.

As elaborated herein **Order XXIII Rule 1 and 3 of the CPC**, the plaintiff who withdraw his suit or abandon his claim he will be precluded from instituting a fresh suit in respect of such subject matter or such part of the claim. Thus, what is at issue is whether or not the present application is similar to the previous one.

In Misc. Application No. 320 of 2019 the applicant prays for an order to waive and vacate its order (withdrawing Land Application No. 156 of 2018) an order passed against the Applicant herein on 9.07.2019. the said

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application was dismissed with costs after sustaining the preliminary objection raised by the respondents herein.

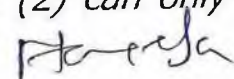
And the main prayer in the present application, as depicted from his chamber summons are;

- i. That, this Honourable Court may be pleased to extend time to the Applicant to file Application for revision out of time against ruling and Drawn Order of the District Land and Housing Tribunal for Arusha in Misc. Civil Application No. 320 of 2019 dated 19th October, 2020.
- ii. Any other orders this Honourable Court may deem fit and just to grant.

The cited paragraphs prove that the applicant herein is only seeking an extension of time to file revision there is no similarity on both applications.

This court is aware of the cited case of the **Jennings- Bramly's case** (supra) cited by the 3rd respondent's counsel which states:

"A party who withdraws a suit without first securing leave to institute a fresh suit thereby bars himself from instituting a fresh suit. The Court's discretion to grant leave to institute a fresh suit as envisaged under Order XXIII, Rule 1 (2) can only be



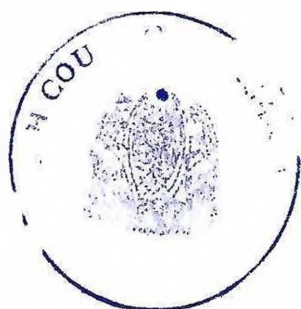
exercised at the time when the withdraw order is made and not after."

However, the previous application and the current one are dissimilar. Further to that the raised preliminary objection was pre-maturely raised as it was submitted by the applicant that it will move the court to determine the revision application while it is not the right time to do so.

All said and done, the point of preliminary objection raised by the 3rd respondent is meritless and deserved to be overruled. The case is to proceed on merit. Costs to be in cause.

It is so ordered.

Dated at Arusha this 29th day of April, 2022.



N.R. Mwaseba
N.R. MWASEBA

JUDGE

29.04.2022