

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS APPLICATION NO. 25 OF 2023

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR
PREROGATIVE ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION BY
REUBEN JOSIA MWANRI AND 10 OTHERS**

AND

**IN THE MATTER OF CHALLENGING IMPROPER REVOCATION OF
BUILDING PERMIT**

BETWEEN

REUBEN JOSIA MWANRI1ST APPLICANT
ALBERT HENRY CURUSSA.....2ND APPLICANT
EVELYNE NDAMBALA.....3RD APPLICANT
SHEYLA NGASSA.....4TH APPLICANT
ABSALOM ELIAH.....5TH APPLICANT
DOMINIC PASCAL MABULA.....6TH APPLICANT
GALINA DOROHAYA MUHONDEZI.....7TH APPLICANT
BARARE LIMITED8TH APPLICANT
MOLLEL ELECTRICAL CONTRACTORS LIMITED.....9TH APPLICANT
MAYA INVESTMENT LTD.....10TH APPLICANT
LEISURE TOURS AND HOLIDAY LTD.....11TH APPLICANT

AND

KINONDONI MUNICIPAL DIRECTOR.....1ST RESPONDENT
KINONDONI MUNICIPAL COUNCIL.....2ND RESPONDENT
THE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

21/08/2023 & 28/08/2023

KAGOMBA, J.

The applicants herein have filed in this court an application for leave to apply for prerogative orders of certiorari, mandamus and prohibition under section 19(3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, [Cap 310 R.E 2019] ("CAP 310"); rule 5(1), 5(6) and 7(5) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014 ("GN 324 of 2014") and section 2(1) of the Judicature and Application of Laws Act, [Cap 358 RE 2019].

The application has, however, been greeted with a notice of preliminary objection from the respondents which is based on the following points of law;

1. The application is untenable in law for being time barred.
2. The application is incompetent and untenable in law for failure to join Treasure Registrar, Registrar of Titles and Ministry of Lands, Housing and Urban Development as necessary parties.

The preliminary objection was argued by way of written submissions, pursuant to the order of this court. Ms. Kause K. Izina, learned State Attorney, drew and filed the submissions in support of the preliminary

objection for the respondents, while Mr. Edson Kilatu, learned Advocate, drew and filed the applicants' reply submissions.

On the first point objection, the learned State Attorney referred to section 3(1) of the Law of Limitation Act, [Cap 89 R.E 2019] ("LLA") and the case of **John Cornel vs A. Grevo (T) Limited**, Civil Case No. 70 of 1998 as cited by the Court of Appeal in **M/S P&O International Limited vs Trustees of Tanzania National Parks (TANAPA)**, Civil Appeal No. 265 of 2020, CAT, Tanga for a contention that a case instituted after expiry of the time prescribed by law has to be dismissed. They call for a similar fate to befall this application which they argue, was filed beyond six months period prescribed under section 19(3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, [Cap 310 R.E 2019] ("Cap 310"). They reckon that according to paragraph 11 and 13 of the affidavit which supports the application, the decision to revoke the building permit and require demolition of the applicants' structure was issued on 7th September, 2022. The contention is simply that, since the present application was filed in this court on 8th June, 2023, being more than six months counting from 7th September, 2022 when the building permit was revoked, this application is therefore rendered time barred.

According to the respondents' Attorney, the fact that the applicants previously filed a Miscellaneous Cause No. 7 of 2023 of similar nature as the matter at hand, which was withdrawn vide court order dated 6th April, 2023 with leave to refile, does not preclude them from the wrath of the law of limitation. She referred to the case of **Flomi Hotel Limited vs Equity Bank Tanzania Limited**, Civil Case No. 106 of 2021, High Court of Tanzania at Dar es salaam (unreported), to back up her contention.

The learned State Attorney went further to submit that the provision of Order XXIII Rule 2 of the Civil Procedure Code, [Cap 33 R.E 2019] ("CPC") which was applied by the court in **Flomi Hotel Limited case** (supra) is applicable to the matter at hand, vide rule 17 of GN No 324 of 2014 which permits this court to apply the practice and procedure applicable to the High Court. Order XXIII Rule 2 of CPC subjects a previously withdrawn suit to the law of limitation even if it was withdrawn with liberty to refile.

With regard to the second point of objection, the learned State Attorney contends that since paragraph 4 of the applicants' affidavit reveals that they bought the suit plots from the defunct Consolidated Holding Corporation whose functions have been transmitted to the office of the Treasury Registrar, and since the certificate of title annexed to the affidavit as MCH 01 shows that there was land transfer made by the land registry,

the Treasury Registrar and the Registrar of Titles were, under such circumstances, necessary parties to this application but have not been joined contrary to the dictates of the law.

In concretizing the above contention, the learned State Attorney cited **Stanslaus Kalokola vs Tanzania Building Agency and Another**, Civil Appeal No. 45 of 2018, CAT, Mwanza, to urge this court to find the non-joinder of the Treasury Registrar and the Registrar of Titles fatal, for a reason that such a non-joinder may render the decree of this court ineffective. The learned Attorney is not oblivious of the position of the law under Order 1 rule 9 of the CPC that no suit shall be defeated merely for non-joinder of parties. She contends, however, that each case has to be decided basing on its circumstances as there are non-joinders that may render the suit unmaintainable and those which are inconsequential.

In clarifying her contention, she submitted that in order to ascertain the legality of the impugned decision in this application, facts pleaded under paragraphs 4 and 5 of the applicants' affidavit that they are occupiers in common of the land with Title No. 26303, Mikocheni B, Dar es Salaam and that the said land is not a unit title, are essential, making the non-joinder of the Treasury Registrar and the Registrar of Titles fatal. She wound up by

praying the court to find merit in the objection and dismiss the application with costs.

Replying to the above submissions, first reaction the applicants' counsel is that the points of objection raised by the respondents have no basis at all. He started by attacking the reference made by the respondents to section 3(1) of the LLA, arguing that the provision was inapplicable to the application of this nature because there are specific laws governing them, which are CAP 310 and GN No. 324 of 2014. While agreeing with the respondents' Attorney that the provision of rule 17 of GN No. 324 of 2014 permits the court to invoke other laws, it is the contention of applicants' counsel that such other laws like the LLA may be applicable only where there is a lacuna.

The applicants' counsel distinguishes the case of **M/S P&O International Limited** (supra) and the circumstance of this application, arguing that this matter was withdrawn with leave to refile, thus expelling an argument that the applicants slept over their right. He argues; to the extent that the case of **M/S P&O International Limited** (supra) states that failure to plead facts exempts the case from time limitation, the case is in favour of the applicants.

It is his further contention that by the applicants pleading in their affidavit that they previously instituted the matter of this nature which was withdrawn with leave to refile, the exemption stated under Order VII Rule 6 of the CPC shall be applicable to the circumstance of this case. He went further to distinguish the case of **Flomi Hotel Limited** (supra) from the matter at hand on ground that while **Flomi case** was refiled after being dismissed, this matter was previously withdrawn with leave to refile.

On the second point of objection, the applicants' counsel contends that since this dispute is not based on land ownership, rather it is based on revocation of building permit, the Treasury Registry and Registrar of Titles aren't necessary parties. Hence, the case of **Stanley Kalokola** (supra) and Order I Rule 9 of the CPC are, according to the applicants' counsel, irrelevant. Ultimately, he finds the respondents' preliminary objection devoid of merit and prays this court to overrule the same with costs. There was no rejoinder from the respondents.

Therefore, basing on the submissions made by both counsel, the issue before the court is whether the preliminary objection raised by the respondents is meritorious.

Regarding the first point of objection that challenges the application for being time barred, both sides appear to be in agreement that the law under section 19 of CAP 310, in particular subsection 2, has set a time limitation of six months for filing an application of this nature. Indeed, the intention of the legislature to have applications for orders of certiorari, mandamus and prohibition filed within time period shorter than six months is vividly stated under the cited provision of the law, which states thus;

*"Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order under section 17 shall, in specified proceedings, **be made within six months or such shorter period as may be prescribed after the act or omission to which the application for leave relates.**"*

From the parties' submissions, it is not disputed that the impugned decision of the 1st respondent was issued on 7th September 2022, and that the applicants filed this application on 8th June 2023 after their previous application was withdrawn on 6th April 2023, with leave to refile. It follows, therefore, that the instant application was filed nine (9) months after the date of the impugned decision, which is contrary to the requirement of the law.

However, the learned counsel part ways when it comes to the consequence of the previous withdrawal of the matter as far as time limitation is concerned. I should remark here that the law applicable to this application, as correctly submitted by the learned State Attorney, is CAP 310 and GN No. 324 of 2014. Cap 310 is the Act intended to effect miscellaneous reforms in the law relating to civil actions like the instant matter. GN No. 324 of 2014 are the rules made to implement the provisions of Cap 310. Where any matter is not provided for in the said rules, this court is allowed, under rule 17 of GN 324 OF 2014 to make reference to other rules of procedure applicable to this court. The said Rule 17 provides;

"Where there is any matter not provided for in these rules, the practice and procedure applicable to the High Court shall apply".

Based on the above position of the law, it follows that the application previously instituted by the applicants was withdrawn pursuant to the provision of Order XXIII of the CPC, considering that CAP 310 and GN No. 324 of 2014 are silent on the procedure for withdrawal of applications for certiorari, mandamus and prohibition. In this perspective, obviously even the provisions of LLA, shall be applicable to this matter in so far as CAP 310 and

GN No. 324 of 2014 are silent on the time within which the withdrawn application should be refiled.

Apparently, Order XXIII rule 2 of the CPC provides the consequence of withdrawal of the application on time limitation. It provides;

*"In any fresh suit instituted on permission granted under rule 1, **the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted.**"*

It is my take, and indeed my finding from the foregoing excerpt, that the party whose application is withdrawn shall be bound by the law of limitation in the same manner as if the first matter had not been instituted. Hence, the applicants were not precluded from observing the law on time limitation merely for a reason that this application has been filed after grant of withdrawal of the previous application with leave to refile. Similar position was taken by this court in **Emmanuel Eliazry vs Ezironk K. Nyabakari**, Land Appeal No. 56 of 2018, High Court, Land Division at Dar es salaam, a decision which I am fully persuaded with. The Court stated the following;

*"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.”

[Emphasis supplied]

In view of the above, the applicants were bound to observe time limitation of six months from 7th September 2022, the date of the impugned decision of the 1st respondents. I am therefore clear in my mind that failure of the applicants to refile within the prescribed time renders this application time barred.

The applicants' counsel tried to rely on the exemption available under Order VII Rule 6 of the CPC by capitalizing on “the leave to refile” order.

With respect, I am unable to agree with this argument because withdrawal of an application does not fall under specified grounds warranting exemption from time limitation. As I have described above, the law under Order XXIII rule 2 of the CPC has a clear mandatory provision requiring a party whose application has been withdrawn with leave to refile to be bound by the law on time limitation. The case of **M/S. P & O International Limited** (supra) also clearly narrates those exemptions under Order VII Rule 6 of the CPC by stating the following;

*"In terms of Order VII rule 6 of the CPC, a party who seeks to rely on exemption from time limitation has an obligation to plead grounds for such exemption. **The grounds which are permitted for the purpose of exemption are specified under sections 20,21, 22 and 23 of the Act.**" [Emphasis Added]*

The Act referred to by the Court of Appeal in **M/S. P & O International Limited** (supra) is the Law of Limitation Act [Cap. 89 R.E. 2019]. Hence, the exemptions intended to be covered by the provision of Order VII Rule 6 of CPC are provided under S. 20, 21, 22 and 23 of the Law of Limitation Act, and these do not include the withdrawal of the application with leave to refile.

Even if this court was to assume that this matter falls under the said exemptions, the applicants would yet be unsuccessful for not stating the facts justifying the exemption, as required by the law. Under paragraph 14 of their affidavit, the applicants have only narrated the background of the application. In **M/S. P & O International Limited** (supra), it was explained as follows;

*"It is clear from the pleadings that the appellant never considered that she was time barred so as to plead exemption from limitation. **To bring into play exemption under Order VII rule 6 of the CPC, the plaintiff must state in the plaint that his suit is time barred and state facts showing the grounds upon which he relies to exempt him from limitation.**"*

(Emphasis added)

Therefore, in either way, the applicants cannot benefit from the exemption stated under Order VII rule 6 of the CPC. For the reasons above, this court finds merit in the first point of objection and hereby rule that this application is time barred.

As regard the remedy when a matter is held to be time barred, I am in agreement with the respondents that this application should be dismissed

in line with the provision of section 3(1) of the LLA. This is because, the specific laws governing this application, as indicated above, are silent as to the remedy available to a matter filed out of prescribed time.

With dismissal of the application for being time barred, it follows that determining the second point of objection will not only be wasted effort but also contravention of the law. It is an established position of the law that jurisdiction of the court is hindered by time limitation. I shall, therefore, not labour on the second ground of the preliminary objection.

In the end, the first point of preliminary objection is sustained and the applicants' application is accordingly dismissed. Considering the nature of this action which involves disgruntled citizens who appear to be mourning their investment efforts, I make no order as to costs.

Order accordingly.

Dated at Dodoma and delivered this 28th day of August, 2023.




ABDI S. KAGOMBA

JUDGE