

IN THE HIGH COURT OF ZANZIBAR

HOLDEN AT TUNGUU

CIVIL APPLICATION NO. 12 OF 2023

(Arising from Civil Appeal No. 61 of 2021 of the High Court of Zanzibar at Tunguu.)

SOUD HAJI NDAME APPLICANT

VERSUS

(1) MALENGE OMAR KHATIB

(2) MUHAMED OMAR KHATIBRESPONDENTS

RULING

Dated: *3rd April, 2023*

S.HASSAN (J)

This is a ruling on preliminary objection raised by the respondents against the application at hand before this court.

The applicant Soud Haji Ndambe has filed an Application **No 12 of 2023** seeking for an extension of time to file an Application of leave to appeal to the Court of Appeal out of time against the decision of the High Court dated 30th August, 2022 in the **Civil Appeal No. 61 of 2021**.

The application is preferred under **section 11 (1) of the Appellate Jurisdiction Act, Cap 141 R.E 2002** and supported by affidavit affirmed at Zanzibar by the Applicant himself.

On the other side, the respondents objected the application through counter affidavit sworn by Juma Muhammed Omar, legal representative of the respondents. The respondents also lodge the notice of preliminary objection as follows:

(a) That, this court lacks requisite Jurisdiction to entertain Applicant's application.

(b) That, the application is defective for lack of signature of the counsel representing the Applicant.

(c) That, application is defective for lacking of source of information.

As it is usually the practice of the court where a notice of preliminary objection is lodged, the court allows the parties to argue the preliminary objection first before going into the merit of the matter in hand.

The preliminary objection was heard on **27/3/2023** whereby the applicant was represented by advocate Amina Kheri, while the respondents was under the legal services of advocate Mwanaidi Abdalla.

With respect to **paragraph (a)** of the preliminary objection, advocate Mwanaidi submitted that this Court lacks jurisdiction because the applicant had lodged Application **No. 88 of 2022** which was for leave to appeal to the Court of Appeal. In that Application the Applicant withdraw the Application without cost on 20/12/2022. The applicant did not ask for liberty of the court to re file the Application again. Hence this Court lacks jurisdiction to hear the Application for Extension of time. She further submitted that, Application **No. 88 of 2022** was defective, hence the applicant was to ask the Court to dismiss it or strike it out and not withdrawal. She further referred the court in **Order XXVII Rule (1) (a)** of the Civil Procedure Decree Cap 8, and **section 30 (a) of the Act No. 5 of 1995** where the word suit was defined. To cement her position on this point that the applicant did not ask for leave of the court to re file again the application, she made reference to the case of **Maynard Luganja v. Municipal Director of Kinondoni Municipal Council and Michael Lema Bathromeo, Misc Land Application No. 561 of 2021** where the applicant did not ask for leave of the court to re file the application again and the application was strike out for that reason. Moreover advocate Mwanaidi also made reference to the case of **Jennings Brandy v. A and F Contractors LTD and another (2003)2 EA 425 and Order XXVII Rule (1) sub rule (3)** of the Civil Procedure Decree (supra) and prayed the court to dismiss the Application with cost.

With respect to **paragraph (b)** of preliminary objection, Advocate Mwanaidi submitted that the application is defective and contrary to the provision of law as it does not bear the signature of the counsel who prepared it, she also prayed for the application to be dismissed.

On **paragraph (c)** of preliminary objection advocate Mwanaidi made reference to section 7 of the affidavit and stated that it lacks in the verification source of information and made reference to the case of **We refer the case of Salima Vuai Fom v. Registrar of Cooperative Societies & Others [1995] TLR 75** to cement her position on the matter. In the end she prayed for the entire application to be dismissed with cost.

In reply advocate Amina submitted on **paragraph (a)** that the Applicant did not pray for re filing of the Application **No 88/2022** because the said application was defective for non citation of the proper section for leave to Appeal to the Court of Appeal. She went on to refer the case of **VIP Engineering and Marketing LTD V. SGS Society No. 32/2006** at paragraph 5 and stated that it was the court that made an error in its ruling dated 20/12/2022 the ruling marked the application as withdrawn instead of striking it out for being defective because back then the applicant only prayed for amendment of the application in order to be allowed to cite a proper citation of the law.

With respect to **paragraph (b)** of the preliminary objection she conceded that it is an error that the application does not have the signature of the counsel who prepared it and the remedy is to strike out the application and not to dismiss it as prayed by respondent advocate.

With respect to **paragraph (c)**, she submitted that she was present in the Application No. 88/2022, hence she has the source of information of section 7 of the Affidavit. In the end she prayed this court to strike out the application and not to dismiss it.

In her brief re joinder, advocate Mwanaidi objected the submission made by the applicant advocate and stated that, the applicant in the application **No. 88 of 2022** prayed to withdraw the application as shown in the ruling of the court dated 20/12/2022, she further maintained her position to have this application be dismissed.

I have heard the submission made by both parties and now it is the time to determine whether the preliminary objection has merit or not.

I will first determine **paragraph (b)** of the preliminary objection, and since the applicant has conceded in this point, I shall not be detained and spent much time in this matter, the requirement of the law is very clear in this matter, refer section **58 of the Advocate Act No. 1 of 2020** and the case of **Ashura Abdulkadiri v. The Director Tilapia Hotel Misc Civil Application No. 2 of 2005** (unreported). This alone would have been enough to dispose of this application and strike it out.

However, Advocate Mwanaidi for the respondent has prayed for this application to be dismissed while the applicant has prayed for the application to be strike out.

To decide whether to dismiss this application or to strike it out, I will make my determination by making analysis on the **paragraph (a)** of the preliminary objection.

The gist of **paragraph (a)** of the preliminary objection is that, the applicant did not ask for the liberty of the court to re file again the Application for Leave to Appeal to the Court of Appeal when the Application **No. 88 of 2022** was withdrawn, the argument from the respondents is that since the applicant did not ask for the leave of the court to re file again his/her application, therefore, this court lacks jurisdiction, on the other side the applicant faulted the court for marking the application as withdrawn instead of strike it out hence the applicant should not be punished.

The submission from advocate Amina that the court erred in its ruling does not hold any weight at this stage, the proper procedure to be taken if the applicant was aggrieved by the ruling of the court was to file for an appeal against the said ruling, after all this court is not a proper forum to discuss its own ruling, so at this stage paragraph (a) of the preliminary objection will ^{be} determined based on the records in hands.

It is on records that the application **No 88 of 2022** was marked as withdrawn and the applicant did not ask for leave or liberty of the court to re file again the application. Since respondents has raised the issue of jurisdiction, this court has a duty to ask itself whether it has the jurisdiction to act on the matter placed before it for determination. For instance in the case of **Tanzania Revenue Authority v. Tango Transport Company Ltd, Civil Appeal No. 84 of 2009** (unreported) the Court of Appeal stated the following:

" Principally, objection to the jurisdiction of a court is a threshold question that ought to be raised and taken up at the earliest opportunity, in order to save time, costs and avoid an eventual nullity of the proceedings in the event the objection is sustained"

It is the view of this court that, the rationale behind reserving liberty of the court to re file suit or application is to maintain certainty of the law rather than allowing to take recourse and abandon the suits or application and come up again as an afterthought, if that is the case then the law will be a game of surprise. Reserving no liberty or obtaining leave to re file guarantees time lines of proceedings. When parties are allowed to abandon and come again to court there will be no end to litigation, hence I agree with advocate Mwanaidi that, the applicant was to ask for the leave of the court to re file his application again before lodging current Application.

In **Mulla, the code of Civil Procedure 16th edition Vol 3 at page 3154**, had the following to say:

" The principle underling the provision for withdrawal and abandonment is, that the law confers upon a man no right or benefit which he does not desire, invite beneficium non datur. The second suit after withdrawal of the first suit (without seeking permission to file a fresh suit) is barred, not because of the principle of res judicata but because, whoever waives, abandons or disclaims a right, will lose it"

Mulla at page 3157 continued to comment as follows:


" If a party desire to withdraw from the suit having the liberty to institute a fresh suit, he must apply to the court to permit him so. If he does not desire to have the liberty, then he can withdraw the suit of his own motion and no order of the court is necessary"

These quotations above refer to the suit but the same principle applies also to the application and as submitted by advocate Mwanaidi that **section 30 (a) of the Act**

No. 5 of 1995 which amended **section 60 (1)** of the Civil Procedure Decree Cap 8 of the Laws of Zanzibar, and extended the definition of a suit to also include application or proceedings. Hence, the applicant in the application **No. 88 of 2022** was at a liberty to obtaining court order to withdraw with leave to re file it afresh which he did not do so. Failure to ask leave of the court to re file afresh operates as a bar to subsequent application against the same parties with the same subject matter. I further agree with submission made by the respondents that at this stage this court lacks jurisdiction to determine the application in hand.

All being equal, this court finds merits in the preliminary objections **paragraph (a) and (b)** and allows it, and see not need to determine **paragraph (c)**, consequently this court dismiss the **Application No. 12 of 2023** with cost.

Dated: *3rd April, 2023*


S. HASSAN (J)
03/04/2023

Ordered accordingly.

Court:

This Ruling is delivered this 03/04/2023 in the presence of Advocate Sadic Sultan for the Applicant and Advocate Mwanaidi Abdalla for the Respondents.

S. HASSAN (J)
03/04/2023