IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL CASE NO. 100 OF 1999

ROGZENA J. TEMU . . . . . PLAINTIFF

VERSUS

1. THEONEST L. RUTASHOBORWA
2. MALAWI CARGO CENTRES LTD } . . . DEFENDANTS

RULING

Date of last order - 5/6/2006
Date of Ruling - 5/7/2006

MLAY, J.:

This ruling is on an oral application made by the plaintiffs advocate Mr Adelade, to withdraw the plaintiffs suit, with leave to refile the same. The application was made on a date on which the suit had come up for hearing, after this court had granted the last adjournment on 21/7/2004. The application was made under Order XXIII of the Civil Procedure Code. The reason given is that the suit is justiciable in the subordinate courts. The advocate prayed each party to bear own costs.

Mr. Matunda advocate for the Defendants opposed the application and argued that it is a clear abuse of the court process. He submitted that although the plaintiff had the right to withdraw the suit, the reason given does not entitle the plaintiff to institute a fresh suit. Mr Matunda submitted that the plaintiff's advocate has not cited any law which removes the jurisdiction of this court and that it is trite law that retrospective legislation does not affect existing rights of on individual. He argued that the plaintiff should not be granted leave to refile the suit because that suit is for defamation under the Newspaper Act, 1976 which is triable by the High Court. He also argued that the defendant has already incurred costs since 1999 todate. Mr Matunda submitted that the withdrawal is calculated to prevent the suit being dismissed for failure to offer evidence, since this court had ordered that this would be the last adjournment.

In reply Mr Adeladed submitted that after perusal of the record and pursuant to his instructions, they intended to remove the 1st Defendant from the suit. He argued that by applying to withdraw the suit, it does not mean that this court does not have jurisdiction but that the plaintiff intends to refile the suit in order to drop the 1st Defendant. The issue that a suit for defamation is only triable by the High Court, Mr Adelade submitted that the Defendant can raise it as a preliminary objection and as for costs, Mr Adelade conceded that let the defendant have his costs subject to taxation.

The question for determination is whether this court should grant the plaintiff the prayer to withdraw the suit with leave to refile it. The withdrawal of suits and the considerations for granting the right to refile the suit, are governed by the provisions of Order XXIII which states in part:

> *"XXIII (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 formal defect; or*
>
> *(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from the suit or abandon part of the claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of a claim."*

In terms 8 of rule 1 (1) of Order XXIII cited above, the plaintiff is at liberty at any time to withdraw the suit. He does not need the permission of the court but in terms of sub rule (3) of that rule, he is liable to pay costs. If he wishes to refile the suit the applicable provision is sub rule (2) of rule (I) of the said Order. The court will only grant permission, if the conditions set out in paragraph (a) or (b) of sub rule (2), exist. The plaintiffs advocate has stated that the purpose of withdrawing and refilling the suit, is to drop the 1st defendant from the suit. He did not demonstrate if the maintenance of the 1st defendant in the suit, is a defect by which the suit must fail. At any rate, if it is a defect, it can be remedied by applying either to amend the plaint or to have the 1st Defendant struck out of the plaint. The reason given is therefore neither "*a formal defect*" under paragraph (a) or "*sufficient reason*" under paragraph (b) all of sub rule (2) of Rule 1 Order XXIII, to justify this court granting the prayer.

In the circumstances, permission to withdraw the suit with leave to refile it, is denied. Secondly, since the plaintiffs counsel was not ready to proceed on the date set for hearing but prayed to withdraw the suit, the suit is marked withdrawn. The Defendant will have their costs in the proceedings up to the stage of withdrawal of the suit.

(J.I. MLAY)
JUDGE

Delivered in the presence of Mr Mandele holding brief for Mr Mafuru and Mr. Mbuna for the Defendant and in the absence of the plaintiff and his advocate, this 5th day of July, 2006.

(J.I. MLAY)

JUDGE

5/7/2006

891 Words.