

IN THE HIGH COURT OF TANZANIA

AT TABORA

MISC. CIVIL APPLICATION NO. 1 OF 2014

(Arising from High Court of Tanzania at Tabora Misc. Civil Application  
No. 53 of 2013)

HAJAT FATUMA B. LUSENDELA .....APPELLANT

VERSUS

LUSENDELA B. MUSTAFA LUSENDELA & 3 OTHERS.....RESPONDENT

**RULING**

22<sup>nd</sup> May & 03<sup>rd</sup> June, 2014

**S.M.RUMANYIKA, J**

Brought under Order XXVII rule 1(a) of the CPC Cap. 33 RE 2002, the application is for on order restraining the Respondents from tempering with the disputed property (subject matter in. Misc. Civil application No. 53 of 2013). Messrs M.K.Mtaki and K.K.Kayaga learned counsel appear for the Respondents and Applicant respectively.

Just before the matter took off, I had to hear them Counsel addressing me on the Preliminary point of objection (p.o). Raised and registered by Mr. Mtaki on 01.04.2014. On wrong citation by the Applicant's counsel, of the enabling provisions of law.

However, even before the p.o was argued, Mr. Kayaga in his submissions, told this court that having noticed some defects, namely citation of wrong provisions of the law, was of the view that matter be withdrawn without costs. And wrote the Registrar to that effects. Letter with Ref. No. KK/ADV/Misc. CIVIL APP. No. 53/2013 of 20/02/2014.

Mr. Mtaki submitted that they were unaware of the letter. But now in court equipped and prepared to argue the p.o. Their client having travelled thrice all the way from Kasulu. The learned counsel prayed matter be struck out with costs or marked withdrawn with costs alternatively.

The issue is whether matter can be withdrawn based on the same grounds raised in the p.o, the effects of which (p.o) render it being struck out by the court. The answer is no. Because if courts were to allow such preemptive acts by plaintiffs all the preliminary points of objection would be redundant and ineffective.

The letter of withdrawal by Mr. Kayaga will suggest that it was written hardly  $1^{17}/_{30}$  months after the lodgment of the matter. Mr. Mtaki registered the material p.o  $1^{10}/_{30}$  months later.

However, the said letter has no legal effects. The reasons are five; One; not only it was not endorsed by the Registrar, but also no copy was on court records. Two; the letter was not copied to Mr.

Mtaki. Three; reasons for withdrawal are the same as those ones raised in the p.o. Like one intends to preempt it (p.o). The possibilities of which can thus not be ruled out.

On this one, I will hasten to hold in passing, that whereas it cannot serve individual, public or even court interests retaining matters parties were no longer interested in, no party shall be precluded from withdrawing matter without costs in the absence of the adverse party. Provided there is no p.o raised. And such other party has entered no single appearance in court.

I am mindful of the p.o being not yet argued. But with all intents and purposes, it is open secret that Mr. Kayaga concedes to the p.o (vide the said letter he brought to court on 8/5/2014). The p.o is hereby sustained. Application struck out with costs.

R/A explained.

**S.M.RUMANYIKA**

**JUDGE**

**22/05/2014**

Delivered under, my hand and seal of the court in chambers. This 3<sup>rd</sup> June, 2014. In the presence of Ms Stela Thomas Advocate for Appellant and Ms. Teresia Fabian Advocate for 3<sup>rd</sup> Respondent.

**S.M.RUMANYIKA**

**JUDGE**

**03/06/2014**