

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM.

CIVIL CASE NO. 169 OF 2018.

ISLAM ALLY SALEH.....PLAINTIFF

Versus

AKBAR HAMEER.....1st DEFFENDANT

CATS TANZANIA LIMITED.....2nd DEFENDANT

RULING

5.12.2019 -13.2.2020

J. A. DE-MELLO J;

The **Plaintiff, Islam Ally Saleh** instituted this suit against the Defendants claiming among others, an order that this Court compels the Defendant to prepare Sale and Transfer documents for house on **Plot No. 214 and 216 Block "C" in Msasani Village Area, Dar Es Salaam**, under the **Title Deed No. 52127**. As the Pleadings and, Scheduling orders were complete, Counsel for the Plaintiff made an oral prayer for withdrawal of the matter under **Order XXIII Rule 1 (1) of Cap. 33**. The same was vehemently objected by the Defendant's Counsel, reasons being that, his Written **Statement of Defense** is accompanied by **Preliminary Point of Law**, in which the Plaintiff is invoking evasive method which the law does not allow. He cited the case of **Amasi Mwinyi vs. NBC and Another**,

[2001] TLR page 83, and, Minister for Labor and Human Development and UDA vs. Gaspar Swai and Others, [2005] TLR 239. He otherwise suggested that, the **Preliminary Objection** be heard on merits or otherwise. In response, the Plaintiff insisted that, **Order XXIII** gives right to Parties to withdraw at any time.

The ground upon which this prayer is premised, is to the fact that, it is in exercise of the right given by the law for a party to withdraw a suit at any time.

Order XXIII Rule 1(1) provides;

“At any time after institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.”

In terms of **Rule 1 (1)** of this **Order XXIII**, the Plaintiff is at liberty at any time to withdraw his suit. However and, as observed, no reasons whatsoever have been assigned by the Plaintiff for withdrawal, of which the Defendants believes to be prejudiced, considering the objection raised which accompany his **Written Statement of Defence**. It is trite law that, **P.O’s** must be determined first prior to hearing of the substantive matters. See the case of **Mukisa Biscuits Manufacturing Co. Ltd. vs. Westend Distributors Ltd. [1969] E.A. 696**. In the case of **BOT vs. Valambhia, Civil Application No. 15 of 2002** the Court ruled out that;

“The aim of preliminary objection is to save time of the Court and of the Parties by not going into the merits of an Application

because there is a Point of Law that will dispose the matter summarily."

Based on the objection raised that of the suit is grossly "tortuous and criminal" it would be just and fair if the court determines the said Preliminary Objection, which would either way determine the appropriateness of the suit or otherwise. By granting the withdrawal, the Plaintiff is pre-empting the outcome. In the case of **Rogzena J. Temu vs. Theonest L Rutashoborwa and Malawi Cargo Centers Limited, Civil Case No. 100 of 1999**, discussed the conditions for granting the prayer under **Order XXIII Rule 1(1)** as they are provided under **sub Rule (2) of Rule (1)**. Neither "**a formal defect**" under paragraph (a) nor "**sufficient reason**" under **paragraph (b)**, all of **sub Rule (2) of Rule 1 Order XXIII** has been pleaded to support his prayer.

In the circumstances, and, absence observed, the prayer is denied as the Court will proceed to hear and, determine the Preliminary Objections on its merits as required by law.

It is so ordered.


J. A DE-MELLO

JUDGE

13/02/2020