

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
MISC. CIVIL APPLICATION NO. 71 OF 2022
(Arising from Civil Case No. 150 of 2021)**

BANK OF AFRICA TANZANIA LIMITED..... APPLICANT

VERSUS

EURO COMMERCIALS LIMITED.....1ST RESPONDENT

DORAH JAMES MONYO.....2ND REPENDENT

DISMASS LEONE MASSAWE.....3RD RESPONDENT

RULING

Date of last Order: 15/06/2022.

Date of Ruling: 12/07/2022.

E.E. KAKOLAKI, J.

This ruling seeks to address the objection picked on 15/06/2022 by the 1st respondent against the applicant's prayer for withdrawal of her application for temporary injunction orders without costs.

Briefly the application sought to be withdrawn was stemmed on Civil Case No. 150 of 2021 which was also withdrawn on the same date 15/06/2022, after the applicant/plaintiff in the main suit was pre-empted by the court suo mottu on the competence of the suit. It was the applicant's prayer through her counsel Mr. Jonathan Mbuga that, this court be please to withdraw the application under Order XXIII Rule 1 and 2(a) and (b) of the Civil Procedure

Code, [Cap. 33 R.E 2019] (the CPC) and costs be waived for three grounds. One, the foundation withdrawal of the application emanated from the court's suo mottu pre-emption in the main suit in which the application is stemmed. Second that, the application was at its early stages and not advanced to the hearings thus the respondents could not have claimed to incur costs. Thirdly that, prior to the filing of any counter affidavit to this application the applicant notified the 1st respondent through a letter dated 20/04/2022 and duly served to her on 22/04/2022 of her intention to withdraw this application, a copy which was served to the court. Hence any counter affidavit if filed by the 1st respondent was without justification.

Resisting the applicant's prayer Mr. Gideon Opanda counsel for the 1st respondent objected the prayer on the reasons that, the court was improperly moved for wrong citation of the provisions as the proper ones ought to be section 68(a) and 95 of the CPC. Secondly he submitted, this application being incompetent for containing defective prayers, this court is barred to withdraw it rather the same should be struck out with costs. He referred the Court to the case of **Terrazo Paviers Limited Vs. J.W. Ladwa (1997) Limited**, Civil Application No. 63 of 2012, where the Court of Appeal said that an incompetent application cannot be withdrawn but it

should be struck out. As to the prayer for costs it was his contention that, since the applicant in the chamber summons was claiming for costs as one of the reliefs then this court is enjoined to grant the same to the 1st respondent. He added that prior to the service of the notice of the intention to withdraw this applicant the applicant had served the 1st respondent with another notice of her intent to amend the prayers in the chamber summons in which they acted upon, hence deserve to be awarded costs. It was in his conclusion that, the mere filing of this application by the applicant suffered the 1st respondent cost hence the objection be upheld with costs.

In his brief rejoinder Mr. Mbunga reiterated his submission in chief while submitting that, generally the right to withdraw the applicant rests on the applicant. The only respondent's right is to press for costs. As regard to the contention of this application being incompetent he countered there is not any ruling of the court that declared it incompetent hence urged the court to dismiss that assertion. On the wrong citation of the provision for moving this court to grant the prayed orders, he insisted that the cited provisions is correct as suit covers also the application and that sections 68(a) and 95 of the CPC are only applicable the circumstances where there is no appropriate provision to cover the order or relief sought, which is not the case in this

matter. He therefore implored the Court to dismiss the 1st respondent's objection and grant the applicant's prayers.

I have carefully chewed the fighting arguments by the applicant and 1st respondent's counsels. The issue for determination before me is whether the applicant's prayers should be granted as prayed or not. To start with the ground of the applicable law in withdrawal of the application I agree with Mr. Mbuga that the provisions of Order XXIII Rule 1 and 2(a) and (b) of the CPC, is the proper provision and applicable one under the circumstances of this matter. The provision of Order XXIII Rule 1 and 2(a) and (b) of the CPC reads:

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

What is deciphered from the above provision of the law is that a party is at liberty to withdraw his **suit** or abandon part of his claim upon satisfying the court that, the **suit** is liable to fail from the defects noted or upon assigning any other sufficient grounds warranting the court to grant him the prayer for withdrawal or abandoning part of the claims. As submitted by Mr. Mbuga the submission which I embrace, the definition of suit includes application. This court in the case of **MSK Refinery Limited Vs. TIB Development Bank Limited and Another**, Misc. Civil Application No. 317 of 2020 (HC-unreported) on the definition of the term **suit** to include application had the following to say:

*"...The application instituted by the applicant being part of the proceedings arising from the main suit Civil Case No. 80 of 2020 in my considered view cannot be excluded from the definition of suit under section 6(3) of the Government Proceedings Act, as Mr. Mnyere would want this court to believe. I am at one with Miss Sued's submission that **the same intended and covers not only main suits but also all applications emanating from the main suits or made independently ...**" (Emphasis added)*

In light of the above position of the law, I distance myself from Mr. Opanda's proposition that, suit does not include application. In this matter since there

is proper provision for withdrawal of the suit or part of the claim or the application as correctly cited by the applicant in the chamber summons, I hold sections 68(a) and 95 of the CPC are not applicable in the withdrawal of application as Mr. Opanda would want this court to believe, hence the Court is properly moved for the prayers sought.

I now move to consider contention by Mr. Opanda that, this application is incompetent for containing defective prayers, thus this court is barred to withdraw it as it has to be struck out with costs. I think this ground need not detain me much as there is no any ruling or order of this court declaring it incompetent as rightly submitted on by Mr. Mbuga, nor was there any preliminary objection raised by the 1st respondent to that effect before the prayer for its withdrawal came forth. The assertion by Mr. Opanda that the same is incompetent I hold is unjustifiable and I dismiss it. With that finding therefore the case of **Terrazo Paviers Limited** (supra) relied on by the 1st respondent is inapplicable in the circumstances of this matter.

As regard to the last ground on prayer for waiver costs by the applicant I also find the reasons advanced by Mr. Opanda for the 1st respondent are without any merit. I so find as the record is very clear that, **one**, the prayer for withdrawal of the application was brought in by the applicant after

withdrawal of the main suit in which it emanates from upon pre-emption by the court suo mottu. **Second** that, the 1st applicant though issue with the notice to amend the chamber summons as alleged by Mr. Opanda, there is no evidence proving that she acted on it in anyway. Third that, the 1st respondent was served with the Notice of the intention by the applicant to withdraw this application hence was fully aware that the same was going to be withdrawn. Fourth and lastly as rightly submitted by Mr. Mbuga this matter had not gone to the stage of hearing hence the costs suffered by the 1st respondent if any is negligible. It is from that account I refrain from awarding costs to the 1st respondent as prayed.

That said and done I find the objection by the 1st respondent against withdrawal of this application is without merit and I dismiss it. I therefore proceed to grant the prayer by the applicant for withdrawal of the application. The application is therefore withdrawn without costs.

It is so ordered.

DATED at Dar es Salaam this 12th day of July, 2022.



E. E. KAKOLAKI

JUDGE

12/07/2022.

The Ruling has been delivered at Dar es Salaam today on 12th day of July, 2022 in the presence of Mr. Emanuel Mbuga holding brief for advocate Jonathan Mbuga for the applicant, Mr. Patrick Malewo holding brief for advocate Gideon Opanda for the Respondent and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

12/07/2022.