

**IN THE HIGH COURT OF TANZANIA
SHINYANGA DISTRICT REGISTRY
AT SHINYANGA**

MISC. CIVIL APPLICATION NO. 22 OF 2022

(Arising from Misc. Civil Revision No. 4 of 2022, Originating from Shinyanga District Court in Misc. Civil Application No. 2 of 2022 and Civil Case No. 3 of 2022)

JAMBO PETROLEUM PRODUCT..... APPLICANT

VERSUS

ENERGY AND WATER UTILITIES

REGULATORY AUTHORITY (EWURA)1st RESPONDENT

MANAGING DIRECTOR OF ORYX

ENERGIES TANZANIA LIMITED.....2nd RESPONDENT

RULING

Date of Last Order; 14/07/2022

Date of Ruling; 19/07/2022

S.M. KULITA, J.

On 14/07/2022 Advocate for the Applicant, Mr. Paul Kaunda sought for withdrawal of this matter. Counsel for the 1st Respondent, Mr.

George Kalenda, State Attorney objected the prayer for withdrawal raised by the Applicant's Counsel. He said that in a situation where the Preliminary Objection has been raised by the opponent, the remedy, if the Applicant concedes the Preliminary Objection, is for the court to strike out the matter, not for the Applicant to seek for withdrawal.

To support his argument the State Attorney cited the following cases as the authorities that he relied upon;

- 1. LEOPHORD TIMOTH V. MARIAM YUSUPH CHALIGAMBO, Civil Appeal No. 310 of 2021, High Court, DSM District Registry.**
- 2. RESPICIUS EMILIAN MWIJAGE V. THE MUNICIPAL DIRECTOR, ILALA MUNICIPAL COUNCIL & 2 OTHERS, Land Case No. 27 of 2021, High Court Land Division, at DSM.**
- 3. MUGETA TOROKOKO & ANOTHER V. MINISTRY OF LANDS, HOUSING & HUMAN SETTLEMENTS, Civil Case No. 12 of 2019, High Court, at Musoma.**

In his reply, Mr. Kaunda, Advocate submitted that he has not conceded the Preliminary Objection but willingly decided to withdraw the case upon getting instruction from his client, the

Applicant. He said that his client is no longer interested to further prosecute the case.

Actually, position of the law according to the cases cited by the State Attorney, Mr. Kalenda is that the Applicant is precluded to withdraw his case upon been attacked with the Preliminary Objection. He said that what the Applicant can do is to concede with the Preliminary Objection and pray the court to strike out the matter.

My findings drive me to the following question, what constitutes admission of the Preliminary Objection? It is just the words the opponent party that he concedes with the Preliminary Objection. As rightly submitted by the Defence Counsel relying on the cases he has cited, the fact that the Preliminary Objection has been raised, it must be argued and the court determine it fully.

Basically, the complainant has the right to withdraw his case at any time that he wishes, but he is precluded to do so when he has been attacked with the Preliminary Objection, basing on the speculation that the said Objection has a great likelihood of success against his case. The proper means is for him to withdraw it upon the Preliminary Objection being fully determined, if the said Preliminary Objection is decided on his favour.

Thus, the Applicant herein should not be allowed to withdraw his case, as it was so held in the above cited cases of **LEOPHORD TIMOTH V. MARIAM YUSUPH CHALIGAMBO (supra)**, **RESPICIUS EMILIAN MWIJAGE (supra)** and **MUGETA TOROKOKO & ANOTHER (supra)** that, by doing it will be preempting the Preliminary Objection.

Be it noted that in the matter at hand, no reasonable person can agree with Mr. Kaunda, Advocate that it is the Applicant's wishes, and not the Preliminary Objection, which led him to seek for the withdrawal of the application. In fact, the said Counsel submitted no proof to justify that the reasons for him seeking for withdrawal is the instruction from his client, that he had even before the said Preliminary Objection being lodged to court by the Respondent's Counsel.

In making decision on this matter this court takes a precaution that, if Mr. Kaunda's prayer to withdraw this application is allowed, while there is undetermined Preliminary Objection raised by his opponent, it may create a precedent that in every case that the Complainant is attacked with the Preliminary Objection, the said Applicant will seek to withdraw it under the same umbrella that, he withdraw it at his own wishes, even if the reason behind is known

to him being the strong Preliminary Objection raised by the opponent party which has great chance of success.

In upshot, I find the argument raised by the Applicant's Counsel, Mr. Kaunda that the suit should be marked withdrawn has no merit. The matter is therefore **struck out** with costs.




S.M. KULITA
JUDGE
19/07/2022

