

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND CASE NO. 205 OF 2020**

**ATHUMANI MSHAMU LINGASULE .....PLAINTIFF**

**VERSUS**

**KIDAWA ABUSHIRI.....1<sup>ST</sup> DEFENDANT**

**HELIOS TOWER TANZANIA LTD (HTT).....2<sup>ND</sup> DEFENDANT**

**(MIC) CO.LTD.....3<sup>RD</sup> RESPONDENT**

**RULING**

**Date of Submissions: 27/06/2022**

**Date of Delivery: 27/06/2022**

**AMOUR S. KHAMIS, J.**

I am called upon to determine whether the present suit should be struck out or withdrawn with leave to refile afresh.

When parties appeared before me for commencement of trial, Mr. Ally Hamza, learned counsel for the third defendant, brought out a preliminary point of law for court's determination.

Mr. Hamza critically challenged a power of attorney lodged by the plaintiff purporting to appoint Kheri Athumani Mshamu and Semeni Athumani Rwanda as Attorneys to represent him in prosecuting this land case as well as Land Case No. 396/2017 instituted in the District Land and Housing Tribunal for Kinondoni.

The third defendant's counsel pointed out that the power of attorney purported to show that it was registered on 22/11/2021, a date that has not yet materialised as per the calendar.

Mr. Hamza further contended that the power of attorney was not dated and the advocate purporting to witness the donor, and two joint donees; Diana C. Mungi, did not show as to when she witnessed those parties.

He prayed for dismissal of the suit with costs on the ground that the defects pointed out amounted to plaintiff's inability to prosecute the case.

Mr. Mark Lebba, learned counsel for the first defendant, concurred with Mr. Hamza's submissions and moved the Court to struck out the suit with costs.

Mr. Makaki Masatu, learned advocate for the second defendant joined hands with Mr. Hamza and contended that the Court was left with an option of either to strike out the suit or grant a prayer for withdrawal with leave to refile. In either option, Mr. Masatu pressed for costs of the suit.

In reply, Mr. Hassan Chande, learned advocate for the plaintiff, relied on Section 95 of the Civil Procedure Code (Supra) in moving the Court to make an order for withdrawal of the suit with liberty to refile afresh.

He contended that despite of the shortcomings in the pleadings pointed out by the defendants' counsel, the Court has powers to make necessary orders for the ends of justice.

As pointed out earlier, the issue is whether the suit should be struck out or withdrawn with liberty to refile.

It is not disputed that on 24/05/2022 the plaintiff was directed by this Court to amend the earlier filed power of attorney.

On 14/06/2022, the plaintiff through his advocate, filed a list of additional documents to be relied upon.

Among others, the list included copy of a power of attorney which is now disputed, allegedly issued by the Registrar of Titles on 30/11/2022 under reference No. RD/OPT/21/58/500.

Mr.Hassan Chande conceded that the disputed power of attorney suffers from the defects pointed out by the learned counsel for the defendants.

Order XXIII Rule 1(1)(2) of the Civil Procedure Code (Supra) provides that at any time after the institution of a suit, the plaintiff is entitled to withdraw his/her suit or abandon part of the claim where it is shown to the satisfaction of the Court that the suit must fail by reason of some formal defect(s).

Under Order XXIII Rule, 1(2) (a) (b) of the Civil Procedure Code, the Court is empowered to order withdrawal of the suit with liberty to refile afresh if satisfied that there are sufficient grounds of doing do.

The above stated provisions in my view are applicable where the plaintiff himself /herself discovers some legal defects which are likely to affect competency of the suit.

However, the situation is different where an adverse party raises out a preliminary objection for the Court's determination

and a prayer to withdraw is made subsequent to the objection raised.

In **KANTIBHAI M. PATEL V DAHYABHAI F. MISTRY, CIVIL APPEAL NO. 58 OF 1997 (Unreported)**, the Court of Appeal held that:

*"The Court had held on a number of occasions that once an objection is taken to the competency of the appeal, it would be contrary to the law to entertain a prayer the effect of which is to defeat the objection. If such prayers were entertained, Rule 100 which permits preliminary objection would be negated ....."*

In the present case, the learned counsel for the defendants drew attention of the Court on defects in the plaintiff's pleadings and power of attorney before a prayer for withdrawal of the suit was made by Mr. Chande.

In determining the issue before me, I am fully alert of the law that where issues of law and fact arise in the same suit, and the Court is of opinion that the case or part thereof may be disposed of on the issues of law only, should try those issues first (Order XIV Rule 2 of the Civil Procedure Code).

In view of the above legal position and for the reasons pointed out, this suit is hereby struck out. Owing to the fact that the defects pointed out are attributable to the learned counsel and not the plaintiff directly, I make no order for costs. It is so ordered.

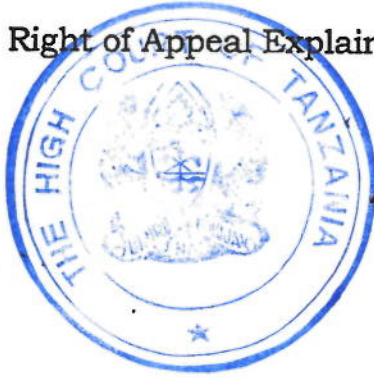
  
**AMOUR S. KHAMIS**

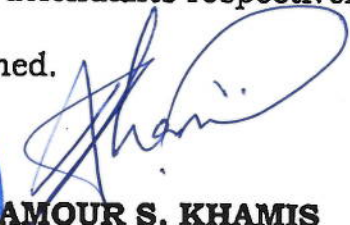
**JUDGE**

**27/06/2022**

**ORDER:** Ruling delivered in chamber in the presence of Mr. Hassan Chande, Advocate for the plaintiff, Mr. Mark Lebba, Mr. Makaki Masatu and Mr. Ally Hamza, learned advocates for the first, second and third defendants respectively.

Right of Appeal Explained.



  
**AMOUR S. KHAMIS**  
**JUDGE**  
**27/06/2022**