

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 145 OF 2021

**SOPHIA FUNDIKIRA (As Administratrix of the estate of the late
FUNDIKIRA SAID.....PLAINTIFF**

VERSUS

EQUITY BANK (TANZANIA) LIMITED1ST DEFENDANT

ZUBBEN COMPANY LIMITED.....2ND DEFENDANT

NKAYA COMPANY LIMITED.....3RD DEFENDANT

SILO STAR DEBT COLLECTORS

COMPANY LTD.....4TH DEFENDANT

FREDRICK BONIPHACE KYANDO.....5TH DEFENDANT

THE REGISTRAR OF TITLES.....6TH DEFENDANT

THE ATTORNEY GENERAL.....7th DEFENDANT

RULING

Date of Submissions: 24/06/2022

Date of Delivery: 24/06/2022

AMOUR. S. KHAMIS, J:

Following an order for settlement of the case between the plaintiff, first and third defendants, and withdrawal of the plaintiff's suit against the fourth defendant, the plaintiff moved the Court to withdraw the suit against the second defendant with leave to refile a fresh suit.

Mr. Richard Kasisiko, learned advocate for the second defendant consented to the prayer for withdrawal but pressed for costs. He

contended that the plaintiff did not have a cause of action against the second defendant and the suit subjected the second defendant to financial loss and harassment.

Mr. Kasisiko asserted that withdrawal of the plaintiff's suit was not automatic withdrawal of the counter claim.

The learned counsel asserted that on account of a cause of action against the plaintiff, the second defendant intended to prosecute the counter claim because it was a cross suit and independent from the plaintiff's case.

Ms. Doreen Kalugila, learned advocate for the plaintiff strongly differed with Mr. Kasisiko. She maintained that the counter claim had no legs upon which to stand in this Court as it was purely contractual such that this Court lacked jurisdiction.

Ms. Kalugira urged this Court not to grant costs citing Order XXIII Rule 3 of the Civil Procedure Code (supra).

Two main issues crop up for determination: Whether the 2nd defendant's counter claim is maintainable after withdrawal of the plaintiff's suit and whether the 2nd defendant is entitled to costs of upon withdrawal the plaintiff's suit.

There is no doubt that a counter claim is a cross suit and stand independently from the original suit. Order VIII Rule 12 of the Civil Procedure Code (supra) provides that;

" 12 where a defendant has set up a counter claim the Court may if is of the opinion that the subject matter of the counterclaim ought for any reason to be disposed of

by a separate suit, order the counterclaim to be struck out or order to be tried separately or make such other order as may be expedient."

I have closely examined a counter claim presented by the second defendant on 2 November 2021. The reliefs prayed therein are as follows:

- "(a) payment of TZS 300,455,000/= by the plaintiff to the 2nd defendant.*
- (b) Interest at commercial rate of 20% per annum from December 2016 up to the date of Judgment.*
- (c) Payment interest at the court's rate of 12% from the date of Judgment to the defence of full payment.*
- (d) General damages.*
- (e) Payment of costs for counter claim.*
- (f) Any other relief this court deems fit to grant."*

Paragraph 14 of the counter claim show that the sum of money demanded by the second defendant was repayment of an amount advanced to the plaintiff around the year 2013 to settle a bond created by the plaintiff to one Mr. Jidawi and loss of money occasioned by the plaintiff maliciously.

With this cause of action and the reliefs sought as reproduced above, I am in all four with Ms. Kalugira that the second defendant's cause of action against the plaintiff is contractual and this Court is not a proper forum.



For the stated reasons, I am of the view that the counter claim cannot stand alone in this suit and should be separately instituted.

As regards to the second issue, Order XXIII Rule 1(1) of the Civil Procedure Code entitles a plaintiff to withdraw the suit or abandon part of the claim at any time after its institution.

It is trite law that in all instances referred to under Order XXIII Rule 1(1), 2(a) (b), (3) of the Civil Procedure Code, an award for costs is discretionary.

In the present case, record show that parties had just completed pleadings and trial of the main suit was about to start when settlement took place and subsequently, a prayer for withdrawing the suit against the second defendant.

In such circumstances and owing to the advanced age of the plaintiff whose witness statement show that she is 80 years old, and a widow, I am not convinced that it is just to award costs against her.

In the circumstances, the plaintiff's prayer to withdraw the suit against the 2nd defendant with liberty to file afresh is granted pursuant to Order XXIII Rule 1 (b) of the Civil Procedure Code (Supra) and for the reasons stated above, the second defendant's counter claim against the plaintiff is hereby struck out in terms of Order VIII Rule 12 of the Civil Procedure Code. I make no order for costs. It is so ordered.


AMOUR.S. KHAMIS
JUDGE
24/06/2022

ORDER: Ruling delivered in chambers on presence of Ms. Doreen Kalugira and Mr. Habib Kassim for the plaintiff and Mr. Rashid Kasisiko for the 2nd defendant.

Right of Appeal explained.



[Handwritten signature]
AMOUR.S. KHAMIS

JUDGE

24/06/2022