IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA.

CIVIL APPEAL NO. 3 OF 2022

(Arising from Civil Case No. 9 of 2021 of the Resident Magistrate's Court of Kagera at Bukoba)

MATHIAS RWEYEMAMU MKEBEZI.....1st APPELANT

ROBERT MUSHENGI BONEFACE.....2nd APPELLANT

VERSUS

ENOCK BAKENGESA .....1st RESPONDENT

THEONEST MWOMBEKI.....2nd RESPONDENT

JUDGMENT

29th September, 2022 & 5th October, 2022

Isaya, J.

On the 16th March, 2020, Mathias Rweyemamu Mkebezi and Robert Mushengi Boniface who were the plaintiffs, sued the Respondents in the Resident Magistrate's Court of Bukoba claiming TZS 40,000,000/= being the specific and general damages for defamation and trespass. On 1st November, 2021, the 1st Appellant prayed to withdraw the case with leave to refile without court fees reasoning that it was about to befell to backlog. The same was supported by Mr. Pereus Mutasingwa, the learned counsel for the 2nd Appellant. However, in reply, Mr. Lameck, representing the Respondents, objected the Appellants to be given a leave to refile it arguing that they had failed to prosecute their case.

That, if they intended to withdraw the matter, they should not be given a leave to refile because doing so would prejudice the Respondents.

In its decision, the trial court found that, though the case was a backlog, but the appellants had no sufficient reasons to be granted leave to refile the case after withdrawing. They failed to prosecute the case after several adjournments. In result, the case was withdrawn with costs.

Aggrieved, the appellants are before this court faulting the findings of the trial court. In their joint memorandum of appeal, they raised eight grounds as follows:

1. *That the Trial Learned Magistrate grossly erred in law and fact to withdraw the 2nd Appellant's suit without any prayer made by the 2nd Plaintiff or his Advocate.*
2. *That the Trial Learned Magistrate grossly erred in law and fact to withdraw the case against the 1st Appellant Suo motto without any reasons to do so.*
3. *That the Trial Learned Magistrate after had found that the suit was still in time to proceed, grossly erred in law to reject the prayer for withdrawing with leave to re-file or to proceed hearing and determined the suit on merit inter parties without influencing her own interest in the suit before her.*
4. *That the trial learned Magistrate after had found that the life span of the suit had fallen on the Backlog Case, grossly erred in law and fact for failure to grant the prayer of the 1st Appellant.*
5. *That the Trial Learned Magistrate grossly erred in law and fact to condemn the appellant that was in abuse of Court Process while the Respondents were the ones who were in abuse of court process to*

continue the suit without a competent Written Statement of Defence and failure to conduct mediation as obliged by the law.

6. *That the Trial Learned Magistrate grossly erred in law for failure to meet (sic) a standard of Justice of the Appellant's right and she exercised discretion with illegal material on points of law and facts which prejudiced the Appellants against their Statutory Rights of the law which resulted to the miscarriage of justice.*
7. *That the Trial Learned Magistrate failed to rescue (sic) herself from conducting the case which she knew specifically that she had been under training of the Learned Counsel for all the defendants who had influenced the Proceedings and acting in good breach of the principles of Natural justice* ***Nemo Judex in Causa Sua.***
8. *That the Learned Magistrate grossly erred in law and in fat in withdrawing the suit* ***Under Order XXIII Rule (1)(i) and (3) of CPC, Cap 33 R.E 2019*** *with Costs the Application which was not before him.*

At the hearing of this appeal, the 1st Appellant appeared in person, unrepresented while the 2nd Appellant was represented by Mr. Pereus Mutasingwa whereas the Respondents were represented by Mr. Lameck John Erasto.

In his submission, the 1st Appellant prayed to consolidate grounds 2, 3, 4 and 8 and argue them together. He faulted the trial court to withdraw the case but denying them leave to refile, something which was not in his prayer before the trial court. According to him, the trial Magistrate, if had no intention of allowing the matter to be refiled, was at liberty to deny the prayer and order the hearing to proceed. Also, the 1st Appellant faulted the trial court to condemn him to be

the causative of the delay while in fact was caused by both parties including the trial Magistrate.

Furthermore, submitting on ground 7, the 1st Appellant complained that the trial Magistrate in conducting the matter could not be impartial, she had interest to serve because she once was a trainee in the office of respondent's counsel.

He concluded his submission by urging the court to allow the appeal, set aside the order of the trial court and the matter be remitted back to the trial court to be heard on merit from where it had reached or grant the leave to refile it.

On his side, Mr. Mutasingwa, faulted the trial court to give order of withdrawal that was not asked for. According to him, before the trial court they prayed for leave to withdraw the case with leave to refile without court fee, but the trial Magistrate decided to withdraw without granting the leave to refile which are two different things founded in different laws with different impacts. Withdrawal with leave to refile protects the right to be heard while the withdrawal denies the right to be heard. Therefore, if the trial Magistrate was not willing to grant the sought leave, she would have proceeded with hearing the matter on merit. Hence, the order was illegal. He prayed the order be quashed and allow the suit to proceed from where it ended.

Mr. Lameck, learned counsel for the Respondent, opposed the appeal. He submitted that the trial Magistrate was right to withdraw the case without granting a leave to refile because the Appellants failed to give sufficient reasons

to be availed a chance to refile the matter as provided for under Order XXIII Rule (1)(2) (b) of CPC.

Submitting on ground 7 concerning the complaint the trial Magistrate was not impartial, Mr. Lameck did not deny that the trial Magistrate was once attached to their office for internship. According to Mr. Lameck, the case was conducted diligently with no any double standard. The complaints by the 1st Appellant are baseless; the court granted what was prayed by the Appellants. He prayed the appeal be dismissed.

In rejoining, the 1st appellant reiterated his submission adding that withdrawal was the available remedy to rescue his case because the case had become backlog and the trial Magistrate kept on complaining on the situation.

Mr. Mutasingwa rejoined by reiterating what he submitted in chief. He stated that they prayed to withdraw because the case had fallen to backlog but the trial Magistrate was bias for ordering what was not prayed for.

From the submissions made by both parties, there are two disputing issues to be determined; whether the order was proper and whether the trial magistrate was bias.

Starting with the first issue, there is no any dispute that the Appellants prayed to withdraw the case after what is alleged to be stated by the trial Magistrate that the case was by then a backlog. Again, the parties are not in dispute that, the main prayer before the trial court was to be granted a leave to refile after

withdrawal. I think the Appellants contemplated Order XX111 Rule 1(2) (b) of the CPC which reads;

" 1(2) Where the Court is satisfied

(a).....N/A

(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 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".

Indeed, going through the records and as rightly submitted by the Appellants, what triggered the prayer to withdraw the matter with a leave to refile was the fact that the matter had surpassed the required age of 12 months lifespan for a case to be disposed to finality in the Resident Magistrate Courts and the District Courts. The time limit goals in each level of the court were given through an official circular letter dated 11th April, 2016 with the main intention to expedite disposal of cases, the move which takes aboard part of the vision of the Judiciary, timely justice for all. It is an excellent strategy and a fruitful one but should not be used in detrimental to the very spirit of justice and the sense of justice. In his ruling, the trial Magistrate has stated to be aware that the speed truck in which the matter was running was still in time for about 7 months

ahead. The trial court allowed the withdrawal but denied them leave to refile because it was of the opinion that since there were a lot of adjournments, they failed to prosecute their case. In this matter, I agree with the Appellants that what they were granted is not what they asked or prayed. It is a position of the law in our jurisdiction that the court will grant only a relief which has been prayed for. [See the cases of **JAMES FUNKE GWAGILO V. ATTORNEY GENERAL** (2004) T.L.R 161 and **HOTEL TRAVERTINE LIMITED and 2 Others V. NATIONAL BANK OF COMMERCE LIMITED** (2006) T.L.R 133]

Secondly, in denying them leave to refile the matter it was as good as they were condemned unheard. I agree with the Appellants that, the court had the discretion either to grant or reject their prayer but not to come up with its own invention. Through the order issued, everything ended there, sadly it was not on merit. In the case of **MUFINDI PAPER COUNCIL LIMITED Vs. IBATU VILLAGE COUNCIL & 3 OTHERS**, Civil Revision NO. 555/17 7of 2019 CAT-Dar es salaam, while quoting with approval the case of **PATROBERT D. ISHENGOMA V. KAHAMA MINING COOPERATION LIMITED AND 2 OTHERS,** Civil Application NO.172 of 2016 (Unreported), it was stated as follows;

> *"It is settled that, the law that no person shall be condemned without being heard is now legendary. Moreover,* ***it is trite law that any decision affecting the rights or interest of any person arrived at without hearing the***

affected party is a nullity, even if the same decision would have been arrived at had the affected party been heard". (Emphasis added)

In this matter, the order of the trial court closed the doors of the temple of justice for the Appellants to knock in search for their alleged right. Yes, it denied them the right to be heard contrary to law. The trial Magistrate was required to confine herself to that prayer and make a decision thereof. If there was no merit, the trial magistrate would have refused to allow the withdrawal of the case and order the matter to be heard to its finality.

Before penning down, I wish to make observation on the complaint made by Mr. Mathias Rweyemamu and Mr. Mutasingwa accusing the trial magistrate that she was bias. In my opinion, this issue should not waste our time because the same ought to have been complained of earlier in the trial court and not later at this stage of appeal. I find it an afterthought, and of course, should not be a big deal at this stage.

All said, the appeal is allowed. The ruling and order of the trial court hereby set aside. The file to be remitted back to the trial court to be heard on merit from where it had reached to the finality. Being a backlog case, it should be attended promptly and be finalized as soon as practicable. I make no order as to costs.

Order accordingly.

DATED at BUKOBA this 5th day of October, 2022.

G. N. Isaya

JUDGE

Court:

Judgment delivered this 5th day of October, 2022 in the presence of the Appellants, present in person and Miss. Erieth Barnabas, the counsel for the respondents but in the absence of the respondents.

G. N. Isaya

JUDGE