

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL REVIEW NO. 07 OF 2021

(Arising from the proceedings and order of the High Court in Civil Case No. 374 of 1999, dated
05/05/2021)

REZA COMPANY.....APPLICANT

VERSUS

TANZANIA PORTS AUTHORITY.....RESPONDENT

RULING

Date of last Order: 06/05/2022.

Date of Ruling: 09/05/2022.

E.E. KAKOLAKI, J

This is a ruling in respect of the application for Review against the proceedings and order of this Court in Civil Case No. 374 of 1999 dated 05/05/2021, withdrawing the respondent/plaintiff's suit in absence of the applicant/defendant following the withdrawal prayer from the plaintiff. The application is preferred under section 78(1)(a) and Order XLII Rule 1(1)(a) of the Civil Procedure Code, [Cap. 33 R.E 2019](the CPC) and any other enabling laws.

Briefly in Civil Case No. 374 of 1999, the applicant (defendant) was sued by the respondent (plaintiff) for a sum of Tshs. 515,438,491.32 being the money used and costs incurred by the plaintiff in the re-flotation and removal to a safe location the vessel known as M.V. MAYTHAM, owned and managed by the Applicant/defendant, which had been negligently sunk by her servants and/or agents at Dar es salaam ports hence disruption of plaintiff's business activities. In her written statement of defence apart for her defence, the applicant raised a counter claim against the respondent. Their case which was assigned to speed truck III (fourteen (14) months) could not be finalised timely as per the scheduling orders dated 30/05/2000. Further to that, parties failed to move the Court for extension of time of the speed truck until when they were moved by the court to so do, the result of which was the suit to be struck out following this court's order of 27/10/2014. Aggrieved with the decision of striking out the suit, the respondent successfully preferred revision application before the Court of Appeal vide Civil Application No.593/01 of 2017, as on 04/09/2019 the ruling of this Court was set aside and the file remitted back for urgent disposal of the suit before another judge and that, new date be scheduled for the parties to file amended pleadings.

In compliance to the Court of Appeal orders and directives this suit was re-assigned to me and on 24/11/2020 an order for notifying the parties was issued for them to appear before this court on 15/12/2020, but none of them entered appearance. On the 15/12/2020 matter was adjourned to 25/03/2021 where both parties appeared as the respondent (plaintiff) was under representation of Mr. Erigh Rumisha and Ms. Vivian Method, learned State Attorneys while the applicant (Defendant) proceeded represented by Capt. Ibrahim Bendera, learned advocate. On that day the Court was informed by Mr. Rumisha, that since they were newly assigned to the case and given its nature parties needed short adjournment of the matter for their thorough perusal and deliberation on the way forward. The prayer for adjournment was supported by Capt. Bendera, the result of which was to adjourn the matter to 05/05/2021 for necessary orders.

On the 05/05/2021 only the plaintiff appeared represented by Mr. Rumisha assisted by Ms. Mwantumu Selle, State Attorneys who informed the court that, upon perusal of the plaint and previous orders of the Court of Appeal the plaintiff had formed an intention of withdrawing the suit and refile it as there was a lot to be included in the plaint to allow the court determine properly the issues at disputed. As regard the counter claim raised by the

applicant it was Mr. Rumisha's submission that given the nature of the counter claim which hinges on the annexures to the plaint, once the plaint is withdrawn the same dies too. He thus prayed to have the suit marked withdrawn with leave to refile the order which was granted by the court, while the plaintiff ordered to file the said suit within 21 days. It is the said withdrawal order of 05/05/2021 which prompted the present application for review premised on three grounds going thus:

1. That under the Civil Case No. 374 of 1999 (herein referred to as Main suit) the Respondent herein (the Plaintiff in the Main case) requested to dispose of the ship MV. MAYTHAM which was a wreck causing inconveniences to safety of ships in Dar es salaam Harbour, the parties to the suit formed a Joint Trustees to sell the ship by public auction and put the money in a joint trust; hence by withdrawing Civil Case No. 374 of 1999 will cause the money obtained from the sale not to be in the new case. Collectively attached herein and marked as AA-1 are the Sale of MV. MAYTHAM advert on Daily News dated 22/10/2009, a Joint Trustees Meeting Minutes held on 19/11/2009, a letter from the Joint Trustees to the purchaser of MV. MAYTHAM dated 23/11/2009, and a letter to TPA on the sale of MV. MAYTHAM dated 17/12/2009.

2. That upon reading of the proceedings and the order of the Court delivered on the 5th May, 2021 the Main suit was withdrawn suo moto during a mention without giving applicant the right to be heard on the imports of the subject of withdrawal of a suit and the consequences involved.
3. That upon reading of the proceedings and the Order of the Court it withdrew the main suit and the counter claim which was a cross suit an action which is contrary to Order VIII Rule 9(2) of the CPC,[Cap. 22 R.E 2002]

It is from those grounds the applicant is praying this court to review its withdrawal order of the Main suit and restore the same to proceed normally and further to be pleased to do so with costs, the prayers which are vigorously challenged by the respondent.

Hearing of the application was conducted by way of written submission as the applicant was represented by Capt. Ibrahim Bendera, learned advocate while the respondent enjoyed good representation of Mr. Erigh Rumisha, learned State Attorney.

I have had an ample time to read both parties submissions and internalise their rival submission in respect of this application. It is uncontroverted fact that this court under the provision of section 78(1)(a) of the CPC has powers to entertain the application at hand. In this ruling I am intending to address all grounds for review as raised by the applicant. However, before so doing I wish to address briefly a point raised by Mr. Rumisha in his reply submission doubting whether the application was filed in time in which Capt. Bendera justified it in his rejoinder submission. Without wasting time I hasten to state that I am in agreement with Capt. Bendera that this application was filed timely on 04/06/2021 which was the 29th day from the date of the order 05/05/2021.

Having so put clear the record from the outset I wish to put it to light that, for smooth determination of this application, I am prepared to determine the second ground first in which the applicant laments that, she was denied of her natural right of being heard on the reasons and subject of withdrawal of the suit and the consequences involved before the grant of an order for withdrawal of the suit. Relying on the case of **De Souza Vs. Tanga Town Council** (1961) E.A 377, Capt. Bendera submitted that, the right to be heard is a constitutional one in accordance with Article 13(6)(a) of the Constitution

of the United Republic of Tanzania, 1977, thus its violation as a natural justice is not curable by mere holding that, the same decision would have been right had it not been violated.

In response to this ground Mr. Rumisha argued that, it is not true that the applicant was denied of her right to be heard. He contended, there is no way the court could have afforded the applicant with the claimed right in her absence in court without any notice. While submitting that the relied on case by the applicant is distinguishable to the facts of this matter, he urged the court to dismiss the ground as the applicant slept on her right. The Court was referred to the case of **Barclays Bank Ltd Vs. Phylisiah Hussein Mcheni**, Civil Appeal No. 19 of 2016 (CAT-unreported). In his rejoinder submission on the issue of his absence in court without notice, Capt. Bendera countered that, in that day he was in court corridors awaiting for the case to be called. And that after a long wait he decided to go in the judge's chambers only to be informed that the case had already been called, heard ex-parte and withdrawn. It was therefore his submission that refusal to restore the main suit withdrawn in unintentional absence of the applicant will be as good as condemning her unheard and urged the Court to allow the application.

Having considered the submissions by both parties I think this issue need not detain this Court much. I am at one with Capt. Bendera *that a party has a right to be heard before an adverse action or decision is taken against such a party.* That right is so basic to the extent that a decision which is arrived at in violation of it will be nullified even if the same would have been reached had the party been heard, because the violation is considered to be a breach of the principles of natural justice. That settled principle of the law was enunciated in the case of **General Medical Council Vs. Spackman**, [1943] A.C 627, Lord Wright said:

"If principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision."

The above principle of law was followed with approval by the Court of Appeal of Eastern Africa in the case of **Hypolito Cassiano De Souza Vs. Chairman and Members of the Tanga Town Council** [1961] E.A 377 and by the Court of Appeal in the case of **D.P.P Vs. I. Tesha and Another** [1993] TLR 237, **Abbas Sherally and Another Vs. Abdul Sultan AHji Mohamed Fazalboy**, Civil Application No. 133 of 2002 (CAT-unreported)

and **M/S Flycather Safaris Limited Vs. Hon. Minister for Land and Human Settlement Development and AG**, Civil Appeal No. 142 of 2017 (CAT-unreported), to mention few.

I however disagree with Capt. Bendera on his submission that, the above discussed constitutional right was denied to the applicant. There is no right without duty(ies). In this matter both parties were present in court on 25/03/2021 when the suit was adjourned to 05/05/2021 for necessary orders to avail parties with time to review the way forward of the suit. Both parties were duty bound to abide to the court's order to appear in court for necessary orders on the fixed date failure of which is tantamount failure to waiver of his right to be heard, hence risking to have an adverse order issued against him. No doubt on the 05/05/2021 when the respondent prayed to withdraw his case Capt. Bendera was absent in court without notice hence waiver of the applicant's right to respond to the respondent's prayer. The submission that he was in court premises with due respect is the submission from the bar as it is not supported by any evidence be it affidavit or otherwise. It is the law that arguments and submission by an advocate in court cannot be a substitute of evidence. See the case of **Tina & Co. Limited and 2 Other Vs. Eurafrikan Bank (T) Ltd Now known as BOA**

Bank (T) Ltd, Civil Application No. 86 of 2015 (CAT-unreported) when cited with approval the Ugandan Court of Appeal case of **Trasafrica Assurance Co. Ltd Vs. Cimbria (E.A) Ltd** (2002) E.A where the court held that:

"As is well known a statement of fact by counsel from the parties is not evidence and therefore, court cannot act on."

In this case since the applicant was duty bound to appear in court and since there is no evidence to substantiate Capt. Bendera's contention that he was in court corridors when the matter was called on and proceeded in his absence without notice, I hold the ground that the applicant was denied of his right to be heard is without merit and does not warrant grant of the application. That matter I shoulder up with Mr. Rumisha that the case of **Hypolito Cassiano De Souza** relied on by the applicant is inapplicable in the circumstances of this matter where the applicant waived her right to be heard.

I now move to the first ground where Capt. Bendera is of the argument that the money obtained from the sale of ship MV. MAYTHAM and kept in a joint trust account owned by parties may not be included in the newly opened case. As every case is decided on its own fact it is his prayer that the withdrawn case Civil Case No. 374 of 1999 be restored as the sale order

arises from it. In his reply Mr. Rumisha attacked this ground submitting that it does not qualify to be ground for review but rather ground of appeal as it goes to the merit of the plaintiff's case since she was at liberty to withdraw it. He opined that, since the court's order (sale order) remains a valid order, the withdrawal order of plaintiff's suit does not affect it as the applicant can execute it if she so wishes. Thus to him the ground should crumble.

It is true as rightly submitted by Mr. Rumisha that, the plaintiff's right to withdraw his case cannot be interfered by the defendant as provided under Order XXIII Rule 1(1) of the CPC. And that an order of the Court is not displaced by the higher court remains valid. In this case, sale order of the ship MV. MAYTHAM in which it proceed is kept in a joint trust account in my opinion is still valid and can be executed at any time as rightly suggested by Mr. Rumisha. I do not entertain Capt. Bendera's worries that, the joint trust account might not be included in the newly instituted case which undisputedly is Civil Case No. 81 of 2021, as that is a mere speculation. There is no evidence establishing that, the applicant tried unsuccessfully to implead existence of the said joint trust account in the written statement of defence if any filed against Civil Case No. 81 of 2021 pending before this court. In the event, I find any attempt to entertain applicant's prayer is

tantamount to allowing existence of two cases over the same subject matter which is against the law of the land. This ground too is devoid of merit and is hereby dismissed.

Lastly is on the third ground in which Capt. Bendera is submitting the Court's order of withdrawing respondent/plaintiff's case in Civil Case No. 374 of 1999 affected applicant/defendant's case in the counterclaim the act which contravenes the provision of Order VIII Rule 9(2) of the CPC. According to him the cited provision provides that, *"where a counterclaim is set-up in a WSD, the same shall be treated as cross-suit and the WSD shall have the same effect as a plaint in a cross-suit, and the provision of Order VII shall apply mutatis mutandis to such written statement of defence as of it were a plaint."* Placing reliance on the status of the counterclaim as dictated in the said provision he argued, in the complained case this court omitted to comply with the law by considering the fact that, the said withdrawn suit had a counterclaim hence failure to give directives on how to proceed with the said counterclaim after granting the prayer for withdrawal of the main suit. The court was referred to the case of **Bibiana Limited Vs. CRDB Bank and Abana Limited**, Land Case No. 137 of 2017 where this court held that, counterclaim can be proceeded with even when the main suit is

discontinued, dismissed or stayed. He thus invited the court to vacate its withdrawal order and direct for the case to proceed normally.

In his reply submission Mr. Rumisha resisted the submissions by Capt. Bendera on the prayer for restoration of the counterclaim in the main suit arguing that, since the same is based on annexure to the plaint which is already withdrawn ironically such claim of restoration lacks basis. He said since the plaintiff has already instituted a new case in compliance with court's order Civil Case No. 81 of 2021, still the applicant/defendant therein can raise his counter claim if she is still interested, as she is so allowed by the law under Order VIII Rule 19(1) of the CPC. He viewed the ground as unmeritorious and urged the court to dismiss it and the whole application. In his rejoinder Capt. Bendera almost reiterated his submission made during submission in chief while insisting that counterclaim being an independent suit by the applicant as per the decision of the court in **Bibiana Limited** (supra) could not have been withdrawn by the respondent as it was not her case.

It is true and I agree with Capt. Bendera on the status of the Counterclaim that, the position of the law is that, it is a cross suit independent from the main suit hence can be proceeded with even when the main suit is discontinued,

dismissed or stayed. This is the position of this court in **Bibiana Limited** (supra) which position I subscribe to when the Court stated thus:

“Even if the plaintiff in the said suit discontinues or the suit itself is stayed or dismissed, still the counterclaim can be proceeded with as contemplated under Order VIII Rule 9(2) of the CPC...”

Similarly the court of Appeal in the case of **NIC Bank Tanzania Limited Vs. Hirji Abdallah Kapikulila**, Civil Application No. 561/16 of 2018 (CAT-unreported) on the status of counterclaim had the following observation:

“... a counterclaim is substantially a cross suit which should be treated, for all purposes as an independent action.”

As it is now settled that counterclaim is an independent action no doubt the defendant who normally raises it is turned into plaintiff in respect of the same. That being the position the issue for determination is whether the court was justified to dismiss it. Mr. Rumisha says since the said counterclaim is hinges on annexure to the plaint which is no longer existing in court automatically the same lacks basis. With due respect I don't agree with Mr. Rumisha proposition that, withdrawal of the main suit goes with the counterclaim for one good reason that the same is an independent suit as

held in the cases of **NIC Bank Tanzania Limited** (supra) and **Bibiana Limited** (supra). Notably and as rightly submitted by Capt. Bendera this court when granting the withdrawal order of the main suit omitted to give any direction on how the counter claim could be treated. I so view as there is no where it is indicated in the court's order of 05/05/2021 that the said counterclaim is withdrawn too. In view of that fact I hold this ground of review has merit and I uphold it.

In the premises and for the fore stated reasons, the application is partly allowed and partly dismissed. The order of this court issued on 05/05/2021 is hereby reviewed by directing that, the applicant/defendant's counterclaim in Civil Case No. 374 of 1999, should be heard on merit to its finality. Otherwise the withdrawal order in respect of Civil Case No. 374 of 1999 remains intact.

I order each party to bear its own costs.

It is so ordered.

DATED at Dar es salaam this day of 09th day of May, 2022



E. E. KAKOLAKI

JUDGE

09/05/2022.

The ruling has been delivered at Dar es Salaam today on 09th day of May, 2022 in the presence of Ms. Jacqueline Arkadius, advocate for the applicant and Ms. Debera Mcharo, State Attorney for the Respondent and Ms. Asha Livanga, Court clerk

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

09/05/2022

