

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

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 213 OF 2023

IN THE MATTER OF THE COMPANIES ACT NO. 12 OF 2022 (CAP. 212)

AND

IN THE MATTER OF RESTORATION OF THE COMPANY

BETWEEN

CHALINZE CEMENT COMPANY LIMITED 1ST PETITIONER

MOHAMED HUSSEIN BAHADELA 2ND PETITIONER

VERSUS

REGISTRAR OF COMPANIES RESPONDENT

RULING

01st June, 2023

BWEGOGGE, J.

The petitioners herein commenced civil proceedings against the respondent for declaratory orders. When the matter herein was brought for mentioned before this court, Mr. John James Ismail, counsel for the petitioners, informed this court that they have noted that there are

some defects in the pleadings filed herein. Therefore, they refrained to serve the respondent with chamber summons, intending to withdraw the case and put the record properly. In fact, the counsel enlightened this court that, they omitted to implead the Attorney General as one of the necessary parties in this matter. Therefore, the counsel prayed to withdraw the case with leave to refile.

On the other hand, Mr. Ayubu Sanga, learned state attorney representing the respondent, contested the prayer. From the outset, he admitted that he was not served with summons to appear. However, he had searched the electronic filing system of this court and found this case registered and scheduled for mention today. Consequently, he found himself obliged to appear. He therefore printed the pleadings filed herein and he is fully prepared for the ongoing proceedings.

Further, the attorney charged that, as rightly conceded by the counsel for the petitioners, the petition herein was filed in contravention of sections 6 and 10 of the Government Proceedings Act, for failure to issue statutory mandatory notice to the government of the intention to sue and join the Attorney General as a necessary party. That the effect of the omission above vitiates the proceedings. The attorney cited the case of the **Board of Trustees of the National Security Fund vs**

M/S Mara Security Guard and Patrol Services (Civil Case 01 of 2020) [2023] TZHC 196, to bring his point home.

In the same vein, the attorney contended that the prayer to withdraw the petition is untenable. That the law is clear in that if a suit is incompetent, the prayer to withdraw cannot stand. The case of **Shangwe Mjema vs Frida Salvatory and Another** (Criminal Appeal 103 of 2017) [2020] TZCA 61 was cited to bolster the point. On the above premises, the attorney asserted that he is of the firm view that this matter should be struck out. Likewise, the attorney prayed for costs on the ground that he took the effort to inspect the electronic filing system of this court to discover this case and made preparation to appear and address this court on the issue raised above.

In rejoinder, the counsel for the petitioners countered that the prayer for costs is misconceived, as nothing has been filed by the respondent to justify the same. That the respondent was not served with summons, but coincidentally, the attorney herein heard the case being announced and appeared in this court. The counsel contended that this court must take note that no objection has been lodged to justify the prayer made by the attorney herein. That it is the legal procedure that a party appears in court following effective service. The counsel reminded this

court that they were self-moved to make the prayer to withdraw the matter herein having discovered the anomaly and made the contested prayer. Conclusively, the counsel prayed this court to accommodate his prayer to withdraw the suit.

The issue before this court is whether the prayer made by the counsel for the petitioners is tenable.

From the outset, I am on all fours with counsel for the petitioners in that the prayer for costs is manifestly misconceived. The reasons for my disposition are as follows. **First**, the respondent has not been served with summons for appearance in this case. The counsel for the petitioners was clear in that, upon apprehending the anomaly in the pleading filed herein, he opted not to serve the respondent, intending to appear before this court and seek leave to withdraw the case. **Second**, the counsel for the respondent having taken an endeavour to inspect the electronic filing system of this court, discovered the pendency of this case, printed documents thereof and appeared in court, as he asserts, cannot be heard to pray for costs of his own endeavour. I need not mention the fact that the same is yet to file the corresponding pleading.

I now revert to the contested prayer for withdrawal of the matter herein. It is apparent that the counsel for the petitioners, on his own initiative, moved this court to allow his prayer to withdraw his case for the purpose of rectifying a defect he discovered in the pleading filed herein. The prayer was neither actuated by an objection from the respondent, nor by scrutiny of this court. The case of **Shangwe Mjema vs Frida Salvatory and Another** (supra) cited by the counsel for the respondent to fortify his contention, is distinguished from this case. In the respective case, the court *suo motu* raised the issue of competence of the appeal and called upon the appellant to address the same whereas the appellant conceded the fact that the appeal was incompetent before the court and prayed to withdraw the same. In the case at hand, as aforestated, the counsel for the petitioners opened up by the prayer to withdraw his case. This court has no cogent ground to disallow the prayer and, or otherwise, strike out the case.

In fine, based on the foregoing reasons, I hereby allow the petitioners' prayer to withdraw their case with leave to refile. No order as for costs.

I so rule.



A handwritten signature in blue ink, appearing to read 'O. F. Bwego', is written over the judge's name.

O. F. BWEGOGHE

JUDGE