

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(MTWARA DISTRICT REGISTRY)
AT MTWARA
LAND CASE NO 01 OF 2020
INVOCAVIT ZAKAYO MUSHIPLAINTIFF
VERSUS
TANZANIA PORTS AUTHORITY AND 3 OTHERS DEFENDANTS

RULING

Date of Order: 11.07.2023

Date of ruling: 20.07.2023

Ebrahim, J:

The Plaintiff instituted the instant case claiming that he is the lawfully owner of two pieces of land which are adjacent and or bordering each other. One known as Farm No. 19 located at Mnawene in Mtwara District Council measuring 651 hectares with Certificate of Title No. 36320; and another one is located at Mtawanya Mtawanya Village in Mtwara District Council measuring 125 acres with a letter of offer dated 17th December, 1984.

The Plaintiff is claiming also that between January to February 2014, the 1st Defendant under the authority of the 2nd and 3rd Defendants unlawfully interfered with the above described pieces of land by

affixing concrete marks reading "**TPA Area**". The said area has the approximate value of Tanzania Shillings One Billion Only (say TZS 1,000,000,000/-).

The Plaintiff is thus praying for judgement and decree against the Defendants as follows:

- i. An order nullifying a grant of the suit land to the 1st Defendant.
- ii. An order that the 1st Defendant provides vacant possession of the suit land.
- iii. An order of payment of general damages as may be determined by the court.
- iv. Interest thereof at bank commercial rate of 21% per annum from the date of filing to the date of full recovery.
- v. Costs of the suit.
- vi. Any other relief(s) and orders that this court may deem just to grant
- vii. **IN THE ALTERNATIVE;**
 - a. An order that the acquisition of the suit land, if any, be done in accordance with the law.
 - b. An order that the Plaintiff be fairly and reasonably compensated in accordance with laws of Tanzania.

Upon being served with a copy of the plaint, the Defendants filed a joint written statement of defence stating that the survey/planning, relocation and registration of Plot 1/1, Port Additional Area, Msanga Mkuu – Ng'wale area, Mtwara District under Certificate of Occupancy Title No. 2037 to the 1st Defendant did neither affect nor involve any part of the Plaintiff's Farm No. 19 located at Mnawene. They insisted that the suit lands are two distinct and separate plots which are adjacent and parallel to each other demarcated by beacons and do not intermingle at any point. The Defendants therefore put the Plaintiff to strict proof thereof.

The hearing of the Plaintiff's case was opened on 22.06.2023 where the Plaintiff testifying as PW1 adduced his evidence. When PW1 finished to adduce his evidence, Counsel for the Plaintiff, Mr. Hussein Mtembwa prayed to be availed with a summons to call another witness before they could proceed with the one who was present on the day.

The court agreed to the prayer by Mr. Mtembwa and ordered for issuance of summons to the respective witness for the Plaintiff and scheduled the hearing of the case to 11.07.2023 and 12.07.2023 consecutively.

On 11.07.2023, before the Plaintiff could proceed with their next witness, counsel for the Plaintiff sought indulgence of the court and made a lengthy submission praying for the withdrawal of the suit with leave to refile under the provisions of **Order 23 Rule 1 (1)(2)(a) and (c)(3) of the Civil Procedure Code, Cap 33 RE 2019** and waiver of costs under **Order 23 Rule 1(3) of the Civil Procedure Code, Cap 33 RE 2023**.

He adduced reasons for the above prayers being the discovery they have made that their annexure no. 3 in their list of additional documents filed on 22.08.2022 titled Surveyed Map on Farm No. 19 Mnawene, Mtwara is different with the surveyed plan in exhibit PE2- Certificate of Title No. 363220. He explained that there are beacons which feature in exhibit PE2 but do not feature in annexure No. 3 in a sense that it is seen new boundaries have been invented in a surveyed map which are missing in exhibit PE2. Thus, the intended witness cannot explain annexure no.3 vis a vis exhibit PE2 vis à vis what is on the grounds resulting to failure of the suit by reason of default. Hence, a need for a re-survey, said Mr. Mtembwa.

Submitting further, he said the Plaintiff not being a professional in surveying could not detect the defect until on the preparation of the witness. He prayed also for the waiver of cost because the Plaintiff has good reasons.

Responding to the arguments raised by the Plaintiff's counsel, Ms. Songoi in assistance with Mr. Shija both learned State Attorneys, told the court that they do not object the prayer for withdrawal but the same be with costs. Ms. Songoi however registered their objection on the leave to refile the suit on the reason that allowing the withdrawal with leave to refile would amount to abuse of court process because it is the same plaintiff who prayed for the court to vacate its scheduling order on 18.05.2022 and upon the prayer being granted on 22.08.2022 among other documents they attached a Surveyed Map of Farm No. 19, Mnamwene, Mtwara District, Annexure No.3 believing that it is a correct map.

Ms. Songoi in referring to the cited law i.e., **Order 23 Rule 1 and 2 (a) and (b) of Cap 33** said that one of the reasons for the withdrawal with leave to refile is formal defect and sufficient reasons. Nonetheless, no formal defect has been shown by the Plaintiff's counsel, she uttered. She invited this court to be persuaded by the decision of this court in the case of **Amali Kibondei Vs TANROADS**, Land Case No. 358 of 2017 where the court rejected to grant leave to refile a suit on the basis that the Applicant failed to show sufficient reasons. Applying the principle to the instant scenario, Ms. Songoi argued that in this case there are no formal defects and sufficient reasons but rather the

Plaintiff failed to prosecute his case. She further urged the court to be guided by the principle that every litigation must come to an end as held in the case of **Stephen Masafi Wasira Vs Joseph Sinde Warioba** [1999] TLR 332.

Amplifying what has been submitted by Ms. Songoi, Mr. Shija, learned State Attorney explained the formal defect to be a procedural defect which does not affect merits of the case like misjoinder of parties, none issuance of statutory notice etc., but not variance of evidence i.e., variance of exhibit PE2 and annexure no. 3.

On the aspect of sufficient reasons, Mr. Shija said that the Plaintiff was placed to know his case before filing it and he equated the said variance to negligence on part of the Plaintiff. He invited the court to the persuasive case of **Peponi Beach Resort Limited Vs Lodge Creations Ltd and Another**, Commercial Case No. 89/2018 pg 6.

He concluded on the point that there is no sufficient reason to grant leave to refile and the case be marked withdrawn with costs because the defendants have been travelling since 2020 using tax payers money.

In rejoinder, advocate Mtembwa noted that the Defendant's counsels have not objected the withdrawal of the case. He re-joined

however that the guiding principle to order cost and order refile is the presence of formal defect and sufficient reasons – **subrule 2 of Order 23**. He reiterated that the defects in their suits are formal. As for the interpretation of formal defect, he said there is none in the CPC and the one provided by Mr. Shija is his own invention.

He urged the court to give wider interpretation of the phrase sufficient reasons.

Speaking about the cited cases, he said **Amani Kibondei' case** (supra) insisted on the formal litigation and in **Peponi's case** (supra) it was the pleadings that initiated the case while in their case annexure no.3 did not initiate proceedings but rather it came later after seeing the evidence brought by the defendant.

He argued also that the principle of litigation must come to an end does not mean that the person cannot come to court.

I have carefully followed the rival submissions of both parties' counsels.

Indeed, the position is clear that a person, be it a Plaintiff or Appellant or Applicant bringing a matter to court is at liberty to withdraw such matter at any time without permission of the court and the court cannot issue any other consequential order about the rights of the

parties save for the costs - **Mechmar Corporation (Malaysia) Berhad (in Liquidation) v. VIP Engineering and Marketing Limited and Others**, Civil Application No. 190 of 2013, CAT at Dar Es Salaam [2021] TZCA 335 (30 July 2021).

*"We think the effect of a withdrawal of a legal action is to place the parties in the same position as if no such action had been brought to the court. In our research we did not readily find any local precedent aligned to or contradicting this view. Gratefully, we found a number of decisions handed down by the courts in India on the question, to which we subscribe. In **Hare Krishna Sen v. Umesh Chandra Dutt and Others**, 62 Ind Cas 962, it was held that:*

"... the effect of the withdrawal of the suit is to leave the rights of the parties undetermined in so far as they were asserted in that suit..."

Furthermore, in **Smt. Raisa Sultana Began and Others v. Abdul Qadir and Others**, AIR 1966 All 318, it was held that:

*"Next it is to be noted that no act is required to be done by the Court to effectuate a plaintiff's withdrawal of his suit. There is no provision for any act to be done in the suit by the Court for making the withdrawal effective or even after the withdrawal it is not required to pass any order. **Withdrawal of a suit is itself its end. A plaintiff withdrawing his suit is liable for such costs as the Court may award; so***

the Court is empowered to pass an order only in respect of the costs. The liability for costs arises out of the plaintiff's withdrawing his suit; the suit has been withdrawn and consequently he becomes liable." [Emphasis added]

From the above decisions, three points are clear. First, that withdrawal of a legal action, be it a suit or a petition or an appeal, is itself its end. Secondly, that withdrawal of a legal action leaves the rights of the parties undetermined in so far as they were asserted in that action. Finally, a party withdrawing his action is liable for such costs as the court may award. So, the court is empowered to pass an order only in respect of the costs."

The position is however different where a party seeks to withdraw the case but at the same time be allowed to institute a fresh suit.

The renowned scholar **Mulla, the Code of Civil Procedure sixteenth edition Vol 3 at page 3154 - 3157**, had the following to say pertaining to withdrawal with leave to refile:-

*"The principle underling the provision for withdrawal and abandonment is, **that the law confers upon a man no right or benefit which he does not desire** -invito beneficium non datur. **The second suit after withdrawal of the first suit (without seeking permission to file a fresh suit) is barred**, not because of the principle of res judicata (because there has been no adjudication), but because, whoever waives, abandons or disclaims a right, will lose*

...If a party desires to withdraw from the suit having the liberty to institute a fresh suit, he must apply to the court to permit him so. If he does not desire to have the liberty, then he can withdraw the suit of his own motion and no order of the court is necessary" [emphasis added].

The above position has been further amplified by the late Justice Chipeta in his Book **Civil Procedure in Tanzania** at page **259 - 260** where he said that :-

*"A plaintiff who seeks to withdraw with leaves, therefore, will only be allowed by the court to withdraw from a suit or abandon part of the claim where it is satisfied that the suit will have **to fail by reason of some formal irregularity**, or where **there are other sufficient grounds for allowing him to do so**. It should be noted, however, that a fresh suit instituted on such permission is subject to the Law of Limitation in the same manner as if the first suit had not been instituted. In other words, the time does not stop to run merely by virtual of the court's permission to institute a fresh suit. The time continues to run from the date the cause of action arose or the right to sue accrued" [emphasis added].*

The above positions are equally well positioned in our statutes.

The withdrawal of the suit is provided under **Order XXIII Rule 1 (1) of the Civil Procedure CAP 33 R.E 2019** that:

"1-(1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim."

Again, withdrawal of a suit with leave to refile/to institute a fresh suit is provided under **Order XXIII Rule 1 (2) of the Civil Procedure CAP 33 R.E 2019** that:

"1-(2) Where the court is satisfied-

*(a) that a suit must fail by **reason of some formal defect;***

or

*(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 suit or abandon 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."*

Having outlined the jurisprudential position and the law pertaining to the instant matter, the issue is whether the reason assigned by the counsel for the Plaintiff to be availed leave to refile the suit falls within the ambit of **Order XXIII Rule 1(2) (a)(b) of the CPC, Cap 33**. i.e., there is formal defect and sufficient reasons.

Mr. Shija has told the court that formal defect is procedural defect that does not affect merits of the case like misjoinder of parties but

not variance of evidence i.e., variance of exhibit PE2 and annexure no. 3.

Mr. Mtembwa vigorously argued that there is no definition in our Civil Procedure Code as to what amounts to formal defects.

While it is true that the Civil Procedure Code has not provided or defined as to what amounts to formal defects; other jurisdictions have been more elaborative and made a further elaborative on the issue. The Supreme Court of India in **K.S. Bhoopathy and Ors. v. Kokila and Ors.** MANU/SC/0395/2000 : (2000) 5 SCC 458, faced with a similar situation entailing to ascertaining a formal defect in order to decide as to whether to allow leave to refile as suit held as follows;

*"if is the duty of the Court to be satisfied about the existence of **"formal defect"** or "sufficient grounds" before granting permission to withdraw the suit with liberty to file a fresh suit under the same cause of action. Though, liberty may lie with the Plaintiff in a suit to withdraw the suit at any time after the institution of suit on establishing the "formal defect" or "sufficient grounds", such right cannot be considered to be so absolute as to permit or encourage abuse of process of Court. The fact that the Plaintiff is entitled to abandon or withdraw the suit or part of the claim by itself, is no licence to the Plaintiff to claim or to do so to the detriment of legitimate right of the*

Defendant. When an application is filed under Order XXIII Rule 1(3) Code of Civil Procedure, the Court must be satisfied about the "formal defect" or "sufficient grounds". **"Formal defect" is a defect of form prescribed by the Rules of procedure such as, want of notice Under Section 80 Code of Civil Procedure, improper valuation of the suit, insufficient court fee, confusion regarding identification of the suit property, mis-joinder of parties, failure to disclose a cause of action etc. "Formal defect" must be given a liberal meaning which connotes various kinds of defects not affecting the merits of the plea raised by either of the parties".** [Emphasis added]

Order XXIII Rule 1(3) of the Indian Code of Civil Procedure is in parimateria with Order XXIII Rule 1(2) of the Civil Procedure Code, Cap 33 RE 2019. I am intrigued and verily inspired by the above quotation and find that the enlightenment falls in ten and saves the purpose of the instant case. In-fact looking at the excerpt of the late Chipeta, J (**Civil Procedure in Tanzania**), he used the term **"formal irregularity"**.

It follows therefore that the formal defects intended by the legislature are the irregularities in form and not content which would have the effect of affecting the merits of the matter. In other words, the formal defects could not be attributed to the content of the evidence of the case or the content of exhibits etc.

The bone of contention in this case is whether the two suit plots intertwined each other and of-course if it would be found that the same is true, the question would come to what extent and the remedy pertaining to such intertwining. In essence, I could categorise the issue as a confusion on the boundaries of the two plots in dispute.

I would not completely ignore the fact that the variance on documents to prove or disapprove such intertwining have been discovered after the passage of a long period of time hence exerting elements of negligence. However, I that the final resolve of the issue would save justice to both parties and I do not see that it would affect the pleas of both sides at this stage but rather solve a long standing dispute.

As alluded earlier, **Order 23 Rule 1(2)(a)(b)** read together with **Section 30 of the Civil Procedure Code**, gives mandate to the court to allow the re-filing of the case in such terms as it think fit. More – so as correctly argued by the counsel for the Defendants, Plaintiff and his counsels ought to have had discovered the variance since they applied to add the said document. Therefore, I conclude that there is dilatory conducts on their part. Again, this case had been in court since 2020 subjecting the Defendants to all sorts of expenses from travelling to the research and arguing the case as the hearing of this

case had already began. Also, the Plaintiff might decide not to institute this case again.

It is from the above back ground, I allow the withdrawal of this case and the same is marked withdrawn with leave to refile a fresh case subject to time limitation with costs.

Accordingly ordered.



A handwritten signature in black ink, appearing to read "R.A. Ebrahim".

R.A. Ebrahim

JUDGE

Mtwara

20.07.2023