IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISRTY OF SHINYANGA

AT SHINYANGA

CIVIL APPEAL NO.15 OF 2022.

(Originating from Civil Case No.38 of 2021, before Kahama District Court)

NGOSSO TRADERS CO.LTD .....APPELLANT

VERSUS

ZACHARIA FAUSTINE MASALU.....RESPONDENT

19th July & 16th August 2023

F.H. MAHIMBALI, J.

JUDGEMENT

The question this Court is invited to respond in this appeal is whether a plaintiff in a civil suit may wish to withdraw his case when the matter is due for the delivery of judgment? In this current case, the respondent instituted civil case no. 38 of 2021 against the appellant, before Kahama District Court claiming for among others a total of Tshs 7,000,000 and other reliefs to that effect. However, after some court proceedings, the matter was fully heard inter partes on merit and scheduled for judgement.

When the matter came for judgment, the respondent prayed to withdraw it with the leave to refile, on the ground that, the respondent

wishes to join the necessary party to a suit. Despite of much resistance from the appellant's Counsel herein, the trial Court granted the prayer by the respondent.

The appellant was aggrieved by the decision of the trial Court; he has then approached this Court with the limbs of two grounds of appeal namely;

1. *That, the learned trial Magistrate erred in law and facts in granting the plaintiff's prayer to withdraw the suit with the leave to refile.*
2. *That the trial magistrate erred in law and facts for failure to order the respondent herein to pay costs of the suit after granting the respondent prayer to withdraw the suit with the leave to refile.*

During the hearing of this appeal, the appellant enjoyed legal services of Mr. Erick Katemi learned advocate while the respondent had legal services of Ms. Zena Kazimoto also learned advocate.

Mr Katemi, submitting to the first ground of appeal argued that it was an error for the trial court to allow the withdraw of the suit with the leave to refile while the suit had reached at judgement stage.

He further averred that the leave to refile the suit was improperly granted. He stated that after the hearing of the case on 7/10/2021 parties closed the hearing and the case was fixed for judgement on 22/10/2021.

On that day of 22/10/2021, the judgement was not read and adjourned for another day, where it was scheduled for delivery on 2/11/2021. Before the said judgment was delivered on that day, the respondent prayed before the trial court to withdraw the matter for purpose of including new parties.

Mr Katemi further contended that, he resisted the prayer by the respondent but the trial court granted the application without costs. Despite the fact that Order XXIII Rule 1(2) (b) of the Civil Procedure Code, Cap 33 R.E 2019 allows for such a circumstance, but since both parties had given their testimonies and closed their case, it is his view the prayer to withdraw the case after the closure of the case, it has prejudicial effects. Refiling of the matter benefits the respondent in drafting his case well so as to cure the deficient pointed by the defence.

Mr. Katemi referred this court *to the case of* ***Peponi Beach Resort Limited versus Lodge Creation Limited and Nolic Company, commercial Case No.89 of 2018.***

He concluded that the trial Magistrate misplaced the law and consequently misapplied it.

On the second ground of appeal, Mr. Katemi submitted that the grant of the application to withdraw the suit without costs was inordinate as per circumstances of the case.

He also stated that, he is aware that the trial Court has discretional power in awarding costs, however such powers have to be exercised judiciously. In the case at hand, the trial Court had not exercised the judicial discretion properly. As parties were attending to the Court and thus incurred unnecessary costs, the withdraw of the case at that stage necessitates an award of costs for a frivolous trial.

Meanwhile, Mr. Katemi submitted that, the defendant (appellant) had engaged a lawyer to deal with the case but the plaintiff (respondent) had not. However, there were other costs for accommodation and meal. Therefore, the prayer to withdraw the case ought not to be given cheaply as prayed especially on the circumstances of the case.

On the side of the respondent, Ms. Kazimoto resisted the appeal on the ground that as per law, the plaintiff is at liberty after filing the suit to withdraw the case from Court as per Order XXXIII Rule 2 of the CPC.

Since the case was set for judgment, it qualified for the withdraw thereof. Praying to withdraw has no legal impingement since the legal procedure was well complied, there was no any legal error as contended.

Regarding to Order XXVIII Rule 3 of the CPC, the grant of the leave was not necessarily supposed to be granted with costs of the case, Ms. Kazimoto referred this Court to the case of ***Chang Jian investment Ltd versus Africa Banking Corruption (T) LTD and & 2 others, Land Case No. 7 of 2019., (HC Mtwara)***.

In rejoinder, Mr. Katemi reiterated his submission in chief and contended that in any case the appellant (defendant) has been prejudiced. He argued that if the rule is not strictly applied, there will be no relevancy of filing of cases before Courts of Law. And therefore, liability of costs was inevitable.

Having heard both parties, I have now to determine the appeal and the issue to be considered is whether this appeal has been brought with sufficient cause.

In regarding to first ground, I have endeavoured my mind to pursue the trial Court's records. It is true that the respondent filed Civil Case No. 38 of 2021 against the appellant, whereby the matter was fully heard on merit and scheduled for judgment on 22/10/2021. Unfortunately, on

22/10/2021 the Judgement was not delivered where the respondent for the first time presented her prayer to withdraw the case. The case was then adjourned. Surprisingly, on the next scheduled date for its delivery (2nd November 2021), in her address to the court, the respondent maintained her concern that she wishes to withdraw her case on reason that there is an important party to be joined in the case for justice.

As a matter of right and cherishing the best practice of the right to be heard, the trial court before granting the respondent's prayer of the withdraw of the case without costs, heard the both parties in that regard. Nevertheless, on 10/12/2021, the trial Court delivered the ruling by granting the respondent her prayer to withdraw the case with the leave to refile and without costs.

I am inclined to commence my consideration by quoting Order XXIII Rule 1 (1), (2) and (3) of CPC, which I think may provide an answer to whether, the case met qualification to be withdrawn or otherwise. The law in the indicated Order provides 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.*

(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 plaintiffpermission 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.

These rules speak lauder, that the court has discretionary powers to grant a prayer to the plaintiff to withdraw the whole plaint or abandon part of the plaint. However, the restrictions imposed by law to the withdraw of plaint are mainly two. Firstly, **that a suit must fail by reason of some formal defect**; Secondly, **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.

Undoubtedly, the plaintiff has every right and at any time during the existence of the suit in court, to withdraw the whole suit or part of it or withdraw a suit against certain defendants or add other defendants upon leave of the court to amend his/her pleadings.

Mulla, the Code of Civil Procedure sixteenth edition Vol 3 at page 3154, had the following to say:- *"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 -into 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 it"*

Mulla at page 3157 continued to comment as follows: -

"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"

These quotations imply that the plaintiff is the one who instituted a suit in court, likewise is at liberty to continue with it or withdraw or abandon part of it or as a whole. However, that liberty is subject to compliance to a certain guiding principle, including, obtaining court order to withdraw the suit with leave to refile it afresh, if he so wishes to do so, or withdraw it without leave of the court to refile afresh, which will operate

as a bar to subsequent suit against the same parties with the same subject matter and same law applicable.

This position was further amplified by the late Justice Chipeta in his Book Civil Procedure in Tanzania at page 259 & 260 as follows: -

> *"Plaintiff who seeks to withdraw with leave, 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".*

The above quoted reasoning of late justice Chipeta is conclusive in essence and in logic because the right to withdraw an action always remains so to the Plaintiff.

Always, this court has been encouraging parties to reconsider their actions if they find that they are in a wrong road to the ends of justice, they should retreat from that wrong road and reengage the right road to

the ends of justice. Otherwise, it is a wastage of time of the parties and of the court to continue labouring on a wrong road while knowing for sure the destination of it may not be achieved.

In the circumstances of this matter, I have keenly studded the trial court's record to establish the reasons for the said withdraw of the suit. The plaintiff just says:

> *"Naomba kuondoa shauri hili mahakamani na kulirudisha kwa kuwa sikumuunganisha mtu muhimu kwenye shauri hili hivyo itapelekea kukosa haki zangu za msingi."*

It is from this prayer by the respondent (plaintiff at the trial court) which was forcefully resisted by the appellant, it was eventually granted and without costs. My interest is whether this reason by the plaintiff met the legal grounds warranting the grant of the prayer. According to law, such a prayer is only entertained upon fulfilment of two conditions namely; Firstly, that a suit must fail by reason of some formal defect; Secondly, 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. Fitting these two conditions as per law in the current case, I find them none in compliance by the trial magistrate's order as the plaintiff had not established the formal defect of his case or the

sufficient grounds for reinstituting the said case. Since the rule to withdraw is not absolute, but restrictive, when the case is fully heard (both parties), the parties have no longer such a right but only the court's duty to compose a judgment or ruling.

The reasoning is straight forward that if the practice of the respondent (plaintiff) is cherished in our courts, it will cause more injustice than fairness to the parties in contests. It is pretty clear that a prayer to withdraw suits with leave to refile is not an absolute right. It is subject to certain limitations. That is why registration of reasons is necessary. The practice displayed by the respondent at the trial court must be discouraged by this Court, as I hereby do so. In fact, precedents available in common law legal tradition are in support of the move. Withdrawal of case with leave to refile fresh suit must be accompanied with reasons (see: **Sh. Abdur Rashid v. Ehsanullah**, Civil Revision No. 60 of 1995; and **Amjan Rashid Khan Malik v. Mrs. Shahida Naeem Malik** (1992SCMR 485); **Hindustan Sanitaryware and Industries Limited & 12 Others v State of Haryana**, Civil Appeal Nos. 2539 of 2010 and 4454 of 2019, Benson Ndaro Makulile & Another V. Rose Makenge Ruge, Land Revision No. 8 of 2023, HC Musoma Registry). In the precedent of **Sh. Abdur Rashid v.**

Ehsanullah (supra), Judge Peshawar of the High Court in India, on similar subject, has resolved that:

> *It is true that plaintiff is vested with the powers to withdraw his suit at any time after its institution, but it is equally true that he does not have such right at his free-will affecting the right of the defendants and also the right of the third party which might have been created by or arising from the order passed or proceedings taken in the suit.*

In the present appeal, the record is vivid that the suit was withdrawn in breach of Order XXIII Rule 1(2) (a) and (b) of the Code, and it affected the appellant. In that case, the question: whether plaintiff in civil suits may wish to withdraw their cases when the matter is due for judgment is replied in negative. I say so basing on the reasoning above and that it will be an abuse of the court process if such a course is entertained. The reason that there is a necessary party to be joined in a case, shows lack of seriousness by the plaintiff. Filing a case before a court of law is not just a matter of one's pleasure but rather a pre-mediation sufficiently done and upon assessment of the high chances of winning a case. It will be absurd as in the current matter if a party instituted a case against the appellant leaving the necessary party behind. That however ought to have been established

much earlier than done. Doing it at the closure of the defense case, means nothing but intending to fill the gaps of the plaintiff's case.

By way of analogy, the Court of Appeal in a number of criminal cases have been so reluctant ordering retrial for fear of crafting evidences by the prosecution (See **Peter Kongoli Maliwa and 4 Others V. the Republic,** Criminal Appeal No. 253 of 2020, **Fatehali Manji V, Republic** [1966] E.A 343). In a similar vein, in civil cases, where a case has been fully heard as it is in the current case, retrial (after closure of the case will save no good purpose save an opportunity for the prosecution to craft their evidence and fill in the gaps and thus occasioning injustices to the appellant, the cause I am not ready to condone it. I am further inspired by the Court of Appeal's holding in the case of **Tumaini Frank Abraham vs Republic** (Criminal Appeal No.40 of 2020) [2023] TZCA 17467 (1 August 2023) it was held that:

> *We are mindful of both the law and logic that once a party to case has closed the case, from there his hands are tied and his mouth is closed. Except, as regards entering nolle prosequi in terms of section 91(1) of the CPA where the Director of Public Prosecutions is at*

liberty to withdraw its case at any stage before judgment.

Similarly, in the current case, where the parties had finished giving their evidences and closed their cases, their hands were tied and mouths closed to do or say anything more about their case. Another incidence is as discussed in the case of **S. M. Z. vs Machano Khamis Ali and 17 Others** (Criminal Application 8 of 2000) [2000] TZCA 22 (21 November 2000), in which the Court of Appeal despite the appellant had decided otherwise with the appeal, the Court proceeded to determine it for the interests of justice.

I know this is a civil case, nevertheless, my insistence is the same that as the respondent had finished giving her evidence and closed her case, her hands were tied up to decide anything on the case as well as her mouth closed to say anything but only a greeting to the Court.

In the end, as I have noted errors material to the merit of the case, which have occassioned injustice to the appellant, I consequently allow this appeal. The proceedings in Civil Case No. 38 of 2021 from 22nd October, 2022 to 2nd December, 2022 and the resulting orders are consequently quashed and set aside. The trial magistrate is hereby directed to pronounce the prepared judgment or compose it with immediate effect, in any case, the judgment be readover to the parties

not later than 8th September, 2023. The lower court record to be returned to the trial court immediately after today.

Further the respondent is condemned to pay costs incurred by the appellant in litigating Civil Case No.38 of 2021 before the trial court and costs of this appeal.

It so ordered.

DATED at SHINYANGA this 16th day of August, 2023.

F.H. MAHIMBALI
JUDGE