

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
( IN THE SUB REGISTRY OF KIGOMA)**

**AT KIGOMA**

**LAND CASE NO. 30 OF 2022**

**DELIUS EVALIST ANDREA ..... PLAINTIFF**

**VERSUS**

**EMMANUEL JAMES SWAZI ..... 1<sup>ST</sup> DEFENDANT**

**KIGOMA/UJIJI MUNICIPAL ..... 2<sup>ND</sup> DEFENDANT**

**COMMISSIONER FOR LANDS ..... 3<sup>RD</sup> DEFENDANT**

**THE ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**Date of Last Order: 24.08.2023**

**Date of Ruling: 01.09.2023**

**RULING**

**MAGOIGA, J.**

This ruling is on the preliminary objection formerly raised by the learned advocate for the 1<sup>st</sup> defendant that the instant suit is barred by the provisions of Order XXIII Rules 1(1), 2 (b) and 3 of the Civil Procedure Code, [Cap 33 R.E. 2019] for reasons that same was once filed as Land Application No.57 of 2021 in the District Land and Housing Tribunal but was withdrawn without leave to refile, hence, barred by law.

The plaintiff by way of plaint registered as Land Case No.30 of 2022 instituted this suit in this court claiming jointly and severally reliefs against the defendants, among others, revocation of Certificate of Occupancy in respect of Plot No.1787 KGLR, L.O. 897365, eviction orders and payment of consequential orders, not the subject of this ruling now.



Upon being served with the plaint, the 1<sup>st</sup> defendant filed written statement of defence and simultaneously raised a preliminary objection to the effect that instant suit is barred and urged this court to dismiss this suit with costs.

When the suit was called on for hearing of the preliminary objection, the plaintiff was enjoying the legal services of Mr. Elinisadi Samwel Msuya, learned advocate, the 1<sup>st</sup> defendant had the legal services of Mr. Eliutha Kiviyiro, learned advocate and the 2<sup>nd</sup> to 4<sup>th</sup> defendants were advocated by Mr. Nixon Tenges, learned State Attorney. Mr. Tenges remained spectator of the legal wrangle between the plaintiff and 1<sup>st</sup> defendant.

Mr. Kiviyiro arguing the preliminary objection told the court that his objection is pegged on Order XXIII Rules 1(1), 2(b) and 3 of the Civil Procedure Code, [Cap 33 R.E.2019]. According to Mr. Kiviyiro, the plaintiff once instituted Land Application No. 57 of 2021 in the District Land and Housing Tribunal for Kigoma between the plaintiff and the 1<sup>st</sup> defendant on the same subject matter but on 06.07.2022 the plaintiff withdrew his case without a leave of the Tribunal to refile the same. The learned advocate went on arguing that much as no reasons were assigned, leave sought and granted to refile the instant suit, then , same is barred by law. In support of his stance, Mr. Kiviyiro cited Mulla on Civil Procedure Code 16<sup>th</sup> edition Volume 3 at pages 3154 in which the famous learned author



said that the principle underlying the provision for withdraw and abandonment is that the law confers upon a man no right or benefit which he does not desire. The principle is not based on res judicata but whoever abandon or disclaim a right will loose it.

Further quoting on Mulla, the learned advocate told the Court that at page 3157 the learned author insisted that

***"if a party desire to withdraw from the suit having the liberty to institute a suit must apply to the court to permit him to do so and if he does not desire to refile, he can do so without leave."***

On the strength of the above reasons and the fact that the order of withdraw was done without leave, Mr. Kiviyro strongly urged this court to find that this suit is incompetent deserving one order of dismissal with costs.

On his part, Mr. Msuya learned advocate for the plaintiff with equal force, vigorously countered the submissions made by Mr. Kiviyro. The learned advocate admitted that it is true Land Application No. 57 of 2021 was withdrawn from the District Land and Housing Tribunal but was quick to point out that the same was made with intention to add 2<sup>nd</sup> to 4<sup>th</sup> defendants. According to Mr. Msuya, Mr.Kiviyro had completely missed the import of the Order cited because leave could be sought if the plaintiff





was to go back to the same Court/Tribunal but in this case a case was filed in this court, hence, no necessity of having leave to file a fresh case. Mr. Msuya went on arguing that much as this is the first time this matter is instituted in this registry, then, there was no need of the leave and all argued and cited by Mr. Kiviyiro were argued out of ignorance and context. According to Mr. Msuya, her client is dray and home with the law and consequently urged this court to overrule the objection with costs.

In rejoinder, Mr.Kiviyiro rejoined that the wording of the provisions of the Order in which the objection is pegged do not contain the words argued by Mr. Msuya and much as no leave was granted the bar envisaged in the Order are very clear and reiterated his earlier prayers.

This marked the end of hearing of this hotly contested objection. The noble task of this court now is to determine the merits or otherwise of the objection.

However, before going into the merits or otherwise, I need to point out and insisted that the provisions of Order XXIII Rule 1(1),2(b) and 3 of the CPC was enacted with a purpose to serve in respect of the withdrawal or adjustment of the suit and institution of fresh suit, if need be. For easy of reference the said provision provides:



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

***Rule (2) Where the court is satisfied-***

***(a) NA***

***(b) that there are other sufficient grounds for allowing the plaintiff to withdraw 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 a 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 the claim.***

***(3) where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub rule (2), he shall be liable for such costs as the court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim."***

Going by the literal wording of the above provisions, generally one cannot fail to grasp the underlying rationale of the above provisions is to allow the plaintiff to withdraw a suit either absolutely or conditional withdraw with liberty upon granted leave to file a fresh suit, on one part, and at the



same time, on the other part, conforms with the legislative policy to prevent endless litigation, wastage of court's time and abuse of the legal procedure by litigants unless leave of the court to its satisfaction is granted.

Now with that in mind and back to the instant suit, after considering the competing arguments by the legal trained minds for parties, the issue I am inclined to determine is whether the objection is merited in this suit or not. I have had an opportunity to go through the order of the District Land and Housing Tribunal subject of this objection, which for easy of reference provides as follows:

**" Kwa kuwa wakili wa mleta maombi ameomba kuondoa shauri hili; shauri linaondolowa chini ya Kanuni 17 ya Kanuni za Mabaraza ya Ardhi G.N.No.174 of 2003. Imeamriwa hivyo**

**F.Chinuku**

**Mwenyekiti**

**06/07/2022."**

From the above excerpt no doubt that the Application before the District Land and Housing Tribunal subject of this objection was withdrawn under Regulation 17 and not under Order XXIII Rule 1(1), (2)(b) and (3) of the CPC. The said Regulation for easy of reference provides as follows:





***"Regulation 17 (1) The applicant may apply to the Tribunal to withdraw his application.***

***(2) The Tribunal may after consideration of the application under sub- regulation (1) allow the applicant to withdraw the application and make orders as to costs, as it deems fit."***

I am as well alive that the above Regulations were made under section 56 of the Land Disputes Courts Act, [Cap 216 R.E.2019] and the provisions of section 51(2) of the same Act provides that where there is inadequacy in those Regulations it shall apply the Civil Procedure Code. Therefore, much as the Regulations were inadequacy in the effect of the withdraw or abandonment of the suit, I find that the provisions of the Civil Procedure Code equally apply in this suit. The said sub regulation 2 provides as follows:

***"Regulations 51(2) The District Land and Housing Tribunal shall apply the Regulations made under section 56 and where there is inadequacy in those Regulations it shall apply the Civil Procedure Code."***

With the above stance of the law and from the excerpt of the order withdrawing the suit no leave was sought and granted and the plaintiff failed to produce any evidence to show that leave to withdraw the suit was sought and granted by the trial Tribunal. Much as the order did not



record what was the formal defect or sufficient ground as required in Regulation 2(b) of Order XXIII of the CPC in the circumstances of this suit I find and I am inclined to hold that, the plaintiff exercised absolute withdraw which he cannot be allowed to institute a fresh suit on the same cause of action. Not only that but also that the plaintiff had legal representation and it cannot be said she was laywoman who did not understand the law.

Another reason I find this suit barred in the circumstances of this suit is that, there is no specific prayer for seeking the trial Tribunal leave to institute fresh suit on the same cause of action.

Further reason is that, the arguments by Mr. Msuya that leave was to be sought only if the plaintiff was to go back to the same court is but a mere argument not supported by the wording of Order XXIII of the CPC and do not as such convince me otherwise.

That said and done, I am inclined to agree with Mr. Kiviyiro that the instant suit is barred and same must be and is hereby dismissed with costs to the 1<sup>st</sup> defendant.

It is so ordered.

Dated at Kigoma this 1<sup>st</sup> day of September, 2023.



  
**S.M. MAGOIGA**  
**JUDGE**  
**01/09/2023**