

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM SUB REGISTRY)
AT DAR ES SALAAM**

CIVIL CASE NO. 102 OF 2019

ALLI SAID SAKORO, the Administrator of the Estate

Of the late **SAIDI ALLI SAKORO** **PLAINTIFF**

VERSUS

LUCAS MWAMLIMA **1st DEFENDANT**

MANISH HOME NEEDS INDUSTRIES LIMITED **2ND DEFENDANT**

RELIANCE INSURANCE CO. LTD **3RD DEFENDANT**

RULING

29th & 29th August, 2023

I.C. MUGETA, J.

On 26/2/2021, the 1st & 2nd defendants applied for orders granting them leave to present a third party notice. The application was granted on 23/06/2021. However, instead of granting leave to present a third party notice, the court ordered for amendment of pleadings to join the third defendant in the suit. This order stalled this case since then as all the parties consider the same to be erroneous and have made several attempts to have it vacated. The parties have always relied on the case of **January Nshimba v. the Registered Trustees of Daughters of Mary & Another**, Civil Case No. 127 of 2018, Court of Appeal - Dar es Salaam

(unreported) to demonstrate the error in the order. Therein, it was held that a third party cannot be included in a suit as defendant because her liability is limited to indemnification of the defendant.

On 3/8/2022, this court made an order referring this case to the Court of Appeal in order to decide, by revision, on the regularity and the propriety of the order of this court for amending the pleadings to include the 3rd defendant.

On 31/5/2023, through a letter Ref. No. 81/85/01/99, the Registrar of the Court of Appeal returned the file to this court. In paragraph 2 of the letter his Worship states:

"Baada ya kupitia jalada Mhe. Jaji Mkuu amelekeza kwa kuwa shauri bado halijasikilizwa na kukamilika, Mahakama hii haina mamlaka ya kufanya mapitio (Revision)".

On account of the above backdrop, the plaintiff has prayed to withdraw this case with leave to refile. Counsel for the 1st – 2nd defendants, Mr. Stephen Lucco had no objection. The 3rd defendant was not heard for her absence. The application is made under Order XXIII Rule 1 (2) (a) and (b) which provides:-

"(2) Where the court is satisfied:

*(a) That a suit must fail by reason of some formal defects;
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 the claim.

I have considered the general facts of the case leading to the prayer, I am compelled to believe that the order of this court which allowed the plaintiff to implead the 3rd defendant as defendant instead of the 1st & 2nd defendants issuing a third party notice has caused a formal defect for which this suit must fail either in this court or at the appeal court. This realization is sufficient ground for allowing the plaintiff to institute a fresh suit. In the same vein, I have to consider the effect of the caveat for filing a fresh suit provided under Order XXVIII Rule 2 of the CPC under the circumstances of this case where the withdrawal order is a result of an order of the court which has disoriented the proceedings. Order XXIII Rule 2 of the CPC provides:

"In any fresh suit instituted on permission granted under rule 1, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted".

By this law, the plaintiff's intended fresh suit would be time barred because the cause of action arose in 2014. It is my view that for the interest of justice, the plaintiff must be protected from the application of the said law because he is not blameworthy. The errors leading to the decision to withdraw the case were caused by the court and efforts to have them rectified by the court itself have failed. On that account, I order that when a fresh suit is filed, computation of limitation period shall exclude the period of the pendency of this case.

In the event, I allow the application to withdraw this suit with leave to refile. The fresh suit to be filed within twenty one (21) days from the date of this order. I further order that the parties to this case shall file their respective pleadings in the suit to be filed without payment of court fees because the same have been paid in this case but for its withdrawal for technical reasons at the instance of court's error. No orders as to costs.

It is so ordered.




I.C. Mugeta

JUDGE

29/08/2023

Court: Ruling delivered in chambers in the presence of the plaintiff in person, Patrick Malewo, learned advocate for the plaintiff, Stephen Lucco, learned advocate for the 1st and 2nd defendants and in the absence of the 3rd defendant.

Sgd: I.C. Mugeta

JUDGE

29/08/2023