

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

**AT DAR ES SALAAM**

**CIVIL CASE NO. 69 OF 2023**

**BANK OF AFRICA (T) LTD ..... PLAINTIFF**

**VERSUS**

**EURO COMMERCIAL LTD .....1<sup>ST</sup> DEFENDANT**

**DORAH JAMES MONYO ..... 2<sup>ND</sup> DEFENDANT**

**DISMASS LEONE MASSAWE ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

*Date of Last Order: 10/11/2023.*

*Date of Ruling: 08/12/2023.*

**E.E. KAKOLAKI, J.**

The plaintiff herein sued the defendants jointly and severally claiming among other things payment of **one**, Tsh. 174,971,774.05/= being outstanding debt as of August 2022, **two**, agreeable interest of 22% per annum of the outstanding debt, **three**, Tsh. 16,000,000/=being money paid at the bank counter on 6<sup>th</sup> July 2020. The claim is premised on 1<sup>st</sup> defendant and 2<sup>nd</sup> and 3<sup>rd</sup> defendants as its directors' breach of repayment of loan agreement following advancement of loan of Tshs. 200,000,000/= as working capital for acquiring assets (mobile cranes) duly secured by two cranes and in

additional two other cranes intended to be purchased, the loan which was later on added with working capital of Tshs. 16,000,000.

It appears before institution of this matter the 1<sup>st</sup> defendant had sue the plaintiff in Civil Case No. 150 of 2021, in which the plaintiff raised a counter claim against her before the same was withdrawn allegedly with leave to refile the same separately, hence the present suit.

After the defendants were served with the plaint, in the course of filing their joint Written Statement of Defence filed a Notice of preliminary objections raising three points to wit:

- 1. That this honourable court lacks jurisdiction.*
- 2. That the suit is bad in law for lack for contravening the provisions of order XXIII Rule 1(3) of the Civil Procedure Code, [cap 33 R.E 2019].*
- 3. That the suit is bad in law for contravening the provisions of the law under section 94 of the Companies Act [cap 212 R. E 2019].*

In view of the above raised points of objection this Court is invited by the defendants to sustain the objections and strike out the suit with costs.

As it is a practice of the Court to dispose of first preliminary objection on points of law when raised, parties were heard by way of written submissions

which were filed in compliance with scheduled order. The plaintiff was represented by Mr. Mbuga Jonathan, while the defendants were represented by Mr. Gideon Opanda, both learned advocates. In this ruling I am intending to address each and every point of objection if need be. However for the reasons to be apparent soon I find it convenient to start with the 2<sup>nd</sup> ground of objection in that, the suit is bad in law for contravening the provisions of Order XXIII Rule 1(3) of the Civil Procedure Code, [Cap. 33 R.E 2019], (the CPC).

It was Mr. Opanda's submission in chief in respect of the 2<sup>nd</sup> point of objection that, under the above cited provisions of the law this court is precluded from entertaining this matter as it was withdrawn from the Court in Civil Case No. 150 of 2021 without leave of the court to refile the same. to fortify his stance he referred the Court to its decisions in **Halima Hamisi Rajabu Budda and 4 Others Vs. Abubakar Hamisi** (Administrator of the late estate of Hamis Rajab Budda), Misc. Civil Application No. 34 of 2022, **Maynad Lugenja Vs. Municipal Director of Kinondoni Municipal Council and Micheal Lema Bartholome**, Misc. Civil Application No. 561 of 2021 (both HC-unreported) where in **Maynad Lugenja** (supra) it was held that:

*"The court issued an order to withdraw the application without leave to refile. In other words, this court did not grant the applicants prayers as the applicant's request."*

Expounding on his proposition Mr. Opanda submitted that, it is not in dispute that the plaintiff prayed for withdrawal of the suit which prayer was granted but the court did not grant her leave to refile fresh suit on the same claim, as is so granted the Court could have ordered the same and appear in the court order. As long as there is no court order to refile he stressed, this court is barred by the law to entertain the suit refiled without leave of the court hence should struck out the suit.

In his rebuttal to the above raised point of objection Mr. Mbuga based his submission on three limbs. **One**, that the objection is baseless for want of foundation as the purported court's order hindering the plaintiff to re-institute this suit is not before the Court thus defendant's submission is premised on mere allegation.

**Secondly**, while at one with counsel for the defendants on the interpretation of the law cited above he contended that, the pleaded facts under paragraph 17 of the plaint and the circumstances of this case do not fit in the said provision as an order for liberty to file was obtained. According to him

whether the said facts are true or not is the question of fact and not law which can only be verified during hearing and not at this stage.

**Thirdly** that, since the order for leave to refile the suit was granted in the presence of 1<sup>st</sup> defendant's counsel who did not contest the plaintiff's prayer the same can be brought in court before hearing in terms of Order XIII Rule 1 of the CPC and added that, if anything this Court can take judicial notice of the order which is annexed to the submission and marked as JN-1. In view of the above three limbs of his submission, Mr. Mbuga impressed upon the Court that the objection lacks merit and therefore should suffer the consequences of being overruled.

On his rejoinder Mr. Opanda almost reiterated what he had submitted in his submission in chief and insisted that, there is nothing inviting consideration of independent facts on the raised objection as the alleged order granting leave to refile this suit, which the defendants disputes its existence is pleaded in paragraph 17 of the plaint and the Court has been invited by the plaintiff's counsel to take judicial notice of the same. He thus invited the Court to find merit on the raised point of objection and proceed to struck out the suit.

Having chewed and internalised the rival submissions from both parties and having glanced an eye to the referred order of this Court in Civil Case No. 150 of 2021 dated 15/06/2022 annexed to the submission, it is now opportune for this Court to determine the issue as to whether refiling of this suit by the plaintiff is offensive of the provisions of Order XXIII Rule 1(3) of the CPC. For better understanding and fair disposal of this point I find it imperative to reproduce the provisions of Order XXIII Rule 1(1)(2) and (3) of the CPC which reads:

*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 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.*

*(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.***

It is settled law as also conceded by both parties that, under Order XXIII Rule 1(3) the plaintiff is barred from instituting any fresh suit in respect of subject matter or part of the claim which he formally withdrew from the Court without leave to refile the same as envisaged in rule 1(2) of Order XXIII of the CPC. As per the dictates of rule 1(2)(b) of Order XXIII of the CPC, Court has discretion to allow or disallow the plaintiff to withdraw his/her suit or abandon part of his claim upon being satisfied or dissatisfied with the reasons advanced by the said plaintiff seeking withdrawal order. In my humble view, whenever plaintiff's prayer for withdrawal of suit or part of the claim is granted by the Court, Court's order must clearly and unambiguously so state as the same cannot be implied.

In the present matter while Mr. Opanda contends that, this Court when allowing the plaintiff to withdraw her counter claim in Civil Case No. 150 of 2021 did not grant her with leave to refile a fresh suit on the same claims, Mr. Mbuga is of the contrary view in that it did so in the presence of the 1<sup>st</sup>

defendant while inviting the Court to take judicial notice of the said court's order of 15/06/2022.

This Court took judicial notice of existence of its order dated 15/06/2022 in Civil Case No. 150 of 2021 when allowing the plaintiff to withdraw her counter claim without costs as invited by Mr. Mbuga. What is discerned therefrom is the undisputed fact that, in the presence of Mr. Opanda, counsel for the 1<sup>st</sup> defendant and without his objection Mr. Mbuga counsel for the plaintiff (1<sup>st</sup> defendant in that case) prayed for withdrawal of the 1<sup>st</sup> defendant's counter claim with leave to refile similar claims and without costs under Order XXIII Rule 1(2)(a) and (b) of the CPC. In granting the prayer and to what extent, the Court pronounced itself thus:

***COURT:*** *The prayer by the 1<sup>st</sup> defendant for withdrawal of the counter claim is granted under Order XXIII rule 1(2)(a) and (b) of the CPC. The same is marked withdrawn without costs.*

Viewing at the above cited order, I find no ambiguity in it as the Court being clothed with discretion to grant withdrawal of the suit or part of the claim either with or without leave to refile, proceeded to grant plaintiff's prayer for withdrawal of the counter claim without costs, without more. I am persuaded as alluded to above that, leave to refile the suit or part of the claim in the



withdrawn suit cannot be implied as in this matter, if the Court intended to grant the plaintiff with leave to refile a fresh suit after withdrawal of her counter claim in respect of the same claims, it would have specifically and unambiguously pronounced itself so in its order. In absence of such specific order issued, I am running short of any reason not to subscribe to Mr. Opanda's proposition that, this suit was preferred without leave to refile it and in infraction of the provision of Order XXIII Rule 1(3) of the CPC, hence the same is rendered incompetent as it was held in the cases of **Halima Hamisi Rajabu Budda and 4 Others and Maynad Lugenja** (supra). I therefore find merit in the 2<sup>nd</sup> point of preliminary objection and sustain the same.

As the 2<sup>nd</sup> point of objection suffices to claim life of this suit, I see not pressing agenda to labour much efforts in determining the rest of the preliminary points of objection. In the end I find the raised preliminary objection meritorious and hereby sustain the same. Consequently the suit is rendered incompetent before the Court hence struck out with costs.

It is so ordered.

Dated at Dar es Salaam this 08<sup>th</sup> December, 2023.



E. E. KAKOLAKI  
**JUGDE**  
08/12/2023.

The Ruling has been delivered at Dar es Salaam today on 08<sup>th</sup> day of December, 2023 in the presence Mr. Alfred Rweyemamu, advocate for the Plaintiff who is also holding brief for Mr. Gideon Opanda, advocate for the Defendant and Ms. Elieth Lugahanga, Court clerk.



E. E. KAKOLAKI  
**JUGDE**  
08/12/2023.

