

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

COMMERCIAL CASE NO. 89 OF 2018

BETWEEN

PEPONI BEACH RESORT LIMITED.....PLAINTIFF

VERSUS

LODGE CREATIONS LIMITED.....1st DEFENDANT

NOLIC COMPANY LIMITED.....2nd DEFENDANT

Last Order: 05th Feb, 2020

Date of Ruling: 04th Mar, 2020

RULING

FIKIRINI, J.

This is a ruling on an oral application made by the plaintiff's counsel to withdraw the suit with leave to refile. The application was made under Order XXIII Rule 1 (2) (a) and (b) of the Civil Procedure Code, Cap. 33. R.E. 2002 (the CPC). This was after last adjournment granted on 22nd October, 2019 in the presence of Mr. Sheck Mfinanga counsel for the plaintiff and Mr. Andrew Akyoo counsel for the defendant.

Assigning reasons for the prayer, it was Mr. Mfinanga's submission that, *first*, he has discovered new and important piece of evidence which could assist the Court to arrive at just decision. He described that evidence as being a bill of quantity report prepared in January, 2020 by the engineer after visiting the site.

He further submitted that at the time of filing the suit, the report was not in place hence not filed in Court. The only remedy available now was to withdraw the matter with leave to refile.

Second, he submitted that, there were formal defects which if the matter proceeds the suit was bound to fail because some of the documents included were ineligible Tanzania Revenue Authority (TRA) receipts, whereas the documents in the new report are important and crucial in proving the plaintiff's case. Reinforcing his submission, Mr. Mfinanga referred the Court to **Mulla, Code of Civil Procedure 18th Edition p. 2884.**

Concluding his submission, he submitted that, the defendant will not be prejudiced, if the Court grants the application as they will have enough time to file their reply and examine the document's genuineness.

Opposing the application, Mr. Akyoo contended that, the matter has already commenced with hearing and parties have already filed in Court their witness statements. Therefore if the prayer is granted it will not only prejudice the defence case but also defeat justice.

Extending his submission, he submitted that it was not the first time the plaintiff was praying to withdraw their suit. The first plaint was filed on 6th July, 2018, only to be withdrawn at some point on the same ground, the prayer which was conceded by the defendant. An amended plaint was filed on 24th August 2018,

and an additional list of documents including a report on bills of quantity was filed on 06th February, 2019. The supposedly bill of quantity as per the additional list was prepared on 28th July, 2018.

He further submitted that, the matter was granted last adjournment but the plaintiff has again failed to procure attendance of their witness. Disputing the plaintiff's submission that new evidence has been obtained, he submitted that not being true unless the report prepared in January, 2020 was completely new. Otherwise the plaintiff had already filed a report on bill of quantity dated 28th July 2018, filed on 6th February, 2019, as a list of additional documents to be relied on by the plaintiff.

Continuing opposing the application, Mr. Akyoo submitted that on 14th August, 2019, Mr. Lema who was then the plaintiff counsel made the same prayers that they be allowed to substitute ineligible documents on record. The Court declined the prayer. Mr. Akyoo considered this as tactic to circumvent the Court orders. Admitting that TRA can have copy of the receipts of the goods bought from different suppliers who have different EFD machines, but the TRA does not keep a duplicate receipt that can be used by the plaintiff but rather can have a weekly report from the TRA of every EFD machine they think transacted.

In finalizing his submission, he submitted that the applicant without doubt failed miserably to prosecute their case and therefore pray the matter to be dismissed with costs.

In his rejoining submission, Mr. Mfinanga submitted that, he was not part of the said conduct because it was the first time he appeared before this Court. Conceding that hearing of the matter has commenced, but was not sure if the witness statement only can form part of the plaintiff's case unless they appear in Court and recognize their respective evidence.

Reacting to the submission on previous withdrawal issue, he was dismissive that not being true as the only order sought and granted was to amend the plaint. Otherwise the plaintiff has already been penalized therefore the use of the same argument was pure double jeopardy. Reinforcing the position the case of **Fortunatus Masha v William Shija & Another [1997] T.L.R 155** was cited.

Mr. Mfmanga further argued that, the Court has powers under Order XXIII of the CPC to allow the plaintiff to withdraw the plaint with leave to refile based on the noted defects, which included the report which was different from the one referred by the defendant. Mr. Mfinanga, admitted that the Court has already ruled on ineligible receipts, but he considered that should be dealt at the hearing stage of the case. In the present situation the only remedy was to allow

withdrawal so that the plaintiff can bring legible document in order to allow the Court to reach fair decision.

Concluding his submission and abandoning on the issue of receipts to be availed by TRA, Mr. Mfinanga alike dismissed the submission that the matter be dismissed for wants of prosecution. It was his submission that the matter has not reached that stage of concluding that the plaintiff has failed to produce witnesses.

Withdrawing of a suit is a plaintiff's right, without seeking Court's permission. It is however, a completely different situation, if the plaintiff wishes to withdraw the suit with liberty to refile. This will require Court's leave. These discretionary powers to allow withdrawal of suit with leave to refile is however to be exercised judiciously.

Before the Court the issue for determination is whether this Court should grant the plaintiff's prayer that the suit be withdrawn with leave to refile.

Withdrawal of suits and refiling are governed by the provision of Order XXIII Rule 1 (2) (a) & (b) of the CPC. The provision has specifically provided two conditions to be satisfied before the Court grants the application: **One**, the suit must fail by reason of some formal defect, and **two**, sufficient ground for allowing the plaintiff to institute a fresh suit on the same subject matter or party to the claim.

The plaintiff has assigned only one reason after abandoning the second reason on ineligible TRA receipts, that the plaintiff has discovered new evidence which was not in their possession at the time of filing the suit. This is the report prepared in January, 2020 after the engineer had visited the site. The report was therefore not part of the amended plaint and hence the application to be allowed to withdraw the suit with leave to refile.

Under the circumstances of the present suit, the ground raised is actually not sufficient ground to grant application for withdrawal of the suit with leave to refile. The reasons for the observation are: *one*, the plaintiff is best placed to know the evidence in support of her claim. And it is on the basis of these evidence a suit is instituted against the defendant. The task of collecting, preparing and preserving the evidence to be relied on, rests with the one who alleges, in this case the plaintiff. Section 110 (2) of Evidence Act, Cap 6 R.E. 2002 (the TEA) has clearly provided that:

*“when a person is bound to prove the existence of any facts,
it is said that the burden of proof lies on that person”*

And all these are to be done prior to instituting a suit and not at different stages of the suit. The assertion that the plaintiff has obtained new evidence does not convince this Court as sufficient reason to warrant grant of withdrawal with leave to refile. Omission of important evidence including the alleged engineer's

report is rather negligence and lack of diligence on both the counsel and their client's part. This being an essential piece of evidence in support of the plaintiff's case, ought to have been in the plaintiff's possession long before the suit was contemplated. Failure by the plaintiff to collect and prepare evidence for her case cannot be described as a formal defects or sufficient reason rather disobedience of the rules of the procedure and abuse of the Court process.

Additionally, and as submitted by Mr. Akyoo there was already a report filed in respect of the bill of quantity. For the plaintiff to apply to withdraw the suit with leave to refile, while the actual intention is to have the newly created report file, does not in my view justify the prayer by the plaintiff. It seems to me the plaintiff was shopping around for a report which best suits her case. No reasons were advanced as to why the previous report was no longer agreeable by the plaintiff.

Two, the plaintiff had an opportunity to amend her pleadings including filing additional list of documents as provided under Order VII Rule 14 (2) of the CPC. No sufficient reasons were advanced as to why the opportunity availed previously was not fully utilized. The right to withdraw a suit is not absolute but subject to reasonable grounds, which in the present situation the plaintiff has not been able to persuade the Court.

Three, the plaintiff in their submission argued that there will be no prejudice on the other party because the defendant will have enough time to file their reply and examine the documents. It has to be remembered that the plaintiff was never rushed to institute a suit. The submission that the defendant will have enough time to reply or to examine the documents does not necessarily translate that they will not be prejudiced. Allowing the plaintiff to withdraw the suit with leave to refile will be akin to shifting goal posts which will certainly have an impact on the other party, as they will indefinitely be preparing for whatever new evidence obtained by the plaintiff, calling for a fresh suit.

Four, this application was unfortunately made on the date of hearing, after the Court had ordered last adjournment on 22nd October, 2019. Even though Mr. Mfinanga drew Court's attention that it was his first appearance after the engagement, this Court was not availed with any reason as to why the intended application was not made then and waited until on the date set for hearing. The application is in my view an afterthought after the plaintiff has failed to secure witnesses and be able to prosecute her case.

The Court apart from dispensing justice paying all attention required ought to protect itself or its process from being abused as that could likely result into occasioning miscarriage of justice. Also it has to be borne in mind that public policy demands for finality of litigations rather than being dragged on litigations without any exhibit of seriousness, as it has been a case in this suit. This Court

regrettably has failed to completely find logic and substance in the plaintiff's prayer as there was neither "a formal defect" under paragraph (a) or "sufficient reason" under paragraph (b) of sub-rule (2) of Rule 1 Order XXIII, to support and grant the application as prayed by the plaintiff.

The application to withdraw the suit with leave to refile is without any hesitation denied. Similarly, the suit is marked withdrawn as the plaintiff's counsel was not ready to proceed with hearing of the suit instead moved the Court to grant the application that the plaintiff be allowed to withdraw the suit with leave to refile.

In the light of the above I find this application devoid of merit and proceed to mark the suit withdrawn under Order XXIII Rule 1 (1) and (3) of the CPC, Cap. 33 R.E. 2002, with costs. It is so ordered

A handwritten signature in black ink, appearing to read "P.S. FIKIRINI".

P.S FIKIRINI

JUDGE

04th MARCH 2020