

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM
COMMERCIAL CASE NO. 72 OF 2023
BIOSSUSTAIN TANZANIA LIMITED.....PLAINTIFF
VERSUS
UPAMI AGRO-BUSINESS LIMITED.....DEFENDANT
RULING

Date of last order: 21.8.2023
Date of ruling: 13.10.2023

AGATHO, J.:

In this suit, the plaintiff claims against the defendant arises from alleged breach of contract. It is alleged that on 24th July, 2022 parties entered into sale and purchase contract of bale cotton. In executing the contract, the plaintiff performed its obligation by effecting the price contract to the tune of TZS. 1,061,352,570.00 being payments for 200,000 Kg bale. It was alleged further that, the defendant managed to deliver 189,030 Kg only out of agreed quantity. Against this background the plaintiff sued the defendant claiming the payment of TZS. 72, 000, 000 being specific damages for the failure to deliver 74 bales plus accrued interest calculated at the rate 16%, TZS. 30,000,000 (Thirty Million Only) being general damages and other consequential reliefs.

Disputing the claims, the Defendant have filed a written statement of defence prefaced with a notice of preliminary objection. The preliminary objection is grounded on the following points:

- i. The suit has been filed without leave of the court, and;
- ii. General damages have been quantified.

When the matter was called up for hearing learned counsel for both parties unanimously agreed to dispose of the raised point of preliminary objections by filing written submissions. Their agreement was blessed by this court by drawing the submissions schedule and the parties complied with it. When the matter was called on for hearing the plaintiff was under legal representation of Mr George Masoud learned Advocate, and the defendant had legal services of Beatus Kiwale, learned counsel. Having depicted the background of the suit, it is ideal to turn to points of preliminary objection in relation to what has been submitted by the parties learned advocate.

When Mr. Kiwale was invited to argue his preliminary objections on point of law, he instantly informed the court that he is abandoning the second ground of objection and will argue the first limb of objection alone. Submitting on the first limb of objection which is to the effect that the suit has been filed without leave of the court. It was Mr. Kiwale's submission

that before the institution of Commercial Case No 72 of 2023, the plaintiff had filed Civil Case No 4 of 2023 before Kilosa District Court whose cause of action is similar to the instant suit. Extending his submission on the similarity of cause of action Mr. Kiwale told the court that, the cause of action was breach of contract in which the Plaintiff was claiming for payment of TZS. 70, 000, 000 being specific damages for losses incurred by the Plaintiff due to the defendant's failure to deliver 74 bales of cotton plus interest calculated at the rate of 16% and payment of TZS. 30,000,000 being general damages for breach of contract. According to Mr. Kiwale commercial case No 72 of 2023 is similar to Civil case No 4 of 2023 which was withdrawn on 9th day of May 2023 with no order for leave to refile. Mr. Kiwale reasoned that based on that order the plaintiff is precluded from filling a fresh suit under Order XXIII Rule 3 of the Civil Procedure Code, [Cap 33 R.E 2019].

The learned counsel for the defendant insisted that, since the Plaintiff did withdraw her suit under Order XXIII Rule 1(1) without leave to refile, she cannot again or for any occasion be allowed to file a similar suit as she will be contravening the provision of Order XXIII Rule 1(3) of the Civil Procedure Code. To cement his argument, he cited the case of **Equity for Tanzania Limited (EFTA) v Salim Kasim Msangi, Civil Appeal**

No.21 of 2022 HCT at Tanga (unreported) where the court held that since the counsel for the appellant prayed to withdraw the matter and never sought leave to refile and similarly the court order did not allow the appellant to refile fresh appeal she is undoubtedly precluded from instituting fresh appeal. Further reliance was placed in the case of **Prof Philip Odoyo Bwathondi and Another vs Abdallah Said Mashaka& 6843 others, Misc. Land Application Cause No. 206 of 2023 HCT Land Division at Dar es salaam.**

Concluding his submission, the learned counsel for defendant summarised that the instant suit is similar to Civil Case No 4 of 2023 which was withdrawn without leave to refile one as such the plaintiff is precluded from having second bite by filling the instant suit without having leave at first place. On the above reasons, the learned counsel for defendant prayed the suit to be dismissed in its entirety.

Submitting in reply to the preliminary objection, the learned counsel for the Plaintiff argued that the preliminary objection by the defendant is misconceived and unfounded for being raised out of pleadings (Plaint and Written Statement of Defence) because it was not pleaded anywhere on the parties' pleadings and the same remain to be the facts known to the defendant counsel only. According to Mr Masoud since the point raise as

preliminary objection was not pleaded in the plaint and written statement of defence the ascertainment of the point will require further evidence in order to determine the said objection which is contrary to the landmark case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] 1EA 696** at 701 where the court held that, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings. According to Mr. Masoud the so raised preliminary objection falls short as it requires evidence because the Civil Case No 4 of 2023 which is the base of the preliminary objection has not been pleaded as such remain as a fact which is known to defendant.

He added that, the defendant's submission does not qualify to be regarded as the submission since it contains annexures which are not required to form part of a submission as may raise matters of evidence and therefore should be expunged from the said submission. He cited the case of **Tanzania Union of Industrial and Commercial Workers (TUICO) at Mbeya Cement Company Ltd v Mbeya Cement Company Ltd and National Insurance Corporation (T) Ltd [2005] TLR 42** and the case of **Abubakar Rashid Ismail v Ahmed Salum**

Rashid Katungunya and 1 another Civil Application No. 347/17 of 2022 (unreported) in which the court had this to say:

"I am at one with him because at the stage of making submission parties are precluded from adducing or tendering evidence, annextures intending to form part of evidence in the matter like the one at hand, have to be appended to the affidavit (s) deposed to support the notice of motion, otherwise it cannot be tendered or admitted and considered during submission stage."

He concluded that, since the existence of the said civil case at Kilosa was not pleaded by either party to the suit, hence the said preliminary objection lacks merit for not qualifying to the principle guiding preliminary objection stated in **Mukisa Biscuit Manufacturing Co. Ltd** (Supra) and in the Case of **Jackline Hamson Ghikas v Mllatie Richie Assey, Civil Application No. 656/01 of 2021 CAT** (unreported). In addition to that he stated that, the authorities cited by the defendant's counsel in the submission is distinguishable to the circumstance of the case at hand and therefore the preliminary objection is unmerited for being raised out of context and against rules of pleadings and cited the case of **Yara Tanzania Limited v Ikuwo General Enterprises Limited, Civil**

Appeal No. 309 of 2019 CAT (unreported). On the above reasons he prayed the Defendant's preliminary objection be dismissed with costs.

This marked the end of hearing of the preliminary objection and the task of this court is to determine the merits and demerits of preliminary objection. Having dispassionately considered the rival argument for the parties there are some facts which are not in dispute between parties, these are, there is no dispute that the cause of action in Commercial Case No 72 of 2023 is similar to Civil Case No 4 of 2023 which was withdrawn on 9th May, 2023 at Kilosa District Court and there is no dispute that Civil Case No 4 of 2023 was withdrawn with no order for leave to refile.

However, what is in serious dispute is whether the point raised as preliminary objection is warrantable as a preliminary objection in the sense of what a preliminary objection should be as per the **Mukisa Biscuit's** (supra). The learned counsel for defendant submitted that Commercial No 72 of 2023 is unmaintainable for want of leave to refile it. On the other hand, the learned counsel for plaintiff strongly submitted that since the withdraw of the of Civil Case No 4 of 2023 was not pleaded by either party, then this issue need evidence which is contrary to the **Mukisa Biscuit's case** (supra). While I appreciate the arguments by the

learned counsel for plaintiff and what was stated in **Mukisa Biscuit's case** that:

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

However, it is worth noting that the above position, has been further improved recently as well by the Court of Appeal in the case of **Ali Shabani & 48 others v Tanzania Roads Agency (TANROADS) & Another, Civil Appeal No. 261 of 2020, CAT at Tanga**, where the Court of Appeal held that:

" At any rate, we hold the view that no preliminary objection will be taken from abstracts without reference to some facts plain on the pleadings which must be looked at without reference examination of any other evidence."

From the above understanding, the Court seized with a matter where a preliminary objection has been raised is not barred from referring to facts

that may be plain on the pleadings without reference examination of any other evidence. In our present scenario, however, what is pertinent to consider in light of what a preliminary objection is all about, is whether the objection befits the matrix upon which the current preliminary objection is premised, taking into account that, this court has been called to take the Kilosa District Court order as judicial notice, that Civil Case No 4 of 2023 was withdrawn without an order for leave to refile. Bringing the raised preliminary objection to the context of Section 58 of the Evidence Act, [Cap 6 R.E. 2019] which provides that; *No fact a court takes judicial notice need to be proved.*

From the above provision of the law, it is crystal clear that further proof is not required when the court is called to take a fact as judicial notice. As such the argument that the existence of Civil Case No 4 of 2023 and that it was withdrawn was not pleaded by either party is devoid of merits because the defendant has called the court to take the withdraw of Civil case No 4 of 2023 as judicial notice. It should be noted that, the issue of judicial notice in our jurisdiction through judicial pronouncements of cases is settled that no evidence is required to prove the existence of the fact when the court is called to take a fact as judicial notice. However, I am live that section 59(3) of the Evidence Act requires that if the court is

called upon by any person to take judicial notice of any facts, it **may** refuse to do so unless and until such person produces any such book or document as it may consider necessary to enable it to do so.

That being the case and in my understanding of the provision of section 59(3) of the Evidence Act, the use of the word **may**, implies that the requirement of production of book or document is optional. That means it is upon the court to decide whether the production of book or document relied upon is needed or not. In other words, it implies that, there are situations where the court can be called to take judicial notice without calling for production of the book or document. As such the argument that the withdraw of Civil Case No 4 of 2023 was not pleaded by a party is meritless because the provision of section 59(3) of the Evidence Act is not on mandatory terms, therefore each case has to be decided based on its peculiar facts. In addition to that, there is no dispute that Civil Case No 4 of 2023 is like Commercial Case No 72 of 2023 and was withdrawn with no order for leave to file fresh suit. For that reason, filling of the instant suit without leave amounts to abuse of court process. Consequently, this court cannot condone the treacherous game played by the plaintiff just because the withdraw of Civil Case No 4 of 2023 was not pleaded and it is not warrantable in the name of **Mukisa Biscuit's case**. Still this suit is

not maintainable for at best it is the abuse of court process. Moreso, it should be noted that, the law confers no right which a person does not desire as such no litigant can be allowed to file suits one after the other for the same cause of action which is not only to cause harassment to a party against whom it is filed, but also imposing unnecessary load on the court. **The book of Mulla, the Code of Civil Procedure Sixteenth Edition Vol 3 at page 3154** had the following to say when explaining principles of Order XXIII Rule 1(3) of the CPC "The law confers no right which a person does not desire *invito beneficium non datur*. The second suit after withdraw of the first (without permission to file a fresh suit) is barred, not because of the principle of *res judicata* but because whoever waives, abandons or disclaims a right will lose it.

The plaintiff's counsel submission that since the Preliminary Objection relates to matters not pleaded in the pleadings it cannot therefore be raised is misconceived. Being a point of law, it can be raised by the parties or by the court *suo motu*. And it can be raised anytime and at any stage even on appeal. However, a convincing part was on the issue of evidence beyond the pleadings which is precluded by the **Mukisa Biscuit's case** (supra). Nevertheless, the evidence itself in the context of this case is matter of judicial notice, that there was a case that was withdrawn. The

plaintiff cannot use the failure to plead that fact in the pleadings to defeat the PO raised. But this is neither to condone the practice of including evidence in the submissions nor to support inaction to plead crucial facts in the pleadings. As obiter dictum, in this case assuming that the preliminary objection is overruled due to the alleged procedural defect, there is nothing to preclude the defendant to object filing of this suit meritoriously even after this ruling.

Moreover, in my humble view, even when it is not possible to strike out the plaint on the ground of the raised preliminary objection, the suit can be struck out as an abuse of the process of the Court because it is an abuse for a party having the knowledge of non-compliance with Order XXIII Rule 1(3) of the CPC. But for the reason known best to the plaintiff decided to refile the suit without obtaining leave to refile on the day, he requested for withdraw. In such circumstance even though the other party has not produced or attached the order withdrawing the suit, still the objection has to be sustained on the ground that there is violation of principles of the law and abuse of the court process. At this juncture this ground suffices to dispose of this suit but of interest of clarity, this court find equally imperative to discuss whether Plaintiff was required to have leave of the court before filing commercial case No 72 of 2023. It worth

noting that the withdraw of the civil suit is governed by the provision of Order XXIII Rule 1(1), (2) and (3) of the Civil Procedure Code, [Cap 33 R.E 2019] which for easy of reference I will reproduce hereunder:

"Order XXIII Rule 1(1)

At any time after institution of the suit the plaintiff may, as against all or any of the defendants, withdrawal 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 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 the claim, without the permission to in subrule (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 claim."

In my literal interpretation of the above provision, it is crystal clear that at any stage after the institution of the suit and before its disposal, the plaintiff may withdraw the suit. However, if the plaintiff desires to reinstitute it must make application under sub rule 3 so that the court could permit to her do so (leave to refile it afresh). And it is worth noting

that a prayer for leave to refile is not an automatic right but a court discretion and can only be exercised when the withdrawal order is made and not after. But if she does not have the desire to subsequent institution of a fresh suit, she can withdraw the suit on her own motion under sub-rule 1.

With that in mind, back to our instant case, since Civil case No 4 of 2023 was withdrawn and plaintiff did not pray for the leave to refile and the court did not grant the prayer to withdraw with leave to refile a fresh suit, the plaintiff is precluded from instituting a fresh suit. See the case of **CRDB Bank PLC and Others v Aziz Mohamed Aboud and Morogoro Canvass Mill (1998) Ltd, Misc. Commercial Cause No. 277 of 2016 HCCD at Dar es salaam** the court stated that:

"The applicant did not pray for leave to re-institute the application at the time they prayed for the withdraw of the formal application and the court therefore did not make any order to the effect. In absence of any order of this court to have the withdrawal of the application and to re-instituted, if the applicant so wishes, the present application cannot legally stand."

That said and done the preliminary objection is sustained. This suit is unmaintainable for want of leave to refile. It is therefore struck out with costs.

Order accordingly.

DATED at DAR ES SALAAM this 13th Day of October 2023.



U. J. AGATHO

JUDGE

13/10/2023

Date: 13/10/2023

Coram: Hon. U.J. Agatho J.

For Plaintiff: Godlove Godwin, Advocate, holding brief of George Masoud, Advocate.

For Defendant: Beatus Kiwale, Advocate

C/Clerk: Beatrice

Court: Ruling delivered today, this 13th October 2023 in the presence of the Godlove Godwin, advocate, holding brief of George Masoud, learned counsel for the Plaintiff, and Beatus Kiwale, learned counsel for the Defendant.



A handwritten signature in blue ink, appearing to read "U. J. Agatho".

U. J. AGATHO

JUDGE

13/10/2023