

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

LAND CASE NO. 358 OF 2017

AMALY KIBONDEI.....PLAINTIFF

VERSUS

TANZANIA NATIONAL ROADS AGENCY.....1ST DEFENDANT

ATTORNEY GENERAL.....2ND DEFENDANT

Date of Last Order: 16/9/2021

Date of Ruling: 24/9/2021

RULING

MKAPA, J

This is a Ruling in respect of an oral application made by Mr. Kishaluli, learned advocate and counsel for the plaintiff to withdraw the suit with leave to re-file. 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)

Submitting on the prayer Mr. Kishaluli briefly submitted that the plaintiff had discussions with the defendants on the matter and found it appropriate to withdraw the suit at the moment with leave to file fresh suit

Submitting in support of the application Ms. Neisha Shao learned State Attorney consented to the prayer made as they earlier had discussions with the plaintiff with a view to enlightening him on the legal position governing road reserve. Thus the defendants had no objection but prayed for costs of the suit.

In his brief rejoinder, Mr. Kishaluli submitted that, as he did comply with the requirements of Order XXIII Rule 1 sub rule (3) by seeking permission



prior to the withdrawal of the suit. Thus he maintained his prayer to withdraw the suit with leave to re- file without costs.

I have heard the learned counsel for the parties' and the question that arises is whether the application to withdraw the suit with leave to re-file is maintainable.

From the outset it is pertinent to refer to the relevant provision of the law to wit; Order XXIII Rule 1 (2) (a) and (b) of the CPC which provides; *"XXII 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 satisfied-

*(a) that a suit must fail by the reason of **some formal defect**; or*

*(b) that there are other **sufficient grounds** for allowing the plaintiff to institute a fresh suit for the same 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."*

A reading from the above Order it is plain clear that the same specifically provides for two conditions to be met before the Court grants the application. **One**; the suit must fail by reason of some formal defect, and **two**; sufficient grounds for allowing the plaintiff to institute a fresh suit on the same subject matter of party to the claim. It is only when the two



conditions are satisfied that leave to withdraw a suit and file fresh suit is granted.

In the present suit however, the counsel for the plaintiff has just stated that the plaintiff has decided to withdraw the suit with leave to re-file following their discussions with the defendants. He did not disclose any formal defect by which the suit must fail. The crux of the suit is the claim is the property erected by the plaintiff within the road reserve area the property of the 1st defendant. The question to be asked is what difference would it make in the event the suit is withdrawn and re-filed. My view is, the answer is in negative.

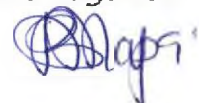
It is worth noting that withdrawing a suit is a plaintiff's right without seeking Court's permission. However it is completely different situation if the plaintiff wishes to withdraw the suit with liberty to file a fresh suit. This will require a Court's leave and the plaintiff has to assign reasons.

Unfortunately, this application was made on the date of hearing on 16th September, 2021 after the Court had ordered last adjournment on 18th August 2021. In my view the application is just an afterthought after the plaintiff has failed to secure witnesses and be able to prosecute his case.

The court apart from dispensing justice also promotes the fundamental principle of finality in litigation as opposed to never-ended litigations.

In **Stephen Masato Wasira V. Joseph Sindi Warioba & the Attorney General, [1999] TLR 332** at page 342 the Court of Appeal emphatically held;

"The law of this country like laws of other civilized nation recognizes that like life, litigation has to come to an end. Those who believe litigation



*may continue as long as legal ingenuity has not been exhausted are
clearly wrong"*

In the instant matter there can be no doubt that the plaintiff has miserably failed to satisfy the two conditions set out under Order XXIII Rule 1 (2) (a) & (b) of the CPC. **First**; as to what formal defect exists in the earlier suit by reason of which is sought to be withdrawn; secondly by not assigning "sufficient reasons" for withdrawing the suit with leave to refile.


In the circumstances, the application to withdraw the suit with leave to re-file is denied. Consequently, 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 re-file.

For the reasons discussed, I find the application devoid of merit and the same is marked "withdrawn" under Order XXIII Rule 1 (1) and (3) of the CPC, Cap 33 [R.E 2002]

It is so ordered. Parties to bear own costs.

Dated and delivered at Dar-Es-Saalam, this 24th Day of September 2021.




S.B. MKAPA
JUDGE
24/9/2021