

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND CASE NO. 190 OF 2021

EMMANUEL GITIGAN GHERABASTER PLAINTIFF

VERSUS

CRDB BANK PLC 1ST DEFENDANT

BANI INVESTMENT AUCTION MART 2ND DEFENDANT

SAID NASSOR SAID 3RD DEFENDANT

RULING

Date of Last Order: 25/03/2022

Date of Ruling: 08/04/2022

A. MSAFIRI, J

On 25/3/2022, the plaintiff in this case represented by his advocate Mr. Kassim Nyangarika, prayed to withdraw this case under the provisions of Order XXIII Rule 1 and Section 95 all of the Civil Procedure Code, Cap 33 R.E. 2019.

On the part of the defendants, the 1st defendant represented by learned advocate Esther Msangi, had no objection to the prayers but she prayed for costs. The 2nd defendant was absent. The 3rd defendant represented by Mlyambebele Mveli, learned advocate, vehemently objected to the prayer of withdrawal. The reasons for objection were that first, the plaintiff gave no clear reasons for the said withdrawal. Second, Mr. Mveli said that when filing their Written Statement of Defence, the defendants has raised two preliminary objections. That, it is trite law that where there

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is a raised preliminary objection, before the Court has ordered anything, the preliminary objection should first be heard and determined. He argued that, the act of withdrawing the suit is tantamount to pre-empting the preliminary objection. He prayed that the withdrawal prayers should not be granted until the hearing of the raised preliminary objection.

In alternative, Mr. Mveli submitted that, he could agree with the plaintiff's prayers only if the same could have conceded to the raised preliminary objection by the 1st and 3rd defendants, with costs.

Replying, Mr. Nyangarika, stated that the prayers of withdrawal under the cited provisions are clear and there is no need for the plaintiff to assign any reasons. He said further that under Order XXIII Rule 1(1) of the Civil Procedure Code, the suit can be withdrawn at any time unconditionally. He added that the plaintiff is not praying to withdraw with leave to refile but it is absolute withdrawal.

In rejoinder, Mr. Mveli had nothing to add.

Having heard the submissions from both parties, the issue here is whether the prayer of withdrawal of the case is tenable.

It is not in dispute that the 1st defendant and 3rd defendant has raised preliminary point of objections, and before hearing and determination of them, the plaintiff is praying to withdraw the case. *Acle.*

The Court of Appeal in the case of **Meet Singh Bhachu vs. Gurmit Singh Bhachu**, Civil Application No. 144/02 of 2018, CAT Arusha, (unreported), reiterating the principle set in their numerous decisions in similarly conditions, held that, it is the practice of the Court that once a preliminary objection has been raised, it must be heard first and the other party is precluded from doing anything to pre-empt it.

This decision by Court of Appeal is binding upon this Court. Although the counsel for the plaintiff has argued that the prayers for withdrawal are absolute with no intention to refile, still he had to concede first to the preliminary objections raised. Instead, the counsel has argued that, it was the plaintiff who have filed a suit and has now decided to withdraw it, so he has the right to do so.

However, as per the case I have referred, the act of withdrawal of the matter when there is a preliminary objection raised, is frowned upon and not entertained by the Court.

In the circumstances, this court draws an inference that the plaintiff has conceded to the preliminary objections raised by the 1st and 3rd defendants and hereby struck out the case with costs.

Dated at Dar es Salaam this 08th April, 2022.



A. MSAFIRI,
JUDGE