

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

LAND CASE NO. 244 OF 2021

**SIASA MAKAU LEPACHU.....1ST PLAINTIFF
APAA KONYOKIO.....2ND PLAINTIFF
KASIMU KONYOKIO.....3RD PLAINTIFF
LUNG'ALO MUHALUMA.....4TH PLAINTIFF
MARIAGA PAMBAU.....5TH PLAINTIFF**

VERSUS

**ATTORNEY GENERAL1ST DEFENDANT
TANZANIA ELECTRIC SUPPLY CO. LTD.....2ND DEFENDANT
HALMASHAURI YA KIJJI CHAMAKWEZA.....3RD DEFENDANT
PARBOI KIMOLO LEPACHU.....4TH DEFENDANT**

RULING

Date of last Order: 16/05/2023

Date of Judgment: 17/05/2023

K. D. MHINA, J.

This is a suit for declaratory orders over a landed property measuring 60 acres located at Chamakweza Village- Chalinze after the allegations that the 2nd and 4th defendants trespassed into the suit land.

The background of controversy between the parties, briefly per the pleadings, is as follows: the plaintiffs allege that the 1st plaintiff and the 4th defendant are relatives. On 11 July 1999, when the 1st plaintiff arrived at

Chalinze, they stayed together until, in 2000, the plaintiffs acquired 60 acres of unsurveyed land after clearing the bushes, and no one owned that land.

It was until 2015 that the 4th defendant claimed ownership of the suit land after the electricity project (Kinyerezi- Chalinze Project) conducted by the 2nd defendant passed at Chamakweza Village and registered the owners of the land to which the project would pass to compensate them. The 4th defendant claimed to have been allocated the suit land by the 3rd defendant through a Village Council Meeting dated 2 May 2004. The plaintiffs allege the fact was untrue as the Village Council has no authority to allocate that land without their consent.

This triggered the plaintiffs to seek relief from this Court. They now pray for Judgment and Decree against the defendants for the following reliefs;

- i. A declaration that the plaintiffs are the rightful owner of the land in dispute.*
- ii. A declaration that the 3rd and 4th defendants are trespassers to the plaintiffs' land.*
- iii.*

- iv. A declaration that the 4th defendant is not entitled to any compensation from the 2nd defendant; hence the 1st plaintiff be paid.*
- v. A declaration that the compensation is to be paid to the 1st plaintiff and not the 4th defendant.*
- vi. Costs be paid by the 3^d and 4th defendants*
- vii. Any other order and relief as this Court may deem fit to grant.*

In the joint written statements of defence, the 1st, 2nd and 3rd defendants vehemently disputed the claims. Briefly, the alleges that the 4th defendant is a lawful owner of the suit land who was allocated the same by the Chamakweza General Assembly through a meeting conducted on 8 May 2004 and 12 December 2005 in the presence of the plaintiffs who did not dispute the same.

On his part, the 4nd defendant alleges that in 1983 he started to occupy and possess land measuring 1100 hectares at Chamakweza Village for cattle grazing. In 2004 he applied and was granted a certificate of customary rights of occupancy by the Village Authorities for that land. He further alleges that in 1999 he invited the 1st plaintiff to stay with him on humanitarian grounds and a blood relationship with no intention to pass his title to him. It was after the 1st plaintiff's eviction from his father's land.

The dispute above put the parties at issue.

The plaintiffs in this matter were represented by Mr. Wilson Magoti, a learned advocate. On the other hand, the 1st, 2nd and 3rd defendants were represented by Ms. Lightness Msuya, learned State Attorney, while the 4th defendant by Mr. Mtumwa Rajab Kiondo, also a learned advocate.

However, on the first day of the hearing of the suit, *suo mottu*, I prompted the parties to satisfy this Court on the propriety of this suit. Prior to starting the hearing of the case, the counsel for the 1st, 2nd and 3rd defendants, when filed the additional list of documents to be relied upon, filed under Order XIII Rule 1 (1) of the CPC, one of the documents attached was the proceedings and order of District Land and Housing Tribunal (“the DLHT”) for Kibaha in Land Application No. 86 of 2021. That application was withdrawn on 3 September 2021 at the request of the counsel for the applicant, and the parties were **Siasa Makau Lepachu vs. Parboi Kimolo Lepachu and Tanzania Electric Supply.**

Therefore, the question I raised and posed to the parties was; “whether this suit is properly before this Court following the withdrawal of Land

Application No. 86 of 2021 by the DLHT for Kibaha. I find this issue very pertinent because it touches on the issue of the jurisdiction of this Court.

When invited to submit, the first to "kick start the ball" was Mr. Magoti, who stated that the DLHT did not withdraw Land Application No. 86 of 2021. He argued that the application was struck out; therefore, this suit is proper.

He narrated that the Chairman of the DLHT raised an issue and invited the parties to address that issue. The issue raised was that since there was a government agency; therefore, the Attorney General was supposed to be notified, so the matter should be filed at the High Court.

Further, he submitted that, unfortunately, he was not present on the date scheduled for the parties to address the DLHT. When his fellow advocate appeared, the Chairman of the DLHT insisted on that on that issue. His fellow counsel conceded after that, and the DLHT struck out the matter.

Therefore, Land Application No. 86 of 2021 cannot bar this suit because it was struck out for want of jurisdiction.

In his further submission, Mr. Magoti stated that the parties to this suit are Siasa Makau Lepachu and four others versus the Attorney General and three others. At the same time, in the application which was struck out by

the DLHT, there was one applicant. Therefore, 1st and 3rd defendants were not the parties at the DLHT. The 3rd defendant was not a party at the DLHT, while in this case, he is a necessary party.

He also submitted that the facts are different. In this suit, it is alleged that 3rd defendant was a person who allocated the land belonging to the plaintiffs to be owned by the 4th defendant, while at the DLHT, the 3rd defendant was not a party.

He concluded by submitting that the 90 days' notice served to the 3rd defendant is a document which confers jurisdiction to this Court; therefore, whatever language was used in striking out the matter at the DLHT but the fact remains that the DLHT did not have jurisdiction because one of the parties was a government agency. Therefore, this suit is proper and should be treated differently from the application, which was struck out as it was not finally determined.

On her side, Ms. Msuya first submitted that the Land matter at the Tribunal was withdrawn and not struck out. It was withdrawn following the prayer of Mr. Katemi advocate after he was instructed by Mr. Magoti advocate. Then the DLHT withdrew the application without costs.

Further, the DLHT proceedings did not indicate if the withdrawal was because the DLHT lacked jurisdiction. Therefore, the plaintiff's act of filing another case with facts similar to the withdrawn application is improper. That application before the DLHT and this case have the same cause of action and reliefs claimed. Therefore, this matter is a res-judicata.

Mr. Kiondo, for the 4th defendant, joined hands with what Ms. Msuya had submitted earlier. In addition, he submitted that what was submitted by the counsel for the plaintiffs was not in the record of proceeding in Land Application No 86 of 2021.

He concluded by submitting that this matter is a constructive res-judicata and the abuse of court process as indicated in paragraph 4 of the 4th defendant WSD.

In rejoinder, Mr. Magoti resisted the submission that the application at the DLHT was withdrawn. He narrated that the proceedings referred to indicated that the day the application was withdrawn was the second time the application was attended. Therefore, the proceedings of the first day were the ones which indicated what he had submitted earlier that it was the DLHT which raised the issue of jurisdiction.

He further objected to the submission that this suit is res-judicata. He said that in res-judicata, the principal requires parties, facts, and subject matter must be the same. Further, the previous matter must be decided on merits. Therefore, res-judicata could not be applicable in the suit at hand where parties and facts are different, and the previous matter was not determined on merits.

Mr. Magoti went on by submitting that in the application, which was struck out by the DLHT, the word used was "**limeondolewa**", and by that word, no one could say that the matter was withdrawn. He insisted that the matter was struck out following the issue of jurisdiction raised by the Chairman of the DLHT.

He concluded by submitting that what the counsel for the 4th defendant submitted was that they were supposed to raise the same as a point of law.

Having gone through the submission by the parties, I now turn to the determination of the matter raised *suo motu*. The first question is whether the DLHT withdrew or struck out Land Application No 86 of 2021.

For this, I quote the DLHT proceedings, which are in Swahili language, dated 3 September 2021

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MWENENDO

03/09/2021

Mwenyekiti: S.L Mbuga

Mleta Maombi: Katemi wakili/Magoti wakili

Wajibu maombi: 1. Kiondo

2. Eva Mchau Wakili

Karani: Asha Mshana

Katemi Wakili: Shauri ni kwa kutaja, wakili Magoti yupo Mahakama Kuu
ameomba kuliondoa shauri hili na kwa kuwa wadaiwa
hawajaleta utetezi wao basi kila upande ubebe gharama
zake.

Kiondo wakili: Sina pingamizi juu ya kuliondoa shauri ila naomba gharama
maana nimekuwa nakuja hivyo kuna gharama zimetumika.

Eva Mchau wakili: Mimi naona sawa liondolewe pasipo gharama.

BARAZA: Shauri ni kwa kutaja, Ombi la kuondoa limekubalika. Kuhusu
gharama hapatakuwa na gharama maana ndiyo kwanza leo
mara ya pili.

AMRI: Shauri hili **limeondolewa** pasipo gharama. (Emphasis provided)

Sgd

03/09/2021

"

From the above, Mr. Magoti contends that the word "limeondolewa" means that the matter was struck out, while Ms. Msuya and Mr. Kiondo maintained that the word denotes the case was withdrawn.

According to MobiTuki Online Swahili-English Dictionary, accessed at ["withdraw" in Swahili / MobiTUKI English to Swahili translation \(Swahili-dictionary.com\)](#), the Swahili word ondoa means "withdrawal" in English.

Therefore, from the above meaning, I have the following observations;

One, following the definition above, means as rightly submitted by Ms. Msuya and supported by Mr. Kiondo, Land Application No 86 of 2021 was withdrawn by the DLHT contrary to what Mr. Magoti suggested and submitted.

Two, the records of the DLHT indicated that it was Mr. Katemi Advocate, who appeared on behalf of Mr. Magoti Advocate was the one who requested the withdrawal of the application, and the DLHT granted his prayer. In short, the record is clear, and facts speak for themselves *"Res ipsa testit"*

Therefore, what the learned advocate Mr. Magoti, tells me and what I read on record are two different things. Mr. Magoti tells me that it was the Chairman of the Tribunal who raised suo motu the issue of jurisdiction, and when his fellow advocate conceded to that issue, the Chairman struck out the matter. But as I alluded to earlier record reveals contrary to what he submitted.

Therefore, I hold that the DLHT withdrew Land Application No 86 of 2021.

The next question is whether the withdrawal of that application precludes the plaintiffs from filing this suit.

As far as “withdrawal of applications” is concerned before DLHT, the instructive provision of law is Regulation 17 (1) and (2) of the **Land Disputes Courts (The Land and Housing District Tribunal) Regulations 2003** (“the Regulations”) which provides that;

"17 (1) The applicant may apply to the Tribunal to withdraw his application.

(2) The Tribunal may, after consideration of the application under sub-regulation (1) allow the applicant to withdraw the application and make orders as to costs as it deems fit".

The Regulations are silent on whether, after a withdrawal, a party may re-file the same matter in the same or any court with competent jurisdiction. Therefore, that is a lacuna, and it is trite that Section 51 (2) of the **Land Disputes Courts Act**, Cap 206 R: E 2019 ("The Act") offers the way forward in case of a lacuna. It provides;

"51 (2) The District Land and Housing Tribunals shall apply the Regulations made under section 56, and where there is inadequacy in those Regulations, it shall apply the Civil Procedure Code.

On this, Order XXIII Rule 1 (1), (2) and (3) of the **Civil Procedure Code** [Cap 33 R: E 2019] (the CPC) clearly for the withdrawal of suits and issues of re-filing after withdrawal. Therefore, this is an "escape route" for inadequacy under the Regulations. The relevant order states as follows;

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) not applicable in this case;

*(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 the 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 the 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". [Emphasis provided]

This Court expounds the applicability of the above provision of law in **Chang Jian Investment Ltd vs Best Group Auction Mart and two others**, Land Case No. 7 of 2019, Tanzlii (HC-MTWARA), as follows;

"...liberty is subject to compliance to certain guiding principles, including, obtaining a court order to withdraw the suit with leave to refile it afresh, if he so wishes to do so, or withdraw it without leave of the court to refile afresh, which will operate as a bar to subsequent suit against the same parties with the same subject matter and same law applicable.

Further, in **Tanzania Venture Capital Fund Ltd vs Igonga Farm Ltd**, [2002] TLR 304, it was held that when a plaintiff or the applicant withdraws the matter without obtaining leave to reinstitute it, he is precluded by law

from instituting a fresh suit/application in respect of the same cause of action.

Therefore, flowing from the above withdrawal of the suit without leave to re-file operates as a bar to subsequent suits against the same subject matter and the same law applicable. The Court of Appeal in **Mechmar Corporation (Malaysia) Berhad (In liquidation) vs. VIP Engineering and Marketing Ltd and three others**, Civil Application No. 190 of 2013 (Tanzlii), put it in the following words;

"...withdrawal of a legal action, be it a suit or a petition or an appeal, is itself its end".

In the matter at hand, the record indicated that Land Application No 86 of 2021 was withdrawn without leave to appeal to re-file.

The question is whether the subject matter, cause of action and the parties in Land Application No 86 of 2021 before the DLHT are the same as in this suit. In my analysis, I revisited the plaint in both matters, and I discovered that;

One, in both matters, the subject matter is the suit land located at Chamakweza Village in Chalinze, and the cause of action arose in Chamakweza Village.

Two, in both matters, the main reliefs claimed were the same, that;

- i. The plaintiff be declared the lawful owner of the suit land
- ii. The 2nd and 4th defendants be declared as trespassers to the suit land.

One, in both matters, the subject matter is the suit land located at Chamakweza Village in Chalinze, and the cause of action arose in Chamakweza Village.

Three, the parties in Land Application No 86 of 2021 before the Tribunal were Siasa Makau Lepachu vs. Parboi Kimolo Lepachu and TANESCO, while in this matter, the parties Siasa Makau Lepachu, Apaa Konyoko, Kasimu Konyoko, Ling'alo Muhaluma and Mariaga Pambau vs. the Attorney General, TANESCO, Halmashauri ya Kijiji cha Chamakweza and Parboi Kimolo Lepachu.

Looking at the plaint, the 1st and 3rd defendants were included in the suit as the necessary parties, while on the part of the plaintiff, the 1st plaintiff added the 2nd -5th plaintiffs into his cause. Therefore, in principle and by looking even at the reliefs claimed, the parties were the same in both matters save for the slight addition of other plaintiffs who joined the 1st plaintiff, who by law is barred to re-file the suit.

From the above discussion, it is worth noting that the withdrawal of the suit has the effect of barring subsequent proceedings on the same cause of action and subject matter, even in the circumstances of the parties in this matter. As I alluded to above, the addition of the 2nd to 5th plaintiffs in the 1st plaintiff cause and an act of re-filing this matter at hand results in a matter that becomes a constructive res judicata since the law precludes the plaintiffs from instituting a case involving the same subject matter.

Lastly, I wish to comment briefly on the argument by Mr. Magoti that this Court, in this matter, acquired its jurisdiction vide a 90 days' notice served to the Government. In my opinion, the 90 days' notice is not a jurisdictional issue. There is a plethora of authorities of this Court on the purpose of 90 days' notice. In **Salim O Kabora v Kinondoni Municipal Council & three others**, Land Case No. 10 of 2020, Tanzlii (HC-Land

Division) and **Joshua Arthur Mhagama and six others vs. TANESCO and two others**, Land Case No. 42 of 2022, Tanzlii (HC-Land Division) this Court put it succinctly that the requirement to copy the Attorney General and Solicitor General with a copy of 90 days Notice is to notify them of the impending suit against the Government entity. The purpose of issuing a 90 days' Notice is to notify the Attorney General and Solicitor General, among other things, to consult the relevant authorities and collect relevant information from the Government authorities who are party to the case. Also, to allow the Attorney General and Solicitor General to find whether there is any amicable settlement of the dispute with the relevant entity.

Therefore, failure to serve the Attorney General and Solicitor General with a copy of 90 days' Notice vitiates the institution of the suit at hand. It touches on the issue of admissibility and competency of the suit.

Therefore, since in this suit, the subject matter, the cause of action and the reliefs claimed are similar to the previously withdrawn matter at the DLHT; then the plaintiffs are precluded from filing this similar suit.

Consequently, this suit is not properly before this Court for want of jurisdiction; therefore, I dismiss it. Since the matter was raised *suo motu*, I make no order regarding costs.

It is so ordered.




K. D. MHINA

JUDGE

17/5/2023