

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

LAND APPEAL NO. 396 OF 2023

(From the decision of the District Land and Housing Tribunal for
Ubungu at Luguruni in Application No. 23 of 2023)

ANDREA SIRITHO MAKOI.....APPELLANT

VERSUS

DOREEN ANDREW.....1ST RESPONDENT

NATIONAL MICROFINACE BANK PLC.....2ND RESPONDENT

BANI INVESTMENT LIMITED.....3RD RESPONDENT

VICTORIA GOLDEN MGENI.....4TH RESPONDENT

ELISIFA AWUNIEL NGOWI.....5TH RESPONDENT

JUDGMENT

6th to 12th December, 2023

E.B. LUVANDA, J

Andrea Siritho Makoi (the Appellant herein) is aggrieved by the decision of the Tribunal which struck out his suit on account that it contravened the provision of Order XXIII Rule 3 of the Civil Procedure Code, Cap 33 R.E. 2019.

The Appellant raised five grounds of appeal to challenge the above decision.

1. That, the Tribunal erred in law and fact for dismissing Application Number 23 of 2023 for the reason that the Appellant herein contravened Order XXIII rule 3 of the Civil Procedure Code [Cap 33 R.E. 2019] without consider that the 4th and 5th Respondents were not party to Application Number 31 of 2015 which ordered the 1st, 2nd 3rd Respondents not to dispose the disputed property.
2. That, the Trial Tribunal erred in law and fact for dismissing Application Number 23 of 2023 for the reason that the Appellant herein contravened Order XXIII rule 3 of the Civil Procedure [Cap 33 R.E. 2019] without consider that the cause of action in Application No. 31 of 2015 were not similar to cause of action in Application No. 23 of 2023.
3. That, the Trial Tribunal erred in law and fact when find Application number 23 of 2023 as abuse of court process without consider that 4th and 5th Respondents were not party to Application No. 31 of 2015 and Land Miscellaneous Application No. 239 of 2015 which ordered the release of the attached and sold house, belongs properties into the Appellant till final determination of Application number 31 of 2015.
4. That, the Trial Tribunal erred in law and fact for dismissing Application Number 23 of 2023 for the reason that the Appellant

herein contravened Order XXIII rule 3 of the Civil Procedure Code [Cap 33 R.E. 2019] without consider that Application Number 31 of 2015 was withdrawn under Regulation 17(1) GN 174 of 2023.

5. That, the Trial Tribunal erred in law and fact for failure to consider that 4th and 5th Respondent had no capacity to raise preliminary objection since were not party to the Application Number 31 of 2015.

Ground number one, the Appellant submitted that he is in agreement that Order XXIII rule 3 Cap 33 (supra) is to the effect that once a party withdraw a case without a live (sic, leave) to refile, precludes such a party to file a fresh suit. He submitted that the provision provides that the same should be in respect of the same party over the same subject matter. He submitted that Application No. 31/2015 was against the First, Second and Third Respondents. He submitted that the Fourth and Fifth Respondents were not party to the said suit, arguing it was improper for them to raise an objection under Order XXIII rule 3 Cap 33 (supra).

Ground number two, the Appellant submitted that the cause of action in Application No. 31/2015 is quite different from a cause of action in Application No. 23/2023, arguing in the former application the cause of action was to request the Tribunal to order the Second Respondent herein to enlarge time to enable the Appellant to clear the loan and an order

against the Second Respondent not to dispose the Appellant's property until determination of the case, while in the latter application the cause of action was illegal public auction conducted by the Second Respondent contrary to the order of the Tribunal. He submitted that legal issues involved in the two cases are substantially different and the cause of action are not the same, and relief sought are not the same.

Ground number three, the Appellant faulted the Tribunal for finding that Application No. 23 of 2023 amounted to abuse of court process without considering that the Fourth and Fifth Respondents were not the parties in Application No. 31 of 2015. He submitted that Application No. 23 of 2023 was aimed at fighting the illegality surrounded the attachment and sale of the Appellant's properties on illegal auction conducted by the Third Respondent, while the former suit was intended to request the Tribunal to order the Second Respondent to enlarge time to enable the Appellant to clear the loan.

Ground number four, the Appellant submitted that the Appellant prayed to withdraw Application No. 31 of 2015 without citing the law, arguing withdrawal of a case at the Tribunal is provided for under rule 17(1) of the Disputes Courts (The District Land and Housing Tribunal) Regulations GN 174 of 2003, which has no relief to re-file, unlike order XXIII rule 3 Cap 33 (supra).

Ground number five, the Appellant submitted that the Fourth and Fifth Respondents were not parties in Application No. 31 of 2015, arguing they had no capacity to raise a preliminary objection.

In reply, Ms. Haika Mrango learned Counsel for Second Respondent combined grounds number one, two and three argued jointly by submitting that as long as Application No. 31 of 2015 was withdrawn by the Appellant without leave to refile, that matter was finalized in its finality. She submitted that a fact that the Fourth and Fifth Respondents were not parties in Application No. 31 of 2015 does not make application proper since the subject matter that is the mortgaged property in dispute is the same and the matter/cause of action was withdrawn by the Appellant without praying for leave to refile a fresh application. She submitted that the Appellant was barred by law, citing section 10 Cap 33 (supra). She submitted that the law permits to withdraw and refile a suit in court, however this unfiltered position of law does not give an automatic right to refile. She submitted that leave to refile must have been specifically prayed for and granted, citing the case of **Halima Hamisi Rajabu & Four Others vs. Abubakari Hamisi**, Misc Civil Application No. 34 of 2022 HC, **Glory Gerson Kizinga & Another vs. Amana Bank Limited**, Land Case No. 185 of 2021 HC Land Division.

Ground number four, the learned Counsel submitted that regulation 17(1) of GN 174 of 2003 which allow a party to withdraw an application, should be read together with section 51(2) of the Land Disputes Courts Act, Cap 216 R.E. 2019, which allows to refer to Cap 33 (supra) if there is a lacuna in the Regulation. She cited **Dilala Gidabulgada vs. Dalangu Gidabulgada & Four others**, Land Appeal No. 4/2022 HC Manyara. Ground number five, the learned Counsel submitted that preliminary objection can be raised by any party to the suit, arguing as long as the Fourth and Fifth Respondents were parties to Land (sic) Application No. 23 of 2023, they had the locus to raise a preliminary objection and be heard on it.

Mr. Makubi Kunju Makubi, learned Counsel for Forth and Fifth Respondents likewise combined ground number one, three and five, the learned Counsel submitted that the Appellant has not cited any law which support his position that a person with the right to raise a preliminary objection basing on Order XXIII rule 3 must be a person who was a party in the previous suit. he submitted that a preliminary objection based on a point of law can be raised by any person to the suit. He submitted that so long the preliminary objection was raised by the Fourth and Fifth Respondents who were parties in Application No. 23 of 2023, the court (sic, tribunal) had a role to decide on the matter. He submitted that the

Tribunal has no jurisdiction to determine a suit because it was withdrawn without leave to refile, arguing it is considered finally determined and therefore the principles of *res judicata* along a rule that there must be an end to litigation, comes into play. He cited the case of **Jalibu Mrisho Mwene Milao vs. Hon. Attorney General & Others**, HC.

Ground number two, the learned Counsel submitted that since the Appellant started his move in court, has been struggling to rescue his house which was mortgaged to the Second Respondent as a collateral for the loan. He submitted that the subject matter of both suits is the said property which was auctioned by the Second Respondent. He submitted that despite a fact that the Appellant might have had different cause of action, reliefs in the two suits, still there is only one subject matter in both suits. He cited Black's Law Dictionary, 8th Edition, **Musanga Ngwandwa vs. Chief Japhet Wanzagi & Others** (2006) TLR 351.

Ground number four, the learned Counsel submitted that the provisions of Cap 33 (supra) is applicable to the Tribunal by virtual of section 51(2) of Cap 216 (supra). He submitted that because Cap 216 does not provide for the effect of withdrawn without leave to refile the said lacuna is then seen and that is when Cap 33 (supra) is applicable and Order XXIII rule 3 comes into play.

Basically the Appellant conceded a fact that Order XXIII rule 3 Cap 33 (supra), debar a party to file a fresh suit in the circumstances where a previous suit was withdrawn without leave to refile. However, the Appellant is testing to this court whether some one who was not a party to a previous suit can raise an objection based on the provision of Order XXIII rule 1(3) Cap 33 (supra). And whether disallowance under sub rule (3) of rule 1 to Order XXIII, is applicable to a fresh suit founded on a different cause of action and reliefs. For appreciation, I reproduce the provision of Order XXIII rule 1(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) (a)...NA...

(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 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 abandon 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.

Therefore to my view, any person who has been impleaded to a fresh suit instituted after withdrawal under sub rule (2) of rule 1 Order XXIII above, may raise an objection in respect of a suit instituted in contravention of sub – rule (3) of rule 1 to Order XXIII. Herein, the Fourth and Fifth Respondent were impleaded by the appellant in Land Application No. 23 of 2023, as the Fourth and Fifth Respondent therein. To my view, the Fourth and Fifth Respondents have got all rights, mandate, powers and locus to play an active role and participate in the proceedings, including raising an objection to that suit and to be afforded the right to be heard like any other party therein. A mere fact that the Fourth and Fifth Respondents were not parties in a previous withdrawn suit Application No. 31/2015, is immaterial. Above all, the objection taken was not against Application No. 31/2015, rather was hit against Application No. 23/2023 to have been instituted in contravention of the law. It is absurd that the Appellant implead and invite parties and invite and now ask the Court to shut their mouth and retain a role of merely watching brief or a mere observer to the court proceedings. To my opinion, all parties in the proceedings enjoy the same status, there is no grade or segregation as

to active, passive, or dominant members or parties. Provided they argue and participate by abiding to the Order of procedure provided for under Order XVIII rule 1 Cap 33 (supra), I quote,

"The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendants the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin"

The above provision of the law does not make categories or discriminate by way of cherry picking categories of defendants who can raise a point of law. Therefore the argument of the Appellant who attacked the Fourth and Fifth Respondents to have raised a preliminary objection and entertained by the Tribunal, while being not parties to Application No. 31/2015, is wholly misconceived and misplaced. Sequel to that, the law on Order XXIII rule 1(3) does not make reference to a cause of action and relief sought, unlike the provision of section 9 Cap 33 (supra) with marginal note *res judicata*, it presupposes the matter to be substantially the same in terms of parties, title, issue and relief. Presumably the Appellant was under a wrong impression that the two concepts or clusters, are governed by the same rules or principles. However, the two connote

two different perimeters. Order XXIII rule 1(3), is too broad and wide, it covers a subject matter or claim generally.

As alluded by the learned Counsel for Fourth and Fifth Respondent, herein, the Appellant has been struggling and suing over the same subject matter to wit a house which was mortgaged to the Second Respondent as a collateral for a loan advanced by the latter to the First Respondent. Therefore an argument by the Appellant that the two suits involved two different cause of action and different relief, has no room to be entertained. This adumbration takes into board, ground number one, two, three and five, all are dismissed for want of merits.

Ground number four. It is true that in the order dated 30/03/2022 it was not indicated under which law, the application was withdrawn. To my view non citing the provision of the law does not by implication mean that the withdrawal was made under rule 17(1) of GN. 174 of 2003 (supra). Even if it is taken that the withdrawal was made under rule 17(1) of GN 174, which is silent regarding the effect of withdrawing a suit in a manner it was sought and granted, still the provision of Order XXIII Rule 1(3) find it is way therein by operation of the provision of section 51(2) Cap 216 (supra).

In **Gidabulgald** (supra), this Court speaking through Honourable Barthy, J had this to say.

"The prayer for withdrawal was made under Regulation 17(2) of the Regulation. However, the provision is silent on the effect of withdrawal without the leave to refile. Applicability of the CPC in the proceedings before the District Land and Housing Tribunal is governed with section 51(2) of the Act. As it is applicable only where there is inadequacy in the law or regulations"

Therefore the Appellant cannot escape and runaway from the applicability of Order XXIII rule 1(3) Cap 33 (supra). That said, the appeal is devoid of any merit whatsoever.

The appeal is dismissed with costs.



E. B. LUVANDA
JUDGE
12/12/2023

Judgment delivered in the presence of the Appellant, Makubi Kunju learned Counsel for the Fourth and Fifth Respondent, Ms. Haika Mrango learned Counsel for the Second Respondent, in the absence of the First and Third Respondent.



E. B. LUVANDA
JUDGE
12/12/2023