

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MTWARA)

AT MTWARA

LAND CASE NO. 7 OF 2019

CHANG JIAN INVESTMENT LTD..... PLAINTIFF

VERSUS

AFRICAN BANKING CORPORATION (T) LTD.....1ST DEFENDANT

BEST GROUP AUCTION MART2ND DEFENDANT

UTEGI TECHNICAL ENTERPRISE (INTL) LTD3RD DEFENDANT

RULING

Hearing date on: 11/11/2020

Ruling date on: 13/11/2020

NGWEMBE, J:

The plaintiff in this suit, on 11th October, 2019 instituted this suit in court. However, after some court proceedings, but during pleadings the plaintiff's advocate Mr. Charles Alex stood in court and orally prayed to withdraw the suit with leave to refile it afresh. The withdraw is made under Order XXIII Rule 1 (1) & (2) (b) of the Civil Procedure Code Cap 33 R.E. 2019. Above all he argued that the reason for withdrawal is based on the fact that when the suit was filed in court, the third defendant is Utegi Technical Enterprise

(INTL) Ltd which was the highest bidder in purchasing the plaintiff's plants. However, later was noted that the highest bidder was not the one purchased the plant, but Xinghao Group Company Ltd which company is occupying the plant as of today. Therefore, withdrawal of the suit is intended to allow the plaintiff to reorganize and file a fresh suit when need arise.

The application met with strong resistance from the first and second defendants' advocate Mr. Mohamed Muya. He argued quite strongly that to withdraw a suit in the absence of the 3rd defendant is irregular. Further, rightly pointed Order 1 rule 10 of Civil Procedure Code which allow the plaintiff to substitute any party to the suit. Above all, withdrawal of a suit requires to be formal and all parties should be present to respond on it. Alternatively, the withdrawal if granted should be with costs. Order XXX III Rule 3 of CPC costs may be granted in case of withdraw of a suit.

Having summarized the arguments of learned counsels, I am inclined to commence my consideration by quoting **Order XXIII Rule 1 (1), (2) and (3) of CPC**, which I think may provide an answer to whether, this case should be withdrawn or otherwise:-

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 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 a claim, **without the permission referred 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 the claim"*

These rules speak lauder, that this court has discretionary powers to grant a prayer to the plaintiff to withdraw the whole plaint or abandon part of the plaint. There is no restriction related to withdraw of plaint so long the plaintiff does so within the legal frameworks.

Undoubtedly, the plaintiff has every right and at any time during the existence of the suit in court, to withdraw the whole suit or part of it or withdraw a suit against certain defendants or add other defendants upon leave of the court to amend his/her pleadings. **Mulla, the Code of Civil Procedure sixteenth edition Vol 3 at page 3154**, had the following to say:-

"The principle underling the provision for withdrawal and abandonment is, that the law confers upon a man no right or benefit which he does not desire – invito beneficium non datur. The second suit after withdrawal of the first suit (without seeking permission to file a fresh suit) is barred, not because of



the principle of res judicata (because there has been no adjudication), but because, whoever waives, abandons or disclaims a right, will lose it"

Mulla at page 3157 continued to comment as follows:-

"If a party desires to withdraw from the suit having the liberty to institute a fresh suit, he must apply to the court to permit him so. If he does not desire to have the liberty, then he can withdraw the suit of his own motion and no order of the court is necessary"

These quotations imply that the plaintiff is the one who instituted a suit in court, likewise is at liberty to continue with it or withdraw or abandon part of it or as a whole. However, that liberty is subject to compliance to a certain guiding principles, including, obtaining court order to withdraw the suit with leave to refile it afresh, if he so wish 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.

This position was further amplified by the late Justice Chipeta in his **Book Civil Procedure in Tanzania** at page 259 & 260 as follows:-

"A plaintiff who seeks to withdraw with leaves, therefore, will only be allowed by the court to withdraw from a suit or abandon part of the claim where it is satisfied that the suit will have to fail by reason of some formal irregularity, or where there are other sufficient grounds for allowing him to do so. It should be noted, however, that a fresh suit instituted on such permission is subject to the Law of Limitation in the same manner as if the first suit had not been instituted. In other words, the time does not stop to ran merely by virtual of the



court's permission to institute a fresh suit. The time continues to run from the date the cause of action arose or the right to sue accrued'

The above quoted reasoning of late justice Chipeta is conclusive in essence and in logic because the right to withdraw an action always remain a right to the Plaintiff. Always, this court has been encouraging parties to reconsider their actions if they find that they are in a wrong road to the ends of justice, they should retreat from that wrong road and reengage the right road to the ends of justice. Otherwise, it is a wastage of time of the parties and of the court to continue laboring on a wrong road while knowing for sure the destination of it may not be achieved. Thus, the Order cited above allow the plaintiff at any time of the suit before judgement to withdraw the whole suit or abandon part of it.

The effect of withdrawing a suit means, before the court nothing remains. Leave to refile it afresh, to the best, means reinstating a fresh suit in court which suit is subject to time limitation and other prerequisites. Above all this court cannot force the Plaintiff to continue with an action against the defendants, which is no longer interested with it. I fully, subscribe to the reasoning of **Mulla**, that the principle underling the provision for withdrawal and abandonment is, that the law confers upon a man no right or benefit which he does not desire – *invito beneficium non datur*. Therefore, this court cannot grant benefits to a person whose right does not desire. The Plaintiff, I think is at liberty to sue any of the Defendant and abandon or withdraw a claim against whoever does not desire to continue with.



This is a private litigation, so long the plaintiff has complied with Order XXIII Rule 1 (2) (b) of CPC, I find logic to the prayer to withdraw the suit with liberty to institute a fresh suit when need arise.

The learned defence counsels have strongly urged this court to grant them costs for withdrawing this suit. I understand, this suit was at preliminary stages of pleadings. The suit did not reach viable stages towards finalization of the suit. Therefore, in that initial stages, obvious the defendants cannot claim that they have spent substantial costs.

Legally, to grant or refuse to grant costs is always court's discretion. Such discretion is always exercised judiciously. In this application, the applicant has advanced quite satisfactory reasons for the prayer to withdraw the suit. That the plaintiff sued some wrong parties which has no claim against them. Also the learned advocate for the plaintiff argued quite clearly that his client intends to retreat and reconsider if there is any necessity to refile afresh suit against proper and necessary parties.

In the circumstances, I am of the settled view that this application to withdraw the suit is meritorious, same is allowed. Consequently, Land Case No. 07 of 2019, is hereby marked withdrawn with leave to the Plaintiff to reinstitute afresh when need arise. Parties to bear their own costs.

I accordingly Order.

Dated at Mtwara this 13th November, 2020

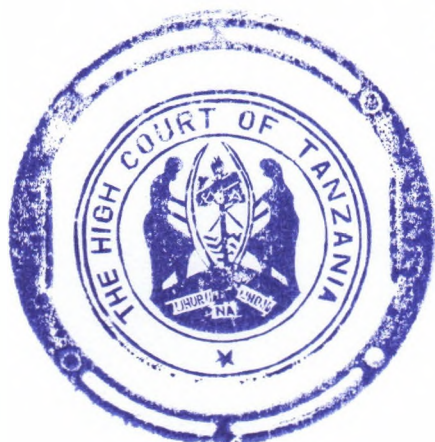


**P.J. NGWEMBE
JUDGE**

13/11/2020

Court: Ruling delivered at Mtwara in Chambers on this 13th day of November, 2020 in the absence of the Plaintiff and Mr. Rweikiza for Advocate Muya for the Defendants.

Right to appeal to the Court of Appeal explained



A handwritten signature in blue ink, appearing to read "P. J. NGWEMBE", is written over a faint circular stamp.

P. J. NGWEMBE

JUDGE

13/11/2020