

TANZANIA / JUDGMENT

zaina leboi kikando 150 others vs miraji mbena 45 others 2021 tzhclandd 489 24 september 2021

COURT
TANZLIIDECIDED
24 September 2021

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IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM LAND CASE NO. 121
OF 2018 ZAINA LEBOI KIKANDO & 150 ORS.....PLAINTIFFS VERSUS MIRAJI MBENA
& 45 ORS..... DEFENDANTS Date of Last Order 15/9/2021 Date of Ruling
24/9/2021

RULING

MKAPA, J The plaintiffs are suing the defendants praying for a number of orders among them a declaration that the plaintiffs are the lawful owners of suit land situated at Kihungo area in Magulumatari village, Talawanda Ward within Bagamoyo district in Coast Region. On 16th October 2019 Mr. Nestory Mkoba learned advocate and counsel for the plaintiffs prayed for leave to amend the plaint for the purpose of joining other trespassers in the suit who had invaded the suit land after filing of the present suit in Court. The prayer was made under Order VI Rule 17 of the Civil Procedure Code, Cap 33 [R.E 2002] (the CPC). Leave to amend the plaint was accordingly granted and the amended plaint was presented for filing on 29th October 2019. On 15th September 2021 when the matter was called on for hearing Mr. Mkoba made yet another application orally to withdraw the suit with leave to institute a fresh suit for the same subject matter. He made the application under Order XXIII Rule 1 (2) (a) (b) of the (CPC). tWWs ' i The learned counsel submitted the reasons behind being plaintiffs' desire to join the Village Council for Magulumatari and the Chalinze District Council in order for them to appreciate the dispute and have a common understanding. In that regard he submitted further that, the Attorney General would also be required to be joined after a 90 days Notice as required by the law. Defendants did not enter appearances without notice, accordingly the Court ordered the hearing to proceed as scheduled. Having heard counsel for the plaintiffs' submission the question for determination is whether the reasons advanced by plaintiffs' meet the criteria for granting leave for withdrawal of the suit on condition that the plaintiffs' may be permitted to institute a fresh suit for the same subject matter? From the very 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; " XXIII 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) that a suit must fail by reason of some formal defect; or
- (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. A reading from the above provision of the law it is plain clear that the same specifically provide 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 ground for allowing the plaintiff to institute a fresh suit on the same subject matter or party to the claim. It is only when the two conditions are satisfied that, leave to withdraw a suit and file a fresh suit in respect of the same subject matter is granted. The plaintiffs have submitted single reason namely joining other parties in order to appreciate the existing dispute. As I mentioned earlier, on 29th October 2019 the plaintiffs were granted leave by this court to amend the plaint in order to join other tress-passers. Three years down the road the plaintiffs are praying for leave to withdraw the suit with leave to re-file for the very reason of joining other parties. The question to be asked is why the opportunity availed previously was not fully utilized? If at all is a defect, ought to have been remedied by utilizing the opportunity availed earlier on when leave was granted by this court to amend plaint. Failure of which cannot be remedied by abusing court process by applying rules and procedures of the Court to the plaintiffs' advantage. Unfortunately, the instant application was made on the date of hearing after the Court had ordered last adjournment on 12/08/2021. There can be no doubt that the application is an afterthought after the plaintiffs have failed to secure witnesses and be able to prosecute there case. The Court apart from dispensing justice also promotes the fundamental principle of finality in litigation rather than being dragged on never ending litigations as was held in the Court of Appeal decision in Stephen Masato WWAtn 3 Wasira V. Joseph Sinde 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 ingenuity has not been exhausted are clearly wrong. In the circumstances I am of the view that the plaintiffs have miserably failed to satisfy the two conditions set out under Order XXIII Rule 1 (2)
- (a) & (b) of the CPC as to what is the formal defect in the earlier suit by reason of which it is sought to be withdrawn. Hence, the reason is neither "formal defect" under paragraph (a) nor "sufficient reason" under paragraph (b) of sub Rule (2) {supra} to warrant this court granting the application sought. For the reasons discussed the application to withdraw the suit with leave to re-file is denied. Consequently, the suit is marked "withdrawn" as the plaintiffs' 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.

In the end, 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 with costs. ' 4 It is so ordered.
24/09/2021 5

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