

THE REPUBLIC OF UGANDA
THE TAX APPEALS TRIBUNAL AT KAMPALA
MISCELLANEOUS APPLICATION 157 OF 2022
ARISING FROM APPLICATION 68 OF 2022

AMER ABDALLAH APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY RESPONDENT

BEFORE DR. ASA MUGENYI, MR. GEORGE MUGERWA, MS. CHRISTINE KATWE

RULING.

This ruling is in respect of an application to reinstate a suit that was withdrawn

This application is brought under S. 98 of the Civil Procedure Act and Order 52 Rules, 1,2 and 3 of the Civil Procedure Rules for orders that Application 68 of 2022 be reinstated and for costs in the cause

The application is supported by the affidavit of the applicant. The applicant is a Sudanese who allegedly purchased cosmetics of Shs. 287,623,000 from markets in Uganda on 25th January 2022. While the goods were being transported to South Sudan the respondent impounded the goods and a seizure notice was issued under the East African Community Customs Management Act 2004 (EACCMA).

During the hearing of the said application both parties reached an unwritten understanding that; the impounded goods be released upon withdrawal of the application. On 29th April 2022, the applicant withdrew Application 68 of 2022 by a formal letter. The applicant deponed that the respondent only released some of the goods worth Shs. 7,000,000, hence this application for reinstatement.

In reply, Mr. Amanyam Mishambi, a legal officer with the respondent denied all the averments of the applicant's application. He stated that the application is untenable in law. There is nothing to reinstate. The subject matter has since changed. He advised the applicant to file a new matter instead of reinstating one that has been overtaken by events.

The applicant submitted that the tribunal has discretion to reinstate an application on grounds that include; mistake of counsel, illegality, fraud, seriousness of the issue in the case to be reinstated and any other justifiable cause. It cited *Rashid Kibirige V Dr A. Lubega* Civil Application 1 of 1987 and *Helge Angstrom Rudolf v Henry Collins Masaawa & another* Miscellaneous Application 112 of 2008.

The applicant submitted that there is a serious issue of law for the tribunal to investigate in the main application for review. It also submitted that the withdrawal of the applicant's case was on the advice of the respondent. The respondent should not benefit from its own action.

The applicant submitted that S. 231 of the EACCMA establishes the Tax Appeals Tribunal to hear appeals against decisions of the Commissioner. S. 1 (k) of the Tax Appeals Tribunal Act defines a taxation decision to mean an assessment, determination, decision or notice. The applicant argued that the contention by the respondent that the proper cause of action for the former was to file a fresh application is not legally tenable because it presupposes that the commissioner made another taxation decision. The applicant argued that there is one decision the commissioner can make and he/she becomes *functus officio*. The applicant cited *Game Discount World Uganda Ltd v Uganda Revenue Authority* High Court Civil Appeal 039 of 2021 where it was stated that the doctrine of *functus officio* kicks in when a final and valid decision is made. The applicant implored the tribunal to allow the application in the interest of justice as espoused under Article 126 (2)(e) of The Constitution, S. 98 of the Civil Procedure Act, and Rule 22 of the Tax Appeals Tribunal (Procedure) Rules.

In reply, the respondent submitted that Application 68 of 2022 was voluntarily withdrawn by the applicant and cannot be reinstated. The respondent submitted that withdrawal of suits is provided for under Order 25 of the Civil Procedure Rules. It cited *Frost Mark EHF v Uganda Fish Packers Limited* CACA 114 of 2011 where Lady Justice Percy Night Tuhaise quoted *Black's Law Dictionary's* 8th Edition definition of withdrawal as "To take something presented, granted, enjoyed, possessed or allowed." This implied that: "A withdrawal of a suit by its very nature infers that the suit ceases to exist from the record and it will appear as though no matter had in the first place been commenced." The respondent therefore submitted that Application 68 of 2022 is no longer existent. It submitted that reinstatement is only available for matters dismissed. The respondent submitted that the correct course of action of the applicant is to institute a fresh suit under Order 25 Rule 5 of the Civil Procedure Rules. The respondent submitted that filing a fresh matter does not require a new taxation decision. The respondent contended that the applicant should file a fresh application subject to the limitations in S.229 (1) of the EACCMA, S.16 of the Tax Appeals Tribunal Act and Order 25 Rule 5 of the Civil Procedure Rules.

The respondent submitted that the applicant raises no justifiable ground for reinstatement of the application for two reasons. Firstly; that the applicant is barred from reinstating a nonexistent application. Secondly the applicant raised no evidence to prove that the withdrawal of the main application was a result of advice and mutual concession with the respondent. The respondent submitted that in the cases cited by the applicant, the counsel for the applicant purported to act with instructions whereas they did not have. In this matter counsel for the applicant had full authority to withdraw the application and no contrary allegation has been put forward by it. Therefore, there is no justification for the reinstatement.

In rejoinder, the applicant cited *Lucia Wangeshi Kamau v Jared Roderick Nayundi and 2 others* [2018] eKLR where the court stated that "I see no substance in that argument. If that was to be allowed, then it means that there can never be entertained an application to reinstate a suit that has either been withdrawn or dismissed." The applicant contended

that the respondent admitted that a court can reinstate a case that has been withdrawn if the withdrawal was illegal, fraudulent or based on mistake by counsel. The applicant contended that a court can withdraw a matter if there is sufficient cause. The applicant cited *Wangeshi Kamau v Jared Roderick Nyaundi and 2 others* [2018] eKLR where it was held that being duped by a defendant is sufficient reason to allow a reinstatement. The applicant stated that he was duped by the respondent. The applicant stated that the respondent only released some of the goods but not all. This was not denied by the respondent. The applicant contended that this is just cause for reinstating the application.

Having read the application and submissions of the parties this is the ruling of the Tribunal.

On 21st March 2022, the applicant filed Application 68 of 2022 against the respondent protesting the seizure of his goods. On 29th April 2022, the applicant wrote to the Tribunal withdrawing his application. He stated that "during the pendency of the Application, parties agreed to have our client receive his goods without undergoing the litigation process." The applicant being aggrieved by the respondent's refusal to release all its goods applied to have the matter reinstated.

S. 22(4) of the Tax Appeals Tribunal Act provides that the tribunal is empowered to apply such assistance available to a court in Uganda. The law on withdrawal of suits is provided for under Order 25 of the Civil Procedure Rules which reads:

"1. Withdrawal of suit by plaintiff or defendant.

(1) The plaintiff may at any time before the delivery of the defendant's defence, or after the receipt of that defence before taking any other proceeding in the suit (except any application in chambers) by notice in writing wholly discontinue his or her suit against all or any of the defendants or withdraw any part or parts of his or her alleged cause of complaint, and thereupon he or she shall pay the defendant's costs of the suit, or if the suit is not wholly discontinued the costs occasioned by the matter so withdrawn. Upon the filing of the notice of discontinuance the costs shall be taxed, but the discontinuance or withdrawal, as the case maybe, shall not be a defence to any subsequent action.

- (2) Except as in this rule otherwise provided, it shall not be competent for the plaintiff to withdraw or discontinue a suit without leave of the court, but the court may, before or at, or after hearing upon such terms as to costs, and as to any other suit, and otherwise as may be just, order the action to be discontinued or any part of the alleged cause of complaint to be struck out.
- (3) The court may, in like manner, and with the like discretion as to terms, upon the application of a defendant order the whole or any part of his or her alleged grounds of defence or counterclaim to be withdrawn or struck out, but it shall not be competent for a defendant to withdraw his or her defence or any part of it without such leave.”

Though the applicant attached a letter to its application for withdrawal. The applicant withdrew its application under O. 25 Rule 1 before any proceedings could take place. Under Order 25 Rule 1 the parties do not need leave of court. There was no consent of the respondent on the letter.

The law on withdrawal is stated in *Frost Mark EHF v Uganda Fish Packers Limited* Civil Appeal 114 of 2011 where Justice Percy Tuhaise said:

“A withdrawal of a suit is by its very nature infers that the suit ceases to exist from the record and it will appear as though no matter had in the first place commenced. A cursory examination of Order 25 of the Civil Procedure Rules which deals with withdrawal of suits shows that a withdrawn suit is a discontinued suit which attracts costs, but it does not bar, or is not a defence to, any subsequent action. The language of Order 25 of the Civil Procedure Rules suggests that a subsequent or fresh suit is distinct from a withdrawn suit, or a former suit. Such subsequent or fresh suit is bound by the law of limitation in the same manner as if the former suit, or withdrawn suit has not been instituted.”

When a matter is withdrawn it is discontinued. It appears as though there is no matter in the first place that commenced. The applicant cited *Lucia Wangeshi Kamau v Jared Roderick Nyaundi* (supra) and *Emmanuel Tindi Mwanzaka and another v Jungo Vince Dandasi* (supra) which are Kenyan authorities on withdrawal. Though persuasive, they cannot override a Court of Appeal decision in Uganda. There is no evidence that the law on withdrawal of suits in Uganda is in *pari materia* with that in Kenya.

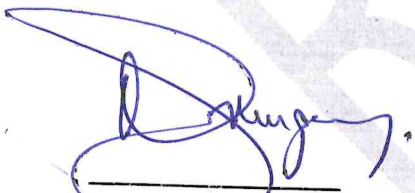
The applicant states that it withdrew the main application on an understanding with the respondent that the latter will release its goods. However, that was not reduced into a writing signed by the respondent. In the absence of a signed consent to that effect, it is difficult for the Tribunal to state that this was the condition for the withdrawal. Where there are conditions to be met by either or all the parties it is prudent for the parties to reduce them into a consent order. Where a party merely withdraws a matter before the Tribunal it is an indication that it is no longer interested in pursuing the matter. Where the other party has not signed or set down conditions it is difficult for a court or Tribunal to read into the withdrawal on what was agreed. Order 25 Rule 2 of the Civil Procedure Rules provides for a withdrawal by consent. It states that "When a suit has been set down for hearing it may be withdrawn prior to the hearing by either the plaintiff or the defendant upon filing a consent signed by all the parties. In the absence of an order of withdrawal by consent, it is difficult for the Tribunal to state that the respondent consented to the withdrawal and that there were conditions for the withdrawal. If a condition had been included in a consent withdrawal, a party would not need to reinstate an application but simply apply to enforce the term of the consent. The letter by the applicant shows it was an unilateral decision. The issue of costs was never resolved as the applicant unilaterally withdrew the application without providing for them. Such an applicant does not come to court with clean hands.

Where parties have withdrawn by consent, the rules governing setting aside an agreement come into play. In *Attorney General and Uganda Land Commission v James Mark Kamoga* SCCA No.8 of 2004, the Supreme Court stated that for a court to interfere with a consent order, the applicant must prove fraud, mistake, misrepresentation or contravention of court policy. In the instant case, no consent withdrawal has been tendered in for the said rules to apply. There is a difference between setting aside a withdrawal and reinstating a matter that has been withdrawn. For one to set aside a withdrawal he must show that it was not valid. In this matter the applicant does not argue that its withdrawal was not valid.

The applicant withdrew its application unilaterally. The only ground the Tribunal can entertain to set aside a unilateral withdrawal is where counsel was not instructed to withdraw the matter. In this case, counsel of the applicant does not deny that they did not have instructions. A Tribunal like a court is not a market or a church where a people walk in and out at will or leisure. As the Court of Appeal stated in *Frost Mark EHF v Uganda Fish Packers Limited* (supra) stated that where a matter is withdrawn it appears as if there was no matter in the first place that commenced. A court cannot reinstate what is not in existence. The rules do not provide for reinstating a matter that has been withdrawn unilaterally by a party. Litigation has to come to an end. When a party is withdrawing a matter, it should exercise prudence and caution. Any conditions for the withdrawal should be reduced to a consent withdrawal. The law helps the vigilant and not the indolent or those who sleep on their rights - *Vigilantibus Non Dormientibus Jura Subveniunt*. See *Nabirye and 2 others v Kizito and 2 others* Civil Appeal 27 of 2014. A party has to file a fresh suit where a matter has been withdrawn. Order 25 Rule 5 of the Civil Procedure Rules provides that in any fresh suit the plaintiff shall be bound by the law of limitation

Taking the above into consideration, this application for reinstatement lacks merit. It is therefore dismissed with costs.

Dated at Kampala this 2nd day of December 2022.



DR. ASA MUGENYI
CHAIRMAN



MR. GEORGE MUGERWA
MEMBER



MS. CHRISTINE KATWE
MEMBER