IN THE HONORABLE SUPREME COURT OF THE REPUBLIC OF LIBERIA
SITTING IN ITS MARCH TERM, A.D. 2020

BEFORE HIS HONOR: FRANCIS S. KORKPOR, SR……CHIEF JUSTICE
BEFORE HER HONOR: JAMESETTA H. WOLOKOLIE……ASSOCIATE JUSTICE
BEFORE HER HONOR: SIE-A-NYENE G. YUOH……ASSOCIATE JUSTICE
BEFORE HIS HONOR: JOSEPH N. NAGBE…… ASSOCIATE JUSTICE
BEFORE HIS HONOR: YUSSIF D. KABA……ASSOCIATE JUSTICE

ECO Fuel SA Trading of 2 Rue de Ecole-de-Chime 1205, Geneva, represented by its authorized agent in person of Mr. Huw Jones, of the City of Monrovia, Montserrado County, Republic Of Liberia ……..……Appellant

APPEAL

VERSUS

Srimex Oil and Gas Company, represented by and thru Its Chief Executive Officer, Madam Wedei H. Powell, its Chairman of the Board of Directors, Mr. Musa Bility, and Mr. Musa Bility, Pro Se, of the City of Monrovia ……..…….. Appellees

GROWING OUT OF THE CASE:

Srimex Oil and Gas Company, represented by and thru Its Chief Executive Officer, Madam Wedei H. Powell, its Chairman of the Board of Directors, MR. Musa Bility, and Mr. Musa Bility, Pro Se, of the City of Monrovia ……..……Petitioner

VERSUS

PETITION FOR A WRIT OF CERTIORARI

Her Honor Eva Mappy Morgan, Chan-Chan Paegar and Richard S. Klah, Chief judge and Associate Judges of the Commercial Court of Liberia …… 1ST Respondents

AND

ECO Fuel SA Trading of 2 Rue de Ecole-de-Chime 1205, Geneva, Represented by its Authorized Agent in person of Mr. Huw Jones, of the City of Monrovia, Montserrado County, Republic Of Liberia ……..….2nd Respondents

GROWING OUT OF THE CASE:

Srimex Oil and Gas Company, represented by and thru Its Chief Executive Officer, Madam Wedei H. Powell, its Chairman of the Board of Directors, MR. Musa Bility, and Mr. Musa Bility, Pro Se, of the City of Monrovia …….…… Petitioners

BILL OF INFORMATION

VERSUS

Her Honor Eva Mappy Morgan, Chan-Chan Paegar and Richard S. Klah, Chief judge and Associate Judges of the COMMERCIAL Court of Liberia …….1ST Respondents

GROWING OUT OF THE CASE

ECO Fuel SA Trading of 2 Rue de Ecole-de-Chime 1205, Geneva, Represented by its Authorized Agent in person of Mr. Huw Jones, of the City of Monrovia, Montserrado County, Republic Of Liberia ……..…… Plaintiff

	)	
VERSUS	)	
	)	ACTION OF
Srimex Oil and Gas Company, represented by and	)	DEBT
thru its Chief Executive Officer, Madam Wedei H. Powell,	)	
its Chairman of the Board of Directors, Mr. Musa Bility,	)	
and all Corporate Officers acting under its control	)	
……..……1ST Defendant	)	
	)	
AND	)	
	)	
Mr. Musa Bility, also of the City of Monrovia	)	
…… 2ND Defendant	)	

HEARD: March 19, 2020 DECIDED: September 4, 2020

MADAM JUSTICE WOLOKOLIE DELIVERED THE OPINION OF THE COURT

The substantive parties in this appeal, ECO Fuel Trading SA (ECO Fuel), appellant, and Srimex Oil and Gas Company and Mr. Musa Bility, appellees, are major participants in the oil and gas sector of Liberia, and share business relations. In time, their business dealings degenerated with the parties asserting claims and counter claims against each other. An aspect of their dispute being filed and handled by the Commercial Court of Liberia, has made its way to the Supreme Court on a remedial process which has its genesis from a ruling made by the Commercial Court on a bill of information filed by the appellees.

The facts are that on November 2, 2018, the appellant, ECO Fuel Trading SA (ECO Fuel), filed an action of debt before the Commercial Court of Liberia against the appellees, Srimex Oil and Gas Company and Mr. Musa Bility, alleging that the said appellees were indebted to it in the amount of US$22,501,178.02 (United States Twenty-two Million Five Hundred One Thousand, One Hundred Seventy-eight United States Dollars and Two Cents) as a result of the appellees failure to pay the value of oil products received from the appellant under various sales contracts executed by the parties, and an unauthorized receipt from the Liberia Petroleum Refining Company (LPRC) of the appellant's petroleum products (AGO and PMS) valued at US$14,182,312.50 (Fourteen Million One Hundred Eighty Two Thousand Three Hundred Twelve Dollars Fifty Cents). The appellant prayed the Commercial Court to jointly and severally adjudge the appellees liable to the appellant in the amount of United States Twenty Two Million Five Hundred One Thousand One Hundred Seventy Eight Dollars Two Cents (US$22,501,178.02) stated in its complaint. The appellees denied the claims made by the appellant in their answer.

Pleadings having rested, a pretrial conference was scheduled by the Commercial Court to take place on December 3, 2018. When the parties met in court on December 3, 2018, they agreed to postpone the pretrial conference to December 5, 2018, to allow ample time for discussions already commenced by the parties to figure out alternative means of resolving the dispute. The court granted the request.

At the pretrial conference on December 5, 2018, the appellees' counsel made a submission that the parties had met and mutually agreed to submit their claims to a formal audit under the supervision of the court; that the parties further agreed that the Pricewater House Coopers (PWC) and the names of two other auditors would be submitted to the court by the parties through their legal counsels, and the selection of the auditors would be based on cost and time consideration and the auditors' methodology and its professional reputation in the industry; that the terms of reference (ToR) of the auditors would be prepared and mutually agreed on by the parties and same would translate into a formal stipulation to be signed by the respective counsels on behalf of their clients and approved by the court.

There being no objection from the appellant's counsel, the court granted the submission made by the appellees' counsel and ordered that letters be written to the PWC and two other auditing firms, inviting them to submit proposals for the conduct of the audit.

In keeping with the mutual understanding reached by the parties, the appellees' counsel drafted a set of terms of reference for the audit and shared it with the appellant's counsel on December 10, 2018, for the purpose of making inputs and recommendations. The appellant's counsel proffered some changes to the proposed terms of reference via a letter dated December 14, 2018, and furnished copies of the letter to the appellees' counsel and the court. Following a number of pretrial conferences and submissions by the parties, the case was assigned for another conference on January 8, 2019, during which time the parties signed a stipulation which was approved by the court but with the proviso that the parties would further review and submit a finalized ToR, on January 9, 2019, to be signed by the parties and approved by the court. The records do not reveal that the parties met on January 9, 2019 as agreed on.

On January 22, 2019, the appellant, Eco Fuel Trading SA, filed with the clerk of the Commercial Court a "Notice of Withdrawal" stating therein that it was withdrawing the debt action filed against the appellees on November 2, 2018, with reservation to re-file the action. The appellant stated that its

decision to withdraw was necessitated by new findings that the quantity of petroleum products that was alleged to have been unauthorisedly taken by the appellees from LPRC in the tone of US$14,182,312.50 (US$ Fourteen Million One Hundred Eighty Two Thousand Three Hundred Twelve United States Dollars Fifty Cents) was incorrect; that it was withdrawing its debt action and refilling in order to have the debt amount commensurate with the facts it had authenticated. Accordingly, the appellant on January 30, 2019, re-filed its debt action in which it asserted a debt claim against the appellees for US$8,212,397.52 (US$ Eight Million Two Hundred Twelve Thousand Three Hundred Ninety Seven United States Dollars Fifty Two Cents) instead of the US$22,501,178.02 as previously alleged.

Upon receipt of the summons for the new action, the appellees in response to the appellant's notice of withdrawal of its action filed a bill of information on January 28, 2019 before the Commercial Court, contesting the legality of said withdrawal. The appellees contended in their bill of information that the notice of withdrawal filed by the appellant was a legal nullity because a notice of withdrawal cannot be used to discontinue a pending action; that a notice of withdrawal can only be used to withdraw and amend pleadings, and is governed by Section 9.10 of the Civil Procedure Law, while discontinuance of actions are governed by the provisions of section 11.6 of the Civil Procedure Law. The appellees further contended that the agreement reached by the parties at the two pre-trial conferences held on December 5, 2018 and January 8, 2019 to submit their claims to audit, and the subsequent signing of the amended terms of reference for the prospective auditors by the parties with approval from the judges of the Commercial Court amounted to a submission of their controversy to the court within the contemplation of section 11.6 (3) of the Civil Procedure Law; hence, the appellant could only discontinue its action upon stipulation made and signed by all the parties. The appellees therefore prayed the Commercial Court to deny the notice of withdrawal filed by the appellant for being legally defective and contrary to the provision of the Civil Procedure Law on discontinuance of actions.

Countering the appellees' bill of information, the appellant asserted that the Commercial Court lacked jurisdiction over the subject matter since the appellant had already withdrawn its action, and that the appellees' filing of a bill of information to object to the appellant's withdrawal was out of place. The appellant also contended that the withdrawal of its action did not in any way injure or prejudice the appellees; that the case had not been submitted

to the court or auditors within the contemplation of section 11.6(3) so as to require a stipulation for a withdrawal; and that the appellees filed the bill of information in bad faith with the sole purpose and intent of delaying the case.

The Commercial Court entertained arguments on the bill of information, and ruled stating that in accordance with the practice in this jurisdiction, a case is submitted to the jury [in the case of a jury trial] or to the court [in the case of a bench trial] when evidentiary hearing has been conducted, or the parties have rested their respective sides of the case, submit their case for final argument as allowed by law, and/or waive such arguments and submit their case to the court or jury. The court held that the parties having agreed at the January 8, 2019 pre-trial conference to submit a revised terms of reference for the auditors on January 9, 2019, for approval by the court, and the revised terms of reference not having been submitted to the court as agreed by the parties to inform the work of the auditors, the case was not yet submitted to the court or to the jury [the auditors] within the contemplation of section 11.6 (3) of the Civil Procedure Law so as to require a signed stipulation of the parties before a discontinuance can be permitted.

The Commercial Court further held that voluntary discontinuance is not the only method by which an entire action can be removed from the court; rather, a party is also permitted to withdraw an entire action and file a new one where the substantive rights of the other party is not affected or the court divested of jurisdiction over the parties and the subject matter. The court relied primarily on the case *Pan American Airways v. Obey,* 30 LLR 324 (1982), to support this holding.

In the Pan American Airways case, referenced and relied on by the Commercial Court, the Supreme Court opined that "the withdrawal of a pleading with reservation to amend is quite different from the withdrawal of an entire action with reservation to re-file. Although the current Civil Procedure Law is silent on the withdrawal of an entire action and filing of a new action, a long established practice in this jurisdiction permits a party to once withdraw an entire action and file a new one, and doing so neither affects the substantive rights of the defendant nor does it divest the court of jurisdiction over the parties and of the subject matter. It is only when the action is withdrawn without reservation that nothing is left in court. Where the plaintiff or petitioner reserves the right to re-file, he may do so by filing a new action which will require a written direction and issuance of another writ of summons to be duly served and returned served because the former

action was withdrawn and there was nothing left before the court by which the court will exercise jurisdiction over the parties and subject matter…".

The Commercial Court therefore denied the bill of information filed by the appellees, concluding that the appellant's withdrawal of its entire action without a signed stipulation by all the parties was legally proper.

The appellees came up on a petition for a writ of certiorari filing same before the Justice in Chambers. In their petition for certiorari the appellees prayed the Chambers Justice to rule and reverse the Commercial Court Judges' ruling and to instruct that the 2nd respondent, Eco Fuel Trading SA, debt action be disposed of in accordance with the submission made to the court at the initial pretrial conference and approved by the 1st respondent judges, and that the claims and counter claims of the parties be submitted to an audit. The appellees in other words prayed for the parties to revert to their initial submission to an audit of the appellant's claim of US$22,501,178.02 against the appellees and the appellees counterclaims as they had agreed in consonance with the provisions of section 12(1) (e) (f) of the Civil Procedure Law.

Mr. Justice Joseph N. Nagbe before whom the petition was filed issued the alternative writ but his term as Chambers Justice expired before hearing and ruling on the petition. His successor in Chambers, Justice Yussif D. Kaba, called for a hearing of the petition and ruled granting the peremptory writ of certiorari. He held that the course taken by the appellant to terminate the entire action without a stipulation with the appellees, based on the Pan American Airways case, was inappropriate, and did not promote substantive justice; that the assertion in the Pan American Airways case that the Civil Procedure Code (1974) was silent on the issue of withdrawal of an entire action is not reflective of the law that had been in existence eight years prior to the rendition of that Opinion; that Section 11.6 "VOLUNTARY DISCONTINUANCE" of the Civil Procedure Statute in vogue as of 1974 speaks to how an entire action may be withdrawn. Pleadings, Justice Kaba said, having rested and the parties resorted to Chapter 12 "PRETRIAL CONFERENCES" of the Civil Procedure Law, the appellant could not have legally withdrawn the entire action without a stipulation with the appellees or by leave of court under the Civil Procedure Law, Sections 11.6(2) and 11.6(3). Allowing the plaintiff to withdraw the entire action without permission of court, the Chambers Justice stated, would substantially affect the rights of the appellees and undermine the fair administration of justice. The Chambers Justice therefore reversed the ruling entered by the

Commercial Court. The appellant excepted and announced an appeal to the Court en banc.

The Court in its review of the exceptions taken by the appellant, Eco Fuel Trading SA, against the Chambers Justice's ruling, overturning the ruling of the Commercial Court, has considered the following issues: (i) whether the case was submitted to the court within the contemplation of Section 11.6 (3), of the Civil Procedure Law and (ii) whether the Commercial Court's acquiescence to the appellants discontinuance of the action met the intent of section 11.6(2) of the Civil procedure law?

Laying the premise for a review of our colleague's ruling, we note from the records that at the time the appellant discontinued the action, the following events had occurred: (i) pleadings had rested; (ii) the parties had reached an understanding to submit the matter to an audit; and (iii) the parties had commenced drafting the terms of reference for the audit for approval by the Commercial Court; the parties had signed a copy of the proposed terms of reference for the auditors which was approved by the Judges of the court on January 8, 2019, agreeing however that the terms of reference would be finalized on Wednesday, January 9, 2019.

Justice Kaba is of the view that the steps taken by the parties as enumerated above amounted to a submission of the case to trial by the parties, and therefore a stipulation signed by both parties was compelling for discontinuance of the case in keeping with section 11.6(3) of the Civil Procedure Law or by leave of court in keeping with Section 11.6(2).

We agree with the Chambers Justice that discontinuance after the case has been submitted to the court or jury to determine the facts required a stipulation of all parties (Civil Procedure Law, section 11.6 (3)); Waggy v. Belleh et al., 33 LLR 515, 521 (1985)], but we, however, disagree that in this case, the steps taken by the parties before the withdrawal of the case by the appellant constituted a submission of the case to trial, or as in this case, to the referees, (the auditors).

In the case *ALICO v. Koroma,* 30 LLR 61, 64 (1982), the Supreme Court in interpreting the phrase "submitted to court or jury" as used in section 11.6(3) of the Civil Procedure Law, stated that a case is submitted to the court or jury when the court has received evidence after arguments and submitted the case for determination of the facts by the jury or the court.

In the instant case, there is no dispute that the parties had agreed to resort to audit and had signed a draft terms of reference; that the court had

approved the draft terms of reference with an order that the parties appear at the court on January 9, 2019, to conclude a finalization of the terms of reference after which the case would be submitted to the auditors for determination of the respective claims made by the parties. Under the circumstance then, it could not be said that the case had been submitted to the auditors for trial, most especially when no evidence had even been presented by either of the parties for determination of the case by the auditors. To evoke section 11.6 (3) where the parties are required to enter a stipulation for discontinuance of the action by the appellee, there must have been a completed and approved terms of reference signed by the Commercial Court for forwarding to the auditors and evidence presented to the auditors in support of claims for determination. This not being the case here, section 11.6 (3) is not applicable in this case.

The Chambers Justice further held that pleading having rested the appellant ought to have pursued the course prescribed by the Civil Procedure Law, Rev. Code 1:11.6(2) *By order of court.* This section states:

> "Except as provided in paragraph 1, an action shall not be discontinued by the claimant except upon order of the court and upon such terms and conditions as the court deems proper."

This brings us to the issue, whether the appellee having failed to filed a formal application to the court for discontinuance of its action and a formal order gotten from the court, same should be disallowed, because as Justice Kaba held, allowing same would undermine the fair administration of justice.

The Supreme Court ruled on this issue in the case Liberia Material, Ltd. v. His Honor Gbeneweleh et al, Supreme Court Opinion, October Term, 2014.

In the Liberia Material, Ltd. case, the National Port Authority(NPA), appellee/petitioner, filed a petition for cancellation of a twenty-five year lease agreement which it had concluded with the Liberia Materials Ltd, appellant/respondent, alleging in substance that the appellant had consciously violated the terms and the tenets of the lease agreement. Subsequently, after several procedural challenges by the appellant, the appellee NPA withdrew the action with reservation to re-file.

In resisting the new action filed by the petitioner, the respondent advanced the contention that under Section 11.6 of the Civil Procedure Law, a party cannot withdraw an action and file a new action as was done by the petitioner without an order of the court, or in the alternative, after the filing and service of a responsive pleading, an agreement with the adverse party

and the payment of costs. None of the foregoing, the respondent proclaimed, had occurred, and therefore the petition was a fit subject for dismissal.

The trial judge heard arguments on the motion to dismiss, and entered ruling wherein he denied the respondent's motion, reasoning that not only had the petitioner not violated the law, but that the judge's approval of the new petition was tantamount to an order by the court, in fulfillment of section 11.6(2) of the Civil Procedure Law, and that the approval by the judge of the notice of voluntary discontinuance amounted to an order by the judge to allow discontinuance.

On appeal of the ruling of the lower court, the Supreme Court agreed that a plaintiff or petitioner seeking to effect a voluntary discontinuance under sub• section 11.6(2) must secure from the court an order to discontinue the action, however, the approval by the judge of the notice of voluntary discontinuance satisfied the intent of the statute, as the approval of the judge signifies that the court had agreed to the voluntary discontinuance, which is what the statute actually seeks. The Court wrote:

> "We do not disagree with the appellant that the law requires that where a plaintiff or petitioner decides to pursue the course prescribed in sub-section 11.6 (2) in seeking to effect a voluntary discontinuance the plaintiff/petitioner must secure from the court an order to discontinue that action. The question, however, is whether there is a specific form that the order must take. We admit and recognize that ordinarily the form that is pursued in this jurisdiction is that a formal written instrument captioned "order" is prepared and signed by the judge of the court, evidencing that it is the court that has ordered the discontinuance. We do not see, however, that when one considers the intent of the statute, that the approval of the judge is of any significant departure from the standard form that it can be said that the requirements of the statute have not been met. To the contrary, the approval of the judge clearly fulfills the requirement and intent of the statute since the approval by the judge signifies that the court has agreed to the voluntary discontinuance, which is what the statute actually seeks."

In similar regard, the Commercial Court's tacit approval of the voluntary discontinuance, especially by its denial of the appellees bill of information satisfies the intent of the statute and the appellant's discontinuance of the action. If the court felt otherwise, it would not have entered an adverse ruling on the bill of information filed by the appellees.

The Chambers Justice stated that the Commercial Court in granting the appellant a withdrawal of the entire action without the express permission of

court under the factual circumstances of the case, if upheld, would certainly open a floodgate and undermined the fair administration of justice.

We are unclear as to how the appellant's withdrawal of the action to reflect the proper claim of debt against the appellees opens a floodgate and undermined the fair administration of justice. In the Liberia Material, Ltd. case cited supra, this court also stated:

> "…. that no prejudice is suffered by any party by the judge's approval of the voluntary discontinuance as opposed to the execution of a formal document captioned "judge's order". This is such a minute and insignificant technical point that does not warrant the infliction by this Court of substantial injustice, or for that matter, any injustice, upon any of the parties. Indeed, this Court has spoken on many occasions of the utility, or the lack thereof, of applying technicalities to the administration of justice. This Court has been very vocal in stating that it will not allow any semblance of technicalities, not of any significant magnitude, to defeat the ends of justice…."

We deem the appellees challenge to the appellant's failure to attain a formal court order before discontinuing its action as a mere technical challenge which has no impact on the substantive merits of the case considering that the Commercial Court tacitly acquiesced in line with the intent of the statute by its issuance of a summons for the new action filed by the appellant, and this Court in keeping with its long line of holdings will give little or no attention to technicalities not affecting the merits of a controversy but will endeavor always to delve into the substance of the complaint brought before it.

In this case, we hold that the Commercial Court by its issuance of a summons in the new action filed by the appellant tacitly approved the discontinuance of the former action and this was affirmed by the court in its ruling on the bill of information filed by the appellees.

We note that Section 11.6.2 of the Civil Procedure Law requires the court upon its order to have a party discontinue an action and to set out the terms and conditions for said discontinuance. In this case, it is only proper that the Commercial Court sets the terms and conditions of the discontinuance as required by the statute. Additionally, the terms of reference already drafted and signed by the parties form a part of the instruments to be submitted to audit as was already agreed on by the parties in these proceedings.

WHEREFORE AND IN VIEW OF THE FOREGOING, the ruling of the Chambers Justice is hereby reversed, the alternative writ is quashed and the peremptory writ denied. The Clerk is ordered to send a mandate to the Commercial Court to resume jurisdiction and have the matter proceeded

with in keeping with the Court's Judgment. Costs to abide final determination.

When this case was called for hearing, Counsellor Abraham B. Sillah of the Heritage Partners & Associates, Inc. appeared the appellant. Counsellors James E. Pierre and Oswald N. Tweh of the Pierre, Tweh and Associates, Inc. appeared for the appellees.