

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LAND CASE NO. 40 OF 2022

BAHATI IBRAHIM (As Administratrix of the Estate of the Late Hadija Mohamed)PLAINTIFF

VERSUS

NAFISA MOHAMED (As Administratrix of the estate of the Late Jamila Mursal)DEFENDANT

RULING

15.08.2022 & 22.08.2022

N.R. MWASEBA, J.

The plaintiff herein has sued the defendant for the following reliefs:

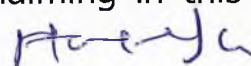
- i. An order for a permanent injunction to stop the Defendant to sell the disputed land until proper consultation is made and all beneficiaries consented in writing on the intending sell and agreed on the selling price and distribution of their shares for each beneficiary.



IN ALTERNATIVE

- i. The plaintiff to get a first priority to buy the disputed land and deduct her share and the remain amount to be given to the remain three beneficiaries such as Dasta Mohamed, Husna Mohamed and Nasifa Mohamed.
- ii. General damages due to physiological torture, mental anguish, harassment caused by the defendant as it shall be assessed by this Hon. Court.
- iii. Interest on the item (ii) herein above at Commercial rate from the date of judgment until full payment.
- iv. Costs of this suit
- v. Any other relief as this honourable Court may deem fit and equitable to grant.


Prior to the hearing of the matter, on 15.08.2022 when the suit came for mention, Mr Reginald Rogati Lasway, Learned Counsel for the Plaintiff prayed to withdraw the matter with leave to refile. His prayer was made under **Order XXIII Rule 1 (2) (b) of the Civil Procedure Code**, Cap 33 R.E 2019. He averred that they had decided to withdraw the suit because after being served with the written statement of defence they have noticed that the house which they are claiming in this case has



already been sold. Thus, their prayers sought will have to change completely. Further he alleged that the parties agreed to settle the matter out of court to create good relation between them. So, they prayed to withdraw the matter with no order as to costs.

On his side, Mr Alex Yunga, Learned Counsel for the defendant contended that the prayer to withdraw the suit come just as an afterthought. The plaintiff wanted to prohibit the Administrator to perform his duties as per **Section 101 of Probate and Administration of Estates Act**, Cap 352 R.E 2002. He said, since his client incurred costs when he was hiring an advocate, it is a necessity for him to be awarded costs. More over the cited **Order XXIII Rule 3 of the CPC** does not talk about costs. Since the plaintiff is not aware as to when the case will be refiled, there is a need for the defendants to be awarded costs. He also exposed that there is no any negotiation to settle the matter out of court.

In brief rejoinder, Mr Lasway submitted that the plaintiff was not aware with the sale of the said house and no consent was given by her. Therefore, since their claim changed for more than 90% there is a need to file a fresh suit. Therefore, they maintained their prayer for the suit to be withdrawn with no order as to costs.



Having gone through the rival submissions of both parties the main issue for determination is whether the defendant is entitled to the costs of this case after being withdrawn.

Regarding the submissions from both parties, there is no objection for this suit to be withdrawn with leave to refile. The dispute is on the costs of the suit of which Mr Yunga learned counsel for the defendant claimed that his client has incurred costs to engage an advocate and to file his written statement of defence. Mr Laswai insisted that his client was not aware that the house was sold and so he insisted that the suit be withdrawn with no order as to costs.

It should be noted that normally awarding costs is in the discretion of the court. But the discretion is judicial and has to be exercised upon established principles. This position was well stated in the case of **Mohamed Salmini Vs. Jumanne Omary Mapesa**, Civil Application No. 04 of 2014 CAT at Dodoma (unreported), it was held that: -

*"As a general rule, costs are awarded at the discretion of the court. But the discretion is judicial and has to be exercised upon established principles, and not arbitrarily or capriciously. **One of the established principles is that, costs would usually follow the event,** unless there are reasonable*



grounds for depriving a successful party of his costs.”(Emphasis added)

I will be guided accordingly by the above laid down principle in determining this matter. In the case at hand, the plaintiff’s counsel has been prompted to withdraw the suit with leave to refile just after being served with the written statement of defence. This act does not waive his obligation to pay costs unless there is a sufficient reason that the court finds it not proper to grant. This is due to the fact that although the matter is withdrawn at the earliest stage, the record speaks by itself that the defendant has already filed a written statement of defence, engaged an advocate and appeared before the court for a number of days. That alone suffices to prove that the defendant incurred costs as stated by Mr Yunga learned counsel. As long as it is the plaintiff who initiated the proceedings, he will have to pay the costs.

This was also a position in the case of **The Registered Trustees of Moravian Church in Southern Tanzania Vs Tanzania Zambia Railways Authority and 3 Others**, (Misc. Land Application 15 of 2021) [2021] TZHC 3602 (18 May 2021) (Tanzilii) that:

“Generally, for all what the Respondents’ Counsels have done, they deserve to be awarded costs. Even if the Applicant had not intended this to happen as alleged by her

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Counsel, the fact that she is one who instituted the application there is no way she can waive the costs liability."

That being said and done, the suit is hereby withdrawn with leave to refile subject to the law of limitation. The plaintiff has to bear the costs.

Ordered accordingly.

DATED at ARUSHA this 22nd day of August 2022.



A handwritten signature in blue ink, appearing to read "N.R. Mwaseba".

N.R. MWASEBA

JUDGE

22/08/2022