

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

LAND CASE NO. 09 OF 2022

YONA LABAN MWENDA (As the Administrator of the Late
COSTA MKOTE MWENDA) **PLAINTIFF**

VERSUS

- 1. YUSI KILIMWIKO**
- 2. NEWUSI KILIMWIKO**
- 3. VESTO KILIMWIKO**
- 4. NGAMANGA VILLAGE COUNCIL**
- 5. MAKAMBAKO TOWN COUNCIL**



..... **DEFENDANTS**

RULING

Date of Ruling: 30.08.2022

S.M. KALUNDE, J.:

By a plaint dated 15.06.2022 the plaintiff herein filed a suit praying for judgment and decree against the defendants in the following terms: one, a declaratory order that the defendants are trespassers into the dispute land; two, declaration that the respondent unlawfully enjoys the disputed land at the detriment of the plaintiff; three, an order of vacant possession; four, general damages to the tune of TZS. 15,000,000.00; and costs of the application.

On being served the 1st, 2nd and 3rd defendants filed a joint Written Statement of Defence (WSD). Together with the WSD the 1st, 2nd and 3rd defendants filed a Notice of Preliminary Objection couched in the following terms:

- (a) That the suit is incompetent for offending sections 6(3) and (4) of **the Government Proceedings Act, [CAP. 5 R.E. 2019]** as amended by Act No. 1 of 2020;
- (b) That the suit is incompetent for offending Order VII Rule 1(c), (f) and (i) of **the Civil Procedure Code, [CAP. 33 R.E. 2019]**; and
- (c) That the suit is premature lack of valid notice of the Administrator of the estate of the late Costa Mkote Mwenda.

The 4th and 5th defendants were also not left behind, on 19.07.2022 they filed joint WSD. They also filed a Notice of Preliminary Objection containing three points of law as follows:

- (i). That the plaint contravenes section 6(3) and (4) of **the Government Proceedings Act, [CAP. 5 R.E. 2019]** as amended by Act No. 1 of 2020;
- (ii). That the plaint contravenes Order VII Rule 1(c) of **the Civil Procedure Code, [CAP. 33 R.E. 2019]**; and

(iii). That the plaint contravenes Order VII
Rule 1(f) of **the Civil Procedure Code,**
[CAP. 33 R.E. 2019].

On 30.08.2022 when parties appeared before me the plaintiff was represented by learned counsel **Mr. Innocent Kibadu** who was holding brief for **Mr. Octavian Mbungani**, learned advocate for the plaintiff. The 4th and 5th defendants were represented by **Ms. Amina Kassim**, learned State Attorney. On their part, the 1st, 2nd and 3rd defendants appeared in person, unrepresented.

At the outset the counsel for the plaintiff Mr. Kibadu conceded to the first limb of the preliminary objection. In amplifying his position, the counsel submitted that, in view of the provision of section 6(3) and (4) of CAP. 5 R.E. 2019 as amended by Act No. 1 of 2020, the suit was incompetent for failure to join the Attorney General as a necessary party to the suit. The counsel prayed that the suit be struck out without costs for being incompetent. For the 4th and 5th defendants, Ms. Kasim did not object to the prayer that the suit be struck out without costs. On their part, the 1st, 2nd and 3rd defendants insisted that they have incurred costs in defending the suit. They thus pressed for costs.

In the present case, both parties are at one that the suit ought to be struck out for being incompetent, however, they are at loggerheads on whether costs should be awarded or not. This point

should not detain this Court that much. The principles governing award of costs were articulated in detail by the Court of Appeal in the case of **DB Sharpyiya & Company Limited vs The Regional manager, TANROADS Lindi**, (Civil Reference No.1 Of 2018) [2018] TZCA 256; (18 September 2018 TANZLII), where the Court (**Ndika, J.A**) stated:

"...it is common cause that costs of, and incidental to, all civil actions are awarded in the discretion of the Court ... In exercise of its discretion to award costs, the Court is generally enjoined to award costs to the successful party on the basis of the principle that "costs follow the event." Nonetheless, it is also trite that the Court may withhold costs to a successful party on any justifiable ground, which may include that party's misconduct"

The Court then specified that:

"I would also add that since the discretion in awarding or denying a party his costs must be exercised judicially and not by caprice, the Court is enjoined to state explicitly, and specifically which party is to meet the costs of the action of the other party to the action."

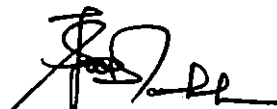
I am also aware that awarding of costs is not automatic. That is to say that costs are not awarded to the successful party as a matter of course. They are entirely in the discretion of the court upon

consideration to the facts and circumstances of each case. Mindful of the above position of the law and circumstances of the present case, I struck out the suit for being incompetent and award half of the costs to the 1st, 2nd and 3rd defendants.

It so ordered.

DATED at IRINGA this 30th day of AUGUST, 2022.




S. M. Kalunde
JUDGE