IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI SUB-REGISTRY

AT MOSHI

MISC. LAND APPLICATION NO. 15 OF 2023

(C/F Land Case 12 of 2023 in the High Court of Tanzania at Moshi Sub-Registry)

ZADOCK ENOCK KOOLA …….…… APPLICANT

VERSUS

TANGANYIKA COFFEE CURING COMPANY LTD……...RESPONDENT

RULING

Date of Last Order: 29.08.2023
Date of Ruling : 29.09.2023

MONGELLA, J.

This is a Ruling on preliminary objection raised by the respondent in respect of an application for temporary injunction filed by the applicant herein. Briefly, the applicant preferred this application under Order XXXVII, Rule 1 (a) and (4); Sections 68 (e) and 95 of the Civil Procedure Code [Cap 33 RE 2019]. He sought for this court to issue a temporary injunction Oder restraining the respondent or its employees, agents, workers and any other person working under her instruction from interfering with the disputed land registered with certificate number CT No. 11235, LO No. 10014, Farm No. 146, Plot No. 7C Block C in Moshi Municipality including trespassing into and undertaking any activity or dealing with the land in any manner

whatsoever and disposing of the disputed land or intefering in any manner pending hearing and determination of Land Case No. 15 of 2023.

Upon filing her counter affidavit, the respondent raised four points of preliminary objection. However, during hearing of the preliminary objection, three points were abandoned. The respondent argued on one point only, to wit;

> *That the application is defective for non joinder of the attorney general.*

The objection was argued in writing and both parties complied with the fixed schedule. The applicant was represented by Mr. George Stephen Njooka while the respondent was represented by Ms. Lilian Filemoni Mushi and Mr. Elikunda G. Kipoko, all learned advocates.

In the respondent's submission in chief, it was averred by the counsels for the respondent that, it was undisputed by the applicant that the alleged sale of the suit property was invalidated by the probe team formed by the Prime Minister of the United Republic of Tanzania, Hon. Kassim Majaliwa Majaliwa. In the premises, they had the stance that this application cannot be determined in his absence. They contended that the applicant's failure to reply to the facts in the Written Statement of Defence (WSD) as required under Order VII Rule 13 of the Civil Procedure Code amounted to admission of the same. In support of their contention they referred the case of **Re. Mashauri Amaniel Malleo Saiye between Danford Mashauri Malleo vs. Godwin Amaniel**

Malleo and Dorah Amaniel Malleo Misc. Application No. 360 of 2019 (HC at Dar es Salaam).

The learned counsels continued to argued that it is settled under **section 6(2) of the Goverment Proceedings Act [Cap 5 RE 2019]** that no suit against the government shall be instituted and heard unless the claimant submits to the government minister or any department concerned a 90 days' notice of his intention to sue the government and the same being sent to the attorney general and copy thereof served to the solicitor general. In consideration of this provision of the law, the learned counsels had a conclusion that the application is defective for non-joinder of the Attorney General and for emanating from an untenable suit for the same reasons. They thus prayed for the application to be struck out with costs.

In reply, Mr. Njooka conceded with the preliminary objection. He submitted that they communicated with the respondent's counsels on their concession to the objection prior to filing the reply submission. He thus prayed for no orders as to costs upon the application being struck out.

Rejoining, counsels for the respondent denied the prayer for the application to be struck out without costs. They disputed Mr. Njooka's submission that there was a communication between them regarding their concession to the preliminary objection saying that the same was unfounded. they added that the allegation, if any, was never formerly communicated to the court to justify their prayer for no costs to be awarded. The counsels reiterated their

prayer for costs to be granted considering that the respondent incurred costs in arguing the preliminary objection.

Upon considering the submissions from both parties' counsels, I find that there is no dispute that the matter at hand is untenable for non-joinder of the Attorney General and for being preferred from an incompetent case before this court, that is, Land Case No. 12 of 2023 in which the Attorney General was also not joined into the suit, while the same required his presence. This requirement is well provided under **section 6(2) and (3) of the Goverment Proceedings Act [Cap 5 RE 2019]**, which states:

> "**6 (2)** No suit against the government shall be instituted and heard unless the claimant previously submits to the Government Minister, Department or Officer concerned, a notice of not less than ninety days of his intention to sue the Government, specifying the basis of his claim against the Government, and he shall send a copy of his claim to the Attorney General and the Solicitor General.
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> **(3)** All suits against the Government shall, after the expiry of the notice be brought against the Attorney-General, and a copy of the plaint shall be served Upon the Solicitor General, Government Ministry, Department or Officer that is alleged to have committed the civil wrong on which the civil suit is based."

Both parties' counsels are at one that the suit emanates from directives issued by the Government through the Prime Minister, ana in that respect the Attorney General ought to have been

joined as directed under the provisions of **section 6 (2) and (3) of the Goverment Proceedings Act [Cap 5 RE 2019]** as quoted above. In the premises, the preliminary objection is sustained. The application at hand is struck out for being incompetent before this court.

After striking out the application, the remaining contention is on the grant of costs. Mr. Njooka requested for the application to be struck out without costs, while the counsels for the respondent insisted on the grant of costs. Mr. Njooka's request is based on his assertion that he communicated with the counsels for the respondent on his intention to concede to the preliminary point of objection. This assertion was vehemently disputed by the respondent's counsels.

It is well settled that grant of costs to a successful party is not automatic. The same is a discretion of the court. This is evident on the wording of **Section 30 of the Civil Procedure Code** which states:

> **30.** (1) Subject to such conditions and limitations as may be prescribed and to the provisions of any law from the time being in force, **the costs of, and incidental to, all suits shall be in the discretion of the court and the court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid**; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of such powers.
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> (2) Where the court directs that any costs shall not follow the event, the court shall state its reasons in writing.

> (3) The court may give interest on costs at any rate not exceeding seven percent per annum and such interest shall be added to the costs and shall be recoverable as such.

The above provision was further discussed in the case of **Nkaile Tozo vs. Philimon Musa Mwashilanga** [2002] TLR 276 in which this court stated;

> "… the respective interpretation of these two identical provisions have now made it trite law that the awarding of costs is not automatic. In other words, they are not awarded to the successful party as a matter of course. Courts are entirely in the discretion of the court and they are awarded according to the facts and circumstances of each case. Although this discretion is a very wide one, like in all matters in which courts have been invested with discretion, the discretion in awarding or denying a party his costs must be exercised judicially and not by caprice."

See also, **DB Shapriya & Co. Ltd. vs. Regional Manager, Tanroads Lindi** (Civil Reference 1 of 2018) [2018] TZCA 256 TANZLII, in which it was held:

> "While the grant of costs is not automatic, the denial of the same ought to be with good reason. Example where successful party conducted a misconduct, was negligent or the suit was vexatious."

In the matter at hand, in consideration of the holdings above, I find nothing indicating the respondent or her counsels behaving in an otherwise improper manner or negligently. In my considered view, for the concession to be considered in awarding costs or not, the

applicant or his counsel ought to have acted promptly before taking off of the hearing and not during submissions. This is because the same would have served the respondent from incurring further costs in arguing the preliminary objection. In such circumstances, I find it reasonable that the respondent be awarded costs. The application is therefore, struck out, with costs.

Dated and delivered on this 29th day of September 2023.

X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA