

IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LAND CASE NO. 12 OF 2023

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 defendant against the land case filed by the plaintiff herein. The plaintiff filed the land case against the defendant over a plot of land registered with Certificate of Title No. 11235, LO No. 10014, Farm No. 146 Plot No. 7C Block C located at Moshi Municipality, which he claimed to have purchased from the defendant in 2014. Upon filing his Written Statement of defence, the defendant filed a preliminary objection on five points of law. However, during submissions, the counsel for the defendant abandoned the rest and submitted on two points, to wit:

- 1. The suit is bad for non-joinder of the Attorney General.*
- 2. The suit is barred by estoppel.*

The objections were resolved in writing and both parties complied with the fixed schedule. The plaintiff was represented by Mr. George Stephen Njooka while the defendant was represented by Ms. Lilian Filemoni Mushi and Mr. Elikunda G. Kipoko, all learned advocates.

In the defendant's submission in chief, the counsels for the defendant averred that it was undisputed by the plaintiff, who also conceded in writing, 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. That, the plaintiff's failure to reply to the facts in the written statement of defence as required under Order VII Rule 13 of the Civil Procedure Code amounted to admission of the same. They referred the case of **Re. Mashauri Amanuel Malleo Saiye between Danford Mashauri Malleo vs. Godwin Mananiel Amanuel Malleo and Dorah Amanuel Malleo** Misc. Application No. 360 of 2019 HC at Dar es Salaam to fortify their argument.

They added that it is a settled position under **section 6(2) of the Government 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. They had the view that a just disposal of this case calls for the Attorney General to be joined in the case. They had the stance that failure of the plaintiff to join the Attorney

General amounts to contravention of the law rendering the suit defective.

On the 2nd point of objection, the learned counsels for the defendant contended that the suit was barred by estoppel as it is clear that the plaintiff surrendered the alleged title to the government and promised not to claim any compensation or costs from the government and the defendant. That, in the premises, the defendant is estopped from denying that he surrendered his title with no right to reclaim the same. They therefore prayed for the suit to be found incompetent and struck out with costs.

In reply, the Mr. Njooka conceded to the 1st preliminary objection as to non-joinder of the Attorney General. However, on the issue of estoppel, he maintained that the same was a matter that required evidence, thus could not qualify as a preliminary objection. He further argued that they communicated with the defendant's counsels on their concession to the preliminary objection prior to their submission in chief. He prayed for no orders as to costs since they conceded to the objection.

Rejoining, the counsels for the defendant denied the prayer for the application to be struck out without costs. They asserted that the allegation that there had been a prior communication with the defendant's counsels on their intention to concede to the objection was unfounded. That the assertion was just a ground to deny the defendant costs. Further, they said that the same was never properly communicated before the court in writing to justify

their prayer for no costs to be awarded. The counsels reiterated their prayer for the case to be struck out with costs.

I have considered the submissions by the counsels for both parties whereby Mr. Njooka, for the plaintiff conceded to first point of preliminary objection regarding non-joinder of the Attorney General. From the defendant's counsels' submission in rejoinder, it appears that the second point on estoppel has been abandoned or rather the argument by Mr. Njooka that the same does not qualify as a preliminary objection for want of evidence, has been conceded by the defendant's counsels. I, in fact, am at one with Mr. Njooka that the second point of preliminary objection needs proof in evidence thus not qualifying to be such. It is settled law that a preliminary objection must be based on a pure point of law unstained with facts. See: **Mukisa Biscuit Manufacturing Co. Ltd. vs. West End Distributors Ltd.** (1969) E.A. 696. This point of objection is therefore overruled.

To this point, the parties' contention remains on the grant of costs. Mr. Njooka requested for the case to be dismissed without costs while the defendant's counsels insisted on the grant of costs. Mr. Njooka's request is based on his assertion that that he communicated with the counsels for the defendant on his intention to concede to the first preliminary point of objection. On the other hand, the counsels for the defendant averred that there was no proper communication between them.

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 (1) of the Civil Procedure Code, Cap 33 R.E. 2019**, 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.

The provision was further discussed in **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. Costs 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.

While the grant of costs is not automatic, the denial of the same ought to be with good reason. In the matter at hand, the

defendant has not succeeded in all points of preliminary objection as the second point has been overruled. In the premises, I find it apposite to award no costs. The plaintiff's case is therefore struck out for being incompetent for non-joinder of the Attorney General. Each party shall bear his own costs.

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



X

L. M. MONGELLA
JUDGE

Signed by: L. M. MONGELLA