

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

LAND CASE NO.11 OF 2022

ASAYILE PAULO MSAKU @LONDON PLAINTIFF

VERSUS

SALUM BASHIRI MOHAMED1ST DEFENDANT

TINDOSSY PAULO MAGANGA2ND DEFENDANT

RULING

26th September 2023

LALTAIKA, J.,

The Plaintiff, **ASAYILE PAULO MSAKU @ LONDON**, a natural person who lives and works for gain in Sumbawanga, is claiming severally and jointly against the first and second Defendants, respectively. The first and second Defendants, respectively, are also natural persons who live and work for gain in Mtwara Region. The Plaintiff's claim pertains to interest in the suit premise, Plot No.17 and 19 Block 10 Commercial Area, situated in Mtwara Region at Mikindani area, valued at more than TZS. 250 million.

The Plaintiff successfully attached the order made by the District Court of Sumbawanga in Execution Case No.2 of 2021. Furthermore, after the decree was sent for execution to the Resident Magistrate Court of Mtwara at Mtwara, the suit premise was attached, and an order of sale was made therewith. Despite the two orders of attachment and sale of the suit premises by the court, the second Defendant attached the property to the first Defendant on 18/10/2022 allegedly in bad faith and with the intent to prevent the execution process by the Plaintiff, knowing that the same was attached by the court. Thus, the Plaintiff prayed for the following reliefs:

- (i) *A declaration that the two plots namely Plot 17 and 19 of Block 10 Commercial Area in Mtwara Mikindani were properly attached.*
- (ii) *A declaration that the two plots namely Plot 17 and 19 Block 10 Commercial Area in Mtwara Mikindani Area were illegally and maliciously sold after attachment to prevent the execution process in application for execution No.02 of 2021 in the Resident Magistrate Court of Mtwara.*
- (iii) *An order of the court that the two plots namely Plot 17 and 19 block 10 Commercial Area in Mtwara Mikindani Area were wrongly released from attachment and further execution process to proceed against the 2nd Defendant and the plots be sold to recover the decretal sum.*
- (iv) *General damages to the tune of 20,000,000/= and costs of this suit.*
- (v) *Any other orders and relief as this Honourable Court shall deem fit.*

No sooner had the pleadings reached the Defendants than the first Defendant filed his Written Statement of Defence, which featured with the **Notice of Preliminary Objection on a point of law**. The first defendant raised a preliminary objection that "This Honourable Court has no legal and pecuniary jurisdiction to entertain this suit." On the other hand, the second Defendant only lodged his Written Statement of Defence.

When this matter came up this morning for the hearing of the preliminary objection raised by the first Defendant, the Plaintiff was represented by Mr. Emanuel Ngongi, learned Advocate holding brief for Mr. Samuel Kipsha, learned Advocate. On the other hand, both Defendants were being represented by Mr. Stephen Lekey, a learned Advocate.

It was Mr. Ngongi's submission that he was notified by Mr. Samuel Kipsha, learned counsel for the Plaintiff, that he found merit in the Preliminary Objection. Mr. Ngongi stressed that his learned colleague had conceded to the Preliminary Objection and thus, he prayed the matter be dismissed without costs. However, Mr. Ngongi reasoned, since this is a legal point, the effects of conceding are striking out the suit and not outright dismissal.

In response, Mr. Lekey submitted that despite the conceding, he prayed for the court to take into consideration that the Defendants incurred costs. The learned counsel went further and submitted that these include costs to engage an advocate, file pleadings, and other related costs. Thus, Mr. Lekey vehemently objected Mr. Ngongi's prayer against awarding costs.

The learned advocates were however in concurrence with regards to striking out as opposed to dismissing the suit because the objection raised does not go to the merits of the case.

I have dispassionately considered the written submissions of both parties. It is noteworthy that the main issue to be considered by this court is whether the suit should be struck out with costs or not. It is the trite law that granting costs is court discretion that must be exercised judiciously and without abuse or prejudice to either party in the suit. In case the court

directs that costs shall not follow the event, the court shall give the reasons for the decision in writing. See; Section 30 (1) and (2) of **the Civil Procedure Code [Cap. 33 R.E. 2019]** which reads: -

"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.

(2) Where the court directs that any costs shall not follow the event, the court shall state its reasons in writing.

In the case of **Said Nassor Zahor & Others vs Nassor Zahor Abdulla El Nabahany & Another** (Civil Application 169 of 2017) [2017] TZCA 237 (24 July 2017), [Tanzlii], the Court of Appeal addressing inter alia the issue of granting or refusing to grant costs in a suit or application had this to say: -

"...We are of such a considered view because, in civil cases, the general rule is that costs must follow the event. Costs are the panacea that soothes the souls of litigants that, in the absence of sound reasons, the Court is not prepared to deprive the winning litigant of. These are the usual consequences of litigation to which the respondents are not exempt..."

In the line of the above authorities, it is clear that in civil cases, the general rule is that costs must follow the event as the wishes of the litigants. It must be noted that in a suit or application of civil nature one among the consequences of the litigation is the costs to follow the event.

Therefore, these usual consequences of litigation do not exempt the defendants or respondents.

In the present suit, the Plaintiff has conceded to the preliminary objection that this court has no legal and pecuniary jurisdiction to entertain this suit. The learned advocate for the Plaintiff did not give the reason(s) as to why this court should not order the costs to follow the event. However, Mr. Lekey stressed that the preliminary objection be sustained with costs because the Defendants have incurred costs. He evaluated that the costs incurred by the Defendants include the costs of engaging an advocate, filing the pleadings, and other related costs.

Looking keenly on the reasons advanced by Mr. Lekey and also as per authorities referred to by this court herein above, I am fortified that the Defendants deserve an order that the costs shall follow the event. With regards to whether the suit should be dismissed or struck out the learned Advocates agreed on the latter.

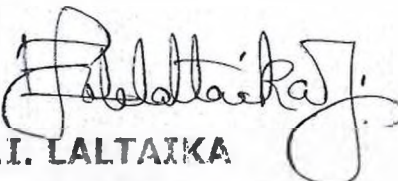
I can only add that the parameters for the proper path were laid by the apex Court in the case of **Khalid Hussein Muccadam vs Ngulo Mtiga & Others** (Civil Application No.405/17 of 2019) [2023] TZCA 17494 (11 August 2023) at page 11 and 12, the Court of Appeal of Tanzania stated that: -

"It is a settled principle of law that orders of dismissal and striking out a matter have different legal consequences. Dismissal connotes that the matter has been heard on merit and determined to its finality. This has the effect of barring the party from pursuing the matter before the same court. On the other hand, striking out connotes that the matter has not been heard on merit for being incompetent..."

Premised on the above, the suit is hereby struck out with costs.

It is so ordered.

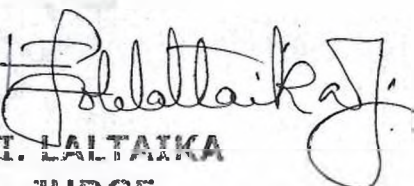



E.I. LALTAIKA
JUDGE
26.9.2023

COURT:

This Ruling is delivered under my hand and the seal of this Court on this 26th day of September 2023 in the presence of Mr. Stephen Lekey, learned advocate for the Defendants and Mr. Emanuel Ngongi, learned Advocate holding brief for Mr. Samuel Kipesha, learned Advocate, for the Plaintiff.




E.I. LALTAIKA
JUDGE
26.9.2023