

**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**MBEYA SUB-REGISTRY**

**AT MBEYA**

**LAND CASE NO. 00027332/2023**

**GRANT EDWARD MWALINGO..... PLAINTIFF**

**VERSUS**

**FRANCIS EDWARD MWALINGO .....1<sup>ST</sup> DEFENDANT**

**NMB BANK PLC.....2<sup>ND</sup> DEFENDANT**

**TWINS AUCTION MART CO. LTD .....3<sup>RD</sup> DEFENDANT**

**MIRAAZI ENTERPRISES LTD .....4<sup>TH</sup> DEFENDANT**

**REGISTRAR OF TITLES.....5<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL .....6<sup>TH</sup> DEFENDANT**

**RULING**

*Date 17<sup>th</sup> & 18<sup>th</sup> January 2024*

**KAWISHE, J.:**

On the date scheduled for necessary orders, the plaintiff's learned counsel Mr. Felix Kapinga advanced two prayers before the Court. First, the Court be pleased to allow the plaintiff to withdraw the case and second, the Court to be pleased to make no orders as to costs following the withdraw of the case.

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In his submission Mr. Kapinga fortified that, the plaintiff Mr. Grant Edward Mwalingo had discussions with NMB Bank PLC the 2<sup>nd</sup> defendant, and Miraazi Enterprises the 3<sup>rd</sup> defendant whereby, they have agreed that Land Case No. 000027332 of 2023 be withdrawn from the Court. He further stated that, the agreement was reached after the plaintiff has shown no interest to pursue the case, following the intention of the 2<sup>nd</sup> defendant to settle the matter out of court.

Following the recourse after Mr. Kapinga's submission on the first prayer, the 1<sup>st</sup> defendant, who appeared in person, the 5<sup>th</sup> and 6<sup>th</sup> defendants represented by Mr. Joseph Tibaijuka State Attorney and the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants represented by Mr. Isaya Mwanri learned counsel did not object the prayer to withdraw the case.

Since this prayer was not objected to, I will not take much time to deal with it. For that reason, I am persuaded to dispose the second prayer, that the Court to be pleased to make no orders as to costs.

On the second prayer, Mr. Kapinga argued that, the plaintiff is praying to the Court to forego the costs of the case due to the fact that, it is the first mention of the case, therefore there is no inconvenience occasioned to the Court and the other parties to the case. He also claimed that, parties to the case have agreed to settle the case out of court. He added that, the plaintiff has some money from the sale of the mortgaged house which has to be reimbursed by NMB Bank PLC the 2<sup>nd</sup> defendant. He continued to submit that, one of the conditions for the return of the money from NMB Bank PLC is that, the plaintiff has to withdraw the case. Mr. Kapinga

cemented his prayer by referring to the overriding principle for the interest of justice to both parties and added that, the time of court has not been misused.

In summing up the second prayer, Mr. Kapinga contended that, the plaintiff joined the Registrar of Titles and the Attorney General in the case since it is a statutory requirement to do so given the nature of the case. That, there was no way they could file the plaint without joining them. He stressed that, since they are discharging their duties, then he is praying to the Court to make no orders as to costs. He made a reference to section 30 (1) and (2) of the Civil Procedure Code Cap. 33 R.E 2022 (the CPC), which gives the Court discretionary powers in deciding costs.

Mr. Joseph Tibaijuka, learned State Attorney representing the 5<sup>th</sup> and 6<sup>th</sup> defendants, in replying to the submission made by the plaintiff's counsel, stated that, from the long submission on waiving costs made by the learned counsel, shows that, he appreciates that coming to court is time consuming plus, preparations and filing of pleadings. Mr. Tibaijuka left the matter to be decided by the Court using the discretionary powers as provided for under section 30(1) and (2) of the CPC.

Mr. Isaya Mwanri learned counsel for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants in his reply to the second prayer objected the prayer to relinquish costs. He submitted that, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants be awarded with costs for the expenses they incurred in the matter. He alleged that, his objection is anchored in the fact that, there is no agreement to withdraw the case. He further added that, their three clients are companies and were not notified

in any formal or informal means that there was an agreement to withdraw the case. Consequentially, the withdrawal is the plaintiff's own will thus, he has to bear the costs of the case.

Mr. Mwanri also, maintained that, there are advocates' costs for representation and filling of court's documents and attendance on the scheduled day. In that regard, he called upon this Court to consider the expenses incurred while exercising its discretionary powers over costs.

Mr. Mwanri attacked the submission to rely on the overriding principle by stating that the plaintiff knew about it hence, should have notified the respondents about the discussion on settling the matter out of court. That, the plaintiff notified the 5<sup>th</sup> and 6<sup>th</sup> defendants only without considering the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants who are surprised to have heard about the prayer to withdraw the case being presented in the Court. He prayed to the Court to make orders to costs against the plaintiff.

Mr. Francis Edward Mwalingo the 1<sup>st</sup> Defendant did not object the prayer to waive the costs of the case. He claimed that, the 2<sup>nd</sup> defendant, NMB Bank PLC, advised them to withdraw the Land Case No. 000027332 of 2023 so that, the plaintiff can be reimbursed the money gained from the sale of the mortgaged house. He further lamented that, since they are incurring more costs when pursuing the case, and in the meantime, the evicted tenants from the sold house are demanding repayment of their rents, they agreed with the advice of the 2<sup>nd</sup> defendant to settle the matter out of court in order to be reimbursed with the money which will help them repay the evicted tenants from the house sold.

Mr. Kapinga in his rejoinder was very brief. He submitted that, on the issue of time, it is the first time the case is called before the Court for necessary orders, and the prayer to withdraw presented. He added that, it is true that the government replied, but the other defendants have not replied. The government was discharging its public duty. In that regard, it may refrain from claiming for costs.

In his rejoinder to the submission by Mr. Mwanri, Mr. Kapinga said that, the denial by the learned counsel that there was no discussion does not suffice to object the prayer. He added that, for 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants not filing their Written Statement of Defence and the fact that time for reply lapsed, it is a fact that they knew what was going on in this matter.

Tackling the issue of overriding principle he contended that, the Government was notified as per statutory requirement. There is no such requirement to private entities like the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants. He insisted that, there was a discussion between the plaintiff and the defendants. Mr. Kapinga in concluding his submissions, he strongly supported the submission made by the 1<sup>st</sup> defendant and prayed for no order as to costs while asking this Court to consider the principle of deep pocket, given the fact that this matter is between low-income persons versus big monetary companies.

I have considered the arguments by the counsels for both sides and the 1<sup>st</sup> defendant who appeared unrepresented. The plaintiff's counsel, like

I pointed out earlier, made two prayers before this Court. The first is to withdraw the case which was not objected by the defendants.

With regards to the second prayer that the Court be pleased to make no orders as to costs, both parties agreed that it falls under the discretionary powers of the Court. As rightly argued on behalf of the plaintiff and the defendants, the Court's powers with regard to the grant of costs is anchored in section 30(1) and (2) of the Civil Procedure Code Cap. 33 R.E 2022.

Mr. Kapinga prayed that the Court basing on the cited provisions of the CPC waive the costs of the case following the prayer to withdraw it. Mr. Mwanri objected to the prayer by stating that, their clients were not invited to the discussion about settling the case out of court. After his objection and the reason he advanced. I was indebted to peruse the documents in the file of the case. I find out that, the suit was filed in the High Court Mbeya Registry on 8<sup>th</sup> December, 2023 and an application under certificate of extreme urgency was filed on 12<sup>th</sup> December, 2023. I could not find any reply from the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants. That means, the time for filing such documents had elapsed already. Just thinking out of the box, there was no application to file the written statement of defence (WSD) out of time. In that regard, I agree with Mr. Kapinga that, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants were aware of the discussion to settle the matter out of the court, that is why they did not bother to file their WSD. In that case, the objection to the prayer lacks merit.

In the same vein, the claim that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants are surprised to be notified in court that there is a prayer to withdraw the case has no legs to stand on. Further, the claim that, the defendants incurred costs for advocates to prepare and file documents in court lacks merit as there are no documents filed by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents.

Having disposed off the objections raised by Mr. Mwanri, I am set to deliberate on the issue whether the Court should waive costs for the case following the prayer to withdraw it.

In determining the issue raised, I would refer to the provisions of the CPC which gives the Court the discretionary powers over costs. The provisions state as follows:

*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.*

Various cases have given interpretations over the provisions of section 30(1) and (2) of the CPC. One of the cases is **Mohamed Salimin vs. Jumanne Omary Mapesa** Court of Appeal Civil Application No. 4 of 2014 where 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.

Also, in the case of **Geofields Tanzania Limited vs. Maliasili Resources Limited and others** (Misc. Commercial Cause No. 323 of 2015) [2016] TZHC COM D 8 the court stated that:

*Generally, costs are awarded not as a punishment of the defeated party but as a recompense to the successful party for the expenses to which he had been subjected or for whatever appears to the court to be the legal expenses incurred by the party against the expenses incurred by the party in prosecuting his suit or his defence. Costs are thus in the nature of incidental damages allowed to indemnify a party against the expense of successfully vindicating his rights in court and consequently the party to blame pays cost to the party without fault."*

Also refer **Nkaile Tozo vs. Phillimon Musa Mwashilanga** [2002] TLR 276 and **Tanzania Fish Processors Ltd vs. Eusto K. Ntagalinda**, Civil Application No.6 of 2013 (unreported).

The matter at hand borrows the reasoning from the cited cases on the exercise of the discretionary powers of the court in awarding or not awarding costs. The matter at hand though follows the interpretation of the cited cases, the question of costs has been raised at the instance of the plaintiff's prayer to withdraw the case after he has agreed with the defendants to settle the matter out of court. Therefore, the case was not heard on merits. It is clear that, the costs follow the event, meaning that the successful part has to be awarded with costs though every case has its own merits and the court has to exercise its discretionary powers judiciously. In the case of **Aida Makukura and 23 Others vs. Mahadi**



**Hadi** (Land Appeal 228 of 2020) [2021] TZHC Land D 354 (26 July 2021) it was held that:

*"The courts have however been vested with discretionary powers to award or not to award depending on circumstances and in case of any departure from the general rule, reasons for not awarding costs must be adduced. It has been emphasized more often than not that in exercising its discretionary powers, the courts must do so judiciously"*

Also see the cases of **Tanga Cement Company Limited vs. Jumanne O. Massanga and Amos A. Mwalwanda**, Civil Application No 6 of 2001(CAT) and **Regional Manager, TANROADS Kagera vs. Ruaha Concrete Company Limited**, Civil Application No 96 of 2007 (CAT) both unreported). In the cited decisions, the court added that in exercising their discretionary powers, the court must do so judiciously while taking into account the circumstances of each case.

From the above reasoning, and given the fact that, the plaintiff's prayer to withdraw the case came after discussion between the plaintiff and the defendants to settle the matter out of court, and since the case was not heard on merits, and by considering the nature of the matter at hand, it is my view that, burdening the plaintiff with the costs of the case may not be justifiable before the eyes of the law.

Having said so, and since the withdraw of the case is not objected to, I find that the plaintiff's prayers have merits, I hereby grant the prayers accordingly, withdraw of the case and make no orders as to costs.

It is so ordered.

Right to appeal by any aggrieved party is explained.

Dated at **MBEYA** this 18<sup>th</sup> day of January, 2024.

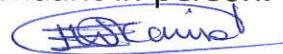


**E.L. KAWISHE**

**JUDGE**

**18/1/2024**

**Court:** Ruling delivered in chambers this 18<sup>th</sup> day of January, 2024 in the presence of Ms. Edna Mwamlima, State Attorney for the 5<sup>th</sup> and 6<sup>th</sup> defendants, Mr. Felix Kapinga, counsel for the plaintiff also holding brief for Mr. Baraka Mbwilo, counsel for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants and the 1<sup>st</sup> defendant in person.



**E.L. KAWISHE**

**JUDGE**

**18/1/2024**

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