

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

MISC LAND APPLICATION NO. 441 OF 2021

(Originating from the decision of Execution No. 57 of 2019,
High Court of Tanzania dated 19/10/2020)

ZAITUNI HAMIS ALI.....APPLICANT

VERSUS

**KAISI HAMIS (Suing as Administrator of the Estate of the late
HAMIS ALI).....1ST RESPONDENT**

JOSHUA ELIAS MWAITUKA t/a FOSTERS

AUCTIONEERS AND GENERAL TRADERS LTD.....2ND RESPONDENT

Date of last Order: 01/09/2022

Date of Ruling: 01/09/2022

RULING

I. ARUFANI, J

The counsel for the applicant, Mr. Juma Mtatiro prayed the court to withdraw the application from the court under order XXIII Rule 1(1) and (2)(b) of the Civil Procedure Code Cap 33 R.E 2019 with leave to refile and without costs. The counsel for the respondent Mr. Derick Kahigi, had no objection to the prayer of withdrawing the application from the record of the court. He however objected the prayer of leave to refile the application and prayer of being denied costs of the matter.

Mr. Derick Kahigi told the court that, this application has been before the court for long time and it was awaiting determination of the application for review which was pending before the Deputy Registrar of this court which was Review No. 431 of 2021. He stated the said application for review has already been disposed of by being dismissed and there is no any other matter which is pending in this court. He argued that, as there is no any other matter pending in this court there is no justification for the court to grant the applicant leave to refile the present application in the court.

As for the prayer of waiving costs the counsel for the respondent told the court that, the matter has been before the court for long time and they have been incurring costs of coming to attend the present application. At the end he prayed the application be withdraw with no leave to refile but with costs.

In his rejoinder the counsel for the applicant told the court the applicant cannot be barred by the counsel for the respondent or this court to come to the court to seek for legal remedy. He stated that, as they have already filed notice of appeal to the Court of Appeal, the court of Appeal may order the matter to be returned to this court for rehearing that is why is praying for leave to refile the application if need will arise.

As for the costs of the matter he told the court the matter has not been heard and determined therefore there is no justification for granting costs as the respondent has not been prejudiced by the application. At the end he prayed to be allowed to withdraw the application with leave to refile and with no order as to costs.

After considering the argument put forward before this court by the counsel for the parties the court has found that, the prayer made to this court by the counsel for the applicant was not supposed to be made under the provision of the law he has cited in his prayer. The court has come to the stated finding after seeing the cited Order XXIII of the Civil Procedure Code, is dealing with a withdraw of a suit from the court and not an application like the one which is before this court.

To the view of this court the said prayer was supposed to be made not under the cited provision but in other provisions of the law like section 95 of the Civil Procedure Code. However as the prayer to withdraw the application has not been contested by the respondent the court has found there is no justifiable reason to deny to grant the same. As for the prayer of leave to refile the application after being withdrawn the court has found that, as rightly stated by the counsel for the respondent there is no justifiable reason to grant the applicant leave to refile the application.

The court has come to the stated finding after seeing this application was seeking for an order to lift and set aside the order issued or granted on 19th October, 2020 in execution No. 57 o 2019 pending determination of Land Review No. 431 o 2021, Misc Land Application No. 3 of 2021, Misc Land Application No. 276 of 2021 and PC Civil Appeal No. 190 of 2020.

The court has found the counsel for the applicant has informed the court all of the above mentioned matters have already been determined and they are no longer pending in the court. Under that circumstance the court has found there is no justification of granting the prayer of leave to refile the application at hand while the matters which had been targeted to be protected by the present application have already been determined and they are no longer pending in the court. In the premises the court has failed to see any essence of granting leave to refile this application in the court.

As for the prayer of costs made to the court by the counsel for the respondent the court has found that, it is not true that the respondent will not be prejudiced if they will not be granted costs because they have engaged an advocate and they have filed in the application some documents to resist the application and they have been appearing in the court on different dates scheduled for this matter. However, after going through the record of this matter the court has found the parties in this

matter are member of the same family therefore to avoid adding more fire to their conflict the court has found proper to make no order as to costs in this application.

Consequently, the prayer to withdraw the application from the court is granted but with no leave to refile. As for the costs of the application the court is ordering each party to bear his or her own costs. It is so ordered.

Dated at Dar es Salaam this 01st day of September, 2022



A handwritten signature in blue ink, appearing to read "I. Arufani".

I. Arufani

JUDGE

01/09/2022

Court:

Ruling delivered today 01st day of September, 2022 in the presence of Mr. Juma Mtatiro, learned advocate for the applicant and in the presence of Mr. Derick Kahigi, learned advocate for the respondent. Right of appeal to the Court of Appeal is fully explained.



A handwritten signature in blue ink, appearing to read "I. Arufani".

I. Arufani

JUDGE

01/09/2022