

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**CIVIL REFERENCE NO. 1 OF 2018**

**DB SHAPRIYA & COMPANY LIMITED ..... APPLICANT/DECREE-HOLDER  
VERSUS**

**REGIONAL MANAGER, TANROADS LINDI .. RESPONDENT/JUDGMENT-DEBTOR**

**(Reference from the Ruling and Order of the Taxing Officer of the Court of  
Appeal of Tanzania at Dar es Salaam)**

**(Hon. E.Y. Mkwizu, Taxing Officer)**

**dated 26<sup>th</sup> day of March, 2018**

**in**

**Civil Appeal (Bill of Costs) No. 110 of 2013**

.....

**RULING**

24<sup>th</sup> August & 26<sup>th</sup> September, 2018

**NDIKA, J.A.:**

This is a reference under Rule 125 (1) of the Tanzania Court of Appeal Rules, 2009 ("the Rules") from the ruling and order dated 26<sup>th</sup> March, 2018 made by Hon. E.Y. Mkwizu, Deputy Registrar, in her capacity as Taxing Officer, in Civil Appeal (Bill of Costs) No. 110 of 2011. In that ruling she struck out an application by DB Shapriya & Company Limited, the applicant/decree-holder, for taxation of a bill of costs in respect of an appeal (that is, Civil Appeal No. 110 of 2011) that had been instituted by Regional Manager, TANROADS Lindi, the respondent/judgment-debtor

In order to appreciate the context in which this reference was instituted, I find it necessary to begin with a summary of the essential facts of the dispute.

On 9<sup>th</sup> May, 2017, the respondent's appeal against the applicant herein (that is, Civil Appeal No. 110 of 2011) came up before the Court for hearing, but the respondent defaulted appearance. Accordingly, Mr. George Kilindu, learned counsel who appeared for the applicant herein, prayed for the dismissal of the appeal with costs. Following Mr. Kilindu's prayer, the Court ordered as follows:

*"For our part, we fully subscribe by the prayer of the learned counsel for the respondent [the applicant herein]. In the circumstances, the appeal is, accordingly, dismissed under Rule 112 (1) of the Tanzania Court of Appeal Rules, 2009."*

Subsequent to the dismissal of the appeal, the applicant, through Mr. Kilindu, on 7<sup>th</sup> June 2017 filed for taxation a bill of costs amounting to TZS. 33,315,562.00. The respondent, through Mr. Benedict Mtinangi, learned counsel and a Legal Officer from TANROADS' Legal Unit, resisted the taxation on a preliminary point that by its order of 9<sup>th</sup> May, 2017 this Court

did not award the applicant any costs and, therefore, there was, in effect, no bill of costs to be taxed.

In his written submissions to the Taxing Officer on the preliminary point, Mr. Mtinangi argued, in essence, that the Court exercised its discretion under Rule 114 (1) of the Rules by withholding costs as it did not make any order as to costs when it dismissed the respondent's appeal for non-appearance. He fervently submitted that had the Court been minded to award costs to the present applicant in whose favour the appeal was determined, it would have said so expressly in its order.

To bolster his position, the learned counsel urged the Taxing Officer to seek inspiration from the decision by the High Court in **Nkaile Tozo v. Phillimon Musa Mwashilanga** [2002] TLR 276, which concerned the construction of section 30 (1) and (2) of the Civil Procedure Code, Cap. 20 RE 2002 (CPC) governing the award of costs of, and incidental to, all suits. The relevant part of that decision is at pp. 278-279, which I take the liberty to reproduce as follows:

*"Whether or not the first appellate court was entitled to deny the [appellant] his costs will largely depend on the construction of section 30 (1) and (2) of the Civil Procedure Code (the Code). Our section 30 of*

*the Code is in pari materia with section 35 of the Indian Code of Civil Procedure. The respective interpretations 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 the Indian case of Naramma v. Kotamma (1965) 1 and WR 433). Thus when a party successfully enforces a legal right and in no way misconducts himself he is entitled to his costs as of right: Civil Service v. GSN Company [1903] 2 KB 756 C.A.* “[Emphasis added]

On the adversary side, Mr. Kilindu contended that since the Court explicitly indicated in its order that it fully subscribed to his prayer that the appeal be dismissed with costs, the Court did not have to state expressly in its consequent order dismissing the appeal that costs had been awarded as well. While stressing the cardinal principle that “costs follow the event”,

meaning that a successful party must be awarded costs, he took the view that the holding in **Nkaile Tozo** (supra) supported his position as opposed to that of the respondent.

Having considered the competing written submissions, the Taxing Officer sustained the objection and, as a result, struck out the taxation cause. She reasoned, at first, based upon Rule 121 (1) governing the assessment or taxation of costs as well as Rule 124 that guides the taxation of costs, that the Court's scheme for payment of costs contemplates the existence of a decision or order of the Court assessing and fixing the quantum of awarded costs or, in the alternative, a decision or order for payment of costs subject to taxation. On taxation of costs, the Taxing Officer took the view, in particular, that:

*"... in taxation proceedings, the taxing master assesses the amount of costs payable under the costs order; meaning that unless there is in existence an order/decision for payment of costs, assessment/taxation of costs cannot be carried out."*

Secondly, while the Taxing Officer agreed with both Mr. Mtinangi and Mr. Kilindu that, as illustrated in **Nkaile Tozo** (supra) and elaborated by the Court in **Tanzania Fish Processors Ltd. v Eusto K. Ntagalinda**, Civil

Application No. 6 of 2013 (unreported), costs ordinarily follow the event unless otherwise decided, she particularly disagreed with Mr. Kilindu's other limb of his argument that the Court in the instant matter awarded costs as it indicated its acceptance of his prayer for the appeal to be dismissed with costs. She stressed her view that costs could not be claimed where the decision of the Court is silent on the question of costs.

At the hearing before me, the parties were represented by the same legal counsel that appeared before the Taxing Officer.

In his oral submissions, Mr. Kilindu repeated essentially the same line of argument that he put before the Taxing Officer. He underlined that if the Taxing Officer had looked at the Court's order in its totality she would have concluded that the Court had awarded the applicant costs after it had indicated its unreserved subscription to his prayer for the dismissal of the respondent's appeal. The said full subscription, he added, negated the necessity on the part of the Court to state explicitly that the dismissal was made with costs. He thus urged me to reverse the Taxing Officer's decision.

Mr. Mtinangi, on his part, disagreed with Mr. Kilindu. He reiterated what he stated before the Taxing Officer that while costs ordinarily follow the event, they are awarded at the discretion of the Court and that an

award of costs must be explicitly made. While acknowledging that the Court indicated that it subscribed fully to the applicant's prayer (for dismissal of the appeal with costs), he insisted that the order for dismissal of the appeal for the non-appearance of the respondent was made without any award of costs. The learned counsel, once again, relied upon **Nkaile Tozo** (supra) and **Tanzania Fish Processors Ltd** (supra).

From the rival learned submissions, the kernel of the contest is the question whether the Taxing Officer erred in deciding that this Court did not award any costs to the applicant in its order of 9<sup>th</sup> May, 2017.

For a start, it is common cause that costs of, and incidental to, all civil actions are awarded in the discretion of the Court: see, for instance, the decision of the Court in **Tanzania Fish Processors Ltd** (supra). In exercise of its discretion to award costs, the Court is generally enjoined to award costs to the successful party on the basis of the principle that "costs follow the event." Nonetheless, it is also trite that the Court may withhold costs to a successful party on any justifiable ground, which may include that party's misconduct. In this regard, I fully subscribe to the stance taken by the High Court in **Nkaile Tozo** (supra), in particular, that the awarding of costs, being a discretionary process, is not automatic and that costs are not

awarded to the successful party as a matter of course. I find **Nkaile Tozo** (supra) quite relevant even though it concerned the construction of section 30 of the CPC, which is, admittedly, not applicable to the procedure before this Court. In my view, the same principles for awarding costs apply in both the High Court and this Court even though their respective sources may be different.

I would also add that since the discretion in awarding or denying a party his costs must be exercised judicially and not by caprice, the Court is enjoined to state explicitly and specifically which party is to meet the costs of the action of the other party to the action. That is so especially on the reason that an award of costs to one party against the other grants a benefit to the former and imposes a liability on the latter. Such an award, therefore, cannot be merely implicit.

In the instant case, it is undisputed that the order at hand was preceded by the Court's explicit and unambiguous expression that it fully acceded to Mr. Kilindu's prayer for termination of the appeal for the non-appearance of the present respondent. On the other hand, I would agree with Mr. Mtinangi that what the Court did in its ensuing order was dismissing the appeal without indicating anything as to costs. In my view,

the language used by the Court in the order is plain, clear and unequivocal; it is capable of one meaning only, which is that "*the appeal is ... dismissed under Rule 112 (1)*" of the Rules. Nothing was stated as to the costs of the action. Certainly, it is arguable that the costs in the appeal ought to have "followed the event", which, in the matter, was that the applicant, being the successful party, was entitled to costs. But then, I do not think that such costs would inevitably and automatically "follow the event" even where the Court is explicitly silent on that aspect when handing down its final order of disposal of the matter as was the case in the instant matter.

With respect, I am on the whole unpersuaded by the claim by Mr. Kilindu that the Court must be reckoned to have awarded costs as it stated so expressly that it subscribed fully to his "prayer for dismissal of the appeal with costs" and that the said expression negated the necessity on the part of the Court to state explicitly that the dismissal was made with costs. I would reiterate my earlier position that for the reason that an allocation of costs to one party against the other grants a benefit to the former and correspondingly imposes a liability on the latter, such an award must be made specifically and explicitly in the final disposal order, upon the basis of the principles discussed earlier. Adding to or implying anything in the

Court's order under focus, beyond what the Court stated so expressly, would be wide of the mark.

In sum, I find no fault in the Taxing Officer's finding that the Court did not make any award as to costs in the order at hand. For that reason, the reference is without any substance. It stands dismissed with costs.

**DATED** at **DAR ES SALAAM** this 18<sup>th</sup> day of September, 2018.

G. A. M. NDIKA  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.



A.H. MSUMI  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**

