

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA**

PC.CIVIL APPEAL NO. 17 OF 2017

(C/F Resident Magistrate Court of Arusha, Civil Case No. 48/2016)

KEEN FEEDERS LTD.....APPELLANT

VERSUS

GEORGE NUSRA FRISBY.....RESPONDENT

JUDGMENT

DR. M. OPIYO, J

The appellant named above, being aggrieved with part of the judgment and decree of the Resident Magistrate Court of Arusha at Arusha in Civil Case No. 48 of 2016 dated 25th day of April, 2017 appealed before this court basing on the following ground;

1. That the Hon. Trial Magistrate erred in law and in facts in failing to grant costs to the Appellant in the Civil Case No. 48 of 2016.

Before this court, the appellant was represented by Mfinanga learned Advocate while the respondent was represented by Ms. Fatuma learned Advocate. This court ordered the hearing of this appeal to be

argued by way of written submission. I appreciate efforts by both sides as they accordingly filed their written submission in accordance to the schedule.

Arguing the appeal, the appellant submitted that, granting costs is upon court discretion; however the said discretion must be exercised without abuse or prejudicial to either party in the suit. He further submitted that, section 30 (2) of the Civil Procedure Code, Cap. 33 R.E 2002 provides where the courts directs that any costs shall not follow the event, the court shall state its reasons in writing. However, in Civil Case No. 48 of 2016, the trial Magistrate delivered a judgment which stated that;

"All in all, I find that this Court has no jurisdiction to entertain the same and consequently I hereby dismiss the same with all due respect. Each party to bear its own costs."

He thus contended that, the requirement of section 30(2) of the Civil Procedure Code (supra) is for the trial Magistrate to state the reason for not granting costs, but in the Civil Case No. 48 of 2016 it was neither pronounced nor provided in the judgment despite the fact that the Appellant managed to appear and spend time in court, filed his defence together with preliminary objection as well as testified for showing his innocence. He added that, in the Civil Case No. 48/2016

the Appellant who was the defendant hired the service of the Advocate and he paid for instruction fees on top of other costs.

He further stated that, the trial Magistrate also failed to consider that the case was too complicated by the respondent through a number of oral applications and a lot of unrealistic notice to produce which abused the court process and making the said case to be re-opened from time to time. He submitted that the case tasked them to make a high quality research for purposes of assisting the court to reach into reasonable decision. He referred this court to the case of **Anna UfooUlomi vs. Ramadhani Mohamed**, Land Appeal No. 15/2016 where this court stated that;

"Regarding costs, the law gives discretion for the court/tribunal to impose costs. Where the Court directs that no costs shall be paid, the court shall state its reasons; section 30 (1) of the Civil Procedure Code. In this case the Tribunal did not give reasons why it did not order costs. Although the Court decided on the point of law suo motto, yet the error was occasioned by the Applicant."

He said that, in Civil Case No. 48/2016 one of the issue was whether the court has jurisdiction which was raised at the earliest possible opportunity by Defendant who is Appellant herein, but it was then decided to be one of the issue, since it needed evidence for the

plaintiff now respondent in this appeal to testify basing on his cause of action. Thus the said issue as to jurisdiction was raised by Appellant and not the court *suo motu*, the circumstance that the trial court was supposed to grant costs to the Appellant. To support his argument, he cited the case of **Kiska Limited vs. De Angelis**[1969] EA 7 where it was stated that;

"The appellant, as the successfully party, should have had costs of the de bene esse."

He also cited the case of **Njoro Furniture Mart Limited vs. Tanzania Electric Supply Co. Limited** [1995] TLR 205 where it was stated that;

"Where the Court directs that any costs shall not follow the event, the Court shall state its reason in writing."

Based on the above, he prayed this appeal be allowed with costs both for the trial court and for this appeal.

Opposing the appeal, the respondent's counsel submitted that after filing Civil Case N. 48/2016 before the trial court, the appellant filed a preliminary objection on the point that the court had no jurisdiction; but after filing the said preliminary objection he abandoned to argued it on its merits and further proposed and agreed that the same be

determined by the court at the end. He contended that, the appellant never moved the court in regard to the merits of the preliminary objection. He agreed the appellant participated fully in the trial; but it was after the case was closed, then the court on its own motion revived the question of jurisdiction and then a determination *suo motu* that it did not have the jurisdiction to entertain the case. He insisted that, the appellant made no effort whatsoever to raise the issue let alone address it, rather the appellant continued with the hearing of the main suit as if there was no preliminary point of objection filed. Thus, it is clear evidence that the appellant did not research, write, submit nor present any arguments in regard to the question of jurisdiction. He took no steps whatsoever to warrant an order for costs in that regard.

He invited this court to the Book authored by B.D. Chipeta titled The Civil Procedure in Tanzania: A student Manual and section 30 (2) of the Civil Procedure Code (*supra*) and stated that, it is a general rule that costs of and incidental to all suits are awarded at the discretion of the court. Aside from the general rule, in some circumstances the court may decide costs in a particular event must not follow the event and in such a case the court must give a reason in writing as to why the costs should not follow the event. He further contended that, costs are awarded to the successful litigant based on the court materials and arguments in support of the issue; but in this matter the appellant was not a successful party within the meaning of the

word and he did not win the case in his favour, as he raised the preliminary objection but did not follow through with the merits of this preliminary objection. It was left to the court, at the end of the trial, to deliberate, research and determine whether there was a question of jurisdiction to be addressed at all. Alternatively, he contended that even if the appellant raised the preliminary objection as he argued, yet he never did any tangible work or effort to address the court about its merit. All in all, he insisted that awarding costs is the discretion of the court and cited the case of **Kiska Limited vs. Vittorio De Angelis** (1969) EA 71 where it was stated that;

"Thus, where a trial court has exercised its discretion on costs, an Appellate Court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute "good reason" within the meaning of the rule."

He contended that, the judgment of the trial court has no any defects pointed by the appellant. Therefore, prayed this court to dismiss this appeal with costs.

I have considered the submission of both parties. It is well provided under section 30 of the Civil Procedure Code (supra) that, it is

discretion powers of the court to award costs. Section 30 (1) of the Act provides that;

*"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, ail 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.**"(emphasis is mine)*

In exercising the discretion powers to award costs, the court will have to consider the circumstances of each case. As such there is no hard and fast rule in exercising such discretion; it depends on the circumstances of the case. In other cases, the court may refuse to award costs even if the party wins the case and in some cases, the court may award costs to the winner. So it totally depends on the circumstances of each case; what is important is, the discretion to award costs must be exercised judicially. As stated in the case of **Kiska Limited vs. Vittorio De Angelis** (supra) cited by the respondent's counsel, where the trial court has exercised its discretion on costs, an appellate court is barred from

interfering unless the discretion has been exercised unjudicially or on wrong principles. But going through the judgment of the trial court, I see no point where the trial Magistrate exercised its powers unjudicially considering the circumstances of the case. In my considered view, the, the only fact that the case was disposed in favour of the appellant does not in itself entitle him to the costs. The trial court is subjected to consider other circumstances in awarding or refusing costs. On that regards, I refrain from interfering with discretionary powers of the trial court as long as it is pointed nowhere that such powers were not exercised judiciously.

On that basis, I therefore find that this appeal lacks merits and accordingly dismiss the same. I make no order as to costs.

Order accordingly.

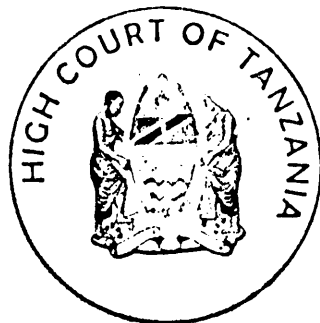
(Sgd)

DR. M. OPIYO

JUDGE

13/4/2017

I hereby certify this to be a true copy of the original.



A handwritten signature in black ink, appearing to read "D.J. Msoffe", is written over the printed name.

D.J. MSOFFE

Ag. DEPUTY REGISTRAR

ARUSHA