

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
CIVIL APPEAL NO 1 OF 2017

(Arising from Civil Case No. 105 of 2016 in the district court of Temeke)

1. YUSUPH MPINI.....1ST APPELLANT
2. AMADI LIUTE.....2ND APPELLANT
3. GRATIAN MUKANDARA.....3RD APPELLANT

VERSUS

1. JUMA Y. MKINGA.....1ST RESPONDENT
2. MIKIDADI A. MAKOBE.....2ND RESPONDENT
3. JUMA MTENDELWA.....3RD RESPONDENT

JUDGMENT

MASABO, J.L.:-

The Respondents unsuccessfully sued the Appellants in the district court of Temeke in Civil case No 105 of 2016. The appellants are disgruntled by the trial court's failure to grant them cost for the suit. Their appeal is consequently anchored on only one ground that the trial Magistrate erred in law in dismissing the suit without costs. The appeal was argued in writing.

Submitting on behalf of the Appellant, Mr. Juma Nassoro, counsel for the Appellant argued that the withholding of cost contravened section 30(1) Civil Procedure Code, Cap 33 RE 2002 which requires the court to give reasons for withholding orders as to costs of a suit or application. He further

reasoned that the withholding of cost was erroneous because the suit was heard interparties, the appellants engaged an advocate whom they paid, they gave evidence, filed pleadings and attended the suit from the beginning of the proceedings up to final determination of the suit all of which attracted costs and expenses which deserves to be reimbursed by the respondents by way of bill of costs. In support, he cited the cited the case of **Bahati Moshi Masabile t/a Ndondo Filing Station v Camel Oil** (t), Civil Appeal 2018 (unreported) where it was held that it is a general rule that a winning litigant as a matter of right must be awarded costs.

For the Respondents, it was submitted that the court is vested with discretion to make any orders it deems necessary for the ends of justice (Section 95 of the Civil Procedure Code, Cap 33 RE 2002) and that the trial magistrate while dismissing the suit did not order costs as it deemed it fair and just to require each part to bear their own cost. It was further argued that the suit was fairly heard and the appellants were given an opportunity to defend and prosecute their case. Regarding the discretion the court the respondents cited the case **Yusuph Same & Another v Hadija Yusufu**, Civil Appeal No. 1 of 2002 (CAT) and **Lyamuya Construction Company LTD V Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 and argued that discretionary powers of the court are to be discretionary exercised according to the rules of reasoning and not according to privileges. Further, citing the cases of **Regional Manager, TANROADS Kager V. Ruaha Concrete Company Limited**, Civil Application No 96 of 2007 (CAT) unreported; and **Tanga Cement Company Limited v Jumanne O. Massanga and Amos A.**

Mwalwanda, Civil Application No 6 of 2001(CAT) Unreported they argued that discretionary powers of the court must be judiciously exercised taking into account the circumstances of the case guided by the principles of justice, equity and common sense. Hence, the trial court exercised its discretionary powers awarding costs judiciously.

Having carefully considered the submissions the main issue to be addressed is whether in withholding the order for cost the trial court exercised its discretionary powers judiciously. As rightly argued on behalf of the Appellant, the court power with regard to the grant of costs is anchored in in section 30(1) and (2) of The Civil Procedure Code Cap 33 RE 2002 which stated 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.
[emphasis added]

The provision above has been interpreted in numerous decisions including in **Mohamed Salimin v 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 **Geofields Tanzania Limited V Maliasili resources Limited and others** (Misc. Commercial Cause No 323 of 2015) [2016] TZHC COM D 8 the court held with this provision in length where it stated that:

“it is a trite law that the losing party should bear the costs of a matter to compensate the successful party for expenses incurred for having to vindicate the right.”

The court held further 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 what ever 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.”

On the strength of these authorities and in consideration that section 30(2) uses the word 'shall' which imposes a mandatory requirement it goes without say that an order for withholding costs should be accompanied by concrete reasons. In the instant case, the judgment is entirely silent on the issue of costs. In the light of the above authorities and considering that the appellants fully participated and engaged an advocate it is naturally that they incurred

some costs which they would not have incurred in the absence of a suit against them, there as no reason for them costs.

As correctly argued on behalf of the Respondent, the discretion to award costs being a judicial discretion must as a rule be judiciously exercised. Thus it is imperative for the trial court to assign reasons supporting the withholding of costs. In the absence of such reasons, as in the instant case, the discretion cannot be said to have been judiciously exercised.

In the foregoing, I have found merit in the appeal and proceed to award it with cost. I further order for costs in favour of the Appellant for the lower court.

DATED at DAR ES SALAAM this 31st day of October 2019.



J.L. MASABO

JUDGE

Judgment delivered this this 31st day of October 2019 the Appellant and the Respondent, both present in person.



J.L. MASABO

JUDGE