

**IN THE HIGH COURT OF TANZANIA
(MWANZA DISTRICT REGISTRY)**

AT MWANZA

CIVIL APPEAL NO. 44 OF 2019

*(Appeal from the judgment and decree of the District Court of Misungwi at
Misungwi in Civii Appeal No. 3 of 2019 Dated 15th of August, 2019)*

SHIJA DEREFA APPELLANT

VERSUS

MSOBI NAMJI RESPONDENT

JUDGMENT

21st April, & 26th June, 2020

ISMAIL, J.

This is an appeal arising from the decision of the District Court of Misungwi, in respect of PC Civil Appeal No. 7 of 2019, which partly allowed the appeal that was instituted by the appellant, against the decision of the Primary Court of Misungwi at Inonelwa, in PC Civil Case No. 2 of 2019. In the said trial proceedings, the respondent's claim for costs of pursuing the matter in PC Criminal Appeal No. 79 of 2017, were partly allowed. In the latter, the appellant, then the accused person, was

convicted of malicious damage to property for allowing his cattle to graze on the respondent's farm as a result of which his crops were consumed and destroyed. He was sentenced to payment of fine or imprisonment for six months. Enforcing the verdict in criminal proceedings, the respondent instituted PC Civil Case No. 2 of 2019 in which a claim of TZS. 12,000,000/- was staked. The claim comprised of TZS. 3,500,000/- being damages for the damage suffered; TZS. 5,500,000/- being costs of pursuing the matter for two years and TZS. 3,000,000/- being damages for disruption of his activities. The trial court was convinced that the sum of TZS. 6,500,000/- was enough to recompense the respondent. It awarded it.

The decision did not sit well with the appellant. He challenged it in the District Court of Misungwi, vide PC Civil Appeal No. 7 of 2019 which significantly reduced the sum to an aggregate amount of TZS. 1,000,000/- to cater for costs and damages. The appellant would have none of it, he has decided to take a ladder up, through the instant appeal.

Disposal of the appeal was ordered to proceed by way of written submissions consistent with a schedule which was drawn. By close of

business on 26th May, 2020, only the appellant had conformed to the schedule for filing the submissions. Knowing that the law is settled in that respect, I applied the astute position settled in ***National Insurance Corporation of (T) Ltd & Another v. Shengena Ltd***, CAT-Civil Application No. 20 of 2007 (DSM-unreported), in which it was stated as follows:

"The applicant did not file submission on the due date as ordered. Naturally, the Court could not be made impotent by the party's inaction. It had to act. ... it is trite law that failure to file submission(s) is tantamount to failure to prosecute one's case."

See: ***Patson Matonya v. Registrar Industrial Court of Tanzania & Another***, CAT-Civil Application No. 90 of 2011; and ***Geofrey Kimbe v. Peter Ngonyani***, CAT-Civil Appeal No. 41 of 2014 (DSM-unreported).

Submitting in support of the appeal, the appellant began by abandoning the first ground of appeal, choosing to remain with ground two as a sole ground of appeal. In the said ground, the appellant contends that ***the District Magistrate erred in law by awarding compensation for general damages and costs while the same were not proved***. In respect thereof, the appellant's contention is that since the respondent did not prove how the costs were incurred then the same ought not to have

been awarded and upheld. Relying on the decision of the Court of Appeal in ***Ashraf Akber Khan v. Ravji Govind Varsan***, CAT-Civil Appeal No. 5 of 2017 (unreported), he contended that since the trial court conceded and concurred that costs incurred were not sufficiently proved, the same ought not to have been granted. In this respect, the appellant argued that the 1st appellate court should have formed an opinion to quash and set aside the trial court's judgment. The appellant further contended that costs of the matter have to be taxed. The sum of TZS. 3,000,000/- which was awarded by the trial court before it was reduced to TZS. 500,000/- was not taxed by a Taxing Master. The appellant further argued that such costs emanated from PC Criminal Case No. 79 of 2017 in which no order as to costs was made. He contended that costs would not arise from a judgment in respect of which no costs were ordered.

From the appellant's submission, the question for the Court's determination is whether the 1st appellate court erred in its decision.

With respect to costs the law is settled. It is to effect that costs are a discretionary award made by the court. Exercise of such discretion, is as always, judicial and in conformity with established principles, without arbitrariness or capriciousness (See: ***Mohamed Salimin v. Jumanne***

Omari Mapesa, CAT-Civil Application No. 4 of 2014 (unreported)).

Consideration for awarding costs has been discussed in a number of court decisions one of which is the reasoning in **Geofields Tanzania Limited v. Maiiasiii Resources Limited & Others** (Misc. Commercial Case No. 323 of 2015 [2016] TZHC COM D 8 in which it was held:

"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.... 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 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 to the party without fault."

In the ordinary way of doing things, costs are awarded to a winning party. This was emphasized in **Bahati Moshi Masabile t/a Ndondo Filing Station v. Camel Oil (T) Ltd**, HC-Civil Appeal No. 216 of 2018 (DSM-unreported) in which it was held that it is a general rule and, as a matter right, a winning litigant must be awarded costs. Award of costs is a discretionary power that is exercised by courts judiciously and taking into account circumstances of the case and guided by principles of justice,

equity and common sense (see: ***Tanga Cement Compnay Llimited v. Jumanne O. Massanga and Amos A. Mwalwanda***, CAT-Civil Application No. 6 of 2001 (unreported)).

In the proceedings in the first appellate court, costs which were assessed at TZS. 3,000,000/- were whittled down to TZS. 500,000/- which is now complained about. The appellant's contention is that the proceedings in criminal case did not order costs.

While it is true that the trial magistrate in criminal case did not award costs, nothing would preclude a party from claiming costs that he incurred in pursuing the matter. It is common knowledge that no costs are awarded in criminal cases. However, a party is free to institute proceedings for recovery of costs that he incurred in pursuing his rights under the law, provided that he justifies his claim for costs. This is what the respondent did in the civil matter that bred this appeal. The trial court was convinced that those were the costs which were genuinely incurred. The 1st appellate court felt that such costs were highly inflated and were not justified, hence the decision to whittle them down. I find nothing wrong with that. On whether the 1st appellate court was right to award the costs without subjecting them to tax, I hold the view that the 1st appellate court was

perfectly within its powers to revise the figure if in its opinion the same was outrageous. Such reduction, however, was supposed to have had its base on some solid foundation and upon conviction that the figure reflected the sum which was actually incurred. This considers the fact that costs are a recompense or an indemnification of what was incurred by a party and not an arbitrary indulgence which can be dished out at will and subjectively. In this case, the formula used by the 1st appellate court to award the costs is as capricious as the criterion used by the trial court. This cannot be said to be the judicious use of discretion. In view of this anomalous indulgence by the 1st appellate court, I set aside the award of TZS. 500,000/- made by the 1st appellate court for want of justification.

As I turn to the question of damages, let me preface by restating the reasoning in the decision of the Court of Appeal in ***Anthony Ngoo & Another v. Kitinda Kimaro***, CAT-Civil Appeal No. 25 of 2014 wherein it was held:

"The law is settled that general damages are awarded by the trial judge after consideration and deliberation on the evidence able to justify the award. The Judge has discretion in the award of general damages. However, the judge must assign a reason, which was not done in this case."

The sum of TZS. 3,500,000/- which was awarded by the trial court as damages was revised downwards to a paltry TZS. 500,000/- which is still complained about by the appellant. Like the trial court, the 1st appellate court did not give the breakdown of which of the said sum constituted special damages and which one catered for general damages. It should be recalled that, as a general rule, award of damages is the domain of the trial court, done after a thorough assessment of the claim, supporting documents, and all the prevailing conditions. An appellate court can only intervene in very limited circumstances some of which are enshrined in the landmark case of ***Cooper Motors Ltd v. Moshi Arusha Occupational Health Services*** [1990] TLR 90, in which it was held:

*"In claim for general damages, particulars will not be needed of the quantum of damages claimed. On the other hand, the mere statement or prayer of a claim for 'damages' will not support a claim for any particular injury or loss other than general damages. ... Whether the assessment of damages be by a judge or a jury, the appellate court is not justified in substituting a figure if it had tried the case **Before the appellants court can properly intervene, it must be satisfied either that the judge, in assessing the damages, I applied a wrong principle of law (as taking into account some irrelevant factor leaving out of account some relevant one); or, short of this that the amount awarded is so inordinately low or so inordinately***

high that it must be wholly erroneous estimate of damage."

[Emphasis is provided].

In this case, the 1st appellate court intervened and drastically reduced the sum. In my considered view, the decision by the 1st appellate court was justified, having noted that the sum awarded by the trial court was so inordinately high, implying that the same was a wholly erroneous estimate of the damage that the respondent allegedly suffered. I am also convinced that the award by the trial court took into account some irrelevant factors that led to awarding a hefty sum which was devoid of any plausible justification. The revised sum of TZS. 500,000/- is, in my view, justified and an adequate recompense of the damage that the respondent suffered.

Consequently, and, in view of the foregoing, I partly allow the appeal on the aspect of costs, while the other part is dismissed. No order as to costs.

It is so ordered.

DATED at **MWANZA** this 26th day of June, 2020.




M.K. ISMAIL

JUDGE

Date: 26/06/2020

Coram: Hon. M. K. Ismail, J

Applicant: Present

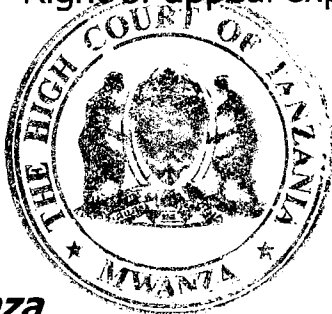
Respondent: Absent

B/C: B. France

Court:

Judgment delivered in chamber in the presence of the appellant but in the absence of the respondent, and in the presence of Ms. Beatrice b/C, this 26th day of June, 2020.

Right of appeal explained.



A handwritten signature in black ink, appearing to be "M. K. Ismail", written over a horizontal line.

M. K. Ismail

JUDGE

At Mwanza

26th June, 2020