THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(IRINGA DISTRICT REGISTRY)

AT IRINGA

LAND APPEAL NO. 41 OF 2020

ANDREW C. NDAKIDEMI ---------- APPELANT

VERSUS

NASSORO LWILA ---------- 1ST RESPONDENT

ANYESI N. LWILA ---------- 2ND RESPONDENT

MAJEMBE AUCTION MART ---------- 3RD RESPONDENT

09/11 & 10/12/2021

JUDGMENT.

MATOGOLO, J.

This is an appeal filed by the appellant one Andrew C. Ndakidemi after being partly dissatisfied with the decision of the District Land and Housing Tribunal (DLHT) in Land Application No. 63/ 2019

The brief background of this appeal is that, the respondents herein Nassoro Lwila, Anyesi N. Lwila and Majembe Auction Mart unsuccessfully sued the appellant in the DLHT in a claim for a suit premise in which they claimed to be lawful tenants. The appellant was partly aggrieved with the

judgment and he preferred to this court this appeal comprising of two (2) grounds of appeal as follows:-

1. That the learned trial Tribunal erred in law and fact by procuring the judgment with the reliefs which has never been prayed for by the Respondents.
2. That, the learned trial Tribunal erred both in law and fact by refusing to grant costs of the suit basing on illogical reasons after declaring that the appellant is a lawfully tenant.

The appellant herein prays as follows:-

i. That, this Honourable Court be pleased to allow this appeal.
ii. That, the orders of the District Land and Housing Tribunal for Iringa at Iringa be nullified.
iii. Costs of this appeal be borne by the Respondent.
iv. Any other relief (s) that this Honourable Court may deem fit, just and equitable to grant.

During the hearing of this appeal parties were represented, Mr. Emmanuel Kalikenya Chengula learned advocate represented the appellant while the respondents enjoyed the service of Dr. Ashery Utamwa learned advocate, the appeal was argued through written submissions.

With regard to the first ground of appeal, that the learned trial Tribunal erred in law and fact by procuring the judgment with the reliefs which has never been prayed for by the Respondents, Mr. Chengula submitted that, it is clear and undisputed fact that the trial Tribunal acted

upon and basing on the pleadings which among other things include the reliefs sought by the parties who bring the disputes before the Tribunal for determination. He contended that, the relief of 90 days given to the 1st and 2nd Respondents to use the suit premise for free while looking for alternative accommodation was never been prayed for by the respondents in their prayers before the trial Tribunal as well, since they lost the case on their application they were not entitled to such relief since they belong on inquisitorial legal system whereas the looser lose all and the winner takes all.

He contended that, the trial Tribunal erred in law and fact by procuring judgment with the relief which never been prayed by the respondents of which the same is bad in law and legal practice, he bolstered his argument by citing the case of ***Abel Maligisi versus Paul Fungameza,*** PC. Civil Appeal No. 10 of 2018 HC at Shinyanga (unreported) where at page 8 paragraph 3 and page 9 paragraph 1 of the typed judgment it was held that:-

> *"Before I conclude, I have noted, as the learned counsel for the appellant did that, the Magistrate on appeal introduced a new fact that whoever breaches the marriages contract will pay damages of RSHS. 2,000,000/= the fact is nowhere to be found on record of the trial court. This is bad in law. More so, as the damages were not specifically pleaded, it is*

correct as observed by the learned counsel that the learned Magistrate on appeal granted relief not prayed for. Again, this is bad in law".

He went on submitting that, since reliefs granted by the trial Tribunal had never sought anywhere in the application and since it is a common practice of the law that parties are bound by their own pleadings, for that reason, he prayed for this court to allow this appeal.

With regard to the 2nd ground of appeal that, the learned trial Tribunal erred both in law and fact by refusing to grant costs of the suit basing on illogical reasons after declaring that the appellant is a lawful tenant.

Mr. Chengula submitted that, it is a general principle of law that usually costs follow the event. In other words, the party who wins the case is entitled to the costs of the case this being a cerebrated principle of law as well as issues relating to costs is the creature of the statute, to support his argument he cited section 30 of the Civil Procedure Code [Cap. 33 R.E. 2019] in which among other things provides for the costs to be awarded to the party whom successfully win the case.

He submitted that, costs are awarded based on the discretion of the court but such discretion must be exercised judiciously and not arbitrarily. Costs serve among other purpose, to bar parties from filing hopeless cases, there are two reasons, first upon loosing the case the loser will pay costs of the case. This weakens the looser financially, second, award of costs puts the winning party at his/her financial position prior been sued as far as

costs of the case is concerned. The reason been that the winning party has to be refunded all the costs incurred during the trail of the case.

He went on submitting the Trial tribunal concluded the disputes between the parties to the case on 4th December 2020 without awarding the appellant with costs as it is shown at page 8 of the typed trial Tribunal judgment. Despite the fact that the law directs that once the orders as to costs is not granted to either party to the disputes then the reasons for that should be given thereof but the reasons as to no order of costs given by the Tribunal in its decision dated 4th December, 2020 at page 8 of the trial tribunal judgment that;..... "no order for costs due to the party's relationship" The said relationship is unsubstantiated, vague, controversial and illogical, its not sufficient, reasonable and concrete reasons since the case were neither filed under *forma pauperis,* nor matrimonial cases that involves division of matrimonial properties and some probate cases.

Mr. Chengula submitted that, it is unfair and unjust on the part of the appellant to be left without being awarded costs, by considering that he was taken to court by the 1st and the 2nd Respondents therefore it cannot be said that under normal circumstances there is good relationship to that effect. The records show that the appellant had engaged an advocate, he filed written statement of defence, there was transportation costs incurred, secretarial costs and other related costs, there was no reasons denying him costs, in facts the denial of cost could encourage scrupulous litigants to file cases before courts for wastage of time while knowing that at the end of the day no costs shall be awarded to the winning party.

He supported his argument by referring this court to the case of ***Bahati Moshi Masabile T/A Ndondo Filing station versus Camel Oil (T),*** Civil Appeal No. 216 of 2018 HC at Dar es Salaam (unreported. He concluded by praying to this court to nullify the orders of no order to costs of trial Tribunal thereof and the costs of this appeal be borne by the respondents.

In reply Dr. Utamwa submitted that, the appeal is generally too ambiguous in that the Appellant prays for nullification of the entire Land, Application No. 63 of 2019 which was delivered on 4th December, 2020 by the Iringa District Land and Housing Tribunal, but amazingly the appeal does not indicate what should be award instead.

With regard to the first ground of appeal, Dr. Utamwa submitted that, the appellant has misdirected himself by holding that, 90 days grace period was awarded to the respondents without a prayer to that effect. This is because it is evident from the decree and or the application itself, that in relief number (iv) the respondents were seeking for any other reliefs that the Tribunal could deem just and equitable to grant. Therefore, the Tribunal was dully moved to grant the relief of 90 days owing to relief number (iv) of the application.

He went on submitting that, the Tribunal went further and also recorded the reasons for granting such grace period at page 7 of the impugned judgment, where according to the Hon. Chairman, he observed that the 1st and 2nd Respondents were conducting business in the suit premises since 2010, therefore in the interest of justice and to maintain the relationship between the parties, he found it just and equitable to grant the

respondents a 90 days grace period before they could vacate the premises. He submitted that, the first ground of appeal has already overtaken by events, since 90 days grace period has expired almost 6 months ago and the said Respondents have already been evicted by the Appellant.

With regard to the second ground of appeal, he submitted that, the appellant contends that the Tribunal erred by refusing to grant him costs of the suit relying on illogical reasons, despite the fact that he was declared the lawful tenant. He submitted further that, the law is well settled that, the power for any court to award or not to award costs is discretionary depending on the circumstances of each case, and that, where any court withholds costs, the reasons for not awarding such costs must be adduced in writing, he supported his argument by citing section 30(2) of The Civil Procedure CODE (Cap 33 R.E 2019) which provides that:-

> *"Where the court directs that any costs shall not follow the event, the court shall state its reasons in writing".*

Also, he cited regulation 21 (1) of the Land Dispute Courts (District Land and Housing Tribunal Regulations, 2003 which read as follows:-

> *"The Tribunal may make such orders as to costs in respect of the case as it deems just".*

He further cited the case of ***Aida Makukura & 23 Others versus Mahadi Hadi (As personal Legal Representative of Mohamed Mahfoudh Mbaraka,*** Land Appeal No. 228 of 2020, High Court (Land Division) at Dar es Salaam (unreported) where it was pointed out at page 8

that in exercising discretionary powers, courts must do so judiciously taking into account the circumstances of each case. It was further observed that the guiding principles in awarding costs should be justice, equity and common sense and not punishing the losing party.

He went on submitting that, he is confident to speak that, the Hon chairman of the District Land and Housing Tribunal for Iringa did not error in any how by dismissing Land Application No. 63 of 2019 without awarding costs to the Appellant since he exercised his discretion powers judiciously by clearly giving the reasons for not awarding costs. He contended that, the reason for the trial chairman for not awarding costs is disclosed in the last paragraph of page 7 of the impugned judgment, where the tribunal emphasized that, it ordered so to maintain the relationship between the appellant and the 1st and 2nd respondents, as the appellant himself at the trial tribunal testified that, the 1st respondent is his best friend and family friend for over 20 years. He contended further that, the reason is acceptable by many courts hence he differs with the appellant's counsel that, the said reason is unsubstantiated and illogical since the same reason was also embraced in the case of ***Aida Makukura*** (supra).

With regard to the complaint that, the appellant incurred costs in the cause of defending Land Application No. 63 of 2019 such as attendance, transportation, secretarial and other related costs, he argued that, he differs with the counsel for the appellant on that point because he thinks the trial chairman was in better position to judge the extent to which the appellant had suffered in terms of costs than this court.

Dr. Utamwa supported his argument by referring this court to the case of ***Nyabakwasi Kamata versus Mathias Timoth***, HC Civil Revision No. 16 of 2019 TZHC at Mwanza (unreported) where the court had this to say at page3:-

> *"It should be known that the court has discretional power to award with cost or without consequently, I find no reason to differ with the trial Magistrate decision as he was in a better position to decide the case and he used his discretional power to award the applicant or not to award her. For those reasons, the application before this court is dismissed".*

With regard to the case of ***Bahati Moshi Masabile T/A Ndondo Filing station versus Camel Oil (T)*** (supra) as cited by Mr. Chengula, Dr. Utamwa submitted that, to hold that denial of costs would encourage scrupulous litigants to file cases before courts with no justification for wastage of time while knowing that at the end of the day no costs shall be awarded to the winning party. He contended that, the case of ***Bahati Moshi Masabile*** (supra) can be easily be differentiated from the circumstances of the appeal at hand due to the following variances;

1. The suit that was dismissed without costs in the case of **Bahati** was hopelessly filed in the court with no jurisdiction, unlike in the

case at hand where the respondents had well instituted *Land Application No.63 of 2019* in the competent court, with no bad intentions of time wastage.

In the Bahati's case we see that the court found that, the trial Magistrate erred to withhold costs after dismissing a suit that was filed hopelessly in an incompetent court with no jurisdiction and the same would encourage litigants to institute suits of such nature to waste time.

However, the circumstances are different in the instant matter where the respondents instituted Land Application No. 63 of 2019 in a competent court and they had an obvious cause of action after being served with an eviction notice from the appellant. Therefore, the appellant cannot blame the respondents for instituting the suit since he is the one who initiated the dispute by attempting to evict the respondents.

In the case of **Bahati** the trial court did not give any reasons after refusing to award costs, unlike in the case at hand where the Hon. Chairman plainly recorded the reason for withholding costs in the last paragraph of the impugned judgment. Therefore, while the court in the case of **Bahati** found that the trial magistrate had acted un-judicially to withhold costs without recording the reasons, the circumstances are different in the instant case where the tribunal recorded the reasons which are also reasonable.

He went on submitting that, from the differences above the case of **Bahati** can be distinguishable from this appeal as it was also distinguishable in the case of ***Aida Makukura*** (supra) where despite of being cited by the appellants, the court still dismissed their appeal because

the circumstances were different as the discretion to withhold costs was exercised judiciously.

Dr. Utamwa concluded by praying to this court to dismiss this appeal with costs because it is baseless and has no merits at all.

Having read the respective submissions by the parties and read the grounds of appeal and carefully examining the trial Tribunal records, the issue to be determined here is whether this appeal has merit.

The main complaint in the first ground of appeal is that, the District Land and Housing Tribunal erred in law and fact by procuring the judgment with the reliefs which have never been prayed for by the respondents

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The trial Tribunal record speaks louder that, the following are the prayers prayed by the respondents before the trial Tribunal:-

(a) A declaratory order that the applicants are the lawful tenant of the suit premises.

(b) A permanent injunction restraining the 1st respondent or his agents or servants from interfering whatsoever with the tenancy agreement over the suit premises.

(c) Costs of this suit.

(d) Any other reliefs this honorable tribunal may deem fit and equitable to grant.

After hearing the suit the trial tribunal ordered that;

1. The matter is dismissed but no order for costs due to the parties relationship.

2. The applicants to use the suit kibanda free of charge for period of 90 days from judgment date while they are looking alternative accommodation.

Basing on the above reliefs that were prayed by the respondents here in, the order that, the respondents to use the said Kibanda free of charge was never prayed. For that reason, in my opinion as the respondents were using the said kibanda for business purposes and considering that, among the reliefs he prayed for the Tribunal to grant any other order that, the Tribunal may deem just and equitable to grant. For interest of justice the trial Tribunal saw it just and equitable to grant the respondents 90 days grace period before they could be evicted from the said Kibanda, as the respondents were using it for doing business. In my view the order by the Tribunal was correct as 90 days period was to give room for the respondents to get another place to continue with their business. Thus, in my opinion the first ground of appeal has no merit.

With regard to the 2nd ground of appeal, the complaint here is that, the Tribunal erred for not awarding costs to the appellant.

In civil litigation normally costs follow events. In the case of ***Mohamed Salmini v. Jumanne Omary Mapesa,*** Civil Application No. 04 of 2014 CAT at Dodoma (unreported), 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. One of the*

established principles is that, costs would usually follow the event, unless there are reasonable grounds for depriving a successful party of his costs. A successful party could lose his costs if the said costs were incurred improperly or without reasonable cause, or by the misconduct of the party or his advocate".

Also in the case of ***Registered Trustee of the Roman Catholic Archdiocese of Dar es Salaam versus Sophia Kamani*** ,Civil Appeal No. 158 of 2015 CAT at Dare es Salaam (unreported) it was held that:-

"Finally, the order of costs. It is well known principle that a winner is entitled to cost unless there are exceptional circumstances which were shown to exist. So, the appellant is entitled to costs"

In the instant case as we have seen above the trial Chairperson dismissed the application but did not award costs to the appellant.

With the above cited cases awarding costs is the requirement of the law that once the court withholds the costs must give reason for doing so. But the reason advanced by the trial Tribunal chairperson appears to be irrelevant to the matter at hand, also was not sufficient to lead for denying the costs to the appellant.

The only reason given for not awarding costs is to maintain the relationship between the appellant and the 1st and 2nd respondents. After all it was not explained well as to what that relationship the trial Tribunal aimed to protect to justify his departure from the general practice. He did

not explain whether there were present exceptional and compelling circumstances justifying the waiver of costs to the wining party.

Basing on the instructive decisions of the Court of Appeal above cited, it is my firm view that the trial chairperson did not exercise his discretion properly for not awarding costs as the reason for not awarding costs he gave was not sufficient, because the records shows that, the appellant had engaged a lawyer, he filed written statement of defence, there are secretarial costs incurred and other costs as he has complained. The appellant was entitled to be awarded costs so as to compensate him for expenses he incurred in prosecuting the case. I find merit in the second ground and allow this appeal, the appellant is entitled to costs in this court and in the District Land and Housing Tribunal.

It is so ordered.

DATED at **IRINGA** this 10th day of December, 2021.

F.N. MATOGOLO
JUDGE.
10/12/2021

Date: 10/12/2021
Coram: Hon. F. N. Matogolo – Judge
Appellant: Mr. Emmanuel Chengula Advocate
1st Respondent: Present
2nd Respondent:
3rd Respondent: Absent
C/C: Grace

Mr. Emmanuel Chengula – Advocate:

My Lord I am appearing for the appellant being assisted by Mr. Byombalirwa Advocate.

Nuru Stanley – Advocate:

My Lord I am appearing for the 1st and 2nd respondents.

Mr. Emmanuel Chengula:

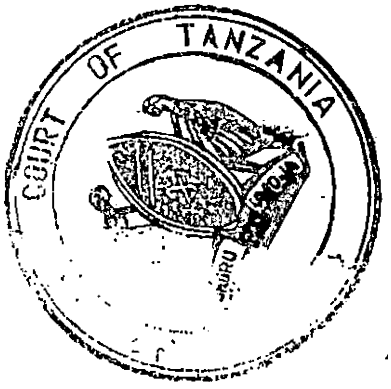
My Lord the matter is for judgment on our part we are ready if it is ready.

Nuru Stanley:

We are ready.

COURT:

Judgment delivered.



F. N. MATOGOLO

JUDGE

10/12/2021