

**THE UNITED REPUBLIC OF TANZANIA  
(JUDICIARY)**

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

**AT IRINGA**

**MISC. LAND APPEAL NO. 02 OF 2022**

(Originating from District Land and Housing Tribunal for Iringa  
at Iringa Misc. Land Application No. 102 of 2021)

**BETWEEN**

**MATIAS RAPHAEL MBANGWA ..... APPELLANT**

**VERSUS**

**YAHAYA KAPENE ..... RESPONDENT**

**Date of Last Order: 31/05/2022**

**Date of Judgment: 05/07/2022**

**EX-PARTE JUDGMENT**

**MATOGOLO, J.**

This is an appeal by one Matias Raphael Mbangwa after being dissatisfied with the decision of the District Land and Hosing Tribunal for Iringa on the claim of costs.

He filed an appeal to this court comprising of six grounds of appeal as follows:-

1. That, the trial chairman erred in law and facts by giving favour the respondent for not paying the costs to the Appellant incurred at

Ibumu Ward, and without adhere the Ward declaration about the costs used by the Appellant.

2. That, the trial chairman erred in law and fact by composing a judgment in favour of the Respondent relying on the technicalities hence reached to the unfair decision.
3. That, the trial tribunal erred in law and fact by considering the surprised Respondent's submission regarding preliminary objection which is unjustifiable, hence reached to unfair decision.
4. That, the trial chairman erred in law and in facts by giving favour the Respondent without decide the Application on the balance of probability.
5. That, the trial chairman erred in law and facts by condemn (sic) the Appellant unheard.
6. That, the trial chairman erred in law and facts by not considering that the Ibumu Ward ignored the proper forum on outlined the Appellant's costs hence made the Appellant to loose his costs, as a result declared unjust decision.

The Appellant prayed to this court to allow the appeal and quashed the decision by the District Land and Housing Tribunal with costs.

The Respondent in this appeal one Yahaya Kapene though served but declined service and a report was furnished to this court. The appeal was therefore heard ex-parte, and through written submission. The brief back ground of the matter is that, the parties had a land dispute. The same was filed by the present Appellant at Ibumu Ward Tribunal which decided for

the Appellant. The matter was referred to the District Land and Housing Tribunal for execution vide Civil Application No. 102 of 2021.

In that application, the Appellant also prayed to be paid the sum of Tshs. 872,000/= as costs of the case he incurred in prosecuting his case at the Ward Tribunal. The Respondent agreed with the decision of the Ward Tribunal regarding the land in dispute and left it to the Appellant. However he disputed for the claimed costs in which his advocate Ms. Rehema Daffi submitted before the District Land and Housing Tribunal that the decision of the Ward Tribunal is silent on the amount of costs awarded, such that the amount of Tshs. 872,000/= claimed by the Appellant as costs of the case at the Ward Tribunal cannot be accepted. The District Land and Housing Tribunal agreed with the Respondent and thus did not award the claimed costs hence this appeal.

Having gone through the appellant's grounds of appeal and his submission in support of his appeal, although he filed six grounds but the same can be canvassed in only two grounds:-

1. Failure by the District Land and Housing Tribunal to award costs to the Appellant.
2. The District Land and Housing Tribunal deciding the application basing on technicalities.

The appellant's complaint is that the Ward Tribunal of Ibumu awarded him costs of the suit but the District Land and Housing Tribunal without any good reasons denied him such costs. On the issue of deciding the matter on technicalities the Appellant asserted that the chairman to the

District Land and Housing Tribunal erred to entertain objection from the Respondent's Advocate that he did not prove costs of the case Appellant incurred at the Ward Tribunal while he proved the same. The Ward Tribunal analyzed the amount incurred by the appellant. The District Land and Housing Tribunal was required to order the same. He submitted that before the District Land and Housing Tribunal the matter was for mention but the learned advocate raised the objection and the Appellant who was unrepresented was not given chance to respond to it nor was it served to him before, he was just taken by surprise. The Respondent refused to pay costs while he knows that Appellant incurred costs at the Ward Tribunal.

Starting with the issue of costs, but before I discuss on the issue of costs, there are allegations by the appellant that he was condemned unheard which I think it is important to resolve them first. That was alleged in ground no. 5 of appeal and his written submission. His complaint primarily is that the matter was not fixed for hearing but it was just fixed for mention thus he was not prepared for hearing. It should be noted from the outset that in civil matters procedure for mention is not provided for by law. The law provides for hearing. The District Land and Housing Tribunal record shows that the Appellant had lodged an application for execution before it in which he also claimed costs he incurred in the Ward tribunal of Ibumu. The Respondent who was the judgment debtor admitted to vacate from the suit. However he disputed the claimed costs on the ground that the same was not decided in the trial Ward Tribunal. The Respondent's advocate did raise that issue after the Appellant has addressed the Tribunal on the trial Tribunal award and the costs of the case he filed in the Ward

Tribunal. Hence what was raised by the Respondent was a result of the Appellant's submission, it was the respondent's reply to what Appellant had submitted. His attempt to have the matter be adjourned to another date for him to send evidence was reject, in actual fact it had no room as that was not the trial Tribunal for him to send evidence. That ought to have been done at the trial Ward Tribunal.

Now going back to issue of costs, I have gone through the proceedings of the Ward Tribunal and decision thereof. Although the Ward Tribunal in its decision mentioned the issue of costs but that was not quantified. To be precise the order by the Ward Tribunal of Ibumu is herein below quoted:-

***"GARAMA ZILIZOTUMIKA WAKATI WA  
KUENDESHA KESI KATIKA BARAZA LA  
KATA IBUMU TANGU TAR. 23/3/2020.***

*YAHAYA KAPENE AMESEMA KUWA YEYE  
HAYUKO TAYARI KULIPA GARAMA  
ALIZOAMLIWA NA BARAZA.*

*Sahihi yake*

*YAHAYA KAPENE AMEKANUSHA JUU YA  
GARAMA ZILIZOPANGWA NA MSHITAKIWA NA  
BARAZA LILIMUOMBA NDUGU YAHAYA AWEZE  
KUSAINI KUWA HATALIPA GARAMA HIZO  
NDUGU YAHAYA KAPENE AMEKATAA KUSAINI  
KUWA HATALIPA.*

*R. Mhingu".*

There is nowhere in above quoted passage nor in the Ward Tribunal judgment indicated how much the Respondent was condemned for costs of the suit, nor did the Appellant claimed for costs and mentioned the amount of costs she incurred in prosecuting her case in her evidence.

The amount of Tshs. 872,000/= claimed by the Appellant has featured for the first time before the District Land and Housing Tribunal in the execution proceedings. That amount would not be executed because it was not adjudged by the Ward Tribunal. The District Land and Housing Tribunal was correct to decline to award that amount as costs of the suit. What appears to be related with the costs of the case is a separate sheet which is attached in the record in which the Appellant listed costs which he stated he incurred in prosecuting the case at the Ward Tribunal of Ibumu from 23/03/2021 to 11/05/2021, which include transport allowance Tshs. 64,000/=, visiting locus in quo Tshs. 108,000/=, disturbance and loss of time Tshs. 300,000/= and compensation for 20 basket (tenga) of tomatoes valued at Tshs. 400,000/= thus making a total of Tshs. 872,000/=.

However as I have pointed out earlier there is nowhere in the Ward Tribunal record where such costs were discussed by the Tribunal and decided on them, upon going through the documents annexed by the appellant to his petition of appeal, the copy (photocopy) of claim of costs appears to be stamped with the Ward Tribunal seal. I was surprised to see that as the original document of that claim of costs is not stamped.

Regulation 21(1) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulation, G.N. No. 174 of 2003 empowers the Tribunal to make an order as to costs in respect of the case as it deems just. The High Court Commercial Division in the case of ***Geofields Tanzania Limited vs. Maliasili Resources Limited and Others***, Miscellaneous Commercial Cause No. 323 of 2015, (2016) TZHC Com. D8 held as follows:-

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

Again in the case of ***Njoro Furnitures Mart Ltd vs Tanzania Electrical Company Ltd (1995) TLR 205***, the Court of Appeal of Tanzania, has this to say:-

*"Undoubtedly in our opinion, costs are within the discretion of the court as stated under Section 30 of the Civil Procedure Code, 1966. It has however long been established by the courts that costs normally follow the event. See case of ***Kiska Ltd vs. De Angelis (1)*** Moreover, under Subsection (2) of Section 30 of the Civil Procedure Code, it is expressly stated that, where the court's directs that any*

*costs shall not follow the event, the court shall state its reasons in writing".*

As it was correctly held by this court, Maghimbi, J in the case of ***Aida Makukura and 23 Others vs. Manadi Hadi (As personal legal representative of Mohamed Mahfoudh Mbaraka***, Land Appeal No. 228 of 2020, High Court Land Division (unreported) at page 10 that:-

*"I find that to be satisfactory reasons because costs are not an automatic right to the winning party, it is rather in the discretion of the court to see the circumstances of the case, a discretion which should be exercised judiciously by adducing reasons for not doing so".*

The chairman of the Land and Housing Tribunal in his ruling explained as to why it did not award costs to the appellant.

At page 1 of the ruling last paragraph, the learned chairman said:-

*"Hukumu ya Baraza la Kata iko kimya juu ya swala la gharama za kesi kwani haijasema chochote kwa mazingira hayo kiasi cha gharama kinachoombwa. Baraza hili linakataa hizo gharama".*

To that I agree with that position taken by the District Land and Housing Tribunal. It is trite law that what is not decided cannot be dealt with. In the case of ***Hotel Travertine Ltd and Other v. National Bank***



**of Commerce (NBC) Ltd [2006] TLR 133**, the Court of Appeal of Tanzania, held that:-

*"As a matter of general principle, an appellate court cannot allow matters not pleaded or argued in the court below".*

As the Ward Tribunal did not decide on the costs by pronouncing the awarded costs, the District Land and Housing Tribunal as an executing court could not award costs in the execution of the decree by the trial Ward Tribunal. An executing court can only execute what is in the decree and not otherwise.

That said I find no merit in this appeal, the same is hereby dismissed. Each party to bear his costs in this appeal.

**DATED at IRINGA** this 05<sup>th</sup> day of July, 2022.

  
**F. N. MATOGOLO**

**JUDGE.**

**05/07/2022**

Date: 05/07/2022  
Coram: Hon. F. N. Matogolo – Judge  
L/A: Blandina Mwenda  
Appellant: Present  
Respondent: Absent  
C/C: Charles

**Appellant:**

Honourable Judge I was give summons to serve the Respondent. The summons was sent to him by the village chairman but he declined to accept service saying his case is over.

**COURT:**

Judgment delivered in the presence of the appellant but in the absence of the Respondent.



*F.N. Matogolo*  
**F.N. MATOGOLO**

**JUDGE**

**05/07/2022**