

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
THE DISTRICT REGISTRY OF BUKOBA
AT BUKOBA

MISC. LAND CASE APPEAL NO. 19 OF 2022

*(Arising from Appeal No. 79 of 2019 in the District Land and Housing Tribunal for Karagwe at Kayanga
and Originating from Civil Case No. 17 of 2019 in the Bugene Ward Tribunal)*

APOLO KYARWENDA----- APPELLANT

VERSUS

MACLAUD KANYAMBO----- RESPONDENT

JUDGMENT

Date of the Last Order: 02/09/2022

Date of Judgment: 16/09/2022

A.E. Mwipopo, J.

Lawsuits are instituted in Court by the party who want to get some redress following injuries caused by the other party. As result, parties are often concerned with the process including outcome of litigation. In civil litigation, one possible aspect that should not be overlooked in the case is the cost of the suit itself. In the present case, the appellant namely Apolo Kyarwenda have filed the present appeal against the order of the Karagwe District Land and Housing Tribunal (DLHT) to award the cost of the Appeal No. 79 of 2019 to the respondent after the said appeal was granted. The said dispute originates from Civil Appeal No. 17 of 2019

at Bugene Ward Tribunal which was instituted by the appellant. The appellant successfully sued the respondent herein namely Macklaud Kanyambo in the Ward Tribunal for encroaching into the suit land. The decision aggrieved the respondent who appealed to Karagwe DLHT. In the said appeal, the appellant informed the appellate Tribunal on the hearing date to allow the appeal since the person who sold the land in dispute was not joined in the main case at Bugene Ward Tribunal. Following the appellant's submission, the DLHT allowed the appeal with cost and quashed the decision of trial Ward Tribunal in Civil Case No. 17 of 2019. The appellant was aggrieved with the order for cost and filed the present appeal.

In his petition of appeal the appellant has two grounds of appeal as follows hereunder:-

- 1. That, the District Land and Housing Tribunal for Karagwe at Kayanga erred in law and fact in giving the order for cost to the respondent while the appeal was determined on the irregularities committed by the trial Tribunal and the appellant conceded to the said irregularities which vitiated the whole proceedings and the orders made therein. After the appellate Tribunal had come to the conclusion that the proceedings and decision of the trial Tribunal were irregular and decided to quash the same, it ought to have ordered each party to bear his cost on noting that the irregularities were caused by the trial Tribunal and not by the parties, and on further noting that the dispute was not determined on merits.*
- 2. That the District Land and Housing Tribunal for Karagwe erred in law and fact in failing to consider the submission and prayer made by the appellant*

during the hearing of the appeal, for quashing the irregular proceedings of the trial Tribunal and ordering each party to bear his cost.

On the hearing date, both parties were present in person. The Court invited both parties to address the Court on grounds of appeal.

The appellant submitted jointly on all two grounds of appeal found in the petition of appeal. He said that the Karagwe District Land and Housing Tribunal erred to order the appellant to pay cost while both parties appeared before the District Land and Housing Tribunal. He said he supported the appeal before District Land and Housing Tribunal for intention to find peace with the respondent, but the respondent is claiming for a lot of money as cost. The District Land and Housing Tribunal was supposed to order each party to take care of his own cost as both of them appeared in the District Land and Housing Tribunal.

In his response, the respondent said that the appellant admitted before the District Land and Housing Tribunal that he was supposed to join Geoffrey Ruboneka who sold the land in dispute to him as the 2nd defendant in the case of Ward Tribunal. He have been prosecuting the said appeal for almost three years as result he deserve to be paid cost. The District Land and Housing Tribunal properly ordered for the payment of cost. This was the end of submission from both sides.

From the submissions, the centre of dispute in this appeal is the order for cost which was given by the District Land and Housing Tribunal. Thus, the issue

for determination in this appeal is whether the District Land and Housing Tribunal properly ordered the appellant to pay for the cost of the suit.

Costs is awarded in civil litigation to compensate a successful party for the legal costs incurred in having to initiate and/or to defend legal proceedings. The cost awarded is not intended to punish the unsuccessful party. It is discretion of the Court to award cost. The same is provided by Section 30 (1) of the Civil Procedure Code Act, Cap. 33 R.E. 2019. The said section provides 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."

This Court while interpreting section 30 of the Civil procedure Code Act in the case of **Nkaile Tozo vs. Phillimon Musa Mwashilanga** [2002] TLR 276 it held that:-

"... the awarding of costs is not automatic. In other words, they are not awarded as to the successful party as a matter of course. Costs are entirely in the discretion of the Court and they are awarded according to the facts and circumstances of each case. Although this discretion is a very wide one like in all matters in which Courts have been invested with discretion in

awarding or denying a party his costs must be exercised judicially and not by caprice...”

The Court in the above cited case was saying that although awarding cost is discretion of the Court the discretion has to be exercised judiciously. Thus, awarding and denying cost has to be according to the sufficient reason. The Court of Appeal subscribed to the position taken in the case of **Nkale Tozo**, (supra), in the case of **DB Shapriya & Company Limited vs. Regional Manager, Tanroads Lindi**, Civil Reference No. 1 of 2018, Court of Appeal of Tanzania, at Dar Es Salaam, (unreported), where it held at page 7. The Court of Appeal went on to state in page 8 of the judgment the importance of the Court to state explicitly and specifically which party is to meet cost of the other party to the action. The Court stated as follows hereunder:-

"I would also add that since the discretion in awarding or denying a party his costs must be exercised judicially and not by caprice, the Court is enjoined to state explicitly and specifically which party is to meet the costs of the action of the other party to the action. That is so especially on the reason that an award of costs to one party against the other grants a benefit to the former and imposes a liability on the latter. Such an award, therefore, cannot be merely implicit."

The court is not supposed to deprive the award for cost to the successful party except for good cause as it was held in the case of Hussein **Janmohamed & Sons vs. Twentsche Overseas Trading Co. Ltd** [1967] EA 287. The same

position was stated in the case of **Mohamed Salmini vs. Jumanne Omary Mapesa**, Civil Application No 4 of 2014, Court of Appeal of Tanzania at Dodoma, (unreported), 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. 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."

On the factors to be considered before decision to grant or deny to award cost, this Court in the case of **Juma Mganga Lukobora and 7 others vs. Tanzania Medicine and Medical Devices Authority and 3 Others**, Misc. Civil Application No. 642 of 2020, High Court at Dar Es Salaam, (unreported), cited with approval the Kenya's case of **Independent Electoral and Boundaries Commission Ex-Parte Mohamed Ibrahim Abdi & Others** which enunciated the factors which the Court should take into account in granting or refusing to grant cost. The said factors includes the conduct of the parties, the subject of litigation, the circumstances which led to the institution of the legal proceedings, the events which eventually led to their termination, the stage at which the proceedings were terminated, the manner in which they were terminated, the relationship between the parties and the need to promote reconciliation amongst

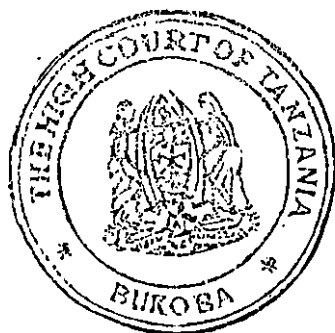
the disputing parties, the social, cultural and economic reasons. The rationale behind should be to bring fairness and justice between the parties.

Taking into consideration those factors in the present case, the appellant successfully sued the respondent for trespassing in his land in the Bugene Ward Tribunal. The respondent appealed to the District Land and Housing Tribunal in Appeal No. 79 of 2019. The record show that on 21.07.2021, the appellant informed the DLHT that the appeal has to be allowed as the person who sold the land to the respondent was not sued. He prayed for the decision of the trial Ward Tribunal be quashed and the matter to start afresh so that Geoffrey Rubonela could be joined. On that date the appeal was adjourned to another date. The appellant repeated the same prayer to the trial Chairman on 29.09.2021 and as result the DLHT allowed the appeal and quashed the proceedings and decision of the trial Ward Tribunal with cost. Thus, the appeal was terminated before hearing of the same following the appellant's prayer for the DLHT to allow the appeal.

The irregularity which was pointed by the appellant at DLHT that made appellant to ask the DLHT to allow the appeal is that Geoffrey Rubonela was supposed to be joined as party in the trial Ward Tribunal. The said irregularity was caused by decision of the trial Ward Tribunal to proceeded with hearing of the case despite the respondent stating that he bought the land in dispute from Geoffrey Rubonela. Following the decision of the trial Ward Tribunal to continue

with the case to its end, the respondent appealed to the DLHT for redress and the appellant did not oppose the appeal. In such situation, the DLHT ought not to award the cost of the suit to the respondent.

For that reason, the appeal is allowed. The order for cost awarded by the Karagwe District Land and Housing Tribunal is hereby set aside and it is replaced with the order that each party shall take care of his own cost of the suit. Given the circumstances of this case, I will give no order as to the cost of this suit. It is so ordered accordingly.

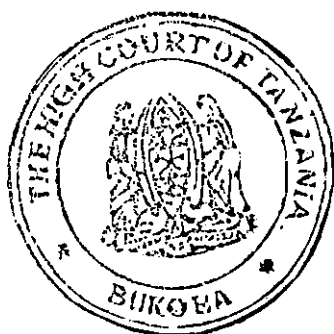


A.E. Mwipopo

Judge

16.09.2022

Court: The Judgment was delivered today 16.09.2022 in the presence of the appellant and the respondent.



A.E. Mwipopo

Judge

16/09/2022