

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOKA DISTRICT REGISTRY

AT BUKOKA

LAND APPEAL NO. 36 OF 2022

(Arising from Land Application No. 58 of DLHT Kagera)

THEOBARD BONIPHACE TIBAHIKAO-----APPELLANT

VERSUS

ELIAS KASHAGAMA-----RESPONDENT

JUDGMENT

28/09/2022 & 06/10/2022

G.N. ISAYA, J.

This is an appeal where the Appellant is challenging the decision of the Bukoba District Land and Housing Tribunal which upheld the preliminary objection raised by the Respondent and thereby dismissing the suit with costs for want of territorial jurisdiction.

The brief facts underlying the matter is that the Respondent had once filed an appeal in this court which was registered Land Case Appeal No.71 of 2019 faulting the decision of the District Land and Housing Tribunal for Kagera at Bukoba in Land Application No.105 of 2013. This court (Mtulya, J) quashed the judgment, set aside the proceedings and orders emanated in the impugned application. The court directed any interested party to prefer a fresh and proper suit in accordance with the law regulating land dispute.

On 15th day of September,2021 the appellant herein approached the Bukoba District Land and Housing Tribunal at Bukoba and filed a fresh suit vide Application No. 58 of 2021. The same encountered a stumbling block due to the respondent raising a Preliminary Objection on point of law that the tribunal

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lacked territorial jurisdiction to adjudicate on the suit land which is located in Karagwe District. That there was already established the District Land and Housing Tribunal in Karagwe where the suit land is situated. The Preliminary Objection was sustained; the application was dismissed with costs.

It was on that dismissal and costs awarded to the respondent which precipitated the current appeal through the following grounds:

- 1. That the tribunal erred in law to reach to an order for the costs in contravention with section 30(2) of the Civil Procedure Code, Cap.33 R.E 2019.*
- 2. That the tribunal erred in law for not exercising its powers to transfer the suit to the tribunal with territorial jurisdiction.*

When the appeal was called on for hearing, the appellant enjoyed the professional services of Mr. Raymond, Advocate whereas the respondent had a legal service of Mr. Angelo Samwel, the learned advocate.

In submission, Mr. Raymond, contended that it was wrong for the DLHT to dismiss the appeal for want of jurisdiction. It ought to have strike out the matter since dismissal entails that the matter was heard on merit which was not the case and if the order is left to stand, all doors are closed for him to institute the case. He cited **The Director General NSSF vs Consolata Mwakisu**, Civil Application No.329/01/2017, CAT at Dar es Salaam (Unreported), **Ibrahim Omary (EX.D.2323 IBRAHIMU) vs The Inspector General of Police and 2 Others**, Civil Appeal No.20 of 2009, CAT at Arusha.

Mr. Raymond on the second ground submitted that it was wrong to dismiss the appellant's submission for want of jurisdiction. According to him, the Bukoba District Land and Housing Tribunal for Kagera has entire jurisdiction to the whole region. Therefore, filing the matter afresh thereat was proper in law since in 2013 when it was filed, the Karagwe District Land and Housing Tribunal was not established yet, as it was established in 2015. However, if it had no



jurisdiction, the proper remedy was to struck out or it would have transferred the file to Karagwe under section 20,21 of CPC, Cap 33 on its own motion.

He finally prayed this court to set aside the dismissal order and remit back the case file to the tribunal to proceed or transfer the same to Karagwe. That since the matter is a *probono*, he prayed each party to bear its own costs.

Replying, Mr. Lameck contended that it is not true that the District Land and Housing Tribunal for Kagera, today has jurisdiction to the entire region. He substantiated that after establishment of the Karagwe District Land and Housing Tribunal in 2014 the Kagera DLHT ceased to have jurisdiction all over the region because all Districts have their own tribunals and currently section 22(2) requires land matters to be presided over within the district the land is located.

Further, he argued that the High Court judgment quashed the proceedings with direction that any interested party should file the matter afresh according to law. It was Mr. Lameck's stance that the Appellant did not follow the law. Mr. Lameck did not support remitting the case file to Bukoba District Land and Housing Tribunal as all what will continue transpiring there will eventually be declared a nullity as the jurisdiction of the court is a creature of statute. He supported his submission with the case of **George Kiliani Mtanga vs Joseph Mheshi and Another**, PC Civil Appeal No.82 of 2020 HCT at Dar es Salaam (Unreported) where cases of similar nature were cited including **Sospeter Kahindi vs Mbeshi Mashini** Civil Appeal No.56 of 2017.

On the first ground concerning the costs, Mr. Lameck stated that his client used costs, therefore, has to be reimbursed and the costs are not intended to punish him as costs are always issued to the successful party unless there is a good cause. He buttressed his stance with cases of **Wambura Chacha vs Samson Chorwa** (1973) L.R.T, NO.5, **African group(t) ltd. Vs Said Abdalla Msangi and Another**, Misc. Commercial Cause No. 206 of 2015 at page 458 and page 463.



Responding on the issue of the order of the tribunal being dismissal instead of struck out, Advocate Lameck referred this court to look on the title of the ruling that it is "uamzi" and lastly the tribunal concluded that "maombi haya yamefukuzwa". That the appellant's counsel did not tell the court if *kufukuzwa* is "dismissal" or "struck out" That there was a confusion in Kiswahili words. He concluded that under section 30(20) of the CPC the costs must be paid.

In his rejoinder, Advocate Raymond reiterated what he had earlier submitted and on the issue of jurisdiction he added that there is no Government Notice which waived away the jurisdiction of Kagera Tribunal. On the issue of dismissal, he supported the respondent advocate's observation that the proper order was to struck out. As far as costs are concerned, he contended that section 30(1) of CPC provides costs but the same should be exercised judiciously.

Having paid due consideration to the submissions of parties' learned advocates, I think I have to determine the following issues:

- 1. Whether the District Land and Housing Tribunal for Kagera had territorial jurisdiction over the land matters situated in Karagwe?*
- 2. Was the order to pay costs proper?*

The first issue should not detain me here. Once the District Land and Housing Tribunal is established in the district, any tribunal which formerly had territorial jurisdiction to such District will automatically cease to have territorial jurisdiction on that District. I agree with the submission advanced by the Respondent's counsel that after the district land and Housing Tribunal for Karagwe was established in Karagwe District in 2014, the District Land and Housing Tribunal for Kagera which was established since 2003 and formerly had territorial jurisdiction over the entire region, its territorial power ceased to apply.

According to Mr. Raymond, when Application No. 105/2013 was filed in the District Land and Housing Tribunal for Kagera, there was no District Land and



Housing Tribunal for Karagwe. That since the High Court had ordered the application to be heard *de novo*, the appellant, therefore could not have filed the matter to the new established tribunal in Karagwe than returning where the matter had formally commenced.

The appellant's counsel argument triggered me to visit the judgment which was before Mtulya, J to see what was ordered. I reproduce part of it as hereunder:

"I have formed an opinion to quash the judgment, set aside the proceedings and any orders emanated in the Application. If any of the parties still interested in the dispute may prefer fresh and proper suit in accordance to the laws regulating land disputes....."

In light of the above quoted order of this court, there was no *de novo* order which was given by this court because what was done by the court was to quash the entire proceedings and set aside the judgement of the trial tribunal and direct whoever still interested to file a fresh application to the proper or competent tribunal subject to laws of the land. By the time he filed Land Application No. 58/2021 on 15th September, 2021, there was already a District Land and Housing Tribunal established in Karagwe seized with territorial jurisdiction for all lands situated in Karagwe District, therefore, the appellant was required to file the matter there.

The fact that the Appellant's counsel alternatively prays this court to order the transfer of the case to District Land and Housing Tribunal, confirms that he is aware that the District Land and Housing Tribunal for Kagera has no territorial jurisdiction over the land located in Karagwe.

Now, what was supposed to be the appropriate order. Once the matter is found incompetent for want of jurisdiction the only remedy is to strike out it to give a room for parties to find a proper forum and not to dismiss it as if the matter was heard on merit. It is not in dispute that the DLHT for Kagera did not hear



the matter on merit and hence the **strike out** order was appropriate in the circumstances. I am therefore agree with the Appellant's counsel that dismissal order closes the right of parties to re-institute the matter again to the competent forum save for appeal or review. See The Court of appeal cases of **The Director General NSSF vs Consolata Mwakisu (Supra), Ibrahim Omary (EX.D.2323 IBRAHIMU) vs The Inspector General of Police and 2 Others** (supra) as rightly referred by the appellant's counsel.

On the order of the tribunal that; "Maombi *haya yamefukuzwa kwa gharama*", Mr. Raymond is of the view that the application was dismissed while Advocate Lameck suggests that the order was a struck out. The Swahili Legal Terms Dictionary Published by the Legal Research Centre and Faculty of Law, University College, Dar es Salaam, 1968 pg.36 where legal terms are translated in Kiswahili. The term "**Dismiss**" means: "(1) fukuza... (2) Kataa..." "**Dismissal**" means: (1) Kufukuza (2) Kukataa whereas the term **Strike** means "*ondoa*" Therefore, as the dispute was incompetently filed, the tribunal would have ordered struck out instead of dismissal.

I therefore quash the dismissal order and substitute it with a struck-out/off order which was proper in the circumstance since the two terms have different implications as discussed already. The second ground of appeal partly succeeds to that extent.

Was the order to pay costs exercised judiciously?

The inputs on **section 30. -(1) of CPC, Cap 33 (R.E 2022)** provides that:

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 in the case of **Nkaile Tozo vs. Phillimon Musa Mwashilanga** [2002] TLR 276 also cited in **Apolo Kyarwenda vs Maclaud Kanyambo** Misc. Land Case Appeal no. 19 of 2022, HCT at Bukoba (Unreported), it was 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."

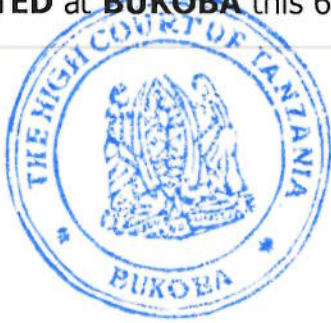
It is a trite law that costs are awarded at the discretion of the court according to section 30 of Cap 33 and the case laws cited above. However, it is also a cardinal principle that whoever the court is bestowed with discretionary powers such power must be exercised so judiciously. See **Nkaile Tozo vs. Phillimon Musa Mwashilanga (Supra)**.

In the event, the appeal is hereby allowed to that extent. The dismissal order is hereby set aside and substituted with struck out. The order for costs awarded by the trial tribunal is hereby set aside. Any interested party is at liberty to file a fresh matter to the competent tribunal according to the law. Each party to bear its own costs.

It is so ordered.



DATED at **BUKOB**A this 6th day of October, 2022.



G. N. Isaya

JUDGE

06/10/2022

Court: The Judgement delivered this 6th day of October, 2022 in the presence of the counsel for the appellant, Miss Erieth Barnabas and the respondent present in person, Mr. Audax Vedasto, Judge's Law Assistant and Ms. Grace Mutoka, B/C.



G. N. Isaya

JUDGE

06/10/2022