

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY**

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

PC. CIVIL APPEAL NO. 8 OF 2022

*(Originating from District Court of Rungwe in Civil Appeal No. 19 of 2021 of Kandete
Primary Court in Civil Case No. 27 of 2021)*

Between

SAMSON MWAMBWENEAPPELLANT

VERSUS

VUMILIA MWANTYUKURESPONDENT


JUDGMENT

Date of last order: 9th November, 2022

Date of judgment: 14th December, 2022

NGUNYALE, J.

The respondent unsuccessfully sued the appellant in the Primary Court of Busokelo District at Kandete in Civil Case No. 27 of 2021 for Tsh. 3,500,00/= as compensation for malicious prosecution. Aggrieved she appealed to the District Court of Rungwe in Civil Appeal No, 19 of 2021 which dismisses the appeal without an order of costs. The order not to award costs is the subject matter under scrutiny today, the appellant was aggrieved with the order, as a result he preferred the present appeal



premising a singly ground of appeal per petition of appeal dated 19th April 2022;

That the Hon. Magistrate erred in a point of law and fact for failure to award costs incurred in Civil Case No. 27 of 2021 of Kandate Primary Court and Civil Appeal No. 19 of 2021 of the District Court for Rungwe.

When the appeal came for hearing, parties appeared in persons, had no legal representation. They opted to ague the appeal by way of written submission which they obediently filed as per the scheduling order of the court.

The appellant submitted that it is the requirement of the law that the winner litigant is entitled to costs so as to compensate for the costs he incurred. He cited the case of **Emmanuel Dawi vs Stephano Boi**, Msc. Civil Application No. 4 of 2022, HCT at Arusha. He added that as a general rule a winning party is entitled to costs, although there is exception provided under section 30 (2) of the Civil Procedure Code [Cap 33 R: E 2019] to the effect that where the court directs that any cost shall not follow event, the court shall state its reasons in writings. He contended that the reason to be stated must me sound and judicious, he referred to the case of **Maulid Yahaya vs Mugishi Renatus & 4 Others**, Civil Appeal No. 3 of 2019, HCT at Bukoba.



He submitted that the reason for denying him costs was relation of parties but to his view such reason was irrelevant and insufficient as it was not indicated what was that relationship the parties had. He added that the reason advanced was improper use of discretionary power. He referred to the case of **Andrew C. Ndakidemi vs Nassoro Lwila & Others**, Land Appeal No. 41 of 2020, HCT at Iringa where the court stated after all it was not explained well as to what that relationship the trial court aimed to protect to justify his departure from the general practice. He said that the disputants are not relatives to each other or have any close relationship.

He impressed the court that Civil Case No. 27 of 2021 of Kandete primary court and Civil Appeal No. 19 of 2021 made the appellant to incur costs both monetary and time which all together attracted expenses for which he was to be reimbursed.

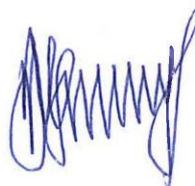
In reply the respondent was in agreement with the principle pertaining to award of costs to the winning party and that should the court desire to deprive must state reasons. He added the case of **Hussein Jonmohamed & Sons vs Twentsche Overseas Trading Co. Ltd** [1976] EA 287 to the list of cases cited by the appellant. He contended that the magistrate provided a reason for his departure from the general



rule which was sound and judicious. He added that costs are awarded at the discretionary of the court and in this case the power was exercised judiciously. The case of **Nkalie Tozo vs Philimon Musa Washilanga** [2002] TLR 276 was cited to support the argument.

In rejoinder the appellant submitted that the issue that parties are neighbour has only been brought by the respondent in his reply submission as such, it is a new issue. He submitted that although awarding costs is in the discretion of the court but the same has to be exercised judiciously and not caprice which was not the case here.

From the rival learned submissions, the core of the contest is the question whether the reason given by the magistrate when he avoided to award cost was judicious. The rule is that the awarding of costs is not automatic, is a discretion of the court. In other words, costs are not awarded to the successful party as a matter of course, it is entirely in the discretion of the court. This is well embraced under section 30 (1) of the Civil Procedure Code [Cap 33 R: E 2022] and they are awarded according to the facts and circumstances of each case. Although this discretion is a very wide, like in all matters in which courts have been invested with discretion the discretion in awarding or denying a party his costs must be exercised

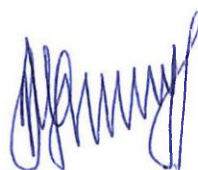


judicially and not by caprice. When the court decides to deprive a party cost then it has to state reasons.

It is a settled principle that an appellate court would not interfere with the discretionary powers of the lower court, it can interfere with the discretion of the lower court if, among others, it has acted on a matter that should have not acted upon, or it has failed to take into consideration that which it should have taken, and as a result, it has arrived at a wrong conclusion.

See **Metro Petroleum Tanzania Limited & 3 Others vs United Bank of Africa**, Civil Appeal No. 147 of 2019, CAT at Dar es Salaam (Unreported).

In this appeal the bone of contention is that the reason advanced by the magistrate was not reasonable. While the appellant feels that relationship of parties which was advance to deny her costs was not sufficient, the respondent has a contrary view. Before discussing the merits of this appeal, it has to be noted that the respondent's claim of malicious prosecution was dismissed without costs in the primary court and the appellant did not appeal against the order denying him costs. This implies that he was satisfied with the judgment of the trial court. In his submission he submitted that he was supposed to be given costs in Civil Case No. 27 of 2021 of Kandete primary court, this was erroneously because there was

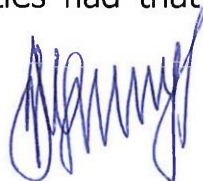


no appeal on such matter and therefore it cannot be claimed in this appeal as the District Court did not deliberate on it. Therefore, this court has no jurisdiction.

From the above, the costs which is under contention is that denied by the appellate court, from the rival submission there is no dispute that the magistrate advance a reason for not awarding costs. Although there is no list of reasons which may be justified in denying the winning party costs but it can include party's misconduct, non-appearance of the other party, not filing pleadings and so many others. Relationship of parties is one of the reasons for departing from the general rule of awarding costs, for stance, matrimonial dispute, probate matter and labour disputes normally costs are not awarded.

The respondent claim against the appellant was on tort founded on malicious prosecution, the trial court having dismissed the suit, the appellant appealed to the District Court where the appellant among others, entered appearance filed reply to petition of appeal and appeared to defend himself against the appeal. All these entitled the appellant to have costs after the appeal being dismissed.

The reason advance by the appellate magistrate is not concise, it is not clear what relationship the parties had that the magistrate wanted to



preserve. Even in their submission parties have not mentioned any. I am persuaded by the reasoning of **Motogoro, J.** in the case of **Andrew C. Ndakidemi** (supra) also cited by the appellant, where the court held that;

'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 winning party.'

In this regard, it is my considered view that this Court is justified to interfere with the exercised discretionary powers by the appellate court in this matter for its failure to take into consideration what it should have, namely that the appellant participated full in the conduct of the appeal which led him to incur costs like paying court fees to pleadings he filed, secretarial costs and any other which was incidental to the appeal.

In the upshot, I find the appeal has merit I allow it, the appellant will have his costs in the District Court and this court. it is so ordered.

DATED at MBEYA this 14th date of December, 2022




D.P. Ngunyale
Judge