

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 160 OF 2022

*(Arising from the Decision of the Temeke District Court at Temeke (Hon. Millanzi, SRM
delivered on 24/10/2022 in Civil Case No. 24 of 2022)*

ELIKANA EMMANUEL APPELLANT

VERSUS

PETER ANDREW SILAYORESPONDENT

JUDGMENT

14th & 24th February, 2023

MWANGA, J.

By order of the trial court dated 24th October, 2022 the trial magistrate in the District Court of Temeke at Temeke dismissed the suit in Civil Case No. 24 of 2022 for want of prosecution. In his order, the trial magistrate held that;

"This is the 2nd time the plaintiffs' counsel does not appear in court with unjustifiable reasons...it is clear that the plaintiff and his counsel have no interest with

***this civil suit, so the same is hereby marked dismissed
without costs."***

In the upshot, the trial magistrate gave no reason for not awarding costs to the appellant. Such failure triggered this appeal. Mr. Kabura Elinihaki the learned counsel for the appellant submitted that it is a general principle that a successful party is entitled to be reimbursed the expenses spent in presenting or defending a case and, where the court held otherwise, it has to assign reason for doing so. The counsel cited the case of **Njoro Furniture Mart Ltd Vs Tanzania Electric Supply Co. Ltd [1995] TLR 205** to the effect that; costs normally follow the event and where the court directs that, any costs shall not follow the event, the court shall state its reasons in writing.

In furtherance to his submission, the counsel was of the view that, the award of costs to the appellant would enable him to cater for expenses incurred relating to instruction fees, attendance in court, stationaries and other facilities for research. He added that, in view of the decision in **Shabani Fundi Vs Leonard Clemence, (Unreported), Civil Appeal No. 38 of 2014** (Unreported), costs are panacea or soul of litigation

Stressing on the background of the present appeal, the learned counsel contended that, prior to the dismissal of the suit by the trial court, there was another Miscellaneous Civil Application No. 21 of 2022 which was also dismissed and, it was directed that costs should follow the event, which is the results in the main case which was dismissed. It was his conclusive remarks that, as long as the respondent was not represented under legal aid scheme, his client who is the appellant herein was entitled to costs of litigation.

On the other hand, the respondent who enjoyed the service of Mr. Tendwa J. B controverted the arguments of the learned counsel stating that, the award of costs in litigation is upon discretion of the court and not a mandatory requirement. However, in rejoinder Mr. Kabura was sceptical on the argument by his fellow learned counsel. He re-joined that, much as the award of costs can be considered discretionary, the same has to be exercised judiciously.

On a careful consideration of the submission of parties, the issue is whether the trial magistrate erred in law and fact by not awarding costs to the appellant without any justifiable reason.

I have perused the respective order of 24th October, 2022 and found out that, the contention of Mr. Kabura is correct. The trial magistrate gave no reason for not awarding costs to the appellant. As I have indicated earlier, he dismissed the suit without costs and no reasons were assigned for his decision.

Without going to the shoes of the trial magistrate on how his proceedings were conducted, the fact that the appellant prayed for costs and the suit was dismissed without costs and no reasons were given; it was in violation of the law under Section 30 (2) of the Civil Procedure Code, Cap.30 R.E 2022 which expressly provides that;

'Where the court directs that any costs shall not follow the event, the court shall state its reasonings in writing'.

From the above provision of the law, much as I agree with the learned counsel Mr. Tendwa J.B that the award of costs is upon discretion of the court, the same has to be exercised judiciously and; that is by giving reasons for the decision.

I further states that, one of the most important aspects for necessitating to record reason is that it substitutes subjectivity with objectivity. On the same note, to give reason is the rule of natural justice and the foundation of a just and fair decision. In one of the Indian cases of **Alexander Machinery (Dudley) Ltd Vs Crab Tree 1974** ICR 120, the Supreme Court went further to the extent of observing that; ***"Failure to give reasons amounts to denial of justice"***. In fact, reason is the heartbeat of the decision and without reason the order becomes dead.

Further to that, it is clearer from the records that the appellant engaged an advocate in response of action of the respondent filing a case against him. As argued by Mr. Kabura, the appellant had incurred expenses relating to court fee, process fee and advocate fee or any other incidental costs for that matter.

Be that as it may, courts should develop practice of awarding costs and also give reason(s) where costs are not awarded. In an English case of **Cropper Vs Smith (1884)** 26 Ch. D 700 Lord Justice Bowen had this to say;

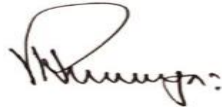
“I have found in my experience that there is one panacea which heals every sore in litigation and that is costs.”

The award of costs in civil litigation, may prevent parties to file frivolous suits, deterrent to vexatious or luxury litigation borne out of ego or greed resorted to as 'buying time' tactic.

In the current appeal, the trial magistrate expressed his dissatisfaction on the conduct of the respondent's counsel that, he does not appear in court with unjustifiable reason. And there was no record in the proceedings that the plaintiff opted to proceed with his case in absence of his learned counsel.

On the basis of such observation, this appeal must succeed. The appellant was entitled to costs at the trial court, subject to proof, which I hereby grant. I order further that; each party shall bear its own costs in the present appeal before this court as neither part is at fault for its existence.

Order accordingly.

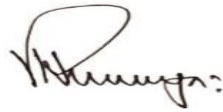


H. R. MWANGA

JUDGE

24/02/2023

ORDER: Judgment delivered in Chambers this 24th day of February, 2023
in the presence of both learned counsels for the appellant and respondent.



H.R. MWANGA

JUDGE

24/2/2023

