

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF TABORA

AT TABORA

MISC. LAND CASE APPEAL NO. 2 OF 2022

*(From the Decision of District Land and Housing Tribunal of Tabora
District at Tabora in Land Case Appeal No. 50 of 2021)*

ISAYA IDFONCE MGAWA.....APPELLANT

VERSUS

SHAFII ALLY MOHAMED.....RESPONDENT

JUDGMENT

Date: 17/02/2023 & 17/03/2023

BAHATI SALEMA, J.:

This appeal is brought against the decision of Tabora District Land and Housing Tribunal at Tabora, (M.H Waziri, Chairperson) in Land Appeal Case No.50 of 2021. The Tribunal's decision was delivered on 20/10/2021.

The appellant **ISAYA IDFONCE MGANA** aggrieved by the decision of the appellate paraded the following grounds that;

- (i) That, the appellate court erred in law and in fact in not awarding costs to the appellant without stating any reason.*

- (ii) *That, having admitted the first ground of appeal by the respondent the appellate tribunal erred in law and in fact by not directing the respondent to pay the cost to the appellant.*
- (iii) *That, the appellate tribunal erred in law to act **suo motu** and revise the proceeding without considering that there was an appeal before it.*
- (iv) *That, the appellate tribunal erred in law and fact to hold that the mistake was done by the trial tribunal while that was not the fact.*

In the course of the hearing, the appellant was represented by Mr. Musyani Emmanuel, learned counsel while the respondent enjoyed the services of Mr. Kanani Chombala, learned counsel. With the permission of this court, the submissions were disposed of by written submission.

Submitting on the first and second grounds of appeal Mr. Musyani contended that, it was the respondent who sued the applicant at the trial court, hence the District Land and Housing Tribunal was enjoined to make an order for costs in favour of the appellant upon striking out of the appeal.

He advanced that when a party successfully enforces a legal right and in no way misconduct himself, he is entitled to his **cost as of right** unless the unsuccessful party can show some ground such as negligence, his conduct that the court may exercise its discretion to refuse to award cost to the successful party. See also the case of **Nkaile Tozo Vs Philimon**

Music Mwashilanga [2002] TLR 276 and in the decision of **Njoro Furniture Mart Ltd V. Tanzania Electric Supply Co. Ltd**, [1995] TLR.205.

He stated that the appellant was entitled to the cost as they were no reason which was advanced for not awarding cost to the appellant as provided under section 30 (1) and (2) of the Civil Procedure Code, Cap. 33 [R.E. 2019], that costs are awarded at the discretion of the court and they follow the event unless the court records good reason justifying a departure from the general rule.

He submitted that according to the record, the appellant appeared in person and engaged an advocate and he also filed a petition of appeal when the impugned order was made. It is a settled law that it is the loser in a matter before the court who pays the cost, in the matter at hand the respondent was the loser.

He further stated that the record reveals that, it was the respondent who instituted, filed, and concluded the suit; not ordering the cost to be paid by the respondent would set a bad precedent, because some other person may use the loophole and safely but unreasonably drag other people to court. To bolster his stance in the case of **Wambura Chacha V Samson Chorwa** [1973] LRT.4 page 7, the court held that costs are paid to reimburse a party for costs incurred and not enrich the winning party. He further advanced that, it is a legal obligation in both civil and criminal proceedings for the court to record reasons for each decision they make.

As this position was illustrated in the case of **Ikindila Wigae V. Republic**, 2005, TLR.365.

He contended that it was improper for the appellate court to be silent regarding costs and without giving any reasons since it had struck out the appeal in favour of the respondent. Thus it did not use its discretion judiciously regarding costs.

He advanced further, since the appeal was struck out an order for costs had to be made.

As to the third and fourth grounds of appeal which were argued together, the appellate court erred to act **suo moto** to revise the proceeding since there was no letter or application for revision. He wrongly revised the proceeding while there was already an appeal filed before it. The proper remedy was for the appellate court to rule out in respect of the appeal at hand and not to revise.

He submitted that the appellate tribunal misdirected itself to state that the mistake was done by the Trial Tribunal because the respondent was the one who instituted the case in the ward tribunal and it is a duty for a person who institutes a claim to know whether the trial tribunal had jurisdiction. He submitted that the argument by the appellate tribunal that the mistake was done by the trial tribunal "**Makosa yamefanywa na Baraza la Kata**" is unjustifiable. He prayed to this court to order that

the appellant is entitled to cost before the appellate court may deem fit and just to grant.

Responding, Mr. Chombala, counsel for the respondent submitted that on the first ground that was the effect that the tribunal erred in law in not awarding costs to the appellant without stating any reason. He submitted that the District Land and Housing tribunal judgment has only two pages. On page 2 of the typed judgment, the tribunal held that;

"Kila upande utachukua gharama zake kwa kuwa makosa yamefanyika na baraza la kata".

He submitted that the main and crucial question to be asked is *whether the duty to inquiry and determine the pecuniary value of the property was of the trial tribunal and whether the tribunal nullified the proceeding on the bases of irregularity caused by the trial ward tribunal for failure to ascertain the pecuniary value of the suit property and in answering the two issues, he referred to several decision of the court on the same issues as it was held in various cases that determination of the pecuniary value of the subject matter is the duty of the trial tribunal so as they can ascertain if it has jurisdiction. In the case of **Philimon Nzinze V. Paulino Mikindo**, Misc. Land Case Appeal No. 03/2015, High Court Tabora (unreported) which was referred in the case of **Ndekeja Kashinje Versus Mboje Masunga**, Land Appeal No. 11 of 2018, High Court Tabora (unreported) where the court at page 3 and 4 of the judgment quoted the holding in **The Philimon's** case (supra) that;*

*“The question that I pose to myself is therefore, whether or not the Trial tribunal was justified in entertaining the dispute without first inquiring into and determining the monetary value of the suit land. In my view, an inquiry and determination of the monetary value of a subject matter of any dispute in court or an adjudicating organ is a very significant step to be taken at the outset of the process of adjudication as underscored by the CAT in **Richard Rukambura** (supra). This view is based on the understanding that it is the monetary value of the subject matter that determines the pecuniary jurisdiction of the court or the adjudicating organ.”*

It was further held that;

“That it was obligatory for the trial tribunal to first inquire into the monetary value of the subject matter of the disputed land for the purposes of determining its own pecuniary jurisdiction before it proceeded to try the matter. There is also no indication that the trial tribunal bothered to inquire into that monetary value and determine whether it had jurisdiction to try the case or not”.

Therefore it is the duty of every tribunal to make an inquiry and determine the pecuniary jurisdiction to ascertain whether it has jurisdiction or not and determine the matter without jurisdiction and this is the basis of the district tribunal to nullify the whole proceeding on account of the trial ward tribunal error.

He further stated that Regulation 21 of the Land Disputes Courts (The District Land and Housing Tribunal Regulations, 2003, G.N. No. 174 provides that the tribunal may make such orders as to costs in respect of the case as it deems just.

This is the specific law that governs a land tribunal and is not coached into mandatory but it is the discretion of the tribunal to grant or not. The appellant's advocate is trying to earn money out of the context of the law as he baselessly spends time and energy trying to mislead this court by invoking the Civil Procedure Code which out to be used on matters not covered by the specific law on the subject matter.

He submitted that, the rest of the grounds fails short of merit as once the trial tribunal lacks jurisdiction all other matters cease to exist. The District and Housing Tribunal has powers under Sections 35 and 36 of the Land Disputes Courts Act, Cap. 216 [R.E. 2019] to confirm the decision or reverse, or vary in any manner the decision, quash any proceedings; and or order the matter to be dealt with again by the ward Tribunal, and may if it deems appropriate, give an order or direction as to how any defect in the earlier decision may be rectified.

Section 36 (1) empowers the District Land and Housing Tribunal to revise the decision of the ward tribunal he satisfied that such proceedings of the Tribunal contravened the law.

Subsection (2) of Section 36 of the Act (supra) provides that;

In the exercise of its revisional jurisdiction, a District Land and Housing Tribunal shall have all the powers conferred upon it in the exercise of its appellate jurisdiction.

He further submitted that it is a long-established principle that advocates are court officers whose duty is to assist the court to arrive at a fair and just decision. From the quoted paragraph it is clear that the tribunal chairperson advanced a reason as to why he cannot order costs and further the tribunal went to order that the matter be tried afresh at the proper forum.

The counsel submitted that, this appeal is short of merit in intent to cause delay for the parties to resort to the tribunal and file the fresh suit so that justice can be determined and the counsel for the appellant has nothing but causing unnecessary costs to the respondent taking into account that it is the appellant who sold the suit property to the respondent. He further prayed to this court to dismiss the appeal with costs since it is unnecessary to delay and cause unexpected costs in dealing with this baseless appeal.

Having carefully examined the submissions from both parties, the issue for determination is whether the appeal has merit.

As to the first and second grounds of appeal, Section 30 (1) and (2) of the Civil Procedure Code, Cap. 33 [R.E. 2019] provides that;

"Costs are awarded at the discretion of the court and they follow the event."

In this matter, the appellant has submitted that the trial tribunal did not give any reasons while dismissing the case. The court upon thorough perusal of the records of the District Land and Housing Tribunal judgment noted on page 2 of the typed judgment, I quote;

"Kila upande utachukua gharama zake kwa kuwa makosa yamefanyika na baraza la kata."

Similar to Regulation 21 of the Land Disputes Courts (The District Land and Housing Tribunal Regulations, 2003, G.N. No. 174 provides that the tribunal may make such orders as to costs in respect of the case as it deems just.

As correctly stated by the counsel for the respondent that this is a specific law that governs land tribunal and is not couched into mandatory but it is the discretion of the tribunal to grant or not. It is trite law that costs are normally awarded by courts on discretionary bases. In my view most of the time courts consider the circumstances of each case to arrive at just findings. Costs are both motivations and deterrent sanctions to parties. In this view, when costs are granted or rejected the court may be guided by factors such as mistakes occasioned by unfocussed legal advice to a party; unintended mistakes of parties; time and resources spent in the matter by the opposite party; illegalities/irregularities raised

by the court. It is the view of this court that costs awarded not judiciously may tend to shut the doors of the courts as litigants or the public will become afraid to seek such important legal redresses.

Therefore, guided by the reasons above, in the matter at hand the tribunal was right not to order costs to the parties since the mistake was done by the trial tribunal.

As to the third and fourth grounds of appeal, I agree with the respondent's counsel that the District and Housing Tribunal has powers under Sections 35 and 36 of the Land Disputes Courts Act, Cap. 216 [R.E. 2019] to confirm the decision or reverse, or vary in any manner the decision, quash any proceedings; and or order the matter to be dealt with again by the ward Tribunal, and may if it deems appropriate, give an order or direction as to how any defect in the earlier decision may be rectified.

Consequently, for the aforesaid reasons, the appeal is hereby dismissed with costs.

Order accordingly.



A handwritten signature in blue ink, appearing to read "A. Bahati Salema".


A. BAHATI SALEMA
JUDGE
17/3/2023

Court: Judgment delivered in presence of the appellant counsel Ms. Esther Mchele.



A. BAHATI SALEMA
JUDGE
17/3/2023

Right of Appeal fully explained.



A. BAHATI SALEMA
JUDGE
17/3/2023

