

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

**[ARUSHA SUB-REGISTRY]
AT ARUSHA**

MISCELLANEOUS LAND APPLICATION NO. 167 OF 2022

(Cf High Court of Tanzania at Arusha Civil Appeal No 04 of 2021)

BETWEEN

GLORIA RAJESH CHANDARANA _____ APPLICANT

AND

JUDITH CHARLES AKWERA _____ 1ST RESPONDENT

REV CHARLES AKWERA _____ 2ND RESPONDENT

**THE REGISTERED TRUSTEES _____ 3RD RESPONDENT
OF DOMINION RESTORATION
INTERNATIONAL MINISTRY**

RULING

07/03/2024 & 15/03/2024

BADE, J.

This is a Ruling on a point of contention regarding costs that the counsel for the Respondent Mr. Omari Gyunda seeks against the Applicant's prayer for order of withdrawal as prayed by the counsel for the Applicant Mr. Emmanuel Sood. I had to reserve my Ruling despite ordering that the Application is

struck out and ordered no costs. The genesis of the matter is an Application for Leave to appeal to the Court of Appeal that was preferred by the Applicant having been aggrieved by the decision of the High Court, Tiganga, J. in Civil Appeal No 04 of 2021.

The Application was preferred by way of chamber summons under section 5 (1) (c) of the Appellate Jurisdiction Act, Cap 141 R.E 2019 and Rule 45 (a) of the Court of Appeal Rules, 2009 the (Court of Appeal Rules), as amended and any other enabling provisions. The Application was also supported by the affidavit duly sworn by the Counsel for the Applicant, in which he averred, among other things, that his client was aggrieved by the decision of the court and wishes to appeal to the Court of Appeal against the decision in Civil Case No 4 of 2021, which cannot be done unless he obtains leave of this court.

When the matter was called for hearing, Advocate Emmanuel Sood brought to the attention of the court his desire to withdraw the Application on account of there being no requirement for leave as it has been waived as per the amendment of the Appellate Jurisdiction Act Cap 141, through the Legal Sector Laws Misc Amendments Act 2023 specifically Section 10 of the Act. He intimated that the said amendment made the requirement of leave to

appeal no longer an essential step for the processing of an appeal to the Court of Appeal.

He swiftly noted that at the time the Application which is before the court was filed, this law had not been passed, but soon thereafter after it was passed, the interpretation of the said provision done by the Court of Appeal in **Petro Robert Myavilwa vs Zera Myavilwa and Anor**, Civil Application No 117/06 of 2022 made it obvious that it is not a requirement. The Court specifically on Pg 7 made it clear that the act had a retrospective effect. That being the case, the Application before the court has been overtaken by the operation of the law, which is what prompted their said withdrawal urging the court to not order any costs in consequence.

Responding, Advocate Omari Gyunda readily conceded to the withdrawal, even though he counseled that the proper cause will be to strike it out, did not bulge on the costs aspect. His take was that the Application should be struck out rather than being withdrawn. He also contend that while the counsel was well aware that he will not be proceeding today, noting that this awareness ought to have been with the counsel since December 2023 when the law became operational and brought into force, but he not did take any action until the present sitting, concluding that by not taking any initiative to

inform of his intention to so withdraw all this while, he had let the other side make preparations for this hearing. He concludes that this fact should entitle them to their costs.

Rejoining, Mr. Sood made a plea to the court to direct as it shall deem proper on the contention over the appropriate remedy between the suit being struck out or withdrawn, as to him, he discerns no difference between withdrawal and striking it out, as long as the effect is the same that the Application can not be heard as it has been affected by the operation of law.

On the other hand, concerning the order for costs, he finds no reason why the Respondent's advocate should insist that the Application be struck out with costs since the Applicant cannot be faulted by the act of the law in question being amended.

He insists that the law was amended, the notice to that effect was circulated to all practitioners including the advocate for the Respondent, and so by that notice, it was construed on him that he was equally aware of the same. It is therefore baseless to assert that he was taken by surprise and got prepared to defend the Application for Leave.

Also, on the fact that it was on the Applicant's laxity that this Application is scheduled for hearing today, he countered that the record is clear that the Application had not been scheduled for hearing or any appearance in court before now, and that this is the earliest from the time the amendment came into force, urging the prayer for costs is baseless and should not be entertained.

Having heard both counsels, It is now upon the court to determine whether the matter is marked withdrawn or struck out, and whether costs should fall due in consequence.

The issue whether the Application should be struck out or withdrawn should not detain me at all. GN No 48 which came into force on 1st December 2023, its part 12 amended section 47 (2) of the Land Disputes Courts Act Cap 216 by deleting subsection 2 of the said section. In that regard leave became no longer a requirement for one to appeal to the Court of Appeal of Tanzania. Meanwhile the Court of Appeal sitting in Mbeya in the **Myavilwa case**, (supra) struck out an Application for Leave as it ruled that the law is effected retrospectively, it being a procedural law. I shall follow suit and order this Application be struck out as it is now ineptly incompetent.

Regarding costs, the power to grant costs finds favour under Section 30 (1) and (2) of the Civil Procedure Code, Cap 33 R.E. 2022 which states:

30 (1) Subject to such conditions and limitations as may be described and to the provisions of any law from the time being in force, the costs of, and incidental to, all suits shall be at 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.

(2) Where the court directs that any costs shall not follow the event the court shall state its reasons in writing.

The above provision has also been interpreted in **Mohamed Salimin vs Jumanne Omar Mapesa**, Civil Application No. 4 of 2014, where it was held by the Court of Appeal 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, not arbitrarily or capriciously. Similarly, in **Geofields Tanzania Limited vs Maliasili Resources Limited and**

Others (Misc. Commercial Cause No 323 of 2015) [2016] TZHC Commercial Division, this court, intensively, dealt with this provision where it stated:

"Generally costs are awarded not as a punishment of the defeated party but as a recompense to the successful party for the expenses to which he had been subjected or for whatever appears to the court to be the legal expenses incurred by the party in prosecuting his suit or his defense. Costs are thus in the nature of incidental damages allowed to indemnify a party against the expense of successfully vindicating his rights in court and consequently the party to blame pays the cost to the party without fault."

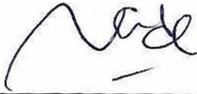
But then again, in **Mwakajinga vs Mwaikambo** (1967) HCD 281 this court also had clarified the position on costs to the effect that:

"... where neither party was responsible for the loss sued upon, then each party will bear his/her own costs."

In that regard I order that the Applicant not be condemned to costs as the matter is struck out due to operation of the law. The Applicant were not responsible for the fate that the Application has encountered. Each party should bear its own costs.

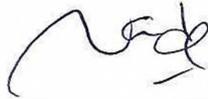
It is so ordered.

DATED at **ARUSHA** this **15th** day of **March 2024**



A. Z. Bade
Judge
15/03/2024

Ruling delivered in the presence of the Parties' representatives in chambers
on the **15th** day of **March 2024**



A. Z. BADE
JUDGE
15/03/2024