

IN THE HIGH OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB -REGISTRY OF MOSHI
AT MOSHI

REVISION APPLICATION NO.08 OF 2022

(Arising from decision of District Land and Housing Tribunal of Moshi at Moshi dated 15th September, 2022 in Application No.76 of 2021 before Hon. R. Mtei-Chairman)

NSHARA SACCOS LTD:.....APPLICANT

Versus

RAMADHANI ABDI SWAI :.....RESPONDENT

RULING

15th & 27th February 2024.

A.P. KILIMI, J.:

The applicant hereinabove has knocked the door of this court praying for revisionary orders against the ruling of District Land and Housing Tribunal of Moshi at Moshi in Land application No. 76 of 2021. The application was brought by way of chamber summons under section 43(1)(b) of the Land Disputes Courts Act Cap 216 R.E. 2019 supported by a dully sworn affidavit of the applicant's principal officer one Yohane Z.Uronu.

The facts gave rise of this application may be discerned from the record of the tribunal to the effect that; at a District Land and Housing Tribunal of Moshi at Moshi, the respondent hereinabove filed a Land Application No.76 of 2021 against the two respondents first being the Independent Agencies

&Court Brokers Ltd and the second was the applicant herein. The claim was over a piece of land situated at Msikitini street, Bomang'ombe area within Hai District which was mortgaged in favour of the second respondent an applicant herein. Before the case proceeded to a full trial, the applicant herein being the second respondent in a course of filling his written statement of Defence raised a Preliminary objection on point of law that a trial tribunal lacked jurisdiction to try the suit. The trial tribunal considered the arguments of both parties and eventually sustaining the Preliminary objection that it lacked jurisdiction to try the suit and consequently dismissing the suit and condemning the second respondent, who is an applicant herein to pay the costs. It is from such orders the applicant herein filed this matter in this Court praying revision of orders granted by the said trial tribunal.

In a counter affidavit sworn by Mr. Gideon B. Mushi an advocate authorised by the respondent, the respondent did not dispute the fact that the applicant was condemned to pay costs on the said application. The respondent contested the facts deposed on item 6 and 7 and the remaining facts of the sworn applicant's affidavit, and further averred that the order for

the applicant to pay costs was fair as the respondent incurred a lot of costs before the police officer as well as before the trial Tribunal.

When this application was called for hearing, before me it was agreed by parties to be argued by way of written submission, whereas, the applicant was represented by Regina Onesmo Mwari while the respondent enjoyed the service of Gideon B.Mushi both the learned advocates.

In her submission in support of the application, Ms.Regina Onesmo Mwari submitted that the trial tribunal erred in condemning costs to the applicant basing on the allegations that the respondent was arrested and forced to sign a loan agreement and it is from that a trial tribunal chairman acted in illegality by upholding the Preliminary Objection but still ordering the same applicant herein to pay costs. The counsel referred to section 43(1)(b) of the Land Dispute Courts Act on powers of this Court power for revision.

The counsel for applicant further submitted that, she was aware of the legal position that granting costs was a Court's discretion but the same is to be judiciously exercised. She presented that the circumstances of the Honourable Chairman condemning costs to the applicant despite the fact

that he upheld the preliminary objection raised by the applicant was wrong. To buttress her point the learned counsel referred to section 30(1) and (2) of the Civil Procedure Code Cap 33 R.E 2019 on the requirements for the court to state reasons when it directs costs not to follow the event. In support of her submission, she referred to a decision of **Maduhu Sang'udi Investment versus Kasonzo Car Hire Company**, [2023] TZCA 17524 (TANZLII) and that of **Njoro Furniture Mart Ltd vs. Tanzania Electric Supply Co. Ltd** [1995] TLR 205.

By referring to the decision **The Director of Public Prosecution vs. Josephat Joseph Mushi and another**, [2023] TZCA 17536 (TANZLII), the Counsel for applicant stated further that submissions in nature were not evidence and that the allegations that the respondent was apprehended by the police force was in the respondent counsel written submission to which the chairman should have not acted upon those allegations as they were raised during written submissions.

In submission regarding to how the Honorable Chairman handled the raised Preliminary objection, the counsel was of the view that, the trial tribunal could have only strictly base on point of law and not facts. She fortifies her stance by referring a decision of **Mukisa Biscuit**

Manufacturing Co. Ltd vs. West End Distributors [1969] E.A 696 and then prayed for the application to be allowed.

In reply to this application, Mr. Gideon Mushi learned counsel for the respondent referred to Regulation 21(1) of the Land Disputes Courts Act (The District Land Housing Tribunal) Regulations, G.N No 174/2003 on powers of the trial tribunal in granting costs as it deems just. He further submitted that the trial Tribunal having determined the raised preliminary objection and sustained it, it had discretionary powers to award costs depending on the nature and circumstances of the case, thus proceeded to order the applicant herein to pay costs.

The counsel for respondent further argued that, such costs were awarded to the respondent because at the trial tribunal the respondent had incurred costs when approached Registrar General and when he was arrested and detained at Bomang'ombe police station and thus why the trial tribunal awarded him costs depending on those circumstances. To make his point clear, the counsel referred to section 30(1) of the Civil Procedure Code Act Cap. 33, the decision of **Nyabakwasi Kamata vs. Mathias Timoth**, High Court Civil Revision No 16/2019 TZHC at Mwanza, and the decision of **Aida Makukura and 23 Others vs. Mahadi Hadi (As personal legal**

representative of Mohamed Mahfoudh Mbaraka) Land Appeal No 228/2020, High Court of Tanzania, Land division at Dar es salaam (Unreported).

Mr Gideon Mushi further replied that denial in awarding such costs would have encouraged scrupulous litigants to file cases before the court with no justification for wastage of time while knowing that at the end no costs will be awarded to a winning party. To bolster his assertion, the counsel referred the decision of **Bahati Moshi Masabile T/A Nondo Fillin Station vs. Camel Oil (T)** Civil Appeal No. 216/2018 High Court of Tanzania Dar es salaam.

I have carefully gone through submissions of both counsel's and trial tribunal's records and come up with one issue for determination in this application which is whether this application has shown merits to be granted by this court.

It is undisputed fact that the trial tribunal awarded costs to be borne by the applicant even after he successfully raised a Preliminary Objection which dismissed the respondent claim at the trial Tribunal, under this

juncture the point for determination is whether the trial Tribunal was correct to order such costs to be borne by the applicant herein.

The learned Counsel for the applicant submitted that the applicant was condemned to pay costs to the respondent based on allegation that the respondent was arrested and forced to sign a loan agreement the allegation that was from the respondent counsel written submission and the counsel then proceeded to warn the court not to rely on such submission as submission were not evidence. In reply the Counsel for respondent adduced that the award of such costs depended on the circumstances of the case and not otherwise as the respondent incurred costs at the registrar general and the trial tribunal and that the signed loan agreement was forged.

In answering the issue raised above, I find appropriate to reproduce part of the ruling of the trial tribunal as hereunder;

*"..Hata hivyo kwa mujibu wa kanuni hizo tajwa ambazo naye mwombaji hazipingi ni dhahiri kwamba **baraza hili halina mamlaka ya kusikiliza na kuamua mgogoro** uliopo kati ya mwombaji na mjibu maombi wa pili. Hivyo kanuni zilizowekwa kwenye kanuni ya 83 ya Vyama vya Ushirika na kanuni ya 130 ya SACCOS, 2014 zilizofuatwa na wadaawa.*

Hata hivyo kwa mujibu maombi wa pili alifahamu utaratibu za kufuatwa katika kumaliza mgogoro,lakini hakufanya hivyo na badala yake kutumia nguvu ya polisi na ofisi ya mkuu wa wilaya ,nimeona kwamba mjibu maombi wa pili atawajibika kulipa gharama za shauri hili. Baada ya kusema hayo maombi haya yametupiliwa mbali kwa gharama ambazo atawajibika nazo mjibu maombi wa pili."

[Emphasis is mine]

In a literal translation from the quoted ruling above it means the applicant who was the second respondent in Land application No.76/2021 was ordered to pay costs to the respondent because he was aware and knew the procedures to be followed in solving and determining the dispute instead, he used police force and the office of the District Commissioner.

It is a general rule that the court is limited on interfering with the subordinate court's findings unless the same cause miscarriage of justice. In this application since the Trial Tribunal had discretional powers to award costs, and as per the records the applicant despite being the one who raised a preliminary objection which was sustained at the trial tribunal, he was ordered to pay the respondent costs.

In awarding costs, the general principle is that a successful party is entitled to have his costs paid unless the Court gives reasons otherwise. This has been well depicted in different decisions like in the decision of **Hussein Janmohamed & Sons vs. Twentsche Overseas Trading Co. Ltd** [1967] 1E.A. 287 at page 289-290, and in **The Registered Trustees of Roman Catholic Archdiocese of Dar es salaam vs Sophia Kamani** Civil Appeal No 158 of 2015. For instance in **The Registered Trustees of Roman Catholic Archdiocese of Dar es salaam** (supra) the court of appeal had this to say;

"It is well known principle that a winner is entitled to cost unless there are exceptional circumstances which were shown to exist"

Courts have been mandated to order costs at their discretion with the exception that such discretion must be exercised judiciously. Such foundation is founded under section 30(1) and (2) of the Civil Procedure Code Act Cap 33 which was also referred by the parties' advocates in this application. The said provision states 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 what extent such costs are to be paid, and to give all necessary directions for the purpose aforesaid; and the fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers .

[Empasis supplied]

From the excerpt above, it is clear that even if the Court may not have jurisdiction to try the case still the winning part is entitled to his costs. In the application at hand obviously the winner was the applicant after he filed his preliminary objection which led to a dismissal of the respondent case. But the trial tribunal ordered and condemned the same winner to pay costs, and reasoned that the applicant knew that their dispute was to be resolved using their regulations of Savings and Credit Cooperative Societies as stated above.

Now the next point to be considered is whether the trial tribunal was justified to award costs to the applicant.

Courts has power under section 30(1)(2) of the Civil Procedure (supra) to order the losing party to pay the costs of the suit and if the court finds that there is no need to order costs, then it must gave reasons as its

discretion are to be exercised judiciously and upon established principle and not arbitrary or capriciously as it was held in the case of **Mohamed Salmin vs. Jumanne Omary Mapesa**, Civil Application No.4 of 2014 CAT at Dodoma, the court had this to say;.

"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, and not arbitrarily or capriciously. One of the established principles is that, costs would usually follow the event, unless there are reasonable grounds for depriving a successful party of his costs."

Again, this was also discussed in the decision of **Nkaile Tozo vs. Phillimon Musa Mwashilanga** (2002) TLR 276 where the Court observed 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."

Further in **In Mulla's the Code of Civil Procedure, 12th Edition of 1953** at page 150 the issue concerning award of costs was highlighted and stated that;

"The general rule is that costs shall follow the event unless the Court, for good reason, otherwise orders. This means that the successful party is entitled to costs unless he is guilty of misconduct or there is some other good cause for not awarding the costs to him. The Court may not only consider the conduct of the party in the actual litigation, but the matters which led up to the litigation."

Applying my minds to the above decisions authorities, it is clear that the Court in exercising its discretion powers in awarding costs to parties must act judiciously and that; it is always a part who wins the case is entitled to be compensated in terms of the costs incurred. Back home, in this matter the trial tribunal reasoned that the applicant knew the procedure to be followed but instead he went to police station and the office of District commissioner where force was used.

In my view the above reasoning succumbed with erroneous consideration judiciously. I am saying this because; first; the tribunal considered irrelevant matters, the said case at the tribunal was argued by way of written submission, as rightly stated by the applicant's counsel, submissions are not evidence, they are there to reflect the general exposition of the party's case. In the case of **Registered Trustees of the Archdiocese of Dar es Salaam versus The Chairman, Bunju Village Government & 11 Others**, Civil Appeal No. 147 of 2006 (unreported) it was observed that;

"Submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence."

In view thereof, since no affidavit was tendered at the tribunal proving the said allegation, the tribunal misdirected to take up as sound reason. Therefore, I am settled the tribunal was flawed to consider irrelevant matters to award costs.

Secondly, I have considered another point taken by the tribunal in awarding costs, is the act of applicant not sending the matter to negotiation or reconciliation as the law of Savings and Credit Cooperative Societies (supra) provides. I agree this was the route for their justice, notwithstanding the above, I have considered the same mistake was done by the respondent in this matter, he opted to go to the tribunal while the law above prohibits, therefore respondent fall also on the same suit. With respect, the learned Chairman condemned the applicant of his fault while leaving the respondent freely to the same error. In my view, I think he could have forgiven the applicant who repented and came up with a preliminary objection claiming that the road to justice in respect to their matter was improper. It is therefore my considered opinion the said award of costs to one party to the suit while leaving the another triggers the issue of impartiality of the said decision, hence affect the fairness of the trial of their suit by the trial tribunal.

Thirdly, since the matter at the trial tribunal was concluded by preliminary objection, therefore as rightly argued by the applicant's counsel, the tribunal ought to stick on the point of law and none others, thus, it was not proper to deal with previous conduct of the applicant which are factual matters. Sustaining the role of the court when there is preliminary objection,

the court in **Thabit Ramadhan Maziku & Another vs Amina Khamis Tyela & Another** [2011] TZCA 223 (TANZLII) referred its earlier decision of **Bank of Tanzania Ltd vs. Devran P. Valambia**, Civil Application No 15 of 2002 (CAT) (unreported) and observed that;

"The law is well established that a Court seized with a preliminary objection is first required to determine that objection before going into the merits or the substance of the case or application before it."

[Emphasis is mine]

Basing on the foregoing stated and reasoning above, I am settled the trial tribunal erred when considered irrelevant factors hence not fair in exercising its discretions in awarding costs to the applicant. In the circumstances I am constrained to grant the application, which I do. Consequently, in the exercise of revisionary powers vested in this Court by section 43(l)(b) and (2) of the Land Disputes Courts Act (Cap. 216, R.E. 2019), the trial tribunal decision dated 15/09/2022 in Land Application No.76/2021 is hereby quashed and set aside.

After considering the circumstances of the case, I order each party to bear its own costs. It is so ordered.

DATED at **MOSHI** this day of 27th February 2024.



X

JUDGE
Signed by: A. P. KILIMI

Court: - Ruling delivered today on 27th day of February, 2024 in the presence of both parties.

Sgd; **A. P. KILIMI**
JUDGE
27/02/2024

Court: - Right of appeal duly explained.

Sgd; **A. P. KILIMI**
JUDGE
27/02/2024