IN THE HIGH COURT OF TANZANIA

DODOMA SUB REGISTRY

AT DODOMA

LAND REFERENCE NO. 2504 OF 2024

(Originating from the Ruling on the Bill of Costs Application No 36 of 2023 dated 18/10/2023)

EMMANUEL KALEBI (ADMINISTRATOR

OF ESTATE OF LATE KALEBI MPUKU) .....FIRST APPLICANT

KIJOJI FURAHE.....SECOND APPLICANT

VERSUS

ISSA OMARI SUMBI.....FIRST RESPONDENT

HALMASHAURI YA KIJIJI CHA MTINKO.....2nd RESPONDENT

RULING

Date of the last Order: 28/05/2024

Date of the Ruling: 11/06/2024

LONGOPA, J.:

This is a reference against a ruling of the District Land and Housing Tribunal for Singida in Bill of costs. The application is made under Rule 7(1) and (2) of the Advocates Remuneration Order, GN No. 2015 and any other enabling provision of the law. The prayers contained in the Chamber Summons are as follows, namely:

1. That, the honourable High Court be pleased to quash, set aside the ruling of the District Land and Housing Tribunal of Singida at Singida in bill of costs No. 36 of 2023 ruling delivered on 18.10.2023.
2. Costs of this application be provided for.
3. Any other order/ relief (s) that this Honourable Court shall deem fit and just to grant.

In a joint affidavit supporting the application it is stated that:

1. *That, we are the applicants hereof hence conversant to depone the facts hereunder.*
2. *That, it is true there was a case between the applicants and the respondents herein before the District Land and Housing Tribunal for Singida at Singida which was decided in favour of the respondents herein.*
3. *That, aggrieved by the decision of the District Land and Housing Tribunal of Singida at Singida applicants herein appealed to the High Court of Tanzania at Dodoma the case which ended in their favour.*
4. *That, the Respondents herein instituted an application for bill of costs No. 36 of 2023 whereas they were granted the disputed amount of TZS 5,678,000/= (Leave is craved to adduce Copy of the Tribunal Order to be marked as SM 1 to form part of this affidavit.*

5. *That the learned trial Chairman proceeded to determine the application whilst the applicants had a valid excuse of not proceeding with the hearing.*
6. *That, the respondents herein failed to adduce tangible evidence and justification to substantiate their claims.*
7. *That, in the District Land and Housing Tribunal of Singida at Singida the applicants were 14 respondents, in the Land Application No 03/2016 while the Bill of Costs had two respondents in the Land Application No 36 of 2023 but the award was equal.*
8. *That, we take out the affidavit in support of prayer set out in the Chamber Summons forming part of this application.*

On 28th May 2024, the parties appeared in person before me fending for themselves. The parties argued the application for reference orally. The applicants are objecting the grant of Bill of Costs for several reasons. First, there were three cases and one of them involved fourteen (14) persons who were represented by three of us as the representative of all the 14 persons. On appeal, the one of the three representatives and the rest 11 persons abandoned the case by withdrawing from the conduct of the appeal. It is only the two applicants who remained in the case handling the appeal that was initiated by all of the 14 persons. According to applicants, such costs should have been apportioned to all the 14 persons.

Second, it is true that the court ordered that the applicants herein should pay the costs of the two cases that were handled at the High Court of Tanzania Dodoma District Registry and the one at the District Land and Housing Tribunal in Singida.

The main contention of the applicants is that amount being costs of transport (bus fare) at that time was TZS 2,500/= and not TZS 4,000/= as it was awarded from Mtinko to Singida and that from Singida to Dodoma was only TZS 10,000/=. It was contended that amounts awarded were high compared to the actual costs incurred.

Also, it was argued by the applicants that there are dates that respondents claimed but the parties did not attend the Court namely 12/11/ 2019. The applicants reiterated that there were no receipts for accommodation to substantiate the amount spent as stated in the Bill of Costs.

On the other hand, the respondents argued that there are two categories of claims. One was the damages and the costs of the case. The costs were TZS5,678,000/= was awarded by the Tribunal from costs submitted of TZS 7,456,000/=. The case had been ongoing for almost fifteen years thus expenses that were incurred were huge.

The respondents argued that costs are only for those who were parties to the case. All others were not parties to the case as Hon Judge Mlacha did strike them from the Court after they had formally withdrawn from the case in presence of the applicants. The records are in court files. The rest of the persons were no longer pursuing any claim against the respondents save for the duo applicants. According to respondents, the trial Judge informed them that those withdrawing from the case cannot benefit if the case is determined in favour of the rest of persons in that group nor can they be condemned to costs as they had already withdrawn thus not parties to the case.

On the amount awarded as transport costs, it was submitted that bus fares submitted to the tribunal during the taxation of bill of costs from Mtinko to Singida and from Singida to Dodoma, and they were critically evaluated by the District Land and Housing Tribunal. They were found to be correct as the bus fares differ slightly depending on the class of the bus one boards.

On appearance and right to be heard, it was argued that first Applicant was present at the Tribunal during the hearing of the taxation of bill of costs and he blatantly refused to be heard in the Tribunal without any reasonable cause. Also, the second Applicant did not appear without assigning any tangible reasons at the hearing of the bill of costs taxation cause.

It was further reiterated that the first applicant never challenged anything before the Tribunal thus cannot at this stage try to be wise by challenging the uncontroverted evidence tendered before the Tribunal on the hearing of the bill for costs. Thus, it was the respondents' prayer that this reference should be dismissed with costs.

Having heard the parties, I have dispassionately perused and analysed the available evidence on record to find out whether there are any tangible reasons for this Court to interfere with the ruling of the District Land and Housing Tribunal in its decision regarding bill of costs.

There are three main aspects that are reiterated by the applicants to support the application. First, the applicants were not heard as they had justifiable reasons for adjournment of the hearing of the application for bill of costs. Second, that the costs were ordered to the two applicants while the Land Application that led to the appeal involved a total of 14 applicants, inclusive of two respondents. Third, the respondents failed to substantiate the costs' claims.

The first aspect is the right to be heard on part of the applicants. This is right is very crucial in the administration of justice. It forms fundamental part of the natural justice, and it is entrenched in the Constitution of the United Republic of Tanzania, Cap 2 R.E. 2019. Article 13(6) (a) of the Constitution provides that when any rights and duties of

any person are being determined such person must afforded opportunity to be heard.

In the case of **Attorney General vs Raksha Gadhvi & Others** (Civil Application No. 147/01 of 2022) [2024] TZCA 10 (30 January 2024) (TANZLII), at pages 7-8, the Court of Appeal reiterated that:

> *The right to be heard is a fundamental principle of natural justice which should always be observed, a party's right to be heard be guaranteed. The Court has emphasized this in a number of its decisions, including* ***Mbeya - Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma*** *[2003] T.L.R. 251 that the right to be heard is both fundamental and constitutional right enshrined in Article 13 (6) (a) of the Constitution of the United Republic of Tanzania of 1977.*

The available record reveals that on 26/09/2023 the parties were in District Land and Housing Tribunal. Both respondents were present. The first applicant was present, but the second appellant was not present.

The first applicant without any tangible evidence informed the trial Tribunal that the second applicant was not present as he had excuse. It was stated that the second applicant had a sick person. The respondents

requested that hearing of application for bill of costs. The trial tribunal ruled that there was no evidence that 2nd applicant was prevented by a reasonable cause not to appear before the Tribunal thus ordered the hearing to proceed. The respondents presented their bill of costs totaling TZS 7,456,000/= and submitted all the original receipts for determination by the District Land and Housing Tribunal.

The first applicant was invited by the trial Tribunal to respond to the costs submitted by the respondent. He responded that "Sipo tayari kusikilizwa leo".

In **CRDB Bank PLC vs Heri Microfinance Limited & Another** (Civil Appeal No. 20 of 2020) [2024] TZCA 202 (19 March 2024) (TANZLII), at pages 22-23, the Court illustratively emphasized on the effect of failure to accord right to be heard. It stated that:

> *The right to be heard in any proceedings is paramount and this cannot be overstated enough. In* ***John Morris Mpaki vs. NBC Ltd and Ngalagila Ngonyani,*** *Civil Appeal No. 95 of 2013 (unreported), we held; "... it is trite law that any decision affecting the rights or interests of any person arrived at without hearing the affected party is a nullity, even if the same decision would have been arrived at had the affected party been heard... ". Similarly, in* ***Abbas***

Sherally vs. Abdul Sultan Haji Mohamed Fazalboy, *Civil Application No. 133 of 2002 (unreported), the Court held: "That right is so basic that a decision which is arrived at in violation of it will be nullified even if the same decision would have been reached had the party been heard [because the violation is considered to be a breach of the principles of natural justice".*

It is a general rule a decision arrived at without affording adequate opportunity on the parties to be heard is a nullity. That happens when the party was not afforded opportunity to defend the case or unreasonable denied opportunity to appear, cross examine the other party' witnesses or address a particular issue before the court.

In the instant case, the record reveals that the 2nd applicant was not in not without any justifiable reasons having known the hearing date as in the previous date he was before the trial Tribunal when it was adjourned to the hearing date. Also, the first applicant appeared and categorically stated that he is not willing to be heard. There was no reason advanced by the first applicant for not being ready to be heard. This blatant refusal to be heard was made after having heard the submission of the respondent on items contained in the bill of costs.

In the circumstances, I am satisfied that the applicants were afforded opportunity to challenge the bill of costs but on their own volition the duo

decided not to utilize the availed opportunity to challenge the bill of costs. The applicants cannot at this juncture be heard complaining that they were afforded opportunity to be heard. It is an afterthought having been availed opportunity to appear and defend against the bill of costs.

The second aspect of the reference relates to parties to the case thus parties to the application for bill of costs. It is not disputed by the parties herein that at the beginning of the Land Application at the District Land and Housing Tribunal for Singida the applicants herein were part of the 14 persons suing the respondents. However, at some point twelve of the person forming part of the appellants did withdraw from the conduct of the appeal.

It is the applicants who continued to pursue the appeal after withdrawal of twelve members of the group that was pursuing the appeal. The withdrawal meant that in case of any judgment and decree in favour the applicants (who were appellants), it was only the duo who could have benefited as the rest were not parties to the appeal.

The parties to the appeal in the High Court case are the ones who should be accountable for all the costs that were incurred by the respondents. It is a settled law that if it was not the acts of the applicants to institute the case at the District Land and Housing Tribunal for Singida or appeal to the High Court against the decision entered in favour of the

respondent, it is obvious that respondents could not have incurred any costs.

In **Anthony M. Masanga vs Penina (mama Mgesi) and Another** (Civil Appeal 118 of 2014) [2015] TZCA 556 (18 March 2015) (TANZLII), at page 10, the Court held that:

> *It is a common knowledge that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on the balance of probabilities.*

In the case of **Martin Fredrick Rajab vs Ilemela Municipal Council & Another** (Civil Appeal 197 of 2019) [2022] TZCA 434 (18 July 2022) (TANZLII), at pages 8-9 the Court noted that:

> *It is a cherished principle of law that, generally in civil cases, the burden of proof lies on the person who alleges anything in his favour. This is the genesis of the provisions of section 110 of the Evidence Act (Cap 6 R.E. 2002] which stipulates as follows: "110 (1) Whoever desires any court to give Judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to*

prove the existence of any fact, it is said that the burden of proof lies on that person."

Therefore, in civil proceedings a party who alleges anything in his/her favour also bears the evidential burden and the standard of proof is on the balance of probabilities which means that, the Court will sustain and uphold such evidence which is more credible compared to the other on a particular fact to be proved.

It is on record that bill of costs of TZS 7,456,000/= was not challenged at all by the applicants herein. This is because 1st applicant decided on his own volition not to object anything by stating categorically that he would not defend. On the other hand, the 2nd applicant absconded appearance on that material date.

The District Land and Housing Tribunal critically analysed the contents of the bill of costs and all the original documentary authorities in form the bus fare tickets. As a result, the trial Tribunal found that respondents were entitled to TZS 5,678,000/=. This amount awarded was after fully consideration and analysis of the costs items presented. On page 2 of the Ruling the trial Tribunal Chairman stated categorically that the costs covered are divided into two parts: costs incurred in handling Land Application No. 03 of 2016 before the District Land and Housing Tribunal for Singida whereas a total of TZS 726,000/= was awarded for it.

The second part is on costs in prosecution of the Land Appeal No. 38 of 2018 before the High Court of Tanzania at Dodoma Sub Registry where TZS 4,952,000/= was awarded.

There was sufficient proof on the part of the respondents regarding the costs incurred by them in handling both the land application before the District Land and Housing Tribunal and the appeal in the High Court of Tanzania at Dodoma.

The trial Tribunal's Chairman properly taxed the bill of costs and on page 3 of the Ruling the analysis of how the amounts were arrived at is presented thoroughly. In **Lawrence Magesa t/a Jopen Pharmacy & Another** (Civil Appeal 333 of 2019) [2022] TZCA 605 (6 October 2022) (TANZLII), at pages 14-15 the Court of Appeal emphasized that:

> *It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act. It is equally elementary that the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges his and the said burden is not diluted on account of the weakness of the opposite party's case. A commentary by the learned authors M.C. Sarkar, S.C. Sarkar and P.C. Sarkar in Sarkar's Law of Evidence, 18th Edition 2014 at page 1896 published by Lexis Nexis,*

persuasively, discussing a section of the Indian Evidence Act, 1872 which is similar to ours stated that: "...the burden of proving a fact rest on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof. It is ancient rule founded on consideration of good sense and should not be departed from without strong reason...Until such burden is discharged the other party is not required to be called upon to prove his case. The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party... "[Emphasis added]. We subscribe to the above position as it reflects a correct legal position in the context of the matter under scrutiny.

In the instant reference, it is lucid that the respondents had produced all the original receipts pertaining to costs incurred by the respondents in handling the Land Application No. 03 of 2016 and the Land Appeal No. 38 of 2018. The respondents managed to discharge their duty to prove existence of costs that were incurred in pursuit of the two cases at Singida and Dodoma respectively.

The respondents were the ones who alleged that costs were incurred in handling the two cases, namely Land Application No. 03 of 2016 and Land Appeal No. 38 of 2018, The respondents tendered all the documentations regarding every item of costs they had incurred. All the items were scrutinized by the trial Tribunal's Chairman and only those which passed the required test were accepted. That is why the trial Tribunal's Chairman taxed the bill of costs from TZS 7,456,000/= that the respondents herein had submitted to TZS 5,678,000/=. This was a correct exposition of the proof of the case on balance of probabilities on party of the respondents as decree holders.

The last aspect is the argument by the applicants that items 26, 27 and 29 of the Bill of costs should be discarded from the ruling of the trial Tribunal. At this juncture, two issues are pertinent. First, what was the findings of the Tribunal on those aspects. The second, effect of the party to a case failure to challenge the evidence.

On the first limb, it is explicit that on page 3 of the ruling of the District Land and Housing Tribunal the amount of claim contained in the bill of costs was taxed properly by addressing all the unsupported claims. That is the reasons for the Tribunal granting TZS 5,678,000/= from a total claim of 7,456,000/=.

In the case of **Mutamwega Bhatt Mugaywa vs Charles Muguta Kajege** (Taxation Reference 5 of 2010) [2011] TZCA 128 (10 May 2011) (TANZLII), at page 10, the Court observed that:

> *It is trite law that a superior court cannot overrule an exercise of discretionary power unless proof is shown that the discretion was exercised unjudiciously. There is no material before me to indicate unjudicious exercise of discretion so the argument fails as for as item four is concerned. The amount as taxed shall therefore remain undisturbed.*

In **Paulina Samson Ndawavya vs Theresia Thomasi Madaha** (Civil Appeal No. 45 of 2017) [2019] TZCA 453 (11 December 2019) (TANZLII), at page 20, the Court of Appeal observed that:

> *More often than not, the Court has held that failure to cross- examine a witness on a particular important point may lead the court to infer that the cross-examining party accepts the witness' evidence and it will be difficult to suggest that the evidence should be rejected.*

The applicants having opted on their own volition not to question the amounts presented by the respondents at the Tribunal essentially was

agreeing that the amount was correct and that the same reflected the truth on ground. As the duo applicants did not raise the same as a concern at the trial Tribunal, I am of the view that this lamentation should be dismissed for being unmeritorious.

The Court of Appeal in the case of **John Eliafye vs Michael Lesani Kweka** (Taxation Reference 12 of 2007) [2010] TZCA 68 (3 March 2010) (TANZLII), at page 4 reiterated that:

> *In the case of **Prechand Raichand v. Quarry Services of East Africa Ltd and Others** [1972] E.A 162, the earstwhile Court of Appeal for East Africa gave the following principles before the court allows costs "(i) (a) that costs be allowed to rise to such a level as to confine access to the courts to the wealthy; (b) that a successful litigant ought to be fairly reimbursed for the costs he has to incur. (c) that the general level of remuneration of advocates must be such as to attract recruits to the profession; and (d) that so far as practicable there should be consistency in the awards made. (ii) the Court will only interfere when the award of taxing officer is so high or so low as to amount.*

The trial Tribunal did not award any exorbitant costs rather it awarded on the proved actual incurred costs that were proved through tendering of documentary evidence by the respondents. The respondents were reimbursed the costs relating to travel costs and meals and accommodation. It was fairly awarded by the trial Tribunal on actual costs.

That being the case, I find no reason whatsoever to interfere with the decision of the trial District Land and Housing Tribunal for Singida in Bill of Costs Application No. 36 of 2023 as there are no cogent reasons to so interfere.

It is a settled position of this Court that this reference lacks merits whatsoever thus it deserves to be dismissed. I shall proceed to dismiss the same with costs.

It is so ordered.

DATED at DODOMA this 10th day of June 2024.

THE HIGH COURT TANZANIA

Longopa

E.E. LONGOPA
JUDGE
11/06/2024