

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM**

MISCELLANEOUS COMMERCIAL CAUSE NO. 1 OF 2015

SALEHE SAID NAHDI APPLICANT

VERSUS

**NATIONAL MICROFINANCE BANK PLC
ADILI AUCTION MART LTD } RESPONDENTS**

6th March & 2nd April, 2015

RULING

MWAMBEGELE, J.:

This an application for orders of injunction filed by the applicant Salehe Said Nahdi. The application has been taken under section 68 (e) (c) and Order XXVII rules 1 (a) and 4 of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (henceforth "The CPC") seeking for *ex parte* and *inter partes* orders both in the nature of interim and temporary injunctions to restrain the respondents, their agents or servants from selling by public auction the applicant's house located at Plot No. 36/A Msamvu - Morogoro Municipality pending hearing and full

determination of the main suit currently pending in this court. He prayed for costs as well.

An affidavit in support of the application which was duly sworn by one Salehe Said Nahdi tells the story behind the application which can be briefly re-told as follows. The applicant had guaranteed repayment of a loan of Tshs. 30,000,000/= for one Farid Salehe Said over a legal mortgage charge over Plot No. 10 Block C in Morogoro Region registered with a Certificate of Title No. 183041/1 in his (applicant's) name. Upon default to repay the loan, the respondents advertised the sale of the respondent's house located on Plot No.36/A, Msamvu Morogoro; a property which was not subject of the legal mortgage. A counter affidavit thereof sworn by one Ernest Kato denied all allegations putting in the main that the notice which was issued had expired without effect.

The application was argued before me on 06.03.2015 during which the applicant was represented by Mr. Benjamin Mwakagamba, learned counsel and the respondents had the noble services of Ms. Karua, learned advocate. The learned counsel representing the applicant filed their skeleton written arguments well before the hearing as required by the Rules. Save for costs, the application was not objected by the respondent's counsel.

The applicant's counsel having submitted in respect of the application, the learned counsel for the respondents conceded stating that the respondents did not object to the application for injunction, save for, as already alluded to above, costs. The reason for taking that course, according to her, was that the respondents do not intend to sell the said house anymore because the debtor, to whom the applicant stood as a guarantor had already discharged the loan. She then prayed that the application may be granted but without orders as to costs.

Upon this prayer, the learned counsel for the applicant insisted that they should be awarded costs because they had prepared for the hearing as well as filing the application. He stated that the preparation thereof had involved huge task and therefore they should be awarded costs.

Having gone through their respective pleadings as well as the submissions made by the learned counsel for the parties during the hearing, I am of the settled mind that my ruling in respect of the substantive application for injunction is simple. It being not objected by the respondents, it is hereby granted. Subject to the prevailing law on injunction, the respondents, their agents or servants are restrained from selling by public auction the applicant's house standing on Plot No. 36/A Msamvu within the Municipality of Morogoro pending hearing and full determination of the main suit currently pending in this court.

The bone of contention in the present application is on costs. While the respondents' counsel prays that there should be no order as to costs, the applicant's counsel strenuously prays that there should, arguing that he has spent considerable time and resources in the preparation of and arguing this application.

Issues relating to costs are discussed at some considerable length by my brothers at the Bench Utamwa, J. in the case of the case of ***In The Matter Of Independent Power Tanzania Ltd And In The Matter of a Petition by A Creditor For An Administration Order By Standard Chartered Bank (Hong Kong) Ltd*** Misc. Civil Cause No. 112 of 2009 (unreported) and Mackanja, J. in ***Nkaile Tozo Vs Philimon Mussa Mwashilanga*** [2002] TLR 276; wherein a lot of authorities on the point have been discussed. Such authorities include ***Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd*** [1967] 1 EA 287, ***Karimune and others Vs the Commissioner General for Income Tax*** [1973] LRT n. 40, ***N. S Mangat Vs Abdul Jafer Ladak*** [1979] LRT n. 37, ***M/S Umoja Garage Limited Vs National Bank of Commerce***, High Court Civil Case No. 83 of 1993 (Dar es Salaam), ***Njoro Furniture Mart Ltd Vs Tanzania Electric Supply Co Ltd*** [1995] TLR 205 and ***Kenedy Kamwela Vs Sophia Mwangulangu & another*** HC Miscellaneous Civil Application No. 31 of 2004 (Mbeya). I entirely am in agreement with the reasoning and verdicts in the ***Standard Chartered*** and ***Nkaile Tozo*** cases (supra) and will adopt them in this ruling.

The reason advanced by counsel for the respondents why the court should not order costs to follow the event is that the respondents have no intention of auctioning the house under discussion as the applicant has already paid the amount due. On the other hand, Mr. Mwakagamba, learned Counsel for the applicant vehemently resists the prayer arguing that the respondents countered the application by filing a counter affidavit which prompted them to file a reply to counter affidavit and skeleton arguments and prepared for and argued this application. I entirely agree with the applicant's counsel. The fact that the respondents' counsel has conceded to the application, in my view, is no sufficient reason to warrant this court to depart from the long established principle of law that costs must follow the event. It should be noted that the applicant filed this application and paid court fees for so doing. The applicant's counsel spent time and resources to prepare for and argue the application. The respondents' counsel should be reminded that there are costs which go hand in hand with litigating a suit. Such costs include expenses incurred in preparation of suit, filing suit, attending to the suit and defending it, legal instruction fees, travelling, accommodation *et cetera* – see the ***Umoja Garage*** case (*supra*). In the premises, I find no reason why the respondents should be exempted from paying costs.

On this point, I find it irresistible to quote the statement of Bowen, L.J. in ***Cropper Vs Smith*** (1884), 26 Ch. D. 700, at p. 711, quoted by the

High Court of Uganda in ***Note Waljee's (Uganda) Ltd v Ramji Punjabhai Bugerere Tea Estates Ltd*** [1971] 1 EA 188:

"I have found in my experience that there is one panacea which heals every sore in litigation and that is costs. I have very seldom, if ever, been unfortunate enough to come across an instance where a party ... cannot be cured by the application of that healing medicine".

The foregoing statement was re-echoed by Othman, J. (as he then was – now Chief Justice of Tanzania) in the ***Kenedy Kamwela*** case (supra) when confronted with an identical situation. He Lordship stated as follows:

"Costs are one panacea that no doubt heals such sore in litigations".

I share the same sentiments as Their Lordships in the foregoing quotes respecting costs as a panacea in litigation. Costs are one panacea that soothes the souls of litigants that, in the absence of sound reasons, as is the case in the present instance, this court is not prepared to deprive the successful litigant with. These are usual consequences of litigation to which the respondents are not exempt.

The general rule is that in civil cases he who wins has to have his costs. Subsection (2) of section 30 of the CPC require the court to assign reasons in case it does not order costs to follow the event. The subsection reads:

“Where the court directs that any costs shall not follow the event, the court shall state its reasons in writing.”

In the ***Hussein Janmohamed & Sons*** case (supra) this general rule was underscored, I quote from the headnote, as follows:

“The general rule is that costs should follow the event and the successful party should not be deprived of them except for good cause”.

And the court went on to quote from **Mulla: the Code of Civil Procedure**, 12th Edition, at Page 150 where it is stated:

“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 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.”

The above paragraph in the 12th Edition has been improved in the 18th Edition (2011) of the same legal work by Sir Dinshah Fardunji Mulla, at page 540 as follows:

“The general rule is that costs shall follow the event unless the court, for good reason, otherwise orders. Such reasons must be in writing. 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 costs to him; and this rule applies even to proceedings in writ jurisdiction.” .

The general principle is therefore that a successful party is entitled to costs unless the court, for good reasons to be assigned, orders otherwise. The question that I pose to myself is whether there are good reasons in the present case that may empower this court to depart from the general principle that a successful party is entitled to costs.

In the result, and as already alluded to above, I would accordingly allow this application for injunctive orders with costs.

It is so ordered.

DATED at DAR ES SALAAM this 2nd day of April, 2015.

J. C. M. MWAMBEGELE

JUDGE