IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL CAUSE NO. 206 OF 2015

(Arising from Commercial Case No. 87 of 2013)

AFRISCAN GROUP (T) LTD ..... APPLICANT

VERSUS

SAID ABDALLAH MSANGI

AFRISCAN CONSTRUCTION CO. LIMITED ..... RESPONDENTS

27th October& 26th November, 2015

RULING

MWAMBEGELE, J.:

Mr. Rutabingwa, learned counsel for the applicant had filed this application seeking leave of this court to amend the plaint in Commercial Case No. 87 of 2013 for the purpose of impleading Afriscan Construction Co. Ltd; the second respondent herein, as the second defendant.

When this application was called on for hearing on 26.10.2015, Mr. Rutabingwa, learned counsel for the applicant told the court that he was no longer interested in prosecuting the application and sought to withdraw it. The learned counsel prayed that there should be no order as to costs. Mr.

Rutabingwa, learned counsel, had earlier written an administrative letter to the Deputy Registrar of this court notifying the court of his intention to withdraw this application.

On the other hand, Mr. Mbamba, the learned counsel who appeared for the first respondent, had no qualm with the prayer to have the application withdrawn. However, he strenuously objected the second limb of Mr. Rutabingwa's prayer to have the application withdrawn with no order as to costs. The learned counsel stated that given the fact that they were instructed, appeared in court and filed a counter affidavit, they deserve to be awarded costs. The learned counsel recounted that they once appeared in another matter; Miscellaneous Commercial Cause No. 62 of 2013 which was an application for leave to appeal to the Court of Appeal between the same parties in this same court in which the respondents herein sought to withdraw the application and prayed for no costs but the applicant herein vehemently resisted the prayer and were awarded costs. In view of that and for consistence of the court's decisions, he stressed, they must be awarded costs.

Mr. Rutabingwa, learned counsel, rejoined that the circumstances obtaining in Miscellaneous Commercial Cause No. 62 of 2013 are quite distinct from the ones in the present case. In Miscellaneous Commercial Cause No. 62 of 2013, he recalled, the applicant sought to withdraw the application amidst the hearing while in the present case, the applicant had been written a letter beforehand notifying the court of the intention to withdraw this application. Thus the learned counsel for the respondent entered appearance today knowing full well that this application would be withdrawn; he thus did not prepare for any hearing, he submitted.

I have listened well the learned counsel for the parties in this application. The learned counsel are at one on the withdrawal of the application. What is at issue between them is whether it (the application) should be withdrawn with or without costs.

Regarding costs, I have had an opportunity to discuss this point in some of my previous rulings. The recent ones are ***Mohamed Enterprises Vs the National Food Reserve Agency & Anor***, Commercial Case No. 182 of 2013, ***Pradeep Kumar Gajjar & 2 ors Vs Vita Grains Ltd***, Miscellaneous Commercial Cause No. 16 of 2015 and ***Mazenge Investment Company Ltd Vs Director, Singida Municipal Council***, Commercial Case No. 16 of 2015 (all unreported). In view of the fact that I still hold the same views today, I will reiterate my discussion and conclusion on these three cases.

The general rule is that a successful party must have its costs. Once the court departs from this general principle, in the terms of subsection (2) of section 30 of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002, it must assign reasons for doing so. This sub-section reads:

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

This general rule has been a subject of discussion in a good number of cases in this jurisdiction. In ***Hussein Janmohamed & Sons Vs Twentsche***

Overseas Trading Co. Ltd [1967] 1 EA 287; the decision of this court (Biron, J); His Lordship, I quote from the headnote, held:

> "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 His Lordship 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."
> [Emphasis supplied].

The above paragraph in the 12th Edition of Mulla 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."
> [Emphasis added].

The general rule that costs shall follow the event has also been discussed by this court at some length in ***Nkaile Tozo Vs Philimon Mussa Mwashilanga*** [2002] TLR 276 and ***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). In these two decisions, this court referred to a string of authorities on the point. Such authorities include ***Hussein Janmohamed & Sons*** (supra), ***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 (unreported), ***Njoro Furniture Mart Ltd Vs Tanzania Electric Supply Co Ltd*** [1995] TLR 205 and ***Kennedy Kamwela Vs Sophia Mwangulangu & another*** HC Miscellaneous Civil Application No. 31 of 2004 (unreported). I subscribe to the reasoning in the ***Nkaile Tozo*** and ***Standard Chartered*** cases (supra) and propose to follow them in determining the present case.

In the matter at hand, as rightly put by the first respondent's counsel, the first respondent's counsel was instructed, filed a counter affidavit and entered

appearance thrice until 27.10.2015 when the applicant's counsel prayed to withdraw the application. He therefore must have spent time and resources in preparation of the application. There is an old adage which goes: the lawyer's time and advice are his stock in trade. The first respondent's counsel has, certainly, incurred costs on account of this application despite the withdrawal of the application by Mr. Rutabingwa, learned counsel. In the premises, I find no sufficient reason why the first respondent's counsel should be deprived of the same.

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 Vs 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".

In a somewhat similar tone, this court [Othman, J. (as he then was – now Chief Justice of Tanzania)] reverberated the foregoing excerpt in *the* ***Kennedy Kamwela*** case (supra) when confronted with an identical situation. His Lordship simply but conclusively remarked:

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

I share the sentiments of Their Lordships in the foregoing quotes respecting costs as a panacea in litigation. To borrow Their Lordships' words, I feel comfortable to recap as follows: costs are one panacea that soothes the souls of litigants that where, as here, there are no sound reasons to depart from the general principle that costs should follow the event, this court will not deprive the winning party of. These are foreseeable and usual consequences of litigation to which the plaintiff is not exempt. In the premises, I decline the invitation by Mr. Rutabingwa, learned counsel for the applicant, to exempt the applicant from paying costs.

For the avoidance of doubt, I have gone through ***Said Msangi Vs Afriscan Group (T) Ltd***, Miscellaneous Commercial Cause No. 62 of 2013 (unreported); an application referred to by both counsel. In that application, the applicant (the first respondent herein) had sought to appeal against the ruling of this court which had the effect of disqualifying Mr. Marando, learned counsel, in the conduct of that application. The record shows that when the application was called on for hearing on 30.06.2014, Ms. Aziza Msangi, the learned counsel who appeared for the applicant, prayed to withdraw the application on the ground that the matter had been overtaken by events. The learned counsel prayed that there should be no order as to costs. Mr. Rutabingwa, learned counsel, who appeared for the respondent in that application, had no problem with the prayer for withdrawal but prayed for costs. The reasons the learned counsel gave for pressing for costs were, *inter alia*, that he had taken some steps in the application and that he had filed a

preliminary objection. Mr. Rutabingwa's prayer for costs was granted and the application was consequently marked withdrawn with costs. I think, without deciding, that my brother at the Bench exercised his discretion well by awarding costs. In any case, even if the court would have not awarded costs, that would not have changed my position in view of the authorities referred to hereinabove.

In the upshot, I decline the invitation by Mr. Rutabingwa, learned counsel for the applicant and, accordingly, proceed to order that this application is marked withdrawn at the instance of the applicant with costs to the first respondent.

Order accordingly.

DATED at DAR ES SALAAM this 26th day of November, 2015.

J. C. M. MWAMBEGELE

JUDGE