IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 190 OF 2016

(Arising from Commercial Case No. 130 of 2013)

NASRA SAID ..... APPLICANT

VERSUS

KCB BANK TANZANIA LIMITED ..... RESPONDENT

6th October & 2nd November, 2016

RULING

MWAMBEGELE, J.:

The applicant Nasra Said had filed the application for leave to appear and defend Commercial Case No. 130 of 2013; a summary suit filed by the respondent KCB Bank Tanzania Limitted under the provisions of Order XXXV of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (hereinafter "the CPC"),

When the application was called on for hearing on 06.10.2016 Mr. Elisa Mndeme, the learned counsel who appeared for the respondent sought to concede to the application. The learned counsel also prayed that costs should be in the main suit. It is important to note at this juncture that the respondent's counsel had not filed any counter-affidavit but, in its stead,

wrote a letter to this court intimating that the respondent had no objection to the applicant's application to appear and defend the summary suit.

The applicant, who appeared in person because her advocate was appearing in the Main Registry of the High Court in another matter, chose to respond to the question posed by the court on what was her view in respect of the concession and the flanking prayer by the respondent's counsel for costs to be in the main suit. The applicant had no objection to the concession by the respondent's counsel but vehemently argued against the idea of costs being in the cause. She argued that costs should be awarded at the conclusion of the present application because she had spent a lot of money in preparing the application and that costs in this application will help her in the defence of the main suit.

In a short rejoinder, the learned counsel for the respondent stuck to his guns stating that costs should be in the cause because he has saved the court's and applicant's time by his concession. Having heard the applicant and counsel for the respondent, I reserved my decision thereon to today which I am now set to give.

The only point on which the respondent's counsel and applicant have locked horns and which this ruling must answer is whether, the application having been conceded by the respondent, costs should be awardable at this stage or await finalization of the main suit.

Luckily, this issue will not detain me as I have had opportunities more than once to deal with it is some of my previous decisions; the recent one being the case of ***DB Shapriya & Co. Ltd Vs Gulf Concrete and Cement & Anor***, Miscellaneous Commercial Cause No. 248 of 2015 (unreported). In

that case, the applicant's counsel, having realized by himself that his application was filed under wrong provisions, opted to withdraw it and, somewhat like in the present case, prayed that costs should not be ordered arguing that the respondent did not unveil the anomaly and that he had saved the court's and respondent's time. That prayer, like in the case at hand, was vigorously objected. In determining the point, I revisited my earlier rulings on the point in ***Mohamed Enterprises Vs the National Food Reserve Agency & Anor***, Commercial Case No. 182 of 2013, ***Mazenge Investment Company Ltd Vs Director, Singida Municipal Council***, Commercial Case No. 16 of 2015, ***Pradeep Kumar Gajjar & 2 ors Vs Vita Grains Ltd***, Miscellaneous Commercial Cause No. 16 of 2015 and ***Daikin Tanzania Limited Vs Daikin Industries Limited & Anor***, Miscellaneous Commercial Cause No. 252 of 2015 (all unreported) and ruled that costs should be awarded to the respondent. I still find that that was the position of the law and opt to reiterate the arguments therein in this ruling.

In civil cases, the general rule is that a successful party must have its costs. This position is derived from the provisions of subsection (2) of section 30 of the CPC which 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."

This general rule was underscored by this court (Biron, J.) in ***Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd*** [1967] 1 EA 287, at 290 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 of **Mulla: the Code of Civil Procedure**, 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 supplied].

This general rule 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 plethora of authorities on the point. Such authorities include ***Hussein Janmohamed*** (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 Kamweia Vs Sophia Mwangulangu & another*** HC Miscellaneous Civil Application No. 31 of 2004 (unreported). I share the reasoning and verdicts in the ***Nkaile Tozo*** and ***Standard Chartered*** cases (supra) and propose to follow them in determining the matter at issue between the parties..

Mr. Mdeme, learned counsel for the applicant has argued that the respondent has saved the applicant's and court's time in conceding to the application so that the main suit is expeditiously heard on merits to justify his proposition that costs should be in the cause and beckoned the court to so order. Respectfully, I am not prepared to swim his current. The fact that the respondent has saved anybody's time in conceding to the application does not, in my view, justify departure from the long established principle of law founded on statute and case law that costs must follow the event. To the contrary, I agree with the applicant that she has expended money in the

preparation of the application. In the premises, I find no good reason why the applicant should not be granted them at this stage.

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 ***Waljee's (Uganda) Ltd Vs Ramji Punjabhai Bugerere Tea Estates Ltd*** [1971] 1 EA 188 in which His Lordship stated:

> "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)] echoed the foregoing excerpt in ***Kennedy Kamwela*** (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 regarding costs as a panacea in litigation. To borrow Their Lordships' words, I feel comfortable to recap that costs are one panacea that soothe 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 applicant of. These are foreseeable and usual consequences of litigation to which the respondent is not exempt to pay.

For the avoidance of doubt, I must state at this juncture, that I am aware that the authorities cited above were dealing with costs in main suits; it was not in applications. However, I have no iota of doubt that the principle can be applicable to applications like the present one as well.

In the final analysis, I decline the invitation by Mr. Mndeme, learned counsel for the respondent and, accordingly, proceed to order that the applicant is entitled to costs in the present application the concession of the respondent notwithstanding. This application is allowed with costs. The applicant to file her written statement of defence in a fortnight reckoned from the date hereof.

Order accordingly.

DATED at DAR ES SALAAM this 2nd day of November, 2016.

J. C. M. MWAMBEGELE
JUDGE