

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

MISCELLANEOUS COMMERCIAL APPLICATION NO. 277 OF 2016
(Arising from Commercial Case No. 79 of 2016)

MTENDA DISTRIBUTORS COMPANY LIMITED
GEORGE KARISTUS MTENDA } **APPLICANTS**
VERSUS .
DIAMOND TRUST BANK TANZANIA LIMITED **RESPONDENT**

20th & 22nd December, 2015

REASONS FOR DECISION

MWAMBEGELE, J.:

On 03.12.2015 when this application came up for hearing of a preliminary objection raised by Mr. Dilipkumar Ramniklal Kesaria, learned counsel for the respondent, Mr. Mashauri Charles Mulla, the learned counsel who appeared for the applicants rose to tell the court that he was conceding to the preliminary objection. He was ready to face the wrath of the application being struck out but prayed that there should be no order as to costs.

Mr. Kesaria, learned counsel, was without objection to the concession. However, the prayer to have the application struck out without costs met a strenuous objection. The learned counsel argued that the respondent deserves to be paid costs as the counter-affidavit in which the preliminary objection was embodied was served upon the applicants on 25.11.2016 and

when the parties appeared before me on 30.11.2016, the learned counsel for the applicants prayed for a hearing date of the preliminary objection and 20.12.2016 was fixed. He contended that the learned counsel for the application should have conceded on 30.11.2016 and that by so doing costs would have been minimized.

Mr. Mulla, learned counsel, reiterated the prayer not to be condemned to pay costs submitting that the error was an oversight which any person could have committed.

Having heard the learned counsel's contending arguments, I promptly struck out the application with costs. I reserved the reasons thereof to today; 23.12.2106 which I am now ready to give.

The issue of costs in legal proceeding has been a subject of discussion in some of my previous rulings. Some of those rulings are ***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 and ***DB Shapriya & Co. Ltd Vs Gulf Concrete and Cement Products Co. Ltd***, Miscellaneous Commercial Cause No. 248 of 2015 (all unreported) to mention but a few. In those rulings, I relied on several authorities for the stance that costs must follow the event. As I still hold the same position today, I do not find it inappropriate to reiterate my discussion and conclusion on the point as I did in those cases.

The general rule in civil cases is that a successful party must have its costs. This is derived from the provisions of subsection (2) of section 30 of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002. The subsection requires the court to assign reasons in case it does not order costs to follow the event. The subsection provides:

"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, in which, interestingly, Mr. Ramniklal Champsi Kesaria, a renowned lawyer of his times appeared for the respondent company, and it was held (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 then 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."

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].

The general rule that costs shall follow the event unless the court, for good reason, otherwise orders in writing discussed in the above case was followed and discussed at some length by this court 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 those 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 Kamwela 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 adopted them in those rulings and will adopt them in the present ruling.

Mr. Mulla, learned counsel for the applicant, has asked the court to forbear with the issue of costs because the impairment was an oversight which any person could have fallen in. Respectfully, I am not prepared to accept the invitation extended to me by Mr. Mulla, learned counsel. If anything, the invitation is nothing but an exposition of lack of seriousness by the learned counsel. The learned counsel must be aware that failure to comply with the law by oversight will not amount to an acceptable defence for noncompliance with the provisions of section 8 of the Notaries Public and Commissioners for Oaths Act, Cap. 12 of the Revised Edition, 2002. Neither will the contention that anybody else could have fallen into such an error be accepted as a defence for such noncompliance.

In the situation at hand, certainly, the respondent filed the counter-affidavit and skeleton written arguments which were filed in compliance with the provisions of rule 64 of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012 and therefore must have spent time and resources in preparation of the application including entering appearance on 30.11.2016 and 20.12.2016. These are costs involved in the application which the applicant, having conceded to the preliminary objection, must shoulder. I find no sufficient reason why the respondent 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, at 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".

[Quoted by the High Court of Uganda in ***Waljee's (Uganda) Ltd Vs Ramji Punjabhai Bugerere Tea Estates Ltd*** [1971] 1 EA 188].

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

"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 that costs are one panacea that soothes the souls of litigants that, in the absence of sound reasons, as is the case at hand, this court is not prepared to deprive the respondent of. These are foreseeable and usual consequences of litigation to which the parties to this application are not exempt.

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 a suit. However, I have no iota of doubt that the principle fits to situations like the present one as well.

It is for the foregoing reason that I declined the invitation by Mr. Mulla, learned counsel for the applicant and, accordingly, struck out the application with costs.

DATED at DAR ES SALAAM this 22nd day of December, 2016.

J. C. M. MWAMBEGELE

JUDGE

