**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISCELLANEOUS COMMERCIAL CAUSE NO. 291 OF 2015**

**IN THE MATTER OF THE COMPANIES ORDINANCE, CAP.212**

**AND**

**IN THE MATTER OF COMPANIES WINDING UP RULES, 1929**

**AND**

**IN THE MATTER OF A PETITION FOR WINDING UP OF DICKSON KINOKO TANZANIA LTD**

**BETWEEN**

**SHAFII MOHAMMED MRAMBAS ..... PETITIONER**

**AND**

**DICKSON KINOKO TANZANIA LTD ..... RESPONDENT**

10th October & 7th November, 2016

**RULING**

**MWAMBEGELE, J.:**

The present petition was filed on 10.11.2015 by the Petitioner seeking to wind up the respondent Dickson Kinoko Tanzania Ltd. The petition was filed under the provisions of section 167 (b) & (f) and section 170 (1) of Cap. 212,

On 30.11.2015 the Respondent filed a two-point preliminary point of objection to the effect that the company sought to be wound up does not exist and that petition was incompetent for being filed under a repealed law.

When the present petition was called on for hearing of the preliminary objection on 10.10.2016, Mr. Augustino, learned counsel for the petitioner sought to withdraw the petition on the ground that the matter had been overtaken by events. Ancillary to that, the learned counsel prayed that the court should not make any order as to costs because the respondent joined the proceedings prematurely in that they were supposed to be joined after the petition had been advertised. This, he averred, is in accordance with rule 42 of GN No. 43 of 2005. He also submitted that the respondent has not submitted to the jurisdiction of this court by filing a defence. He added that the Petitioner is the Director and shareholder of the Respondent, thus the acts of director and shareholder in seeking intervention of the court in the affairs of his company cannot be sanctioned by the imposition of costs. He also added that the Petitioner is the only Resident Director of the Respondent and has not participated in appointing Locus Attorneys to represent the Respondent. They were thus illicitly appointed, he argued.

The prayer to withdraw the petition without any order as to costs met a strenuous objection from Mr. Mariam Semlangwa, learned counsel for the respondent. She submitted that the course was meant to preempt the preliminary objection filed. She posed a question that the learned counsel did not question their appearance in Miscellaneous Commercial Cause No. 49 of 2016 which was struck out for wrong citation, why raise the alarm now? Should the court grant the prayer, she submitted, then costs should follow the event.

In a short rejoinder, Mr. Augustino, leaned counsel, stated that the respondent is not entitled to any costs while they have not filed any reply to the Petition.

I have subjected the arguments of the learned counsel for the parties to proper scrutiny they deserve. The only issue on which the learned counsel for the parties seem to have locked horns on is whether, after withdrawing the application, costs should or should not follow the event. Mr. Augustino for the petitioner is of the view that the respondent is not entitled to any costs because it did not file and reply to the petition therefore had not subjected itself to the jurisdiction of this court. On the other hand, Ms. Semlangwa, learned counsel for the respondent is of the view that the prayer to have the petition withdrawn is aimed at preempting the preliminary objection and therefore should be refused or, if granted, there should be an order as to costs to the respondent.

This matter will not detain me as I have had opportunities more than once to deal with an identical proble is some of my previous decisions; the recent ones being the cases of ***DB Shapriya & Co. Ltd Vs Gulf Concrete and Cement & Anor***, Miscellaneous Commercial Cause No. 248 of 2015 and ***Nasra Said Vs KCB Bank*** Miscellaneous Commercial Application No. 190 Of 2016, both unreported.

In ***DB Shapriya***, for instance, the applicant's counsel, having realized by nimself that his application was filed under wrong provisions, opted to withdraw it and, 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 by the learned counsel for the respondent. I

still hold the same views of what I discussed therein and propose to reiterated the discussion and conclusion therein in the present 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 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 propose to follow them in determining the matter at issue between the parties.

Mr. Augustino, learned counsel for the applicant has argued that the respondent the respondent is not entitled to any costs as no reply to the petition was filed. With due respect to the learned counsel, I am not prepared to buy this argument. The fact that no reply to the petition was filed is ,in my view, not sufficient reason to deprive the respondent of costs that would soothe their soul after the application somewhat concession of the PO and disguised it with the withdrawal of the petition.

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 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 respondent of. These are foreseeable and usual consequences of litigation to which the petitioner is not exempt.

In the final analysis, I decline the invitation by Mr. Augustino, learned counsel for the applicant and, accordingly, proceed to order that the petition is marked withdrawn at the instance of the petitioner. Costs to follow the event.

Order accordingly.

DATED at DAR ES SALAAM this 7th day of November, 2016.

**J. C. M. MWAMBEGELE**
**JUDGE**