

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 41 OF 2018

*(Appeal from the Judgement and Decree of the District Land Housing Tribunal for Kinondoni,
(Hon. R. L. Chenya (Tribunal Chairperson) in Land Application No. 207 of 2012)*

HASSAN WAZIRI HASSAN APPELLANT

VERSUS

FINCA TANZANIA..... 1ST RESPONDENT

SULEIMAN MBAVA..... 2ND RESPONDENT

JUDGEMENT

Date of last Order: 25/02/2020

Date of Judgment: 29/04/2020

F. K. MANYANDA, J.

This appeal seeks to fault the orders given in Judgment and Decree of the District Land Housing Tribunal for Kinondoni, (Hon. R. L. Chenya, Tribunal Chairperson) in Land Application No. 207 of 2012 on the following grounds:

- i. That the Honourable Chairman erred in law and in fact in ordering that the Appellant alongside the first respondent pay costs of the second respondent; and
- ii. That the Honourable Chairman erred in law and in facts in failure to order for costs by the first and second respondents to the appellant.

The background of this matter is that the Appellant secured a loan from the first respondent on 21/09/2011; he mortgaged his house to secure the loan facility. It turned out that he failed to repay some of the monthly installments as agreed between them, hence the first respondent engaged a court broker, who was the third respondent in the original Land Application, who attached and sold the

appellant's house to the second respondent in a public action. The appellant being aggrieved by the respondent's conducts sued them in the District Land and Housing Tribunal, hereafter referred to as the trial District Tribunal, for Kinondoni District. The said trial District Tribunal despite, the fact that it found the appellant to have breached the Loan Agreement between him and the first respondent by failing to pay some installments of the loan according their agreed terms, decided in his favour because the sale procedures were not followed in the process of attachment and ultimately sale of his house. However, when it came to costs, the trial tribunal ordered the same to be jointly paid to the second respondent by the appellant and the first respondent. The appellant who emerged a winner in the original case was aggrieved by the order joining him with the first respondent, who was a loser, to pay costs to the second respondent who also was a loser. Therefore, he preferred this appeal against the said order.

Hearing of this appeal was ordered to be argued by way of written submissions, the appellant was represented by Mr. Rwegoshora, learned Advocate, and Hussein Jeremia, learned Advocate appeared for the first respondent and Gabinus Galikano for second respondent. The court broker, who was the third respondent in the original Land Application, was not made a part in this appeal. The counsels filed their submissions in time as ordered.

Mr. Rwegoshora started the ball rolling by submitting that while the appellant emerged the winner of the case, the trial District tribunal condemned him alongside with the first and second respondents to pay costs to the second respondent and to the detriment denied him his rights of costs payments. Mr. Rwegoshora contended that the issues of the case as framed by the trial District Tribunal were that:

- i. Whether the applicant breached the loan agreement;
- ii. Whether the respondent was justified in selling the suit premises to the second respondent;
- iii. Whether the auction was lawful;

- iv. Whether the second respondent is entitled to vacant possession of the suit premises; and
- v. What reliefs are the parties entitled.

It was the views of Mr. Rwegoshora that that the core issues of the case were issues number ii, iii and iv. These issues were all resolved in favour of appellant which were to the effect that sale of his house did not follow the procedures laid down by the law. At page 7 of the impugned judgement, the trial District Tribunal examined the provisions of Section 127 of the Land (Amendment) Act, No. 2 of 2004 as well as the Mortgage Financing (Special Provisions) Act, No. 17 of 2008 and reasoned thus:

"Since the provisions of the law above were not met by the 1st respondent before instructing the 3^d respondent to attach and auction the suit property, we are of the considered view that the respondent was not justified to sell the suit premises to the 2nd respondent."

Mr. Rwegoshora contended further that the case fundamentally was decided in favour of the appellant. In these circumstances, he deserved to be awarded with costs. He defined costs with the aid of the Internet Law Dictionary to mean: *"Money award made by a court or tribunal for expenses in bring or defending a legal proceeding, which must be paid by the losing party in a lawsuit."* He also defined the legal principle underlying costs by aid of the Dictionary of Law, Oxford University Press as meaning:

"the general principle is that the costs follow the event, i.e. the loser of the case must pay the costs of the winner."

Mr. Rwegoshora in regard to the first ground of appeal concluded that costs are such payments to the party in whose favour a case is finally and conclusively determined with the view to reimburse that party in respect of the expenses, the appellant ought

not to have been condemned to pay costs of the second respondent or any other costs at all.

As regard the second ground of appeal Mr. Rwegoshora basically repeated his contentions in the first ground and added that since the appellant's prayers in the trial District Tribunal Land application included general damages for of Tshs. 25,300,000/= be paid by the respondents jointly and severally, then it was an error for failure to order for the same. To support his argument, he cited the case of **Njoro Furniture Mart Ltd vs. Tanzania Electric Supply Co. Ltd** [1995] TLR 205 where the Court of Appeal inter alia held:

"Costs follow the event: where the court directs that costs shall not follow the event the court shall state its reasons in writing".

Mr. Rwegoshora prayed to this Court to allow the appeal and order for both damages and costs.

On his side, Mr. Jeremia, for the first respondent submitted in opposition to the appeal by narrating the background of this matter as above adding that it was proved in the trial District Tribunal that the appellant failed to repay several installments of the loan an act which in law constitutes breach of the Loan Agreement. In the circumstances, the trial District Tribunal was entitled to exercise its discretion under section 30(1) of the Civil Procedure Code, [Cap. 33 R. E. 2019], hereafter referred to as the CPC, to require the appellant pay costs of the case to the second respondent.

Mr. Jeremia was of the view that there are exceptions to the principle that costs are to follow the event, meaning that the circumstances of this case are exceptions to the said principle. The trial District Tribunal therefore rightly exercised its discretionary powers. In regard to the second ground of appeal trial District Mr. Jeremia contended that the trial District Tribunal rightly denied costs to the appellant because he is the one who breached the Loan Agreement. He relied on the long known legal maxim which says "

"He who comes into equity must come with clean hands" condemning the appellant as a source of troubles. He prayed the appeal be dismissed in its entirety.

On his side, Mr. Galikano, first of all got surprised as to why the third respondent in the original suit was not included in this appeal while, as far as costs are concerned, he too contributed to the costs incurred by the parties in the case. However, Mr. Galikano explaining the role played by the court broker that he was the one who attached and sold the house Mr. Galikano said, issue number three concerned him. He was of the view that the second respondent is responsible in any way. He was just a bona fide purchaser; he should not have been condemned to pay costs, the trial District Tribunal was therefore right to direct his costs be jointly paid by the appellant and the first respondent

Arguing in respect of the ground two of the appeal Mr. Galikano reiterated his submissions that the trial District Tribunal was right in not ordering the second respondent to pay costs to the appellant because he is innocent in this matter, he added that the even the appellant's submissions do not cover the second respondent. He prayed the appeal be dismissed in its entirety.

Those are the submissions by the Counsels for the parties. I must appreciate that they have done a tremendous work of research which is great help to this Court.

The question in this matter is whether under the circumstances of this matter, the trial District Tribunal was justified to order the appellant pay costs to the second respondent. And the second issue is whether the DLHT was justified to deny the appellant award for costs by the first and second respondents.

Starting with the first issue whether the trial District Tribunal was justified to order the appellant pay costs to the second respondent. The law on costs in this land is well

settled, first of all the provisions of section 30(1) provide for the circumstances under which costs are awarded. Section 30(1) of the CPC reads:

"30(1) Subject to such conditions and limitations as may be prescribed and to the provisions of any law from the time being in force, the costs of, and incidental to, all suits shall be in the discretion of the court and the court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of such bar.

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

Under this section costs are awarded in the discretion of the court which have full power to determine by whom or out of what property and to what extent such costs are to be paid. More over courts are empowered to give all necessary directions. The powers are required to be exercised judiciously. The provisions above have been interpreted in numerous decisions including in **Mohamed Salimin vs. Jumanne Omary Mapesa** Court of Appeal Civil Application No.4 of 2014 where it was held *inter alia* that:

"as a general rule, costs are awarded at the discretion of the court but the discretion is judicial and has to be exercised upon established principles, and not arbitrarily or capriciously."

Also, in **Geofields Tanzania Limited V Maliasili resources Limited and others**, Misc. Commercial Cause No. 323 of 2015 reported in [2016] TZHC COM. D. 8 the court stated that:

"It is a trite law that the losing party should bear the costs of a matter to compensate the successful party for expenses incurred for having to vindicate the right."Generally costs are awarded not as a punishment of the defeated party but as recompense to the successful party for the expenses to which he had been subjected or for whatever appears to the court to be the legal expenses incurred by the party against the expenses incurred by the party in prosecuting his suit or his defence. Costs are thus in the nature of incidental damages allowed to indemnify a party against the expense of successfully vindicating his rights in court and consequently the party to blame pays cost to the party without fault."

Issues relating to costs were also discussed at length by My Lord Mwambegere, Judge (as he then was) in the case of **Salehe Said Nahdi vs. NMB Bank PLC**, Miscellaneous Commercial Cause No. 01 of 2015 where after buying the reasoning and verdicts in the **Matter of IPTL and in the Matter of a Petition by a Creditor for an Order by Standard Chartered Bank (Hong Kong) Ltd**, Misc Civil Cause No. 112 of 2009 (unreported) by Utamwa, J and **Nkevile Tozo Vs. Philimon Muna Mwashilanga** 2002 TLR 276 by Mackanja, Judge, Hon. Mwambegere, Judge held that:

"the general rule in Civil Cases is that he who wins has to have his costs.

Then Hounourable Judge Mwabegere, after cited with approval an elaboration paragraph from Sir Dinshah Farduji Mula in Mulla, **the Code of Civil Procedure** 18th Edition at page 540 which reads:

*"The general rule is that costs shall follow the event unless the court for good reason, otherwise orders. Such reason 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)

his Lordship Mwambegere, J. went on holding that:

"the general principle is therefore that a successful party is entitled to costs when the court, for good reasons to be assigned, orders otherwise"

There are many other cases which dealt with the legal position on costs including the **Njoro Furniture Mart's case** (supra) cited by the appellant.

In the instant case it is not disputed that the appellant was declared a successful by the trial District Tribunal. Among the five issues which were framed by the trial District Tribunal, only the first issue was decided against him. The issues framed by the trial District Tribunal were that:

- i. Whether the respondent was justified in selling the suit premises to the second respondent;
- ii. Whether the auction was lawful;
- iii. Whether the second respondent is entitled to vacant possession of the suit premises; and
- iv. What reliefs are the parties entitled.

The trial District Tribunal answered issue number one in positive. My study of the counsels' submissions and the record of DLHT including the impugned judgment I found that the appellant was found to have breached the Loan Agreement by failing to pay the monthly installments as agreed. This act made the first respondent to instruct a court broker, who was the third respondent in the original Land Application, to attach and ultimately sell the appellant's house. The acts of the first respondent and the court broker were premature; hence the trial District Tribunal answered the second and third

questions in favour of the appellant because the execution of sale of house through public auction did not follow the procedure and practice laid down by the law.

Mr. Jeremia and Mr Gallkano invited this court to use the discretionary powers to uphold the decision to the trial District Tribunal because the appellant has come to this court while he is not clean. I agree with the learned counsels for the respondents that this finding by the DLHT did not cleanse him of the blame that by his breach the Loan Agreement he was the source of the problem. The appellant rushed to the trial District Tribunal to sue the respondent while knowing that he was still with a blame of failure to repay the loan.

The general rule as gleaned from the **Mohamed Salimin case** (supra) is that costs are awarded at the discretion of the court. I understand that discretionary powers are required to be exercised judiciously and have to be exercised upon established principles, and not arbitrarily or capriciously. Among the principles are spelled in **Geofields Tanzania Limited's case** (supra) that the losing party should bear the costs of a matter to the successful party. The costs are not a punishment but rather recompense to the successful party for the expenses. I have gone through the judgement of the trial District Tribunal I found no reasons that were given as why the appellant was condemned to pay costs to the second respondent other than a fact that he was declared a lawful owner of a house which was prematurely attached and sold to the second respondent by public auction. The appellant did not declare himself a lawful owner of the house, but was so declared by the tribunal which again condemned him to pay costs to the losers. The word "*judicious*" is defined in the **WordWeb Online Dictionary** to mean "*marked by the exercise of good judgment or common sense in practical matters*" Under the circumstances of this matter, can the trial District Tribunal exercise of court's discretion be said to have been judicious. It appears to me the answer is in negative. The respondents have some blames for their acts of prematurely attaching his house and selling the same; hence depriving the appellant of his house. They wrongly invoked the law and forced him to come to the court prematurely as well.

The circumstances of this matter demand the appellant to bear his own costs rather than been condemned to pay the costs to his unsuccessful opponents.

The second issue is whether the DLHT was justified to deny the appellant award for costs by the first and second respondents.

As explained above the provisions of section 30 of the CPC and the authority in **Geofields Tanzania Limited's case** (supra) the general rule is that a losing party should bear the costs of a matter to the successful party. However there are exceptions to this rules some of them were listed in **Salehe Said Nahdi's case** (supra) in circumstances where it is established that he **is guilty of misconduct** or **there is some other good cause for not awarding costs to him**. The appellant after been declared a successful and lawful owner of a house which was purchased by the second respondent was also declared to have breached the Loan agreement by failing to pay some installments. In addition he was ordered to pay costs to the second respondent. He is coming to this court seeking for damages and costs for the case. The second respondent entered the auction with his eyes open, hence the maxim buyers be aware. He ought to have conducted due diligence to satisfy himself whether the auction was lawful. In the conduct of the case each party incurred costs, the appellant engaged an advocate on top of engagement costs there were costs for preparation of documents and the routine attendance in court. As explained above each party had a role which contributed to this case. Can the appellant be entitled to damages and costs under the circumstances of this case. The answer is in negative because the record shows that the appellant failed to repay the loan thereby breaching the Loan Agreement between him and the first respondent. The respondents retaliated by selling his house albeit unlawfully, then the appellant requests for the respondents to pay damages and costs of the case to him. In my opinion, the appellant is trying to use the law as a sword for his own benefit, that he failed to repay the loan and at the same time forcing the person who learnt him the money to pay him for damages and costs. The principle in **Salehe Said Nahdi's case** (supra) as interpreted by Hon. Mwamberegere, J. does not

support him, not because of misconduct but for his role in the whole matter, by failed to repay the loan he inflicted injuries to the respondent who in turn also inflicted injuries to him by auctioning his house, I don't see any reason for condemning the respondents to pay damages and costs to him.

In the upshot and for reasons given above, this appeal fails. I do hereby dismiss it at its entirety. In addition exercising the powers of this Court on appeals under section 42 of the Land Disputes Courts Act, [Cap. 216 R. E. 2019], I do hereby quash the trial District Land and Housing Tribunal order that the appellant, who was the applicant in the original Land Application No. 207 of 2012 which condemns the Appellant and the First Respondent to pay costs of the Second Respondent and I do hereby order as follows:

The appeal is dismissed in its entirety:

- i. The appeal is dismissed in its entirety;
- ii. Each party in the original Land Application No. 207 of 2012 will bear his own costs
- iii. Each party in this appeal will bear his own costs

It is so ordered.

F. K. MANYANDA

JUDGE

29TH APRIL, 2020