

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

**LAND APPEAL NO. 228 OF 2020**

<b>AIDA MAKUKURA.....</b>	<b>1<sup>ST</sup> APPELLANT</b>
<b>AMRI MATAKA.....</b>	<b>2<sup>ND</sup> APPELLANT</b>
<b>DENIS TEMBO.....</b>	<b>3<sup>RD</sup> APPELLANT</b>
<b>EDGAR MTINIYA.....</b>	<b>4<sup>TH</sup> APPELLANT</b>
<b>ELIAKUNDA MSIRIKALE.....</b>	<b>5<sup>TH</sup> APPELLANT</b>
<b>EMMANUEL MONYO.....</b>	<b>6<sup>TH</sup> APPELLANT</b>
<b>ELIVIDA KISOMBE.....</b>	<b>7<sup>TH</sup> APPELLANT</b>
<b>FAUSTIN KALANGA.....</b>	<b>8<sup>TH</sup> APPELLANT</b>
<b>GRACE MWAHOJO.....</b>	<b>9<sup>TH</sup> APPELLANT</b>
<b>GODFREY IRIYA.....</b>	<b>10<sup>TH</sup> APPELLANT</b>
<b>JACKLINE MOSHI.....</b>	<b>11<sup>TH</sup> APPELLANT</b>
<b>MASOUD KISANDU.....</b>	<b>12<sup>TH</sup> APPELLANT</b>
<b>JOSHUA OZIAS LEMA.....</b>	<b>13<sup>TH</sup> APPELLANT</b>
<b>CASIAN KAHELA.....</b>	<b>14<sup>TH</sup> APPELLANT</b>
<b>MARTHA KAMNDE.....</b>	<b>15<sup>TH</sup> APPELLANT</b>
<b>PASCHAL MALYA.....</b>	<b>16<sup>TH</sup> APPELLANT</b>
<b>PILI TARIMO.....</b>	<b>17<sup>TH</sup> APPELLANT</b>
<b>SAKINA TARIMO.....</b>	<b>18<sup>TH</sup> APPELLANT</b>
<b>SAKINA SANGA.....</b>	<b>19<sup>TH</sup> APPELLANT</b>

**SIFAEI MANANG.....20<sup>TH</sup> APPELLANT**  
**SHAFII NOKELA.....21<sup>TH</sup> APPELLANT**  
**TEDDY NGUMBUKE.....22<sup>ND</sup> APPELLANT**  
**GERVAS GEORGE CHAULA.....23<sup>RD</sup> APPELLANT**  
**ODILIA MSAKI.....24<sup>TH</sup> APPELLANT**

**VERSUS**

**MAHADI HADI** (*As persona legal representative of*  
**MOHAMED MAHFOUDH MBARAKA.....RESPONDENT**

**JUDGMENT ON APPEAL.**

**S.M. MAGHIMBI, J:**

The Appellants above named, being dissatisfied with the part of the Ruling and Order of the District land and housing tribunal for Ilala at Ilala dated 01<sup>st</sup> October, 2020; have lodged this appeal on the ground that the trial Chairman of the District Land and Housing Tribunal erred in law by dismissing the application without awarding costs to the appellants. The appellants' prayers were that:

- (a) The appeal be allowed with costs.
- (b) The Decision of the Mkuranga District Land and Housing Tribunal be partly set aside to the extent of this appeal
- (c) Such other relief(s) this Court deems fit.

The appeal was disposed by way of written submissions. The appellants' submissions were drawn and filed by Mr. Abdulafattah Al-Bakry, learned advocate while the respondent's submissions were drawn and filed by Mr. Nickson Maganya, learned advocate.

In his submissions to support the application, Mr. Al-Bakry submitted that at the tribunal, the preliminary objection raised by the Appellants herein was decided in favour of the Appellants but the court denied them costs. He argued that the appellants were and are entitled to an award of costs and that there are no reasons assigned by the tribunal for denying the appellant costs. He supported his submissions by citing Regulation 21 of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, 2003 which provides that:

*"The courts have developed principles to be applied by court in exercising their discretion in awarding costs including awarding costs under Regulations 21 of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations 2003."*

He then submitted further that the reason for granting costs to a successful party in a case has been stated in several decisions of the courts including the case of **Geofields Tanzania Limited V. Maliasili Resources Limited and others (Misc. Commercial Cause No. 323 of 2015) [2016] TZHC COM D 8** where the court held 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."*

He then submitted that the Appellant are the tenants who paid rent to the owners of the leased property and that the property does not belong to the Respondent who is also not a beneficiary. Thus they have incurred costs to hire an advocate to represent them in the application filed by the Respondent and also filling fees were paid accordingly, that all these

involved costs and expenses which can be decompensated by the Respondent herein by an award of costs as held in the case of **Bahati Moshi Masabile T/A Ndono Filing Station vs Camel Oil (T) 216 of 2018) [2019] TZHC 275**; where Honorable Judge Mlyambina said at page 7 as follows;

*"Moreover, the record shows that the defendant had engaged a lawyer, he filed Written Statement of Defence, and there are transportation costs incurred, secretarial costs and other related costs. The defendant upon raising a plea in limine litis, he prosecuted it successfully. There was no reason of denying him costs. Infact, the denial of costs would encourage scrupulous litigant to file cases before Courts with no jurisdiction for wastage of time while knowing that at the end of the day no costs shall be awarded to the winning party."*

He also cited the case of **Hussein Jan Mohamed & Sons v. Twenshce Oversea Trading Co. Ltd (1967) EA 287** to cement his submissions. Mr. Bakry submitted further that the case was for rent payment and the Respondent herein was not authorized by the owners to institute the case against the Appellants herein. This meant that the Respondent decided on his own to institute a case at the tribunal hence he caused unnecessary costs to Appellants. His prayer was that this Court step into the shoes of the trial tribunal to grant the costs.

In reply, Mr. Manganya submitted that while proceeding with hearing of the preliminary objection in a written form, on 26-08-2020 letters of administration of estate of the late Mohamed Mahfudh Mbaraka granted to

the respondent herein were REVOKED following a Court Judgment in Civil Appeal No. 207 of 2019 between Salum Mohamed and Khalid Mohamed Versus Mahad Hadi, High Court of Tanzania, Dar es salaam District Registry. That in lieu thereof, one Salum Mohamed and Haklid Mohamed were appointed as joint administrators. That in their joint rejoinder filed in the trial tribunal on 01-09-2020, the appellants (respondents) submitted to the effect that the respondent was revoked from administering estate of the late Mohamed Mahfudh Mbaraka.

He went on submitting that given the circumstances, the ruling of the trial tribunal was delivered while the respondent was no longer executing powers of the personal legal representative of the late Mohamed Mahfudh Mbaraka instead there was Salum Mohamed and Khalid Mohamed. Thus from the date of revocation the respondent herein was relieved from all the doings he performed in good faith under the capacity of personal legal representative of the late Mohamed Mahfudh Mbaraka.

Mr. Manganya then addressed the issue of awarding costs. He submitted that awarding costs to a successful party in a suit follows under the discretionary powers of the Court which are exercised in accordance with rules of reason and principle of justice. He cited the case of **Lyamuya Construction Company Ltd Versus Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010**, Court of Appeal of Tanzania, At Arusha at page 6, to support his argument.

He then submitted that while dismissing Application No. 44 of 2020 without costs, the chairwoman properly exercised her discretionary powers vested

on her by Regulation 21 (1) of the Land Dispute Courts (District Land and housing tribunal Regulations), 2003 which provides that:

*"The tribunal may make such orders as to costs in respect of the case as it deem just"*

Further that in backing up her order as to costs, the trial chairwoman gave reason of her findings where she wrote:

*"I do not grant costs per nature of this case"*

He went on submitting that the trial chairwoman dismissed the suit without costs to maintain lessor and lessee relationship. Furthermore, the trial chairwoman rightly exercised her discretionary powers for dismissing the suit without costs given that the suit was dismissed at a preliminary stage where no witness was called to testify neither for the appellants nor respondent, hence the dismissal was fair and just. That should the trial chairwoman have had dismissed the suit with costs, Salum Mohamed and Khalid Mohamed who are now joint administrators of the estate of the late Mohamed Mahfudh Mbaraka are the one responsible and not the respondent. He prayed that the appeal is dismissed with costs.

In his rejoinder, Mr. Al-Bakry brought about new facts in attempting to convince the court whether the ruling of the tribunal was fair and just. With respect to the learned Counsel, those submissions cannot be taken on board at the point of rejoinder because entertaining new facts at this stage will deny the respondent his right to be heard by making reply submissions.

He also submitted that the respondent is misleading the court because the revocation of administration was done much later while the property was

transferred to the heirs whom the appellants paid rent since 2005. He reiterated his submission that it is imperative for the trial court to assign reasons supporting the withholding of costs and that in the absence of reasons, the discretion cannot be said to have been judiciously exercised. He reiterated his prayer that this appeal be allowed and the applicants be awarded costs with costs of this appeal.

There is only one issue in this appeal, whether the tribunal Chairman erred in not awarding costs of the application at the tribunal, in other words, whether in not issuing the order for cost the tribunal exercised its discretionary powers judiciously under Regulation 21 (1) of the Regulations. The Regulation provides that;

*"The tribunal may make such orders as to costs in respect of the case as it deem just"*

The basis of the above regulation is that in any suit, the general rule is that 'costs follow the event' which means the successful party may recover its costs incurred in defending his/her case. This is in response to the concern that a person should not suffer loss as a result of having to assert or defend his or her rights. The courts have however been vested with discretionary powers to award or not to award depending on circumstances and in case of any departure from the general rule, reasons for not awarding costs must be adduced. It has been emphasized more often than not that in exercising its discretionary powers, the courts must do so judiciously (see the cases of **Tanga Cement Company Limited Vs. Jumanne O. Massanga and Amos A. Mwalwanda, Civil Application No 6 of 2001(CAT)** and **Regional Manager, TANROADS Kagera Vs.**

**Ruaha Concrete Company Limited, Civil Application No 96 of 2007** (CAT) both unreported). In the cited decisions, the court added that in exercising their discretionary powers, the court must do so judiciously while taking into account the circumstances of each case. The guiding principles should be emphasized in justice, equity and common sense and not as a punishment to the losing party. In the case of **Geofields Tanzania Limited V Maliasili resources Limited and others (Misc. Commercial Cause No 323 of 2015) [2016] TZHC COM D 8**, the court held that:

*Generally costs are awarded not as a punishment of the defeated party but as a 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."*

Coming back to the case at hand, the matter was filed on 18/02/2020 and an amended plaint was filed on 02/04/2020 of which the respondents filed a reply on 14/04/2020 with a subsequent reply from the 23<sup>rd</sup> respondent on 06/07/2020. The notice of preliminary objection was lodged on the 14/04/2020 and determined on the 01/10/2020. First and foremost, I have noted that in her ruling, the Chairperson started by saying that it was the 23<sup>rd</sup> respondent who raised preliminary objection. As per the records, it



was Mr. Al-Bakry who raised the objection on behalf of the then respondents. The appellants were represented by an advocate and had raised a preliminary objection which was sustained. In concluding her ruling, the Chairperson only held:

*"In all, the preliminary objections raised are sustained, the application is dismissed. Each party to bear his own costs. **I do not grant costs as per the nature of this case.**"*

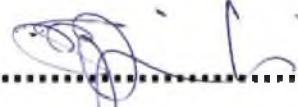
The question may be that when the tribunal to the nature of the case, what was meant by the Chair person. However, she adduced her reasons for not awarding costs, which reason was the nature of the case. Maybe Mr. Al Bakry challenges whether by stating "*as per the nature of this case*" did not constitute sufficient reasons. On my part, this sufficed to be a sufficient reason for not awarding costs and it is my perusal that has convinced me more because, the claim by the respondent was for arrears of rent which the respondent (who was then administrator) claimed to have been outstanding to the estate.

In his own submissions to support this appeal, Mr. Al-Bakry submitted that the case was for rent payment and the Respondent herein was not authorized by the owners to institute the case against the Appellants herein. It means from his submissions that the respondent acted in his personal capacity and not on behalf of the heirs of the estate. This means if he acted without instructions of the owners and he sued as an administrator of the estate, costs that will be imposed on him will be borne by the administrators of the estate as against what Mr. Al-Bakry attempted to establish. Therefore from the nature of the relationship that was

existing, the Chairperson decided not to award costs to the appellants and I find that to be a satisfactory reason because costs are not an automatic right to the winning party, it is rather in the discretion of the court to see the circumstances of the case, a discretion which should be exercised judiciously by adducing reasons for not doing so.

As for the case at hand, the Chairperson exercised her discretion and she adduced reasons for not awarding costs. Therefore there is nothing to fault in her order. In the upshot, I find the appeal to be devoid of merits. Given the grounds of appeal, the appellants feeling aggrieved for not having been awarded costs, I find it fair to leave the parties at even by not awarding costs in this appeal as well. The appeal is dismissed without costs.

Dated at Dar-es-salaam this 26<sup>th</sup> day of July, 2021.



**S.M. MAGHIMBI.**

**JUDGE.**

