

**IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM**

**CIVIL APPLICATION NO. 29 OF 2005  
In the Matter of an Intended Appeal**

**BEN HAKIM..... APPLICANT**

**VERSUS**

**VIRIAN (T) LIMITED..... RESPONDENT**

**(Application for leave to argue and pray for costs from the  
Orders Decision of the Court of Appeal of Tanzania at Dar es  
Salaam)**

**(Lubuva, J.A., Munuo, J.A., And Nsekela, J.A.)**

**dated the 14<sup>th</sup> day of February, 2005  
in  
Civil Application No. 7 of 2003**

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R U L I N G**

**MUNUO, J.A.:**

Mr. Mfalila, learned advocate for the applicant, Ben Hakim, filed a Notice of Motion under Rules 3 (2) 45 and 46 (1) of the Tanzania Court of Appeal Rules, 1979 praying that the applicant who was the respondent in Civil Application No. 7 of 2003 before this Court, be allowed to present his bill of costs for the said application which was withdrawn by the present respondent (then applicant), on the ground that -

“The applicant herein is entitled to his costs in Civil Application No. 7 of 2003 which was not prayed for at the time the respondent withdrew its application.”

Adopting his affidavit in support of the application,

counsel for the applicant submitted that when Civil Application No. 7 of 2003 was called out for hearing on the 14<sup>th</sup> February, 2005, counsel for the applicant in the said application applied to withdraw the same, and as counsel for the present applicant had no objection, the application was marked withdrawn on the 14<sup>th</sup> February, 2005. However, counsel for the applicant inadvertently overlooked the issue of costs in that he forgot to pray for costs which would have ordinarily followed the event thereby entitling the present applicant to costs. Hence the present application for costs in the withdrawn matter.

Mr. Nchunga, learned advocate the respondent opposed the application on the ground that since the applicant did not ask for costs upon the withdrawal of Civil Application No. 7 of 2003, he is deemed to have waived the same and is now estopped from seeking costs before a single judge given that the matter was withdrawn before a panel of three justices of appeal. The withdrawal of the application was conclusive, counsel for the respondent contended, so it cannot be reopened on the issue of costs.

The issue is whether an order for costs can now be made in favour of the applicant, in the circumstances.

The above issue has to be resolved negatively. The Court had dealt with a similar matter in the case of **Laurean G. Rugaimukamu versus Dereck Murusuri and the Editor Mfanyakazi**, Civil Reference No. 8 of 1994, Court of Appeal of Tanzania (unreported). In the said Reference, the applicant challenged the refusal of a single judge to order costs in a matter which had been determined in his favour, but he forgot to then pray for costs. The case started as a defamation suit wherein the applicant sued for damages for libel. The suit proceeded ex parte upon the default of the defendants to enter appearance. The trial court dismissed the suit because it was not established on the balance of probabilities. A subsequent review of the suit by the trial court was not successful either. The applicant therefore challenged the dismissal of the suit in Civil Reference No. 8 of 1994. The Court allowed the Reference, quashed the proceedings of the trial court and ordered a retrial but made no order for costs because the applicant did not pray for costs. Later on, the applicant applied for costs in the trial Court in vain. He made a Reference before a single judge but that too failed so he instituted Civil Reference No. 8 of 1994. In determining the Reference, the Court observed and I quote in extenso:-

The applicant was asked and he rightly replied to this Court that costs have to

be asked for specifically. He alleged that his advocate had done that. However, he conceded that the memorandum of appeal contained no such prayer. He was then asked whether a court is obliged to grant costs when they have not been asked for. He replied, and again correctly, too, in the negative. That is, a court is not obliged to grant costs when there is no specific prayer for the same.

However, the applicant added that this Court had to say categorically that costs were not to be awarded. He submitted that if a court is silent on costs then the assumption is that they have been granted.

The Court continued -

We find these submissions by the applicant to be novel, to say the least. The rule is that costs have to be specifically asked for. Even where more than one counsel have appeared, there has to be a specific prayer for costs for more than one counsel. The taxing

officer can only award costs if there is an order for costs given by the Court.

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We cannot fault the learned single Judge.

The Reference is dismissed.

Put succinctly, where a party has not asked for costs, as is the case with the present applicant who inadvertently forgot to ask for costs upon the withdrawal of Civil Reference No. 7 of 2003 on the 14<sup>th</sup> February, 2005, and the Court having determined the matter by marking it withdrawn but made no order for or against costs, the matter so ended and was conclusive so the applicant by not asking for an order for costs is deemed to have waived his entitlement for costs. Under the circumstances the present application is misconceived. I accordingly dismiss the application.

Since the applicant lost his costs in Civil Reference No. 7 of 2003 through inadvertence, I make no order for costs in this application. Either party to bear their costs for this application.

DATED at DAR ES SALAAM this 17<sup>th</sup> day of November,

2005.

E.N. MUNUO  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.

( S.M. RUMANYIKA )  
**DEPUTY REGISTRAR**