

TANZANIA / JUDGMENT

20100511 TZCA Mwanza1

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11 May 2010

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j ·{ . IN THE COURT OF APPEAL OF TANZANIA ATMWANZA CIVIL APPLICATION NO. 2 OF 2009
THE EDITOR MSANU AFRICA NEWSPAPER APPLICANT VERSUS ~ ZACHARIA
KABENGWE 1.~... RESPONDENT (Application for Extension of Time to
serve the respon~ with a copy· of the letter by which the applicant applied to be supplied with
copies of proceedings, judgment and decree of the High Court of Tanzania at Mwanza) (Sumari.
J.) i dated the 26 day of November, 2008 th in HC Civil Case No. 3 of 2001 -----:-----

RULING

7 & 11 May, 2010 MSOFFE, J.A.: The respondent ZACHARIA KABENGWE successfully sued the
applicant, THE EDITOR MSANII AFRICA NEWSPAPER, for libel in the High Court at Mwanza and
was accordingly awarded damages to the tune of shs. 10,000,000. Incidental'ly, the pleadings
before the High Court appeared to refer to the tort as defamation. While it was not wrong to do
so, the appropriate word ought to hav been libel which 7 in law refers to a written accusation, any
malicious defamatory publication etc. A libel is different from slander in that the latter I I usually
refers to Spoken words: So, libel arisek where there is a I written publication while generally
speaking a slander arises where r . I there is injurious defamation by ,spoken words or by looks,
signs, gestures etc. Sumari, J. pronou~ced the judgm~nt on 26/11/2008 and the applicant duly
filed a Notice of Appeal, thrthrough its advocate, i I Mr. Silwani Galati Mwantembe on 3/12/2008. On
2/12/2008 the i advocate wrote a letter to the ! Registrar applyling for copies of proceedings,
judgment and decree for appeal i purposes. The gravamen of this application centres on the
unbisputed fact that I there was a delay in serving the re~pondent with a lcopy of the letter. I I In
this application the applicant is asking for enlargement of time to , I effect the said service on the
resp~ndent. The ap~lication is by way I . of a notice of motion and is supported by the! affidavits
of Mr. Mwantembe and Mr. SILAS LUCAS !SANGI, a tourt broker and process server. For purposes
of this application prragraphs 6, 7, 8 and 9 of Mr. Mwantembe's affidavit are relevant, thus:- 11 '1 I

6. That on Id December 2008, I assigned a court broker and process server one Silast Lucas
Isangi to serve the r,espondent with I a copy of the said letter. 2 ! I I ! I I

7. That I kept close contact with the process server to see whether he succeeded to serve the respondent with the said letter, but the process server told me that the respondent, I was nowhere to be seen in Mwanza and when he was called through his mobile phone he told the process server that he was not in Mwanza and promised to fetch the letter at the process server's office when he comes but he did not do so.
8. That according to the records there is no specific address for service for the respondent provided therefore it was not even easy to know the place where the letter could be served
9. That the respondent was never seen by the process server until when the time prescribed for serving the respondent with the said letter lapsed. Likewise, paragraphs 2, 3, and 4 of Mr. Isangi's affidavit are relevant, thus:-
2. That on 1st December, 2008, I was instructed by Mr. Silwani Galati: Mwantembe, (Advocate) to serve the respondent herein with a copy of a letter that he wrote to the District Registrar applying to supply with copies of judgment decree and proceedings in respect of the High Court Civil Case No. OB of 2001. I, I,
3. After receiving the instructions, I together with my staff officer one 'GIBSON MUTAIGEYA, looked for the respondent in order to serve him with the said letter. As the respondent's place of work is not known to us, we looked for him at his home at Lisamilo Mwanza. The respondent was always not there and the children told us that they did not know where he went and they even did not know his phone number, or his place of work. I
4. I kept on looking for the respondent on diverse dates at his home but he was always not there. I sometimes called him through his mobile phone where he said that he was out of Mwanza and will be back soon. He promised to fetch the letter at my office when he comes back. However he did not come to my office and I did not see him up to the mid January this year. In response, the respondent filed an affidavit in reply. In similar vein, paragraphs 5, 9 and 10 of the respondent's affidavit in reply are relevant, thus:-
5. That, since when the High Court Judgment was delivered on 21 November, 2008 I have been available either at my home or in Mwanza City doing my normal personal business, I have always been meeting I with Mwantembe and Isangi on the streets, but they haven't asked or informed me of any documents to be served on me in this matter. I
9. That, I deny the contents of paragraphs 2 - 4 of Isangi's affidavit, moreover the said Isangi has not come to my home or else however I received no any call from Silas Lucas Isangi that is pure blatant lie and perjury. I
10. That, on 1st December, 2008 I went early in the morning at MagJ, while there, I received a mobile phone call from Gibson Mutaigeya whom I know him for a long period, he told me that he wanted a house to rent, I replied to him that I could be back on the same day or the next, I came on 15th December, 2008 in evening, but Gibson did not make follow up of his request, affidavits in reply of Mary! Mussa Ntwale Kabengwe, Mussa Kitinde and Happiness Elikana, collectively are attached as exhibit ZK 4. I I This application was filed on

16/3/2009 at a time when the applicable Rules were the Tanzania Court of Appeal I Rules, 1979 (hereinafter the old Rules). In terms of Rule 130 (a) of the Tanzania Court of Appeal Rules, 2009, in so far as is possible, I will to a large extent determine this application on the basis of the old Rules. Under Rule 83 (2) of the old Rules it was imperative upon an intended appellant to send to the respondent a copy of the application applying for copies of the proceedings in order to be entitled to rely on the exception to sub-rule (1) thereto. It is important to observe here that no period was prescribed by the said Rules within which to send a copy of the letter of application. In order to fill in this gap case law prescribed a period of 30 days - See *The Principal Secretary Ministry of Defence and National Service v Devram P. Valambhia*, (1992) TLR 38f at page 393. It is interesting to note that even under Rule 90 (2) of the 2009 Rules no period has been prescribed within which to send a copy of the letter. Indeed, the new feature brought in by Rule 90 (2) is that instead of the word "sent" used in the old Rules, the word used now is "served." Anyhow, it is common ground that in this matter the period of 30 days prescribed by case law to effect service on the respondent of a copy of the letter applying for a copy of proceedings has elapsed, hence this application. Under Rule 8 of the old Rules the Court may extend time for the doing of any act authorized by the Rules if there is sufficient cause for doing so. Needless to say, the power granted under this Rule is at the discretion of the Court. And like any other discretion the power has to be exercised judiciously. The crucial question is whether or not sufficient cause has been shown to warrant the exercise of the discretion in favour of the applicant. The respondent exercised his right under Rule 53 (1) of the old Rules and lodged an affidavit in reply. Together with his affidavit, for doing so there are three other affidavits in reply from HAPPINESS I ELIKANA, MARY MUSSA NTWALE KABENGWE and MUSSA KITINDE. This drew criticism from Mr. Mwantembe that under the sub-rule only a respondent who has been served with a notice or motion may file an affidavit in reply. He accordingly invited the Court to expunge from the record the other affidavits in reply. With respect, I am not in agreement with Mr. Mwantembe. In law an affidavit is evidence. So, ideally a person is free to bring as many witnesses as possible in proving or establishing a certain fact. In this sense, ordinarily, a person might wish to bring in affidavits from other persons if by so doing they will prove a fact or facts in the matter which is/are in the personal knowledge of that person or those other persons only. In other words, it may be necessary to do so particularly where a certain fact or facts is/are not in the personal knowledge of a respondent. At any rate, the catchwords under the sub-rule are "more affidavits in reply". In my reading and understanding of the sub-rule, it is envisaged that the "more affidavits in reply" will come from persons other than a respondent. There is yet another point that drew criticism from Mr. Mwantembe. That the respondent's affidavit in reply is defective in that the basis of belief is not shown in the verification clause. Also that in the jurat it is not indicated whether the respondent was known to the Commissioner for Oaths. In this regard, Mr. Mwantembe urged me to hold that the application is uncontested and should therefore be granted. With respect, this point need not detain me. It is not my intention to be drawn into deciding on whether or not the said affidavit in reply is defective, because under Rule 53 (1) a respondent has the

discretion of filing an affidavit in reply. In this sense, in the exercise of that discretion, a respondent may decide not to file an affidavit in reply. So, if a respondent decides not to file such an affidavit that should not be taken to mean that the application is uncontested. On the contrary, in the absence of an affidavit in reply a respondent may still appear and contest the application. In this context, even if I were to hold that the respondent's affidavit in reply is defective, and thereby I I I 9 I, I expunge it from the record that would not necessarily mean that the application is uncontested. This brings me to the crux of the matter in the application. In deciding this application I have decided to take the following points into consideration:- 1

- (a) In his oral submission before me Mr. Mwanembe asserted that the period of 30 days expired on 1/1/2009 which happened to be a public holiday. At that time his office was closed due to the public holiday and the Christmas vacation which usually begins on 15th December and ends on 31st January each year. When he came back from vacation he realized that the respondent had not been served. With the letter applying for a copy of proceedings, but that it was not, until 16/3/2009 when he filed this application. Withholding words, I will say straight away here that Mr. Mwanembe was negligent in not taking prompt action. It defeats reason that he reported back to duty at the end of January when he realized the mistake; yet it was not, until 16/3/2009 when he filed this application. With respect, this kind of laxity should not be allowed to happen in future. I I I, I I I, I I I
- (b) It is not in dispute that after the decision of the High Court on 26/11/2008 the notice of appeal was filed promptly, that is on 3/12/2008, within the period of fourteen days prescribed under Rule 76 (2) of the old Rules. I I I
- (c) There is also no dispute that the applicant, through Mr. Mwanembe, took prompt action by writing a letter applying for a copy of the proceedings. The letter was written on 2/12/2008 and received in Court on 3/12/2008. I I I 1
- (d) It is also undisputed that the applicant, through Mr. Mwanembe, acted promptly on 3/12/2008 by signing Mr. Silas Lucas Isangi, the court broker and process server, to send a copy of the letter to the respondent. I I I 1
- (e) There is also no serious dispute that since the respondent's address was unknown, Mr. Isangi and one Gibson Mutaigey, had to go to the respondent's home with a view to serving him with a copy of the letter. Unfortunately, they did not meet him at home. In fact, in the absence of the respondent's address, what Mr. Isangi and Mr. Mutaigey were attempting to do here was in line with Rule 20 (7) of the old Rules in that, in the circumstances, the copy of the letter was in effect "required to be sent" to the said respondent "by hand". After giving the application a very careful thought and in consideration I am of the following decided opinion. There is no doubt that there was an inordinate delay in filing his application, as demonstrated above. However, on balance, in the light of the diligence shown by the applicant in (b), (c), (d) and (e) above, and in the spirit of "substantive

justice" Under Rule 2 of the 2009 Rules, I am inclined to give the applicant a chance to serve a copy of the letter I on the respondent. At any rate, I do not think that the respondent will be prejudiced by the decision to exercise my discretion in favour of the applicant.

Henceforth, the application is granted. The said letter should be served on the respondent within a period of seven days from the date of delivery of this Ruling. Since in this matter the applicant is also to blame for indiligence as shown in (t) above, there will be no order as to costs. 12 I I I I I I I I :1 :: [DATED at MWANZA this 10th day of May, 201 . I I I ,I 'I 1. J. H. SOFFE JUSTICE OF APPEAL ,, 13

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