

TANZANIA / JUDGMENT

mericky samson mangula and another vs samwel amani makundi and another 2023 tzhc 16750 17 march 2023

COURT
TZHCDECIDED
17 March 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (DAR-ES-SALAAM SUB-REGISTRY) AT DAR ES SALAAM CIVIL CASE NO. 120 OF 2022 MERICKY SAMSON MANGULA..... 1st PLAINTIFF JANETH GERVAS MGONELA..... 2nd PLAINTIFF VERSUS SAMWEL AMANI MAKUNDI 1st DEFENDANT JOSEPHAT DAUD KALWERA..... 2ndDEFENDANT

RULING

S.M.MAGHIMBIJ The Plaintiffs herein-above are aggrieved by libelous statement allegedly to be published by 1st and 2nd Defendants via Mwananchi newspaper, Sokoni page. They have lodged the current suit praying for judgment and decree against the Defendants jointly and severally for the following;

- (a) Payment of compensation in the tune of TZS 900,000,000/= being compensation for loss of the Plaintiff's reputation and integrity.
- (b) Loss of business/General damages to be assessed by this honourable Court.
- (c) An order compelling the Defendants to punish a retracted apology to be published in the same MWANANCHI newspaper- sokoni page through which the Defendants used to publish the complaint of libelous words.
- (d) An order for permanent injunction restraining the Defendants, their agents, assignees, or whomsoever from committing a similar complained act.
- (e) Court interest at the rate of 7% per annum of the decretal sum from the date of judgment to the full satisfaction of the Decree.
- (f) Bank interest at a commercial rate of 25% per annum of the decretal sum from the date of filling this suit til! full satisfaction of the Decree.
- (g) Costs of the suit and,

- (h) Any other relief the Court may deem fit to grant. On the 26th day of August, 2022 while filing their Written Statement of Defence, the Defendants jointly filed a preliminary objection on points of law that;
- (1) The suit is bad in law having been filed contrary to Rule 4(1) of the Media Services (Deformation Proceedings) Rules, G/N 108 of 2019 and form DP.
 - (2) The suit is barred by law having been contrary to Sections 2 38(l)(e); 40 and 41(2) of the Media Service Act, No. 12 of 2016 (Matter complained of are subject to absolute privilege; no demand notice for amends; and the print media complained of has not been attached.
 - (3) That the suit is bad in law for non-joinder of necessary parties, i.e the Attorney General, the District Land and Housing Tribunal for Temeke, and honourable Mwakibuja Chairperson whose order is being assailed as "Defamatory"
 - (4) That the suit is bad in law for non-joinder of necessary party i.e the alleged publisher of the order complained of i.e Mwananchi Newspaper and the Court process server who affixed the summons.
 - (5) The suit is bad in law for being subjudice contrary to Section 8 of the CPC, Cap 33 R.E 2019.
 - (6) The honourable Court has no jurisdiction to entertain the matter as the Tribunal's proceedings and order complained of are subject to absolute privilege and barred by law.
 - (7) The suit is bad in law having been instituted in place of an appeal, revision, or review for proceedings and order being complained of. 3
 - (8) Plaintiffs have no cause of action against the Defendants.
 - (9) The suit's frivolous vexatious and an abuse of the Court process having been filed contrary to sections 66 of the Advocate Act, Cap8 341 R.E 2019; Regulations 55(l)(a) and (b); 92(l)(2)(a) and 93 of the Advocates (Professional Conduct and Etiquette) Regulation G.N 118 of 2018. The objections were disposed by way of written submissions. The defendants' submissions were drawn and filed by Mr. Emanuel Msengezi, learned advocate while the plaintiff's submissions were drawn and filed by Mr. Eric Rweyemamu. Having appreciated the lengthy and well researched submissions of the parties, submissions which I will not reproduce but will consider them in due course of determining the objections, my findings are elaborated. I will start with the ground that touched the jurisdiction of this court to entertain the suit. This is ground 6 which states that the honourable Court has no jurisdiction to entertain the matter as the Tribunal's proceedings and order complained of are subject to absolute privilege and barred by law. Although in his submission in chief the defendant has argued ground 1, 2, 6 and 8 together, that the publications are on absolute privilege and bar of suit by law, I will base my findings on the issue of jurisdiction. In case it is found that the court has jurisdiction to entertain the matter, then I will deal 4 with the remaining points of objection. In his submissions, Mr. Msengezi submitted that the present suit is barred by law and hence the honourable court lacks jurisdiction to entertain it. He referred to Section

38(1) (e) of the Media Services Act No, 12 of 2016 ("the MSA") which provides as follows:

- 1) "the publication of a defamatory matter is absolutely privileged; and person shall not be liable to punishment in that respect where: (a)-(d)..... NA (e). The matter is published in the course of any judicial proceedings by a person taking part in court proceedings as a judge or magistrate or commissioners or advocate or assessor or witness or party there to;
- 2) Where a publication is absolutely privileged, it is immaterial for the purposes of this part whether the matter is true or false and whether it is known or be not known or believed to be false and whether or not it is published in good faith. He then submitted that much as the law on the above provisions is clear that judicial proceedings are subject of absolute privilege, by citing the law above he does not intend to suggest any how that the matter complained of is by any imagination defamatory. That paragraph 11 of the plaint speaks it all 5 loud and clear that all what is complained of is an order of the District Land and Housing Tribunal ("the Tribunal") for Kinondoni made on 19th day of April, 2022, by Honourable Mwakibuja, Chairperson. The order was for issuance of substituted service by way of publication and affixation to the 2nd Plaintiff who is the 1st Respondent in Application No. 350 of 2018. He pointed out that the proceedings of that particular day are annexed herewith and forms part of his submissions and invited the Honourable Court to take judicial notice on them. He went on submitting that nothing in the proceedings of that particular day infers any defamation to any of the Plaintiff and to attempt to impeach them in the manner preferred by the Plaintiffs is, but to challenge the sanctity of court records in a far too low a yard stick. He supported his submissions by citing the decision of the Court of Appeal of Tanzania in the case of Seleman Juma Masala Vs. Sylvester Paul Mosha and Another, Civil Reference No. 13 of 2018 (Unreported) whereby the Court held that: " We must emphasize that the court record cannot be impeached easily as it is taken to be authentic until the contrary is proved..." He then concluded that in the instant suit, the Plaintiffs have not challenged the authenticity of the Tribunal's record on the material day and the same remain absolutely privileged under the law. That the Plaintiffs have failed to put material sufficient to bring the proceedings into ambit of the definition of 6 defamation under Section 35(1) of the Media Services Act, No. 12 of 2016 hence the suit must crumble. In reply, Mr. Rweyemamu submitted that the dispute is hinged on the tortious acts including defamatory words of the Defendants against the Plaintiffs and not purely on libelous/ defamation per se as the Defendants tend to mislead the Court. He argued that the matter does not fall under the MSA. He went further to submit on the definition of the term Defamation by citing cases without referring to case numbers. It would appear in the case cited the court referred to Halsbury's Laws of England Vol. 28, 4th Edition, paragraph 10 and 7 where defamatory Statement was defined as: '>4 statement which tend to lower a person in the estimation of right-thinking members of the Society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule or to convey an imputation on him disparaging or injurious to him in his office, profession, calling trade or business" He then argued that the suit is properly filed and the Court is vested with jurisdiction and is not bound by the MSA as the Defendants are misconceiving the position

and resort to MSA while the matter in controversy are not under the said forum/MSA. He further cited Section 2(1) of Judicature and Application of Laws Act, which he argued that it also provides for the Jurisdiction of the High Court and Article 108 of the Constitution of 7 the United Republic of Tanzania as amended. He then submitted that the Constitution or in any other law, it is clear that, under this Article cited above, the jurisdiction of the High Court is also subject to some other laws like in the Land Disputes Act Cap.216, R.E. 2019. Further that Section 13 should be read together with Section 7(1) of the CPC which provides that every suit shall be instituted in the Court of the lowest grade competent to try it. Having considered the submissions of parties, and the records of this case, the suit is based on an order of the Tribunal in Land Application No. 350/2018 which involved the 1st defendant, the 2nd defendant and the 2nd plaintiff herein. Through an order of the Tribunal dated 19th day of April, 2022, the Tribunal issued summons by substituted services. It is this summons that the plaintiffs have been aggrieved with on the ground that it contained defamatory statements against them. Under para 15 of the plaint, the plaintiffs allege that instead of publishing summons for the Land Application No. 350/2019, they named a different case being Civil Case No. 769/2019 which never existed at the Tribunal. At this point, the question would be who was responsible for preparation of the publication; it is the court which prepares the publication for substituted services. Hence whatever the case may be, the publication followed a Tribunal order and was a responsibility of the tribunal to prepare the advertisement. Hence 8 whatever the order that was published, it was issued by the Tribunal. At this point, I am in agreement with Mr. Msengezi that the suit at hand is barred under the provisions of Section 38(1) (e) of the MSA which privileges the publication of a defamatory matter where the matter is published in the course of any judicial proceedings by a person taking part in court proceedings as a judge or magistrate or commissioners or advocate or assessor or witness or party there to. Therefore, since the publication emanates from judicial proceedings, it is privileged under the aforesaid provision of the law. Since these facts are clearly pleaded in the plaint, and since the Plaintiffs have not challenged the authenticity of the Tribunal's record on the material day, it is clear that the suit at hand is on a claim that is privileged by the law. I have no hesitation to hold that this court has no jurisdiction to entertain the matter. Since the sixth point of objection which goes to the root of the jurisdiction of the court is sustained, and having so found that this court has no jurisdiction to entertain the matter, I see no reason to dwell on the remaining grounds of objection. Consequently this suit is hereby dismissed. Dated at Dar es Salaam this 17th day of March, 2023. 9

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