

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF TANZANIA (DAR ES SALAAM DISTRICT REGISTRY) AT DAR ES SALAAM
CIVIL CASE NO. 3 OF 1997 AUGUSTINE LYATONGA MREMA & 2 OTHERS
APPLICANTS\RESPONDENTS VERSUS MABERE NYAUCHO MARANDO & 2 OTHERS ... ~
RESPONDENTS\APPLICANTS RUL I N G KALEGEYA, J. On 13th October, 1997, this court issued an
interim order restraining the~Applicants (Augustine Lyatonga Mrema and 7 others, who are
Defendants in the main suit, Civil Case No. 3\97) from convening the National Executive
Committee and the Central Committee of the NCCR-Mageuzi Party pending the final
determination of the suit. The Respondents (Plaintiffs in the main suit) are three, Mabere N.
Marando, Kassim Haidar Magutto and Alli Sumaye while, apart from Augustino Lyatonga Mrema,
the I other defendants include Prince Mahinja Bagenda, Harold Jaffu, Ndembwela Ngunangwa,
Hamdun Marcel, Kamara Kasupa, Weid Mwasakafyuka and Mahmoud Madenge. The Court was
satisfied that the NCCR-Mageuzi Party had split into two warring factions, in a charged
atmosphere, and that there existed "two sets of the National Executive Committee and Central
Committee, each set claiming to be the o~e lawfully recognised under the party's constitution". In
recognition of this situation, although the application was intended to restrain the Applicants
(Defendants) the court made a precautionary order which in substance covered the Respondents
(Plaintiffs) as well, and directed, " as there are two warring sets.of committees, and for the
same reasons embodied in this ruling, none of them is authorised to convene the sai4 NEC and
Central Committee meeting until the final determination of therautit 0 • : 2: Thereafter hearing of
the main suit co11ld not proceed because hitherto parties seem to have been carried away by the
main-stream of various applications (includjng the one which led to the interim order referred to
above) forgetting in the process to file the necessary pleadings - these were completed in early
November, 1997. On 10\11\97 when the matter was mentioned with a view to fixing a hearing date
it was noted that an application for review of the interim order dated 13\10\97 had been filed by
the Applicants (Defendants} on 3\11\97. Focus was now turned on this application which was
fixed for hearing on 11\12\97. On th~t date hearing could not take place because the applicant's
advocate, Mr. Mbuya, was ab~ent but applied through Mr~ Nyange, Advocate, for submissions to
be made in writing which prayer (also consented to by Respondents\Plaintiffs) was granted by the
Court. The last written submission was filed in late January,

1998. This ruling is in respect of that application for review. The applicant came to this court armed with a "memorandum of Review" which contained four grounds and a chamber summons supported by an affidavit. For both the memorandum of Review and the Chamber Summons O. XLII (1)(1)(b); S. 95 of the Civil Procedure Code and "any other enabling provisions of the laws" are relied upon except for the latter where O.LX 111 (2) of the same code is also brought into play. For clarity, even at the danger of making this ruling unduly long I will quote the memoranda and affidavit extenso: The memorandum, states, ..1.1 "I, AUGUSTINE LYATONGA MREMA one of the Applicants above named being aggrieved by the order issued by this Honourable Court on the 13th day of October hereby apply for a review of the said order on the following grounds. 1. That following the order issued by this Honourable Court restraining the Applicants\Respondents from convening of the : 3: meetings of the National Executive Committee and the Central Committee the Secretariat of NCCR-Mageuzi under the Chairmanship of the 1st Respondent\Applicant has usurped the powers of the National Executive Committee of NCCR-Mageuzi under Article 5.9 and 5.11 of the Constitution of NCCR-Mageuzi and in breach of the said Constitution which requires the prior convening of the Executive Committee before withdrawal and expenditure of government subsidies to the party the Respondents has been unlawfully withdrawing and using the said monies without the sanction of the National Executive Committee.
2. That the said order has been interpreted by the Respondents to mean that the Secretariat and the Board of Trustees of NCCR-Mageuzi are empowered to conduct all the party's administrative and financial functions to the detriment of the Applicant and in clear breach of the constitution of the party.
 3. The order leaves a vacuum and\or a loophole in the party machinery which if not properly filled or addressed will accelerate the existing chaos within NCCR-Mageuzi and lead to further breach of the party's constitution.
 4. The order makes impossible for NCCR-Mageuzi to field potential parliamentary candidates for parliamentary constituencies which may be declared vacant such as the Arusha Constituency as the NCCR-Mageuzi Constitution requires such candidates to be approved by the National Executive Committee. WHEREFORE the Applicant pray that this application for review be allowed with costs and the said court order be reviewed and set aside". As to the affidavit in support of the Chamber Summons which implored the court "to hear the memorandum of Review for Civil Case No. 3 of 1997", the relevant paragraphs (para.2 - 15) run as under:... "2. That on the 13th October, 1997 this Honourable Court as per Kalegeya J., issued a temporary injunction (hereinafter referred .. ,. : 4: to as "the Interim Order") restraining the Applicants from convening the National Executive Committee and the Central Committee of the NCCR-Mageuzi Party pending the final and conclusive determination of the main suit.

3. That subsequent to the abovesaid Honourable Court's Interim Order, there evolved a chain of actions and substantial matters instigated by the Respondents which gravely and detrimentally affected the Applicants and the welfare and existence of the NCCR-Mageuzi Party.
4. That it is my firm convictions that the abovesaid actions and matters by the Respondents have fundamentally touched and affected the validity and effectiveness of the above referred interim order of this Honourable Court.
5. That on the 7th October, 1997 the Respondents, influenced the signatories of NCCR-Mageuzi Party NBC account No. 6590000074 at Kariakoo Branch and withdrew large sums of monies from the said account.
6. That the Respondents did altogether withdrew 52 million shillings and that the Respondents further manipulated and succeeded in convening a special meeting of Trustees which only had two Trustees present as quorum, and therefrom removed one signatory JOHN JOSEPH and replaced him with another, GORDON JOTAN.
7. That the abovesaid actions were the consolidating attempts to ensure that all the signatories of the account were supporters of the Respondents purported "Camp" of NCCR-Mageuzi Party.
8. That as a result of these developments, I immediately contacted, ISRAEL MUSHENDWA, one of the Trustees who informed me that he and the remaining trustees were not informed of the said special Trustees meetings which changed the signatory of the account.
9. Thus, ISRAEL MUSHENDWA, informed me that in his capacity as one of the Trustees, on the 8th October, 1997 wrote to the MSC, Kariakoo branch a notice and a request to stop any further : 5: withdrawal from the abovesaid account. A request which was unreasonably refused by the Bank taking into account the disputes brewing within the NCCR-Mageuzi Party.
10. That it is within these existing chaos and money crisis within NCCR-Mageuzi Party that this Honourable Court issued the interim order.
11. That the interim order is causing irreparable harm and loss to the Applicants in that:-
 - (a) The said order have made the disciplinary and administrative organ, the National Executive Committee of the NCCR-Mageuzi Party powerless.
 - (b) That with the said organ powerless chaos, vandalism and disorder has greatly increased within the party which in turn gravely threatens its continuing existence as a political force.
 - (c) That as a result of the said court order, the Respondent have on the 15th October, 1997 withdrawn a further 73 millions and on the 29th October, 1997, 30 million from the said account, monies which are unaccounted for and belonging to the NCCR- Mageuzi Party.

- (d) That in accordance with the NCCR-Mageuzi I ' ' constitution, the National Executive Committee is the disciplinary organ as well as the financial controller of the party, which not only creates poli~y ~u~ ;,; control the spending of the monies of the party.
- (e) That with the National Executive Committee powerless, the Respondents have been withdrawing monies from the bank and depleting unmercifully the coffers of the NCCR-Mageuzi Party for their own unaccounted use and contrary to the interests and welfare of the party. :6:
12. That further with the National Executive Committee and the Central Committee of NCCR-Mageuzi Party restrained it is my conviction that the political force and stability as well as the development of the party itself have stagnated. And this not only affects the party and its members but also the contrib11tion of NCCR-Mageuzi Party as an opposition party to the economic, social and political development of Tanzania in the following manners:-
- (a) That with the recent court developments in the various election petitions lodged, some results of the constituencies have been declared null anrl void. This of course, presupposes parliamentary re- elections for.the said constituencies.
- (b) Presently, the Bunda and Arusha township constituencies have been declared vacant as a result of the Court of Appeal of Tanzania decisions nullifying the same.
- (c) That in accordance with the NCCR-Mageuzi Party constitution the National Executive Committee is the one to approve potential parliamentary candidate to represent the party. But with the said organ powerless, and restrained by this Honourable Court, it is obvious, NCCR-Mageuzi Party is denied representation and their right to contest as a registered political party in the upcoming parliamentary re-election.
13. That I also ~elieve that the existing Honourble_Court Interim Order acts like a catalyst to the increasing chaos, disharmony and dispute within the NCCR-Mageuzi Party in that the Respondents are well aware and are blatantly taking advantage of the lack of power of the National Executive Committee and Central Committee of NCCR~Mageuzi Party, the sole organs empowered with discipl~nary and administrative control.
14. That with these developments and substantial matters, I believe that the Honourable court interim order's validity, : 7: effectiveness and foundation have been greatly eroded in that on a reasonable balance of convenience, the Applicants and the NCCR- Mageuzi Party are subjected to irreparalJle loss and damage going to the roots and affecting the existance of the party itself.
15. That I further believe that these developments are so material and that the Interim Order imposed on the National Executive Committee and the Central Committee of the NCCR-Mageuzi Party is causing a miscarriage of justice to us, the party itself and the interested general public". The above provoked a he~ted response from the Respondents who in their reply to the memorandum of Review vehemently disputed the contents of all the four paragraphs of the memorandum of review arguing that the NCCR-Mageuzi party's financial

matters are purely taken care of by the Party's Treasurer and Trustees; that article 5.9 of the constitution empowers the NEC to receive and scrutinise previous annual income and expenditure and audit report while under Art. 5.11 the executive committee prepares financial regulations, employment rules and publicity activities; that the interim order has left no vacuum or loopholes in the party machinery, and that notwithstanding the interim order NCCR-Mageuzi Party can field potential parliamentary candidates as the responsible appointing organ is the District Executive Committee. As already indicated, the parties effected their submissions in writing. . In their written submissions the Applicants expounded what is contained in the memorandum of Review and affidavit above quoted. They argued that this is a proper case for review under O.XLII (c) CPC as the Respondent's acts have titled the status quo which was intended to be maintained by the interim Order; that the secretariat of NCCR-Mageuzi under the Secretariat of the 1st Respondent has usurped the powers of NEC under articles 5.9 and 5.11 of the constitution by effecting withdrawals of huge : 8: sums of the party's subsidy thus consolidating its position; that the interim order has been interpreted by Respondents to mean that "the Secretariat of the NCCR-Mageuzi under the chairmanship of the 1st Respondent\Applicant and the Board of Trustees of the NCCR-Mageuzi loyal to the 1st Respondent\Applicant are empowered to conduct all the party's administrative and financial functions to the detriment of the 1st Applicant\Respondent and in clear breach of the constitution of the party", The Applicants further argued their case by saying that the interim order left a vacuum or loophole in the party machinery which if not properly filled or addressed will accelerate the existing chaos within the NCCR-Mageuzi and lead to further breach of the party's constitution". They insisted that while NEC is a disciplinary organ as well as the financial controller of the party which not only creates policy but also controls spending of the party's money the Central Committee has a principal role as per articles 7.1 and 7.6 of the constitution and that the interim order " ... left a vacuum in the party machinery which requires to be filled in order to enable the NCCR-Mageuzi to make an effective contribution to the enhancement of democracy and to the economic social and political development of Tanzania as an opposition party and if chaos in NCCR- Mageuzi is to be avoided". They then went on to suggest how that vacuum or loophole can be filled in, " ... can be filled in by either:-

- a) varying the order so as to prohibit the other existing organs of NCCR-Mageuzi at the National level such as the chairman, the Secretariat or the Board of Trustees from exercising the powers conferred on the National Executive committee and central committee by the Constitution of the party; or
- b) setting aside the order". : 9: Finally, the Applicants submitted that the order has led to the party's failure to field parliamentary candidates in Muleba and Makete Constituencies, as much as it led to the fielding of Makongoro by 1st Respondent's action in the Arusha parliamentary by - Elections, proving that without NEC and CC convening meetings the requirement set by the National Electoral Committee that every parliamentary contestant must have his form duly signed by two top national leaders of the party "recognised by the Registrar of Political parties" can never be met. On the other hand Respondent's attack

started with preliminary objections. They argued that, first it is wrong to come to court on review by way of chamber summons supported by an affidavit as under 0. XLII Rule 3 CPC the form of preferring appeals applies Mutatis Mutandis to applications for Review. Secondly they insisted that the affidavit in question (paras. 5,6,7,8,9,10,12,11(b),(c),(d),(e) and 13) introduces new facts for which the Applicants should have sought leave under S.76(1)(d) CPC (that appeal provisions also refer to Reviews) to give evidence to prove the same thus affording chance to them to be heard as well. Thirdly, that the affidavit is fatally defective in that para 11(c) deposes on facts based on an event which took place 5 days (29\10\97) after it was sworn (24\10\97). Lastly, on preliminary objection the Respondent argued that the jurat is defective as it does not comply with S. 10 of the Oaths (Judicial Proceedings) and statutory declaration Act, 1966, in which the declaration must state "whether the person making that oath is known to the Commissioner of oaths personally or is identified by a person who is personally known to the Commissioner of Oaths", and concluded by praying to have the Chamber Summons and affidavit struck off. In the alternative, the Respondents argued that the matter is not fit for review because issues raised by Applicants are incorrect: They argued on what they termed issues under four headings in the process detailing what is contained in their reply to the memorandum of review.

10: First, they said that while conceding that under Art. 5.9 of NCCR-Mageuzi Constitution NEC receives and deliberates upon annual report of the income and expenditure and Auditors report of the past year and under article 5.11 NEC is empowered to make regulations and establish procedures on financial matters, there is no provision empowering NEC to "discharge day to day decision making functions in relation to withdrawals and expenditure of party finances let alone government subsidy". They cited the decision of Samatta, J.K. (as he then was) in THE REGISTERED TRUSTEES OF NCCR-MAGEUZI AND OTHERS VS AUGUSTINE LYATONGA MREMA and OTHERS, CIVIL CASE NO. 17 of 1997 -that the supervisory powers of the party's finances and property matters in political parties are vested in their Boards of Trustees; that in the case of NCCR-Mageuzi Constitution this is provided under Article 20 Sub-article 1 read together with Article 19 sub-article 3. Secondly, they argued that the Secretariat has not usurped NEC's powers for its functions are provided under Articles 8.1 to 8.12 of the Constitution. They insisted that the prayer that activities of other party organs should be prohibited as well can only be entertained by way of new application. Thirdly, the Respondents insisted that the interim order has not banned the administrative and financial functions of the Secretariat or Board of Trustees as it was limited to the calling of the meeting of NEC and Central Committee. As regards finances being given out they argued, "The fact that the Applicants as rebels may not be receiving allocation of moneys from the secretariat does not make the activities of the secretariat and Board of Trustees unlawful or unconstitutional. The Applicants must make a fresh application on this point and show why they are entitled to any funds by way of Court order other than by employing normal administrative process in force in the party".

11: Fourthly, and finally, they argued that the interim order does not prevent NCCR-Mageuzi party from fielding a candidate in parliamentary by-elections because the function of electing parliamentary candidates is vested in the District Executive Committee under article 4.7 of the Constitution, and that

though article 5.17 puts the duty of certifying the candidature of a parliamentary candidate on NEC, the Electoral Commission's Rules do not require any certification by any committee or organ of a party but rather signatures of two top leaders of a party on a nomination form, a procedure the parties in this matter have so far used in fielding the Arusha parliamentary candidate. I will start with the preliminary objections. But before that let me state what the law says on applications for review. Under O. XLII of the Civil Procedure Code the manner by which an aggrieved party comes before the Court for review is provided. "O.XLII 1 (1) Any person considering himself aggrieved

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been prepared; or
- (b) by a decree or order from which no appeal is allowed, and who, from discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment of the Court which passed the decree or made the order (2)

2. 3. The provisions as, to the form of preferring appeals shall apply, mutatis mutandis, to application for review". : 12: Regarding the form of preferring an appeal, O. XXXIX, Rule 1 of the Civil Procedure Code provides, "Every appeal shall be preferred in the form of a memorandum signed by the Appellant or his advocate The memorandum shall be accompanied by a copy of the decree appealed from and (unless the Court dispenses therewith) of the judgement on which it is founded". Considering the provisions of the governing law quoted above one need not elaborate further, that the Respondents are right in their quarrel with the manner the review was brought before this Court. The Applicants improperly filed a chamber summons accompanied by its affidavit. What was required was a memorandum and a decree and judgement (in this case Ruling). With this finding, though other matters raised contain some substance, it becomes unnecessary to dwell and decide on the correctness or otherwise of the affidavit filed in support of the chamber application. The said Chamber Summons and accompanying affidavit are accordingly struck off. However, this is not the end of the story. The Applicants seemingly not sure with which road they should enter the court with their application made a two pronged advance - by way of chamber application which has been struck off as not being in consonance with law, and by a memorandum of review. This latter line has not also been safe from the Respondents attack calling in O.XXXIX CPC to their aid. As I have already said, under O.XLII Rule 3 CPC read together with O.XXXIX Rule 1 CPC, the said memorandum was supposed to be accompanied by a decree (order) and judgement (Ruling). At the same time however, the court may dispense with the judgement\Ruling. It would seem however that while a decree is an essential ingredient in an appeal it may not necessarily be so in review. I have made this last observation because notwithstanding the provisions of O.XLII Rule 3 - that the form

of preferring an appeal shall apply mutatis mutandis -there is a marked difference between Appeals and Reviews. In Appeals the aggrieved party is challenging a decision of one Court before another (superior court) while in Review the application is made before the same court. The necessity of there being a memorandum accompanied by a decree and judgement in appeal is very obvious because the Court being appealed to, by the time of filing the appeal, will have only these documents at its disposal (the original record being still with the subordinate court) as opposed to the case of Review where whatever documents presented are filed in the same record where the decision being challenged was made. In the latter situation the requirement of accompanying decree (order) and judgement\Ruling becomes an unnecessary formality for they are there present in the same record. Only the memorandum is of paramount importance because the Court has to know the gist of the application. Treading on this and as the memorandum of Review clearly shows what the applicants consider to be their grievance and grounds for review I hold that their application is properly before this Court. The preliminary objection by the Respondents is partly allowed. We now turn to the grounds for the application. In deciding on this I will limit myself to the contents of the memorandum for Review; Reply to the memorandum for Review and written submissions by the parties limited to the contents of the said memorandums. I have already quoted and summarised at length submissions of both parties in support of their memorandums. Here I will simply proceed to analysis and observations. On page 11 of this judgement I have quoted what the law lays down as grounds for an aggrieved party to apply for review. Surely in their memorandum of review and submissions the Applicants have not advanced a newly discovered important matter or evidence which was not in their knowledge or could not be produced at the time the interim order was made nor any mistake or error apparent on the face of the record. They have simply argued under the last category provided under O.XLII, Rule 1 CPC, that there is a sufficient reason entitling them to the review of the order. Fortunately however the Applicants are quite aware of the restrictive interpretation of what should the words "sufficient reason" be gauged into. They themselves, rightly, conceded and submitted, " ... the words for any sufficient reason have been interpreted to mean a reason sufficient on grounds at least analogous to those specified immediately previously namely the discovery of new and important matter of evidence and some mistake or error apparent on the face of the record. See Mulla on the Code of Civil Procedure 15th Edition Vol. III at page 2728, Sarkar's Law of Civil Procedure 8th Edition, Volume 2 at page 1597 and Mogha's Law of Pleadings 14th Edition at page 373". The Applicants nevertheless implore the court to depart from that legal stand for they say, "However as the words "for any sufficient reason" are not only very wide in themselves but were intentionally so made by the legislature because of exceptional cases arising in which obvious injustice would be worked by strict adherence to the terms of the order as originally passed and further as too narrow interpretation will not be in accord with equitable principles it is submitted that a strict application of the analogous rule in this case should not be made as it will not only cause injustice to the Applicants\Respondents but will also not be in accord with equitable principles". On the facts as they are, however sympathy generating the above plea may appear, the application

for review can't succeed. The centre of all matters that led to the present application seem to be the way the secretariat headed by the 1st Respondent and the Board of trustees deal with the government subsidy given to NCCR-Mageuzi Party. But surely the interim order : 15:

- given on 13th October 1997 did not touch any other organ or activity of NCCR-Mageuzi party. The order in very explicit terms barred only the convening into a meeting of the National Executive Committee and the Central Committee. All other activities of the party were left to go on unabated. Although both parties have referred to NCCR-Mageuzi Party Constitution, each trying to show the extent and limits of powers regarding finances, it is my considered opinion that for the purposes of this application this was unnecessary and as a result I will not go into its details. If there is any other organ or body in NCCR-Mageuzi Party whose actions or activities, outside the realms of NEC and CC meetings (which have been banned) are in such a manner or way, in the eyes of the other body, organ or NCCR-Mageuzi party members, against the Constitution or to the detriment of the other, that body, organ or person is at liberty to call upon the Court, in the manner prescribed by the law, to intervene and call a stop to such acts or activities. Such application has to be made separately as has been hitherto the case in other previous applications. The application which barred the convening of the National Congress was different from the one which barred the NEC and CC meetings. It would be improper to come under the cover of review in matters which clearly stand not directly connected. Just to clarify the above, ground one and two of the memorandum of review (see page 2 & 3 of this judgement) simply attack the way the secretariat and Trustees deal with the subsidy. With respect, if the allegations are true (and I think they are, regard being had to what the Respondents have submitted as I have quoted on page 11, para. 3 of this judgement) one can't fail to see the logic and why the Applicants are aggrieved. However, if the situation is as presented, why shouldn't the Applicants apply in normal manner to have their (Respondents) actions barred. I have really failed to comprehend why they have decided to embark on what they should have clearly seen as an
- : 16: impossible channel instead of embarking on the obvious one. In the same memorandum, ground 2 and 3 cannot be supportive either under review. The referred to situations existed, if at all, when the 13th October, 1997, order was being made. If the Applicants felt need of pursuing their (grounds) strength and legality the only way to test their veracity was to appeal against the whole order and not otherwise. On the whole, for reasons discussed above, by whatever imagination and interpretation of the words "for sufficient reason" the present application can't fall under what was envisaged under O.XLII CPC. I am satisfied that none of the grounds advanced in the memorandum of review would entitle this Court to review its order dated 13th October, 1997 as the present circumstances are not different from those that existed when the order was made. In their (parties) submissions the warring factions at the stage of NEC and CC have not a bridged - that is, if anything, the gap is taking a wider arena. How then can the lifting of the order under review be justified? New developments outside the ambit of the order, if any, have the whole world at their disposal for fresh applications and prayers under normal procedure. The application for review is accordingly dismissed with costs. AT DAR ES SALAAM (L. B.

Kalegeya) 5TH APRIL, 1998. :. , . JUDGE Delivered today .. IJ.-/.1.t A~.~ .. in the presence
of bt.Gtfl~ ~ ~Qt,~1~ ~ ~ HIGH COURT

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