

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KISANGA, J.A., MFALILA, J.A., And LUBUVA, J.A.)

CIVIL APPEAL NO. 41 OF 1999

BETWEEN

1. AUGUSTINE LYATONGA MREMA)
2. LEO LWEKAMWA) APPELLANTS
3. HAROLD JAFFU)

AND

1. ABDALLAH MAJENGO)
2. ALPHONCINA MASSAWE) RESPONDENTS
3. WINSTON GELLEGE)

(Appeal from the decision of the High Court
of Tanzania at Dar-es-Salaam)

(Bubeshi, J.)

dated the 14th day of May, 1999

in

Civil Case No. 3 of 1999

JUDGEMENT OF THE COURT

MFALILA, J.A.:

On 6/5/99, the respondents filed a suit against the appellants in which they claimed for a number of declarations including the following:

"The purported wholesale removal from office of the elected office bearers of the Tanzania Labour Party and the installation of the 1st, 2nd and 3rd defendants (the present appellants) as National Chairman, National Vice-Chairman (Mainland) and Secretary General respectively, and all appointments made at all levels of the Party are null and void for being contrary to the Constitution of the United Republic of Tanzania, the Constitution of the Tanzania Labour Party and the Political Parties Act."

This suit followed the alleged gate-crashing by the 1st and 3rd appellants into the Tanzania Labour Party after their resignations from the NCCR-Mageuzi Party. The respondents alleged in their plaint that the 1st and 3rd appellants not only gate-crashed into their Party but also usurped all national leadership positions in the Party. Also that the 2nd appellant vacated his position as National Chairman of the Party without following the procedures laid down in the Party Constitution. In the plaint, the respondents described themselves as members of a registered political party, the Tanzania Labour Party and holding Party portfolios as follows:

1st respondent, Abdallah Majengo	- Vice-Chairman (Mainland)
2nd respondent, Alphoncina Massawe	- National Women's Chairman
3rd respondent, Winston Gellege	- Dodoma Regional Party Secretary

The appellants are described as follows:

1st appellant, Augustine Lyatonga, Mrema	- installed as National Chairman
2nd appellant, Leo Lwekamwa	- installed as National Vice-Chairman (Mainland)
3rd appellant, Harold Jaffu	- installed as Secretary General

It appears that before the appellants had filed their written statements of defence, the respondents filed a Chamber Summons supported by the affidavit of the 1st respondent in which they prayed first for an interim ex-parte injunction restraining the appellants, their followers, agents and servants from acting as office bearers of the Tanzania Labour Party, conducting political activity in the name of the Party or issuing the new TLP membership cards pending the hearing and determination of the Application inter-parties. Secondly, for a temporary injunction,

upon hearing the Application inter-parties, restraining the appellants, their followers, agents and servants from acting as office-bearers of the Party, conducting party political activities in the name of the Party or issuing the new TLP membership cards pending the final determination of the suit: and, thirdly, for costs of the application.

On 14/5/99, ~~ex-parte~~ proceedings to hear this application commenced in the High Court before Bubeshi, J. Mr. Tadayo learned counsel who appeared for the respondents, told the trial judge that he was applying for an interim injunction against the appellants, their followers, agents and servants restraining them from acting as office bearers of Tanzania Labour Party and conducting political activities in the name of the said Party or issuing new Party membership cards. Elaborating on this prayer, Mr. Tadayo further told the trial court that the appellants had descended on the Party and purported to assume Party official positions of National Chairman and Secretary General. Replacements of TLP functionaries with former NCCR-Mageuzi cadres were also effected at regional and district levels. All these actions, Mr. Tadayo submitted, were contrary to the Party Constitution as well as the provisions of the Political Parties Act. On the basis of these unconstitutional activities by the respondents, he said, the Party was put in danger of being struck out from the register of political parties. Hence, he concluded, it was necessary for the Court to issue the order prayed for in order to maintain the status quo pending the hearing inter parties of the main application for temporary injunction.

Following these submissions, the learned judge made the following order:

"After hearing counsel for the applicants ex-parte, and after studying the accompanying affidavit deposed to by the first plaintiff (sic) in support thereto, this court grants ex-parte an interim injunction as prayed. The main application inter parties is hereby fixed for hearing on 27/5/99. Respondents to be served to appear."

The order which was drawn up following this ruling was indeed as prayed in the chamber summons, and this is the order whose correctness is being challenged in this appeal. As indicated, the ex-parte order which was granted as prayed, restrained the appellants, their followers, agents and servants from acting as office bearers of Tanzania Labour Party, conducting political activities in the name of the Party and issuing the new TLP membership cards, pending the hearing and determination of the application inter parties.

The appellants challenged the correctness of this order in a ~~two~~ point memorandum of appeal as follows:

1. The High Court erred in law and in fact to grant interim order of injunction to the respondents ex-parte without first having served a notice to the appellants.
2. The High Court erred in law and in fact by granting an interim order of injunction ex-parte, without evidence to dispose with the requirement of service of notice to the appellants.

The two grounds are inter related and will be dealt with together. At the hearing of this appeal, Mr. Magesa, learned counsel who appeared for the appellants, submitted with some force that the amended order 37 r. 4 of the Civil Procedure Code 1966 made it mandatory to serve the notice on the opposite party before hearing and issuing the order of injunction. Order 37 rule 4 provides as follows:

The court shall in all cases, before granting an injunction, direct notice of application for the same to be given to the opposite party, except where it appears that the giving of such notice would cause undue delay and that the object of granting the injunction, would thereby be defeated.

On the basis of this provision, Mr. Magesa contended that the requirement of giving notice is mandatory and that the burden is on the party alleging otherwise to prove the circumstances exempting the notice, and cited the decision of the Court of Appeal for Eastern Africa in Noor Mohamed Jan Mohamed v. Kassamali Virji Madhani (1953) 20 EACA 8 as authority for this proposition. He added that in this case not only did the affidavit by the 1st respondent fail to disclose any reasons for dispensing with the mandatory requirement of serving notice on the opposite side, but there was actually no reason because the appellants, all resident in Dar-es-Salaam, could have been easily served before the hearing. Mr. Magesa concluded his submissions by stating that because no reasons had been advanced for dispensing with notice, the ex-parte order of injunction granted by the learned judge was in contravention of O. 37 r.4.

In reply, Mr. Tadayo for the respondents conceded that no reasons were given for the non-service of notice on the appellants, but he said that in his view the rule applies only to applications for temporary not as in this case interim injunctions.

With respect, we think Mr. Tadayo's argument is ingenious but it has no merit. The rule as cited above makes no distinction between interim and temporary injunctions. On the contrary it covers all cases, it states - "the Court shall in all cases ...". With even greater respect we are satisfied that Mr. Magesa's submissions are correct. The effect of rule 4 of Order 37 is to make it compulsory for the giving of notice to the opposite party in all cases except

in situations covered by the exception to the rule. In the Noor Mohamed case (above) referred to by Mr. Magesa, it concerned O.39 r.3 of the Kenyan Civil Procedure Code in pari materia with our O.37 r.4, the Eastern Africa Court of Appeal stated, after quoting Rule which is identical to our Rule 4:

The requirement to give notice is clearly mandatory and it cannot be disputed that the onus of satisfying the Court that there is good cause for dispensing with it will lie with the applicant.

In the instant case, the respondents' summons did not contain any reference to rule 3 nor any application for the order dispensing with notice and the only paragraph of his affidavit which could be prayed in aid of the immediate issue of an injunction is paragraph 10 which contains the bald assertion that the furniture, goods and effects are in danger of being wasted or wrongfully sold in execution."

That case is on all fours with the case before us. It was up to the respondents to satisfy the Court that there was a good cause for dispensing with the mandatory requirement to serve the notice of the application to the appellants. Not only did the respondents' chamber summons fail to refer to Rule 4, but the first respondent's affidavit contained no grounds for dispensing with such notice. Without the respondents satisfying the Court as to the necessity of dispensing with the notice under the exception to rule 4, the Court had no power to grant ex-parte the injunction against the appellants. The result of this unfortunate error was that the appellants have been denied their constitutional and civil right to engage in the political life of their country, this is because in this country political activity is not possible outside registered political parties. We also wish to observe that the High Court, even if it were minded to grant the

order for injunction, should not have granted the order as prayed because it was unduly wide, bringing under its umbrella even innocent parties apart from its vagueness. For instance, who are the appellants' followers? What have the appellants' servants in the form of cooks, housegirls or gardeners to do with their bosses' political life? As no political activity is allowed in this country outside registered political parties, the judge's order amounted virtually to a suspension of the appellants' constitutional and civil rights. The judge should have limited her order to the main complaint against the appellants, namely usurpation of leadership positions in Tanzania Labour Party.

Before we end, we wish to quote the very useful guidelines on the practice to be followed in applying for injunctions under Rule 37, the guidelines made by the Court of Appeal for Eastern Africa in the Noor Mohamed case. These guidelines when followed will help the High Court avoid making similar mistakes in future. The Court stated at page 12:

"In conclusion I will venture to add a few observations on the practice in applying for the injunction under O. 39. I have been most surprised to find in this case that service on the opposite party was dispensed with without there being a formal application for this in the applicant's summons, and that peremptory injunction was served without the party affected there by being at the same time served with the copy of the plaint. I should like to suggest therefore that, as a rule of practice:-

- (a) An application under Order 39 should contain a prayer for, either, directions as to service of the notice on the defendant, or, for an order dispensing with such notice. In the

latter case reference should be made to the affidavit or affidavits relied upon in support.

- (b) Every order made under Order 39, r.3, should direct that service of the notice or injunction, as the case may be, should be accompanied by service of the plaint if this has not previously been served.

Having said all this, we allow the appeal and set aside the interim injunction ordered against the appellants. We also make an order for costs in favour of the appellants both in this Court and in the Court below.

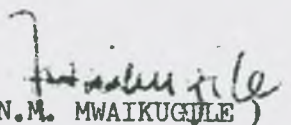
DATED AT DAR-ES-SALAAM THIS 11TH DAY OF ~~SEPTEMBER~~ 1999.

R. H. KISANGA
JUSTICE OF APPEAL

L. M. MFALILA
JUSTICE OF APPEAL

D. Z. LUBUVA
JUSTICE OF APPEAL

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


(N.M. MWAIKUGILE)
SENIOR DEPUTY REGISTRAR

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