

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: RAMADHANI, J.A., LUBUVA, J.A., And LUGAKINGIRA, J.A.)

CIVIL APPEAL NO. 7 OF 1997

BETWEEN

SILAS SIMBA. APPELLANT

AND

1. EDITOR MFANYAKAZI
NEWSPAPER
2. MAHAMUDI MWINYI RESPONDENTS

(An appeal from the decision of
the High Court of Tanzania at
Dar es Salaam)

(Bubeshi, J.)

dated the 23rd day of December, 1996

in

Civil Case No. 27 of 1994

R U L I N G

RAMADHANI, J.A.:

This is yet another protracted litigation before this Court involving a number of applications and adjournments. This appeal came up for hearing on 07th September, 1998, and three things happened: Dr. Tenga, learned advocate, informed this Court that he had withdrawn his services for the first respondent in the High Court for lack of instructions and, so he was not representing him in this Court. We allowed Dr. Tenga to go. The second matter was that Dr. Lamwai, learned counsel for the second respondent, told the Court that he was appearing for both respondents. The Court recorded so. Thirdly, there was a notice of preliminary objection filed by both respondents and was fully argued by Dr. Lamwai and respondent to by the appellant who was not represented. However, Dr. Lamwai in the alternative to striking out the appeal, asked the appeal to be stood over as there was pending in the High Court an

application to set aside the ex parte judgment.

This Court on 02nd December, 1998, decided to stand over this appeal and to await the outcome of the application to set aside the ex parte judgment, the subject matter of this appeal. That application to set aside the judgment was dismissed by BUBESHI, J. on 02nd June, 1999. The appeal came up again on 10th April, 2000 and Dr. Lamwai, again, cautioned the Court that there was an application pending in this Court for leave to appeal against the ruling of BUBESHI, J. of 10th June, 1999. Of course, that application was after a similar one was dismissed by MANENTO, J. on 05th October, 1999. So, the appeal was stood over again.

On 26th February, 2001, in Civil Application No. 97 of 1999, LUBUVA, J.A. refused the application for leave to appeal. The matter was taken before a full Court in Civil Reference No. 3 of 2001 and met the same fate of being dismissed on 19th February, 2002. The appeal came up again on 17th July, 2002. The first respondent had changed advocates and was represented by Mr. Rugonzibwa, learned counsel, who wanted to revive the preliminary objection that was exhaustively argued on 07th September, 1998 by Dr. Lamwai. The Court did not allow that and decided to adjourn the matter so as to prepare a ruling on the preliminary objection aiming at striking out the notice of appeal.

Dr. Lamwai on 07th September, 1998 argued that both respondents were not served with copies of notice of appeal and also record of appeal and that Rules 77 (1) and 90 (1), respectively, were infringed.

His case relied on the fact that the appellant had filed Civil Application No. 11 of 1997 asking to be allowed to conduct this appeal ex parte. A single judge refused that application on 21st May, 1997. Dr. Lamwai submitted that that application is eloquent evidence that the appellant did not serve copies of the notice of appeal on the respondents. Dr. Lamwai went further to argue that after his application was rejected, the appellant did not apply for extension of time within which to serve the respondents with copies of the notice of appeal.

The appellant relied on an affidavit he filed on 07th September, 1998, stating that he served a copy of the record of appeal on the second respondent on 21st February, 1997, but he refused to receive it in front of one Hassan Selemani, the ten cell leader of the second respondent. Hassani Selemani swore an affidavit supporting the appellant. As for the service of a copy of the record of appeal on the first respondent and the service of copies of the notice of appeal on both respondents, the appellant relied on his diary. Under 06th January, 1997, there are two entries to the effect that one Wabebwa received a copy of the notice of appeal and a copy of the record of appeal on 21st February, 1997. As for the second respondent, there are entries, on the same dates, in the appellant's diary, witnessed by Hassan Selemani, that the second respondent refused to receive the two documents.

Dr. Lamwai countered the appellant's submissions by first, doubting the authenticity of the diary entries because of some erasures. Then, he questioned why the affidavits were not filed

on the dates when the documents were rejected. He also said that his instructions are that there had never been a clerk by the name of Wabebwa with the first respondent.

We do not think that we need say anything on the appellant's application to proceed with this appeal ex parte. The evidence before us may give the lie to speculation by Dr. Lamwai. The crucial matter is the validity of the evidence.

We start with the affidavits. We do not agree with Dr. Lamwai that the filing of the affidavits in July, 1998 and not in January, 1996, has any significance at all. The raising of the preliminary objection, prompted the need to produce evidence to show that the documents were served on the respondents. There was absolutely no need to file affidavits at the time service of the documents was refused. Besides, what Hassan Solemani stated in his affidavit is what he inscribed in the diary entries when receipt of the documents by the second respondent was refused.

Are the diary entries valid? Admittedly, there are erasures and superimpositions of dates with respect to the first respondent. The figures "6" and "1" in 6th January and figure "2" in 21st February were superimposed on the erasures by white correcting fluid. But these appear on the diary pages printed "January 6" and "February 21". The appellant explained that Wabebwa mistakenly wrote wrong dates while there was no need to write dates at all. It is curious that Wabebwa made that same mistake on both occasions and on dates far apart. But that is not improbable. We may as well point out that below these mistakes of Wabebwa there are entries in respect

of the second respondent and inscriptions by Hassan Selemani which do not have those mishaps. We are satisfied that they were genuine mistakes.

Then there is the question of whether or not there was a clerk by the name of Wabebwa in the service of the first respondent. First of all, the advocate, it was, who made the contradiction and from the bar. In any case it was not for the appellant to check who was and who was not an employee of the first respondent at the latter's premises.

We are satisfied that both respondents were served with copies of both documents. So, the preliminary objection seeking to strike out the notice of appeal for failure to take essential steps is dismissed with costs. We order that the appeal proceeds to hearing on merit.

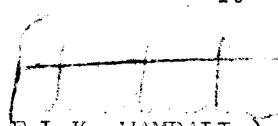
DATED at DAR ES SALAAM this 22nd day of August, 2002.

A.S.L.RAMADHANI
JUSTICE OF APPEAL

D.Z. LUBUVA
JUSTICE OF APPEAL

K.S.K.LUGAKINGIRA
JUSTICE OF APPEAL

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


(F.L.K. WAMBALI)
DEPUTY REGISTRAR