IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISSTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO 160 OF 2010

CPL. EMIAS KAYAULA ..... APPLICANT

Versus

EDSON J. MKISI ..... 1ST RESPONDENT

YAHYA S. MOTO ..... 2ND RESPONDENT

SALUM KANUTI ..... 3RD RESPONDENT

Date of last order: 04/10/2011

Date of Judgment: 19/10/2011

Twaib, J:

JUDGMENT

The Appellant, Cpl. EMIAS KAYAULA, has raised three grounds of appeal. In essence, he is challenging the ruling of the Kisutu RM's Court delivered on 12th October 2010 in Civil Case No. 289 of 2009 (Sanga, RM). Also at issue is the lower Court's decision made earlier, on 22nd September 2010. By consent, the appeal was argued by way of written submissions. The same were duly filed by both counsels.

The Appellant is represented by Mr. Steven Kosi Madulu, learned Advocate. The Respondents are represented by learned Advocate Mr. Adam Mwambene.

I will begin with the 3rd ground of appeal, since it is capable of disposing of the appeal, if it succeeds.

Under it, the Appellant complains that the lower Court made two contradictory rulings, one on 22nd Sept. 2010 (in which it dismissed the Respondents' preliminary objections on points of law), and the other delivered on 12th October 2010 (in which it sustained the said preliminary objections). The record of the lower Court shows that after delivering the "first" ruling on 22nd September 2010, Mr. Mwambane for the then Defendant informed the Court that the ruling was delivered pre-maturely because he had not yet filed his client's rejoinder submissions because the appellant (then Defendant)'s advocate had not served them with his reply submissions.

After hearing submissions from both counsels, the learned Magistrate, by necessary implication, vacated his earlier ruling and allowed Mr. Mwambene to file his client's submissions. On 12th October 2010, he delivered another ruling in which he rejected the Plaint for failure to disclose a cause of action. Following that ruling, the Plaintiff filed the present appeal.

I have considered the argument advanced in the support of the 3rd ground of appeal. It faults the delivery of the Court's second ruling as inappropriate. I am satisfied that the said ground has no merit. Having vacated his earlier ruling, the learned RM was perfectly entitled to reach a different decision from the earlier one, which was no longer on record. In fact, the Magistrate was clearly influenced by the rejoinder submissions filed subsequent to the order granting leave to do so. For these reasons, I would dismiss the 3rd ground of appeal.

I now move to determine the first and second grounds of appeal, which seek to challenge the decision of the lower court on merit to the effect that the plaint did not disclose any cause of action. I shall deal with both grounds simultaneously.

Counsel Madulu for the Appellant contended that the cause of action was disclosed in paragraph 5 of the plaint, in which the Appellant stated:

> "That on the 7th day of April, 2008, the defendants without color of right or justification published a defamatory letter through advocate's chamber known as Associated Attorneys. The letter had the heading of legal demand notice to [stop and remove] your pombe shop Business at the residence of Phillipo John Mlangala, ANA, Maboksi with reference number AA/LN /1 dated 7th day of April 2008 and forwarded through the plaintiff commandant; 603 KJ Air Force Transport System, Air wing, Dar es salaam as Annexure M-1. The same is attached and marked as M-1 and plaintiff craves leave of this court to form part of the plaint."

Hence, the basis of the Appellant's claim was a letter of demand and notice of intention to sue, written and served on the Respondents by the Appellant's advocate. As Mr. Mwambene for the Respondents submitted, the notice was served pursuant to rule 68 of the *Advocates Remuneration and Taxation of Costs Rules*, 1992.

The issue in contention, therefore, is whether the learned RM was correct in rejecting the plaint on the grounds that the same did not disclose a cause of action. To be more precise, can a notice of intention to sue, published only to the defendant, amount to defamation in law?

Learned counsel Madulu for the Appellant appears to hold the view that it is, and that whatever dispute on whether or not the statements complained of are defamatory or not can only be determined through evidence. For that reason, it is Mr. Madulu's view that the suit should be allowed to stand and proceed.

The first ground of appeal claims that the Plaint sufficiently pleaded the defamation as stated above. I would for now assume that to be the case and move to determine the second ground of appeal. I would thus proceed on the

assumption that the allegations in the Plaint, especially in paragraph 5 thereof, which counsel Maduhu maintains is the basis for the cause of action, are true.

Mr. Mwambane argues that a notice of intention to sue is issued in the cause of judicial proceedings—an argument that the lower Court accepted in reaching its decision to reject the Plaint. With due respect, I do not agree with Mr. Mwambene on this point. Sending a demand notice is not a judicial proceeding. It is simply a step towards what is potentially a judicial proceeding.

It is however true that a notice of demand and intention to sue, issued by a claimant against another person, is an important statutory requirement that gives basis for a potential Plaintiff's desire to claim for costs in the intended litigation. It shows that the Plaintiff has been compelled to litigate after the Defendant failed or neglected to comply with the demand. The main purpose of rule 68 of the *Advocates Remuneration and Taxation of Costs Rules*, therefore, is to give a potential Defendant an opportunity to settle the claim with the claimant and avoid the costly process of litigation.

Rule 68 is thus an important rule in our civil process. It encourages parties to settle their differences amicably and without delay and, in so doing, it assists in the administration of justice.

Hence, unless there are allegations of abuse of this opportunity, the mere sending of a notice of intention to sue, even if the claim has no merit, without publishing it to any other person apart from the Defendant himself, cannot in law amount to defamation. Indeed, holding otherwise would go against the spirit of rule 68.

I am thus satisfied that the plaint as filed did not disclose any cause of action against the Respondents. Even if all the allegations therein were proved by way of evidence at the trial (or, indeed, admitted by the Respondents), the same would not entitle the appellant to a judgment in his favour.

In view of the foregoing, therefore, the appeal stands dismissed in its entirety.

Considering the nature of the case, I would make no order as to costs of this appeal.

Dated at Dar es Salaam this 19th day of October 2011.

F. Twaib

Judge

19th October 2011

Delivered in Court this 19th day of October 2011.

F. Twaib

Judge

19th October 2011