

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

MISCELLANEOUS CIVIL CAUSE NO. 24 OF 2012

**THE MANAGING EDITOR, MWANAHALISI 1ST APPLICANT
HALIHALISI PUBLISHERS LTD. 2ND APPLICANT**

VERSUS

**THE MINISTER FOR INFORMATION,
YOUTH, CULTURE & SPORTS..... 1ST RESPONDENT
THE REGISTRAR OF NEWSPAPERS 2ND RESPONDENT
THE ATTORNEY GENERAL 2ND RESPONDENT**

R U L I N G

F. Twaib, J.

The Applicants in this case, the Editor of *Mwanahalisi*, a local weekly newspaper, and the newspaper's publisher, Halihalisi Publishers Ltd., are aggrieved by the decision of the 1st Respondent, the Minister for Information, Youth, Culture and Sports ('the Minister'), to indefinitely ban the publication of *Mwanahalisi*. The decision was communicated to the Applicants by the 2nd Respondent, the Registrar of Newspapers, through a Press Release dated 30th July 2012 and a letter dated the same day addressed to the 2nd Applicant.

The impugned decision was published in the Government Gazette as the *Newspapers (Cessation of Publication) (Mwanahalisi) Order*, 2012 (GN No. 258 of 27th July 2012). The ban was done under powers vested in the Minister by section 25 (1) of the *Newspapers Act*, 1976. The Applicants thus filed the present application, seeking leave to file an application for orders of *certiorari*, *mandamus* and prohibition against the Respondents. They have also applied for the

substantive orders of *certiorari*, *mandamus* and prohibition and maintenance of the *status quo ante*, "upon the grant of leave".

The Respondents, represented by Mr. Paul Shaidi, learned State Attorney, have raised two points of preliminary objection. They run thus:

1. The application is incompetent for being accompanied by a defective affidavit; and
2. The application is incompetent for containing private and public law remedies.

Arguing the point on the alleged defects in the supporting affidavit, Mr. Shaidi submitted that the affidavit contains arguments and opinions in paragraphs 15, 16 and 17. This, he said, is contrary to Order XIX rule (3) of the *Civil Procedure Code*, Cap 33 (R.E. 2002) ('the CPC'). He referred the Court to the Court of Appeal decision in *Juma Busiyah v. Zonal Manager TPC*, Civil Application No. MBY 8 of 2004 (unreported), where the Court of Appeal, relying on the famous Ugandan case of *ex parte Matovu*, struck out an affidavit found to be defective for similar reasons.

Dr. Nshala, counsel for the Applicants, responded by saying that the impugned paragraphs contain facts and not opinions. He further submitted that even if the paragraphs are found to contain opinions, they are only three out of twenty paragraphs. Hence, in his view, the affidavit can stand even if those three paragraphs are "overlooked".

It is thus counsel Nshala's submission that unless the Court finds an affidavit to be incurably defective, it can act on it if, upon striking out the offending paragraphs, the rest of the affidavit can sustain the application. He cited the Court of Appeal decision in *Phantom Modern Transport (1985) Ltd. v. D.T. Dobie (T) Ltd.*, Civil Reference Nos. 15 of 2001 and 3 of 2002 (CA, DSM, unreported) to buttress his argument.

I propose to deal with the two objections *seriatim*.

The first is on the validity of the affidavit in support of the application. In paragraphs 15, 16 and 17, the deponent, Mr. Saed Kubenea, who describes himself as the Editor of *Mwanahalisi* (meaning the 1st Applicant) and the Managing Director of the 2nd Applicant, stated the following (I quote *verbatim*):

- "15. *That upon looking and reading the said Government Notice I learned that it was the 1st Respondent who issued the order to ban MwanaHALISI newspaper indefinitely. At no material time did the 2nd Applicant and I receive any complaint or communication from the 1st Respondent on the conduct of MwanaHALISI newspaper or any disciplinary proceedings that she was about to conduct or conducted against it.*
- "16. *That the 1st Respondent decision has brought to a halt the publication of the nation's leading and trusted weekly publication that many Tanzanians rely on to receive thoroughly researched news articles.*
- "17. *Moreover, its banning stand to render jobless MwanaHALISI employees and destroy its clientele and goodwill on the one hand and ruin the businesses of its printing company and news vendors on the other"*

I have taken a careful look at what is stated by Mr. Kubenea in the above three paragraphs. With due respect to Mr. Shaidi, though it is possible for one to impute opinions in the said paragraphs, I think that the statements in paragraphs 15 and 17 are allegations of fact and not opinion. And, even though paragraph 16 can be seen, from one angle, to be based on a belief or opinion, it is also capable, looked at it from a different angle (especially from the viewpoint of the deponent), of being based on facts.

The manner in which paragraph is 16 couched, however, would render it more of an expression of opinion rather than of fact. While it is an allegation of fact that the Minister's act "has brought to a halt the publication of *MwanaHalisi*," it would obviously be the deponent's view (or belief) that the publication was "trusted" and that "many Tanzanians rely on [it] to receive thoroughly researched news articles." That being the case, such assertions ought to have been accompanied by a disclosure of the basis of the said opinion, as required by Order XIX rule 3 of the CPC. There being no such disclosure, the contents of the said paragraph would render the same defective.

The question is, what would be the effect of this finding? As Dr. Nshala submitted, the paragraph can be struck off while the rest of the affidavit can be left intact (See *Phantom Modern Transport (1985) Ltd. v D.T. Dobie (T) Ltd. (supra)*). I thus order that paragraph 16 of the supporting affidavit be struck off. The affidavit, minus paragraph 16, shall remain on record.

Mr. Shaidi's second point of preliminary objection is that it is wrong for the Applicants to pray for an order restoring the *status quo*, which is a private law remedy, in the same application where the public law remedies of *certiorari*, *mandamus* and *prohibition* are also sought.

Mr. Shaidi cited the case of *Mobrama Gold Corporation Ltd. v Attorney General & Another*, Misc. Civil Cause No. 42 of 1995 (unreported). Unfortunately, the copy of the decision that Mr. Shaidi provided to the Court contains only pages 1, 3, 5, 7, 9, 11, 13 and 16. The other pages are missing. And, since page 16 is not the last page, I am not in a position to say what really was the decision of the Court in *Mobrama's* case. Ordinarily, I would have required counsel to produce to me a complete copy of the ruling. But I do not consider that to be absolutely necessary in the circumstances of this case. I do not think that that decision would be of much assistance in what I am called upon to decide in this ruling. Suffice it to say that I have not made use of it at all.

Mr. Shaidi's complaint is that this being an application for the public law remedies of *certiorari*, *mandamus* and *prohibition*, the applicants should not have combined it with what he considers to be a private law remedy contained in the prayer for maintenance of the *status quo*.

With respect, I am inclined to agree with the learned author, Sekaana Musa in his *Public Law in East Africa* (2009), at 229 (cited to me by Dr. Nshala) that the jurisprudence in cases for the exercise by superior Courts in the common law world of the power to issue the prerogative orders of *certiorari*, *mandamus* and *prohibition* has gone a step further and included, in appropriate cases, the Courts' powers to grant certain private law remedies, such as declaratory and injunctive or conservatory reliefs.

I think that the above is the position in Tanzania. And, since an order for maintenance of *status quo* is in the nature of an injunctive or conservatory order, I hold that the prayer contained in the present application for maintenance of the *status quo* can properly be made in a proceeding for prerogative orders, where appropriate, such as the present. For those reasons, it is my finding that the second point of preliminary objection is unfounded.

In the upshot, the Respondents' two points of preliminary objections stand dismissed with costs.

DATED AT DAR ES SALAAM this 5th day of February 2013.

Fauz Twaib

Judge

5th February 2013

DELIVERED in Court this 5th day of February 2013.

Fauz Twaib

Judge

5th February 2013