

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

**MISC. CIVIL CASE No. 220 OF 2018**

**BERNARD KAMILIUS MEMBE.....PLAINTIFF**

Versus

**CYPRIAN MAJURA MUSIBA.....1<sup>st</sup> DEFENDANT**

**THE EDITOR, TANZANITE NEWSPAPER.....2<sup>nd</sup> DEFENDANT**

**RULING**

12<sup>th</sup> - 24<sup>th</sup> December, 2019.

**J. A. DE-MELLO J;**

This is a Ruling is on three (3) points of **Preliminary Objections** raised by the two Defendants in their **Joint Written Statement of Defence** filed on **25<sup>th</sup> February, 2019**, on the following grounds:

- i. That, this Court has no Jurisdiction to adjudicate the matter**
- ii. That, the Plaintiff has no cause of Action against the defendants**
- iii. The Plaint is fatally defective for violating Order VI rule 3 of the Civil Procedure Code [Cap. 33 R.E 2002.]**

The objections were argued orally, with the Plaintiff being represented by **Jonathan Mndeme, Counsel**, while the Defendants enjoyed the legal services of **Hosea Chambali and Bahati Bwire**, learned Advocates.

Arguing on the first limb of Preliminary Objection that, the Court has no Jurisdiction to adjudicate the matter, **Hosea Chambali, Counsel** for the Defendants submitted that, the claim brought about and, against the Defendants, is as provided for under the **Media Service Act Sevice Act 2017 for News Papers Part IV** as defined by its Act under section 66 and 229 having been repealed by establishing **Media Council** whose **section 24** and speaks louder in itself. . It is therefore further mandated under **section 26 (1) , (c)** for determining Print Media content complaints. Counsel referred the interpretation with a view of defining what print media is all about, as provided under **section 3**to read, newspapers, journals, magazines, newsletters and, any other related print intended, for mass media, Newspaper inclusive. It is that Council whose **section 27 (1) (2) Act** (supra) establishing several committees to deal with similar complaints on which sub section (2) makes it mandatory and for print media content complains. **Section 29 (1) (2) (3)** of this **Act No. 12 of 2016 (supra) empowers** the High Court with Appellate mandate as opposed to first instance level. The High Court shall upon receipt, hear the Appeal and, summon Parties to the case with **section 28 (1)** providing for three (3) months of the publication of the content, for a person aggrieved may, to intimate and by writing submit to the Committee established pursuant to **section 27**, Council mandated under **section 28 (2)** award the complainant if justified. It is Counsel's view that Defamation as alleged by the Petitioner is, in essence a complaint by nature levied against the Newspaper Tanzaniaite. The lodging before the High Court therefore falls short of the standards set and in case the award granted is

unimpressive the High Court under **section 41** on Appeal can grant. **Part V** of the Act, bears Defamation as its heading, and purely relating to print media and as depicted in the last sentence to refer some cases for Defamation stipulated by **section 41(1)** and **(2)** for both filing and attaching copy of the print content complained of. **Section 41(3)**, the Court shall, as soon as practicable and, in accordance with the procedural laws, hear and, determine the suit while under section 41 this same Court is invited to revisit and interpret **section 3** for what **Print Media, Electronic** content is, omitting Newspaper as well as Electronic Media, such omission being deliberate as intended by the Legislature. Sitting as first instant Court and not Appeal is thus wrong, he stresses. Section 7(1) Cap. 33, makes it mandatory for exhausting that requirement so long as there is special forum. Cognizant of this **section 13** provides for institution of the case at the lowest grade competent and so long as there exists this **Quasi Judicial** forum, jurisdiction being a creature of law makes it paramount. Referring the cases of **TRA vs. Contrator Limited Court of Appeal pg 8. & Tanganyika Oil vs. TRA , Ujenzi Ltd vs. DAWASA**, to enhance the point that, Courts need to satisfy itself whether or not it has jurisdiction to entertain matters that are before them, notwithstanding it's unlimited jurisdiction. As gathered Counsel observes, as was the case in Ujenzi (supra) purely a print media dispute as reflected Plaintiff, hence this Court is misplaced. Addressing the second limb of objection with regard to Cause of Action, Counsel is of a firm view that, **Cyprian Majura Musiba** the 1<sup>st</sup> Defendant while the second being the Editor of Tanzanite Newspaper, which the Media Act excludes them as

Printers, except where it is shown that, they too knew of the alleged Defamatory contents as reflected under section 64 (1) of the Media Act. Addressing the 3<sup>rd</sup> limb on contravention with **Order VI Rule 3 of Cap. 33** which for clarity sake he referred and reads;

**“Every pleading shall contain, and contain only, a statement in a concise form of the material facts. On which the party pleading relies for his claim or defence, as the case may be, but not evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs, numbered consecutively, and, sums and numbers may be expressed in figures.”**

It is hence, Counsel is view that, some of the **paragraphs, 5,27,28 & 29** are not concise, as they contradict each other, let alone several damages which is empty, while the specific, included damages that are general. Despite this, the plaint contains exaggeration and, purely fabrication as he humbly submitted.

Opposing the objections **Counsel Jonathan Mndeme**, for the Plaintiff and basing his submissions on a plea for hearing the suit in its substantive nature coupled with the oxygen principle that of overriding objectives, in quest of embracing justice. It is improper to accompany Written Statement of Defence with Preliminary Objections irrespective of the fact that even the **Media Service Act** (supra) exclusively as referred, does not to obtain its full contextual meaning as **sections 26, 27, 28, 29** and **41** suggests **“may”** as opposed to **“shall”** for one file a complaint to Committee. This, he believes, renders the reference to Committee purely optional. Similarly

'is **section 53 (1)** of the Interpretation of Law Act provides for, "**...exercise or not...**" whose absence of such construction which Counsel for the Defendant attempts to mislead the Court, he states. Neither is **section 3** nor **27** of what print media is and, resort to the Committee, respectively to exclude the party's discretion under **section 28**. Counsel vehemently submits that what is before this Court is purely a defamation one, and making reference to **section 41(1) (2) (3)** and, (4) of the **Media Act (supra)** read together with **Media Service Information Proceedings Rules of 2019**, in which **Rule 4 (3)** empowers this Court to address Defamation case of this nature. Whether or not the Printer has knowledge or not, is subject for evidence during hearing, he alludes being misconceived at this stage. He cautioned the Court of the cases referred being distinguishable in this instance, more so the case of **Tropical Pesticides vs. NBC and PSRC (supra)** that, was referred for Cause of Action. On the last limb with regard to contravention to Order VI Rule 3 details of which have been attached for compliance. In absence of Reply to the WSD whose right is yet to be exercised, Counsel will highlight the figures for specific and general damages if granted by Court. The objections are all meritless and ought to be dismissed he concluded.

In his brief rejoinder, Counsel for the Defendant submitted that, the option that **section 28 (1)** stipulates is for filing or not and, not for avoiding the Committee as a special forum for any complaint, which is not optional notwithstanding the word "may" as depicted on **section 41**. It is that this contradiction that Counsel concludes the Plaint to be defective for offending **Order VI Rule 3/(supra)**. Rectification as suggested by Counsel

for the Plaintiff in Reply to WSD, is not the law unless prayer for amendment following grant of Leave, if any. He discarded the position that Counsel refers The **Media Service Defamatory Rules of 2019, Rule 4** whose **Part IV**, this Court is to determine. The Rules are for procedure as opposed to Print media., where this Court emerges in its Appellate mandate. Refuting the invoking of the Overriding Objective to have relevance on jurisdiction, the objection being pure point of law.

I have keenly and, attentively listened to the rival submissions from both sides and will endeavour to address each objection as raised with a view of arriving to my final analysis. Jurisdiction, as one of the pillar of suits, has and will remain paramount in adjudication of cases that, Courts are faced with. This is all on view of avoiding getting into merits of cases unknowingly and, only to end up entertaining a Nullity. Several cases have cautioned adjudicators of the need to satisfy oneself, as to whether or not one is mandated to act. As observed, the claim is founded on Defamation and whose law under the **Media Service Act** provides exclusive reference to the Committee under **section 26,27,28,29 and, 41**, but clearly rendering it, optional. **Section 53 (1) of Interpretation of Law Act** (supra) provide its exercise or not, in essence of such construction, when the word "**may**" is used. I am inclined to agree with Counsel for the Plaintiff that, **section 41(1) (2) (3) and, (4)** of the **Media Act** read together with **Media Service Information Proceedings Rule of 2019, Rule 4 (3)** empowers this Court to entertain the Defamation case of this nature. The Act does not oust the jurisdiction of the Court to entertain the defamation cases. In the premises I find no

merit on the first ground of preliminary objection and, is hereby dismissed. On the second ground of objection the expression "**Cause of Action**" though not defined under the Civil Procedure Code, 1966, it however may be taken to mean essentially, "**facts which it is necessary for the Plaintiff to prove before he can succeed in the suit...**" The Court of Appeal in the **John M. Byombalirwa's case** held further that:

**"The question whether a plaint discloses a cause of action must be determined upon a perusal of the plaint alone, together with anything attached so as to form a part of it, and upon the assumption that any express or implied allegations of fact in it are true."**

It is evident and, quite apparent under **paragraph 5** of the Plaint, the Plaintiff seeks to establish to have been defamed and, claim against the Defendants jointly and, severally for payment of **TShs.**

**2,000,000,000/= (Two billion Shillings)** as General Damages, Exemplary or Punitive or Vindictive damages and, Aggravated Damages. On that same vein, are **annextures BKM, BMK1, BKM2, BKM3, and BMK4**, expressing allegedly to have been defamed and by the entire Defendants team as published in the **TANZANITE Newspaper** in its issue **No. 251, dated 25<sup>th</sup> October, 2018 paragraph 5-6. On 29<sup>th</sup> October 2018** the Defendant printed the by publication in **Tanzanite Newspaper issue no. 254 titled "Vigogo 14 Hatari kwa nchi watajwa"** as shown on **paragraph 7. On 6<sup>th</sup> November, 2018** it is further alleged that the Defendant defamed the Plaintiff by publication in **Tanzanite Newspaper issue no. 262 titled "KIKAO KIZITO"** with sub-heading "**Membe,**

**Zitto, Rostam wakutana faragha saa kadhaa**” as seen in **paragraph 8**. On **2<sup>nd</sup> December, 2018** the defendant again is alleged to Defame the Plaintiff by publication in **Tanzanite Newspaper issue no. 284 titled “Kauli ya Dkt. Bashiru, Membe apagawa”** this is in **paragraph 9**. On **3<sup>rd</sup> December, 2018** the Defendant is said to have defamed the Plaintiff by publication in **Tanzanite Newspaper issue no 285 titled “wananchi : Bernad Membe hana mvuto wa kisiasa”** with sub-heading **“wanasema mikakati yake ya urais 2020 kazi bure”** see **paragraph 10**. On **5<sup>th</sup> December, 2018** the Defendant allegedly defamed the Plaintiff by publication in **Tanzanite Newspaper issue no. 287 titled “Bashiru amtaka Membe ajifunze kwa Lowassa,”** **paragraph 11**. Under **paragraphs 5- 11** of the **Plaint** is for also specific damages and general damages which were subject to assessment at the discretion of the Court in the event the suit sails through. Such claims are essentially regarded as a substantive claims for the Court to hear and determine whether injurious or not. As observed by the Court of Appeal of Tanzania in the case of **Tanzania Breweries Limited vs. Anthony Nyingi, Civil Appeal No. 119 of 2014 (Mwanza)**, under the doctrine of **‘Stare Decisis’**, or Precedent, as the correct interpretation of laws relating to civil jurisdiction of the High Court until such time the Court of Appeal may depart from it, or some relevant statute is amended’, and, which I am obliged to be bound by that . That said, I would hold that for the purposes of jurisdiction, the Courts subordinate to this Court similarly have jurisdiction to try and, determine this suit brought about by the Plaintiff together with the Counter Claim raised by the Defendant. It is this same



famous land mark case of **John M. Byombalirwa vs. Agency Maritime Internationale (T) Ltd [1983] TLR** where **Kisanga J.** (as he then was), held in favour of Cause of Action that;

**"The expression "Cause of action" is not defined under the Civil Procedure Code, 1966....but may be taken to mean essentially facts which it is necessary for the Plaintiff to prove before he can succeed in the suit... The question whether a plaint discloses a cause of action must be determined upon a perusal of the plaint alone, together with anything attached so as to form a part of it, and upon the assumption that any express or implied allegations of fact in it are true." See also the case of**

**Joraf Shariff & Sons vs. CHOTAI Fancy Stores (1960) E.A at 375.**

In view of the above, the entire Preliminary Objections have no legal basis and, are hereby overruled. Other than the oxygen principle in place, Let the Court hear the substantive suit on its merits and, by law guiding Civil cases, that of **Balance of Probabilities** as to whether or not the Plaintiff has been defamed.

It is so ordered.



**J. A. DE-MELLO**

**JUDGE**

**24<sup>th</sup> December, 2019.**

