

REFERENCE NUMBER 1 OF 2003

IN THE COMESA COURT OF JUSTICE

LUSAKA, ZAMBIA

CORAM: Akiwumi L.P, Korsah, Nyankiye, Kalaile, and Ogoola, L.JJ

Registrar: S.H. Zwane, Esq.

KABETA MULEYA (Dr)..... APPLICANT

VERSUS

THE COMMON MARKET FOR FIRST RESPONDENT
EASTERN AND SOUTHERN AFRICA

ERASTUS J.O. MWENCHA SECOND RESPONDENT

PRELIMINARY APPLICATION PURSUANT TO RULES 2 AND 82 OF THE
RULES OF THE COMESA COURT OF JUSTICE

For the Applicant: Prof. M.P. Mvunga Esq, of Mvunga Associates

For the Respondents: J. P. Sangwa Esq, of Simeza, Sangwa & Associates

JUDGMENT OF THE COURT

Lord Justice James Ogoola delivered the Judgment of the Court.

In response to Reference No.1 of 2003 filed by Dr. Kabeta Muleya against COMESA and Mr. Erastus Mwencha for alleged defamation, the First and Second Respondents (herein referred to as "COMESA") filed this instant preliminary application pursuant to Rules 2 and 82 of this Court's Rules of Procedure. The preliminary application sought to dismiss the entire Reference on account of its being defective in certain material particulars – notably, the failure to disclose or particularize:

- (i) the defamatory meaning of the words complained of;
- (ii) the persons to whom the defamatory words were published; and

(iii) the damage suffered by Dr. Muleya in his professional reputation.

In the **alternative**, COMESA prayed for an order of this Court to strike out Mr. Mwencha as a party to the underlying Reference - in as much as the Reference does not disclose:

- (i) whether Mr. Mwencha is being sued in his personal and private capacity (as Mr. Mwencha); or in his official capacity, as the Secretary General of COMESA; nor
- (ii) the extent and manner of Mr. Mwencha's involvement, if any, in the alleged defamatory publication.

The Court heard the preliminary application on 3rd April, 2003. Learned counsel for COMESA (Mr. Sangwa) reiterated the above points. In addition, the Court considered certain legal issues pertaining to Articles 17 and 27 of the COMESA Treaty. In particular, the Court observed that paragraph 2 of Article 17 and paragraph 2 of Article 186 of the Treaty empower the Secretary General of COMESA "to represent the Common Market in the exercise of its legal personality", yet paragraph 2 of Article 27 provides that:

"The court shall have jurisdiction to determine claims by any person against the Common Market or its institutions for acts of their servants or employees in the performance of their duties." [emphasis added]

It is self evident that under paragraph 2 of Article 27, the party to be sued *for the acts of its servants or employees* is the **Common Market**, and not Erastus Mwencha who is an employee of the Common Market.

In the light of the above, learned counsel for Dr. Muleya (Prof. Mvunga) opted not to oppose the alternative prayer in the preliminary application. Instead, he conceded to striking out the Second Respondent (Mr. Erastus Mwencha), as a party to the underlying Reference, and prayed for leave of Court to amend the Reference with a view to including therein the particulars of defamation sought by learned counsel for COMESA. In these circumstances, the Court had no option but to order that Mr. Erastus Mwencha be struck out as a party to the Reference.

That disposed of the whole preliminary application in as much as Mr. Sangwa did not object to the amendments prayed by Prof. Mvunga. In the result, this Court hereby grants leave to Prof. Mvunga to effect the said amendments to the original Reference - namely, by providing:

- (i) detailed particulars of the meaning of the defamatory words complained of; and
- (ii) details of the person(s) to whom the words complained of were published.

Those amendments are to be effected, filed in this Court, and duly served on all concerned not later than 7th April, 2003.

As the Court has granted COMESA's two major prayers – namely, struck out Mr. Mwencha as a party to the main Reference, and made the finding that the Reference is legally insufficient/inadequate, the costs of this preliminary application are hereby awarded to COMESA and to Mr. Erastus Mwencha.

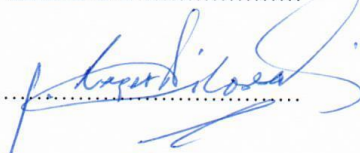
It is so ordered.

DATED and delivered at Lusaka, Zambia, this 4th day of April, 2003.

A.M. Akiwumi
Lord President

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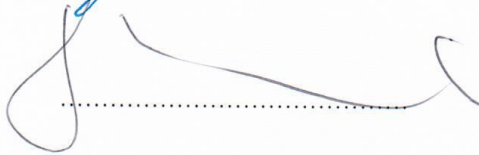
K.R.A. Korsah
Lord Justice

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A. Nyankiye
Lord Justice

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J. B. Kalaile
Lord Justice

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J.M. Ogoola
Lord Justice

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