

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: RUTAKANGWA, J.A., KIMARO, J.A., And MASSATI, J.A.)

CIVIL APPLICATION NO. 21 OF 2012

BLUELINE ENTERPRISES LIMITED APPLICANT

VERSUS

EAST AFRICAN DEVELOPMENT BANK RESPONDENT

**(An Application for review of the decision of the Court of Appeal of Tanzania
at Dar es Salaam**

(Rutakangwa, J.A., Kimaro, J.A., And Massati, J.A.)

Dated 22nd day of December, 2011

in

Civil Appeal No. 110 of 2009

RULING OF THE COURT

RUTAKANGWA, J.A.:

Before us is an application for review of our judgment dated 22nd December, 2011, in Civil Appeal No. 110 of 2009. When the application was called on for hearing, Prof. Gamaliel Fimbo, learned advocate made an oral application requesting the Court to refer the matter to a Full Bench of the Court. Indeed, on 6th February, 2013 his client, acting through one John D. Lamba, had written to the Registrar of the Court of Appeal requesting the *"Appeal to be heard de novo by a Panel of Judges which*

excludes Mr. E.M.K. Rutakangwa, J.A., Mrs. N.P. Kimaro, J.A. and Mr. S.A. Masatti, J.A.” The assigned reason:-

"Mr. S.A. Masatti, J.A. and Mrs. N.P. Kimaro, J.A. took part in earlier proceedings between the same parties."

This unprocedural request by Lamba, got the blessings and confirmation of Prof. Fimbo through his letter dated 11th April, 2013 to the Chief Justice. Mr. Fimbo thus asserted in his letter:-

"BLUE LINE ENTERPRISE LTD, the Applicant herein requests that a Full Bench be constituted to overrule the decision in HUMPHREY CONSTRUCTION CO. LTD V. PAN AFRICAN POSTAL UNION (PAPU), Court of Appeal of Tanzania at Dar es salaam....

*Civil Revision No. 1 of 2007 (unreported) on the ground that it was given per incuriam Article 13 of the Constitution (on the right of access to Court) and Article 108 of the Constitution (on the jurisdiction of the High Court of the United Republic of Tanzania). The Court of Appeal held that in terms of section 13(1) of the **Consular***

Immunities and Privileges Act Cap 356 R.E. 2007 read together with Articles II (1) and III (1) of the Headquarters Agreement...between PAPU and the Government of ...Tanzania, the property of PAPU is immune from attachment or execution. The present application for Review challenges the Court's decision... regarding the Respondent's immunity from attachment by way of garnishee order.

It is, therefore, requested that the present application for Review should be determined by the Full Bench."

The Chief Justice, advised him to make the prayer before the Justices assigned the application for review, hence the oral application referred to earlier. In his submission before us, Prof. Fimbo, essentially repeated the above contents of his letter before elucidating on the whys the Full Bench is usually constituted and who has the powers to order a reference to that Bench under Article 118 (1) of the Constitution. He had also urged us to recuse ourselves in case his prayer was rejected.

Mr. Dilip Kesaria, learned advocate, on behalf of Mr. Michael Sullivan, Q.C. and Mr. Mabere Marando, learned advocate, resisted the application.

Suffice it to say here that we unanimously rejected Prof. Fimbo's application for reasons stated in our ruling.

After the ruling had been delivered, Prof. Fimbo sought for a change of venue, calling for our recusal. This time he came up with new ammunition. He asserted that there was a great possibility of bias on the part of all members of the panel. To substantiate this assertion he, very correctly, said that two of the panel members (Kimaro, J.A. and Rutakangwa, J.A.) were members of the panel that decided the **PAPU** case, which he claimed had a great bearing on the application for review. He further asserted, and again correctly, that Kimaro, J.A. had sat on the panels between the same parties, while Massati, J.A. had delivered an interlocutory ruling in 2004 when the matter was still in the High Court. We have a duty to point out here that this latter point is a subject of complaint in the notice of motion for review and justice requires us to refrain from making a ruling on it at this stage.

Mr. Sullivan, on behalf of his colleagues, resisted this request for recusal. He referred us to their written submission in opposition to the application for review regarding the prayer for Kimaro and Massati, JJ.A. to recuse themselves. On the **PAPU** case issue, his resistance rested on the

naked fact that their learned friend has never raised it before, neither in the notice of motion nor in the earlier application for a reference to the Full Bench. This was indicative of his lack of seriousness and sincerity, he concluded.

We have had the benefit of giving a mature and objective consideration to the competing submissions. We are inclined to agree with Mr. Sullivan's submission.

To us, the ingenuity displayed by Prof. Fimbo, so far smacks of forum shopping. If he genuinely doubted the impartiality of any or all of the panel members, he would not have fronted his client to test the waters in the first place. Furthermore, he ought to have specifically requested for the recusal of Justices Kimaro and Rutakangwa on the ground raised belatedly, first of all before the appeal was heard or belatedly, in the notice of motion or in his letter of 11th April, 2013 and in the worst scenario, in his oral submission while seeking a reference to a Full Bench. This is all because going by the record, this fact was within his personal knowledge even before he lodged the appeal. That he never did so, he should not been heard to complain now. We concede that right-minded people demand

justice to be rooted in confidence but the same group abhors what appears to be forum shopping in search of justice.

All said and done, we reject the applicant's prayer and order the application proceed to hearing forthwith.

DATED at DAR ES SALAAM 16th day of May, 2013.

E.M.K RUTAKANGWA
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

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


Z.A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL