IN THE COURT OF APPEAL OF TANZANIA

AT DAR-ES-SALAAM

(CORAM: MUGASHA, J.A., MKUYE, J.A. And MWAMBEGELE, J.A.)

CIVIL REVISION NO. 3 OF 2017

MILLICOM (TANZANIA) N.V .....APPLICANT

VERSUS

1. **JAMES ALAN RUSSEL BELL.....1ST RESPONDENT**
2. **GOLDEN GLOBE INTERNATIONAL SERVICES LIMITED .....2ND RESPONDENT**
3. **QUALITY GROUP LIMITED.....3RD RESPONDENT**
4. **MIC UFA LIMITED.....4TH RESPONDENT**
5. **MILLICOM INTERNATIONAL CELLULAR S.A.....5TH RESPONDENT**
6. **MIC TANZANIA LIMITED.....6TH RESPONDENT**

(Revision from the proceedings and Orders of the Deputy Registrar of the High Court of Tanzania, At Dar-es-salaam)

(Pamela S. Mazengo, Deputy Registrar)

in

Civil Application No. 338 of 2014

RULING OF THE COURT

11th May & 26th July, 2018

MUGASHA, JA.:

These *suo motu* revisional proceedings were prompted by a complaint of **MILLICOM (TANZANIA) N.V**, the applicant. The gist of the complaint is that, the applicant was not given an opportunity to be heard in the execution proceedings which culminated to the illegal attachment and

sale of her 34,479 shares in the **MIC TANZANIA LIMITED** (the 6th respondent.

When the Revision was called on for hearing, Messrs. Eric Ng'maryo, Gaudios Ishengoma and FAyaz Bhojani, learned counsel represented the applicant. The 1st respondent, **JAMES ALAN RUSSEL BELL** was absent though duly served vide substituted service in two newspapers (The Guardian dated 23rd April, 2018 and the Daily Newspaper dated 24th April, 2018). The 2nd respondent (**GOLDEN GLOBE INTERNATIONAL SERVICES LIMITED**) had the services of Messrs. Mpaya Kamara and Joseph Ndazi whereas Messrs. Seni Malimi and Alex Mgongolwa, learned counsel represented the 3rd respondent **(QUALITY GROUP LIMITED)**. The 4th respondent (**MIC UFA LIMITED)** was absent and according to the affidavit of the process server, she is said to have been liquidated. Dr. Wilbert Kapinga and Gasper Nyika, learned counsel represented the 5th respondent (**MILLICOM INTERNATIONAL CELLULAR S.A)** and the 6th respondent (**MIC TANZANIA LIMITED)** had the services of Mr. Rosan Mbwambo, learned counsel.

The hearing of the application had to proceed in the absence of the 1st and 4th respondents in terms of Rule 63 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

In order to appreciate the merits or otherwise of the complaint, the following background is crucial.

In Civil Case No. 306 of 2002 before the High Court of Tanzania at Dar-es-salaam, the 1st respondent, **JAMES ALAN RUSSEL BELL** commenced a suit against the 4th 5th and 6th respondents namely: **MIC UFA LIMITED, MILLICOM INTERNATIONAL CELLULAR S.A** and **MIC TANZANIA LIMITED** respectively. The claim was in respect of terminal benefits plus damages for termination of a contract of employment of the 1st respondent, **MR. JAMES ALAN RUSSEL BELL** by the 6th respondent, **MIC TANZANIA LIMITED.**

Following failure by the 4th and 5th respondents to file the written statements of defence, on 12th March, 2005 Mr. Francis Mgare, the learned counsel who was representing the 1st respondent prayed, and was granted a default judgment against the 4th and 5th respondents in terms of Order VIII Rule 14 of the Civil Procedure Code, **CAP 33 RE. 2002** (the CPC).

Subsequently, on 13th May, 2005, Mr. Mgare sought and was granted leave to withdraw the suit against the 6th respondent (**MIC TANZANIA LIMITED)** in terms of Order XXIII Rule 1(2) (b) of the CPC.

In a bid to execute the decree of the said case, the 1st respondent made two abortive attempts and succeeded in the third one. The initial attempt was successfully objected by among others the **MIC TANZANIA N.V** after the High Court [Kalegeya, J. (as he then was)] in a Ruling handed down on 20th November, 2009 concluded that, the 1st respondent, had failed to establish the alleged interest of the 5th respondent in both the applicant (**MIC TANZANIA N.V)** and the 6th respondent. As such, the warrant of attachment order initially issued was set aside accordingly.

The second attempt which was also unsuccessful was made before Kihio, J. who in a Ruling dated 13th February, 2014 did strike out the application for execution on account that it had impleaded the 6th respondent (**MIC TANZANIA LIMITED)** who was not a judgment debtor following the withdrawal of the suit against her on 13th May, 2005. The 1st respondent was further ordered to file a proper application for execution.

About five days later, that is on 18th February, 2014 the 1st respondent made a third attempt to execute the decree in Civil Case No. 306 of 2002. As reflected in the respective handwritten application, the execution was sought against the 4th and the 5th respondents. The decretal sum to be realized plus costs was USD 3,131,825. 26 and mode of execution sought was by attachment and sale of shares of the 34,479 shares of **MILLICOM INTERNATIONAL CELLULAR S.A** (the 5th respondent) in **MIC TANZANIA** (the 6th respondent). On 22nd April, 2014, the applicant's advocate made an *exparte* application for attachment of 34,479 shares of **MILLICOM INTERNATIONAL CELLULAR S.A** (5th respondent) to enable the 1st respondent and decree holder realize the fruits of the court decree.

However, the Deputy Registrar (the **DR**) was hesitant to make an order for a summons to show cause on account that, Kihio J. had struck out the earlier application with an order that a fresh application be filed. As such, the **DR** ordered the execution matter be placed before the Judge for directions before she embarked on making any orders. However, surprisingly the file was never placed before Kihio J. and instead, the **DR** is on record to have been addressed by the decree holder **JAMES ALAN**

RUSSEL BELL (the 1st respondent) and judgment debtors **MIC UFA LIMITED AND MILLICOM INTERNATIONAL CELLULAR S.A** (the 4th and 5th respondents) as to why execution should not proceed. Upon being satisfied that the judgment debtors had failed to show cause, she allowed execution to proceed as prayed as per the mode applied by the decree holder, that is, by attachment and sale of 34,479 shares of **MILLICOM INTERNATIONAL CELLULAR S.A** in **MIC TANZANIA LIMITED**. Then, a Prohibition Order was issued to the Registrar of Companies not to dispose in any way the attached shares. This is reflected in the DR's letter dated 17th June, 2014 which was copied to **MILLICOM INTERNATIONAL CELLULAR S.A** in **MIC (T)** Ltd. On 8th July, 2014 vide a letter Ref. SAM/CB/CC.N0.306/02, the Court Broker reported to have served the Prohibition Order on the Registrar of Companies and the said Court Broker sought for the proclamation of sale because the judgment debtors had not paid the decretal sum.

On 10th July, 2014 advocate Mgare for the 1st respondent, filed an exparte application against the 4th and 5th respondents respectively upon the following prayers:

That the court be pleased to state the date, time and place of sale of the attached 34,479 shares of **MILLICOM INTERNATIONAL CELLULAR S.A** held by **MIC TANZANIA LIMITED** as verified by **MR. JAMES ALAN RUSSEL BELL** by public auction to be conducted by Court Broker one Mustafa Nyumbamkali of Super Auction Mart and Court Broker Ltd.

On 16th July, 2014, advocate Mgare prayed for the proclamation of sale of 34,479 shares of **MILLICOM INTERNATIONAL CELLULAR S.A** (the 2nd judgment debtor/5th respondent) in **MIC TANZANIA LIMITED** (the 6th respondent). The proclamation of sale was issued for the sale of the shares by public auction. The proclamation of sale dated 15th November, 2014 shows the defendants to be: **MIC UFA, MILLICOM INTERNATIONAL CELLULAR S.A** and **MIC TANZANIA LIMITED.** (4th, 5th and 6th respondents respectively). The description of the property to be sold as per schedule to the proclamation of sale reflects as follows:

> *"34,479 shares of Millicom International Cellular S.A (2nd judgment debtor in MIC (T) Ltd".*
> [Emphasis ours].

The Notice of auction by the court broker published in the Habari Leo Newspaper dated 25th October, 2014 and 3rd November, 2014 and the Daily News dated 25th October, 2014 and 4th November,2014 among other things, read as follows:

"IN THE HIGH COURT OF TANZANIA

AT DAR-ES-SALAAM

CIVIL CASE NO 306/2002

JAMES ALLAN RUSSEL BELL.....PLAINTIFF

Versus

1. MIC UFS
2. **MILLICOM INTERNATIONAL CELLULAR S.A**
3. MIC(T) LTD

Under the instruction of the High Court of Tanzania at Dar-es-salaam, on Wednesday, the 5th day of November, 2014 at 10.00 a.m We shall sell by Auction **34,479 Shares of Millicom International Cellular S.A** (2nd judgment debtor in MIC (T) LTD.

PLACE OF AUCTION

The public Auction will be held at 5th Floor in Raha Tower Building at the junction of Bibi Titi Road and Azikiwe Road opposite to Kisutu Court.

Mustafa O. Nyumbamkali"

[Emphasis supplied].

It is pertinent to note that neither the applicant nor her property was mentioned in the notice of public auction.

Subsequently, the auction was conducted and shares in question sold to the 2nd respondent (**GOLDEN GLOBE INTERNATIONAL SERVICES LTD**) as reflected in the receipt issued by Court Broker to the 2nd respondent which reads among other things as follows:-

VRN: 10-014354-L TIN: 100-964-740

RECEIPT

No. 1279 Date : 05/11/2014

Received from GOLDEN GLOBE INTERNATIONAL SERVICES LTD 2 RVE THALBERG, CH 1211, GENEVA, SWITZERLAND

The Sum of shillings: TWO BILLION SEVEN HUNDRED NINE MILLION 2,709,000,000/=.

Being payment of **BUYING 34,479 SHARES OWNED BY MILLICOM INTERNATIONAL CELLULAR S.A** IN MIC TANZANIA LTD IN PUBLIC AUCTION.

Cheque No. 122839 Sgd

For Super Auction Mart Ltd."

[Emphasis supplied].

In a letter with Ref SAM/CB/CC.NO 306/02 the Court Broker above reported the above sale to the **DR** on 10th November, 2014. The **DR**

declared absolute the sale of shares owned by **MILLICOM INTERNATIONAL CELLULAR S.A** in **MIC TANZANIA LIMITED**. However, surprisingly, five days earlier the 2nd respondent's /purchaser in letter dated 5th November, 2014 REFGGI/MIC/01.01/4 intimated to the **DR** the status of ownership of the auctioned shares as follows:

> *"That, in continuation as a due diligence exercise GGISL Advocates undertook an official search of MIC (T) Ltd with the Business Registrations and Licensing Agency, which results state that 34, 479 shares of MIC (T) Ltd (auctioned) are held by one MILLICOM TANZANIA N.V as placed in Appendix 3".*
>
> *Appendix 3 with Ref: MIT/RC/24275/53 dated 5/11/2014 titled THE COMPANIES ACT, 2002 MIC TANZANIA LIMITED:*
>
> *Shareholders:*
>
> *Millicom Tanzania N.V World Trading Centre, Unit BC 11.04*
>
> *Piscadera Bay, Curacao Netherlands...34,479 shares.*
>
> *Shai Holdings S.A*
>
> *Route De LONGWAY, l-8080*
>
> *Betrange Luxembourg..... 1 share".*

Despite the said status from BRELA, still the 2nd respondent sought clarification if the shares she had purchased on 5th November, 2014

belonged to the applicant and if not; demanded to be refunded the purchase price. However, the record shows that, Advocate Mgare came with a new dimension having addressed the **DR** to the effect that: shares owned by **MILLICOM TANZANIA N.V** in MIC Tanzania Ltd are same as those advertised and auctioned on 5th November, 2014 on the basis of official search of BRELA dated 14th August, 2013 and 2012 annual report of **MILLICOM INTERNATIONAL CELLULAR S.A** which is quoted in the website *http:/www.tigo.co.tz/tigoword/about-us*. Mr. Mgare who added that, such information was reported to the judge on 12th February, 2014 when the judgment debtor was required to show cause as to why execution should not proceed. Having relied solely on the submission of advocate Mgare, the **DR**, vide letter with Ref. Civil Case No. 306/2002 dated 6th November,2014 informed the 2nd respondent as follows:

> *"This is to assure you that the 34,479 shares owned by Millicom NV in MIC Tanzania Limited are the same as those advertised and auctioned on 5th day of November, 2014... This is based on official search from BRELA dated 14th August, 2014 and 2012 annual report by Millicom International Cellular S.A*

which is quoted in their website http//www.tigo.co.tz/tigo world/about-us".

Surprisingly, the **DR** added that:

"That being the position International Cellular S.A is estopped from denying the fact that they own MIC Tanzania Limited".

The said position was acknowledged by the 2nd respondent in the letter Ref. GGI/MIC/02.1014 dated 7th November, 2014 addressed to the **DR** and the 2nd respondent promised to make the final payment of 75% of the bid subject to the confirmation of the Judiciary Bank Account.

It is not known as to why the **DR** did not bring to the attention of Mr. Mgare the more recent position of the search on the status of ownership of the shares as availed by the 2nd respondent to the effect that the 34,479 auctioned shares belonged to **MILLICOM TANZANIA N.V**. Apart from this raising more questions than answers, this is how the applicant surfaced in the matter while she does not feature in the execution process from the beginning. However, it is glaring that subsequent to the said **DR's**

assurance to the 2nd respondent, she issued two certificates of sale both dated 10th November, 2014. In one of the certificates she certified to the following effect:

> *" This is to certify that 34,479 shares owned by 2nd judgment debtor,* ***Millicom International Cellular S.A*** *in* ***Mic Tanzania Limited*** *were attached by an order of this Court dated 17th June, 2014 and sold by Public Auction on 5th November, 2014.*
>
> *The successful bidder/purchaser was GOLDEN GLOBE INTERNATIONAL SERVICES LIMITED to the tune of USD 6,300,000.*
>
> *As the successful Purchaser has already paid the full purchase money and relevant receipt issued, the sale of the shares has become absolute.*
>
> ***P.S MAZENGO***
>
> ***DEPUTY REGISTRAR***
>
> ***DAR-ES-SALAAM ZONE"***

The other certificate reflected as follows:

> *"This is to certify that 34,479 shares owned by 2nd judgment debtor,* ***Millicom International Cellular S.A/Millicom Tanzania N.V*** *in Mic*

Tanzania Limited were attached by an order of this Court dated 17th June, 2014 and sold by Public Auction on 5th November, 2014."

Despite one of the certificates having introduced the applicant at that stage, the same is not reflective of advocate Kamara's letter Ref. No. CA/GEN. 218/2014 dated 13th November, 2014. In the said letter advocate Kamara sought endorsement/execution of shares transfer instrument of 34,479 shares from **MILLICOM INTERNATIONAL CELLULAR S.A (EX OWNER) IN MIC (T) LTD TO GOLDEN GLOBE INTERNATIONAL SERVICES LIMITED (SUCCESFUL PURCHASER)**. For a better understanding of the contents we feel inclined to reproduce Paragraphs 1 and 3 of the said letter as follows:

*"Our client is a successful Purchaser, hence new owner of 34,479 shares which were previously owned by **Millicom International Cellular S.A** in MIC (T) Ltd. Those shares were sold to our client by public auction in execution of a decree in the case captioned in the heading above.*

... Our Client humbly requests for your Honour's endorsement/execution of the pertinent share

transfer instrument submitted together with this letter) as clearly stipulated under Order XXI rule 78 (1) and (2) of the Civil Procedure Code."

Mr. Kamara also requested the **DR** to appoint the Director General, Tanzania Communication Regulatory Authority (TCRA) to receive any interest or dividend due on 34,479 shares and to sign the receipt for the same for the benefit of the successful purchaser until the effective transfer of those shares to his client. However, contrary to what Mr. Kamara had sought, the **DR** is on record to have done the following on 13th November, 2014 as to who was the transferor:

> **" *TRANSFER OF SHARES OR STOCK***
> (Under Order XXI Rule 78 (1) & (2) of the Civil Procedure Code Cap 33 RE. 2002).
> *In consideration of the sum of United States Dollars Six Million Three hundred Thousand (US $ 6,300,000) only).*
> *Paid by GOLDEN GLOBE INTERNATIONAL SERVICES LIMITED of Rue Thalberg 2, P.O Box 1507, CH- 1211 Geneva 1, Switzerland (Hereinafter called the said Transferee]*

We ***MILLICOM INTERNATIONAL CELLULAR S.A/MILLICOM TANZANIA N.V By PAMELA S. MAZENGO, DISTRICT REGISTRAR, HIGH COURT OF TANZANIA- DAR ES SALAAM ZONE***
[Hereinafter called the said Transferor]".
Do hereby bargain sell, assign, and transfer to the said transferee 34,479 shares of and in the Undertaking called MIC TANZANIA LIMITED."

Moreover, in the **DR**'s Order dated 13th November, 2014 she informed the Director General of Tanzania Communication Regulatory Authority (TCRA) on the said sale of 34,479 shares owned by **MILLICOM INTERNATIONAL CELLULAR S.A/MILLICOM TANZANIA N.V** in **MIC TANZANIA LTD** to **GOLDEN GLOBE INTERNATIONAL SERVICES LIMITED** in a public auction conducted on 5th November, 2014. Having inserted **"MILLICOM TANZANIA N.V",** the **DR** appointed the Director General to receive any interest or dividends as shall be due on the shares for the benefit of the 2nd respondent pending finalization of the transfer of shares.

We have taken a great deal to give a lengthy background in order to show as to how and when the applicant surfaced in what was before the executing court.

At the hearing, the counsel for the 2nd and 3rd respondents asked for the directions on the following issues: **One,** the propriety or otherwise of the additional record of revision and additional parties which includes the Ruling of the Court not a subject for revision in the absence of any order, while the sufficiency of the previous record is cemented by the order dated 20th February, 2017. **Two,** the absence of **MIC UFA LIMITED** the 4th respondent/judgment debtor in the wake of her liquidation while the liquidator has not been summoned in the present proceedings. **Three,** the written observations filed by the applicant and **MILLICOM INTERNATIONAL CELLULAR S.A** and **MIC TANZANIA LIMITED**, the 5th and 6th respondents respectively who were not privy to the proceedings before the High Court *vis a vis* the plight of **GOLDEN GLOBE INTERNATIONAL SERVICES LIMITED** and **QUALTY GROUP LIMITED** the 2nd and 3rd respondents respectively who have not yet responded to those observations. **Four,** the order of address by the 5th and

6th respondents who currently, apart from supporting the applicant they have raised serious allegations against the 2nd and 3rd respondents.

Dr. Kapinga for **MILLICOM INTERNATIONAL CELLULAR S.A** (the 5th respondent) submitted that, in these *suo motu* proceedings, the practice of Court is unfettered because it can call any party or document including the written observations for the purposes of determining whether or not the applicant was heard in the execution proceedings before the High Court. He also confirmed to the Court to have been informed by his client about the liquidation of the 4th respondent and that is why such information was availed to the process server who has sworn an affidavit to the same effect. Mr. Mbwambo associated himself with what was submitted by Dr. Kapinga adding that, these *suo motu* proceedings were commenced pursuant to the direction of the Chief Justice found at page 12 d in Volume I of the record.

On the other hand, Mr. Ng'maryo submitted that, by the nature of these proceedings, parties have been summoned and availed the record by the Court in order to assist it in the determination of what is before the Court. Thus, he argued that, what is sought by the 2nd and 3rd respondents

seek to challenge the *suo motu* revision in the guise of seeking directions so as to entrap the applicant before the determination of the main matter which is a subject of the revision. He added that, the directions sought are similar to the preliminary objections which were overruled by the Court in its two previous decisions.

As for Mr. Bhojani, he complained that, the 2nd and 3rd respondents are all out to drag the Court into unnecessary preliminary objections in order to stall the determination of the matter on merit. In this regard, he urged us to disallow the preliminary objections brought in whatever form.

Mr. Kamara rejoined by reiterating that, the directions sought by the 2nd and 3rd respondents were not a subject of the initial preliminary objections dealt with by the Court in the previous Ruling.

Having seriously considered the submission of counsel, we wish to point out that, the complaint on the propriety or otherwise of the additional record of appeal and the additional parties seem to be challenging the competence of the record of the Revision. This point need not detain us because this is not a revision which was initiated by a party where the adversary party can challenge the propriety or otherwise of the record of

revision – See: **BALOZI ABUBAKAR IBRAHIM AND ANOTHER VS MS BENANDYS LIMITED AND TWO OTHERS,** Civil Revision No. 6 of 2015, (unreported). Besides, it is settled that, the present proceedings were commenced pursuant to the direction of the Chief Justice dated 27th January, 2017. Thus, the Ruling of the Court contained in the additional record is not offensive having been availed to the parties in order to assist the Court in the determination of this *suo motu* revisional matter.

Regarding the absence of the 4th and 1st respondents, in an application of this nature, according to Rule 65 (3) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the Court has discretion to summon parties and grant them opportunity of a hearing. Having exercised its discretion by summoning the parties, the Court has discharged its duty whereas entering appearance was upon the parties or their respective representatives. We wish to emphasise at this juncture that, in *suo motu* revisional proceedings, the Court may revise any order of the High Court without summoning any person or it may summon any person as it deems fit and just – see: **JEHANGIR AZIZ ABDULRASUL AND TWO OTHERS VS BALOZI IBRAHIM ABUBAKARI AND ANOTHER**, Civil Application No. 8 of 2016 (unreported).

On the written observations by **MILLICOM INTERNATIONAL CELLULAR S.A** and **MIC TANZANIA LIMITED** the 5th and 6th respondents respectively filed on 16th February, 2018 and those of the applicant filed on 1st March, 2018 after the lodging of the preliminary objections we are about to dispose of, we have found it unnecessary to give any directions considering that, by consent, parties were allowed to file written submissions in respect of the *suo motu* revision. We are satisfied that, the written observations by the applicant, the 5th and 6th respondents are in response and to the written submissions of the 2nd and 3rd respondents filed on 26th July, 2017 in respect of the preliminary objections. Thus, regardless of the title the written arguments are in effect challenging the preliminary objections raised by the 2nd and 3rd respondents and they will be considered as such.

Having given our directions, we were as well constrained to resolve initially a pertinent issue if we have jurisdiction to entertain these *suo motu* proceedings. This was pursuant to the notice of preliminary objection filed on 26th July, 2017 by the learned counsel for the 2nd and 3rd respondents challenging the jurisdiction of the Court to entertain these *suo motu* revisional proceedings.

At the hearing the learned counsel for the 2nd and 3rd respondents adopted their written submissions earlier filed on 26th July, 2017 in support of the preliminary points of objection. To bolster their arguments, they submitted that, section 4 (3) of the Appellate Jurisdiction Act, **CAP 141 RE. 2002** (the AJA), confines the mandate of the Court to revise matters which are pending before the High Court and not otherwise. It was argued that, the Court has no jurisdiction to entertain the *suo motu* revision because what is intended to be revised is no longer before the High Court and the Judgment debtor was discharged. In this regard, it was contended that, since the jurisdiction is a creature of statute, jurisdiction of the Court cannot be assumed or usurped as it is the case in these revisional proceedings. To back this proposition decisions cited to us were **FAHARI BOTTLERS LIMITED AND ANOTHER VS REGISTRAR OF COMPANIES** and **ANOTHER** [2000] TLR 107, **AUGUSTINE LYATONGA MREMA VS REPUBLIC,** [2003] TLR 6 and **BALOZI ABUBAKAR IBRAHIM AND ANOTHER VS MS BENANDYS LIMITED AND TWO OTHERS** (supra), **FANUEL MANTIRI NG'UNDA VS HERMAN NG'UNDA AND OTHERS,** Civil Appeal No. 8 of 1995, **K.S.F. KISOMBE VS TANZANIA PORTS AUTHORITY**, Civil Appeal No. 2 of 2009,

KOMBO MKAMBARA VS MARIA LOISE FRISCH, Civil Application No. 3 of 2000 (all unreported).

It was further submitted that, since the subject under revision stem from execution proceedings, the law provides for the avenue of alternative remedies whereby all complaints as to propriety or otherwise of execution of the decree can be remedied by way of an application or suit before the High Court in terms of the provisions among others, section 38 of CPC. Thus, it was viewed that, the Court should refrain from invoking *suo motu* revisional jurisdiction on matters whose relief is readily available in the High Court as the law does not provide avenue for coming to the Court of Appeal as a court of original jurisdiction on these matters. To back this argument following cases were cited to us: **CRDB BANK LIMITED VS MATHEW KILINDU AND ANOTHER,** Civil Application No. 74 of 2010, **BANK OF TANZANIA VS DEVRAM P. VALAMBHIA,** Civil Reference No. 4 of 2002 (both unreported) and **MOHAMED ENTERPRISES (T) LTD VS TANZANIA INVESTMENT BANK AND OTHERS** [2012] EA 173.

Finally, the learned counsel for the 2nd and 3rd respondents concluded by urging the Court to strike out the *suo motu* proceedings on account of lack of jurisdiction.

On the other hand, the applicant challenged the preliminary objections. Having adopted their written arguments they submitted that, the preliminary objections are inadmissible in the light of the Court's Ruling dated 23rd February 2017, which clearly stated that, preliminary objections cannot be raised on procedural and jurisdictional matters in revision proceedings instituted *suo motu* by the Court. In this regard, it was argued that, the repeated preliminary objections raised are an abuse of court process. Besides, it was submitted that, the Court can exercise its revisional jurisdiction *suo motu,* at any time whether or not a right of appeal or an alternative remedy exists in the light of the case of **BALOZI ABUBAKAR IBRAHIM** (supra). The learned counsel for the applicant challenged the applicability of the remedy of the applicant proceeding under section 38 of the CPC arguing that, it is restricted to parties to the suit while the applicant was not.

On our part we have found that, apart from the preliminary point of objection questioning the jurisdiction of the Court on the ground that, what is intended to be revised is no longer before the High Court, all the remaining points of objection touch on alternative remedies available to the applicant. These were determined by the Court in previous Ruling in this matter which was handed down on 23rd February, 2017. Thus, we shall not embark in the endeavour to readdress them or else we shall be going against the sound and prudent policy that litigation must come to an end. We wish to add that, in the case of **BALOZI ABUBAKAR IBRAHIM** (supra), execution proceedings were part of what was subjected to revision *suo motu* and as such, the present case is not the first case to subject the execution order or findings to *suo motu* revision proceedings. Moreover, we agree with the applicant that she could not invoke section 38 (1) of the CPC which provides:

> *"All questions* ***arising between the parties to the suit in which the decree was passed****, or their representative, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit".*

In the light of bolded expression, the scope of questions to be determined by the executing court is limited to those arising between the parties to the suit in which the decree was passed. Since the applicant was not a party, she could not invoke section 38(1) of the CPC.

We are thus, enjoined to determine the point of law touching on the Court's jurisdiction in these *suo motu* proceedings.

In disposing of the preliminary objection which questions *suo motu* revisional jurisdiction of the Court we believe to be inclined to state the obvious. At its inception in 1979, the Court was vested with only appellate jurisdiction. It was not mandated with powers of revision. The predicament was realized fourteen years later and the mischief intended to be cured can be discerned from the Objects and Reasons for the Bill presented to Parliament whereby the English Version reads as follows:

> *"The Bill is designed to amend the Appellate Jurisdiction Act in order to give the Court of Appeal* ***supervisory and revisionary powers over the High Court****. At the moment the Court of Appeal exercises revisionary powers over the High Court only when an appeal lies over the matter on which*

the High Court had exercised revisionary powers. Otherwise, ***the Court has only appellate powers and it cannot inspect or correct errors on the decisions of the High Court which are not subject of appeal."***

[Emphasis is ours.]

In our considered opinion, an objective reading of the Objects and Reasons for giving this Court both supervisory and revisionary powers was crucial for the sake of rendering justice to all by giving this Court of last resort in the land, unfettered judicial powers to inspect and/or correct errors, be they procedural or substantive, committed by the High Court which were apparent but could not be remedied in the absence of an appeal – see: **HON. ATTORNEY GENERAL AND TWO OTHERS VS OPULENT LTD**, Civil Revision No. 1 of 2015 (unreported).

Thus, through the Appellate Jurisdiction (Amendment) Act, 1993 (No. 17) ("the Amendment Act"), the Court was clothed with revisional jurisdiction in order to cure the mischief stated in the object and reasons

for the Bill. The said amendments witnessed the enactment of subsections 2 and 3 of section 4 of the AJA as follows:

> *"(2) For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred upon it by this Act, the Court of Appeal shall, in addition to any other power, authority and jurisdiction conferred by this Act, have the power of revision and the power, authority and jurisdiction vested in the court from which the appeal is brought.*
>
> *(3) Without prejudice to subsection (2), the Court of Appeal shall have the power, authority and jurisdiction to call for and examine the record of any proceedings before the High Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, order or any other decision made thereon and as to the regularity of any proceedings of the High Court."*

Section 4(3) of the AJA first came under scrutiny by this Court in its decision in **MOSES J. MWAKIBETE VS THE EDITOR–UHURU, SHIRIKA LA MAGAZETI YA CHAMA AND NATIONAL PRINTING**

CO. LTD [1995] TLR 134. Then, the provision was subjected to test in the case of **TRANSPORT EQUIPMENT LTD VS DEVRAM P. VALAMBHIA** [1995] T.L.R. 161. In both cases, the Court clearly said that, the court may, *suo motu*, embark on revision whether or not the right of appeal exists or whether or not it has been exercised in the first instance. Slightly a year later, the Court conclusively held thus in **HALAIS PRO –CHEMIE VS WELLA A.G.** [1996] TLR 269 at page 272 as follows:

> *"We think that **MWAKIBETE's** case read together with the case of **Transport Equipment Ltd** are authority for the following legal propositions concerning the revisional jurisdiction of the Court under ss (3) of s. 4 of the Appellate Jurisdiction Act, 1979:*
>
> *(i)* ***The Court may, on its own motion and at any time, invoke its revisional jurisdiction*** *in respect of proceedings in the High Court;*
>
> *(ii)* *Except under exceptional circumstances, a party to proceedings in the High Court cannot invoke the revisional jurisdiction of the Court as an alternative to the appellate jurisdiction of the Court;*

(iii) A party to proceedings in the High Court may invoke the revisional jurisdiction of the Court in matters which are not appealable with or without leave;

(iv) A party to proceedings in the High Court may invoke the revisional jurisdiction of the Court where the appellate process has been blocked by judicial process."

[Emphasis is ours.]

The bolded expression of words **"and at any time"** was a new dimension in the interpretation of section 4(3) of the AJA which widened the scope in which the Court can exercise discretion on its own motion to invoke its revisional jurisdiction. A year later, in the case of **SALUM ABUBAKAR & TWO OTHERS VS REPUBLIC**, Criminal Revision No. 3 of 1997 (unreported), the Court entertained and allowed revision although the High Court had already become *functus officio*. Later, the principle propounded in **HALAIS** (supra) was emulated and further expounded in the case of **OLMESHUKI KISAMBU VS CHRISTOPHER NAINGOLA** [2002] T.L.R 280. It partly held that:-

"The subsection has been considered by this Court on a number of occasions and various principles have been formulated to guide the exercise of discretion under the provision. For instance in ***Halais Pro-Chemie Industries Ltd v. Wella AG****, the Court reverted to and consolidated its earlier pronouncement in* ***Mwakibete v. Editor of Uhuru, Transport Equipment v. D.P. Valambhia****, and said that the revisional powers conferred by subsection (3) were not meant to be used as an alternative to the court's appellate jurisdiction. Hence, the court will not proceed* ***suo motu*** *in cases where the applicant has the right of appeal, with or without leave, and has not exercised that right.* ***However, the court will proceed under the subsection where there.....exists good and sufficient reason to justify recourse to the subsection."***

[Underlining supplied].

It is vivid that, existence of good and sufficient reason is one of the instances justifying the intervention of the Court by invoking its revisional jurisdiction. In **OPULENT** (supra) the High Court had decided that the Registrar of Titles is not permitted by law to rectify the Register of Titles

without the court's order. No appeal was preferred. Having received a complaint from the office of the Attorney General, the Court commenced *suo motu* proceedings which were confronted with a preliminary objection challenging its *suo motu* revisional jurisdiction on ground that, what was intended to be revised was no longer before the High Court. The Court overruled the preliminary point of objection by saying:

> *"This power to inspect and correct can be exercised by the Court,* ***on its own motion and at any time****, even after the proceedings in the High Court have been finalized, because it has not always been easy or practicable for the Court to learn of these illegalities, irregularities, errors, improprieties, etc. before proceedings in the High Court are concluded. To hold otherwise, in our view, would, firstly, be to rob the words "of any finding, order or any other decision made thereon and as to the regularity of any proceedings" of their effect. This is simply because a finding, order or decision of the High Court, as is mostly the case, may be the final judicial act of the High Court in the concerned proceeding".*
>
> [Emphasis supplied].

It is clear from all these cases that this Court can exercise its revisional jurisdiction ***suo motu,*** **at any time** which is in line with the manifest intention of Parliament in deciding to vest this Court with supervisory powers over the High Court in order to determine the propriety or otherwise of the finding, order or any decision of the High Court regardless of the proceedings being finalized at the High Court. In the light of clear supervisory and revisional mandate of Court over the High Court which is sparingly invoked to correct errors, illegalities and improprieties, that is not to act as a court of original jurisdiction as suggested by the learned counsel for the 2nd and 3rd respondents.

We have also come across in 2nd and 3rd respondent's list of authorities. The case of **KOMBO MKAMBARA** (supra) which we think is distinguishable in the sense that the High Court record was in the Court of Appeal, the notice of appeal having been duly lodged. Also the case of **K.S.F KISOMBE** (supra) was an appeal and the Court was confronted with an issue whereby the High Court did not determine the preliminary of point objection on jurisdiction. As such, the Court sitting on appeal invoked section 4(2) of the AJA to quash and set aside the High Court proceedings. Also the case of **GEORGE KILINDU (**supra) is distinguishable from the

case at hand because the applicant was a party in the case and the subsequent application for execution. This is not the case here as the applicant was neither a party to the suit nor the execution proceedings.

Since it is settled law that, the Court can invoke *suo motu* revisional jurisdiction **at any time**, to uphold the 2nd and 3rd respondents' argument that there is nothing to be revised because the matter is concluded, if such finding, order, decision or proceeding contains an incurable error, or irregularity would render the Court to remain powerless. More worse, this would be an abdication of our constitutional mandate and a manifest defeat of the clear intention of Parliament in enacting legislation to clothe the Court with supervisory powers over the High Court.

In view of the above discussion, we find no grain of merit in the preliminary objection as it is misconceived. We hereby overrule it.

As to the substantive matter and a subject of these *suo motu* revisional proceedings, in terms of rule 65 (6) of the Rules, parties were given opportunity to address the Court. As such, they sought and were allowed to file their written submissions. While we appreciate their efforts we will not address each and every point that was raised in their submissions

because not everything they said is immediately relevant to these *suo motu* proceedings.

The written submissions and the complaint of the applicant basically hinge mainly of two issues namely: **One**, the propriety or otherwise of the sale of 34,479 shares of the applicant and **two,** if before such sale the applicant was given opportunity to be heard by the executing court.

It was submitted for the applicant that, she was denied the right of hearing having not been given any notice or opportunity to appear and make submissions before the **DR** issued orders which culminated into the sale by auction and transfer of the applicant's 34,479 shares. Also, the applicant faulted the **DR** for availing audience solely to the 1st respondent's counsel who appeared, prayed and was granted the Proclamation Order while the applicant was not given a notice of the proclamation of sale. Besides, it was argued that, the absence of any reference to the applicant in the execution process is evidenced in:- **One,** the Court Broker's sale report to the **DR** which indicates that, a total of 34,479 shares owned by **MILLICOM INTERNATIONAL CELLULAR S.A** were successfully sold to the 2nd respondent vide the public auction as ordered. **Two,** The **DR**'s

acknowledgement in her order dated 10th November, 2014 whereby she declared absolute the sale of shares which belonged to **MILLICOM INTERNATIONAL CELLULAR S.A** in **MIC TANZANIA LTD** in a public auction conducted on 5th November, 2014. **Three,** the 2nd respondent's counsel's letter dated 5th November, 2014 seeking endorsement and transfer of shares of **MILLICOM INTERNATIONAL CELLULAR S.A** the 5th respondent and 2nd judgment debtor in the 6th respondent.

Moreover, the applicant faulted the decision of the **DR** who while already in possession of the status of the ownership of shares in question as submitted by the 2nd respondent, opted to rely solely on the erroneous submission of advocate Mgare based on outdated and non-existent alleged **BRELA** Official search dated 14th August 2014 and 2012 annual report of the 5th respondent claimed to have been sourced from the website. It was thus contended that, the said e*xparte* hearing of the 1st respondent's counsel which culminated into the applicant's deprivation of her shares is tantamount to unheard condemnation which is against the fundamental tenets of the right to fair hearing as articulated under article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 (the

Constitution). To support the proposition the applicant's counsel referred us to the cases of **HALIMA HASSAN MAREALLE VS PARASTATAL SECTROR REFORM COMMISSION** Civil Application No. 84 of 1999 (unreported), **HAMISI RAJABU DIBAGULA VS REPUBLIC** [2004] TLR 181.

The applicant further faulted the subsequent insertion of its name in the execution orders which is not compatible with the pleadings, court broker's application for his fees and the receipt acknowledging the sale of the shares as they do not make any reference to the applicant. In conclusion it was submitted for the applicant that, the conduct of the execution proceedings by the **DR** which resulted to the purported attachment, sale by auction and transfer of the applicant's shares to the 2nd respondent and issuance of two certificates of sale, exhibits irregularity which vitiates the execution proceedings calling for the intervention by the Court.

Finally, the applicant urged us to revise and set aside the execution proceedings in Civil Application No. 338 of 2014 and orders issued by the

DR on 10th, 11th and 13th November, 2014 on account of being void and of no legal effect; and, make an order that the applicant was and continues to be the true owner of 34,479 shares that were purported to be sold by auction in Civil Application No. 338 of 2014.

On the part of **MILLICOM INTERNATIONAL CELLULAR S.A** (the 5th respondent), it was submitted that itself and the applicant are two distinct companies and separate entities incorporated in different jurisdictions with different directors and assets. Thus, the applicant is neither owned nor is the asset of the 5th respondent and the execution which led to the sale of applicant's shares is unlawful. In this regard, it was argued that the applicant's assets could not have been purported to be attached and sold by the Court Broker upon the orders of the **DR** to satisfy the debt of the 5th respondent. It was further pointed out that, the order of the Proclamation of Sale was irregular because it was never served on the 5th respondent. Moreover, it was the 5th respondent's submission that, the version of the Certificate of Sale referring to **MILLICOM INTERNATIONAL CELLULAR S.A/MILLICOM TANZANIA N.V** is a false document because initially, the order referred to **MILLICOM INTERNATIONAL CELLULAR S.A.**

On the other hand, it was submitted for the 2nd and 3rd respondents that the applicant's right to be heard was not breached as alleged because the applicant is an asset of judgment debtor in Civil Case No 306 of 2002. As such it was contended that, the attachment and sale was lawful and proper following the **DR**'s determination on 3rd June 2014 that the 5th respondent had failed to show cause as to why execution should not proceed subsequent to which the shares were attached and sold. Besides, Execution order was issued in the presence of the judgment debtor.

The 3rd respondent faulted the applicability of the principle of **Salomon's** case arguing that, it had the likelihood of concealment of assets and defeats the interest of justice leaving the decree holder with an empty decree. It was submitted that, the Tanzanian law provides for execution to be levied against the assets of judgment debtor who is not entitled to be given a separate notice or separate right as judgment debtor. Moreover, it was reiterated that, the applicant's complaints are not merited having not been brought in accordance with the law addressing execution matters under the laws of Tanzania.

While on the one hand, it was submitted by the 2nd and 3rd respondents' counsel that, the principle of corporate veil of incorporation is not absolute and not applicable, it was asserted that, the 5th respondent is concealing the identity of its assets through the applicant in order to evade execution which is against the law. It was argued that, the execution court has power to pierce the veil, attach, and dispose assets wherever they may be. As such, the 2nd and 3rd respondents invited the Court to hold and deem appropriate the attachment and sale of the concealed share of assets of judgment debtor through the applicant.

In particular, it was submitted for the 2nd respondent that, he was invited by the Court to the auction and became the successful bidder and paid for the shares which were later transferred in his name and registered by the Registrar of Companies. It was argued that as a bonafide purchaser, she is protected under Order XXI Rule 76 and as such, she cannot lose her title and the conduct of the executing court has nothing to do with her. (To support the proposition the case of **OMARI YUSUFU VS RAHMA AHMED ABDUKADR** [1987] T.L.R 169 was cited.

Having considered the written submissions and the record of the execution proceedings the major issue for determination is whether the sale of 34,479 applicant's shares was valid and if the applicant was heard before the sale of her shares. Before embarking on that task, we believe to be inclined to restate the object of execution and the law governing its process.

Execution is the enforcement of decrees and orders by the process of the Court, so as to enable the decree-holder to realize the fruits of the decree. It is indeed the culmination of the entire process in litigation and cannot escape public scrutiny and comment, let alone judicial interventions where the interests of justice so demand. In **RE OVERSEAS AVIATION ENGINEERING (GB) LTD** [1962] 3 ALL E.R, execution was defined as follows**:**

> *"Execution" means quite simply,* ***the process of enforcing or giving effect of the judgment of the Court:*** *and it is completed when the judgment creditor gets the money or other thing awarded to him by the judgment ".*

[Emphasis supplied]

The formal execution process of decrees under the CPC subject to prescribed limitations commences with the decree holder applying to the court which passed the decree for its execution in one of the five specified modes as spelt out in section 42 of the CPC namely: **one**, by delivery of any property specifically decreed; **two,** by attachment and sale or by sale without attachment of any property; **three,** by arrest and detention in prison; **four,** by appointing a receiver; or **five** in such other manner as the nature of the relief granted may require.

The starting point is prescribed under Order XXI Rule 9 of the CPC which provides:

> "*When the holder of a decree desires to execute it,* ***he shall apply to the court which passed the decree or to the officer (if any) appointed in this behalf,*** *or if the decree has been sent under the provisions herein before contained to another court then to such court or to the proper officer thereof.* "

[Emphasis ours].

The bolded expression clearly indicates that, in whichever mode of execution the court should always be moved, it cannot act on its own motion.

Every written application for execution must conform to the mandatory requirements spelt out under Order XXI rules 10 (2) of the CPC which among other things mandatorily requires ***the name of the person against whom execution of the decree is sought to be stated in the application for execution.***

Upon admission of the application, the executing court shall, under Order XXI rule 15 (4) of the CPC, order execution of the decree according to the nature of the application sought. It is the formal execution order which forms the legal basis of issuing among others a garnishee order, warrant of attachment of movable property, prohibitory order under rule 22.

After the said formal order, the executing court proceeds to issue its process for execution of the decree under Order XXI rule 22. It is a

mandatory requirement under rule 22 (2) and (3) that, every such process shall bear the date of the day it was issued, be signed by the judge or magistrate, be sealed with the seal of the court and specify the day on which it shall be executed – see: **MS SYKES INSURANCE CONSULTANTS CO. LTD VS MS SAM CONSTRUCTION CO. LTD**, Civil Revision No. 8 of 2012 (unreported).

Once the warrant of attachment is issued, the Registrar may employ any person to perform such duty in terms of Rule 3 of the Court Brokers and Process Servers (Appointment, Remuneration and Discipline) Rules, 1997 GN 315 of 1997 as amended by GN 763 of 1997, (Court Brokers Rules). Under Rule 4 of the Court Brokers Rules, the executing officer shall give the judgment debtor at least a notice of fourteen (14) days to settle the decretal sum or else comply with the decree. These were Rules applicable at the material time.

Under section 48 (1) of the CPC, subject to the proviso, the property which is liable to attachment and sale in execution of a decree include shares in a corporation belonging to the judgment debtor, or over which, or the profits of which, he has a disposing power which he may exercise

for his own benefit, whether the same be held in the name of the judgment debtor or by another person in trust for him or on his behalf. The law makes a clear distinction in the modes of attachment. Subsequently, the application for attachment of the property, and in particular the shares, the person in whose name the share may be standing from transferring the same or receiving dividend thereon – see: Order XXI Rule 45 (1) (b) (ii)] a copy of such order in terms of rule 45 (2), ***shall be fixed on some conspicuous part of the court house*** **and a copy sent** ***to the proper officer of the respective institution.***

After a successful attachment and where no objection proceedings are preferred or disallowed, the execution may proceed upon the application by the decree holder under Order XXI rule 65 (3) of the CPC to order the sale of the property. Where the executing court decides to sell the property, it must make a formal order in the court record. Where sale is ordered is to be by public auction, the executing court shall cause a proclamation of the intended sale to be made in the language of the court after a proper notice to the decree holder and judgment debtor stating time and place of sale in terms of Rule 65. In terms of Rule 65 (2) the

proclamation shall among other things state the property to be sold. MULLA, in his treatise **MULLA ON THE CODE OF CIVIL PROCEDURE ACT V OF 1909 VOL II 15TH EDITION** at page 1826 comments on Rule 66 of the Indian Code which is *in pari materia* with Order XXI rule 66 of the CPC as follows:

> *"It has been held that when a sale is held without any publication of the proclamation, as distinguished from defective proclamation its void. Where apart from publication in local newspaper the mandatory provisions of r. 54 (2) have not been followed, the omission does not merely amount to a material irregularity as contemplated by r.90.* ***Such an omission amounts to clear violation of mandatory provisions and renders the sale being without proclamation and therefore void."***

[Emphasis supplied]

At page 1889 elaborating on Order XXI rule 90 of the Indian Code which is equivalent to Order XXI rule 88 of our CPC, MULLA thus, states:

> "When *the proclamation is not in accordance with rule 54 as required by sub-rule (1), it is a material*

irregularity within rule 90, ***but when there is total absence of proclamation, the sale is a nullity. It has been held that where the requirements as to publication as laid down in r54 (2) have been altogether ignored, there is no such publication at all and such non compliance is not merely a material irregularity. Failure to affix proclamation of any of the items of properties proclaimed for sale constitutes absence of publication amounting to illegality."***

[Emphasis ours]

SARKAR in his **CODE OF CIVIL PROCEDURE** 11th edition at page 1768 says as follows:

"*An auction sale held in execution of a decree without fulfilling the requirements of the mandatory provisions contained in O.21 Rules 64,66 will make the sale void ab initio [**Dilip Kumar Singh @ Dilip Sinha v Mostt.Sakuntala Devi,** 2003 (51) (2) BLJR 978.*

Total absence of proclamation of sale is not an irregularity but makes the sale void *[**Jayarama v. Vridhagiri**, 44m 35: A 1921 m 528..*

*Issuance of sale proclamation is mandatory. Sale held without complying with such mandatory provision would be a nullity and void ab initio [**Madappa v. Lingappa** A 1989 Kant 60]*

In our CPC which is similar to the Indian Code, rule 66 provides for the mode of making proclamation as follows:

"(1) Every proclamation shall be made and published, as nearly as may be, in the manner prescribed by rule 53, sub rule (2).

(2) Where the court so directs, such proclamation shall also be published in the Gazette or in a local newspaper, or in both, and the costs of such publication shall be deemed to be costs of the sale.

(3) Where property is divided into lots for the purpose of being sold separately, it shall not be necessary to make a separate proclamation for each lot, unless proper notice of the sale cannot, in the opinion of the court, otherwise be given."

In the case of **BALOZI ABUBAKAR IBRAHIM** (supra), the Court was faced with a situation whereby, the three houses of the judgment

debtor were sold in satisfaction of the decree without there being in place: any decree holder's application for such sale in terms of Order XXI Rule 65 (3); consent of the judgment debtor; a valid attachment; a prohibitory order; a publication of the proclamation of sale in the conspicuous place of the court house. The Court held that, the execution process was marred by material irregularities and patent illegality which rendered the sale a nullity and it was set aside.

In the light of the stated position of the law, was it proper and lawful for the applicant's shares to be sold in satisfaction of the decree? In our considered view, the answer will depend on whether or not the execution was carried out in accordance with mandatory requirements of the law. We wish to point out that, the execution process was not conducted as per mandatory dictates of the law and we shall state our reasons.

In terms of the stated position of the law, the position reflected by the **DR** in one of the certificates of sale and the endorsed transfer of shares to the effect that the shares sold in the public auction 5th November, 2014 were owned by **MILLICOM INTERNATIONAL CELLULAR S.A/MILLICOM TANZANIA N.V** (the applicant) in **MIC TANZANIA** is

not compatible with the following namely: **One,** the decree holder in his application for execution did not apply for attachment and sale of applicant's shares as required by Order XXI rule 15 (4) of the CPC. Instead, he had applied in the execution the attachment and sale of 34,479 shares of **MILLICOM INTERNATIONAL CELLULAR S.A. Two,** the attachment, prohibition order and the proclamation of sale categorically described the owner of those shares as **MILLICOM INTERNATIONAL CELLULAR S.A** and not the applicant. **Three,** notice of public auction and the report of sale of shares indicate that the owner is **MILLICOM INTERNATIONAL CELLULAR S.A** and not the applicant. **Four,** Mr. Mustafa Nyumbamkali (the Court Broker's) application for fees dated 10th November, 2014 in respect of fees for attachment of 34,479 shares indicate to have been held by **MILLICOM INTERNATIONAL CELLULAR S.A** in **MIC TANZANIA LIMITED** and not the applicant**. Five,** advocate Mgare's application for Bill of Costs dated 11th November, 2014 which shows the judgment debtors to be **MIC UFA** and **MILLICOM INTERNATIONAL CELLULAR S.A**, the applicant is not amongst those parties.

The above stated trend of events confirm that, the applicant for the first time surfaced in the Certificate of sale and the endorsement of transfer of shares all made by the **DR** after the sale was conducted. This, **firstly,** contravened Order XXI rules 9 and 15 (4) of the CPC because the decree holder never applied for the attachment and sale of the applicant's shares and the executing court did not make any formal order for attachment of the applicant's shares. **Secondly,** the decree holder did not mention the applicant as the person against whom the execution is sought which is in violation of Order XXI rule 10 (2) of the CPC. **Thirdly**, the sale of the applicant's shares was conducted without any proclamation order as required by Order XXI rules 65 and 66 of the CPC and it was against the legal spirit of enforcing what is decreed by the Court. **Fourthly,** contrary to rule 66 (1) read together with rule 45 (2), the copy of order of sale of applicant's shares by public auction was neither published nor fixed upon a conspicuous part of the court house and besides, a copy thereof was not sent to the proper officer of the applicant. **Fifthly,** the auction was illegal as the executing court did not indicate the day and time when the sale of applicant's shares would take place which is crucial in any court sanctioned

public auction. These were material irregularities not curable under Order XXI rule 88 of the CPC and the sale of the applicant's shares was a nullity.

Even if we were to agree, which we don't, with the submission by the 2nd and 3rd respondents that the shares of the applicant were sold being asset of the 6th respondent, the sale of shares was void for the reasons stated above. At this juncture, we agree with the applicant that, there was a falsification of one of the certificates of sale and the transfer of shares order showing the share sold to the 2nd respondent belonged to **MILLICOM INTERNATIONAL CELLULAR S.A/MILLICOM TANZANIA N.V**. We are fortified in that account because that version emerged after the shares were illegally auctioned which cannot validate the illegal sale of the applicant's shares. Moreover, the falsified certificate and the endorsed transfer of the shares was not part of the execution process which commenced with the application lodged under Order XXI rule 9 of the CPC on 18th February, 2014. Thus, the sale was illegal as it was conducted contrary to the mandatory provisions of the law regulating the execution of decrees.

The aforesaid notwithstanding, we feel inclined to address the issue as to whether or not the applicant was heard before the attachment and sale of the 34,479 shares. The right to be heard is one of the fundamental rights embedded in article 13 (6) (a) of the Constitution which among other things provides:

> *"When the rights and duties of any person are being determined by any court or any agency, that person shall be entitled to a fair hearing ..."*

Since the right to be heard constitutes one of the fundamental tenets of the right of fair hearing, denial of such right is a valid basis for the Court's intervention. On this accord we reiterate what we said in **HALIMA HASSAN MAREALLE VS PARASTATAL SECTOR REFORM COMMISSION,** Civil Application No. 84 of 1999 (unreported):

> *"... It is no argument that there were no grounds before the learned judge on which the order could be made. Rather the concern is whether the applicant whose rights and interests are affected is afforded the opportunity of being heard before the order is made. The applicant must be afforded such*

opportunity even if it appears that he or she would have nothing to say, or what he or she might say would have no substance."

Having fully subscribed to the above holding, in the matter under scrutiny, the record does not reflect if the applicant was given opportunity to be heard before the attachment and sale of her shares. After the sale of her shares, that is when the applicant was dragged into the matter after the **DR** inserted the applicant's name in one of the certificates of sale and the endorsed transfer of the shares. In our considered view, the **DR**, besides having received the status of current search as presented by the 2nd respondent, she ought not to have relied solely on Mr. Mgare who in our view misled the executing court that the sold shares belonged to the applicant. Again the sale of the applicant's shares was contrary to what the decree holder had applied for that is, attachment by way of sale of 34,479 shares of **INTERNATIONAL CELLULAR S.A** in **MIC TANZANIA LIMITED.**

In our considered view, the applicant's right to be heard was paramount regardless of whether or not she was an asset, a subsidiary or a holding company of the judgment debtor. We do not agree with

the 2nd and 3rd respondents' argument that, the applicant being an asset of the judgment debtor was not entitled to a hearing. We say so because the Applicant Company and 5th respondent company are distinct and both enjoy legal personality.

From the juristic point of view, a company is a legal person distinct from its members – See: **SALOMON VS SALOMON AND CO. LTD** (supra). We are aware that, piercing the veil entails looking behind the person in control of the company not to take shelter behind legal personality where fraudulent and dishonest use is made of the legal entity. This is so because the legal entity should not be used to defeat public convenience, justify wrong, and defend crime and the law will regard the corporation as an association of persons whereby the courts can draw aside the veil to see what lies behind.

Apart from finding the 2nd and 3rd respondents' invitation wanting to deem attachment and sale proper, in our considered view the issue of piercing the veil is out of context having not been a subject in the execution proceedings where parties could make a respective address. Besides, it did not waive the obligation of the executing court to hear the

applicant before attachment and sale of its shares. Since it is determined that the attachment and sale was illegal, there is no sale whatsoever to be deemed lawful. As such, the applicant was condemned without being heard on what culminated to the illegal attachment and sale of her 34,479 purporting to satisfy the 5th respondent's debt. This also answers the second issue in the negative as the applicant was not heard before the attachment and sale of her shares. That is to say, on account of the applicant not being heard in the process which perpetuated the illegal sale of her shares, the entire process was vitiated.

In view of what we have endeavoured to discuss, we are certain that on the material before us, it is established that there was no valid attachment and sale of the shares of the applicant. The purported sale of the shares of the applicant in execution of the decree in favour of the 1st respondent was in violation of the mandatory requirements of the law regulating the process of execution which renders the sale void *ab initio.*

As to the way forward, it was submitted by the counsel for the 2nd respondent that the purchaser has paid the purchase price as *bonafide* purchaser, and that she is protected under Order XXI Rule 76 of the CPC.

In our considered view, the 2nd respondent cannot take shelter of being a bonafide purchaser. We say so because with the illegal sale there can be no bonafide purchaser and infact no title passed to the 2nd respondent. Besides, we have found the 2nd respondent to be the cause of her misfortune because a day after the purchase of shares which was the earliest opportune moment, having smelt a rat on some indicators of misrepresentation, she ought to have maintained her demand to be refunded money. Instead, while in possession of the current status on ownership of the auctioned shares obtained from BRELA she opted to join the illegal transaction. The case of **OMARI YUSUFU VS RAHMA AHMED ABDUKADR** (supra) cited by the 2nd respondent cannot salvage the 2nd respondent's predicament. It dealt with a situation on the fate of a *bonafide* purchaser following reversal or modification of the decree on appeal and the Court held that, a *bonafide* purchaser who is a stranger to the decree does not lose his title to the property by the subsequent reversal or modification of the decree. This is not the situation at hand as the decree was not modified in but rather the execution process was flouted.

We wish to reiterate that, the execution which is a subject of the *suo motu* revision was conducted contrary to the mandatory provisions regulating the requisite process and without high degree of discipline and care. On this accord, and in order to remind the executing courts on the crucial judicial function of execution in enforcing and giving effect of the judgment of the Court we reiterate the wise word we stated in the case of **MS SYKES INSURANCE CONSULTANTS CO. LTD VS MS SAM CONSTRUCTION CO. LTD** (supra) that:

> *"... execution of decrees is a judicial function which must be carried out transparently, efficiently and judiciously which entails observing a high degree of discipline and care from all court officers entrusted with such duty because non compliance with the mandatory legal provisions relating to execution of decrees occasioning material irregularities may result to vitiation of the entire processes and in the same vein, such irregularities lead to nullification of the trial of the suits."*

All said and done, we find the applicant's complaint merited. As earlier intimated, we thus hold that the execution process was flawed with

material irregularities which rendered the purported sale of the applicant's shares a nullity. For this reason we set aside the purported sale and order the purchaser to be refunded the purchase price by whoever is holding that money. We further order that, the illegally sold 34,479 shares be restored to the applicant forthwith. It is so ordered.

DATED at **DAR ES SALAAM** this 26th day of July, 2018.

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

J. C. MWAMBEGELE
JUSTICE OF APPEAL

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

J. R. KAHYOZA
REGISTRAR
COURT OF APPEAL