

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

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 476 OF 2023

(Arising from Execution No. 22 of 2023, pending before Hon. J. D. Luamabano, DR)

THE ATTORNEY GENERAL.....APPLICANT

VERSUS

MIRAGE LITE LTD.....1ST RESPONDENT

AIRTEL TANZANIA LTD.....2ND RESPONDENT

RULING

Date of Last Order: 20/09/2023.

Date of Ruling: 29/09/2023.

E.E. KAKOLAKI, J.

The applicant herein under certificate of extreme urgency is moving this Court to allow him to join and intervene in Execution No. 22 of 2023 as an interested party. The application is preferred by way of chamber summons under section 17 (1)(a) and 2(a) and (b) of the Office of the Attorney General (Discharge of Duties) Act, [Cap. 268 R.E 2019] (the AGDDA) and Order 4(1)(h) of the Office of Solicitor General (Establishment) Order G.N. No. 50 of 2018 (the OSG Order), supported with an affidavit duly sworn by **Lukelo**

Samweli, Principal State Attorney in the applicant's Office under Solicitor General, stating the grounds as to why this application should be granted.

When served with the said application the 1st respondent strenuously resisted it through counter affidavit duly sworn by Joseph Rutabingwa, her advocate filed to that effect, inviting this Court to dismiss the same on the ground that, the applicant was aware of the original suit in which execution matter is stemmed through the Solicitor General being the immediate chairman of the 2nd respondent's Board of Directors, hence in a position to join and intervene in the suit but chose to permit representation through private law firm (IMMMA advocates). It was in 1st respondent's further response that, the applicant has already entered appearance twice through the Solicitor General in execution proceedings and that, there is no public money involved to attract public interest as the judgment debt is not a subject of dividends. Thus by this application the 1st respondent is being denied enjoyment of fruits of her judgment as applicant's action is an abuse of powers of intervention vested on him in actions involving government interests. The 2nd respondent did not file any counter affidavit, the implication of which is to concede to the application.

When the matter was called on for hearing, both parties appeared represented and were heard viva voce as the applicant enjoyed the services of Ms. Luciana Kikala, learned State Attorney while the 1st respondent fended by Mr. Joseph Rutabingwa, learned counsel and the 2nd respondent represented by Ms. Miriam Tenga, her Principal Officer.

Before I advance into determination of the merit or otherwise of this application, I find it imperative to tell its background story albeit so briefly as garnered from applicant's affidavit in support of the chamber summons. Before this Court in Civil Case No. 216 of 2016, the 1st respondent herein successfully sued the 2nd respondent a Public Limited Company operating mobile network in which the Government of the United Republic of Tanzania is one of the shareholders owning 49% of shares as per BRELA official search annexure OSG-1 to the affidavit and obtained a decree against her. In a bid to execute the said decree the 1st respondent filed with this Court Execution No. 22 of 2023 now pending before the Executing Officer (Deputy Registrar). It appears in pendency of the said execution proceedings, on 14th July, 2023, by letter annexure OSG-2 to the affidavit, the applicant was notified by the 2nd respondent of the existence of the said execution proceedings the result of which he notified and instructed the Solicitor General to intervene the said

proceedings for protection of government's interest vide his letter dated 18th July, 2023 annexure OSG-3, hence the present application which was preferred after request and supply with the copies of records concerning the matter.

Arguing in favour of the application and having adopted the affidavit to form part of her submission Ms. Kikala informed the Court that, the provisions of the law under which this application is preferred as cited above confers the applicant with powers to exercise his right to intervene in any matter which he considers to have public interest or the public property is involved. In her submission the question to be answered by this Court in which its response is '**Yes**' is whether there is public interest in the matter in Execution No. 22 of 2023. She said, the Government owns 49% shares in the 2nd respondent's company who is the judgment debtor in Execution No. 22 of 2023 as exhibited in annexure OSG- 1, and for that matter there is public interest in the said shares for being a public property hence the applicant is mandated under the law to protect that interest. The next issue for determination by this Court in her view is whether the applicant has complied with the law under section 17(2)(a) and (b) of AGDDA. According to her, the law as interpreted in the case of **CRDB Bank Plc Vs. Symbion Power (T)**

Limited, Civil Application No. 449/16 of 2020 (CAT-unreported) laid down the procedure to be complied with by the Attorney General in the application of this nature. She mentioned the procedure to be, **one**, a proof that, the Attorney General has been notified by the Authority or institution of any pending suit or the intention to be instituted or any other matter against the Authority or institution in which in this matter she submitted, the applicant was informed by the 2nd respondent on 13th July, 2023 vide annexure OSG-2, requesting him to intervene in the matter. **Second** that, the applicant should state on how he became aware of the matter in which he seeks to intervene which in this matter paragraph 4 of the affidavit tells it all, Ms. Kikala submitted. As the law requires the applicant to intervene once notified she argued, on 18th July, 2023 the applicant notified the Solicitor General to so intervene in the proceedings for protection of public interest as clearly shown in the affidavit. To her, the applicant has demonstrated valid reasons as to why this application should be granted after exhibiting his compliance with the law, hence the application is meritorious deserving to be granted and prayed the Court so find.

In rebuttal Mr. Rutabingwa having successfully invited the Court to adopt the 1st respondent's counter affidavit he reminded to the Court to take note

that, the applicant failed to file a reply to the 1st respondent's counter affidavit, hence the facts deposed in paragraphs 6 of the said counter affidavit remains uncontested. He also put to the Court's attention the fact that, the filing dates as indicated in the applicant's chamber summons, certificate of urgency and affidavit differ. He then proceeded to argue in response to the applicant's submission that, the mere fact that the 2nd respondent is a Public Limited Company and that, the government is one of the two shareholders does not entitle the government to claim direct public interest in the matter pending for execution before this Court as its interest therein if any are being represented by directors in the company who are government officials. He said, when the dispute arose chairman of the board of directors to the 2nd respondent was the Solicitor General, Hon. Malata, who later on was appointed a Judge of the High Court, hence the applicant was fully aware through him of the pending matter before the Court and could have intervened at that stage, but instead left the matter to be handled by private law firm, IMMMA Advocates up to the appellate level. To him the change of strategy of representation came at late hours after the issue of garnishee order against 2nd respondent's account.

Regarding the submission on existence of public interest in Execution No. 22 of 2023, Mr. Rutabingwa contented that, Government's ownership of 49% of shares in the 2nd respondent's company does not constitute *public interest* as defined in **Blacks Law Dictionary**, 9th Ed at page 1350, to mean '*The general welfare of the public that warrants recognition and protection or something in which the public as a whole has a stake; especially an interest that justifies government regulations.*' As to whether applicant's shares in the 2nd respondent could be treated as **public property**, Mr. Rutabingwa relied on the definition of that term as provided at page 1337 of **Blacks Law Dictionary**, 9th Ed to bring home the argument that, when it comes to a company, a shareholder is entitled to dividend only as he does not become the company owner to claim any possession of interest therein.

On the case of **CRDB Bank Plc** (supra) relied on by the applicant, the learned counsel retorted that, the same is irrelevant as in that case the Court of Appeal refused to grant the application despite of the government owning 37% of shares of CRDB Bank. On the relevance of the letter annexure OSG-2 he attacked its contents accusing it to contain some false information, hence an argument that the applicant failed to demonstrate to the Court that public interest or public property is involved in this matter.

In another argument Mr. Rutabingwa relying on the case of **CRDB Bank Plc** (supra) at page 19 restricting appearance of Attorney General in lesser cases which might impact independence and impartiality of his office, he contended in this matter the AG has acted without impartiality for jumping into the case at this stage despite of the fact that, he was aware of the case from the initial stage up to the Court of Appeal level.

As to the applicant's mode of seeking intervention he contended, the Solicitor General appeared before the Court in Execution No. 22 of 2023 on 17/07/2023 and 09/08/2023 and made submission imploring the executing officer to avail him with the right of audience before the ruling was reserved to 05/09/2023. So the filing of this application in pendency of the said ruling according to him aimed at pre-empting the said ruling, the practice which he called this Court to condemn. Lastly he questioned the jurisdiction of this Court to entertain the matter for handling and deliver judgment in the main suit Civil Case No. 216 of 2016 hence functus officio, as this application ought to have been lodged in the Court of Appeal where an application for extension of time within which to appeal by the 2nd respondent lies, in which the applicant has already filed an application for intervention and joining interested party vide Civil Application No. 647/01 of 2023 between the

Attorney General Vs. Mirage Lite Ltd and Airtel Tanzania Ltd. He

thus, prayed the Court to find the application is lacking in merit and dismiss it with costs. The 2nd respondent on her side adopted the submissions by the applicant without more as she was conceding to the application.

In rejoinder submission Ms. Kikala on the assertion that, the applicant was aware through the then Solicitor General Hon. Malata (now the Judge of this Court) as chairman of the 2nd respondent's Board of Directors argued, the Solicitor General held that chairmanship in his personal capacity and not by virtue of his office title hence not responsible to divulge in his office any information obtained from the board. According to her as the law mentions the Attorney General (AG) as the person to be notified by the institution or authority suing or sued, it cannot be said he was aware as the evidence goes that AG was notified on existence of Execution No. 22 of 2023 on 14/07/2023. On the issue of public interest traced from government 49% shares going by definition of public interest as obtained in the **Blacks Law Dictionary** cited by Mr. Rutabingwa she maintained that, same is wide enough to cover **public interest** as claimed by the applicant in this matter, derived from the shares owned by the government in the 2nd respondent

company which also benefits the public at large as it is not defined what **general welfare of the public** entails or is restricted for.

As to the relevance of the case of **CRDB Bank Plc** in the present matter she insisted, it is relevant since the decision did not base on the shares owned by the government but rather on the procedures to be adopted in a matter in which the AG seeks to intervene or be joined as interested party. On the falsity of the letter in OSG-2 annexed to the affidavit she responded that, its purpose was to prove notification of the AG by the 2nd respondent and the request for intervention in the proceedings pending in this Court, as the contentious issue before this Court is not whether its contents is false or not. On impartiality of the AG she countered that, he acted with impartiality and in accordance with the law by responding to the request made to him by letter after satisfying himself of existence of public interest in the matter before this Court in Execution No. 22 of 2023 and that is why he is seeking leave of this Court to intervene in the said pending matter.

On the last point by the 1st respondent as to whether this Court is functus officio or not, she held the view that it is not as the matter in which the application is seeking to intervene is still pending before it scheduled for mention on 03/10/2023, since the Court ordered for amendment of

pleadings only. According to her, as clearly stated in the chamber summons the applicant seeks to intervene in the pending matter before this Court Execution No. 22 of 2023 and not any other matter as suggested by Mr. Rutabingwa. In view of the above submission this Court was invited to find the application has merit and proceed to grant the same.

Having closely followed the fighting submissions by the parties and travelled through the affidavit and counter affidavit, it is now opportune for this Court to determine the merit or otherwise of this application. I wish to start with the issue as to whether this Court is **functus officio** or not as contended by Mr. Rutabingwa since that issue touches jurisdiction of the Court to entertain the matter which if disposed off in affirmative might have the effect of disposing of the application. While Mr. Rutabingwa contends that, this Court having disposed of Civil Case No. 216 of 2016 in which Execution No. 22 of 2023 subject of this application emanates from, is functus officio to entertain the application. And further that, this application ought to have been filed by the applicant in the Court of Appeal where another application in Civil Application No. 647 of 2023 for intervening and joining as interested party in the pending application there for extension of time within which to file the appeal between the 2nd respondent and 1st respondent, lies. Ms.

Kikala is of the divergent view arguing that, the Court is not *functus officio* as the matter in which the applicant seeks to intervene and be joined is not yet determined, thus the matter is still pending before this Court. This Court speaking my sister Masabo, J in the case of **Cipex Tanzania Limited Vs. Tanzania Investment Bank**, Civil Appeal No. 127 of 2018 had the opportunity of looking into the definition of the term *functus officio* where it said:

*"The term **functus officio** is a judicial context, simply connotes that once a judge or magistrate has performed his official duty, he is precluded from re-opening the decision."*

From the above definition the general rule is that, once a decision is made by the Court on specific claim or right and pronounced in open Court, then the said Court is precluded or ceases from having jurisdiction to further reconsider its decision on similar claim or right, save for matters such as setting aside of ex-parte decisions and review of its decisions induced by fraud or misinformation. See also the case of **Scholastics Benedict Vs. Martin Benedict** [1993] TLR 1 (CAT). Back to the present application, I am unable to find any material suggesting that applicant is seeking for reconsideration of the claim or right already determined in Civil Case No. 216

as the application is for leave of the Court to intervene and join in Execution No. 22 of 2023, the application which has never been determine by this Court. I have also taken judicial note the ruling of this Court by Luambano – DR, dated 05/09/2023 rejecting applicant’s oral application for stay of proceedings in Execution No. 22 of 2023 pending filing of this application, for want of compliance with the procedure to according him the right of audience to this Court. As the applicant’s prayer under consideration in that ruling was for stay of proceedings pending filing of an application to this Court for him to intervene and be joined as interested party in Execution No. 22 of 2023, and not for intervention and being joined as party to the matter, it cannot be concluded also that with such decision of rejection of applicant’s prayer in the said ruling renders this court functus officio to entertain this application, as correctly submitted by Ms. Kikala. I disagree with Mr. Rutabingwa’s proposition that, under the circumstances this application ought to have been filed in the Court to Appeal where the other application lies. Instead I embrace Ms. Kikala’s submission that, it was rightly filed before this Court where Execution No. 22 of 2023 lies. Hence I overrule the contention by Mr. Rutabingwa that this Court is functus officio.

Next issue for determination is whether the applicant has demonstrated sufficient grounds for grant of this application or in other words whether this application has merit. Mr. Rutabingwa argues that, it does not have merit as the applicant has failed to demonstrate to the Court that public interest exists in this matter for him to intervene and be joined as interested party hence abuse of his powers. Conversely Ms. Kilaka is of the view that, the applicant has fulfilled all mandatory requirement of the law for the grant of application of this nature and convincingly shown to the Court that the Government owns 49% of shares in the 2nd respondent which constitute public interest for being public property. It is discerned from both parties submission thus uncontroverted fact that, the Attorney General has unimpeded right of audience and the right to joining in any proceedings in court in terms of the provisions of section 17(1) of AGDDA, section 6A(1) of the Government Proceedings Act, [Cap. 6 R.E 2019] (the GPA) and Order 4(1)(h) of the OSG Order GN No. 50 of 2018 where he considers to have public interest in the matter or that public property is involved in it, but upon complying with the well settled procedure provided under section 17(2)(a) and (b) of the said AGDDA and section 6A(3) of GPA as it was also held in the case of **CRDB Bank Plc** (supra). This is upon exhibiting to the Court's satisfaction, **one,**

that he was notified in writing by the authority or institution seeking his intervention in the case or proceedings pending in court or the action intended to be instituted in court, **second** that, he communicated that request to the Solicitor General and instructed him to apply for intervention and joining in the matter and the Solicitor General duly notified the Court of AG's intention to be joined in the proceedings and **thirdly** I would add that, the matter he seeks to intervene or to be joined in has public interest and/or involves public property. Section 17(2)(a) and (b) of AGDDA provides that;

(2) In the exercise of the powers vested on the Attorney General with regards to the provisions of sub section (1), Solicitor General shall-

*(a) **notify any court, tribunal or any other administrative body of the intention to be joined to the suit, inquiry or administrative proceedings; and***

*(b) **satisfy the court, tribunal or any other administrative body of the public interest or public property involved, and comply with the directions of the court, tribunal or any such other administrative body on the nature of pleadings or measures to be taken for purposes of giving effect to the effective discharge of the duties of the office of the Attorney General. (Emphasis supplied)***

And section 6A(3) of GPA reads:

*(3) Notwithstanding the provisions of any written law, a ministry or local government authority, independent department or other **government institution shall have a duty to notify the Attorney General of any impending suit or intention to institute a suit or matter against the Authority.**" (Emphasis added)*

In this application I note through the letter in annexure OSG-2 of the affidavit that, the Applicant was notified by the 2nd respondent on 13/07/2023 and requested to intervene in the proceedings arising from Civil Case No. 2016 of 2016 between **Mirage Lite Ltd Vs. Airtel Tanzania Plc**, at both High Court and Court of Appeal level, the information which he communicated to the Solicitor General and instructed him to intervene in the proceedings as exhibited in the letter annexure OSG-3 dated 18/07/2023, in which later on all necessary court records were obtained from the Court for that purposes as deposed in paragraphs 3,4,5,6 and 7 of the affidavit. With such evidence from the letters in annexure OSG-2 and OSG-3 of the affidavit, it is to this Court's contentment that, the applicant was dully notified by the 2nd respondent of the existence of Execution No. 22 of 2023 and requested to intervene before the Solicitor General was instructed to so act as required by the law, hence passed the first and second tests in the procedure to be

adopted for the AG for intervening and joining the proceedings in court. The argument by Mr. Rutabingwa that, the letter in annexure OSG-2 is tainted with false contents, I find is an afterthought and submission from the bar not supported by the averment/evidence in the counter affidavit, hence discounted as it is trite law that, arguments and submission by an advocate in court cannot be a substitute of evidence. See the Court of Appeal decision in the case of **Tina & Co. Limited and 2 Other Vs. Eurafrican Bank (T) Ltd Now known as BOA Bank (T) Ltd**, Civil Application No. 86 of 2015 (CAT-unreported) when cited with approval the Ugandan Court of Appeal case of **Trasafrica Assurance Co. Ltd Vs. Cimbria (E.A) Ltd** (2002). As rightly submitted by Ms. Kikala the submission which I embrace, the said letter is meant to establish to the Court that, the applicant was notified by the 2nd respondent of the existence of Execution case No. 2023 and requested to intervene it.

As to the contention by Mr. Rutabingwa that, the applicant was aware of the existence of parties dispute or Civil Case No. 216 of 2016 in which Execution No. 22 of 2023 subject of this application arises from, simply because the chairman of the board of directors was the then Solicitor General, Hon. Malata (now judge) as averred in paragraph 6 of the counter affidavit, I find

no cogent evidence advanced by the 1st respondent to substantiate such assertion. As there is no evidence exhibited to the court's satisfaction to prove otherwise, I find the chairman held that post by virtue of his office and not in personal capacity as correctly submitted by Ms. Kikala. Even if for the sake of argument it is established that, he held that post by virtue of his office which is not proved, still I would hold there is not proof that the AG was aware of existence of the said suit as Mr. Rutabingwa would want this Court to believe. The reason I would so do is simple to tell as the law under section 6A(3) of GPA imposes the duty of notifying the **Attorney General** of any impending suit or an intention to institute a suit or matter, to the ministry or local government authority, independent department or other government institution concerned, and not the Solicitor General. Since there is no proof that the 2nd respondent notified the AG before 13/07/2023 as exhibited in annexure OSG-2 in the affidavit, there is nothing to persuade this Court conclude that, the AG was aware of the existence of the said civil case before, as claimed by the 1st respondent.

With the above findings I now move on to determine the third test as to whether the applicant has exhibited to the Court's satisfaction that, public interest or public property is involved in this matter. It is not one of disputed

fact in this application that, in Execution No. 22 of 2023 the 1st respondent is seeking to execute the decree obtained against the 2nd respondent, the company which the government owns 49% of its shares. In order to answer the above issue in my humble view, this Court has to examine first whether a shares in the company or entity is property or not.

A **property** is defined as anything (items or attributes/tangible or intangible) that can be owned by a person or entity. It is the most complete right to something; the owner can possess, use, transfer or dispose of it. Source www.law.cornel.edu/wex/property. **Blacks Law Dictionary, 8th Ed** at page 1335 defines property as *the right to possess, use and enjoy a determinate thing*. **Oxford Dictionary of Law, 5th Ed** at page 391 also defines property as **anything that can be owned, be it tangible or intangible**. I must confess that, through out my perusal of the provisions of laws in the AGDDA, OSG Order, GPA and CPC under consideration in the present application, I could not be able to come up with any definition of the term property or public property. However, the law under section 3(1) of the **Proceeds of Crime Act**, [Cap. 256 R.E 2019] defines **property** to include bank credits, travelers cheques, bankers cheques, money order, **shares**, bonds and other securities, drafts and letters of credits, and any interest,

dividends or other income on or value from or generated by such assets whether situated in or outside the United Republic. With the above exposition on what a property is, I am persuaded that a '**share**' is one of the thing capable of being possessed or owned by a person or entity hence **a property**. Now with that definition the next question to be answered is what public property is?

Public property is defined by **Blacks Law Dictionary**, 8th Ed at page as cited by Mr. Rutabingwa to mean:

"State or community owned property not restricted to anyone individual's use or possession."

With the above definition it is evident to this Court that, for the property to qualify as a public property the same must be either state or community owned and not the one restricted to individual use or possession or ownership. In the present matter as alluded to above there is no dispute as exhibited in annexure OSG-1 that the Government through **The Treasury Registrar** owns 49% of the shares in the 2nd respondent (company) hence a state owned shares. And since it already defined that shares constitute a property capable of being possessed or owned by the person or entity and given the definition of public property that include state owned property, I

find no difficulties in concluding that, the 49% shares owned by the government is a public property.

Now can the applicant successful claim public interest out of the said 49% shares the government owns? Again the **Blacks Law Dictionary**, 8th Ed at page 1350 as cited by Mr. Rutabingwa defines **public interest** to mean:

"The welfare of the public that warrants recognition and protection or something in which the public as a whole has a stake, esp., an interest that justifies government regulation."

In view of the above definition public interest involves welfare of the public at large warranting recognition and protection of the government. In other words it is something concerning the welfare or well-being of the general public. In this matter while I am in agreement with Mr. Rutabingwa that, the applicant being a shareholder in the 2nd respondent's company is entitled to dividends to the extent of the owned shares, I distance myself from his proposition that, he cannot claim to have public interest in the judgment obtained against the 2nd respondent for being entitled to dividends only as shareholder. In this I share Ms. Kikala's views that, the fact that the applicant owns shares in the 2nd respondent's company which is public property involving welfare of the general public, the same constitutes public interest

that need to be protected by the applicant. I so do as the mode of execution of the judgment is by way of garnishee order attaching the 2nd respondent's accounts in which no doubt includes government's money for being a shareholder in the 2nd respondent's company. As Government's money is a public property which needs to be protected, it goes without saying that, public interest is involved in the said property. The third test I declare is passed by the applicant as this matter involves public interest that needs to be recognised and protected.

All said and done I am convinced that, this application is meritorious and the same is hereby granted. The applicant is therefore allowed to join and intervene in Execution No. 22 of 2023 as an interested party.

Costs in cause.

It is so ordered.

Dated at Dar es Salaam this 29th September, 2023.



E. E. KAKOLAKI

JUDGE

29/09/2023.

The Ruling has been delivered at Dar es Salaam today 29th day of September, 2023 in the presence of Ms. Luciana Kikala, State Attorney for the applicant and Mr. Joseph Rutabingwa, advocate for the 1st respondent and Mr. Oscar Msaki, Court clerk and in the absence of the 2nd respondent.



E. E. KAKOLAKI
JUDGE
29/09/2023.

