

TANZANIA / JUDGMENT

Civil Application No 21 of 2012

2013 Blueline Enterprises limited

vs East African Development bank

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1 January 2013

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IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM fCORAM: RUTAKANGWA. 3.A.. KIMARO. J.A., And MASSATI, 3.A.) CIVIL APPLICATION NO. 21 OF 2012 BLUELINE ENTERPRISES LIMITED..... APPLICANT VERSUS EAST AFRICAN DEVELOPMENT BANK..... RESPONDENT (An Application for review of the decision of the Court of Appeal of Tanzania at Dar es Salaam) (Rutakanawa.J.A.. Kimaro, J.A., And Massati. J.A.I Dated 22nd day of December, 2011 In Civil Appeal No. 110 of 2009 RULING OF THE COURT 15th & 30th May, 2013

RUTAKANGWA. 3.A.: Indeed, as an old adage says, "Hopesprings eternal". It is on account of this that we have found it apt, to preface this ruling by a quotation from the exceedingly comprehensive and able judgment pronounced by the Court in Chandrakant Joshubhai Patel v. R. [2004] T.L.R. 218. It was an application for review of the Court's judgment. The Court said:- "It is, we think, apparent that there is a conflict of opinion as to what amounts to an error manifest on the face of the record and it is important to be clear of this, lest disguised appeals pass off for applications for review. We say so for the well known reason that no judgment can attain perfection but the most that courts aspire to is substantial justice. There will be errors here and there, inadequacies of this or that kind, and generally no judgment can be beyond criticism. Yet while an appeal may be attempted on the pretext of any error, not every error will justify a review". [Emphasis is ours]. Almost similar sentiments had earlier on been echoed by Lord Edmund-Davis in "JUDICIAL ACTIVITISM", 1975 (28) C.L.P. page13, thus: "Whatever a judge does he will most surely, have its critics. If, in an effort to do justice, he appears to make new law, there will be cries that he is overweening and that he has rendered uncertain what had long been regarded as established legal principles. On the other hand, if he sticks to the old legal rules, an equally vocal body will charge him with being reactionary, a slave to precedent, and failing to mould the law to changing social needs. He cannot win and if he is wise, he will not worry even though at times he may ruefully reflect that those who should know better seem to have little appreciation of the difficulties of his vocation. He will just direct himself to the task of doing justice in each case as it comes along. No task could be nobler". [Emphasis is ours]. We are set, as usual, to discharge this noble task in this application for review of our judgment in Civil Appeal No. 110 of 2009 dated 22nd December, 2011. It is a duty we cannot shirk. This review application (the application) has its origin in Civil Appeal No. 110 of 2009 (the appeal), as alluded to

immediately above. For the benefit of those unfamiliar with this saga, we should quickly point out that the facts leading to the institution of the appeal are not in dispute. Very briefly, they are as follows. The respondent East African Development Bank (the Bank) was created by the Treaty of East African Cooperation, between the sovereign States of Kenya, Uganda and the United Republic of Tanzania in 1967. The Bank's Charter was set out in Annex VI of this 1967 Treaty. The Charter was, however, amended and re-enacted by a new Treaty (the Treaty) between the same parties in 1980. Pursuant to the requirements of the Treaty, the Parliament of the United Republic of Tanzania (the Parliament), passed Act No. 7 of 1984 known as the East African Development Bank Act (the Act). The Act gave the Bank a juridical personality and unequivocally provided in s. 4 that the provisions of the Charter "shall have the force of law in ... Tanzania". By the Finance Act, 2005 (No. 13) (the Amending Act), the Schedule to the Act, was amended. The Amending Act came into force on 1st July,

2005. Before its amendment, the Schedule to the Charter had extended certain status, privileges and immunities to the Bank which will be discussed later on. These were embodied in Articles 43 to 46. The Bank was given both lending and borrowing powers. Exercising its lending powers, the Bank, in between March, 1990 and June 1992, extended to the applicant a loan of Special Drawing Rights (SDRs) 2,279,000.00. This loan was secured by a floating charge. In case of default in payment, the Bank was to appoint a Receiver for the charged properties, and that is what actually happened. Upon this eventuality, the applicant petitioned for the submission of the dispute to arbitration. It managed to get an ex parte court order restraining the respondent and the Receiver Manager from taking over its business. Subsequently, the parties resolved to refer their dispute to a single arbitrator. The arbitrator (one Mr. A T. H. Mwakyusa) made his award in favour of the applicant, in the sum of USD 61,386,853.00 which was filed in the High Court at Dar es Salaam. The award dated 3/8//2005, was duly registered on 29/9/2005. The respondent was aggrieved by the Award and petitioned the High Court to set it aside on the sole ground of misconduct on the part of the Arbitrator. The petition was eventually dismissed on account of being time barred. On 25/9/2006, the applicant applied for the execution of the Award. Initially, it requested the issuance of a garnishee order nisi in the sum of USD 68,546,653 and TAS 5,000/=, and "thereafter a garnishee order absolute." The applicant targeted the Bank's Account No. 01090205071-00 at the Standard Chartered Bank International House Branch, Dar es Salaam. The High Court (Shangwa, J.) as the executing court, granted the sought order without much ado. The attachment of the Bank's account, forced it to file an application, in the High Court, seeking a declaration that the garnishee order nisi was improperly issued as:-

- (a) It enjoyed immunity from execution under the provisions of the Amending Act, and
- (b) There was still pending in the same court a petition to set aside the Award. Neither the applicant herein nor the learned High Court judge was impressed by these protestations, and/or unequivocal plea of absolute immunity from execution. In his ruling dated 12th May, 2009, the learned High Court judge (Shangwa, J.) found the immunity plea totally wanting in

merit. He reasoned that the plea of immunity had been premised on a total misapprehension of the true import of article 45. The anchor of his reasoning was that "the Applicant's money ... on its Account No. 01090205071-00 ... which is a subject of the Garnishee Order is not a type of asset which is meant to be immune from interference". To him, "the type of assets" which were meant to be immune from interference are "physical assets ... but not money which is not physical asset," but "liquid asset." As we pointed out in our now impugned judgment, to him, any view contrary to his, "would be fatal to the Respondent's right as the latter would be left with nothing to attach". He reached this partly correct conclusion because according to him the provisions of the Act make "all physical properties and assets of the Applicant absolutely immune from interference by executive or legislative or judicial or administrative action." We have deliberately used the words "partly correct" because while it is a mundane truth that the Bank's immunity under article 45 is subject to the proviso contained therein, he imported into the article the word "physical" which adjective does not appear anywhere in the entire Act and Charter. Aggrieved by the ruling, the Bank instituted the appeal. As we pointed out in our judgment in the appeal, the Bank had listed five grounds of complaint in its memorandum of appeal. We, all the same, found three of them to have the inclination of "effectually and conclusively" disposing of the appeal if upheld. In accordance with the Court's settled practice which is not in conflict with any known applicable principle of law, we canvassed these three first. These were, briefly, as follows:

1. The learned High Court Judge erred in law in his interpretation of Article 45 of the Appellant's Charter by holding that it did not enjoy absolute immunity pending delivery of a final judgment against the appellant by the highest court of competent jurisdiction.
2. The learned High Court Judge erred in law in his interpretation of the Appellant's immunity as provided in Article 45 of its Charter by limiting its application to physical assets only.
3. The learned High Court judge erred in making the garnishee order absolute when there had been no final determination of the dispute against the Bank by the highest court of competent jurisdiction. We are enjoined to point out here that the applicant (then Respondent) not only resisted the appeal but also lodged a notice of grounds for affirming the High Court decision. The grounds went thus: "1. That the issue of Appellant's immunity was res judicata having been finally determined by the High Court in Misc. Civil Cause No. 135 of 1995 (Hon. Katiti, J.).
2. That the Learned Judge had no jurisdiction to set aside the garnishee order issued on 16th November 2006 in the absence of objection proceedings under order XXI Rules 57- 62 of the CPC." In the appeal, as in the application, the parties were ably represented by admittedly renowned counsel and we duly recognized their zeal and industry in our judgment as we equally do in this application. While the Bank was represented by Mr. Michael Sullivan, Q.C., Mr. Mabere Marando and Mr. Dilip Kesaria, learned advocates, the Applicant was represented by Prof. Gamaliel Mgongo Fimbo, learned advocate. The mainstay of the Bank's arguments in support of the appeal was that it enjoys absolute immunity from any form of

legal process in proceedings based on disputes arising from the exercise of its lending powers. It vehemently contended that its immunity extended to cover all its property and assets, "wheresoever located and by whomsoever held". Professor Fimbo adamantly pressed us to find that argument flawed and reject it because:-

- (a) the much relied on Bank's immunity did not apply to commercial transactions which the parties had conducted, and
- (b) the Bank's case was *res judicata*. Prof. Fimbo thought that his smoking gun lay in the customary international law concepts of *acta jure imperii* and *acta jure gestionis*. Failing to discern the commonly acknowledged difference between sovereign immunities extended to sovereign states and immunities granted to international organizations by sovereign states, it was his strong and uncompromising contention that the transaction between the contending parties "was a pure commercial transaction to which sovereign immunity does not apply." He went on to press us to embrace the prevailing "Judicial shift from the concept of absolute immunity to a narrower principle which excludes ordinary mercantile transactions from the ambit of sovereign immunity". He sought support for this position from the case of *Trendtex v. Central Bank of Nigeria* [1977] 1 All E.R. 881 C.A. (U.K.). The response of counsel for the Bank, with which we were in agreement, was that "the restrictive theory of state immunity as a principle, of common law" had no application to the facts of the case. In our judgment, we agreed with Prof. Fimbo's submission that there is currently a shift, in both judicial and state practices, from the concept of absolute immunity as far as states' commercial transactions (*acta jure gestionis*) are concerned to a narrower concept of restrictive immunity. All the same, we found, and we still maintain this stance, that this undisputed shift could not advance Prof. Fimbo's case any further because it holds water only in claims of State immunity from jurisdiction and as such it could not be applied to impeach claims of immunity from legal processes by international organizations which are granted such immunities "under their constitutive instruments". We added and this is not disputed in the application that: "[T]his is all because these are two different legal institutions and distinguishable with respect to the fundamental grounds on which they are built and in regard to the extent to which the immunity is recognized." It was our firm finding based on States practice, academic writings, judicial decisions and Treaty law, that "[T]he applicability to international organizations of the distinction between *acta jure imperii* and *acta jure gestionis* and thus the development from absolute to restricted immunity" so far "appears not to be generally accepted". We accordingly rejected Prof. Fimbo's chief ammunition holding that the Bank's immunity must be based on its Charter. But his arsenal was not short of ammunitions. It was Prof. Fimbo's additional submission to us that the claimed "issue of immunity was *res judicata* in Misc. Civil Cause No. 135 of 2005 having been finally determined in Misc. Civil Cause No. 135 of 1995". The plea, he asserted, was dismissed by the High Court and could, therefore, not be "regurgitated". The response of counsel for the Bank on this assertion, was that the High Court in the two applications had considered assertions of immunity under two separate and distinct statutory provisions. In our judgment we upheld the Bank's submissions and rejected the defence of *res judicata*,

holding that in both proceedings, "the plea of immunity was premised on different and totally distinct pieces of legislation". We further held that "a decision in favour of a defendant does not bar proceedings founded on a new set of circumstances". For similar reasons we rejected the defence of issue estoppel. The Bank's second ground of appeal was also allowed because we believed that the learned High Court Judge was totally wrong in his "own 12 interpretation of the word "assets". We conclusively held that the word "asset" includes money, i.e. cash on hand and cash held in a bank. For the record, we wish to point out here that in our judgment we clearly pointed out that 11counsel for the respondent did not say anything to counter the appellant's counsel strong submission to the effect that the appellant's money at the bank form an integral part o f its assets and properties. "We concluded this discussion by sharing the certitude of the Bank's counsel that "it is an established principle o f international law that monies o f an entity subject to immunity held in a bank, are capable o f being immune from attachment". We did so relying on a number of persuasive decisions rendered outside our own jurisdiction, chief of which was the Phillipines Embassy Bank Account Case (1977)65 ILR 146 (1984), which was found by Lord Diplock, as instructive in *Alcorn Ltd v. Republic of Colombia and Another* [1984] AC 580 or [1984] 2 All E.R. 6 (H.L.). The latter decision was recently relied on by the U.K. Supreme Court in the case of *Servaas Incorporated v. Rafidian Bank and Others*, Trinity Term

[2012] U.K.S.C. 40. We accordingly faulted the learned High Court judge's holding to the contrary and held that the Bank's attached money was absolutely immune from attachment. We were then settled in our minds that our decision on the two grounds of appeal conclusively disposed of the appeal, which we allowed with costs and lifted the garnishee order. The applicant was not satisfied with the judgment in appeal. This has come as no surprise to us. This Court had long anticipated such reactions in the case of *Peter Ng'homango v. Gerson A.K. Mwanga and Another*, Civil Application No. 33 of 2002 (unreported) wherein it had thus observed: "It is no gainsaying that no judgment however elaborate it may be can satisfy each of the parties involved to the full extent..." The applicant accordingly instituted this application by notice of motion predicated on Rule 66(1) (a) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The only basis for seeking this relief is that the judgment in appeal " was based on a manifest error on the face o f the record resulting in the (sic) miscarriage o f justice, to wit:

- (a) The Court erred by failing or neglecting to determine ground 2 in the Notice o f Grounds for Affirming the decision o f the High Court lodged by the Applicant on 30.12.2009 namely, "That the Learned Judge had no jurisdiction to set aside the garnishee order issued on 14 K ? 1 November 2006 in the absence o f objection proceedings under Order XXI Rules 57-62 o f the CPC".

- b) The Court erred in allowing the third ground of appeal (page 5 of the record of appeal pages 10 and 46 of the Judgment) without articulation. It is contended this ground ought to have been dismissed since the garnishee order absolute was made on 28.5.2009 sixteen days after the decision appealed against was delivered on 12.5.2009 (pages 272-281, 298 of the record of appeal).
- c) The Court erred in making a determination based upon Article 44 (pages 22,24 and 30,35,38 of the judgment) since this Article 44 was not the subject of appeal in the Memorandum of Appeal (pages 4-5 of the record of appeal and pages 9-10 of the judgment). It is contended that such consideration of Article 44 influenced the Court's interpretation of Article 45.
- d) The Court erred in quashing the proceedings in Misc. Civil Cause No. 135 of 2005. It is contended that in so doing the Court quashed the Respondent's application for leave to appeal (page 489 of the record of appeal) that enabled it to appeal to the Court of Appeal.
- e) In holding that under Article 45 the Respondent's asset and /or property is absolutely immune from attachment (p. 46 of the judgment) the Court erred in depriving the Applicant its right of access to the court with regard to enforcement of the Arbitration Award dated 31.8.2005 under the Arbitration Act Cap 15. It is contended further that the Court erred in failing or neglecting to resolve the inconsistency or contradiction between Act No. 13 of 2005 and the Arbitration Act in regard to enforcement of an arbitration award through the High Court.
- f) While refraining from offering a definition of the term the Court erred in extending the definition of "property" "assets" to include money or cash in a bank (page 43). It is contended that in the judgment the Court did not state that the cases referred to by the Court at pages 43-46 outlined by the Court at pages 41-42 of its judgment positively refer to cash or money in a bank.
- g) The Court erred in dismissing the plea of res judicata and the plea of issue estoppel (page 38) without articulation of the effect of the amendments contained in Act 13 of 2005 (pages 179-181;243 of the record of appeal) on the Respondent's immunity; the Court simply made equivocal statements, "the equation radically changed" (page 35); "Circumstances changed through the coming into operation of the Amending Act in 2005" (pages 37-38); the Act was "substantially amended" (page 38).
- h) The Court erred in holding, without articulation, that failure to list the case for further hearing and afford counsel for both sides opportunity to be heard on the construction of the word "assets" constituted good cause to nullify the entire ruling (page 39 of the judgment). It is contended that the Court ought to have articulated whether it was following an established rule of law or rule of practice or it was making a new rule to operate retrospectively.

- (i) The Court erred in failing or neglecting to determine whether the Respondent had waived its immunity and/or had submitted to the jurisdiction of the Court by initiating the following proceedings against the Applicant in the High Court at Dar es Salaam after the commencement date of Act No. 13 of 2005, 1.7.2005, namely
- (i) Misc. Civil Cause No. 324 of 2003 being a petition under section 17 of the Arbitration Ordinance, Rules 5 and 6 of the Arbitration Rules for an order to remove the 2nd Respondent as the Sole Arbitrator page 62 of the record of appeal. (ii) Misc. Civil Cause No. 142 of 2005: (a) a Petition to set aside the Arbitration Award dated 31.8.2005 filed on 22.9.2005, pages 51 and 330 of the record of appeal (b) an application for stay of execution of the Arbitration Award dated 31.8.2005 filed on 19.10.2005, pages 51 and 330 of the record of appeal. (iii) Misc. Civil Cause No. 85 of 2006 filed on 5.7.2006 being an application for extension of time to file a petition to set aside the Arbitration Award dated 31.8.2008, page 502 of the record of appeal; (iv) Misc. Civil Cause No. 134 of 2006 filed on 15.9.2006 being a petition to set aside the Arbitration Ordinance and Rules 5-6 of the Arbitration Rules 1957, pages 17, 49 of the record of appeal;
- (v) Misc. Civil Cause No. 135 of 2005 being an application for leave to appeal to the Court of Appeal of Tanzania, page 489 of the record of appeal.
- (j) The Court erred by failing or neglecting to take account the Compromise of suit signed on 28th February 2001 (page 18 of the record of appeal, paragraph 7) under which the Respondent submitted itself to the jurisdiction of the High Court.
- (k) The Court contravened the rule against bias in that one of the member of the panel presided over an application between the same parties (page 62 of the record of appeal) and another was a member of both panels in Civil appeal No. 101 of 2009 and Civil Application No. 47 of 2010 between the same parties; both decisions of the Court were in the Applicant's list of authorities lodged on 12th December 2011. It is contended that the two members of the panel should have recused themselves. The Applicant seeks the following reliefs:-
 - 1. The decision of the Court dated 22nd December 2011 and delivered on 28th December 2011 be reversed or set aside;
 - 2. Alternatively, the issue of Respondent's waiver of immunity and/or submission to the jurisdiction of the High Court be heard and determined by the court; 3. Alternatively, the appeal be heard de novo by a panel of judges which excludes Mr. E.M.K. Rutakangwa, Mrs. N.P. Kimaro J.A. and Mr. S.A. Massati, J.A.
 - 4. Costs of this review as well as the appeal". Rule 66 (1) (a) under which the notice of motion is predicated provides as follows:- "66 - (1) The Court may review its judgment or order, but no application for review shall be entertained except on the following grounds:-

- (a) the decision was based on a manifest error on the face of the record resulting in the miscarriage of justice;... " Admittedly, this Court unlike, for instance, the Supreme Court of India (see Article 137 of the Indian Constitution) or the High Court of Tanzania (see section 78 of the Civil Procedure Code, Cap 33) has no statutory jurisdiction of review. The review jurisdiction we exercise is derived from the Court's decision in *Felix Bwogi v. Registrar of Buildings*, Civil Application No. 26 of 1989 (unreported). It was held in the latter case that the Court has inherent jurisdiction to review its own decisions. For this reason, therefore, it is a jurisdiction which we exercise very sparingly and with great circumspection. This is not only because a review is not a routine procedure but, as the Supreme Court of India succinctly held in *Devender Pal Singh v. State, N.C.T. of Delhi and Another*, Review Petitions No. 497, 626 and 627 of 2002 (17/12/2002), because: "a judgment of the final court of the country is final and review of such judgment is an exception." This stance is not predicated on the pretext that these courts are -infallible but, as this Court held in *Tanzania Transcontinental Co. Ltd. V. Design Partnership Ltd*, Civil Application No. 62 of 1996 (unreported) "bearing in mind the demand of public policy for finality of litigation and for certainty of the law as declared by the highest court of the land". See also, *Karim Kiara v. R.*, [CAT] Criminal Application No. 4 of 2007 (unreported) among many other decisions. This stance has long been taken by courts of other jurisdictions. In *Haystead v. Commissioner of Taxation* [1920] A.C. 155, at page 166, for instance, Lord Shaw thus observed: "Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case or new versions which they present as to what should be a proper apprehension, by the court of the legal result... If this were permitted litigation would have no end except when legal ingenuity is exhausted." [Emphasis is ours]. We think it will be instructive to return to India. In another case the Federal Court of India in *Raja Prithwi Chand Lall Chaudhary v Sukhraj Rai* (AIR 1941 SCI), lucidly held thus: "This Court will not sit as a Court of appeal from its own decisions nor will it entertain applications for review on the ground only that one of the parties in the case conceives himself to be aggrieved by the decision. It would, in our opinion, be intolerable and most prejudicial to the public interest if cases once decided by the court could be re-opened and re-heard: 'There is a salutary maxim which ought to be observed by all courts of last resort... ' (It concerns the state that there be an end of law suits)'... Its strict observance may occasionally entail hardship upon individual litigants, but the mischief arising from that source must be small in comparison with the great mischief which would necessarily result from doubt being thrown upon the finality of the decisions of such a tribunal as this." We totally subscribe to the conventional wisdom inherent in this holding which was followed by the Supreme Court in *Devender P. Singh* (supra), and which this Court has all along given heed to ever since it assumed the review jurisdiction. Without prejudice to the above, however, we must quickly point out that since this jurisdiction exists, then justice demands that it ought to be exercised in fitting situations when circumstances of a substantial compelling character demand us to do so in order to correct a manifest wrong and pass an order to do full and effective justice in the case: See, *O.N. Mohindroo v. District Judge, Delhi* (1971 (2) SCR 11 at page 27. After all, as *Sahai, J.* once aptly observed, and we agree with him entirely, in *S. Nagaraj v. State of Karnataka* [1993 Supp

(4) SCC 595 at page 619], "justice is a virtue which transcends all barriers." Therefore no barrier will obstruct or delay us in our resolve to avoid a miscarriage of justice to any party in these proceedings. In order to secure an unimpeachable review order in its favour, the applicant, as correctly submitted by Prof. Fimbo (para 2.3 of his submission), must sufficiently demonstrate that:-

- a) There is an error or errors,
- b) The error must be manifest on the face of the record, and
- c) The error must have resulted in a miscarriage of justice. [See Chandrakant 3. Patel (supra), E.A.D.B. v. Blueline Enterprises Ltd, Civil Application No. 47 of 2010 (unreported), etc]. It now behoves us to determine whether or not the listed errors either singularly or cumulatively have crossed these thresholds. But before doing so, we must be candid enough to say that in resolving this issue, we shall make no attempt to re-invent the wheel. We shall abide by some unequivocal truths, the Constitutional directives and accepted legal principles governing issues of immunities from jurisdiction and/or execution, res-judicata, applications/petitions for review, canons of statutory construction, etc. These and others to be mentioned thereafter, will be our roadmap to our ultimate destination of doing justice in the case in accordance with our constitutional mandate. To mention but a few at this juncture, these are:-
 - a) This Court is a creation of the Constitution of the United Republic of Tanzania 1977 (the Constitution): see Article 117(1).
 - b) In dispensing justice, all courts in the country are independent but are mandatorily "required to observe only the provisions of the Constitution and those of the laws of the land" (Article 107 B).
 - c) Jurisdiction of Courts to dispense justice is basic and fundamental. It goes to the very root of the adjudicative power. All courts must be certain and assured of their jurisdictional positions at the commencement of any proceedings (see, Fanuel M. Ng'unda v. Herman M. Ngunda and Others, [CAT] Civil Appeal No. 8 of 1995, Richard 3. Rukambura v. Issack M. Mwakajila and Another, [CAT] Civil Appeal No. 3 of 2004 (both unreported), etc.
 - d) In international law, the law of immunity is essentially procedural as it regulates the exercise of jurisdiction by the courts in respect of a particular conduct or actions (Arrest Warrant (Democratic Republic of Congo v. Belgium), I.C.J. Reports 2002, page 25 paragraph 60; Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening) an I.C.J. decision dated 3rd February, 2012.
 - e) As far as the issue of immunity from legal processes in respect of any legal entity is concerned, there is a universally recognized distinction between immunity from jurisdiction and immunity from execution (Germany v. Italy (supra)).

- f) Immunity from jurisdiction and from execution or enforcement of decrees or awards granted to international organizations is not grounded on customary international law norms as is the case with sovereign or state immunity. It is traceable to their constitutive instruments, e.g. Treaties, Charters, Conventions, etc.
- g) The Bank is a universally recognized international organization with its own constitutive instrument (The Treaty) and operates in Tanzania under undoubted statutory provisions.
- h) Due process is not infringed by the proper enjoyment of immunities derived from lawful sources even if thereby a claimant is frustrated in prosecuting a lawful claim (*Dorstal v. Haig* 652 F. 2D 173 (D.G. Cir. 1981,)), *Maria Do Rosarion Veiga v. World Meteorological Organization & 4 Others* U.S. Court of Appeals 2nd Circuit. DNO. 08- 3999 - cv dated 1/5/2009, etc
- i) The power of review can be exercised to correction of a manifest mistake on the face of the record resulting in a miscarriage of justice and not to substitute a view or to re-hear the appeal all over again (*Dr. Aman Walid Kabourou v. The Attorney General and Another* [CAT] Civil Application No. 70 of 1999 and *Karim Kiara v Republic* (supra) (both unreported), *Devender v Pal Singh* (supra), etc.
- j) A review may only be granted whenever the court believes that the error is self evident and does not require an elaborate argument to be established. It will not be sufficient ground for review that another judge would have taken a different view. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law. "Misconstruing a statute or other provisions of the law cannot be a ground for review" per the Court of Appeal (Kenya) in *National Bank of Kenya Ltd v. Njau* [1995 -98] 2 E.A. 231. See also, *Chandrakant Patel* (supra), *Peter Ng'homango* (supra), *The EADB v. Blueline Enterprises (T) Ltd*, (supra) *African Marble Company Ltd v. Tauzan Saresi Co.* [CAT] Civil Application No. 132 of 2005 (unreported), *Thobias M. Mango v. Republic*, (CAT) Criminal Appeal No. 8 of 2010 (unreported), *Mulla*, on the Civil Procedure Code, 1908, 14th Edition pg 2335 etc.
- k) The object of the plea of *res judicata* is to bar multiplicity of suits in order to guarantee finality to litigation between same parties on the same issues. I) The principles of natural justice do not supplant the law but supplement the law. Their application may be excluded by statute either expressly or by necessary implications: *Dr. V.S. Chaudhury*
- v. *State of M.P.* (1994) 4 SCC 328; *MP Jain and S.N. Jain* in "Principles of Administrative Law" 5th Ed. (2007) p. 260, *Justice G.P. Singh* in "Principles of Statutory Interpretation," 8th Ed. (2001) p. 348, *Tanzania Breweries Ltd v. Mohamed Kazingumbe* [CAT] Civil Appeal No. 53 of 2008 (unreported), etc.
- m) Since the prime purpose of a review is to remove a manifest mistake or error on the face of the record and not an appeal, a review application will be heard by the same judge or judges, unless circumstances have radically changed in between: see, for instance, Rule 66(5) of the Rules, Order XLII, Rule 5(1) of our Civil Procedure Code, Cap 33 R.E. 2002 (the C.P.C), etc

- n) A "record" for purposes of a review application, means any material which is already on record or may with the leave of the Court, be brought on record. If justice summons for judges to allow in vital material, it becomes part of the record, and if a manifest error is here, review becomes unavoidable: Devender Pal Singh (supra). In our considered judgment it is these unassailable facts, constitutional and statutory provisions, as well as settled legal principles which will provide us with appropriate and, hopefully, unimpeachable answers to the applicant's grievances. We shall, if the justice of the case so require, tackle each listed "error" separately but, of course, not in the same sequence in which they are presented. Logic demands a different approach. We shall accordingly start with the last mentioned error, for if found to have merit, that would be the end of the entire exercise.
- (a) Error (k): Bias We have found it apposite to preface our discussion on this serious accusation with this latin maxim of respectable antiquity. It says:- "*Allegans contraria non est audiendus*." It is postulated here that the Court contravened the rule against bias. It was the submission of Prof. Fimbo before us, that two of the three Justices who heard and determined the appeal "ought to have recused themselves from participation, having taken part in earlier proceedings between the parties", because, "there was a likelihood of bias". We should readily confess that if indeed there was bias, even a likelihood of it, on the part of any of the panel members, then this was a grievous error. With the above observation in mind, we proceed to admit forthwith the truth in Prof. Fimbo's first assertion. In Misc. Civil Cause No. 324 of 2003 in the High Court at Dar es Salaam the Bank had petitioned under the Arbitration Ordinance, for the removal of the Alternate Sole Arbitrator. The applicant herein questioned the competence of the petition on account of failure to comply with the mandatory provisions of the Arbitration Rules,
1957. In its ruling dated 11th May, 2004, the High Court (Massati, 1) sustained the preliminary objection and struck out the petition with costs. Under these circumstances, conventional wisdom would dictate that if there were to be any party to feel jittery about or to be wary of Justice Massati sitting on the appeal, that party would naturally have been the Bank. Fortunately that was not the case. If that was not the case, then, when does the law require a judge to recuse himself or herself from a judicial proceedings? This question leads us to another equally vital question: What is "recusal"? Specifically, "recusal" in law is the "removal of oneself as a judge or policy maker in a particular matter because of a conflict of interest": Black's Law Dictionary, 8th Edition (2004) p 1303. The Supreme Court of Kenya in *Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai & 4 Others* [2013] eKLR, after directing its mind to the above definition, elucidated recusal thus:- "From this definition, it is evident that the circumstances calling for recusal for a judge, are by no means cast in stone. Perception of fairness, of conviction of moral authority to hear the matter is the proper test of whether or not the non- participation of the judicial officer is called for. The object in view, in the recusal of a judicial officer, is that justice as between the parties be uncompromised; that due process of law be realized, and be seen to have had its role; that the profile of the rule of law in the matter in question be seen, to have remained uncompromised." As we could not have expressed the principal object of "recusal" more

neatly and more convincingly, we have opted to adopt this elucidation and we will follow it here. The Court went on to provide instances which different jurisdictions "through statutes or practice directions" have found acceptable, to be: "where the judicial official is a party; or related to a party; or is a material witness; or has a financial interest in the outcome of the case; or had previously acted as counsel for a party". Nevertheless we hasten to point out here that this list is not exhaustive. On account of these grounds, for example, in *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* {No. (1) [2001] I.A.C. the then House of Lords (U.K.) set aside its earlier judgment because one of the members of the Bench who had an interest in the outcome of the proceedings had failed to recuse himself. No such claim has been made in these proceedings. Further to the above, we find ourselves in full agreement with the holding of a U.S. Court in *Perry v. Schwarzenegger*, 671 F. 3d 1052 (9th Cir. February, 2012, that the test for establishing a Judge's impartiality is the perception of a reasonable person this being a "well- informed, thoughtful observer who understands all the facts" and who has "examined the record and the law" and thus, "unsubstantiated suspicion of personal bias or prejudice will not suffice". We are respectfully of the firm view, that the true test could not have been propounded more candidly and yet more forcefully for any dispassionate mind to fail to comprehend. It is difficult to improve on it. Applying these benchmarks, how does the applicant fare in his complaints? We shall first have to look at the true facts on the ground. The day the appeal was called on for hearing, counsel for both sides were all ready for the hearing on merit. Aware of the 11th May, 2004 ruling, as one counsel for the appellant stood up to make his oral submissions, the Court on its own motion, invited the parties counsel's views on this issue. This was done, as rightly submitted by counsel for the Bank, "out of an abundance of caution and fairness". The response from both sides was forthwith and forthright. For the Bank/appellant, lead counsel Mr. Sullivan, said: "I have no objection to Mr. Justice Massati's sitting in this panel for the hearing of the appeal." On behalf of the then respondent, now applicant, Prof. Fimbo, with transparent honesty (to us at least), said: "I have no objection too". This tells it all. It exposes the nothingness of this complaint. We sincerely believe that counsel for the applicant had no hidden agenda. But even if he had one, it will be of no avail to him now. Having avowedly in open court assured us of his and his client's unreserved confidence in the impartiality of the members of the panel, he cannot be heard to renege on it now. The law, professional ethics and his supposed to be undoubted loyalty to the profession's call to let justice be done even if the heavens fall, estopp him from belatedly impeaching the transparent impartiality of the two Justices. If he had any reservations on any or all of the panel members, he ought to have had the temerity to say so on 14th December,

2011. He should not be allowed to blow hot and cold at the same time. That said, and without prejudice, we believe we have a duty to make brief remarks on the attack on the other Justice who sat on the panels that decided Civil Appeal No. 101 of 2009 and Civil Application No. 47 of 2010. In Civil Appeal No. 101 of 2009, the Bank was challenging the striking out by the High Court (Sheikh, J.) of its application for extension of time to apply for setting aside

the Arbitration award. The Court (Msoffe, Kimaro, and Mbarouk, JJ.A.) dismissed the appeal with costs on 5th March, 2010. The Bank ventured to have the Court judgment reversed by way of review. The same Justices heard the application, inter partes, without any voice of protest from any quarter. The application was dismissed with costs. Then came the appeal in which the panel was as shown above. Again the applicant had not lost confidence in any of the panel members. The parties were heard in full and our judgment was delivered on 28th December, 2011. It was after this date that the applicant formed the view that Justices Kimaro and Massati ought to have recused themselves for the reasons stated above. If indeed the applicant honestly never believed in the impartiality of the Justices, why did it have to wait until the outcome of the appeal? Would it have complained if the appeal had been dismissed? Going by the record, it could have not. If the reason advanced by the applicant against Justice Kimaro, was legally tenable, then one would have expected it to ask the entire panel which determined Misc. Civil Application No. 47 of 2010 to recuse itself. Furthermore, even Justice Rutakangwa ought to have been rejected as he participated in Civil Reference No. 11 of 2006 between the same parties in which the applicant lost with costs, on 25th February, 2009. Having given the matter the benefit of a mature and dispassionate consideration, we are increasingly of the view that the applicant in fronting this ground, which is the first of its kind in this Court, was skating on very thin ice. Though not perturbed by this twist of events, for Lord Edmund-Davis had long foreseen such eventualities, we are bound to observe in passing that if the applicant was naturally disturbed by our judgment it ought to have looked for a nobler and more just cause than drawing red herrings. Against this background, counsel for the respondent in their reasoned out submission on the issue, which was backed by instructive authorities, strongly submitted that Prof. Fimbo abysmally failed to make out his case on bias. They stressed that counsel for the applicant, instead fronted a strange and unacceptable scenario to the effect: "I am content for judges to be biased in my favour and to hear my case so long as they rule in my favour". They could not have been more correct. Relying on the decision of the House of Lords (U.K.) in *Porter v. Magill* [2002] 2 A.C. 357, they urged us to reject this otiose complaint as: "No fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased". We agree with this assertion notwithstanding the fact that mortal as we are, we are not infallible. All in all, these facts compel us to admire and respect the wisdom and vision of the ancient Romans who bequeathed us the latin maxim which introduced our discussion. In our ordinary language, it simply means: "A person making contradictory allegations is not to be heard." This is all because justice is rooted in truth. Equivocation, in our respectful opinion, is not a noble course in pursuing justice; for equivocation and truth are strange bed-fellows. Applying the test on bias propounded in the *Rai*, *Porter*, *Bow* and *Perry* cases (supra), we hold that "no reasonable person" in the *Perry* case sense, would act "on the unsubstantiated" and indeed now discredited "suspicions of personal bias" on the part of any of the Justices and conclude that both or any one of them ought to have recused himself/herself or themselves. Since, it is now obvious that this cry of bias was not based on genuine grounds but on the applicant's mere dissatisfaction with the outcome of the appeal, we have found

no reason to abdicate our jurisdiction under the Rules to hear and conclusively determine this application as urged by the applicant. We accordingly hold that no manifest error of bias, leave alone one occasioning a miscarriage of justice to the applicant, has been established.

- (b) Error (g): Rejection of Res Judicata. The Court is being reproached with erroneously dismissing the plea of res judicata and the plea of estoppel "without articulation of the amendments contained in Act 13 of 2005... on the Respondents immunity." The applicant's counsel's submission in support of this ground is, in our respectful opinion, glaringly narrow in focus. We shall take the liberty of quoting, in full, the most pertinent argument of his submission. He said:- "Without identifying the cause of action, the Court quickly answered its question this way, "Our considered answer to the above question is definitely in the negative"(vol. 1 p 35 now p 130 line 1). The Court then veered to an outline of applicable legislation in the subsequent sentence. It is submitted that the Court erred in failing to state the cause of action. The cause of action was the same, namely breach of contract." The question we had posed in our judgment is: "Was the claim of immunity in the present proceedings founded upon the same cause of action which was the basis of the proceedings before Katiti, J.? Prior to posing the question we had indicated very vividly that Prof. Fimbo had contested the appeal on two grounds only, a fact not disputed here. These we said were: one, that the Bank's granted immunity did not apply to commercial transactions and two, that the case was res judicata. We first concentrated on the issue of immunity. At the end of the discussion we thus conclusively held: "All in all, Prof. Fimbo's argument, in our considered opinion, can only hold water when viewed in relation to state immunity from jurisdiction. It cannot be correct when it comes to international organizations which have been granted immunity from legal processes under their constitutive instruments.... In the light of these unambiguous Treaty provisions, it cannot be seriously predicated that the appellant's claim to immunity from legal processes is grounded on sovereign immunity, as Prof. Fimbo courageously insisted... It is imperative, therefore, that its claimed immunity must be judged only on the basis of its Charter provisions and not on customary international law doctrine of sovereign immunity." We accordingly rejected his first defence and proceeded to canvass the defence of res judicata and estoppel. We proceeded on the premise that the bone of contention in the proceedings before Katiti, J. and Shangwa, J., was immunity from legal process based on two distinct legal provisions. Prof. Fimbo does not want to accept this view. He is pressing us to tow his line of reasoning thereby unwittingly placing an insurmountable hurdle along his way. This is because a review of judgment cannot be sought to substitute a view or to re-hear the appeal. Furthermore, as the Court held in Chandrakant, a decision unreservedly relied on by Prof. Fimbo in the application, "an error which will ground a review whether it be of fact or law, will be an error over which there should be no dispute..." This is not the case in these contested review proceedings. And, as held in Devender (supra), the mere possibility of there being two views in the subject is not a ground for review, but, in our view, an attempt to challenge the decision pegged on that possibility can be made in an appeal to a superior court, which is not the

case here. There is no dispute here that the proceedings before Shangwa, X, were execution proceedings. The applicant was seeking the enforcement of the Arbitrator's award by attaching the Bank's money, which was issued in the absence of the parties. The bank, on becoming aware of the attachment by a garnishee order nisi, immediately protested to the High Court, claiming that all its properties and assets "wheresoever located and by whomsoever held" were immune from any attachment from any source. We have re-studied the proceedings before Katiti, J. The more we read them and the resultant ruling, the more we became convinced that those proceedings were adjudicative in nature. We shall let Katiti, J., tell it himself. In his ruling, the learned late Judge said:- "The Petitioner/Applicants -BLUE LINE ENTERPRISES LTD, on 4/12/1995\ won an ex parte interim injunction order, before Kaji, J., restraining the receiver, or Manager, or other agents o f the EADB, hence...the respondents, from taking over and running the applicants business, till the determination o f their inter parties application, for temporary injunction. In the pursuit o f this, o f this inter parties temporary injunction application, the parties through their respective advocates, have submitted their respective pros, and cons written submissions, hence to be hereafter, opportunely given deserving treatment." After giving a brief history of the dispute, the learned Judge continues:- "...[I]t is equally beyond dispute, that the Respondent Bank is commercial child, born o f the 1980 Treaty, ... that was in this country, given legal force and legal life by the EABD Bank Act No. 7 o f 1984, which came into operation on the 18/06/1984. And it is equally an uncontrovertible fact that under section 13 o f the Diplomatic and Counselor (sic) Immunities and Privileges Act 5 o f 1986, and Fourth Schedule thereto, and G.N. No. 25/1988, the Respondent Bank, enjoys immunities and privileges, as per Fourth Schedule. These facts, in my view defy challenge, and are the foundation of what follows hereafter. The pros and cons, in the counsels written submissions, first looked at globally and broadly, before the judicial minute dissection, thereof reserved for opportune time touch on two broad aspects -1- the courts competent jurisdiction, and -2- the principles that govern the granting o f a temporary injunction. Each o f the above aspect, I hope, shall seriatim receive commensurate, and attendant attentive jurisdiction ..." (Emphasis is ours.) Suffice it then here to say briefly that the application before Katiti, J., was one for issuance of an order of a temporary injunction. The Bank had challenged the High Court's competence to entertain it because it: "enjoyed statutory immunity, from suit and legal process, under section 13 (1) o f the Diplomatic and Consular Immunities and Privileges Act No. 5 o f 1986, as granted to it, by the Minister under the Diplomatic and Consular Immunities and Privileges (Designation) (International Organizations) Order, 1986, G.N. No. 85 o f 1988, in the Third Schedule, and the Immunities thereof, specified in the Fourth schedule." The Bank had also specifically denied having any of its immunities waived "expressly or by necessary implications." On the other hand, Prof. Fimbo assisted by Mr. Mwakasungula, learned advocate, had challenged the onslaught on the High Court's jurisdiction from four perspectives, namely:-

- (i) The E.A.D.B. Act No. 7/1984 and Act No. 5 of 1986, were inconsistent, (ii) The EADB had waived its immunity; (iii) The claimed immunity did not apply to commercial transactions, citing the *Trendtex* (supra) as authority; and (iv) Immunity did not extend to arbitration proceedings. We should pause here and hasten to admit that we had not found it absolutely necessary to include these undisputed facts in our judgment. This was because we held an honest, but as it has turned out a mistaken belief, that despite the passage of time, counsel for the applicant was alive to them. That is an error of omission, which we believe did not result in a miscarriage of justice. That said, we should return to Katiti, J. After he had given his "commensurate, and attendant attentive jurisdiction" to the objections raised, the learned High Court judge held, correctly in our view, that for the purpose of the Fourth Schedule, which granted the Bank immunity from "suits and legal process", such immunity covered arbitration proceedings. He had also found that the Bank had not waived its immunity. Justifying our affirmative answer to the question we had posed of which we stand accused of providing without any articulation, we had this to say in our judgment: "The appellant challenged the competence of the proceedings on the basis that it was immune from legal process. The claim was based on the East African Development Bank Act, 1984 (No. 7), the Diplomatic and Consular Immunities (Designation) (International Organizations) Order, GN. No. 85 of 1988 and the Diplomatic and Consular Immunities and Privileges Act, 1986 (No. 5). The High Court (Katiti, J.) overruled the appellant's objection. Relying on the *TRENDTEX* case, the learned judge had held:- "/ would therefore hold, that where an authority, is otherwise a juristic personality a body corporate, with attendant legal capacities, enters into ordinary commercial transaction, for mutual reliefs and equal treatment, it shall not be entitled for immunity in the execution of such commercial transactions. It follows that Act No. 5/1986 was meant to apply to non-commercial activities". Earlier on in his ruling, the learned judge had held thus:- "Second\ where a scheduled organization has been granted immunity, its enjoyment of the same is not different from that enjoyed by a foreign state unless conditions and qualifications have been attached thereto. From the above, it is without trepidation that, I am saying that the times of economic transparency of economic liberalization are already here and we are no island but part of it, and in the absence of dear statutory provision, there is no reason why, our common law, even leaps and bounds should not be so influenced by the changing international (sic) to look, like the times, whereby a separate legal entity, whether International organization ... with powers to institute legal proceedings, to contract, etc., should be entitled to immunity unless the proceedings relate to the exercise of sovereign authority and the circumstances are such that the state would be immune."/ [Emphasis is ours]. We see no reason of entering into a debate on the soundness or otherwise of this reasoning. All we can safely say now, in all sincerity, is that all that was said and done before 1st July, 2005, when the Amending Act which supplied the needed "dear statutory provisions" became operative." From the Ruling of Katiti, 1, it is crystal clear, that he was determining the applicant's application for grant of an injunctive order pending the finalization of the arbitral proceedings. After rejecting the Bank's plea to immunity from jurisdiction the learned judge thus concluded "From the foregoing, and for reasons above, I

am amply satisfied that a case for a temporary injunction, till the arbitral proceedings are finalized has been made out, and it is hereby granted." Proceeding from this conclusion, in our judgment we confidently held as follows:- "As we have already sufficiently demonstrated, in the previous proceedings for appointment of an arbitrator, the plea of immunity was based on the three pieces of legislation we have referred to above. In the current proceedings, the plea is based on the provisions of the Act as amended in 2005. As counsel for the appellant have rightly pointed out, Katiti, J., could not have grounded his ruling on the provisions of the Amending Act, as it was not in existence. Hence his pertinent observation, "in the absence of dear statutory provision." This is an indisputable indication that he would have been prepared to uphold the immunity plea had there been "dear statutory provision". The lacuna was filled in by the Amending Act. This gives the appellant absolute immunity in the manner already adequately shown. In the proceedings giving rise to this appeal, the appellant was seeking the lifting of the garnishee order which had been issued on 25/09/2005, when it had already been conferred with absolute immunity from this type of legal process. For this reason we accept as valid, the argument of counsel for the appellant to the effect that with the coming into force of the Amending Act, the equation radically changed, assuming without deciding though, that Katiti, J. was correct." The question as to why we held that "the equation radically changed" can be answered satisfactorily by going back to the Act and the Amending Act. We shall reproduce relevant provisions as follows:- A-THE ACT: "CHAPTER X - STATUS, IMMUNITIES, AND PRIVILEGES. Article 43 - Purpose of the Charter To enable the Bank effectively to fulfil its objectives and carry out the functions with which it is entrusted, the status, immunities, exemptions and privileges set forth in the Charter shall be accorded to the Bank in territories of each of the member States. Article 44 - Legal Status (not relevant) Article 45 - Judicial Proceedings

1. Actions may be brought against the Bank in the territories of the member States only in Courts of competent jurisdiction in member States in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities.
 2. No action shall be brought against the Bank by members or persons acting for or deriving claims from members. However, members shall have recourse to such special procedures for the settlement of controversies between the Bank and its members as may be prescribed in this Charter, in the regulations of the Bank or in contracts entered into with the Bank.
- Article 46 - Immunity of Assets
1. Property and other assets of the Bank, wheresoever located, or by whomsoever held, shall be immune from requisition, confiscation, expropriation or any other form of taking or foreclosure by executive or legislative action and premises used for the business of the Bank shall be immune from search. 2..... not relevant...." B. THE AMENDING ACT: "Article 44 - Judicial Proceedings:-

1. The Bank shall enjoy immunity from every form of legal process except in cases arising out of the exercise of its borrowing powers when it may only be sued in a court of competent jurisdiction in a member State in which the Bank has an office, has appointed an agent for the purpose of accepting services or notice of process or has issued or guaranteed securities. 2.... Not relevant... Article 45 - Immunity of Assets.
1. Property and other assets of the Bank wheresoever located and by whomsoever held, shall be immune from interference, search, requisition, confiscation, expropriation or any other form of taking or foreclosure by executive or legislative or judicial action and premises used for the business of the Bank shall be immune from search provided that in legal proceedings brought within the terms of the Charter such immunity shall apply before delivery of a final judgment against the Bank by the highest court of competent jurisdiction." (All emphasis is ours). Our above emphasis sheds light on the manifest fact that the immunities of the Bank were expanded by the Amending Act. It is also worthwhile mentioning in passing here that Article 10 mandates the Bank to make or participate in direct loans (by lending) with its unimpaired paid-in capital and/or funds, raised by it in the capital markets, borrowing, etc., hence, the specific mentioning of "its borrowing powers" in article 44 above. It will be immediately realized by any objective mind that "immunity from requisition or any other form of taking," in Article 46 (1) of the Act did not cover judicial actions. Furthermore, although the amending Act did revoke and substitute Articles 45 and 46, and it did re-enact them as Articles 44 and 45. In the new Articles, the Bank's immunities, status and privileges were not only retained but expanded and some made absolute, a fact even recognized by Shangwa, J., as we shall show later, in his ruling. While under Article 45 (1) of the Act, actions against the Bank were permissible without restrictions, as indicated therein, effective from 1st July, 2005, the Bank enjoyed absolute "immunity from every form of legal process" in all cases emanating in the exercise of its lending powers. Prof. Fimbo was very much aware of this fact, as we shall show later when dealing with ground (c). Under Article 46 (1) of the Act, properties and other assets of the Bank were only "immune from requisition, confiscation, expropriation, or any other form of taking or foreclosure by executive or legislative action." But under Article 45 (1) of the Amending Act, all properties and assets of the Bank "wheresoever located and by whomsoever held" including any bank therefore, "shall be immune from interference, search, requisition, confiscation, expropriation or any form of taking or foreclosure by executive, legislative or judicial action." The underlined words were introduced by the Amending Act. It will be helpful to counsel for the applicant to point out here that even in proceedings lawfully brought under Article 44 (1) against the Bank, immunity from enforcement or execution subsists until "a final judgment against the Bank by the highest court of competent jurisdiction" has been delivered. We clearly pointed out in our judgment that the Court envisaged in Article 45 (1) in the case of Tanzania is the Court of Appeal. But for the willful blind, it must be obvious to all that under the scheme of the Amending Act, Tanzania through its Parliament granted the Bank absolute immunity from jurisdiction and execution processes in cases arising from its exercise of its lending powers, as was the case in the transaction between the applicant and

the Bank. It would, therefore, be idle for anyone to argue that the Bank enjoyed broader rights under the Act. In their response submission counsel for the respondent found the reasoning of Prof. Fimbo to be flawed because the Court, "in a well reasoned analysis ... identified three relevant principles of law from a consideration of the authorities." These principles, which were distilled from settled jurisprudence are:-

- (a) If a law is changed by the passing of a new Act after a decision has been made in a case, the doctrine of res judicata does not arise;
- (b) Where as a result of a change in the law, new rights are conferred on parties, such rights are not barred by res judicata, and
- (c) Where a proceeding applied to a different set of circumstances, it could not be defeated by a plea of res judicata. These principles, it must be pointed out, apply disjunctively and not conjunctively. In all fairness to Prof. Fimbo, we have noted that in his brief submission in support of this ground, he made no attempt at all to challenge the soundness of these principles, which we found to be very pertinent in our 54 resolution of the issue of res judicata and estoppel which he had raised himself to oppose the appeal. He, all the same, contrary to his submission before Shangwa, J., argued that "the Amending Act did not grant new rights regarding immunity to suit and legal process since it enjoyed broader rights under Cap 356 above". Prof. Fimbo further faulted the Court for characterizing "the proceedings before Katiti, J. as purely adjudicative." Then he posed this crucial question: "Did the temporary injunction fall under adjudicative jurisdiction or enforcement jurisdiction?" Ironically, he did not even hazard a guess for a possible answer as he equally never posed a similar question in relation to the proceedings before Shangwa, J. which gave rise to the appeal. Instead, he concluded immediately that: "In my submission, this error resulted in a miscarriage of justice; it influenced the court in rejecting both pleas of res judicata and issue estoppel." With great respect to Prof. Fimbo, we think he could not have been very serious. The character and/or the nature of the proceedings before Katiti, J. is very obvious. That is why in anticipation of this, we took the liberty of quoting in ex tenso, from his ruling. We knew it would vindicate us in due course. As we have already demonstrated, before Katiti, J. the applicant was seeking an injunctive order to restrain the Bank and its servants, agents, etc., from taking over and running its business, until the finalization of the arbitral proceedings. It must be recalled that this was prompted by the act of the Bank in appointing the Receiver Manager and there was therefore by then no arbitral award or court decree to be enforced. Under these circumstances, we respectfully hold, it would have been admittedly preposterous on our part to hold that the proceedings before Katiti, J., were enforcement or execution proceedings. If the word "adjudication" is taken to mean, "the legal process of resolving a dispute" or "the process of judicially deciding a case", (Black's Law Dictionary, page 42) as we hereby do as Prof. Fimbo provided us with no alternative meaning, then the proceedings before Katiti, J., were purely adjudicative. That is why, we may as well add, the learned judge after "opportunistically" giving "deserving treatment" to the "pros and cons" of the dispute, resolved it in a 28-page typed ruling. Needless to

emphasize here, is the naked fact that the proceedings before Shangwa, J., were enforcement proceedings. These were proceedings based on a new set of circumstances as we held in our judgment and we are barred from the re-hearing this issue in a review petition. The same applies to our holding to the effect that the amending Act, created new rights to the Bank. The applicant, therefore, is trying to re-open the appeal, disguisedly in the form of a review application. It has no such right under our laws. Our answer to Prof. Fimbo's criticism of unfair rejection of the plea of issue estoppel is found in counsel for the respondent's submission, which we wish to adopt. It is lucidly pointed out that:- "(I)t should be noted that neither the Applicant's Notice to Affirm nor its submission dated 14 December, 2011 dealt separately with the issue of issue estoppel. The conclusion of its submission at paragraph 9.3 of the submission ...was: 'It is on this basis that I respectfully submit that the issue of immunity was res judicata, having been determined by Katiti, J.' and at paragraph 9.7 thereof: I am inviting your Lordships ... to invoke the principle of res judicata to these two applications application before Katiti, J. and application before Hon. Shangwa, J. in the High Court'. There was no subsequent attempt in oral submissions to articulate the characteristics of a separate and distinct principle of issue estoppel. " Indeed, as correctly pointed out by the respondent's counsel despite this omission, the issue of issue estoppel was canvassed in our judgment thus:- "... we have found ourselves with no flicker of doubt in our minds that issue estoppel does not arise here. If issue estoppel as we understand it, is meant to preclude a party 'from contending the contrary of any precise point which having been distinctly put in issue, has been solemnly and with certainty determined against him, ' then it has been wrongly invoked here by the respondent The immunity raised and decided on in Misc. Civil Cause No. 135 of 1995 rested on the provisions of the Act before it was substantially amended, as well as the laws governing Diplomatic and Consular immunities. As already shown, Katiti, J., never grounded his decision on the present Articles 44 and 45 of the Schedule to the Act. For that reason it cannot be convincingly argued that the immunity from legal process being relied on by the appellant here was a point which was in issue then and was solemnly and with certainty determined against it. To us, the differences in the facts and the laws relied on in the two proceedings are too glaring to call for any further elaboration." In the absence of any input from Prof. Fimbo on the issue, need we had said more? Of course, not. All the same, even if he had said volumes on the issue, we remain convinced that our answer would have been the same. If another Judge or judges would have taken a different view of the matter that, unfortunately for the applicant as we have sufficiently shown, would not suffice to be a ground for review. All in all as far as this ground is concerned, we are constrained to agree with counsel for the respondent that it is "plain from the applicant's submission that it is simply seeking to re-argue the appeal, contending in effect that the Court of Appeal is wrong in its analysis". That is not the intended purpose of a review. We therefore, find no error, let alone a manifest one, on the face of the record of the like fronted in ground (g), to justify a review of the judgment.

- (c) Error (i): Waiver of Immunity If we may be excused in borrowing and using the language of counsel for the respondent in their written submissions we would say that "the burden of this allegation is that the Court failed or neglected to determine whether the Respondent had waived its immunity when it submitted itself to the jurisdiction of the Courts by reason of its institution of the proceedings particularized" in paragraph (i) of the notice of motion. As properly approached by counsel for both sides in their submissions, this allegation as well as the one in paragraph (j) (i.e. failure to consider the compromise suit) can be conveniently consolidated and disposed of together as we propose to do. As correctly and appropriately pointed out by counsel for the respondent, despite the fact that the Bank first raised the issue of immunity before Katiti, X, the applicant has raised these two issues for the first time ever in this application. Under normal circumstances we would be justified to throw them out without a consideration. However, in order to avoid the prospect of adding insult to injury in the event the entire application fails, we shall not do so. In resolving these twin issues, we have found it instructive to begin our discussion with an admission that an international organization may waive its immunity from jurisdiction or that by agreeing to an arbitration clause, it waives its right to invoke its immunity before the arbitral tribunal. This is even clear from Article 52(1) of the Act. But each case must be judged on the basis of its own peculiar facts. We have already shown above that in international law, the law of immunity is essentially procedural. It is accordingly entirely distinct from the substantive law which determines the legality or otherwise of the conduct, activities etc, the subject of the judicial proceedings. It is settled law that immunity from legal processes generally, is immunity not merely from being subjected to an adverse judgment, but from being subjected to the trial process. A national court to which an international organization appears is required to determine whether or not such entity "is entitled to immunity, as a matter of international law before it can hear the merits of the case brought before it and before the facts have been established". In short, in international law, as is the case in our municipal jurisprudence regarding jurisdiction in general, the question of immunity must be determined at the outset of the proceedings: see, *Democratic Republic of Congo v. Belgium* (supra) and *Germany v. Italy* (supra). The I.C.J. in *Reference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights*, Advisory Opinion of 22 April, 1999, I.C.J. Reports (1999) page 62 at page 88 paragraph 63, notably stated that it is a generally recognized principle of procedural law that questions of immunity should be expeditiously decided in *limine litis* (i.e. at the outset of the proceedings). To what extent are these principles of law of relevance to the issues under scrutiny in the application? The best starting point is the recognition that immunity, be it state immunity or immunity granted to international organizations, is a concept that applies both at the adjudicative and execution stages. It is common knowledge that "while immunity from jurisdiction refers to a limitation of the adjudication power of national courts, immunity from execution restricts the enforcement powers of national courts or other organs" (Reinisch in "European Court Practice Concerning Immunity from Enforcement Measures", in the *European Journal of International Law* vol. 17 no. 4, 2006 page 1. In both the United Kingdom and the United States statutes require separate waiver in respect of

execution and jurisdiction (see, Hazel Fox CMG Q.C. in "The Law of Immunity, 2nd ed. 2010 O.U.P. at page 602. In "Degrees of Immunity. A Lesson from the Privy Council", found in the European, Middle Eastern and African Arbitration Review, 2013, James Barrat, Margatitta Michael O'melvery and Myres citing Fox (supra) report that "French Courts have held that consent given in an arbitration clause to refer disputes to arbitration does not constitute consent to execution in national courts of any award subsequently handed down". This is so because, it is increasingly evident that immunity from execution or legal process is a defence invariably used to resist execution of a judgment or award regardless of whether or not the concerned sovereign or organization had submitted to jurisdiction of the municipal courts or tribunals. In its very elaborate and seminal judgment in Germany v. Italy (supra) the I.C.J. unequivocally held that:- "[T]he rules of customary international law governing immunity from enforcement and those governing jurisdictional immunity (understood *stricto sensu* as the right of a State not to be subject of judicial proceedings in the courts of another State) are distinct and must be applied separately." [Emphasis is ours]. The I.C.J. was simply re-affirming a salutary and, admittedly, elementary principle of law of long standing. The above principles, in our settled minds, apply with equal force to immunity from enforcement enjoyed by international organizations. We recognize the persuasive authority of an international judgment. It is considerably greater than that of any writer or even judges writing in their private individual capacity. This is true, especially, of judgments of the World Court (I.C.J.). Collective wisdom which in the case of the I.C.J., I.C.T.R., I.C.T.Y, I.C.C, etc., represents the main legal systems of the world, is superior to individual wisdom, and common deliberation by the Court members is a unique check on subconscious national prejudices and limitations in outlook. The I.C.J.'s holding on this issue is consonant with the commonly accepted principle that immunity from jurisdiction and immunity from enforcement measures are not always correlative and a judgment creditor cannot always obtain satisfaction. Accepting as we hereby do, that there is a clear distinction between immunity from jurisdiction and immunity from execution, the allegation that the Bank had waived its immunity flies in the face of this fact. As we have already elucidated, the proceedings before Shangwa, J., were not adjudicative but execution proceedings. Execution proceedings, it is common knowledge, begin where adjudicative proceedings end. May be the Bank might have waived its immunity from jurisdiction, despite the undenied fact that it's very early claim to this immunity was dismissed by Katiti, J., but it is our firm holding that it did not do so, either expressly or implicitly, at the execution stage. It unequivocally asserted this immunity before Shangwa, J. Fortunately, Shangwa, J. had a grasp of it, when in his ruling he held thus: "...all physical properties and assets of the Applicant are absolutely immune from interference by executive or legislative or judicial or administrative action." Then, where did he go wrong? In our respectful opinion, he went wrong, first of all, when he entertained the proceedings without jurisdiction and secondly, as we have already indicated, when he read into the statute and Charter the adjective "physical." That was, indeed, not the intention of the signatories to the Charter and/or the Parliament. If they had the intention of thus limiting the terms assets and properties they would have provided so specifically. It is 65 settled law, but we are not sure if it is sufficiently remembered, that

courts should apply unambiguous laws as they find them and not as they wish them to be. That is why we held in our judgment that all assets and properties of the Bank, "wheresoever located and by whomsoever held" are absolutely immune from attachment in cases arising out of the exercise of its lending powers. We have no jurisdiction then, in these proceedings to substitute another view. We are, therefore, constrained to accede to the Bank's counsel's submission that each of the causes referred to in ground

- (i) concerned the adjudicative jurisdiction of the High Court. It cannot, then, be seriously argued that the Bank had waived its immunity from the enforcement process. Of course Prof. Fimbo came up with another ingenious argument. This was that "the Respondent genuinely believed that it enjoyed absolute immunity, it ought to have contacted the Attorney General as PAN AFRICAN POSTAL UNION did" in the HUMPHREY CONSTRUCTION CO. LTD vs PAPU case (CAT, Civil Revision No. 1 of 2007) (unreported). Our straight forward answers are easy to get. One, immunity is granted by Sovereign States, and not begged. In our case, Tanzania in the exercise of its sovereignty granted the Bank with the impugned immunities. Through Parliament, it made the relevant Charter provisions, part of the laws of the land, which all courts in the country are enjoined by Article 107 B of the Constitution to follow to the letter while administering justice. In asserting its statutory right, the Bank had no duty to seek the opinion, advice or clearance of the Attorney General. Two, as correctly submitted by counsel for the Bank, "it is the Court and not the Attorney General who is the final arbiter of the issue." In view of the above considerations, we are settled in our minds that the Bank has never at all material times during the pendency of this dispute waived its statutory and Charter rights of immunity from enforcement measures. The High Court judge recognized this and that is why he, out of sympathy, looked for an expedient way to have the applicant obtain satisfaction. He had no jurisdiction to do that. We accordingly find the allegation in grounds (i) and (j) not established at all. This naturally leads us to grounds (c) and (f) which are interrelated.
- (d) Grounds (c) and (f): Invoking Article 44 and Defining "Property and Assets." The bone of contention here is that the Court committed a manifest error by resorting to Article 44 of the Treaty and defining the word asset/property 67 in deciding the appeal. As we have already reproduced in full the relevant provisions of Articles 44 and 45 as well as the two crucial grounds of appeal in the appeal, we shall, not reproduce them here. It was the contention of Prof. Fimbo that the Court committed a manifest error leading to a miscarriage of justice by defining the term assets to include money or cash in a Bank account without saying in so many words whether the authorities relied on so define the said term, or without saying explicitly that the definitions we relied on refer to cash or money in the bank. On the other hand, in another display of his ingenuity but forgetting that he was once more simultaneously blowing hot and cold, it was his strong submission that the Court erred in resorting to Article 44 and as a result, it led itself to an unwarranted conclusion that the term "assets" covers money in a bank account. We do not deny, and we do not regret, to have had recourse to Article 44 in our resolve to effectually and conclusively adjudicate on the crucial issues involved in the appeal. We did so for two principal reasons:- One, "When the question

arises as to the meaning of a certain provision in a statute, it is not only legitimate but proper to read that provision in its context. The context here means, the statute as a whole, the previous state of the law, other statutes in pari materia, the general scope of the statute and the mischief that it was intended to remedy": Justice G.P. Singh (supra) at page

28. See, also *Union of India v. Elphinstone Spinning and Weaving Co. Ltd.*, AIR 2001 SC 724 p. 740 (Constitution Bench) etc. This salutary rule of statutory construction was in *AG V. H.R.H. Prince Ernest Augustus* (1957) 1 All ER 49, P. 55 (H.L.) referred to by Viscount Simonds as an "elementary rule." Two, in his strong submission before Shangwa, J., vehemently resisting the Bank's categorical assertion to immunity from enforcement proceedings, Prof. Fimbo had said, and we shall quote him in extenso:- "23. My Lord it is submitted that the above assertions of the applicant are misconceived in that they are based upon mis-interpretation of the relevant provisions. In my submission Articles 44 and 45 must be read together.
24. Article 44 sub-article 1 grants immunity from every form of legal process 'except in cases arising out of exercise of its borrowing powers.' My Lord the Applicant is an investment banking organization that borrows and lends funds. In my submission the above sub-article must be construed to extend to the Applicant's lending functions as well. Article 44 sub-article 2 grants immunity to the Applicant against actions - (legal proceedings) instituted by members or 'persons acting for or deriving claims from members'...My Lord, the Respondent is not such a member nor does its claim derive from a member. Accordingly the Respondent's application for execution was not barred by the above provision.
25. My Lord, sub-article 1 of Article 45 has reference to Article 44. It qualified the duration of the immunity by reference to the time 'before delivery of a final judgment against the Bank by the highest Court of competent jurisdiction in legal proceedings brought within the terms of the Charter. 'In other words immunity lapses on pronouncement of a final judgment. "[Emphasis supplied]. He proceeded to conclude thus in para. 27:- 7/7 my submission all processes after the order of 29.9.2005 are not barred by Article 44 and 45 as amended by Act No. 13 of 2005." He accordingly prayed for the rejection of the Bank's asserted right of immunity. If we have chosen to quote at length from this submission, it is not because of having personal preferences to the learned advocate. Such preferences are not permitted to prevail in the performance of one's judicial duties. We did so, however, for two good reasons. One, for its somehow pedagogical Value. Two, it exposes the flaws inherent in the learned advocate's strong submissions before us and Shangwa, J. who fortunately did not fall for it hook, line and sinker, but devised his own way to save the Applicant. The first major flaw to be discerned from it, which totally defeats the sole purpose of the allegation in grounds (i) and (j) of the notice of motion, is that while before the High Court he vehemently pressed for both Articles 44 and 45 to be read together in order to do justice to the Applicant, he is reproaching the Court of Appeal for having done what he actually wanted done by Shangwa, J. If he honestly believed to be correct in his submission then why does he want to irreconcilably reverse himself, now without in anyway having the courage of saying so openly? Secondly, the Bank did not predicate its asserted

right of immunity from legal proceedings on Article 44(2). From the pedagogical point of view, we can distil from his submission his undisguised admission that under the terms of Article 44(1) of the Charter, the Bank enjoyed and still enjoys full "immunity from every form of legal process" in relation to the dispute between it and the applicant. It was for this reason that he strongly urged Shangwa, J. to read into the law that which was not intended by its makers: that "sub-article (1) must be construed to extend to the Applicant's lending functions as well." Then why should he blame the Court for resorting to Article 44(1) in order to do substantive justice in the case? He seemed both in the High Court and before us, to forget that "it is contrary to all rules of construction to read words into an act unless it is absolutely necessary." See, Justice G.P. Singh (supra). Furthermore, he seems to forget that "there is no presumption that a *casus om* *issus* exists and language permitting the court should avoid creating a *casus om* *issus* when there is none": see, *Konorkata State v. Union of India*, AIR 1978 SC 68 approved in *M.G. Wagh v. Jay Engineering Works Ltd*; (1987) 1 SCC 542 P 546. As counsel for the Bank have correctly pointed out in their submissions before us, counsel for the applicant in his submissions before us, did not mention even fleetingly the fact that he exhorted Shangwa, J. to 73 have regard to Article 44 in construing the nature and extent of the Bank's statutory immunity. It is true, as submitted by counsel for the Bank that in the appeal they made lucid submissions relating to "the nature and extent of its immunity, including the application of Article 44", and "on the meaning of 'property and other assets'". They then urged us to set aside the High Court ruling as it was based on an erroneous interpretation of the scope of its immunity regarding "property and other assets" after holding that they are absolutely immune from interference by executive or legislative or judicial or administrative action. It is equally true that the applicant's written and oral submissions did not challenge "much of what was submitted by the Bank, but focused principally on the issue of *Trendtex*, and the "application and correctness of *Humphrey Construction*". In the light of these facts, it does not add up to claim now, as the applicant is doing that "the Court was indulgent in considering Article 44 or that it was a manifest error on the face of the record to have regard to it," as rightly argued by counsel for the Bank. It is equally unjustified and totally incorrect, on the part of counsel for the applicant, to submit that we 74 "indulged in the interpretation of Article 44 unnecessarily and without invitation". We should go further and state that since this was an issue of jurisdiction, the Court was totally entitled to have regard to Article 44. In our considered opinion, it would have been a manifest error patent on the face of the record occasioning a miscarriage of justice and a blatant violation of Article 107B of the Constitution, had we failed to do so. This is all because, as we said earlier on, the issue of "jurisdiction of courts to dispense justice is basic and fundamental" as it goes to the very root of the adjudicative power and Courts must ... be certain and assured of their Jurisdictional position at the commencement of trial ." Indeed, the Court in *Richard Rukambura*, (supra) and *Baig and Batt Construction Ltd*

- v. Hasmati Ali Baig, Civil Appeal No. 9 of 1992 (unreported) categorically held that:- "There is authority, therefore that on a fundamental issue like that of jurisdiction, a court can suo motu, raise it and decide a case on the ground of jurisdiction without hearing the parties."

And in *Tanzania Revenue Authority v. Kotra Co. Ltd*, Civil Appeal No. 12 of 2008 (unreported) the Court said: "We may as well add, without any risk of being contradicted, that what was said in respect of a trial court on this issue, applies with equal force to an appellate court." We need say no more on this. We accordingly hold without demur that the error alleged in ground (c) has not been established. We equally find the allegation in ground (f) legally unmaintainable in a review application. The Bank's complaint in the appeal was that Shangwa, 1, had erred in his holding that its money in the bank was not immune from attachment as it is not a "physical asset" but "liquid assets". The Bank's counsel made a strong submission on this ground of complaint, which was supported by very persuasive judicial decisions and treatises on the issue and on rules of statutory construction. It was their strong contention that Shangwa, J's "approach to construction of the statutory provisions was impermissible", as "there is nothing within the statute which supports such a restrictive construction". We have already held so in this ruling. Counsel further forcefully submitted that: "It is an established principle of International Law, of which immunity of states and state bodies and public international organizations is a creature, that monies and monies held in a bank account are capable of being immune from attachment". Counsel for the Bank took us through a plethora of authorities in support of their propositions. The long list of these cases is found in our judgment. They then invited us to reject Shangwa, J/s proposition. Curiously, counsel for the applicant (then respondent) made no attempt at all to challenge the Bank's assertions that "the terms property and assets' did include money held in a bank account' an assertion we upheld on the basis of the authorities cited to us and others. His attempts to use the back door under the disguise of a review to re-argue the appeal is totally unacceptable in our jurisprudence. A review does not encompass a right to a second bite. As we have already demonstrated it will not be a good ground for review that another judge would have had a different view. Nor can it be a sound ground for review that the court proceeded on an incorrect exposition of the law or misconstrued a statute. There must be finality to litigations save in cases where a miscarriage of justice has occurred, which has not been shown in the special circumstances of this case. For the benefit of counsel, we respectfully want to assure him that the Bank's immunity contemplated under Article 45(1) is not restricted to "assets" only as such. It covers all the Bank's "assets and properties" be it "physical" or liquid". Moreover, all the cases relied on in our judgment related to "monies" held in bank accounts. In the *Alcom Ltd v. Republic of Columbia & Another* [1948] AC 580 or [1984] 2 All ER 6 (HL), for instance, the House of Lords, held that money in a bank account (as in the case under scrutiny) used to meet the expenditure incurred in the day-to-day running of Columbia's diplomatic mission was immune from attachment. The Supreme Court (U.K) in *Servaes Incorporated* (supra), agreed with the holding in *Alcom*. We accordingly reject in its totality, the allegation or complaint in ground (f).

- (e) Error (e): Denial of Access to court. It is contended here that in "holding that under Article 45 the Respondent's asset and/or property is absolutely immune from attachment....the Court erred in depriving the Applicant of its right of access to court" for the purpose of

enforcing the award in its favour. There is no gainsaying that the right of access to justice or to courts is a fundamental right. It is enshrined in Article 13(1) of the Constitution, which reads: "13-(1) All persons are equal before the law, and are entitled, without any discrimination, to protection and equality before the law." An equivalent provision is found in the U.S. Constitution. By Amendment XIV (1868) to that Constitution, it is provided that: "... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. "[Emphasis is ours]. Similar provisions are found in constitutions of almost all modern democracies. The above position notwithstanding, we believe this issue should not detain us unnecessarily. This is all because firstly, this Court, as already pointed out, is a creature of the Constitution. Secondly, it is enjoined by the Constitution to observe all the laws of the land in the course of administering justice. This peremptory requirement covers all courts in the land. Both the Act and the Amending Act are part and parcel of the laws of the land. Needless to emphasize is the fact that the Bank's Charter "annexed to the Treaty and set out in the schedule to the Act" are part of the laws of the land. This Court, as is the High Court, is strictly enjoined to observe them and give them full effect. These laws we are enjoined to enforce, extend absolute immunity from attachment to the Bank's assets and properties "wheresoever located and by whomsoever held". We held in our judgment that the Bank's attached money form an integral part of the Bank's assets and properties and is accordingly immune "from interference, search, requisition, confiscation, expropriation or any other form of taking or foreclosure by executive or legislative or judicial action", since 1st July, * 2005. Viewed from the above perspective, we are settled in our minds that this case is distinguishable from the Kenyan case of *Tonoka Steels Ltd v The PTA Bank* [200] (sic) 2 EA 536 in many aspects. Chief among these, is the undisputed fact that, in the *Tonoka* case, the court was "considering a different statutory regime" as counsel for the Bank have persuasively argued. In *Tonoka*, as lucidly argued by the Bank's counsel here, the Court was concerned with "the legal effect of a Ministerial order....under the Privileges and Immunities Act... The Court of Appeal (K) construed the primary legislation in a manner which did not permit the Minister to issue a Notice conferring such absolute immunity" In this case, counsel for the Bank have forcefully argued, and we agree with them, what is under consideration is the Act and the Amending Act, passed by the Parliament in its enduring wisdom and having the national interests in contemplation. The words of the statute are clear and short of doing unwarranted violence on the language of the statute need no interpolations. Moreover, counsel for the applicant who has placed much reliance on *Tonoka*, has not told us whether or not the then Kenyan Constitution had a provision similar to our Article 107 B. We accordingly find, the *Tonoka* case of no persuasive authority here. After all there is no magic behind the phrase access to justice or to courts. In the light of the above, we have found ourselves in full agreement with the contention of counsel for the Bank that "access to justice is to ensure that an individual can assert or protect his legal rights".. In the absence of a legal right which it is sought to assert and/or protect from infringement, the Constitutional right of access to justice does not arise". We do not want to

enter here into any discussion on the constitutionality or otherwise of the Act. That is not within our province in these proceedings. All the same, all things being equal, there can be no doubt that the Executive has powers to conclude Treaties and Parliament has powers to enact laws conferring immunities to foreign Sovereigns and International Organisations. In the exercise of these powers these two branches of government conferred the Bank with immunity and privileges mentioned in Articles 44 and 45. We are enjoined to enforce them. The sympathy which one cannot, perhaps, help feeling for the applicant must not be allowed to alter one's view of the law. A law that can be bent at discretion in order to make exception from it, is not a law at all but an arbitrary exercise of the will. This is not permissible in our jurisprudence. For this reason, we wholly subscribe to the earlier stated principle of law to the effect that due process, or indeed access to justice, is not denied by the proper enjoyment of immunities derived from lawful sources even if thereby a claimant is frustrated in prosecuting a lawful claim. The Act and the Amending Act are such undoubted "lawful sources". We are also alive here to the fact that the I.C.J. in the *Germany v. Italy* case unequivocally held that Germany's immunity prevails over the right of victims of grave violations of international law right of access to justice. To conclude this discussion, we have found it unavoidable to refer to the observations of the High Court of Tanzania in *Betty Kissiri v ESAMI*

[2001] T.L.R. 478, a case cited to us in both the appeal and the application. It was thus observed at page 458: "Mr. Mahatane has also raised the issue of the constitutionality of paragraph 2 of the Schedule to Act No. 3 of 1987. He is claiming that the proviso thereto is in contravention of article 13(3) and (6) of the 1977 ConstitutionAH that I can say here out of courtesy, is that I am not clothed with jurisdiction even to give a disguised comment on this complaint. This is because this is not the appropriate forum... If he thinks that it is so, he must petition this Court accordingly..." These observations cover the applicant's lamentations. This is definitely the wrong forum to table them. Counsel for the applicant should know better. Even the High Court of Uganda (Commercial Division) was of the same view in the case of *Nelson Dhibikirwa v. Agro-Management (U) Ltd*, Misc. Application No. 651 of 2010, arising from Civil Suit No. 281 of 2004. In its ruling delivered on 24 April, 2012, the High Court recognized the Bank's absolute immunity from legal processes (as well as its officials) on the basis of the Treaty creating it. The court further observed "Counsel for the applicant has submitted that this result would not allow for equality before the law as provided in the Constitution. I am unable to see how as this immunity is granted law through Acts of Parliament. However should the applicant wish to seek Constitutional interpretation of this then he...shall have to do this before the Constitutional Court and not this Court." All these pronouncements tell it all. We, accordingly reject the allegation in ground (e) of the notice of motion. The Court, under the prevailing circumstances, did not deprive the applicant of its right of access to courts.

- (f) Error (a): Failing to Determine Ground No. 2 in the Notice of Grounds for affirming the High Court decision. It is true that the judgment does not specifically address this issue. Even counsel for the Bank have conceded that much. However, to us this does not constitute a manifest error on the face of the record resulting in a failure of justice. Since it has already been established that the High Court entertained the execution proceedings without jurisdiction, the same even if singularly considered, would have failed. Furthermore, since this dispute was between a decree holder and a judgment debtor, it is misconception in law to argue that the "judge had no jurisdiction to set aside a garnishee order...in the absence of objection proceedings under Order XXI Rules 57- 62 of the C.P.C.", as forcefully contended by Prof. Fimbo. And, incidentally, the applicant had unequivocally abandoned this particular point in the High Court which he attempted to regurgitate in the appeal and now in this application. For the above single but legally sound reason, this ground also fails.
- (g) Error (d): Nullifying the proceedings in Misc. Civil Cause No. 135 of 2005. The crux of the complaint here, is that the Court erred in quashing these proceedings. In so doing, it is contended, the respondent's application for leave to appeal was also quashed. The applicant presented no arguments in support of this allegation in its submissions. All the same we have found it difficult to follow the logic behind this complaint. The High Court granted the Bank leave to appeal on two points, namely:-
- (i) whether the Bank's monies in a "Bank account is not the type of assets which is meant to be immune from...execution," and (ii) whether the order for execution dated 15th November, 2006 (the garnishee order) was properly issued notwithstanding the existence of Court proceedings between the same parties. These two, formed the basis of grounds two and three of the memorandum of appeal. The Court was called upon to allow them and quash the decision of the High Court. In our judgment we found and held that Bank enjoyed absolute immunity from all legal processes emanating from actions in the exercise of its lending powers. We, in effect, held that as the courts have no jurisdiction to issue execution processes against the Bank, the High Court wrongly entertained the application for execution by issuing a garnishee order. We further held that for the purposes of such types of execution proceedings the final highest court contemplated under Article 45 was this Court. It goes without saying, therefore, that since the High Court acted without jurisdiction, the proceedings before it were a nullity. They had to be set aside. They could not be nullified and set aside without an appeal to this Court, as the Bank's counsel have rightly argued. They had to institute separate proceedings either in the High Court or this Court in the event of a second bite, to obtain leave. The leave granted in order to secure the quashing of the void proceedings could not be affected, therefore, by the nullification order. Furthermore, since the garnishee order absolute was given in void proceedings, it too, was void and had to be quashed. So grounds of complaint in (b) and (d) are devoid of merit and are also dismissed,

(h) Error (h): Failing to state clearly whether or not a new law was being established: In our judgment, we ruled that it was an error of law on the part of the High Court judge, to determine the matter on the basis of an issue or point he raised suo motu, while he was composing his decision, without hearing the parties on it. The burden of the applicant is that we were wrong to hold so without articulating on whether we were following established law or making a new law. It must be obvious to all, that all that we had in mind, as pointed out by the Bank's counsel, is one of the two cardinal rules of natural justice: hear the other side, -This rule is so elementary to need any introduction. We accordingly see no need to cite any authority to bear us out on this. There was, therefore, no error committed and better still no miscarriage of justice has been demonstrated. We should go further and conclude that even if the parties had been heard, the proceedings would have been nullified. Indeed we ultimately allowed the appeal and nullified the proceedings on the basis of want of jurisdiction by the High Court to entertain them. All said and done, we conclude asserting confidently that the applicant has abysmally failed to establish any manifest error on the face of the record, leave alone one leading to a miscarriage of justice. All that it attempted to do, we respectfully hold, is to re-argue the appeal, which is not allowed in an application for review. We accordingly find ourselves constrained to dismiss the application with costs as pressed by counsel for the Bank. DATED at DAR ES SALAAM this 30th day of May, 2013.
E.M.K. RUTAKANGWA JUSTICE OF APPEAL N. P. KIMARO JUSTICE OF APPEAL S. A.
MASSATI JUSTICE OF APPEAL I certify that this is a true copy of the original. Z.A. MARUMA
DEPUTY REGISTRAR COURT OF APPEAL

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Prepared on 14 October 2026 · Esheria