

TANZANIA / JUDGMENT

Civil Revision No

COURT
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IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM (CORAM: NSEKELA, J. A., RUTAKANGWA, J. A., And KIMARO, J. A.) CIVIL REVISION NO. 1 OF 2007 HUMPHREY CONSTRUCTION LTDCLAIMANT VERSUS PAN AFRICAN POSTAL UNION (PAPU)..... RESPONDENT (Revision from the Order of the High Court of Tanzania (Commercial Division) at Dar es Salaam) (M a s s a t i) dated the 1st day of August, 2007 in Miscellaneous Comm. Case No. 8 of 2007 JUDGMENT OF THE COURT 29 February & 16 May 2008 NSEKELA, J. A. The Respondent herein, Pan African Postal Union, (PAPU) was the respondent in Misc. Commercial Case No. 8 of 2007 filed in the High Court, Commercial Division. The claimant was Humphrey Construction Ltd, who had filed an arbitration award under section 10 of the Second Schedule to the Civil Procedure Code and section 11(2) of the Arbitration Act, Cap. 15 and Rule 4 of the Arbitration Rules. On the 27.3.2007, Massati, J. (as he then was) made the following Order - 1 "Judgment is hereby pronounced according to the award and decree to follow accordingly in terms of S. 16(2) of the Second Schedule of the Civil Procedure Code 1966." Subsequently, the claimant filed an application for execution whereupon the court on the 6.6.2007 made the following Order:- "Order:

- (i) Issue prohibitory order in respect of landed property (ii) Issue warrant of attachment for the motor vehicles." On the 14.6.2007, the court issued a warrant of attachment of movable property under Order XXI Rule 21 of the Civil Procedure Code. The following motor-vehicles were listed in that Order - Reg. No. T 244 CDI (Mercedes Benz) and Reg. No. T 244 CD 20 (Toyota Surf). Then on the 7.8.2007, the Court issued a warrant of sale of property in execution of a decree under Order XXI Rule 66 of the Civil Procedure Code. It is against this background that the Hon. Attorney - General wrote a letter to the Registrar of this Court Ref. No. J/C.60/4/6003/3 dated the 20.9.2007 which reads in part as follows- "The Hon. Attorney General is in receipt of a letter dated 19th September, 2007 from the Ministry of Foreign Affairs and International Cooperation wherein it is stated that the High Court of Tanzania (Commercial Division) Dar es Salaam Registry has issued Decree and Attachment Order against Pan African Postal Union (PAPU) Headquarters building in Arusha. Pan African Postal Union is an International Organisation specified in the third schedule of the Diplomatic and Consular Immunities and Privileges Act (Cap. 356 RE 2002) hence enjoys immunities. Those privileges and immunities were also conferred on PAPU in terms of Article III of the Headquarters Agreement dated 7th October, 1984 between PAPU and the

Government (see also GN No. 183 published on 28.9.84). It was unfortunate that the Hon Attorney General or his representative was not invited to appear as Amicus Curie in those proceedings. In the circumstances and as a matter of urgency, the Hon. Attorney General humbly requests the Court of Appeal of Tanzania to invoke powers vested in it under the provisions of section 4(3) of the Appellate Jurisdiction Act, 1979 and call for and examine the record of the proceedings, judgment, Order and Decree of the High Court of Tanzania Commercial Division (Massati, J.) in Misc. Commercial Case No. 8 of 2007 with a view to satisfy itself as to correctness legality and propriety of the decision made thereon." Ms. Sehel, learned Senior State Attorney, was invited to address the Court on the issue raised in the letter from the Hon. Attorney General. The learned Senior State Attorney submitted that PAPU is an international organization under the Diplomatic and Consular Immunities and Privileges Act, Cap. 356 RE 2002 (the Act) to whom it is accorded the immunities and privileges set out in Part I of the Fourth Schedule to the Act. Consequently the property of PAPU is exempt from attachment. She added that PAPU was granted immunity from suit and legal process by virtue of Government Notice No. 183 published on the 28.9.1984 and therefore the proceedings to enforce the arbitration award in the High Court were illegal. The learned Senior State Attorney invoked also Article 45(4) of the Vienna Convention on Consular Relations and submitted that it was part of the law of the land. As such there was need for an express waiver from PAPU that its properties be taken in execution. She vigorously contented that PAPU had not expressly waived its immunity from attachment of its properties. The main contention by Dr. Ringo, learned advocate for the claimant, was to the effect that PAPU had entered into a domestic construction agreement with the claimant under which there was an arbitration clause. This amounted to an implied waiver of immunity. He added that in terms of Article III(i) of the Headquarters Agreement, PAPU had expressly waived its immunity, citing the case of *Birch Shipping Corp v Embassy of the United Republic of Tanzania*, 1980 507 F. Supp 311. Section 4(3) of the Appellant Jurisdiction Act Cap. 141 RE 2002 provides as follows- "(3) Without prejudice to subsection (2), the Court shall have the power, authority and jurisdiction to call for and examine the record of any proceedings before the High Court for the purpose of satisfying itself as to the correctness, legality or propriety of any findings, order or any other decision made thereon and as to the regularity of any proceedings of the High Court". It is evident from this sub-section that the power granted under this provision applies to "any proceedings before the High Court." (see: Criminal Appeal No. 61 of 1999, *Augustino Lyatonga Mrema v Republic* (unreported). The proceedings before Massati, J. (as he then was) fall within the ambit of Section 4(3) above. This is not the end of matter. Before exercising its revisional jurisdiction, the Court has to satisfy itself that the matter before it falls within one of the circumstances enumerated in the case of *Halais Pro-Chemie v Wella A. G* (1996 TLR 269). In this case the Court set forth circumstances which must be present before the Court can exercise its revisional jurisdiction under section 4(3) above. These are- "1. The Court may, on its own motion, and at any time, invoke its revisional jurisdiction in respect of proceedings in the High Court;

2. Except under exceptional circumstances a party to proceedings in the High Court cannot invoke revisional jurisdiction of the High Court as an alternative to the appellate jurisdiction of the Court;
3. A party to proceedings in the High Court may invoke the revisional jurisdiction of the Court in matters which are not appealable with or without leave;
4. A party to proceedings in the High Court may invoke the revisional jurisdiction of the Court where the appellate process has been blocked" We are of the settled view that these revisional proceedings fall under the first category. The Court suo motu has acted on the letter from the Hon. Attorney General reproduced above in cause listing this application to be heard and determined by the Court. The central issue before us is whether or not the property of PAPU is immune from attachment to satisfy an award of the Arbitrator. Our starting point is section 13(1) of the Diplomatic and Consular Immunities and Privileges Act, Cap 356 RE 2002 (the Act). It is in the following terms- "13(1) The Minister may, by Order published in the Gazette -
 - (a) provide that any organization specified in the third schedule (hereinafter referred to as the organization) shall, to such extent as may be so specified in the Order, have the immunities and privileges set out in Part I of the Fourth Schedule and shall also have the legal capacities of a body corporate." PAPU is an organization specified in the Third Schedule (item no. 27). It is therefore entitled to the immunities and privileges set out in Part I of the Fourth Schedule to the Act. These immunities and privileges include "immunity from suit and legal process." PAPU under the Act has been granted immunity from suit and legal process. "Legal Process" has not been defined in the Act but in our view, it includes all proceedings in a legal action before a Court. The proceedings before Massati, J. (as he then was) were aimed at the enforcement of an arbitration award. Under the Act, such legal process, that is, attachment/ execution proceedings, are not permitted. PAPU enjoys immunity from such attachment/ execution proceedings. Dr. Ringo, learned advocate for the claimant, forcefully argued that PAPU had impliedly waived its immunity by entering into an agreement with the claimant which included an arbitration clause. He added that PAPU had also submitted to the jurisdiction of the High Court. In support of his submissions, he referred to the case of *Birch Shipping Corporation v Embassy of the United Republic of Tanzania*, decided by the United District Court for the District of Columbia 507 F Supp. 311. With respect, we have carefully examined the proceedings before Massati, J. (as he then was) from the 19.3.2007 onwards and have found no shred of evidence that PAPU had entered an un- conditional appearance submitting to the jurisdiction of the Court in those attachment/ execution proceedings. The clearest expression of consent by PAPU to attachment and execution of its properties would be its appearance and contest on the merits in Court proceedings without raising a defence of immunity. This did not happen and therefore PAPU cannot be said to have waived its immunity. In an American case, *Dexter & Carpenter, Inc. v Kunglig Jarnvag sstyrelsen* 43 F 2nd 705, a valid judgment was obtained against the Kingdom of Sweden, acting through the unincorporated Swedish StateRailways, which was held to have waived its immunity.

Execution was issued on the judgment and an order of attachment was levied against the property of the Kingdom of Sweden. The Court stated in part as follows- "The question presented is whether execution may, issue against this sovereign powers property because the Court acquired jurisdiction by expressed or implied consent Consent to be sued does not give consent to a seizure or attachment of property of a sovereign government. The clear weight of authority in this country, as well as that of England and Continental Europe, is against all seizures, even though a valid judgment has been entered. To so hold is not depriving our Courts of any attribute of jurisdiction. It is but recognizing the general international understanding, recognized by civilized nations, that a sovereign's person and property ought to be held free from seizure or molestation at all peaceful times and under all circumstances. Nor is this in derogation of the dignity owed to our Courts The Courts have been reluctant to seize property of a foreign government even where the government consented has to the jurisdiction for the purpose of litigating a claim. The basis of this is that giving such consent to litigation does not thereby give consent to an indiscriminate seizure of the property to satisfy the judgment". With respect, these erudite observations were made in a different set of facts, but the reasoning is persuasive to the matter at hand. Admittedly, PAPU is not a sovereign state raising the defence of sovereign immunity. However, as stated before, PAPU is an international organization in terms of Section 13(1) of the Diplomatic and Consular Immunities and Privileges Act, under which it has been granted "immunity from suit and legal process". In addition PAPU was vested with "the legal capacities of a body corporate". To this end, the Government of the United Republic of Tanzania entered into a "Headquarters Agreement" with PAPU on the 7.10.1984. For our purposes, Articles II(I) and III(I) of this Agreement are particularly relevant. They provide as follows- "ARTICLE II: LEGAL STATUS OF THE UNION

1. The Government recognize the legal status of the Union and its capacity to -
 - (a) contract
 - (b) acquire and dispose of moveable and immovable property and
 - (c) institute legal proceedings. ARTICLE III: PROPERTY, FUNDS AND ASSETS
1. The Union together with its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case it shall have expressly waived its immunity. It is however, understood that no waiver of immunity shall extend to any measure of execution", (emphasis added) It is crystal clear that in terms of Section 13(1) of the Act, read together with Articles 11(1) and III (1) of the Headquarters Agreement, the property of PAPU is immune from attachment or execution. PAPU did not and in any case could not waive its immunity as contended by Dr. Ringo, learned advocate. In the result, and for the reasons set out above, we hold that this is a proper case for the exercise of the Court's revisional powers under section 4(3) of the Appellate Jurisdiction Act. We accordingly quash and set aside the proceedings and Orders made by the High Court, Commercial Division, Misc, Commercial Case No. 8 of 2007. We

make no order as for costs. DATED at DAR ES SALAAM this 12th day of May, 2008. H. R. NSEKELA JUSTICE OF APPEAL E. M. K. RUTAKANGWA JUSTICE OF APPEAL N. P. KIMARO JUSTICE OF APPEAL

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