IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MMILLA, J.A., MWANGESI,J.A., And NDIKA, J.A.,)

CRIMINAL APPEAL NO. 2 OF 2018

THE DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT

VERSUS

1. JACKSON SIFAEL MTARES
2. DOMINIC KIGENDI
3. TIMOTHEO SAIGURAN OLE LOITG'NYE } **..... RESPONDENTS**
4. SAMWEL SIFAEL MTARES

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Kibela, J.)

dated 16th day of July, 2015

in
DC. Criminal Appeal No. 181 of 2014

.....

JUDGMENT OF THE COURT

20th August & 13th September, 2018

MMILLA, J.A.:

This is a second appeal by the Director of Public Prosecutions (the DPP). It challenges the decision of the High Court of Tanzania, Dar es Salaam Registry, for having abstained to reverse the order of the Kisutu Resident Magistrate's Court (the trial court), which directed the money which was the subject of the pyramid scheme offence charged in the

first count, to be refunded to the members of DECI (T) Ltd. in Criminal Appeal No. 19 of 2013.

The background facts of the case were that in 2009, Jackson Sifaeli Mtares, Dominic Kigendi, Timotheo Saiguran Ole Loitg'nye and Samwel Sifaeli Mtares (the first, second, third and fourth respondents respectively), together with one Arbogast Francis Kipilimba who was acquitted, were jointly charged before the trial court with two counts; conducting and managing a pyramid scheme contrary to section 171 A (1) and (3) of the Penal Code Cap. 16 of the Revised Edition, 2002 (the Penal Code); and accepting deposits from the general public without licence contrary to section 6 (1) and (2) of the Banking and Financial Institutions Act, No. 5 of 2006 (the BFIA). After a full trial, the respondents were found guilty on both counts, while Arbogast Francis Kipilimba was found not guilty and acquitted. Each of the respondents was sentenced to pay a fine of T.shs three million (3,000,000/=) or to serve a custodial term of 3 years in default in respect of the first count; while they were each sentenced to pay a fine of T.shs eighteen million (18,000,000/=) or to serve 3 years imprisonment in default in respect of the second count. On top of that, the trial court ordered the Bank of

Tanzania (the BOT) to make arrangements so that a refund would be made to the members of DECI (T) Ltd. who deposited their funds and did not collect any proceeds at any single instance. Likewise, the trial court ordered the sale of exhibits P32 – P43, P46 and P47 which constituted different certificates of title in respect of Right of Occupancy of land and motor vehicles Registration cards which were held by DECI (T) Ltd., and directed the proceeds of sale to be added to the fund supposed to be paid to the DECI (T) Ltd. members. The DPP was aggrieved by that order. They unsuccessfully appealed to the High Court, hence this second appeal to the Court.

An excursion on the circumstances which sparked the charges against the respondents will help the understanding of this case, hence the basis of the order under focus.

According to PW8 Noel Joseph Shani who was the Assistant Registrar of BRELA, DECI (T) Ltd. was a foreign oriented company in that it was a branch of DECI Africa Ltd. which was based in Kenya. The directors of the said DECI Africa Ltd. made an application in Tanzania, seeking an establishment of a branch of that company in the country. They presented to him the Memorandum and Articles of Association for

consideration and issuance of the certificate of registration. After considering the application, he approved and issued them with the certificate of compliance. He had testified that Alex G. Mgongolwa and Jackson Sifaeli Mtares were the persons initially involved in the negotiations. He nevertheless added that its shareholders were Jackson Sifaeli Mtares, Dominic D. Kigendi, Timotheo Saiguran Ole Loitg'nye, Samwel Sifaeli Mtares and DECI Africa Ltd. Those were indeed, the persons who were authorized to conduct the business of DECI (T) Ltd. He was clear however, that DECI (T) Ltd.'s objectives were not to receive deposits from customers.

There was also the evidence of PW3 Joseph Mashauri Massawe who by 2009 was the Director of Banking Supervision of the BOT. According to him, in 2007 DECI (T) Ltd. applied for a licence to conduct business of providing loans without receiving deposits from customers. They approved it. He nonetheless added that on 1.10.2007, the BOT received a complaint from an anonymous person that the said company was receiving deposits from its customers. Upon that, they wrote a letter to that company demanding an explanation, coupled with instruction to show cause why stern measures could not be taken against them.

Instantaneously, the BOT wrote them another letter directing that company to remit operational policy manual and audited accounts. Unfortunately, DECI (T) Ltd. did not respond.

On 2.2.2009, the BOT received a letter from the Director of Criminal Investigation (the DCI), asking them if they had issued a licence to DECI (T) Ltd., allowing them to conduct business of receiving deposits from its customers. The former denied.

There was also the evidence of PW5 Goodliving Maro, a witness who by 2009 was working with BOA Bank in his capacity as a Risks and Compliance Manager, responsible for transactions monitoring, including pattern transactions, in customer accounts. According to him, DECI (T) Ltd. was one of their customers, and that due to regular heavy deposits which did not match with the business of running a SACCOS as that company had earlier on represented, they suspected foul play which prompted them to investigate it. They visited DECI (T) Ltd.'s offices and demanded explanation. Unsatisfied with the explanation offered by the latter's directors, BOA Bank reported the incident to the Financial Intelligence Unit (F.I.U.) which deals with anti-money laundering for their action. In retaliation, DECI (T) Ltd. attempted to withdraw cash

T.shs one billion from that bank, but was refused permission. At a later stage, PW5 said, the Attorney General served BOA Bank with a letter and a garnishee order vide which the account of DECI (T) Ltd. was attached.

The sequence of those events however, sparked the Capital Market Authority, the BOT, and the DCI to convene a meeting in which to discuss the conduct of DECI (T) Ltd. They learnt that the said company was conducting a pyramid scheme with the aid of the deposits collected from its customers, for which the latter generated attractive profits in a very short time which was not based on any productive activities. They came to the conclusion that the conduct of that company constituted a criminal act which demanded a prompt action.

The DCI appointed a Task Force Committee of investigators, including PW2 ASP Mohamed Rashid Fereji and PW6 SP Suleiman Nyakulinga, with instructions to investigate the activities of DECI (T) Ltd. According to PW6, they tracked all the directors of that company, and that he personally interrogated the first and second respondents who admitted that DECI (T) Ltd. was conducting a pyramid scheme. He recorded their cautioned statements (exhibits P14 and P15 respectively).

They also searched the residential premises of the first and second respondents, whereof they recovered and seized some documents including payment vouchers, used registration forms of different years, and petty cash vouchers, and bank cards which revealed that DECI (T) Ltd. had bank accounts in a number of banks in Dar es Salaam. They also recovered title deeds of several landed properties and motor vehicle registration cards - (See exhibit P16, a certificate of seizure to that effect). Likewise, the interrogation of those two persons enabled them to know that DECI (T) Ltd. had 49 branches in the country, and that a large amount of money collected from its members was deposited and held in that company's account with Jesus Christ Deliverance Church here in Dar es Salaam. According to PW6, the kind of business which was conducted by that company was illegal and they had no business licence.

On the other hand, PW1 SSP Salum Kisanyi, a fraud investigator, interrogated Arbogast Francis Kipilimba and recorded his cautioned statement. That person allegedly told him that he was a mere consultant of DECI (T) Ltd., and that he was not one of its directors. After recording his cautioned statement (exhibit P6), PW1 and his team went to that

suspect's home at which they conducted a search. Among other things, they recovered a number of receipts which were material evidence in the case (exhibit P7).

The third respondent was interrogated by PW4 ASP Deusdedit Mataba and recorded his cautioned statement. He also searched the house of that person and recovered therefrom, among other documents, the Memorandum and Articles of Association of DECI (T) Ltd. (exhibit P11).

Other witnesses included Adolfina Mwita Maginga (PW7), an employee of Tanzania Postal Bank, PW13 Mary Victor Ngalwa, the Branch Manager of National Microfinance Bank, Msasani Brach and PW15 Godfrey Joseph, the Operational Manager with Kenya Commercial Bank in Tanzania, all of whom respectively said DECI (T) Ltd. was among their customers. Other witnesses were PW9 Jerome Wambura of Sokoni One, Arusha, PW10 Pastor Edward Hamis Mrope of Mtwara, PW11 No. E. 6857D/Cpl. Moses, and PW14 Reverend Emmanuel Saani of the Evangelistic Assemblies of God Tanzania at Nzega, all of whom were members of DECI (T) Ltd. There was also PW16 Saganda Ally Mtondu, a legal officer at the Prime Minister's Office who was given statements

from the directors of DECI (T) Ltd. to read and give legal advice to that office.

On the other hand, all the respondents admitted that they played a vital role in the registration of DECI (T) Ltd. in the country, also that they were shareholders and directors of that company. They stated in common that prior to establishing DECI (T) Ltd., they had organized a relatively small self-help scheme to enable its members to fulfill basic needs in life, including building houses, purchasing motor vehicles, education, capital for business and the like; but that it was limited to church followers only. They could contribute money and give it to the members alternatingly. Eventually, other members of the public heard about the usefulness of that organization and became interested, which is why they invited them. That led to the formation of DECI (T) Ltd. which had multifarious objectives. However, their sole defence was that if anything, they did not commit the charged offences as individuals because it was DECI (T) Ltd. which received the money and conducted the pyramid scheme. They were categorical that the charges ought to have been directed to that company which was a legal person in the

eyes of law, and not its directors. As aforesaid however, the trial court rejected their defences.

As earlier on pointed out, the appeal by the DPP to the Court is solely against the resultant order of the trial court, which was partly upheld by the first appellate court in connection with the properties which were seized from DECI (T) Ltd. The memorandum of appeal has raised five (5) grounds as follows:-

1. *That, the learned Hon. Judge erred in law for not reversing the order of the trial court which ordered refund of money to DECI (T) Ltd. members.*
2. *That, the learned Hon. Judge erred in law for not declaring the properties (proceeds of pyramid scheme) acquired by to DECI (T) Ltd. to be tainted properties.*
3. *That, the learned Hon. Judge erred in law when he held that the defence of innocent owner is available for those who deposited their money to DECI (T) Ltd.*
4. *That, the learned Hon. Judge grossly erred in law by holding that the money deposited to DECI (T) Ltd. be restored to the ignorant innocent owners of the said money.*

5. That, the learned Hon. Judge erred in law when he failed to determine ground number two in the petition of appeal filed before that court.

When this appeal was called on for hearing, Mr. Shedrack Martin Kimaro, learned Senior State Attorney, appeared for the appellant; whereas the respondents enjoyed the services of Mr. Makarious Tairo and Ms Christina Ilumba, learned advocates.

At the inception of hearing, Mr. Kimaro abandoned the second ground of appeal, thereby leaving the first, third, fourth and fifth to be proceeded with. He chose to begin with the first ground.

As already pointed out, the first ground challenges that the first appellate court erred in law for not reversing the trial court's order which directed the refund of the money which was the subject of the offence of pyramid scheme to the members of DECI (T) Ltd. Mr. Kimaro submitted that it was erroneous for the High Court judge to have not done so.

In his submission on the point, Mr. Kimaro emphasized that in the circumstances of the present case, this Court's interference is inevitable

for two reasons; **one** that, it was not easy to determine which members of DECI (T) Ltd. deposited their money for the first time, and who among them did not collect the money at any single instance; and **two** that, the trial court order to sell Exhibits P32 – P43, P46 and P47 which constituted different certificates of title in respect of Right of Occupancy of land which was held by DECI (T) Ltd. and motor vehicles' registration cards was not practicable. He elaborated that the physical properties which were the subject of those Exhibits were not tendered as Exhibits, and that the trial court's order was an apparent error because those Exhibits could not be sold as they were mere papers. He stressed that in view of that, the first appellate court ought to have reversed that order. Since this is a second appeal, Mr. Kimaro added, the Court has duty to re-evaluate the evidence on record and reach at its own conclusion. He relied on the cases of **Pascal Christopher & 6 Others v. The DPP,** Criminal Appeal No.106 of 2006, **Jimmy Zacharia v. Republic,** Criminal Appeal No. 69 of 2006 CAT (unreported) and **Goodluck Kyando v. Republic** [2006] T.L.R. 363

Besides, Mr. Kimaro queried, the trial court did not cite any law which empowered it to make such an order. He referred the Court to the

provisions of section 42 (1) of the Magistrates Courts Act Cap 11 of the Revised Edition, 2002 (the MCA) which he said, covers the scope of the exercise of powers of the District and Resident Magistrates' courts. He argued therefore that, the trial court's order was erroneous because it lacked the backing of the law.

Mr. Kimaro submitted similarly that it was wrong for the trial court to have directed the BOT to organize the refund of the said money to the members of the said company because it was neither a party to the case, nor was it entrusted with duty to hold the money which was attributed to DECI (T) Ltd., the first appellate court ought to have reversed that order. Since it did not do so, he asked this Court to intervene. On this background, he pressed us to allow the first ground of appeal.

On his part, while expressing full support to the submission of Mr. Kimaro regarding the principle which is required to guide the Court in a second appeal as expressed in the cases his learned friend cited, Mr. Tairo vigorously contested the argument that the trial court's order was erroneous, maintaining that the first appellate court correctly desisted to reverse it. He submitted that the members of DECI (T) Ltd. who may be

entitled to get the refund were listed in the Register Books (Exhibits P2), so also the receipts which were tendered as Exhibits during trial. He added that those documents were a sufficient aid of identifying the said members. He also contended that the certificates of title and motor vehicle cards translated into the physical properties to which they corresponded. He urged the Court to dismiss the first ground of appeal.

Mr. Kimaro discussed together the third and fourth grounds of appeal. While the third ground queries that the defence of innocent owner was improperly accorded to the members of DECI (T) Ltd., the fourth ground alleges that the order directing the refund of that money to the said members of that company in the circumstances of this case was likewise erroneous. He stated that these two grounds are based on the fact that the said members of that company were not heard, and that they could only be heard under the procedure covered under the Proceeds of Crime Act Cap. 256 of the Revised Edition, 2002 (the PCA). Particular reference was made to sections 9 (1), 10 and 16 (1) and (6) all of the PCA. He illustrated that while section 9 (1) of that Act allows the DPP to apply to the convicting court or any other appropriate court for confiscation of the proceeds of crime; section 10 thereof instructs the

DPP to give notice to any interested parties. On the other hand, section 16 (1) and (6) of that Act provides for the effects of the forfeiture order on third parties. He contended that the trial court and the first appellate court in particular, ought to have made directions in accordance with these provisions.

As regards the case of **The Attorney General v. Mugesi Anthony and 2 Others,** Criminal Appeal No. 220 of 2011, CAT (unreported) which was relied upon by the first appellate court, Mr. Kimaro argued that it is distinguishable to the present case because the respondents in that case were heard, whereas in present case the members of DECI (T) Ltd. had no such opportunity because they were not charged along with the directors of that company. He also made a distinction of the present case to that of **Magoiga Mnanka v. Republic**, Criminal Appeal No. 105 of 1988, CAT (unreported) in respect of which he said, there was a specific provision which empowered the court to make the order which was in focus, whereas the trial court in the present case did not cite any provision of law under which it made the order in issue. For these reasons, he asked the Court to likewise allow the third and fourth grounds of appeal.

On the other hand Mr. Tairo submitted that basing on the evidence in the Record of Appeal, there is no doubt that the members of DECI (T) Ltd. were indeed the owners of the money which is the subject of the order appealed against, and that because they were not charged along with the directors of DECI (T) Ltd., sections 9 (1), 10 and 16 (1) and (6) of the PCA cited by Mr. Kimaro did not apply to them. Relying on the case of **The Attorney General v. Mugesi Anthony** (supra), Mr. Tairo contended that the first appellate court correctly found and held that the members of DECI (T) Ltd. were innocent owners.

On another point, Mr. Tairo maintained that the Republic wrongly resorts to the provisions under the PCA on account that the offence of pyramid scheme offence does not fall under the definition of *"serious offences"* contemplated under section 3 (1) thereof, hence that the property involved was not *"tainted property"* under that Act. He urged us to dismiss the third and fourth grounds of appeal.

As regards the fifth ground of appeal, Mr. Kimaro's submission was very brief. He challenged that the first appellate court wrongly ignored to determine the second ground of appeal which was to the effect that the trial magistrate erred in law and in fact by ordering the

BOT to make arrangement of refunding the money to the members of DECI (T) Ltd. He maintained that it was a crucial ground which demanded determination on the ground that the said Bank was neither a party to the case, nor an institution which was entrusted to hold the money which was attributed to DECI (T) Ltd., thus it had nothing to do with that case. He urged the Court to similarly allow this ground of appeal.

In countering his colleague's submission on the fifth ground, Mr. Tairo strenuously submitted that the first appellate court determined the second ground which was raised before it. Though it did not expressly allow it, he said, it impliedly did so when one considers the Court's statement at page 586 of the Record of Appeal that "*At the end therefore, I find that the trial court was somehow right when (it) decided that the money deposited at DECI (T) Ltd. should be restored to the members of DECI,* ***but to make it correct,*** *such money should be restored to the ignorant innocent owners . . . .*" Upon being probed by the Court however, Mr. Tairo succumbed that the relied upon statement does not suggest that the second ground of appeal before that court was determined. He however, quickly added that should the Court come

to the conclusion that it was not proper to have directed the BOT to discharge that task, it would be appropriate to place that task on DECI (T) Ltd. itself because he was confident that its directors could perfectly perform that duty. He requested the Court to dismiss the appeal in its entirety.

In a brief rejoinder, Mr. Kimaro reiterated his submission that the defence of innocent owner was wrongly accorded to the members of DECI (T) Ltd. because they did not deserve it since they were not heard.

On the applicability or otherwise of the PCA, Mr. Kimaro contended that the learned defence counsel did not consider the 2012 amendment to the Anti-Money Laundering Act vide which the offence of pyramid scheme was added as a predicate offence, the effect of which it was brought under the ambit of the PCA.

Mr. Kimaro did not at all agree with Mr. Tairo's suggestion that the task of refunding the money to the members of DECI (T) Ltd. should be entrusted to that company's director for the reasons earlier on given that the solution subsists/lies on the application of the afore-pointed out provisions of the PCA, that is, sections 9 (1), 10, and 16 (1) and (2) of the said Act. He reiterated his prayer for the Court to allow the appeal.

After carefully considering the competing arguments of counsel for both sides, we propose to discuss together the first, third and fourth grounds of appeal because they are inter-linked. To begin with however, we wish to firstly address the issue touching on the duty of the Court in a second appeal.

As often restated, the practice is that in a second appeal, the Court rarely interferes with the concurrent findings of facts by the two courts below. As a wise rule of practice, the Court may interfere as such only when it is clearly shown that there has been a misapprehension of the evidence, a miscarriage of justice or violation of some principles of law or procedure by the courts below. There are a range of cases to that effect including those of **Amratal Damodar Maltaser and Another t/a Zanzibar Silk Store v. A. H. Jariwalla t/a Zanzibar Hotel** [1980] T.L.R. 31, Pascal **Christopher & 6 Others v. The DPP, Jimmy Zacharia v. Republic, Goodluck Kyando v. Republic (supra), Joseph Safari Massay v. Republic,** Criminal Appeal No. 125 of 2012, CAT **and Felix s/o Kichele & Another v. Republic,** Criminal Appeal No 159 of 2005, CAT (both unreported) . In the case of **Felix s/o Kichele & Another v. Republic** the Court stated that:-

"This Court may, however, interfere with such finding if it is evident that the two courts below misapprehended the evidence or omitted to consider available evidence or have drawn wrong conclusions from the facts, or if there have been misdirections or non-directions on the evidence."

Thus, where it is apparent that the evidence on the record of proceedings had not been subjected to adequate scrutiny by the trial court or the first appellate court, the second appellate court has an obligation to do so.

As repeatedly pointed out, the main complaint in the present case orbits on the orders of the lower courts regarding the property which was seized from DECI (T) Ltd., said to have been the proceeds of the charged offence of pyramid scheme. Mr. Kimaro is forceful that the first appellate court ought to have reversed the trial court's order which directed the BOT to organize the payment of the money to the members of that company. He gave reasons to justify his stand.

We hasten to state that we agree with Mr. Kimaro that both the trial court and the first appellate court wrongly made the respective orders for reasons we are about to assign.

However, before we may consider the point raised by Mr. Kimaro concerning the focus on the procedure under the PCA, we take note that in the High Court, the DPP's contention was mainly that the forfeiture was wrongly made in favour of the members of DECI (T) Ltd., but that it ought to have been made in favour of the Government because the property involved was tainted in terms of section 3 of the PCA. We entertain no doubt that that was a misdirection on account of the existence of the procedure covered under sections 9 (1), 10 and 16 (1) and (2) of the PCA which we are about to illustrate.

To begin with, we wish to explicate that it is incontrovertible that the offence of pyramid scheme under section 171A (1) of the Penal Code was not at the time of its enactment in 2006 brought under the PCA, and that the definition of *"serious offence"* under section 3 (1) of the said PCA did not cover that offence, so also that it was not prescribed as such by or under section 6 thereof. Thus, had the situation remained like that to date, no doubt, Mr. Kimaro could not have raised the arguments such as these raised in the present case as they would have lacked legal basis. Unfortunately however, the situation changed in 2012 as submitted by Mr. Kimaro, with the enactment of the Anti-Money

Laundering (Amendment) Act, No. 1 of 2012. That again, has its background to Act No 15 of 2007 of the Written Laws (Miscellaneous Amendment) Act. Let us illustrate.

Following the enactment of Act No 15 of 2007 of the Written Laws (Miscellaneous Amendment) Act as afore pointed out, the phrase *"serious offence"* was redefined to mean *"money laundering and includes a predicate offence."* As is evident, that Act did not bring into its realm the offence of pyramid scheme. However, the 2012 amendment to the Anti-Money Laundering Act, No. 12 of 2006 by the Anti-Money Laundering (Amendment) Act, No. 1 of 2012, the phrase *"a predicate offence"* was made to include *"fraud and other offences; murder;* ***pyramid and other similar schemes;*** *and piracy of goods,"* thus making the property which may be involved in such offences to qualify to be "***tainted property***" under section 3 (1) of the PCA, that is, property which is an instrumentality of the offence. Under that section the phrase ***"tainted property"*** is defined to mean:-

"(a) any property used in, or in connection with the commission of the offence;

(b) any proceeds of the offence; or

(c) N.A. . . . ."

The effect of this categorization is that upon conviction of the accused persons faced with such offences, any property falling under the above definition becomes the subject of confiscation within the confines of the procedure laid down under the PCA, that is section 9 (1) thereof. That section provides that:-

> *"S. 9 (1): Where a person is convicted of a serious offence, the Attorney-General may, subject to subsection (2), apply to the convicting court, or to any other appropriate court, not later than six months after the conviction of the person, for–*
>
> *(a) a forfeiture order against any property that is tainted property in respect of the offence; or*
>
> *(b) a pecuniary penalty order against the person in respect of any benefit derived by the person from the commission of the offence."*

From the above, it is clear that no forfeiture or desire to impose a pecuniary penalty order against the involved person(s) can be made without the court's sanction.

We are aware that section 9 (1) of the PCA is referring to the AG as being the officer who may apply to the convicting court for the said forfeiture order or pecuniary penalty order, and it does not refer to the DPP. However, as we said in the case of **The Attorney General v. Mugesi Anthony** (supra), the offices of the AG and the DPP are by law enjoined to cooperate and work together in the performance, control and prosecutions in all criminal matters in Tanzania. Thus, the DPP may as well comfortably apply for orders of that nature.

Back to the track, where an application for a forfeiture order or a pecuniary penalty order against the accused person(s) in respect of such property may have been filed in a court under section 9 (1) just cited, the DPP is required under section 10 (1) and (2) of that Act to give a written notice to any person he may have reason to believe that he has interests in the property involved. That section provides that:-

> *"S.10 (1): Where the Attorney-General makes an application in terms of subsection (1) of section 9 for a forfeiture order against property in respect of a person's conviction of an offence–*

(a) the Attorney-General shall give written notice of the application to the person or to any other person he has reason to believe may have an interest in the property;

(b) the person, and any other person who claims an interest in the property, may appear and adduce evidence at the hearing of the application; and

(c) the court may, at any time before the final determination of the application, direct the Attorney-General to give notice of the application to a specified person or class of persons in a manner and within such time as the court considers appropriate.

(2) Where the Attorney-General makes an application for a pecuniary penalty order against a person–

(a) the Attorney-General shall give the person written notice of the application; and

(b) the person may appear and adduce evidence at the hearing of the application."

On the other hand, section 16 (1) of the PCA provides for a procedure where there may be third parties having an interest in the

property which was involved in the crime under focus. That section provides that:-

> *"(1) Where an application for a forfeiture order is made against property, any person who has an interest in the property may, before the forfeiture order is made, apply to the court for an order under subsection (6).*

The referred to subsection (6) of section 16 of that same Act provides that:-

> *"(6) Where a person applies to a court for an order under this subsection in respect of his interest in property against which an application for a forfeiture order or a forfeiture order has been made and the court is satisfied that–*
>
> *(a) the applicant was not in any way involved in the commission of the offence concerned; or*
>
> *(b) if the applicant acquired his interest at the time, or after the commission of the offence, the applicant did so–*
>
> *(i) for sufficient value; and*

(ii) without knowing and in circumstances such as not to arouse reasonable suspicion that the property was, at the time of the acquisition, tainted property, the court shall make an order for the transfer of the interest by the Treasury Registrar to the applicant or for the payment by the Treasury Registrar to the applicant of an amount equal to the value of the interest, as the court thinks fit."

On the strength of the above therefore, we are in agreement with Mr. Kimaro that a thorough procedure has been provided under the PCA on how to deal with *"tainted property."*

As earlier on pointed out, it is the 2012 amendment to the Anti-Money Laundering Act, No. 12 of 2006 which brought the properties of a person(s) charged with the offence of pyramid scheme in the territory of the PCA. Since the case from which this appeal originates started in 2009, the immediate issue is whether the 2012 amendment covers the properties which were involved in the present appeal; or rather whether such amendment may have a retrospective effect to cover the present case.

We are aware that normally new enactments are not supposed to apply retrospectively except where any such particular enactment provides otherwise - See section 14 of the Interpretation of Laws Act Cap. 1 of the Revised Edition, 2002. That section provides that:-

> *"Every Act shall come into operation on the date of its publication in the Gazette or, if it is provided either in that Act or in any other written law, that it shall come into operation on some other date, on that date."*

Normally, it may not be made to apply retrospectively where the said legislation affects the substantive rights of the potential victims of that new law. On the other hand however, if it affects procedure only, *prima facie* it operates retrospectively unless there is good reason to the contrary – See the case of **Makorongo v. Consigilio** [2005] 1 EA 247 (CAT).

In that case, the appellant appealed to the Court of Appeal against the decision of the High Court in an appeal made on 19 July 1999. While the appeal was pending, Written Laws (Miscellaneous Amendments) Act No. 25 of 2002 came into force. That Act amended section 5 (2) (b) of the Appellate Jurisdiction Act of 1979 which stated that "*no appeal . . .*

shall lie against . . . preliminary or interlocutory decision or order has the effect of finally determining the criminal charnge or suit." The order against which that appeal was made was of an interlocutory nature. The Court of Appeal *suo motu* invited the parties to address it on whether the appeal was properly before them in view of the said amendment. The respondent's advocate contended that the appeal was improperly before the Court. It was held that:-

> *"The general rule is that unless there is a clear indication either from the subject matter or from the working of Parliament, that Act should not be given a retrospective construction. One of the rules of construction that a Court uses to ascertain the intention behind the legislation is that if the legislation affects substantive rights it will not be construed to have retrospective operation, unless a clear intention to that effect is manifested; whereas if it affects procedure only, prima facie it operates retrospectively unless there is good reason to the contrary . . . . "*

In that case, the Court followed the case of **Municipality of Mombasa v. Nyali Ltd.** [1963] EA 371 and approved that of **Yew Bon Tew v. Kendaraan Bas Mara** [1983] 1 AC 583.

A similar position has been stated in the works of A. B. Kafaltiya, M.A., LL.M., Ph.D. in the book titled *"Interpretation of Statutes"*, 2008 Edition, Universal Law Publishing Co., New Delhi – India. At page 237 of that book, the learned author stated that:-

> *"No person has a vested right in any course of procedure, but only the right of prosecution or defence in the manner prescribed for the time being, by or for the court in which he sues. When the legislature alters the existing mode of procedure, the litigant can only proceed according to the altered mode. It is well settled principle that "alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be". The rule that "retrospective effect is not to be given to laws" does not apply to statutes which only alter the form of procedure or the admissibility of evidence.* ***Thus amendments in the civil or criminal trial procedures, law of evidence and limitation etc., where they are merely the matters of procedure, will apply even to pending cases.*** *Procedural amendments to a law, in the absence of anything contrary, are retrospective in the sense that* ***they apply to all actions after***

the date they come into force even though the action may have begun earlier or the claim on which action may be based accrued on an anterior date. *Where a procedural statute is passed for the purpose of supplying an omission in a former statute or for explaining a former statute, the subsequent statute relates back to the time when the prior statute was passed.* ***All procedural laws are retrospective, unless the legislature expressly says they are not."***

Consequent to what we have just clarified above, we are firm that the Anti-Money Laundering (Amendment) Act, No. 1 of 2012, through which a predicate offence was made to include "*fraud and other offences; murder;* ***pyramid and other similar schemes****; and piracy of goods*," applies to the present case because the amendment pertains to procedure on how to deal with "*tainted property*" involved in a predicate offence. Since that law was in existence at the time both lower courts handed down their respective judgments, to have not applied that law was an error entitling the Court to intervene. Consequently, the first ground of appeal has merit and we allow it.

As may be reflected, the third and fourth grounds of appeal challenge that the defence of innocent owners was wrongly accorded to the members of DECI (T) Ltd. on account that they were not heard, therefore that it was erroneous to direct the refund of that money to them. Once again, we share that view.

Indeed, we entertain no doubt that resolve to these grounds too is linked to what we have already said in respect of the first ground of appeal. We have discussed about the existence of the procedure covered under sections 9 (1), 10 and 16 (1) and (6) which is required to be followed in dealing with the property which may have been involved in a predicate offence. On the basis of that, we agree with Mr. Kimaro that the defence of innocent owner was improperly bestowed to the members of DECI (T) Ltd. in the circumstances of this case because they were never heard. As we have comprehensively explained above, they could have possibly been heard if recourse was made to the procedure prescribed under the PCA. Thus, the third and fourth grounds too have merit and we allow them.

We now come to address very briefly the fifth ground of appeal for the sake of completeness. The complaint in that regard is about the

first appellate court's failure to determine the second ground of appeal before it. That ground had alleged that the trial court wrongly ordered the BOT to arrange the payment of money to the members of DECI (T) Ltd.

Sincerely, we agree with both counsel for the parties that the first appellant court did not determine the second ground of appeal before it as it ought to have done. That being the case, we have the duty to re-evaluate the available evidence in that regard with a view of finding resolve to that issue.

We appreciate the fact that the BOT had nothing to do with that case because it was neither a party, nor was it entrusted the task to keep the property seized from DECI (T) Ltd. Unfortunately, both lower courts did not throw light or give justifications why, despite the obvious fact that it was not in any way involved in that case they gave it that task. Besides, given that the PCA had prescribed the procedure on how to deal with tainted property, *ipso jure*, that duty was wrongly placed on that Bank. Thus, this ground too has merit and we allow it.

In conclusion, we allow the appeal and quash the order of the first appellate court. We direct the DPP to file an application **in the High**

Court in compliance with the provisions of sections 9 (1), 10 and 16 (1) and (6) of the PCA within a period of six months from the date of delivery of this judgment.

Order accordingly.

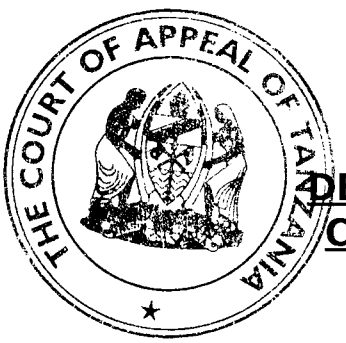
DATED at **DAR ES SALAAM** this 7th day of September, 2018.

B. M. MMILLA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

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



S.J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL