IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CIVIL APPLICATION NO. 441/01 2018

1. GOLDEN GLOBE INTERNATIONAL SERVICES LTD
2. QUALITY GROUP LTD ..... APPLICANTS

VERSUS

1. MILLICOM TANZANIA N. V.
2. JAMES ALLAN RUSSELL BELL
3. MIC UFA LIMITED ..... RESPONDENTS
4. MILLICOM INTERNATIONAL CELLULAR S. A.
5. MIC TANZANIA LIMITED

(Application for Review of the Ruling and Order of the decision of the Court of Appeal of Tanzania at Dar es Salaam)

(Mugasha, Mkuye And Mwambegele, JJ.A.)

Dated the 26th day of July, 2018
in
Civil Revision No. 3 of 2017

RULING OF THE COURT

6th May & 9th July, 2020

KITUSI, J.A.:

On 26th July 2018 we delivered a ruling in Civil Revision No. 3 of 2017. This application seeks to have that ruling reviewed on two main grounds namely; **one**, there are serious manifest errors on the face of the record resulting in miscarriage of justice, **two**, the applicants were denied an opportunity to be heard before the Court ordered that shares purchased by the applicants be released to the first respondent. At the core of this matter which has been simmering for quite a while, lies an

issue of ownership of shares that were sold by public auction in execution of a Court decree.

There are five subsidiary grounds for each of the two grounds, therefore we have a total of ten points to consider. Given the fragile nature of the matter before us and the argument involved in it, we take the pain to reproduce the grounds: -

a) The decision of the Court has serious manifest errors on the face of the record resulting in miscarriage of justices as follows: -

i. The Court has ruled that in Suo motu revision a party cannot challenge the propriety or otherwise of the Record of Revision when the Record of Revision contains more documents other than those forming the record of the High Court which the Court of Appeal calls under provisions of Section 4(3) of the Appellate Jurisdiction (Cap 141 R.E 2002) thus resulting in miscarriage of justice as the applicants had no opportunity of challenging additional documents and testing them through cross examination or otherwise.

ii. The direction asked by the applicants at the start of hearing of Civil Revision No.3 on 11th May, 2018 on the documents referred to as written observation were not given till delivery of the Ruling and that led to miscarriage of justice as the applicants had no opportunity to answer written observations.

iii. *The Court was to call for the record that was before the High Court and revise it, that the Court sat to revise what was not the record before the High Court and the record does not fall within the meaning of Section 4(3) of the Appellate Jurisdiction. The decision occasioned miscarriage of justice to the applicants. There was nothing for the Court to call and revise.*

iv. *That the direction of the Chief Justice had only one issue to be determined namely whether the 1st Respondent was heard and this Court in its ruling on preliminary objections, the Rulings delivered on 27th February, 2017 and 20th October, 2018 had decided that there was only one issue to be determined as directed by the Chief Justice, the Court, however, in its Ruling of 26th July,2018 considered the execution process instead of determining the issue that was before it and in the process introduced Order XXI Rule 88 of the Civil Procedure Code which was not an issue and which was not applicable to the proceedings given the nature of the property in dispute and to the fact that a Certificate of Sale had already been issued.*

v. *The direction of the Chief Justice was confined to the right to be heard, the Court, however when quoting from the Constitution of the United Republic of Tanzania how that right is to be exercised and left out the provisions of the same Article, which provides how the right to be heard had to be exercised by the 1st Respondent.*

b) The Applicants were deprived an opportunity to be heard before the Court ordered that shares purchased by the applicant be released to the 1st Respondent as follows: -

i. *The complainant that brought about Civil Revision No. 3 of 2016 is that the 1st respondent was not heard on her ownership of the shares sold. That 1st respondent supplied documents and the applicants supplied documents on the ownership. The Court decided to release and restore the shares to the 1st respondent without proof for ownership and without affording the applicant an opportunity to be heard.*

ii. *The Court noted in the ruling that the 4th respondent/Judgement Debtor of the judgement, be against which no appeal has been preferred, was alleged to be under liquidation and noted that the liquidator was summoned. No efforts were made to summon the liquidator, which denied the applicants an opportunity to be heard on the party who is to bear responsibility for the amount paid as a purchase price for the shares in question as the result of the judgement that has never been challenged.*

iii. *The applicants have nothing to do with the falsification. That being an act that connotes commission of an offence, and requires evidence, the applicants were not given an opportunity to be heard on what the Court found to be falsification of the certificates and on the information that led to that findings of falsification.*

iv. *The 1st applicant made efforts to establish the truth and was assured by the Court of the authenticity of the shares the 1st applicant purchased. Despite those*

efforts, the applicant was condemned by the Court as "a cause of her own misfortune" without giving her an opportunity to be heard.

v. *The issue that was before the Court was only one. The question of how the 1st applicant should get her money back was not an issue. The 1st applicant who paid money under the Court process is now required to look for that money by himself. The Court decided on the right of the applicant without giving her an opportunity to be heard.*

The background of the matter up to the time of instituting the impugned Revision was sufficiently set out in our decision now under review. However, in order to give sense to our present pronouncement we shall briefly repeat that background:

James Alan Russel, the second respondent, was initially working for **MIC TANZANIA LIMITED**, the fifth respondent, under a contract of employment. It seems the fifth respondent terminated the said contract, for which the second respondent successfully sued the said fifth respondent jointly with **MIC UFA Limited** and **MILLICOM INTERNATIONAL CELLULAR SA,** the third and fourth respondents respectively. That was in Civil Case No. 306 of 2002.

The third and fourth respondents defaulted in filing their respective statements of defence as a result the second respondent was awarded a

default judgment against them. Subsequently, the second respondent withdrew the suit against the fifth respondent as he already had a decree amounting to USD 3,131,825.26 against the third and fourth respondents. He however, sought to execute this decree by way of attachment and sale of 35,479 shares of the fourth respondent held in the fifth respondent. Execution process was quite eventful but finally it was effected by a Court Broker who sold the shares to the first applicant, Golden Globe International Services Ltd. Thereafter the Deputy Registrar who had handled the whole matter declared the sale absolute. This did not bring the matter to an end. If anything, what followed has proved to be more complex.

MILLICOM (Tanzania) NV, the first respondent, complained that the sold shares belonged to her and that since she was not a party to the proceedings in Civil Case No. 306 of 2002 neither in the execution proceedings that followed, she was condemned unheard in the sale of those shares. This complaint was made by the first respondent through a letter addressed to the Hon. Chief Justice who directed the opening of revisional proceedings. Those proceedings were indeed opened as Civil Revision No. 3 of 2017 from which the impugned ruling arose.

This motion has been preferred under section 4 (4) of the Appellate Jurisdiction Act [Cap 141 R.E 2002] as amended by section 4(a) of the

Written Laws (Miscellaneous Amendments) Act No. 3 of 2016, hereafter, the AJA, rule 66 (1) (a) (b) (d) and (e) of the Tanzania Court of Appeal Rules 2009, GN No. 368 of 2009, hereafter, the Rules. For ease of reference, rule 66 (1) (a) to (e) of the Rules provides; -

> *"66 (1) The Court may review its judgment or order but no 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; or*
>
> *(b) a party was wrongly deprived of an opportunity to be heard;*
>
> *(c) the court's decision is a nullity; or*
>
> *(d) the court had no jurisdiction to entertain the case; or*
>
> *(e) the judgment was procured illegally, or by fraud or perjury."*

On the date when the matter was placed before us for hearing, Dr Wilbert Kapinga and Mr. Rosan Mbwambo, learned advocates, entered appearance, acting for the fourth and fifth respondents respectively. Mr. William Mang'ena, learned advocate was also in court but he was holding brief of Mr. FAyaz Bhojani, learned advocate, for the first respondent. There was no appearance by or for the applicants although they had been duly served, nor by the second and third respondents who had also been served by publication.

Dr Kapinga drew our attention to a letter dated 4th May 2020 which had been jointly signed by counsel for the applicants, as well as for the first, fourth and fifth respondents. In the letter, counsel waived their right to address us and prayed that we proceed to consider the application on the basis of the written submissions which they had earlier filed in terms of rule 106 of the Rules. They stated that they did not wish to engage in lengthy and repetitive oral arguments on the application because the written submissions were sufficient. The global health crisis of Covid-19 pandemic which they said may have claimed the life of one of their colleagues, made appearance for oral submissions unnecessary.

We agreed with the scheme that had been proposed by the learned counsel because we had no questions requiring more clarifications from them. Counsel have made informed submissions and long lists of authorities, for which we are grateful. We note that there are no written submissions from the second and third respondents, though, as already intimated above, they were served by publication, and evidence to that effect in a form of copies of the newspapers, was presented for our perusal.

The applicants have picked grounds (a) and (b) of rule 66 (1) of the Rules in this crusade, alleging in (a) that there is a serious manifest error on the record, and that in (b) they were denied the right to be heard.

We shall first address the principle as to what is meant by an error apparent on the face of the record. It has been submitted for the applicants that neither the Rules nor case law provide any assistance as to what is meant by error apparent on the face of the record. The learned counsel resorted to a book titled, **THE LAW LEXICON THE ENCYCLOPIDIA LEGAL AND COMMERCIAL DICTIONARY REPRINT 2002,** 2ND Edition by Justice Y.V. Chandrachidage.

The applicants' submissions that there is no case law on the meaning of an error apparent on the face of the record has been challenged by the respondents who argue that case law provides an answer to that question. In their submissions, the learned counsel for the respondents have referred to the cases of **Chandrakant Joshubhai Patel v. Republic** [2004] TLR 218; **SGS Societe Generale de Surveillance S.A v. VIP Engineering and Marketing Limited and Tanzania Revenue Authority,** Civil Application No. 25 of 2015; and **Serengeti Road Services v. CRDB,** Civil Application No. 12A of 2011 (all unreported) to mention just a few.

With respect, we agree with the learned counsel for the respondents that there is a score of decisions of this Court on what amounts to an error apparent on the face of the record, some of which are those which have been referred to by the respondents' counsel. However, even if we

were to go by the book that has been referred to by the applicants' counsel, invariably the learned author says the same thing as to what type of errors are manifest on the record to justify a review. To illustrate our point, in **Chandrakant Joshubhai Patel** (supra) the Court held inter alia: -

> *"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."*

In the book cited by the learned counsel for the applicants, the learned author states in part: -

> *"If there is a general error in the application of the law and the chain of reasoning has to be examined to find out the error then there is not an error on the face of the record."*

It is clear from the above paragraph that both from the author's point of view and from case law, the jurisdiction of review is narrow in scope and that not every error would justify it. So, what are those errors that may justify a review? Courts have given many names to what is an error manifest on the record. The statement of principle in the Indian case of **M/s. Thunga Bhandra Industries Ltd v. the Government of Andra Pradesh,** AIR 1964 SC 1372 as cited in **Tanganyika Land Agency Limited and 7 Others v. Manohar Lal Aggrwal,** Civil

Application No. 17 of 2008 has continued to illuminate the path. We recently cited that case in **Issa Hassan Uki v. Republic,** Criminal Application No.122/07 of 2018 and **Maulid Fakihi Mohamed @ Mashauri v. Republic,** Criminal Application No. 120/07 of 2018 (both unreported). The statement as reproduced in the latter case is to the following effect;

> *"A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error. We do not consider that this furnishes a suitable occasion for dealing with this difference exhaustively or in any great detail, but it would suffice for us to say that where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out."*

We see in rule 66 (1) (a) of the Rules, as well as in case law, some kind of a litmus test which is to be applied in the determination of whether there is an existence of an error manifest on the record. One has to establish existence of an error, which is manifest and which results in miscarriage of justice. The error must be obvious, or patent such that it may be spotted at a glance.

We shall now address the alleged errors, one after the other. The first alleged error under paragraph (a) (i) is that in ruling that in *suo motu* revision the propriety of the record cannot be challenged by a party, the Court denied the applicants an opportunity of challenging the additional documents that had been introduced, and ultimately a miscarriage of justice was occasioned. On this point counsel for the applicants have submitted as follows at paragraph 4.9 of their written submissions:-

> *"...we have read over and again those provisions empowering the court to exercise the jurisdiction of revision suo motu but we could find nowhere any sanction (sic) that permits the court to call or add any document outside the record that is before the High Court. There is no inherent power to call* ***or such documents to the High Court record that is called*** *pursuant to Section 4(3) of the Appellate Jurisdiction Act. This is what, in our humble submission, constitutes an error on the face of the record."*

On the question of additional documents, the learned counsel faulted the Court for deciding the point against them, and that it was wrong to decide the point by relying on the case of **Balozi Abubakar Ibrahim and Another v. M/S Benady Limited and Two Others,** Civil Application No. 6 of 2015 (unreported). They stick to the point that the Court should not have wandered outside the record that was before the

High Court and whose propriety the Chief Justice had directed examination of.

Responding to this part of the applicants' submission, the first respondent's counsel submitted that the applicants have not established that the error being complained of is a patent or glaring mistake. He also submitted that the applicants must meet another criterion which is to show that the error has resulted in a grossly unfair outcome of the case. He cited the case of **Nguza Viking and Johnson Nguza v. Republic**, Criminal Appeal No. 5 of 2010 (unreported). It is submitted that the applicants have failed in establishing both.

For the fourth respondent it is submitted that the powers of the Court in Revision *Suo motu* are unfettered, but counsel proceeded to argue the gist of this complaint. He submitted that what the applicants are complaining about and refer to as additional documents are, in fact, the written observations of the fourth and fifth respondents. Counsel dismissed the complaint for being unjustified because the applicants as well as the respondents submitted their own written submissions too.

The submissions by counsel for the fifth respondent are that this ground raises a procedural issue and, like the fourth respondent's counsel, he argued that our powers in revision are unfettered. The learned counsel pointed out that the applicants are seeking a rehearing of the points of

preliminary objection that were earlier raised by them and determined by the Court. He similarly dismissed the complaint regarding additional documents as trivial because after all the parties responded to them by filing their own observations. Counsel added that the written observations were rendered irrelevant when the Court subsequently ordered filing of written submissions which, when filed, turned out to be materially similar in content to the written observations.

In resolving this point, we apply the settled test, that is, whether there was an error and whether the alleged error is patent and easy to see without any process of long drawn arguments. With respect, we find the alleged error to be rather obscure. More importantly, the parties had addressed this point before the Court made its decision on it. We think the complaint under paragraph (a) (i) springs from the following scenario as recorded in the impugned decision at page 60 – 61: -

> *"At the hearing the counsel for the 2nd and 3rd respondents asked for the directions on the following issues: One, the propriety or otherwise of the additional record of revision and additional parties which includes the Ruling of the Court not a subject for revision, in the absence of any order while the sufficiency of the previous record is cemented by the order dated 20th February, 2017...Dr Kapinga for MILLICOM INTERNATIONAL CELLULAR S.A (the 5th respondent) submitted that in these suo motu proceedings, the practice of the Court is unfettered because it*

can call any party or document including the written observations for the purpose of determining whether or not the applicant was heard in the execution proceedings before the High Court...On the other hand Mr. Ng'maryo submitted that by the nature of these proceedings, parties have been summoned and availed the record by the Court in order to assist it in the determination of what is before the Court. Thus, he argued that, what is sought by the 2nd and 3rd respondents seek to challenge the suo motu revision in the guise of seeking directions so as to entrap the applicant before the determination of the main matter... As for Mr. Bhojani, he complained that the 2nd and 3rd respondents are all out to drag the Court into unnecessary preliminary objections in order to stall the determination of the matter on merit... Mr. Kamara re-joined by reiterating that the directions sought by the 2nd and 3rd respondents were not a subject of the initial preliminary objections dealt with by the Court in the previous Ruling."

The Court's decision on this wrangle went like this at page 62: -

"Having seriously considered the submission of counsel we wish to point out that the complaint on the propriety or otherwise of the additional record of appeal and the additional parties seem to be challenging the competence of the record of the Revision. This point need not detain us because this is not a revision which was initiated by a party where the adversary party can challenge the propriety or otherwise of the record of revision. See: ***BALOZI ABUBAKAR IBRAHIM AND ANOTHER VS MS BENANDYS LIMITED AND TWO OTHERS,*** *Civil Revision No.*

6 of 2015 (unreported). Besides, it is settled that, the present proceedings were commenced pursuant to the direction of the Chief Justice dated 27th January, 2017. Thus, the Ruling of the Court contained in the additional record is not offensive having been availed to the parties in order to assist the Court in the determination of this suo motu revisional matter".

Now, is there an error apparent on the face of record here or it is mere re- agitation of the same matter? Perhaps we need to repeat what we stated in **Blueline Enterprises Limited v. East African Development Bank,** Civil Application No. 21 of 2012 (unreported) reproducing a paragraph from **Raja Prithwi Chand Lall Chaudhary v. Sukhraj Rai** (AIR 1941 SCI):-

"This Court will not sit as a Court of appeal from its own decision 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 be reopened 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."*

[Emphasis ours.]

In the submissions made by counsel for the respondents, similar arguments on the point have been made, citing cases which are based on a similar principle. For instance, two of the decisions referred to by counsel for the first respondent are of great value to our decision on this point. The first case is **Union of India v. Sandur Manganese and Iron Ores Ltd** (2013) 8 SCC 337 and the second is **Angella Amudo v. The Secretary General**, Application No. 4 of 2015 (East African Court of Justice). We are persuaded by the following statement in the latter case:-

> *"As long as the point has already been dealt with and answered, the parties are not entitled to challenge the impugned judgment in the guise that an alternative view is possible under the review jurisdiction".*

Therefore, this point regarding additional documents was raised and it was decided upon by the Court. We cannot pretend that we are unaware of the applicants' previous attempts to raise the same matter. First it was by way of preliminary objections that were concluded by a ruling dated 27th February 2017, and then by an application for review that was concluded by a ruling dated 20th October 2017.

We ask ourselves again, whether we have here an error manifest on the face of the record, but we see none. All we see is the applicants'

subtle dissatisfaction with the decision on the point. Also, glaringly missing, is proof that the alleged error occasioned a miscarriage of justice, a huddle which the applicants must cross, but have not. Our conclusion on the complaint under paragraph (a) (i) is that it does not meet the standards required for a review, so we accordingly dismiss that ground.

Next, we shall consider the complaints under paragraphs (a) (ii) and (iii). Although the next two grounds are also complaints associated with the documents known as written observations, and the record of revision already discussed above under (a) (i), we shall consider them in their separate form.

Under paragraph (a) (ii) the complaint is that the directions of the Court regarding the written observations, given by it at the time of delivering its Ruling deprived the applicants an opportunity to respond to those written observations. This complaint stems from paragraph 9 of the affidavit by Mr. Rweyongeza, which states:-

> *"9. That the directions requested by the applicants were not given till the Court read its Ruling on 26th July, 2018. With that ruling the applicants had no opportunity to reply to the written observations before proceeding with the case. The applicants' written submissions to which the written observations purported to address were filed before an additional record was served on the applicants".*

There are three affidavits in reply, that is, by FAyaz Bhojan for the first respondent (paragraph 10), Dr Wiibert Basilius Kapinga for the fourth respondent (paragraph 11) and Rosan Mbwambo for the fifth respondent (paragraph 7). In all the affidavits in reply, the deponents dispute the applicants' assertion in paragraph 9 of the affidavit and they aver that the applicants had more than one opportunity to respond to the written observations. Taking an instance by reproducing Mr. Mbwambo's reply, it goes thus:-

> *"7. That what is stated in paragraph 9 of the affidavit which are repetitive, are all not true and the 5th respondent reiterates what is in paragraph 6 herein above. It is in addition stated that the applicants were given two opportunities to be heard by way of written submissions. They filed their joint written submissions in this Honourable Court first on 25th May and then rejoinder on 8th June, 2018. It is further stated that written observations having been expunged following the applicants' concerns the need for directions got overtaken by events."*

We are now going to pronounce ourselves on this complaint, honestly wondering how it differs from the first complaint. In the written submissions, the parties virtually stated the same as what is in their respective affidavits. The issue for our determination is whether there was an error, and whether the same was manifest. For the applicant, an

interesting argument has been made suggesting that the issue is not that the applicants did not read the written observations, but that in the absence of directions from the Court, they could not figure out what they should have done with them. It is submitted that the giving of the directions at the end when the applicants could not usefully react to the written observations, is what constitutes an error apparent on the face of the record.

Obviously, there are two or more opinions about that complaint and that in itself erodes away the contention that the error, if any, is patent. Then there is an issue of consistency on the part of the applicants on this, because under paragraph 9 of the affidavit they allege that the written observations were purportedly a response to their written submission. Yet, under paragraph 2.10 of their present written submissions, the applicants argue that the written observations were the fourth respondent's support to the first respondent.

The issue of written observations was the third point on which the applicants had requested directions. The Court's conclusion on that was that its jurisdiction in revision is unfettered. Anyhow, it takes a long-drawn argument to see the basis of the complaint, and we think the argument places us too close to the wood to see the trees in this complaint. We reiterate the fact that the Court made its decision on the complaint

regarding additional documents, so the applicants should not drag us into sitting on appeal of our own decision. Secondly, we are satisfied that the applicants' complaint that they were denied a hearing because the directions did not come early, is inconsistent with their own affidavit as well as the fact that they filed written submissions. Our conclusion is that the complaint under paragraph (a) (ii) does not qualify as an error manifest on the record. We dismiss this ground.

As for the complaint under paragraph (a) (iii) the gist is that the Court dealt with the record other than what was before the High Court which it should have dealt with in terms of section 4 (3) of AJA and thereby occasioned injustice. It is also argued that there was nothing to call and revise. This complaint was raised as a preliminary issue questioning the Court's jurisdiction and it was dealt with by the Court from page 65 to page 68 of the record of appeal. At page 68 the Court concluded as follows:-

> *"On our part we have found that apart from the preliminary point of objection questioning the jurisdiction of the Court on the ground that what is intended to be revised is no longer before the High Court, ail the remaining points of objection touch on alternative remedies available to the applicants. These were determined by the court in previous Ruling in this matter which was handed down on 23rd February, 2017. Thus, we shall not embark in the endeavour*

to readdress them or else we shall be going against the sound and prudent policy that litigation must come to an end.

We wish to add that, in the case of ***BALOZI ABUBAKAR IBRAHIM*** *(supra), execution proceedings were part of what was subjected to revision suo motu and as such, the present case is not the first case subject to the execution order or findings to suo motu revision proceedings. Moreover, we agree with the applicant that she could not invoke section 38(1) of the CPC which provides:*

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

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

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

It beats us how the present complaint may be maintained, because it is self-defeating. If there was nothing to be called from the High Court for examination and revision as argued in that complaint, how then is

there a suggestion, within the same breath, that the Court ought to have called what was before the High Court? What we gather from the record however, is that the complaint is actually that the Court should have desisted from sitting on revision and leave the disgruntled first respondent to pursue alternative remedies available under the Civil Procedure Code, Cap 33 R.E 2002. Fine, but the same argument was raised during the hearing of the revision and it was ultimately dismissed as shown above. Should we now treat it as an error manifest on the record? We are afraid we cannot, because if we go that path there will never be an end to litigation, and the concept of functus officio will cease to apply.

In **THE UGANDA CIVIL JUSTICE BENCH BOOK**, The Law Development Centre, 1st Edition 2016 the authors write the following at pages 394 to 395:-

> *"In **F.X Mubuuke v. UEB** it was held that for a review to succeed on the basis of an error on the face of record, the error must be so manifest and clear that no court would permit such an error to remain on the record. A wrong application of the law or failure to apply the appropriate law is not an error on the face of the record".*

Incidentally, the excerpt in that book reflects similar views as those of the author in the other book which has been cited by the applicants, that an inappropriate application of the law, is not in itself a ground for

review. Further in **Golden Globe International Services and Quality Group Limited v. Millicom (Tanzania) N.V and James Alan Russel Bell**, Civil Application No. 195/01 of 2017, we reproduced nine principles for review from the decision in the case of **Angella Amudo v. The Secretary General East African Community** (supra). We are particularly interested with principle (e) which states:-

> *"e) In review Jurisdiction mere disagreement with the view of the judgment cannot be ground for invoking the same. As long as the point is already dealt with and answered, the parties are not entitled to challenge the impugned judgment in the guise that an alternative view is possible under the review jurisdiction...".*

Like in the previous two grounds, we find the third complaint falling far below the requirement under rule 66 (1) (a) of the Rules. We accordingly dismiss it.

The fourth complaint is, we think, mouthful. However, in effect it is a complaint that both in the Chief Justice's direction and in the Court's ruling dated 26th July 2018, the issue for determination was only whether the first respondent was denied a hearing, but the Court is being blamed for casting its net wider by deciding another issue which was not before it and wrongly applied Order XXI Rule 88 of the CPC which was not

applicable to the kind of property in question, which had already been sold. The complaint is spelt like this, in the affidavit of Mr. Rweyongeza:-

"12. That, the applicants, to protect their interest in the suo motu revision, had proposed more issues to be considered in the suo motu application so as to have the matter conclusively determined. The issues which the Applicant considered pertinent and were raised in Civil Application No. 195/01/2017 are:-

1) *Whether the 1st respondent is not the judgment debtor and thus his alleged shares were attached and sold fraudulent (sic) or*
2) *Whether the 1st respondent legally exists in Tanzania independent of the judgment debtors, or*
3) *Whether the 1st respondent is different from the judgment debtors such that its assets in Tanzania are not attachable in execution of a decree or*
4) *Whether the 1st respondent was not aware of the execution proceedings which led to attachment and sale of Its alleged shares.*
5) *Whether forgery and corruption was committed in the attachment and sale by public auction of the 1st respondent's shares and who committed it"*

13. That, the Court in Civil Application No.195/01/2017 dismissed this issue, sticking to only one issue framed in the direction of the Chief Justice namely whether the 1st respondent was heard before her shares were sold.

14. That, in the Ruling of 26/07/2018, the Court introduced and considered more issues than what had been raised in the direction of the Chief Justice such as falsification of records not attributable to the applicants but 3rd parties and without affording an opportunity to have evidence adduced on what is said to be falsification."

Paragraph 14 of Mr. Rweyongeza's affidavit is of particular interest in this complaint and it has been responded to by the affidavits in reply. It is contended by the deponents of the affidavits in reply that the issue of falsification was part of the first respondent's complaint to the Chief Justice, and it was necessary for the court's final determination of the issue of denial of a hearing. We shall take the affidavit in reply by Dr Kapinga for instance, to demonstrate that position. Paragraph 13 of that affidavit in reply addresses paragraphs 14 and 15 of Mr. Rweyongeza's affidavit. It states:-

"13. Paragraphs 14 and 15 are also disputed. To reach a conclusion on whether the 1st Respondent, Millicom (Tanzania) NV ("Millicom NV"), had been heard during the execution process before Millicom NV's shares in MIC Tanzania Limited were attached and sold, it was necessary for the Court to consider the question of falsification of certain documents in the Record. This is because by establishing that certain court orders were falsified by the addition of Millicom NV's name to those

orders after the execution process was completed, it is established that Millicom NV was not heard during the execution process."

The applicants have submitted that the issue for determination was narrow but the Court exceeded the scope by venturing into the procedure under the Civil Procedure Code Cap 33 R.E 2002. By doing so, it is submitted, the Court wrongly concluded that the first respondent could not have made use of Rule 38 of Order XXI of the CPC. The applicants made the following unequivocal submission on the point;

"We submit that the application of Order XXI Rule 88 to the facts of the application that was before the Court is an error manifest on the face of the record."

The respondents fought back. They submitted that the applicants have no power to prescribe on what the Court ought to decide in revision *suo motu*. Counsel for the fourth respondent submitted that even if the issue in the Chief Justice's direction was narrow, that did not preclude the Court from determining other issues that may have emerged in the course of hearing. For the first respondent it was submitted that the Court identified two issues, namely, the propriety or otherwise of the sale of the shares, and whether the first respondent was given a hearing before that sale. Further that the Court addressed the issues by analysing the submissions of counsel on those issues. For the fifth respondent counsel

submitted that the complaint now under discussion needs a long-drawn argument to determine, therefore it does not meet the standard of an error manifest on the face of the record.

In determining the complaint under paragraph (a) (iv) we shall begin by reproducing the relevant part of the Chief Justice's direction: -

> *"Let revision proceedings be opened suo motu* ***to determine the appropriateness and propriety of the order/proceedings*** *over which the complainant contends the denial of right to be heard. The hearing to be fixed in February 2017 sessions and all parties concerned be notified of the date of hearing.*
>
> *I.H. JUMA*
>
> *Ag. CJ*
>
> *27/1/2017" (emphasis supplied)*

We shall look at this issue from different angles. First of all, we do not see any ambiguity in the Chief Justice's direction to the Court because it clearly calls upon it to determine the appropriateness and propriety of the order/proceedings, which is what the law mandates the Court to do under section 4 (3) of AJA. Then it hints that the first respondent complained that he was denied a hearing. We think the task of determining the appropriateness and propriety of the order and proceedings is wider than mere determination of whether the complainant was heard or not. The direction would not place the Court in a strait

jacket, we think, and it would be impractical for the Court to be expected to go back to the Chief Justice for new directions every time we came across other forms of impropriety. Doing so would, in the words of the Court, be abdication of its statutory duty under section 4 (3) of the AJA.

Secondly, the applicants are unamused by our resort to the provisions of Order XXI Rule 88 of the CPC and this, to them, constitutes an error apparent on the face of the record as referred to above. It is stunning that the applicants have decided to cast stones on what they themselves brought about. Let the record speak. At page 66 of the record the Court stated:-

> *"It was further submitted that, since the subject under revision stems from execution proceedings, the law provides for the avenue of alternative remedies whereby all complaints as to propriety or otherwise of execution of the decree can be remedied by way of an application or suit before the High Court in terms of the provisions among others, section 38 of CPC."*

That was the suggestion made by the applicants, preferring use of the CPC to the revisional jurisdiction. We were to pronounce ourselves on that point, and that is found on page 69 of the record after reproducing section 38 (1) of the CPC:-

> *"In the light of the bolded expression, the scope of questions to be determined by the executing court is limited*

to those arising between the parties to the suit in which the decree was passed. Since the applicant was not a party, she could not invoke section 38 (1) of the CPC."

What is clear from the foregoing is that the applicants were aware that the proceedings before the Court were for determination of the propriety or otherwise of execution proceedings, only that they invited the Court not to deal with it. Certainly, the applicants' suggestion that section 38 (1) of the CPC could be brought into play, could not have been made in addressing the complaint of denial of the right to be heard. This cripples the applicants' argument that the Court ought not to have gone beyond the issue of the right to be heard. Secondly, after the applicants' argument that the matter could be dealt with under the CPC, the Court's resort to Order XXI Rule 88 cannot be said to be an error manifest on the face of the record even if the applicants hold different views on the conclusion. Our reference to Rule 88 of Order XXI of the CPC was made in the course of determining the applicants' suggestion that Rule 38 of Order XXI could be applied. Thirdly, if the applicants have perceived an error under this complaint, the same is far from being a patent one, despite this long-drawn argument.

For those reasons, we find the complaint under paragraph (a) (iv) to be devoid of merit. We dismiss it.

The last complaint under the category of apparent errors is in paragraph (a) (v) and it is on the Chief Justice's direction again. However, this complaint is also difficulty to head or tail, so the crux of the matter going by the Notice of Motion, eludes us. It alleges that at the time of deciding the issue of the right to be heard on the basis of the constitutional provisions, we left out that part of the Constitution which provides how the applicants ought to have exercised that right to be heard.

Luckily, the applicants' counsel shed more light in the written submissions. We gather from the written submissions that the applicants are complaining that the Court was not as keen in ensuring that the applicants enjoyed their right to a hearing in the same way it treated the respondents. Then the first respondent is painted as a person who initially had no confidence in the courts or the justice system of the land, yet he received a fairer treatment than that which was received by the applicants, who have remained faithful to the courts and justice system of this jurisdiction.

The respondents' submissions in reply are that Article 13 (6) (a) of the Constitution of the United Republic, 1977, provides the content of the right to be heard and it guides the courts in their determination of matters. It is on that basis, it is submitted, that the Court concluded that the execution proceedings were a nullity for having been conducted without

giving the first respondent a hearing. They further submitted that this complaint is a disguised appeal.

Equal treatment of parties to a case is a Constitutional requirement under Article 13 (6) (a) so we share the views of the learned counsel for the applicants on this. What we are not prepared to do is to treat parties differently on the basis of their trust to the Court or the lack of it. We cannot reward or punish a party based on their perceptions of our justice system, because that will be a betrayal to our calling and oath of office. We have had occasions to say, like in, **Richard Wambura v. Republic,** Criminal Appeal No. 167 of 2012 (unreported), that:-

> *"We have to ensure that the streams of justice are always kept pure at all stages.... **Justice must never be rationed at all".*** [Emphasis added].

The question that stands out for our determination is whether in our application of the Constitutional provisions on the right to a hearing, we denied the applicants the same right. Like looking for a needle in a haystack, this complaint is hard to see and it falls far below the requirements under Rule 66 (1) (a) of the Rules. In our view, it is difficult to rationalize denial of the right to a hearing when counsel entered appearance and addressed the Court on issues that were known to all the parties. With respect, we decline the invitation to go about considering

every complaint, even those which are not envisaged by Rule 66 of the Rules. The Rules would not let us do that in the exercise of our jurisdiction of review. Thus, this ground is similarly without merit and we dismiss it.

We shall now consider the grounds under paragraph (b) which allege that the applicants were deprived right of hearing in contravention of Rule 66 (1) (b) of the Rules. This is also divided into five sub paragraphs as earlier intimated.

Complaint (b) (i) is that the court released and restored the shares to the first respondent without proof of ownership and without affording the applicants an opportunity to be heard. In the written submissions the applicants have argued that the only forum at which the order of release of the shares could have been made is at the hearing of a suit or application to set aside the sale, under Rule 76 of Order XXI of the CPC.

Part of the written submission charge that: -

> *"... the applicants, though joined as parties to the **suo motu** application for review(sic) were reduced to a level of disengaged observers as they had no opportunity to defend their rights."*

In response, counsel for the first respondent has submitted that the decision of the Court was arrived at after hearing all the parties. Citing the case of **Nguza Vikings and Jonathan Nguza v. Republic** (supra) counsel has submitted that the applicants had multiple opportunities to

present their submissions. Paragraph 47 of the first respondent's submission states: -

> *"47. Millicom NV submits that the Court, in its 39 – pages Ruling, carefully considered each issue before the Court, reviewed the parties' extensive arguments thereto and provided a detailed and fully reasoned judgment on the matters before it."*

For the fourth respondent counsel made similar arguments referring to the same case of **Nguza Vikings and Jonathan Nguza v. Republic** (supra). Paragraph 43 of the submissions of the fourth respondent's counsel goes thus: -

> *"on this basis above, the applicants cannot show that they were wrongly deprived of an opportunity to be heard by the Court during the Course of the Revision. As mentioned above, at the hearing on 11 May 2018, all parties were directed by the Court to make their arguments on the dispute in writing by filling and exchanging submissions at two-weeks intervals on 25 May 2018 and 8 June 2018. The applicants thus filed two rounds of extensive written submissions. Moreover, from the Record, Millicom International observes that the Applicants also filed submissions on 13 and 14 February 2017 and again on their additional preliminary objection also filed several hundred pages of documents as a supplementary record."*

The counsel for the fifth respondent anchored his submissions on the **Nguza Vikings Case** too and invariably made arguments similar to the first and fourth. If we may reproduce paragraph 27 of his submissions it says:-

> *"27. Even as a matter of fact, the applicants cannot show they were denied a hearing.*
>
> *(a) first, the applicants complain they were unheard on the proof of Millicom NV's ownership of the disputed shares [Ground (b) (ii)]. But they have made extensive submissions on the issue in paragraphs 15 to 18 of their 25 May Written Submissions and paragraph 21 of their 8 June Reply Written Submissions."*

We are now going to consider those arguments. In a simple language, the applicants are complaining that we should not have determined ownership of the shares because that was the preserve of the High Court in the exercise of its powers under Rule 76 of Order XX1 of the CPC. In the impugned Ruling we started our deliberations by posing a question at page 91 of the record: -

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

was not conducted as per mandatory dictates of the law and we shall state our reasons."

Then after giving the reasons for our conclusion, we stated the following at page 98 of the record : -

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

Subsequently we rejected the then second respondent's (2nd applicant) plea that we treat it as a bona fide purchaser of the shares. We were of the view that the sale was illegal and there can never be a bona fide purchaser in an illegal sale nor did title pass. Our finding on the point is not scripture, and may be susceptible to criticism. As the final Court of the land it is our duty in a fitting situation, to correct errors arising from our decisions in terms of the Rules. Have the applicants demonstrated that this is a fit case for us to perform that duty? Is the applicant's contention that they were not given a hearing consistent with the record?

It is our considered conclusion that the applicants have not demonstrated that this is an ideal case for exercising our powers of

review. Before making our decision in Civil Revision No. 3 of 2017 we had before us materials, including the applicants' submissions, to consider. It is our conclusion that those materials presented by the parties constituted a hearing. We conclude this part by reproducing an excerpt from **Autodesk Inc. V. Dyson** (No. 2) – 1993 HeA 6; 1993 176 LR 300, cited in **OTTU on Behalf of P.L. Asenga & 106 Others Super Auction Mart & Court Brokers, The Royale Orchard Inn Limited and Amikam Ventures Limited v. AMI (Tanzania) Limited**, Civil Application No. 20 of 2014 (unreported).

> *"(iii) It must be emphasized however, that the jurisdiction is not to be exercised for the purpose of re-agitating arguments already considered by the Court; nor is it to be exercised simply because the party seeking a rehearing has failed to present the argument in all its aspect or as well as it might have been put. The purpose of the jurisdiction is not to provide a back door method by which unsuccessful litigants can seek to re-argue their cases."*

We ask ourselves; what did the justice of this case demand? After our conclusion that the sale was illegal, would the applicants have us sit on the fence and let the parties sort out the consequences for themselves? We think what we did was in the best interest of justice, otherwise there would be no point for us intervening under section 4(3) of the AJA if the

parties ended up with ornamental justice to carry home. For those reasons we find no merit in complaint (b) (i) and we dismiss it.

The complaint under paragraph (b) (ii) is that the absence of the fourth respondent (now the third respondent) deprived the applicants the right to a hearing as the said third respondent is the recipient of the money that was paid for the shares. The Court noted that the third respondent was under liquidation but it is still being blamed for not making efforts to summon the liquidator.

In the submissions, counsel for the applicants has argued that we ought to have satisfied ourselves that the said third respondent had, in facts, gone under liquidation. It is submitted that fair hearing under the Constitution rules out; "*exclusion of a party who has been a party to the proceedings.*"

The applicants have a proposal of what should have been done. Under paragraphs 4.37 of the submissions counsel proposes this course: -

> "... *for the Court to proceed against a party to an application, that party must have failed to appear at the hearing. A party who is not notified of the hearing cannot be taken to have failed. We humbly submit that the exclusion of the 3rd respondent under the circumstances stated in the ruling of the Court and even without seeking*

any comments from the applicants denied the applicants an opportunity to be heard as we shall demonstrate in our submission later. The least that should have been done, in our humble submission was to adjourn the matter and join the liquidator."

Counsel for the first respondent submitted in response to the above argument. He submitted that the complaint is unclear as to how the absence of the third respondent or its liquidator affected the applicants' right to be heard. In any event, it was submitted, that is not a ground for review under Rule 66(1) (b), of the Rules.

The fourth respondent's counsel submitted that the report gathered from the process server's affidavit was that the third respondent had been liquidated. Counsel submitted that in that situation even the liquidator was *functus officio*. Counsel for the fifth respondent made more or less similar arguments

With respect, we think this complaint is destined to fail. There is no nexus between the absence of the third respondent at the hearing and the applicants' exercise of their right to be heard. After all, the main issues that we were called upon to determine in the revision were whether the execution proceedings and the resultant orders were proper and whether the first respondent had been heard in those proceedings. We are trying to figure out how the applicants failed to present the arguments they had

in mind on those issues just because of the third respondent's absence at the hearing. We cannot grasp the essence of this complaint so we find it to have no merit and we dismiss it.

The complaint under paragraph (b) (iii) is that the applicants had nothing to do with the falsification of documents, yet the Court concluded this issue without giving them an opportunity to be heard. In their written submissions the applicants are arguing this point in connection with the issue of the title to the shares. It is submitted that the issue of falsification should only have led the Court to conclude that the first respondent was not heard, but it did not justify the conclusion that the shares should be returned to her.

Counsel for the first respondent submitted that the applicants were heard on the issue by submitting on it from paragraphs 23 to 38 and that the submissions were considered by the Court from pages 39 to 41. Similarly, counsel for the fourth and fifth respondents referred to what they called extensive submissions by the applicants, as constituting a hearing.

What is clear to us is that we nullified the execution and sale on the ground that the procedures under the CPC had not been observed. This analysis appears from page 84 of the record (page 42 of the Ruling) to page 94 of the record (page 52 of the Ruling). After the Court had

concluded that the sale was illegal as a result of irregularities that could not be cured, it observed that the certificate of sale had been falsified. Since the applicants are denying involvement in the falsification, rightly so may be, what sort of a hearing did they want to be given other than what they were given? At page 82 of the record or page 40 of the Ruling we said the following in relation to the second applicant's submissions: -

> *"It was argued that as a bona fide purchaser, she is protected under Order XXI Rule 76 and as such, she cannot lose her title and the conduct of the executing Court has nothing to do with her. (To support the proposition the case of* ***OMARI YUSUFU VS RAHMA AHMED ABDUKADR*** *[1987] T.L.R. 169 was cited."*

Isn't the foregoing paragraph an indication that the applicants made submissions in relation to what was considered to be irregular conduct of the execution process? We see no denial of the right to a hearing on this aspect because in exercising that right the applicants blamed the suspicious conduct on the executing Court. Whether or not the Court accepted the applicants' argument as true, that is something else altogether, but there was no violation of the right to a hearing. We dismiss this complaint.

Paragraph (b) (iv) complains about the first applicant being condemned as "a cause of her own misfortune" without being given an

opportunity to be heard. To guard against missing the context of the applicants' submissions, we reproduce the relevant part in relation to the first applicant: -

> *"As a purchaser, what she had done is best and we submit, that an assurance from the Court, was enough for her to go ahead. We humbly submit that had the Court given the 1st applicant an opportunity to be heard, the Court could have appreciated why she went ahead to acquire the shares after an assurance from the Court."*

Counsel for the first respondent submitted that the Court's examination of the execution process discovered illegalities to which the first applicant was privy. For the fourth respondent it was again submitted that the applicants' counsel made lengthy submissions on all points and that they cannot show that they were wrongly deprived of an opportunity to be heard. The fifth respondent's counsel located the lengthy submissions of the applicants: -

> *"... in paragraphs 50 to 53 of their 25 May Written Submissions and paragraphs 42 – 49 of their 8 June Reply Written Submissions."*

We need to put the compass of the matter right, lest we find ourselves considering the merit of our decision in Civil Revision No. 3 of 2017. In our considered view, the applicants are wrestling with the merits

of the decision of the Court in finding them privy to the irregular conduct of the execution. However, we must repeat, merit may only be challenged on appeal, and good reasons for appeal are not necessarily good reasons for review. See the case of **Jayantkumar Chandubhai Patel @ Jeetu Patel & 3 Others v. The Attorney General & 2 Others**, Civil Application No. 160 of 2016 (unreported) where we stated in part;

> *"Even if, for the sake of argument, the Court wrongly held that the applicants' action was untenable on account of not being sanctioned by the law under section 4 of the Act, we are inclined to find that complaint as not being a fitting ground for review. We think that such an error must have resulted from an incorrect exposition of the law which on the authority of* ***Chandrakant Joshubhai Patel*** *(supra) may be a ground of appeal but not a justification for review of a judgment of the Court".*

As for the right to a hearing, on the complaint under (b) (iv) we think the applicants were afforded that right. We have taken a look at page 55 of our Ruling (page 97 of the record) which bears out the conclusion that the applicants addressed the Court on the propriety of the attachment and sale. It is plain that in the course of their submissions counsel for the applicants even suggested lifting of the veil of incorporation of the fifth respondent, which proposal was rejected by the Court. This thread of submission was made in connection with the

complaint in paragraph (b) (iv). What more did the applicants expect? We find no merit in this complaint, so we dismiss it.

Now for the last complaint, under paragraph (b) (v), which is that; the question of how the first applicant should get her money back was not before the Court for determination, yet it was decided without giving her an opportunity to be heard. As a consequence, it is submitted, the first applicant who paid money under the court process is left to look for that money by herself.

In respect of this last complaint, the applicants have maintained that they were invitees of the Court to the auction and paid the money into the court. They submit that they were not given a hearing when we ordered as here: -

> *"For this reason, we set aside the purported sale and order the purchaser to be refunded the purchase price by whoever is holding that money."*

For the first respondent it is argued that the Court could not help a wrongdoer. It is submitted further that the Court took the impugned position having been satisfied that the first applicant became aware that the fourth respondent was not the owner of the shares in the fifth respondent yet it went ahead and purchased them. The fourth and fifth respondents, as in the previous complaints under paragraph (b), did no

more than establish that the applicants were given a hearing before the decision complained of was reached.

The right to be heard is so basic that in some instances it has been said that even God would not punish Adam and Eve before He had heard each of them. See **Roman Mkini v. Republic** [1980] T.L.R 148. In **Independent Power Tanzania Limited v. Standard Chartered Bank (Hong Kong) Limited** Civil Revision No. 1 of 2009 (unreported) the Court reproduced the following paragraph from the judgment of the Supreme Court of India in **Union of India v. Tulsi Ram** AIR 1985 S.C 1416:-

> *"The principles of natural justice constitute the basic elements of fair hearing, having their roots in the innate sense of man for fair play and justice which is not the preserve of any particular race or country but is shared in common by all men".*

We are called upon to determine whether in Civil Revision No. 3 of 2017 we violated those sacred principles of natural justice. If we did, then certainly the decision in that case will have to be vacated. Were the applicants not heard as alleged?

Invariably in all cases cited by the learned counsel, courts are criticised for deciding matters without summoning persons who are ultimately affected by the decisions, or for raising issues at the time of

composing judgment and deciding them without hearing the parties. Such cases are like, **Abbas Sherally and Mehrunisa Abbas Sherally v. Abdul Sultan Haji Mohamed Fazalboy,** Civil Application No 133 of 2002 and **Said Nassor Zahor and 3 Others v. Nassor Zahor Abdulla El Nabahany and Another,** Civil Application No. 169/17 of 2017 (both unreported).

It has tasked us quite considerably in this case as to what, in the applicants' understanding, would have amounted to being given a hearing. In our view there is no myth about the fact that a party was heard or not, because though it is a legal requirement, it is also factual. In this case the applicants entered appearance through seasoned advocates who addressed the Court orally and presented a thicket of written arguments and authorities in terms of the Rules. It would be too ambitious, we think, to expect that there would be a distinct session for the parties to be heard in every point raised as a complaint in the present application. We are aware that the right to a hearing is exercised in different forms under different legislations, such as by presentation of witnesses' affidavits as per Rule 21A of the Election Petitions Act Cap 343 as amended. Also, under rule 49 of the High Court (Commercial Division) Procedure Rules, 2012 GN No. 200 of 2012, statements of witnesses are akin to what is known as examination in chief in the ordinary hearing.

Where a party seeks to exercise the right to a hearing in a style other than the way it is prescribed by the law governing a particular situation, the court will not allow it. In the case of **Afriscan Group (T) Limited v. Said Msangi**, Commercial Case No. 87 of 2013, High Court, Commercial Division (unreported), the High Court rejected a prayer of one of the parties to call a witness to make an oral statement in lieu of the written witness statement under rule 49 of the Commercial Court Rules as cited above. The said party sought to do so purportedly in the exercise of its right to a hearing. In rejecting that prayer, the learned High Court Judge made this statement, which we wish to adopt: -

> *"The right to be heard, just like other rights, must be exercised within the confines of the law so as to avoid further breach of justice."*

In the Court of Appeal, the right to a hearing is exercised by presentation of written submissions under Rule 106 of the Rules and/or oral submissions. In Civil Revision No. 3 of 2017 as already shown above, the applicants made use of both written and oral addresses to the Court, so the contention that they were not heard is hard to comprehend.

We therefore find the complaint alleging that the applicants were not given an opportunity to be heard, generally unsubstantiated. The order that the applicants should be refunded by the one holding the

money was consequential upon nullifying the sale. We do not conceive a situation where a separate hearing would be conducted on this point.

For those reasons, this application is dismissed with costs.

DATED at **DAR ES SALAAM** this 3rd day of July, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

Ruling delivered this 9th day of July, 2020 in the presence of Mr. Theodore Primus, learned counsel for the Applicants and Mr. William Mang'ena, learned counsel for the 1st Respondent, Mr. Audax Kameja, learned counsel for the 4th Respondent, Mr. Ndanu Emmanuel, learned counsel for the 5th Respondent and in the absence of the 1st and 3rd Respondents, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL