

**IN THE HIGH COURT OF TANZANIA**  
**(COMMERCIAL DIVISION)**  
**AT DAR ES SALAAM**  
**COMMERCIAL CASE NO. 112 OF 2017**

**MOTO MATIKO MABANGA.....PLAINTIFF**

**VERSUS**

**VODACOM GROUP LIMITED.....1<sup>ST</sup> DEFENDANT**

**VODACOM TANZANIA PUBLIC LIMITED**

**COMPANY.....2<sup>ND</sup> DEFENDANT**

**VODACOM INTERNATIONAL LIMITED .....3<sup>RD</sup> DEFENDANT**

**VODACOM CONGO DRC SPRL.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**B.K. PHILLIP, J**

In this case the plaintiff alleged as follows; On 6<sup>th</sup> day of May 2007, the plaintiff acting for Namemco Energy PTY Limited (Hereinafter to be referred to as "Namemco") and on his own behalf entered into a consultancy agreement with the 3<sup>rd</sup> defendant under the direct participation and supervision of the 1<sup>st</sup> defendant, for provisions of corporate and general advice to the 1<sup>st</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants. The plaintiff accomplished his assignment as per the contract successfully. However, the 1<sup>st</sup> and 2<sup>nd</sup> defendants deliberately without good cause refused/neglected to pay the plaintiff his fees for the work done.

Consequently, the plaintiff decided to lodge a case against them at the Commercial Court of Kinshasa at Gombe vide Case No. RCE 1819/1846, which was finally determined in favour of the plaintiff. He was awarded a sum of USD 21,000,000 as special and general reliefs. Sequel to that judgment, the 1<sup>st</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants, in their efforts to rescue their shares in Vodacom Congo DRC SPRL that were attached, initiated negotiations process which culminated into a settlement agreement in which the 3<sup>rd</sup> defendant agreed to pay the plaintiff a total of USD 10,000,000/= free of any taxes. In execution of the aforesaid settlement agreement, the 1<sup>st</sup> and 2<sup>nd</sup> defendants paid the plaintiff a sum of USD 9,250,000/= only on a reason that the sum of USD 750,000 was for taxes payable to the government of Democratic Republic of Congo ("DRC") as ordered in the judgment. It is the plaintiff's case that the said sum of USD 750,000/- was to subject any taxes whatsoever because the agreed sum of USD 10,000,000/- was not paid in accordance with the orders of the Court, but was paid by virtue of the settlement agreement. That by failing to pay the said balance of USD 750,000/=, the 1<sup>st</sup> and 2<sup>nd</sup> defendants repudiated the settlement agreement, therefore the terms and conditions of the judgment of the Commercial Court of Kinshasa in case No. RCE

181/1846 were revived and the plaintiff is entitled to enforce it to the extent of the unpaid amount and interests.

In addition, it is the plaintiff's case that the plaintiff revived the aforesaid judgment of the Commercial Court of Kinshasa and on 12<sup>th</sup> March 2014 the court ordered the 3<sup>rd</sup> defendant and constructively the 1<sup>st</sup> defendant to pay to the plaintiff the amount due as of that date, that is, USD 16,530,027.48 plus 63,000/= Congolese Francs, failure of which the 3<sup>rd</sup> defendants shares in Vodacom Congo DRC SPDL would be attached and auctioned. On 25<sup>th</sup> of March 2015, the Commercial Court of Kinshasa ordered the attachment of the shares belonging to the 3<sup>rd</sup> defendant held in Vodacom Congo DRC SPRL for and on behalf of the 1<sup>st</sup> defendant, for auction thereof. Further the court informed the 3<sup>rd</sup> defendant the right to voluntarily dispose the said shares and pay the plaintiff's money.

Furthermore, The plaintiff alleged that the 3<sup>rd</sup> defendant in connivance with the 1<sup>st</sup> defendant conspired not to dispose the said shares as ordered by the court. At the time of attachment of the shares the decretal amount had increased to a tune of USD 18,360,000 which together with 63,600/= Congolese francs made up a total sum of USD 20,080,000/=. Moreover, the plaintiff maintained that he is entitled to execute the judgment against

the defendants in law and equity as they are a single trading unit. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants are agents of the 1<sup>st</sup> defendant.

In this case the plaintiff prays for judgment and decree against the defendants as follows;

- (a) *The honorable court may be pleased to open the veils of incorporation of the 1<sup>st</sup> and 3<sup>rd</sup> defendant and be pleased to hold that they are practically one and the same and therefore liable for the Judgment pronounced, against either of them jointly and severally.*
- (b) *The Honorable Court be pleased to order the 1<sup>st</sup> and 3<sup>rd</sup> defendants jointly and severally to pay to the plaintiff the unpaid amount under the Judgment that is USD **20,080,000/-** being the unpaid principal amount (**USD 11,250,000/-**) plus interest accrued as at the date of filing of this suits.*
- (c) *Interest on the above to the date of Judgment and thereafter to the date of final settlement of the decree at the Court's rate.*
- (d) *Costs and any other reliefs that the honorable Court may deem it fit to grant.*

In their joint written statement of defence, the defendants averred as follows; That the first contract between Namemco acting through its representative, the plaintiff herein and 3<sup>rd</sup> defendant was signed on 6<sup>th</sup> May 2007. It was agreed in the contract that Namemco would assist the 3<sup>rd</sup> defendant to resolve various issues it had with its minority shareholder in the 4<sup>th</sup> defendant. At that material time, the 3<sup>rd</sup> defendant held 51% of the

shares in 4<sup>th</sup> defendant. The first contract was terminated due to non - performance and effluxion of time. On 12<sup>th</sup> September 2007, the parties entered into another contract ("the second contract") which superseded the 1<sup>st</sup> contract. The governing law and jurisdiction in both contracts were agreed to be the law of the Republic of South Africa and the High court of South Africa respectively. In both contracts the parties were the 3<sup>rd</sup> defendant and Namemco. The plaintiff was not a part to those contracts. On 28<sup>th</sup> July 2010 Namemco instituted a suit against the 1<sup>st</sup> and 3<sup>rd</sup> defendants in the High Court of South Africa, Gauteng in Johannesburg claiming for a sum of USD 40,800,000/- plus interests as success fees for services allegedly rendered in the 1<sup>st</sup> and 2<sup>nd</sup> contracts. However, Namemco stopped that suit. On 4<sup>th</sup> April 2011, Namemco filed an ex-parte application at Commercial Court of Kinshasa in the DRC seeking for orders for provisional attachment of the 3<sup>rd</sup> defendants shares in the 4<sup>th</sup> defendant which order was granted. On 6<sup>th</sup> May 2011 Namemco filed a suit in the Commercial Court of Kinshasa, Gombe against the 3<sup>rd</sup> and 4<sup>th</sup> defendants alleging breach of the 1<sup>st</sup> and 2<sup>nd</sup> contracts aforesaid. On 24<sup>th</sup> January 2012, the Commercial Court of Kinshasa at Gombe delivered its judgment in which it ordered the 3<sup>rd</sup> defendant to pay Namemco a sum of

USD 20,000,000/= for the principal claim and damages to a tune of USD 1,000,000/= plus interest. The 3<sup>rd</sup> defendant filed an appeal against that judgment but since the appeal did not act as an application for stay of execution of the judgment, Namemco proceeded to carry out the execution of the said judgment by attaching the 3<sup>rd</sup> defendant's shares in 4<sup>th</sup> defendant. In February 2013, the 1<sup>st</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants entered into a settlement agreement with Namemco and the plaintiff for the purpose of settling the disputes existing between them. According to the terms of the agreement, it was agreed that the pending cases at the Commercial Court of Kinshasa at Gombe and the Court of Appeal of Kinshasa at Gombe be withdrawn, including the lifting of the provisional attachment on the 3<sup>rd</sup> defendant's shares in the 4<sup>th</sup> defendant. The 3<sup>rd</sup> defendant was supposed to pay Namemco a settlement sum of USD 10,000,000/=, in two installments of USD 5,000/= each. Any taxes charges or levies imposed by the tax administration or any authority were supposed to be borne by Namemco. The settlement agreement also included in article 9, an arbitration clause, which provided as follows;

*"Any dispute, controversy or claim which arises from or in connection with this Settlement Agreement will be resolved by binding arbitration administered by the International Chamber of*

*Commerce ("ICC") in accordance with its arbitration rules then in force (the "Rules"), and the Parties hereby agree to be bound by such Rules"*

Furthermore, the defendants alleged as follows; following the execution of the aforesaid settlement agreement, on 16/8/2013 in recognition of the settlement agreement, the Commercial Court of Kinshasa at Gombe rendered a court order in respect of the withdrawals of the cases by the parties. Likewise, on 27/8/2013, the Court of Appeal of Kinshasa at Gombe acknowledged the 3<sup>rd</sup> defendant's withdrawal of her appeal. In performance of the aforesaid settlement agreement the 3<sup>rd</sup> defendant paid Namemco the sum of USD 9,250,000/= and withheld a sum of USD 750,000/= for payment of taxes to the Congolese Tax Authority on behalf of Namemco as Namemco did not honour the request/ order to pay the same that was served unto her by the Congolese Tax Authority. On 4<sup>th</sup> November 2013 the 1<sup>st</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants commenced arbitration proceedings against Namemco and the plaintiff regarding the dispute on the interpretation and performance of Article 2.3 of the settlement agreement on payment of taxes. Despite Namemco's and the plaintiff's refusal to appoint an arbitrator, to sign the terms of reference and participate in any hearing, the arbitration proceedings proceeded under the terms of the ICC Rules and the arbitrator issued orders restraining Namemco and the plaintiff from taking any action in respect of their dispute pending before the arbitral Tribunal. Namemco disregarded the arbitrator's order. It initiated new judicial actions in the DRC and on 12<sup>th</sup> March 2014 Namemco served the 3<sup>rd</sup> Defendant an order to pay the said

USD 750,000/=. On the 3<sup>rd</sup> of November, 2015 the Arbitral Tribunal delivered its award in favour of the 3<sup>rd</sup> defendant, in which it ordered as follows;

- a. *That the Settlement Agreement is still in force.*
- b. *That the arbitration clause contained in the Settlement Agreement and the Emergency Arbitrator orders were breached by the Plaintiff and Namemco.*
- c. *That the 3<sup>rd</sup> Defendant could retain the amount of **USD 747,000/=** held in escrow.*
- d. *The Plaintiff and Namemco jointly and severally, to pay the 3<sup>rd</sup> Defendant the sum of **USD 326,379.14** consisting of all fees and costs expended by the 3<sup>rd</sup> Defendant in resisting the Plaintiff's and Namemco's legal actions in the DRC and all sums that the 3<sup>rd</sup> Defendant might be ordered to pay in future in those pending proceedings.*
- e. *The Plaintiff and Namemco to pay all attorney fees and court costs that the 3<sup>rd</sup> Defendant might have to bear in the event that the Plaintiff and Namemco succeed in any of the pending parallel proceedings.*
- f. *The Plaintiff and Namemco jointly and severally, to pay the 3<sup>rd</sup> Defendant material and moral damages in the amount of **USD 683,403.90.***
- g. *The Plaintiff and Namemco immediately to cease and desist from all current enforcement actions carried out or to be carried out on the basis of the Judgment, and in particular, to release the First and*

*Second Seizures, and to refrain from future such enforcement actions, and more generally immediately to cease and desist from any action whatsoever carried out against the Claimants and/or any of them on the basis of the First and Second Contracts;*

- h. *The Plaintiff's and Namemco's failure to comply with the anti-suit injunctions of paragraph g) herein above to be subject to a daily fine of **USD 15,000/=** per day of non-compliance from the date of the Final Award;*
- i. *The Plaintiff and Namemco jointly and severally, to pay the 3<sup>d</sup> Defendant **USD 40,000** being the fees and expenses of the Emergency Arbitrator and the ICC administrative costs, as well as **USD 91,398.27** in legal costs for the Emergency Arbitration Proceedings.*
- j. *The Plaintiff and Namemco, jointly and severally, to pay the 3<sup>d</sup> Defendants the fees and costs incurred in the ICC arbitration, namely:*
  - i. *the sum of **USD 150,000.00** being the costs fixed by the ICC;*
  - ii. *the sum of **EUR 422,478.17** being legal fees incurred by the 3<sup>d</sup> Defendant;*
  - iii. *the sum of **EUR 1,050.00** being fees for appointing a court reporter/recorder and the sum of **EUR 420.00** for the rental of the venue for the Hearing and paid by the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants.*

Namemco and the plaintiff refused to comply with the orders made in the Award issued by ICC Arbitral Tribunal in its entirety. Consequently, the 1<sup>st</sup>

3<sup>rd</sup> and 4<sup>th</sup> defendants commenced enforcement proceedings in Tanzania, France, Cyprus, DRC and South Africa. By a letter dated 13<sup>th</sup> September 2019 the ICC acting on behalf of the Arbitral Tribunal sent to the Registrar of the High Court of Tanzania an original Award pursuant to Article 11(2) of the Arbitration Act of Tanzania for registration.

Moreover, the defendants contended as follows; That the plaintiff breached the settlement agreement as the submission to arbitration clause is still in force. No notice to rescind the agreement was served to the 1<sup>st</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants. There has been no "revival" of the judgment of the Commercial Court of Kinshansa at Gombe RCC 1819/1846. The amount alleged to have been accrued from the decree are disputed. The final and conclusive judgment is the judgment dated 16<sup>th</sup> August 2013 in recognition of the settlement agreement which acknowledged the withdrawal of cases by the parties themselves. The 1<sup>st</sup> and 3<sup>rd</sup> defendants do not constitute a single economic unit for the purpose of enforcement of the settlement agreement. The 1<sup>st</sup> and 3<sup>rd</sup> defendants are not one and the same. The 3<sup>rd</sup> defendant does not act as a mere agent of the 3<sup>rd</sup> defendant. The plaintiff was not a party to the settlement agreement.

The defendants prayed for dismissal of this case. In his reply to the defendants' written statement of defence the plaintiff maintained that he has a power of attorney and that he was personally a party to a settlement agreement, thus, entitled to the proceeds thereof. As regards the defendants' allegation that, there is already an Award delivered by the ICC Arbitration Tribunal, the plaintiff maintained that the same is a decision/order of a foreign court not recognizable in Tanzania and cannot be taken into account as the same have not been registered in Tanzania in accordance with the law.

Furthermore, the plaintiff stated as follows; That the 1<sup>st</sup> and 3<sup>rd</sup> defendants submitted themselves to the jurisdiction of the Commercial Court of Kinshasa at Gombe in DRC and so long as the matter was determined on merits and judgment given without undue influence or fraud being committed by the plaintiff, execution of that judgment is proper. The plaintiff's decision to lodge his case in the DRC at the Commercial Court of Kinshasa at Gombe is legal following the defendants' announcement and appointment of Rothschild Bank to give effect the sale of the defendants shares in Vodacom Congo DRC SPRL. The 1<sup>st</sup> contact between the Namemco and 3<sup>rd</sup> defendant was performed and later on

renewed to facility further consultancy work which the defendants needed in order to sort out the conflict with their local partner in the DRC. The 1<sup>st</sup> and 2<sup>nd</sup> Contracts referred by the defendants in their defence have nothing to do with enforcement of the contract of the Commercial Court of Kinshasa. The three percent (3%) of the amount levied by the DRC Tax Authority was on the amount ordered in the judgment ( USD 21,000,000/=). Deducting the sum of USD 750,000/= from the amount due and payable under the settlement agreement amounted to repudiation of the said agreement. The amount payable vide the judgment was revived, thus it was capable of being enforced. Each and every term of the settlement agreement and any of its consequences became invalid, null and void upon repudiation by the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants of the terms of the settlement deed by refusing without a reasonable cause to pay the plaintiff the balance of USD 750,000/= consequently, reviving the terms and conditions of the judgment in its totality. That he never received any demand notice for payment of the alleged taxes as alleged by the defendants or at all. He correctly refused to participate in the ICC arbitration proceedings as the said Tribunal did not have jurisdiction to arbitrate on matters pertaining to DRC taxes. The decision of the ICC

Arbitral Tribunal was not made on merits and the plaintiff is not bound by the same. The award of ICC Arbitral Tribunal is not registered in Tanzania and is full of irregularities. The plaintiff has already filed his complaints at the Highest Court of France, Cassation in Paris to challenge the award on the irregularities therein. The enforcement of the award is irrelevant in so far as the enforcement of the revived Judgment of the Commercial Court of Kinshasa is concerned.

Furthermore, the plaintiff contended as follows; In law and equity upon piercing the veil of incorporation of each and every defendant they are one and the same entity. All defendants were always present in court. The 1<sup>st</sup> defendant was present through the 3<sup>rd</sup> defendant within whom it owns all shares. The 2<sup>nd</sup> defendant was present through the 3<sup>rd</sup> defendant within whom it owns all shares. The 2<sup>nd</sup> defendant was present through the 1<sup>st</sup> defendant who owns the majority shares in the said 2<sup>nd</sup> defendant. The 3<sup>rd</sup> and 4<sup>th</sup> defendants were present in DRC as the 3<sup>rd</sup> defendant was sued in the Commercial Court of Kinshasa at Gombe, in DRC and 4<sup>th</sup> defendant is incorporated in the DRC. The plaintiff is entitled to enforce the decree against the assets of either of the defendants, who have assets in

Tanzania. The 1<sup>st</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants have assets in Tanzania by way of shares held by the 1<sup>st</sup> defendant in the 2<sup>nd</sup> defendant.

At the hearing of this case the learned advocates Gabriel Simon Mnyele of Mnyele Msengezi & Co. Advocates and Gaspar Nyika of IMMMA Advocates appeared for the plaintiff and defendants respectively.

At the Final Pre-trial Conference the following issues were framed by the court in consultation with the learned advocates;

- (i) Whether the enforcement of the judgment of the Commercial Court of Kinshasa at Gombe and the settlement agreement dated February 2013 is maintainable in law.*
- (ii) Whether the judgment of the Commercial Court of Kinshasa at Gombe dated 24<sup>th</sup> January 2012 was superseded by the settlement agreement dated February 2013.*
- (iii) Whether this court is legally bound to take into considerations the proceedings and decision of the ICC Arbitral Tribunal in respect of the disputes between the parties in this case.*
- (iv) Whether this suit is maintainable in law despite the proceedings at the ICC Arbitral Tribunal at Paris.*
- (v) Whether it was proper for the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants to withhold 3% of the amount awarded by the Commercial Court of Kinshasa as tax over judgment.*
- (vi) What is the corporate relationship between the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and whether they are in law one and the same.*

*(vii) Whether under the circumstances, this court is entitled to open the veil of incorporation of each of the Defendants in particular the 1<sup>st</sup> and 3<sup>d</sup> Defendants to enforce the judgment in Commercial Court of Kinshasa at Gombe against the assets of the 3<sup>d</sup> Defendant held in the 2<sup>nd</sup> Defendant.*

*(viii) Whether the 1<sup>st</sup> and 3<sup>d</sup> and 4<sup>th</sup> Defendants have tangible assets in form of shares in Tanzania.*

*(ix) To what reliefs are parties entitled to.*

The plaintiff testified as PW1 whereas Mr. Olaf Mumburi, the 2<sup>nd</sup> defendant's Director of Legal and Regulatory Affairs testified as DW1 on behalf of all defendants.

Now let me embark on the analysis of the evidence adduced and the determination of the issues.

Issues No. 1: **whether the enforcement of the judgment of the commercial court of Kinshasa at Gombe and settlement agreement dated February 2013 is maintainable in law.** In his testimony in chief PW1 reiterated the background to this case and his averments in the plaint which I have already summarized them at the beginning of this judgment. Thus, I do not need to reproduce them here again. In addition he stated that he knows all the defendants. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants are incorporated in the Republic of South Africa,

Tanzania, Mauritius, Democratic Republic of Congo respectively. The 1<sup>st</sup> defendant is a holding company of the rest of the defendants. It owns them. The 2<sup>nd</sup> and 4<sup>th</sup> defendants were joined in this case as necessary parties. In 2007 he was staying in South Africa. He became familiar with some of the high placed officers in the 1<sup>st</sup> defendant, one of them is Mr. Nyoka. He was also familiar with high placed people in DRC political hierarchy. While in South Africa Mr. Nyoka with other officers in 1<sup>st</sup> defendant requested him to mediate the simmering dispute that was taking place in DRC between the shareholders in the 4<sup>th</sup> defendant. Consequently he negotiated the two agreements alleged in the plaint. The defendants wrongly withheld the sum of USD 750,000 in breach of the settlement agreement, thus repudiated it. The defendants' averment in their defence that said USD 750,000/= was withheld for payment of taxes is total lies to justify wrongful withholding of the said amount (USD 750,000/=). There is no any order that required him to pay tax. There is no document or evidence showing that the alleged tax administration authority ordered the 4<sup>th</sup> defendant to pay the alleged tax. He revived the execution of the judgment of the Commercial Court of Kinshasa at Gombe as the 1<sup>st</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants breached the terms of the settlement

agreement. Consequently, on 12<sup>th</sup> day of March 2013 the 3<sup>rd</sup> defendant was ordered by the Commercial Court of Kinshasa to pay the balance in the decree with interest and other payments.

PW1 tendered in court the following exhibits; His Passport, No. AB 6962788 (Exhibit P1), the first agreement between Vodacom International and Namemco Energy (PTY) Ltd- dated 6<sup>th</sup> day of May 2007, -(exhibit P2), the 2<sup>nd</sup> agreement between Vodacom International and Namemco Energy (PTY) Ltd dated 11<sup>th</sup> September 2007 -( Exhibit P3), a copy of the judgment in Case No. REC 181/1846, both in French and translated English version-(P4 collectively) in which the court ordered Vodacom International Limited (3<sup>rd</sup> defendant) to pay him USD 21,000,000/=, the settlement agreement was signed between 1<sup>st</sup> February 2013 and 26<sup>th</sup> February 2013 -(exhibit P5), which stipulated that he was supposed to be paid a sum of 10,000,000/= in two tranches of USD 5000/= each. The order for payment of USD 16,530,025,863.60 FC issued by the Commercial Court of Kinshasa at Gombe, the French and translated English version-(Exhibit P6).

Moreover, PW1 testified as follows; that following the 3<sup>rd</sup> defendant's failure to pay the decretal sum as ordered by the Court, its shares in the

4<sup>th</sup> defendant were attached pursuant to the order for seizure by Court Bailiff-(exhibit P7). The auction of the 3<sup>rd</sup> defendant's shares were frustrated by the 1<sup>st</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants in collaboration with the government of DRC. Finally, on 6<sup>th</sup> day of July 2017 he decided to file a suit in this court against the defendants because they constitute a single business unit. He contended that the above allegation is substantiated by the fact that all defendants signed exhibit P5. PW1 also tendered in court 3<sup>rd</sup> defendant's prospectus for the year 2017-(exhibit P9) and Vodacom consolidated financial statement for the year 2017-(exhibit P10), which includes financial report of the 1<sup>st</sup> defendant together with its subsidiaries which includes the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants among others. He further contended as follows; the fact that there is a single consolidated financial statement is a proof that the defendants are a single trading unit and agents. The arbitration purportedly held in Paris and the award thereof, the proceedings purportedly held in Cyprus and South Africa to enforce the purported award cannot be used to invalidate any proceedings in Tanzania so long as the said award is not registered in Tanzania. The proceedings in the ICC Arbitration Tribunal was concerned with the interpretation of the settlement agreement and what is pending here in court in this case is an

action to enforce a foreign Judgment following the breach and repudiation of the settlement agreements by the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants. The Application to enforce the award was neither served to him nor to his Advocate. Any alleged order of enforcement if any which he denied, was obtained clandestinely and fraudulent without according the plaintiff (PW1) right to be heard. At the end of his testimony PW1 reiterated the prayers made in the plaint.

While responding to questions posed to him during cross examination PW1 told this Court that the parties in the agreement -(exhibit P2) were 1<sup>st</sup> defendant (Vodacom group Ltd) and Namemco. He was not a party to the agreement. The parties in the case that was decided in DRC were the 3<sup>rd</sup> defendant (Vodacom International Ltd) and Namemco Energy (PTY) Limited. He was not party to that case but maintained that he has *locus standi* to bring the case because he is the owner of Namemco. He owns it 100%. Namemco is registered in Cyprus and the Judgment shows that Namemco is entitled for the payment. The contract was to render services through the plaintiff. Though Namemco was the one indicated to be paid he received the money because Namemco is his company. He is aware that Vodacom instituted a complaint at the ICC Arbitration Tribunal

and was notified of the same. He is aware that an award was issued against him. The same is not at set aside ,but was not aware of the registration of the ICC Arbitration award in Tanzania.

Responding to questions posed to him by his Advocate, Mr. Gabriel Mnyele, during Re- examination, PW1 insisted that he owns Namemco 100% .In his absence, Namemco does not exist. He is the one who did the consultancy works and signed all documents in respect of the consultancy agreement for Namemco.

On other hand, in his testimony DW1 reiterated most of the facts surrounding the background to this case as alleged in the written statement of defence. He conceded to the existence of exhibits P2, P3, P5. He identified them in court and prayed the same to form part of his testimony. He also stated the following; That the first contract ( Exhibit P2 ) was terminated for non performance and effluxion of time and was superseded by the 2<sup>nd</sup> contract ( Exhibit P3) .In both contracts the plaintiff was not a party. On the 3<sup>rd</sup> November, 2015, the ICC Arbitral Tribunal delivered an award in favour of the 1<sup>st</sup> , 2<sup>nd</sup> and 4<sup>th</sup> defendants. The plaintiff and Namemco have failed to comply with the orders of the ICC Arbitration Tribunal. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants applied for

execution of the award in Paris, the application was granted. The plaintiff and Namemco filed an application to challenge the award in Paris, but the appeal was dismissed. The award was also filed for execution in Cyprus, DRC, South Africa and in the High Court of Tanzania. The 1<sup>st</sup> and 3<sup>rd</sup> defendants do not constitute a single economic unit for the purpose of settlement of the agreement. The 1<sup>st</sup> and 3<sup>rd</sup> defendants are not for any intent and purpose one and the same entity. The 3<sup>rd</sup> defendant does not act as a mere agent of the 1<sup>st</sup> defendant. The 3<sup>rd</sup> defendant does not have any assets in Tanzania held through the 1<sup>st</sup> defendant or otherwise.

In his closing submission Mr. Mnyele invited this court to hold that the enforcement of the judgment of the Commercial Court of Kinshasa at Gombe is maintainable. He termed this suit as an enforcement action aimed at enforcing the a foreign judgment and went on to submit that this enforcement action is based on the doctrine of Common Law of England as at 22<sup>nd</sup> day of 1920, whereat prior to the enactment of England Foreign Judgment Enforcement Act in 1931, foreign judgments were enforced through an action to recover the debt contained in a foreign judgment. He insisted that since there is no law that covers the scenario in this case, then, the filing of this suit as an enforcement action is the only

available and proper way of enforcing the judgment of the Commercial Court of Kishansa. To cement his arguments he referred this court to the of the Judicature and Application of Laws Act, Cap 358, through which Common Law practices in Tanzania comes into play. He also referred this Court to the ruling of this Court in case of **Moto Matiko Mabanga (Acting as receiver of Namemco Energy PTY United) Vs Vodacom Group Limited and 3 others Commercial Case No. 36 of 2017 and Misc Commercial Cause No. 80 of 2017** (unreported) by Madam Justice Sehel, J as she then was and the ruling of Hon. Justice Songoro, J as he then was in this case which he delivered on 26<sup>th</sup> January, 2018 while making determination on points of preliminary objection which were raised by the Advocate for the defendants. Mr. Mnyele contended that now this court is *functus officio* to determine the maintainability of this suit in this court.

In additional to the above, Mr. Mnyele submitted that, this court is supposed to be guided by the conditions provided in the provisions of Section 11 of the Civil Procedure Code, Cap 33 R.E. 2019, which basically are the exceptions under which a foreign judgment might not be termed to be conclusive. He went on to submit that, the first matter to be looked at

is whether or not the foreign court had Jurisdiction to adjudicate the suit from which the foreign Judgment emanates. He submitted that according to the holding in the case of **Henry Vs Geoprosco International Ltd (1976) QB 726**, Jurisdiction is presumed in the following ways:-

- (i) Presence of the assets of the Judgment debtors (defendant) in the country from which a foreign court where a Judgment comes from.
- (ii) Submission by the defendants on the Jurisdiction of foreign court where a Judgment comes from.
- (iii) Residence of the defendants in a foreign stated from which the Judgment comes from.

Mr. Mnyele insisted that there are also other the matters which are looked upon before the foreign Judgment is enforced through an action, but all are matter of facts that need to be proved. With regard to the presence of the assets of the Judgment debtor in DRC , he had the following views ; that the testimony of PW1 has proved that the 3<sup>rd</sup> defendant had assets in DRC in form of 51% shares held in the 4<sup>th</sup> defendant . The same is substantiated by Exhibit P10 (Consolidated Annual financial statement). Exhibit P10 also indicates that 1<sup>st</sup> defendant held 100% of shares in the 3<sup>rd</sup> defendant. Moreover, contended that the

3<sup>rd</sup> defendant was a mere facade for the 1<sup>st</sup> defendant in respect of the ownership of shares in the 4<sup>th</sup> defendant. The actual and practical owner was the 1<sup>st</sup> defendant. The 1<sup>st</sup> and 3<sup>rd</sup> defendants are practically a single business unity that in reality cannot be separated and that is proved by exhibit P5, contended Mr. Mnyele.

Moreover Mr. Mnyele submitted that 1<sup>st</sup> and 3<sup>rd</sup> defendants fully participated in the proceedings at the Commercial Court of Kinshasa Gombe. The 1<sup>st</sup> and 3<sup>rd</sup> defendants were resident in DRC at the time the suit was filed in DRC and in this case the 1<sup>st</sup> and 3<sup>rd</sup> defendants have not raised the issues of non –residence. The Judgment the subject of this case has met all matter that are supposed to be established before the enforcement of the foreign Judgment effected. He insisted that the defendant in their written statement of defence have not alluded any matters stipulated in section 11 of the CPC which can render the execution of the judgment in Case No REC 181/1846 not maintainable in this court. In conclusion he maintained that this issues should be answered in the affirmative.

On the other hand , in his closing submission Mr. Nyika invited this court to make a finding that the enforcement of the judgment of the

Commercial Court of Kinshasa at Gombe and the settlement agreement dated February, 2013 is not maintainable in law on the following ground; Firstly, that the plaintiff has failed to prove interests or right which was breached or interfered with by the defendants. Mr. Nyika was of the view that the evidence adduced and the pleadings show that the plaintiff was not a party to the judgment upon which this suit is based. the Commercial Court of Kinshasa at Gombe did not make any order for payment of money or granted any relief to the plaintiff. Expounding on this point, Mr. Nyika submitted that, the right to sue / *locus standi* is governed by Common Law and in order for the plaintiff to maintain proceedings successfully, he must show that the court has jurisdiction to determine the issue and that he/she is entitled to bring the matter in Court. To cement his arguments, he referred this court to the case of **Lujuna Shubi Ballanzo Senior Vs Registered Trustees of Chama cha Mapinduzi (1996) TLR 203** in which the court held as follows;

*"Locus standi is governed by common law according to which a person bringing a matter to court should be able to show that his right or interest has been breached or interfered with"*

Mr. Nyika also submitted that the plaintiff has failed to prove that he has a cause of action against the defendants because no relief for payment of

money or otherwise was granted by the Commercial Court of Kinshasa Gombe in his favour. To bolster his argument, he cited the case of **Antony Leonard Msanze and another Vs Juliana Elias Msanze and two others, Civil Appeal No. 76 of 2012 CA**, (unreported). He contended that exhibit P2 and P3 do not show that the plaintiff was somehow a party to the agreement, but he is mentioned as a director of the consultant charged with the delivery of the services agreed with the consultant. That the plaintiff was not a party to the Judgment dated 24<sup>th</sup> January, 2012 which is sought to be enforced in this suit. He insisted that this suit is not maintainable for want of cause of action and *locus standi*.

Mr. Nyika recalled that the concern on plaintiff's *locus standi* was raised by the defendants' advocate as a point of preliminary objection. The same was overruled by this court (Hon Songoro J, as he then was) because the plaint contained facts alleging that the plaintiff had interests in the case thus the court ruled out that he had *locus standi* , but the question on whether or not his interests to sue in this case as alleged in the plaint could success was a matter of evidence, contended Mr. Nyika. So, he was of a strong view that the plaintiff was required to prove his interests (*locus andi*) and ultimately the cause of action to sue by evidence but failed to

do so. Moreover, Mr. Nyika implored this Court to amend this issue pursuant to order XIV Rule 5 (1) of the CPC and remove the aspect of enforcement of the settlement agreement because the plaintiff in paragraph 6 (b) the plaintiff states categorically that he is seeking to enforce the Judgment of the Commercial Court of the Kinshasa at Gombe dated 24<sup>th</sup> January, 2012. In the alternative Mr. Nyika maintained that, Even if this issue will not be amended, the plaintiff cannot maintain any action to enforce the settlement Agreement (exhibit P5) because in terms of clause 2.1 and 2.2 of the settlement agreement, the sum of USD 10,000,000/= agreed upon in the agreement was to be paid to Namemco not the plaintiff. Therefore the plaintiff is not entitled to bring claim on the basis of the settlement agreement.

Secondly, Mr. Nyika contended as follows; That this suit is not maintainable in law because there is a decree of the High court of Tanzania at Dar es Salaam passed in **Miscellaneous Civil Application No. 607 of 2019** (Hon. Kulita, J) which recognizes the ICC Arbitral Award No. 19803/MCP (Henceforth 'The ICC award') as a decree of this court. The ICC Award among other orders requires the plaintiff to cease and desist from any action whatsoever carried out against the defendants

herein or any of them in the basis of the first and second contracts and that the settlement agreement is still in force. Mr. Nyika invited this court to take Judicial notice of the ruling of this Court aforesaid issued by Hon. Kulita J, pursuant to section 59 (1)(a) of the Evidence Act. To bolster his argument he referred this court to the case of **International commercial Bank (T) Ltd Vs. Yusuf Mulla and another, High Court of Tanzania Commercial Division, Commercial Case No. 108 of 2018** (unreported). He insisted that the effect of the order of this court by Hon. Kulita, J is that the ICC Award now has the same effect as the decree of this court. Under the circumstances this suit is not maintainable, contended Mr Nyika. Moreover, he submitted that, this court is precluded by the order of this court from exercising jurisdiction over this suit because in terms of Section 7 (1) of the CPC its recognition is expressly barred by an order of this court issued in the aforesaid **Miscellaneous Civil Application No. 607 of 2019**.

Having analyzed the evidence adduced and the closing submissions made by the learned advocates appearing herein, before going further with the discussion on the evidence adduced as well as the closing submissions made by the learned advocates, I think, at this juncture it is

worthy stating albeit brief what transpired before the hearing of this case started.

In short, initially, this case had two plaintiffs, to wit; Namemco PTY Ltd and Moto Matiko Mabanga (the plaintiff herein) and upon being served with the plaint, the defendants' advocates raised the following points of preliminary objection.

- i) *The court has no jurisdiction to hear and determine Commercial Case No. 112 of 2017 filed by Namemco Energy PTY Limited and Moto Matiko Mabanga, 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff respectively.*
- ii) *The plaint does not disclose a cause of action against the 2<sup>nd</sup> defendant.*
- iii) *The 2<sup>nd</sup> Plaintiff does not have locus standi in the suit.*

With regard to the 2<sup>nd</sup> and 3<sup>rd</sup> points of preliminary objection which are relevant in our arguments at hand, in its ruling, this Court (Hon. Songoro, J as he then was) said the following:-

*On the preliminary objection that 2<sup>nd</sup> Plaintiff does not have a locus standi in the suit, so the 2<sup>nd</sup> Plaintiff cannot under the circumstances stand as a person with right on the order to pay, I have considered the point and find the issue of locus standi was discussed in the case of Lujuna Shubi Balonzi Senior Versus Registered Chama cha Mapinduzi (1996) TLR 203 that, what must be looked upon is, if a party to the proceedings must show not only has power to bring the matter to the court but must also show that has interest in the matter. So, for the 2<sup>nd</sup> Plaintiff to claim that, has a locus standi has*

*to maintain in the plaint that, has an interest in the matter, Now turning to the plaint the court finds at paragraph 7 of the plaint the 2<sup>nd</sup> plaintiff maintain and claims that, was representing the 1<sup>st</sup> plaintiff in the transactions which are also subject of the present suit and others previous contracts. In that respect, I find the 2<sup>nd</sup> plaintiff had interests in previous contract and proceedings of the 1<sup>st</sup> plaintiff and therefore has an interest in the Commercial Case No. 112 of 2012 The issue whether or not his interest will succeed or is not mention in the order of court bailiff are not matter which the court may base it decision on the 2<sup>nd</sup> plaintiff has locus stand. The point here is that, the 2<sup>nd</sup> Plaintiff has just to show in the plaint that, has interest in the matter, and that, has been shown in paragraphs 7 and 8 of the plaint. So the objection as to the locus standi of the 2<sup>nd</sup> plaintiff also fails”.*

*(Emphasis is added)*

As regards the 2<sup>nd</sup> point of preliminary Objection the court said the following ;

*“ .....So going by a definition of jurisdiction in relation to a commercial Court, it appears to me from Rules 3 and 5 of the Commercial Court Rules GN.No.250 of 2012, which are made under the Judicature and application of Laws Act Cap 358, the Court has jurisdiction to hear and determine a case which has commercial significance and notwithstanding the merit and demerit of the suit. It follows therefore since..... a sum which is being litigated exceed Shs. 70,000,000 and the issue involved are of commercial*

*Significance it follows this Court has jurisdiction to determine the filed Suit"*

On 5/8/2019 Mr. Mnyeale prayed to amend the plaint by removing Namemco from this case because it was subject to an order for wound up which was issued in Cyprus, where it is was incorporated. The prayer was resisted by Mr. Nyika. On 12<sup>th</sup> September, 2019 this court allowed Mr. Mnyeale to amend the plaint. Thus, Namemco was removed from the case and Moto Matiko Mabanga (the plaintiff herein) remained as the only plaintiff in this case. Upon being served with the amended plaint, Mr. Nyika filed the defence to the amended plaint which contained a notice on a point of preliminary objection that the plaintiff has no *locus standi*. This court dismissed the point of preliminary objection on the reason that the same had already been determined by this court (Hon. Songoro J as he then was) and that the plaintiff's allegation in the amended plaint were not different from the one in the first plaint save for the removal of Namemco in the case.

It is also worthy pointing out here that the first issue which is basically concern with the maintainability of this suit was framed basing on the pleadings as it is required by the law. Despite raising the point of preliminary objection on the plaintiff's *locus standi*, the defendants in

their joint written statement of defence alleged that this suit is not maintainable in law on the ground that that plaintiff was not a party to the judgment in Commercial Court of Kinshasa at Gombe thus, he has no *locus standi* in this case. The defendants' allegations aforesaid are found in paragraphs 53 (a) and 57 of the written statement of defence to the amended the same are reproduced hereunder;

*Paragraph 53 (a):*

*"The Plaintiff ( if capable of doing so which is denied because he was not a party to the settlement agreement) did not provide the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants with notice of the intention to rescind the Settlement Agreement"*

*Paragraph 57*

*"As for paragraph 17 of the Plaint, the Defendants state that the Plaintiff was not a party to the judgment in the Commercial Court of Kinshasa/Gombe and accordingly has no locus in this suit. In addition, it is denied that he 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants have any assets in Tanzania. The 1<sup>st</sup> Defendant holds shares in the 2<sup>nd</sup> Defendant company however neither the 1<sup>st</sup> Defendant nor the 2<sup>nd</sup> Defendant are party to the dispute that led to the judgment in the Commercial Court of Kinshasa/Gombe, accordingly it is denied that this Court has jurisdiction to entertain this suit against all the Defendant".*

Also, in paragraph 51 of the written statement of defence, the defendants alleged that, by a letter dated 13<sup>th</sup> September, 2019 the ICC award was lodged in this court pursuant to Article 11 (2) of the then Arbitration Act. For easy of reference I hereby reproduce the contents of paragraph 51 of the written statement of defence hereunder;

*Paragraph 51:*

*" In additional, by letter of 13 September 2019 the ICC, acting on behalf of the arbitral tribunal provided the registrar of the High Court of Tanzania with an original of the Award pursuant to Article 11 (2) of the Arbitration Act of Tanzania. A copy of the said letter is herewith attached and marked **"Voda 12"***

The plaintiff filed a reply to the defendants' written statement of defence to the amended plaint and his response on the allegations concerning the maintainability of this case were stated in paragraphs 2 and 3 of the reply. For ease of reference let me reproduce the above mentioned paragraphs;

*paragraph 2:*

*"In reply to the contents of paragraph 18, 19 and 20 of the reply, the plaintiff maintains that he has a power of attorney and that he was personally a party to a settlement agreement and thus entitled to any proceeds thereon. The power of attorney is contained in annexure **("A")"***

*Paragraph 3:*

*"With regard to the contents of paragraph 36, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, and 51 in addition to what has been stated under in annexure "A", the Plaintiff maintain the same being decisions/orders of foreign Court are not recognizable in Tanzania and cannot be taken into account as the same have not be registered/filed in Tanzania Courts".*

From the foregoing, it is clear that this issue was framed purposely address to what was pleaded as elaborated herein above, that is, the issue concerning the plaintiff's *locus standi* and the ICC award that the defendants alleged had been filed in our court.

With due respect to Mr. Mnyele, his contention that the issue concerning the plaintiff's *locus standi* is *res judicata* and that this court is *functus officio* to deal with that issue on the reason that it was determined by Hon. Songoro, J as he then was, is misconceived as the order of this court (Hon. Songoro, J as he then was) was to the effect that, so long as the plaintiff alleged to have interest in the suit, then the court declined to dismiss the suit on the ground that the plaintiff had no *locus standi*. Therefore, what followed automatically was for the plaintiff to prove what he alleged in the plaint, that is, he has interests in this case as it is required by the law. Thus, I am in agreement with Mr. Nyika that the

plaintiff had a task of proving before this court that he has interest in the suit, so as to establish that he has *locus standi* to sue. In other words evidence was required for the court to determine the plaintiff's interest in this case.

In his closing submission Mr. Mnyele submitted extensively on the issue of jurisdiction which had already been determined conclusively by this Court in its ruling in respect of the points of preliminary objection on the Court's Jurisdiction quoted in this judgment.

On the other hand I am in agreement with Mr. Nyika that this court has to take judicial notice of the orders of this court pursuant to section 59 (1) (a) of the Evidence Act. To my understanding, the effect of this provision of the law is that this court has to take into consideration all orders issued by our courts, regardless whether or not are tendered as exhibits in Court. As submitted by Mr. Nyika , in **Miscellaneous Civil Application No. 607 of 2019, between Vodacom International Limited (Mauritius), Vodacom Group Limited ( South Africa) Vodacom Congo DRC S.P.R.L and Namemco Energy (P.T.Y) ( Cyprus) and Mr Moto Matiko Mabaga** (unreported) My brother Hon Kulita J, registered the ICC Award as a decree of this Court vide the Order of the court he issued on

29<sup>th</sup> July 2020. Therefore, the plaintiff's argument that the ICC Award is not yet registered in this Court is not correct. I am aware that the copy of the decree of this court in **Miscellaneous Civil Application No. 607 of 2019** aforesaid was not tendered in Court, however, as I have endeavored to explain herein above, that does not make any difference as far as the legal impact of that order is concerned in this case. I had opportunity to peruse the case file in respect of the aforesaid **Miscellaneous Civil Application No.607 of 2019** and noted as correctly submitted by Mr. Nyika, that the ICC award was registered as a Decree of this Court, on 29<sup>th</sup> July 2020.

In addition to the above, I also noted that on 27<sup>th</sup> November 2020, Mr. Mnyele's Law firm of Mnyele, Msengezi and Company Advocates, wrote a letter to the Registrar of the High Court requesting for permission to peruse the case file in respect of the aforesaid **Misc Civil Application No.607 of 2019** and in that letter the learned advocate stated clearly that the matter was determined 2020 by Hon Kulita,J. Hence the plaintiff's advocate was aware that the application for registration of the ICC award had been registered as a court Decree.

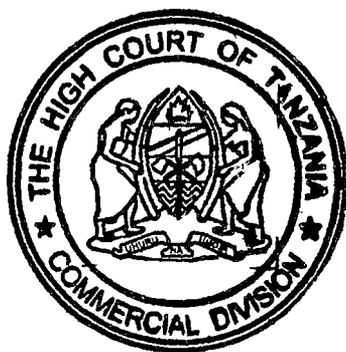
In short, the orders issued in the ICC award which now is the decree of this court restrain the plaintiff from executing the orders issued by the Commercial Court of Kinshasa at Gombe in case No.REC 181/1846 and stated categorically that the settlement agreement is still in force . Under the circumstances explained herein above, since in this case the plaintiff wants to execute the orders made in Case No. REC 181/1846 and alleges that the settlement agreement has been repudiated, hence invalid, it is the finding of this court that this case cannot be maintainable in law as this court is *functus officio* as far as the execution of the judgment of the Commercial Court of Kinshasa in Case No.REC 181/1846 is concerned and all agreements emanating thereof. The position of the law is that, once the court issues an order in respect of any matter then the same cannot be entertained again by the judge /magistrate of the same court. In the case of **Mohamed Enterprises (T) Limited Vs Masoud Mohamed Nasser, Civil Application No. 33 of 2012 (CA)** (unreported), the Court of Appeal held as follows;

*"Once a judgment and decree are issued by a given Court, Judges (or Magistrate) of that Court become "functus officio" in so far as that matter is concerned"*

From the foregoing, the first issue is answered in the affirmative. Under the circumstances, I do not see any plausible reasons to proceed with the determination of the remaining issues since the finding in this issue has disposed of this case.

In the upshot, this case is hereby dismissed with costs.

Dated at Dar es Salaam this 25<sup>th</sup> day of June 2021.



  
**B.K. PHILLIP**

**JUDGE**