IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: RUTAKANGWA, J.A., KIMARO, J.A., And MASSATI, J.A.)

CIVIL APPEAL NO. 110 OF 2009

EAST AFRICAN DEVELOPMENT BANK.....APPELLANT
VERSUS
BLUELINE ENTERPRISES LIMITED .....RESPONDENT

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

(Shangwa, J.)

dated the 12th day of May, 2009
in
Misc. Civil Cause No. 135 of 2005

JUDGMENT OF THE COURT

14 & 28 December, 2011

RUTAKANGWA, J.A.:

This assertion might appear banal. It is, nevertheless, worth repeating here. The East African Development Bank (the EADB or the appellant), the Eastern and Southern African Trade and Development Bank (the PTA Bank) and the African Development Bank (the ADB), are **International Organizations**. By this term we mean that they are organizations or institutions established by international agreements to which two or more States are parties and, therefore, members of the said organizations. Tanzania is a member of the three organizations.

Created by State parties, each organization's legal capacities and status are clearly defined in the particular agreement establishing it. These agreements, as is the case in respect of other agreements creating such organizations, contain provisions granting each one of them specific privileges and, in most cases, absolute immunities from judicial, executive, legislative, administrative, etc., processes. This emanated from the recognition by sovereign states of the fact that "the attribution of these priviliges and immunities … is an essential means of ensuring the proper functioning of such organizations free from the unilateral interference by individual governments" (**BEER UND REGAN v. GERMANY**, Application No. 28934/94, European Court of Human Rights, (1999), ECHR 6). See also, **WAITE AND KENNEDY,** (1999) ECHR 13 and Article 43 of the Charter establishing the PTA Bank.

The EADB was established by the sovereign states of Kenya, Uganda and the United Republic of Tanzania **vide** Article 21 of the Treaty for East African Co-operation dated 6th June, 1967. The Bank's Charter was set out in Annex VI of the said Treaty. The EADB survived the collapse of the original East African Community. However, the same three states by a Treaty signed on 23rd June, 1980, amended and re- enacted the Charter of the EADB.

Pursuant to the 1980 Treaty, the Parliament of the United Republic of Tanzania, passed Act No. 7 of 1984 (Cap. 231), for the purpose of:-

> "…*carrying out the obligations of the Government of the United Republic arising under the Treaty amending and re-enacting the Charter of the East African Development Bank and to provide for related matters."*

This Act is known as the East African Development Bank Act (the Act).

It is unequivocally provided in section 4 of the Act that the provisions of the Charter annexed to the 1980 Treaty and set out in the schedule to the Act, "**shall have the force of law in the United Republic of Tanzania."** The said schedule to the Act was amended by the Finance Act 2005 (No. 13) (the Amending Act) which, as far as this appeal is concerned, came into operation on the **1st day of July, 2005.**

The Amending Act revoked and substituted Articles 45 and 46 of the schedule on immunities and renumbered them as 44 and 45 respectively. These partly read as follows:-

> *"Article 44-Judicial Proceedings:*
>
> 1. ***The Bank shall enjoy immunity from every form of legal process except in cases arising out of the exercise of its borrowing***

powers *when it may be sued only in a court of competent jurisdiction in a Member State in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process or has issued or guaranteed securities.*

2. *….not relevant…*

Article 45 – Immunity of Assets.

1. ***Property and other assets of the Bank, wheresoever located and by whomsoever held, shall be immune from interference, search, requisition, confiscation, expropriation or any other form of taking or foreclosure by executive or legislative or judicial action*** *and premises used for the business of the Bank shall be immune from search provided that in legal proceedings brought within the term of the Chapter such immunity shall apply before delivery of a final judgment against the Bank by the highest court of competent jurisdiction."*

(Emphasis is ours).

The Treaty creating the ADB and the charter creating the PTA Bank vests these Banks with almost identical immunities in Articles 52 (1) and (2) and 42 (1) and (3) respectively.

This first appeal against the ruling and order of the High Court (Shangwa, J.) dated 12th May, 2009 is based, mainly, on the above unambiguous Treaty and statutory provisions. For a proper appraisal of the merits or otherwise of the appeal we think a short factual background of the case is required to be taken note of. It is as follows.

One of the seven objectives of the EADB as spelt out in Article 1 of the 1980 Treaty is "to provide financial assistance to promote the development of the member States". To achieve this objective, the Bank is mandated in Article 10, to make or participate in direct loans with its unimpaired paid-in capital and/or funds raised by it in capital markets, borrowing, etc. So, the EADB has both lending and borrowing powers.

In the exercise of its lending powers, on 7th March, 1990, the appellant Bank entered into a loan agreement with the respondent. This was followed by a supplemental agreement on 16th June, 1992. In all, the respondent was advanced a loan of Special Drawing Rights (SDRs) 2,279,000.00. The loan was secured by a floating debenture. In case of default in payment, the Bank was to appoint a Receiver for the charged properties.

When subsequently, a dispute arose over the loan agreements between the two parties, the appellant exercised its right to appoint a Receiver Manager to enforce the debenture. The respondent petitioned for the submission of the dispute to arbitration and managed to get an **ex-parte** court order restraining the appellant and the Receiver Manager from taking over the respondent's business. Eventually the parties mutually consented to resolve their disputes through arbitration. The Arbitrator (one Mr. A. T. H. Mwakyusa), after hearing the parties, made his Award which he caused to be filed in the High Court at Dar es salaam, under section 12 (2) of the Arbitration Act, Cap. 15. The Award, dated 3/8/2005, was thereafter registered on 29/9/2005.

In the Award, the respondent was granted USD 61,386,853.00. The appellant was dissatisfied. It petitioned the High Court to set it aside on the ground of misconduct on the part of the Arbitrator. The petition was eventually dismissed on the sole ground of having been lodged out of time.

On its part the respondent commenced the execution process. On **25/9/2006**, it applied for the execution of the Award. The High Court, as the executing court, was requested to issue, initially, a garnishee order nisi

in the amount of USD 68,546,653 and Tshs. 5,000/= and "thereafter a garnishee order absolute" against the appellant, in respect of the latter's Account No. 01090205071-00 at the Standard Chartered Bank International House Branch, Dar es Salaam. Shangwa, J. granted the sought order on the same day.

On 23/11/2006, the appellant filed an application, by chamber summons, in the High Court. It sought a declaration that the garnishee order *nisi* was issued in contravention of the provisions of the Finance Act, No. 13 of 2005. Furthermore, it complained that the garnishee order was improperly issued as there was still pending in the same court a petition to set aside the Award. Accordingly, it prayed for the lifting of the garnishee order. The respondent vigorously resisted this application. The High Court delivered its verdict in the application, on 12th May, 2009.

In his ruling, the learned High Court Judge found the application totally wanting in merit. He found the first ground of complaint that the issuance of the garnishee order *nisi* had contravened the provisions of the EADB Act, 1984, (as amended), "*as it enjoyed absolute immunity in relation to all of its assets and property against execution or interference"*, to be premised on a total misapprehension of the true import of Article 45.

He thus reasoned:-

> *"In my own interpretation of the amendment of the said provisions by the Finance Act No. 13 of 2005, S. 27, Article 45- Immunity of Assets,* ***the Applicant's money which is on its Account No. 0109025071-00 at Standard Chartered Bank International House Branch Dar es Salaam which is a subject of the Garnishee Order is not a type of asset which is meant to be immune from interference.*** *Under those provisions, the type of assets which are meant to be immune from interference are* ***physical assets*** *of the Applicant Bank such as buildings, office equipments, motor vehicles and computers but not money which is not physical asset. Money is liquid asset, it stands as a medium of exchange of goods and services which is incapable of being immunized …"*
> *(Emphasis is ours).*

To the learned judge, any view contrary to his, would be fatal to the Respondent's right as the latter would "be left with nothing to attach". He was of this view because going by the provisions of the Act, "*all physical properties and assets of the Applicant are absolutely immune from interference by executive or legislative or judicial or administrative action"*.

He accordingly dismissed the first ground of complaint.

The second ground of complainant was also rejected, as it was grounded on mere speculations. There was no guarantee that the petition would have been successful, he reasoned. Having lost the battle in the High Court the appellant lodged this appeal.

The appellant's memorandum of appeal lists five main grounds of appeal against the High Court ruling. However, we have found the first three grounds of appeal, if upheld, to be sufficiently weighty to effectually and conclusively dispose of this appeal. We shall, therefore, have to canvass them first. These grounds are follows:-

> *"1. The Learned High Court Judge erred in law in his interpretation of Article 45 of the Appellant's Charter (as amended by section 27 of the Finance Act, No. 13 of 2005) by holding that the Appellant did not enjoy absolute immunity pending delivery of a final judgment against the appellant by the highest court of competent jurisdiction.*
>
> *2. The Learned High Court Judge erred in his interpretation of the Appellant's immunity as provided for in Article 45 of its Charter (as*

amended by section 27 of the Finance Act, No. 13 of 2005) by limiting its application to physical assets and in holding that immunity did not extend and did not include money held to the credit of the appellant in a bank account in its name, Account No. 0109020571-00 held at Standard Chartered Bank International House Branch or any other bank balance."

In the third ground of appeal, the learned High Court judge is being partly faulted for making the garnishee order absolute when there had been no final determination against the Bank by the highest court of competent jurisdiction.

Before we discuss these crucial legal issues we have found it apposite to note briefly that before this appeal was called on for hearing, the ADB and the PTA Bank lodged separate intervener applications in the Court. The two applications, Civil Application No. 84 of 2010 and Civil Application No. 89 of 2010 respectively, were by Notice of Motion. The two banks were seeking leave of the Court to be added as interested parties or interveners in the appeal. The common ground for seeking intervention was that the ruling of Shangwa, J., "*has had a direct and adverse effect*

on the immunity guaranteed" to them by their establishing Treaties/Charters, in so far as it went to the extent of defining the *" types of assets which can be awarded immunity from interference",* which definition excluded money, as already shown. The ADB is not only a shareholder in the appellant Bank and the PTA Bank, but more importantly, it is a major shareholder in the EADB. On this basis, the ADB had good reason to fear that its "*proprietary interests"* in the appellant Bank would be directly affected by these proceedings and hence its application (see **TANG GAS DISTRIBUTORS LTD. v. MOHAMED SALIM SAID &TWO OTHERS LTD**, CAT Civil Revision No. 68 of 2011 (unreported).

These applications, however, were struck out for being incompetent. For this reason we shall not have recourse to the brief but focused submission of Ms. Fatma Karume, learned advocate, for the two banks. She had, with the consent of all counsel in the appeal addressed us on a **de bene esse** basis.

At the hearing of the appeal, the appellant was represented by Mr. Michael Sullivan, Q.C., Mr. Mabere Marando, learned advocate and Mr. Dilip

Kesaria, learned advocate. Prof. Gamaliel M. Fimbo, learned advocate, represented the respondent.

If we were to borrow the words of Lord Denning in the case of **TRENDTEX TRADING CORPORATION LTD v. THE CENTRAL BANK OF NIGERIA** [1977]1 All E.R. 881 C.A. (U.K.), when commending counsel in the case and use them us ours here, we would thus compliment counsel in this appeal. They presented their respective positions in a manner to which we would pay sincere tribute. The relevant documents have been prepared admirably with all relevant material and authorities collected. The arguments, both written and oral, have been put forward lucidly. We cannot hope to do full justice to them, but we are definitely greatly indebted to them all.

As already alluded to earlier on, the appellant's main grievances are anchored on Articles 44 and 45 of the schedule to the Act. It is the appellant's contention that it enjoys absolute immunity from judicial proceedings in relation to disputes arising from the exercise of its lending powers. In elaboration, appellant's counsel stressed that while courts have adjudicative jurisdiction over it, the same cannot be exercised until delivery

of a final judgment against it by the highest court of competent jurisdiction, which court in Tanzania happens to be this Court (Article 45). This immunity, counsel strongly urged, "*extends to all property and other assets of the Appellant, wheresoever located and by whomsoever held"*. They accordingly asked us to fault the learned judge's decision.

Prof. Fimbo found this submission not strong enough to melt his heart. He gallantly defended the learned judge's ruling from two fronts. One, the granted immunity does not apply to commercial transactions. Two, the case was res judicata.

Elaborating on the first point, Prof. Fimbo said that the transactions between the appellant and the respondent "was a pure commercial transaction to which sovereign immunity does not apply". He accordingly called upon us to consider the prevailing "*Judicial shift from the concept of absolute immunity to a narrower principle which excludes ordinary mercantile transactions from the ambit of sovereign immunity"*. On this he relied heavily on the case of **TRENDTEX v. CENTRAL BANK OF NIGERIA** (supra).

Placing much faith in the **TRENDTEX** case, Prof. Fimbo pressed us to

depart from our decision in the case of **HUMPHREY CONSTRUCTION CO. LTD V. PAN AFRICAN POSTAL UNION (PAPU),** Civil Revision No. 1 of 2007 (unreported). To Prof. Fimbo this **PAPU** case was wrongly decided as "*it failed to consider whether the contract was an ordinary commercial transaction and thereby failed to consider the shift in International Law from the concept of absolute immunity to a narrower principle which excluded ordinary mercantile transactions from the ambit of sovereign immunity.*"

In a rejoinder, counsel for the appellant pointed out that the **TRENDTEX** case is only authority for the proposition that a State or State organ cannot plead state immunity in relation to ordinary commercial transactions as distinct from the governmental acts of a sovereign state. It was their strong contention, with which we are in full agreement as we shall presently show, that the "restrictive theory of State immunity as a principle of common law has no application in the present case".

In trying to resolve this issue of absolute and restricted immunity we have found it convenient to start with this seemingly terse observation. Looked at superficially, Prof. Fimbo's arguments appear to be attractive.

This is all because, in our respectful opinion, they are based on a totally wrong legal premise. We shall demonstrate why we are so asserting.

There is no dispute here that as far as sovereign immunity is concerned, there is a growing shift from absolute immunity to restrictive immunity, especially where commercial transactions are concerned. In the U.K., it all started with the judgment of Lord Denning (his first in the House of Lords) in the case of **RAHIMTOOLLA v. H.E.H. The NIZAM OF HYDERABAD AND OTHERS** [1957] ALL E.R. 441, in which he dissented on a point of principle which he thought to be of much importance in international law.

Stripped of details and in simple terms, the facts in the **RAHIMTOOLA** case (supra) were as follows: There had been a sum of money, £ 1,000,000, in the Westminster Bank in London. It had been deposited there by the Nizam of Hyderabad and was claimed by the Government of Pakistan. The issue was whether Pakistan could claim **Sovereign immunity.**

In his judgment, Lord Denning said:-

> *"…sovereign immunity should not depend on whether a foreign government is impleaded directly*

> *or indirectly, but rather on the nature of the dispute… if the dispute brings into question, for instance, the legislative or international transactions of a foreign government or the policy of its executive, the court should grant immunity if asked to do so, because it does offend the dignity of a foreign sovereign to have the merits of such a dispute canvassed in the domestic courts of another country;* ***but if the dispute concerns, for instance, the commercial transactions of a foreign government … and it arises properly within the territorial jurisdiction of our courts, there is no ground for granting immunity"*** at pp. 463-4.
>
> [Emphasis is ours].

Next in importance on the issue came the **TRENDTEX** case (supra). The brief facts were that the Nigerian Central Bank, which was a separate legal entity from the Nigerian government, had issued a letter of credit in favour of Trendtex, a Swiss company, to pay for cement ordered by the Nigerian Ministry of Defence for military purposes. Following a military coup the new government ordered the Central Bank not to pay for the cement. Trendtex sued the Central Bank and demanded payment. The Court of Appeal (U.K.) found that the bank was not entitled to immunity

since it was a separate entity. The Court held:-

1) *That the bank, which had been created, as a separate legal entity with no clear expression of intent that it should have governmental status was not an emanation, arm, alter ego or department of the state of Nigeria and therefore not entitled to immunity from suit.*

2) *That even if the bank were part of the Government of Nigeria , since International Law now recognized no immunity from suit for a government department in respect of ordinary commercial transactions as distinct from acts of a governmental nature, it was not immune from suit on the plaintiff's suit in respect of a letter of credit.*

The same Court took the same approach in the case of **HISPANO AMERICANA MERCANTIL S.A. v CENTRAL BANK OF NIGERIA** [1979], 64 ILR 221, where the facts were similar to those in **TRENDTEX** and attachment was allowed.

The three cases cited above, in our respectful opinion, help to explain

the weakness in the respondent's position. In all instances, immunity was predicated upon a claim of state sovereign immunity, which is not the case here and was rejected for reasons given. All the same, we think that it will be instructive to note in passing here that subsequently, in the U.K., the State Immunity Act 1978 came into force. In Section 14(4) of this Act, it is provided that a central bank's property shall not be considered as property in use or intended for use for commercial purposes. So in cases where a central bank is a separate entity, a waiver of immunity from execution is necessary in order to lawfully attach its property. So were the **TRENDTEX** and **HISPANO AMERICANA MERCANTIL** cases to be decided today, they would have been decided in the favour of the Nigerian Central Bank. See, for example: **AIC LTD v. THE FEDERAL GOVERNMENT OF NIGERIA & ANOTHER** [2003] EWHC 1357 (Q.B.) and **AIG PARTNERS INC. v. REPUBLIC OF KAZAKHSTAN** [2005] EWHC 2239.

All in all, Prof. Fimbo's argument, in our considered opinion, can only hold water when viewed in relation to state immunity from jurisdiction. It cannot be correct when it comes to international organizations which have been granted immunity from legal processes under their constitutive instruments. This is all because these are two "different legal institutions

and distinguishable with respect to the fundamental grounds on which they are built and in regard to the extent to which the immunity is recognized". See, for instance, FELICE MOREENSTERN, in his "Legal Problems of International Organizations", pp 5-10, and "*IMMUNITY OF INTERNATIONAL ORGANISATIONS AND ALTERNATIVE REMEDIES AGAINST THE UNITED NATIONS," by* Dr. Reinsich, at a Seminar on State Immunity, held at the University of Vienna in 2006.

There is no gainsaying that the traditional grounds for state immunity are not always unqualifiedly valid for granting immunity to international organizations. Sovereign immunity has always been premised on the now historic view of **par in parem non habet imperium** or **par in parem no habet jurisdictionem**, that is "an equal has no power over an equal". The same cannot be said of international organizations. This is because they are creatures of sovereign states themselves. It is these states which determine their legal status, capacities, privileges and immunities as shown at the outset of this judgment. For this reason, it is a general consensus, which this Court subscribes to, that:

> "*The applicability to international organizations of the distinction between acts* ***jure imperii***

*and **jure gestionis** – and thus the development from absolute to restricted immunity – appears not to be generally accepted. The characterization, by way of an anology with activities attributable to a State, of certain activities of international organizations as 'commercial' in nature and as unrelated to the official functions of the organization is unconvincing …," Dr. A. Reinisch' (supra).*

Our search for possible support for the above opinion led us to Article II of the Convention on the Privileges and Immunities of the United Nations (the CPIUN). The same provides as follows in the sections 2 and 3:-

"2. *The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case it has expressly waived its immunity. It is, however, understood that no such waiver of immunity shall extend to any measure of execution."*

3 The premises of the United Nations shall be inviolable. The property and assets

> of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by the executive, administrative, judicial or legislative, action."

We have also found out that the provisions of this Article, are almost identical to Article 2 of the Agreement on the Privileges and Immunities of the Organisation of American States (the OAS). Unarguably, these Articles which for all intents and purposes are similar to the impugned Articles 44 and 45, unambiguously, grant absolute immunity to these two international organizations. On this, we are borne out by the decision of the U.S. District Court for the Southern District of New York in the case of **De LUCA v UNITED NATIONS ORGANIZATION, PEREZ de CUELLAR, GOMEZ, DUQUE, ANNAN & OTHER**S, 841 F. Supp. 531 (SDNY 1994), **MARVIN R. BROADBENT et al. v. OAS** (decided by the US Court of Appeals for the District of Columbia Circuit (DC Circ. 1980) and the legal opinion of the U.N. Office of Legal Affairs, UNJY (1999) pp 94 – 95 at para. 19.

In the case of **De LUCA** (supra), the claimant (De Luca) was claiming for reimbursement of income taxes, to which staff subject to the United States income taxation are entitled. The court considered the varying exceptions to immunities under the United States International Organisations Immunities Act, 1945 (the IOIA) and the Foreign Sovereign Immunities Act (the FSIA) and then held:-

> *"We need not consider the application of these exceptions to the instant case for the UN Convention, which contains no such exceptions; provide sufficient grounds for finding the UN immune from the plaintiff's claims."*

By parity of reasoning, we too find that Article 44, in as far as the EADB enters a transaction in the exercise of its lending powers as was the case here, provides it with absolute immunity from every form of legal process. In our considered judgment, the term "*legal process"* includes execution proceedings contemplated and purportedly carried out in Misc Civil Cause No. 135 of 2009.

The earlier referred to legal opinion of the U.N., related to attempts that had been made in the U.S to apply the restrictive immunity theory to international organizations including the United Nations, as advocated by

Prof. Fimbo before us, and in the High Court. The conclusion was:-

"…In the United States courts, such attempts have been based on the FSIA and on the provision in the US International Organizations Immunities Act that 'International organizations…..shall enjoy the same amount of immunity from suit and every form of judicial process as is enjoyed by foreign governments.' As far as we are aware, no attempt to apply the restrictive theory to the United Nations has been successful. In this respect, we would note that the United States Government in briefs submitted to the courts in cases involving the United Nations, has supported the UN position that the restrictive theory of state immunity does not apply to the United Nations, ***inter alia*** *because the United Nations derives its immunity from international obligations based on treaties to which the US is a party, i.e. the U.N. Charter and the CPIUN, which do not recognize any difference between non-commercial and commercial acts."*

In Tanzania, we do not have any law containing a provision similar to the one in the U.S. International Organizations Immunities Act referred to in the above extract. On the contrary, we have Articles 44 and 45 which, unarguably, confer absolute immunity to the appellant Bank from any legal process in cases arising out of its exercise of its lending powers and qualified immunity in respect of cases arising out of its exercise of

borrowing powers as correctly postulated by counsel for the appellant.

Furthermore, Tanzania has shown its total and unflinching commitment to its obligations under various international agreements, through Article 130 of the Treaty for the Establishment of the East African Community. This Treaty is part of Tanzania's municipal laws. It is provided as follows in Article 130(1) and (4) of this Treaty:-

> *"1. The Partner States shall honour their commitment in respect of other multinational and international organizations of which they are members.*
>
> *2. ……*
>
> *3. ……*
>
> *4. The Partner States shall accord special importance to co-operation with the Organisation of African Union, United Nations Organisation and its agencies, and other international organizations, bilateral and multi-lateral development partners interested in the development of the community."*
>
> [Emphasis is ours].

Such international organizations include the appellant, the ADB, the PTA Bank, etc.

In the light of these unambiguous Treaty provisions, it cannot be seriously predicated that the appellant's claim to immunity from legal processes is grounded on sovereign immunity, as Prof. Fimbo courageously insisted. After all, how can the appellant claim sovereign immunity when it has neither a territory of nor citizens of its own? In our considered judgment, the appellant like the UN or the ADB, etc., derives its immunity from the Treaty/Charter which established it and fortunately the Tanzania Government does not deny this fact. It is imperative, therefore, that its claimed immunity must be judged only on the basis of its Charter provisions and not on customary international law doctrine of sovereign immunity.

We think it will be instructive to take one example which will illustrate this proposition of international law. This is the case, relied on by appellant's counsel, of **SCIMENT S. P. R.L. v THE A.D.B,** The Brussels Court of Appeal 2nd Division, No. Rep. of 2002/3929. The relevant facts were briefly as follows. The ADB made a loan to the Republic of Chad for the study of a stormwater evacuation scheme; the African Development Fund granted a loan to the Republic of Chad, the loan was ear-marked for funding the N'Djamena Storm-water evacuation project. Chad awarded the

contract for the project works to SPRL Sciment. Differences arose in relation to the project financing in which the ADB was involved. Sciment commenced proceedings against the ADB. The judge at first instance accepted ADB's submission that it had immunity from legal process. On appeal, the Court of Appeal, **inter alia**, observed that:-

1) *the immunity from legal process conferred on international organizations constitutes, except in a few rare cases, a key element in the Charter of those international organizations and is recognised as a key element of their status in the legal systems of most countries;*

2) *in general the primary objective of the immunities conferred on international organizations is to ensure their efficient operation and to shield them from the undue interference of States or private persons in their operation;*

3) *contrary to the immunities conferred on foreign States the scope of which has been gradually restricted to the actions performed in the exercise of sovereign authority, the immunity*

from legal process conferred on international organizations is, pursuant to their respective texts of the majority of them, absolute in nature.

From the above survey, it has occurred to us that from both judicial and State practice, contrary to Prof. Fimbo's submission, it is clear that presently, the need to protect these organizations in order to safeguard their efficient operations is still the main concern of member States when it comes to the regulations of their immunities. This is notwithstanding the fact that the traditional strict doctrine of absolute sovereign immunity has gradually given way to the doctrine of restrictive immunity.

Commenting on this phenomenon Emmanuegla Illard and Isabelle Pingel-Lenuzza, both Professors of Law at the University of Paris XII say:-

"Today, the conditions exist for the regime of immunity of international organizations, in turn, to undergo a major evolution…Nonetheless, the dominant case law still does not follow this approach. Relying either on the convention

creating the organization, or on the headquarters agreement between the organization and the host State, or less frequently, on customary law, judges generally consider themselves bound to grant immunity to an organization that requests it…Academic writing equally takes a highly classical approach to analysing the scope of the immunity from jurisdiction of international organizations. On the basis that this immunity is often 'instituted without any restriction or exception', 'it is generally considered to be 'erroneous to attempt to interpret conventions granting immunity from jurisdiction [to international organizations] by attributing to the relevant provisions the meaning that the restrictive conception of immunity, now accepted by a number of states, attributes to the immunity from jurisdiction of States'. ***In other words, according to this theory the immunity from jurisdiction of States has become relative, whereas that of international organisations has remained absolute,*** *barring exceptions allowed under specific provisions mandated by the nature of the organisation or of the dispute in question", in "International Organisations and Immunity*

from Jurisdiction: To Restrict or To Bypass" Vol. 51, Part 1. BIICL.

[Emphasis is ours].

We conclude, therefore, our extensive discussion on this crucial point affirming the stance taken by counsel for the appellant that basing on the generally accepted rule, the immunity of international organisations is based on the principle of functionality. Furthermore, we accept as a correct proposition of law, as evidenced by state and judicial practice as well as academic writings on the issue, that the proper determination of this immunity should be based on the organisation's constitutional instrument (eg. Treaty, Charter etc.). The member States have full sovereignty to grant such privileges and immunities to the organisation as they deem it proper for the purpose of achieving its objectives. The courts should always be loath to interfere with the States' transparent exercise of their sovereign powers or impose constrained interpretations on such treaties on the basis of fanciful reasons.

For the foregoing reasons we have no lurking presentiment in holding that via Article 44 of the schedule to the Act, the EADB, has been granted absolute immunity from all forms of legal process in all cases arising out of

the exercise of its lending powers. Equally, all its properties and assets and business premises enjoy absolute immunity under Article 45 except when exercising its borrowing powers. A contrary construction, in our respectful view, would necessarily lead to a blatant breach of the terms of the Charter and the Treaty establishing the East African Community. Such an eventuality will not augur well for the country in its relationship with the Partner States and the international community.

Having held that the immunity claimed by the appellant in these legal proceedings was not based on the traditional doctrine of sovereign immunity, as mistakenly held by counsel for the respondent, we hold without any demur that the **TRENDTEX** case has no relevance to this appeal. While not doubting its soundness, we are of the firm view that it does not detract from the fact that the immunity from legal process granted to the appellant in the exercise of its lending powers is unfettered and absolute. The High Court, therefore, wrongly entertained the execution proceedings after the appellant had unequivocally pleaded immunity. For this reason also, we hold that the criticism levelled against the decision of this Court in the **PAPU** case (supra) was totally unjustified. It was based on a wrong legal premise. We accordingly see no reason even to contemplate a departure from it.

We understand that counsel for the respondent had another seemingly attractive argument. This one was predicated on the now too familiar plea of res judicata.

It was Prof. Fimbo's strong argument that "the issue of immunity was res judicata in Misc. C.C. No. 135/2005 having been finally determined in Misc. C.C. No. 135/1995" between the same parties. That plea, he confidently asserted, was dismissed by the High Court. It could not be regurgitated, he stressed.

Counsel for the appellant countered the respondent's argument by submitting that the High Court in the two applications was considering assertions of immunity under two separate and distinct statutory provisions.

This issue should not detain us. It is true that in Misc. Civil Cause No. 135 of 1995, the High Court was called upon to decide on the claimed issue of immunity by the appellant. Those proceedings emanated from the act of the appellant appointing the Receiver Manager following an alleged default in repayment by the respondent of the loan obtained from the appellant. The respondent petitioned the High Court to submit the matter to arbitration and had also prayed for a temporary injunction.

The appellant challenged the competence of the proceedings on the basis that it was immune from legal process. The claim was based on the East African Development Bank Act, 1984 (No. 7), the Diplomatic and Consular Immunities (Designation) (International Organisations) Order, GN. No. 85 of 1988 and the Diplomatic and Consular Immunities and Privileges Act, 1986 (No. 5). The High Court (Katiti,J.) overruled the appellant's objection.

Relying on the **TRENDTEX** case, the learned judge had held:-

> *"I would therefore hold, that where an authority, is otherwise a juristic personality a body corporate, with attendant legal capacities, enters into ordinary commercial transaction, for mutual reliefs and equal treatment, it shall not be entitled for immunity in the execution of such commercial transactions. It follows that Act No. 5/1986 was meant to apply to non-commercial activities".*

Earlier on in his ruling, the learned judge had held thus:-

> *"Second, where a scheduled organisation has been granted immunity, its enjoyment of the same is not different from that enjoyed by a foreign state unless conditions and qualifications have been attached thereto. From the above, it is without trepidation that, I*

am saying that the times of economic transparency of economic liberalization are already here and we are no island but part of it, ***and in the absence of clear statutory provision****, there is no reason why, our common law, even leaps and bounds should not be so influenced by the changing international (sic) to look, like the times, whereby, a separate legal entity, whether International organisation … with powers to institute legal proceedings, to contract, etc., should be entitled to immunity unless the proceedings relate to the exercise of sovereign authority, and the circumstances are such that the state would be immune…"*

[Emphasis is ours].

We see no reason of entering into a debate on the soundness or otherwise of this reasoning. All we can safely say now, in all sincerety, is that all that was said and done before 1st July, 2005, when the Amending Act which supplied the needed "*clear statutory provisions"* became operative.

Earlier on in this judgment we observed that res judicata is a familiar plea. In our civil jurisdiction it is embodied in Section 9 of the Civil

Procedure Code, Cap. 33. Its prime "*object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgment between the same parties or their privies on the same issues by a court of competent jurisdiction in the subject matter of the suit"*: **PENIEL LOTTA v. GABRIEL TANAK: & TWO OTHERS**, CAT, Civil Appeal No. 61 of 1999. See, also, **NELSON MREMA v. KILIMANJARO TEXTILE CORPORATION**, CAT Civil Appeal No. 22 of 2002 (unreported) and MULLA, CODE OF CIVIL PROCEDURE, 16th ed. Pp 4-7, 160-5 and 2774-9.

The crucial question for determination here then becomes: was the claim of immunity in the present proceedings founded upon the same cause of action which was the basis of the proceedings before Katiti, J.?

Our considered answer to the above posed question is definitely in the negative. As we have already sufficiently demonstrated, in the previous proceedings for appointment of an arbitrator, the plea of immunity was based on the three pieces of legislation we have referred to above. In the current proceedings, the plea is based on the provisions of the Act as amended in 2005. As counsel for the appellant have rightly pointed out, Katiti, J., could not have grounded his ruling on the provisions of the Amending Act, as it was not in existence. Hence his pertinent observation, "*in the absence of clear statutory provision."* This is an indisputable

indication that he would have been prepared to uphold the immunity plea had there been such "*clear statutory provision.*" The lacuna was filled in by the Amending Act. This gives the appellant absolute immunity in the manner already adequately shown.

In the proceedings giving rise to this appeal, the appellant was seeking the lifting of the garnishee order which had been issued on 25/09/2005, when it had already been conferred with absolute immunity from this type of legal process. For this reason we accept as valid, the argument of counsel for the appellant to the effect that with the coming into force of the Amending Act, the equation radically changed, assuming without deciding though, that Katiti, J. was correct.

Counsel for the appellant have referred us to a chain of very persuasive authorities coming from beyond our jurisdiction. We have read them and found them both interesting and very helpful to us. But as was once aptly observed, it is very easy in the forest of precedents to not see the wood for the trees. All the same, from our study of the authorities cited, we have discerned at least three undisputed salutary principles of law which we shall adopt here. They are: One, if a law is altered by the passing of a new Act after a decision has been made in a case, the

doctrine of **res judicata** does not arise: on this, see **LAKSHANI v. LATAL** [1913] ILR 40 Cal 534, among others, Two, where as a result of a change of law, new rights are conferred on parties, such rights are not barred by **res judicata** by decisions given before the new law came into force: see **RAM DEO v. BOARD OF REVENUE**, AIR 1961 All 278, among others.

There is a third dimension to the issue articulated by counsel for the appellant with which we are also in agreement. This is that where a proceeding applied to a different set of circumstances, it could not be defeated by a plea of **res judicata.** This was neatly put thus by Lord Cranworth, L.C. in **MOSS v. ANGLO-EGYPTIAN COMPANY** [1965] Ch. Appeals 108:-

> "… *that in pleading a former suit as a bar, it is not sufficient to show that the bill was dismissed but you must plead further that which will show that the same matter in dispute in the subsequent suit was* ***res judicata*** *in the first".*

Admittedly, this principle covers this appeal. The proceedings before Katiti, J. as correctly argued by learned counsel for the appellant,

concerned the adjudicative jurisdiction of the High Court. The applicant therein was seeking appointment of an arbitrator and an injunction. But the ones before Shangwa, J. concerned the enforcement jurisdiction of the High Court. The two are, therefore, distinct jurisdictions (**HUMPHREY CONSTRUCTION v. PAPU** (supra)). Also, in both proceedings the plea of immunity was premised on different and totally distinct pieces of legislation. Relying on **LIVERPOOL CORPORATION CHORLEY WATER-WORKS CO.** [1852]2 De GM & G 852, **Spencer Power** & **Handly** in their work entitled "**RES JUDICATA**" affirm the principle that a decision in favour of a defendant does not bar proceedings founded on a new set of circumstances, as is the case here. Circumstances changed through the coming into operation of the Amending Act in 2005 granting the appellant the pleaded immunities. In view of this, we hold that the plea of **res judicata** would not avail to the respondent here.

For similar reasons, we have found ourselves with no flicker of doubt in our minds that **issue estoppel** does not arise here. If issue estoppel, as we understand, is meant to preclude a party "from contending the contrary of any precise point which having been distinctly put in issue, has been solemnly and with certainty determined against him", then it has been wrongly invoked here by the respondent. The immunity raised and

decided on in Misc. Civil Cause No. 135 of 1995 rested on the provisions of the Act before it was substantially amended, as well as the laws governing Diplomatic and Consular immunities, as already shown. Katiti, J. never grounded his decision on the present Articles 44 and 45 of the Schedule to the 1980 Treaty. For that reason it cannot be convincingly argued that the immunity from legal process being relied on by the appellant here was a point which was in issue then and was "solemnly and with certainty determined against" it. To us, the differences in the facts and the laws relied on in the two proceedings are too glaring to call for any further elaboration.

In the second ground of appeal the learned High Court Judge is being criticized for his restrictive interpretation of Article 45 when he held that the appellant's immunity did not extend to cover its money in the bank because money is not an asset. Is this criticism valid? We believe it is. We have two basic reasons.

One, the question whether the word "assets" as used in Article 45 included money held in the Appellant's account in any bank or elsewhere, was not an issue for determination in the High Court. As correctly pointed out by counsel for the appellant in their submission, it was" a conclusion

which the learned Judge reached without the benefit of submission on the point". In short, they are complaining that they were condemned without a hearing. This we hold without any hesitation, was highly irregular and fatal. Since it was a decisive issue which altered the outcome of the case through his construction of the word "assets", the learned judge ought to have listed the case for further hearing and afforded counsel for both sides opportunity to be heard. That he failed to do so, constitutes good cause for us to nullify his entire ruling.

Two, even if it were found that the issue had been raised and argued in the High Court, our answer to the posed question would still have been the same. The learned judge, we respectfully hold, was totally wrong in his "own interpretation" of the word "assets".

We would approach this issue by first asserting that given the facts before him, the learned judge had no good reason at all to embark, **suo motu** on this exercise. It has long been established and we believe there is ample authority for saying so, that "our first assumption in reading the words of any text is that the author is using them in their ordinary meaning". **F. Bowers,** in "**Linguistic Aspects of Legislative Expression**", (Vacouver: UBC Press, 1989) at page 116. It is only after

reading some way into the text and finding out that the word or words is or are being used in a way different from its or their ordinary meaning that we retrace our steps and embark on the exercise of interpretation. In keeping with this principle, **Ruth Sullivan** in his book entitled **"Statutory Interpretation**" (1997, says:-

> *"… It is presumed that drafters rely on ordinary meaning when drafting legislation and that readers are entitled to do so as well. In the absence of an adequate reason to prefer some other interpretation, the ordinary meaning should prevail" pg. 41.*

We subscribe wholly to this presumption.

The courts, therefore, under the ordinary meaning rule of statutory construction, are obliged to determine the ordinary meaning of the words to be interpreted and "to adopt this meaning in the absence of a reason to reject it in favour of some other interpretation". We have carefully read the submission of counsel of both sides before Shangwa, J. and his ruling. We have failed to glean therefrom any reason which forced the learned judge to abandon the ordinary meaning of the word "assets" and proceeded to ascribe to it a totally alien meaning.

It is common knowledge that dictionaries play an important role in statutory interpretation. It is agreed that they offer a useful starting point, which is "tangible and objective". What then is the ordinary meaning of the word "assets"? In our search for an answer to this pertinent question, we resorted to a number of sources. These included dictionaries, case law and even the web. We have found the following definitions.

In the Oxford Advanced Learners Dictionary of Current English, 6th edn., the word "asset" is defined as follows:-

> *"A thing of value, especially property that a person, or company owns which can be used or sold to pay debts"; pg.* P66

The same dictionary at page 857, offers this definition of the word "money"

> *"3 A person's wealth including their property."*

According to Black's Law Dictionary, 9th ed. by B.A. Garney, asset means.

> *"1. An item that is owned and has value.*
>
> *2. The entries on a balance sheet showing the items of property owned including cash, inventory, equipment, real estate, accounts receivable and good will", at page 138.*

The Law Lexicon, 2nd edn. 2002 reprint, edited by Justice Y.V. Chandrachud, at page 154, defines "assets" as:-

> *"A man's property of whatever kind which may be used to satisfy debts or demands existing against him".*

From the Business Dictionary.com, it is shown that "an asset can be (1) something physical, such as cash, machinery, inventory, land building", etc. On the Investor Words. com, an identical definition is offered.

From the above definitions, it should to be accepted that in ordinary language, the word asset/assets includes money, be it cash at hand and/or held in a bank, etc. That being the case, the appellant's money currently held at the Standard Chartered Bank, International House Branch, Dar es Salaam, in Account No. 0109025071-00, and elsewhere, is part of its assets and properties. This conclusion finds support in undisputed case law and statutory law as well. We shall provide two examples in illustration.

It is specifically provided in section 48 of the Civil Procedure Code Cap 33 that money including banknotes and cheques, is property liable to attachment in execution of a decree. Hence the issuance of the impugned

garnishee order in favour of the respondent. Furthermore, the cases of **SHAVABHAI PATEL v. MANIBHAI PATEL** [1959] E.A. 907, **PERRIN v. MORGAN** [1943] 1KB 187 and **SHAH v. ATTORNEY GENERAL** (No. 2) [1970] EA 523, referred to us by counsel for the appellant, go to reinforce this view. It is not insignificant, all the same, to point out here in all fairness that counsel for the respondent, in his submissions before us, did not say anything to counter the appellant's counsel's strong submission to the effect that the appellant's money at the bank form an integral part of its assets and properties.

In view of the above findings can it be seriously argued that the holding of the learned judge that the appellant's money, the subject of the garnishee order, is not the "type of asset which is meant to be immune from interference" because it "is incapable of being immunized"? We think not. On this we are supported by a plethora of very highly persuasive authorities referred to us by counsel for the appellant on the issue. This is in addition to the naked fact that the learned judge never referred to any authority to prop up what we may justifiably, in the circumstances, call a startling proposition.

We frankly share the certitude of counsel for the appellant that it is

an established principle of international law that monies of an entity subject to immunity held in a bank, are capable of being immune from attachment. This principle extends even to mixed bank accounts. If authority be needed, we shall quickly refer to these cases:-

a) **PARKIN V. GOVERNMENT OF THE REPUBLIQUE DEMOCRATIQUE DU CONGO & ANOTHER, South African Supreme Court (1970), 64 ILR 668;**

b) **THE PHILLIPINE EMBASSY BANK ACCOUNT CASE (1977) 65 ILR 146 (1984);**

c) **NETHERLANDS v. AZETTA BV [1998] 128 ILR 688,**

d) **ALCOM LTD v. REPUBLIC OF COLUMBIA & ANOTHER [1984] AC 580 or [1984] 2 ALL ER, 6 (HL),**

e) **LEASING WEST v. GENEVA SUPERVISORY AUTHORITY FOR THE ENFORCEMENT OF DEBTS AND BANKRUPTCY (1990), 102 ILR 205;**

f) **AIG CAPITAL PARTNERS INC. v. REPUBLIC OF KAZAKHSTAN [2005] EWHC 2239, etc.**

The **PHILLIPINE EMBASSY** case was before the Federal Constitutional Court of Germany. The plaintiff as landlord, had sought to attach balances of the Phillipines held on its account at Deutsche Bank in Bonn. The Court, after a thorough examination of treaty practice and court decisions, found that the bank account could not be attached as its purpose was to cover the embassy's costs and expenses, which is a sovereign non-commercial purpose. Lord Diplock adopted the same reasoning in the **ALCOM** case, holding that a bank account used to cover the day -to -day expenses of an Embassy, clearly served sovereign purposes and therefore was immune from enforcement measures. The **AIG CAPITAL** case concerned monies held in two separate accounts, a Cash Account and a Securities Account, in London by the monetary authority of the Republic of Kazakhstan, together known as '**the London Assets'.** The issue was whether or not those monies were immune from execution by reason of the U.K. State Immunity Act. The Court [Queen's Bench – Commercial Division] found the monies to be "property" within the meaning of section 14 of the State Immunity Act, 1978. It proceeded to hold the same to be immune from attachment.

The above cited decisions, in our respectful judgment, prove beyond any shadow of doubt that the learned High Court judge erred both in law

and fact in holding that the appellant's money in account No. 0109025071-00 at Standard Chartered Bank Int. House, the subject of the garnishee order, is not an asset contemplated under Article 45. We now hold without reserve that it is an asset and/or property which is absolutely immune from attachment as far as this appeal is concerned. We accordingly allow the first, second and third grounds of appeal in their entirety. As our findings on these two grounds essentially render the entire proceedings in Misc. Civil Cause No. 135 of 2005 a nullity, we see no compelling reason to canvass the remaining three grounds of appeal.

In fine, we allow the appeal with costs by quashing the ruling and order of the High Court dated 12th May, 2009. The garnishee order is accordingly lifted.

DATED at **DAR ES SALAAM** this 22nd day of **DECEMBER**, 2011.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

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

(M. A. Malewo)
DEPUTY REGISTRAR
COURT OF APPEAL