when freely translated means "those who quarrel, are the ones who make it." In his evidence the appellant told the trial court that the two had once quarreled and their Member of Parliament timely intervened and advised them to refrain from such behaviour. I lend the full weight of this court in support of the M.P's advice. They should give heed to it, for a united leadership is essential for people's sustained development. Very recently Israel's best known contemporary author, Amos OZ had the following apposite advice to his country in its approach to the entire peace process with the Palestinian people. He said:

> (A) conflict begins and ends in the hearts and minds of people, not in the hill tops, Newsweek Magazine of 1 March 1999 at page 52.

Let them, the conflict between Lenga and Mebolokini end in like manner. All said and done, I allow this appeal for the reason given herein.

FAHARI BOTTLERS LIMITED AND ANOTHER *v.* REGISTRAR OF COMPANIES AND ANOTHER

COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM

(Nyalali, C.J., Ramadhani and Lubuva, JJ.A.)

CIVIL REVISION No. 1 OF 1999

(From Rulings of the High Court of Tanzania at Dar es Salaam in Miscellaneous Civil Applications Nos. 146 to 155 of 1998)

Constitutional Law – Court of Appeal and the legislative powers of Parliament – Constitution vests in the Court of Appeal appellate powers only – Parliament subsequently adds thereto the powers of revision – Whether

the addition is not ultra vires – section 4(2) and (3) of the Appellate Jurisdiction Act 1979 and article 117 of the Constitution.

Court of Appeal – Revision – Powers of the Court of Appeal to revise proceedings in the High Court – When those powers may be invoked.

Court of Appeal – Constitutional Issues – Whether the Court of Appeal is precluded from dealing with a constitutional issue not first decided by the High Court – Article 30(3) and (4) of the Constitution.

Company Law – Winding Up – Law applicable in winding up proceedings – Sections 285 and 348 of the Companies Ordinance and the [Imperial] Winding Up Rules 1929.

Company Law – Winding Up Proceedings – Appointment of Provisional Liquidator – No application is made for appointment of provisional liquidator but winding up petition includes prayer for such appointment – Whether proper – Rule 8(2) of the Winding Up Rules 1929.

Company Law – Provisional Liquidator – Ten companies simultaneously file winding up.

Petitions and ask for appointment of provisional liquidators – One of the three provisional liquidators appointed has a law firm acting for one of the ten petitioners – Whether the appointment is proper.

In Miscellaneous Civil Applications Numbers 146 to 155 of 1998 in the High Court at Dar es Salaam, ten companies simultaneously filed winding up petitions so that they could restructure and obtain outlays of capital to be able to compete. There was also involved a suit by one of the petitioners against its creditor, the National Bank of Commerce (1997) Ltd., (the bank) in which the plaintiff wanted to restrain the Bank from exercising its debenture rights against it in Civil Case Number 98 of 1998. In the petitions was also a prayer for the appointment of provisional liquidators. After an *exparte* hearing, the presiding judge made an *exparte* order appointing three persons as provisional liquidators, and one of the provisional liquidators appointed was a man called NE Mkono whose law firm was representing one of the petitioners. The court also ordered a stay of any suit, application, case, petition or matter pending in the High Court or any other court or tribunal. Two secured creditors, namely, the Bank and the National Social Security Fund instituted objection proceedings against the appointment of the provisional liquidators.

Following the order of stay, Civil Case Number 98 of 1998, which was before a different judge, was stayed on 15 September 1998. The the same judge handling the petitions made an order, *suo motu*, suspending the order of appointment of provisional liquidators pending hearing inter parties of an objection by NSSF in respect of one of the petitioners, Southern Highlands Bottlers Ltd. The order of suspension was made applicable to all the parties. On 23 September 1998, before a different judge, NSSF applied to withdraw its objection as it had assigned its rights to a third party, Fahari Bottlers. The judge allowed the application and also stayed the execution of the order appointing the provisional liquidators made by a fellow judge earlier pending final determination of all objections 'in order to maintain the *status quo.'*

Meanwhile the provisional liquidators, on 7 October 1998 filed in the High Court a report of their activities from the time of their appointment to the date of their suspension as earlier ordered by the court.

Subsequently advocates for the first and second respondents appeared before the court and sought leave to file counter affidavits. The court granted leave and, *suo motu,* made an order that a *status quo* prevailing on 7 October 1998 "be restored" until the objections were finally determined.

On 30 October 1998, before yet another judge, two advocates appearing for receiver and managers told the court that there was apparent confusion in the interpretation of the previous orders. The court then ordered stay of execution of the order made "on 30 October 1998" pending hearing of an application for execution and hearing of the case inter parties".

It was then that revisional proceedings in the court commenced *suo motu* on information given by a firm of advocates.

During the hearing of the revisonal proceedings, it was argued that's Acts Number 17 of 1993 and 32 of 1994 were *ultra vires* the provisions of articles 117(1) and (3) of the Constitution of the United Republic of Tanzania.

Held: (i) Subsections (2) and (3) of the Appellate Jurisdiction Act 1979 as amended by Act Numbers 17 of 1993 and 32 of 1994 are not *ultra vires* the provisions of sub-articles (1) and (3) of article 117 of the Constitution. The provisions of article 11(3) of

the Constitution which deal with the appellate function of the court cannot be construed as derogating from the power conferred upon the Parliament under article 117(1) of the Constitution.

(ii) The provisions of article 30(3) of the Constitution apply only to enforcement of the provisions of human rights and freedoms contained in the Constitution. There is no provision either under the Constitution or any other law which requires any other constitutional issue to be decided first by the High Court before being decided by the Court of Appeal.

(iii) The Court of Appeal may, on its own motion and at any time, invoke its Revisional Jurisdiction in respect of proceedings in the High Court.

(iv) Section 348 of the Companies Ordinance [Act] makes the Winding up rules 1929 made under the Companies Act 1928 (Imperial) of the United Kingdom applicable in this country until such time when the High Court of this country makes rules for this country under section 285 of the ordinance [Act].

(v) rule 8(2) requires an application for the appointment of provisional liquidators to be made by Chamber Summons and to be served upon any persons against whom the order is sought. No application of any kind was made for appointment of provisional liquidators. Instead the winding up petitions included a prayer for such appointment. This was clearly in contravention of the clear provisions of rule 8(2).

(vi) Failure to notify the creditors was fatal to the appointment of provisional liquidators.

(vii) ***Obiter:*** It was improper to extend the order of suspension to the petitioners in respect of whom no objection had been raised by NSSF.

(viii) The proceedings in the High Court were affected by confusion which was deepened by changes of judges who presided over the proceedings contrary to the individual calendar system. The individual calendar system requires that once a case is assigned to a judge or magistrate, it has to continue before that judge or magistrate unless there are good reasons for doing otherwise. The system is meant not only to facilitate case management by trial judges and magistrates, but also to promote accountability on their part. Failure to follow this procedure was certainly irregular and was amenable to the revisional process.

(ix) The appointment of Mr Mkono as provisional liquidator placed him in a position of conflict of interest. His appointment was, therefore, improper.

(x) The mediation process was applicable to Civil Case Number 98 of 1998 in which the plaintiff sought an injunction. The rules pertaining to mediation were not observed.

(xi) The order restraining the judge from proceeding with Civil Case Number 98 of 1998 was made without authority as the case did not concern the ten companies which petitioned for liquidation.

It was finally ordered that the Miscellaneous Civil Causes be placed before a judge in the High Court for various directions as to the future course of those matters. The order staying Civil Case Number 98 of 1998 was set aside; so too were orders made in that case after closure of pleadings which were inconsistent with Order VIII A and Order VIII B of the Civil Procedure Code.

Cases referred to:

(1) *Moses Mwakibete v. The Editor, UHURU and others* [1995] T.L.R 134

(2) *Halais Pro-Chemie v. Wella AG* [1996] T.L.R 269

Statutory provisions referred to:

(i) Appellate Jurisdiction (Amendment) Act Number 17 of 1993, subsections (2) and (3)

(ii) Appellate Jurisdiction Act 1979 section 4

(iii) Companies Act 1928

(iv) Companies Ordinance Chapter 212, sections 285, 167(a), 183(1) and 348

(v) Constitution of the Republic of Tanzania, articles 117(1) and (3), 117(1) and 30(3)

(vi) Ordinance Chapter 212 and rule 31(1) of the Winding Up Rules

(vii) Winding Up Rules 1929

Mr. Mkono and *Mr. Ng'maryo,* for the Petitioners

Mr. Kapinga and *Mr. Kameja,* for the Respondents

ORDER

(Dated 12 March 1999)

NYALALI, C.J.: These are revision proceedings by the court acting *suo motu* on the basis of information originating from Sinare and Shiyo, advocates. The information relates to proceedings currently pending in the High Court. They are proceedings for the winding up of ten companies and a suit by one of the companies against one of the creditors. The winding up proceedings are Miscellaneous Civil Case Numbers 146 to 155 of 1998 and the suit is Civil Case Number 98 of 1998 all of the High Court at Dar es Salaam. The parties to the suit are Fahari Botters Ltd. as Plaintiff and The National Bank of Commerce (1997) Ltd., as defendant, hereinafter called The Bank. Essentially, Fahari Bottlers Ltd. seeks to restrain The Bank from exercising its debenture rights against it. As to the winding up proceedings, simultaneously instituted in court on 24 August 1998, the ten companies essentially seek the assistance of the court in a move to restructure the ten companies, which are admittedly insolvent. These companies are Ziggi Bottlers Ltd, Kilima Bottlers Ltd, Mwanza Bottling Company Ltd, Ruaha Bottling Company Ltd, Shinyanga Bottlers Ltd, Serengeti Beverages Company Ltd, Westlake Bottlers Ltd, Fahari Fruit Products Ltd, Southern Highlands Bottlers Ltd and Fahari Bottlers Ltd, hereinafter called, the ten companies. All winding up petitions in respect of the ten companies are couched in similar terms. Among the prayers contained in the petitions, is a prayer for the appointment of provisional liquidators, with powers to spearhead the restructuring exercise. Following the institution of the petitions, an order was made by the High Court on the 25 August 1998 consolidating all winding up proceedings into Miscellaneous civil case number 154 of 1998. Soon after the order was made that day, Mr Ng'maryo, learned advocate for the ten companies addressed the High Court at length, and stated, *inter alia:*

> This application is brought before the court pursuant to section 167(a) of the Companies Ordinance Chapter 212; as well as the Companies (Winding Up) Rules 1929 (Imperial) as applied to Tanganyika. The purpose of this

> A application – i.e. winding up by the court is to enable the companies to restructure in order to qualify for equity investment from a foreign investor in the name of International Pepsi Cola Bottler Investment Ltd (IPCBILL). The need for equity investment came because of very rapid growth by B the applicants' companies which by 1995 necessitated vast outlays of capital to sustain the growth. Simultaneous with this need, the major competitor in the business of the applicant company, namely COCA-COLA, through a foreign company called SABCO had by 1995 invested over 60 million C US dollars on the acquisition of new plants, machinery and equipment. The applicant companies are vying for restructuring in order to get the equity investment and to cope up with the competition. The applicant companies also recognize the presence of creditors of varying magnitude who must D also be protected in the process of restructuring and re-organization of the petitioner companies. The protection will be in the form of a court supervised process, through court appointment provisional liquidators whose appointment is prayed for in the petitions by virtue of section 183(1) of the Ordinance Chapter 212 and rule 31(1) of the winding Up Rule ...

E After an *exparte* hearing of the submission of Mr Ng'maryo, the High Court, Kileo, J. made an order appointing three persons as provisional liquidators as prayed, including various consequential F directions, including such as, "that any suit, application, case, petition or matter pending in this court or in any Subordinate Court or tribunal be stayed pending the order for winding up the companies or further order". and "... that notice of this order be given to all the creditors thus appointed in respect of the ten companies were Nimrod Elirehemah G Mkono of Mkono and Company, Advocates, Pual H. and Kelvin A. Murphy of Finne Associates, London.

Consequent upon this court order, objection proceedings against H the appointment of the provisional liquidators were at various times instituted in the High Court by two secured creditors, namely, the National Social Security Fund (NSSF) and the bank. Furthermore, of the objection by NSSF in respect of one of the companies, namely, I Southern Highlands Bottlers Ltd. The order of suspension was made applicable to all other companies.

Subsequently on the 23 September 1998, when the proceedings A came up before the court, Mr Ng'maryo, advocate, for the petitioners informed the court, Mackanja, J. to the effect that NSSF had assigned its rights to a third party, namely, Fahari Bottlers Ltd upon the said third party paying in full the claims by NSSF against Southern Highlands Bottlers Ltd, and that NSSF was consequently withdrawing its objection. B Mackanja, J. reserved his ruling initially until 25 and subsequently until 29 September 1998. On the 25 September Mr Sinare, learned advocate for NSSF appeared and confirmed the position of NSSF. In his reserved ruling of the 29 September, Mackanja, J. allowed C NSSF to withdraw its objection and stayed the execution of the order appointing the provisional liquidators, "... pending the final determination of all the objections in order to maintain the *status quo.*"

D After delivery of the reserved ruling, counsel for the petitioners indicated an intention to appeal but that move did not materialize. Meanwhile, on the 7 October 1998 the provisional liquidators filed in the High Court, a report detailing their activities from the time of their appointment, to the date of their suspension as earlier ordered E by the court on 17 September 1998. Mr Ng'maryo for the petitioners and Mr Mponda for the provisional liquidators asked the court to give directions concerning the report. In a ruling given on the same day, Mackanja, J. declined to give the directions and instead made F an order as to the schedule of the hearing inter parties of the pending objections and fixed the 15 November 1998 as the date when he will give his ruling on the objections.

G While this scheduling order was still in operation, an application was filed in court and it came up for consideration by the court on 23 October 1998. Mr Ng'maryo Advocate appeared for the applicant, whereas Mr Kapinga, advocate and Captain Kameja, advocate appeared for the first and second respondents respectively. Counsel for the H respondents sought leave to file counter affidavits. The court made two orders. The first order granted leave to file counter affidavits, the second one, which was *suo motu*, was made without hearing the parties, and it stated: I

> Before me there is an application which has information to the effect that another set of liquidators has been appointed to wind up the petitioner in these proceedings. This means that there will be those whose appointment is stayed by order of this court and those appointed thereafter. The instant application is in respect of the second set of liquidators. I have decided that I hear none of the learned counsel on this matter and, instead I have decided to make an order at the court's own motion to bring credence to these proceedings.
>
> Now I have already made an order that the *status quo* be maintained pending the determination of the objections that were raised by NBC (1997) Ltd. It will be rather unusual for NBC (1997) Ltd, who are bound by that order to appoint liquidators when its own objections are still pending determination.
>
> The only way to maintain sanity is, therefore, to order that pending the determination of all objections, the *status quo* prevailing on 7 October 1998 is hereby restored, that is when I delivered my last, but this, ruling. This means that the operations of the petitioner shall remain under the management of whoever was in charge on that date and who shall remain in charge until the objections are finally determined.

Subsequent to this order and when the previous order scheduling the *inter parte* hearing of the objections was not yet fulfilled, an application was filed in the High Court, by Thomas Bashite Mihayo, advocate apparently for the petitioners, for execution of the court order which maintained the *status quo*. The application for execution was granted as prayed.

Thereafter on the 30 October 1998, the proceedings came up before a different judge, that is, Chipeta, J. Mrs. Maajar, appearing for receiver and managers and holding the brief of Kapinga for NBC, addressed the court concerning apparent confusion in the interpretation of previous court orders. Upon hearing this address, Chipeta, J. made the following order:

> It seems to me that there has been a large cloud on the interpretation of this court's order of 23 October 1998 which is sought to be executed.

> Until that cloud is lifted, it will never be clear as to what the parties were told to do. In the circumstances, the execution of the order made this 30 October 1998 is hereby stayed pending a hearing inter parties of that application for execution and hearing of the case inter parties as ordered by the court on 23 October 1998.

The proceedings thereafter came to a halt, when the records of the proceedings were called to the Court of Appeal for purposes of steps under the provisions of sub-section (3) of section 4 of the Appellate Jurisdiction Act, 1979 as amended by Act Number 1 of 1993. A number of persons, with an apparent interest in the proceedings pending in the High Court, were notified to appear to assist us in this exercise. We appreciate the good response to that notification and the research consequently made to assist us, especially by Mr Ng'maryo.

Since this is the first time this court is acting under the provisions of sub-section (3) of section 4 of the Appellate Jurisdiction Act 1979, the first point that arises from the material before us, is whether the Court of Appeal has jurisdiction and competence to inquire into the proceedings pending in the High Court. Mr Mkono, learned advocate, supported by Mr Ng'maryo, learned advocate, submitted to the effect that this court has no Revisional Jurisdiction of any kind, since the law granting such jurisdiction, that is sub-section (2) and (3) of the Appellant Jurisdiction Act 1979, as amended by Act Number 17 of 1993 and 32 of 1994 are *utra vires* the provisions of sub-articles (1) and (3) of article 117 of the Constitution of the United Republic of Tanzania, which reads in the Kiswahili language as:

> 177(1) Kutakuwa na Mahakama ya Rufani ya Jamhuri ya Muungano (itakayojulikana kwa kifupi kama "Mahakama ya Rufani" ambayo mamlaka yake yatakuwa kama ilivyoelezwa katika Katiba hii au katika sheria nyingine yoyote.
>
> (2) ... (not applicable)
>
> (3) Kazi ya Mahakama ya Rufani itakuwa kusikiliza na kutoa uamuzi juu ya kila rufaa inayoletwa mbele ya Mahakama ya Rufani kutokana

> na hukumu au uamuzi wa namna nyingine yoyote wa Mahakama Kuu au Mahakama ya Hakimu.

According to Messrs Mkono and Ng'maryo, these provisions, particularly sub-article (3) show that this court is vested with only appellate jurisdiction by the Constitution. On the other hand, M. Kapinga, learned advocate, supported by Capt. Kameja, learned advocate, have submitted to the effect that the provisions of section 4 of the Appellate Jurisdiction Act, 1979 were amended by the Parliament to confer Revisional Jurisdiction upon the court in addition to its appellate jurisdiction, and that the Parliament is so empowered under sub-article (1) of Article 117 of the Constitution.

After considering carefully the opposing arguments, we are satisfied that Mr Kapinga and Captain Kameja are correct. By reading the two provisions together, that is sub-article (1) and (3), it is clear to us that there are two sources of jurisdiction of the Court of Appeal as stated under sub-article (1). These are, firstly, the Constitution itself, and secondly, any other law enacted by the Parliament. The first source, that is, the Constitution, gives rise to the appellant jurisdiction of the court. The second source is open ended. Apparently, the parliament is empowered by Constitution to confer additional jurisdiction of any kind. This is what it did in the amendments contained under Acts Numbers 17 of 1993 and 32 of 1994. The provisions of sub-article (3) of Article 117 which deal with the appellate function of the court cannot be construed as derogating from the power conferred upon the Parliament under sub-article. (1) They have to be construed as an elaboration of the appellate jurisdiction of the court. The Constitution itself does not contain any elaboration of such other function. We think this omission is deliberate. The Parliament is expected to elaborate on any functions arising out of any Act conferring additional jurisdiction on the court. This has been done under the said amending Acts. It would of course have been clearer if the provisions of sub-article (3), had been included in sub-article (1) empowering the Parliament to designate the functions that may be exercised by the court. We are satisfied, however, that the present arrangements of the provisions

of Article 117 does not in any way derogate from the power of the Parliament to designate functions which may be exercised by the Court of Appeal.

For purposes of clarity, we need to respond to one other aspect of Mr Ng'maryo's submission. It is to the effect that this court has no jurisdiction or power to decide on the constitutionality of the amending Acts before such an issue is decided by the High Court as provided under article 30(3) of the Constitution. With due respect, we are satisfied that this is a misinterpretation of the relevant provisions. The provisions of article 30(3) apply only to enforcement of the provisions of human rights and freedoms contained under the Constitution. There is no provision either under the Constitution or any other law which expressly or implicitly requires any other constitutional issue to be decided first by the High Court before being decided by this court.

As to competency, Mr Ng'maryo has submitted to the effect that the matter is not properly before the court, on the ground that Sinare and Shio, advocates, whose information apparently moved the court to intervene in the proceedings pending in the High Court, are excluded from moving the court other than by way of appeal. This is so, it is argued, because the National Social Security Fund, (elsewhere referred to as NSSF) was a party to the proceedings pending in the High Court. Two decisions of this court were cited in support of the submission, that is the case of *Moses J Mwakibete v. The Editor – Uhuru and others* (1) and the case of *Halais Pro-Chemie Industries v. Wella, AG* (2). The legal position in these cases was summarized in the case of *Halais Pro-Chemie Industries Ltd.* as follows:

> (i) The court may, on its own motion and at anytime, invoke its Revisional Jurisdiction in respect of proceedings in the High Court;
>
> (ii) Except under exceptional circumstances, a party to proceedings in the High Court cannot invoke the Revisional Jurisdiction of the court as an alternative to the appellate jurisdiction of the court;

(iii) A party to proceedings in the High Court may invoke the Revisional Jurisdictional of the court in matters which are not appellable with or without leave;

(iv) A party to proceedings in the High Court may invoke the Revisional Jurisdiction of the court where the appellate process has been blocked by judicial process.

For reasons which will be apparent presently, we are satisfied that Sinare and Shiyo did not move this court to act, but merely drew our attention to a serious problem concerning the proceedings pending in the High Court.

The first point that we have to examine on the record is whether the *ex parte* application for appointment of provisional liquidators is proper. There is common ground among all advocates, who submitted on this point, that the relevant law is to be found in the Companies Ordinance Chapter 212 and the winding Up Rules 1929 made under the Companies Act, 1928 (Imperial) of the United Kingdom. This is so because section 348 of the Companies Ordinance makes those rules applicable in this country until such time when the High Court of this country makes rules for this country under section 285 of the ordinance. Apparently, the High Court has not yet made the rules up to now. We hope this will be rectified soon.

The rule applicable for chamber applications made under the Ordinance, including any application for the appointment of provisional liquidators is rule 8(2). That rule requires the application to be made Chamber Summons and to be served upon any persons against whom the order is sought. It is common ground among all advocates, who made submissions to us on the record, that no application of any kind was made for appointment of provisional liquidators. Instead the Winding Up Petitions included a prayer for such appointment. This was clearly in contravention of the clear provisions of rule 8(2). There was a further and more serious error. The petition was *exparte* and was not publicized in any way. This means that no person

affected by the move had prior notice of the decision made by the High Court to appoint the provisional liquidators.

Mr Ng'maryo has submitted to the effect that under the circumstances of this case, where a large number of creditors is involved, it was more convenient to have the provisional liquidators appointed first and let the objectors appear later. On the other hand, Captain Kameja submitted in effect that the *exparte* proceedings were intrinsically inappropriate, since in order to decide whether to grant the order sought, the court could not but partially hear the petition before it was advertised contrary to the provisions of rule 27, which require the petition to be advertised at least seven clear days before being heard.

It is our considered opinion that the requirement for service of Chamber Summons upon persons affected by the order is important not only to ensure that justice is done but that it is seen to be done. After all, the provisional liquidators were expected to protect the interests of creditors, and it is only fair that such creditors be given the opportunity to play a part in the proceedings for appointment of liquidators. The large number of creditors is not an obstacle to notification of creditors, since an appropriate manner of notification can always be ordered by the court. We have no doubt in our minds that the irregularies in the proceedings for appointment of provisional liquidators, especially the failure to notify the creditors, was fatal to the appointment. This irregularity of course could not be challenged by NSSF by way of appeal, since NSSF was not a party to the proceedings which resulted in the appointment of the provisional liquidators. It became a party later, after filing the objection against the appointment.

This finding is sufficient to conclude our examination of the winding up proceedings in Miscellaneous Civil Cause Numbers146 to 155 of 1989, but bearing in mind that this is the first case of its kind to come before us, we feel that there is need to examine briefly other relevant points.

We begin with the point concerning the propriety of the order made by Kileo, J, on the 15 September 1998 suspending the appointment of the provisional liquidators in respect of all ten companies upon an objection made in respect of one of them – that is, the objection made by NSSF in respect of Southern Highlands Bottler Ltd. None of the learned advocates who made submissions before us supported the scope of the suspension order. We are satisfied that it was improper to extend the order of suspension to the companies in respect of which no objection had been raised by NSSF. We would have curtailed that extension if the appointment itself was not flawed in the manner already indicated.

The other point for examination concerns the order made *suo motu* by Kileo, J. on 17 September 1998 directing the suspended provisional liquidators to submit to the court a report detailing their activities from the time of their appointment to the date of their suspension. We are satisfied that this *suo motu* order was proper, since it was a follow up to the order of suspension, which directed, *inter alia*, that the case comes up for further directions.

The other *suo motu* order was made on 23 October 1998 by Mackanja, J. On that day, there was an application before the court but both Mr Kapinga and Capt. Kameja, who appeared for their clients, sought leave to file counter affidavits. Their requests were granted. Thereafter but soon after granting the requests, the court made the following order:

> **ORDER:**
>
> Before me there is an application which has information to the effect that another set of liquidators has been appointed to wind up the petitioner in these proceedings. This means that there will be those whose appointment is stayed by order of this court and those appointed thereafter. The instant application is in respect of the second set of liquidators. I have decided that I hear none of the learned counsel on this matter and, instead I have decided to make an order at the court's own motion to bring credence to these proceedings.

> Now I have already made an order that the *status quo* be maintained pending the determination of the objections that were raised by NBC (1997) Ltd. It will be rather unusual for NBC (1997) Ltd, who are bound by that order to appoint liquidators when its own objections are still pending determination.
>
> The only way to maintain sanity is, therefore, to order that pending the determination of all objections, the *status quo* prevailing on 7 October 98 is hereby restored, that is when I delivered my last, but this, ruling. This means that the operations of the petitioner shall remain under the management of whoever was in charge on that date and who shall remain in charge until the objections are finally determined.

This order was incomprehensible to the learned advocates representing the parties. We sympathize with the advocates concerned. The reason is not far to seek. The learned Judge had confused two different entities – that is – the Receivers appointed by NBC (1997) Ltd. and the provisional liquidators appointed by the court.

Furthermore, the learned judge was ambiguous about the identity of the management who were to remain in charge of the operations. We think that had the learned judge heard submissions from counsel, instead of going it alone, so to speak, he would most likely have made a sensible order and there would have been no need to use emotive words on his part. Counsel informed us that an attempt to get the judge to clarify his order was made by way of a subsequent application for execution of the order made on the 23 October. Unfortunately, the attempt misfired when on the 28 October 1998 it was ordered as follows:

> Upon reading application for execution of order dated 23 October 1998 and filed in this court on 28 October 1998, by Thomas Bashite Mihayo, Advocate for the decree holder applying for:
>
> To compel the receivers and manager of Southern Highlands Bottlers or their servants or agents to immediately hand over to the Directors of Southern Highlands Bottlers or their Agents or Nominees, all the assets tangible or intangible of Southern Highlands Bottlers, Ltd.

Order: Let the application be granted accordingly.

Obviously this order did not advance the matter any further, since the court had never at any time decided exactly who was in charge of the management of the ten companies at the material time.

The other problematic order or decision was made by the High Court on the 29 September 1998 in which the court allowed NSSF to withdraw its objection to the appointment of provisional liquidators, in respect of Southern Highlands Bottlers Ltd. This order was bound to confuse the parties as indeed it did. The petitioners logically expected the suspension of appointment of provisional liquidators to be lifted, at least in respect of Southern Highlands Bottlers Ltd. Moreover there was an order still in force requiring the suspended provisional liquidators to report on their activities prior to their suspension. It is not clear in what capacity they were to report to the court when the order appointing them as such had been suspended and later stayed by the court. Predictably, the confusion asserted itself, when the report was eventually submitted to the court. In his order dated 7 October 1998, Mackanja, J., correctly stated, *inter alia*, that:

> Of course the stay of execution of the order appointing provisional liquidators has created *an impasse*. The orders being as they are, one making an appointment of provisional liquidators, another staying that order and yet another giving directions to the provisional liquidators are likely to cause confusion....

It is obvious to us that the proceedings in the High Court were affected by confusion and that the confusion was deepened by changes of judges who presided over the proceedings. Three judges were involved at various stages of the proceedings. When such a situation occurs, there is likely to be confusion, unless the succeeding judges thoroughly study the record of previous proceedings. This does not seem to have been done in this case. Moreover, no reasons are given on the record to explain the change of judges, especially when the individual calendar system requires that once a case is assigned to an individual judge or magistrate, it has to continue before that particular judge

or magistrate to its final conclusion, unless there are good reasons for doing otherwise. The system is meant not only to facilitate case management by trial judges or magistrates, but also to promote accountability on their part. The unexplained failure to observe this procedure in this case is certainly irregular, to say the least. Such irregularities and the accompanying confusion in our view are not amenable to the appellate process for remedy. They are amenable to the revisional process.

The other point for examination on the record is the propriety of Mr Ng'maryo, representing not only the petitioners, on the 23 September 1998, but also the assignee of a debt, that is, M/S Fahari Beverages Ltd, who were not a party to the proceedings. Mr Ng'maryo informed the High Court, Mackanja, J. that NSSF had assigned the debt to that other person, and that the person was not interested in pursuing the objection by NSSF. On this basis, the High Court allowed the objection to be withdrawn.

Mr Ng'maryo informed us that NSSF had written to the Registrar of the High Court indicating its intention to withdraw. The information was not contradicted by anyone before us. It is our considered opinion that it was wrong on the part of Mr Ng'maryo to move the High Court on behalf of a person who was not a party to the proceedings. It was proper to move the court to act on the basis of the indication contained in the letter of NSSF was communicated to the High Court.

The final point for examination on the record concerns the propriety of Mr Mkono, learned advocate, to be appointed a provisional liquidator when his firm, that is, Mkono and Company, Advocates, was representing one of the ten companies, that is Fahari Bottlers Ltd, in a suit against one of the major creditors, that is NBC (1997) Ltd. Mr Mwaikusa, learned advocate, who appeared before us for Mr Mkono, when this point was being examined, could not assist us. We have no doubt whatsoever that Mr Mkono's appointment as provisional liquidator placed him in a position of conflict of interest between Fahari Bottlers Ltd. as a debtor and NBC (1997) Ltd. as a creditor. It follows therefore that his appointment as provisional liquidator was improper.

There is not much to say about the appointment of the two other provisional liquidators. At first we had the impression that both resided outside the jurisdiction of the High Court, that is, in London, but on closer examination of the record, it appears that they have an address within the jurisdiction of the court. Normally no person resident outside the jurisdiction of the court is qualified for appointment as a liquidator. It is our understanding that the same position prevails in England. See page 752 of **Charlesworth and Morse's Company Law,** (15 ed).

Our last examination concerns two points relating to the proceedings in Civil Case Number 98 of 1998. The first point is whether the provisions of Order VIIIA and VIIIB which mandate a court annexed mediation process, do apply to the suit. There was unanimity of counsel appearing before us that the mediation process is applicable to Civil Case Number 98 of 1998, in which Fahari Bottlers sought an injunction to prevent NBC (1997) Ltd. from enforcing its debenture rights. We are unable to understand why the rules relating to mediation were not observed in that case. We need to remind all concerned, that is, trial judges, magistrates and advocates, that mediation not only facilitates the expeditious disposal of cases, but is less costly. Moreover, and this is important, mediation has no room for corrupt practices. Under mediation the parties themselves decide their dispute under guidance of the court. The transparent and participatory nature of the process makes it a very portent tool for the judiciary and the legal profession in combating corruption both at the Bar and the Bench. This court expects to see better compliance with the relevant rules in the future.

The other point concerns the order made by Mapigano, J. on 17 September 1998 staying the proceedings in the suit consequent upon an order made by Kileo, J, on the 25 August 1998 while appointing the provisional liquidators. Kileo, J:

> ... ordered that any suit, application, case, petition or matter pending in this court or in any Subordinate Court or tribunal be stayed pending the order for winding up the companies or further order.

Although Kileo, J. did not state the law upon which that order was made, Mr Ng'maryo, learned advocate submitted to the effect that the learned judge must have acted under section 171 of the Companies Ordinance Chapter 212. That seems to us to be the case, since we are not aware of any other relevant law. Section 171 of the ordinance however relates only to proceedings against the companies subject to winding up proceedings. The section states:

> The court may, at any time after presentation of the petition for winding up a company under this ordinance, and before making an order for winding up the company, upon the application of the company or any creditor or contributory, restrain further proceedings in any suit or proceeding against the company upon such terms as the court thinks fit.

We are satisfied that Kileo, J. had no powers to restrain Mapigano, J. or any other fellow judge of the High Court from proceeding with matters which were not against the ten companies.

In conclusion, we have found at the end of our examination of the proceedings pending in the High Court, that not only was the order appointing the provisional liquidators invalid in law, but the proceedings were afflicted by confusion caused by several irregular orders and decisions. Under the circumstances and bearing in mind that this is a commercial case deserving to be treated with sensitivity for the needs of the commercial community both within the outside Tanzania, we hereby order that:

(i) the proceedings for appointment of provisional liquidators be and are quashed; and

(ii) the petitions filed in Miscellaneous Civil Cause Numbers 146 to 155 be amended by the petitioners within 14 days from today to expunge references to appointment of provisional liquidators; and

(iii) the order by Mapigano, J. in Civil Case Number 9 of 1998, staying the proceedings therein be and is set aside;

(iv) Any orders or decisions made in Civil Case Number 98 of 1998 after closure of the pleadings and which are inconsistent with the provisions of Order VIIIA and VIIIB of the Civil Procedure Code mandating the use of Mediation are set aside;

(v) The Bank is at liberty to act on its debenture according to law unless and until The Bank and its debtor companies agree otherwise or the High Court directs otherwise according to law;

(vi) The records of Miscellaneous Civil Cause Numbers 146 to 155 of 1998 and Civil Case Number 98 of 1998 be placed before a judge in the High Court within 14 days from today for directions as to the future course of these cases, including the fate of the report submitted by the provisional liquidators;

(vii) No order for costs in this court is made;

(viii) Any expenses incurred *bona fide* by the provisional liquidators before their suspension are to be met out of assets of the ten companies.

ELIBARIKI MBOYA *v.* AMINA ABEID

COURT OF APPEAL OF TANZANIA AT ARUSHA

(Mfalila, Samatta and Lugakingira, JJ.A.)

CIVIL APPEAL No. 54 OF 1996

(Appeal from the Judgment and Decree of the High Court of Tanzania at Arusha, Munuo, J., dated 28 January 1994.

Evidence – Documentary evidence – Admissibility of document required to be stamped but not stamped – Contract of sale of a house not stamped – Whether the contract may be admitted in evidence – Sections 5 and 46(1) of the Stamp Duty Act 1972 and section 73 of the Civil Procedure Code.

Stamp Duty – Failure to affix stamp duty on an instrument – Effect thereof – Sections 5 and 46(1) of the Stamp Duty Act 1972.

The appellant successfully sued the respondent in the court of the Resident Magistrate for vacant possession of a wooden house in Arusha Municipality. The appellant testified that he entered into a written contract with the respondent whereby the respondent sold to him the said house for 130,000. The written contract tendered in evidence as exhibit was not stamped in accordance with the Stamp Duty Act 1972. The trial court decided in favour of the appellant. The High Court, on appeal, found in favour of the respondent on the ground that the contract of sale was not stamped and thus could not be admitted as evidence under section 46(1) of the Stamp Duty Act 1972 as to do so would offend section 5 of the said Act. The appellant was aggrieved and appealed to this court.

Held: (i) Failure to stamp the contract of sale was an irregularity not affecting jurisdiction of the court and was cured by section 73 of the Civil Procedure Code, 1966. The respondent is ordered to pay the duty with which the instrument is chargeable.

Appeal allowed.

Cases referred to:

(1) *Transport Equipment Ltd. v. DP Valambia*, [1993] T.L.R 91

(2) *Mohammed Hussein Khan v. Kishua Nandan* [1937] All ER 655

(3) *Kiran Singh v. Chaman Paswan* (1954) SC 340

Statutory provisions referred to:

(i) Magistrates Courts Act 1984, section 37 Order 3 , rule 2, Order 13 of rule 2, rule 4

(ii) Civil Procedure Code, 1966, section 73

(iii) Stamp Duty Act 1972, sections (5) and 46(1)

(iv) Indian Civil Procedure Code, section 99

Mr. Mwale, for the Appellant

Respondent, in person