OBJECTION MY LORD

LEGAL PRACTICE DEMYSTIFIED

FIRST EDITION

ISAAC CHRISTOPHER LUBOGO

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"Legal Practice Demystified"

CORPORATE AND COMMERCIAL PRACTICE

OBJECTION MY LORD: LEGAL PRACTICE DEMYSTIFIED

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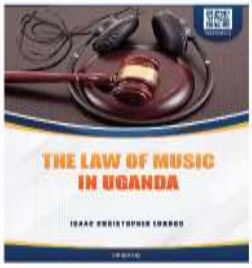

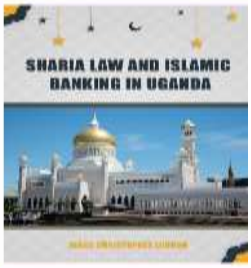

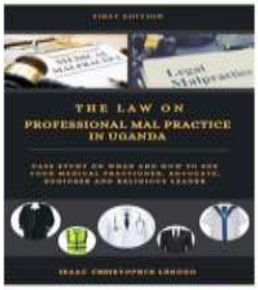

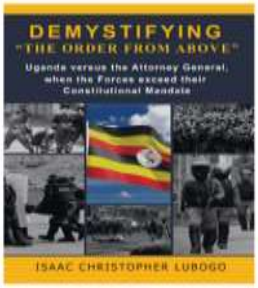

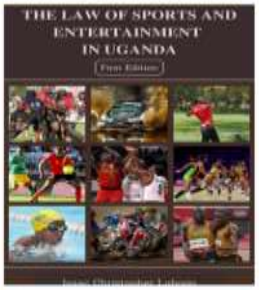

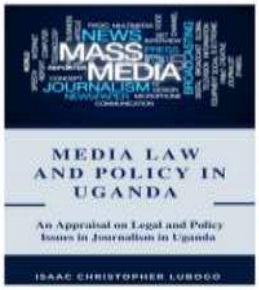

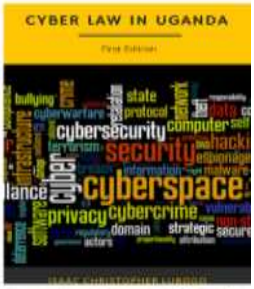

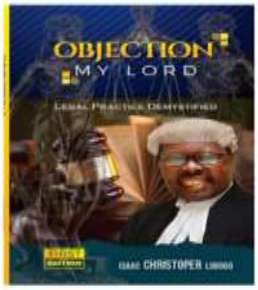

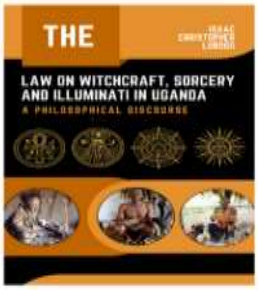

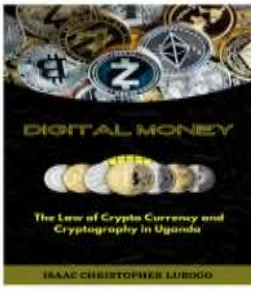

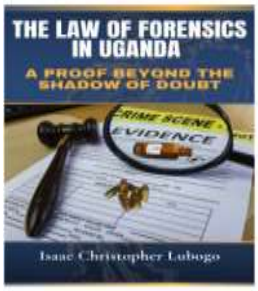

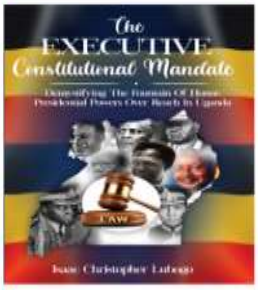

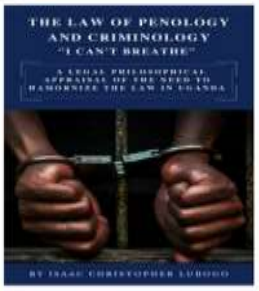

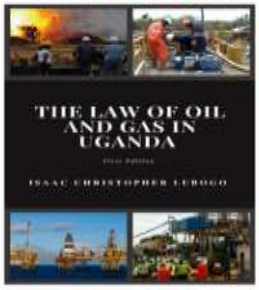

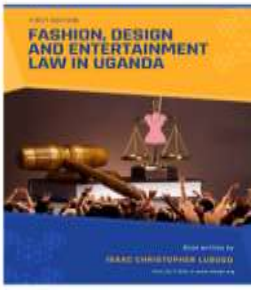

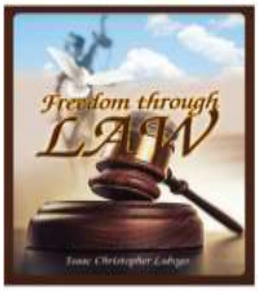

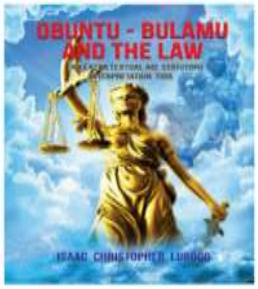

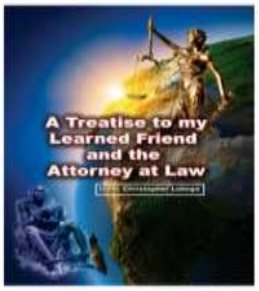

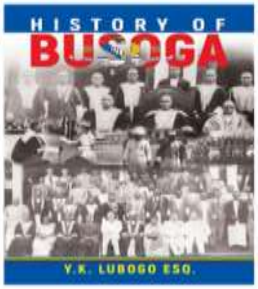

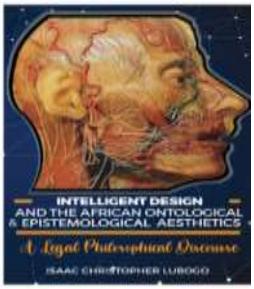

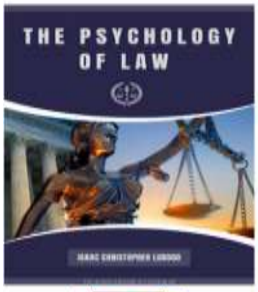

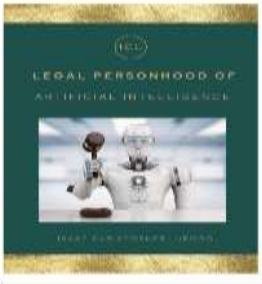

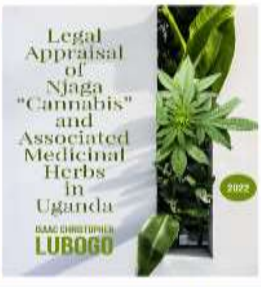

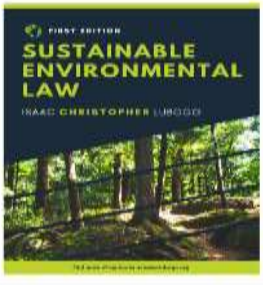

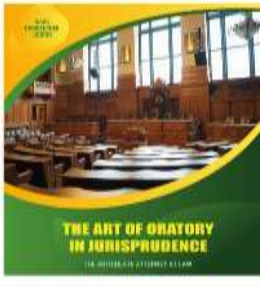

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DEDICATION

To the Lord Who Breathes Life and Spirit on Me … Be My Guide
Oh Lord of The Entire Universe.

"….Daniel was preferred above the presidents and princes, because an excellent spirit was in him, and the king thought to set him over the whole realm"

Daniel Chapter six, verse three

Vox Populi, Vox Dei (Latin, 'the voice of the people is the voice of God')

Salus populi suprema lex esto (Latin: "The health (welfare, good, salvation, felicity) of the people should be the supreme law", "Let the good (or safety) of the people be the supreme (or highest) law", or "The welfare of the people shall be the supreme law") is a maxim or principle found in Cicero's De Legibus (book III, part III, sub. VIII).

ACKNOWLEDGEMENT

Great thanks to Doya, whose materials have inspired me to abridge this tome into a formidable book. I offer distinctive recognition and thanks to my team of researchers whose tireless effort in gathering and adding up material has contributed to this great manuscript. Blessings upon you.

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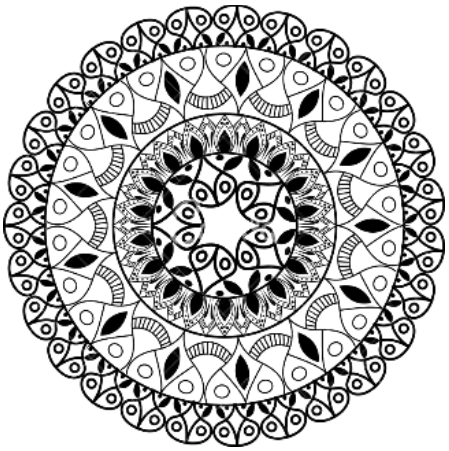


PARTNERSHIPS

The law applicable to this scope of study includes the following;

The Constitution of the Republic of Uganda

The Judicature Act Cap 13

The Partnership Act 2010

The Business Names Registration Act Cap 109

The Contract Act 2010

The Cooperative Societies Act Cap 490

The Registration of Documents Act Cap 81

The Uganda Citizenship and Immigration Control Act Cap 66

The Stamps Act Cap 342 as amended by Act 12 0f 2002

The Trade (Licensing) Act Cap 101

The Companies Act 2012

The Registration of Documents Rule SI 81-2 as amended by SI 55 of 2005.

The Business Names Registration Rules SI 109-1 (as amended by Act 53 of 2005)

The Advocates Act Cap 267

The Advocates (Remuneration and Taxation of Costs) Rules SI 267-4

The Civil Procedure Act Cap 71

The Civil Procedure Rules SI 71-1

Common law and Doctrines of Equity.

The checklist/ Issues arising include:

- Whether the parties can form an organization and if so what type of organization.
- Whether the parties have capacity to form the said organization.
- What other additional information is needed to form the organization.
- What is the forum procedure and documents?
- What are the fees payable?

NATURE OF PARTNERSHIP

Partnerships are one of the various forms of business organizations /associations. Other associations inter alia include;

a) Sole proprietorships

b) Companies

c) Cooperative societies

d) Joint ventures

A partnership is defined in **Section 2(1) of the Partnership Act 2010** (hereinafter referred to as the Partnership Act), as two or more persons carrying on a business with a view of obtaining profits. This definition is fortified by **FESTO SENDI VS CLEARERS LIMITED CA 1/1997;** where court held that in order to tell whether there is existence of a partnership, there should be actual receipt of profits and not a mere intention to share profits.

The number of members of a partnership, ranges from 2-20 as enunciated stated in **WALAKIRA V WALUSIMBI (CIVIL SUIT 579 OF 2012) [2016] UGCOMMC 92**

In **ASINGWIRE& ANOR V RWAKOOJO (HCT-01-CV-CS 1 OF 2014) [2018] UGHCCD 73 (18 DECEMBER 2018) among other things the court argued Whether there existed a partnership between the parties?** Partners really and truly intended to join together for the purpose of carrying on business and sharing in the profits or losses or both. Their intention is a question of fact.

ELEMENTS OF A PARTNERSHIP

1. **Relationship**

No partnership exists with a single person. A partnership is a relationship which if established governs the rights and duties between the parties and their relationship with those transacting with the parties.

A partnership is said to exist when two or more people have agreed either expressly or impliedly to share in the profits and control of a business. The agreement maybe I written oral or deduced from the conduct of the parties. **Section 5-20 of Partnership Act and order 2 of the civil procedure rules**. In partnership the general principle of the law of agency governs the liability of partnerships for the acts of the partner. Under **Section 6** an act or instrument relating to the business of the firm and done or executed in the name of the firm or in any other manner intending to bind the form by the firm by a person binding the firm whether a partner or not is binding on the firm and all the partners. In contracting the firm's liability, a third party who is not a member of the form of one who is not aware of the internal regulation imposed on individual partner can approve liability on the firm and other partner. Under **Section 6 of the Partnership Act,** every partner is an agent of the firm and a 3rd party is free to enter in to transactions with any partner. Therefore, any member of the firm can bring the firm of his/her acts are carried out in the usual way or scope of business

2. CARRYING ON A BUSINESS

Sharing profits per person does not create a partnership relationship and neither does joint ownership of property. **Section 2** (1)**Subject to subsection (2)**, defines a partnership is the relationship which subsists between or among persons, not exceeding twenty in number, who carry on a business in common with a view to making profit. In order to say that persons are carrying on a business, they must have gone beyond the preparatory stages of setting up a venture they have agreed to engage in and reached that **MIAH V KHAN AND OTHERS [2000] 1 WLR 2163**, individuals agreed to go into a partnership to run a restaurant. The under took various activities such as stage where they are actually doing the business.

A partnership is not created by a mere intention to do business together but by an intention which is manifested practically. In **HANSHAW V ROBERTS1967(1) ALR COMM. 5**; the plaintiff formed a business syndicate with three partners each paid on amount to a central fund as account of management expenses. There was also an agreement to form a business partnership within a limited time. Partnership was never formed as agreed.

ISSUE WAS WHETHER THERE WAS A PARTNERSHIP?

It was held that the existence of a partnership depends on carrying on business in partnership and not on the agreement to form a partnership. The expression carrying on business according to common law also connotes a repetition of acts and includes the case of association formed for doing one particular act which is never to be repeated for example in **SMITH V ANDERSON (1880) 15 CH D 247,** a group of investors subscribed for the purchase of shares through a trust in various submarine cable companies. The shares were sold to the investors by the trustees of the trust who then issued the subscribers a E100 certificate for each E90 certificate that was subscribed. In determining whether the trust was a partnership, the court held that single act of the trust did not satisfy the element of carrying on business which connoted a repetition of acts.

In BUBARE COMPANY VS. MBALE KENTE [1982] HCB 143) a partnership can be informal. It is also trite that not every partner in a partnership should get actively involved in the management of the partnership business for a partnership to exist. In fact, there are partnerships with inactive partners known as sleeping partners.

Section34 (1) (b) of the partnership Act envisages the existence of a partnership for a single venture. Although it deals with dissolution, it impliedly acknowledges the validity of a partnership of a single venture by providing its dissolution.

3. CARRYING ON A BUSINESS IN COMMON

The business must be carried on by or behalf of all parties. There is no requirement for all parties to take an active role. This ingredient on the face of it implies some degree of continuity. To satisfy this element, the business must be carried on by or on behalf all the partners. All the partners need not take an active role. In **LANG V JAMES MORRISON & CO LTD (1912) 13 CLR 1**, Griffiths CJ held that in order to establish that there was a partnership it is necessary to prove that the appellant carried on the business on behalf of himself and his two colleagues, in this sense, that he was their agent in what he did under the contract with the plaintiffs. In **SMITH V ANDERSON (1880) 15 CHD 247**, court observed that carrying on business implies a repetition or acts of transaction. From the definition and section 2 of the Act it is essential that the business be carried on it done in common i.e., where more than one person is involved but this is not to suggest that one should be physically involved provided there is concerns. **MANN V DARCY (1968), WRL 893**

Does working together or a social relationship constitute a partnership?

In PALTER V ZELLER (1997) 30 0R (3D) 796,

Wilkins J rejected the assertion of existence of a partnership and found that not even a scintilla of evidence to support a finding of a partnership between the defendants. He that, although the plaintiffs presumed that the defendants were partners, the mere fact that lawyers may be married and behave in an equal social and marital relationship has no impact upon the question of whether they are partners as a matter of law. He held that what is important to this issue is how they conduct their business affairs together, not how they conduct their personal affairs.

4. VIEW TO MAKE PROFIT

The partnership must be entered with a view to make profit and this distinguishes it from clubs and societies formed for formation of religious or social, education or recreational activities.

Business that not made any profits can be construed as partnerships as long as they were entered with a view to make profit **MIAH V KHAN [2000] 1 WLR 2163**

In **FRANCIS SEMBUYA V ALLPORTS SERVICES (U) LTD (CR. APPEAL NO.2 OF 1993) [2000] UGSC 8; the** court formed that there was an existence of a partnership between the appellants for purposes of buying the cement, reselling it and distributing the profits amongst themselves.

In **HENSHAD V ROBERT (1967) ALR** court held that it is basically the carrying out of business that determines a partnership. An agreement for a future plan was just an agreement to carry on business in future but not a partnership establishment, it was further noted that the relationship that existed did not amounts to a partnership and the fact that partners believed that they were partners in irrelevant.

In FIRMSTONE (1940) 23 T.C 29

Firestone wanted to purchase and develop a piece of land but lacked money and he asked a friend who gave him money. He later described in writing the relationship which was forged between him and the friend, a venture was successful and profits made. The issues were whether the venture constituted a partnership just because profits were made. The second was whether the terms of the transaction constituted a partnership. Court held that the facts which preceded the written agreement did not make it clear that a partnership had been formed, that persons involved in trade business or a venture upon the terms of sharing profit that answer the therefore from are to some extent partners in the trade. In this case it was not sufficient to say that from some of the features indicated in that transaction there was no partnership and that it was just a peculiar agreement partly a contract of loan, partly a contract of services and partly a contract of partnership.

In the above case there was nothing either in the agreement itself or in the circumstances in which it was entered into or even in the way it was performed to indicate a presumption of relationship which rose from sharing of both profit and losses. **S 3 (e) of Partnership Act** is to the affect that a receipt by a person of a share of profit of the business is prima facie evidence that he/she is a partner of a business. But the receipt of such a share or payment contingent or the profit for not in study makes a person a partner of the business.

In **DAVIS V DAVIS (1894) 1 CH. D 313**

The contradiction in **Section 3 (3)** it means that you look at the evidence of sharing the prior which court did not perse presume the existence of a partnership. If there is profit sharing and no other evidence at all to constitute the existence of a partnership, then you cannot claim there is existence of a partnership. You have to look at all the ingredients without undue weight to one of them.

FRANCIS SEMBUYA V ALL PORT SERVICES (U) LTD SCCA NO. 6 OF 1999 court found the

existence of a particular partnership between the appellants for purposes of buying cement, reselling it and distributing the profits amongst themselves.

RULES IN DETERMINATION OF EXISTENCE OF A PARTNERSHIP.

These rules are provided for in **Section 3 of the Partnership Act** thus;

1) Where there is a joint tenancy, tenancy in common, joint property, common property or part ownership; this does not necessarily create a partnership in itself as to the so held and owned; whether the tenants do or do not share profits.

2) Sharing of gross returns does not in itself create a partnership though the persons sharing, have or do not have a joint or common right, interest in the property from which returns are derived.

3) Receipt by a person of a share of the profits of a business is prima facie evidence of a partnership; but receipt of such share does not make one a partner in the business.

The above rules help in ascertaining existence of a partnership, when one is countered with a set of facts.

CAPACITY TO BE A PARTNER IN A FIRM

A) Minors.

Section 10 Partnership Act, a person who is a minor according to the law to which he or she is subject may be admitted to the benefits of partnership, but cannot be made personally liable for any obligation of the firm; but the share of that minor in the property of the firm is liable for any obligation of the firm.

The general rule regarding capacity of a person to be a partner is to the effect that a person of majority age can enter into partnership with another. There have been many inroads into this doctrine; thus, a minor can be a partner in a firm. However, without prejudice to the foregoing, he/she can only be liable upon attaining majority age. This principle is conversed in **IN THE MATTER OF KYESWA A (MINOR UNTILL 2030), BATWAWULA 9MINOR UNTILL 2027) AND SEBADUKA (MINOR UNTILL 2014) (Family and Children's Cause 32 of 2018) [2019] UGHCFD 10; further more in NANTUME SHARIFA V KAMPALA CITY COUNCIL & 2 ORS (CIVIL SUIT 33 OF 2007) [2009] UGHC 89;** where court held that a minor would be liable for debts accruing to a firm upon attaining 18 years but not incurring liability for debts before attaining18 years.

IN LOVELL V BEAUCHAMP [1894] AC 607, it was held that a minors' immunity from liability covered the private property of the minor but did not protect the whole of the partnership assets from being made available for the payment of the partnership debts. However, the immunity does not extend to the minor if he was taking profits from the partnership i.e., he cannot partake in the profits and avoid liability.

Section 11 of the Partnership Act

A person who has been admitted to the benefits of partnership while still a minor shall, on attaining the age of majority, be liable for all obligations incurred by the partnership from the date of his or her admission, unless he or she gives public notice within a reasonable time of his or her repudiation of the partnership. Failure to repudiate within a reasonable time of majority may be regarded as affirmation of the contract of partnership.

In **Goode v Harrison [1821] 5 B & Ald 147**, it was held that the defendant who had been in partnership with I.S. was liable in respect of goods delivered to I.S. after the defendant had attained majority. Despite the absence of proof that the defendant had done any act as a partner after reaching majority, he was nevertheless held liable because he had failed to disaffirm the partnership when he came of majority age.

B) Companies.

A company can be a partner in a firm. This is premised on the legal principle in section 15 of the Companies Act and in **SALMON VS SALMON (1877) AC 22** which state that a company is a legal entity, separate and distinct from persons who comprise it. This principle was further noted with approval in **STEPHEN VS. KATONAGEN (1918) AC 229.**

C) Persons of Unsound Mind.

Persons in this category don't have capacity to contract as partners. This is fortified in the **YONGE V TOYNBEE** [**1910] 1 KB 215**where court held that a person who is mentally incapacitated cannot contract. Legal literature has buttressed this principle in **Halsbury's Laws of England Vol. 28 Para. 499** that an agreement of partnership with an insane person ought to be avoided for all intents and purposes.

D) Foreigners

Foreigners have capacity to join partnerships subject to legal conditions. First and foremost, a foreigner should be in possession of a valid entry permit and a work permit as provided for **under section 54 of the Uganda Citizenship and Immigration Control Act Cap 66** (hereinafter referred to as the Uganda Citizenship and Immigration Control Act).

E) Employees

In relation to persons in public offices, their ability to form partnerships depends on the Standing orders and whether the proposed undertaking to form a partnership is acceptable to the head of such employee.

FORMATION OF A PARTNERSHIP

This is governed largely by principles of common law and equity. There is no clear procedure in the Partnership Act, or regulations to effect it purposes there under. However, **Section 2 (1**) of the Partnership Act, a partnership is a relationship which subsists between or among persons not exceeding 20 in number who carry on business in common with a view to make profit. A partnership is formed for the purpose to carry on a profession, the numbers of professions which constitute the partnership shall exceed 50.

Underhill says that for a partnership to exist there should be a business in common and these individuals to qualify as partners is a question of fact a very difficult one. Accordingly, you must look at the arrangement as a whole if it is reduced into writing you must ascertain it from the contents of the documents. if it is not in writing you ascertain from the conduct and circumstances surrounding the case. Whether or not a transaction/ relation constitutes a partnership is generally a question of fact and in particular three ingredients in place;

i)Whether the transaction/relation amounted to a business

ii) Whether that business was carried on in common

iii) Whether the business was carried on with a view of profit

Common law and equity lay down a principle in **STENOS VS. MANDILAS**[1]that a partnership being contractual in nature should be expressed in a partnership deed. This implies that the onus would be upon the partners to draft a deed.

THE BASIC TERMS IN THE PARTNERSHIP ACT DEED OF 2010 INCLUDE:

- Name of the firm
- Name and addresses of the partners
- Date of commencement
- Duration of business
- Capital contributions of each
- Methods of raising finances
- Ratios of sharing profits and losses
- Interest on partners;' capital
- Salaries and commissions if any
- Accounting and auditing
- Duties, powers and obligations of the partners
- Signatories to the bank accounts
- Procedure in case of lunacy, death, retirement, bankruptcy or admission of a new partner, *interalia.*
- Dispute resolution
- Termination of partnership
- Signature of the partners

The test for the existence of a partnership according to Lindley on partnership (1950) 11th edition at page 17 is the carrying o of a business and not an agreement to carry on a business.

A future agreement to carry on business together in future will not amount to partnership **HENSHAW V ROBERTS [1967]1 ALR COMM.5)**. The plaintiff formed a business syndicate and each partner paid an amount to a central fund but the partnership was not formed as agreed. It was held; existence of a partnership depends on carrying on a business in partnership and not the agreement to form a partnership. if the parties have begun to carry on business, they will be regarded partners.

Further, the creation of a partnership is not in the execution of a partnership deed as the agreement is not in the execution of partnership deed as the agreement to carry on business in common might be oral or deduced from conduct. In **DR OKELLO N DAVID V KOMAKECH STEVEN (HCT-02-CV-CS 30 OF 2004) [2006] UGHC 56 (06 NOVEMBER 2006),** the plaintiff and defendant equally contributed money towards the purchase of an omnibus taxi to operate on the Arua Adjuman route. On the issue of whether there existed a partnership between the parties, justice Kania held that the absence of a partnership deed did not negate the existence of a partnership, based on the evidence;

[1]**(1964) 10 WACA 269**

there existed a partnership to which both parties had equally contributed money towards the purchase of the taxi.

SECTION 3 OF THE PARTNERSHIP ACT SETS OUT RULES FOR DETERMINING THE EXISTENCE OF PARTNERSHIP

In determining whether a partnership does or does not exist, regard shall be had to the following rules

(a) Joint tenancy, tenancy in common, joint property, common property or part ownership does not of itself create a partnership;

(b) the sharing of gross returns does not of itself create a partnership, whether the persons sharing those returns have or do not have a joint or common right or interest in any property from which, or from the use of which, the returns are derived;

(c) the receipt by a person of a share of the profits of a business is *prima facie* evidence that he or she is a partner in the business, but the receipt of such a share, or a payment contingent on or varying with the profits of a business, does not of itself make a person a partner in the business; and in particular —

(i) the receipt by a person of a debt or other liquidated amount by installments or otherwise, out of the accruing profits of a business, does not of itself make that person a partner in the business or liable;

(ii) a contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable;

(iii) a person, being the widow or child of a deceased partner and receiving by way of annuity, a portion of the profits made in the business in which the deceased person was a partner, is not, by reason only of that receipt, a partner in the business or liable;

(iv) the advance of money by way of a loan to a person engaged, or about to engage, in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person carrying on the business or liable as such if the contract is in writing, and signed by or on behalf of all the parties to the contract;

(v) a person receiving, by way of annuity or otherwise, a portion of the profits of a business in consideration of his or her sale of the goodwill of the business is not, by reason only of the receipt, a partner in the business or liable;

(d) the ordinary evidence of partnership, including —

(i) whether the accounts are prepared for internal use or for other purposes;

(ii) any admissions by the members of the partnership;

(iii) advertisements which include the alleged partners;

(iv) agreements or other documents, formal or otherwise, which disclose the partnership relationship;

(v) the manner in which bills of exchange have been drawn, accepted or endorsed;

(vi) judgments of courts of law in which a partnership has been held to exist;

(vii) meetings which partners attended or were expected to attend;

(viii) payment of money to courts of law for the liability of the partnership;

(ix) letters and memoranda which relate to admission of a person in the partnership or which give a person a share in the profits as intended by the partners;

(x) any release executed by all the alleged partners; and

(xi) recitals in the agreement in which the partners are parties.

4. MANDATORY REGISTRATION

(1)A firm carrying on business in Uganda under a business name which does not consist of the true surnames of all partners who are individuals and the corporate names of all partners which are corporations without any addition other than the true first names of individual partners or initials of the first names; and the corporate names of all partners which are corporations, shall register its name under the Business Names Registration Act.

(2)Where any persons operate a business as a partnership in contravention of **subsection(1) of section 4 of the Partnership Act of 2010**, every party to the business commits an offence and is liable on conviction, to a fine not exceeding twenty currency points and to an additional fine not exceeding five currency points for each day for which the offence continues after the expiration of fourteen days..

RELATIONSHIP BETWEEN PARTNERS

The relationship between the parties is of a fiduciary nature.

In **MATHBRISTOL AND WEST BUILDING SOCIETY V MOTHEW [1996] EWCA CIV 533** a fiduciary was defined as someone who has undertaken to act for and on behalf another in a particular matter in circumstances which give rise to a relationship of trust and confidence.

The fiduciary duty imposes the highest standard of care at both equity and law. The fiduciary duties which the partners are to each other one;

a) Act in good faith and with honesty

b) Provide full accounts of all information and assets in a partner's possession or control which are material to the partnership deed.

c) Avoid any conflict of interest.

d) Avoid making a personal profit from partnership opportunities for information.

e) Account for benefits obtained from partnership business.

DUTIES OF PARTNERS

Section 30 of the Partnership Act lays out the Duty of partners to render accounts, etc.

Every partner is bound to render true accounts and full information of all things affecting the partnership to any partner or his or her legal representatives.

Each partner must render the true account of all things pertaining to the firm. Disclosure must be to the partners or legal representatives, in **LAW V LAW (1905) ICLD 140 W**. Law and Law were partners in a wood business. James did most of the firm work while William was a dormant partner. James proposed to buy millions shares and William accepted the offer for E21000. however, William realized later that James had hidden some of the partnership property and thus had bought the shares at under value.

1. Duty not to make a secret profit (Section 31 of Partnership Act)

Every partner must account to the firm for any benefit derived by him or her without the consent of the other partners from any transaction concerning the partnership, or from any use by him or her of the partnership property, name or business connection.

In OLSON V. GULLO, 1994 CANLII 1268*)* the defendant and plaintiff were equal partners in a venture to develop attract of land. Gullo bought and sold 90 acres of land and made a profit of merely USD 25 billion. Olson sued for the recovery of the land and money. Court awarded him half of the profit. The court found that the 2.5 billion would have been profit of the firm with each partner receiving half of the money.

In **BENTLEY V CRAVEN (1453)18 BEARS 75**, Craven was a partner in a firm in the business of sugar. When prices in the market were particularly low, he bought a huge stock of sugar with his own personal money and stored the same in his own godowns. Soon, the firm needed to purchase sugar for its business and entrusted the job to purchase the sugar to Craven. Craven immediately supplied the required quantity of sugar from his own stock at the prevailing market rates. Craven made a good amount of profit and later, the partners of the firm came to know about this. They demanded the difference amount of Cravens cost price and selling price to the firm be paid to the firm. Craven contended that there was no deception and he had used only his personal resources and if he wanted, he could have sold the sugar to other people at the same market rate. It was held that the firm was entitled to an account for the profit made by Craven as well as to be paid the profit Craven earned in the said transaction. This is so because all partners must work for the greatest common good and no partner is entitled to personal profits from the transactions of the firm. Furthermore, a partner is duty bound to give account of all the things that concern and affect the business of the firm.

2. **DUTY NOT TO COMPETE WITH THE FIRM**. (Section32 of PA)

A partner is not allowed to carry on a similar business as that being carried on by the firm. If he does so, then he or she must account for the profit made.

The only exception being where the partner sought the consent of other partners.

In **TRIMBLE V. GOLDBERG (1906) AC 494 (PC**)

The parties entered into a partnership to acquire 'stands of land' for conversion into a township and subsequent re-sale. The land was acquired, along with shares in a company owning other stands in the same locality. One of the partners then bought that company's other stands himself, having been shown them while in Johannesburg for the purpose of finalizing the terms of the partnership's acquisition.
Held: The partner was not liable to account because 'the purchase was not within the scope of the partnership', even though he found out about the land while on partnership business and his personal purchase was an identical type of investment to that of the partnership. A breach of contract arising as a result of breach of a term of good faith not to purchase property for a partner's own purposes sounds in damages.
The parties entered into partnership to acquire 'stands of land' for conversion into a township and subsequent re-sale. The land was acquired, along with shares in a company owning other stands in the same locality. One of the partners then bought that company's other stands himself, having been shown them while in Johannesburg for the purpose of finalizing the terms of the partnership's acquisition.
Held: The partner was not liable to account because 'the purchase was not within the scope of the partnership', even though he found out about the land while on partnership business and his personal purchase was an identical type of investment to that of the partnership.

TYPES OF PARTNERSHIPS

1. GENERAL PARTNERSHIPS.

It is a business arrangement by which two or more individuals agree to share in all assets, profits and financial and legal liabilities of a jointly owned business structure. **Section 2(1)** of the **Partnerships Act** limits the number of such partnerships to not more than 20 persons. Unlike in limited liability partnerships, there is no requirement for registration of the partnership.

2. LIMITED LIABILITY PARTNERSHIPS (LLP)

Section 47 Limited liability partnership

(1) A limited liability partnership may be formed in the manner prescribed by this Act.

(2) A limited liability partnership shall consist of not more than twenty persons, and shall have one or more persons called general partners who shall be liable for all debts and obligations of the firm.

(3) A limited liability partnership shall, in addition to general partners have one or more persons called limited liability partners who shall contribute a stated amount of capital to the firm, and shall not be liable for the debts or obligations of the firm beyond the amount of capital so contributed.

(4) A limited liability partner shall not, during the continuance of the partnership, either directly or indirectly, draw out or receive back any part of his or her contribution to the partnership, and if a limited liability partner draws out or receives back any part of his or her contribution, he or she shall

be liable for the debts and obligations of the partnership up to the amount so drawn out or received back.

(5) **A BODY CORPORATE MAY BE A LIMITED LIABILITY PARTNER**.

Section 48 provides for the mandatory registration of LLPS with the registrar and failure to do so, the partnership shall be considered to be a general partnership**.**

Section 50 Particulars of registration of limited liability partnership

(1) The registration of a limited liability partnership shall be affected by delivering to the Registrar a statement signed by the partners containing the following particulars —

(a)the name of the limited liability partnership;

(b)the general nature of the limited liability partnership's business;

(c)the principal place of business of the limited liability partnership;

(d)the full names and address of each of the partners;

(e)the term, if any, for which the limited liability partnership is entered into, and the date of its commencement;

(f)a statement that the partnership is limited;

(g)a description of the status of each partner, limited or general; and

(h)the sum contributed by each partner and the form in which it is so contributed.

(2) The Registrar shall, upon receiving the particulars referred to in subsection (1) and the prescribed fee for the registration, issue a certificate of registration of the limited liability partnership.

3. PROFESSIONAL PARTNERSHIPS

These are partnerships formed for purposes of carrying on a profession**. Section 2 (2) of Partnership Act** 2010puts the number of partners for such shall not exceed 50 who must be professional.

Section1 of the Partnership Act defines a professional as a person who is a member of a profession regulated by the laws of Uganda.

RIGHTS OF PARTNERS.

The rights just like duties of a partner may be varied by agreement and **Section 26 of Partnership Act** takes cognizance of the same.

A) RIGHT OF A PARTNER TO THE MANAGEMENT OF THE FIRM.

According to **Section 2(1)** partners are expected to carry on business in common, its thus expected that same or all of the partners shall engage in the management of the business.

Section 26 (e) provides expressly that every partner may take part in the management of the partnership

Right to management also entails having a say in who is admitted to the partnership.

In **HIGHLY V WALKER (1910) 26 TLR**, two of three partners agreed to the admission of one their sons to be trained as an apprentice in the firms' workshop. The third partner did not agree and sought an injunction to prevent the admission. Court held that the decision to admit an apprentice in the firm to be trained was an ordinary matter that could be decided by the majority to bind the minority must however exercise with utmost good faith and the majority cannot bind the minority giving them the opportunity for decision.

Right to indemnify, remuneration and interest. According to **Section 26 (b**), unless a contrary intention appears, the firm must indemnify every partner in respect of payment made and personal liabilities narrated by him in the ordinary of proper conduct of business.

PARTNERSHIP PROPERTY.

All property, rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, an account of the firm and in the course of the partnership business are referred to as partnership property (**Section 22 Partnership Act)**

The property owned by firm though referred to as partnership property is held by the firm as it's not a legal person. The property is held by the partners. A partner may contribute capital to the partnership in the form of the property unless a contrary intention is expressly stated, it is partnership property. In **POCOCK V CARTER[2],** A, B and C were partners in a tailoring business. The building in which the business was carried out belonged to A. the firm paid him rent for use of it. The building declared under the partnership deed to be the property o A for whose life the partnership was to last. Court inferred that the partnership was a tenant and the tenancy would continue during the firm's subsistence. **DAVIS V DAVIS (1894) 1 CH 399**: the use of property by a partnership does not necessarily mean it is partnership.

PROPERTY ACQUIRED USING FIRM FUNDS.

Under **Section 23**, all property acquired using firm money is deemed to be firm property unless a contrary intention is shown and this presumption is not neglected by the fact that the property was registered in one partner's name. in **FOSTER V HALE1800) 5 VES JR 308**, land was purchased using partnership funds and the title was taken out in the name of the purchasing partner. Court held the land to still constitute firm property.

In **ASS V BENHAM [1891] 2 CH. D 244**, Lindley J stated thusIt is clear law that every partner must account to the firm for every benefit derived by him without the consent of his co-partners from any

[2] ***(1912)*** **1 CLD 663**

REGISTRATION OF A PARTNERSHIP

There is no laid down procedure for registration of the partnership in the Act. This is fortified by **KAFEERO VS. TURYAGENDA (1980) HCB 122** where court held that there is no need for registration of a partnership; but for evidential value, it imperative upon the members to register the partnership deed with the Registrar of Documents.

It must be noted further that the Business name of the firm should be registered with the Registrar of Business names within the meaning of the Business Names Registration Act Cap 109 (hereinafter referred to as the Business Names Registration act)

PROCEDURE

A draft of the partnership deed should be made.

- One fills out Form A in the schedule to the **Business Names Registration Rules SI 109-1 (as amended by Act 53 of 2005)** (hereinafter referred to as the Business Names Registration Rules). The application is made under **rule 5 of the rules; SI 109-1 (as amended by Act 53 of 2005).** The particulars include a business name, nature of business, principle place of business, present names and ages, nationality, date of commencement of business, inter alia.
- One makes a statutory declaration before a magistrate or commissioner for oaths.
- The deed is registered with the Registrar of Documents.
- The relevant stamp duty is paid according to the Stamps Act (supra) (as amended).
- In case the partners are desirous of changing the type of business or any particulars, the Registrar is informed by virtue of Rule 7 to the Business Names Registration Rules and by filling out a form in the schedule to the Rules for change in particulars.

FORUM

The forum is the Registrar of Documents and Registrar of Business Names as noted in the foregoing discussion.

Relevant Documents (SEE COPIES AFTER THIS SUB TOPIC)

- Partnership deed
- Registration of Business Names (Form A)
- Statutory Declaration
- Change in Business (If required)

LIABILITY OF PARTNERS TO PERSONS DEALING WITH THE FIRM

Section 6 of The Partnership Act provides that all partners of a firm are agents of the firm and the other partners and acts of each partner bind the firm and its partners.

Section 7 of The Partnership Act, provides further that Acts on behalf of the firm executed in the firm name bind the partners except that this does not affect the general rule relating to execution of deeds of negotiable instruments.

Where a partner pledges credit of the firm for a purpose apparently not connected with the firm's ordinary course of business the firm is not bound unless the partner is specially authorized by other partners. This is conversed in **Section 8 of the Partnership Act.**

A firm is liable for the wrongs of its partners under **Section 13 of the Partnership Act.** Where there is a wrongful act or omission of any partner acting in the ordinary course of business or with the authority of his or her partners and injury or loss is caused to a person not being a partner or if a penalty is incurred.

The above should be read in line with **Sections 14, 17, 19 and 20 of the Partnership Act**.

RELATIONSHIP OF PARTNERS INTERPARTY

This is governed under **SECTIONS 32-33 OF THE PARTNERSHIP ACT.** The partners have a duty to render true accounts and full information of all things affecting the partnership. These include;

- Duty to render true accounts and full information of all things affecting the partnership.
- Duty to account to the firm for private profits/ benefit derived without consent of other partners under section 32 of the Partnership Act.
- Duty not to compete with the firm under section 32 of the Partnership Act.
- Duty to protect partnership property.
- Duty to keep honesty.

Section 2 OF the Partnership Act Defines A Partnership as a relationship which subsists between or among persons not exceeding twenty in number who carry on business in common with a view to making a profit.

Key elements in the definition.

- Relationship
- Carrying on a business in common
- With a view of profits
- Limit the numbers
- Existence of a partnership.

W v COMMISSIONER OF TAXES (1969) 1 AFRICA LAW REPORT Comma 91.

Held; by definition, a partnership must have 4 essentials. i. each partner must pool something into the business i.e., money, Labor or skill. (ii) business must be carried on for the joint benefit of all partners. (iii) the object must be to make a profit and (iv) the contract must be legal.

EXISTENCE OF A PARTNERSHIP.

Section 3 of the Partnership Act provides a criterion for determining the existence of a partnership.

Co. Ownership of property does not of itself create a partnership

Sharing of gross returns does not of itself create a partnership.

Profit and loss sharing; the receipt by a person of a share of the profits is prima facie evidence that there is a partnership but it does not of itself make him a partner.

REAMTON LTD V UGANDA CO ORPERATIVE CREAMERIES1996]3 KALR 28; *Held;* the receipt by a person of a share of the profits of a business is strong evidence that he is a partner but not conclusive ipso facto. court must take into account the agreement and intention of the parties. in the instant case, other co-existing factors show that there was no partnership. the co-existing factors include the fact that the defendant had borrowed money from other banks which loan was only the liability of the defendant and yet if the business were a partnership, the two said parties would be jointly liable.

ALLPORT PORTS FREIGHT SERVICE V JULIUS KAMANYI & ANOR. [1996] V KALR 21.

At the instance and on the order of the defendants who were carrying on business as a partnership in the name and under the style of Aero International Limited which was unregistered, the plaintiff delivered to the defendants' cement valued at 200m but the defendants reneged on the debt balance of 147m. The second defendant denied liability but the first defendant admitted.

Whether there was a partnership between the first and second defendants?

Held:

I. If two or several persons jointly purchase goods for resale with a view to dividing the profits arising from the transaction, a partnership is created and each of them will be liable to third parties. In the instant case it was clear that both defendants obtained cement from the plaintiff, for resale at a profit to be shared. Therefore, a partnership relationship was established as under **Section 3 (1) of the Partnership Act**.

ii. A partnership need not be established formally and in writing. It is sufficient to

establish that a community of interest exists between the parties. This was amply proved in this case.

Receipt of profits by way of annuity to a widow or child of deceased does not create a partnership.

Advance of a money by way of a loan to a person engaged in or about to engage in a business does not make the lender a partner.

NUMBER OF PARTNERS.

Section 2[1] of the Partnership Act limits the number to 20 people

Section 2[2] of the Partnership Act provides for a maximum of 50 for partnerships formed for purposes of carrying on a profession.

COMMENCEMENT OF A PARTNERSHIP.

The partnership commences on carrying on a business. Carrying on a business entails going beyond the preparatory stages of setting up the venture and actually doing the business.

A partnership is not created by a mere intention to do business together but by an intention which is manifested practically.

HENSHAW V ROBERTS [1967]1 ALR COMM.5

The plaintiff formed a business syndicate and each partner paid an amount to a central fund but the partnership was not formed as agreed. It was held; existence of a partnership depends on carrying on a business in partnership and not the agreement to form a partnership. if the parties have begun to carry on business, they will be regarded partners.

In **OMELLA V RAYMOND 1984 HCB 62** it was held that the act of opening up an account in itself does not create a partnership.

W v COMMISSIONER OF TAXES (1969) 1 AFRICA LAW REPORT Comma 91.

Held; the mere execution of a partnership agreement is not in itself sufficient to constitute a partnership. Nor on the other hand will the absence of a formal agreement entitle one to infer that there is no partnership between the parties concerned. There must be a course of dealing and conduct of the partnership which must be consistent with its terms.

ABUBAKER WALAKIRA v ABUBAKER WALUSIMBI CIVIL SUIT No. 579 OF 2012

Held; The Partnership Deed defined the relationship between the parties but did not provide for the event of the partnership coming to an end. That in such an event, the subsequent existence of the partnership could not be perceived from the Partnership Deed but from extrinsic evidence and from the conduct of the parties. Quoting the definition of a partnership in Section 2 of the Partnership Act, Court held that in order to say that a partnership is in existence and operational, there must be business being carried on by the partners. However, where partners have done more than enough to embark on the actual business a partnership exists.

MIAH AND ORS V KHAN AND ANOR 2001 ALLER 20

Lord Millet; There is no rule of law that the parties to a joint venture did not become partners until actual trading commenced. Rather, the rule was that persons who agreed to carry on a business activity as a joint venture did not become partners until they actually embarked on the activity in question. It was therefore necessary to identify the venture in order to decide whether the parties had actually embarked upon it, but it was not necessary to attach any particular name to it. The acquisition, conversion and fitting out of the premises and the purchase of furniture and equipment had all been part of the joint venture, had been undertaken with a view of ultimate profit and had formed part of the business which the parties had agreed to carry on in partnership together. Thus, the question was not whether the restaurant had commenced trading, but whether the parties had done enough to be found to have commenced the joint enterprise in which they had agreed to engage. They had done so, and accordingly the appeal would be allowed.

FORMATION OF A PARTNERSHIP

Unlike other business organizations such as companies, formation of a partnership does not require formalities such as registration;

A Partnership can also be made orally or writing. It can also be implied from the conduct of the parties.

BUBARE COMPANY V MEBLEKENTE 1982 HCB 143; It was held the fact there was no written agreement between the parties when the partnership was immaterial since a partnership may be formed orally or by the conduct of the parties. This was approved in **ALLPORT FREIGHT SERVICE V JULIUS KAMANYI [1996] KALR 21**

ALLPORTS FREIGHT SERVICE V JULIUS KAMANYI& ANOR. [1996] V KALR 21. It was held that if two or several persons jointly purchase goods for resale with a view to dividing the profits arising from the transaction, a partnership is created and each of them will be liable to third parties. That a partnership need not be established formally and in writing. It is sufficient to establish that a community of interest exists between the parties.

Ref: DR OKELLO N DAVID V KOMAKKECH STEPHEN HCT- 02- CR-CS-0030-2004.

DR. OKELLO N. DAVID VS KOMAKECH STEVEN, HCCS NO. 30 OF 2004

The plaintiff and the defendant contributed equally to purchase for the purposes of jointly running a transport business. A vehicle a taxi omnibus was purchased and started plying the Adjumani - Arua route as taxi. The two parties hereto also opened a joint account with the now defunct commercial bank into which the revenue from the operations of the taxi omnibus were supposed to be banked. The defendant being a qualified drive ran the duty affairs of the omnibus taxi and for some time banked the proceeds on the said joint account. The defendant later failed to account to the plaintiff and transferred the vehicle into his names.

The defendant denied the existence of a partnership on grounds that there was no partnership deed, the plaintiff was not involved in the business and that the plaintiff did not contribute towards the

purchase of the vehicle but only lent the defendant money. The defendant denied that the joint account opened by himself and the plaintiff was for banking partnership proceeds but that it was opened to pay back the money he had borrowed from the plaintiff and it was agreed it would be closed once the plaintiff had been fully paid.

Whether there was a partnership between the parties

Held;

Section 2(1) of the Partnership Act defines a partnership as the relationship which subsists between persons carrying on a business in common with a view of profit. The fact that there is no partnership agreement is irrelevant because a partnership can be formed informally or by the

conduct of the parties. See **BUBARE COMPANY VS MBALEKENTE [1982] HCB 143.**

The defendant disputed the existence of a partnership were not written and because the plaintiff was not in the daily management of the taxi business. As it was held in **BUBARE COMPANY VS. MBALEKENTE (SUPRA)** a partnership can be informal. It is also trite that not every partner in a partnership should get actively involved in the management of the partnership business for a partnership to exist. In fact, there are partnerships with inactive partners known as sleeping partners.

Court thus concluded that the parties had agreed to buy a vehicle jointly and operate a taxi business with a view to profit. The parties went a step further by opening a joint bank account for collecting the proceeds of their businesses. That a partnership was the intention of the parties and that their conduct pointed to the existence of a partnership.

CAPACITY TO FORM A PARTNERSHIP.

Section10 of the Partnership Act provides that a minor may be admitted to the benefits of a partnership but cannot be personally liable for any obligation of the firm.

TYPES OF PARTNERSHIPS.

General partnerships; this is where the liability of the partners is unlimited.

Limited liability partnership; where one or more of the partners enjoy limited liability while the liability is unlimited. The limited liability partner does not partner in the daily running of the business and if he does so, this liability becomes unlimited **Section 52**.

Professional Partnerships for example lawyers, accountants doctor maximum number is of 50 members just like in **Section 2[2] of the Partnership Act**

LIABILITY OF PARTNERS;

Section 9 of The Partnership Act 2010 Liability of partner(1)A partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he or she is a partner

Section 9 Subsection(2) provides that Where a partner dies, his or her estate is severally liable in due course of administration for the debts and obligations of the firm so far as they remain unsatisfied but subject to the prior payment of his or her separate debts.

Section 9 (3) also provides that, The estate of a partner who dies or who becomes bankrupt or of a partner, who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy or retirement respectively.

In the case of **WALAKIRA V WALUSIMBI (CIVIL SUIT 579 OF 2012) [2016] UGCommC 92 (10 October 2016) court held** that the plaintiff has failed to prove that the defendant was in breach of his obligations under the partnership before it ceased to carry on business.

RIGHTS, DUTIES AND OBLIGATIONS

- Duty of disclosure Section 30
- Duty not to make a secret profit Section 31
- Duty not to compete with the firm Section 32
- Right to the management of the firm, every partner may take part in the management of the firm
- Right to Indemnity for expenses incurred in carrying out the business **Section 26(B)Admission to Partnership;** Section 26 (g)no partner shall be introduced as a partner without the consent of all existing partners.

Section 22 of the Partnership Act provides for **Partnership property** where Property brought to the firm at its commencement is partnership property unless a contrary intention is expressly stated.

Section 23 of the Partnership Act provides that Property acquired during the subsistence of the firm is partnership property is taken to have been bought on account of the firm.

DISSOLUTION OF A PARTNERSHIP

This is covered in **Sections 34, 37 of the Partnership Act**. This is discussed as follows;

Section34 of the Partnership Act. Dissolution by expiration or notice

(1) Subject to any agreement between or among the partners, a partnership is dissolved —

(a) **if entered into for a fixed term, by the expiration of that** term;

In **MOSS V ELPHICK [1910] 1 KB 846**, the question before court was whether a partnership that provided that it shall be terminated "by mutual arrangement only," could be dissolved by notice. Court rejected the argument that the partnership was for "no fixed term" and that it was "for an

undefined time" and could be terminated by notice of one of the partners on grounds that it could only be dissolved by mutual arrangement as provided by the partnership agreement

(b) if entered into for a single adventure or undertaking, by the termination of that adventure or undertaking;

(c) if entered into for an undefined time, by the agreement of the partners to dissolve the partnership.

It was noted by Eldon L.C. In **CRAWSHAY V MAULE (1818) 36 ER 479 at 483** that The general rules of partnership are well settled. Where no term is expressly limited for its duration, and there is nothing in the contract to fix it, the partnership may be terminated at a moment's notice by either party..... Without doubt, in the absence of express, there may be an implied, contract as to the duration of a partnership.

(2) In the case mentioned in **subsection (1) (c)**, the partnership is dissolved as from the date agreed by the partners for the dissolution to take effect.

Section 35 of the Partnership Act Dissolution by bankruptcy, death or charge

(1) Subject to any agreement between or among the partners, a partnership may, at the option of the other partners, be dissolved by the death or bankruptcy of any partner.

(2) A partnership may, at the option of the other partners, be dissolved if any partner suffers his or her share of the partnership property to be charged under this Act for his or her separate debt.

Section 36 of the Partnership Act. Dissolution by illegality of partnership

A partnership is, in every case, dissolved by the happening of any event that makes it unlawful for the business of the firm to be carried on or for the members of the firm to carry on business in partnership.

Section 37 of the Partnership Act. Dissolution by court for incapacity, etc.

On the application by a partner, the court may decree dissolution of a partnership in any of the following cases —

(a) when a partner is shown, to the satisfaction of the court, to be of permanently unsound mind, in which case the application may be made on behalf of that partner by his or her guardian ad litem or next friend or person entitled to intervene as by any other partner;

(b) when a partner, other than the partner suing, becomes in any other way permanently incapable of performing his or her part of the partnership contract;

(c) when a partner, other than the partner suing, has been guilty of such conduct as, in the opinion of a court, regard being had to the nature of the business, is calculated prejudicially to affect the carrying on of the business;

(d) when a partner, other than the partner suing, willfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself or herself in matters relating to the partnership business, that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him or her;

(e) when the business of the partnership can only be carried on at a loss; or

(f) whenever, in any case, circumstances have arisen which, in the opinion of the court, render it just and equitable that the partnership be dissolved.

A partnership can also be dissolved at the happening of any event which makes it unlawful for the business of the firm to be carried on. A partnership may also be dissolved on application to court for dissolution; where one or more of the partners is adjudged bankrupt, or of unsound mind; or permanently incapable of performing his or her duties, or if a partner is guilty of conduct prejudicial to carrying on of business, or if it is just and equitable to dissolve the partnership.

The procedure to follow where one seeking to dissolve a partnership by moving court, application can be by Originating summons under **Order 37 rule 4 of the Civil Procedure Rules SI 71-1**, or by chamber summons under **Order 30 rule 11 of the Civil Procedure Rules SI 71-1**.

FORMALITIES

1. REGISTRATION OF PARTNERSHIP

Section 4 of the Partnership Act 2010 makes it mandatory for the registration of a business name which does not consist of the true Surnames of all partners. **Subsection 2** makes it an offence to contravene this section. The registration is under **the Business Names Registration Act Section 2 thereof** reiterates the above position. Before registration, it is prudent practice that a search is carried out to establish the availability of the suggested business name and if it's available it is reserved by the registrar prior to registration.

REGISTERING A PARTNERSHIP DEED

There is no mandatory requirement for having a written agreement in order to establish a partnership. In **DR. OKELLO N. DAVID VS KOMAKECH STEVEN, HCCS NO. 30 OF 2004,** it was held; The fact that there is no partnership agreement is irrelevant because a partnership can be formed informally or by the conduct of the parties.

However, in order to protect the interests of the partners and for proper management of the business, we advise the clients to sign a properly drafted partnership deed that unequivocally encompasses all their concerns. The parties can execute can execute a partnership deed to govern their relations. However, there is no requirement that the partnership should be registered as stated in **KAFEERO v. TURYAGENDA [1980] HCB 122**registration is important for evidential purposes. The deed is registered with the registrar documents.

OBJECTION MY LORD

BUSINESS NAMES REGISTRATION ACT CAP 109

Section 1 defines a business name to mean the name or style under which any business is carried out whether a partnership or otherwise.

A firm is defined to persons who have entered into a partnership with one another; an unincorporated body of two or more individuals or one or more individuals and one or more corporation who have entered in to partnership with one another with a view of carrying of business for profit.

Section 2 provides for firms to be registered. Every firm having a place of business in Uganda and carrying on business under a business name which does not consist of the true surnames of all the partners who are corporations without any addition other than the Christian names of individual partners or initials of such names shall be registered in the manner directed by the Act.

Section 4 provides for manner and particulars of registration. These include;

- The business Name
- The general nature of the business
- The principal place of business
- The present Christian name and surname, nationality, the usual residence and other business occupation.
- Date of commencement of business
- Age of each of the partners

Section 7 provides for the registration of changes in the particulars of the firm which should be done within 14 days after the changes.

This is made by a statement in writing whose format is given under **Rule 7 of the Business Names Registration Rules S.I 109-1**

Under **Section 8** failure to furnish the registrar with particulars or change in particulars, every partner in the firm commits an offence.

Section 14 Provides for removal of the firm's name from the register where the firm ceases to carry on business. This is the duty of every partner which should be done within 3 months. Failure of which is an offence.

Rule 8 of the Business Names Registration rules provides for the form of the notice. The format for the application for a business name is provided in the schedule to the rules.

The application for registering a business name attracts 20,000 under the Business Names Registration [Amendment] Rules 2005 S.I 2005 No35. There are other fees to be paid on conducting a search and reserving a business name. According to the form provided by URSB for the reservation of a name, a person pays 25,000. Thereafter a certificate of registration is issued under **Rule 10 of the Business Names Registration Rules S.109-1**

THE REGISTRATION OF DOCUMENTS ACT CAP 81

S. 1 defines "registrar" to mean the registrar of documents or any assistant registrar of documents appointed.

Section 3 provides for the **Register of documents.** The registrar shall keep a register of documents and, subject to the exceptions hereafter stated, shall register in it in the manner hereafter provided all documents presented to him or her in the prescribed form on payment of the prescribed fee.

Section 4 provides for **Persons to present documents for registration.** A document presented for registration must be so presented either by a person executing or claiming an interest under it or the agent of that person, and the registrar may require to be satisfied as to the identity and interest of the person by whom it is brought, or, in the case of an agent, as to his or her authority.

Section 5 provides for how **Registration is affected.** Registration shall consist in the filing of a copy (to be furnished by the person presenting the document for registration) of the document brought for registration after that copy has been certified by the registrar as a true copy.

Section 6 provides for the **Numbering and filing of documents.** The registrar shall number every copy so filed consecutively and record on it the date of registration and the name of the person presenting it and shall file copies in the order in which he or she receives the documents.

DOCUMENTS IN FOREIGN LANGUAGE SHOULD BE TRANSLATED AS PROVIDED FOR UNDER SECTION 11.

In **Rule 2** of the **Registration of the Documents Rules Statutory Instrument 81 – 2**. It provides that copies of all documents presented to the registrar for filing under Section 5 of the Act shall be either in manuscript and written in ink, or the original of type writing with a record ribbon on lined full scarp folio paper measuring approximately 13 inches in length and 8 inches in width and shall contain a margin of at least one- and one-half inches on the left-hand side of the paper, the paper to be written on one side only and to be bound or sown together in book form. The fees for registering are Sh.10, 000 under the Registration of Documents (Fees) (Amendment) Rules, 2005.

This is registered at the Uganda Registration Service Bureau (URSB) as provided for in **Section 4 (2)** (a) of the Uganda Registration Service Bureau Act which gives it the mandate to carry out all registration required under the relevant laws.

Fees; in registering documents, there are prescribed fees which is according to the Registration of Documents (Fees) (Amendment) Rules, 2005 S.I No. 55as follows;

1. For registering documents 10,000

2. For a general search (whether in the old or new register or in both) 2,000

3. For inspection of a particular document (whether in the old or new register) 2,000

OBJECTION MY LORD

PAYMENT OF STAMP DUTY

Stamp duty must be paid on all instruments executed or received in Uganda under the Stamps (Amendment)Act 2019as amended. It is paid on all instruments received in Uganda within 30 days. Stamp duty rates are either fixed or ad valorem rates.

The clients shall pay stamp duty of UGX 10, 000/- (Uganda Shillings 10,000) as provided for Stamps (Amendment)Act 2019.

THE REPUBLIC OF UGANDA

IN THE MATTER OF THE PARTNERSHIP ACT 2010

PARTNERSHIP DEED

This partnership deed is made this **3rd day of October 2018** by and among NABENDE NICOLE, MAKUBUL SIMPSON and NIXON ZINDE of Kampala, Ugandan being of sound mind and full age are herein collectively referred to as partners.

Whereas the above the above-named partners have decided to establish the professional partnership business of legal practice have deemed it necessary and desirable reduce the terms and conditions into writing as mentioned hereunder;

IT IS NOW HEREBY AGREED AS FOLLOWS;

PARTNERSHIP:

That the partners shall form a partnership to be governed by the partnership Act 2010 and all relevant laws governing partnerships in Uganda.

NAME:

That the partnership shall operate under the name divinely Inspired Legal & Co. Advocates.

NATURE OF BUSINESS:

That the partners shall engage in legal practice in the fields of Public International Law, International Law and Political Advocacy.

COMMENCEMENT

The partnership will be deemed to have commenced upon the issuance of a certificate of registration of the business name.

MANAGEMENT

5.1 **LEADERSHIP;**

i) All members shall be legible to manage the membership of the firm.

ii) The managing partner shall be agreed upon by all members whose term of office shall be two years. On expiration of the two years, another partner may take over the management of the firm for the same period.

MEETINGS;

The firm shall have meetings every first Monday of the month. The managing partner may call upon the partners for a meeting in case of any urgent issues with a days' notice.

RIGHTS AND DUTIES

Every partner shall;

Not engage in any business that compete with the firm

Give accountability of all monies earned from running the firm's business

Attend meetings except where such attendance is prevented by any genuine and reasonable cause.

Execute their duties and with the legally required level of professionalism.

Have the right to inspect the books of account

FINANCES AND ACCOUNTABILITY

7.1 **ACCOUNTS**;

The firm shall run two accounts namely; the client's account and firm account

SOURCES OF FINANCES

The firm may receive finances from non-partners upon agreement of the partners.

SIGNATORIES TO THE ACCOUNT;

Money from the firm account shall only be withdrawn by the managing partner upon approval of the other partners.

PROFIT AND LOSS SHARING

PROFITS;

Partners shall have an equal share of the profits made from the firm business.

LOSSES;

Partners shall share the losses of the firm equally among themselves.

COMMISSION

Any partner who registers a new client for the firm shall be entitled to 30% of the fees paid by the client and the balance of 70% shall be shared equally among all the partners.

ADMISSION

The partners may agree to admit a new member into the partnership provided such person bears the required qualifications and expertise.

AMENDMENT

This partnership deed is subject to amendment as and when the partners deem it necessary.

DISPUTE RESOLUTION

The partners shall resolve disputes amicably among themselves. Failure to agree, the partners may refer the dispute for mediation.

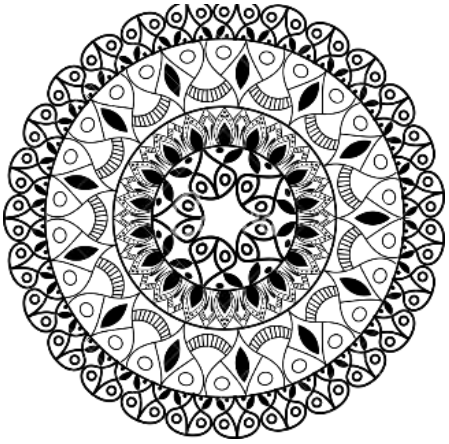
Where mediation is unsuccessful, the aggrieved party may seek redress in the courts of law.

DISSOLUTION

The partnership shall be dissolved by unanimous agreement of the partners.

In witness hereof;

PARTNERS	**SIGNATURE**
NABENDE NICOLE	_____
MAKUBUL SIMPSON	_____
NIXON ZINDE	_____



FORMATION OF A LAW FIRM

The laws and Regulation governing legal Practice in Uganda include the following;

The Advocates Act Cap 267 (with the 2002 amendment)

The Judicature (Court Bailiffs) Rules, S.I. No. 53/2022

The Judicature (Legal Representation at the Expense of the State) Rules, S.I. No. 55/2022

The Advocates (Enrolment and Certification) Regulations SI 267-1

The Advocates (Professional Conduct) Regulations SI 267-2

The Advocates (Accountants Certificate) Regulations SI 267-3

The Advocates (Remuneration and Taxation of Costs) (Amendment) Regulations 2018 (Statutory Instrument 7 of 2018)

The Advocates (Taxation of Costs) (Appeals and References) Regulations SI 267-5

The Advocates (Disciplinary Committee) Regulations SI 267-6

The Advocates (Restoration to the roll) Regulations SI 267-7

The Advocates (Special Rank) Regulations SI 267-8

The Advocates (Use of Generic Names by Law firms) Regulations 2006 No 16

The Advocates (Inspection and Approval of Chambers) Regulations2005 No.65

Judicature (Court of appeal) Rules Directions SI 13-10

Judicature (Supreme Court) Rules Directions SI 13-11

Judicial Service Act Cap 14

Commissioner for Oaths (Advocates) Act Cap 5

Oaths Act

Value Added Tax Act Cap 349

Value Added Tax Act Regulations SI 349-1

ELIGIBILITY TO PRACTICE LAW IN UGANDA

Section 8 of the Advocates Act provides for Persons Eligible to practice law in Uganda, and below are the legal requirements.

- one should be a holder of a degree in Law granted by a recognized University in Uganda
- one should have a diploma in Legal practice from Law Development Centre.
- Apply to Law Council for a certificate of eligibility and to the Chief Justice to have his or her name put on the roll (the person must be a fit and proper person).
- Payment of subscriptions to Uganda Law Society and East Africa Law Society.

REQUIREMENTS FOR FORMATION OF A LAW FIRM.

- The lawyer should have a practicing certificate.
- The lawyer(s) desirous of forming the firm should pick a name and register it with the Registrar of business names.
- They then draft and register a partnership deed.
- An application is then made to the Uganda Law Society to inspect the proposed venue of the premises.
- One applies to be a VAT payer and clears any taxes with URA and NSSF. The lawyer(s) should get the receipts from Uganda Law Society and East Africa Law Society.
- It must be noted that the laws of partnership govern the members, in this regard, the members should not be more than 20.

ENROLMENT OF PERSONS FROM OTHER JURISDICTIONS

NOTE: On the other hand, there are instances where someone has studied their under graduate and post graduate diploma (bar course) from a foreign jurisdiction and such a person wishes to practice law in Uganda or even form a law firm within. Fortunately, a new law has been made to this effect. the **Advocates (Professional Requirements for Admission of Persons Enrolled in Foreign Jurisdictions) Regulations, 2022** in regulation 3 provides for admission of persons with qualifications from foreign jurisdictions. It recognizes the awards obtained by layers from foreign

jurisdictions. The same regulation requires that a person who obtains their post graduate/bar course from a foreign jurisdiction is eligible to practice law in Uganda but on condition that they undertake a post call professional training course and sit examinations at an institution accredited by the council for that purpose in the subjects listed in schedule 2 to these regulations.

Regulation 3(4)[3]provides that a person awarded a post call diploma in legal practice shall qualify to have his or her name entered on the roll subject to his or her satisfaction of the requirements for enrollment provided in the advocates (Enrolment and certification) **Regulations S.I 267 – 1.**

The subjects to be studied under the post call professional training are listed in schedule 2 to the regulations and include among others, land transactions, family law practice, legal writing, trial advocacy, accounting etc.…

Regulation 4 allows Ugandan citizens who have been enrolled to practice law from a foreign country operating under common law system, to apply to the council for a certificate stating that the applicant is a fit and proper person to have their name entered on the roll.

This application shall be accompanied by;

- certified copies of certificates as evidence of the qualifications obtained,
- a certified copy of the certificate of enrollment or admission to practice law in the country operating a common law system.
- Proof of practice and the duration of the practice
- Confirmation of good professional conduct from the professional regulator of the country in which he or she enrolled and;
- Evidence of payment of requisite fees.

As already noted, the country must be that one provided in schedule 1 to these regulations.

KEEPING OF DIFFERENT ACCOUNTS

A law firm is enjoined to keep particular types of accounts. Examples are hereunder;

CLIENT'S ACCOUNT

This is a current or deposit account at a bank in the names of the Advocate in the title of which the word Client appears. The monies deposited herein include; money for payment to or for the client, money payable towards a debt due to the advocate, money drawn on a client's authority.

[3] Advocates (Professional Requirements For Admission of Persons Enrolled In Foreign Jurisdictions) Regulations, 2022

OBJECTION MY LORD

TRUST BANK ACCOUNT.

This contains the money received by an advocate or held in trust by him as a trustee.

ADVOCATES ACT CAP 267

Section 8(1) A person who has compiled with such requirements as to the acquisition of professional skill and experience as be specified in the regulations made for that purpose by the law council is eligible to have his or her name entered on the **rol**l.

Section 7 provides that the registrar should keep a roll of advocates.

Section 8(2) any person eligible to have his or her name entered on the roll may make an application to the law council and the law council if satisfied that the applicant is so eligible and is fit and proper person to be an advocate should issue to him or her a certificate to that effect.

Section 8 (3) provides that any person who has obtained a certificate under (2) may apply to the chief Justice to have his or her name entered on the roll and the chief Justice shall unless cause to the contrary is shown to his or her satisfaction direct the registrar on receipt of the fee to enter the applicants name on the roll.

Section 8(7) provides that every application made under the section should be advertised in a manner as prescribed by the regulations made by the Law Council.

Section 8(8) provides that the section applies to a person who is-

i) A Ugandan citizen or who normally resides in Uganda.

ii) the holder of a degree in law granted by a university in Uganda or a degree in law or other legal qualification granted by or obtained from such other university or institution outside Uganda as may be recognized by the Law council by regulations made for that purpose or the person has been in practice as a legal practitioner for an aggregate period of not less than 5 years in any country designated by the law council by regulations for the purposes of this section.

Section 8 is to the effect that the fee mentioned in **Section 8(3)** can be altered by the Attorney General by statutory instrument.

A person to whom this section applies (other than the holder of a degree in law granted by a Ugandan university in Uganda) may be required to undergo courses of study in such subjects relevant to the law prior in force in Uganda as may be specified and to satisfy examiners in those subjects and any of those requirements shall be in addition to those mentioned in that subsection.

Section 11 The registrar shall issue a Practicing Certificate to every advocate whose name is on the roll and who applies for such a certificate on such form and on payment of such fee as the Law council may be regulations prescribed and different fees may be prescribed for different categories of advocates.

Section 11(2) A practicing certificate is valid until the 31st December next after its issue and it shall be renewable on application being made on such form and on payment of such fee as the law council

may by regulations prescribe and different fees may be prescribed for different categories of advocates.

Section (1)(3) Every advocate who has in force a Practicing Certificate may practice as such in the High court or in any court subordinate to high court. The law Council may be regulations prescribe that for a specified period of time after enrollment an advocate shall have a right of audience only before such courts as may be designated

Section 11(4) and also make regulations with regard to the granting of a special rank (however styled) to advocates of long-standing skill and experience the regulations of their practice and restricting such practice to certain courts

Section 11(5) creates an offence if any advocate contravened or fails to comply with any of the provisions of regulations made under **Section 11(4)**

THE ADVOCATES ENROLLEMENT AND CERTIFICATION) REGULATIONS S.1.267

Regulation 2 requirements to the acquisition of professional skill and experience under Section 8of the Act shall be;

a) attendance of a post graduate bar course conducted by the Law Development center and award of a diploma in legal practice by the law development center on successful completion of the course.

b) in case of a person who has been on the roll as a legal practitioner work under surveillance and in the chambers of an advocate enrolled under the act in the service of the government as a state attorney at the commencement of his or her practice in Uganda for a period of not less than six months and who satisfies any regulations which may be made under **Section (7) of the Ac**t.

REGULATION 4 APPLICATION FOR CERTIFICATE OF ELIGIBILITY.

Application for certificate.

(1) In an application for a certificate under **Section 8(2)** of the Act, there shall be stated—

(a) the name and address of the applicant;

(b) the qualifications of the applicant, being one or more of the qualifications set out in section 8(5) of the Act, and the date of the qualifications;

(c) the date and place of birth of the applicant;

(d) if the applicant was not born in Uganda, the aggregate period of continuous residence in Uganda during the twelve months immediately preceding the date of the application or the aggregate period

during which he or she has been in practice as an advocate in any of the countries specified in Part II of the First Schedule to these Regulations;

(e) Whether the applicant is at the date of the application subject to any disentitlement or disciplinary proceedings, and whether he or she has been convicted in or is subject to any pending or present criminal proceedings described in **Section 12(1)(h) of the Act**;

(f) whether the applicant is an undischarged bankrupt or the subject of any bankruptcy proceedings in any country.

(2) The application shall conclude with a prayer that the applicant be granted a certificate of eligibility for enrollment as an advocate.

(3) The application shall be supported by an affidavit by the applicant verifying the facts set forth in the application.

REGULATION 5 MODE OF APPLICATION.

(1) An application for a certificate of eligibility for enrollment shall be made by delivering or sending to the secretary of the Law Council—

(a) the application;

(b) the affidavit supporting the application;

(c) The certificate or other document which the applicant submits as evidence of his or her qualifications, professional skill and experience;

(d) testimonials from two advocates whose names have been on the roll for at least three years, certifying that the applicant is a fit and proper person to be enrolled as an advocate.

(2) The application and affidavit shall each be accompanied by a copy thereof.

REGULATION 6 ADVERTISEMENT OF APPLICATION.

An advertisement of an application for a certificate of eligibility for enrollment shall be made by publication in one issue of the Gazette and shall be in Form 1 in the Second Schedule to these Regulations.

REGULATION 7 ACTION ON APPLICATION FOR CERTIFICATE.

(1) The applicant shall appear before the Law Council, if the Law Council so directs, at such time and place as may be notified by the secretary.

(2) The secretary shall notify an applicant of the decision of the Law Council in respect of the application.

(3) A certificate issued by the Law Council shall be in Form 2 of the Second Schedule to these Regulations.

REGULATION 8 APPLICATION FOR ENROLLMENT.

(1) An application for enrollment under **Section 8(3) of the Act** shall be by petition to the Chief Justice praying that the name of the petitioner be entered on the role of advocates.

(2) The petition shall be accompanied by—

(a) the certificate of eligibility for enrollment issued by the Law Council;

(b) a certified copy of the statement referred to in regulation 4(1) of these Regulations;

(c) the certificate or other document which the petitioner submits as evidence of his or her qualifications, professional skill and experience;

(d) the fee specified in **Section 8(3) of the Act**, which fee shall be returned to the petitioner if his or her application is refused; and

(e) testimonials from two advocates whose names have been on the roll for at least three years, certifying that the applicant is a fit and proper person to be enrolled as an advocate.

REGULATION 9 ADVERTISEMENT OF APPLICATION FOR ENROLLMENT.

An advertisement of an application for enrollment shall be made by publication of the advertisement in one issue of the Gazette and shall be in Form 3 of the Second Schedule to these Regulations.

REGULATION 10 ACTION ON APPLICATION FOR ENROLLMENT.

(1) If the Chief Justice has given directions for that purpose, the applicant shall appear before the Chief Justice at such time and place as maybe notified by the registrar.

(2) The registrar shall notify an applicant for enrollment of the decision of the Chief Justice in respect of the application.

REGULATION 11 CERTIFICATE OF ENROLLMENT.

Whenever the name of a person is entered on the roll to practice as an advocate under the Act, the Chief Justice shall cause to be issued to the advocate a certificate of enrollment under his or her hand.

REGULATION 12 APPLICATION FOR PRACTISING CERTIFICATE.

An application under **Section 11(1) of the Advocates Act** for a practicing certificate shall be in Form 4 of the Second Schedule to these Regulations and shall be accompanied by—

(a) a statutory declaration on oath that the applicant is not a person to whom **Section 12(1) of the Advocates Act** applies; and

(b) the fee specified in the Third Schedule to these Regulations.

REGULATION 13 RIGHT OF AUDIENCE.

A person to whom Section 8(5)(a) of the Act applies and who is entered on the role of advocates shall, for a period not less than nine months after that entry, have a right of audience only in a magistrate's court, and the practicing certificate as issued to him or her shall be endorsed accordingly.

REGULATION 14 APPLICATION FOR RENEWAL OF PRACTISING CERTIFICATE.

An application under **Section 11(2) of the Act** for the renewal of a practicing certificate shall be in Form 5 of the Second Schedule to these Regulations, and there shall be paid there for the fee specified in the Third Schedule to these Regulations.

REGULATION 15 DECLARATION AND SUBSCRIPTION TO THE LAW SOCIETY.

An application for renewal of a practicing certificate under **Section 11(2) of the Advocates Act shall be in Form 5 of the Second Schedule** to these Regulations and shall be accompanied by—

(a) a statutory declaration on oath that the applicant is not a person to whom **Section 12(1) Of The Act** applies;

(b) a receipt or such other documentary evidence as the registrar may deem sufficient to satisfy himself or herself that the applicant has paid his or her subscription for a current year as a member of the Law Society; and

(c) the fee specified in the Third Schedule to these Regulations.

REGULATION 16 FEE FOR SPECIAL PRACTISING CERTIFICATE.

For the issue of a special practicing certificate under section 13 of the Act, there shall be paid the fee specified in the Third Schedule to these Regulations.

Regulation 16 Special practicing certificate under **Section 13 of the Act**.

Third Schedule to the Regulations

Fees

1. For the issue of a P.C = 20,000/=
2. For the renewal of a PC = 20,000/=
3. for the issue of a PC

a) in the case of a person entitled to practice as an advocate from the 200,000/=

countries designated in part II of the first schedule to these Regulation (Kenya, TZ

Zambia and any other country with reciprocal arrangements in force in favor of Uganda)

b) in case of any other person 400,000/=

THE ADVOCATES INSPECTION AND APPROVAL OF CHAMBERS) REGULATIONS 2005 NO.65

Under **Section 77 (1) (A) of The Advocates Act**, **Cap 267**

Regulation 2-"chambers" means premises used by a practicing advocate as approved by the law council.

Generic names mean any name other than the names of partners of a law firm.

Regulation 3. Inspection of chambers is carried out by the law council, its representation or agent once a year.

Regulation 4. application for inspection. The application for inspection of chamber is addressed to the secretary of the law council and it is submitted at least two months before the expiry of the certificate of approval of chambers for the previous year of the applicant.

Regulation 5. requirements to be met before approval;

1. An advocate's chambers should be well maintained with a professional appearance and must have;
    a) a suitable desk for an advocate
    b) a separate room for each advocate and another for a clerk secretary and cashier.
    c) a secretarial desk and computer or type writer
    d) a reception with chairs or benches for clients.
    e) a book shelf
    f) a chest of drawers or a filing cabinet
    g) a reasonable collection of reference law books including a full set of the Revised laws of Uganda 2000.
    h) access to a toilet and sanitary facilities and
    i) books of accounts

2. The headed paper of every law firm should bear the names and qualifications of each partner, advocate and legal assistant in the firm.

3. A law firm with generic names shall only be approved if consent is sought from the law council prior to the registration of that name

4. The consent must be in writing

5. Trading should not be carried out in any chambers

6. The law council may refuse to approve any chambers that do not meet any of the requirements and order the closure of these chambers until the chambers meet the required standards set out in the Regulations.

Regulation 6. A firm whose chambers have been approved shall be issued with a certificate of approval of chambers which shall remain valid for one year.

Regulation 7. The certificate of approval of chambers may be revoked for the following reasons.

a. change of premises

b. change of firm name

c. change in partnership of the firm

d. striking the name of the partner of the firm off the roll of Advocates in case of a sole practitioner.

e. carrying on practice under a name consisting solely or partly of the name of a partner who has ceased to practice as an advocate subject to the Act and other regulations made under it or

f. where the law council deems it necessary

Regulation 8. Application of Inspection of chambers shall be accompanied by the fees prescribed in the Advocates (fees) Regulations 2004.

Regulation 9 penalty for late submission of application (after 31st Dec) prescribed in the Advocates (fee) **Regulations 2004**.

THE ADVOCATES (PROFESSIONAL CONDUCT) REGULATIONS STATUTORY INSTRUMENT 267—2.

These regulations are intended to ensure the following;

Good relationship between the client and advocate

Record keeping

Proper maintenance of client's files; It should have a proper filing reference system for easy location of files.

Regulation 29, every advocate shall account for client's moneys

Regulation 7, Advocate not to disclose or divulge information of the clients unless it is required by law

Regulation 10, advocate to disclose any personal interests to the clients and to maintain the fiduciary relationship

Regulation 11, not to exploit the lack of understanding of his clients

Regulation 12 Advocate to advise his clients diligently

Regulation 8 advocate not to use the client's money for his or her own benefit

Handling clients work diligently like appearing in court in time, proper keeping of the files

HIGHLY QUALIFIED STAFF

Encourage advocates to go for continuing legal education so as to improve on their skills

Qualifications of the partners and other employees, e.g., need for specialized advocates with special skill in different areas of law, well connected team in terms of network so as to easily get clients

The proposed best practices were also adopted in the International Bar Association law firm governance initiative best practice guidelines which include the following;

The firm should set out in writing its governance and decision-making structure

The firm should have transparent process for selection of leaders and appointment of managers

The capital structure of the firm should be described to partners in a clear way

The firm should establish an appropriate mechanism for partners to communicate with each other and with the firm leaders or management.

The way in which the profits and losses of the firm are to be distributed among the partners should be clearly described to all the partners.

The firm should set out its recruitment policies and processes in writing so that all potential recruits like new partners and associates have access to enough information to allow them to make an informed decision about whether or not they wish to pursue recruitment discussions with the firm

The firm should adopt recruitment and promotion policies and process that are non- discriminatory in nature and that are designed to encourage diversity at all levels of the firm.

The partners should ensure that every person in the firm receives a clear written statement of the performance and behavior expected of them.

The firm should seek to operate according to the highest professional and ethical standards.

It should develop a policy on dealing with conflicts of interests with due regard to rules and requirements of the law.

The firm should state clearly and openly the basis on which people are promoted to higher positions in the firm

The firm should seek to ensure that the partners comply with the applicable laws and regulation. In order to catch up with contemporary practices, a firm should have a website and social media accounts.

There should be regular staff meetings

It should have all the relevant tools of trade; a well-stocked library, telephones, emails, faxes, computers, business cards, safe, cabinets, firm seal. Stamp, practicing certificates, professional gowns etc.

It should have good security. It should have proper management of finances by opening an office account, client account and a trust account as per **Section 40 of the Advocates Act**.

INTERNATIONAL BAR ASSOCIATION PRINCIPLES ON CONDUCT FOR THE LEGAL PROFESSION

Lawyers throughout the world are specialized professionals who place the interests of their clients above their own, and strive to obtain respect for the Rule of Law. They have to combine a continuous update on legal developments with service to their clients, respect for the courts, and the legitimate aspiration to maintain a reasonable standard of living. Between these elements there is often tension. These principles aim at establishing a generally accepted framework to serve as a basis on which codes of conduct may be established by the appropriate authorities for lawyers in any part of the world. In addition, the purpose of adopting these International Principles is to promote and foster the ideals of the legal profession. These International Principles are not intended to replace or limit a lawyer's obligation under applicable laws or rules of professional conduct. Nor are they to be used as criteria for imposing liability, sanctions, or disciplinary measures of any kind.

1. **INDEPENDENCE**

A lawyer shall maintain independence and be afforded the protection such independence offers in giving clients unbiased advice and representation. A lawyer shall exercise independent, unbiased professional judgment in advising a client, including as to the likelihood of success of the client's case.

2. **HONESTY, INTEGRITY AND FAIRNESS**

A lawyer shall at all times maintain the highest standards of honesty, integrity and fairness towards the lawyer's clients, the court, colleagues and all those with whom the lawyer comes into professional contact.

3 CONFLICTS OF INTEREST

A lawyer shall not assume a position in which a client's interests' conflict with those of the lawyer, another lawyer in the same firm, or another client, unless otherwise permitted by law, applicable rules of professional conduct, or, if permitted, by client's authorization.

4 CONFIDENTIALITY/PROFESSIONAL SECRECY

A lawyer shall at all times maintain and be afforded protection of confidentiality regarding the affairs of present or former clients, unless otherwise allowed or required by law and/or applicable rules of professional conduct.

5 CLIENTS' INTEREST

A lawyer shall treat client interests as paramount, subject always to there being no conflict with the lawyer's duties to the court and the interests of justice, to observe the law, and to maintain ethical standards.

6.LAWYERS' UNDERTAKING

A lawyer shall honor any undertaking given in the course of the lawyer's practice in a timely manner, until the undertaking is performed, released or excused.

7.CLIENTS' FREEDOM

A lawyer shall respect the freedom of clients to be represented by the lawyer of their choice. Unless prevented by professional conduct rules or by law, a lawyer shall be free to take on or reject a case.

8.PROPERTY OF CLIENTS ANDTHIRD PARTIES

A lawyer shall account promptly and faithfully for and prudently hold any property of clients or third parties that comes into the lawyer's trust, and shall keep it separate from the lawyer's own property.

9.COMPETENCE

A lawyer's work shall be carried out in a competent and timely manner. A lawyer shall not take on work that the lawyer does not reasonably believe can be carried out in that manner.

10.FEES

Lawyers are entitled to a reasonable fee for their work, and shall not charge an unreasonable fee. A lawyer shall not generate unnecessary work.

TRADE LICENSE

Under **Section 8** of the **Trade (Licensing) Act as amended 2015**, no person shall trade in any goods or carry on any business specified in the schedule to this Act unless he or she is in possession of a trading license granted to him or her for the purpose under this Act.

Section 1(h) defines trade or trading to mean the selling of goods in which a license under the act is required in any trading premises whether by retail or wholesale.

Section 9 provides for the licensing authority to be the town clerk of the respective council. For

Kampala, the licensing authority is the Kampala Capital City Authority

Section 11, the licensing authority grants a license on application made to it in the prescribed manner and on payment of the appropriate fee.

The fee to be paid depends on the nature and size of business as provided for under the Trade

Licensing (Amendment of Schedule) Instrument 2017 S.1. No. 2.

THE ADVOCATES (USE OF GENERIC NAMES BY LAW FIRMS) REG 2006. NO.16

Regulation 3-A generic name should include the word "advocates" at the end of the name of a law firm. (Regulation 3(11)

A law firm that uses a generic name shall have the partner's names and qualifications appearing on the letter head of the law firm. **Regulation.3 (2).**

The law firm shall also have a list of names of all the partners conspicuously stated by side with the name plate of the partnership. **Regulation 3 (3)**

Where the name and qualifications of the partner do not fit on the letterhead of the firm, a reference to the information and where it is to be found shall be included in the letter head. **Regulation 3(4)**

A generic name shall not make any reference actual or derived to any symbolic, cultic, political, religious, sectarian, discriminatory or spatiality classification. **Regulation 3(5**)

Associated with or suggest any connection with any government, parastatal or a non-government organization, misleading. **Regulation 3(6**)

Regulation 4 where a firm changes its name of a form the name of a partner to a generic name, its former name shall be included on the letterhead and the nameplate for at least three-year section

Regulation 5 a generic name shall not be used or registered with the Registrar General or any other authority until clearance is obtained from the Law Council.

The law council may reject an application to use a generic name for sufficient cause.

THE ADVOCATES (REMUNERATION AND TAXATION OF COSTS) REGULATIONS S123 OF 1982

[Amended by Advocates (Remuneration and Taxation of Costs) (Amendment) Regulations, 2018 (Statutory Instrument 7 of 2018) on 2 March 2018]

Regulation 3. definition of folio means one hundred words and in the calculation of a folio a single figure or a group of figures up to five or an item in accounts shall be counted as one word.

Regulation14 scale of changes in non-contentious matters fifth schedule scale of fees in respect of business the remuneration for which is not otherwise prescribed.

THE UGANDAN LAW SOCIETY ACT CAP 276

Section 2 of the Uganda Law Society Act provides for the Establishment of the Uganda law society.

Corporate body perpetual succession and a common seal with power to sue and be sued in its corporate name.

Section 3 of the Uganda Law Society Act provides for Objects.

These include

i) to maintain and improve the standards of conduct and learning of the legal profession in Uganda.

ii) to facilitate the acquisition of legal knowledge by members of the legal profession and others.

iii) to represent, protect and assist members of the legal profession in Uganda as regards conditions of practice and otherwise.

to protect and assist the public in Uganda in all matters touching and auxiliary or incidental to the law among others.

Section 4 provides for Membership

The Attorney General and the solicitor General shall be ex officio members of the society.

Any person entitled to practice by virtue of **Section 6(2) of the Advocates Act**, who applies for memberships in the prescribed manner shall be admitted as a member of the society except that any person who I appointed to an office in the public service specified by the Ministry by statutory instrument shall become a member of the society at the date of his /her appointment to that office.

Section 5 provides for Honorary Membership

The council may elect as honorary members of the society such persons as it may think fit either for life or for such period as the council may in any case deem appropriate.

Section 6 provides that Annual subscription by all members except the honorary membership. No entrance fee is to be aid (Section 7)

Section 8 provides for Termination of membership

A member whose name has been struck off the roll of Advocates or whose right has been suspended.

any member who ceases to be qualified for membership shall cease to be a member of the ULS other than an honorary member.

Section 9 provides for the Constitution of the council

President, Vice-president, Attorney General, Secretary General, a secretary, a treasurer and are elected annually by the society in general meeting

Section 10 provides for the Powers of the Council

The council has all powers of the society and may exercise the same.

Section 15 provides for the General meetings -every after 31st day of December as soon as convenient.

Section 16 provides that Any 15 members of the ULS may not at any time requisition a general meeting by written notice specifying the object of the proposes meeting. If the council fails for 14 days, to be held within 30 days, the members may themselves convene that general meeting is to be held at any time within 2 months after such deposit.

Section 17 provides for Voting

Every member has one vote and the chairperson of that meeting shall also have a costing vote.

Section 18 provides for General meetings to act by simple majority.

A firm means an incorporated body of two or more individuals or one or more individuals (and one or more corporations or two or more corporations) who have entered into partnership with one another with a view of carrying on business for profit. (Section 1 of the Business Names Regulation Act.)

HOW TO SET UP A MODERN LAW FIRM.

a) **Regulation**

After one has decided on what type of firm one has to set up, he /she proceeds to Registrar General and registers the firm name under the Business Names Regulation Act, special form, statement of Particulars.

the form can be procured from Uganda Bookshop in Kampala or to any other branches in other towns in the country.

After you have filed in the form you file it with the Registrar Generals Office in Kampala. You pay a prescribed fee for registration. Then you are issued with a certificate of Registration

b) Premises-called chamber

c) physical location

d)Lay out of the chambers

QUALIFICATIONS

Advocates Act-qualifications

Application for Practicing Certificate

Firm

Registration Section 4 of the Partnership Act and Business Names Regulation Act

- Generic names
- Register the name
- Inspection of chambers
- Apply for inspection.

ADVOCATES ACT CAP 267 as amended by the **Advocate (Amendment Act No.27 of 2002**

Qualifications

1.Holder of a degree -Section8 cap. 267

2.Holder of a post Graduate Bar Course Diploma in Legal practice conducted by Law Development Centre

THE ADVOCATES (ENROLLMENT AND CERTIFICATION) REGULATIONS S.I 267-1

Procedure and Document for Enrollment

Regulation 4 Application for certificate.

(1) In an application for a certificate under section 8(2) of the Act,

there shall be stated—

(a) the name and address of the applicant;

(b) The qualifications of the applicant, being one or more of the qualifications set out in **Section 8(5) of the Act**, and the date of the qualifications;

(c) the date and place of birth of the applicant;

(d) if the applicant was not born in Uganda, the aggregate period of continuous residence in Uganda during the twelve months immediately preceding the date of the application or the aggregate period during which he or she has been in practice as an advocate in any of the countries specified in Part II of the First Schedule to these Regulations;

(e) whether the applicant is at the date of the application subject to any disentitlement or disciplinary proceedings, and whether he or she has been convicted in or is subject to any pending or present criminal proceedings described in **Section 12(1)(h) of the Act**;

(f) Whether the applicant is an undischarged bankrupt or the subject of any bankruptcy proceedings in any country.

(2) The application shall conclude with a prayer that the applicant be granted a certificate of eligibility for enrollment as an advocate.

(3) The application shall be supported by an affidavit by the applicant verifying the facts set forth in the application.

Note that the affidavit and Statutory Declaration must be commissioned by commissioner for Oaths and registered with the Registrar of documents at the Uganda Registration Service Bureau

Law council is at Georgian House,7th Floor

Regulation 5 Mode of application.

(1) An application for a certificate of eligibility for enrollment shall be made by delivering or sending to the secretary of the Law Council—

(a) the application;

(b) the affidavit supporting the application;

(c) the certificate or other document which the applicant submits as evidence of his or her qualifications, professional skill and experience;

(d) testimonials from two advocates whose names have been on the roll for at least three years, certifying that the applicant is a fit and proper person to be enrolled as an advocate.

Regulation 3. Recognized legal qualifications, etc.

(1) The legal qualifications set out in Part I of the First Schedule to these Regulations are recognized by the Law Council for the purposes of **Section 8(5)(a) of the Act**.

(2) The countries set out in Part II of the First Schedule to these Regulations are designated countries for the purposes of **Section 8(5)(b) of the Act**

Regulation 24 of the Advocates (Professional conduct) Regulation S.1 267 standard size of the name plate must be (36 x 25.5).

(1) An advocate may erect a plate or signboard of not more than 36 centimeters by 25.5 centimeters in size containing the word “advocate”, indicating his or her name, place of business, professional qualifications, including degrees, and where applicable, the fact that he or she is a notary public or commissioner for oaths.

(2) Notwithstanding sub regulation (1) of this regulation, a nameplate or signboard shall, in the opinion of the Law Council, be sober in design.

(3) No advocate shall carry on any practice under a firm name consisting solely or partly of the name of a partner who has ceased to practice as an advocate.

(4) An advocate or a firm of advocates affected by sub regulation (3) of this regulation shall be allowed five years from the date of the change in the composition of the firm, in which to effect the required change in the firm name.

(5) Notwithstanding sub regulation (1) of this regulation, no advocate shall include on his or her nameplate, signboard or letterhead any non-legal professional qualifications or appointments in any public body whether the appointments are present or past.

THE REPUBLIC OF UGANDA

THE PARTNERSHIP ACT 2010

THE PARTNERSHIP DEED:

THIS DEED is made the ……. day of …… **BETWEEN OGWANG BOB** of P.O. Box 122 Kampala of the one part and **ODONG LOUIS** of P.O. Box 221 Kampala the Second part.

WHEREAS the said **OGWANG BOB** and **ODONG LOUIS** (hereinafter collectively referred to as "The Partners") are desirous of forming a Partnership amongst themselves.

NOW THIS DEED WITNESSETH as follows: -

1. PARTNERSHIP:

The partners hereby form a partnership which save as it is expressly set down below shall be governed by the **Partnership Act (Cap114)** or such other Laws for the time being governing partnerships.

2. NAME:

The name of the Partnership shall be **KOOL RESTAURANT** (hereinafter referred to as "the firm")

3. OBJECTIVES OF THE BUSINESS:

The business of the firm shall be the establishment and operation of the services of Bar and Restaurant and any other business or activity which is normally carried out in connection with the said nature of business/service.

4. PLACE OF BUSINESS:

The principal place of business of the firm shall be situated in Uganda along **LDC Tent way on Makerere Hill Road** or any other such place as the partners shall agree.

5. COMMENCEMENT OF BUSINESS:

The Business /services of the firm shall be deemed to have commenced on the **17th day of January 2006.**

6. CAPITAL:

The capital of the firm shall be Ushs. 7,000,000/= (Uganda shillings seven million only) to which each partner shall contribute as follows:

1. **OGWANG PASCAL** **60%**

2. PATRICK KAIJA **40%**

7. **BANKERS**:

The Bankers of the firm shall be **Nile Bank Ltd** or any such other Bank as partners shall from time to time determine.

8. **MANAGEMENT**:

The partners do hereby appoint the said **ODONG LOUIS** to be the Managing partner of the firm who shall be responsible for the overall day to day co-ordination of all the departments and the general administration of the firm and/or business although the partners may from time to time as they deem fit appoint any other manager.

9. **RETIRING / DEMISED**:

In case of death of a partner or any retirement thereof, such dead/retired partner or his estate shall be entitled to a portion which corresponds to the capital contribution which shall be valued by the surviving partner and the determined value shall be paid in full and final settlement of the deceased/retired partner's claim.

10. **PROFIT AND LOSS:**

The net profit and the losses of the business shall be divided in the proportional capital contribution of each partner.

11. **FINANCE OF THE FIRM**:

All finances of the firm not required for current expenses shall immediately upon receipt be paid into the Bank account of the firm and all the cheques on the said account shall be signed by both partners or as may be determined by the partners from time to time.

12. **ACCOUNTS:**

1) The Partners shall cause Books and Accounts of the firm to be kept and each partner shall have liberty to inspect the said books of accounts as and when he likes.

2) The Partners shall ensure that the books of accounts of the firm are audited at least every financial year.

13. **ASSETS:**

On every **31st day of December of each year** an account shall be taken of the assets and liabilities of the firm and balance sheet and the profits and losses account, making due allowance of depreciation and any lost capital and showing what is due to each Partner in respect of capital and share of profits shall be prepared and shall be signed by each partner who shall be bound thereby unless some manifest error be found therein within **three (3) months** in which case such error shall be rectified.

14. **NEW PARTNERS**:

No new partner shall join the partnership without the consent of both parties

15. **RESIGNATION**:

In the event of resignation of a partner, his shares shall be sold off to the continuing partner.

IN WITNESS WHEREOF THE PARTIES hereto have affixed their respective signatures this …… day of …... 2004.

SIGNED and DELIVERED

By the said 1. **OGWANG PASCAL**

_____

2. PATRICK KAIJA

ALL in the presence of _____

1. _____

1st Witness

2. _____

2nd Witness

DRAWN BY:
SUI GENERIS
KAMPALA.

OBJECTION MY LORD

THE REPUBLIC OF UGANDA

STATEMENT OF PARTICULARS REQUIRED TO BE GIVEN PURSUANT TO THE BUSINESS NAME REGISTRATION ACT IN CASE OF A FIRM

This *form* must be signed either (a) by all the individuals who are partners *(or* if one or *more* of the partners is a corporation, by a director or secretary thereof) or (b) by one individlli11 who is a partner in the firm, or (c) by A director or secretary in case of or a corporation which is a partner In the firm; but in cases (b) and (c), a statutory declaration as to the truth of the particulars contained in the form must be made as per reverse. (Vide sec. 6 of the Act).

1, Business name to be registered.	…….. …… …… …..
2. Where a business is carried on under two or more business names, each or these business names must be slated.	.. . .
3. Principal Place of Business Plot. Street and Postal Address	.. . . …… . .. .
4. Present Christian names *(or* names) And of the individuals who are partners. if any *of* the individuals who are partners are of non-European origin. such individual or individuals (as the case may be) must also slate 'the Christian name *(or* names) and surname or his, *her* or their fathers, respectively	.. . . ……. .. . .
5.-Former Christian name*(or* names) and surname (if any) of each of the individuals who are partners	.. . .
6.-Nationality of each of the individuals who are partners.	.. . .

	.. . .
7.-Usual place of residence of each of the individuals who are partners. Plot. Street and Postal Address,	.. . .
8.Other business occupation (if any) of each of the individuals who are partners	.. . .
9.Date of commencement of business. The dale need only be staled where the business was commenced after the 151h day October 1918.	.. . .
10.-Corporate name of each corporation which is a partner.	.. . .
11.-Registered or principal office of each corporation which is a partner.	.. . .

Dated this day of …………… 20…………. …..

Signed . . .. ……………………..………………………………………………….. .. . .

. . .. ………………………………………………………………………….. .. . .

. .. . ……………………………………………………………………………... .. ..

.. . . ………………………………………………………………………….. .. .

ISAAC CHRISTOPHER LUBOGO

STATUTORY DECLARATION

I, ...of …… Uganda

DO SOLEMNLY AND SINCERELY declare that the particulars contained hereon are true and correct AND I make this solemn declaration conscientiously believing the same to be true and by virtue of the Oaths Act.

DECLARED at ……. District of …….. at …… the ……. Day of …… 20 ……

BEFORE ME.

…….

Magistrate/Commissioner for Oaths.

OBJECTION MY LORD

THE REPUBLIC OF UGANDA

THE TRADE (LICENSING) ACT. CAP 101

THE TRADE (LICENSING) REGULATIONS 2011

FORM 1
APPLICATION FOR A TRADING LICENSE

1. a) full name of applicant: KELEMSIA,

a) Address of applicant: SHOP D2, NABUKERA PLAZA, KAMPALA UGA.

2. a) Nature of the business for which the license is required: A retail shop dealing in second hand clothes.

3. a) Name of firm/company: KELEMENSIA, MEGANI AND OPIO TRADERS.

   b) date of registration: 30th September 2022

4. names of partners and their nationalities:

i) KELEMENSIA MERINDA, UGANDAN

ii) GABRIELI MEGANI, UGANDAN.

iii) OPIO ZAPPA, UGANDAN.

5.(a) Amount of partnership property:

6.the proprietors of the partnership have never been committed of any criminal offence

7. No previous trading license issued to any of the partners has been cancelled.

8. a) The partners shall keep proper books of accounts to e inspected and balanced at the end of every calendar year (31st December) of every year.

b) The books shall be kept in English.

I declare that the particulars given above are to the best of any knowledge and believe them to be true.

Dated this 1st Day of October,2022.

MERINDA KELEMSIA. (On behalf of all partners)

PARTNER.

ISAAC CHRISTOPHER LUBOGO

P.O BOX 0000,

KAMPALA UGANDA

Date: 1st October 2022.

THE SECRETARY LAW

COUNCIL.

P.O BOX 7183

KAMPALA.

Dear sir/madam

RE: APPLICATION FOR USE OF GENERIC NAME.

I address you in regard to the above reference as follows:

1. That I am a practicing advocate enrolled under the laws of Uganda.

2. That my colleagues and I intend to open up a law firm operating in Uganda under the name..... Advocates.

3. That we do hereby seek your approval pursuant to Regulation, 2006 to use the name .....advocates prior to reserving the name with the registrar general.

Hoping our application will be put under your utmost consideration.

Yours faithfully

(For and on behalf of .....)

P.O BOX 0000,

KAMPALA,

UGANDA

DATE :2/OCT/2022

TO THE REGISTRAR

GENERAL,

P.O BOX 6848,

KAMPALA, UGANDA.

Dear Sir,

RE: RESERVATION OF BUSINESS NAME

I address you in regard to the above reference as follows:

1. That my colleagues and I are desirous of setting up a legal practice in Uganda.

2. That we have applied to the law council for approval to use the name ..... advocates and the same has been granted pursuant to the Advocates (use of Generic Names by law firms) Regulation, 2006. Attached a copy of the letter of approval for use of the name from the secretary law council.

3. That in light of the above we seek to reserve the name .....advocates having conducted a search and there is no other business operating under the same or similar name. Attached are the result of the search conducted.

Hoping for your kind consideration on this matter

Yours faithfully.

(For and on behalf of other partners)

Tel:

Email:

ISAAC CHRISTOPHER LUBOGO

THE REPUBLIC OF UGANDA

THE BUSINESS NAMES REGISTRATION ACT.

NOTICE OF CESSATION OF BUSINESS

To: the registrar.

Whereas I the undersigned registered under the number .....in the index of registration have ceased to carry on business as.....

Now I give notice that I have ceased to carry on business as..... As from the 30th day of September, 2022, except for purposes of winding up the business.

Dated this 2nd day of October 2022.

(Signature).

P.O BOX 0000,

KAMPALA, UGANDA

DATE: 2ND OCTOBER 2022

TO: THE SECRETARY

LAW COUNCIL.

P.O BOX 7183,

KAMPALA.

Dear sir/madam

RE: APPLICATION FOR THE INSPECTION AND APPROVAL OF CHAMBERS.

As the above matter refers, we hereby do apply for the inspection and approval of chambers in the name style of.....

All the necessary requirements have been complied with as provided for under Regulation 5 of the Advocates (inspection and approval of chambers) Regulations, 2005

We look forward to your positive consideration.

ISAAC CHRISTOPHER LUBOGO

THE REPUBLIC OF UGANDA

IN THE MATTER OF THE CONTRACTS ACT 2010

PROFIT AND LOSS SHARING AGREEMENT.

This agreement is entered on this 2nd day of October 2022.

Between.

Trading as..... (Hereinafter referred to as the "partners" which expression shall unless where the context so otherwise requires include their nominees, agents, assigns and successors in title). Their address for purposes of this agreement shall be.....P. O BOX 0000, KAMPALA UGANDA.

AND

Edward Mukuutana of Kakika Village, Gomba Parish, Gomba Sub County, Wakiso district, P.O BOX 12, KAMPALA (herein after referred to as the "associate" which expression shall unless where the context so otherwise requires include his nominees, agents, assigns and successors in title.

WHERE AS

1. The associate is the lawful owner of

2. The partners are desirous of taking on the same building aforementioned above as business premises for purposes of carrying on their business.

IT IS THEREFORE AGREED AS FOLLOWS:

1. DURATION OF THE AGREEMENT.

This agreement shall last from the date of execution until terminated by six months written notice by either party.

2. OCCUPATION OF

The partners shall occupy the building for purposes of carrying on the business of a law firm and shall continue to do so from the date of signing of this agreement to its termination

3. PROFIT SHARING

In consideration for the purposes occupy ....., the Associate shall be entitled to 10% of the profits earned by the partners from the business

4. STATUS OF THE ASSOCIATE

The associate shall at no time be deemed to be partner of the business and thus shall not bind the firm.

5. CONFIDENTIALITY.

OBJECTION MY LORD

The associate shall not in any fashion, form or manner, either directly or indirectly

a) Disclose any information above the firm to any party

b) Use any confidential information he has received through his association with the firm for his benefit.

6. EFFECT OF TERMINATION.

Upon termination according to clause 1 of this agreement, the following shall occur:

a) The partners shall be allowed 6 months in which to vacate the premises

b) The associate will be entitled to his share of the profits during that period.

7. DISPUTE RESOLUTION.

All disputes arising under Agreement shall:

a) First be resolved through a mediation facilitator by a mediator appointed and agreed upon by both parties.

b) Where the mediation fails to yield results after 5 working days, the matter shall be referred to court of competency jurisdiction for adjudication in Uganda.

8. LAW APPLICABLE.

This agreement shall be governed by the relevant laws of Uganda.

WITNESSED BY:

PARTNERS: EDWARD MUKUUTA

1. NAME

SIGNATURE

2. NAME

SIGNATURE.

In the presence of:

1. NAME

SIGNATURE

DESIGNATION

Drawn by:

Sui generis

P.o Box 0000.

Kampala.

THE ADVOCATES (ENROLLMENT AND CERTIFICATION) REGULATIONS. (S.1-267-1)

REGULATION 6.

FORM 1.

ADVERTISEMENT

The Advocates Act.

Advertisement. Application for Certificate of Eligibility for Enrollment. The Advocates Act. It is notified that an application has been presented to the Law Council by _____ (name of applicant), who is stated to be _____ (qualifications), for the issue of a certificate of eligibility for entry of his or her name on the roll of advocates for Uganda.

_____

Secretary, Law Council

REGULATION 7(3).

FORM 2.

LAW COUNCIL.

CERTIFICATE OF ELIGIBILITY FOR ENROLLMENT.

The Advocates Act.

This is to certify that _____ _____ (name of applicant and qualifications) has complied with the requirements as to acquisition of professional skill and experience and is an eligible, fit and a proper person to be an advocate.

_____

Chairperson, Law Council

OBJECTION MY LORD

REGULATION 9.

FORM 3.

ADVERTISEMENT.

APPLICATION FOR ENROLLMENT OF ADVOCATE.

The Advocates Act.

It is notified that a petition has been presented to the Chief Justice by_____ (name of applicant), who is stated to be _____ (qualifications), for the entry of his or her name on the role of advocates for Uganda.

_____

Registrar, High Court of Uganda

REGULATION 12.

FORM 4.

APPLICATION FOR PRACTICING CERTIFICATE.

The Advocates Act.

To: The Registrar

The High Court of Uganda

Kampala

1. I, _____, (name and address of applicant) whose name was entered in the roll of advocates for Uganda on _____ (date), apply for the issue of a practicing certificate.

2. Attached to this application is proof of my having paid my subscription for the current year as a member of the Uganda Law Society.

3. I send with this application the sum of 20,000 shillings for payment of the prescribed fee.

_____

Signed

Date _____, 20 ____

REGULATION 15.

FORM 5.

APPLICATION FOR RENEWAL OF PRACTICING CERTIFICATE.

The Advocates Act.

1. I, _____, (name

and address of applicant) to whom a practicing certificate was issued on _____ (date), and was last renewed on_____(date), apply for a further renewal of that certificate.

2. Attached to this application is proof of my having paid my subscription for the current year as a member of the Uganda Law Society.

3. I send with this application the sum of 20,000 shillings for payment of the prescribed fee.

_____

Signed

Date _____, 20 ____

_____

ISAAC CHRISTOPHER LUBOGO

FEE NOTE/DEBIT NOTE

SUIGENEIS & CO. ADVOCATES

SUIGENERIS/CV/2014/200 VAT NO:19318-D Date:10.10.2014

P.O Box 0000 **Phones**

Kampala **Fax**

TO.

ITEM	PARTICULARS	PROFESSIONAL FEES	DISBURSEMENTS	TOTAL AMOUNT
1	Interpretation of the wills of both the applicant and his son VAT 18% of total	1500,000/=		1,500,000 270,000 1,770,000

Please note:

1.that the above amount is now due and payable and we expect your remittance by return mail with endorsed copy of fee metal/Debit note.

2.that under Rule 6 of the Advocates (Remuneration and Taxation of casts) Rules, interest of 67% P.a becomes payable on the above amount exactly 1 month from today.

THE ADVOCATES (ENROLLMENT AND CERTIFICATION) REGULATIONS. S.I 267—1.

REGULATION 6.

FORM 1.

ADVERTISEMENT.

APPLICATION FOR CERTIFICATE OF ELIGIBILITY FOR ENROLLMENT.

The Advocates Act.

It is notified that an application has been presented to the Law Council by _____ (name of applicant), who is stated to be _____ (qualifications), for the issue of a certificate of eligibility for entry of his or her name on the roll of advocates for Uganda.

_____

Secretary, Law Council

REGULATION 7(3).

FORM 2.

LAW COUNCIL. CERTIFICATE OF ELIGIBILITY FOR ENROLLMENT.

The Advocates Act.

This is to certify that _____ _____ (name of applicant and qualifications) has complied with the requirements as to acquisition of professional skill and experience and is an eligible, fit and a proper person to be an advocate.

_____

Chairperson, Law Council

OBJECTION MY LORD

REGULATION 9.

FORM 3.

ADVERTISEMENT.

APPLICATION FOR ENROLLMENT OF ADVOCATE.

The Advocates Act.

It is notified that a petition has been presented to the Chief Justice by _____ (name of applicant), who is stated to be _____ (qualifications), for the entry of his or her name on the roll of advocates for Uganda.

_____

Registrar, High Court of Uganda

REGULATION 12.

FORM 4.

APPLICATION FOR PRACTICING CERTIFICATE.

The Advocates Act.

To: **The Registrar**

The High Court of Uganda

Kampala

1. I, _____, (name

and address of applicant) whose name was entered in the roll of advocates for Uganda on _____ (date), apply for the issue of a practicing certificate.

2. Attached to this application is proof of my having paid my subscription for the current year as a member of the Uganda Law

Society.

3. I send with this application the sum of 20,000 shillings for payment of the prescribed fee.

_____

Signed

Date _____, 20 ____

REGULATION 15.

FORM 5.

APPLICATION FOR RENEWAL OF PRACTICING CERTIFICATE.

The Advocates Act.

1. I, _____, (name and address of applicant) to whom a practicing certificate was issued on _____ (date), and was last renewed on _____1 (date), apply for a further1 renewal of that certificate.

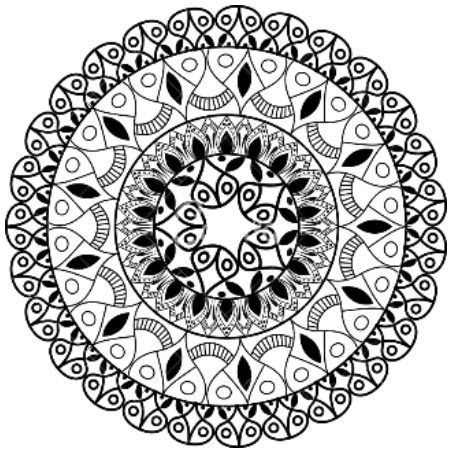
2. Attached to this application is proof of my having paid my subscription for the current year as a member of the Uganda Law Society.

3. I send with this application the sum of 20,000 shillings for payment of the prescribed fee.

_____

Signed

Date _____, 20 _____



FORMATION AND MANAGEMENT OF COMPANIES:

Law Applicable

The law applicable to this area of study includes the following:

- The Companies Act 2012
- The Companies (General) regulations SI 110-1
- The Companies (Fees) Rules SI110-3 as amended by SI 57/2005
- The Companies (High Court) (fees) Rules SI110-4
- Investment Code Act Cap92
- The Stamps Act Cap 342 as amended by Act12/2005
- Advocates (Remuneration and Taxation of Costs) Regulations SI 267-4
- Trade (Licensing Act) 2012
- Uganda Registration Services Bureau Act Cap 210
- Civil Procedure Act Cap 71 (if court action is envisaged)
- Civil Procedure Rules SI 71-1 (if court action is envisaged)

THE BASIC ISSUES/CHECKLIST ON FORMATION AND MANAGEMENT OF A COMPANY

- Whether the parties have capacity to form a company
- What type of company can the parties form?
- What additional information needed in incorporation of the company?
- Whether the proposed company can enter into agreements before incorporation
- What is the forum, procedure and documents? (for incorporation of a company and for a company going public)
- Fess payable

OBJECTION MY LORD

THE BASIC DOCUMENTS INCLUDE

- Application for Reservation of company Name
- Articles of Association
- Memorandum of Association
- Statement of Nominal Capital (Form A1)
- Declaration of Compliance (Form A2)
- Prospectus

WHAT IS A COMPANY?

Section 2 of the Companies Act defines a company as a company formed and registered under the act, or an existing company or a re-registered company under the act.

CASES

NGAREMTONI ESTATES LTD v COMMISSIONER OF INCOME TAX (1969), ALR COMM.186

Platt J; The argument for the appellant was that it had incurred liability on taking over the contract so that the sale of the coffee produced an income on which it was liable to tax, then it must follow that it had also taken over the liability for the expenses which had been incurred in connection with its business but before its business commenced. The Commissioner General argued that this could not be so because the company had no corporate existence at the time when the expenses were incurred. It was said that those expenses were a matter between the original purchases and the vendors.

The judge said that a promoter has no right of indemnity against the company which he promotes in respect of any obligation undertaken on its behalf before its incorporation and he cannot sue it upon a contract made by him with an agent or trustee on its behalf before its incorporation even where the articles of association provide that the company shall defray the preliminary expenses.

The Company cannot ratify an agreement purporting to be made on its behalf before its incorporation. The promoter or other person involved can only sue upon a new contract and whether there is a fresh contract between the company and the promoters and their parties after incorporation is a question of fact.

KELNER v BAXTER (1866) L. R .2. CP 174

The plaintiff was a wine merchant and the proprietor of the Assembly Rooms at Gravesend. In August 1865, it was proposed that a company should be formed for establishing a joint clock hotel company to be called The Gravesend Royal Alexandra Hotel Co. Ltd. The plaintiff was to be the manager of the proposed company. One part of the scheme was that the company should purchase the premises of the plaintiff and the defendant was the nominal purchaser on behalf of the company.

In December a prospectus was settled on 9th Jan 1866, an MOU was executed by the plaintiff and the defendants and others on 27th Jan 1866 an agreement was entered into for the transfer of this additional stock to the company. The company having collapsed the present action was brought against the defendants upon the agreement of the 27th of January.

The defendant argued that the agreement was not entered into by the defendants personally but only as agents for the hotel company and they thereby incurred no personal obligation to the plaintiff who was himself a promoter.

Held: 1. If the company had been on existing company at this time, the persons who signed the agreement would have signed as agents of the company. But as there was no company in existence at the time the agreement would be wholly incorporative unless it were held to be binding on the defendants personally.

2.Where a contract is signed by one who professes to be signing as agent but who has no principal existing at the time and the contract would be altogether inoperative unless binding upon the person who signed it, he is bound thereby and a stranger cannot by a subsequent ratification relieves him from that responsibility .When the company came afterwards into existence it was a totally new advocate having rights and obligations from that time but no rights and or obligations by reason of anything which might have been done before.

PRICE v KELSALL (1957) E.A 752

The mere adoption and confirmation by directors of a contract made before the formation of a company by persons purporting to act on behalf of the company creates no contractual relation whatever between the company and the other party to the contract.

SALOMON v SALOMON (1897) A.C 22

Mr. Salomon now a pauper was a wealthy man who was a boot and shoe manufacturer trading on his own sole account under the firm of "A Salomon & Co." He turned his business into a limited company. He wanted to make provision for his family. All the formalities were gone through and all the requirements were duly observed.

The capital was fixed at £40,000 in 40,000 shares of £1 each. The subscribers to the memorandum were Mr. Salomon, his wife and five children. The appellant obtained an allotment of 20,000 shares and he held 20,000 shares and six shares by his wife and family. The company fell upon evil days. Mr. Salomon and his wife lent the company money and then he got his debentures cancelled and reissued to a Mr. Broderip who advanced him £5000 which he handed over to the company on loan. Mr. Broderip's interest was not paid when it became due. He took proceedings at once and got a receiver appointed. Then came liquidation and a forced sale of the company’s assets. They realized enough money to pay Mr. Broderip but not enough to pay the debentures in full and the unsecured creditors were left out in the cold.

Act requires that a memorandum of association should be signed by seven persons who are each to take one share at least. There is nothing in the Act requiring that the subscribers should be independent or unconnected or that they or any one of them should take a substantial interest in the undertaking or that they should have a mind and will of their own or that there should be anything like a balance of power in the constitution of the company.

When a memorandum of association is duly signed and registered, though there be only seven shares taken, the subscribers are a body corporate capable forthwith to use the words of the enactment of exercising all the functions of an incorporated company.

The company is at law a different person altogether from the subscribers to the memorandum and though it may be that after incorporation the business is precisely the same as it was before and the same persons are managers and the same hands receive the profits the company is not in law with agent of the subscribers or trustee for them.

SMITH v CROFT (NO.2) (1987)3 ALLIER 909

Grounds for bringing a derivative claim are laid down by Knox J and it provides that such a claim may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty to exercise reasonable care skill and diligence by a director of the company.

The criteria or prerequisites before instituting derivative claims/suits.

i) Prima facie case

ii) The company is the defendant and plaintiff

iii)Wrong done to the company

iv) Wrong committed by people in control either as Majority or Defacto control through manipulation of No internal remedy (has exhausted internal remedies)

vi) Support of majority of independent shareholders.

FOSS v HARBOTTLE (1843) 2 HARE 461

The complainants were two shareholders in the Victoria park Company. They brought an action against an action against the company's five directors and promoters, alleging that the defendants had misappropriated assets belonging to the company and has improperly managed its property. The complainants sought an order to compel the defendants to make good the losses suffered by the company. They also applied for the appointment of a receiver.

Held: That the action must be fined. The harm in question was suffered by the whole company not just by two shareholders. It was open to the majority in general meeting to approve the defendants conduct. To allow the majority to bring an action in these circumstances would risk frustrating the wishes of the majority.

- The Rule is that where a wrong has been committed against the company, the proper complainant in respect of that wrong is the company itself.
- Rationale. It prevents a multiplicity of legal proceedings being brought in respect of the same issuer.
- It upholds the principle of majority rule, if the majority of shareholders do not wish to purse an action than the minority is bound by that decision.

LYANGOMBE AND ANOTHER V R [1959] 1 EA 678 Court held that where a private company exceeds the statutory limit of 50 members (now 100) it ceases to enjoy the privileges and exemptions attached to it.

IN THE MATTER OF ALLIED FOOD PRODUCTS LTD (1978) H.EB.294

The Company was a private company owned by Uganda Asians. The petitioner was removed from being the director of the company. There was no evidence that there was a general meeting since 1975 or that there had been notification of the petitioner to attend it and his removal was done without calling a meeting.

Held. The definition of a member of a company as defined in the companies Act covers two categories of person thus those who have subscribed to the memorandum of a company and those who subsequently agree to become members of the company and whose names are entered on the company's register of members.

The Government has a discretion to make any order it sees fit among others the company's affairs are being conducted including the petitioner and oppressive means burdensome, harsh and wrongful.

The section only covers members in their character as members of the company and not as servants of the company/employers. It is only members in their capacity who can invoke the application of Section 211.Therefore the fact that the petitioner was deprived of his pay as sales manager poses as director and that he was removed from the post of director did not amount to oppression.

4.The facts that the petitioner was not notified of any meeting and that the directors were removed by from office without any general meeting did amount to conducting the affairs of the company.

JOSEPH LUNGUJU KAKOOZA V ETHIOPIAN AIRLINES LTD (1982) HCB III

The Plaintiff brought an action for damages for breach of contract against the defendant airlines for failing to carry him on a business trip to China on its flight ET 782 on 13th November 1977.

Held: A member is not entitled to claim damages personally for loss suffered by company. The plaintiff failed to prove that he personally as distinct from his company had suffered any loss.

IN THE MATTER OF AIR-REP INTERNATIONAL LTD (1984) HCB 63

This was an application for an order that one of the two shareholders in Air Rep International Ltd be permitted to call and hold a meeting of the company and pass resolutions on behalf of the company.

Held: Section 135 of the Companies Act (Cap 85) gives power to the court to order for a meeting of a company where it is not practicable to call for a meeting in anyway and this case fell within the section. (EI Sombrero Ltd (1953) ALL ER I Followed)

SHEIKH ALI SSENYONGA & ORS v SHEIKH HUSSEIN RAJAB KAKOOZA & GORS. (1992-1993) HCB 93.

Between 1980 to 1987 the adherents of the Muslim religion in Uganda were divided. The leaders of the two factions agreed to settle their differences at Makkho and the terms of the settlement included that the parties would unite in the overall body called Uganda.

A general assembly was convened and after the election of the chairman, it was adjourned to 2:30 pm on the following day. Owing to some confusion in the Assembly, the first respondent purported to adjourn the assembly sin die by sending notice on radio Uganda and hand written chits to the individual delegates. The majority decided to continue business and the appellant were elected officials of UMSC. The respondents refused to hand over all the requirements for the management and administration of the UMSC hence the suit.

Held: The UMSC had been constituted as a legal entity in the form of an unlimited company without share capital. As it had Memorandum and Articles of Association which was the constitution, it was subject to company law. The membership of UMSC was exclusively confined to those eligible by religion criteria and not by the purchase of shares offered to the public thus it was a private not a public company.

2. The power to adjourn or continue a meeting /an assembly lay in the membership. As there was quorum when the decision was taken the decision to continue was valid.

IN THE MATTER OF NAKIVUBO CHEMISTS (1977) HCB 344

Held: For a petitioner to succeed under Section 211 of the C\V companies Act he must show not only that there has been oppression of the minority shareholders of a company but also that it has been the affairs of the company which have been conducted in an oppressive manner. The oppression must be to a person in his capacity as a shareholder and not in any other capacity.

2. The petitioner's salary and allowances were withheld in good faith in order to offer his debits with the company but it was not fair for the petitioner not to be finished with a statement of account at all. However, this could not amount to oppression as it affected him in his capacity as directors only.

The courts will make a winding up order on account of oppression only if a very strong case is made out where such order would be contrary to the wishes of the majority shareholders. The real test is whether the business of the company cannot go on due to the deadlock among the shareholders. Where a company is in effect a partnership between the directors the same principles should be applied in the case of a dissolution of partnership.

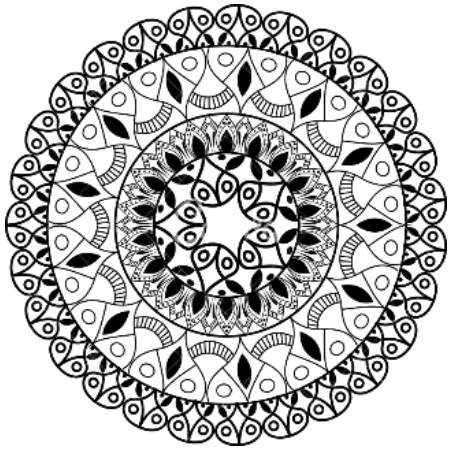
STEINBERG V SCALA (LEEDS) LTD (1923) 2. Ch. 452

P(minor) applied for shares in a company paid amount due on allotment and first call made on shares,18 months after still a minor he repudiated the contract and sought to recover the paid money.

Held: He is not entitled to the money. Even though no dividends declared the company had done all that it had bargained to do and P could have gotten some value by selling the shares.

FREDRICK SENTAMU v UCD R ANOR (1983) HC 59.

It was held that a limited liability company is a separate legal entity from its directors, shareholders and other members, individual members of the company are not liable for its debts.



BUSINESS ENTITIES

PARTNERSHIPS

These are governed by the **Partnerships Act 2010; Section 2(1)** defines a partnership as the relationship which subsists between or among persons not exceeding twenty in number who carry on a business in common with a view of making profit.

Section 2(3) provides that registered companies under the companies Act or any other Act relating to the registration of joint stock companies are not partnerships.

Section 47 provides for limited liability partnerships; consist of not more than 20persons and have one or more persons called general partners who are liable for all debts and obligations of the firm (**Section 47(2)**

Partnerships have unlimited liabilities for each partner; no perpetual succession, no legal status and limited borrowing powers.

SOLE PROPRIETORSHIP

This is a business entity carried by one individual who is in direct control of all elements. The sole individual has full exposure and liability for the debts and other business liabilities.

The objective is profit for the proprietor and it does not have separate legal existence. It can also exercise perpetual succession.

For example, **GOIL LTD** is a separate legal entity and has several stakeholders who are all liable therefore a sole proprietorship is not the appropriate legal entity.

In KABENGE ADVOCATES V EDITOR IN CHIEF RED PEPPER PUBLICATIONS LTD & 9 ORS (HCT-00-CC-MC 324 OF 2011) [2012] The legal position is quite clear; A sole proprietor of a business cannot sue in the name of that business if that name is not his own. He should not even sue in his own name trading in the business name. He should sue in his own name simpliciter and then in the body of the plaint he can say that he carries on business in the name of whatever his business name happens to be and is the sole proprietor of that business…."

ASSOCIATIONS

A group of individuals /companies pursuing common objectives. They must have a constitution and normally liability extends to amount guaranteed.

Associations also lack perpetual successions and usually the main objective is not profit driven. These business organizations are not often used as investment vehicles in Uganda therefore these are not the best business organizations to be used by the foreign company that seeks to do business in Uganda. Goil Ltd should therefore not form an association.

COPERATIVE SOCIETIES

These are created and governed by the Cooperative Societies Act Cap 112, S.4(1) a) provides for a minimum of 30 members. The liability is established by statute. It can exercise perpetual succession and has corporate status. The main objective is community development.

This is not appropriate for **GOIL Ltd** because the information in Appendix I is not about community development.

PARASTALS

These are public corporations and are government owned. They are created by specific legislation and liability established by statute. These are not subject to the requirements of the companies Act No 1 of 2012.The main objective is to further some national interest. Have a corporate status and characterized by perpetual succession.

JOINT VENTURES

These are profit oriented companies and they do not exist in perpetuity. They are purely contractual and are governed by the contracts Act except if one chooses to register them as a company, then company law will be applicable.

The parties must have agreed on a common task to execute. It is a business agreement in which the parties agree to develop for a finite time a new entity and new assets by contributing equity(shares)

CORPORATIONS / COMPANIES

A company is defined as an association of persons sharing resource to pursue a common purpose.

Companies are registered to pursue the functions of;

- For purposes other than making profits for owners or members e.g., NGOs, Charitable organizations
- Companies registered to personify the business between a small body of persons.
- Companies registered to involve a large body of shares in investment though not necessarily involved in the management of the company.

Section 4 of the Companies Act ,2012 provides for a company limited by shares, a company limited by guarantee, unlimited company, a private or a public company.

The difference between a company limited by shares and that limited by guarantee is the assumption that a company limited by shares, operations or working capital is supported by the share capital contribution of members and all creditors.

Companies limited by guarantee, members undertake to pay in case of the business failure to indemnify creditors. Usually charitable organizations.

Private company. **Section5(1)** defines a private company and it is limited to 100 members and restricts the right to transfer it shares and other securities. Private companies also prohibit any invitation to the public to subscribe for any shares or debentures of the company.

Public company; defined under **Section 6** of the companies Act as one which is not a private company under **Section 5.**

As a public company has more procedural requirements at incorporation during its existence and at its dissolution which includes inter alia.

PREPARATION OF PROSPECTUS

Obtaining a certificate of commencement.

Shares can be sold at stock exchange and invites the public to subscribe for shares through a prospectus. There is no confidentiality in view of the prospectus being a public document.

It is prudent to form a private company (a private limited company) as the liability of members would be restricted only up to unpaid up shares. It also has minimal interference from the public.

A private company is easy to form as it can be formed by one or two persons. It is a flexible as one is required to perform lesser legal formalities as compared to a public company .it enjoys special exemptions and privileges under company laid.

If the company is a public company, the following additional documents are required to be registered: Prospectus or statement in lieu of prospectus.

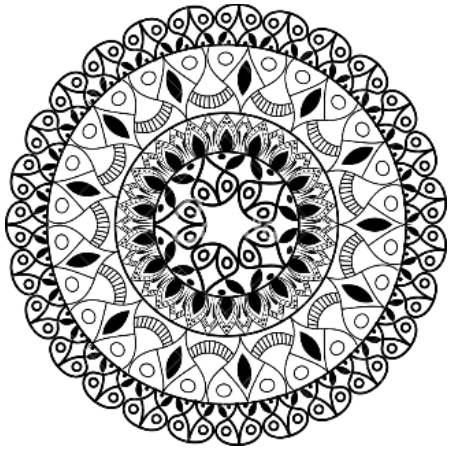
If the company is a public company, the following additional documents are required to be registered: Prospectus or statement in lieu of prospectus.

REGISTRATION OF PROSPECTUS.

Section 60 provides that a prospectus shall not be issued by or on behalf of a company or in relation to an intended company unless, on or before the date of its publication—

(a) the Capital Markets Authority has approved the company's prospectus in accordance with the Capital Markets Authority Act; and

(b) there has been delivered to the registrar for registration a copy of the prospectus signed by every person who is named in it as a director or proposed director of the company or by his or her agent authorized in writing.



CHARITABLE ORANISATIONS

COMPANIES LIMITED OR GUARANTEE

Section 4(2) (b) of the Companies Act,2012. The liability of its members is limited by the memorandum to the amount that members undertake in the memorandum to contribute to the assets of the company of its being wound up. This association has to be incorporated.

TRUSTS/BOARD OF TRUSTEES.

A trust is created by a settler who settles money or property which is held by a trustee on behalf of the beneficiaries.

Section 1 of the Trustees Incorporation Act Cap 165 provides that trustees may be appointed by anybody or association of persons established for any religious education, literacy, scientific, social or charitable purpose and such trustee may apply in the manner mentioned hereafter to the Minister for a certificate of registration of the trustees or trustee of such body or association of persons as a corporate f body. The Trustees Incorporation Rules S.1 165-1 in Rule 2 prescribes the form of applications (Form 1 of the schedule)

Rule 4 states that the application shall be made in duplicate on stout foolscap folio and one side of the paper written on.

Section 3 of the Trustee Incorporation Act, Cap 165 provides in subsection (1) that every certificate shall be in writing signed by the persons(s) making it and it shall contain the several particulars specified in schedule to the Act or as may be prescribed or such of them as may be applicable prescribed to the case,

Rule 2 of the Rules provides that the application should be submitted to the commissioner land registration in Form 1 in the 1st schedule to these Rules

Rule 6 of the Trustees Incorporation Rules

The fees set out in the second schedule to these Rules shall be payable in respect of the matters specified in that schedule. Upon submission of an application for a certificate of registration as a corporate body-20,000/= Upon issue of a certificate of incorporation -10,000/=

NON-GOVERNMENTAL ORGANISATIONS

Section 2 of the Non-Government Organization Registration Act, Cap 113 provides that no organization shall operate in Uganda unless it has been duly registered and has a permit.

Section 3 provides that an organization shall apply for registration under this Act to the secretary to the board. **Regulation 4 of the Non-Government Organization** Registration Regulations 2009 provided under **Sub regulation (1) that an application under Section 3** shall be in Form A as specified in the schedule to the Regulations.

Regulation 5 **Requirements for registration**

(1) An application under **regulation 4** shall be accompanied by—

(a) a specification of the area of intended operation of the organization—

(i) geographical area; and

(ii) Field of operation e.g., health, education etc;

(b) the prescribed fee;

(c) valid reservation of its name by the Registrar of Companies;

(d) Two copies of the organization's constitution;

(e) a chart showing the organizational structure of the organization;

(f) a work plan and a budget for the first year of operation of the156organisation;

(g) in the case of a local organization—

(i) a written recommendation to the Board by two sureties;

(ii) a written recommendation by the chairperson of the executive committee of the sub county council and the Resident District Commissioner of the area where the organization intends to operate;

(iii) Where the organization intends to operate throughout Uganda, a written recommendation by the chairperson or at least two sub county councils and at least two Resident District Commissioners;

(iv) Where the Resident District Commissioner rejects an application for a recommendation under sub-paragraph (ii) or (iii), of this paragraph the reason for refusal shall be given in writing within a period of 60 days.

(2) The application shall be signed by at least two promoters.

(3) Notwithstanding **Sub Regulation (1) (c)** the Board may reject a name if in its opinion it may cause confusion with an already existing organization.

Regulation.10 (1) fees of the certificate

- Local organisation-20000 or one currency point
- Foreign organization $100 or convertible equivalent

Nongovernmental organizations Registration Regulations .2009

Regulation 10(20 fees (permit)

- Local organization -20,000/= or one currency point
- Foreign organization -$100 or convertible equivalent

Forum

Section4 of the NGO Registration Act as amended Establishment and composition of the Board establishes a board known as National Board for NGOs.

The best or appropriate charitable organization is an NGO (tax regime and

Interview guide and Additional information

Greetings

Preliminaries

Obtaining facts

Decision and advise

Way forward

Desired names

Objectives of the company

Share capital and structures

Name, address and particulars of directors and nationalities, secretary and other members, nationalities of the employees and their number place of business.

How to Interview

- by email

- Skype
- Yahoo messenger
- Nominees' subscriber
- Faxing
- It could also be in the presence of a translator from MUK institute of Language.

HOW TO EXCHANGE DOCUMENTS

1. By email; **Section 4 (1) (a) of the Electronic Transaction Act, Act No 8 of 2011** provides that one of the objects of the Act is to enable and facilitate electronic communication and transactions.

2. Courier services e.g., DHL

CHARACTERISTICS OF A COMPANY.

1. A separate legal personality

In the case of **SOLOMON V SOLOMON (1897) AC 22**. Lord Macnaghten held that the company is at law at different person all together from the subscribers to the memorandum. By virtue of being in possession of legal personality, a company is capable pf enjoying rights and being subject to duties separate from its members.

By virtue of being in possession of legal personality, a company is capable of enjoying rights and being subject to duties separate from its members. **In JOHN LUBEGA MATOVU V MUKWANO INVESTMENTS LIMITED MISC.APP NO.156 OF 2012**, the applicant had sued the respondent company for recovery of UGX 139,343,041 upon which a consent judgment was entered. He later realized that directors had abandoned, altered or changed the name of the respondent company. He brought the suit for an order to lift the corporate veil. Hellen Obura J, held that the concept of corporate personality is what distinguishes a company from other forms of business associations. It means that a company has a separate legal personality from its members and is capable of enjoying rights and being subject to duties separate from its members.

EMPLOYMENT BY THE COMPANY.

Under the principle of separate legal personality, a shareholder can be an employee of the company as was in the case of **LEE V LEE'S AIR FARMING LTD (1960) UKPC 33,** where lee was the controlling shareholder and director of the respondent company. Lee was jailed while piloting a company aircraft in the course of aerial top dressing. His wife claimed compensation under the worker's compensation act. The issue whether the deceased was a worker within the meaning of the worker's compensation act. Lord Morris held that the deceased was in contractual relationship was based on consensus between the deceased, one legal person and the company is the other legal entity. The deceased was a worker of the company and was entitled to the compensation, the mere fact

someone is a director of a company does not preclude or prevent him from entering into a contract of service with the company.

IN FREDRICK SENTAMU V UCB AND ANOR. (1983) HCB 61. The plaintiff negotiated a loan on the company's behalf from the 2nd defendant's branch. The company defaulted and the plaintiff was arrested. It was held that a limited liability company is a separate legal entity from its directors, shareholders and other members. Individual members cannot be sued by the company's creditors.

2. Perpetual succession

This means that a company continues to exist despite a change in membership and can only be terminated through the legal process of winding up.

Death, insolvency or insanity of the member's does not affect the company's legal existence. **IN MICHEAL OSCAR KAYEMBA V JAMES MULWANA AND 3 ORS (1999),** the sole owner of the shares in the company died. Bossa J on the authority of **SOLOMON V SOLOMON,** where a company had only one paid up shareholder it still remains in law a corporation with independent existence. The company continues to exist despite the death of its shareholder.

In RE NOEL TEDMAN HOLDING PTY LTD (1967) Q. B 561, husband and wife were the only shareholders and directors in the company and they both passed on in an accident. The company continued and court allowed the personal reps to appoint directors to affect the transfer of shares to their surviving child.

3. **SEPARATE PROPERTY.**

Upon incorporation, a company can own property in its own name. A member of a company cannot own company property and has no interest in the company property. **IN MACURA V NORTHERN ASSURANCE CO.**[4]. The appellant, a shareholder in the company, took out fire insurance for timber that belonged to the company. The timber was destroyed by a fire, he asked the insurance company to indemnify him for the loss. Baxter J held, he could not be indemnified because the assets did belong to him, but the company. No shareholder has any right to any item or property owned by the company because he has no legal or equitable interest therein. **In INTERNATIONAL LIMITED V MOHAMMED HALID EL. FAITH**. **CIVIL APPEAL 16/1993** ODOKI JSC, held that the respondent could not claim the company's property by an action in his own name.

4. **SUITS BY OR AGAINST THE COMPANY**

A company is a legal person and can sue or be sued in its own name. Suits against the company must be brought in the company's registered name. a suit by or against an in correct company name is a nullity. **In QYUICK CARGO HANDLING SERVICES LIMITED V IRON STEEL WAVES AND 2 ORZ, CIVIL SUIT NO. 328 OF 2002**. The plaintiff sued "property management services ltd" instead of properties management limited." Kibuuka Musoke J, held that in company law, upon incorporation, a company is known only by its name on the register of companies. The suit against a non-existing party was improper before court.

The person representing the company must be authorized by a resolution or powers of attorney otherwise his actions may not bind the company. However, lack of the board resolution does

[4] **(1925) AC 619**

not invalidate the proceedings. **In CONSTRUCTION ENGINEERS AND BUILDING LIMITED V NEW VISION AND 3 ORS H.C.CS NO 67 OF 1991**, the defendants raised a P.O. that, the suit was improper as the plaintiff had no board resolution authorizing the institution of the suit. Held that, a board resolution is merely evidence that the company has authority to institute a suit but lack of a board resolution does not necessarily mean that the company directors have no authority to institute the suit.

5. **COMMON SEAL**

Every company must have a company seal that is an embossment with the company name and postal address. Every document used the company must have the company seal and be signed by at least two directors. Documents requiring authentication by a company signed by the director or secretary do not need to be sealed.

In KINTU V KYOTERA GOWERS (1976) HCB 336. Court held that the power to possess, use and change a seal is incidental to a corporation. In the absence of any special and legally binding regulations to the contrary, the seal affixed to the corporation deed bears a special emblem to indicate that it's the corporate seal.

6. **RACIAL ATTRIBUTES.**

A company has attributes similar to a human being but it can't have racial attributes. It has no soul or feelings. **In KATATE V NYAKATURA (1956) 7 ULR 47**, the respondent sued the petitioner for misappropriation of money which belonged to Anole African society in which they were all shareholders. The complaint was made to the native court. The issue was whether the company whose shareholders were all Africans can be said to be an African within the meaning of the native ordinance. The court held that a company is a distinct legal entity that is abstract in nature and incapable of having racial attributes. The suit was in a wrong court; a company can't be sued in the native court simply because it has native members.

CITIZENSHIP OF A COMPANY.

The current legal frame divides companies into citizen and non-citizen companies. The classification comes with certain limitations for example under **Article 237 (2) (c) of the Constitution** and **Section 40 (4) of the Land Act cap 227**, a non-citizen company cannot acquire or hold Mailo or freehold land.

Section 40 (7) of the Land Act, defines a non-citizen company as:

b) In the case of a corporate body, a corporate body in which the controlling interest lies with non-citizens.

c) In the case of companies where share is not applicable, where the body's decision-making lies with non-citizens

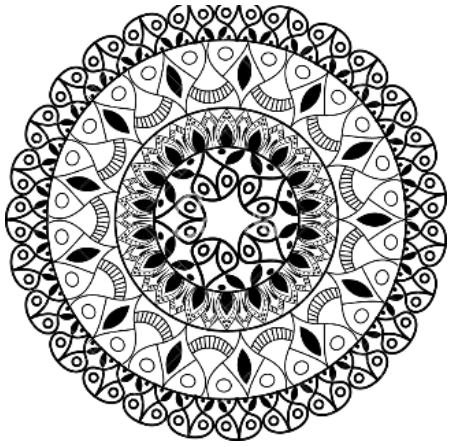
d) A company in which shares are held in trust for non-citizens.

e) A company incorporated in Uganda whose articles of association do not contain provision restricting transfer or issue of shares to non-citizens.

Section 40 (8) of the Land Act defines controlling interest to mean:

a. In case of companies limited by shares, the majority shares are held by persons who are non-citizens.

b. In the case of companies without shares, a company in which decisions are arrived at by the majority who are not citizens.



FORMATION OF COMPANIES

TYPES OF COMPANIES

These include the following

- Private company
- Public company
- Limited liability Company
- Unlimited liability company

Company law in Uganda is primarily regulated by the Companies' Act, act no.1 of 2012 which commenced on 1st July 2013 under the Company's Act, 2012 (commencement instrument, 2013).

Incorporation.

The companies act lists the various types of companies in S.4 i.e.

1. Companies limited by shares.
2. Companies limited by guarantee.
3. Unlimited liability companies
4. Private and public companies.
5. Section 50 provides for single member companies.

Section 5 and 6 define a private and a public company respectively.

PRIVATE COMPANY (SECTION 29) OF THE (COMPANIES ACT HEREIN AFTER KNOWN AS C.A)

This company has a number of members ranging between 2 to 50 persons. In addition, there is a restriction on transfer of shares. This is further evident in **Article 23 of Table A** to the first schedule to the Companies Act. A private company prohibits any invitation to the public to subscribe for any shares or debentures in the company. It was held in **LYANGOMBE VS R**[5] that where a private company exceeds the statutory limit of 50 members, it ceases to enjoy the privileges and exemptions attached to it.

PUBLIC COMPANY

A public company attracts a minimum of 7 members and it has no maximum. In contrast, this type of company does not restrict transfer of shares. This type of company allows invitation to public to subscribe for shares

LIMITED LIABILITY COMPANY

Company limited by shares.

This type of company can be limited by either shares or guarantee. Where the company is limited by Shares, this means the liability of the members is limited to the level of the unpaid shares.

COMPANY LIMITED BY GUARANTEE

If the company is limited by guarantee; this means that the liability of the members is limited to such amount as to members may have agreed to contribute in the event of winding up and the company's assets are not sufficient to satisfy the debts. Usually, such companies are non-profit making entities.

UNLIMITED LIABILITY COMPANY.

This refers to a company which does not have any limit on the liability of its members.

It must be noted that a company may use the word bank at the end if it is involved in banking business and a company may dispense with the word "Limited" under section 20 of the Companies Act; upon application to the minister showing that the company will promote science, religion, charity or justice *inter alia.*

[5] (1959) EA 678

OBJECTION MY LORD

WHO IS A PROMOTER?

The C.A does not define a promoter. Case law has however defined a promoter. **In TWYCROSS V GRANT (1877) 2 CPD 469,** justice Cockburn defined a promoter as one who undertakes to form a company with reference to a given project, to set it going and who takes the necessary steps to accomplish that purpose. A promoter must act in good faith and they stand in a fiduciary duty with the company. They must disclose any interests and everything they do.

Reference can also be made to the case of ERLANGER V NEW SOMBRERO PHOSPHATE CO (1878) 3 APP CAS 1218

PRE –INCORPORATION CONTRACTS.

These are transactions entered into before the company is incorporated. The rule in, **SALOMON V A SALOMON AND CO LTD [1897] AC 22**presupposes that a company can only enter into a contract upon incorporation and any contracts purportedly entered into before incorporation with the company are void and cannot be enforced against the company.

In the case **of KELNER V BAXTER (1866) LR 2 CP 174**, the plaintiff and defendant were promoters of a company called "Gravesend Royal Alexander" co ltd.' They entered a contract to purchase a stock of wines and signed "on behalf" of the company. The contract was later ratified by the company upon incorporation. The court held that ratification was invalid since the company was non –existent at the time. Pre incorporation transaction are void ab initio and cannot be ratified. They had signed on behalf of a non-existent principal and were therefore liable.

In the case **of PHONOGRAM LTD V LANE (1982)1 Q.B 938**.

Under **Section 54 (1) of Companies Act,** the contract which purports to be made on behalf of accompany before its **incorporation** is void as against the company is valid as against the person purporting to act for the company.

Section 54 (2) provides that the company may adopt a pre-incorporation contract with its formation and registration made on its behalf without a need for novation.

Where the company adopts a pre-incorporation contract, the liability of the promoter of that company then ceases. **Section 54 (3).**

REGISTRATION OF A COMPANY.

1. Search for availability of business name.

This can be done by writing a formal letter to the registrar to ascertain the existence of a name and suitability.

2. Reservation of nature.

Section 36 (1) of Companies Act grants the registrar of company's power to reserve a name of a company. Under **Section 36 (2)**, registrar is prohibited from reserving and registration of names considered being undesirable.

The reservation is for a period of 30 days and must not exceed 60 days.

Under **Section 41**, a charitable organization which promotes art, science charity etc. may apply to dispense with limited.

Regulation fees: 1. Less than 5M-50K

2. 1% of capital if in excess of 5M

Stamp duty:

On articles: UGX 10,000

Capital; 0.5%

3. **PREPARATION OF THE NECESSARY DOCUMENTS**.

The documents to be prepared are include:

a) The memorandum of association.

Section 2 of Companies Act 2012 defines a memorandum of association as the memorandum of association of a company as originally framed and altered from time to time. S.17 of CA provides for the statutory form of the memorandum. **Section 7 of Companies Act** requires the memorandum of every company to be printed in the English language. It contains the name, objects, capital structure and liability of the members.

Section 8 of the Companies Act states that the memorandum must be dated and signed by each subscriber in the presence of at least one attesting witness. **Section 19 of the Companies Act** provides for registration of the memorandum. The form for a memorandum of association for company limited by shares is under Table B while that of a company limited by guarantee is in table C of the schedule.

REGISTRATION OF COMPANY, FEES AND DUTIES PAYABLE

A company is defined in **SALMON VS. SALMON (1877) AC 22** as a legal entity separate and distinct from the members who comprise it. This principle has subsequently been codified in our laws by virtue of **SECTION 15** which lays down some of the characteristics of a company, thus a company can hold property, can sue or be sued, has perpetual succession, has a common seal, and it is a legal entity.

THE FORMALITIES FOR INCORPORATION OF A COMPANY ARE AS FOLLOWS:

One applies to reserve a name pending registration of a company as provided for under **Section 18 of the Companies Act.** The application is by formal letter. (see copy of letter for reservation of a company name). Court held in **MOBIL OIL LTD VS TEXACO AFRICA [1968] 1LR 106** that if a name is undesirable or confusing, it will not be reserved.

Upon reservation of the company name; the promoters of the company go ahead to draft the Articles of Association and Memorandum of Association. This can be done by the promoters (usually the directors) or promoters can engage services of a lawyer. It must be noted that the articles of association for a private limited liability company must contain a restriction on transfer of shares. This is fortified by the case of **GUINNESS VS LAND CORPORATION OF IRELAND**[6]and the same principle[le was noted with approval in **LONDON OVERSEAS TRADING COMPANY VS THE RALEIGH CYCLES COMPANY.**[7]

The Articles of Association and Memorandum of Association are accompanied by a statement of nominal capital- see Form A1 in the appendix. This is done pursuant to section 9 of the stamps act.

Another form which needs to be attached is a declaration of statutory compliance. This form is filled out by an advocate of the High Court and duly commissioned by a commissioner for oaths wherein the advocate makes a declaration that the all the legal requirements have been complied with. See Form A2 in the appendix. This is done pursuant to **section 16(2) of the company's Act**.

Ascertainment of the fees payable; this is delivering the Documents above to the Companies Registry within the meaning of **Section 14 of the Companies Act**. Assessment is done in accordance with the Companies (Fees) Rules. SI 110-3. The stamp duty is 0.5% of the nominal capital under the auspices of the stamps act. Upon payment of the fees, the documents are lodged with the Registrar of Companies for registration; upon which a Certificate of Incorporation is issued to the promoters of the subsequent company. It must be noted that before starting the business, the company should obtain a trading license within the meaning of Trade (Licensing) Act Cap 101

It must be noted that if the incorporation is for a public company, the procedure is the same as above save for a few peculiarities as follows;

Filing a statement with The Registrar with names of directors, secretary and undertakings,

Filing a Statement in lieu of a prospectus;

Deliver and register Articles of Association and Memorandum of Association MOA

Statement of Nominal Capital and Statutory Declaration.

[6]**(1882) 22 Ch.D 349**
[7]**[1959] EA 1012**.

PROCEDURE AND FORMALITIES OF REGISTERING A COMPANY INCORPORATION OF A LOCAL COMPANY.

The Company's Act does not provide for a search of the register but its prudent practice that the promoters of any company conduct a search at the registry to find out whether the name is still open for reservation. **Section 246 of the Companies Act (inspection the documents.)**

Reservation of name **Section 36(1) of the Companies Act** provides that the registrar may on application reserve a name pending registration of company or a change of name by any existing company. The registration shall remain in force for 30 days or such longer period not exceeding 60days and in that period no other company s entitled to be registered with that name.

Forum Uganda Registration Services Bureau which has the mandate to carry out all registration required under the relevant laws. **Section 2(g) of the URSBA Cap 210**) fee 20,000 by formal letter

Under Section 36(2) of the Companies Act states that the name must be desirable. In **MOBIL OIL LTD TEXAS AFRICA** (1968) LB 106-if a name is undesirable or confusing it will not be registered.

According to **Section 37 of the Companies Act** states that the registrar has powers whereas in his opinion the name by which the company is registered as misleading he may require the company to abandon the misleading name.

Registration **Section 18(1) of the Companies Act** states that a company shall be registered by filling in the particulars contained in the registration form in the second schedule.

The register shall register the company and assign it a registration number if he/she is satisfied that the requirements have been compiled with.

Registration of companies under the Companies Act provides that a registrar of companies or an assistant registrar officer performing the duty of registration under this Act.

Memorandum and Articles on registration, the and articles if any shall be delivered to registrar and he/she shall retain and register them and shall assign a registration number to each company to be registered **Section 19(1) of the Companies Act.**

Section 19 (2) of the Companies Act provides that the registration number shall be indicated on all official documents of the company.

Section 7 (1) of the Companies Act provides that the memorandum of every company is printed in English language stating the name of the company with "Limited "in case it is limited by shares or guarantee. It shall state that the registered office of the company is to be situated in Uganda and may also state the objects of the company. If it is a private limited company, it must state that the liability of its members is limited and if is limited by guarantee it must state that each member undertakes to contribute to the assets if it's wound up. **Section 7(1) and (2) respectively) of the Companies Act.**

Section 7(4) of the Companies Act provides that if a company has share capital, it should state the amount which it purposes to be registered and the division of that share capital into shares of a fixed amount unless the company is an unlimited company.

Each subscriber must write opposite his or her name the number of shares he /she takes.

Section 8 of the Companies Act -it should be dated and signed by each subscriber in the presence of at least one attesting witness who shall state his occupation and postal address.

Opposite the signatures of the subscriber there that shall be written in legible characters his or her full names, occupation and postal address.

Articles of Association, Section 11 of the Act provides that in addition to its memorandum and articles of association, a company can register such regulations of the company as the company may deem necessary.

Section 13 of the Companies Act states that the AOA may adopt all or any of the regulations contained in table A. Under Section 13 (2) in case of a company limited by share and registered after the commencement of this Act, if the articles are not registered is not exclude or modify the regulations contained in table A, those regulations shall so far us applicable, be the Regulations of the company.

Section 14-Adoption and application of Table F public company shall adopt Table F (provisions of the code of corporate governance) Section 14(2) a private company can also do the same.

Section 21 of the Companies Act provides that the Memorandum when registered bind the company and the members of the company to the same extent as if they had been signed and sealed by each member and contained covenants on the part of each member to observe all the provisions of the memorandum and Articles.

The memorandum and articles are filed with the company's nominal capital statement and a declaration of compliance stating that all the requirements of the companies Act and any other formalities relating to registration have been compiled with.

This declaration is commissioned by the commissioner for oaths.

Payment of stamp duty calculate a rate of 0.5% of the nominal share capital stipulated in the name/memo once paid the registrar then registers the Memorandum of Association and Articles of Association.

The statement of particulars of directors should also be filed.

Company Form 7 sets out the particulars of directors and it requires the following, names of the directors and secretary, their nationality, usual residential and postal addresses, business occupation, dates of birth.

Notice of situation of **registered office, company form 9 requires the physical and postal address of the company and the director must sign this form Section 115 and Section 116 of the companies Act.**

Resolution to open up a bank account, details to the choice of bank and its branch signatories of the account and whether they can sign solely or jointly. The resolution must be signed by at least 2 persons i.e. director (s) or a secretary.

Issuance of certificate of incorporation, **Section 22 of the Companies Act**, a certificate of incorporation shall be conclusive evidence that all the requirements of registration have been complied with.

Section 22 (2) provides that a statutory declaration by an advocate engaged in the formation of the company or by a person named in the articles as director or secretary of the company.

ALTERATION OF THE OBJECTS CLAUSE.

Section 10 of Companies Act. A provides for the mode and extent to which objects of the company may be altered. Section 9 places **restrictions on the alteration of** the memorandum except in accordance with the express provisions of the act. A company may alter its objects to:

a) Conduct its business more economically or efficiently

b) Attain its main purpose any new or improved means

c) Enlarge/change the local areas of its operations.

d) Carry on some business which under the existing circumstances may conveniently or advantageously be combined with the business of the company.

e) Restrict or abandon any of the objects specified in the memo.

f) Sell or dispose the whole or any part of the undertaking

g) Amalgamate with any other company or body of persons.

Any alteration not falling within the above categories cannot be entertained.

PROCEDURE FOR ALTERATION

Section10 must always start with the power of directors to call meetings and how they exercise that power.

1) A special resolution must be passed at the general meeting. **Section 10(2)(a)** requires that the resolution is passed by holders of not less in aggregate than 15% in nominal value of the company's issued share capital. Under **Section 10 (2)(b**), holders of not less than 15% of the company's debentures entitling the holders of not less than 15% of the company's debentures entitling the holders to object may pass the resolution.

2) The resolution sanctioning the alteration must be registered. **Section 150(1)**

   Notice must be given to holders of debentures entitling them to object and the notice must be the same as for the members. **Section 10 (8).**

3) The amended memorandum of association must be delivered to the registrar of companies within 35 days, 21 days for the application and 14 days after the end of those 21 days from the date of the resolution if no application for cancellation of the alteration has been made to court.

Application for cancellation of the alteration of a resolution altering the memorandum.

- Under **Section 10 (3),** the application shall be made to the registrar within 21 days after the date on which the resolution was made.
- Under **Section 10 (4),** upon the application being made the registrar may make an order canceling the alteration or confirming the alteration either wholly or in part.
- The application may be made by a member or a holder of a debenture entitling them to object. **Section 10 (7)** states that debentures secured by a floating charge or which form part of the same as any debentures issued.

4) Upon delivery and registration of the amended memorandum of association, it supersedes the original memorandum and takes effect from the date of registration.

4. **Liability clause**.

It contains the liability of the members. Where a company is limited by shares, it shall state so and where it's limited by guarantee it shall state as such. Member's liability in a company limited by shares is limited to unpaid shares, liability is nil if the shares are fully paid up. For a company limited by guarantee, the liability clause will state the specific amount every member undertakes to contribute to the company assets in the event of its being wound up.

ALTERATION OF LIABILITY CLAUSE.

The company cannot alter the liability clause except in accordance with the Act. The liability of members can't be increased by altering the memo unless the members agree to the alteration in writing.

Under **Section 230**, a limited liability company may have directors with unlimited liability. The company may by special resolution make the liability of its directors unlimited under **Section 231** however the alteration must be permitted by the articles.

5. Capital clause

It provides for the amount of share capital for the proposed company. Government taxes and fees payable that is stamp duty and registration fees depend on the amount of the authorized or nominal capital of the company.

The effect of the clause and the amount stated therein is that the company can't issue more shares than are authorized by the memo unless the nominal capital is increased. A capital clause isn't

included for a company with unlimited liability or a company limited by guarantee without a share capital.

ALTERATION OF CAPITAL CLAUSE.

The amount of share capital of a company may be altered in a number of ways:

1. Under **Section 71 of Company Act**, a company may alter its capital clause if authorized by the articles of association by:

a) Increasing its share capital by issuing new shares.

b) Consolidation and division of all or part of its share capital into shares of larger amounts.

c) Conversion of all or any of its fully paid-up shares into stock or reconversion of that stock into fully paid-up shares.

d) Sub division of the existing shares into shares of lower denominations.

e) Cancellation of shares which have been taken up and reduction of its capital accordingly.

PROCEDURE.

- Under **Section 71 (2),** the alteration in **Section 71 (1**) is through an ordinary resolution in a general meeting. **Regulation 44 and 45 of Table A** provide for the ordinary resolution. Must be registered under **Section 150 (1).**
- The registrar then effects the necessary changes in the memo upon delivery of the documents and payments of the requisite fee.

2. Reduction of share capital under **Section 76**.

The company which is either limited by shares or by guarantee, with a share capital may reduce its share capital if authorized by its articles of association.

Procedure. Start with preliminaries on how you come to pass the resolution. (Refer to workshop)

- The reduction must be approved by the members through a special resolution. **Section 76 (2).** Must be registered under **Section 150(1**)
- The company must then apply to court for any order confirming the reduction under **Section 77.** The court will take into account the interests of the creditors and shareholders.

The certified copy of the order must be filed with the registrar upon obtaining the court order.

Under **Section 73 (1)** the company may increase its share capital beyond the registered capital and where it does so it must give the registrar notice within 30 days.

3. Reserve liability under **Section 70**

The company can under **Section 70 (1**) by special resolution determine that a given portion of its share capital not called up shall not be capable of being called up, except where the company is being wound up. This is termed as reserve capital.

The resolution must be filed and registered with the registrar of companies.

4. Variation of shareholders rights under **Section 82**.

5. Re-organization of capital under **Section 207**.

6. Subscription clause.

Includes the name, address of occupation of each subscriber to the memo of association. **Section 7 (4) (b)** states that a subscriber to memo may not take less than a share**. Section 7(4) (c)** requires that he/she writes opposite his/her name the number of shares he/she is taking. **Section 8** requires that every subscriber signs on the memo in the presence of at least one attesting witness.

B) Articles of association.

Section 2 defines articles to mean the articles of association of a company originally framed or as altered by special resolution. It includes regulations contained in table A in the 3rd schedule to the act. It contains rules which govern the company's internal affairs and sets out the rules to be followed in attaining the company's objects. The articles are solely for the benefit of the directors and shareholders. S.19 requires that the articles of association are registered together with the memorandum of association.

FORM AND CONTENT.

Section13 provides that the articles of association may adopt all or any of the regulations in table A. they must be printed, divided into paragraphs and numbered consecutively and signed by each subscriber to the memo. Attested by at least one witness according to **Section 15 of Company Act**

Where the company adopts with modifications it must state the modifications first then last article states that Table A is adopted with the above modifications.

Article 23 and 24 of Table A part 1 do not apply to private companies.

EFFECTS OF THE ARTICLES.

Section 21 provides that the articles bind the members of the company upon registration.

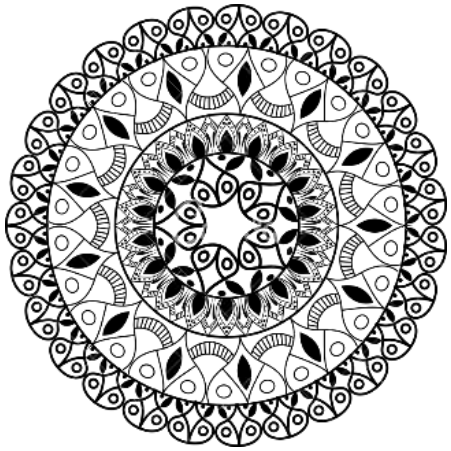
In WOODS V ODESSA WATER WORKS CO. (1899)42 CLD 636, woods sought an injunction to restrain the company from acting on a resolution passed which proposed to pay no dividend but instead give shareholders debenture bonds. **STIRLING J** stated that the articles of association constitute a contract not merely between the shareholders and company but between each individual shareholder and every other. The articles are binding on the company and its members; however, they don't bind the company to outsiders.

BROWN V TRINIDAD (1887) 3W7W Ch. D 1., brown was to be appointed until 1888 as provided in the articles but was removed earlier. The court held that theatricals do not constitute a contract between company and an outsider, thus Brown has no cause of action against the company.

The articles create a contract between the members and the company. The member of the co. accepts the terms of the contract by subscribing to the articles or by purchasing shares in a company. A company may sue its members for enforcement of the article or breach.

ALTERATION OF ARTICLES

The company may alter its articles of association from time to time. The alterations must however be in accordance with the companies act and the memo of association. S.16 provides that the articles should be altered by special resolution. The altered articles will bind the members the same way as the original articles.



REGISTRATION OF FOREIGN COMPANIES

It must be noted from the onset that foreign companies are not incorporated but registered. The rational for this is because; the companies are already incorporated and simply extending operations. Therefore, it serves to note that registration is for foreign companies. The procedure for registration of foreign companies is evident in **Section 252 of the Companies Act** and it is as follows: Foreign companies which establish a place of business in Uganda should within 30 days from the date of establishment deliver to the Registrar the following for registration:

- A certified copy of the Charter, or Articles of Association and Memorandum of Association or Constitution of the Company

- A list of directors and secretaries containing their names, nationality, postal address, business occupations and in case of a corporation, a corporate name, its registered principal place of business and postal address.
- Statements of all subsisting charges created by the company and not charges comprising solely property outside Uganda.
- Names and postal addresses of persons authorized to accept on behalf of the company service of the court process and any other notices due to be served on the company.
- The full address of the registered or principal office of the company.

ESTABLISHMENT OF A FOREIGN COMPANY

Application for an investment license **Section 9 of the Investment Code Act Cap 92** defines a foreign investor as a person who is not a citizen of Uganda. In case of a company, it means a company other than that in **Section 9(2)** in which more than 50% of the shares are held by a person who is not a citizen of Uganda **Section 9(1) (b)**

According to **Section 10** no investor shall operate a business enterprise without an investment license.

Section 11(1) an application for a license shall be made in writing to the executive director and must contain the following information name and address of proposed business, its legal firm, its bankers ,name and address of each director name, address ,nationality and shareholding of any shareholder who is not a citizen of Uganda.

- nature of proposed business activity and proposed location of the business.
- proposed capital structure number of investments and projected growth over 5 years or more
- estimated employees

Qualifications expenses, nationality and other relevant particulars of project management and staff.

- incentives which the applicant expects to qualify and details of such qualifications.
- any other information relating to the viability of the project.

Under **Section 14 of the Investment Code Act** provides that the authority within 30 days after the receipt of the application, prepared a detailed report in respect of the application and accordingly within 14days after 30days consider the application and the report of an application is in accordance with the provisions of the code and the business to be undertaken is not unlawful on contrary to the interests in Uganda.

Section 14(4) the authority within 7 days informs the applicant of its decisions.

Section 15 provides that when the applicant for an investment license and the authority have agreed on the terms and conditions of the investment license and incentives if any authorize the holder of it to make all arrangements necessary for establishing the business enterprises, contain the terms and conditions and the license shall have 5years from the date of issue contain any other information or details as may be prescribed.

Reserve a business name. This is done by application to the registrar by ordinary letter. The registrar has to endorse on the letters that the name has been accepted.

Registration of the foreign company. **Section 252 of the Companies Act**, No 1 of 2012, A foreign company which establishes a place of business in Uganda shall with 30days after the establishment of the business deliver to the registrar for registration a certified copy of the charter, statutes or memorandum and articles of association or other instrument, constituting or defining company's constitution and where the instrument is not in English a certified translation of instrument **(Section 252) (1) (a)**

i) a list of the director and secretary of the company containing the particulars in **Section 5(2) (form A.19)**

ii) In case of an individual, his or her present first name and surname any former first name or surname his or her usual postal address, his or her nationality and his or her business occupation.

iii) In the case of the corporation, its corporate name and registered principal office and its postal address. **Section 252(2)**

c) A statement of all subsisting charges created by the company being the kinds set out **in Section 105(2**) and not being charges comprising solely property situated outside Uganda**. (Form A20**)

d) Name and postal addresses of one or more person's resident in Uganda authorized to accept on behalf of the company service of process and notices required to be served on the company**. (form A.21**)

e) Full address of registered or principal office of the company **(Form A.22)**

On registration of the above document the registrar shall issue a certificate of incorporation signed by him or her that the company has complied with **Section 252** and shall be conducive that the company has registered or is registered as a foreign company. **Section 253 (I)**

Section 253(2) provides that upon registration of a foreign company the provisions of this Act shall apply to the foreign company as they apply to an incorporated company under the Act.

Application for an investment license is done after the registration of the company which is issued by the Uganda Investment Authority.

Upon obtaining a certificate of registration GOIL Ltd will be eligible to open bank account in Uganda enter agreement and generally do business.

The CEO of GOIL Ltd should also apply for an entry permit **Section 54(i)** citizenship Immigration Control Act, cap provides that no person shall enter or remain in Uganda unless that person is in possession of a valid entry permit, certificate of permanent residence or pass.

Section 6(i) (d) of the citizenship immigration control Act provides also that no foreigner shall engage in private business in Uganda without an entry permit.

Forum; URSB

Document (before registration)

A certified copy of incorporation translated)

A registered and certified copy of resolution passed to that effect authorizing the registration Fees head of the second schedule companies (fees) rules 2005 item, for registering a certified copy of the charter and statutes or memo and articles or other instrument constituting or defining the constitution of the company-25000 us

For registering any other documents required to be delivered to the registrar under part A of the Act Us & 55.00 Each co-form USD 10.

GOVERNANCE OF COMPANIES

Corporate power is divided between two organs: Members and directors

Public companies are required to incorporate in their articles of association the code of corporate some or all provisions of the code but it is not mandatory for private companies.

Directors. A director is a person who directs the affairs of the company. Case of **STANBIC BANK UG LTD V DUCAT LUBRICANTS U) LTD 83 ORS-**[8]it was held that directors and managers are/represent the directing mind of the company.

Number of directors

Section 185 States that every company other than a private company, shall at least have registered of one director

A public company has at least two directors.

TYPES OF DIRECTORS

Executive directors: Executive directors are full time officers of the company and they have administrative or managerial roles in the company's business and operations.

They include managing director or chief executive officer (C.E.O).

Under Article 107 of Table A, the managing director is appointed by the directors from among themselves.

They may entrust and confer upon a managing director any of the powers exercisable by them upon such terms and conditions and with such restrictions as they think fit.

Part III of the capital markets corporate governance guidelines 2003 prescribes best practices relating to the position of chairperson and chief executive.

[8]**MISC APP No.845/2013**

NON-EXECUTIVE DIRECTORS

Non-executive director is not involved in the administrative or managerial operations of the company.

DEFECTOR DIRECTOR

He is not formally appointed as a director but nevertheless acts as a director that is to say undertakes a directorial roe in the conduct of the company's affairs.

SHADOW DIRECTOR

He has not been formally appointed as a director but is a person in accordance with whose directions or instructions the actual directors are accustomed to act.

Alternate director. **Section 186** and Nominee directors for a single member company. These are appointed by the actual director of the single company. Nominee are only effective when the Single Member Company dies and alternate only acts when the nominee director is non-available.

APPOINTMENT OF DIRECTORS

FIRST DIRECTORS

Article 75 the names of the first directors are determined in writing by the subscribers to the memorandum of association as a majority of them. In practice, this is done by filing the particulars of directors and secretary at the time of registration of the company.

If the subscribers do not determine the first directors as above, then the signatories to the memorandum of association are deemed to be first directors.

An application to register a public company must be accompanied by written consent (company form 19) of the persons who have agreed to be directors of the company **Section 192(1) (a) Companies Act.**

APPOINT OF SUBSEQUENT DIRECTORS

Article 89 of table A, states that at the first annual general meeting of the company, all the directors should retire from office. The company in that annual general meeting (or an extra-ordinary general meeting if convened) must appoint new directors.

But they are eligible for re-election **Article 91 Table A.**

PROCEDURE FOR APPOINTMENT OF DIRECTORS

Appointed by ordinary resolution-a separate resolution must be passed by each director. An omnibus (i.e. appoint two or more directors) cannot be passed unless the members have unanimously agreed to make such a resolution-call extra-ordinary meeting **Article 49** with a notice, ordinary resolution is passed appointing the director.

Form 20 for Section 228(5) company shall send appointment of directors/seventy to the registrar in the prescribed form used to notify the register. Form 7 a return containing the particulars of a notification of any change among its directors or its secretary. Fees 20,000 finance Act.

Section 19 (applies to public companies)

At a general meeting of a company other than a private company, a motion for the appointment of a two or more persons as directors of the company by a single resolution, shall not be made unless the resolution has first been agreed to by the meeting without any vote being against it.

APPOINTMENT OF TEMPORARY DIRECTORS BY THE EXISTING DIRECTORS

Article 95 of table A of the Companies Act, the directors have power to temporarily appoint any person to be a director either to fill a casual vacancy or as an addition to the existing directors, such a director holds office until the next annual meeting.

QUALIFICATION OF DIRECTORS

A director must have the required qualification as stipulated in the companies Act, articles of the company and any other relevant laws/rules/regulations.

Section 191 of Companies Act, states that the acts of a director or manager remains valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification. Some salient conditions, qualifications and disqualifications include the following:

a) Minimum age is eighteen under **Section 196**

b) Minimum age if prescribed by the articles or other applicable law/rule/regulation.

c) Whether the director has already served the minimum number of terms if so, prescribed by the articles or other applicable law rule (term limit).

d) Share qualification is prescribed by the articles i.e., being required to hold a specified number or class of share.

e) Whether the person is subject to a disqualification order made by court **under Section 1998/201 of Companies Act.**

f) An undercharged bankrupt is prohibited by **Section 200** from becoming a director.

g) Approval of the individual by the relevant regulatory body if required, for instance, the director of a financial institution must be approved by the central bank.

RETURN OF DIRECTORS

Within fourteen days from the appointment of the first director, a return must be sent to the registrar whenever a change occurs in the director's view particularly a return must be made to the registrar within 14 days. **Section 228(5).**

The appointment of a director or secretary is notified to the Registrar using company form 20.

REGISTER OF DIRECTORS

Section 228(2) Companies Act requires the company to keep a register of its directors and secretaries.

DUTIES AND RESPONSIBILITIES OF DIRECTORS

As a general rule, directors' duties are owed to the company and not to individual members of the company.

Section 198 Companies Act provides that the duties of directors include the following:

a) To act in a manner that promotes the success of the business of the company.

b) To exercise a degree of skill and care as a reasonable person would do looking after their own business.

c) To act in good faith in the interests of the company as a whole and this includes

   (i) Treating all shareholders equally

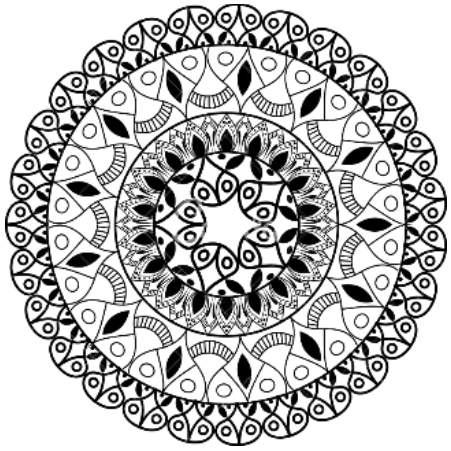
   (ii) Avoiding conflicts of interest.

   (iii) Declaring any conflicts of interest

   (iv) Not making personal profits at the company's expense

   (v) Not accepting benefits from third parties that will compromise him and,

d) Ensuring compliance with the companies Act and any other law.



SHARES AND SHARE CAPITAL

A share is defined in the ICSA Study Text, Paper 12 of Corporate Law; as a unit contribution by a member of the company/ promoter towards a company's capital. In relation to capacity to become a shareholder; the companies Act has no clear-cut provision. In practice a minor, personal representative, trustees in bankruptcy, a company and an individual inter alia, can be a shareholder.

There are many types of shares; thus

ORDINARY SHARES

These have no special rights and have the highest risks.

PREFERENTIAL SHARES

Holders of such shares have preference and priority over the rest of the shareholders. The shares are cumulative. The disadvantage or advantage with this type of share is that they payment does not go beyond the fixed dividend. They are usually held by promoters and directors.

REDEEMABLE SHARES

These shares are bought by the company after issue of shares. However, a company cannot have the entire share capital made up of entirely redeemable shares. A company cannot convert shares into redeemable if the shares in question have not been issued as redeemable shares and secondly, a company cannot redeem redeemable shares which are not fully paid up.

They are many types of share capital thus;

- Nominal capital which is the startup capital.
- Issued capital which refers to shares issued to members.

- Paid up capital; which refers to issued capital which is paid up.
- Reserve capital; which refers to capital kept for unforeseeable times.

RAISING AND MAINTENACE OF SHARE CAPITAL.

Share capital is the authorized capital of the company i.e., the amount which it can raise by way of issuing shares and this is stated in the memo.

There are various ways of raising share capital and these include;

1. Selling shares at a premium.

Pursuant to **Section 66 of Companies Act**, which provides for sell of shares at a premium, a company may sell its shares at a premium in order to raise share capital.

Where the company sells share at a premium, it must open a premium account because the premium is treated as part of its paid-up capital.

Procedure: a board of directors meeting is convened and a board resolution to issue the shares at a premium is passed.

2. Issuing redeemable preference shares.

Pursuant to **Section 68(1)** of the company act, a company limited by shares may if authorized by its articles, issue preference shares which are at the option of the company are liable to be redeemed by the company.

A company can only issue redeemable preference shares where it is authorized by the articles of association to do so.

Under **Article 3 of table A,** redeemable preference shares are issued with the sanction of an ordinary resolution of the company on such terms as stipulated.

A board resolution issuing the shares is passed pursuant to the ordinary resolution sanctioning the issue of redeemable preference shares.

Procedure for redeeming redeemable preference shares.

The redemption of redeemable preference shares is an exception to the rule in **TREVOR V WHITWORTH (1887) 12 AC 409,** that a company has no power to acquire its own shares. The rationale being the maintenance of capital which prohibits a transaction between a company and shareholder where money is retained by the company to the shareholder unless there is a court order.

When redeeming redeemable preference shares, the company must pay due regard to **Section 68 (2**) which requires that:

a) The redeemable shares only be redeemed out of profits of the company which would otherwise be available for distribution as dividends out of the proceeds of a fresh issue of shares made for the purpose of redemption.

b) The redeemable shares can only be redeemed when fully paid up.

c) The premium if any, payable on redemption, must have been provided for out of company's share premium accounts before the shares are redeemed.

d) Where the shares are redeemed other than out of the proceeds of a fresh issue, there shall be out of the profits which would otherwise have been available for dividend be transferred to a reserve fund to be called "the capital redemption reserve fund", a sum equal to the nominal amount of the shares redeemed and shall be treated as paid up share capital of the company subject to the restrictions on reduction of share capital.

- The company essentially must have twice the amount required to finance the redemption
- The half of that will be transferred to the capital redemption reserve and this will replace the capital redeemed.

The redemption is by board resolution and a notice issued to the shareholder of the redeemable preference shares as per the terms of issues.

3. Allotment of shares subject to pre-emption rights.

The very essence of a private company is that this is restricted transfer of shares to the public. **Section 5 (1) (a**) defines a private company as a company which restricts the right to transfer its shares and other securities.

The pre-emption rights are contained in the articles of association.

Procedure of allotment.

Convene the requisite meetings as per articles. However often it is:

a) A board meeting which passes a board resolution calling for an EOGM

b) Notices are issued to the members convening the EOGM

c) EOGM having the requisite numbers passes a resolution allowing the board to allot the shares all members having exercised their preemption rights/members take up shares

d) Board convenes a meeting and passes a resolution allotting the shares to a prospective shareholder in the public or issuing them to an existing shareholder who exercised their pre-emption rights.

DOCUMENTS.

- Notices calling for meetings
- Ordinary resolution

- Board resolutions
- Return of allotment.

ALLOTMENT IN EXCESS OF SHARE CAPITAL.

Where the company needs to allot shares in excess if its share capital, it must pass a special resolution increasing its share capital clause in the memo pursuant to **Section 71(1)(a) of Companies Act** and a notice of increase of share capital under **Section 73(1) of Company Act** within 30 days from day of passing the resolution.

On top of other documents, a notice of increase of share capital in the form in form 12 of CO. (Gen) Regulation 2016.

Regulation 20 (2) requires that the special resolution altering capital be attached.

Certain restrictions may be imposed on the allotment of certain shares by the registrar pursuant to **Section 183 (2) (b) and (c) of Companies Act.**

4. SHAREHOLDERS LOAN AGREEMENT.

The company in a purely loan agreement between it and one of its shareholders receives funds from its shareholder as a loan. The arrangement does not confer onto the shareholder any rights other than those of a creditor of the company.

PROCEDURE.

- The board of directors convene for a board meeting and pass a board resolution to the effect the company should borrow money from the name shareholder, payable in the given time and other terms.

5. CALL ON SHARES.

Refer to notes on call on shares.

6. ISSUE OF SHARES AT A DISCOUNT.

This is pursuant to **Section 67 (1) of the Company Act**. the issue of shares at a discount must pursuant to **Section 67(2)** be sanctioned by a resolution of the company at a general meeting and sanctioned by court.

EXTERNAL SOURCES/WAYS OF RAISING CAPITAL.

1. Debt financing

The company takes out money directly from a lender in form of a loan often secured by a debenture. The lender may be a bank, money lender etc.

2. Lease financing.

The lender (lessor) acquires an asset needed by the company and allows the company to use the asset as it makes periodic payments for a specified time. Upon lapse of the specified time and the company has fulfilled its obligations, the ownership of the asset then passes to the company. The periodic payment is known as the lease rental.

3. Tradeoffs.

A company approaches a lender (3rd party) and asks them to buy off their existing debts obligation with another lender on the agreement that the new lender offers better repayment terms in terms of say interest payable on the debt and the duration of repayment.

4. Trade financing.

This involves things such as letters of credit and other short term loan arrangement geared at facilitating the company to acquire trade items.

5. Bail outs.

These are offered by government to financially distressed companies so as to help them solve their solvency issues.

6. Warehouse receipting.

This occurs where a ware housing company is given the mandate to ware house the goods of the company by another entity extending a credit facility to the company. The condition is that the warehoused goods proceeds are applied to the servicing of the credit facilitate. The company is thus allowed to access the products at the warehouse as long as it continues to service its credit facility.

7. Hire purchase.

The company acquires an asset and pays a down sum as agreed and takes possession of the asset. The company then continues to pay a specified sum for a given period before ownership can pass to the company. Default in payment means the purchaser can repossess the asset.

8. Disposal of assets.

A company can sell off its assets and raise money from the sell.

9. Tax credits.

Perfection of securities under the Company Act.

Most company debts are secured by debentures. A debenture is a charge on the assets of the company. It can either be fixed or floating. A debenture is perfected through execution of a debenture deed and registration of the same pursuant to **Section 105 (1) of the Companies Act**.

An unregistered debenture is pursuant to **Section 105 (1) of Companies Act** void against the liquidator or a creditor of the company.

Pursuant to **Section 105 (1) of Companies Act**, the debenture must be registered within 42 days after its creation.

Under **Section 106**, it's the duty of CO to register the debenture.

Procedure for registration.

Once the debenture deed is executed you must assess the stamp duty payable on the URA website which is usually 0.5% of the sums secured.

Once the stamp duty is paid, you lodge the debenture deed together with the evidence of payment of stamp duty together with the registration form as prescribed in form 13 of the schedule to the companies (general) regulations, 2016 pursuant to **Regulation 23.**

A certificate of registration of a charge is then issued upon registration pursuant to **Section 108(1) of Companies Act** of the charge is entered on the company's charge list.

ALTERATION OF SHARE CAPITAL

Alteration of share capital is governed by **Section 63 of the Companies Act.** A company limited by shares or guarantee and having share capital, if so, authorized by it articles may alter the conditions of the Memorandum by; reducing or increasing the share capital, consolidating or converting, sub dividing or canceling the shares.

It must be noted that the power to alter a company's share capital must be authorized at a general meeting. This is fortified by **Article 44 of Table A** to the first schedule to the Companies Act. Alteration of share capital is by Ordinary resolution.

PROCEDURE FOR ALTERATION OF SHARE CAPITAL

a) For Reduction of share capital

Passing of Ordinary resolution to reduce the share capital (**Section 63 and regulation 44 of Table A)**

Passing of resolution to alter the Memorandum of association to reflect the new changes. (See copy of resolution in the Appendix)

Petitioning court **under Order 38 rule 3(e)** for an order to con SUIGENERIS reduction in the Capital. In this petition, all creditors should be named. The petition is gazetted. If there is no contest, then court grants the order.

Giving notice to the Registrar of the changes, within thirty days from the date of passing resolution to do so. This is reflected in **sections 64** (for consolidation, conversion, sub division, redemption, cancellation or anything to do with reduction of share capital)

Payment of the prescribed fees upon assessment within the meaning of the Companies (Fees) Rules SI 110-3 as amended by SI 57/2005 and paying the advocate's fees (if one has engaged one).

After payment, the Notices and the Resolutions are lodged with the Registrar for registration onto the Company Register.

OBJECTION MY LORD

REQUISITE DOCUMENTS

- Resolution for alteration of share capital.
- Resolution for alteration of Memorandum of Association.
- Notice to Registrar of alteration of share capital
- Petition for an order of confirmation of the reduction in share capital

FOR INCREASE IN SHARE CAPITAL

Passing of Ordinary resolution to alter the share capital by reducing or increasing the share capital, consolidating or converting, sub dividing or canceling the shares. (**section 63 and regulation 44 of Table A**)

Passing of resolution to alter the Memorandum of association to reflect the new changes. (See copy of resolution in the Appendix)

Giving notice to the Registrar of the changes, within thirty days from the date of passing resolution to do so. This is reflected in **section 65** (for notice on increase in share capital).

The notice for increase in share capital is given to the Registrar by filing out Form 3 in the schedule to the Companies (General) Regulations SI 110-1. The statutory forms are accompanied by the resolutions.

Payment of the prescribed fees upon assessment within the meaning of the Companies (Fees) Rules SI110-3 as amended by SI 57/2005 and paying the advocate's fees (if one has engaged one).

After payment, the Notices and the Resolutions are lodged with the Registrar for registration onto the Company Register.

REQUISITE DOCUMENTS

- Resolution for alteration of share capital.
- Resolution for alteration of Memorandum of Association.
- Notice to Registrar of alteration of share capital

CALL ON SHARES.

Under **Regulation 80 (1) of Table A**, the business of the company is managed by the directors and they can exercise any powers under the regulations.

Under **Section 21(2) of Companies Act**, all money payable by any member to the company under the memorandum or articles shall be a debt due from him/her to the company.

Pursuant to **Regulation 15 (1) of Table A**, the directors may from time to time make calls on the shares that are unpaid.

The call on any shares is made by board resolution.

- A company, pursuant to **Regulation 15(2),** a company cannot make a call exceeding ¼ of the nominal value of the share. Further the company cannot make a call requiring the shareholder to pay for the unpaid shares less than one month from the date fixed for the payment of the last preceding call.

PROCEDURE

1. A board meeting is convened and a resolution calling on the shareholder to pay up a sum of not more than ¼ of the nominal value of the shares that are unpaid is passed. Necessary quorum unless stipulated (fixed) is 2 directors (**Regulation 99**), majority vote is required to pass the resolution. (**Regulation 98(2).**

2. A demand notice shall be issued to the shareholder requiring him/her or it to pay the named sum, where the payment is to be made and the time in which to pay which must be at least 14 days from the day of issuing the notice. **Regulation 15 (3)**.

3. Where there is non-compliance with demand notice, a notice of payment is issued.

Documents.

1. Board resolution

2. Demand notice

3. Notice for payment where the shareholder fails to heed to the demand notice. (Regulation 33 of Table A)

Notice must name a further date than that specified in the demand notice. (Regulation 34 of Table A).

COMPANY MEMBERSHIP.

WHO IS A MEMBER?

A member is defined under **Section 47 of the Companies Act**. **Section 47(1)** states that the subscribers to the memorandum of a company are taken to have agreed to become members of the company and on its registration, they must be entered as members in its register of members.

In MATTHEW RUKIKAIRE V INCAFEX LTD, a subscriber was defined as the first member(s) of a private limited co who add their name to the memo of association during co. formation.

In **Section 47 (2)** states that a person who agrees to become a member of a company and whose name is entered in its register of members shall be a member.

PROOF OF MEMBERSHIP.

In the case of **MAWOGOLA FARMERS AND GROWERS LTD V KAYANJA (1971) E.A 272,** cited with approval by the Supreme Court in **MATTHEW RUKIKAIRE V INCAFEX LIMITED, C.A NO.03 OF 2015**, the court laid down the principle that presence of an individual's name on the register is not the only way in which shareholding can be proved.

In LUTAAYA V GANDESHA (1985) HCB 46, the court stated there was not one exclusive or exhaustive mode of proving membership of a company. The occurrence of one's name on the register of members was only prima facie evidence and other evidence could be adduced to rebut that. Court further noted that some of the ways of proving membership was possession of a share certificate and to some extent the appearance of one's name on the annual report.

DUTY TO MAINTAIN THE REGISTER OF MEMBERS.

Section 119 mandates the company to maintain the register of its members. The company thus according to the court in **MATTHEW RUKIKAIRE V INCAFEX**, has the obligation to enter each member on the register. In the context, the company's duty lies with its company secretary whose duty is to ensure that the company complies with relevant legislation. Thus, failure of a company to enter a member's name cannot be vested on him/her and will be allowed to adduce other evidence to prove membership.

MEETINGS

EXTRA ORDINARY GENERAL MEETINGS

Section 39 Provides that the directors of a company shall on the registration of the members holding not less than one tenth of the paid-up capital convene an extra ordinary general meeting of the company.

According to **Section 139(2**) the requisition must state the objects of the meeting and must be signed by the requisisionist and deposited at the registered office of the company.

Section 141 (2) provides that notice of the meeting shall be served on every member of the company.

Article 50 (1) Table A provides that every general meeting shall be called by at 21 days' notice in writing.

Article 51 Table A provides that the accidental omission to give notice of a meeting to any member entitled to receive notice shall not invalidate the proceedings at the meeting.

Article 52 all business that is transacted at an extra ordinary meeting shall be taken to be special.

Quorum, **Section 141(c)** provides that 2 members of a private company personally present shall form a quorum. **Article 53 (1)** provides that business shall not be transacted at a general meeting unless a quorum of members is present at the time when the meeting proceeds to business.

Minutes. **Article 86(c)** provides that the directors shall cause minutes to be made in books for all resolutions and proceedings at all meetings of the company.

Section 152 provides that every company shall cause minutes of all proceedings of general meetings and all meetings of directors to be entered in books kept for that purpose.

Where minutes have been made in accordance with the proceedings the meeting shall be taken to have been duly held. (Section 152 (2) 3)

Table A. Article 48 provides that all general meetings other than the Annual General meetings shall be called extra ordinary general meetings.

Article 49 the directors may convene an extra ordinary general meeting and extra ordinary general meetings shall be convened on such requisition or in default as provided for under S.139.

RE STATE OF WYOINING SYNDICATE (1901J 2 CH 431, the company secretary or other executive has no power to convene /call a general meeting unless the board ratifies his act of doing so.

BOARD MEETING

A.98 of the Table A provides that director may meet together for the dispatch of business adjourn and otherwise regulate their meeting as they think for questions arising shall be decided by a majority of votes.

UK SAFETY GROUP LTD V HEANE (1998)2 CLC 208 court held that it may not be necessary for a board to meet formally in order to transact business .it may be possible for all the directors informally to transact business.

Article 98 (4) provides that a director may and the secretary on the requisition of a director shall at any time summon a meeting of the directors.

Article 99 sets out the quorum and this may be fixed by the directors and if not fixed the quorum is two.

According to Article 104 (2) questions arising at the meeting shall be determined by a majority of votes of the members present and where there is an equality of votes the chairperson shall have a second or casting vote.

Under **Article 86 (c) the** directors shall cause minutes to be made in books provided for the purpose of all resolutions and proceedings at all meetings of the company and the names of every director present at the meeting. Every director shall sign his / her name in that book.

The general rule is that all directors should act collectively.

The resolution passed in such a meeting is the board resolution.

Therefore, the directors can convene the board meeting in order for them to agree on borrowing , However the sanctioning of the borrowing is agreed upon in the extra ordinary general meeting.

Procedure of having an extra ordinary General meeting.

The directors issue out notice of the meeting of Goil (U) Ltd. It is issued by the company secretary inviting members to come and attend a meeting on the date specified and place. The notice should be issued by the company secretary 21 days prior to the date of meeting. The notice should be in writing **(Section 140 (2) and Article 50 (1)**

1. **TRESSEN V HENDERSON (1899) I CH.861** court said that the notice issued for purposes of rolling members of the
2. Upon lapse of 21 days the meeting shall be held at the place indicated therein in the Notice.
3. The chairperson of the Board of Directors shall preside at every general meeting.
4. The director welcomes the members to the meeting and will read the agenda of the meeting. Opening prayer shall be given by one of the members
5. Quorum
6. If there is quorum then the chairperson shall inform the members of the sole reason of the meeting which is vote for the directors and secretary borrowing money from the Bank
7. Members are invited to vote.

Northwest transportation Co.Ltd v Beatty (1857) 12 589 court held that a shareholder has a right to vote as he/she wishes.

Special resolution notice has to be made for 28 days before the meeting.

TYPES OF RESOLUTION

Even majority shareholders cannot act without a company resolution.

SWIMMING POOL AND UNDERWATER REPAIR LTD (PTY) AND OVSRUSHWAY AND ANOR S.32-12 (ZIMBABWE) it was stated that for a majority shareholder to succeed in an action to evict a minority shareholder, it is necessary to allege and prove that this company resolved to evict the minority shareholders and that the majority shareholder has locus standi to initiate legal proceedings to enforce the company's resolution it is not enough for the majority shareholder to simply say that as the majority shareholder it wants to exclude and evict from the administration of the company the minority shareholder without a company resolution to that effect.

ORDINARY RESOLUTION

This is not defined by the Act and does not have any notice or majority requirements. It can be passed by a bare majority of votes at a meeting.

Whenever the approval of the members is required and ordinary resolution is enough unless some other resolution is specified.

The specific period of notice is required unless it is an ordinary resolution after a special notice. It depends upon the meeting at which the resolution is to be passed i.e Annual General Meeting, Extra-Ordinary General Meeting.

An ordinary resolution can be amended after notice.

SPECIAL RESOLUTION

Section 148 of the Act provides that a resolution shall be a special resolution when it has been passed by a majority of not less than 3/4 of members at a general meeting of which notice specifying the intention to propose the resolution as a special; resolution has been duly given.

At any meeting at which a special resolution is submitted to be passed a declaration of the chairperson that the resolution is carried shall unless a poll is demanded be conclusive evidence of the fact without proof of the number of rates recorded in favor of or against the resolution.

Registration of a special resolution shall within 30 days after the passing or making of the resolution be delivered to the registrar for registration. Where a company fails to comply who is in default is liable to a default fine of 5 currency points (100000) (**Section 150 (5)**

Filing a special resolution out of time **Section 275** where any document is required to be filed, delivered to the registrar within a specified period, the duty to do so shall not cease on the expiration of that period but shall be a continuing duty.

The registrar shall on payment of such additional fee as may be prescribed register any document delivered to him out of time.

SPECIAL RESOLUTION SHOULD CONFORM TO THE NOTICE GIVEN.

Amendment of a special resolution is permitted if it is to correct a typographical error or if the substantive object of the special resolution is unchanged.

EXTRA ORDINARY RESOLUTION.

A resolution is an extra ordinary resolution when it has been passed by a majority of not less than 3/4 of such members as being entitled to vote at a general meeting of which notice specifying the intention to propose the resolution as an extra ordinary has been duly given.

Section 298 (8) where on the coming into force of this Act the articles of any company carrying on business in Uganda may require any matter or thing to be done by the passing of an extra ordinary

resolution that matter or thing shall be taken to have been lawfully and sufficiently done by the passing of special resolution.

Registration of resolutions **Section 150 finance Act 2013** for any resolution filed under the companies Act 3 copies 20,000/=

APPOINTMENT OF DIRECTORS

Section 185 provides that every private company shall have at least one director S.194 directors are usually appointed by the shareholders in a general meeting.

Article 95 of Table A provides that the number of directors and the names of the directors shall be determined in writing by the subscribers of the MOA

Article 94 provides that the company may from time to time by ordinary resolution increase or reduce the number of directors.

Article 88 disqualification of directors

KINTU V KYOTERA COFFEE GROWERS LTD (1976) HCB 362 directors are appointed by shareholders and members of the company. They do not have to be confirmed by the Registrar of companies who has no such powers.

Procedure for Appointments.

Call for extra ordinary general meeting. **Article 49 Table 4** the director may convene an EGM whenever they think fit.

Ordinary resolution is passed appointing the director.

Article 94 Table A, the company may be ordinary resolution increase or reduce the number of directors.

Section 228 (5) the company shall send to the registrar in the prescribed form a return containing the particulars of and a notification of any charge among its directors or in its secretary.

Form 8 fee of 20000 finance Act

File Form 7 containing the particulars of directors and secretary.

RESTRICTION ON APPOITMENT

Section 192 (1) of the Companies Act provides for the Restrictions on appointment or advertisement of director. The acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his or her appointment or qualification

Section 196 of the Companies Act sets out the Age limit; A person shall not be capable of being appointed a director of a company if at the time of appointment he or she has not attained the age of eighteen years also refer to **Article 77 of Table A.**

Section 193of the Companies Act sets out the share qualification for directors; The office of director of a company shall be vacated if the director does not within such shorter time as may be fixed by the articles, obtain his or her qualification or if after the expiration of that period or shorter time he or she ceases at any time to hold his or her qualification.

Section 200 of the Companies Act sets the Provisions as to undischarged bankrupts acting as directors

(1)Where a person who has been declared bankrupt or insolvent by a competent court in Uganda or elsewhere and has not received his or her discharge acts as director of or directly or indirectly takes part in or is concerned in the management of, any company except with the leave of the court, he or she commits an offence and is liable on conviction to imprisonment not exceeding two years or to a fine not exceeding one thousand and twenty currency points or both.

(2)The leave of the court for the purposes of this section shall not be given unless notice of intention to apply for it has been served on the official receiver and it shall be the duty of the official receiver, if he or she is of opinion that it is contrary to the public interest that the application should be granted, to attend on the hearing of and opposed the granting of the application.

(3)In this section—"company" includes an unregistered company and a company incorporated outside Uganda which has an established place of business within Uganda; and "official receiver" means the official receiver within the meaning of the Insolvency Act, 2011.

Section 201 provides for the Power to restrain fraudulent persons from managing companies

(1) Where—

(a)a person is convicted of any offence in connection with the promotion, formation or management of a company; or

(b)in the course of winding up a company it appears that a person—

(i)has committed an offence for which he or she is liable whether he or she has been convicted or not under this Act; or

(ii)has otherwise committed, while an officer of the company, any fraud in relation to the company or of any breach of his or her duty to the company, the court may make an order that that person shall not without the leave of the court, be a director of or in any way whether directly or indirectly, be concerned or take part in the management of the company for a period not exceeding five years as may be specified in the order.

(2)A person intending to apply for the making of an order under this section by the court having jurisdiction to wind up a company shall give not less than ten days' notice of his or her intention to the person against whom the order is sought and on the hearing of the application the last mentioned person may appear and himself or herself give evidence or call witnesses.

(3)An application for the making of an order under this section by the court having jurisdiction to wind up a company may be made by the official receiver or by the liquidator of the company or by a person who is or has been a member or creditor of the company and on the hearing of any application for an order under this section by the official receiver or the liquidator or of any application for leave under this section by a person against whom an order has been made on the application of the official receiver or the liquidator, the official receiver or liquidator shall appear and call the attention of the court to any matters which seem to him or her to be relevant and may himself or herself give evidence or call witnesses.

(4) An order may be made by virtue of subsection (1)(b)(ii) notwithstanding that the person concerned may be criminally liable in respect of the matters on the ground of which the order is to be made.

(5) Where any person acts in contravention of an order made under this section, he or she commits an offence and is liable on conviction to imprisonment not exceeding one year or to a fine not exceeding one hundred currency points or both.

(a)a person is convicted of any offence in connection with the promotion, formation or management of a company; or

(b)in the course of winding up a company it appears that a person—

(i)has committed an offence for which he or she is liable whether he or she has been convicted or not under this Act; or

(ii)has otherwise committed, while an officer of the company, any fraud in relation to the company or of any breach of his or her duty to the company, the court may make an order that that person shall not without the leave of court, be a director of or in any way whether directly or indirectly, be concerned or take part in the management of the company for a period not exceeding five years as may be specified in the order.

(6) For the purposes of subsection (1)—

(a)“the court” in relation to the making of an order against any person by virtue of subsection (1)(a) of that subsection, includes the court before which he or she is convicted as well as any court having jurisdiction to wind up the company and in relation to the granting of leave means any court having jurisdiction to wind up the company in respect of which leave is sought;

(b)“officer” includes any person in accordance with whose direction or instructions the directors of the company have been accustomed to act

APPOINTMENT OF COMPANY SECRETARY

Section 187 is to the effect that a company shall have a secretary.

Article 110, Table A provides that the secretary shall be appointed by the directors for such term, at such remuneration and upon such conditions as they may think fit and any secretary so appointed may be removed by them.

Section 90 qualification of company secretaries.

Article 11 Table A prohibited person as secretary **Section 188** prohibition of certain persons being sole director or secretary.

REPRESENTATIVES OF CORPORATIONS

Article 74 Table A, a corporation which is a member of the company may be resolution of its directors and other governing body authorize a person it thinks fit to act as its representatives at any meeting of the company. (special resolution)

Section 146 (1) A corporation whether a company may if it is a member of another corporation being a company by resolution of its directors authorize the persons to act as its representative at any meeting of the company. This person so authorized is entitled to exercise the same powers on behalf of the corporation which he or she presents as the corporation could exercise it were an individual shareholder.

A register with the Registrar of companies

Section150 of the Companies Act provides for the Registration and copies of certain resolutions and agreements

(1)A printed copy of every resolution or agreement to which this section applies shall, within thirty days after the passing or making of the resolution or agreement, be delivered to the registrar for registration.

(2)Where articles have been registered, a printed copy of every resolution or agreement for the time being in force shall be embodied in or annexed to every copy of the articles issued after the passing of the resolution or the making of the agreement.

(3)Where the articles have not been registered, a printed copy of every resolution or agreement shall be forwarded to any member at his or her request on payment of one tenth of a currency point or such less sum as the company may direct.

(4) This section applies to—

(a)special resolutions;

(b)resolutions which have been agreed to by all the members of a company but which if not so agreed to, would not have been effective for their purpose unless, they had been passed as special resolutions;

(c)resolutions or agreements which have been agreed to by all the members of some class or shareholders but which, if not so agreed to, would not have been effective for their purpose unless they had been passed by some particular majority or otherwise in some particular manner;

(d)all resolutions or agreements which effectively bind all the members of any class of shareholders though not agreed to by all those members.

(5)Where a company fails to comply with subsection (1), the company and every officer of the company who is in default is liable to a default fine of five currency points

.(6)Where a company fails to comply with subsection (2) or (3), the company and every officer of the company who is in default is liable to a default fine of twenty five currency points for each copy in respect of which default is made.

(7)For the purposes of subsections (5) and (6), a liquidator of the company shall be taken to be an officer of the company.

DUTIES OF THE COMPANY SECRETARY

K.A KRISTINA V INDO UNION ASSURANCE COM.LTD (1994) 14 COMP CAS 10(MAD) held that the secretary as a servant of the company is bound to carry out the duties assigned to him. Has the authority to bind the company in matters concerned with administration.

PANAROMA DEVELOPMENT (GUILDFORD) LTD V FIDELIS FURNISHING FABRICS (1971) 2 GB 711, the secretary purportedly on behalf of the company fraudulently hired cars ostensibly for the purpose of meeting customers and used the cars for his own private purpose. Held that the secretary had ostensible authority to enter into contracts for the hire of cars for the company and the company was liable to pay the hire charge.

Lord Denning in the Panaroma case stated that "times have changed a company secretary is a much more important person these days. He is an officer of the company with extensive duties and responsibilities. This appears not only in the modern companies Act but also by the role he plays in the day to day running of the company. He regularly makes representations on behalf of the company and enters into contracts on its behalf.

The duties of a company secretary include;

a) Prepare minute **Section 152** of the proceedings of meetings of a com of directors

Cairney v Back (1906) 2 KB 746 it is usually the duty of the secretary to prepare the minutes of the proceedings of the general as well as directors.

b) Writes letters for the company

JOHNSON V LYTTLES ISON AGENCY (1877) 5 CH D 687 Companies Act as a general principle when the secretary writes letters on behalf of the company, it is to be assumed in the absence of evidence that he is authorized by the company to write them.

c) Certifying transfers **Section 90 (3) (b)**

RE FREDRICK SLOBART AND CO (1902) CH 507the duty of the secretary includes certifying transfers and receiving and registering notices on behalf of the company.

d) Custodian of the company seal

Article 113, Table A to which the seal is applied shall be signed by the director and counter signed by the secretary. Also, **Article 113 (3)** every instrument.

e) Receives court summons and represents the company in legal matters.

ORDER 26 RULE 2the summons may be served on the secretary or on any director or other principal officer of the corporation where the suit is against a corporation.

f) Authentication of document.

Section 59 of the Companies Act provides that a document requiring authentication may be signed by a company secretary.

g) File Company Resolution and Returns.

Section 134 time for completion of annual return is 42 days and the company shall within that period forward to the registrar a copy signed by both a director and secretary.

6. Refer to the previous note on debentures, charges collateral security and mortgages.

REGISTRATION OF CHARGES

A charge is defined in as a security for payment of a debt. A charge can be either a specific charge (per **ILLINGWORTH VS. HOUDSWORTH (1904) AC 355**, or a fixed charge, or a floating charge (per **RE YORKSHIRE WOOLCOMBERS ASSOCIATION LIMITED (1903)**

The procedure for registration of a charge is provided for in section 96 of the Companies Act, thus; it has to be registered within a period of 42 days from the date of creation. The format for registration is by filling out Form 4 in the schedule to the Companies (General) Regulations. Failure to register the charge makes it void as against the Liquidator.

MANAGEMENT OF COMPANY - DIRECTORS – SHAREHOLDERS

Management of a company is in the hands of Directors who are involved in the day to day running of the business. Shareholders on the other hand manage a company through meetings and formulation of policies.

NB- for more enlightenment on directors, read **sections 177- 205 of the Companies Act**

APPOINTMENT OF DIRECTORS AND SECRETARIES.

DIRECTORS.

Section 2 of Companies Act defines a director as any person occupying the position of director by whatever nature name called and includes a shadow director.

Section 198 of the Companies Act spells out the duties of directors to include: acting in a manner that promotes the success of the business of the company exercising a degree of skill and

care as a reasonable person would do looking after their own business and acting in good faith in the interests of the company as a whole.

Regulation 80(1) of Table A empowers directors with the power to manage the business of the company.

Procedure for appointment of directors.

The procedure is governed by the articles of the company however under S.194 (1), directors shall be appointed at a general meeting by ordinary resolution.

Pursuant to **Article 45 (1) of table A**, a board resolution where there is a casual vacancy. The appointment is temporary until the next general meeting. A casual vacancy may arise where a director dies or is mentally incapacitated.

COMPANY MEETINGS

There are many types of meetings held in companies thus;

STATUTORY MEETING

This meeting is held not less than 1 month and not more than 3 months from the date of commencement of business of a company. This is fortified in section 130 of the companies Act.

ANNUAL GENERAL MEETING

In **RE: UGANDA BAATI (MISCELLANEOUS CAUSE 228 OF 2020**.

Court stated that, it is a requirement of the company to convene an annual general meeting in respect every concluded financial year

This is provided for under **Section 138 of the Companies Act** and it is held every year or at least within 15 months by a Company. In case it is the first meeting after incorporation, the meeting should be held within a period of 18 months from the date of incorporation

It must be noted that where default is made, upon application by a member of the company, the Registrar call or direct the calling of the meeting and give consequential orders as he deems expedient. It must be noted further that any general meeting may be dubbed and Annual General Meeting if the members resolve to do so; such resolution should be lodged for registration with the Registrar within 14 days from the date of resolution.

EXTRAORDINARY MEETING

This meeting is provided for under **Section 138** and is convened at the request of the members of the company who have; not less than one tenth of the paid-up capital of the company, or if it's a company

not having share capital; by members of the company representing one tenth of the total voting rights of all the members

KAKYOMA & ORS V AGASA & ORS (COMPANY CAUSE 24 OF 2016) [2016] UGHCCD 124 (16 November 2016)

In her ruling, Lady Justice Mugambe found that the applicants were complaining of mismanagement of company affairs and were dissatisfied that at the Annual General meeting held on 28th October 2015, this issue had not been tabled for resolution. It was on this ground that an extra ordinary meeting was ordered to be held within two weeks from 18.2.2016 and the conveners authorized to pass resolutions and act in the best interests of the company.

It must be noted further that the requisition should contain the objects of the meetings and must be signed by the requisitionists and deposited at the registered office of the company.

A company meeting is duly constituted when there is more than 1 person. it need not be a gathering. This is fortified by the Case of **RE (EXPRESS [1920] I CH 466** Where court held that even an informal agreement of all members may be taken to be a meeting. Another case to concretize this point is **SHARP VS. DOWES (1876) 2 QBD 26** where court held that to constitute meeting prima facie, there must be more than one person. Court has power to order a company meeting when none has been held or it is simply impracticable to do so as stated in **Section 142 of the Companies Act.**

In case one wishes to move court to order for a meeting, the procedure is by filing a summons in chambers under **0rder 38 rule 6 (h) and 8.**

It ought to be noted that notices for meetings should not be less than 21 days, the notices should be in writing, unambiguous, and should be served on every member as set out under **Section 140 of the Companies Act.**

ALLOTMENT OF SHARES.

Farwell J in **BORLANDS TRUSTEE V STEEL BOROS AND CO LTD (1901) 1 CH 239**, defined a share as an interest of shareholder in the company measured by sum of money, for the purpose of liability in the first place and on interest in the second but also consisting of a series of mutual covenants entered into by all the shareholders. A share is not a sum of money but is an interest measured by a sum of money and made up of various rights contained in the contract.

What is allotment of shares.

Allotment was denied in the case of **MATHEW RUKIKAIRE V INCAFEX LTD CIVIL APPLICATION NO. 11 OF 2015 ARISING FROM CIVIL APPLICATION NO. 10 OF 3015 AND CIVIL APPEAL NO. 3 OF 2015**as the process by which the company finds someone who is willing to become a shareholder of the company.

Lord Temple man in **NATIONAL WESTMINISTER BANLPLC V IRC (1995) ACE 3**, held that allotment does not make a person a member of the company. Allotment only confers onto the person the right to be registered as a member.

OBJECTION MY LORD

In AMBROSE LAKE TIN AND COPPER CO (1878) 8 CH.D 635 AT 638 cited with approval in **MATTHEW RUKIKAIRE V INCAFEX**, upon allotment of shares, the allotee only acquires perfect title upon issuance of the shares allotted issuance of shares is distinct from allotment as it means some subsequent act after allotment whereby the title of the allotee becomes complete either by the holders of the shares receiving some certificate or being placed on the register of shareholders or by some other step by which the title derived from the allotment may be made entire or complete.

The process of allotment to issuance of shares makes the person a shareholder in the company but not a member. He/she only becomes a member pursuant to **Section 47 (2) of Companies Act.** Upon entry into the register of members.

Rights of subscribers, shareholders and members in a company.

SUBSCRIBERS

Pursuant to **Section 47 (1) of Companies Act,** upon registration, the subscribers to a memorandum of a company are deemed to have agreed to become members and should be registered in the register of members.

Section 47(1) does not create any pre conditions for example paying up on shares or any sums unless the company articles stipulate some pre-conditions to registration in the register of members or to membership, the subscribers have a right to be registered as members in the company register and to all other members accruing to be members.

In the case of MATHEW RUKIKAIRE V INCAFEX LTD CIVIL APPLICATION NO. 11 OF 2015 ARISING FROM CIVIL APPLICATION NO. 10 OF 3015 AND CIVIL APPEAL NO. 3 OF 2015X, the court stated that the obligation of a member of a company limited by shares, to pay for the shares arises either when the company calls upon the shareholder to make payment for the unpaid shares during its operations or when the company is being wound up.

Nonpayment for the share subscribed does not affect the subscriber's membership in the company.

Where the company has pursuant **to Section 13 adopted Table A** then upon making the call for the shares, Under **Article 65,** the members right to vote at a general meeting shall be suspended pending payment on the call.

SHAREHOLDERS.

In the case of MATTHEW RMATHEW RUKIKAIRE V INCAFEX LTD CIVIL APPLICATION NO. 11 OF 2015 ARISING FROM CIVIL APPLICATION NO. 10 OF 3015 AND CIVIL APPEAL NO. 3 OF 2015X, UKIKAIRE V INCAFEX, the court defined a shareholder as a person either individual or corporate who is issued with shares subsequent to the formation of the company through the process of allotment.

The shareholder has the right to ownership in the share and the right to information.

MEMBERS.

These essentially enjoy three broad rights:

1. Right to information and this entails the right to obtain copies of the company document, right to inspect the members register or the minute book, a right to notices of the meetings

2. right to participation

This includes the right to vote during company meetings, a right to demand a vote by poll during meetings and generally a right to attend company meetings.

3. right to ownership.

This includes the right to transfer shares, right to a share certificate, right to be entered on the register of members and the right to receive dividends.

RECTIFICATION OF A MEMBER'S REGISTER.

Rectification of a member's register only arises when there is a need to add a name of a member to the register or to exclude a member added irregularly.

There are 2 kinds of member's register:

1. A member's register kept by the company at its premises. This can be rectified by an order of the register of companies pursuant to Regulation 8 of the companies (powers of the register) regulations, 2016. You proceed either by letter or petition or by statutory declarations. Favored by the register general. The answer to the petition is by reply to the petition which is like a Written Statement Defense(WSD) accompanied by a Statutory Declaration(SD).

2. A member's register kept by the registrar of companies. This can be rectified by court order pursuant to Section 125 of the company act. When proceeding pursuant to **Section 125,** you proceed to court under **Order 38 rule 4 of Civil Procedure Rules** which provides for either a notice of motion or chamber summons.

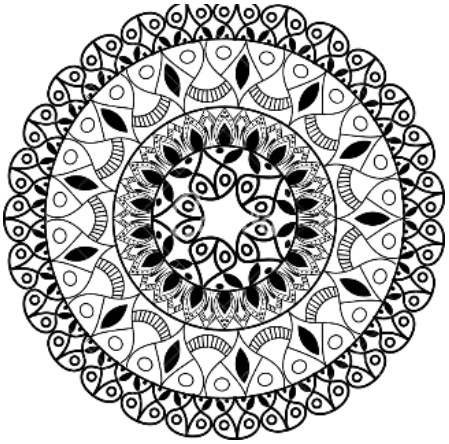
TRANSFER AND TRANSMISSION OF SHARES

Transfer of shares takes place where one shareholder passes over his shares to another person for consideration. It must be noted that if the shareholder is for a company of limited liability, there is usually a clause on restriction of transfer of shares. Consent is required from the other members before the transfer takes place.

OBJECTION MY LORD

Transmission of shares refers to the process of passing on of shares to a deceased shareholder's estate. Upon his death, the legal representative writes to the directors requesting a change in the company's memorandum to reflect his or her name. Where the directors fail to do so, one can apply vide **Order 37 rule 5 Civil Procedure Rules** 71-1 by chamber summons to court for an order of rectification ordering the directors to rectify the register.

Article 30 of Table A gives the procedure for transmission. This is fortified by **RE KASIITA ESTATES LTD [1982] HCB 107** where court held that an administrator of the Estate of a deceased shareholder is entitled to have his name entered on the Company register



CAPITAL MARKETS AND SECURITIES

ERIC KENNETH LOKOLONG IN THE LEGAL AND PRACTICAL ASPECTS OF CAPITAL MARKETS defines capital as accumulated wealth that is available to create further wealth. It is wealth engaged in a reproductive process. Capital Markets are therefore meeting places where those who in need of surplus capital seek from others who wish to invest their excess.

Capital markets mainly consist of;

Debt Markets; -

This is where Government and corporations can raise funds from capital markets through the issuance of debt securities such as bonds.

Equity Markets

Corporations raise funds through issuance of equity securities or shares.

The key players in the capital markets include the Capital Markets Authority and the Stock Exchange.

THE LAWS GOVERNING CAPITAL MARKETS INCLUDE:

The Capital Markets Authority Act, Cap 84

The Capital Markets (Establishment of stock exchanges) Regulations SI 84-3

The Capital Markets (Accounting and Financial Requirements) Regulations SI 84-4

The Capital Markets (Conduct of Business) Regulations SI 84-5

OBJECTION MY LORD

The Capital Markets (Registers of interests in Securities) Regulations SI 84--6

The Capital Markets (Advertisements) Regulations SI 84--7

The Capital Markets (Exempt Dealers) Regulations SI 84—8

The Capital Markets (Interim Stock Trading Facility) Regulations SI 84--9

Public Enterprise Reform and Divestiture Act Cap 98

Procedure for a company going public thus; Any company intending to sell shares to the public must ensure that:

- The resolutions *of* the shareholders converting the company to a public company are filed with the registrar *of* companies.
- The Board resolutions authorizing the sale *of* shares to the public are duly made and filed.
- A prospectus or information memorandum has been complied with in accordance with the provisions of the Companies Act in Sections 38-48, the Capital Markets Authority Cap 84 and the regulations there under namely The Capital Markets (Prospectus Requirements) Regulations.
- The prospectus or information memorandum has been approved by the Capital Markets Authority.

It must be noted that the prospectus discloses;

- The purpose of the issue of shares.
- The legal status and affairs of the issuer.
- The rights of the holders, directors and employees of the company.
- The financial statement of the company for the preceding 5 years

Upon approval of the prospectus, an application for approval to list on the securities exchange is then submitted to Uganda Stock Exchange. Once the approval is obtained, the company is then allowed to officially print out documents which trade it to the public for shares.

SUMMARY ON CAPITAL MARKETS AUTHORITY

Just like any other industry, the capital markets industry operates within a certain regulatory framework within which its players are required to adhere to in the course of offering services. Since its inception, the Authority has strived to deepen and broaden the capital markets by developing a regulatory framework that facilitates the development of new financial products and institutions through research and ensuring fairness and orderliness in the capital markets industry.

The regulatory framework of the Authority is comprised of the following: Acts

1. The Capital Markets Act;

2. The Central Depositories Act, 2000

CAPITAL MARKETS AUTHORITY Regulations and Rules

1. The Capital Markets (Commodity Markets) Regulations, 2020

2. The Capital Markets (Coffee Exchange) Regulations, 2020

3. The Capital Markets (Derivatives Markets) (Fees) Regulations, 2019

4. The Capital Markets (Securities Lending Borrowing and Short-Selling) Regulations 2017.

5. Capital Markets (Online Foreign Exchange Trading) Regulations, 2017

6. The Capital Markets (Collective Investment Schemes) Regulations, 2001

7. The Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations, 2002 – amended 2019

8. The Capital Markets (Takeovers and Mergers) Regulations, 2002

9. The Capital Markets Tribunal Rules, 2002

10. The Capital Markets (Registered Venture Capital Companies) Regulations 2007.

11. The Capital Markets (Foreign Investors) Regulations with 2015 Amendments

12. The Capital Markets (Conduct of Business) (Market Intermediaries) Regulations 2011

13. The Capital Markets (Corporate Governance) (Market Intermediaries) Regulations, 2011

14. The Capital Markets (Demutualization of the Nairobi Securities Exchange Limited) Regulations 2012

15. The Capital Markets Real Estate Investment Trusts Collective Investment Schemes Regulations 2013

16. Capital Markets (Derivatives Markets) Regulations, 2015

17. Capital Markets NSE Limited Shareholding Regulations, 2016

18. Central Depositories (Regulation of Central Depositories) Rules, 2004 – March 2008

19. Central Depositories (Operational) rules, 2003

Guidelines

1. Guidelines on Financial Resource Requirements for Market Intermediaries

2. Credit Rating Agency Guidelines

3. Management Supervision Internal Control Guidelines May 2012

4. Guidelines on the Prevention of Money Laundering in the Capital Markets

Codes

1. Code of Corporate Governance Practices for Issuers of Securities to the Public 2015

2. Stewardship Code for Institutional Investors, 2017

Policy Guidance Notes

1. Regulatory Sandbox Policy Guidance Note – March 2019

2. Policy Guidance Note for Green Bonds

3. Policy Guidance Note for Exchange Traded Funds in Kenya

4. Policy Guidance Note on Issue of Asset Backed Securities, 2017

5. Policy Guidance Note on Global Depository Receipts and Global Depositary Notes. The above pieces of Legislation, together with circulars issued by the Authority from time to time, are what the Authority uses to supervise and regulate market activities. The regulatory framework support self-regulation to the maximum practical extent.

ISLAMIC FINANCE ISLAMIC FINANCE

Islamic Finance Islamic Finance refers to a type of financing mechanism that requires stakeholders to comply with the principles of Islamic Law (Sharia). The concept can also refer to the investments that are permissible under Sharia. Principles of Islamic Finance Islamic finance is based on principles that demarcate boundaries within which financial transactions should be conducted, highlighting the permissible and prohibited activities, products and/or services. The main principles are as below: i. Paying or charging an interest - Islam considers charging of interest on lent funds as an exploitative practice that favors the lender at the expense of the borrower. This is therefore prohibited. ii. Investing in businesses involved in prohibited activities - Some activities considered as harmful to society such as producing and selling alcohol, Tobacco and its products or pork, are prohibited in Islam. These activities are forbidden, just as is investing in such activities.

Gambling/Speculation - Sharia prohibits any form of speculation or gambling because transactions done on this basis create wealth from chance on an uncertain event in the future, instead of productive activity. iv. Uncertainty - Islamic finance prohibits participation in contracts with excessive risk and/or uncertainty. According to Islamic rules, parties to a transaction should have complete information on the transactions thy get into. Transactions executed based on deceit, risk or fraud that might lead to destruction or loss are prohibited. v. Material finality of a transaction - Each transaction is related to a real underlying economic transaction or activity. vi. Profit/loss sharing - Parties that enter a contract in Islamic finance share profits/losses and risks associated to the contract on some pre-agreed terms. The development of Islamic capital markets seeks to position Kenya as a Regional Islamic Financial Hub as envisioned in the 10-year Capital Markets Master Plan, a flagship project under Kenya's economic blueprint, Vision 2030. The Authority seeks to create an enabling regulatory environment that will allow individuals to explore Shariah products as an alternative investment

choice away from traditional investment channels. Towards this end, CMA licensed FCB Capital, which offers Islamic asset management services. In addition, Genghis Capital operates an Islamic Collective Investment Scheme Fund. CMA has also introduced new regulations relating to REITs and these regulations provide for the creation of Sharia-compliant REITs. These developments have enabled Kenyans and specifically, the Muslim communities in the country to have access to financial services adding to the wealth creation in the economy.

CORPORATE GOVERNANCE AND STEWARDSHIP CODES IN CAPITAL MARKETS AUTHORITY

The board and its operations is the engine that underpins the importance and centrality of good governance. The Code provides principles, guidelines and recommendations for: a. Appointment, composition, size and qualifications of Board members b. Structure of the Board c. The functions of the Board. Board independence e. Age limit for Board members f. Board tools g. Board induction and continuous skills development h. Annual evaluation of Board members, including the CEO and Company Secretary i. Remuneration of Board members j. Compliance with Laws, Regulations and Standards k. Governance audit Rights of Shareholders Shareholder rights and investor protection are key in determining the ability of companies to raise capital. This principle caters for investor protection. The Code provides principles, guidelines and recommendations for:

a. The rights of shareholders

b. Equitable treatment of shareholders

c. Institutional investors

d. The media and corporate governance Stakeholder Relations This principle encompasses the management of both internal and external stakeholders to positively impact on the company's achievement of its strategy and long-term growth.

The Code provides principles, guidelines and recommendations for:

a. Managing stakeholder relations

b. Communication with stakeholders

c. Resolving internal and external disputes Ethics and Social Responsibility Being good corporate citizens requires companies to protect, enhance and invest in the well-being of society and the environment. Social responsibility needs to be embedded into the company's core business corporate decisions.

The Code provides principles, guidelines and recommendations for:

a. Ethical leadership and corporate citizenship

b. Management of company's ethical issues

c. The Board and corporate citizenship

d. Strategies and policies relating to good corporate citizenship Accountability, Risk Management and Internal Control. The Board has a responsibility to ensure adequate systems and processes of

accountability, risk management and internal control are in place in order to achieve its strategic objectives.

The Code provides principles, guidelines and recommendations for:

• Financial and business reporting

• Recognition and management of risks

• Internal control systems

• Checking on risk management and internal control practices

• Audit Committee Transparency and Disclosure Transparency and disclosure are crucial for the market-based monitoring of companies and are central to a shareholder's ability to exercise his or her ownership rights. As a result of transparency and disclosure, companies are better able to enhance their sustainability particularly on the environmental, social and governance (ESG) aspects.

The Code provides principles, guidelines and recommendations for timely and balanced disclosure.

THE STEWARDSHIP CODE FOR INSTITUTIONAL INVESTORS, 2017

Stewardship in this context refers to the responsible management and oversight of assets for the benefit of the institutional investors' ultimate beneficiaries or clients.

OBJECTIVE OF THE STEWARDSHIP CODE FOR INSTITUTIONAL INVESTORS

The purpose of the Stewardship Code is to encourage the institutional investment community to take action to serve as responsible stewards for their beneficiaries, provide a framework for institutional investors to engage issuers of securities, promote good corporate governance and sustainable success of listed companies as well as enhance capital markets growth and development.

The Stewardship Code is based on seven core principles:

a. Stewardship or responsible investment policies.

b. Monitoring companies held in investment portfolios.

c. Active and informed voting practices.

d. Engagement, escalation and collaboration with other institutional investors.

e. Conflicts of interest.

f. Focus on sustainability issues, including environmental, social and ethical factors.

g. Public disclosures and client reporting.

The responsibility of the implementation and monitoring of the code lies with the following parties:

a. Asset owners

b. Asset managers

c. Listed companies (Issuers)

d. Capital Markets Authority

CORPORATE GOVERNANCE

Corporate governance is a central and dynamic aspect of business. The term governance is derived from the Latin word Gubernare, meaning to steer. It usually applies to the steering of a ship. Thus, this implies that corporate governance involves the function of direction rather than control. Corporate governance has come to the forefront of academic research due to the vital role it plays in the overall health of economic systems. Corporate governance was long ignored as a matter of potential importance for the development of a nation's economy. The wave of Uganda and the world in corporate fraud today has attributed to deficiencies in corporate governance. The recent 2008-2009 global financial crisis, triggered by the unprecedented failure of Lehman Brothers and the subprime mortgage problems, renewed interest on the role of corporate governance in the financial sector. The development of a strong corporate governance framework is important to protect stakeholders, maintain investor confidence in the transition countries, and attract foreign direct investment.

Table F public companies **Section 13 of Companies Act and Table A** provide for private Companies for corporate governance respectively.

1.Look at best practices also called volunteer 2. and rules practice and 3. mult tier practice.

Section 14 Cap 2012 makes it compulsory for public to adhere to table F but gives private Companies an optional redress.

CODE OF BEST PRACTICE OF CORPORATE GOVERNANCE

The main objective of the Code of Best Corporate Governance Practices is to suggest courses of action to all types of companies – whether listed or privately held corporations, limited liability companies or partnerships – with a view to: improving their performance facilitating access to capital The Code is made up of six parts: Owners – shareholders, quota holders or partners Board of Directors – the body representing the owners Management – the chief executive officer and top managers Auditing – the independent auditors Surveillance – the fiscal council Ethics/Conflicts of interest The Code may include issues already covered by legislation or subject to new laws or regulations, but their application should be voluntary. Business owners willing to improve performance or gain access to capital are advised to follow the Code. Access to capital is not restricted to public offerings of shares, it also involves private equity operations and funds from a company's own cash flow generated through improved performance. **The pillars of this Code of Best Practice of Corporate Governance are Transparency Accountability Fairness 2 Transparency the Code requires that the CEO and management meet different information and transparency needs of**

the owners, the board of directors, the independent auditors, the supervisory board, the stakeholders, and the public at large. Accountability The following agents of corporate governance board of directors, CEO and management, independent auditors and fiscal council should account for their results and activities to those bodies that elected them. Fairness Relations between all agents of corporate governance and the different types of owners must be based on fair treatment of all the parties involved. Ethics Good corporate governance is to comply with the law. In addition, every company should have a statement of values and a code of ethics. The key issue of ethics is the avoidance of conflict of interests.

CORPORATE GOVERNANCE REGULATORY COMPLIANCE CHECKLIST

The following is a brief sample of just a few of the areas we explore when conducting a Corporate Governance compliance and best practices review. For more information on the complete audit checklist, or to discuss questions or concerns specific to your organization, please contact.

Board of Directors and their Committees

- Do all independent directors meet required criteria?
- Are all committees appropriately comprised and functioning effectively?
- How does the Board oversee risk management?
- Is the Board adequately protected through indemnification and insurance arrangements?

Governance Issues

- What should the Company do to address Dodd-Frank rules such as say-on-pay, clawback policies and pay ratio disclosures?
- Has the Company set up and monitored required policies such as whistle-blower procedures, non-audit service fee approvals and related person transaction approvals?
- Are consultants used and overseen appropriately?
- Are equity grants properly and timely approved and documented?

Insider Trading/Ethics

- Does the Company have an effective policy to prevent insider trading?
- Does the Company have a compliant code of ethics and are officers, directors and employees educated about the code?

Disclosure and Reporting Practices

- Are the Company’s controls and procedures adequate?

- Does the Company assist insiders to ensure timely reporting and avoidance of short-swing profits?
- Does the Company's website have required governance and SEC documents?

Business Roundtable has been recognized for decades as an authoritative voice on matters affecting American business corporations and meaningful and effective corporate governance practices.

Since Business Roundtable last updated **Principles of Corporate Governance** in 2012, U.S. public companies have continued to adapt and refine their governance practices within the framework of evolving laws and stock exchange rules. Business Roundtable CEOs continue to believe that the United States has the best corporate governance, financial reporting and securities markets systems in the world. These systems work because they give public companies not only a framework of laws and regulations that establish minimum requirements but also the flexibility to implement customized practices that suit the companies' needs and to modify those practices in light of changing conditions and standards.

Over the last several years, the external environment in which public companies operate has become increasingly complex for companies and shareholders alike. The increased regulatory burdens imposed on public companies in recent years have added to the costs and complexity of overseeing and managing a corporation's business and bring new challenges from operational, regulatory and compliance perspectives. In addition, many U.S. public companies have a global profile; they interact with investors, suppliers, customers and government regulators around the world and do so in an era in which instant communication is the norm. Further, in the recent past, Congress has abandoned strict adherence to the fundamental principle of **materiality**, a central tenet of the disclosure requirements of the federal securities laws. Instead, Congress has sought to use the securities laws to address issues that are immaterial to shareholders' investment or voting decisions. For example, Congress has required public companies to disclose information relating to conflict minerals and payments to foreign governments for resource extraction and mine safety, information that may be relevant in a social context but has little relevance to material information that a shareholder would need to make an investment decision.

The current environment has also been shaped by fundamental changes in shareholder engagement, which has become a central and essential topic for public companies and their boards, managers and investors in the early 21st century. Public companies have undertaken unprecedented levels of proactive engagement with their major shareholders in recent years. Many institutional investors have also increased their engagement efforts, dedicating significant resources to governance issues, company outreach, the development of voting policies and the analysis of the proposals on the ballots of their portfolio companies. In addition, overall levels of shareholder activism remain at record highs, imposing significant pressures on targeted companies and their boards.

Further, many of today's shareholders—and not only those typically viewed as "activists"—have higher expectations relating to engagement with the board and management than shareholders of years past. These investors seek a greater voice in the company's strategic decision-making, capital allocation and overall corporate social responsibility, areas that traditionally were the sole purview of the board and management. Moreover, some shareholder-driven campaigns to change corporate strategies (through spin-offs, for example) or capital allocation strategies (through share repurchase programs) suggest that in some cases, at least, shareholder input on these matters has been heard in

the boardroom. Some commentators view this rise in shareholder empowerment as appropriate, arguing that shareholders are the ultimate owners of the company. Others question, however, whether activists' goals are overly focused on short-term uses of corporate capital, such as share repurchases or special dividends. Capital allocation strategies focusing on short-term value may be entirely appropriate for a shareholder, regardless of the length of its investment horizon. The board, however, has a very different role when considering the appropriate use of capital for the company and all of its shareholders. Specifically, the board must constantly weigh both long-term and short-term uses of capital (for example, organic or inorganic reinvestment, returns to shareholders, etc.) and then determine the appropriate allocation of that capital in keeping with the company's business strategy and the goal of long-term value creation.

Business Roundtable CEOs believe that shareholder engagement will continue to be a critical corporate governance issue for U.S. companies in the years to come. Further, it is our sense that there is a growing recognition in corporate America that an increase in shareholder access to the boardroom cannot come without a corresponding increase in shareholder responsibility. Here, as in many areas of corporate governance, transparency is a basic but essential element—for example, in this "age of information," a shareholder that wishes to influence corporate behavior should be encouraged to publicly disclose the nature of its identity and ownership, even in cases where the federal securities laws may not specifically require disclosure.

More fundamentally, we believe that the responsibility of shareholders extends beyond disclosure. We sense that there is a rising belief that shareholders cannot seek additional empowerment without assuming some accountability for the goal of long-term value creation for all shareholders. Moreover, we believe that shareholders should not use their investments in U.S. public companies for purposes that are not in keeping with the purposes of for-profit public enterprises, including but not limited to the advancement of personal or social agendas unrelated and/or immaterial to the company's business strategy.

We believe that this concept of shareholder responsibility and accountability will—and should—become an integral part of modern thinking relating to corporate governance in the coming years, and we look forward to taking a leadership role in discussions relating to these important issues.

In light of the evolving landscape affecting U.S. public companies, Business Roundtable has updated **Principles of Corporate Governance**. Although Business Roundtable believes that these principles represent current practical and effective corporate governance practices, it recognizes that wide variations exist among the businesses, relevant regulatory regimes, ownership structures and investors of U.S. public companies. **No one approach to corporate governance may be right for all companies, and Business Roundtable does not prescribe or endorse any particular option, leaving that to the considered judgment of boards, management and shareholders. Accordingly, each company should look to these principles as a guide in developing the structures, practices and processes that are appropriate in light of its needs and circumstances.**

GUIDING PRINCIPLES OF CORPORATE GOVERNANCE

Business Roundtable supports the following core guiding principles:

1. The board approves corporate strategies that are intended to build sustainable long-term value; selects a chief executive officer (CEO); oversees the CEO and senior management in

operating the company's business, including allocating capital for long-term growth and assessing and managing risks; and sets the "tone at the top" for ethical conduct.

2. Management develops and implements corporate strategy and operates the company's business under the board's oversight, with the goal of producing sustainable long-term value creation.

3. Management, under the oversight of the board and its audit committee, produces financial statements that fairly present the company's financial condition and results of operations and makes the timely disclosures investors need to assess the financial and business soundness and risks of the company.

4. The audit committee of the board retains and manages the relationship with the outside auditor, oversees the company's annual financial statement audit and internal controls over financial reporting, and oversees the company's risk management and compliance programs.

5. The nominating/corporate governance committee of the board plays a leadership role in shaping the corporate governance of the company, strives to build an engaged and diverse board whose composition is appropriate in light of the company's needs and strategy, and actively conducts succession planning for the board.

6. The compensation committee of the board develops an executive compensation philosophy, adopts and oversees the implementation of compensation policies that fit within its philosophy, designs compensation packages for the CEO and senior management to incentivize the creation of long-term value, and develops meaningful goals for performance-based compensation that support the company's long-term value creation strategy.

7. The board and management should engage with long-term shareholders on issues and concerns that are of widespread interest to them and that affect the company's long-term value creation. Shareholders that engage with the board and management in a manner that may affect corporate decisionmaking or strategies are encouraged to disclose appropriate identifying information and to assume some accountability for the long-term interests of the company and its shareholders as a whole. As part of this responsibility, shareholders should recognize that the board must continually weigh both short-term and long-term uses of capital when determining how to allocate it in a way that is most beneficial to shareholders and to building long-term value.

8. In making decisions, the board may consider the interests of all of the company's constituencies, including stakeholders such as employees, customers, suppliers and the community in which the company does business, when doing so contributes in a direct and meaningful way to building long-term value creation.

This post is intended to assist public company boards and management in their efforts to implement appropriate and effective corporate governance practices and serve as spokespersons for the public dialogue on evolving governance standards. Although there is no "one size fits all" approach to governance that will be suitable for all U.S. public companies, the creation of long-term value is the ultimate measurement of successful corporate governance, and it is important that shareholders and other stakeholders understand why a company has chosen to use particular governance structures, practices and processes to achieve that objective. Accordingly, companies should disclose not only the types of practices they employ but also their bases for selecting those practices.

I. **Key Corporate Actors**

Effective corporate governance requires a clear understanding of the respective roles of the board, management and shareholders; their relationships with each other; and their relationships with other corporate stakeholders. Before discussing the core guiding principles of corporate governance, Business Roundtable believes describing the roles of these key corporate actors is important.

- The **board of directors** has the vital role of overseeing the company's management and business strategies to achieve long-term value creation. Selecting a well-qualified chief executive officer (CEO) to lead the company, monitoring and evaluating the CEO's performance, and overseeing the CEO succession planning process are some of the most important functions of the board. The board delegates to the CEO—and through the CEO to other senior management—the authority and responsibility for operating the company's business. Effective directors are diligent monitors, but not managers, of business operations. They exercise vigorous and diligent oversight of a company's affairs, including key areas such as strategy and risk, but they do not manage—or micromanage—the company's business by performing or duplicating the tasks of the CEO and senior management team. The distinction between oversight and management is not always precise, and some situations (such as a crisis) may require greater board involvement in operational matters. In addition, in some areas (such as the relationship with the outside auditor and executive compensation), the board has a direct role instead of an oversight role.

- **Management**, led by the CEO, is responsible for setting, managing and executing the strategies of the company, including but not limited to running the operations of the company under the oversight of the board and keeping the board informed of the status of the company's operations. Management's responsibilities include strategic planning, risk management and financial reporting. An effective management team runs the company with a focus on executing the company's strategy over a meaningful time horizon and avoids an undue emphasis on short-term metrics.

- **Shareholders** invest in a corporation by buying its stock and receive economic benefits in return. Shareholders are not involved in the day-to-day management of business operations, but they have the right to elect representatives (directors) and to receive information material to investment and voting decisions. Shareholders should expect corporate boards and managers to act as long-term stewards of their investment in the corporation. They also should expect that the board and management will be responsive to issues and concerns that are of widespread interest to long-term shareholders and affect the company's long-term value. Corporations are for-profit enterprises that are designed to provide sustainable long-term value to all shareholders. Accordingly, shareholders should not expect to use the public companies in which they invest as platforms for the advancement of their personal agendas or for the promotion of general political or social causes.

- Some shareholders may seek a voice in the company's strategic direction and decision-making—areas that traditionally were squarely within the realm of the board and management. Shareholders who seek this influence should recognize that this type of empowerment necessarily involves the assumption of a degree of responsibility for the goal of long-term value creation for the company and all of its shareholders.

Effective corporate governance requires dedicated focus on the part of directors, the CEO and senior management to their own responsibilities and, together with the corporation's shareholders, to the shared goal of building long-term value.

II. **Key Responsibilities of the Board of Directors and Management**

An effective system of corporate governance provides the framework within which the board and management address their key responsibilities.

Board of Directors

A corporation's business is managed under the board's oversight. The board also has direct responsibility for certain key matters, including the relationship with the outside auditor and executive compensation. The board's oversight function encompasses a number of responsibilities, including:

- **Selecting the CEO.** The board selects and oversees the performance of the company's CEO and oversees the CEO succession planning process.
- **Setting the "tone at the top."** The board should set a "tone at the top" that demonstrates the company's commitment to integrity and legal compliance. This tone lays the groundwork for a corporate culture that is communicated to personnel at all levels of the organization.
- **Approving corporate strategy and monitoring the implementation of strategic plans.** The board should have meaningful input into the company's long-term strategy from development through execution, should approve the company's strategic plans and should regularly evaluate implementation of the plans that are designed to create long-term value. The board should understand the risks inherent in the company's strategic plans and how those risks are being managed.
- **Setting the company's risk appetite, reviewing and understanding the major risks, and overseeing the risk management processes.** The board oversees the process for identifying and managing the significant risks facing the company. The board and senior management should agree on the company's risk appetite, and the board should be comfortable that the strategic plans are consistent with it. The board should establish a structure for overseeing risk, delegating responsibility to committees and overseeing the designation of senior management responsible for risk management.
- **Focusing on the integrity and clarity of the company's financial reporting and other disclosures about corporate performance.** The board should be satisfied that the company's financial statements accurately present its financial condition and results of operations, that other disclosures about the company's performance convey meaningful information about past results as well as future plans, and that the company's internal controls and procedures have been designed to detect and deter fraudulent activity.
- **Allocating capital.** The board should have meaningful input and decision-making authority over the company's capital allocation process and strategy to find the right balance between short-term and long-term economic returns for its shareholders.
- **Reviewing, understanding and overseeing annual operating plans and budgets.** The board oversees the annual operating plans and reviews annual budgets presented by

management. The board monitors implementation of the annual plans and assesses whether they are responsive to changing conditions.

- **Reviewing the company's plans for business resiliency.** As part of its risk oversight function, the board periodically reviews management's plans to address business resiliency, including such items as business continuity, physical security, cybersecurity and crisis management.

- **Nominating directors and committee members, and overseeing effective corporate governance.** The board, under the leadership of its nominating/corporate governance committee, nominates directors and committee members and oversees the structure, composition (including independence and diversity), succession planning, practices and evaluation of the board and its committees.

- **Overseeing the compliance program.** The board, under the leadership of appropriate committees, oversees the company's compliance program and remains informed about any significant compliance issues that may arise.

CHIEF EXECUTIVE OFFICE (C E O) AND MANAGEMENT

The CEO and management, under the CEO's direction, are responsible for the development of the company's long-term strategic plans and the effective execution of the company's business in accordance with those strategic plans. As part of this responsibility, management is charged with the following duties.

- **Business operations.** The CEO and management run the company's business under the board's oversight, with a view toward building long-term value.

- **Strategic planning.** The CEO and senior management generally take the lead in articulating a vision for the company's future and in developing strategic plans designed to create long-term value for the company, with meaningful input from the board. Management implements the plans following board approval, regularly reviews progress against strategic plans with the board, and recommends and carries out changes to the plans as necessary.

- **Capital allocation.** The CEO and senior management are responsible for providing recommendations to the board related to capital allocation of the company's resources, including but not limited to organic growth; mergers and acquisitions; divestitures; spin-offs; maintaining and growing its physical and nonphysical resources; and the appropriate return of capital to shareholders in the form of dividends, share repurchases and other capital distribution means.

- **Identifying, evaluating and managing risks.** Management identifies, evaluates and manages the risks that the company undertakes in implementing its strategic plans and conducting its business. Management also evaluates whether these risks, and related risk management efforts, are consistent with the company's risk appetite. Senior management keeps the board and relevant committees informed about the company's significant risks and its risk management processes.

- **Accurate and transparent financial reporting and disclosures.** Management is responsible for the integrity of the company's financial reporting system and the accurate and

timely preparation of the company's financial statements and related disclosures. It is management's responsibility—under the direction of the CEO and the company's principal financial officer—to establish, maintain and periodically evaluate the company's internal controls over financial reporting and the company's disclosure controls and procedures, including the ability of such controls and procedures to detect and deter fraudulent activity.

- **Annual operating plans and budgets.** Senior management develops annual operating plans and budgets for the company and presents them to the board. The management team implements and monitors the operating plans and budgets, making adjustments in light of changing conditions, assumptions and expectations, and keeps the board apprised of significant developments and changes.

- **Selecting qualified management, establishing an effective organizational structure and ensuring effective succession planning.** Senior management selects qualified management, implements an organizational structure, and develops and executes thoughtful career development and succession planning strategies that are appropriate for the company.

- **Business resiliency.** Management develops, implements and periodically reviews plans for business resiliency that provide the most critical protection in light of the company's operations.

    - **Risk identification**. Management identifies the company's major business and operational risks, including those relating to natural disasters, leadership gaps, physical security, cybersecurity, regulatory changes and other matters.

    - **Crisis preparedness**. Management develops and implements crisis preparedness and response plans and works with the board to identify situations (such as a crisis involving senior management) in which the board may need to assume a more active response role.

III. **BOARD STRUCTURE**

Public companies employ diverse approaches to board structure and operations within the parameters of applicable legal requirements and stock market rules. Although no one structure is right for every company, Business Roundtable believes that the practices set forth in the following sections provide an effective approach for companies to follow.

BOARD COMPOSITION

- **Size**. In determining appropriate board size, directors should consider the nature, size and complexity of the company as well as its stage of development. Larger boards often bring the benefit of a broader mix of skills, backgrounds and experience, while smaller boards may be more cohesive and may be able to address issues and challenges more quickly.

- **Composition**. The composition of a board should reflect a diversity of thought, backgrounds, skills, experiences and expertise and a range of tenures that are appropriate given the company's current and anticipated circumstances and that. collectively, enable the board to perform its oversight function effectively.

    - **Diversity**. Diverse backgrounds and experiences on corporate boards, including those of directors who represent the broad range of society, strengthen board performance

and promote the creation of long-term shareholder value. Boards should develop a framework for identifying appropriately diverse candidates that allows the nominating/corporate governance committee to consider women, minorities and others with diverse backgrounds as candidates for each open board seat.

- **Tenure**. Directors with a range of tenures can contribute to the effectiveness of a board. Recent additions to the board may provide new perspectives, while directors who have served for a number of years bring experience, continuity, institutional knowledge, and insight into the company's business and industry.

- **Characteristics.** Every director should have integrity, strong character, sound judgment, an objective mind and the ability to represent the interests of all shareholders rather than the interests of particular constituencies.

- **Experience.** Directors with relevant business and leadership experience can provide the board a useful perspective on business strategy and significant risks and an understanding of the challenges facing the business.

- **Independence.** Director independence is critical to effective corporate governance, and providing objective independent judgment that represents the interests of all shareholders is at the core of the board's oversight function. Accordingly, a substantial majority of the board's directors should be independent, according to applicable rules and regulations and as determined by the board.

  - **Definition of "independence."** An independent director should not have any relationships that may impair, or appear to impair, the director's ability to exercise independent judgment. Many boards have developed their own standards for assessing independence under stock market definitions, in addition to considering the views of institutional investors and other relevant groups.

  - **Assessing independence**. When evaluating a director's independence, the board should consider all relevant facts and circumstances, focusing on whether the director has any relationships, either direct or indirect, with the company, senior management or other directors that could affect actual or perceived independence. This includes relationships with other companies that have significant business relationships with the company or with not-for-profit organizations that receive substantial support from the company. While it has been suggested that long-standing board service may be perceived to affect director independence, long tenure, by itself, should not disqualify a director from being considered independent.

- **Election.** Directors should be elected by a majority vote for terms that are consistent with long term value creation. Boards should adopt a resignation policy under which a director who does not receive a majority vote tenders his or her resignation to the board for its consideration. Although the ultimate decision whether to accept or reject the resignation will rest with the board, the board and its nominating/corporate governance committee should think critically about the reasons why the director did not receive a majority vote and whether or not the director should continue to serve. Among other things, they should consider whether the vote resulted from concerns about a policy issue affecting the board as a whole or concerns specific to the individual director and the basis for those concerns.

- **Time commitments.** Serving as a director of a public company requires significant time and attention. Certain roles, such as committee chair, board chair and lead director, carry an additional time commitment beyond that of board and committee service. Directors must spend the time needed and meet as frequently as necessary to discharge their responsibilities properly. While there may not be a need for a set limit on the number of outside boards on which a director or committee member may serve—or for any limits on other activities a director may pursue outside of his or her board duties—each director should be committed to the responsibilities of board service, and each board should monitor the time constraints of its members in light of their particular circumstances.

BOARD LEADERSHIP

- **Approaches.** U.S. companies take a variety of approaches to board leadership; some combine the positions of CEO and chair while others appoint a separate chair. No one leadership structure is right for every company at all times, and different boards may reach different conclusions about the leadership structures that are most appropriate at any particular point in time. When appropriate in light of its current and anticipated circumstances, a board should assess which leadership structure is appropriate.

- **Lead/presiding director.** Independent board leadership is critical to effective corporate governance regardless of the board's leadership structure. Accordingly, the board should appoint a lead director, also referred to as a presiding director, if it combines the positions of CEO and chair or has a chair who is not independent. The lead director should be appointed by the independent directors and should serve for a term determined by the independent directors.

- Lead directors perform a range of functions depending on the board's needs, but they typically chair executive sessions of a board's independent or nonmanagement directors, have the authority to call executive sessions, and oversee follow-up on matters discussed in executive sessions. Other key functions of the lead director include chairing board meetings in the absence of the board chair, reviewing and/or approving agendas and schedules for board meetings and information sent to the board, and being available for engagement with long-term shareholders.

BOARD COMMITTEE STRUCTURE

a) An effective committee structure permits the board to address key areas in more depth than may be possible at the full board level. Decisions about committee membership and chairs should be made by the full board based on recommendations from the nominating/corporate governance committee.

b) The functions performed by the audit, nominating/corporate governance and compensation committees are central to effective corporate governance; however, no one committee structure or division of responsibility is right for all companies. Thus, the references in Section IV to functions performed by particular committees are not intended to preclude companies from allocating these functions differently.

c) The responsibilities of each committee and the qualifications required for committee membership should be clearly defined in a written charter that is approved by the board. Each

committee should review its charter annually and recommend changes to the board. Committees should apprise the full board of their activities on a regular basis.

d) Board committees should meet all applicable independence and other requirements as to membership (including minimum number of members) prescribed by applicable law and stock exchange rules.

IV. **BOARD COMMITTEES**

Audit Committee

- **Financial acumen**. Audit committee members must meet minimum financial literacy standards, and one or more committee members should be an audit committee financial expert, as determined by the board in accordance with applicable rules.

- **Over boarding**. With the significant responsibilities imposed on audit committees, consideration should be given to whether limiting service on other public company audit committees is appropriate. Policies may permit exceptions if the board determines that the simultaneous service would not affect an individual's ability to serve effectively.

- **Outside auditor**. The audit committee is responsible for the company's relationship with its outside auditor, including:

    - **Selecting and retaining the outside auditor**. The audit committee selects the outside auditor; reviews its qualifications (including industry expertise and geographic capabilities), work product. independence and reputation; and reviews the performance and expertise of key members of the audit team. The committee reviews new leading partners for the audit team and should be directly involved in the selection of the new engagement partner. The committee oversees the process of negotiating the terms of the annual audit engagement.

    - **Overseeing the independence of the outside auditor**. The committee should maintain an ongoing, open dialogue with the outside auditor about independence issues. The committee should identify those services, beyond the annual audit engagement. that it believes the outside auditor can provide to the company consistent with maintaining independence and determine whether to adopt a policy for preapproving services to be provided by the outside auditor or approving services on an engagement-by-engagement basis.

- **Financial statements.** The committee should discuss significant issues relating to the company's financial statements with management and the outside auditor and review earnings press releases before they are issued. The committee should understand the company's critical accounting policies and why they were chosen, what key judgments and estimates management made in preparing the financial statements, and how they affect the reported financial results. The committee should be satisfied that the financial statements and other disclosures prepared by management present the company's financial condition and results of operations accurately and are understandable.

- **Internal controls.** The committee oversees the company's system of internal controls over financial reporting and its disclosure controls and procedures, including the processes for

producing the certifications required of the chief executive officer and principal financial officer. The committee periodically reviews with both the internal and outside auditors, as well as with management, the procedures for maintaining and evaluating the effectiveness of these systems. The committee should be promptly notified of any significant deficiencies or material weaknesses in internal controls and kept informed about the steps and timetable for correcting them.

- **Risk assessment and management.** Many audit committees have at least some responsibilities for risk assessment and management due to stock market rules. However, the audit committee should not be the sole body responsible for risk oversight, and the board may decide to allocate some aspects of risk oversight to other committees or to the board as a whole depending on the company's industry and other factors. A company's risk oversight structure should provide the full board with the information it needs to understand all of the company's major risks, their relationship to the company's strategy and how these risks are being addressed. Committees with risk-related responsibilities should report regularly to the full board on the risks they oversee and brief the audit committee in cases where the audit committee retains some risk oversight responsibility.

- **Compliance.** Unless the full board or one or more other committees do so, the audit committee should oversee the company's compliance program, including the company's code of conduct. The committee should establish procedures for handling compliance concerns related to potential violations of law or the company's code of conduct, including concerns relating to accounting, internal accounting controls, auditing and securities law issues.

- **Internal audit.** The committee oversees the company's internal audit function and ensures that the internal audit staff has adequate resources and support to carry out its role. The committee reviews the scope of the internal audit plan, significant findings by the internal audit staff and management's response, and the appointment and replacement of the senior internal auditing executive and assesses the performance and effectiveness of the internal audit function annually.

NOMINATING/CORPORATE GOVERNANCE COMMITTEE

- **Director qualifications.** The committee should establish, and recommend to the board for approval, criteria for board membership and periodically review and recommend changes to the criteria. The committee should review annually the composition of the board, including an assessment of the mix of the directors' skills and experience; an evaluation of whether the board as a whole has the necessary tools to effectively perform its oversight function in a productive, collegial fashion; and an identification of qualifications and attributes that may be valuable in the future based on, among other things, the current directors' skill sets, the company's strategic plans and anticipated director exits.

- **Succession planning.** The committee, together with the board, should actively conduct succession planning for the board of directors. The committee should proactively identify director candidates by canvassing a variety of sources for potential candidates and retaining search firms. Shareholders invested in the long-term success of the company should have a meaningful opportunity to nominate directors and to recommend director candidates for nomination by the committee, which may include proxy access if shareholder support is broad based and the board concludes this access is in the best interests of the company and its

shareholders. Although the CEO meeting with potential board candidates is appropriate, the final responsibility for selecting director nominees should rest with the nominating/corporate governance committee and the board.

- ***Background and experience***. In connection with renomination of a current director, the nominating/corporate governance committee should review the director's background, perspective, skills and experience; assess the director's contributions to the board; consider the director's tenure; and evaluate the director's continued value to the company in light of current and future needs. Some boards may undertake these steps as part of the annual nomination process, while others may use a director evaluation process.

- **Independence**. The nominating/corporate governance committee should ensure that a substantial majority of the directors are independent both in fact and in appearance. The committee should take the lead in assessing director independence and make recommendations to the board regarding independence determinations. In addition, each director should promptly notify the committee of any change in circumstances that may affect the director's independence (including but not limited to employment change or other factors that could affect director independence).

- **Tenure limits**. The committee should consider whether procedures such as mandatory retirement ages or term limits are appropriate. Other practices, such as a robust director evaluation process, may make these tenure limits unnecessary, but they may still serve as useful tools for ensuring board engagement and maintaining diversity and freshness of thought. Many boards also require that directors who change their primary employment tender their resignation so that the board may consider the desirability of their continued service in light of their changed circumstances.

- **Board leadership.** The committee should conduct an annual evaluation of the board's leadership structure and recommend any changes to the board. The committee should oversee the succession planning process for the board chair, which should involve consideration of whether to combine or separate the positions of CEO and board chair and whether events such as the end of the current chair's tenure or the appointment of a new CEO may warrant a change to the board leadership structure.

- **Committee structure.** Annually, the committee should recommend directors for appointment to board committees and ensure that the committees consist of directors who meet applicable independence and qualification standards. The committee should periodically review the board's committee structure and consider whether refreshment of committee memberships and chairs would be helpful.

- **Board oversight.** The committee should oversee the effective functioning of the board, including the board's policies relating to meeting agendas and schedules and the company's processes for providing information to the board (both in connection with, and outside of, meetings), with input from the lead director or independent chair.

- **Corporate governance guidelines.** The committee should review annually the company's corporate governance guidelines, if any, and make recommendations about changes in those guidelines to the board.

- **Shareholder engagement.** The committee may oversee the company's and management's shareholder engagement efforts, periodically review the company's engagement practices, and provide to senior management feedback and suggestions for improvement. The committee and the full board should understand the company's efforts to communicate with shareholders and receive regular briefings on such communications.

- **Director compensation.** The committee also may oversee the compensation of the board if the compensation committee does not do so, or the two committees may share this responsibility.

COMPENSATION COMMITTEE

- **Authority.** The compensation committee has many responsibilities relating to the company's overall compensation philosophy, structure, policies and programs. To assist it in performing its duties, the compensation committee must have the authority to obtain advice from independent compensation consultants, counsel and other advisers. The advisers' independence should be assessed under applicable law and stock market rules, and the compensation committee should feel confident and comfortable that its advisers have the ability to provide the committee with sound advice that is free from any competing interests.

- **CEO and senior management compensation.** A major responsibility of the compensation committee is establishing performance goals and objectives relating to the CEO, measuring performance against those goals and objectives, and determining and approving the compensation of the CEO. The compensation committee also generally approves or recommends for approval the compensation of the rest of the senior management team.

- **Alignment with shareholder interests.** Executive compensation should be designed to align the interests of senior management, the company and its shareholders and to foster the long-term value creation and success of the company. Compensation should include performance-based elements that reward the achievement of goals tied to the company's strategic plan but are at risk if such goals are not met. These performance goals should be clearly explained to the company's shareholders.

- **Compensation costs and benefits.** The compensation committee should understand the costs of the compensation packages of senior management and should review and understand the maximum amounts that could become payable under multiple scenarios (such as retirement; termination for cause; termination without cause; resignation for good reason; death and disability; and the impact of a transaction, such as a merger, divestiture or acquisition). The committee should ensure that the proper protections are in place that will allow senior management to remain focused on the long-term strategies and business plans of the company even in the face of a potential acquisition, shareholder activism, or unsolicited takeover activity or control bids.

- **Stock ownership requirements.** To further align the interests of directors and senior management with the interests of long-term shareholders, the committee should establish stock ownership and holding requirements that require directors and senior management to acquire and hold a meaningful amount of the company's stock at least for the duration of their tenure and, depending on the company's circumstances, perhaps for a certain period of time thereafter. The company should have a policy that monitors, restricts or even prohibits

executive officers' ability to hedge the company's stock and requires ongoing disclosure of the material terms of hedging arrangements to the extent they are permitted.

- **Risk.** The compensation committee should review the overall compensation structure and balance the need to create incentives that encourage growth and strong financial performance with the need to discourage excessive risk-taking, both for senior management and for employees at all levels. Incentives should further the company's long-term strategic plans by looking beyond short-term market value changes to the overall goal of creating and enhancing enduring value. The committee should oversee the adoption of practices and policies to mitigate risks created by compensation programs, such as a compensation recoupment, or clawback, policy.

- **Director compensation.** The compensation committee may also be responsible, either alone or together with the nominating/corporate governance committee, for establishing director compensation programs, practices and policies.

V. **BOARD OPERATIONS**

- **General**. Serving on a board requires significant time and attention on the part of directors. Certain roles, such as committee chair, board chair and lead director, carry an additional time commitment beyond that of board and committee service. Directors must spend the time needed and meet as frequently as necessary to discharge their responsibilities properly.

- **Meetings**. The board of directors, with the assistance of the nominating/corporate governance committee, should consider the frequency and length of board meetings. Longer meetings may permit directors to explore key issues in depth, whereas shorter, more frequent meetings may help directors stay current on emerging corporate trends and business and regulatory developments.

- **Over boarding**. Service on the board of a public company provides valuable experience and insight. Simultaneous service on too many boards may, however, interfere with an individual's ability to satisfy his or her responsibilities as a member of senior management or as a director. In light of this, many boards limit the number of public company boards on which their directors may serve. Business Roundtable does not endorse a specific limit on the number of directorships an individual may hold, recognizing that decisions about limits on board service are best made by boards and their nominating/governance committees in light of the particular circumstances of individual companies and directors.

- **Executive sessions**. Directors should have sufficient opportunity to meet in executive session, outside the presence of the CEO and any other management directors, in accordance with stock exchange rules. Time for an executive session should be placed on the agenda for every regular board meeting. The independent chair or lead director should set the agenda for and chair these sessions and follow up with the CEO and other members of senior management on matters addressed in the sessions.

- **Agenda.** The board's agenda must be carefully planned yet flexible enough to accommodate emergencies and unexpected developments, and it must be structured to maximize the use of meeting time for open discussion and deliberation. The board chair should work with the lead director (when the company has one) in setting the agenda and should be responsive to individual directors' requests to add items to the agenda.

- **Access to management.** The board should work to foster open, ongoing dialogue between management and members of the board. Directors should have access to senior management outside of board meetings.

- **Information.** The quality and timeliness of information that the board receives directly affects its ability to perform its oversight function effectively.

- **Technology.** Companies should take advantage of technology such as board portals to provide directors with meeting materials and real-time information about developments that occur between meetings. The use of technology (including e-mail) to communicate with and deliver information to the board should be accompanied by safeguards to protect the security of information and directors' electronic devices and to comply with applicable document retention policies.

- **Confidentiality.** Directors have a duty to maintain the confidentiality of all nonpublic information (whether or not it is material) that they learn through their board service, including boardroom discussions and other discussions between and among directors and senior management.

- **Director compensation.** The amount and composition of the compensation paid to a company's non-employee directors should be carefully considered by the board with the oversight of the appropriate board committee. Director compensation typically consists of a mix of cash and equity. The cash portion of director compensation should be paid in the form of an annual retainer, rather than through meeting fees, to reflect the fact that board service is an ongoing commitment. Equity compensation helps align the interests of directors with those of the corporation's shareholders but should be provided only through shareholder-approved plans that include meaningful and effective limitations. Further, equity compensation arrangements should be carefully designed to avoid unintended incentives such as an emphasis on short-term market value changes. Due to the potential for conflicts of interest and the duty of directors to represent the interests of all shareholders, directors or director nominees should not be a party to any compensation related arrangements with any third party relating to their candidacy or service as a director of the company, other than those arrangements that relate to reimbursement for expenses in connection with candidacy as a director.

- **Director education.** Directors should be encouraged to take advantage of educational opportunities in the form of outside programs or "in board" educational sessions led by members of senior management or outside experts. New directors should participate in a robust orientation process designed to familiarize them with various aspects of the company and board service.

- **Reliance.** In performing its oversight function, the board is entitled under state corporate law to rely on the advice, reports and opinions of management, counsel, auditors and expert advisers. Boards should be comfortable with the qualifications of those on whom they rely. Boards are encouraged to engage outside advisers where appropriate and should use care in their selection. Directors should hold advisers accountable and ask questions and obtain answers about the processes they use to reach their decisions and recommendations, as well as about the substance of the advice and reports they provide to the board.

- **Board and committee evaluations.** The board should have an effective mechanism for evaluating its performance on a continuing basis. Meaningful board evaluation requires an assessment of the effectiveness of the full board, the operations of board committees and the contributions of individual directors on an annual basis. The results of these evaluations should be reported to the full board, and there should be follow-up on any issues and concerns that emerge from the evaluations. The board, under the leadership of the nominating/corporate governance committee, should periodically consider what method or combination of methods will result in a meaningful assessment of the board and its committees. Common methods include written questionnaires; group discussions led by a designated director, employee or outside facilitator (often with the aid of written questions); and individual interviews.

VI. SENIOR MANAGEMENT DEVELOPMENT AND SUCCESSION PLANNING

- **Succession planning**. Planning for CEO and senior management development and succession in both ordinary and emergency scenarios is one of the board's most important functions. Some boards address succession planning primarily at the full board level, while others rely on a committee composed of independent directors (often the compensation committee or the nominating/corporate governance committee) to address this key area. The board, under the leadership of the responsible committee (if any), should identify the qualities and characteristics necessary for an effective CEO and monitor the development of potential internal candidates. The board or committee should engage in a dialogue with the CEO about the CEO's assessment of candidates for both the CEO and other senior management positions, and the board or committee should also discuss CEO succession planning outside the presence of the CEO. The full board should review the company's succession plan at least annually and periodically review the effectiveness of the succession planning process.

- **Management development**. The board and the independent committee (if any) with primary responsibility for oversight of succession planning also should know what the company is doing to develop talent beyond the senior management ranks. The board or committee should gain an understanding of the steps the CEO and other senior management are taking at more junior levels to develop the skills and experience important to the company's success and build a bench of future candidates for senior management roles. Directors should interact with up-and-coming members of management, both in board meetings and in less formal settings, so they have an opportunity to observe managers directly and begin developing relationships with them.

- **CEO evaluation.** Under the oversight of an independent committee or the lead director, the board should annually review the performance of the CEO and participate with the CEO in the evaluation of members of senior management in certain circumstances. All nonmanagement members of the board should have the opportunity to participate with the CEO in senior management evaluations if appropriate. The results of the CEO's evaluation should be promptly communicated to the CEO in executive session by representatives of the independent directors and used in determining the CEO's compensation.

VII. Relationships with Shareholders and Other Stakeholders

Corporations are often said to have obligations to stakeholders other than their shareholders, including employees, customers, suppliers, the communities and environments in which they do business, and government. In some circumstances, the interests of these stakeholders are considered in the context of achieving long-term value.

SHAREHOLDERS AND INVESTORS

- **Shareholder outreach**. Regular shareholder outreach and ongoing dialogue are critical to developing and maintaining effective investor relations, understanding the views of shareholders, and helping shareholders understand the plans and views of the board and management.
    - **Know who the company's shareholders are**. The nominating/ corporate governance committee and the board should know who the company's major shareholders are and understand their positions on significant issues relevant to the company.
    - **Role of management**. Members of senior management are the principal spokespersons for the company and play an important role in shareholder engagement. This role includes serving as the main points of contact for shareholders on issues where management is in the best position to have a dialogue with shareholders.
    - **Board communication with shareholders**. When appropriate and in consultation with the CEO, directors should be equipped to play a part from time to time in the dialogue with shareholders on topics involving the company's pursuit of long-term value creation and the company's governance. Communications with shareholders are subject to applicable regulations (such as Regulation Fair Disclosure) and company policies on confidentiality and disclosure of information. These regulations and policies, however, should not impede shareholder engagement. Direct communication between directors and shareholders should be coordinated through—and with the knowledge of—the board chair, the lead independent director, and/or the nominating/corporate governance committee or its chair.
- **Annual meeting.** Directors should be expected to attend the annual meeting of shareholders, absent unusual circumstances. Companies should consider ways to broaden shareholder access to the annual meeting, including webcasts, if requested by shareholders.
- **Shareholder engagement.** Companies should engage with long-term shareholders in a manner consistent with the respective roles of the board, management and shareholders. Companies should maintain effective protocols for shareholder communications with directors and for directors to respond in a timely manner to issues and concerns that are of widespread interest to long-term shareholders.
- **Board duties.** Shareholders are not a uniform group, and their interests may be diverse. Although boards should consider the views of shareholders, the duty of the board is to act in what it believes to be the long-term best interests of the company and all its shareholders. The views of certain shareholders are one important factor that the board evaluates in making decisions, but the board must exercise its own independent judgment. Once the board reaches a decision, the company should consider how best to communicate the board's decision to shareholders.

- **Shareholder voting.** While some shareholders may use tools such as third-party analyses and recommendations in making voting decisions, these tools should not be a substitute for individualized decision-making that considers the facts and circumstances of each company. Companies should conduct shareholder outreach efforts where appropriate to explain the bases for the board's recommendations on the matters that are submitted to a vote of shareholders.

- **Shareholder proposals.** The federal proxy rules require public companies to include qualified shareholder proposals in their proxy statements. Shareholders should not use the shareholder proposal process as a platform to pursue social or political agendas that are largely unrelated and/or immaterial to the company's business, even if permitted by the proxy rules. Further, a company's proxy statement is not always the best place to address even legitimate shareholder concerns. Shareholders with concerns about particular issues should seek to engage in a dialogue with the company before submitting a shareholder proposal. If a shareholder submits a proposal, the company's board or its nominating/corporate governance committee should oversee the company's response. The board should consider issues raised by shareholder proposals that receive substantial support from other shareholders and should communicate its response to all shareholders.

EMPLOYEES

- **General.** Treating employees fairly and equitably is in a company's best interest. Companies should have in place policies and practices that provide employees with appropriate compensation, including benefits that are appropriate given the nature of the company's business and employees' job responsibilities and geographic locations. When companies offer retirement, health care, insurance and other benefit plans, employees should be fully informed of the terms of those plans.

- **Misconduct.** Companies should have in place and publicize mechanisms for employees to seek guidance and to alert management and the board about potential or actual misconduct without fear of retribution. As part of fostering a culture of compliance, companies should encourage employees to report compliance issues promptly and emphasize their policy of prohibiting retaliation against employees who report compliance issues in good faith.

- **Communications.** Companies should communicate honestly with their employees about corporate operations and financial performance.

COMMUNITIES, THE ENVIRONMENT AND SUSTAINABILITY

- **Citizenship.** Companies should strive to be good citizens of the local, national and international communities in which they do business; to be responsible stewards of the environment; and to consider other relevant sustainability issues in operating their businesses. Failure to meet these obligations can result in damage to the company, both in immediate economic terms and in its longer-term reputation. Because sustainability issues affect so many aspects of a company's business, from financial performance to risk management, incorporating sustainability into the business in a meaningful way is integral to a company's long-term viability.

- **Community service.** A company should strive to be a good citizen by contributing to the communities in which it operates. Being a good citizen includes getting involved with those

communities; encouraging company directors, managers and employees to form relationships with those communities; donating time to causes of importance to local communities; and making charitable contributions.

- **Sustainability.** A company should conduct its business with meaningful regard for environmental, health, safety and other sustainability issues relevant to its operations. The board should be cognizant of developments relating to economic, social and environmental sustainability issues and should understand which issues are most important to the company's business and to its shareholders.

GOVERNMENT

- **Legal compliance.** Corporations, like all citizens, must act within the law. The penalties for serious violations of law can be extremely severe, even life threatening, for corporations. Compliance is not only appropriate—it is essential. The board and management should be comfortable that the company has a robust legal compliance program that is effective in deterring and preventing misconduct and encouraging the reporting of potential compliance issues.

- **Political activities.** Corporations have an important perspective to contribute to the public policy dialogue and discussions about the development, enactment and revision of the laws and regulations that affect their businesses and the communities in which they operate and their employees reside. To the extent that the company engages in political activities, the board should have oversight responsibility and consider whether to adopt a policy on disclosure of these activities.

CASE LAW IN CORPORATE GORVERNACE

On the 26th, August 2019, Honorable Justice David Wangutsi delivered a landmark decision in Miscellaneous Application No. 320 of 2019 arising from **High Court Civil Suit Number 0493 of 2017 filed by Sudhir Ruparelia and Meera Investments against Crane Bank in Receivership Sudhir RUPARELIA & ANOR V CRANE BANK LIMITED [IN RECEIVERSHIP] (MISC. APPLICATION NO. 320 OF 2019) [2019] UGCOMMC 21 (26 AUGUST 2019)**. By the detailed 22 paged ruling, the said judge dismissed the Bank of Uganda suit against Sudhir and Meera Investments.

Whereas the decision was received with jubilation by the Sudhir camp, my opinion is that the decision:

- Is a blow to good corporate governance of financial institutions especially at a time such as now when Bank of Uganda has been embroiled in several controversies. The dismissal of the suit denied us the chance to delve into the real issues surrounding takeover, management, Receivership and Liquidation of financial institutions especially in regard to the accountability role of Bank of Uganda.

- Denied us a chance to effectively assess the corporate governance issues arising from what Bank of Uganda alleged were acts of misappropriation, mismanagement and abuse of dominant position by Sudhir as shareholder. These issues are so pertinent and

have remained unresolved for long not just in the case of crane bank but several other banks including the National Bank of Commerce where similar issues arose.

- It is also a blow to rights of aggrieved parties for banks in receivership who the decision says cannot petition court for redress in case of any wrong including employees.

In this article I critically analyze in detail and with due respect the decision of the Honourable judge.

GENESIS OF THE CASE.

In 2016, Bank of Uganda took over Crane Bank and in January 2017 put it under Receivership. On the 30th of June, 2019, Bank of Uganda in the name of Crane Bank in Receivership filed a suit against Sudhir and Meera Investments where it made several allegations which briefly were;

1. **Allegations on Ownership and shareholding.**

   Bank of Uganda alleged that Sudhir was the effective and beneficial owner of 100% shares in Crane Bank an act that is illegal under Section 18 and 24 of the Financial Institutions Act. Bank of Uganda alleged that he was the actual recipient of dividends in respect of 47.3% of shares purportedly registered in the names of Rasikal Chotalal Kantaria in White Sapphire Ltd which was the majority shareholder in Crane bank and was also the beneficial owner of shares held in the names of his wife and children in the bank.

2. **Allegations of extraction of money.**

   Bank of Uganda alleged that Sudhir wrongfully extracted millions of dollars from Crane Bank to pay entities for his own benefit, made a fictitious payment to Technology Associates and fraudulent cash transactions made through Infinity Investments a company he co owns.

3. **Allegations of unremitted NSSF contributions.** Bank of Uganda alleged that upon an audit by NSSF, it was discovered that Crane Bank had not remitted over 52,000,000,000/= of arrears, interest and penalty for the period between 2007-2016.

In light of the above allegations Bank of Uganda sought to recover all monies purportedly extracted by Sudhir, NSSF arrears, and an account of all monies received in breach of fiduciary duty and trust by Sudhir.

Against Meera Investments, Bank of Uganda alleged that Meera Investments had dishonestly appropriated the land of Crane Bank in respect of 48 properties comprising of Crane Bank branch network. Bank of Uganda therefore sought a transfer of the said titles into the names of Crane Bank. In opposition of this suit, Sudhir and Meera Investments filed an application seeking to have the suit by Bank of Uganda on preliminary objections revolving around the locus standi(right to sue) by Crane Bank in Receivership which they argued was non existent and also the fact that the orders sought against Meera Investments were unsustainable in law since transfer of titles of Freehold to Crane Bank is prohibited by the Land Act since according to them Crane Bank was a non citizen that could only hold leasehold interest.

In agreeing with them, the honourable judge went at length to dissect provisions of the Financial Institutions Act (FIA) and the Land Act for the two respective grounds.
On the issue of locus standi, Sudhir and Meera Investments argued that from the 20th January, 2017, the Respondent (Crane Bank in Receivership) could not be sued nor could it sue and the suit having

been brought on 30th June, 2017 within the receivership period, the same was unsustainable. Bank of Uganda in return argued that Section 96 of the FIA barred proceedings against a financial institution in receivership but did not bar the financial institution in receivership from commencing legal action.

In dealing with this issue, the judge reaffirms that supremacy of the Ffinancial Iinstitutions Act over any other law in accordance with **Section 133 of the Ffinancial Iinstitutions Act** and adds that the said Crane Bank could only bring an action during the period of statutory management or liquidation.

He concluded that the law under **Section 96 of the Finanancial Iinstitutions Act** does not allow proceedings to be brought by or against a financial institution in receivership. He rightly disagrees with Bank of Uganda and says;

'Having insulated the Respondent against suits, they would not have enabled it to sue because suits against the Respondents were not allowed.'

This finding is powerful as it clarifies the position on Section 96 of the Financial Institutions Act which specifically prohibits proceedings against financial institutions in receivership but does not specifically state whether such institutions can institute proceedings. This would have the unfortunate effect of creating double standards in favour of the receiver.

However, besides this finding, I disagree with the rest of the reasoning of the judge on the issue of locus standi.

THE JUDGE STATES REASONS WHY THE LAW PROHIBITS PROCEEDINGS AGAINST BANKS IN RECEIVERSHIP TO BE;

1. **The short span of time for receivership.**
   The time span for receivership is 12 months and the judge said it is too short to conclude a case. The judge goes on it detail to expose the inefficiencies of the justice system in Uganda where he notes that the first hearing of any case may be anywhere between 6-9 months. Whereas this might be true due to the challenges faced by the Justice system, I respectfully opine that we cannot deny access to justice due to inefficiencies in the justice system. To assume that the matter will only conclude after 6-9 months is also speculative as sometimes indeed matters are resolved at the point of mediation.
2. **The cost of suits**

   The other reasoning the judge espouses is that the costs of the suit would further deplete the financial institution which the receiver is trying to strengthen financially. Although legal costs maybe high, first of all they are negotiable as between client (bank in receivership) and its counsel and the receiver would be expected to exercise prudence in negotiating legal costs. Secondly, these costs would arise anyway even during statutory management or liquidation where at all times, the manager or liquidator is also trying hard to optimize the resources of the embattled institution. Thirdly, cost is relative. The cost of not being able to access justice maybe far higher can the cost of legal representation. Fourthly, as between parties, costs are awarded at the discretion of court and therefore can be capped or minimized to prevent the much-feared depletion.

3. The role of the receiver would not require court to intervene.

The other reason the judge gives is premised on the role of the receiver being to arrange a merger, or purchase of assets and assumption of liabilities by another financial institution or liquidation. He argues that;

'This would not normally require court in any case for the receiver to do it properly diversions of Court should be avoided.'

With due respect, I also disagree with this argument, world over mergers and acquisition or purchase of assets and assumption of liabilities of another company are highly contentious issues and rightly so for the main reason of accountability. It is the most unfair and improper thing to prevent an aggrieved party from seeking recourse whilst they feel that their assets are being sold off in a dubious and fraudulent manner as Sudhir and previously National Bank of Commerce alleged was the conduct of Bank of Uganda.

In fact, in his own decision, the judge notes that

*'***Central Bank sold and did away with Crane Bank in 4 days after receivership'.**

Four days after receivership means that the central bank transitioned from statutory manager, receiver, and liquidator in a very short span of time. Unless there was premeditation by Bank of Uganda, what level of diligence, scrutiny was paid to the transaction involving the purchase of assets and assumption of liabilities of Crane Bank by DFCU. Was 4 days all it needed to carry out a proper audit, valuation, solicitation of bids for purchase? That kind of heist conduct is bound to fall short of standards. To therefore argue that whilst it was glaringly apparent that Bank of Uganda in this case was abusing its dominant position as regulator, it is okay to let aggrieved parties fold their arms without recourse to court all because of a provision of the law that is apparently being abused would lead to the most absurd effect. What about the principle of mitigation of loss. Shouldn't court help the aggrieved party mitigate any loss?

It must be noted that the subsequent purchaser except for fraud takes good title and therefore the aggrieved party in this case cannot run to the third party for accepting such a good deal as was allegedly grabbed by DFCU bank.

Reliance on literal interpretation of the statute.

The judge also heavily relied on previous decisions of court which support the literal interpretation and application of the law. He said that;

'It is not upon court to imagine and say the legislature forgot this, we should insert it for them'

Whereas the literal rule of interpretation and construction of statutes is the most preferred, the courts have in the past gone against it where it is clear that the literal interpretation leads to absurdities, repugnancy, and injustice and is contrary to the constitution.

The purchase of assets and assumption of liabilities, directly affects the right to property that is guaranteed under **Article 26 of the 1995 Constitution of Uganda. Article 26** specifically prohibits any compulsory acquisition of another's property under any law that deprives such person the right to access a court of justice. In my opinion, **Section 96 Of The Financial Institutions Act** contravenes the Constitution in so far as it bars anyone from bringing proceedings against a receiver and the FIA

empowers the receiver to compulsorily sell off the assets of the embattled institution. If the learned judge had been alive to this perhaps, he would have found a basis to deviate from the literal interpretation of the law.

In the past, Courts have gone against the literal rule. For example, in the case of **OSTRACO LTD V AG(2003) 2 EA** reaffirmed in the case of **RYANYARERE AND OTHERS V. ATTORNEY GENERAL (2003) 2 EA 664** the provision of the Civil Procedure and Limitations (Misc. Provisions) Act, which barred execution against government was read into and found to be repugnant for being discriminatory. Similarly, the Supreme Court in the case of **KAMPALA CITY COUNCIL AUTHORITY V KABANDIZE AND 20 OTHERS** found that the requirement to give 45 days' notice prior to commencing a suit though couched in mandatory terms under the **CIVIL PROCEDURE AND LIMITATIONS (MISC. PROVISIONS) Act** was not mandatory.

The reason that Crane Bank was not in existence at the time of filing the suit.

The judge concluded that by the 30th of June, 2017 Crane Bank in receivership was not in position to do so as all its assets and liabilities had been exhausted. I with due respect also disagree with this finding. From the ruling, what DFCU acquired were assets and liabilities of Crane bank. DFCU did not acquire the shares of the respective shareholders of Crane Bank. My opinion is that a company's existence or nonexistence is not determined by its assets or liabilities. Crane Bank may have lost its identity as a financial institution but not its personality as a body corporate under the Companies Act. For all intents and purposes, a financial institution is first a company and that personality subsists even after its assets and liabilities are sold unless completely wound up.

If indeed like the Judge states Crane Bank lost its identity and personality to DFCU upon the laters' acquisition of assets and assumption of liabilities, could it be argued that DFCU can commence an action against Sudhir for accrued rights of Crane Bank? This would be more complex and would create issues of privity as well.

WHAT THE DECISION MEANS FOR CLAIMS BY SUDHIR AGAINST BANK OF UGANDA

The judge's conclusion that no proceedings could be commenced by or against Crane Bank in receivership also means that Bank of Uganda cannot be sued for acts done by it during the period when it acted as receiver since it was clothed with immunity from proceedings at that time. This gets me wondering whether Sudhir can safely pursue Bank of Uganda to account as receiver or whether this ruling is a road block for Sudhir as well.

How about employees whose NSSF contributions were not remitted by Crane Bank? These too have no recourse since Crane Bank no longer exists as the judge says!

The other question that pops to my mind is, can Bank of Uganda in its supervisory capacity sue Sudhir and Meera Investments in respect of the allegations made out in the aborted suit? I believe so.

THE SECOND ISSUE ON LAND,

The second issue that the judge made a finding on was the issue of the order sought by Bank of Uganda that Meera Investments transfers land to Crane Bank. Meera Investments argued that such order would be illegal as it would amount to a transfer of freehold or mailo land to a non-citizen which is prohibited by the Land Act.

My opinion is that this issue too could have been resolved otherwise had the judge delved deeper into the pleadings of Bank of Uganda and I believe it was the kind of issue that required further evidence. The judge found that White Sapphire Ltd was the majority shareholder of Crane Bank Ltd and since it was a company incorporated in Mauritius it was non citizen and therefore could not own freehold or mailo land. However, this conclusion was arrived at without regard to two things;

1. That a company was registered in Mauritus does not of itself make it a non-citizen for purposes of **Section 40 of the Land Act**. Section 40 of the Land Act, prescribes a non-citizen corporation to be that where the controlling interest is held by non-citizen. This could be regardless of the area of incorporation.

2. Secondly, **Section 40(7)** further provides for a non- citizen corporation to be a company where shares are held in trust for a non-citizen. Bank of Uganda argued that the shares of Kantaria the majority shareholder of White Sapphire were held in trust and for the benefit of Sudhir who is presumably a citizen of Uganda and therefore the deep application of this would mean that Crane Bank's controlling interest having been in the hands of a citizen, the titles of Meera Investments for freehold and mailo land could be transferred into Crane Bank as prayed by Bank of Uganda.

Conclusion

The allegations against Sudhir and Meera investments ought to be resolved not only for the good of either party but also for the good of the financial sector. Similarly, Sudhir's allegations against Bank of Uganda for what Sudhir calls 'Mafias' in the system who should render an account ought to be investigated and resolved by court. For this reason, I would have hoped that the Judge would over look this technicality and seeing as he was so convinced about Crane Bank's nonexistence, he should have ordered for a substitution of Crane Bank in Receivership with perhaps Bank of Uganda an act which is well within his power and discretion under the Civil Procedure Rules. This would have been logical considering that in awarding costs, the judge 'lifted the veil' and found that the actual and effective Plaintiff/Respondent is Bank of Uganda and ordered that Bank of Uganda should pay the costs of the suit.

In simple terms Mr. Sudhir and his lawyers from the Kampala Associated Advocates at an earlier court hearing. The Supreme Court recently handed him a mighty victory in the Crane Bank dispute (PHOTO/File).

KAMPALA — On 30th June 2017 Bank of Uganda as receiver for Crane Bank Uganda Limited ("Crane Bank") filed a civil suit against businessman Sudhir Ruparelia, the founder and former Vice chairman of Crane Bank Uganda Limited.

The suit alleged that as its proprietor, the businessman had allegedly mismanaged the Bank and embezzled over Ugx. 400b.

The businessman vowed to fight back in what he termed as breach of a fiduciary duty pursuant to a confidential Settlement and Release agreement entered into with Bank of Uganda in the lead up to the takeover of Crane Bank. Upon receipt of the plaint and summons, the businessman through his Lawyers requested for 21 documents which had been referred to but not attached on to the plaint, maintaining his innocence and that Bank of Uganda had no evidence of the alleged mismanagement and embezzlement. In his defense, Sudhir raised a counterclaim where he wanted Bank of Uganda to pay $8m for breaching clause 12 of the Confidential Settlement and Release Agreement. Bank of

Uganda could not respond to the counterclaim within the stipulated timelines of 15 days from the date of receipt.

Meanwhile, the businessman applied to court and succeeded in discharging Bank of Uganda's legal counsels; Timothy Masembe Kanyerezi of MMAKS Advocates and David Mpanga of Bowmans on grounds of conflict of interest as they had earlier advised, represented and guided him on some of the transactions Bank of Uganda was now claiming were unlawful. The ruling from the application will be celebrated and referred to for years to come for having elucidated the parameters and true meaning of conflict of interest between client and advocate.

The businessman further exposed Bank of Uganda for its unfamiliarity and non-adherence to the law it is charged with enforcing. He filed Miscellaneous Application No. 320 of 2019 among others, challenging the Locus standi of Crane Bank (in receivership).

Once again, the High Court agreed that Crane Bank (In Receivership) could not sustain the suit since the Financial Institutions Act, 2004 did not give a financial institution under receivership the right to sue or be sued while under receivership. In its defense, Bank of Uganda unsuccessful relied on the corporate personality of Crane Bank which was quite feeble an argument in light of the express prohibition under the **Financial Institutions Act, 2004**. More so, **Section 133 of the Financial Institutions Act, 2004** gives the Financial Institutions Act precedence and in the event of conflict, the Financial Institutions Act prevails. The learned Judge further indicated that there was no cause of action simply because Crane Bank (In receivership) was left with no assets to claim and that it was non-existent when the receiver (Bank of Uganda) transferred all her assets to DFCU.

The High Court judgment may have been a relief for the Business man and his associate entities, however what is its impact on financial institutions and Bank of Uganda (the regulator of the institutions)?

Several allegations were made by Bank of Uganda on the lack of Corporate Governance Principles in the defunct Bank, Sudhir beneficially owning 100% of the shares in the Defunct bank, failure to remit NSSF contributions for the employees amounting to UGX 52,000,000/= and siphoning of money by Sudhir through his associates. We have had a trend of Banks closing shop including but not limited to; Global Trust Bank, National Bank of Commerce, Greenland Bank, Teefe Bank, International Credit Bank, among others and all these allegations by Bank of Uganda have been made against those Banks.

Had Bank of Uganda critically analyzed the provisions of the Financial Institutions Act, 2004, they would have had the right party as a plaintiff and we would have had the benefit of having the matter resolved on its merits rather than technicalities like it did.

With all the above discussed, it still leaves us wondering how the said fraudulent activities were going on under the watch of the Central Bank. Let us not forget Crane Bank Limited was named the Bank of the year on several times and this evaluation was being made depending on the supervisory arm of Bank of Uganda. This leaves a lot desired on Bank of Uganda and also the confidence the Bank users can have in the Central Bank."

ENRON CASE

The Collapse of Enron In 2001, Enron became a household name – and probably in most households in most countries around the world. European Scientific Journal June 2016 edition vol.12, No.16 ISSN: 1857 – 7881 (Print) e - ISSN 1857- 7431 285 On the 2nd of December 2001, Enron became one of the 10 largest companies in the USA. In the following months, more and more evidence emerged about the weaknesses and fraudulent activity of corporate governance. However, countries across the world have been unsettled and disturbed by the shock of this event and are now examining their own corporate governance systems in micro-detail. This they do by looking for similar weaknesses and potential like Enrons. Enronitis has spread across the globe like a lethal virus, infecting every company and every shareholding institution. In addition, it also had a significant effect on worrying even by the smallest shareholder and unnerving the financial markets. Enron was a Huston-based energy company founded by a brilliant entrepreneur, Kenneth Lay. The company was created in 1985 by a merger of two American gas pipeline companies. Within a period of 16 years, the company was transformed from a relatively small concern, involved in gas pipelines, and oil and gas exploration, to the world's largest energy trading company (The Economist, 28 November 2002). Enron, the champion of energy deregulation that grew into one of the nation's 10 largest companies, collapsed yesterday. This collapse occurred after a rival backed out of a deal to buy Enron, and after many big trading partners stopped doing business with the company. Enron, based in Houston, has been widely expected to seek bankruptcy protection. With $62 billion in assets as of September 30, it would be the biggest American company ever to go bankrupt. Hence, this company dwarfs the filing by Texaco in 1987. Late in the day, Enron's chief financial officer, Jeff McMahon, stated that the company was still talking to banks about a restructuring and a consideration of other options. The role of a company's board of directors is to oversee corporate management in order to protect the interests of shareholders. However, in 1999, Enron's board waived conflict of interest rules to allow chief financial officer, Andrew Fastow, to create private partnerships to do business with the firm. These partnerships appear to have concealed debts and liabilities that would have had a significant impact on Enron's reported profits. Subsequently, Enron's collapse raises the issue of how to reinforce the directors' capability and will to challenge questionable dealings through corporate managers. Several corporate governance problems have emerged due to Enron's wreckage. Unfettered power in the hand of the chief executive is an obvious problem, and is one that characterized Enron's management. Also, there were numerous illustrations of unethical activity within the Enron organization that continued to come to light long after its downfall. For example, in May 2002, it became clear from the documents released by the Federal Energy Regulatory Commission that Enron's energy traders European Scientific Journal June 2016 edition vol.12, No.16 ISSN: 1857 – 7881 (Print) e - ISSN 1857- 7431 286 developed and used strategies or tricks to manipulate the markets where Califonia bought electricity. Overall, corporate governance in Enron was weak in almost all aspects. Thus, the board of directors is composed of a number of people who lacks moral character. Also, they are often willing to engage themselves in fraudulent activity. This was the genuine root of the company's corporate governance failure. There has been a proliferation of books on the downfall of Enron, seeking to explain why events transpired as they did. As we have seen, the USA and the UK strong reaction to Enron's collapse and corporate governance has been hurled to the center stage. This occurs as a result of the weaknesses at the heart of Enron's corporate governance system. The long-term effects of Enron will hopeful be a cleaner and more ethical corporate environment across the globe. Furthermore, the continuous updating of corporate governance codes of practice and systematic review of corporate governance checks and balances are necessary to avoid other Enrons in the future.

The board of directors' main role is to represent shareholders' interests. The board thus aims to maximize the firm's value or its stock. The board oversees the recruitment, compensation, and

activities of senior managers. Consequently, the roles of compensation and audit committees have received particular scrutiny since 2002. The makeup of the Board and its committees has also been discussed extensively because the prominence of non-independent members on a board or its committees may affect the way the board functions.

Similar conclusions could be drawn from other cases like that of WorldCom. The Enron case raised many questions about corporate governance, which we can define as a management or control system that can reduce conflicts of interest between shareholders and senior managers (or officers). Manipulation of information by senior managers was an important element in the events leading up to the Enron bankruptcy in December 2001. Enron used several risk management tools including derivatives, and was an important intermediary in the trading of these products.

Even specialists generally find it difficult to assess the total risk of a firm, particularly when financial statements use mark-to-market value rather than historical book value. It seems that the capital market as a whole could not identify many potential management problem signals or problems with information disclosure in the months preceding the Enron's bankruptcy. Also, they could not anticipate its financial difficulties.

Arthur Andersen faced several accusations and found itself in a conflict of interest because it had simultaneously assumed the role of independent auditor for Enron while serving as a consultant for the firm. To correct this type of situation, the US Congress created the Public Company Accounting Oversight Board (PCAOB) via the Sarbanes-Oxley Act of 2002. The PCAOB's roles include requiring external audit firms to register with it and setting standards for audit, quality control, ethics, and independence of these firms.

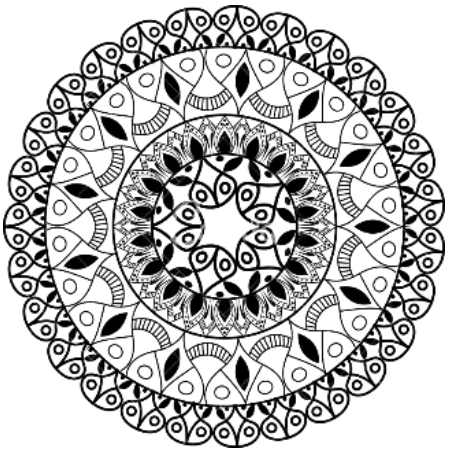
According to several observers (e.g., Healy and Palepu, 2003), Enron's board of directors also failed in its role of protecting shareholders and contributed to the firm's bankruptcy. Several board members held information on Enron's management practices such as very high compensation of senior managers and of some board members, and disclosure of false statistics on the company's growth potential to increase the value of stock and options. These board members chose to ignore them or did not disclose them to shareholders.

The Enron executives were compensated largely by a system based on the firm's stock options. For example, the CEO received over $140 million in compensation during the year 2000, whereas his base salary was slightly higher than $1 million (Demski, 2003). This form of compensation was a major factor in distorting managers' behavior. Stocks 'market value is heavily influenced by expected future income. In the Enron case, top managers manipulated earnings reports to influence share value. They also overvalued assets and undervalued debt.

Researchers recently showed, using data from 31 countries, that managers' manipulation of earnings is positively correlated with the benefits they derive from this practice (on manipulation of earnings by firms, see Lev (2003) and the references in the article). The authors were surprised to note the extent that Enron's executive compensation committees kept silent about data manipulation by senior managers. Were these directors really incompetent? Were they in a conflict of interest because they were paid themselves by stock options? Did they have holdings in other companies that were doing business with Enron?

Evidently, the Enron case hinges more than the agency relationship between executives and their shareholders via directors. As mentioned above, the independent audit firm was questioned, along with the internal audit committee. Yet it is possible that financial analysts, brokers, consultants,

bankers, attorneys, and investors were not all independent. Even the regulation may have introduced distortions. As Demski (2003) explains, a general analytical framework that covers all these players could be used to evaluate the situation more precisely. However, no such framework exists.



NON-GOVERNMENTAL ORGANISATIONS

In this part of the study, the law applicable includes;

The NGO Registration Act 2016

The NGO Registration Regulations SI 113-1

The Companies Act 2012

The Trustees Incorporation Act Cap 165

The Trustees Incorporation Rules SI 165- 1

Advocates (Remuneration and Taxation of Costs) Regulations SI 267-4

Case law

Common law and Doctrines of Equity

THE CHECKLIST OR MAIN ISSUES ARISING INCLUDE;

- Whether the organization can register an NGO?
- If so which type of NGO is this (that is Local or foreign)?
- What appropriate steps should be taken to ascertain the registration
- What are the requisite fees?

THE MAJOR DOCUMENTS INCLUDE THE FOLLOWING;

- The memorandum and Articles of Association (in case of a company limited by guarantee) or a Constitution of the association (in case of registration under the Trustees Incorporation Act).
- Application to NGO Board.
- Written work plan approved by the Ministry for Planning and Economic Development.
- Recommendation by 2 sureties (for instance local leaders).
- Recommendation from the Line Ministry.
- Recommendation of Chairman LC 1, endorsed by LC2, LC3, RDC and DISO of the area where the organization intends to operate.
- Recommendation by a diplomatic mission in Uganda (in case of a foreign organization).

THE PROCEDURE FOR REGISTRATION OF A NON-GOVERNMENTAL ORGANIZATION

One can either incorporate a company limited by guarantee or register trustees of a body established for religious, charitable works inter alia with the meaning of the Companies Act (Supra) or the Trustees Incorporation Act under section 1.

The second step involves application to NGO Board in the form provided for in the schedule. This application is accompanied by a written work plan approved by the Ministry for Planning and Economic Development, recommendations by 2 sureties (for instance local leaders), recommendation from the Line Ministry, recommendation of Chairman LC 1, endorsed by LC2, LC3, RDC and DISO of the area where the organization intends to operate. The application is further supported by a recommendation by a diplomatic mission in Uganda (in case of a foreign Non-Governmental Organization).

The application is signed by at least 2 promoters in case the organization a local NGO. In case of a foreign company, the constitution supporting the application must be authenticated by a diplomatic mission in Uganda.

Upon payment of the requisite fee, a certificate of registration will then be granted which will be valid for a period of 12 months. In case of a first renewal, the certificate will be valid for a period of 36 months and for subsequent renewals, the certificate will be valid for a period of sixty months. Registration is in the Land Registry.

SUMMARY FOR STARTING A NON GORVENMENTAL ORGANISATION (NGOS)

In Uganda the Non-Governmental Organisations are regulated by the Non-Governmental Organisations Registration Act Cap 113 as amended in 2006. The Act governs the registration, management and governance of Non-Governmental Organisations. The requirements are set out below:

1. You need a letter of recommendation written by Local Council One Chairperson (LC I). This must recommend the organization. On the same letter, the Chairman LC II, LC III and Resident District

Commissioner (RDC) should each endorse their signatures and stamp. The organization can use the LC I from the area where it has its Headquarters.

2. The Organization should have written recommendation of two sureties or recommenders

who should each write separately recommending the organization. Technical areas of activities need recommendation from the concerned line Ministry/Department.

3. The Organization should have a work plan of its activities to be carried out for the first year of the term of operation. The activities or work plan for the one year should have budget i.e., how much is to be spent on each of those activities (this is tentative budget). The budget should reflect source of funds and the work plan.

4. The organization should have two copies of the Constitution or by By-Laws or Rules and should have provision in it specifying the purposes for which the funds are to be utilized.

5. The NGO should have an Organizational Chart/Administrative chart showing its leadership.

6. Every indigenous NGO is to pay Ug. Shs. 40,000/= registration fee.

7. Every organization is to fill Form A which should be duly completed and signed by at least two promoters. The names of the promoters should be printed in front of their signatures on the form. Promoters are the owners of the organization.

8. The Organization should bring all its papers/application on a Spring Manila File Cover.

9. On the cover of file, please print in Capital Letters the names of the organization, the address/Box number and telephone contacts in case you are required to appear before the NGO Board.

10. The organization should write a letter to the Secretary NGO Board specifying the area of their operation. This is what will be printed on the permit once granted.

11. Every organization should reserve its name with the Registrar General's Office at the Ministry of Justice. This is done to make sure that no other organization will use your names or the name of the organization is free to be used by you. In case of subsequent change of names, a reservation must be done again.

12. If the organization has a Foreigner working with it or the Foreigner is coming to join them, the organization should read section 13 of Non-Governmental Act 2006 (amended) and the relevant Regulations.

13. A Foreigner coming to assist the organization by staying with it should bring his/her: (a)Photocopies of his/her qualification papers. (b)Present Immigration Status in the Country. (c) A letter from his/her home Government that the subject has no criminal record i.e. he/she is of good conduct. (d)A letter appointing the subject to the position he/she is going to occupy. (e)All organizations seeking Entry Permits/Visas for foreigners on behalf of the NGO should get endorsement/recommendations from the NGO Board. This is to make sure that the Board/Secretariat is aware of such immigrants working with NGOs and the information of such immigrants is available on the NGOs File.

The NGO Board sits once every month. Any registering NGO should expect its Certificate of Incorporation after a month of lodging its papers. This is not always the case and there is often an application back log and it's not a guarantee that an application for registration will be completed in a month.
15. All Lawyers, consultants are advised to come with at least one of the officials of the organization being represented. The Secretariat will not welcome documents without their officials. Collection of Permits/Incorporation Certificates is by any official of the organization. Any other parties sent for that purpose should have authority letters from the organization. 16. Every Constitution must in addition to other requirements have a dissolution clause. 17. When an organization closes down (even temporarily) the NGO Board should be informed. International (foreign) NGOs in Uganda

1. A notarized recommendation letter from the home office from the country of origin where the organization is already in operation or from their embassy in Uganda is the promoters are already in Uganda.
2. A notarized letter from the headquarters of the organisation authorizing the opening of a branch in Uganda.
3. Recommendation from the diplomatic mission of Uganda in the country from which the organisation is originating.

4. Memorandum of Understanding between the Organisation and the relevant line Ministry in Uganda.

5. Photocopies of immigration status of the promoters.

6. Photocopies of qualification papers and evidence of work experience of volunteers coming to work in Uganda.

7. A certified notarized copy of the constitution of the organisation which should have been certified by the home office in the country of origin.

8. Curriculum Vitae of the promoters and expatriates working for the organisation in Uganda.

9. Certificates of good conduct from their government from their government for the people coming to work in Uganda.

10. Registration fees of USD$75Requirements for Renewal of Registration Certificates of both Uganda and Foreign NGOs

1. Application for Renewal Letter

2. A filled in Form 'A'

3. A recommendation letter from the Resident District Commissioner from the area they were operating in to confirm their operations.

4. Annual Report

5. Financial Report (Audited Accounts)

6. Minutes of Annual General Meeting, plus the attendance signed by all people present.

7. A Work Plan and an itemized budget.

PROCEDURE

HOW TO APPLY

Registration of NGO

1. The organization should write a letter to or visit the Secretary NGO Board specifying the area of their operation. This is what will be printed on the permit once granted.
    - Note: All Lawyers, consultants are advised to come with at least one of the officials of the organization being represented. The Secretariat does not welcome documents without their officials
2. The application form A can be downloaded from the ministry of interior affairs (MIA) website portal
3. Fill Form A which should be duly completed and signed by at least two promoters. The names of the promoters should be printed in front of their signatures on the form. Promoters are the owners of the organization
4. The Organization should bring all its papers/application on a Spring Manila File Cover.
5. On the cover of file, please print in Capital Letters the names of the organization, the address/Box number and telephone contacts in case you are required to appear before the NGO Board.
6. Every organization should reserve its name with the Registrar General's Office at the Ministry of Justice. This is done to make sure that no other organization will use your names or the name of the organization is free to be used by you. In case of subsequent change of names, a reservation must be done again
7. The NGO Board sits once every month, to verify and process all the applications from varies NGO's applicants,

Issuance of certificate of Registration

1. If the NGO application has complied with the requirements for registration, the Bureau shall issue a certificate of registration to the organization.
2. The certificate of registration shall be in Form B prescribed in the schedule and shall indicate the name, registration number and the date of registration of the organization.
3. Collection of Permits/Incorporation Certificates is by any official of the organization after a month of lodging its papers. Any other parties sent for that purpose should have authority letters from the organization.

Apply through Agent

There may be an additional cost involved with this process **Note**

- Every Constitution must in addition to other requirements have a dissolution clause.
- When an organization closes down (even temporarily) the NGO Board should be informed.

Advertisement

Required Documents

Registration of NGOs incorporated within Uganda

An application for registration of an NGO shall be in Form A and accompanied by:

- a certified copy of a certificate of incorporation;
- a copy of the Organization's governing documents;
- a chart showing the governance structure;
- proof of payment of the prescribed fee;
- source of funding of the activities of the organization;
- a copies of valid identification document for at least two founder members
- Minutes and resolutions of the members authorizing the organization to register with the Bureau;
- a statement complying with section 45 of the Act(staffing);
- a recommendation from
- DNMC where the headquarters are located;
- A line ministry or a government department or agency;
- The application for registration of an organization shall be signed by at least two founder members

Registration of NGOs incorporated outside Uganda

Any NGO incorporated outside Uganda shall apply to the Bureau for registration in Form N and the application shall be accompanied by: -

- Proof of payment of prescribed fees
- a certified copy of certificate of incorporation from the country of origin;
- a certified copy of its constitution, or charter, or memorandum of association, or any other documents governing the NGO;
- a certified copy of resolution authorizing registration in Uganda;
- a certificate of good conduct of the signatories to the resolution in sub regulation 3(d) or at least two board members of the NGO;

- a curriculum vitae of at least two board members of the NGO;
- a recommendation from their government or missions accredited to Uganda;
- a recommendation from the ministry of foreign affairs in Uganda;
- a chart showing its organizational structure as stipulated in its governing documents;
- a copy of valid identification document for at least two board members;
- a work plan and budget or strategic plan for the organization;
- a statement complying with **Section 45 of the Act (staffing);**
- a recommendation from;
- DNMC where its headquarters will be located;
- and the responsible ministry or ministries or government or department or agency.

COMMUNITY BASED ORGANIZATION(CBO)

WHAT IS A COMMUNITY BASED ORGANIZATION?

A Community Based Organization (CBO) is an organization operating at a sub county level and below whose objective is to promote and advance the wellbeing of the members of the community. From the definition of a community-based organization, it is clear the organization is expected to work beyond one sub county and where it is necessary for a community based organization to work beyond a sub county, it should apply for extension of area of coverage.

A Community Based Organization once registered does not become a legal person. For this reason, the Community Based Organization cannot own property, employ people or enter into contracts. A CBO is also limited in terms of areas of operation since it cannot be allowed to work beyond a sub county.

A person or a group of persons intending to register a community-based organization will apply to the (District NGO Monitoring Committee) DNMC through the Sub-County NGO Monitoring Committee [SNMC] for registration. The SNMC will recommend the CBO to the DNMC for registration. The persons applying should fill Form K, which should be accompanied by

a. the Constitution of the CBO;

b. a recommendation from the SNMC;

c. work plan, budget or strategic plan; and

d. proof of payment of prescribed fees (Ugx: 40,000/=).

The DNMC will consider the application and register the CBO and issue it with a certificate in Form L. The certificate issued has the name of the CBO, the objectives and the area where the CBO will operate. A All CBOs are registered at the DNMC of the district in which they plan to operate.

The DNMC can refuse to register a Community Based Organization if:

a. The objectives of the CBO as specified in its constitution are in contravention with the laws of Uganda; b. The application for registration does not comply with the requirements of the law;

c. The applicant has given false or misleading information in any material particular; and

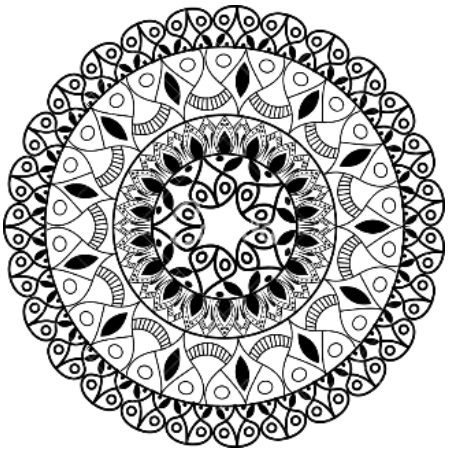
d. The proposed name of the CBO is the similar to that of an existing NGO or any entity operating within the same district; or

e. The proposed name of the CBO is confusing or undesirable.

The DNMC may require persons registering the CBO to change the names or other things to be able to register them. Where the DNMC refuses to register a CBO, it shall give reasons for the refusal in writing and notify the organization of its decision within 30 days in Form M.

The DNMC will inform the persons of the refusal to register the CBO and the reasons for refusal within 30 days. The person who has been refused to register a CBO can seek redress from the Arbitration Tribunal or from courts of laws.

A CBO is required to submit its annual returns in Form S at least once in every 12 years to the SNMC for forwarding to the DNMC. The returns shall be accompanied by a financial report, a copy of annual report, and minutes of the general assembly or governing board of the organization.



JOINT VENTURES

The law applicable to this area of study includes the following;

The Constitution of the Republic of Uganda 1995 (and its subsequent amendments)

The Judicature Act Cap 13

The Companies Act 2012

The Investment Code Act Cap 92

The Investment Code (Acquisition of land by foreign Investors) (Exemption) Instrument SI 92-1

The Uganda Citizenship and Immigration Act Cap 66

The Contract Act Cap 73

The Stamps Act Cap 342 as amended by Act 12/2002

The Uganda Registration Services Bureau Act Cap 210

Common law and doctrines of Equity

The checklist/ issues which need resolution in this area of the law include;

- Whether the parties have the capacity to enter into a joint venture Agreement?
- What are the relevant laws and procedures for establishing the intended business venture?
- What is the most appropriate type of company to be incorporated?
- What is the procedure, forum and documents to effect the above?
- What is the main objects clause, and clauses incidental thereto, in the joint venture agreement?

- What documents would prevail in case of conflict between the memo, articles and the joint venture agreement?
- What are the relevant fees?

The major documents a prudent lawyer would draft include the following;

- Joint venture agreement.
- Application for reservation of the company name
- The memorandum and articles of association of the intended company. (especially the objects clause)
- The statement of nominal capital (Form A1).
- The statutory declaration of compliance (Form A2).

JOINT VENTURE COMPANIES.

A joint venture is defined as a contribution between two or more persons of tangible and or intangible assets towards a mutual conduct of activity in which the parties share in the management of profits and losses of an activity. It can also be referred to as an association of persons jointly undertaking a commercial enterprise.

In relation to capacity to form one, in a scenario where the parties are legal entities such as companies, the cardinal principle in **SALMON VS SALMON**(supra) is followed; thus, since it is a legal entity separate and distinct from the persons who comprise it, this means that it includes capability to enjoy rights and duties granted to it by law.

It must be noted further that by virtue of **section 33** of the companies act, a company is empowered to make contracts in writing or parole. This is fortified by **KINTU VS KYOTERA COFFEE GROWERS (U) LIMITED [1976] HCB 306**

Where one of the companies proposing to enter the agreement is foreign; it has to adhere to all the relevant requirements of the law relating to Immigration and foreign investments. In this regard, section 9(1) of the investment code act defines an investor to include a company, whereby 50% of its shares are held by a person who is not a citizen of Uganda.

In addition, **Section 54 of the Uganda Citizenship and Immigration Control Act Cap 66** provides that no person not being a Uganda shall enter or remain in Uganda without a valid entry permit, certificate of permanent residence or pass issued under the Act. Section 60 provides further that no foreigner shall engage in private business in Uganda without a valid entry permit or certificate of permanent residence.

In the same vein, by virtue of section 10 of the Investment Code Act, a foreign investor shall not establish a business in Uganda unless he has gotten an investment license, in the form of the provisions of section 11(1) of the Act.

There are basically two types of ventures; it can either be a contractual joint venture where two parties merge to form a new company distinct from the contracting parties; or it can be a joint venture where the companies merge and restructure to form a new company, through change of shareholding, capital and directors.

The additional information one would need to obtain from the parties before embarking on this venture is evident in **Section 4(1) and Table A** to the schedule of the Companies Act. This information is then put in the subsequent documents; the information includes:

- The name of the company.
- The objects of the company.
- Share capital and the share structure
- Intended bankers and signatories to the company accounts
- Location of head office
- Occupational and postal addresses of the shareholders and directors.
- Nature of liability of the members
- Criteria for appointment of directors and their removal
- Transfer and transmission of shares.
- Voting rights of members.
- Meetings and procedures
- Dispute resolution
- Appointment of auditors, inter alia.

THE PROCEDURE IS ENUNCIATED AS FOLLOWS (COMPARE THIS WITH PROCEDURE FOR INCORPORATION OF A COMPANY).

- Reservation of company name.
- Draft of Joint venture agreement.
- Draft the Articles and memorandum of association
- Make a declaration of statutory compliance.
- Lodge documents with registrar, who assesses the stamp duty.
- Issuance of a certificate of incorporation upon payment of stamp duty.

CONTRACTS OF GUARANTEE

Section 68 of the Contracts Act 2010 defines a contract of guarantee to mean a Contract to perform a promise or to discharge the liability of a 3rd party in case of default of that 3rd party it may be oral or written.

Paragraph 3 of the Bank of Uganda final consumer protection guidelines defines a guarantee to mean any document, notice or other written statement containing an undertaking however described given

by a guarantor promising to fulfill the obligation or discharge the liability of a 3rd party if that 3rd party fails to do so.

Section 70 at the contracts Act 2010, anything done or any promise made for the benefit of a principal debtor may be sufficient consideration to a guarantor to give a guarantee.

BARCLAYS BANK OF UGANDA VS. JUNG HANG AND ANOR, HEES NO. 39/2009, of relying on Paget's law of Banking 11thedition, chapter 35, Page 617, defined a guarantee as a promise 26 liable to a debt on failure to perform some legal obligation of another.

SOLVENT FEATURES OF THE CONTRACT

- Should be in writing Section 10 (6) Contracts Act
- Offer by guarantor and acceptance by the bank.
- Consensus all item
- Consideration for guarantee Section 70 Contract Act 2010
-

DUTIES OF A GUARANTOR

The primary duty of a guarantor is to ensure that the principal debtor pays off the debt.

MASHD VS – LEP AIR SERVICES[9], stated that a contract of guarantee gives to the guarantor an obligation to the customer that the debtor performs his obligation to the creditor.

LIABILITY OF A GUARANTOR

According to **Section 71 Contracts Act, 2010**, the liability of a guarantor shall be the extent to the principal debtor is liable unless otherwise provided by a contract[10] with liability of a guarantor takes effect upon default by the principal debtor.

Halsbury's Laws of England 4th edition, Vol. 20 para 123, the liability of a guarantor arises only upon the default of the principal debtor in his/her obligations.

IN BANK OF UGANDA VS – BANCOARAB ESPANOL CA 23/2000– once a principal debtor defaults, the guarantor has a duty to repay to loan.

IN MOSHUVSLEPAOR SERVICES LTD (1973) AC it was held that a default of the principal debtor, expert from some special stipulation to the contrary, the surety guarantor is immediately liable to the full extent of the obligation without being entitled to inquire about either a notice or a default

[9] (1973) Ac 331
[10] S.71(1)

or previous recourse against co-sureties. It is a guaranteed obligation on the guarantor to pay the debt in the event of default by the principal debtor.

UCB CORPORATED SERVICES LTD VS CLYDE AND CO. (2002) 2 ALLER 457; it was held that so long as there was a duty executed guarantee, the guarantee is bound by its undertaking.

RIGHTS OF A GUARANTOR

Section 81 Contracts Act 2010, provides that where a guaranteed debt becomes due to guarantor is upon payment of performance of all that the guarantor is liable for, invested the all of rights of the creditor had against the principal debtor.

Section 52(1) provides that a guarantor is entitled to the benefit of every security to a creditor has against a principal debtor of the time a contract of guarantor-ship is entered into whether the guarantor knows of the existence of the security or not.

Section 85 provides for the right of indemnification.

Section 85(1) stipulates that in every contract of guarantee, there is an implied promise by a principal debtor to indemnity a guarantor.

Section 85 (2) provides a guarantor is entitled to revoke from a principal debtor any sum with guarantor rightfully, paid under the guarantee on the contract.

SHELL UGANDA LTD VS CAPTAIN MAXEEM CHAUDRY[11]; court stated at the guarantor's right of indemnity against the liability of they had undertaken to answer for is entitled to be indemnified by the principal debtor, the said right arise on an actual payment by him.

Section 74 rights to consent to variance in terms of the contract.

DISCHARGE OF A GUARANTOR

Section 74 of the contracts Act, 2010, any variance made in the terms of a contract between a principal debtor and a creditor court with consent of a guarantor discharges the guarantor from any transaction with is subsequent to the variance.

BANCO ARABE ESPANOL V BANK OF UGANDA - SUPREME COURT CIVIL APPEAL NO. 8 OF 1998 Okello J, stated that any alteration however Bonafide by the creator and principal debtor court consent of the surety at the terms of the original agreement so far as they relate to the subject matter in respect to the surety discharges him/her unless it is self-evident that the alteration

[11] ***HCCS*** No 179/2004

is unsubstantial or one which cannot be prejudicial to the surety or unless it is provided for in the guarantee.

Section 76 – discharge of guarantor when creditor compromises which gives time to or agrees not to sue the principal debtor.

Section 80 – discharge of guarantor where the eventual remedy of the guarantor against a principal debtor is impaired because a creditor does any act or omits to do any act which is inconsistent with the right of the guarantor.

Section 82(2) Discharge of Guarantor where the creditor loses or puts with the security without the consent of the guarantor.

Section 77 Guarantor not discharged where a contract to give time to a principal debtor is made by a creditor with a 3rd person and not with the principal debtor.

Section 78 Mere forbearance on the part of a creditor to sue a principal debtor or to enforce any other remedy against the principal debtor or to enforce any other remedy against the principal debtor does not in the absence of any provision in the guarantee to the contrary discharge the guarantor.

VITIATING FACTORS

1. Misrepresentation

Section 83 of the Contracts Act 2010, a guarantee which is obtained by misrepresentation made by a creditor or with which knowledge and assent of a creditor concerning a material part of the transaction is void. Guidelines 6 paragraph 6(5) of the Bank of Uganda Guidelines Prior to a person acting as a guarantor a financial services provider shall in writing advice the person of the question of the quantum and nature of the potential liabilities and to seek independent legal advice before activity as a guarantor,

According to **ROYAL BANK OF CANADA (1934) AC 468** –a contract of guarantee like any other contract is liable to be avoided if induced by material representation of existing facts.

2. **Mistake of fact**

Section 14(1) of the Contacts Act 2010, where both parties to an agreement are under a mistake of fact which is essential to the agreement, consent is obtained by mistake of fact and the agreement is void.

Section 17 (2) – a contract is a void where one of the parties to it operates under a mistake as to a mistake of fact essential to market.

3. **Undue influence**

Section 14(1) of the Contracts Act 2010, a Contract is initiated by undue influence as it helps one partly to gain unfair advantage over the other. **Section 16(1) Contracts Act**, where consent to an agreement is obtained by coercion undue influence fraud or misrepresentation, with party where consent was obtained by coercions undue influence, fraud or misrepresentation **Section 15 (fraud**). Is there an obligation to explain to the Guarantor the indebtedness of the principal debtor by the Bank?

In **BAGULA & 3 ORS V LUBEGA (CIVIL APPEAL 31 OF 2008)**

It held that where a contract is obtained by duress or undue influence, it renders the contract made as a result thereof avoidable

A contract of guarantee is not uberima fide, thereof the creditor has a duty to disclose to the surety before the exist is concluded all material circumstances known to the creditor.[12] Yet a creditor does have a limited duty of disclosure, the scope of the depends upon the particular type of guarantee in question.

The Banker is not bound to volunteer to a propulsive guarantor information as to the customer's financial position or business habits.

HAMILTON VS – WATSON*[13]* Lord Campbell held that disclosure would otherwise be a duty only where what had taken place between the bank and the principal debtor was not naturally to be expected.

LEVE H VS BARCLAYS BANK PLC (1995) 1 WLR 1260, the sureties agreed to allow their short dated treasury stock to be used as security in order to assist the principal debtors to borrow money short term from the bank, provided that the security went not encased and was returned before its maturity date the bank did not disclose to the sureties that the terms of the facility letter governing the advance made it certain with the advance, which was to be repaid on the date that the stock matured would be repaid without recourse to the automatically realized on maturity. It was found as the sureties would have acted differently had they known the position and accordingly the executives of the securities provincial marine insurance co.[14]

Yet a creditor does have a limited duty of disclosure, the scope of the depends upon the particular type of guarantee in question. The Banker is not bound to volunteer to a proposing guarantor information as to the customer's financial position or business habits. In **Hamilton v. Watson, 215 Ala. 550, 112 So. 115 (Ala. 1927)** held that disclosure would otherwise be a duty only where what had taken place between the Bank and the principal debtor was not naturally to be expected.

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[12]Daner vs Condom and provincial making insurance co (1878) 8 Ch. D 469 act 475.
[13] (1914) S.C 259
[14] (1878)8 ch. D 469 at 975.

advance made it certain in the advance, it was to be repaid on the date that the stock matured would be repaid without recourse to the differently had they known the position and accusingly the executives of the sureties were entitled to recover the proceeds at the stock. The bank is therefore possessed on obligation to advice the guarantor to seek independent legal advice.

REMEDIES TO THE PARTIES

1. The guarantors are discharged and therefore are not liable to pay.

COUTLES AND CO. VS, BRAUNE – LACKEY AND ORS (1947) KB 104, it laid down the principle of the liabilities of a guarantor is a matter of contract and that if the contracts on the basis that be is liable only it with principles debts is liable there is no ground of imposing a different liability.

PERRY LAVESE LTD VS- INNECER AG[15]; Scott is stated that in the construction of the guarantee Contract the intention of the parties is guaranteed so as to ascertain the form of guarantee Contract, they intended to contract to be for example demand guarantee.

DIFFERENCE BETWEEN GUARANTORSHIP AND SURETYSHIP

Pagers Law of Banking 12th edition pg. 730 paragraph 34.2 it stated that:

The essential difference between a guarantee in that instance, a demand guarantee is that the liability of a sweaty is secondary. Whereas the liability of the issuer of a demand guarantee is primary. A surety ship liable is co – extensive in that of the principle debts and it defaults by the principal debtor is disputed by the party. It must be proved by the creditor. Neither proposition applies to a demand guarantee. The principle with underlies demand guarantee the principle the underlines demand guarantees is that each contract is autonomous. In particular, the obligations of the guarantor are not affected by dispute under the under right between the beneficiaries and the principal if the beneficiary makes an honor demand. The principal must reimburse the guarantor (or counter-guaranteed) and dispute between the principal that the discoursing was a breach of the contract between them, must be resolved in separate proceedings to the bank will not be a party.

EDWARD OWEN ENGINEERING VS BARCLAYS BANK INTERNATIONAL LTD (1978) 198 159; the learned judge held that the insister must pay according to its guarantee on demand if so, stipulated without proof of condition, the only exception being fraud. Such guarantees are naturally promising notes that are payable on demand. It was held that a performance guarantee must honor the guarantee according to its terms. It is not concerned in the least with the relation between the supplier and contractual obligation or not nor with the question whether the supplier is in default.

[15] (1983) I WLR 463 at 489

The bank must pay according to its guarantee on demand. It so stipulated without proof or condition only exception is where there is fraud of which the bank has notice.

LION ASSURANCE CO. LTD VS NATIONAL HSG AND CONSTRUCTION CO. LTD[16]; Madrama J held that demand guarantees are autonomous from the underlying, Contract with when a demand is made. It should be settled properly especially if the wording is such as to make it clear that the guarantor undertook to make good upon demand court proof of conditions, the settled exception being fraud. The relevant date for knowledge of fraud is a date prior to payment.

The exception or destruction on demand guarantees however does not apply where a mortgage was executed.

In **MARIA ODUDO VS BARCLAYS BANK OF UGANDA LTD HCMA 45/2008**, if default by a principal debtor is disputed by the guarantor, it must be proved by the creditor before the guarantee is made enforceable notwithstanding with understanding that it is an on-demand guarantee. The same was reiterated in **WILLIAM SEBULIBAKAYONDO AND BERKELEY EDUCATION ENT. LTD. VS BARCLAYS BANK OF UGANDA LTD**[17]

In **GEORGE SEMBULE VS BARCLAYS BANK**[18]where a mortgage was created, the extent of the guarantor's obligation is constrained by the obligation under the mortgage.

BILLS OF EXCHANGE

Section 2(1) of the Bills of Exchange Act, Cap 68 defines a bill of exchange as an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring a person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person or to bearer.

Section 2(4) a bill is not invalid by reason:

a) That it Is not dated

b) That it does not specify the value given or that any value has been given therefore.

c) That it does not specify the place where it is drawn or the place where its payable.

Section 2 (2) any instrument which does not comply to the conditions in **Section 2(1)** or the orders any act to be done in addition to the payment of money is not a bill of exchange.

Section 22 – no person is liable as drawer, endorser or acceptor of a bill who has not signed.

Section 4(1) a bill may be drawn payable to or the order of the drawer or it may be drawn payable to or to the order of the drawee.

[16] HCMA No. 411/12
[17] HCMA No. 325/2008.
[18] ***HCMA*** No. 267/2008

Section 4(2) where a bill drawer and drawee are the same person or where a drawee is a fictitious person or a person not having capacity to it, the holder option either as a bill of exchange or as a promissory note.

Section 5(1) the drawee must be named or otherwise indicated in a bill with reasonable certainty.

Section 5(2) a bill may be addressed to or more drawees whether they are partnership or not but an order addressed to drawer in the alternative or two or more drawees in succession is not a bill of exchange.

Section 6(1) where a bill is not payable to bearer, the payer must be named or otherwise indicated in it the reasonable certainty.

Section 7(2) a negotiable bill may be payable either to order or to bearer.

Section 7(3) a bill is payable to bearer which is expressed to be so payable or on which there only or last endorsement is an endorsement in black.

Section 8(1) with sum payable by a bill is a sum certain within the meaning of this act.

Section 9(1) a bill is payable on demand

a) Which is expressed to be payable on demand or at sought or on presentation or

b) in which no time for payment is expressed forget signature.

Section 23 where a signature on a bill is forged or placed on a bill about authority of the person, whose signature is purports to be, the forged signature is wholly in operative and no right to retain the bill or to give a discharge of it or enforce payment of it against any party to it can be acquired through or under that signature unless the party against whom its sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority but nothing in this section shall affect the ratification of an unauthorized signature not amounting to a forgery.

BUSENGORA DEVELOPMENT ASSOCIATION LTD. VS CEBTEBNART RURAL DEVELOPMENT BANK[19]; court held that any signature on a bill that is forged or placed one bill court authority of the person whose signature it purports to be what forged or unauthorized signature is wholly inoperative. Its meaningless and of no legal consequence for whatever its worth as far as the bill is concerned.

Section 63(1) where a bill or acceptance is materially altered court consent of all parties, liable on the bill, this bill is avoided except as against the party who has himself or herself made authorized or assented to the alteration and subsequent endorses except that where a bill has been materially altered but the alteration is not apparent and the bill is in the hands of a holder in due course, the holder may avail himself / herself of the bill as if it had not been altered and may enforce payment of it according to its original tenor (state / purpose).

Section 63(2) in particular, the following alteration are material;

[19] HCCS No. 48/2004

1) where a bill or acceptance is materially altered court with assent of all parties liable on the bill, the bill is avoided, except as against a party who has himself / herself made.

2) Namely, any alteration of the date, the sum payable, the time of payment, the place of payment and, where a bill has been accepted generally, the addition of a place of payment without the accepter's consent.

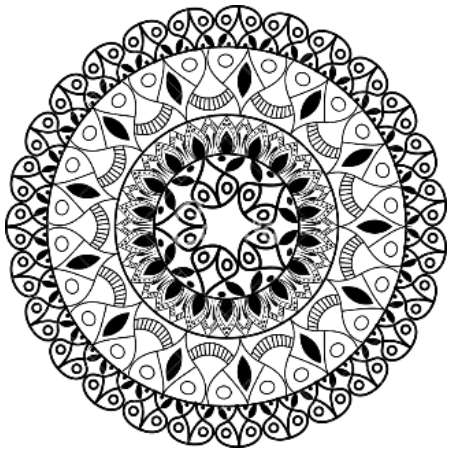
Section 68 replacement of a lost bill.

CHEQUES

Section 72(1) a cheque is a bill of exchange drawn on a banker payable on demand.

Contract based on a cheque.

1. Signature is essential Section 22 and Section 2(1)
2. Capacity to it i.e., general laws of it Section 21
3. It should be in writing
4. Offer and acceptance – Section 2(1)
5. Consideration Section 2(1)
6. Delivery S.20



PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS (PPDPA)

WHAT IS PROCUREMENT AND A PROCUREMENT PROCESS?

Procurement is defined in Section 3 of the Public Procurement and Disposal of Public Assets Act 2003,(As amended) (hereinafter as PPDPA) as acquisition by purchase, rental, lease, hire purchase, license, tenancy, franchise or any other contractual means of any type of works, services or supplies or any combination.

Section 3 further defines a procurement process as the successive stages in the procurement cycle including planning, choice of procedure, measures to solicit offers from bidders' examination and evaluating of those offers, award of contact and contract management

WHAT IS DISPOSAL AND A DISPOSAL PROCESS?

Section 3 of the PPDPA defines disposal as the divestiture of public assets, including intellectual and proprietary rights, good will and any other rights of a procuring and disposal entity by any means including sale, rental, lease, franchise, auction or any combination however classified other than those regulated by the public enterprise reform and divestiture statute 1993.

Section 3 also defines a disposal process as the successive stages in the disposal cycle including planning, choice of procedure, measures to solicit offers from bidders, examination and evaluation of those offers and award of contract.

Key terms defined.

These are defined under Section 3 of the PPDPA.

a) Award is defined as a decision by a district contracts committee established under the LGA or contracts committee established under the PPDPA, or any other subsidiary body of a procuring and disposing entity to which a contracts committee or district contracts committee may delegate powers of adjudication and award within a specified financial threshold to determine the successful bidder.

b) Bid is defined as an offer to provide or to acquire works, services or supplies or any combination thereof, and shall include pre-qualification where applicable.

c) Bid-notice is defined as any advertisement by which eligible providers are invited to submit written offers to provide or acquire works, services and supplies, or any combination of them in case of procurement and disposal respectively.

d) Consultancy service means a service of an intellectual or advisory nature provided by a practitioner who is skilled and qualified in a particular field or profession and includes but is not limited to, engineering designer supervision, accountancy, auditing, financial services, procurement services, training and capacity building services, management advice, policy studies and advice and assistance with institutional reform.

e) Consultant is defined as an individual who or a firm, company, corporation, organization or partnership which provides consultancy services.

f) Foreign provider is a provider whose business is not registered in Uganda.

g) Resident provider is a provider registered in Uganda who is not a national provider

h) Non-consultancy services mean services of skilled or a non-skilled nature which is not a consultancy service and includes cleaning, security and maintenance and repair services.

i) National provider means a provider registered in Uganda and wholly owned and controlled by Ugandans.

j) Pre-qualifications are defined as screening process designed to ensure that invitations to bid are confined to capable providers.

k) Bid documents/solicitation documents are documents inviting bidders to participate in procurement or disposal proceedings and include documents inviting potential bidders to pre-qualify and standard bidding documents.

l) Suppliers means goods, raw materials, products, equipment ,livestock, assets, land, or objects of any kind in the form of electricity or intellectual and proprietary rights as well as works or services: incidental to the provision of those supplies where the value of the works or services does not exceed the value of supplies.

m) Works means any work associated with the constitution, reconstruction, demolition, repair or renovation of a binding or structure on the surface or underground on and under water and includes the preparation, excavation, erection, assembly, installation, testing and commissioning of any plant, equipment or materials, decoration.....as well as supplies or services incidental to their works where the value of the incidental supplies or services does not exceed the value of the works.

ACTIVITIES TO WHICH THE PPDPA APPLIES

Pursuant to Section 2 (1), the act applies to all public procurement and disposal activities and in particular applies to:

a) All public finances

b) Resources in the form of counterpart transfers or any finances of similar nature within the context of development, cooperation agreements for the implementation of national programs.

c) Procurement and disposal entity, within or outside Uganda.

d) Procurement financed from specific public finances specified in (a) in the case of an entity not being of government, except where the authority confirms in writing, that the procurement system of the entity is satisfactory.

e) Procurement and disposal by a company registered under the company's act in which a procuring and disposing entity has majority interest.

The following activities by a procuring and disposal entity are not procurement as per Section 2 (19) of the PPDPA.

I. The acquisition of an asset or of equipment where the asset or of equipment is being disposed of another procuring and disposing entity in accordance with Section 87.

II. The acquisition of a service provided by another procuring and disposing entity except a service normally offered by that procuring and disposing entity for a fee.

III. The recruitment of the services of an individual as an employee of a procuring and disposing entity in accordance with the administrative policies of the procuring and disposing entity.

WHAT IS A PROCURING AND DISPOSAL ENTITY.

Under Section 3 of PPDPA, a procuring and disposing entity includes the following:

a) A ministry or department of government\

b) A district council or a municipal council

c) A body corporate established under an act of parliament other than the company act.

d) A company registered under the companies act in which government or a procurement and disposing entity

I. Controls the composition of the board of directors of the company

II. Is entitled to cast or controls the casting of more than 50% of the maximum number of notes that may be cast at a general meeting of the company.

III. Controls 50% of the issued share capital of the company, excluding any part of the issued share capital that does not carry a right to participate beyond a specified amount in the distribution of profits or capital.

e) An entity not being a government department but whose procurement is financed from specific public finances under Section 2 (1) (d) of PPDPA.

f) A commission established under the constitution or under an act of parliament.

g) A public university and public tertiary institution established under the universities and other tertiary institutions Act, 2001.

h) Bank of Uganda in Section 4 of the Bank of Uganda Act.

i) Any other procuring and disposal entity as maybe prescribed by the minister.

BASIC PROCUREMENT AND DISPOSAL PRINCIPALS

Pursuant to Section 43 of PPDPA, all public procurement and disposal must be conducted in accordance with the following the principles:

a) Non discrimination

b) Transparency, accountability and fairness

c) Maximization of competition and ensuring the value for money

d) Confidentiality

e) Economy and efficiency

f) Promotion of ethics.

a) Non-discrimination (Section 44)

OBJECTION MY LORD

A bidder cannot be excluded from participating in public procurement and disposal on the basis of nationality, race, religion, gender or any other criteria not related to qualification except as provided for in the act.

b) Transparency, accountability and fairness. (Section 45)

All procurement and disposal processes must be conducted in a manner which promotes transparency, accountability and fairness to all involved.

c) Competition (Section 46)

All procurement and disposal must be conducted in a manner that maximizes competition and achieves value for money.

d) Confidentiality (Section 47)

Information obtained or relating to the procurement and disposal must be kept confidential.

However, where a written request is made in respect to the information, the procurement and disposing entity must disclose the information regarding the procurement or disposal process. (Section 47 (1))

Section 47 (2) allows the entity to withhold information upon a written request being issued , where a person who is not involved in the preparation of the solicitation documents, the evaluation process or the award decision , seeks information relating to solicitation documents are officially issued an information relating to the examination, clarification, evaluation and comparison of bids before the best evaluated bidder notice is displayed on the procurement and disposal notice board of the procuring and disposal entity.

The entity may also withhold information where the disclosure is likely to prejudice the security or sovereignty of the state, the disclosure interferes with the right to the privacy of any person, the disclosure would amount to a breach of the law, impede law enforcement or would not be in public interest.

Further the entity shall not disclose information which contains proprietary information including information relating to any manufacturing process, trade secret, trademarks, copyright, patent , or formula protected by lower by international treaty to which Uganda is a party: or scientific or technical information , the disclosure of which is likely to cause harm to the interest of the proper functioning of any procuring and disposal entity or information supplied in confidence by a bidder , the disclosure of which could reasonably be expected to put that bidder at a disadvantage in contractual commercial negotiations or to prejudice the bidder in commercial competition.

e) Economy and efficacy (section 48)

Procurement and disposal must be conducted in a manner which promotes economy, efficiency and value for money.

f) Ethics (Section 49)

Procurement and disposal must at all times be carried out in accordance with the codes of ethics as specified by the authority from time to time.

Under **Section 93 (1) of PPDPA**, public officers and experts engaged to deliver services must sign on to the code of ethical conduct provided in the 5th schedule to the act.

Section 93 (2) mandates all providers of works, services or supplies to sign a declaration of compliance with codes of conduct determined by the authority from time to time.

The authority issued the public procurement and disposal of public assets guidelines No.4 of 2014 on codes of ethical conduct for bidders and providers.

The guidelines mandate that the code of ethical conduct must be part of the bid submission sheet and must be signed by the bidder.

THE VARIOUS PLAYERS IN A PROCURING AND DISPOSING ENTITY.

Section 24 of the PPDPA provides for the composition of a procuring and disposing entity. The entity is comprised of:

a) An accounting officer

b) A contracts committee

c) A procurement and disposal unit

d) A user department

e) An evaluation committee.

a) Accounting officer.

Pursuant to **Section 26 (1)**, an accounting officer has the overall responsibility for the execution of the procurement and disposal process in the entity.

He or she is particularly responsible for:

a) Establishing a contracts committee

b) Appointing the members of the contracts committee as specified in the 3rd schedule

c) Causing to be established a procurement and disposal unit

d) Advertising bid opportunities

e) Communicating award decisions

f) Certifying the availability of funds to support the procurement or disposal activities

g) Signing contracts for procurement or disposal of activities on behalf of the procuring and disposing entity upon approval by contracts committee. In emergency situations through approval of the contracts committee (Section 226 (2)). The accounting officer must inform the contracts committee of the signing within 7 working days and send report to the authority within 10 days. (Section260).

h) Investigating complaints by providers

i) Submitting a copy of any complaints and reports of findings to the authority.

j) Ensuring that implementation of the awarded contract is in accordance with the terms and conditions of the award.

k) Pursuant to Section 26 (4), the accounting officer must prior to commencement of a procurement process undertake an assessment of the market price of the supplies, services or of the unit costs of the works in respect of which the procurement is to be made by the entity.

Section 26(5) empowers the accounting officer to reject a contract, where the price quoted by the bidder who is evaluated by the contracts committee as the best evaluated bidder is higher than the market price established by the accounting officer. The officer is forbidden from signing such contract.

An accounting officer may pursuant to **Section 39** delegate certain procurement and disposal functions of accounting officer, contracts committee or procurement and disposal unit.

b) CONTRACTS COMMITTIE

Section 27 (1) stipulates that the composition of the contracts committee is as specified in the 3rd scheduled to the act. The 3rd schedule stipulates that the composition of the contracts committee shall be:

a) A chairperson

b) A secretary

c) A maximum of three other members appointed by the accounting officer one of whom must be a lawyer.

The members are nominated by the accounting officer and approved by the secretary to the treasury. Section 27 (2) the appointment is as prescribed in form 1 of the 2nd schedule of the PPDPA (procuring and disposing entity regulations.) also Regulation 9(1) of the PPDPA 9procuring and entities) regulations.

Under Section 27 (2) (a), the following officers of the entity are not eligible for appointment to the contracts committee:

a) The head of procurement and disposal unit

b) The head of the finance department, but not the head of the account's department where the positions are held by different officers

c) The staff of the department of internal audit

Accounting officer must pursuant to **Section 27 (4)** inform the authority of the composition of the contracts committed and the qualifications of its members not later than 14 days from the date of its appointment.

FUNCTIONS OF THE CONTRACTS COMMITTEE

The functions of the contracts committed are stipulated under **Section 28 of PPDPA** and these include:

a) Adjudication of recommendations from the procurement and disposal unit and award of contracts

b) Approving the evaluation committee

b (a) Approving negotiation teams

b (b) Ensuring that before it is approved, a procurement is in accordance with the procurement plan.

c) Approving bidding and contract documents.

C (a) for the purposes of disposal of the public assets of an entity:

I. Assessing and certifying the public assets identified by a user department or by the board of survey for disposal

II. Causing the assets identified under (1) to be valued in accordance with regulations made under the PPDPA

III. Approving the reserve price for the public assets to bed disposed of

d) Approving procurement and disposal procedures

e) Ensuring that best practices in relation to procurement and disposal are strictly adhered to by the entity

f) Ensuring compliance with the PPDPA

g) Liaising directly with the authority on matters within its jurisdiction.

Powers of the contracts committee

These are enshrined in Section 29 of the PPDPA. The contracts committee is empowered to :

a) Authorize

   I. The choice of a procurement and disposal procedure

   II. Solicitation of documents before issue

   III. Technical, financial or combined evaluation report

   IV. Contract documentation in line with the authorized evaluation report.

   V. Any amendment to awarded contracts.

d) Recommend for the delegation of a procurement or disposal function by the accounting officer whenever the necessity arises

e) Award contracts in accordance with applicable procurement or disposal procedures as the case maybe.

C) PROCUREMENT AND DISPOSAL UNIT.

Section 3 defines PDU as a division in each procuring and disposing entity responsible for the execution of the procurement and disposal function.

Section 30 mandates every procuring and disposing entity to establish a procurement and disposal unit.

FUNCTIONS OF THE PROCUREMENT & DISPOSAL UNIT(PDU).

These are stated under Section 31 of PPDPA and they include:

a) Manage all procurement or disposal activities of the procuring and disposing entity except adjudication and the award of contracts
b) Support the functioning of the contracts committee
c) Implement the decisions of the contracts committee.
d) Liaise directly with the authority on matters within its jurisdiction
e) Act as a secretariat to the contracts committee
f) Plan the procurement and disposal activities of the procuring and disposing entity
g) Recommend procurement and disposal procedures
h) Check and prepare statements of requirement
i) Prepare bid documents
j) Prepare advertisement of bid opportunities
k) Issue bidding documents
l) Maintain a providers list
m) Prepare contracts documents
n) Issue approved contract documents
o) Maintain and archive records of the procurement and disposal process

p) Prepare monthly reports for the contracts committee
q) Coordinate the procurement and disposal activities of all the departments of the procuring and disposing entity
r) Prepare any other such reports as may be required as may be required from time to time.

Powers of the PDU.

These are stated under Section 32 of PPDPA and the PPDPA has powers to:

a) Recommend the composition of the evaluation and negotiation committees for the approval of the contracts committee

b) Contract independent advice as may be necessary in the discharge of its functions

c) Ensure compliance with the PPDPA, regulation, and guidelines made there under.

d) Manage bid proposals and pre-qualification submissions and make recommendations on them to the contracts committee

e) Provide bid clarifications

f) Receive bids.

CONFLICTS BETWEEN A CONTRACTS COMMITTEE AND A PDU.

These are managed pursuant to **Section 33 of PPDPA**. Where the contracts committee disagrees with the recommendations of the PDU, it has two options:

1. Return the submission to the PDU for review giving reasons for its disagreement

2. Request for independent advice from the authority

Where a PDU disagrees with the views of the contracts committee on its recommendations under **Section 33 (1) (a), the PDU may pursuant to Section 33(2)** request for advice from the authority.

Procedure for seeking advice from the authority.

Section 33 (3) of PPDA stipulates that the request shall be in writing stating the reasons why either of the players disagrees with the other.

D) USER DEPARTMENT.

Section 3 of PPDPA defines a user department as any department, division, branch or section of the procuring and disposing entity, including any project writ working under the authority of the procuring and disposing entity, which initiates procurement and disposal requirements and is the user of the requirements.

FUNCTIONS OF THE USER DEPARTMENT.

These are listed under **Section 34 (1) of the PPDPA** and they include:

a) Liaise with and assist the PDU throughout the procurement and disposal process to the point of contract placement

b) Initiate procurement and disposal requirements and forward them to the PPDU.

c) Propose technical inputs to statements of requirements for procurement requirements to the PDU

d) Propose technical specifications to the PDU when necessary

e) Input with technical evaluation of bids received as required by the PDU

f) Arrange for payments to providers

g) Report any departure from the terms and conditions of an awarded contract to the PDU

h) Forward details of any required contract amendments to the PDU for action

i) Maintain and archives records of contracts management.

j) Prepare any reports required for submission to the PDU, the contracts committee or the accounting officer

k) Pursuant to Section 34 (2) the user department must prepare a procurement plan based on the approved budget which it then submits to the PDU for implementation.

POWERS OF THE USER DEPARTMENT.

The user department pursuant to Section 35 has the powers to:

a) Initiate procurement and disposal requirements

b) Recommend statements of requirements to PDU

c) Undertake conformity assessments

d) Issue change orders in accordance with the terms and conditions of the contract.

e) Certify invoices for payments to providers.

CONFLICTS BETWEEN PROCUREMENT AND DISPOSAL UNIT AND USER DEPARTMENT.

Under **Section 36(1)**, where a PDU disagrees with a user department concerning any decision pertaining to the application or interpretation of any procurement method, process or practice, the two parties may jointly consult with any two members of the contracts committee for a review and guidance in resolving the disagreement.

Under **Section 36(2)** where such review fails to resolve the disagreement, either party may forward the cause of the disagreement as a submission to the contracts committee for a formal decision by the contracts committee.

E) EVALUATION COMMITTEE.

Composition and constitution.

Pursuant to Section 32 (a), the PDU is charged with the powers to recommend the composition of the evaluation committee and same is approved by the contracts committee pursuant to S.28 (b) of PPDPA.

Section 37(2) provides that the membership of the evaluation committee shall be nominated by the PDU and approved by the contracts committee.

Regulation 3(2) of PPDPA (evaluation) regulations 2014, requires that a minimum of 3 members are nominated including a member from the user department and the PDU.

The required qualities for each member are inter alia, knowledge of subject matter and financial management skills.

Section 37 (3) also stipulates a minimum of 3 members.

Form 1 (PPDA (procuring and disposing entities) reg. (appointment of members of contracts committee. (Regulation 9).

PROCUREMENT further more Procurement can be defined as a process of acquiring goods, services and works through a procurement process. This is **provided for under section 3 PPDPA Act as Amended**. It mans acquisition by purchase, rental, lease, hire purchase, license, tenancy, franchise or any other contractual means, of any type of works, services or supplies or any combination;

The legal framework for procurement in Uganda is guided by the following laws; The Constitution of the Republic of Uganda, The PPDA Act. 2003 in 2004 and 2021, The PPDA (Procuring and Disposing entities) Regulations SI No. 7 of 2014, The PPDA (contracts) Regulations SI No. 8 of 2014, The PPDA (Procurement for consultancy services) Regulations SI No. 9 of 2014, The PPDA (Evaluation) Regulations SI No. 8 of 2014, The PPDA (Disposal of Public Assets) Regulations SI No. 8 of 2014, The Local Government Act and Regulations, 2006, Guidelines issued by PPDA, Standard Bidding documents issued by PPDA.

The Supreme court in SCCA NO. 8 OF 2017 GALLERIA IN AFRICA – VS- UGANDA ELECTRICITY DISTRIBUTION COMPANY LIMITED held that one observance with any provisions of the above law renders the entire procurement a nullity, her Lordship Mwondha, JSC observes as follows"- "The provisions of the Public Procurement and Disposal of Public Assets Act are the life engine of its objectives. The provisions in issue are clear. The objectives of the Act for all purposes and intents are to achieve fairness, transparency and value for money procurement among others. Therefore, breach of the provisions is not a mere irregularity since it goes to the core of the Act.

The wording in **Section 76 (3)** is mandatory so non observance leads to fatality. Note that in view of this decision, **FINISHING TOUCHES VS ATTORNEY GENERAL CIVIL SUIT NO. 144 OF 2010**, a high court decision is no longer good law. The PPDA Act applies to: Public Finances of a Procuring and Disposing Entity (PDE's) An entity is a PDE if;- its finances by inter alia; a) Resources for national programs under development cooperation agreements. b) Procurement and disposal activities of government Entities within and outside Uganda; and c) Procurement and disposal activities of Entities, not of Government, but which benefit from public funds. Under section 3 Public funds means monetary resources appropriated to procuring and disposing entities through budgetary processes including the consolidated fund, grants and credits put at the disposal of the procuring entities by foreign donors; revenues generated by the procuring and disposing entities. However; The Exceptions to the above are where: o The PPDA Act conflicts with an international agreement (Section 4). an application for a deviation or Accreditation by a PDE

Basic Principles Governing Procurement? The principles of public procurement and disposal are ruling that PPEs must fulfill when procuring their requirements of works, services and supplies using resources for the entity They Include; 1. Non-discrimination; **section 44 PPDA** Act as Amended 2. Transparency, accountability and Fairness; **section 45 PPDA** Act as Amended Competition; sec 47 PPDA Act as Amended

Economy and Efficiency; **Section 48 PPDA Act** as Amended 5. Promotion of Ethics; **Section 49 PPDA Act as Amended 6**. Confidentiality; **Section 47 PPDA Act** as Amended. Non -discrimination Mulalira Faisal Umar- LDC Lecture Notes 2021 **section 44 of PPDPA** provides that a bidder shall not be excluded from participating in public procurement and disposal on the basis of nationality, race religion, gender or anther criteria not related be qualifications. Procurement and disposal are to be conducted in a manner which promotes transparency accountability and fairness under **section 45** PPDPA.

Competition • Procurement and disposals are to be conducted in a which maximizes and achieve value for money as per Section 46 PPDPA paragraph 4 of the 5th schedule of the act backs up section 46 and it provides that employees shall avoid any business arrangement that might prevent the effective operation of air competition.

Section 47 PPDPA elaborates on the principle of confidentiality and it provides that upon a written request by any person, a procuring and disposing entity shall disclose information shall not disclose to any person who is not involved in the preparation of the solicitation documents before they're issued the evaluation process or the award provides. This provision is in line with paragraph 3 of schedule 5 of the act which provides for confidentiality of information. • Employees are expected to respect the confidentiality and accuracy of information. Employees are expected to respect the confidentiality of information received in the course of business dealings and not to use such

information for personal gain. The information given by the employees in the course of the business dealings is deemed to be true and fair and not designed to mislead.

Section 48 of the same provides that all procurement and disposal shall be concluded in a manner which promotes economy, efficiency and value for money

ETHICS **Section 93(1)** provides that public officers as well as experts engaged to deliver specific services shall sign the code ethical conduct. The code of ethical conduct in business is provided for under the 5 th schedule of the act. • Note: I) Paragraph 1 of the 5th schedule of the Act, employees are enjoined not to not use their offices for personal gain seek to uphold and enhance and enhance the reputation of the Ugandan Government at home and abroad by. I) maintain an impeachable standard of integrity in all business relationships both inside and outside the organization in which they're employed fostering the highest possible standards of competence optimizing. paragraphs 2 provide for conflict-of-interest employees are expected to reveal any personal interest that may impinge or might reasonably be deemed by others to impinge on an employee's business dealings with an industry. Paragraph 5 provides that employees shall not accept business gifts from current or potential. Government suppliers unless such gifts are of very small intrinsic value such as a calendar or a pen. ϖEmployees are expected to refrain from any hospitality that might be viewed by others as having an influence in making a government business decision as a result of accepting that hospitality this is provided is under paragraph 6

Institutional set up in a PDE and their Major Roles. Accounting Officer has overall responsibility over other departments in the procuring and disposing entity. (**See Section 26 of the PPDA Act 2003),** the accounting officer that an accounting officer of a procuring and disposing entity has the overall responsibility for execution of the procurement and disposal process in the procuring and disposing entity, the officer is responsible for establishing the contracts committee, advertising bid opportunities and communicating award decisions.

In the case of **FINISHING TOUCHES LTD VS ATTORNEY GENERAL OF UGANDA,** counsel for the defendant on whether the procurement of plaintiff's services were made pursuant an emergency, the Attorney General's counsel contended that the letter of the PPDA Authority dated 20th of November 2007 refused to consider procurement of the plaintiff's service as an urgent matter, that in an case emergency situations only determine only the choice of the procurement method and do not waive the procedure for procurement, therefore the procedure for procurement were not complied with in any case.

Christopher Madrama Izama J ruled that plaintiffs were entitled to the negotiated amount and be paid damages of breach of contract. The learned trial Judge was of the view that the basis of the Attorney General's submission that costs should not be awarded because of illegality in the procurement process, the duty to comply with the statutory provisions was on the part of the defendant's servants. Contracts Committee Responsible for the award of contracts based on the reports from the Evaluation Committee. (See section 28 and 29 of the PPDA Act 2003) Procurement and Disposal Unit Manages all the procurement or disposal activities of the procuring and disposing entity except adjudication and the award of contracts. (See Section 31 of the PPDA Act 2003)

4. User departments A PPE can have different User departments. These are generally responsible for initiating the procurement process by preparing a procurement and disposal requirements requisition and forwarding it to the Procurement and Disposal Unit. (See section 34 of the PPDA Act 2003)

Evaluation committee * The committee shall be responsible for all the evaluations upon the opening of the bids and shall report to the Procurement and Disposal Unit. (See section 37 and 38 of the PPDA Act 2003)

Key stages in Procurement

a) Procurement planning **– Section 59 PPDA Act**, under regulation 3(3) the User department to notify the PDU of any changes in the procurement plan.

b) Initiation of needs- this is done by the user department **Section 34(2) -** also, see Regulation 3(1) PPDA (PDE) Regulations

c) Preparation of bid documents subject to confirmation of availability of funds. See **Section 59(2) & Regulation 4** on PPDA (rules & methods for procurement of services, works and non-Consultancy services) regulations 2014.

d) Advertising/ issue/sale of bidding documents

e) Bidding

f) Receipt and opening of bids

g) Evaluation of bids

h) Contract award and negotiation and signing

i) Contract management

j) Performance review

Public Procurement and Disposal Rules

1. Records. * PPE should use the standard forms issued by the Authority to record all details except with Permission of the authority to use an alternative document or form. (See S**ection 56 of the PPDA Act 2003), Section 62 of the PDA Act** is to the effect that entitles a so use standard documents provided by the authority for drafting all solicitors for each procurement **Section 31(g) of the Act** provides that to recommend procurement a disposal and disposal is function of the procurement a disposal unit.

2. Communication. Must be in writing and communication in any other form shall be referred to and confirmed in writing. * The language of communication must be English unless otherwise authorized by t Authority. (**See Section 57 of the PPDA Act 2003)**

Procurement and disposal are premised on proper planning Every PPE should prepare its procurement and disposal plan in a rational manner annually Submit it to the Secretary to the Treasury

and to the Authority. This plan is always intended for the following financial year. This is provided for in **Section 58 of the PPDA Act 2003,** A budget is basically a financial plan for a defined period which is usually one year. Budgeting on the other hand can be defined as the tactical implementation of a defined plan. In devising a budget, the stages undertaken to formulate it is called the budget process. This refers to the process by which governments create and approve a budget. This ordinarily involves the preparation of the budget, presentation and approval of the budget estimates through which a cabinet white paper is formed that is approved by parliament under **the Public Finance Management Act 2015 to come** up with the appropriation Act of each year, that translates into the national Budget.

Budgeting and adhering to budgets cont'd **Section 58 (1) PPDA Act** stipulates that in accordance with the budget preparation procedures issued by the Minister, a procuring and disposing entity shall in each financial year, by a date determined by the Secretary to the Treasury, prepare and submit to the Secretary to the Treasury and to the Authority, its annual procurement plan for the following financial year. So, before the procuring and disposal entity can submit its annual procurement plan, reference has to be made to the budget preparation procedures which makes shows the importance of budgeting. **Section 34 (2) PPDA Act** is to the effect that the User Department shall prepare a procurement plan based on the approved budget, which shall be submitted to the Procurement and Disposal Unit for implementation when required. Preparation of a procurement plan is to be done in accordance with the approved budget.

Budgeting and adhering to budgets cont'd **Section 20 (1) PPDA Act** the Executive Director shall, not later than three months before the end of each financial year, prepare and submit to the Board an Annual Management Plan which shall include a budget for its approval for the next financial year and so annual management plan has to be accompanied by a budget.

Section 20 (2) PPDA Act provides that the Executive Director may, at any time before the end of a financial year, prepare and submit to the Board for approval any estimates supplementary to the budget of the current financial year. Supplementary estimates are provided for under Section 16 of the Public Finance and Accountability Act, 2003

Section 20 (3) PPDA Act stipulates that no expenditure shall be made out of the funds of the Authority unless that expenditure is part of the expenditure approved by the Board under the estimates for the fiscal year in which the expenditure is to be incurred, or in the supplementary budget for that year and so a budget is required before accessing the funds of the PDE. In addition, to access public funds budgetary processes have to be undergone before resources are appropriated to procuring and disposal entities. Adhering to budgets ensures that the provisions of **Section 23A PPDA Act** as amended are followed most especially with respect to **Section 4 (1) (a) of the Public Finance and Management** Act which stipulates that the minister shall ensure that systems are established throughout government for planning, allocating and budgeting for the use of resources in order to improve the economy, efficiency and effectiveness of government. This requires that the authority formulates a budget which shall dictate how its resources are distributed so as to handle its functions.

Requirements for Initiation of procurement or disposal processes

1. Every procurement and Disposal process should be documented prior its commencement

2. Procurement or disposal process only to be initiated or continued upon confirmation of availability of funds;

3. All procurement or disposal processes should be approved by the Accounting Officer prior to commencements. (For details, See **Section 59 of the PPDA Act 2003)**

Methods of Procurement are provided for in Section 63-64 which require that all methods of procurement and selection of bidders should allow fair and equitable maximum competition and the choice of any method under **Section 79(2)** shall first be approves by the contracts committee. Only methods prescribed under the law are to be used at all times, under **Section 79(3) of the PDDA,** a PDE shall first obtain the written consent of the authority before it can use any other method other than the one set out in the act, ϖExcept for emergencies, Choice of procurement method is largely determined by the procurement thresholds enshrined in the (Public procurement and disposal of Public Assets Guideline No. 1 of 2014) which include the following;

Procurement methods cont'd Sections **80-86 of the Public Procurement & Disposal of Assets Act 2003** as amended, state the different procurement methods that can be used by the Procuring and Disposing Entity for each procurement activity. The estimated value of the requirement shall be the main criterion for determining the choice of procurement method. ¬ Circumstances pertaining to the requirement may be used as additional criteria in determining the method. ¬ Sometimes it is possible to see in advance that the value or circumstances do not justify or permit obtaining competition or value for money to the extent possible, through an open bidding process. In these cases, it is allowed to use micro procurement, restricted bidding or direct procurement. As shall be discussed herein below

Open Domestic Bidding It provided for under **Section 80 of the PPDA Act 2003** This is a procurement or disposal method which is open to participation on equal terms by all domestic providers through advertisement of the procurement or disposal activity. Open bidding shall be used to obtain maximum possible competition and value for money. Nothing shall prevent a foreign or international bidder from participating in open domestic bidding. Procurement opportunity is publicly advertised. Allows open participation on equal terms. The threshold for procurement of Works should be estimated at a value of Ugx. 500,000,000/= and above. The threshold for procurement of supplies and no consultancy services should be estimated at a value of Ugx. 200,000,000/= and above.

Open International Bidding It provided for under **Section 81 of the PPDA Act 2003**, This type of Procurement opportunity is publicly advertised to foreign providers it's the procurement or disposal method which is open to participation on equal terms by all providers, through advertisement of the procurement or disposal opportunity and which specifically seeks to attract foreign providers. This method of Procurement allows any firm as long as it is legally registered to participate in the procurement process, since it is open to all bidders, the advertisement must appear in at least one foreign newspaper. Open international bidding is used to obtain the maximum possible competition and value for money, where national providers may not necessarily make this achievable. Allows open participation on equal terms**. The threshold for procurement of Works should be estimated at a value of Ugx. 500,000,000/= and above. The threshold for procurement of supplies and non- consultancy services should be estimated at a value of Ugx**. 200,000,000/= and above.

Restricted Domestic Bidding is Provided for under Section **82 of the PPDA Act 2003,** as a method of Procurement opportunities are directly sent to prospective bidders without public advertisements. It is the procurement or disposal method where bids are obtained by direct invitation without open advertisement. So, it's only the contacted bidders that are eligible to practice, example is printing of currency or printing of barrot Papers, this method is used to obtain competition and value for money

to the extent possible, Where the value or circumstances do not justify or permit the open bidding procedure. Bidders are invited based on a pre-qualification exercise or they are selected based on past performance with no pre-qualification exercise It is advisable that the invited bidders should not be less than five, under framework contracts. The threshold for procurement of Works should be estimated at a value greater than Ugx. 200,000,000/= but less than Ugx. 500,000,000/=. The threshold for procurement of supplies and non - consultancy services should be estimated at a value of greater than Ugx. 100,000,000/= but less than Ugx. 200,000,000/

Restricted international Bidding provided under **Section 83 of the PPDA Act 2003)** , Procurement opportunities are directly sent to prospective foreign providers without general invitations * The threshold for procurement of Works should be estimated at a value greater than Ugx. 200,000,000/= but less than Ugx. 500,000,000/=. * The threshold for procurement of supplies and non - consultancy services should be estimated at a value of greater than Ugx. 100,000,000/= but less than Ugx. 200,000,000/=

Quotation method is provided for under **Section 84 of the PPDA Act 2003)** * This method compares price quotations obtained from a number of supplies and works providers * The threshold for procurement of Works should be estimated at a value greater than Ugx. 10,000,000/= but less than Ugx. 200,000,000/=. * The threshold for procurement of supplies and non - consultancy services should be estimated at a value of greater than Ugx. 5,000,000/= but less than Ugx. 100,000,000/=.

Micro Procurement is provided for under **Section 86 of the PPDA Act 2003**, its usually used in a simple direct procurements or disposals are of very low value procurement requirements. **Section 86 (1)** defines Micro Procurement as a procurement method which is used for very low value procurement requirements. It is used to achieve efficient and timely procurement where the value does not justify a competitive procedure **Section 86 (2). Fourth schedule 7 (1)** used for unforeseen requirements whose estimated value is below the prescribed threshold **Rule 7 (2) and 7 (3)** of Fourth Schedule **Regulation 16 of Regulation No. 8 of 2014 provides** that this method does not require, Issuance of a bidding document Submission of a bid Republic bid opening session The use of an evaluation committees Issue of a notice of best evaluated bidder Issue of a notice of award of contract. However, the bench mark is that Micro procurement or disposal should at all times be used to achieve efficient and timely procurement where the value does not justify a competitive procedure. As noted above, this is used for low value procurement. The threshold for procurement of Works should be estimated at a value less than Ugx. 10,000,000/=. The threshold for procurement of supplies and non - consultancy services should be estimated at a value of less than Ugx. 5,000,000/=.

Disposal of Public Assets, **The PPDA Act, defines disposal as a means of divestiture** of public assets, including intellectual and proprietary rights and goodwill, and any other rights of a PDE by any means, including sale, rental, lease, franchise, auction, or any combination however classified other than those regulated by the Public Enterprise Reform Divestiture (PERD) Act,1993.

As a legal requirement, **Sections 34(1) and (2) of** the Act specifies key functions of the User Dept. some of which are: To initiate disposal requirements The Procurement and Disposal Unit should plan all procurement and disposal activities **(Sections 31(f) of the Act')** and aggregate all the individual user dept. plans into annual and multi- annual consolidated procurement and disposal plans

Strategic assets & Major methods of disposal. A PDE (Procurement and Disposing Entity) is borne under **Section 87(1)** from disposing off a strategic asset without the approval of the line minister, and strategic Asset is defined under **Section 86(f)** as land, building, strip, shares belonging to

government. Once sold off without due to the law it may result into criminal prosecution. see CA-Crim. Appeal No. 77 OF 2011 **CHANDIJAMW VS UGANDA. (2018) USCA1** under Section 87, Public assets may be disposed of using any of the following methods: -

• Public auction – Rule 10

• Direct negotiations Rule 10

• Trade-in Rule 17 Transfer to another PDE – Rule 19

• Conversion or classification of assets into another form

• Destruction of assets

• Public bidding – Rule 4 Sale to public officers Rule 11 (very stringent conditions must be met here and public officers of the PDE aren't eligible to purchase)

• Donation- Rule 21 All these are expounded on under the PPDA (Disposal of Public Assets) Regulations 2014

Public Auction lays down the Conditions for use of this method Existence of a large number of potential bidders or assets to be disposed and the value of the Asset is low, or where more than one asset is to be disposed of. Procedure – **Regulation 7** Request by a PDU to the contracts committee in form 30solistation for bids through public invitation notice using at least one publication of wide national circulation &Display on PDE's notice board and PPDA's website. Appointment of an auctioneer by the PDE, the Procedure for appointing the auctioneer is governed by **Rule 8**. Potential bidders inspect the public assets for at least 10 working days. Bidding is done orally and no prior negotiations should have been undertaken by the parties, sale in completed by the fall of the hammer as shall be announced by the auctioneer. No minimum bidding period, non-negotiations, successful bidder shall pay at least 50% of contract price immediately after award of contract, balance within 5 working days of award of contract

Justice Mutonyi in **FORMULAR FEEDS VS KCB BANK & 2 OR'S HC MISC. APP. NO, 208 OF 2020** held that "a public sale is one where property is sold to the highest bidder by one licensed and authorized to do so in order to obtain the best financial return for the seller by free and fair competition among bidders. Competitive bidding is an essential element of the auction sale. An auctioneer must always act in good faith during the whole exercise, and from the above definition the elements of a public Auction are; - the Property must e sold to the highest bidder, Sale conducted by the licensed auctioneer. The goal or aim of the auction is to get a financial benefit There must be free and fair competition by the bidders (competition bidding this is provided for under the **case of PITCHFORK RANCH CO. VS- BAR TL 615 P.2D 54**

Public bidding. It's a form of disposal of public assets as a mean of raising funds by a public institution, **Regulation 4** requires that for public bidding to be used, the asset to be disposed of should be in a High-value or unusual assets, especially Assets located in remote areas, where conditions need to be attached to the sale of the asset, where post-bid negotiations may be required. Procedure is provided under Regulation 5 as follows A request for Pubic bidding to the contracts committee of the PDE to the PPA Unit by form No. 29, with proposed solicitation documents, clearly stating the description of the property and its location, advert to run for at least 4 days. Approval of the request and publication of the notice in a newspaper of wide circulation. Notice should indicate where the

interest party can pick the bid documents. The Bidding documents may be sold and each bid recorded using Form30 Bid opening and evaluation has to take place within 15 working days and an offer presented to the Highest bidder using the price only methodology. Where the successful bidder fails to pay within 5 days, an offer can be made to the next highest bidder

Destruction of the Public Asset Its one of the leases Least favored method of disposal, its only used under **Regulation 13** where the asset has no residual value and where there are issues of national security or public interest, health and safety, legal or human rights issues or environment considerations. As asset is said to have no residual value if it can't be transferred to another PDE or converted into another form for which ever purpose and or use. Example is the recent Mulago Hospital Disposal of the Cancer Bankers which would expose people to radiation, expired drugs, expired food staffs procured by OPM for refuges.

Procedure **Regulation 14** Destruction can be done by the PDE or a competent authority or provider form 34. The contracts committee approves the decision to destruct the property. A procurement advisor is an appointed to advise on the destruction methods. Accounting officer approves the destruction in form 35. Upon completion of the destruction, the competent authority shall issue a certificate of destruction to the PDE which shall form part of the record of disposing proceedings

Sales to public officers established **under Section 87 of the PPDA Act and Regulation 11 of the public** procurement and disposal of public assets (Disposal of public asset) regulation 2014 this method of disposal shall be applicable where the public asset for disposal are of small number or a low value and sale to the public would not achieve the of money for procuring and disposal entity , the use of the public asset by the public officer would directly enhance the performance of public officer in executing his duties within procuring and disposal entity if the asset is put to personal use of public officer. **Regulation 11(2)** is to the effect that disposal by sale of public officials shall be contracted to an independent agent. The reader is advised to study at length the provisions of **Regulations 12, (1) – 17)** for a clear understanding of the procedure of sale to public servants

Conversion/ Trade-in method is provided for **under Section 87 of the PPDA Act** and regulation 17 of the public procurement and disposal of public assets (Disposal of public asset) regulation 2014 sets the conditions to use this method of disposal to include where the public asset of the procuring and disposal entity will be upgraded in a convenient, economic and efficient way by trading in a surplus public asset of the procuring and disposal entity to offset the purchase price of the new asset**. Regulation 17 sub regulation (2) the public** procurement and disposal of public assets (Disposal of public asset) regulation 2014 prohibits the use of this method where competition and value for money will not be achieved in procurement process.

Forums for Administrative Review Accounting Officer; An aggrieved bidder by the decision of the PPE may lodge a complaint with the accounting officer within ten working days from the date the bidder got the notice and a copy shall be given to the Authority. The Accounting Officer shall handle complaint, make and a communicate decision within ten working days.

Where the bidder suspects the accounting officer to have bias of conflict of interests and intends to make an application straight to the tribunal, he has to such a bidder should give a 5 working days' notice to the accounting officer. **Section 89 of the PPDA Act** as amended in 2021 To the Appeals Tribunal. Any Dissatisfied bidder by the decision of the PPE or the Accounting Officer may appeal to the tribunal within ten working days from the date of receipt of the decision and The Tribunal shall handle, decide and communicate the decision within 15 days; **Section 91** I of the PPDA act as

amended in 2021) Appeals to the High Court An appeal against the decision of the Tribunal to the High court may be made only on questions of Law.

THE PROCUREMENT PROCESS (CYCLE)AS AMENDED 2021

PROCUREMENT LAW IN UGANDA

The Public Procurement and Disposal of Public Assets Act has been amended to provide for timely and effective resolution of public procurement disputes. The amendments became effective on July 2, 2021 and are to be implemented by both central and local government procuring and disposing entities.

The PPDA (Amendment)Act, 2021: Recent Amendments to Uganda's Procurement Law

Introduction

In recognition of the continuously changing public procurement environment in Uganda and in an effort to make the procurement dispute resolution mechanism effective, the *Public Procurement and Disposal of Public Assets Act* (PPDA Act) has been amended. Originally enacted as the *PPDA Act,* No 1/2003, it was first substantially amended in 2011 by the *PPDA (Amendment) Act,* No 11/2011 (although there was a 2006amendment effected by the *Local Governments (Amendment) Act*, No 2/2006). The procurement law has substantially been amended for the second time by the *Public Procurement and Disposal of Public Assets (Amendment) Act*, No 15/2021. The amendment Act commenced on July 2, 2021 upon being gazetted in the Uganda Gazette of that date.

Briefly, the 2021 amendment Act has amended the 2003 principal Act to:

(a) Remove the Authority from the administrative review process.

(b) Provide for the appointment of a Registrar of the Tribunal.

(c) Provide for marginalized groups under reservation schemes.

(d) Provide for the powers of the High Court in procurement proceedings.

(e) Provide for the aggregation of procurement requirements.

(f) Provide for the functions of the Authority and of the Board of Directors of the Authority.

(g) Provide for the electronic records and communication.

(h) Amend the *Kampala Capital City Act* and Local Governments Act with respect to procurement and for related purposes.

This Legal Alert highlights key amendments effected to the *PPDA Act*2003 (principal Act) by the *PPDA(Amendment) Act,* 2021 (amendment Act).

Amendment of the Administrative Review Process

The amendment Act (section 34) repeals *sections 90* and *91* of the principal Act which had provided for administrative review by the PPDA Authority. Administrative review is statutory relief availed to an aggrieved bidder for any omission or breach of the Act or regulations or provisions of a bidding document by a procuring and disposing entity.

Initially, the administrative review process had three (3) stages of review, as follows:

- At the first stage, an application for administrative review was made to the Accounting Officer of the entity within 10 working days from the date of circumstances leading to the complaint.
- At the second stage, the complaint was made to the PPDA Authority within 10 working days from the receipt of the notification on the decision of the Accounting Officer.
- The third and final stage entailed lodging the application with the PPDA Appeals Tribunal within 10 working days from the date from which the decision of the Authority was made.

Notably, appeals on questions of law and fact from decisions of the PPDA Appeals Tribunal could be made to the High Court within 30 days after being notified of the decision of the Tribunal.

The amendment Act (section 34) has now done away with the second stage of administrative review by the Authority. There are only two stages now—administrative review by the Accounting Officer and by the Tribunal. A bidder who is aggrieved or whose rights are affected by the decision of an Accounting Officer can apply to the PPDA Appeals Tribunal for administrative review. In case of allegations of conflict of interest against the accounting officer or partiality by the procuring or disposing entity, the bidder applies directly to the Tribunal for determination of the complaint, omission, or breach. The aggrieved bidder must give written notice to the Accounting Officer of the intention to make an application to the Tribunal. Further, under the amendment, the Tribunal now has 15 working days to issue a decision from the date of receipt of an application for review unlike before when it had to do so with 10 working days.

As regards appeal to the High Court, the amendment Act (section41) amends section 91M of the principal Act to restrict appeals to *questions of law* only.

Amendment of the Functions and Powers of the PPDA Authority

One of the most consequential amendments is the change in the functions and powers of the PPDA Authority (as provided under sections 7 and 8 of the principal Act). The amendment Act (section 5) amends the functions of the Authority (as provided under section 7(1)(a) of the principal Act) to include advising procuring and disposing entities on the application of the Act, the regulations and any guidelines made under the Act.

Additionally, the amendment Act (section 6) amends the powers of the Authority, in the exercise of its regulatory function (section 8(1)(a)-(c) of the principal Act), to include the power to require information, documents, records, and reports with respect of a procurement or disposal process; call for the production of books of accounts or documents; and institute procurement and disposal contract as well as performance audits. The amendment Act further (in amending section 8(1) (e of

the principal Act) gives the Authority power to investigate and act on complaints received on a procurement or disposal process from members of the public that are not subject to administrative review or review by the Tribunal.

Recognition of Electronic Records and Communication.

The amendment Act (section 45) introduces a new provision section95B to the principal Act that permits the use of electronic records and communication (in respect of information or document) by the PPDA Authority, an entity, or a bidder during a procurement or disposal process.

This amendment is a clear manifestation of the COVID-19 times and a recognition of the existing restrictions on movements which have called for a much-needed acceptance and reliance on electronic means of communication. Procurement and disposal processes can now be conducted electronically from start to finish unlike before.

Appointment of Registrar (and other officers and employees) of the PPDA Tribunal.

The amendment Act (section 37) amendend section 91G of the principal Act to require the Registrar be appointed by the Tribunal in consultation with the Judicial Service Commission. It also permits the Tribunal to appoint other officers and employees as may be necessary for the effective discharge of the functions of the Tribunal.

Procurement Regulations for Kampala Capital City Authority and the Local Governments

The principal Act provides under section 96(1) for the Minister, on approval of the Parliament, to issue regulations for the better carrying out of the objectives and functions of the Act. Under section 96(2), the Minister is also responsible for issuing regulations for procurement and disposal of a procuring and disposing entity outside Uganda.

The amendment Act (section 47) introduced a new s*ection 96A* in the principal Act to provide for making of the regulations for the Kampala Capital City Authority (KCCA) and local governments without the need for Parliament's approval but in consultation with the line Ministers for KCCA and local governments.

Implications of the amendments

- For the most part, the administrative review process was been shortened by the removal of the Authority from the process. A typical administrative review process previously would take at least 30 working days moving from office to office with the Authority playing jury, judge and executioner at different intervals. PPDA, as a regulator, would hear applications at the second stage of the administrative review process and would be named as a respondent on appeals to the Tribunal and High Court. This is no longer the case.

- Once a bidder is aggrieved by the decision of the entity, their first recourse is to apply for administrative review from the Accounting Officer of that entity and, if not satisfied by the Accounting Officer's decision, the bidder should proceed to apply to the PPDA Appeals Tribunal for administrative review within 10 working days.
- The timelines within which the PPDA Appeals Tribunal has to furnish its decision have increased from 10 to 15working days. Representatives of bidders and procuring and disposing entities need to take note of these timelines.
- Appeals from the Tribunal to the High Court are now only permitted on matters of law (and no longer on matters off act).
- During an appeal to the High Court, the procurement process that was hitherto suspended during the administrative review process before the Accounting Officer and the Tribunal will resume and continue despite the appeal pending before the High Court.
- The PPDA Authority now only plays a regulatory role and does not have power to entertain and adjudge procurement disputes between aggrieved bidders and procuring or disposing entities.
- The necessity for adoption and use of technology in the procurement process has been recognized through the acceptance of submission of documents by electronic means as may be prescribed by the entity and Authority.
- Noteworthy, the number of members of the Tribunal (under section 91B of the principal Act) has increased from 5 to 7and at least two must be female.

The amendments to the *PPDA Act* 2003 have tactfully addressed the challenges faced by the principal legislation in management of time and unnecessary delays occasioned by the lengthy administrative review process. The PPDA Authority issued a circular on July 7,2021 directing all Accounting Officers to comply with the amendments. It is therefore important for all procurement law practitioners and prospective participants in the public procurement and disposal processes to take note of these developments in Uganda's procurement law.

KEY STAGES OF THE PROCUREMENT PROCESS

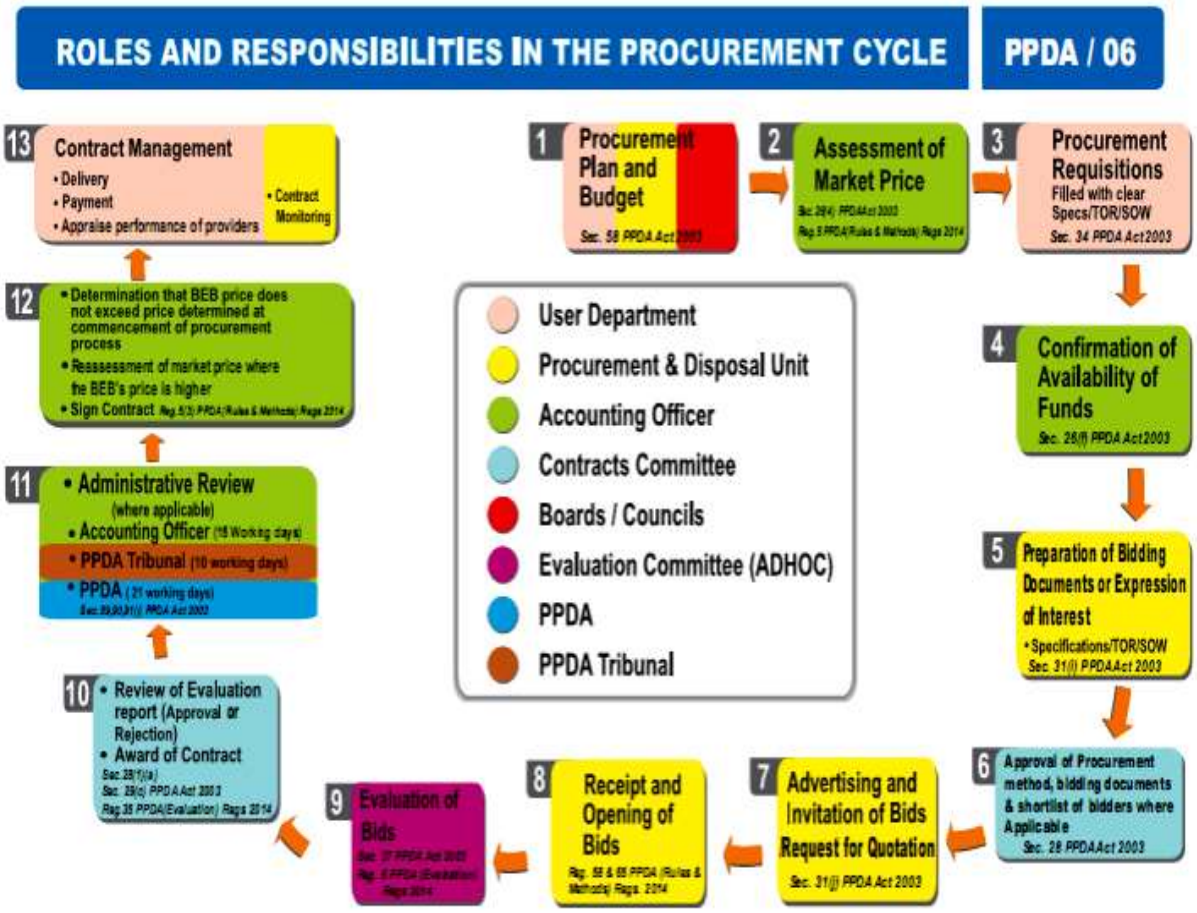
Procurement process or cycle refers to the successive stages in the procurement cycle including planning, choice of procedure, measures to solicit offers from bidders, examination and evaluation of those offers, award of contract, and contract management.

Procurement cycles differ depending on the nature of the product, service, or works to be procured and the procurement method to use. Some procurement cycles are very short where as others involve many stages especially in the public sector.

This means that the procurement exercise follows some steps. These steps must be observed in order to ensure that all stakeholders involved in the procurement exercise obtain fair treatment. There are many stages involved in the procurement cycle right from need identification up to when a need is met. Below is an outline of the various steps in the procurement cycle;

The Procurement Cycle encompasses the timeframe between planning and the ultimate award of a contract including contract administration and management. A procurement practitioner must follow the stages while complying with the laws and regulations. The detailed steps in the procurement cycle are listed below:

- Planning for the required procurements over a given period
- Assessment of Market price
- Identifying source and approval of funds
- Specifications/TOR/ determination and initiation of procurement
- Determination of procurement procedure (method)
- Sourcing (soliciting) offers
- Evaluation of offers
- Post-qualification/Negotiation (if applicable)
- Commencement of contract
- Contract performance (delivery) and management
- Record keeping and accountability
- Payment
- Post contract performance appraisal



To enhance understanding of the stakeholders, the stages have been expounded below:

1) Requirement Identification:

The procurement cycle begins with the identification of a need which creates a requirement. A need to cross a body of water creates a requirement to build a bridge, a ferry, and so on. The actual planning for the fulfillment of the requirement is done during the annual budgeting phase (in the case on Public Procurement), when the various government entities identify their requirements and make inputs to the annual budget, or at the project inception phase where the beneficiary country prepares a proposal to be presented to the funding entity for consideration. It is at this stage that requirements are identified. It is likewise at this stage that the work plans and budget plans are developed. Budget allocation and fund availability are determined before submission of requirements, through the appropriate channels, to the responsible procurement entity for action.

2) Procurement Planning:

Once requirements are defined and approved, procurement planning begins. Some important questions to consider at this stage are:

(i) When are specific requirements needed?

(ii) Are there any requirements on the critical path?

(iii) Are there any dependent requirements?

(iv) What are the different procurement methods that will be used?

(v) What is the average lead-time for each procurement method?

At this stage it is crucial for a procurement practitioner to get involved in order to work with the department or other government entities to develop a procurement plan that takes into account the most appropriate procurement method for each requirement considering the budget and urgency of need.

In summary, the procurement planning phase can be reduced to determining the following:

(i) What's needed, when and what is the relationship to other requirements?

(ii) Is the requirement dependent or independent of other requirements? If dependent, what's the relationship to other dependent requirements?

(iii) What is the deadline for fulfilling the requirement (this determines the contract award date)?

(iv) Is there sufficient time to fulfill the requirement given the project schedule? All requirements should ideally appear on the procurement plan.

3) Procurement Requisition Processing:

The first step in processing a procurement requisition is to determine what the requesting department wants. This is done by reviewing specifications or description of Goods, Services or Works required by the requesting department. Such information should ideally be clearly expressed in the procurement requisition. There must be sufficient detail in the description to ensure that all prospective bidders or service providers have essentially the same understanding of the requirement.

If the specifications are clear the bidding process can begin, if not, the procurement practitioner must seek clarification in order to finalize the bidding or proposals request documents accordingly. Otherwise, contact must be established with the requesting entity to ensure that the requirement is clearly expressed in the bidding or proposal request documents. This is done either by telephone, by email or in a formal letter to the requesting department, this phase of the process is crucial to ensure that the procurement practitioner has a clear understanding of the requesting department's need in order to avoid misinterpretations, disappointments and, most importantly, waste of valuable resources as a result of improperly prepared/understood specifications or terms of reference.

4) Determine Procurement Method

Once the requesting department clearly defined its requirements, the procurement practitioner must determine the appropriate procurement method to fulfill its needs in a most expeditious and cost-effective manner, this should ideally be done during the procurement planning stage, and the requirement considered in the procurement plan; however, if this was not the case, at this point the procurement method needs to be determined. The various procurement methods allowed are defined in the procurement guidelines or regulation.

In selecting the appropriate procurement method it is necessary to consider the

Procurement category - goods, services, works,

(i) the estimated value of the procurement requirement,

(ii) the urgency of need,

(iii) The number of sources available to fulfill the requirement, to mention a few.

If the procurement action is for goods, the selection of the appropriate procurement method can be relatively straightforward. The commonly used procurement methods for the acquisition of goods and related services, including non-consultant services, and also works procurement, are the Request for Quotations (RFQ) and the Invitation for Bids (IFB), which is categorized as competitive bidding (or open tendering) and can be national or international procurement. Other methods of procurement include restricted bidding, direct procurement and force account.

The governing procurement guidelines or regulations address the various procurement methods, condition of use, and approval process for each.

5) Prepare and Publish Bidding/Proposal Documents:

Once the procurement method is determined, the next step is to begin the bidding process with the preparation of the bidding or proposal request documents. The procurement practitioner prepares the bidding/proposal request 'documents and then (after obtaining the necessary clearances to advertise the requirement) invites vendors, suppliers, contractors or consultants (firms or individuals based on the requirement) to submit bids/proposals.

Such advertisement may be done locally and/or internationally depending on the governing procurement guidelines. Prospective bidders, upon request, will be given or sold a formal bidding/proposal request document containing all the information required to successfully compete for the fulfillment of the requirement, and, most importantly, to successfully prepare their bids/proposals for submission on a date specified in the bidding/proposal request documents. In the case of non-competitive procurements, a request for quotation is sent to three or more prospective bidders from a list of known sources of the goods/services being procured.

6) Pre-Bid/Proposal Meeting and Site Visit:

Pre-bid meetings for works procurement are held alone or in conjunction with a site visit. Pre-proposal meetings are held primarily for complex requirements. The purpose of the pre-bid/proposal meeting is to clarify the bid documents or the Request for Proposals (RFP). Bidders or Consultants

are invited to such meetings after the bid or proposal documents have been advertised for a short period, allowing sufficient time for prospective bidders or consultants to become familiar with the requirement. Pre-bid or proposal meetings are programmed during the preparation phase and are mentioned in the bidding or proposal request documents. If there's no mention of such meeting in the bidding or proposal request documents, such meeting is not held unless an amendment (addendum) is made to the bidding or proposal documents prior to scheduling the meeting. The pre-bid/proposal meeting is usually open to all interested bidders/consultants; however, in cases where pre-qualification or short-listing was carried out, only pre-qualified or short-listed bidders/consultants are invited to attend the pre-bid/proposal meeting.

The pre-bid/proposal meeting is a formal event, where minutes are taken and responses to the attendees are only binding on the Client if or when received by the prospective bidders/consultants in writing. Site visits, as mentioned above, can be held in conjunction with a pre-bid meeting. In fact, it is preferable that they are, but this is not required. The reason for this preference is because after the site visit bidders may have additional queries arid these can also be addressed at the pre-bid meeting and followed up in writing to all prospective bidders that expressed interest in the requirement, or those that were short-listed through a pre-qualifjcation exercise or restricted bidding. The time and venue of these meetings are determined by the Client and are mentioned in the bid/proposal documents. Attendance is usually not obligatory.

As mentioned above, site visits are typically undertaken for works procurement in order to give prospective bidders an opportunity to visit and become familiar with the site first hand. The site visit is organized by the Client; however, the Client is not liable for any accidents occurring in connection with the site visit. During the site visit the prospective bidders surveys the site and asks questions to clarify any doubts or information provided in the **bid** document. Sometimes, as a result of the site visit/pre-bid meeting there might be a need to extend the bid submission date by way of an Addendum to the bid document to give bidders sufficient time to address issues arising as a result of the site visit and pre-bid meeting.

7) Bid/Proposal Submission and Opening:

After the pre-bid meeting, one of the following is a natural consequence:

(i) The selection process continues to the bid submission and opening date, as planned,

(ii) The submission date is extended by addendum to give bidders a reasonable amount of time, address issues raised during the site visit and pre-bid meeting, or

(iii) The requirement is altogether cancelled by the entity.

Assuming the process continues as expected, the bid/proposal submission and opening will follow. The opening event is a prelude to the evaluation process given that an initial summary examination of the documents received should take place to determine compliance with the submission requirements. Any bids/proposals received after the pre-announced bid/proposal submission date and

time, should be rejected and not considered for further evaluation. This is the only circumstance that could lead to the rejection of bids/proposals during the opening event.

For the bid/proposal opening a checklist is prepared. During the opening event, the following needs to be determined:

(i) Is the bid/proposal received in a sealed envelope? In the case of proposals received under the Quality and Cost-Based (QCBS) procurement method, it also needs to be determined if the technical and financial proposals are received in separately sealed envelopes.

(ii) Is the bid/proposal form completed and signed?

(iii) Is the bid/proposal received on or before the submission date and time?

(iv) Is there a power of attorney mandating the authorized representative to sign the bid/proposal?

(v) Is the bid security (if any) in the form and amount stipulated in the bidding document?

In addition to the above, any substitution, withdrawals or modification, in addition to discounts and comments should be identified. Attendance is also taken and, in the case of bids for goods and works procurement, the bids price is read out and recorded on a board for all attendees to see and record at their discretion. Price read out for consulting services is done in certain case only, such as under QCBS where the price is read out only after the technical evaluation is concluded and the financial proposals of only those firms that achieved the predetermined minimum qualifying mark, or more, are publicly opened and read out similar to during the bid opening process for goods, related services and works. The preliminary examination of the bids/proposals is left for actual bid/proposal evaluation which is carried out by an approved evaluation team.

8) Bid/Proposal Evaluation:

Before the bid or proposal evaluation takes place, an evaluation panel is formed and approved. Ideally, to create a separation of functions, procurement practitioners should advise, oversee and/or assist with the drafting of the evaluation report, but they should not be members of the evaluation team. Membership of such a team should be determined based on the qualifications of the prospective evaluators. It is preferred that evaluation team members should have knowledge and related experience and, at least, one member, preferably from the requesting department, that is familiar with the details of the Terms of Reference (for services) or technical specifications (for goods/works). The number of evaluation team members should be at least three, not including observers and technical experts if invited.

Conflict of interest is a serious issue that must be taken into account in the evaluation process, such that all prospective members of the evaluation team should sign a declaration of impartiality and confidentially wherein they are expected to declare absence of any family of business ties with the bidders/consultants that submitted bids/proposals. Additionally, after becoming aware of the names

of the firms and/or individuals to be evaluated, all team members are expected to declare any potential or actual conflict of interest that might exist due to any past or present relationship they have, or had with any of the firms and/or individuals to be evaluated, that might impede their ability to be impartial during the evaluation process. As mentioned above, after the initial examination done during the bid/proposal opening, a preliminary examination of the bids/proposals is done to determine, among other things, the responsiveness of the bids/proposals to the bid/proposal documents. Thereafter, a detailed examination of the bids/proposals is carried out. In the case of bids, a price comparison is done to determine the lowest qualified and responsive bidder. In the case of consulting services, again, under QCBS for example, the scoring of proposals is undertaken in accordance with predetermined and pre-announced criteria. All proposals scoring at or above the predetermined minimum qualifying mark are eligible for their financial proposal to be opened and examined.

After the detailed examination of bids, for goods and works procurement, the lowest qualified and responsive bidder is determined, and subsequently recommended by the evaluation team for contract award. However, in the case of consultant services, under QCBS, after opening and examining the financial proposals of the consultants that achieved the minimum qualifying mark and above, the financial proposals are scored and weighted based on a predetermined weight for the technical and the financial evaluation, usually 80/20, and after summing the scores for each of the consultants, the one achieving the highest combined score is recommended by the evaluation team for contract award.

9) Contract negotiations

In the case of consulting services, the award recommendation by the evaluation team is contingent upon a successful negotiation of the contract with the selected consultant (firm or individual). Thus, the award recommendation is in fact a recommendation to initiate contract negotiations with the selected consultant.

Contract for goods and works procurement are not usually negotiated except under special circumstances the details of which must be specially stipulated in the bidding documents. In the invitation for negotiations, negotiation points identifying weakness in the consultant's proposal are sent to the selected consult, along with a draft of the contract, for review and comments.

As a pre-requisite to the negotiations the consulting firm is requested to confirm availability of key staff to carry out the assignment, as well as to provide a power of attorney naming and authorizing the chief negotiator to agree to the final contract on behalf of the firm. Negotiation can be carried out by email, telephone and/or face-to-face. This depends on the monetary value and complexity of the requirement.

Only the technical proposal is negotiated, and the focus is usually on resolving weaknesses observed in the selected consultant's proposal and reaching agreement on the terms and conditions of the contract. In the case of negotiations with individual consultants, the focus is on agreeing on the Terms of Reference of the assignment and make minor modifications if necessary.

10) Contract award:

For goods and works procurement, contract award takes place with the notification of the responsive bidder with the lowest evaluated price. Such notification is done by way of a formal letter of acceptance to which a response must be received with in a stipulated period of time. In the response to the client the selected bidder must also declare their mobilization or time frame with in which they intend to begin setting up and taking over the site to begin works (this is in the case of works).

For goods there isn't such mobilization period, so once the bidder signs the contract, the delivery schedule becomes effective. With consultancy services things are a bit different, notification of award takes place after successfully negotiating the contract and getting all the required approvals to proceed. Thus, after the contract has been successfully negotiated, it is initiated by the authorized representatives of both the entity and the consultants.

11) Post contract Award considerations:

After contract signing, unsuccessful bidders/consultants have the right to request debriefing by the procurement entity. Debriefing can be done orally or in writing, and essentially gives bidders/consults an indication of the strengths and weakness of their bids/proposals, which should help them understand the reasons why they were not selected. Debriefing also helps bidders/consultants to in future improve the quality of their bids/proposals.

Contract award is the beginning of the contract administration phase where the implementing entity will supervise the performance of consultants and the supervising engineer will oversee and report on the works contractor performance. In the case of goods, given that are finished usually being received, contract administration is limited to inspecting goods received to ensure they comply with requirements, and are fit for their intended purpose.

Skills requirements for procurement efficiency

- Good communication and negotiation skills
- High ethical standards.
- Technical knowledge of products being procured.
- knowledge of contract management and supervision law.
- Costing and value analysis skills
- Analytical skills
- Human relations skills

- Rule – abiding culture

MULAGO SCHOOL OF NURSING AND MIDWIFERY

P.O BOX 212

KAMPALA.

Date: 6th/01/2020

SUI GENERIS

CHAIRPERSON CONTRACTS COMMITTEE.

APPOINTMENT TO THE CONTRACTS COMMITTEE.

I confirm your appointment as the chairperson of the contracts committee for MULAGO SCHOOL OF NURSING AND MIDWIFERY following the approval of your nomination by the secretary to the treasury dated 4th/01/2020.

The terms of reference for this appointment shall be in accordance with the PPDA, 2003

If you accept this appointment, please sign this letter in the space availed below and a copy of the code of ethical conduct in business and return the copies to these documents to the undersigned.

The term of this appointment shall be 3 years effective from 20th/01/2010.

JOEL LUMALA,

Accounting officer

I, KUNYIGA SUI GENERIS accept the appointment

Date: 7th/01/2020

Ec. Secretary to treasury

cc. ED, PPD authority.

PROCUREMENT CYCLE.

The procurement planning process is as follows;

1. procurement plan and budgeting
2. assessment of market price
3. procurement requisitions
4. confirmation of availability of funds
5. review and preparation of bidding documents
6. Approval of procurement method, bidding documents and evaluation committee.
7. Advertising and limitation of bids
8. Receipts and opening of bids
9. Evaluation of bids
10. Review of evaluation report and award of contract
11. Signing of contract
12. Contract management and monitoring.

PROCUREMENT PLAN AND BUDGETING.

Section 58(1) of PPDPA mandates every procuring and disposing entity to come up with a procurement plan following the budget guidelines issued by the minister of finance in ever financial year and submit the same to the secretary of treasury at a specified time, **Section 58 (7)** bars the carrying out of any procurement outside the procurement plan except in emergency situations.

Process

User departments are pursuant to **Regulation 3(2) of PPDA (PDEs) Regulations 2014** mandated to prepare procurement plans in line with the approved work and plan and budget.

The user departments start by doing a needs assessment which it then budgets for.

The user departments forward their procurement plans to the PDU for consolidation pursuant to **Regulation 3(1) of PPDA (PDEs) Regulation 2014**. The consolidated plans are sent to the accounting officer for approval pursuant to **Regulation 3(4) of the PPDA (PDEs) 2014.**The procurement plans are approved by the board/council/management The accounting officer pursuant to **Section 58 (5) (a)** and (b) submits the procurement plans to the authority and to the ministry of finance. The annual procurement plans of the entity are then displayed on the entity board as required under **Section 58(6) of the PPDPA** and the website of ministry of finance and authority.

OBJECTION MY LORD

PROCUREMENT REQUISITION

Under **Section 34(1)(b),** the user department is charged with the duty to initiate procurement and disposal requirements. A user department shall initiate the procurement of supplies, works and non-consultancy services according to Regulation 3(5) of the PPDA (rules and methods for procurement of supplies, works and non-consultancy services) Regulations. 2014 by using part 1 of form 5 in the schedule to the regulations.

A user department seeking to procure consultancy services shall initiate the procurement as per **Regulation 3(5) of the PPDA** (procurement of consultancy services) regulations by using part 1 of form 18 in the schedule to the regulations The requisition must include the estimated values and statements of requirements as per **Regulation 24 of PPDA** (Supplies, works and non-consultancy) regulations. **Regulation 3(2) of the PPDA (PDEs) Regulations** requires that the requisition is approved/confirmed by an authorized officer usually the head of the user departments.

ISAAC CHRISTOPHER LUBOGO

FORM 5 (SUPPLIES, WORKS, AND NON-CONSULTANCY SERVICES).

PART 1

MULAGO SCHOOL OF NURSING AND MIDWIFERY

P.O BOX 212 ,KAMPALA.

THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS ACT 2003

REQUEST FOR APPROVAL OF PROCUREMENT REQUEST BY THE ESTATES DEPARTMENT FOR APRROVAL OF PROCUREMENT.

.....

Code of procuring and disposing entity	Works	Financial year	Sequence number
MSNM 03		2019/20	16

Particulars of procurement.

Subject of procurement	Construction of an auditorium
Procurement plan reference	MSNM/03/2019/20/01
Location of delivery	Mulago, Kampala, Uganda
Date required	31st December 2021.

Details relating to the procurement.

Item No.	Description	Quantity	Unit of measure	Est.unit cost	Market price of the procurement.
01	1500-seater auditorium with modern seats and audio system	01		2,000,000,000	2,000,000,000

Estimated total cost in UGX 2,000,000,000

Request for procurement confirmation of request

OBJECTION MY LORD

Name: OKOT RONALD LUMALA JOEL

Signature..... .....

Title: MANAGER ESTATES DIRECTOR ESTATES

Date: 31st/12/2019 2nd /01/2020

(Member of user department) (Head of user department)

Confirmation funding and approval to procure.

Vote/head No	programme	Sub-programme	item	Balance remaining.

Name: MULEMEZI HENRY

SIGNATURE:

TITLE: Accounting officer

DATE: 6th/01/2020.

Part 1 of form 18 of PPDA (procurement of consultancy services

ASSESSMENT OF MARKET PRICE.

Pursuant to Section 26 (4), an accounting officer must undertake a market assessment of the price of the supplies, services or of the unit costs of the work in respect of which the procurement is made. Under **Regulation 5(1) of the PPDA** (**supplies, works and non –consultancy Regulation and the PPDA(consultancy) Regulation**, the accounting officer can rely on prices obtained on previous similar bids or contracts taking into account any difference in the quantities purchased and prices published or advised by potential providers/consultants.

CONFIRMATION OF AVAILABILITY OF FUNDS.

Pursuant to **Section 26 (f) of PPDPA**, the accounting officer must confirm the availability of funds as per approved budget. **Regulation 4 (1) of the PPDA** (**supplies, works and non-consultancy) regulation of 2014** bars an entity from initiating any procurement for which funds are not available or adequate except if payment is to be effected from subsequent financial years or secretary to the treasury confirms in writing that the required funding shall be made available. **Regulation 4(3) supplies, work and non-consultancy Regulations of 2014 and consultancy Regulation of 2014.**

PREPARATION OF BID DOCUMENTS.

Section 62 of PPDPA enjoins a procuring and disposing entity to use the standard documents provided by the authority as models for drafting all solicitation documents for each individual procurement or disposal requirement. The bidding documents are prepared pursuant to **Regulation 32 of PPDA (supplies, works and non-consultancy services) regulations by the PDU**. The documents prepared include: a statement of requirements which must as per **Section 60 (2) of PPDPA give a correct** and complete description of the object of the procurement or disposal activity for the purpose of creating fair and open competition. Bidding documents to be prepared for supplies. These are stipulated under **Regulation 33 (1) of the PPDA (supplies, works and non-consultancy) Regulations** and they include:

a) The instructions to bidders which must stipulate the amount and form of bid security if required, the amount and form of performance security, if required ,the bid formal, the bid submission methodology, the currency in which the bid is to be submitted, the procedure for conversion of prices into a single currency and evaluation purposes including the source and date of exchange rates to be used for conversion, the currency in which a contract shall be paid and the evaluation methodology and criteria.

b) The standard bidding forms to be used.

c) The schedule of requirements which must stipulate, the specification and list of supplies, a sample of the supplies where required and the required delivery terms.

d) The draft contract which must include: the currency in which the contract shall be paid, the amount and form of performance security if required, the payment terms, including any advance payment, stage payments, retentions and payment securities, the basis for fixed or variable prices and the method for calculating variations in variable prices. If required, the method of payment, the documentation required for payment, the required

delivery terms any special requirements for packaging, marking and labeling, the delivery documentation required, any inspection or test required, any insurance requirements, any required warrants and the type of contract to be placed.

Bidding documents for works

These are stipulated under **Regulation 34 of the PPDA (supplies, works and non-consultancy) Regulations** and they include:

a) The instructions to bidder which must entail, the amount and form of bid security or form of bid security or form of bid securing declaration required, the bid format, the currency in which a bid is to be submitted, the bid submission methodology, the evaluation criteria and the procedure for conversion of prices to a single currency for evaluation purposes, including the source and date of exchange rates to be used for conversion.

b) The statement of requirements including design, specifications, drawings, bill of quantities or equivalent as may be applicable and the schedule for execution of the works.

c) The proposed form, terms and conditions of contract to be placed, the amount and form of performance security, if required , the currency in which a contract shall be paid , the payment terms, including any advance payments, interim or stage ,payments or payment retentions and required payment securities, the basis for faced or variable prices and the method for calculating variations, if required, the method of payment, the documentation required for payment, the functions and authority of the technical representative of the procuring and disposing entity, if any, any inspections or tests required and the test method ,requirements relating to certification of conformity and the insurance cover or indemnity required.

Bidding documents for non-consultancy services

These are stipulated under **Regulation 35 of the PPDA (supplies, works and non – consultancy) Regulations** and they Include:

a) Instructions to bidders, which shall include the amount and form of bid security required, the amount and form of any performance security, the bid format, bid submission, methodology, currency in which the bid is to be submitted, the procedure for conversion of prices to a single currency for evaluation purposes, including the source and date of exchange rates to be used for conversion and the evaluation methodology and criteria.

b) The standard bidding forms to be used

c) The schedule of requirements which shall specify, a description of the non-consultancy services required, the duration, timing of inputs and completion schedule, the required deliverables or outputs and any requirements with respect to the personnel to be used in the performance of the non-consultancy services.

d) The draft contract (has similar terms as the supplies contract)

The evaluation criteria provided in the instruction to bidders must be adhered to without any amendments. (**Regulation 37**).

Approval of Procurement Method, Bidding Documents and The Evaluation Committee.

The contracts committee pursuant to Section 28 of PPDPA approves procurement method, bidding documents or any addenda and the valuation committee. Section 28 and Section 29

Section 79(2) of the Act.

LIMITATION TO BID

Upon approval of the procurement method, bidding documents and evaluation committee by the contracts committee, the PDU prepares advertisements and issues the same writing bids through newspapers, website or notice boards pursuant to **Section 31 of PPDPA**.

Regulation 41(1) of the PPDA (supplies, works and non-consultancy) regulations provides for various methods of inviting bidders and these include:

a) By publication of a bid notice

b) Through a pre-qualification

c) By development of a shortlist

d) By direct invitation of a sole or single provider.

Bid notices.

Regulations 42 (1) of the PPDA (supplies, works and non-consultancy) Regulations mandates that the bid notices be published in at least one newspaper of wide circulation.

Sub regulations (2) requires that the bid notice be displayed on the website of the authority and the notice board of the entity from a date not later than the date of application of bid notice and until the deadline for submission of bids.

Bidding period.

Under **Regulation 45(1) of the PPDA (supplies, works and non-consultancy) Regulations** the bidding period shall start on the date the bid notice is first published or on the date of availability of the bidding document to bidders, whichever is later and shall end on the deadline for submission of bids by bidders.

Minimum bidding periods.

1. Pursuant to **Regulation 46(1) (a),** the minimum bidding period in respect of open domestic bidding method is 20 working days.

2. Pursuant to **Regulation 46(1) (b),** the minimum bidding period in respect of open international bidding method is 30 working days.

3. Pursuant to **Regulation 46(1) (c),** the minimum bidding period in respect of restricted domestic bidding method is 12 working days.

4. Pursuant to **Regulation 46 (1) (d),** the minimum bidding period in respect of restricted international bidding method is 20 working days.

5. The minimum bidding period under the quotation's method is 5 working days as per **Regulation 46 (1) (e).**

6. There is no minimum bidding period for direct procurement method. **Regulation 46(2).**

Issue and sale of bidding documents.

Under Regulation 47(1) of PPDA (works, supplies and non-consultancy) Regulation 2014, a procuring and disposing entity shall issue or sell bidding documents to a bidder who requests the documents in the case of open bidding.

Pursuant to Regulation 47(2), where bidding documents are sold, the procuring and disposing entity shall allow a potential bidder to inspect the bidding documents before purchase.

The entity shall record the issue or sale of all bidding documents using form 8 in the schedule to the regulations. **Regulation 47(3)**

Bidding documents may be sold in order to recover the cost of printing, copying and distribution and the price shall be calculated to over only these costs and shall not include any profit. **Regulation 47(4).**

The price of the bidding documents shall be approved by the contracts committee before issuing the bid notice or bidding documents and shall be included in the bid notice. **Regulation 47(5)**

Pre-qualification.

Pre-qualification is defined under **Section 3 of PPDPA** as a screening process designed to ensure that invitations to bid are confined to capable providers.

Under **Regulation 18(1) of PPDA** (**supplies, works and non-consultancy) Regulations 2014**, a procuring and disposing entity any use pre-qualification under open domestic or open international bidding to obtain a shortlist of bidders.

Regulation 18(2) enjoins the PDU to make a submission to the contracts committee to use pre-qualification using form 6 in the schedule.

The list of pre-qualified bidders is developed using the evaluation criteria prescribed by the procuring and disposing entity (**Regulation 18(3)** and published on the notice board of the entity for at least.

Pre-qualification can only be used where:

a) The non-consultancy services or supplies are highly complex, specialized or require detailed design or methodology.

b) The cost of preparing a detailed bid would discourage competition

c) The evaluation is particularly detailed and the evaluation of a large number of bids would require excessive time and resources from procuring and disposing entity.

d) The bidding is for a group of similar contacts, for the purposes of facilitating the preparation of a shortlist. **Regulation 18(4) (a)-(d).**

Pre-qualification notices and documents.

Under regulation 19 (1), the entity must advertise to the public a pre-qualification notice inviting potential bidders to obtain the pre-qualification documents from the entity.

Regulation 19(2) requires that the notice is published in at least one newspaper of wide circulation.

Bidding periods in pre-qualification.

Pursuant to **Regulation 20 (1)** the bidding period for pre-qualification starts from the date of first publication of the pre-qualification notice or the date of availability of pre-qualification documents whichever is later and end on the deadline for submission of pre-qualification applications.

Minimum bidding periods.

Under **Regulation 20(3),** the minimum bidding period for pre-qualification under domestic bidding is 15 working days and under open international bidding, it is 20 working days.

RECEIPT AND OBTAINING OF BIDS.

Section 69 provides that every bidding process must include a formal bid receipt and a bid opening. **Regulation 58(1) of the PPDA (supplies, works and non-consultancy) Regulations** provides for various methods of receipt of bids a procuring and disposing entity may use. These are:

a) Through the staff of the PDU, in person, who must acknowledge receipt of the same by issuing a receipt.

b) By use of a bid box. (Most favored approach). Good practice requires that you put a book around the area with the bid box so that the bidders sign to the book upon dropping the same.

OPENING OF BIDS.

Pursuant to **Regulation 62(1)** bids submitted under open bidding method or restricted bidding method must be opened at a public bid opening session. The bid documents must contain instructions to bidders regarding, the date and time of the bid opening session and the information to be read out and recorded at the bid opening session.

OBJECTION MY LORD

The procedure for public bid opening is stipulated under **Regulation 65 of PPDA (supplies, works and non-consultancy) Regulation 2014**

Sub Regulation (1) of 65 provides that the public opening of bids shall be managed by PDU and must be witnessed by a member of the contracts committee or a person nominated by the user department.

The public bid opening must be recorded using **form 12 in the schedule of the PPDA (supplies, works, and non-consultancy) Regulations (Regulation 65(9)**

EVALUATON OF BIDS.

Pursuant to regulation 5 of the PPDA (evaluation) Regulations 2014, the evaluation committee having evaluated all bids using the evaluation criteria makes an evaluation report indicating the best evaluated bidder. Evaluation period is 20 working days for supplies and non-consultancy services, 40 working days for works. Days start to run from the date of bid opening (guidelines 5 of PPDA guidelines.)

Section 37(1) it's done by the evaluation committee.

PREVIEW OF EVALUATION REPORT AND AWARD OF CONTRACT.

The contracts committee reviews the evaluation report and if satisfied approves the same and best evaluated bidder.

The best evaluated bidder and other unsuccessful bidders alike. **Regulation 4 of the PPDA(contracts) Regulation 2014.**

SIGNING OF THE CONTRACT

The contract can only be signed after 10 days from the date of display of the Notice of the best evaluated bidder.

Contract is provided to the accounting officer who signs it on behalf of the entity under **Section 26 of the PPDPA** and the contract must be approved by the Attorney General where necessary before it's signed. **Section 52 of PPDA** contract will be signed with the best evaluated bidder.

CONTRACT MANAGEMENT AND MONITORING

- Ensure you follow the proper procurement procedure
- Use of performance bonds/guarantees
- Establishment of a building/contracts management committee headed by a manager
- Use of defect liability periods.

EMERGENCY PROCUREMENT.

Section 3 of the PPDPA, defines an emergency as circumstances which are urgent, unforeseeable and not caused by dilatory conduct. The section further defines urgent as not including circumstances that should have been foreseen by the procuring and disposing entity, are a result of inadequate planning or are a result of delays by or within the procuring and disposing entity.

In addition, the section defines an emergency situation as a circumstance which is urgent or unforeseeable or a situation which is not caused by dilatory conduct where:

a) Uganda is seriously threatened by or actually confronted with a disaster, catastrophe, war or an act of God.

b) Life or the quality of life or environment maybe seriously compromised.

c) The conditions or quality of goods, equipment, buildings or publicly owned capital goods may seriously deteriorate unless action is urgently and necessarily taken to maintain them in their actual value or usefulness

d) An investment project is seriously delayed for want of minor items.

e) A government programme would be delayed or seriously compromised unless a procurement is undertaken within the required time frame.

EFFECT OF AN EMERGENCY ON THE PROCUREMENT CYCLE.

Under **Regulation 8(1) of the PPDA (supplies, works and non –consultancy),** an emergency situation may be used to determined then procurement method regardless of the estimated value of the requirement.

Under **Regulation 8(3),** where an emergency situation is used as the criteria for determining the choice of a procurement method, competition shall not automatically be excluded from the procurement process solely on the basis of the emergency situation.

The entity must ensure it obtains maximum competition to the extent practicable in the procurement under an emergency situation (**Regulation 8 (4**)

Before an entity uses direct procurement, it must give priority to other competitive procurement methods (**Regulation 8(5)**

Where the value of the procurement requirement requires the use of the open bidding method the entity must before using direct procurement, in descending order consider to use:

a) The restricted bidding method

b) The quotations method

c) Any other competitive method with the appropriate modifications. (Regulation 8 (6)

Where the value of a procurement requirement requires the use of restricted bidding or restricted selection, a procuring and disposing entity must before using direct procurement in descending order, consider to use:

a) The quotations method

b) Any other competitive method with the appropriate modifications. (Regulation 8 (7)

Where the value of the requirement requires the use of the quotation's method, a procuring and disposing entity must before deciding to use direct procurement, consider using the quotations method with appropriate modifications. (**Regulation 8(8)**

Under Regulation 8(9), the permissible modifications to the competitive methods of procurement an entity may make before using direct procurement include:

a) A bidding period which is less than the minimum bidding period specified in these regulations

b) A shortlist of at least 2 bidders

c) Simplified documentation

d) A simplified bid submission method

e) A simplified evaluation methodology.

PROCUREMENT METHODS

Pursuant to **Section 79 (1),** a PDE may choose any of the procurement methods listed unders.80-88A. Method is chosen by the use PDU and approved by the contracts committee.

Where a PDE is procuring supplies, works or non-consultancy services, **Section 79(1) (a)** provides that the entity may pick ether of the methods provided under S.80 to S.88 bearing in mind the regulations and guidelines and the thresholds. (**Regulation 6(4),**

Regulation 6(3) of the PPDA (Supplies, works and Non-Consultancy) Regulations states that the procurement method shall be determined by:

a) The estimated value of the requirement

b) The circumstances relating to the requirement

c) The type of procurement, whether supplies, works or non-consultancy services.

Threshold for the various procurement methods.

These are stipulated in the PPDA Guidelines No.1 of 2014 on Thresholds for procurement methods.

• Est. value of works (UGX)	• Est. value (UGX) of consultancy services	• Est. value of supplies and non-const.	• Permanent method.
• Above 500 million	• Above 200m (for consultancy firms) • Above 50 million (for individual consultants)	• Above 200m	• Open • Domestic bidding or open international bidding
• Value greater than 200m but not to exceed 500m	•	• Value greater than 100m but not to exceed 200m	• Restricted domestic bidding or restricted international bidding
• Value greater than 100 million but not to exceed 200m	• Value greater than 50m but not to exceed 200m (for consultancy firms. Value less than 50m (for individual consultancy)	• Value greater than 5 million but not to exceed	• Quotation method or request for proposed without expression of interests for consultancy services.
• Not to exceed 10m	•	• Not to exceed 5 m	• Micro procurement.

Special thresholds for the procurement of medicines and other health supplies.

• Method of procurement	• Threshold (value in UGX)	• Conditions for use
• Open bidding	• Default method maybe used irrespective of the value of procurement	• Providers should be registered by the NDA except where no registration has been done
• Restricted binding	• Above 2 billion for national medical stores • Above 500 million for other entities	• Invite at least 5 bidders ,unless shortlist has less than 5

• Request for Quotations	• Above 1 billion for national medical stores • Above 100 million for other entities	• Invite at least 3 quotations, unless shortlist has less than 3 providers.
• Micro procurement	• Above 100 million for NMs • Above 5 million for other entities	•
• Direct procurement	• No limit	• Where there is only a single or sole provider where there is need for continuity.

METHODS FOR WORKS AND SUPPLIES

Open domestic bidding

Is provided for under **Section 80 of the PPDA**, **Section 80 (20)** defines the method as one which is open to participation on equal terms by all providers through advertisement of the procurement opportunity.

Section 80 (4) permits foreign bidders to participate in domestic bidding.

When using the method, the entity must advertise a bid notice in at least one newspaper of wide circulation. **Regulation 12(1) of PPDA, (Supplies, works and non-const) regulations**

Pre-qualification may be used upon advertisement of a pre-qualification notice in at least one newspapers of wide national circulation. **Regulation 12 (2)**

Open international bidding

It's defined in Section 81(1) of PPDA as a procurement method which is open to participation on equal terms by all providers through advertisement of the procurement opportunity and which specifically seeks to attract foreign providers.

It's used to obtain the maximum possible competition and value for money where the national providers cannot make the same achievable. **Section 81 (2) of PPDA**.

Regulation 13(1) of PPDA (supplies, works and non-const) Regulations require a bid to be published in at least one publication of international circulation.

Pre-qualification may be applied upon publication of the pre-qualification notice in at least one publication of wide international circulation. Regulation 13 (2)

1. Restricted domestic bidding

It's defined under **Section 82 (1) of PPDA** as a procurement method where bids are obtained by direct invitation without open advertisements.

It is applicable pursuant to **Section 82 (2) of PPDA** to obtain competition and value for money where the same cannot be obtained or the circumstances do not justify or permit the open bidding procedure.

Regulation 14(1) of PPDA, (supplies, works and non-const) regulations stipulates that the procurement under this method must be by selection of a bidder using a shortlist.

All potential providers must be included on the shortlist where the procurement requirement is available from a limited number of providers. (Regulation 14(2) (a)) and before issuing the bidding documents, publish a notice of restricted bidding on the website of the authority. Regulation 14(2) (b).

The notice for restricted bidding is prepared according to format in 2nd schedule and must be published prior to the issue of the bidding documents.

2. Restricted international bidding

It's defined in **Section 83 (1)** as a procurement method where bids are obtained by direct invitation without open advertisement and the limited bidders include foreign products.

It's used to obtain competition and value for money to the extent possible where the value or circumstances do not justify or permit an open bidding method and short-listed bidders include foreign products. **Section 83(2)**

3. Quotation method.

It's a simplified procurement method which compares price, quotations obtained from a number of providers. (Section 84 (1).

Schedule 4 paragraph 5(1) (b) writes that value of the procurement must not exceed the method stated of the procurement guidelines.

Section 84(2) of PPDA stipulates that a quotation method must be used to obtain competition and value for money to the extent possible where the value or circumstances do not justify or permit open or restricted bidding procedures.

The method is only applicable in works and supplies (Section 84 (3)).

Pursuant to **Regulation 15(1) of PPDA**, supplies, works and non-const) Regulations, the procurement using the quotations method must be by selection of bidders using a shortlist.

The entity must obtain at least 3 quotations. **Regulation 15(2)**

There is no requirement to have the opening of the quotations in public. Regulation 15

4. Micro procurement.

It is used for very low value procurement requirements. **Section 86 (1).**

It is applicable to achieve efficient and timely procurement where the value does not justify a competitive procedure.

Paragraph 7 (2) (c) of the 4th schedule to the act mandates the entity to make a comparison of at least 3 quotations.

Paragraph 7 (3)(b) forbids the use of method for the procurement of works, services or supplies where they are required continuously or repeatedly over a set period of time or for which a framework contract is required.

Under **Regulation 16(1) of PPDA** (supplies, works and non-const) Regulations there is no requirement for issuance if a bidding document, submission of a bid, a public bid opening session, the use of an evaluation bidder and issue of a notice of award of contact.

5. Direct procurement.

It's used to procure requirements where exceptional circumstances prevent the use of competition.

Under paragraph 6(1) of the 4th schedule, the method may be used where there is insufficient time for any other procedure such as in an emergency situation, the works, services or supplies are available from only one provider etc. Regulation 17.

METHODS FOR CONSULTANCY SERVICES.

Section 79 (1) (b) provides that for consultancy services reference shall be made to S.88A. Requires an entity to publish a notice as specified in the 4th schedule inviting expression of interest for a required assignment.

Under **Regulation 8(1) of PPDA** (procurement of consultancy services) Regulations the period of expression of interest starts to run on the date the notice is first published and end on the deadline for submission of expression of interest.

Pursuant to **Regulation 8(3)** the minimum period for expression of interest is:

a) 10 working days where the notice is only published in Uganda

b) 15 working days where the notice is published internationally.

The methods of procuring consultancy serves are: **Regulation 6 (a)-(c)**

1. Publishing a notice inviting expression of interest.

Regulation 7 of the PPDA (procurement of consultancy services) regulations.

- The notice must be published in at least one newspaper of wide circulation in Uganda.

- To ensure effective competition, the entity must publish in the relevant trade or professional publication. (Regulation 7 (3))
- Where entity does not expect the required service to be available from at least 6 consultations in Uganda, the notice inviting expressions of interest shall be published in a publication of wide international circulation.
- Notice must also be displayed on the entities notice board and PPDA website.

2. By developing a shortlist without publication of a notice inviting expression of interest.

Pursuant to Regulation 11(I), the entity can apply the method where, the consultancy service can only be provided by a limited number of consultants, in this case not more than 6 consultants, value of the procurement is lower than the value prescribed for publication of notice inviting expression of interest or there is an emergency situation.

3. Single and sole source consultants

There must be exceptional circumstances preventing the use of competitive bidding and where the conditions for using direct procurement method as specified Regulation 16(1)

The single consultant must be identified from a number of consultants able to provide the consultancy service. **Regulation 16(2) (a).** The sole service consultant is identified due to the unique skills or knowledge of that consultant or where there is need for continuity service**. Regulation 16(2) (b)**

The entity must pick the consultant from the pre-qualified list and where the entity does not have are qualified list, the entity will use

a) The register of providers of the authority

b) The recommendations of a competent authority or the pre-qualified providers of another procuring and disposing entity. Regulation 16(3).

DISPOSAL

In Roko Construction Limited v Public Procurement and Disposal of Public Assets Authority & Ors (Civil Appeal 59 of 2017) [2018], Court The objective of the PPDA Act as enumerated from the long title is to formulate policies and regulate practices in respect of public procurement.

Section 3 of the PPDA, defines disposal as the divestiture of public assets including intellectual and proprietary rights and good will and any other rights of a procuring and disposing entity by any means, including sale, rental, lease, franchise, auction or any combination however classified;

The disposal process is defined as the successive stages in the disposal cycle including planning, choice of procedure, measures to solicit offers from bidders, examination and evaluation of those offers and award of contract.

Methods of disposal.

OBJECTION MY LORD

S.79 (1) of PPDA requires that the choice of a procurement or disposal method must first be approved by the contracts committee.

Under S.87 (1) the methods of disposal of public assets include:

a) Public auction

b) Public bidding

c) Direct negotiations

d) Sale to public officers

e) Destruction of the assets

f) Conversion or classification of assets into another form for disposal by sale

g) Trade-in

h) Transfer to another procuring and disposing entity

i) Donation.

PUBLIC BIDDING

ROKO CONSTRUCTION LIMITED V PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY & ORS (CIVIL APPEAL 59 OF 2017) [2018],

Under subsection 3(b) a bidder not satisfied by the decision of the accounting officer may make a complaint to the PPDA Authority and under section 91(5) where a bidder is still dissatisfied, they may appeal in accordance with part VIIA of the PPDA Act which provides for the Tribunal under section 91B. This court considers that the Tribunal's proceedings and ruling which commenced after action by NDA accounting officer and PPDA are valid within the meaning of these sections of the PPDA Act.

Regulation 4 of the PPDA (Disposal of public assets) Regulation 2014 states that the method will be used where: the assets is located in a remote area, the asset has a geographically dispersed potentially market, the sale has end user or export restrictions, conditions need to be attached to the sale of the asset or post bid negotiations may be required.

Regulation 5(3) requires the entity to solicit for bids to dispose of a public asset by public bidding by publishing an invitation notice to the public.

The invitation must be published in at least one newspaper of wide circulation and communicated through other means to potential bidders so as to increase competition. **Regulation 5(4)**

The bidding documents must among others stipulate that the asset is sold on an 'as is where is' basis or the alternative basis for sale. **Regulation 5(7) (9).**

The minimum bidding period is 15 working days. **Regulation 5(11)** and the bid are evaluated using the 'price only' methodology. **Regulation 5(12).**

PUBLIC AUCTION

In ALOK GROUP LTD & 2 ORS V SHAWAGI & 2 ORS (MISCELLANEOUS APPLICATION 272 OF 2012) [2012] court observed that On payment of the purchase money, the officer or other person holding the sale shall grant a receipt for the purchase money, and the sale shall become absolute.

It shall be where there is a large number of a potential bidder for the asset: value of the asset is low; more than one asset is to be disposed of and the assets are at one location or a site auction is arranged to avoid transport costs. **Regulation 6(1)**

The sale under this method must be at a reserve price. **Regulation 6(2)**

The entity solicits for bids by publishing an invitation notice to the public **Regulation 7(3**) in at least one newspaper of national circulation. **Regulation 7(4)** and the notice displayed on the entity's notice board **Regulation 7(5).**

The entity must appoint an auctioneer and handover the asset to them to conduct the auction on the entity's behalf. **Regulation 7(6).**

The entity must allow at least 10 working days of the potential bidders to inspect the asset. The period is between the date of publication of notice and the date of the public auction. **Regulation 7(8).**

Bidding is made orally at the auction **Regulation 7(9)** and the auctioneer will announce the successful bidder who must immediately after the announcement pay at least 50% of the contract price. **Regulation 7(12)** and the balance within 5 days. **Regulation 7 (13).**

DIRECT NEGOTIATION

ATTORNEY GENERAL V SINO AFRICA MEDICINES AND HEALTH LTD (MISCELLANEOUS APPLICATION 2 OF 2016) [2016] Court stated that Provider shall make every effort to resolve amicably by direct informal negotiation any disagreement or dispute arising between the under or in connection with the Contract It's used where national security, public interest, health and safety issues, legal and human rights issues or environmental considerations are served. When the asset is sold to a particular bidder. **Regulation 9**

The entity must obtain a valuation for the asset before the negotiations are conducted. **Regulation 10(3).**

The entity solicits for bids by issuing bid documents. **Regulation 10(4).**

The minimum bidding period for disposal by direct negotiations is 3 working days. **Regulation 10(6)** and the bid are evaluated using a 'price only' methodology.

SALE TO PUBLIC OFFICERS.

In NKUNYINGI-SSEMBAJJA V SECRETARY, PUBLIC SERVICE COMMISSION & ANOR (MISCELLANEOUS CAUSE 82 OF 2019) [2020] court noted that Once the public office has established a practice in its operations, then such a practice becomes law and must be applied without any discrimination to all manner of public servants under the same or similar circumstances. The same cannot be applied in a discriminatory and/or whimsical manner.

It's used where: the assets are small in number or are of a low value and a sale to the public would not achieve value for money, the use of the asset would directly enhance the performance of the public officer in the execution of his/her duties within the entity. **Regulation 11(1) (a) and (b).**

The sale is done by an independent agent **Regulation 11(2)** and the asset is sold to the public officer for their personal use and not for business or commercial use. **Regulation 11(3).**

The independent agent solicits bids by publication of a non-public invitation notice which is displayed within at least 5 PDEs which are freely and easily accessible by public officers and on the website of the authority. **Regulation 12(3).**

The bidding period must not be less than 10 working days. **Regulation 12(11)** of the bids are evaluated using the 'price only' methodology.

DESTRUCTION OF THE ASSET.

In AKUZZE & ORS V UGANDA NATIONAL ROADS AUTHOURITY & ANOR (HCCS 66 OF 2008) [2019] Court stated that all assets and liabilities not listed in the schedule to those Regulations shall remain vested in the Government of Uganda.

It's used where: national security, public interests, health and safety issues, legal and human rights issues or environmental considerations will be served and the public asset has no residual value and it cannot be transferred to another PDE, converted or classified into another form or disposed of by donation. **Regulation 13(a) and (b).**

Conversion or classification.

Regulation 15 (a) and (b) as in Regulation 13(a) and (b) above.

TRADE IN

UGANDA LAW SOCIETY V KAMPALA CAPITAL CITY AUTHORITY & ANOR (MISCELLANEOUS CAUSE 243 OF 2017) [2020]. It was held that No person shall trade in any goods or carry on any business specified in the schedule to this Act unless he is in possession of a trading license granted to him in that behalf under this Act. (Trade (Licensing) (Amendment of Schedule) Instrument No 17 of 1990)

Pursuant to **Regulation 17(1) and (2)**. It's only used where the asset of the PDE will be upgraded in a convergent, economic and efficient way, by trading in a surplus asset of the entity to offset the purchase price of the new asset and should not be used where competition and value for money will not be achieved in the procurement process.

DONATION

KIZITO MUBIRU V KALISSA AUGUSTINE (CIVIL APPEAL 92 OF 2009) [2019] Court observed that donation is construed in law as a gift inter vivos. In the case of **THE REGISTERED TRUSTEES OF KAMPALA ARCHDIOCESE V NABITETE NNUME MIXED CO-OPERATIVE FARM LIMITED (HCCS NO. 1559/2000) [2017] UGHCLD 4**; It was held that a gift inter vivos is defined in Black's Law Dictionary 8th Edition at page 710 as;

"…a gift of personal property made during the donor's life time and delivered to the donee with the intention of irrevocably surrendering control over the property." following the decision in **JOY MUKOBE VS. WILLY WAMBUWU HCCA NO. 55 OF 2005**, the court held that**;**

"…for a gift inter vivos to take irrevocable root, the donor must intend to give the gift, the donor must deliver the property, and the donee must accept the gift.

Applicable where the entity cannot obtain payment for the asset using any of the other methods and neither can the asset be transferred. Regulation 21 (a) and (b)

DISPOSAL CYCLE.

ROKO CONSTRUCTION LIMITED V PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY & ORS (CIVIL APPEAL 59 OF 2017) [2018] court stated that, under section 90 of the PPDA Act, a bidder aggrieved by a decision of a procuring and disposing entity may make a complaint to the accounting officer of the procuring and disposing entity. Under subsection 3(b) a bidder not satisfied by the decision of the accounting officer may make a complaint to the PPDA Authority and under section 91(5) where a bidder is still dissatisfied, they may appeal in accordance with part VIIA of the PPDA Act which provides for the Tribunal under section 91B. This court considers that the Tribunal's proceedings and ruling which commenced after action by NDA accounting officer and PPDA are valid within the meaning of these sections of the PPDA Act.

OBJECTION MY LORD

1. **Accounting officer institutes a board of survey**.

   Regulation 3(2)

   - Identification of disposal items
   - Determination of reverse price.

2. **Preparation of disposal pan.**

   Regulation 2(1)

   - Approval of the same by ministry of finance and if disposing strategic assets.

3. **User department initiates disposal process**.

   Regulation 3(1)

   - Preparation of statement of requirements.

4. **PDU prepares bidding does**

   This applies to disposal by public bidding and sale to public officers. **Regulation 5,6,7**

5. Contracts committee approves disposal method, bidding document and evaluation committee. **Regulation 3(1)**

6. PDU advertises and invites bids. **Regulation 5(4)**

7. PDU receives and opens bids

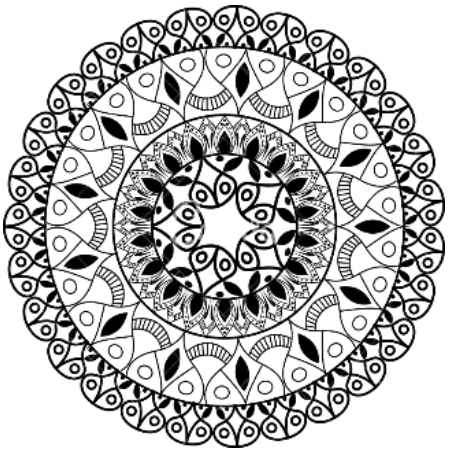
8. Evaluation of bids. **Regulation 5(12)**

9. Contract committee reviews evaluation report.

10. Signing of contract

11. Contract management. **Regulation 5(14**)

    - Provider pays entity
    - Entity hands over asset.



AGENCIES

An agency is a relationship between an agent and a principal in which the agent acts on behalf of the principal.

Section 118 of the contracts act defines:

a) An agent as person employed by a principal to do any act for that principal in dealing with a 3rd person.

b) a principal is a person who employs an agent to do any act for him or her or to represent him or her in dealing with 3rd person

c) sub-agent is a person employed by and acting under the control of an agent in the business of the agency.

REQUIREMENTS FOR AN AGENCY CONTRACT.

1. Capacity

This relates to both the capacity of the principal and the agent.

S.119 states a principal has the capacity to enter into an agency contract if

a) They are 18 years or more

b) They are of sound mind

c) They are not disqualified from entering an agency contract under any law.

Section 120 states that a person is clothed with capacity to act as an agent if:

a) They are 18 years or more

b) They are of sound mind

c) They are not disqualified from entering an agency contract under any law.

2. **Consideration**.

Section 121 of the contracts act states that consideration is not necessary to create own agency.

CREATION OF AN AGENCY.

1.By express appointment by the principal.

S.122 (2) provides that the authority of an agent may be express where it is given by spoken or written word.

2. By implied appointment by the principal.

S.122 (2) provides that the authority of an agent may be implied where it is inferred from the circumstances of the case.

Depending on the circumstances of each case, sub section 3 states that any words, spoken or written in the ordinary course of a dealing maybe taken into account.

3. By necessity.

An agency is created where an agent goes beyond their authority by intervening on behalf of the principal in times of emergency.

S.124 of the contracts act empowers an agent to do any act for the purpose of protecting a principal from loss as would be done by a person of ordinary prudence, under similar circumstances.

An agency of necessity may be created if the following 3 conditions are met.

a).It is impossible for the agent to communicate to the principal. The Australia (1859) 13 MOO P.C.C 132. In light of modern communications, this may be very unlikely to arise. **In SPRINGOR V GREAT WESTERN RAILWAY CO. (1921) 1 KB 257,** a consignment of fruit was found by the carrier to be going bad. The carrier sold the consignment locally instead of delivering it. Court held that the carrier was not an agent of necessity because he could have obtained new instructions from the owner of the first.

b).Agent acted in good faith for the benefit of the principal. **TRONSON V DENT (1853), 8 MOO. P.C.C 419**

4. Agency by Estoppel

Section 169 of Contract Act No 7 of 2010

In **POLE V LEASK (1863), 8 LT.645**, court stated that a person can in the absence of prior agreement as to authority or subsequent ratification of unauthorized acts become a principal by placing another in a situation in which according to the ordinary usage of mankind that other is understood to represent and act for the person who placed him so.

The requirement for an agency by Estoppel were summed up by Slade j in **RAMA CORPORATION LTD V PROVED TIN AND GENERAL INVESTMENTS LTD, (1952) 1 ALL ER 554,** as

1. As representation which must be some statement or conduct on the part of the principal
2. Reliance on the representation which means that it must be made either to the particular individual who transacts business with the agent or to the public at large in circumstances in which it is to be expected that the general public would be likely to transact with the agent.
3. An alteration of a party's position resulting from the reliance.

5**. Ratification**

Section130 (1) of the contracts act

This arises in situations where an agent does something outside their authority however the principal on whose behalf the agent did the thing accepts and adopts it, just as if there had been a prior authorization by the principal to do exactly what the agent has done.

The effect of ratification as stated by Tindal CJ in **WILSON V TURIMAN (1843) 6 MAN AND G 236**, is that the principal is bound by the act, whether it be for his detriment or his advantage and whether it be founded on a tort or a contract, to the same effect as by and with all the consequences which follow from the same act done by the previous authority.

The requirements for ratification were laid down by were laid down by Wright J **in FIRTH V STAINES (1897)2 Q.B 10** and they are:

1. The agent whose act is sought to be ratified must have purported to act for the principal who later ratifies.

In RE TIEDEMANN AND HEDERMANN FRERES (1899)2 Q.B 66, an agent acted in X's name as principal, though intending the sale to be for his own benefit and to his own account. The 3rd party later wanted to avoid the contract when he found out the truth on the ground of the false pretense about the party with whom he was contacting. X purported to ratify the sale. It was held that he could do so and thus deprive the 3rd party of his right to turn a voidable contract into a nullity. The possibility of ratification does not depend upon what the agents' state of mind actually was but upon the way his statements and conduct were reasonably understood by the 3rd party.

2. At the time the act was done the agent must have had a competent principal. The principal must be in existence at the time the act was done by the agent. No one can purport to act

as an agent for a person who will come into existence at some future date even if the agent can reasonably expect that his acts will be adopted.

In **NEWBORNE V SENSOLOD (GREAT BRITAIN) LTD, (1953)1 ALL ER708**, a contract of sale was signed by L. Newsborne on behalf of a projected company, Lepold news borne ltd, which was not registered at the relevant time. The company was accordingly not in existence when the contract was made. Therefore, the contract was a nullity and could not be ratified so as to entitle the company to sue upon it when the defendants refused to take delivery of the goods contracted to be sold.

3. The act done by the agent must be legal

4. Time when ratification takes place. Not only must the principal have capacity to ratify him or she must enjoy such capacity at the time of the purported ratification.

IN **KEIGHLEY MARSTTOD AND CO V DURRANT (1901) AC 240**, court held that if an agent by words or conduct indicates an intention to act not as agent at all but as principal, there is no body who can ratify as principal, the latter cannot ratify any transaction made by the agent.

DIFFERENT KINDS OF AGENTS.

1. **General and specific agents**.

A general agent is one who has authority to do some act in the ordinary course of his trade, business or profession, as agent on behalf of his principal or to act for his principal in all matters or in all matters of a particular trade or business or of a particular nature.

A special agent is one whose authority is limited to doing some particular act or to representing his principal in some particular act or to representing his principal in some particular transaction, not being in the ordinary course of trade, profession or business as an agent.

2. Brokers.

They are mercantile agents. In **FOWLER V HOLLINS (1872) L.R.T Q.B 616**, a broker was defined as an agent employed to make bargains and contracts between persons in matters of trade, commerce and navigation. Properly speaking a broker is being negotiators between other parties.

3. Del credre agents.

These are also mercantile agents. These are agents who in return for an extra commission called a Del credere commission, promise that they will indemnify the principal if the 3rd with whom they contract in respect of goods fail to pay what is due under the contract.

4. Auctioneers.

These are agents whose ordinary course of business is to sell by public auction that is by open sale, goods or other property.

5. Commission agents

These resemble independent parties. A commission agent seems to be a seller of goods for commission.

RIGHTS AND DUTIES OF AN AGENT AND PRINCIPAL DUTIES OF AN AGENT/RIGHTS OF THE PRINCIPAL.

1. PERFORMANCE.

Where the agency is contractual, the agent must perform what he has undertaken to perform. The agent has a duty to carry out the contract which the agent has made with the principal. **In TURPIN V BILTON (1843) 5 MAN AND G H55**, the agent was appointed under a contract to insure the principals ship. He failed to do so, the ship was lost and the principal was therefore uninsured at the time. It was held that the agent had been guilty of a breach of contract for which he was liable.

However, there is no duty to perform an illegal undertaking. **IN COHEN V KITTELL (1889) 22 Q.B.D 650,** the principal employed a tuff commission agent to place certain bets, which the agent failed to do. The principal sued and agent, claiming the loss of the money he would have won had the bets been made. It was held that the agent was not liable. S.10 of the contracts act provides for lawful consideration

2. OBEDIENCE

The agent, in the performance of the undertaking must act in accordance with the authority which has been given to them. He/she must obey instructions contained in the express authority. S.145 of the contracts act.

3. CORE AND SKILL

Agent must perform their duties with due care and skill. S.146 (1) of C.A

4. NON –DELEGATION

The general rule is that the agent must perform his/her undertaking personally. This is because of the relationship between a principal and agent is a confidential one. The principal imposes trust in the agent of his choice hence the duty of the agent is to act personally in conformity with the maximum *delegatus non potestdelegare.*

In **ALLAN AND CO LTD V EUROPA POSTER SERVICES LTD[20]**. The relation of an agent to his principal is normally at least one which is of a confidential character and the application of the maxim *delegatus non potestdelegare* to such relationship is founded on the confidential nature of the relationship.

[20]**(1968) 1 ALL ER** 826

Section 125 (1) of contracts act duty to act personally where agent undertook to act personally.

Section 125 (2) where the ordinary custom of a trade allows it a sub agent maybe employed to perform an act which the agent expressly or impliedly undertaken to perform personally.

Section 125 (3) if the agency permits, then agent may employ a sub-agent.

Section 126 (1) where a sub-agent is duly appointed, he/she binds the principal.

Section 126 (2) an agent is responsible for the acts of the sub agent to the principal

Section 127, where sub-agent is not duly appointed then principal isn't bound.

Where the principal reposes no personal confidence in the agent the maxim has no application, but where the principal does place confidence in the agent that in respect of which the principal does so must be done by the agent personally unless expressly or inferentially, he is authorized to employ a sub agent or to delegate the function to another. If the agent personally performs all that part of his functions which involves any confidence conferred on him or reposed in him by the principal, it is immaterial that he employs another person to carry out some purely ministerial act won his behalf in completing the transaction.

Where there is an express permission to delegate the court in **MACKERSY V RAMSAYS BONARS AND CO. (1843) 9 CI & FIN 818**, stated that the agent will be liable to the principal for breaches of duty on the part of the sub-agent

5. RESPECT OF PRINCIPAL'S TITLE.

The agent cannot deny the title of the principal to goods, money or land possessed by the agent on behalf of the principal. The possession of the agent is the possession of the principal for all purposes.

6. DUTY TO ACCOUNT.

The agent must pay over to his principal all money received to the use of his principal. The duty requires that the agent should be in a position to know what he must pay the principal and that the principal should be able to see whether the agent has fulfilled his/her duty.

7. DUTY NOT TO MAKE SECRET PROFITS.

An agent may not make a secret profit out of the performance of his duties as an agent. It is the duty of agent to relay all benefits to the principal. **SHAH V ATTORNEY GENERAL (1969) EA 261.**

Section 150 of the Companies Act states that principal has right to benefit from gain made by agent dealing on own account in business of agency.

8. DUTY OF FIDELITY.

Where an agent is in a position in which his own interest may affect the performance of his duty to the principal, the agent is obliged to make a full disclosure of all material circumstances so

that the principal with such full knowledge, can choose whether to consent to the agent acting. If this is not done and the principal does not ratify, then he may set aside the transaction and claim from the agent any profit the agent may have obtained from such transaction.

IN MCPHERSON V WATT (1877),[21]the agent of two ladies who wanted to sell their house bought it in the name of his brother, so as to conceal that he was really buying it for himself. Specific performance of the contract of sale was therefore refused.

RIGHTS OF THE AGENT/DUTIES OF THE PRINCIPAL

1. Remuneration **Section 153 of Contract Act**

This is the most important duty of the principal. The duty exists where expressly or impliedly provided for. The duty even if stated only arises where the agent has earned it. The agent must show not only that he has achieved what he was employed to bring about but also that his acts were not merely incidental to that result, but were essential to it happening. Like all cases of causation, it is ultimately a question of fact. **In WILKINSON V MARTIN (1837) SC** and P 1, **Tindal CJ** stated that the question to be answered was did the sale really and substantially proceed from agents' acts.

In TOULMIN V MILLAR[22]an agent found a tenant for an estate, as he was employed to do. Later the tenant purchased the estate, without the intervention of the agent. It was held that the agent was not entitled to commission on the sale.

In TAPLIN V BARRETT[23]the principal employed an agent to sell a house. The agent found a prospective purchase, whose terms were not accepted by the principal, who therefore put the house up for auction. At the auction, x, was the successful bidder who bought the house. It was held that the agent was not entitled to commission.

In GREEN V BARTLETT[24], the agent was employed to sell a house at an auction, failed to get a purchaser at the auction. X who had been present at the auction asked the agent who was the owner of the house. The agent told him and X then proceeded to enter into a contract directly with the owner, the agents' principal. Court held that the agent was entitled to his commission. The court stated that if the relation of buyer and seller is really brought about by the act of the agent he is entitled to commission although sale has not been affected to him.

In BURCHELL V GOWRIE COLLIERIES (1910) AC 614, the principal sold to X behind the agents back but after the agent had discovered x in the course of fulfilling the task of finding a purchaser for the principal and had advised his principal not to sell to X. court held, he was entitled to receive his commission.

It is immaterial that the principal has not benefited from the acts of the agent as long as the agent performs what he was contracted to do. Where principal does not benefit from act.

[21]**3 APP CAS.254**,
[22]**(1887), 58 L.T .96,**
[23]**(1889) 6 T.L.R .30**,
[24]**(1863) 14 C.B.N.S 681**

In FISHER V DREWETT (1879) 48 L.J. QB 32, the agent was employed to get a mortgage on the principal's property. A third party was found ready to advance the money. But the mortgage could not be made because the principal had no title. It was held that the agent was entitled to his remuneration, despite the fact that the principal had got no benefit from his act. For the agent had done what he was employed to do.

The agent is not entitled to his commission if he has not performed what the contract of agency required him to do before his commission was payable, even if the principal prevented the agent from achieving this, as long as the principals conduct was legitimate under the contract.

Under **Section 154 of Companies Act**, an agent guilty of misconduct in the business of the agency is not entitled to any remuneration in respect of that part of the business.

2. INDEMNITY.

The duty maybe expressly stated but usually is implied. The extent of this liability depends upon the nature of the agreement between the parties and the kind of business in which the agent is employed.

Section 158 (1) of Companies Act, a principal must indemnify an agent against the consequence of all lawful acts done by the agent in exercise of the authority conferred upon them.

3. Duty to compensate agent for injury suffered in the execution of their duties. **Section 158 of the Companies Act**.

4. right of principal to repudiate when agent deals without the consent of the principal.

REMEDIES AVAILABLE TO PARTIES UPON BREACH OF AGENCY.

PRINCIPAL

Dismissal Section 137 of Contract Act / revocation.

On discovering the agent's misconduct, the principal may dismiss him without giving any notice and without being liable to pay the agent any compensation.

1. **Court action.**

If depending on the alleged cause of breach, the court action will be founded on that. For example, negligence, and fraud. In the action, the principal may recover damages. S.146 (2) of C.A

2. **Prosecutions.**

Where the agents misconduct takes the form of a criminal offence, such as acceptance of a bribe or misappropriation of the principals property, the principal, besides his remedy in damages, such as an action for conspiracy or conversion, can also institute the appropriate criminal proceedings under , for example the penal code act.

AGENT.

1. Action

Say for payment of remuneration agreed upon in the agency

2. Set off

This happens where principal has a claim but also the agent claims some money from the principal.

3. Lien

If the principal has not discharged his obligation of paying remuneration or indemnity and the agent is in possession of goods belonging to the principal then subject to the consideration, the agent is entitled to exercise a lien on such goods and retain possession of them until such time as the principal has satisfied the due claims of the agent.

EFFECT OF THE AGENCY RELATIONSHIP.

1. CONTRACTS BY AGENTS.

In such contracts, it's necessary to ascertain the nature of the principal on whose behalf the agent contracted.

A named principal. This is one whose name has been revealed to the 3rd party by the agent.in such circumstances, the 3rd party knows that the agent is contracting as an agent and knows also the person for whom the agent is acting.

A disclosed principal is one whose existence has been revealed to the 3rd party by the agent, but whose exact identity remains unknown.

Where the agent contracts with a 3rd party on behalf of a disclosed principal who actually exists and has authorized the agent to make such contract, the principal can sue and be sued by the 3rd party on such a contract. The agent must have been acting with authority in making such a contract. The principal will not be liable where the agent contracted outside the scope of his/her actual, apparent or presumed authority whatever the derivation of the relevant type of authority.

In LINFORD V PROVINCIAL etc. INSURANCE CO. (1864), 34 BEAR 291, a stock broker who sold stock on credit, although in good faith and on behalf of his principal did not bind his principal by such contract since he was not expressly authorized to make such a sale, nor was it within his implied authority as being usual or customary.

Even if the agent appears to have authority, he will not bind his principal to any 3rd party with whom he contracts if such 3rd party has notice of the agent's actual lack of authority.

An undisclosed principal. Is one whose identity

TERMINATION OF AN AGENCY.

Section 135 of Contracts Act lays down the ways in which an agency may be terminated and these include:

a) A principal revoking his/her authority

b) An agent renouncing the business of the agency

c) The business of the agency is completed

d) A principal or agent dies.

e) A principal or an agent becomes of unsound mind

f) A principal is adjudicated an insolvent under the law.

g) The principal and agent agree to terminate

h) The purpose of the agency is frustrated.

ISAAC CHRISTOPHER LUBOGO

AN AGENCY AGREEMENT.

THE REPUBLIC OF UGANDA

IN THE MATTER OF THE CONTRACTS ACT,

2010.

AGENCY AGREEMENT

THIS AGENCY AGREEMENT IS MADE THIS 3RD DAY OF FEBRUARY 2020.

BETWEEN

XXX OF P.O BOX ## KAMPALA (HEREINAFTER REFERRED TO AS THE "PRINCIPAL")

AND

YYY OF P.O BOX ## JINJA (HEREINAFTER REFERRED TO AS THE "AGENT")

WHEREAS:

1.

2.

3.

NOW THEREFORE THE PARTIES AGREE AS FOLLOWS:

1. SUBJECT MATTER
    - Products/services which are the subject of the agreement.
    - Minimum targets to be attained.
2. DURATION/COMMENCEMENT
    - Fixed period
    - Right to renew/automatic renewal

3. DUTIES OF THE PRINCIPAL.
    - Supply promotional literature
    - Refer to the agent enquires from within the territory
    - Provide advice and assistance.
4. DUTIES OF THE AGENT.
5. RENUMEARTION/COMMISSION
    - Basis of commission
    - Time, manner and place of payment.
    - Currency of payment.
6. INDEMNITY
7. EXCLUSIVITY/APPOINTMENT OF ADDITIONAL AGENTS
    - Is the agent exclusive/sole/non-exclusive?
8. TERRITORIAL BOUNDARIES.
9. REPORTING GUDELINES
10. FINES, PENALITIES, CHARGES AND TAXES
11. FORCE MAJURE
12. CONFIDENTIALITY
13. TERMINATION
    - Right to terminate by notice
    - Length of notice period
14. DISPUTE RESOLUTION
15. LAW APPLICABLE

IN WITNESS WHEREOF THE PARTIES here to put their respective hands and seals on the day and the year herein above stated.

PRINCIPAL	AGENT
Signature:.....	Signature
Name:	Name
Position:.....	Position

In the presence of:

Signature:	signature
Name:	name
Profession:	position.

FRANCHISE.

Franchise agreements are regulated under the law of contracts and thus the primary legislation is the contracts act.

Other laws applicable include the trade secrets act, the trademarks act, and the investment code act of 2019.

The black's law dictionary 8th edition defines a franchise as a privilege granted or sold such as to use a name or to sell products or services. The right is given by a manufacturer or supplier to a retailer to use his product and mane on terms and conditions mutually agreed upon.

IN BOLAN BEVERAGES V PEPSICO, 2004 CLD 1530, the supreme court of Pakistan citing the black law dictionary above stated that in its simplest terms, a franchise is a license from owner of trade mark or trade name permitting another to sell a product or to serve under that name or mark. Precisely this definition is mole akin to a license rather than an agency. A franchise is therefore not an agency.

Common features.

1. Contractual relationship from franchisor to franchisee
2. Control by the franchisor over entire business operations of the franchisee
3. Assistance by the franchisor to franchisee in setting up, development, operation and promotion of a business
4. Payment of royalty and fee by the franchisee to franchisor.

Note: franchisor and franchisee are two distinct legal entities having their own profit and loss liabilities.

Customer's relationship with Franchisor through franchisee.

Franchising contracts typically carry a clause relating to any product liability to be the responsibility of the franchisee and such liability cannot under normal circumstances be passed on the franchisor.

FRANCHISE AGREEMENT.

THE REPUBLIC OF UGANDA

IN THE MATTER OF THE CONTRACTS ACT, 2010

FRANCHISE AGREEMENT

THIS FRANCHISE AGREEMENT IS MADE THIS 3RD DAY OF FEBRUARY 2020

BETWEEN

XXX OF P.O BOX 0000 KAMPALA (HEREINAFTER REFERRED TO AS THE "FRANCHISOR"

AND

YYY OF P.O BOX0000 KAMPALA (HEREINAFTER REFERRED TO AS THE "FRANCHISEE")

WHEREAS:

1.

2.

3.

NOW THEREFORE THE PARTIES AGREE AS FOLLOWS:

1. Date of commencement and duration

2. USE OF TRADE MARK
3. NATURE OF BUSINESS
4. ESTIMATED INVESTEMENT
5. ASSIGNABILITY OF RIGHTS
6. CONFIDENTIALITY AND TRADE SECRETS
7. TAX OBLIGATIONS
8. ROYALTY RATE AND PAYMENT PERIOD
9. INTELLECTUALPROPERTY RIGHTS
10. DISPUTE RESOLUTION
11. LAW APPLICABLE AND FORUM
12. TERMINATION

IN WITNESS WHEREOF THE PARTIES here to put their respective hands and seal on the day and year herein above stated.

FRANCHISOR	FRANCHISEE
Signature:	signature:
Name:	name:
Position:	position:
In the presence of	in the presence of
Signature:	signature:
Name:	name
Profession:	position.

DISTRIBUTORSHIP

A distributorship re-sells goods bought from a supplier for a profit which derives as a result of the cost at which he/she sells the goods compared to the cost of the goods when they purchased them.

Unlike in an agency, the distributor has no authority to bind the supplier.

The distributor runs his/her own business and the supplier has no control over it except say in terms of resell price.

OBJECTION MY LORD

In **LAMB AND SONS V GORING BRICK CO LTD (1932)1 K.B 710,** court defined a distributorship as a business transaction under which the distributor often buys from a particular manufacture. In this case the distributor bought building materials from a supplier and sold them at a profit which they were not required to account to the supplier. Court held it was not an agency, See **Also HONEY WILL AND STEINLTD V LARKIN (1934) 1 K.B 191**

DISTRIBUTION AGREEMENT.

THE REPUBLIC OF UGANDA

IN THE MATTER OF THE CONTRACTS ACT 2010.

DISTRIBUTORSHIP AGREEMENT.

THIS DISTRIBUTORSHIP AGREEMENT IS MADE THIS 3RD DAY OF FEBRUARY 2020.

BETWEEN

XXX OF P.O BOX 0000 KAMPALA (HEREINAFTER REFERRED TO AS THE "SUPPLIER")

AND

YYY OF P.O BOX 0000 KAMPALA (HEREINAFTER REFERRED TO AS THE "DISTRIBUTOR")

WHEREAS:

1.

2.

3.

NOWTHEREFORE THE PARTIES AGREE AS FOLLOWS:

1. SUBJECT MATTER

    - The products subject of the agreement

2. TERRITORY
    - The geographical area covered by the agreement.
3. SCOPE OF APPOINTMENT
    - Is the distributorship exclusive/sole/non-exclusive.
4. DURATION AND COMMENCEMENT
5. TERMS OF SALE OF PRODUCTS FROM SUPLLIER TO DISTRIBUTOR
    - Prices
    - Payment terms
    - Delivery terms
    - Warranties
    - Minimum purchase.
6. DUTIES OF DISTRIBUTOR.
    - Purchase goods only from supplier
    - Promote sales
    - Pass back information on the market to the supplier
    - Keep sufficient stock
7. DUTIES OF THE SUPPLIER
    - Advertisement
    - Provide know-how, technical support and training
8. AMENDMENT
9. TERMINATION
10. DISPUTE RESOLUTION
11. LAW APPLICABLE

IN WITNESS WHEREOF THE PARTIES hereto put their respective hands and seal on the day and year herein above stated.

SUPPLIER DISTRIBUTOR

In the presence of in the presence of

APPENDIX B- DOCUMENTS FOR COMPANY MATTERS

Our Ref: FMH/CC/04/2004 **Date: 28th Oct 06**

Your Ref:

THE REGISTRAR OF COMPANIES

COMPANY REGISTRY

KAMPALA

Dear Sir

RE: RESERVATION OF COMPANY NAME

We wish to incorporate a private limited liability company under the following names

1)Gavamukurya Limited

2)Gukuba Limited

Please let us know if any of the above names is available for the purpose and if so proceed to reserve the name for us.

Yours faithfully,

.....

For SUI GENERIS and Co. Advocates

c.c. Promoters

I have searched the Register of Company and business name and found non similar.

Signed:

OBJECTION MY LORD

.. ..

Registrar of Companies

1st day of November 2003

Reserved name

.. ..

For: Promoters, 11th November 2( )3.

ISAAC CHRISTOPHER LUBOGO

GOVERNMENT OF UGANDA

STATEMENT OF NOMINAL CAPITAL

In the matter of the Stamps act cap 342 and in the matter of JJ ltd

I …… OF ……

Hereby state as follows:

1. That I am …… …….. *of …… Ltd.

2. That the nominal capital of the said ……. Ltd is Shs. …….. divided as follows:

…….. shares of Shs. …….each

…….. shares of Shs. …….each

…….. shares of Shs. …….each

Dated at Kampala this …….. day of ……, 20 ……

Signature …….

Full Name …….

Address …….

* An Advocate of the High Court engaged in the formation or person named in the Articles of Ass as Directors or secretary.

OBJECTION MY LORD

THE COMPANIES ACT 2012

DECLARATION OF COMPLIANCE WITH THE REQUIREMENTS OF COMPANIES ACT, ON APPLICATION FOR REGISTRATION OF A COMPANY, PURSUANT TO SECTION ---- OF THE COMPANIES ACT 2012

NAME OF THE COMPANY..... LTD.

PRESENTED BY . . . .

I …… OF …… Do solemnly and sincerely declare that I am …… …….. *of …… Ltd. and that all the requirements of the Companies Act, in respect of the matter's precedent to the registration of the said company and incidental have been complied with.

And I make this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the Statutory Declarations Act Cap. 22.

Declared at Kampala this ……. day of ……., 20 ……

DEPONENT

…….

BEFORE ME

……..

COMMISSIONER FOR OATH

* An Advocate of the High Court engaged in the formation or person named in the Articles of Ass as Directors or secretary.

ISAAC CHRISTOPHER LUBOGO

THE REPUBLIC OF UGANDA

THE COMPANIES ACT 2012

MEMORANDUM OF ASSOCIATION OF GAVAMUKURYA LTD.

1. The first name of the company is Gavamukurya Ltd.

2. The registered office of the company will be situating at Kireka, Kampala.

3. The objects for which the company is established arc to engage in business of

Importation and selling of tractors, tractor spare parts and accessories and establish a tractor assembly plant, and doing of all such other things as re. incidental or conducive to be attainment 0 I' the above.

4. The liabilities of the members are limited by shares.

5. The share capital of the company is Ug. Shs. Six hundred million shillings (600m/=). 600 shares each one (1) million. .

6. We the persons whose names and addresses are subscribed are desirous of

being formed into a company in pursuance of the memorandum of association and we respectively. agree to take the number of shares in the capital of the company set opposite our respective names, addresses and occupation of the number of shares taken and shared for.

NAME, POSTAL ADDRESSES AND OCCUPATIONS OF SUBSCRIBERS	**NUMBER OF SHARES TAKEN BY EACH SUBSCRIBER**	**SIGNATURE OF SUBSCRIBER**

DATED this ……..day of …….2006.

WITNESS TO THE ABOVE SIGNATURES:

FULL NAMES: ……..…

POSTAL ADDRESS: ……..…

OBJECTION MY LORD

OCCUPATION: ……..…

SIGNATURE: ……..

Total Shares taken - 600

Dated this ……. day of …… 2006.

…….

Witnessed to the above signatures.

DRAWN BY:

SUI GENERIS& CO. ADVOCATES

P.O. BOX 0000, KAMPALA

ISAAC CHRISTOPHER LUBOGO

THE REPUBLIC OF UGANDA

THE COMPANIES ACT 2012

ARTICLES OF ASSOCIATION OF GAVAMUKURYA LTD.

COMPANY LIMITED BY SIIARES

ARTICLES OF ASSOCIATION FOR

GAVAMUKURYA

PRIVATE LIMITED LIABI LITY COMPANY

1. This company is a private company and accordingly.

a) The right to transfer shares is restricted in the manner hereinafter prescribed.

b) The number of members of the company (excluding persons who are in the employment of the company and persons who, having been formerly in the employment of the company was, while in such employment and have continued, after the determination of such employment to the members of the company) is limited to fifty, provided that where two or more persons hold one or more shares in the company jointly, they shall for the purpose of the Articles, be treated as a single member.

2. PRELIMINARY

The regulation in Table A of the first Schedule of the Companies Act 2012 shall apply to the company except in as far as they conflict with the A.O.A herein contained. .

3. Interpretation:

In these Articles, if not inconsistent with the subject or subjects, the words standing in the first column of the following table shall bear the meaning set opposite,

Word	**Meaning**
Company	The Company- Gavamukurya Ltd Gavamukurya Ltd
The Act"	The Companies Act.
"The Office"	The registered office for the time being, of the company
The Secretary	Any person appointed to person the duties of the secretary of the company.
"Paid"	Paid or credited as paid
The register	The register of members the company required to be kept by sect. 112 of the Act.
The Seal	The Common Seal of the company,

Save as aforesaid, any words or expressions defined in the Acts shall bear the same meaning in the Articles, The office of the company shall be at such place in Uganda as the directors shall from time to time appoint.

5. TRANSFER AND TRANSMISSION OF SHARES

Subject to such restrictions in these Articles as may be applicable, an) member may transfer all or any of his shares by instrument in writing in an) usual or common form or any other form which the directors may approve.

6. Any party to this Agreement proposing to transfer any shares shall give notice

in writing to other parties, The transfer notice shall state the number of

shares the transferee proposes transfer. The initial parties to this agreement shall have priority over every other party to purchase such shares.

7. ALTERATION OF CAPITAL

The company may from time to time, by ordinary resolution;

a) Consolidate and divide all or any of the company's share capital into shares of larger amounts than the existing shares.

b) Cancel any shares which, at the time of the passing of the resolution, have not been taken or agreed to be taken by any person and in the amount of the share capital by the amount of the shares so cancelled.

8. GENERAL MEETINGS

The company shall in each year, hold a general meeting as the Annual General Meeting in addition to any other meeting in that year, and shall specify the meeting as such in the notice calling it and not more than 15 months shall elapse between the date of one Annual General meeting within the 18 months of the company incorporation. It needn't hold in the year of the company's incorporation, but in the following year. These meetings shall be held at such time and place as the directors shall appoint.

All General meetings other than the Annual General Meetings shall be called extra ordinary General meetings.

The Directors may, whenever they think fit, convene an extra ordinary general meeting it shall also be convened on such requisition as provided by Section 132 of the Act if at any time these are not, within Uganda, sufficient directors capable of acting to form a quorum, any director or any 2 members of the company may convene an extra ordinary general meeting Jig in the same manner.

A general meeting shall be called by 21 days' notice in writing at least, except in situations where it is not practicable to do so.

The accidental omission to give notice of a meeting or the non-receipt of notice, shall not invalidate the proceedings at that meeting except where reasonable cause is shown.

13. **VOTES OF MEMBERS**

Subject to any rights or restrictions for the time being attached to any class 01' shares, on a show of hands, every member present in person, or representative with powers of attorney, shall have one vote and one poll.

14. **DIRECTORS**

MASAKA TEA ESTATES LTD VERSUS SAMALIA (KIGANJA) TEA ESTATE LTD & OTHERS; HCMA NO.505 OF 2004, where she noted that;

In the Makerere Properties case, Berko J, (as he then was), held that; "A suit instituted in the names of a company without authority of the Directors is not maintainable in law. The suit was also struck off for want of authority to institute it.

The number of directors shall not be less than two and no more than 7, and the other qualification of the director shall be at least one share. The names of the first directors shall be determined in writing by the subscribers to the memo of Association, or a majority of them and until such determination, the signatories to the memo of Assn. Shall be the first directors.

The remuneration of directors shall from time to time, be determined by the company in the general meeting. The directors may also be paid all traveling and office expenses properly incurred by the attending and returning from meeting of the company or in connection with the business of the company.

16. SECRETARY

The secretary shall be appointed by the Directors for such terms at such remuneration and upon such conditions as they may fit and any such secretary may be removed by them. Section 178 - 180- of the Act to apply.

17. THE SEAL

The Director shall provide for the safe custody of the seal, which shall be used by the authority of the Directors.

We, the several persons whose names, postal addresses and occupations are hereto subscribed are desirous of being formed into a company in pursuance to the Articles of Association.

• NAME	• POSTAL ADDRESSES	• OCCUPATION
•	•	•
•	•	•

Dated at Kampala this …… day of ……., *20 ……..*

Witness to the above signatures.

Full Name: …….

Signature …….

Postal Address…….

Occupation: …….

OBJECTION MY LORD

THE REPUBLIC OF UGANDA

IN THE MATTER OF COMPANIES ACT 2012

IN THE MATTER OF CONTRACT ACT CAP 73

JOINT VENTURE AGREEMENT BETWEEN

FODDCRAFT (UK) LTD

AND

MARINE PRODUCTS (U) LTD.

The agreement made this 12th day of November 2004, between

FODDCRAFT (UK) LTD, a private liability company incorporated in UK (hereinafter referred to as Foddcraft) on one part

AND

MARINE PRODUCTS (U) LTD. a private liability company incorporated in Uganda (hereinafter referred to as Marine) on the other part.

AND THIS AGREEMENT WITNIESSETH AS FOLLOWS: (fill in info under these heads)

1. FORMATION OF A COMPANY
2. PURPOSE
3. NAME AND LOCATION
4. CAPITAL CONTRIBUTION
5. CONDITIONS AND WARRANTIES
6. MANAGEEMNT
7. ARBITRATION AND DISPUTE RESOLUTION
8. TERMINATION AND DURATION
9. COMMENCEMENT

In witness whereof the authorized representatives of the parties herein have affixed their signatures and seal on this 12th day of November 2005

SIGNED FOR AND ON BEHALF OF

FODDCRAFT (UK) LTD …….

IN THE PRESENCE OF …….

SIGNED FOR AND ON BEHALF OF

MARINE PRODUCTS (U) LTD …….

IN THE PRESENCE OF …….

DRWN AND FILED BY

Firm C and Co. Advocates

P.O.BOX 0000,

Kampala

OBJECTION MY LORD

THE REPUBLIC OF UGANDA

THE BUSINESS NAMES REGISTRATION

NOTICE OF CESSATION OF BUSINESS.

TO: THE REGISTRAR GENERAL.

C.C. THE REGISTRAR OF COMPANIES, REGISTRAR OF DOCUMENTS.

Whereas we the undersigned registered under the number .....in the index of registration have ceased to carry on business as NEW STYLES DRAPERS as from the 6th day of November, 2022 and immediately have commenced the incorporation of the company whose name shall be NEW STYLES DRAPERS LIMITED.

Dated this 6th day of November 2022.

1. KELEMENSIA MERIDA
2. OPIO ZAPPA
3. GABRIELI MEGANI

- Attach a letter to the effect that you're going to use the name for incorporation of a company.

ISAAC CHRISTOPHER LUBOGO

BOARD RESOLUTION.

THE REPUBLIC OF UGANDA

THE COMPANIES ACT, 2012

IN THE MATTER OF MOLBY (U) LTD.

BOARD RESOLUTION.

At a board meeting held at the company premises on this 6th day of December 2022, it was resolved that:

1. Sylivanus Ngobi pay a sum of 5,250,000 being part of the sums due to the company as a result of the unpaid shares he subscribed to.

2. The sums shall be payable by the 23rd day of December 2022 in the bank account of the company as shall be provided to him.

Dated this 6th day of December 2022.

SUI GENERIS — LUMALA JOEL

DIRECTOR — SECRETARY

OBJECTION MY LORD

CERTIFICATE OF CONVERSION.

REPUBLIC OF UGANDA

THE COMPANIES ACT, 2012.

COMPANY NO: CN2009.

CERTIFICATE OF CONVERSION FROM A SINGLE MEMBER COMPANY TO PRIVATE COMPANY NOT BEING A SINGLE MEMBER COMPANY.

I CERTIFY THAT: KELEMENSIA SMC LTD has this day converted into KELEMENSIA LTD, private company with limited liability under the companies' act 2012.

Dated this 7th day of November the year 2022.

REGISTRAR OF COMPANIES.

ISAAC CHRISTOPHER LUBOGO

FORM 4

Notice of conversion.

THE REPUBLIC OF UGANDA

THE COMPANOES ACT,2012.

NOTICE OF CONVERSION OF A SINGLE MEMBER COMPANY INTO A PRIVAE COMPANY.

1. Name of single member company: KELEMENSIA SMC LTD.

2. Company No: CN2009.

3. Name and Address of Single member: KELEMENSIA MERINDA, P.O BOX 0000, KAMPALA.

4. Grounds for conversion from single Member Company to private company. (Tick appropriate)

   a) Transfer of shares

   b) Further allotment of shares.

   c) Death of single member

   d) Operation of law.

5. Date of transfer of shares/allotment of shares/ death certificate or court order 7th Nov. 2022. (Enclose attested copies of transfer deeds or return of allotment or other document effecting the transfer of shares.)

6. Date of special resolution for conversion from single member company to a private company and alteration in article; 6th Nov.2022 (enclose copy of special resolution and altered articles if any).

7. Names, addresses and shareholding of members:

Name	Address	shares held	total
SUI GENERIS	P.O BOX 717 KLA	10	10
KUNYIGA ELVIS	P.O BOX 22 JINJA	10	10

Dated at KAMPALA this 7th day of November 2022.

SUI GENERIS

APPLICANT.

Form 5

OBJECTION MY LORD

Notice of death of S.M Reg 11(2)(b)

THE REPUBLIC OF UGANDA

THE COMPANIES ACT, 2012
NOTICE OF DEATH OF SINGLE MEMBER

1. Name of single member company: KELEMENSIA SMC LTD.

2. COMPANY NUMBER : CN 2009

3. Name and former address of the deceased single member: KELEMENSIA MERIDA

P.O BOX 0000, KAMPALA.

4. Date of death of member: 5th Nov 2022.

5. Particulars of personal representative:

a) Name: KAKIMA JOHN

b) Physical address: KIRA, WAKISO

c) Sex ; MALE

d) Occupation: TRADER

e) age: 25 YRS.

6. Any circumstances leading to impediment.

NONE.

7. Name and address of the nominee/alternate nominee director:

MPIIMA BLAISO

P.O BOX 0000, KAMPALA.

Dated this 7th day of November 2022.

MPIIMA BLAISO

NOMINEE DIRECTOR.

ISAAC CHRISTOPHER LUBOGO

Return of allotment.

THE REPUBLIC OF UGANDA

THE COMPANIES ACT

RETURN OF ALLOTMENT OF SHARES

(Under Section 61(1) (a) of the act)

PARTICULARS OF COMPANY:

1. Name of company: MOLBY (U) LIMITED.
2. Presented by:

PERIOD OF RETURN

From the 30th day of June the year 2016

To the 30th day of June the year 2017

PARTICULARS OF ALLOTMENT

1. Number of the shares allotted payable in cash.

2. Nominal amount of the shares allotted.

3. Amount paid or due and payable on each share

4. Number of shares allotted for consideration other than cash

5. Nominal amount of the shares so allotted

6. Amount to be treated as paid on each such share.

7. The consideration for which such shares have been allotted is as follows.

NAMES, ADDRESS AND PARTICULARS OF ALLOTMENT.

•	•	•	•	•	•	•	• Details of non-cash contributions.
• names	• Address	• preference	• ordinary	• Other kinds	• Amount paid	• Amount unpaid	
•	•	•	•	•	•	•	

SHARE CAPITAL OF THE COMPANY

• Particulars of shares	• Ordinary	• Preference	• Other
• No. Of shares	•	•	•
• Amount paid	•	•	•

• Amount unpaid	•	•	•
• Total nominal value	•	•	•
• Rights attaching to shares.	•	•	•

Signed:

SUI GENERIS

SECRETARY.

Dated this 7th day of December the year 2022.

ISAAC CHRISTOPHER LUBOGO

FORM OF ANNUAL RETURN.

REPUBLIC OF UGANDA

THE COMPANIES ACT 2012

ANNUAL RETURN OF MOLBY (U) LIMITED.

Annual return of MOLBY (U) Limited, made up to the 30th day of December 2019 being the fourteenth day after the date of the annual general meeting for the year 2019.

Notice of situation of registered office.

Section 115(1) requires that on the day of commencement of business or as from the 14 day after the date of incorporation, whichever is earlier, the entity must have a registered postal address to which all communications and notices may be addressed.

Under **Section 115 (2)** of Companies Act, where a company fails to comply with **subsection (1)**, the registrar may give notice to the company giving it reasonable office or postal.

Any change to the registered office or postal address must be notified to the registrar under **Section 116(10 of Companies Act regulations, 2016** the notice of situation of registered business or the change are made in the manner prescribed in form 18 in the schedule to the regulations.

Fees payable as per item 5, head A of the second schedule to the companies (fees) rules, 2005 is UGX 20,000.

Notice of particulars of directors and secretaries.

Section 192(4) of Companies Act requires that on application for registration of the memo and articles of a company, the applicant must deliver to the registrar a list of the persons who consented to be directors of the co.

Inclusion of any person who has not consented is an offence and the person is liable on conviction to a fine not exceeding 500 currency points.

Regulation 26(2) states that every company shall notify the registrar of appointment of a director or secretary by filing notice with the registrar in form 20 in the schedule.

Pursuant to Section192 (4) the particulars of directors must be filed after the filing of the memo and articles of association except if the Co adopts incorporation.

The notice of particulars must be filed within 14 days from the date of appointment of first directors pursuant to **Section 228 (6) (a).**

Notification of change shall be within 14 days from date of change pursuant to Section 228 (6) (b).

OBJECTION MY LORD

Where Article 75 is not adopted, it's unlawful to file the particulars of the directors together with the other documents at incorporation.

Fees payable is UGX 20,000 under item 5 of Head A to the schedule of the company (fees) rules 2005.

ISAAC CHRISTOPHER LUBOGO

NOTICE OF PARTICULARS OF DIRECTORS.

THE REPUBLICOF UGAMDA

THE COMPANIES ACT 2012

NOTIFICATION OF APPOINTMENT OF DIRECTORS AND SECRETARY OF COMPANY.

Name of company: MOLBY (U) LTD.

Presented by: SUI GENERIS.

SECRETARY.

TO: THE REGISTRAR OF COMPANIES.

TAKE NOTE that the person/persons whose particulars are provided below has /have been appointed as director/directors /secretary of the above-named company with effect from the 7th day of December the year 2019.

a) PARTICULARS POF DIRECTORS-INDIVIDUALS.

• Names	• Date of birth	• address	• nationality	• occupation	• Other directorships.
•	•	•	•	•	•

PARTICULARS OF CORPORATE DIRECTORS.

• Corporate name	• Registered or principal office	• Postal address
•	•	•

b) PARTICULARS OF THE PERSON(S) WHO IS SECRETARY

PARTICULARS OF INDIVIDUAL SECRETARY.

• Names (first name and surname)	• Residential and postal address
•	•

PARTICULARS OF CORPORATE SECRETARY.

• CORPORATE NAME	• REGISTERED OFFICE.
•	•

Dated the 8th day of December the year 2019.

OBJECTION MY LORD

THE REPUBLIC OF UGANDA

THE COMPANIES ACT, 2012

IN THE MATTER OF MOLBY (U) LTD.

ORDINARY RESOLUTION.

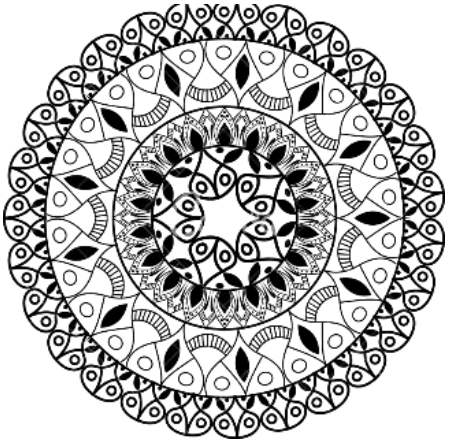
At a members meeting held at the company premises on the 16th day of December 2019, it was resolved that:

1. That KUNYIGA DERROCK KIZITO, be appointed as a director of the company

Dated this 20th day of December 2019.

SUI GENERIS
LUMALA JOEL.

DIRECTOR.
SECRETARY.



WINDING UP OF COMPANIES AND BANKRUPTCY

INSOLVENCY, BANKRUPTCY AND WINDDING UP

I**nsolvency** means one's inability to pay his/her debts or the lack of means to pay debts, according to Downes and Jordan define insolvency as the state of being unable to pay the money owed, by a person or company, on time. There are two forms of insolvency, that is to say, cash-flow insolvency and balance sheet insolvency. In **BAHADUKALI V SPRINGS INTERNATIONAL HOTEL LIMITED (COMPANY CAUSE 5 OF 2019) [2020] Court stated that** a company becomes insolvent when it is no longer able to meet its debts and/ or when liabilities exceed its assets. A business can be cash insolvent but still they may have assets that exceed liabilities; therefore, the corporate debtor should make all its efforts to resolve its cash insolvency.

Cash-flow insolvency is when an individual or a company has enough assets to pay what is owed to the creditors, but does not have the appropriate form of payment. For example, a person may own a chunk of land, but not have enough money to pay a debt when it falls due. It stated that this type of insolvency can be resolved by negotiation including but not limited to the fact that the creditor may wait until the land is sold and the debtor agrees to pay a surcharge

On the other hand, balance-sheet insolvency, also referred to as technical insolvency, is when a person or company does not have enough assets to pay all of their debts. In this case the person or company might file for bankruptcy. However, once a loss is accepted by all parties, negotiation is often able to resolve the situation without bankruptcy. A company that is balance-sheet insolvent may not be allowed by law to pay its next bills unless the outcome of the activity being paid for directly benefits the creditors of such company.

A company which is insolvent may be put into liquidation (wound up). The directors and shareholders can instigate the liquidation process without court involvement by a shareholder resolution and the appointment of a licensed Insolvency Practitioner as liquidator. However, the liquidation will not be

effective legally without the concerning of a meeting of creditors who have the opportunity to appoint a liquidator of their own choice. This process is known as creditors' voluntary liquidation (CVL), the liquidator in this case responsible to the creditors of the company insolvent companies are more wound up by order of the court

Alternatively, a creditor can petition the court for bankruptcy order which, if granted, declares the affected person bankrupt. The liquidator releases the assets of the company and distributes funds released to creditors according to their priorities, after the deduction of costs met during the liquidation process. In the case of a sole proprietorship business, the insolvency options include Individual voluntary Arrangements (lVA) and Bankruptcy

According to **Black's Law Dictionary**, bankrupt of company is the state or condition of company bankrupt, amenability to the bankrupt's laws, the condition of company has committed an act of bankruptcy, and is liable to be proceeded against by his voluntary application, to take the benefit of the bankrupt laws. The term is used in a loose sense as synonymous with insolvency. Insolvency is nightmare to all companies in the world but thoughts

unfortunate when it's proved that company its unable to pay its debts then it has few options thus finding itself winding up where by winding up involves many things it's a process but the Insolvency Act 2011 and the regulations made there under have laid all the procedures to be followed so that every creditor shall be ably compensated.

In all business sectors, both individuals and companies operate in a constantly changing environment, with changing technology, changing competitors, changing customer demand. Many times, failure to manage change results in underperformance and increasing financial pressure. Adverse currency movements, credit constraints, the possibility of strategic errors any or all of these can plunge a company into serious financial distress.

In one of the ways safeguard such occurrences; the Government of Uganda through the Legislative Organ enacted the Uganda Insolvency Act of 2011 which was assented to on 8th August 2011 together with the Insolvency Regulations which provides in detail issues relating to insolvency in Uganda. This Act amended the Bankruptcy Act which was provided for matters relating to Bankruptcy before 2011. It further consolidates all laws relating to insolvency. The requirements of the Insolvency Act are implemented by the "Official Receiver", who is also the regulator of insolvency practitioners. The "Official Receiver" is presently the Registrar General.

An Insolvency Practitioner is defined to mean a person who acts as: "a receiver, a provisional administrator, an administrator, a provisional liquidator, a liquidator, a proposed supervisor of a voluntary arrangement or a trustee in bankruptcy as enshrined in section 203 of the Insolvency Act 2011 The enactment of the Insolvency Act 2011 was a practice of the commercial court to be very conservative with allowing liquidations or bankruptcy petition to succeed. He further enumerates that the commercial court gave preferences to the use of Court Annexed Process (CAP), such as Mediation, Arbitration and other forms of ADR over litigation in insolvency and secured transaction proceedings. The impact of regulation on solvency is a complex matter. This is not only due to the fact that a variety of market players and jurisdictions are involved but it is also because the inhibiting effect of regulation is often difficult to see and to quantify. Solvency and liquidity are both terms that refer to an enterprise's state of financial health, but with some notable differences. Solvency refers to an enterprises capacity to meet its long-term financial commitments. Liquidity refers to an

enterprise's ability to pay short-term obligations; the term also refers to its capability to sell assets quickly to raise cash.

The law on winding up or liquidation of accompany is an extension of the law of bankruptcy. However special rules which are laid down in the Companies Act govern the winding up of companies. Apart from the end of the company being brought about by the registrar striking it off the Registrar of Companies Registry consequent upon it becoming defunct, or its being reorganized or amalgamated, the usual way of terminating the life of the company is through winding up. Winding may take three forms;

(1) By the High court

(2) Voluntarily by either the members or creditors of the company

(3) Subject to court supervision.

The principal focus of modern insolvency legislation and business debt restructuring practices no longer rest on the liquidation and elimination of insolvent entities but on the remodeling of the financial and organizational structure of debtors experiencing financial distress so as to permit the rehabilitation and continuation of their business. This is known as business turnaround or business recovery.

Bankruptcy helps the creditors recover their losses, to him the threat of imprisonment or exile stimulated some debt payment. Under Roman law, debtors were obligated to pay their debts and if the debtor's estates were sold by their creditors, the debtors received no discharge from any unpaid balance. That prior to the late 1700s failure to pay debts was viewed as an immoral act and debtor often faced imprisonment, bankruptcy process influences many people's lives. In addition to the debtors and creditors, the bankruptcy process annually affects the employment of thousands of people, involves billions of dollars in assets, and, to a greater extent concerns the public interest. The bankruptcy process can be characterized at the stage upon which a large cast of characters play out their roles. The bankruptcy process naturally focuses on the debtor.

The present laws governing Insolvency in Uganda are widely regulated and adequately equipped with strengths and benefits to which anyone who wishes to institute in Insolvency proceedings can utilize. They provide a quick response to the challenges of modern business both personal and corporate. It is pertinent to note that the principals of in Insolvency law are contained in the in-Insolvency Act, and the regulations made there under. These two are almost a replica of the English law that was adopted from Britain by virtue of **Section 15 of the 1902 Order in Council** and they give enough steps relating to how both in Insolvency and bankruptcy proceedings are conducted.

Both the Insolvency Act and the Insolvency Regulations are said to have replaced the Bankruptcy Act which had never been changed since Uganda acquired her independence and therefore the current laws came in to fit the commercial circumstances prevailing in Uganda which the old legislations could never do. More so, with the trend of modern business and trade, our insolvency law has been rendered obsolete.

It should be noted that the purpose of in Insolvency law is to provide a fair and easy process of getting individuals and companies in financial hurdles settle their financial obligations without necessarily

winding them up. This way, they will be enabled to continue participating and contributing to economic development.

Fortunately, the current law provides an easy procedure, and easy mechanisms for administering Insolvency firms and bankrupt's estates which limit expenditures which could arise as a result of protracted litigation the **Insolvency Act of 2011 and the Insolvency Regulations of 2013**

These are the cardinal laws as far as Insolvency regulation in Uganda is concerned. They provide for matters such as receivership, administration, liquidation, arrangements, bankruptcy, and regulation of Insolvency practitioners, cross boarder Insolvency among others and which concepts have a great bearing on either Liquidation or bankruptcy proceedings. .

The Insolvency Act of Uganda like the rest of East Africa is a replica of the Insolvency law of England and Wales. The Insolvency Law Bill 2009 was passed into law in 2011. In Uganda, the law and practice relating to Insolvency has since changed substantially with the enactment of a single Insolvency code, which governs both bankruptcy and corporate Insolvency.

According to Section. 263 of the Insolvency Act, which is the transition provision, any case relating to receivership, liquidation or bankruptcy which was pending before any court prior coming into force of this Act that case continued to be heard by that court until completion. This provision gave courts a lee way to try all suits which had already been instituted before the coming into force of the Act.

Regulation of Jurisdiction of Insolvency Matters

Jurisdiction is the authority given by law to a court to try cases and rule on legal matters within a particular geographic area and or over certain types of legal cases. The High Court has jurisdiction over all matters concerning companies under the Act and has jurisdiction in relation to cross boarder insolvencies[25].

The Chief Magistrate Court has jurisdiction over all Insolvency matters against individuals the subject matter of which does not exceed 50 million shillings [19].

Regulation of insolvency practitioners in Uganda

Unlike in the past, where the law in Uganda did not regulate or license liquidators, receivers and manager who can generally be referred to as Insolvency Practitioners and did not clearly state who can act as a Receiver or Manager or even Liquidator but only provided provisions which disqualified body corporate/ bankrupt from acting as Receivers or Managers[26]the current Insolvency Act clearly provides for the regulation and licensing of Insolvency Practice in Uganda.

25.Section 254 of the Insolvency Act of 2011

19Section 254 of the Insolvency Act of 2011

26.Section 349 and 350 of the Companies Act.

An Insolvency practitioner by law is defined [27]to mean a person who is an official receiver who is qualified to act as an Insolvency practitioner within the meaning of Section. 203 of the Act.

Section 203 provides for Insolvency practitioner to include; a Receiver, Provisional liquidator, an administrator, a liquidator, a proposed supervisor of a voluntary arrangement, supervisor of a voluntary arrangement and a trustee in bankruptcy.

Section 204 (1) (a) provides the qualifications to act as Insolvency practitioners to include lawyers, accountants, charted secretary who are registered member of relevant professional body or member of any other professional body as may be prescribed by the Minister.

Furthermore, **under Section 204 (I)(b) of the Act**, the Practitioner is required to have in place a professional indemnity or security for the due performance of their duties under the Act [28]. Insolvency Practitioners are now required to submit reports of their assignment to the Official Receiver and the failure to comply may result in the issuance of a prohibition order by Court. Insolvency Practitioners are required to be of high moral standing with no previous criminal Convictions or pending disciplinary investigations.

The Laws have an age restriction for Insolvency practitioner as 25 years and above. It also makes it an offence to act as an Insolvency practitioner without qualifications. This in my view is inconsistent with and in contravention of Articles 257 (1) and Articles 34 (c) of the 1995 constitution of the Republic of Uganda which provides for the majority age to be 18 years and above and if any concerned citizen petitions the constitutional court, it may not remain a valid section.

Commencement of Insolvency proceedings

In Uganda, the law has made it easier to commence Insolvency proceedings by making inability to pay a debt demanded by an issued statutory demand as the only premise on which bankruptcy proceedings may be commenced.

Section 3 (1) a debtor is presumed to be unable to pay the debtors debt if.

a) The debt has failed to comply with a statutory demand.

b) The execution issued against the debtor in respect of a judgment debt has been returned unsatisfied in whole is in petition.

c) All or substantially all the property of the debtor is in the possession or control of a receiver or some other person enforcing a charge over that property.

In accordance with the case of **TEDDY SSEZZICHEYE V UGANDA (CRIMINAL APPEAL 32 OF 2010) [2011] UGSC 19 (21 DECEMBER 2011);** it was emphasized that in a bankruptcy petition, two essential elements must be proved and these include; Proof of the petitioner's debt; and Performance of an act of bankruptcy; now inability to pay debts.

27.Section 2 of the Insolvency Act of 2011 laws of Uganda.

28.Insolvency Act 2011 Section 4 and5 of the Insolvency Act of 201 1 laws of Uganda.

. Insolvency Act of 2011

Bankruptcy therefore can only be commenced when the debtor is unable to pay his/her debts so it is in liquidation. **Section 3 of the Act** begins with "unless the contrary is proved" meaning that this is subject to proof. The debtor can prove that he is able to pay his/her debts and therefore not Insolvency. This therefore implies that a debtor can successfully challenge any petition for bankruptcy which has been brought against him/her by proving that he is able to pay his debts.

In the case of **SNP PANBUS V JURONYSHIPYARD LTD (2009) 2 SLR 949** the court held that in a case where a solvent company does not admit the debt and is prepared to offer security to defend the claim, the court should not as a matter of principle in the exercise of jurisdiction allow a claimant to file a winding up petition against the solvent company with all the potentially disastrous consequences that may result from the filing of the petition. The creditors have to prove that the company is unable to pay its debts and it can do so by adducing evidence of actual inability to pay its debts or evidence of a declined inability to pay its debts. The court further noted that it is necessary for the creditor to have a "due" debt which the debtor has neglected to pay or to secure or compound to the reasonable satisfaction of the creditor after it has been served with a statutory notice to pay. This means that the debt therefore should not be disputed debt.

Section 3 (3) of the Act, provides that sub section (1) does not prevent proof or inability to pay debt by other means such as proving contingent or prospective debts as against the debtor. Contingent or prospective debts are Insolvent trading occurs when an insolvent individual or the directors of an insolvent company continue to trade or conduct business. This may amount to fraud to the extent that credit is obtained where there is no reasonable prospect of paying the debts. Under **Section 199 of the Companies Act,** a director who allows a company to trade while insolvent is liable to be disqualified from acting as a director for a period of three years.

Section 3 (4) provides that while determining whether debtor is unable to pay the debtors debts, contingent prospective debts may be taken into account. However, the law allows a petition to be brought basing on a contingent or prospective debt only with the leave of the court and the court may give such leave without conditions, only if it is satisfied that prima facie case of inability to pay debts has been made.

Statutory Demand as a legal requirement for Instituting Insolvency proceedings

Section 4 (1)provides that a demand by a creditor in respect of a debt made in accordance with this section shall be a demand notice and shall constitute a statutory demand. It is a demand notice issued to the debtors to pay his debt within a specified period of time. It is called a statutory demand because it provided for by statute. In the case of **GENERAL PARTS (U) LTD AND ORS V NON-PERFORMING ASSETS RECOVERY TRUST (CIVIL APPEAL 9 OF 2005) [2006] UGSC 3 (14 MARCH 2006)** this was a second appeal emanating from a suit in the High Court in which Uganda Commercial Bank sued General Parts (U) Ltd, in the suit, UCB inter alia sought a declaratory Judgment that it had properly appointed a receiver court held that the demand must be unequivocal and must state the consequences.

Circumstances in which a Statutory Demand can be given, Form and Content of a Statutory Demand

A statutory demand is made in respect of a debt that is not less than the prescribed amount and in the case of a debt owed by;

i) An individual is a judgment debtor, or ii) A company is an ascertained debt, but need not to be a judgment debt. The prescribed amount is provided for under the second schedule to the Act but briefly it is to the effect that in case of an individual it is 1,000,000/ = and in case of a company it is 2,000,000/=

The statutory demand has to be in the prescribed form which Form and Content of a statutory demand are stated in Regulation 4 of the Insolvency Regulations of 2013.

Regulation 4 (1) provides that a statutory demand made by the creditor is in form 1 in schedule 1 of the Regulations. The law requires that a statutory demand should specify[29]

(a) The amount of the debt owed and in case of a debt arising out of a judgment or order of a court, the details of the judgment or order.

(b) How the debtor may comply with the statutory demand?

(c) Where the debt is secured, the nature of the security?

(d) Whether and how the debtor may compound the debt or give a charge on property to secure the debt?

(e) That, if the debtor does not comply with the demand within the specified time in section 4 (2) (e) of the Act, Insolvency proceedings, may be commenced against the debtor and.

(f) The right of the debtor to apply to the court to set aside the statutory demand.

Section 4 (c) is to the effect that, except where the debt is a judgment debt, a statutory demand must be verified by a statutory declaration attached to the demand and Section 4 (d), provides for it being served on the debtor.

The demand requires the debtor to pay the debt or compound with the creditor or give a charge over property to secure payment of the debt, to the reasonable satisfaction of the creditor within 20 working days after the date of service or longer period as the court may order[30]. In the case of **SNP PANBUS V JURONG SHIPGARD LTD**, The court held that to prove inability to pay debts, it is necessary for the creditor to have a due debt which the debtor has neglected to pay or to secure or compound to the reasonable satisfaction of the creditor after the debtor has been served with a statutory demand.

Service of a statutory demand

The statutory demand should be served personally on the debtor [31]and according to Regulation 5 (2) where the debtor cannot be found, the demand may be served at the registered office or place of

29 Regulation 4 (2) of the In Insolvency Regulations

30Section 4 (c) of the In Insolvency Act of 201 1

31Section 4(d) of the Act & Regulation 5(i) of the Regulations

business of the debtor, by sending it to the address of the debtor, by serving the legal representatives, the debtor if known or in any other way determined by the court.

In the case of **GEOFFREY GATETE AND ANOTHER V WILLIAM KYOBE ((CIVIL APPEAL NO.7 OF 2005)) [2007] UGSC 7 (21 SEPTEMBER 2007);**court held that service on one of the defendants does not constitute service on the other defendants even if they are sued both jointly and/ or severally. The same is provided for under Order 5 rule 9that service should be made on the defendants personally and was emphasized in the case of **R.W.K NADIOPE DEBTOR (1959) EA 251** in this case a demand notice was sent on the state-run post address of the debtor. The court held that a post office box number is not a sufficient address for the purposes of a bankruptcy notice is now referred to as a statutory demand since it is not an address at which creditor can be found nor is it an address on which he can be paid or the debt can be compounded. This seem to vary with the position in It is important to note that proof of service statutory demand has to be by an affidavit of service stating the time and manner of service. [41] as was stated in the case **EPAINETI MUBIRU V UGANDA CREDIT AND SAVINGS BANK HCCS No. 567 of 1965**, that demand is mandatory and the mortgagee/ debtor must retain proof of service

Application of Equity and common Law in Insolvency

Despite the fact there is a statute together with its instrument regulating Insolvency practice in Uganda, the rules of equity and common law continues to apply in Uganda. The Insolvency Act under Section 264 Provides that the rules of equity and common law are applicable to corporate Insolvency and bankruptcy of individuals and receivership except where they are inconsistent with this Insolvency Act. This means that the Insolvency Act takes precedence over the principles of equity and common law where there is a contradiction between the two Section 2 of the Insolvency Act defines a Court to mean the High Court or a court presided over by a Chief Magistrate. The Insolvency Act provides for jurisdiction on all matters concerning companies to be vested with the High Court of Uganda[32]. It further gives the High Court power to make the necessary orders for cross boarder insolvency proceedings. This means that it is only the High Court that can hear petitions/ matters relating to liquidation of companies. What is important to note is that the same law gives courts presided over by the Chief Magistrates powers over all insolvency matters against individuals the subject matter of which does not exceed 500,000 shillings. This means that the Judiciary arm of government has a central role to play from the time insolvency proceedings are instituted to the time when they are concluded. A case in point is evidenced in **ALLIED BANK INTERNATIONAL LTD V SADRU KARA AND ABDUL KARA**[33]where it was stated that the receiver can sue on behalf of and in the name of the company but if the receiver who being in control of the company is at the same time a wrong doer and refuses to sue, a shareholder can bring a derivative action for fraud. The above case together with many others provides a hint on the roles of courts in insolvency proceedings in Uganda.

The Office of the Official Receiver: An Official Receiver is appointed by the Minister of Justice to perform the functions of Official Receiver under the Insolvency Act[34].The Registrar General of

32 Section 254(1) of the Insolvency Act 201 1 see also Section 254(3) of the Insolvency Act 201 1.

33 High Court Commercial Division Civil Suit No. 191 of 2002

34 Section 1 98 of the Insolvency Act. Under Section 255(b), the acts of the Official Receiver are valid not withstanding any detect in the appointment.

Uganda Registration Services Bureau has been appointed as the Official Receiver[35]The Official Receiver has the following general powers and duties under section199 of the Insolvency Act. investigate the directors, shareholders, contributories and all present and past officers of an insolvent company or of a company which is being wound up or liquidated, for the purpose of establishing any fraud or impropriety, Investigate the promotion, formation, failure and conduct of Business of an insolvent company; Prosecute any person for offences committed under the Insolvency Act; Investigate and prosecute insolvency practitioners; Act during a vacancy in the office of an insolvency practitioner; and Take all necessary steps and actions he or she considers fit to fulfill the provisions of the Insolvency Act. The specific roles of the Official Receiver in insolvency proceedings and processes under the Insolvency Act are the following; **Section 20(3) and 27 (l)(a)** — upon the making of a bankruptcy order, the Official Receiver is appointed as the interim receiver of the estate of a bankrupt for the purpose of preservation of the estate Section 22(4) — the Official Receiver takes part in the examination of the debtor in bankruptcy proceedings.

Section 37 (3) — where as the result of the vacation of office by a trustee, there is no person acting as trustee the Official Receiver acts as trustee until a successor is appointed. The court may appoint the Official Receiver to substantively replace the trustee. **Section 42(2**) — while considering a bankrupt's application for discharge, the court takes into consideration the Official Receiver's report on the bankruptcy and the conduct of the bankrupt during the bankruptcy proceeding **Section 49(5)** the trustee in bankruptcy must make a report to the Official Receiver stating that the trustee has realized all, the bankrupt's estate or so much of it as can be realized without needlessly protracting the trusteeship Section 51 the Official Receiver may apply to court for supervision of the trustee in bankruptcy. **Section 59(2)** a copy of the resolution for voluntary liquidation of a company must he sent to the Official Receiver

Section 65 were winding up is commenced under any other law and the liquidator is of the opinion that the company will not be able to pay its debts in full within the period stated in any declaration made under that other law, the liquidator must immediately notify the Registrar of Companies and the Official Receiver

Section 67 (7) when the date of final dissolution of a company is deferred, a copy of the order must be sent to the official Receiver

Section 82(1) a company liquidator must give the Official Receiver a copy of the notice of his or her appointment

Section 84(3) where the court stays the liquidation proceedings a copy of the order must be delivered to the Official receiver

In conclusion therefore, any person who would wish to institute, practice or even make a study on insolvency as a branch of law has gotten an obligation to read, understand and apply the laws together with the principles as they are discussed herein above in this chapter to avoid being embarrassed in courts of law for having not properly applied any of such laws or principles.

35 Appointed under General Notice No. 650 of 2015.

Insolvency practice has grown to include a few full-blown bankruptcy proceedings. The law governing bankruptcy have been the least utilized in the Ugandan courts of Law as parties desire to go for litigation of civil suits than filing for bankruptcy against individuals. As a result, there is at least a whole generation of lawyers, businessmen, financial consultants among others who cannot appreciate or understand the workings and functions of insolvency. This has also brought about a development of less jurisprudence on bankruptcy as compared to liquidation. While we do applaud the renewed interest in this area of the law, the numbers of cases still coming up are not enough to capture the required level on understanding and appreciation among all the stakeholders of this law. This however can be blamed on the legal implications that come with one being declared bankrupt.

Meaning and presentation of the different forms of Individual Insolvency

Meaning and presentation of a debtors petition for bankruptcy

A bankrupt is defined under Section 2 of the Insolvency Act as an individual in respect of whom a bankruptcy on has been made. Section 20 (1) of the Insolvency Act provides that a debtor may petition court for bankruptcy alleging that s/he is unable to pay his/her debts, and the court subject to submission of a statement of affairs and public examination of a debtor may make a bankruptcy order in respect of that debtor. The bankruptcy orders

declares the debtor bankrupt and appoints the official receiver as an interim receiver of the estate for the preservation the estate of the bankrupt.

When a debtor issues a debtor's petition then it is the debtor, who has commenced the bankruptcy. This is also known as voluntary bankruptcy and the petition should be accompanied a statement of affairs which is a list of persons assets and liabilities [36] Once the petition and the statement of are accepted by the receiver, the debtor will automatically become bankrupt which position was established in the case of Re Jackson Exp. Jackson[49] that it is not only the presentation of a debtors petition which makes a debtor bankrupt but the court's acceptance of the petition and that a bankrupt who has something to hide may be tempted to omit the incriminating information or even in decline to submit any statement of affairs at all.

Meaning and presentation of a creditors petition for bankruptcy.

Section 20 (3) of the Act provides that, a creditor may petition for bankruptcy of the debtor upon the debtor’s failure to satisfy the statutory demand.

Regulation 9 (1) provides that where the debtor fails to satisfy a statutory demand and the debtor has not applied to court to extend the time within which to comply with the demand, creditor may petition the court to make a bankruptcy order in respect of the debtor.

Regulation 9 (2), the petition is in form 3, in schedule of the regulations and it should be supported by an affidavit and sworn by the petitioner or one of the petitioners [50] the petitioner together with the affidavit should be fled after paying the necessary fees which according to the insolvency (fees):

36 Section 21 of the Insolvency Act 2011

Regulations of 2012, item 2; on the filing of any petition 20,000/= item 5, on the filing of an affidavit in support of any petition or application 15,000/=

The petitioner then serves the petition to the debtor by an officer of the court or a person authorized by the court[37]and it is affected by delivering a copy of the petition sealed by the court to the debtor[38]

.

The process server should swear an affidavit of service which should be filed and the petitioning creditor will then within 7 working days after filing the petition give public notice of the petition which notice is in form 4 in schedule I of the insolvency regulations.

The debtor should then after receiving service of the petition, reply to the petition or make cross petition within 14 days.

Every creditor who wishes to be heard on the petition should within 5 days after the publication give notice to the petitioning creditor or debtor of his/her intention to appear and be heard on the petition[39] but if the creditor does not give notice under this regulation, he may appear and be heard only with leave court

The petitioners then prepare for court a list of the creditors and their advance if any who/ have given notice to appear and be heard, specifying their names, and addresses [40]and it should be given to the court before the hearing. The petitions should indicate whether the intention of the creditor is to support the petition or to oppose[41].

When time expires for filing a reply to the petition or cross petition, the court may set down the petition for hearing. The petitioner will then take out hearing and he or she serves them to every creditor who has given notice of intention to appear to be heard and on the official receiver[42].

According to Regulation 18, when two or more bankruptcy petitions are presented against the same debtor, the court may order the consolidation of the proceedings on such terms as it thinks fit[43]. Where the petitioner does not appear at the hearing of the petition, the court may dismiss the petition for want of prosecution, and no subsequent petition against the same debtor shall be presented by the petitioner in respect of the same debt, without leave of court. However, the court may on such terms as it thinks fit substitute the petitioner with any other creditor who[61] has given notice of his/ her intention to appear at the hearing and is present in court on the date on which the petition is fixed for hearing or is in the same position in relation to the debtor as would have enabled the creditor on that

37 Regulation 11 (2) (supra).

38 Regulation 11 (3) (supra). See also Regulation 14(3) of the Insolvency Regulations, 2013.

39 Form 5 schedule one of the Insolvency Regulations.

40 Form 6 in the first schedule.

41 Regulation 16 of the Insolvency Regulations 2013.

42 Regulation 1 5 and 17(1) of the Insolvency Regulations 2013.

43 Regulation 19 of the Insolvency Regulations 2013.
Regulation 20 of the Insolvency Regulations, 2013.

date to present a bankruptcy petition in respect of a debt owed to him or her by the debtor and is desirous of prosecuting the petition.

At first hearing, court will require the debtor to file his/her statement of affairs with the court and within 7 working days serve a copy of a statement on the official receiver after filing it with the court.

The petitioner(s) will then give at least 14 working days' notice of the public examination the debtor to the trustee or special manager and to every creditor of the debtor who has given notice of his/her intention to appear and be heard the petition.

The bankruptcy Order will then be made if the court is satisfied that the debtor is unable to pay his or her debts or has failed to satisfy a statutory demand issued against him/her[62].

The petitioner should then proceed to serve the bankruptcy order on the official receiver who should send other copy to the bankrupt and thereby required to give a public notice within 14 days declaring the person named in the order bankrupt and should there after proceed to call the first creditors meeting wherein, they will appoint a trustee of the estate of the bankrupt. .

The official receiver should then make report to the court of the proceedings of the first creditor's meeting which shall include the person appointed trustee; and the creditors or representatives who attended meeting specifying their names and addresses [44]

Section 26 of the Act requires the trustee within 5 working days after his or her appointment to give notice of his/her full names, physical address, day time telephone number and electronic address and the date of commencement of bankruptcy.

OPTIONS AVAILABLE TO A PERSON IN RESPECT OF WHICH A BANKRUPTCY

Petition is brought. A person who faces threats of bankruptcy is not completely hopeless. This is because the law provides for alternative options which s/he can utilize to minimize the gross effects of a bankruptcy order. They include;

Section 119 of the Insolvency Act allows a debtor who intends to make arrangement with his creditors to apply for an interim protective order and according to regulation 63, this application is by summons in chambers and after its filed in court, it must be served on; the trustee, where the debtor is an un discharged by the proposed supervisor, the debtor where the applicant is a trustee.

Regulation 64 of the Insolvency Regulations provides that at any time after filing the application the court may set down the application for hearing. The applicant shall take a hearing notice which he or she must serve on; the trustee where the debtor is an un discharged bankrupt, the proposed supervisor and the debtor, where the applicant is a trustee

Regulation 64 (3), a person who is served with a copy of the application or hearing notice may appear or be represented at the hearing and the court may make an interim order if satisfied that

44 Regulation 27 of the Insolvency Regulations, 2013. See also Regulation 64(2)

The debtor intends to make an arrangement with his creditors and where the debtor is an un discharged bankrupt or she has given notice of the intention to make an arrangement with his creditors to the trustee of his or her estate.

A named insolvency practitioner is willing to act as supervisor of the proposed arrangement as a trustee or otherwise for the purpose of supervising its implementation.

The debtor is an un discharged bankrupt or is able to petition for his or her own bankruptcy if,

A previous application has not been made by the debtor for an interim order in the last twelve months.

Making the order is appropriate for the purpose of facilitating the consideration and implementation of the debtor's proposed arrangement.

The implication of this is that where an application for an interim order is pending, the court may stay any action, execution or other legal process against the property or person of the debtor but it ceases to have effect at the end of fourteen working days after the making of the order which makes it almost irrelevant[45]

Upon the court making an interim order, the debtor must submit to the proposed supervisory document setting out the terms of the arrangement which the debtor is proposing; and Statement of his or her affairs containing particulars of the debtors, creditors, debts and assets.

Section 123 (1) of the Insolvency Act, gives power to the proposed supervisor to give court a report stating whether in his/her opinion, a creditors meeting should consider the individuals proposed arrangement. And if s/he fails to submit the said report, the court may direct that the proposed supervisor be replaced by another named consenting insolvency practitioner or direct that, the interim order continues or if it has ceased to have effect, be renewed, for a further period as the court may in direction.

Section 123 (3) of the Insolvency Act gives court powers to, on application by the proposed supervisor, extend the period for which- the interim order has effect to give him a more time to prepare the report and after considering the report, court may[70;]

Order the proposed supervisor to call a creditor's meeting to consider the proposed arrangement and for that purpose, extend the period for which the order has effect,

Discharge the interim order if satisfied that the individual has failed to comply with his or her obligations under **section 122** or for any reason it would be inappropriate for creditors meeting to consider the debtors proposed arrangement.

Where the court makes an order to replace the proposed supervisor, the proposed supervisor shall call a creditors meeting not later than 14 working days after making that order and shall give a public notice in Gazette and a newspaper of wide circulation of the meeting addressed to each creditor of the debtor stating the date, time and venue for the meeting and at the meeting, s/he shall the chairperson of the meeting and must give a report of it to court At the meeting the creditors may resolve to; approve the proposed arrangement or to do so with modifications with the consent of the

45 Section 121 of the Insolvency Act 2011

debtor[72] . But where this will affect the rights of a secured creditor to enforce his or her security, the creditors may only approve it with the consent of the secured creditor concerned.

Arrangement order and its effect

Where the meeting declines to approve a proposed arrangement, court may discharge, vary or extend the interim order, and the debtor shall be given only one more opportunity to present a second proposed for arrangement. .However, where the meeting approves a proposed arrangement with or without modifications, the court may make an arrangement order wherein immediately after the supervisor shall send to each known creditor a written notice showing that an arrangement has taken effect and give a public notice that an arrangement has taken effect.

Section 119 (2) of the Act, once the order is given, no application for bankruptcy can be brought and if there has been one, it cannot proceed but this relief can only happen for the period of 14 days.

A receiver of any property of the debtor cannot be appointed, no other steps can be taken to enforce a charge over any of the individual's property, no other proceedings, and execution of other legal processes can be commenced against the debtor.

Advantage of an arrangement order as opposed to a petition for bankruptcy

The creditors stand to benefit by an arrangement in as much as the debtor's estate can be usually wound up more quickly and less expensively than by official proceedings/ petition for bankruptcy. The debtor does not have to go through the embarrassing consequences of bankruptcy which among others include. [46]The creditors also do not have to wait in line for the preferential creditors. i.e., the statutory creditors to be paid in case of arrangement for example URA, NSSF, among others. Arrangements also, facilitate the rescue of businesses of the debtor which do not have close down if there is a viable way of rescuing them from the cripple of debts. The individual is given a fresh start and can continue carrying on his/her businesses.

Consequences of Bankruptcy

To the person of the debtor. A person who has been adjudged bankrupts' certain restriction that s/he is subjected to as seen below;

According to Section 45 (1) of the insolvency Act, where a debtor is adjudged bankrupt, he/ she shall be disqualified from, being appointed or acting as a judge of court in Uganda, being elected to or holding or exercising the office of the president, MP, Minister, Member of Local government, Council, Board, Authority other government body and if s/he has a public office it immediately becomes vacant. [47]

Section 27[48]also discusses the effect of the bankruptcy order. It provides that upon making of a bankruptcy order the bankrupt's estate vests in the official receiver and then in the trustee, without

46. Section 45 of the Insolvency Act of 201 1.

47 Section 45(2) of 201 1.

48 Insolvency Act 201 1.

any conveyance, assignment or transfer and that except with the trustee's written consent or with the leave of the court and in accordance with such terms as the court may impose, no proceedings, execution or other legal process may be commenced or continued and no distress may be levied against the bankrupt or the bankrupt's estate. This section literally eases the process of bankruptcy proceedings by quickly allowing the Official receiver to take over control of the bankrupt's Estate but it still in the same way gives protection to the Estate of the bankrupt by putting a stop on any further proceedings which in away gives relief to the bankrupt.

Offences likely to be committed by a debtor/ who is adjudged bankrupt

Section 53 (1) of the Insolvency Act provides that a bankrupt or a debtor in respect of whom a bankruptcy order is made shall not;

Leave or attempt to leave Uganda without the permission of court

Conceal or remove property with the intention of preventing or delaying the assumption of custody or control by the trustee.

Destroy conceal or remove documents with the intent of defrauding or concealing the state of his or her affairs.

Obstruct the trustee in his or her duties (absconding).

Section 53 (2) provides that a person who commits the offence of absconding on conviction is liable to imprisonment not exceeding six months or to community service.

Section 54 (1) provides that a bankrupt should not obtain credit or engage in business without disclosing bankruptcy and any person who contravenes

section 54 (1) commits on offence and is liable on conviction to a fine not exceeding 480,000/ = or imprisonment not exceeding 12 months or both [80].

Section 55 (1) provides that where a bankrupt has been engaged in any business within 2 years before petition, he commits an offence if he or she has not kept accounting records, that give true and fair new of the business financial possession and explains its transactions.

Section 259; of the Insolvency Act provides for the general penalty which is a fine of exceeding to 480,000/= or imprisonment not exceeding 2 years and shall in addition pay defaults fine.

THE PROPERTY OF THE BANKRUPT

Not only is the person of the bankrupt affected but even his property. **Section 31 (1) of the Insolvency Act** all property which is considered to comprise the bankrupt estate and **section 31 (2)** provides of that which does not comprise the same. A bankruptcy order results in the property which is owned by the debtor at the date of bankruptcy vesting in the official receiver or a registered trustee. In the case of **RE K B DOCKER** It was held that from the time of the commencement of the bankruptcy all the property of the bankrupt in theory belongs to the trustee of the estate. Every payment of money, every transfer of property made by the bankrupt is an alienation of property that belongs, not to him, but to his trustee.

CREDITORS

Section 11 of the Act in Subsection 1, a secured creditor shall as soon as practicable after public notice has been given of the bankruptcy, deliver to the trustee written notice of any debt secured by a charge over any asset including particulars of the asset subject to the charge and the amount secured. The law gives the secured creditors options, that is, realize any asset subject to a charge, where he or she is entitled to do so (free to sell their security y and recover their money), Claim as secured creditors.

The laws further allow them to surrender the charge for the general benefit of creditors and claim as an unsecured creditor for his or her whole debt[49]and if one chooses to realize the security, the secured creditor is allowed to claim his balances as an unsecured creditor after deducting the net amount realized if the amount is not enough.

On the other hand, if he remains with a surplus after selling if there is any other party with a charge on that property, he is supposed to pay the other party. If there is still a surplus, he must a count the trustee **Section 11 (6)** provides that if a person claims to be a secured creditor;

The trustee or liquidator is supposed to meet claim in full and redeem the charge.

The liquidator or trustee is allowed to sell the asset and pay the secured creditor whichever is lower, if realizes less than the debt, he pays the creditor money he obtains, if he realizes more, he, pays the creditor the amount only that is claimed.

The liquidator or trustee can reject, the claim as whole or in part and when a claim is rejected in whole or in part the creditor may make a revised claim as a secured creditor with 10 working days of receiving

notice of the rejection [50]and the liquidator or trustee may if she subsequently considers that a claim was wrongly rejected in whole or in part revoke or amend such decision.

The transactions made by the Insolvent individual

The Act empowers the trustee to recover some property disposed of by the bankrupt through insider dealings which are voidable on application of a liquidator, receiver, trustee, and member or contributory as the case may be[51].The dealing must relate to some asset of the insolvent. The insiders listed include spouses, siblings, children of the insolvent or any person with a class social proximity to the insolvent partners, shareholders, etc. all transactions of this nature will be rendered voidable and therefore will be cancelled [52]. For example, the purchase of land by the debtor in the name of his wife and a gift of a motor car have been held to be settlements. **In RE PAHOFF** the court held that a mortgage of property by the bankrupt to her two sons constituted a settlement and was void against her trustee. The effect of such settlement is that they are void against the trustee.

49 Section 11(2) of the Insolvency Act. See also Section 11(3) (a) of the Insolvency Act. 85 Section 11(3) (b) [Ibid].

50 Section 11(5) (c) (i) [Ibid].

51 See Sections 15-19 of the Insolvency Act commonly referred to as the avoidance provisions under the Act.

52 Section 18 of the Insolvency Act of 2011

In **ARBUTHNOT LEASING INTERNATIONAL LTD V HAVEL LEASING FINANCE**[53]Lord Scott, held that the court must be satisfied that the transaction was entered into for the purpose of putting the assets beyond the reach of those who are making or may at some time make a claim of the bankrupt or the company. However, nothing in **Section 15-18 of the insolvency Act** affects the title of a person who has in good faith and for valuable consideration purchased the subject property from the persons entitled to the benefit of the settlement, covenant or contract. A creditor is deemed not to be a purchaser, payee or encumbrances in good faith if the transaction which benefited him/her took place in such circumstances as to lead to the inference that the creditor knew or had reason to suspect that the debtor was unable to pay his debts as they fell due from his own money that the effect of the transaction would be to give him a preference priority.

Cross Cutting Issues of Bankruptcy as in Other Legislations

The 1995 constitution of the Republic of Uganda.

Article 80 (2) (d) of the constitution Uganda provides that a person is disqualified from being a Member of Parliament when s/he has been adjudged bankrupt or otherwise, declared bankrupt and has not been discharged. This means that the supreme law of Uganda considers a person declared bankrupt to be unable to serve the citizens of Uganda and that such a person is unfit for the office of Member of Parliament of the Republic of Uganda. It is on this basis that an individual is advised to fight and pay his or her debts as and when they follow due.

The same applies to the higher of Office of the President of the Republic of Uganda wherein under **Article 102 (c)**, a person is not qualified for election as president unless that person is qualified to be a member of parliament all the above provisions of the constitution show how a person who is declared bankrupt disabled from serving their country.

The **Advocates Act of 2010, Section 11 (a) of the Advocates Act** provides that an un discharged bankrupt will not practice law in the courts of Uganda. This provision affects the profession of an individual who has been declared Bankrupt but it also in some provides protection to the Noble legal profession from being diluted and marginalized by society which could have already participated in the process of declaring some person bankrupt during the public examination which is one of the processes that subjects the bankrupts to embarrassment and torture in the eyes of the Public.

Companies Act of 2012, Section 200 of the Companies Act of 2012 prohibits an un discharged bankrupt from acting as a director of or taking part in the management of any company except with leave of the court. This implies that companies are protected from such individuals who are considered unable to manage their own affairs from getting involved in the day to day running of any company whose affairs are directly linked to the interest of the general public.

CONTRACTS ACT OF 2010

Section 135 of the Contracts Act 2010 provides for termination of agency and one of the grounds is where a principal is adjudicated an insolvent under the law. Under the law of agency, it's an established legal principle of law that the actions of an agent are actions of the principle. It's also important to note that an agent acts on behalf of his/her principle mostly when dealing with third parties. This section gives protection to the third parties or even the principle who would be directly

53 (1990) BCC 696 .

affected by the actions of the agents who are already bankrupt as they will be unable to indemnify them when they act beyond the authority given to them.

Partnership Act of 2010.

Section 35 of the Partnership Act 2010 provides for dissolution of partnership by bankruptcy that is, subject to any agreement between or among the partners, a partnership may, at the option of the other partners, be dissolved by the death or bankruptcy of any partner, this section saves the other partners from being affected by the consequences of bankruptcy which could end up affecting the partnership business.

THE NATIONAL SOCIAL SECURITY FUND ACT CAP 222

Under the Provision for the Board of directors and their appointment and section 3(3) (b) provides for revocation of the directors' appointment by the minister if he/she is insolvent or bankrupt. This section seems to have been enacted under this act for the purpose of protecting this particular organizations affair from being run by financially incapacitated persons who are victims of bankruptcy with its gross effects. It's important to note that this particular organization deals with the savings of different citizens and to allow a bankrupt to run it would mean subjecting it to financial scandals which can lead it into both administrative and financial problems.

THE REGISTRATION OF THE TITLES ACT CAP 230

Section 197 provides that upon bankruptcy of the proprietor of any land, lease or mortgage, or upon any bankrupt before obtaining his or her discharge becoming proprietor of any land, lease or mortgage, the official receiver or trustee shall be entitled to be registered as proprietor in respect of that land, lease or mortgage. This implies that the bankrupt cannot dispose of any the land to which they are the registered owners and in a way this section protects any of the creditors who would be interested in the property of the bankrupt.

By the official receiver being registered as the proprietor, the interests of the creditors are protected.

Therefore, a person who is faced with a situation of being unable to pay his / her debts stands higher risks of being slapped with bankruptcy petitions and even though s/he may apply for an interim protective order as he or she plans to make arrangement with his / her creditors, the entire process of either a petition or him making arrangement with his creditors is full of grave and negative consequences which do not only affect the person of the bankrupt but also his property and any prior transactions entered into by the bankrupt which stand to be rendered void. It's important to note that these grave consequences of bankruptcy are scattered all over the various legislations as listed under this book.

LIQUIDATION/WINDING UP OF COMPANIES, ITS CONSEQUENCES AND THE CROSS-CUTTING ISSUES IN OTHER LEGISLATIONS

Liquidation is the procedure by which a company or other type of corporation is brought to an end, in other words, the company or such other type of corporation ceases to exist as a corporate entity[54]

54 LS Sealy and RJA Holy, Commercial Law Text, Cases and Materials, 3rd Edition (2003) LexisNexis UK.

. The process of liquidation involves the appointment of a liquidator who is tasked with closing down or selling off the corporation's business, realizing all of its assets, paying off its creditors and if there is residue value, distributing it amongst those who are entitled to it under the corporation's Constitution/ Memorandum and Articles of Association. Liquidation is also sometimes referred to as winding-up or dissolution, although dissolution technically refers to the last stage of liquidation.

Winding up is the process by which a company is dissolved and ceases to be a going concern. In a winding up the company's business is closed down. Its assets are sold off, the creditors are paid, and the balance is distributed to the members and at the end of the whole process, the company ceases to exist[55].

Modes of Liquidation

Section 57 of the Act provides for the modes of liquidation to include; by court, by voluntary liquidation or liquidation subject to the supervision of court. For one to know which mode to use at a particular point in time, it goes back to the facts of a particular case and as to whether these modes are well understood/ utilized, is a matter that requires scrutiny but not much discussed in this research. The above modes are herein discussed as seen below.

Voluntary Liquidation of a Company

This is provided for both under the Insolvency Act and the Companies Act. **Section 58 (1) of the Insolvency Act** provides that a company may be liquidated voluntarily if the company resolves by a special resolution that it cannot by reason of its liabilities continue its business and that it is advisable to liquidate. This particular mode was evidenced in a petition to the High Court of Uganda Civil Division for winding up of **UCHUMI SUPERMARKETS UGANDA LTD** [56]wherein the above company petitioned court for liquidation on the ground that it was insolvent and its operations where no longer commercially viable and upon full inequity by the court, it was found out that indeed the company was no longer a going concern and could no longer pay its debts. The petition was accordingly allowed and the Official receiver was appointed as the Liquidator. It's important to note that the liquidation takes effect at the time the resolution is passed and it can further be discussed as seen below

BY THE DIRECTORS

Section 271 of the Companies Act provides that directors of a company can commence liquidation where they have made a full inquiry into the affairs of the company and have formed the opinion that the company is able to pay its debts in full within a period not exceeding 12 months from the commencement of the liquidation.

The company should be solvent for this mode to be invoked; hence the declaration of solvency and where a company passes a resolution for the voluntary winding up, the provisions of the Insolvency Act, relating to liquidation thereby applies with the necessary modifications.

55 Downes, John and Jordan Elliot. Goodman (2003). Dictionary of Finance and Investment Terms. Hauppauge. NY: Barron's Educational Series, 2003. Print.

56 High Court Civil Division Companies Cause No. 30 of 2015.

By the Members of the Company

This is a liquidation that is initiated by the Company's shareholders. **Section 62 (1) of the Insolvency Act** is to the effect that the company shareholders by special resolution or the directors or any authorized person may appoint one or more liquidators for the purpose of liquidating the company

Section 62 (2) on the appointment of a liquidator all the powers of the director's cease except where the company in a general meeting or the liquidator sanctions the continuance of those powers. The liquidator is required to give a public notice of his appointment within fourteen days after his appointment in the Gazette and failure to do so attracts a penalty of a fine not exceeding five currency points every day for which the default continues.

In the case of **RE IMPERIAL INVESTMENT FINANCE LTD**, the members of the said company applied the High Court of Uganda Commercial' Division to voluntarily wind up the operations of the applicant company. The court held that once the members have gone through the formal procedure of passing a special resolution to wind up the company and a liquidator is appointed, together with making an adequate advert in the local newspaper, the court can go ahead to grant their application.

BY THE CREDITORS

Section 69 (1) provides that the company shall cause a meeting of the creditors of the company to be summoned on the same day as the meeting for the resolution for liquidation is to be proposed or on the following day and send to the creditor's notices for the meeting together with the notices for the meeting for proposing the resolution for liquidation Also refer to Part IX of the Companies Act of 2012 Laws of Uganda.

Also refer to **Section 58 and 93 of the Insolvency Act of 2011** for the mechanisms through which a Company may be liquidated voluntarily by its Creditors.

The notice for the meeting of the creditors should be published in Gazette and in the official language in a newspaper with wide circulation in Uganda[57].

PROCEDURE OF THE CREDITORS MEETING FOR VOLUNTARY LIQUIDATION

Section 69 (3) provides that the directors should appoint one of them to preside at the meeting and present a statement of the company's affairs and a list of the creditors and the estimated amount of their claims to the meeting of the creditors.

Section 70 (1) the creditors and the company at their respective meetings may nominate a person to be liquidator and if they nominate different persons, the person nominated by the creditors shall be the liquidator and if the creditors do not nominate any person, the person nominated by the company shall be the liquidator. It is important to note the person appointed must still abide by the requirement of giving public notice of his appointment before going on with the ascertainment of claims as are alleged by the different creditors in their respective capacities either as secured or unsecured creditors.

57 Section 69 (2) of the Act.

It's important to note that the creditors must also go ahead at their meeting to appoint a committee of inspection which must not be more than five in number who can also be removed by the creditors through a resolution passed by them to that effect but court has power to reappoint any of them. The committee of inspection has power to fix the remuneration to be paid to the liquidator.

PROCEDURE FOR VOLUNTARY WINDING UP OF THE COMPANY

Directors of the company investigate the affairs of the company and then form an opinion that the company can pay its debts within a period of one year[58]and they will then make a statement of the company's assets and liabilities. Directors call a board meeting to make a status declaration of solvency [59]wherein under Article 78[60]the directors of a company are given powers to meet for the disperse of company business and even regulate their meetings as they think fit. The Quorum of such meeting of the directors is two (2) if not fixed.

The declaration is filed together with the statement of assets and liabilities within a period of 30 days with the registrar of companies. [61]The Notice is issued to call an extra ordinary general meeting [62]for the purpose of winding up the company and the quorum is 3members present [63]. A special resolution is passed to the effect that the company be wound up [64]and the same is registered within 7 days by the registrar of companies [65]and they will go ahead to advertise the notice of the resolution to wind up in Uganda Gazette and a newspaper with wide circulation [66.]

After that, they will go on to appoint a liquidator through the directors meeting and make a board resolution appointing the liquidator who will be required within 14 days after appointment to publish in the Gazette a notice of his appointment and deliver the same to the registrar for registration and where the liquidation continues for more than one year, the liquidator must summon a general meeting.

Notice of final meeting is then given in the Gazette and in a newspaper of wide circulation specifying the time and place of the meeting and must be published at least 30 days before the meeting [67]. This meeting determines the final dissolution of the company.

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58 Section 271 (l) of the Companies Act of 2012 laws of Uganda.

59 Section 271 (l) of the Companies Act of 2012 Laws of Uganda.

60 Table A of the Companies Act of 2012 Laws of Uganda.

61 Section 271 (a) & (b) of the companies Act.

62 Section 140 of the companies Act relating to calling of company meetings applies accordingly.

63 See Article 53 and Article 57 of Table A to the Companies Act of 2012.

64 Section 268 of the Companies Act of 2012.

65 Section269 (2) of the Companies Act of 2012.

66 Section 269 (l) of the Companies Act of 2012.

67 Section67 (2) of the Insolvency Act of 2011.

The liquidator will then prepare an account of the liquidation showing how the liquidation was conducted before calling the final meeting which is the general meeting of the company to present the account of his acts and dealings.

Afterwards, s/he sends a copy of the account to the registrar and makes a return of the meeting and its date to registrar within 14 days after the meeting.

And lastly at the expiration of 3 months from the date of registration of the return, the company is taken to be dissolved [68].

COMPULSORY LIQUIDATION

This is the winding up of a company which is initiated by the making of an application by a person who is entitled to do so. In the case of **TRANSAFRICA ASSURANCE CO LTD V CIMBRIA (EA) LTD (CIVIL APPEAL 11 OF 2001) [2001] UGCA 1 (26 MARCH 2001)** the appellant who had failed to honor a performance bond in favor of the respondent successfully petitioned the High Court to wind up the appellant on the ground that it was insolvent and the court gave an order that the company be compulsorily wound up.

Section 92 and Regulation 85 (1) provides for the persons who may petition court for a compulsory liquidation of a company, that is, the company, a director of the company, a contributory or official receiver. A contributory is a person who is liable to contribute to the assets of a company in the event of a winding up.

The grounds for petition are that the Company has been served with a statutory demand and is unable to comply with the demand. Or that the company is unable to pay its debts in the meaning of Section 3 of the Insolvency Act, or that the Company has agreed to make a settlement with its creditors or entered into administration and the forum is the High Court of Uganda.

However, a petition based on a substantial dispute as to whether the debt is due or owing will not be entertained by court. In the case of **RE 'TANGANYIKA PRODUCE AGENCY**, it was held that a disputed debt cannot be the subject matter of a creditors petition for winding up and if the debt is bonafide in dispute, it is an abuse of the process of the court to try to enforce it by a petition to wind up.

PROCEDURE OF COMPULSORY LIQUIDATION

The Petition is presented to the High Court by any of the persons listed under **Section 92 (1) of the Insolvency Act.** Petition is served on persons concerned as they are listed under **Regulation 88** and after which a Public notice of the petition is given within 7 days after filing of petition. An affidavit in reply to petition should then be filed within 15 days after service of the petition and the same should be served on the petitioner

68 Section 67 (6) of the Insolvency Act of 2011

Then all persons who intend to appear and are head on the petition should give notice of their intentions and after which the Petitioner prepares a list of creditors who have given notice of intention to appear.

Regulation 85 of The Insolvency Regulations. Section 91 Of The Insolvency Act.

See form 19 of the Insolvency Regulations of 2013 together with Regulation 86 of the Regulations for the A sample.

See form 4 of the Insolvency Regulations for a sample and Regulation 89 for emphasis.

See **Regulation 90(1) of the Insolvency Regulations. 124 Regulation 90(2) of the Insolvency Regulations of 2013.Regulation 91 and Form 5 of the Insolvency Regulations. And Section 92 and Form 6 of the Insolvency Regulations**.

Court will then set down the petition for hearing and the petitioner must take out hearing notice and serve them on the debtor and every person who gave notice of their intention to be heard on the petition and to the Official receiver

Court will the hear the parties and if satisfied, it will make an order to wind up or appoint provisional liquidator [and] if a provisional is appointed, then s/he must send a copy of the order to the official receives within 7 working days [129] and must also give public notice of his/her appointment within 14 days.

The Creditors will then go ahead to appoint a liquidator at the meeting [131] wherein after the Provisional liquidator within 14 days after the creditors meeting files a report and minutes of the meeting in court and to the official receiver.

The appointed Liquidator should then give public notice of his appointment [133] which s/he must also deliver to the official receiver.

The Liquidator then goes on to collect and distribute the assets of the company [135] in accordance with Section 12 of the Insolvency Act and after which s/he will delivers to the official receiver a final report and account of liquidation.

And the Company is deemed to be liquidated and removed from the companies register after 3 months.

CONSEQUENCES OF LIQUIDATION

The date when dissolution becomes effective marks the termination of the company's legal personality, and hence of its existence. It is this consequence of the winding up regardless of whether it is the voluntary or the compulsory mode, which is employed to constitute the fundamental point of distinction between the insolvency of a corporation and that of an individua1 [69].

Every creditor and every person with a claim of any kind against the company should therefore bear in mind that at the conclusion of the liquidation all liabilities will be extinguished forever. Since there will be no subsisting legal person by whom any liability is owed nor any prospect that unsatisfied

69. See Chapter 10 of CHRISPASNYOMBI & ALEXANDER KIBANDANDAMA'S PRINCIPLE OF COMPANY LAW IN UGANDA, LAW AFRICA PUBLISHING 20 14. PAGES 241-278.

liabilities may be settled out of a sense of moral obligations by a person against when no legal enforcement is capable of taking place.

In the matter of winding up of Muddu Awulira Enterprises Limited in the High Court Commercial Division companies Cause No. 14 of 2004, after the winding up proceedings had commenced, Stanbic Bank appointed a receiver under a debenture that they held. The court had to rule on whether the bank's action was contrary to Sections 227 and 228 of the [now repealed] Companies Act Cap. 110. It was held that the commencement of the winding up proceedings in court or a resolution for winding up does not preclude a debenture holder from appointing a receiver. It was further held that the crystallization of a debenture and the taking possession of all the company's assets both present and future during the currency of the winding up proceedings is an execution/ attachment in violation of section 228 of the Companies Act.

GENERAL EFFECT OF LIQUIDATION

Section 97 of the Act provides that at the commencement of liquidation the liquidator shall take custody of the property and control the company's property, the officers of the company shall remain in office but cease to have any powers Junctions or duties other than those required or permitted to be exercised by this Act, proceedings execution or other legal process required or shall not be commenced or continued, distress shall not be levied against the company or its property, shares of the company shall not be transferred or other alteration made in the rights and liabilities of any company shareholder and a shareholder shall not exercise any power under the companies memorandum and articles of association; and the memorandum and articles of association of the company shall not be altered, except the liquidator may change the companies registered office or registered post address.

The purpose of winding up is to realize the company's, assets and pay its dues however, the courts have through various judicial pronouncements clarified this normally. For example, the Bombay High Court in

AMBEY FLOUR MILLS PVT. LTD. VS SHRI VIMAL CHAND JAIN ON 29 SEPTEMBER, 1989 DELHI HIGH court held, that the machinery of winding up will not be allowed to be utilized merely as a means for realizing debts from the accompany.

CONSEQUENCES FACED BY COMPANY DIRECTORS

Section 73(2) indicates that with the appointment of a liquidator, the powers of the director’s cease except where authorized by the company in general meeting for the members' voluntary liquidation or the committee of inspection sanctions their continuance and if no committee, the creditors sanction their continuance.

From above, the implication is envisaged on the position of the directors in that they become ceremonial officials of the company but any liabilities that was incurred by the directors is investigated and the directors will be held liable thereafter for any loss.

Once a company is wound up directors’ position ceases that is s/he can no longer be a director of a company that has been scraped off the registry their powers is limited to that of a liquidator chosen by the creditors but they have to attend meetings in order to account for their personal liability.

In **DORCHESTER FINANCE CO LTD V STEBBING [1989] BCLC 498:** Foster J said, a director is required to exhibit in performance of his duties such a degree of skill as may reasonably be expected from a person with his knowledge and experience.

(a) A director is required to take in the performance of his duties such care as an ordinary man might be expected on his own behalf.

(b) A director must exercise any power vested in him in good faith and in the interest of the company.

The same principle was further advanced in the case of **RE CITY EQUITABLE FIRE INSURANCE CO [1925] CH 402,** where it was held that in duty of care or due diligence means that the director must not abdicate involvement or responsibilities, he therefore risks liabilities if he neglects to attend board meeting and leave all decision to others, if he fails to apply his judgment to the advice of outsiders or if he signs cheques without inquiry.

CONSEQUENCES ON THE SHARE HOLDERS

Any transfer of shares made after the commencement of winding up/ Liquidation is void. Accordingly, shareholders are prevented from evading this liability as contributory by transferring their shares to some impecunious person after winding up has commenced. Where the winding up petition has commenced and the debs are insufficient to satisfy the creditors, the contributories are under obligations to bring in the sums due to them and when all the debts have been paid and there are surplus assets then these are available for the repayment of capital to the contributories and in certain cases residue may exceed the normal capital of the company and there may be even longer to distribute. The way in which the balance is distributed among the contributories will depend upon the rights attaching the particular shares.

Section 14 of the Insolvency[70] provides for surplus assets and **section 14(b)** in particular provides that in the case of liquidation, the liquidator shall distribute the company's surplus assets in accordance with the memorandum and articles of association of the company in question. This means that each shareholder takes what they are entitled to under the memorandum and the articles of association or in simplicity each takes in accordance with the number of shares they own in the company as indicated under the companies Memorandum and articles of association.

CONSEQUENCES TOWARDS NEW AND OLD CONTRACTS OF THE COMPANY

Contracts may be of employment contracts or of business transactions, Section 186 [145] provides inter alia that a receiver shall be personally held liable for any contract entered into by him or her in the exercise of any of the receivers' powers, in other wards the appointment of a receiver does not determine. contracts entered before the appointment. In the case of **GRIFITHS V SECRETARY OF STATE FOR SOCIAL SERVICES**[71] court held that the appointment out of court by debenture holders of a receiver and manager of a company to act as an agent of the company did not operate to terminate the contracts of the company unless the appointment was accompanied by the sale of business.

70 Act of 201 1.

71 UKEAT/03713/JOJ.

It is important to note that contracts which where binding on the company when the receiver was appointed continue to bind the company though any enforcement as by the selling the company assets is subject to the priority rights of debenture holders over the assets. The receiver may in his obligation fulfill the old contracts although he has discretion, he should not disregard the contracts if to do so would damage the company, good will or affect the realization of its assets and thus in the case of **RE NEW DIGATECOLLIERLY**[72] where the receiver and the manager of mining company could have made a greater profit by disregarding contracts for the former sale, he was not allowed to drop the contracts because of the damage to the company goodwill.

CONSEQUENCES FACED BY THE BUSINESS OF THE COMPANY

In case of a voluntary winding up, the company shall, from the commencement of the winding up, cease to carry on its business, except in far as may be required for the beneficial winding up of the company. The best term to be used in such a circumstance is called halt of business activities.

Insolvency of businesses leads to loss in tax collections by governments since the tax base is reduced by a number directly related to the number of businesses declared insolvent. This reduction in total revenue collections by government has a direct impact on delivery of public goods and services such as health, education and transport infrastructure. This in particular affects the country. Corporate re-organization are more valuable weapons in a firm's strategic harmony, employed for a variety of business purposes, they exist in numerous forms including amalgamations. Share for share exchange divisive-organization and liquidation.

CROSS CUTTING ISSUES OF WINDING UP / LIQUIDATION IN OTHER LEGISLATIONS.

THE FINANCIAL INSTITUTIONS' ACT OF 2004 NO.2 AS AMENDED BY ACT NO.2 OF 2016

Under **Section 97** voluntary winding up of a financial Institution is outlawed. On the other hand, under **Section 82**, the Central Bank is given powers to intervene in the management of the affairs of a financial institution deemed to be operating to the prejudice of the depositors which may include solvency issues. The options available to the central bank include replacing management and or the board of directors with persons appointed by the central bank, ordering additional capital injection, appointing advisors to the troubled company, ordering certain activities not to be done and other such measures.

On the other hand, under **Section 94 to 96**, the central bank is authorized to put an insolvent financial institution under receivership, and the receiver is among others empowered to arrange mergers between the troubled financial. Institution and another, sell its assets or liquidate the company. But still on the other hand, the Central Bank may if it deems it fit, place the financial Institution in compulsory Liquidation. [73]

72 (1912) CH 468.

73 See Section 99 of the Financial Institutions Act No.2 of 2004 as amended by Act No.2 of 2016 Laws of Uganda.

THE COOPERATIVE SOCIETIES ACT, CHAPTER 112, LAWS OF UGANDA

Under this law, the relevant provisions are **Sections 58 to 66**. Under **Section 58**, the Registrar of cooperative societies can wind up a cooperative society after inquiry under **Section 52,** and appoint a liquidator. Under **Section 59** it is provided that upon a liquidation order being made by the said Registrar, the provisions of the Companies Act (by such importation, now The Insolvency Act, 2011), relating to wining up of companies shall apply as if reference to companies is a reference to cooperative Society.

THE PUBLIC ENTERPRISES REFORM AND DIVESTITURE ACT, CHAPTER 98, LAWS OF UGANDA

Under **Sections 19 to 20**, public/ statutory corporations can be restructured or otherwise reformed to make them more viable, and in practice this has taken the form of corporate rescue.

Further, under Part Vi of the Act, insolvent and other corporations deemed non-viable can be divested and liquidated at the discretion of the Minister of Finance. This power has also been used to divest and/or liquidate a number of public enterprises. it is however important to note that, this Act specifically provides for the protection of workers' and contractors' rights in the face of what would have been adverse consequences of liquidation.

THE MICRO FINANCE DEPOSIT TAKING INSTITUTIONS ACT NO.5 OF 2003

This particular Act establishes the Microfinance Deposit Taking Institutions. Under Part 11 of the Act, the Central Bank may upon determining that a microfinance Deposit Taking Institution (MDI) should be liquidated make an order for the winding up of the affairs of that institution. It further provides that the Central Bank or any other person appointed by the Central Bank Acts as the Liquidator of the Institution.

THE TIER 4 MICROFINANCE INSTITUTIONS AND MONEY LENDERS 'ACT NO. 18 OF 2016

This establishes the Tier 4 Microfinance Institutions. Under Part IX of the Act proceedings for the winding up and liquidation of a Tier 4 Microfinance Institution cannot be commenced except by the regulatory authority or the institution itself with the prior approval of the regulatory authority. The insolvency Act and the Companies Act apply, with necessary modifications, to the liquidation of a Tier 4 Microfinance Institution.

A) WINDING UP

In this part of the study, the law applicable includes;

The Companies Act 2012

The Companies (General Regulations) SI 110-1

The Companies (Winding Up) Rules SI 110-2

The Companies (Fees) Rules SI 110-3

The Companies (High Court) (Fees) Rules SI 110-3

Distress for Rent (Bailiffs) Act Cap 76

Distress for Rent (Bailiffs) Rules SI 76

Income Tax Act Cap 240

The Civil Procedure Act Cap 71

The Civil Procedure Rules SI 71-1

Advocates (Remuneration and Taxation of Costs) Regulations SI 267-4

Case law

Common law and Doctrines of Equity

THE CHECKLIST OR MAIN ISSUES ARISING INCLUDE;

- Whether the company can be wound up? (see section 222 of the Companies Act)?
- If so, who has capacity to initiate winding up of the company? (modes of winding up thus see sections 212, 276- 278, 286,288 *inter alia*)?
- What the mode of proof and priority of debts (see section 315 companies Act)?
- What is the forum, procedure and documents?
- What the necessary fees?

The major documents differ from the mode of winding up used; thus, this will be discussed under the subsequent heads.

The procedure for winding up will be discussed under each distinct head

INTRODUCTION

This refers to the procedure through which a company's existence legally comes to an end. There is cardinal principle in **RE HOIMA GINNERS (1964) EA 439** that a winding up petition is not a legitimate means of seeking to enforce payment of a debt and therefore; a petition presented ostensibly for winding up but to really exert pressure to pay a debt will be dismissed. This was noted with approval in **RE HOUSE OF GARMENTS COMPANY CAUSE 2/1972**. There are many different modes of winding up, thus;

DISSOLUTION OF COMPANIES

At the end of this Chapter, the student will be expected to:

1. Understand the different ways in which the life of a company can come to an end;

2. Examine the procedures that are required during the winding up of a company; and

3. Examine and analyze the role of the liquidator in winding up.

DISSOLUTION OF COMPANIES

A company's life can be ended in any of the following ways: Mergers, Takeovers, Reconstructions, Schemes of arrangement and Winding up.

MERGER

A merger (also called an amalgamation) is a transaction whereby two or more companies are combined in some way in united ownership. Example Hewlett pacquard and Compaq merged to form Hewlett pacquardcompaq

TAKE-OVER

The simplest method is a takeover whereby Company A acquires the issued share capital of Company B so that they form a single group. Example is Bank of Africa which took over Allied bank, Barclays Bank took over Nile Bank etc.

ARRANGEMENTS AND RECONSTRUCTIONS.

POWER TO COMPROMISE WITH CREDITORS AND MEMBERS.

Section 234 (1) provides that where a compromise or arrangement is proposed between a company and its creditors or any class of them or between the company and its members or any class of them, the court may, on the application of the company or of any creditor or member of the company or where the case of a company being wound up, of the liquidator order a meeting of the creditors or class of creditors or of the members of the company or class of members as the case may be, to be summoned in such manner as the court directs.

Subsection (2) provides that where the majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors or the class of creditors or on the members or class of members as the case may be and also on the company or in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

Subsection (3) provides that an order made under **subsection (2)** shall have no effect until a certified copy of the order has been delivered to the registrar for registration and a copy of

the order shall be annexed to every copy of the memorandum of the company issued after the order has been made or in the case of a company not having a memorandum, of every copy so issued of the instrument constituting or defining the constitution of the company.

Subsection (4) provides that where a company defaults in complying with subsection (3), the company and every officer of the company who is in default is liable to a fine not exceeding ten currency points for each copy in respect of which default is made.

Subsection (5) provides that in this section and section 235, "company" means any company liable to be wound up under this Act and "arrangement" includes a reorganization of the share capital of

the company by the consolidation of shares of different classes or by the division of shares into shares of different classes by both or by both methods.

INFORMATION AS TO COMPROMISE WITH CREDITORS AND MEMBERS.

Section 235 (1) provides that where a meeting of creditors or any class of creditors or of members or any class of members is summoned under **Section 234**, there shall

(a) with every notice summoning the meeting which is sent to a creditor or members, be sent also a statement explaining the effect of the compromise or arrangement and in particular stating any material interests of the directors of the company whether as directors or as members or as creditors of the company or other and the effect on them of the compromise or arrangement in so far as it is different from the effect on the similar interests of other persons; and

(b) in every notice summoning the meeting which is given by advertisement, be included either the statement referred to in paragraph (a) or a notification of the place at which and the manner in which creditors or members entitled to attend the meeting may obtain copies of the statement.

Subsection (2) provides that where the compromise or arrangement affects the rights of debenture-holders of the company, the statement referred to in subsection (1) shall give similar explanation as respects the trustees of any deed for securing the issue of the debentures as it is required to give as respects the company's directors.

Subsection (3) provides that where a notice given by advertisement includes a notification that copies of a statement explaining the effect of the compromise or arrangement proposed can be obtained by creditors or members entitled to attend the meeting, every such creditor or member shall, on making application in the manner indicated by the notice, be furnished by the company free of charge with a copy of the statement.

Subsection (4) provides that where a company defaults in complying with any requirement of this section, the company and every officer of the company who is in default is liable to a fine not exceeding one thousand currency points and for the purposes any liquidator of the company and any trustee of deed for securing the issue of debentures of the company.

Subsection (5) provides that a person is not liable under subsection (4) if that person shows that the default was due to the refusal of any other person, being a director or trustee for debenture-holders, to supply the necessary particulars as to his or her interests.

Subsection (6) provides that a director of the company and any trustee for debenture holders of the company shall give notice to the company of such matters relating to himself or herself as may be necessary for the purposes of this section.

Subsection (7) provides that a person who makes default in complying with subsection (6) is liable to a fine not exceeding one hundred currency points.

PROVISIONS FOR FACILITATING RECONSTRUCTION AND AMALGAMATION OF COMPANIES.

Section 236 (1) provides that where an application is made to the court under **section 234** for the sanctioning of a compromise or arrangement proposed between a company and the persons mentioned in that section and it is shown to the court that the compromise or arrangement has been proposed for the purposes of or in connection with a scheme for the reconstruction of any company or the amalgamation of any two or more companies and that under the scheme the whole or any part of the undertaking or the property of any company concerned in the scheme in this section referred to as "a transferor company" is to be transferred to another company in this section referred to as "the transferee company", the

court may by the order sanctioning the compromise or arrangement or by any subsequent order, make provision for all or any of the following matters—

(a) the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company;

(b) the allotting or appropriation by the transferee company of any shares, debentures, policies or other similar interests in that company which under the compromise or arrangement are to be allotted or appropriated by that company to or for any person;

(c) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;

(d) the dissolution without winding up, of any transferor company;

(e) the provision to be made for any persons who, within such time and in such manner as the court directs, dissent from the compromise or arrangement;

(f) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out.

Subsection (2) provides that where an order under this section provides for the transfer of property or liabilities, that property shall, by virtue of the order, be transferred to and vest in and those liabilities shall, by virtue of the order, be transferred to and become the liabilities of the transferee company, freed from any charge which is by virtue of the compromise or arrangement to cease to have effect.

Subsection (3) provides that where an order is made under this section, every company in relation to which the order is made shall cause a certified copy of the order to be delivered to the registrar for registration within seven days after the making of the order.

Subsection (4) provides that where there is default in complying with subsection (3), the company and every officer of the company who is in default is liable to a default fine of twenty-five currency points.

Subsection (5) provides that in this section—

“company” does not include any company other than a company within the meaning of this Act, notwithstanding section 234(5);

"liabilities" includes duties; and

"property" includes rights and powers of every description.

AMALGAMATIONS.

Section 237 provides that subject to any restrictions in their respective incorporation documents and to sections 238, 239, 240 and 241, two or more companies may amalgamate and continue as one company which may be one of the amalgamating companies or may be a new company.

AUTHORIZATION OF AMALGAMATION.

Section 238 provides that each company which proposes to amalgamate must authorize in the manner set out in **section 241**

(a) an amalgamation proposal which complies with **section 239**; and

(b) the proposed incorporation documents of the amalgamated company which complies with Section 240.

AMALGAMATION PROPOSAL.

Section 239 (1) provides that an amalgamation proposal for authorization under section 240 must set out the terms of the amalgamation and in particular

(a) the manner in which shares of each amalgamating company are to be converted into shares of the amalgamated company;

(b) if any shares of an amalgamating company are not to be converted into shares of the amalgamated company, the consideration what the holders of those shares are to receive instead of shares of the amalgamated company;

(c) any payment to be made to any shareholder or director of an amalgamating company, other than a payment of the kind described in paragraph (b); and

(d) details of any arrangements necessary to perfect the amalgamation and to provide for the subsequent management and operation of the amalgamating company.

Subsection (2) provides that an amalgamation proposal may specify the date on which the amalgamation is intended to become effective.

Subsection (3) provides that where shares of one of the amalgamating companies are held by or on behalf of another of the amalgamating companies, the amalgamation proposal must provide for the cancellation of those shares when the amalgamation becomes effective without any payment in respect of those shares and no provision may be made in the proposal for the conversion of those shares into shares of the amalgamated company.

INCORPORATION DOCUMENT OF AMALGAMATED COMPANY.

Section 240 (1) provides that the incorporation document for authorization under section 238 must be in the prescribed form and must in particular state—

(a) the name of the amalgamated company;

(b) the share structure of the amalgamated company, specifying—

(i) the number of shares of the amalgamated company; and

(ii) the rights, privileges, limitations and conditions attached to each such share or class of share and its transferability, if different from fundamental rights attached to shares;

(c) the full names, postal and residential addresses of each director of the amalgamated company;

(d) in the case of a public company or a private company with a secretary, the full name, postal and residential address of the secretary of the amalgamated company;

(e) the registered office of the amalgamated company;

(f) the place where the amalgamated company's records are to be kept if not the registered office; and

(g) the amalgamated company's accounting reference date.

Subsection (2) provides that the incorporation document may also contain—

(a) any restriction on the amalgamated company's capacity and powers; and

(b) any provision permitted by this Act or otherwise relating to the internal management of the amalgamated company.

Subsection (3) provides that if the proposed amalgamated company is to be the same as one of the amalgamating companies, the incorporation document for authorization may comprise the incorporation document of that amalgamating company and proposed notice of change of the incorporation document.

Manner of authorizing amalgamation.

Section 241 (1) provides that the directors of each amalgamating company must resolve that in their opinion

(a) the amalgamation is in the best interests of the shareholders of the company; and

(b) the amalgamated company will be solvent immediately after the time at which the amalgamation is to become effective.

Subsection (2) provides that the directors voting in favor of a resolution required by subsection (1) must sign a certificate that in their opinion, the conditions set out in subsection

(1) are satisfied.

Subsection (3) provides that the directors of each amalgamating company must send to each shareholder of that company not less than twenty working days before the amalgamation is to take effect—

(a) a copy of the amalgamation proposal;

(b) a copy of the proposed incorporation document which complies with section 240;

(c) copies of the certificates given by each set of directors under subsection (2) and a statement of any material interests of the directors whether in that capacity or otherwise; and

(d) any further information and explanation necessary to enable a reasonable shareholder to understand the nature and implications for the company and its shareholders of the proposed amalgamation.

Subsection (4) provides that the amalgamation must be authorized—

(a) by the shareholders of each amalgamating company by special resolution; and

(b) by any class of an amalgamating company, where any provision in the amalgamation proposal would if contained in an alteration to that company's incorporation document or otherwise proposed in relation to that company, require the authorization of that class.

Registration of amalgamation.

Section 242 (1) provides that after an amalgamation has been authorized under section 241, the following documents must, within ten working days after the resolution passed under this Act for the purpose be delivered, duly completed, to the registrar in relation to the amalgamated company—

(a) its incorporation document or if the amalgamated company is the same as one of the amalgamating companies, notice of change of incorporation document; and

(b) consents in the prescribed form signed by each of the persons named as director or secretary in the incorporation document or in the notice of change of incorporation document as the case may be; and

(c) certificates required by section 243.

Subsection (2) provides that Subsection (1)(a) does not apply to any part of the amalgamated company's incorporation document relating to the internal management of the company.

CERTIFICATES ON AMALGAMATION.

Section 243 (1) provides that the registrar must send to the company or person from whom the documents required under section 242 were received

(a) if the amalgamated company is the same as one of the amalgamating companies, a certificate of amalgamation in the prescribed form, together with an amended certificate of incorporation if necessary; or

(b) if the amalgamated company is a new company, a certificate of amalgamation in the prescribed form together with a certificate of incorporation in the prescribed form.

Subsection (2) provides that where an amalgamation proposal specifies a date on which the amalgamation is intended to become effective and that date is the same as or later than the date on which the registrar receives the documents required under section 242, the certificate of

amalgamation and any certificate of incorporation issued by the registrar must be expressed to have effect on that date.

Subsection (3) provides that on the date shown in a certificate of amalgamation

(a) the amalgamation becomes effective;

(b) the registrar must remove the amalgamating companies other than the amalgamated company from the register;

(c) the amalgamated company succeeds to all the property, rights and privileges of each of the amalgamating companies;

(d) the amalgamated company succeeds to all the liabilities of each of the amalgamating companies;

(e) proceedings pending by or against any amalgamating company may be continued by or against the amalgamated company;

(f) any conviction, ruling order or judgment in favor of or against an amalgamating company may be enforced by or against the amalgamated company; and

(g) the shares and rights of the shareholders in the amalgamating companies are converted into the shares and rights provided for in the incorporation document of the amalgamated company.

CREDITORS' RIGHTS ON AMALGAMATION.

Section 244 provides that where immediately after the time when an amalgamation becomes effective, an amalgamated company becomes insolvent, any creditor of any of the amalgamating companies may recover any loss he or she has suffered by reason of the amalgamation—

(a) if no certificate was given by the directors of that amalgamating company at the time the amalgamation was approved; or

(b) if the certificate was given and if there were no reasonable grounds for the opinion that the amalgamated company would be solvency from the directors who signed the certificate.

POWERS OF COURT IN RELATION TO AMALGAMATIONS.

Section 245 (1) provides that notwithstanding anything in this Act or in the incorporation document of any company, where it is not practicable to affect an amalgamation in accordance with the procedures set out in this Act or the incorporation document of the amalgamating companies, those

companies may apply to the court for approval of an amalgamation and the court may approve the proposal on such terms and subject to such conditions as it thinks fit.

Subsection (2) provides that within ten working days after an order is made by the court under subsection (1), the directors of each amalgamating company must deliver a copy of the order to the registrar who must take such steps if any as the order may specify.

LIQUIDATION OR WINDING UP

Winding up basically means liquidation of a company.

It's a process by which the company's life is brought an end and its property managed for the benefit of its creditors and members.

It involves an operation of putting to an end the transactions of the company, realizing the assets and discharging its liabilities.

There are two types of winding up.

- **Voluntary winding up:**
- **Involuntary winding up:**

This is provided for under **PART IX** of the Companies Act

Voluntary winding up of company under **section 268 (1)** occurs when a company may by special resolution resolve to be wound up voluntarily.

Subsection (2) provides that a voluntary winding up of a company shall be taken to commence at the time of the passing of the resolution under subsection (1).

NOTICE OF RESOLUTION FOR VOLUNTARY WINDING UP.

Section 269 (1) provides that where a company passes a resolution for voluntary winding up, it shall, within fourteen days after passing the resolution, give notice of the resolution in the *Gazette* and in a newspaper with a wide national circulation in the official language.

Subsection (2) provides that the resolution for voluntary winding up shall be registered with the registrar and a copy sent to the official receiver within seven days from the date of passing the resolution.

Subsection (3) provides that where default is made in complying with this section, the company and every officer of the company who is in default shall be liable to a default fine and for the purposes of this subsection the liquidator of the company shall be taken to be an officer of the company.

CONSEQUENCES OF VOLUNTARY WINDING UP.

Effect of voluntary winding up on the business and status of a company.

Section 270 (1) provides that a company shall, from the commencement of voluntary liquidation, cease to carry on business, except so far as may be required for the beneficial winding up of the company.

Subsection (2) provides that subject to subsection (1), the corporate status and powers of the company shall, notwithstanding anything to the contrary in its articles, continue until it is dissolved.

DECLARATION OF SOLVENCY

Statutory declaration of solvency in case of a proposal for voluntary winding up.

Section 271 (1) provides that where it is proposed to wind up a company voluntarily, the directors of the company or, in the case of a company having more than two directors, the majority of the directors, may, at a meeting of the directors make a declaration in the prescribed form to the effect that they have made a full inquiry into the affairs of the company and that, having done so, they have formed the opinion that the company will be able to pay its debts in full within a period not exceeding twelve months from the commencement of the liquidation as may be specified in the declaration.

Subsection (2) provides that a declaration made under subsection (1) shall have no effect for the purposes of this Act unless

(a) it is made within thirty days before the date of the passing of the resolution for winding up the company and is delivered to the registrar with a copy to the official receiver for registration before that date; and

(b) it includes a statement of the company's assets and liabilities as at the latest practicable date before the making of the declaration.

Subsection (3) provides that a director of a company who makes a declaration under this section, without reasonable grounds for the opinion that the company will be able to pay its debts in full within the period specified in the declaration commits an offence and shall be liable on conviction to imprisonment not exceeding twelve months or to a fine not exceeding twenty-four currency points or both.

Subsection (4) provides that where the company is wound up in accordance with a resolution passed within the period of thirty days after the making of the declaration, but its debts are not paid or provided for in full within the period stated in the declaration, it shall be presumed until the contrary is shown that the director did not have reasonable grounds for his or her opinion.

APPLICATION OF INSOLVENCY ACT, 2011 TO VOLUNTARY WINDING UP OF A COMPANY.

Section 272 provides that where a company passes a resolution for the voluntary winding up of the company in accordance with this Act, the provisions of the Insolvency Act, 2011

relating to liquidation shall, with the necessary modifications apply to the voluntary winding up of the company.

COMPULSORY WINDING UP/ WINDING UP BY COURT

This is provided for under Part IV of the Insolvency Act, 2011

Winding up by court is also known as compulsory winding up. Compulsory winding can be effected under the following circumstances:

MODES OF LIQUIDATION.

Section 57 provides that the liquidation of a company may be—

a. by the court;

b. voluntary; or

c. subject to the supervision of the court.

VOLUNTARY LIQUIDATION.

Voluntary liquidation provided for under section 58

Subsection (1) provides that a company may be liquidated voluntarily if the company resolves by special resolution, that it cannot by reason of its liabilities continue its business and that it is advisable to liquidate.

Subsection (2) provides that Voluntary liquidation shall be taken to commence at the time of passing the resolution for voluntary liquidation.

NOTICE OF RESOLUTION FOR VOLUNTARY LIQUIDATION.

Section 59 (1) provides that where a company passes a resolution for voluntary liquidation, it shall, within fourteen days after passing the resolution, give notice of the resolution in the Gazette and in a newspaper in the official language with a wide national circulation.

Section 59 (2) provides that the resolution for voluntary liquidation shall be registered with the registrar and a copy sent to the official receiver within seven days from the date of passing the resolution.

Section 59 (3) provides that where default is made in complying with this section, the company and every officer of the company who is in default shall be liable to a default fine and for the purposes of this subsection the liquidator of the company shall be taken to be an officer of the company.

CONSEQUENCES OF VOLUNTARY LIQUIDATION: EFFECT OF VOLUNTARY LIQUIDATION ON THE BUSINESS AND STATUS OF A COMPANY.

- **Company ceases to carry on business**

Section 60 (1) provides that a company shall, from the commencement of voluntary liquidation, cease to carry on business, except so far as may be required for the beneficial liquidation of the company.

- **Corporate status and powers to continue until dissolved**

Section 60 (2) provides that subject to subsection (1), the corporate status and powers of the company shall, notwithstanding anything to the contrary in its articles, continue until it is dissolved.

- **Transfers or alterations after commencement of voluntary liquidation are void. Section 61 p**rovides that any transfer of shares, not being a transfer made to or with the sanction of the

liquidator and any alteration in the status of the members of the company, made after the commencement of a voluntary liquidation, is void.

CREDITORS' VOLUNTARY LIQUIDATION.

Section 69 provides for Meeting of creditors.

Section 69 (1) provides that for the creditors' voluntary liquidation, the company shall—

cause a meeting of the creditors of the company to be summoned on the same day as the meeting for the resolution for liquidation is to be proposed or on the following day; and

a. send to the creditors, notices for the meeting of the creditors of the company, together with the notices for the meeting for proposing the resolution for liquidation.

Section 69 (2) provides that the notice for the meeting of the creditors shall be advertised once in the Gazette and in the official language in a newspaper of wide circulation in Uganda.

Section 69 (3) provides that the directors of the company shall—

a) appoint one of them to preside at the meeting; and
b) present a full statement of the position of the company's affairs and a list of the creditors of the company and the estimated amount of their claims, to the meeting of the creditors.

Section 69 (3) provides that the director appointed to preside at the meeting of the creditors shall attend and preside over the meeting.

Section 69 (3) provides that the where the meeting of the company at which the resolution for voluntary liquidation is to be proposed is adjourned and the resolution is passed at an adjourned meeting, any resolution passed at the meeting of the creditors held under subsection (1), shall have effect as if it has been passed immediately after the passing of the resolution for liquidating the company.

Section 69 (3) provides that the where default is made—

a) by the company contrary to subsections (1) and (2);
b) by the director's contrary to subsection (3); or
c) by any director of the company contrary to subsection (4),

the company, directors or director, shall be liable to a fine not exceeding fifty currency points, and, in the case of default by the company, every officer of the company who is in default shall be liable to a similar penalty.

APPOINTMENT OF LIQUIDATOR – SECTION 70

Section 70 (1) provides that the creditors and the company at their respective meetings under section 69, may nominate a person to be liquidator for the purpose of liquidating the affairs and distributing the assets of the company, and if the creditors and the company nominate different persons, the person nominated by the creditors shall be the liquidator, and if the creditors do not nominate any person, the person nominated by the company shall be the liquidator.

Section 70 (2) provides that where different persons are nominated by the company and the directors, any director, member or creditor of the company may, within seven days after the nomination by the creditors, apply to court for an order

a. directing that the person nominated as liquidator by the company shall be liquidator instead of or jointly with the person nominated by the creditors; or

b. appointing another person to be liquidator instead of the person appointed by the creditors.

APPOINTMENT OF COMMITTEE OF INSPECTION – SECTION 71

Section 71 (1) provides that the creditors at the creditors' meeting or at any subsequent meeting may appoint not more than five persons to be members of a committee of inspection.

Section 71 (2) provides that here the creditors meeting appoints a committee of inspection, the company may, at the meeting at which the resolution for voluntary liquidation is passed or at a subsequent time in a general meeting, appoint a number of persons as the company thinks fit, to act as members of the committee, but the majority of the members of the committee shall be persons appointed by the creditors.

Section 71 (3) provides that the creditors may by resolution declare that all or any of the persons appointed by the company ought not to be members of the committee of inspection, and, if the creditors so resolve, the persons mentioned in the resolution shall not unless the court otherwise directs, be qualified to act as members of the committee.

Section 71 (4) provides that on the application of the creditors, the court may appoint any other person to act as a member of the committee in place of a person mentioned in the resolution.

PROCEEDINGS OF COMMITTEE OF INSPECTION – SECTION 72

a. the committee shall meet at least once a month and the liquidator or any member of the committee may call a meeting of the committee as and when he or she considers necessary;

b. the committee shall act by a majority of its members present at a meeting;

c. a member of the committee may resign by notice in writing signed by him or her and delivered to the liquidator;

d. where a member of the committee appointed by the creditors or contributories, becomes bankrupt, compounds, arranges with his or her creditors or is absent from five consecutive meetings of the committee without the leave of the other members who also represent the creditors or contributories as the case may be, his or her office shall immediately become vacant;

e. a member of the committee may be removed by an ordinary resolution at a meeting of creditors or contributories, for which fifteen days' notice stating the object of the meeting is given;

f. where there is a vacancy in the committee, the liquidator shall immediately call a meeting of creditors or of contributories, to fill the vacancy and the meeting may, by resolution, reappoint the same person or appoint another creditor or contributory to fill the vacancy unless the liquidator, having regard to the position in liquidation, is of the opinion that it is not necessary to fill the vacancy, in which case he or she may apply to the court for an order that the vacancy shall not be filled or shall be filled under the circumstances specified in the order; and

g. where there is a vacancy, the remaining members of the committee, if not less than two, may continue to act as the

FINAL MEETING AND DISSOLUTION – SECTION 77

Section 77 (1) provides that as soon as the company is fully liquidated, the liquidator shall—

a. prepare an account of the liquidation, showing how the liquidation was conducted and how the property of the company was disposed of; and

b. call a general meeting of the company and a meeting of the creditors of the company, to present the account and to give any required explanation.

Section 77 (2) provides that if the liquidator fails to call a general meeting of the company or a meeting of the creditors as required by this section, he or she commits an offence and is liable on conviction to a fine not exceeding fifteen currency points.

Section 77 (3) provides that the meetings under subsection (1) shall be called by a notice in the Gazette and in a newspaper of wide circulation in Uganda, specifying the time, place and the objects of the meetings, and shall be published at least thirty days before the meetings.

Section 77 (4) provides that within fourteen days after the meeting or if the meetings are not held on the same day, after the date of the later meeting, the liquidator shall—

a. send a copy of the account to the registrar; and

b. make a return of holding the meetings and of the dates of the meetings to the registrar, and if the copy of the account is not sent or the returns of the meetings are not made in accordance with this subsection, the liquidator shall be liable to a fine not exceeding five currency points for every day for which the default continues.

MEMBERS' AND CREDITORS' VOLUNTARY LIQUIDATION.

Members' and creditors voluntary liquidation – section 78

Sections 79 to 86, apply to both members' and creditors' voluntary liquidation.

DISTRIBUTION OF THE PROPERTY OF A COMPANY.

Section 79 provides that subject to the provisions of this Act on preferential payments, the assets of a company shall, on its liquidation, be applied in satisfaction of its liabilities simultaneously and equally, and, subject to that application, shall unless the articles of association otherwise provide, be distributed among the members according to their rights and interests in the company.

POWERS AND DUTIES OF A LIQUIDATOR IN VOLUNTARY LIQUIDATION – SECTION 80

Section 80 (1) provides that the liquidator in a voluntary liquidation may—

a. exercise any of the powers given to the liquidator in a liquidation by the court, under this Act;

b. exercise the power of the court under this Act, of settling a list of contributories and the list of contributories shall be prima facie evidence of the liability of the persons named in the list as contributories;

c. exercise the power of the court of making calls on shares or any other matter;

d. summon general meetings of the company for the purpose of obtaining the sanction of the company by special resolution or for any other purpose as he or she may think fit.

Section 80 (2) provides that the liquidator shall pay the debts of the company and shall adjust the rights of the contributories among themselves.

Section 80 (3) provides that where several liquidators are appointed, any power given by this Act may be exercised by one or more of the liquidators as may be determined at the time of their appointment, or, in default of such determination, by any number of liquidators of not less than two.

Section 80 (4) provides for Power of court to appoint and remove liquidator in voluntary liquidation.

1. The court may appoint a liquidator in any case where there is no liquidator acting.

2. The court may, where cause is shown, remove a liquidator and appoint another liquidator.

NOTICE BY LIQUIDATOR OF HIS OR HER APPOINTMENT – SECTION 82

1. The liquidator shall, within fourteen days after his or her appointment, publish in the Gazette and deliver to the registrar for registration, a notice with a copy to the official receiver of his or her

2. Costs of voluntary liquidation.

COSTS OF LIQUIDATION

Section 85 provides that all costs, charges and expenses properly incurred in the liquidation, including the remuneration of the liquidator, shall be payable out of the assets of the company in priority to all other claims.

LIQUIDATION SUBJECT TO SUPERVISION BY COURT.

Section 87 provides that where a company passes a resolution for voluntary liquidation, the court may make an order that the voluntary liquidation shall continue, subject to the supervision of court and with the liberty for the creditors, contributories or other interested persons, to apply to court and generally on such terms and conditions as the court may think just.

EFFECT OF APPLICATION FOR LIQUIDATION SUBJECT TO SUPERVISION.

Section 88 provides that an application for the continuance of a voluntary liquidation subject to the supervision of the court shall, for the purpose of giving jurisdiction to the court over actions, be taken to be a petition for

EFFECT OF SUPERVISION ORDER – SECTION 90

Section 90 (1) provides that where an order is made for liquidation subject to supervision, the liquidator may, subject to any restrictions imposed by the court, exercise all his or her powers without the sanction or intervention of the court, in the same manner as if the company were being liquidated voluntarily.

Section 90 (2) Where the order for liquidation subject to supervision is made in relation to a creditors' voluntary liquidation in which a committee of inspection has been appointed, the order shall be taken to be an order for liquidation by the court for the purpose of section

LIQUIDATION BY COURT. JURISDICTION – SECTION 91

The jurisdiction in liquidation matters shall be exercised by the High Court.

section 92 (1) provides for the Circumstances in which the court may appoint liquidator and the court may appoint a liquidator on the application of—

(a) the company;

(b) a director of the company;

(c) a shareholder of the company;

(d) a creditor of the company;

(e) a contributory; or

(f) the official receiver.

COMMENCEMENT OF LIQUIDATION BY COURT.

Section 93 (1) provides that where, before the presentation of a petition for the liquidation of a company by the court, a resolution is passed by the company for voluntary liquidation, the liquidation of the company shall be deemed to commence when the resolution is passed and unless the court, on proof of fraud or mistake, thinks fit and directs, all proceedings of the voluntary liquidation shall be taken to be valid.

Section 93 (2) provides that in all other cases, liquidation of a company by the court shall be taken to commence at the time of presentation of the petition for liquidation.

PROVISIONAL LIQUIDATOR.

Section 94 (1) provides that the order made under **section 92** shall appoint the official receiver or any insolvency practitioner the court considers fit as provisional liquidator of the company, for the preservation of the value of the assets owned or managed by the company.

Section 94 (2) provides that the provisional liquidator shall, have the powers to sell or dispose of any perishable and any other goods, the value of which is likely to diminish if they are not disposed of, unless court limits the powers or places conditions on the exercise of the powers.

NOTICE OF LIQUIDATION – SECTION 95

The provisional liquidator shall, within fourteen days after the commencement of the liquidation—

a. give public notice of the date of commencement of the liquidation; and

b. call a shareholders' meeting.

NOTICE OF APPOINTMENT AND OF LIQUIDATION – SECTION 96

Section 96 (1) provides that the liquidator shall, within five working days after his or her appointment—

give notice in the Gazette and a newspaper of wide circulation of—

a) the date of commencement of the liquidation;
    i. the liquidator's full name;
    ii. the liquidator's physical office address and daytime telephone number; and
b) deliver to the official receiver a copy of the notice.

Section 96 (2) provides that a liquidator shall give notice of the liquidation—

a) on every invoice, order for goods or business letter issued by or on behalf of the company on which the company's name appears stating after the company's name the words "in liquidation"; and
b) otherwise, when entering into any transaction or issuing any document by or on behalf of the company.

Section 96 (3) Failure to comply with subsection (2) does not affect the validity of a document issued by or on behalf of the company.

Section 96 (4) A liquidator who does not comply with subsection (2) commits an offence and is liable on conviction to a fine not exceeding one hundred currency points.

EFFECT OF LIQUIDATION - SECTION 97

1. At the commencement of liquidation—

a. the liquidator shall take custody and control of the company's property;

b. the officers of the company shall remain in office but cease to have any powers, functions or duties other than those required or permitted to be exercised by this Act;

c. proceedings, execution or other legal process shall not be commenced or continued and distress shall not be levied against the company or its property;

d. shares of the company shall not be transferred or other alteration made in the rights or liabilities of any shareholder and a shareholder shall not exercise any power under the company's memorandum and articles of association or the Companies Act; and

e. the memorandum and articles of association of the company shall not be altered, except that the liquidator may change the company's registered office or registered postal

FUNDAMENTAL DUTIES OF A LIQUIDATOR – SECTION 99

Section 99 (1) provides that the fundamental duties of a liquidator are to take, in a reasonable and expeditious manner, all steps necessary to—

a) collect;
b) realize as advantageously as reasonably possible; and
c) distribute,

the assets or the proceeds of the assets of the company in accordance with this Part and Part VIII.

Section 99 (2) provides that the duties in subsection (1) are without prejudice to the liquidator's power in **section 139** to appoint a provisional administrator where the liquidator is of the view that the appointment is likely to result in a more advantageous realization of the company's assets than would be effected in a liquidation.

General duties of liquidator – section 100

Without prejudice to section 99, a liquidator shall have all the other functions and duties specified in this Act and shall in particular

a. take custody and control of all the company's assets;

b. register his or her interest in all land and other assets belonging to the company notwithstanding any interest other;
c. keep company money separate from other money held by or under the control of the liquidator;
d. keep, in accordance with generally accepted accounting procedures and standards, full accounts and other records of all receipts, expenditure and other transactions relating to the liquidation, and retain the accounts and records of the liquidation and of the company for not less than six years after the liquidation ends; and

permit those accounts and records and the accounts and records of the company, to be inspected by

i. any committee of inspection unless the liquidator believes on reasonable grounds that inspection would be prejudicial to the liquidation; or
ii. where the court so orders, any creditor or shareholder. General provisions relating to liquidation.

GENERAL POWERS OF LIQUIDATOR – SECTION 101

A liquidator shall have all the powers necessary to carry out the functions and duties of liquidator under this Act and may delegate the powers to his or her appointed agent.

LIQUIDATOR'S PRELIMINARY REPORT – SECTION 102

Section 102 (1) provides that before the expiry of forty working days after the commencement of the liquidation or during a longer period as the court may allow, a liquidator shall prepare a preliminary report showing—

a. the state of the company's affairs, proposals for conducting the liquidation and the estimated date of its completion; and
b. the right of any creditor or shareholder to require the liquidator to call a creditors' meeting under section 69,

and shall make the report available at his or her address for inspection by every known creditor, shareholder or contributory.

Section 102 (2) provides that the liquidator shall publish the notice given under subsection

(1) in the official language in a newspaper of wide circulation in Uganda and shall send a copy of the report to the registrar.

LIQUIDATOR'S INTERIM REPORTS – SECTION 103

Section 103 (1) provides that a liquidator shall, within twenty working days after the end of every six months during the liquidation, make an interim report and give public notice of the conduct of the liquidation during the preceding six months' period and the liquidator's further proposals for the completion of the liquidation.

Section 103 (2) provides that the liquidator shall make the report available at his or her address for inspection by every known creditor, shareholder or contributory.

Section 103 (3) provides that the liquidator shall publish the notice given under subsection

(1) in the official language in a newspaper of wide circulation in Uganda and shall send a copy of the report to the registrar and the official receiver.

LIQUIDATOR'S FINAL REPORT- SECTION 104

Section 104 (1) provides that before completion of the liquidation, a liquidator shall, give public notice of

a. the final report, final accounts and statement referred to in section 114; and

b. the grounds on which a creditor or shareholder may object to the removal of the company from the register under the Companies Act.

Section 104 (2) provides that the liquidator shall make the report available at his or her address for inspection upon payment of a prescribed fee, by every known creditor, shareholder or contributory.

Section 104 (3) provides that the liquidator shall publish the notice given under section (1) in the official language in a newspaper of wide circulation in Uganda and shall send a copy of the report to the registrar and the official receiver.

COMPLETION OF LIQUIDATION – SECTION 114

The liquidation of a company shall be complete when the liquidator delivers to the official receiver a final report and final accounts of the liquidation and a statement indicating that—

a. all known assets have been disclaimed, realized or distributed;

b. all proceeds of realization have been distributed; and

c. in the opinion of the liquidator, the company should be removed from the register.

GROUNDS FOR COMPULSORY WINDING UP

1. Where the company is unable to pay its debts **– section 3**

Subject to subsection (2) and unless the contrary is proved, a debtor is presumed to be unable to pay the debtor's debts if—

- the debtor has failed to comply with a statutory demand;
- the execution issued against the debtor in respect of a judgment debt has been returned unsatisfied in whole or in part; or
- all or substantially all the property of the debtor is in the possession or control of a receiver or some other person enforcing a charge over that property.

On a petition to the court for the liquidation of a company or bankruptcy order, evidence of failure to comply with a statutory demand by the creditor, shall not be admissible as evidence of inability to pay debts unless the application is made within 30 working days after the last date for compliance with the demand.

PRIORITY OF SETTLEMENT OF DEBTS

1. Preferential Debts.

Section 12 (1) provides that Subject to **section 11, and subsection (2),** the liquidator or trustee shall apply the assets to the preferential debts listed in subsections (4), (5) and (6), which debts shall be paid in priority to other debts.

Subsection (2) provides that Preferential debts shall so far as the assets are insufficient to meet them, have priority over the claims of secured creditors in respect of assets—

a. which are subject to a security interest; and

b. become subject to that security interest by reason of its application to certain existing assets of the grantor and those of its future assets which were after-acquired property or proceeds, and shall be paid accordingly out of those assets.

Subsection (3) provides that preferential debts are as listed in **subsections (4), (5) and (6)** and shall be paid in the order of priority in which they are listed.

PRIORITY OF PAYMENT

Subsection (4) provides that first to be paid shall be—

a. remuneration and expenses properly incurred by the liquidator or trustee;

b. any receiver's or provisional administrator' s indemnity under **sections 159 or 187** and any remuneration and expenses properly incurred by any receiver, liquidator, provisional liquidator administrator, proposed supervisor or supervisor; and

c. the reasonable costs of any person who petitioned court for a liquidation or bankruptcy order, including the reasonable costs of any person appearing on the petition whose costs are allowed by the court.

Subsection (5) provides that after making the payments listed in **subsection (4)**, next to be paid shall be—

a. all wages or basic salary, wholly earned or earned in part by way of commission for four months;

b. all amounts due in respect of any compensation or liability for compensation under the Worker's Compensation Act, accrued before the commencement of the liquidation or bankruptcy, not exceeding the prescribed amount;

c. all amounts that are preferential debts under **Section 33 Or 105**.

Subsection (6) provides that after paying the sums referred to in **Subsection (5),** the liquidator shall then pay—

a. the amount of any tax withheld and not paid over to the Uganda Revenue Authority for twelve months prior to the commencement of insolvency; and

b. contributions payable under the National Social Security Fund Act.

Subsection (7) provides that this section shall apply notwithstanding any other law.

2. **NON-PREFERENTIAL DEBTS**

Section 13 provides that after paying preferential debts in accordance with **Section 12,** the liquidator or trustee shall apply the assets in satisfaction of all other claims.

The claims referred to in **subsection (1)** shall rank equally among themselves and shall be paid in full unless the assets are insufficient to meet them, in which case they abate in equal proportions.

Where before the commencement of a liquidation or bankruptcy, a creditor agrees to accept a lower priority in respect of a debt than that which the creditor would otherwise have under this section, nothing in this section shall prevent the agreement from having effect according to its terms.

Where there is a surplus after making the payments referred to in section 13—

a. in the case of a bankruptcy, the trustee in bankruptcy shall pay the surplus to the bankrupt; and

b. in the case of a liquidation, the liquidator shall distribute the company's surplus assets in accordance with the memorandum and articles of association of the company and the Companies Act.

FINAL MEETING AND DISSOLUTION.

Section 67 (1) provides that subject to **section 68**, as soon as the company is fully liquidated, the liquidator shall—

a) prepare an account of the liquidation, showing how the liquidation was conducted and how the property of the company was disposed of; and

b) call a general meeting of the company to present the account and to give any required explanation.

Section 67 (2) provides that the meeting under subsection (1) (b) shall be called by a notice in the Gazette and in a newspaper of wide circulation in Uganda, specifying the time, place and the object of the meeting, published at least thirty days before the meeting.

Section 67 (3) provides that within fourteen days after the meeting, the liquidator shall—

a. send a copy of the account to the registrar; and

b. make a return of the meeting and of its date to the registrar,

and if the copy of the account is not sent or the return of the meeting is not made in accordance with this subsection, the liquidator shall be liable to a fine not exceeding five currency points for every day during which the default continues.

Section 67 (4) provides that where there is no quorum at the meeting, this subsection shall be taken to have been complied with if the liquidator, in lieu of the return of the meeting, makes a return that the meeting was duly summoned but that no quorum was realized.

Section 67 (5) provides that the registrar shall, on receiving the account and the returns in subsections (3) or (4), register them.

Section 67 (6) provides that upon the expiration of three months from the date of registration of the return, the company shall be taken to be dissolved unless the court, on the application of the liquidator or any other person who appears to the court to have an interest in the company, makes an order deferring the date on which the dissolution of the company is to take effect, for such time as the court may considers fit.

Section 67 (7) provides that the person on whose application an order of the court under subsection (6) is made, shall deliver to the registrar, with a copy to the official receiver ,a certified copy of the order for registration within seven days after the making of the order.

Section 67 (7) provides that a person who contravenes subsection (7) shall be liable to a fine not exceeding five currency points for every day that the person is in contravention.

MODES OF WINDING UP

VOLUNTARY WINDING UP.

This is provided for under PART IX **Section 268 – 272** of the Companies Act. this mode of winding up can be either by the members or the creditors. The procedure for this mode of winding up is as follows;

- The members pass a resolution at a general meeting to wind up.
- This resolution is gazetted and advertised in a local newspaper in circulation for 14 days.

- The directors make a declaration of solvency; thus, they will be able to pay the company's debts within 12 months from the date of commencement of the winding up process.
- The members appoint a liquidator. It must be noted that his appointment extinguishes all powers of Directors.
- The liquidator calls for a general meeting of the creditors and lays before them a statement of assets and liabilities.
- After the final meeting with the creditors, the liquidator sends a copy of the account to the Registrar of companies for Registration.
- Three months after the registration, the company is deemed dissolved.

CREDITORS' VOLUNTARY WINDING UP

This occurs when there is no declaration of solvency. The procedure is as follows;

- A notice of meeting is advertised and gazetted
- The creditors and directors nominate a liquidator. In case of conflict, a creditor can apply to court for a liquidator.
- The liquidator takes over, calls for a meeting of the creditors and lays before the creditors a statement of the assets and liabilities. It must be noted that powers of the Directors cease upon appointment of the liquidator.
- After the final meeting with the creditors, the liquidator sends a copy of the account to the Registrar of companies for Registration.
- Three months after the registration, the company is deemed dissolved.

DOCUMENTS FOR VOLUNTARY WINDING UP

- Resolution.
- Advert of resolution in Gazette or Newspaper in local circulation.
- Declaration of Solvency.
- Letter appointing Liquidator
- Notice calling general meeting with creditors.
- Statement of Assets and Liabilities.
- Liquidator's Account to Registrar of Companies

OBJECTION MY LORD

COMPULSORY WINDING UP

This is where individual(s) being creditors or contributories petition court to wind up a company. This is provided for in the law.

The procedure is as follows:

- One makes a petition under the law. The petition follows Rules (Winding Up) Rules and takes the format in Forms 3, 4, and 5 of the Rules with the necessary modification as circumstances deem fit. Rule of the Companies (Winding Up) Rules provides that the petition is verified by an affidavit of the petitioner(s). A copy of the petition has to be furnished to the creditors.
- Secondly, Rule provides that the petition is advertised in the Gazette and local Newspapers at least seven days before hearing. The petition is served on the company at its principal place of business.

- The law puts a mandate upon a petitioning creditor to prove that the company is unable to pay its debts and debt should be above 1,000 Ug Shs. He must further prove that a demand has been made and the company has for 21 days/ three weeks neglected to pay the amount due or secure or to compound for it to the reasonable satisfaction of the creditor

The documents in their order of precedence

- A demand letter for payment of the sum due and the consequences of failure to adhere to the demand.
- A petition to wind up a company (verified by an affidavit)
- An advert of the Petition in the Gazette/Newspaper in circulation.
- Affidavit of service of petition on relevant parties, hearing Notices etc.

WINDING UP BY THE COURT

- This is provided for in the law. The relevant circumstances which have to be present before winding up by court is done are evident in the law. These include if, *inter alia*;

- The company has by special resolution resolved that the company be wound up by Court.

- The company defaults in delivering the statutory report to the Registrar or in holding the statutory meeting.

- The company does not commence business in within a year from date of incorporation or suspends its business for a whole year.

- The company is unable to pay its debts.

- The court is of the opinion that it is just and equitable that the company should be wound up.

- In case of a company incorporated outside Uganda and carrying on business in Uganda, winding up proceedings have been commenced in respect of it in the country of its incorporation; etc.

FORUM AND PROCEDURE

- The court of jurisdiction in respect to winding up is the High Court as envisaged in the law. The procedure is by petition as provided for in the law.
- In case the petition is successful, the court then appoints an official liquidator to wind up the company.
- The liquidator takes over, calls for a meeting of the creditors and lays before the creditors a statement of the assets and liabilities. It must be noted that powers of the Directors cease upon appointment of the liquidator.
- After the final meeting with the creditors, the liquidator sends a copy of the account to the Registrar of companies for Registration.
- Three months after the registration, the company is deemed dissolved.

THE DOCUMENTS INCLUDE

- A petition to wind up a company (verified by an affidavit where any of the circumstances in law are deponed.
- An advert of the Petition in the Gazette/Newspaper in circulation.

Affidavit of service of petition on relevant parties, hearing Notices etc

(The documents below are consequential upon grant of winging up order)

- Winding Up order (this is granted by court and may include an order to appoint an official liquidator)
- Appointment letter of liquidator
- Notice of General meeting.
- Statement of Assets and liabilities.
- Statement of Account

WINDING UP ORDER AND ITS CONSEQUENCES

A winding up order is given by court upon hearing of a petition to wind up the company. This order includes appointment of an official liquidator and its consequences include; the following.

- The company ceases to carry on business except for the purpose of winding up.
- The powers of the director's cease upon appointment of the liquidator.
- Any transfer of shares is deemed void.
- Contracts of employment between the company and the individuals are extinguished.
- Employees who are dismissed are entitled to damages.

PROOF AND RANKING OF CLAIMS_

Proof and ranking of claims are conversed in law and the order of priority is as follows;

- Taxes and local rates.
- Rents to Uganda Land Commission.
- Wages and salaries to servants of company.
- Amounts due in respect of compensation or liability for compensation under any law of Uganda in force relating to compensation of workers.
- Contributions to NSSF.

OFFICIAL RECEIVER, LIQUIDATOR

An official receiver is appointed by court to receive assets of a company which is being wound up. This is conversed under law.

A liquidator on the other hand can be appointed by members, creditors of a company or court to carry out the winding up of a company. An official liquidator can be appointed by court under section of the Companies Act.

DUTIES AND POWERS OF A LIQUIDATOR

- To call meetings
- To do the work of directors since their duties are vested in him.
- Make a statement of Assets and Liabilities of a Company.
- Make an account of funds and property received and discharged
- To sue on behalf of companies.
- To sell movable and immovable properties
- To draw, accept and endorse bills of exchange
- Power to raise any amount of security of a company's assets.

The Insolvency Act, 2011 ensures the establishment of a protective mechanism to make sure that the value of the estate's assets is not diminished by the actions of various parties involved. The Act has the following objectives; (a) To secure an equitable distribution of the property of the debtor among creditors according to their respective rights against the debtor; (b) To relieve the debtor of liability to the creditors and to enable the debtor make a fresh start in life free from the burden of debts and obligations; (c) To protect the interests of the creditors and the public by providing for the investigation of the conduct of the debtor's affairs and for the imposition of punishment where there has been fraud or other misconduct on the part of the debtor.

The Insolvency Act, 2011 inter alia provides for receivership, administration, liquidation, arrangements, bankruptcy the regulation of insolvency practitioners and cross border insolvency. The significant features introduced by the Act include: (a) Creation of Single Insolvency Code and

increased specialization driven by strict regulatory framework; (b) Improved corporate governance; (c) Introduction of a new aspects relating to regulation of Insolvency Practitioners, their qualifications and uniform training; (d) Clarification the role of the Official Receiver and increased powers of the Official Receiver; (e) Provisions on Receivership; (f) Cross-Border Insolvency and cross border transactions; (g) Protection against bankruptcy in respect of individuals in the form of interim and Arrangement Orders and also for Companies in the form of Administration; and (h) Protection of the Insolvent's estate among others. Under, Section 204, an accountant who is a registered member of the ICPAU is a qualified person to act as an insolvency practitioner. 7

The Insolvency **Regulations, 2013** provide procedures for bankruptcy, arrangements, administration, liquidation and receivership. **4.0 LEGAL AND REGULATORY FRAMEWORK** This section explores different ways in which the Act modernized and consolidated Uganda's outdated Insolvency and Bankruptcy laws into a single law, that permits fresh recourses for creditors and debtors that are more in line with the current global practices. 4.1 Role of the Official Receiver The Official Receiver under the Insolvency Act means a person appointed under Section 198 of the Act. Section 198 provides that the Official Receiver shall be appointed by the Minister to perform the functions of the official receiver under the Act. The Registrar General was thus appointed as the Official Receiver by the Minister of Justice and Constitutional Affairs to carry on the same. The powers and functions of the Official Receiver under the Section 199 include: (a) Investigating the directors, shareholders, contributories and all present and past officers of an insolvent company or of a company which being wound up or liquidated, for the purpose of establishing any fraud of impropriety. (b) Investigating the promotion, formation, failure and conduct of business of an insolvent company. (c) Prosecute any person for offences committed under the Act or discovered to have a case to answer as a result of the investigations carried out. (d) Investigating the conduct of Insolvency Practitioners and to prosecute them for any offences committed under the Insolvency Act. (e) Act during the vacancy in the office of an insolvency practitioner. This provision seems to empower the Official Receiver to take over the functions of a Receiver/Manager even in the case of a creditor's enforcement initiated without recourse to court. (f) Taking all necessary steps and Actions considered fit for the official receiver to fulfill provisions of the Act. Under section 20(3), on making the bankruptcy order, the Official Receiver is usually appointed as the interim receiver of the estate for the preservation of the estate of the bankrupt.

Section 27 states that the bankrupt's estate shall, vest first in the official receiver and then in the trustee, without any conveyance, assignment or transfer**. Under Section 20(4) gives the Official** Receiver powers to sell or otherwise dispose of any perishable and any other goods, the value of which is likely to diminish if they are not disposed of unless the court limits the powers or places conditions on the exercise. **Section 22 (4)** makes it mandatory for the official receiver to take part in the public examination of the debtor under individual insolvency and may employ an advocate if he or she desires. 8

The Official Receiver is also required in fulfilling his duty of investigating the affairs of the bankrupt to make a report to the court if he or she thinks fit e.g., **Section 42(2)** in making the Discharge Order, the court considers a bankrupt's application for discharge, takes into consideration the official receiver's report on the bankruptcy. **Section 59 (2)**, requires the resolution for voluntary liquidation to be registered with the registrar and a copy sent to the official receiver within seven days from the date of passing the resolution Role of Courts in Insolvency Proceedings Since insolvency proceedings aim at a judicially approved and supervised rehabilitation or liquidation of the estate of an insolvent, the proceedings must be initiated in a court having the necessary judicial powers.

Section **254 (1) of** the Act gives authority to the High Court of Uganda to have jurisdiction over all matters concerning companies. Part IX of the Act (Cross Border Insolvency), the High Court has absolute discretion to make the necessary orders for cross border insolvency proceedings. Court presided over by a chief magistrate shall have jurisdiction over all insolvency matters against individuals the subject matter of which does not exceed fifty million shillings.

The court under **Section 19** has the authority to set aside voidable transactions described in Sections 16-18 and where the transaction is set aside, court may make more orders such as; (a) requiring a person to pay to the liquidator, receiver or trustee, in respect of benefits received by that person as a result of the transaction, the sums which fairly represent those benefits; (b) requiring property transferred as part of the transaction to be restored to the company or the bankrupt's estate; (c) requiring property to be vested in the company or the trustee if it represents in a person's hands the application, either of the proceeds of sale of property or of money, so transferred; (d) releasing, in a whole or in part, a charge given by the company or individual; (e) requiring security to be given for the discharge of an order made under this section; or (f) specifying the extent to which a person affected by the setting aside of a transaction or by a declaration or order made under this section is entitled to claim as a creditor in the liquidation or bankruptcy

Corporate Insolvency Under **Section 81**, the court has power to appoint and remove liquidator in voluntary liquidation. The court may, as it thinks just, amend, vary or confirm an arrangement on appeal of a creditor or contributory within three weeks from the completion of the arrangement (**Section 83(2).** Subject to **Section 87**, where a company passes a resolution for **voluntary liquidation**, the court may make an order that the voluntary liquidation shall continue, subject to the supervision of court and with the liberty for the creditors, contributories or other interested persons, to apply to court and generally on such terms and conditions as the court may think just. Subject to **Section 89(1),** where an order is made for liquidation subject to supervision, the court may by that order or any subsequent order appoint an additional liquidator. Courts also play a crucial role in Liquidations by court under **Section 93** where liquidation of a company by the court shall be taken to commence at the time of presentation of the petition for Liquidation.

Under Section **115(4),** Court has a duty of reviewing the decision of the liquidator to decline a request to call a creditors or shareholders' meeting on the application of the creditors or shareholders. Under Section 115(6), Court has the authority to make a decision where there is a difference between the decisions of meetings of creditors and meetings of shareholders on the question of appointing a committee of inspection; or the membership of a committee of inspection. 4.2.2

Court supervision of liquidation Under **Section 117 (1),** on the application of the liquidator, any committee of inspection, the official receiver, or, with the leave of the court, any creditor, shareholder or director of a company in liquidation, the court may— (a) give directions on any matter arising during the course of the liquidation; (b) confirm, reverse or modify any act or decision of the liquidator; (c) order an audit of the accounts of the liquidation; (d) order the liquidator to produce the accounts and records of the liquidation for audit and to provide the auditor with information concerning the conduct of the liquidation as the auditor may request; (e) in respect of any period, review or fix the remuneration of the liquidator at a level which is reasonable in the circumstances and where an amount retained by the liquidator is found by the court to be unreasonable in the circumstances, order the liquidator to refund the amount; (f) declare whether or not the liquidator was validly appointed or validly assumed custody or control of any property; or (g) make an order concerning the retention or the disposal of the accounts and records of the liquidation or of the company.

Under Section 118, court has a duty of enforcing of liquidator's duties. Where the liquidator fails to comply with any of the duties of a liquidator, the court may, on such terms and conditions as it considers fit— (a) relieve the liquidator of the duty to comply, wholly or in part; (b) without prejudice to any other remedy which may be available in respect of a breach of duty by the liquidator, order the liquidator to comply to the extent specified in the order; or (c) remove the liquidator from office.

Cross-border Insolvency and East African Community Issues Courts operate in a cooperative manner to resolve any dispute relating to individual or corporate insolvency in cases where the insolvent has properties in both jurisdictions. They enhance co-operation with reciprocating states to efficiently adjudicate insolvency proceedings. 10 **Section 245 (1)** requires court to cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a trustee or liquidator, in applications for recognition of foreign proceedings in section 235 of the Insolvency Act. Cross-Border issues are becoming increasingly common in restructuring and Insolvency. Insolvencies generally involve companies with operations in several jurisdictions. The significant differences in Insolvency Regulation and procedure among nations and increased globalization of business activities has led to a need for a clearer understanding of applicable law between countries and some level of parity of the legal parameters of Cross Border Insolvency also in the case of **Christopher Sales v Attorney General (Civil Suit 91 of 2011) [2013] UGHCCD 15 (01 February 2013).**

Insolvency Laws in Uganda have not kept pace with commercial and financial trends. They are generally ill-equipped to deal with cases of Cross - Border nature. In response to this need and rapid expansion of global economic Activities, Uganda undertook the task of harmonizing the insolvency processes across national borders by adopting the United Nations Commission on International Trade Law (UNCITRAL) model on Cross-Border Insolvency whose main purpose is to promote: (a) Co-operation between courts and other competent authorities of this state and foreign states involved in cases of Cross-Border insolvency; (b) Greater legal certainty for trade and investment; (c) Fair and efficient administration of Cross-border insolvencies that protects the interests of all creditors and other interested persons including the debtor; (d) Protection and maximization of the value of the debtor's assets; and (e) Facilitation with the hope to rescue financially troubled businesses, thereby protecting investment and preserving employment. The adoption of the UNCITRAL model law on cross-border Insolvency would provide an effective means of achieving this.

Receivership and Liquidation provisions under some of the laws (a) Part VI —Winding up under the Companies Act, **2012** provides for the modes of winding up a company, jurisdiction to wind up companies registered in Uganda, cases in which a company may be wound up by the court, circumstances in which company may be wound up by the court, petition for winding up and effects thereof, Consequences of winding up order among others. (b) Part X of the Financial Institutions Act, 2004, gives the Central Bank powers to close a Financial Institution, place it under receivership and become the receiver of the closed Financial Institution. (c) Part VIII—Dissolution of a Registered Society of the Cooperative Societies Act provides for the appointment of a liquidator appointed under **section 62.**

Section 64 gives powers to the registrar and he or she can rescind or vary any order made by a liquidator and make whatever new order is required; remove a liquidator from office and appoint a new liquidator; call for all books, documents and assets of the society; by order in writing, limit the powers of a liquidator; require accounts to be rendered to the registrar by the liquidator at the registrar's discretion; procure 11 the auditing of the liquidator's accounts and authorize the distribution of the assets of the society.

INDIVIDUAL INSOLVENCY Stages of Bankruptcy Proceedings The following are some of the stages of bankruptcy: (a) Bankruptcy petition Every bankruptcy starts with a bankruptcy petition presented either by a creditor or the debtor themselves (Section 20). The amount owed has to be an unsecured, liquidated sum. In order to show that the debtor is unable to pay their debts, a creditor usually relies upon either the debtor's failure to comply with a statutory demand for payment or else upon their failure to honor a court's order to pay a debt. (b) Court hearing At the hearing, the court will determine whether to make a bankruptcy order or not. (c) Appointment of an Official Receiver On the making of a bankruptcy order, the court will appoint an Official Receiver to take control of the debtor's property. (d) Submission of statement of affairs (Section 21) The debtor has to submit a statement of affairs to the Official Receiver within 21 days of the making of a bankruptcy order. Based on the statement of affairs, the Official Receiver will decide whether it is necessary to call a meeting of creditors to enable them to appoint an insolvency practitioner of the creditors' choice as the trustee in bankruptcy.

Public Examination of the debtor Where a petition for a bankruptcy order is presented to the court under section 20 of the Act, the court shall direct that a public examination be held on a day appointed by the court and the debtor shall attend on that day and be publicly examined on his or her affairs, dealings and property. The examination shall be held as soon as conveniently practicable after the expiration of the time given by the court for the submission of the debtor's statement of **affairs under Section 20. (f) Creditors'** meeting A creditors' meeting will be held at the discretion of the Official Receiver or at the request of creditors who make up at least one quarter in value of the bankrupt's creditors. A trustee in bankruptcy can be appointed at the creditors' meeting. 12 (h) Vesting of debtor's property All of the debtor's personal property would be treated as vested in the trustee in bankruptcy on the date of the bankruptcy order.

The debtor is only allowed to retain the basic essentials for their trade and living. (g) Distribution of assets The trustee in bankruptcy will convert the debtor's property into money, and use that money to pay the bankrupt's debts. **(h) Secured creditor an unsecured creditor will** not depend on the trustee in bankruptcy for repayment of the debts due to them. They can realize the asset over which they have security interest and keep the sales proceeds in discharge or reduction of the debts owed to them. If the sale does not produce funds sufficient to cover the debt, the creditor can claim the balance as an unsecured creditor. If, on the contrary, the proceeds of sale exceed the sum owed to them, they have to pay over the excess to the trustee in bankruptcy for distribution among other creditors. The money realized from sale of the bankrupt's assets will be distributed as required by the law. (i) Cost of bankruptcy The expenses incurred as a result of bankruptcy, including the professional charges of the trustee in bankruptcy. (j) Ordinary unsecured creditors including postponed creditors Certain debts can only be paid once all the ordinary unsecured creditors' debts have been paid in full.

Termination of bankruptcy terminates**; (i) when a bankrupt** is discharged from bankruptcy; (ii) when the bankruptcy **order is annulled**; or (iii) upon withdrawal of a **bankruptcy petition** with leave of court. However, Court shall not grant any application for withdrawal if it is proved to the satisfaction of the court that rights and interests of other creditors are likely to be prejudiced.

Discharge of the bankrupt A bankrupt shall be discharged from bankruptcy, when the court, on an application by the bankrupt makes an order discharging the bankrupt. The court shall, while considering a bankrupt's application for discharge, take into consideration the official receiver's report on the bankruptcy and the conduct of the bankrupt during the bankruptcy proceedings and any other matters court may consider pertinent. When the bankruptcy order is discharged, the bankruptcy comes to an end and the bankrupt is released from most of their previous debts and freed from most

of the disqualifications that affect a bankrupt. Any property that has vested in the trustee in bankruptcy remains so, and is not returned to the debtor. Any property acquired by the debtor after discharge of the bankruptcy order does not vest in the trustee in bankruptcy but belongs to the ex-bankrupt.

Duties of a trustee Where a trustee is appointed before conclusion of an examination; he or she may take part in the examination (**Section 22).**

The fundamental duty of a trustee is to collect, realize as advantageously as is reasonably possible and distribute, the bankrupt's estate in accordance with Part I and Part II of the Act. A trustee shall— (a) take custody and control of the bankrupt's estate; (b) register in his or her names all land and other assets forming part of the bankrupt's estate at the making of the bankruptcy order notwithstanding any transactions that may have taken place and any other law; (c) keep the bankrupt's estate's money separate from other money held by or under the control of the trustee; (d) keep, in accordance with generally accepted accounting procedures and standards, full account and other records of all receipts, expenditures and other transactions relating to the bankruptcy and retain the accounts and records of the bankruptcy for not less than six years after the bankruptcy ends; (e) permit those accounts and records to be inspected by— (i) any committee of inspection unless the trustee believes on reasonable grounds that inspection would be prejudicial to the bankruptcy; or (ii) if the court so order, any creditor; and (iii) perform any other function or duty specified in the Act.

Official name of trustee The official name of a trustee in bankruptcy is the trustee of the property of a bankrupt, with an insertion of the name of the bankrupt and by that name; the trustee exercises any of the trustee's functions, powers and duties. Where a person does not comply with a requirement of the trustee under **section 33**, the court may, on the application of the trustee, order the person to comply and may make ancillary orders as it thinks fit. Failure to keep proper accounts of business Where a bankrupt has been engaged in any business within two years before the petition, he or she commits an offence if he or she has not kept accounting records that give a true and fair view of the business' financial position and explanations thereon. The bankrupt does not commit an offence under subsection (1), if he or she proves that in the circumstances in which he or she carried on business, the omission was honest and excusable.

Consequences of bankruptcy Where a debtor is adjudged bankrupt, he or she is disqualified from— (a) being appointed or acting as a judge of any court in Uganda; or (b) being elected to or holding or exercising the office of the President, a member of Parliament, Minister, a member of a local government, council, board, authority or any other government body

Under **Section 26 of the Accountants Act**, 2013, a person is not qualified to be enrolled as a member of the Institute or to continue to be a member of the Institute if he or she is an undischarged bankrupt. Where a person holding the office of justice of the peace or any other public office is adjudged bankrupt, the office immediately becomes vacant. The disqualifications to which a bankrupt is subject to, do not apply where— (a) The adjudication of bankruptcy against the individual is annulled; (b) A period of five years' elapses, from the date of discharge of the bankrupt; or (c) The individual obtains from the court his or her discharge with a certificate to the effect that the bankruptcy was caused by misfortune without any misconduct on his or her part. (d) Court grants or withholds the certificate as it thinks fit, but any refusal to grant the certificate is subject to appeal. Arrangement with respect to individuals A debtor who intends to make any arrangement with his or her creditors may apply to court for an interim protective order. During this period, a debtor—an application for bankruptcy relating to the debtor does not proceed and a receiver of any property of

the debtor is not appointed. An interim order ceases to have effect at the end of fourteen working days after making an order. The debtor shall have the following duties among others; (a) Documenting proposals setting out the terms of the arrangement; and (b) Preparing a statement of his or her affairs containing— (i) particulars of the debtor's creditors, debts and assets; and (ii) any other prescribed information.

CORPORATE INSOLVENCY

Corporate insolvency should be approached with a rescue culture. A company becomes insolvent if it does not have enough assets to cover its debts and/or it cannot pay its debts on the due dates. It is the directors' responsibility to know whether or not the company is trading while insolvent to avoid a legal responsibility for continuing to engage in wrongful trading.

The decision to appoint receivers, liquidators and administrators is the responsibility of the appropriate parties that is to say banks and lending institutions, creditors, the courts, the directors or the company itself.

Procedures open to an insolvent company these fall into five main categories. The first three provide the potential for the rescue of the company or its business, while the last two do not:

- Administrations
- Administrative receiverships
- Company voluntary arrangements
- Creditors' voluntary liquidations
- Compulsory liquidations

A company can be placed into a formal insolvency procedure by its directors, shareholders, creditors or the court. This is done depending on the facts of each case and the procedure involved under the control of an appointed insolvency practitioner (IP) who is professionally qualified and licensed.

A. Administration: This is a collective corporate rescue procedure run for the benefit of all creditors, under which the company's assets are protected by virtue of a statutory 'moratorium', or stoppage, of any forms of creditor action. Administrators have the power to trade on the insolvent business and may look to find a buyer for it.

B. **Administrative receivership:** Is a process initiated by a secured creditor (normally a lender) who has doubts regarding a company's ability to repay the sums owed. An administrative Receiver is an official appointed by a court or a lender (under the terms of a secured debenture) who takes control of all, or substantially all, assets of a company in receivership and is mandated to pay off the company's debts, if possible, without liquidating it. Administrative receivers have no authority to pay unsecured creditors. Doing this requires a subsequent liquidation, although administrators can also make such payments with the approval of court.

C. Company Voluntary Arrangement (CVA): This is a binding form of agreement between a company and its creditors which is legally regulated. Under a CVA, creditors will typically agree to a reduced or rescheduled debt arrangement which will allow the company to survive. CVAs are sometimes used in conjunction with the administration procedures.

D. Scheme of arrangement: This is a compromise or arrangement between a company and its creditors or members. It is similar to a CVA in many respects, although it must be approved by a court. 16 The process is more complicated than a CVA, and only be used on large companies and those with a significant number of classes of creditor or shareholder. Whether unsecured creditors can be repaid where a company enters into a CVA or scheme of arrangement is determined by the related documentation. These arrangements rarely interfere with secured creditors' rights.

E. Compulsory Liquidation: This is the collective process by which a company is ended by converting all of its assets into their cash value and distributing them to shareholders if the company is solvent or creditors if the company is insolvent. The liquidator must also examine the directors' conduct, and take action if appropriate.

The Liquidation Process in Uganda The liquidation of a company may be by:

- By the court;
- Voluntary; or
- Subject to the supervision of Court.

The Insolvency Practice Regulations, 2013 make provisions for:

- Appointment of the liquidator
- Conduct and experience of the liquidator
- General Powers of the liquidator
- Rights of creditors and shareholders
- Supervision and enforcement by the court
- Reporting requirements

Appointment of an administrator; An administrator must be a professional 'insolvency practitioner'. During administration, directors must hand over control of the company and everything it owns (its 'assets') to the administrator. The administrator's fees are paid by the company. Administrator can be appointed in a number of ways, either by:

- The company, through an officer of the company other than a director;
- The Directors;
- One or more secured creditors, or
- One or more unsecured creditors; The aim of placing a company under administration is to either rescue the company as a going concern or achieve a better result for the creditors than if a company is wound up.

Broad objectives and Outcome of administration Under **Section 140** are to; (a) to investigate the company's business, property, affairs and financial circumstances; and (b) to exercise his or her powers in a manner which he or she believes on reasonable grounds to be likely to achieve one or

more of the following outcomes— 17 (i) the survival of the company and the whole or any part of its undertaking as a going concern; (ii) the approval of an administration deed under section 150; and (iii) a more advantageous realization of the company's assets than would be effected in a liquidation.

How administration works. The administrator writes to the creditors and regulators informing them of his or her appointment. A notice of the appointment is published in the Gazette. The administrator will try to stop the company being wound up ('liquidated'). If he or she cannot, he or she will try to pay as much of the company's debts as possible from the company's assets. The administrator could decide to: (a) negotiate a Company Voluntary Arrangement (CVA) so your company can keep trading. (b) sell your business as a 'going concern' to another company - meaning the business can carry on, e.g., by keeping its clients, workforce or orders (c) sell the company assets as part of a creditors' voluntary liquidation, pay creditors from any money raised and close the company (d) close the company if there's nothing to sell For as long as the company is in administration, the administrator will run the business and has control over all operations of the business during administration.

Administration Period; The company's administration ends when either: (a) the administrator decides the purpose of administration has been achieved, e.g., a CVA has been agreed with the creditors (b) the administrator's contract ends Note that, there is no protection against any legal action the creditors take once administration has ended.

Claims Settlement Process. When a company is placed under administration or liquidation, creditors are repaid in the following descending order of priority depending on the amount of cash available: (a) secured creditors' claims (fixed charge realizations); (b) expenses relating to the administration or liquidation; (c) Insolvency Practitioners' fees; (d) preferential creditors' claims, including employee claims; (e) secured creditors (floating charge realizations); (f) unsecured creditors' claims – usually distributed by a liquidator; and (g) shareholders – very unusual, otherwise the company would not be insolvent. 18 6.5 Receivership This is the situation in which an institution or enterprise is being held by a receiver. A receiver is appointed through:

(a) **Court** • Appointment specified in the court order. • Court will direct the indemnity of the Receiver.

(b) **An instrument** • this takes effect when receiver accepts appointment in writing. • Where the Indemnity is through the appointer.

Types of Receiverships There are several types of receiver appointments:

(a) Appointed by a government regulator

(b) Privately appointed receiver

(c) Court-appointed receiver 6.5.2 Duties of a receiver (a) Runs the company in order to maximize the value of the company's assets, sell the company as a whole, or sell part of the company and close unprofitable divisions. (b) Secures the assets of the company and/or entity. (c) Realizes the assets of the company and/or entity. (d) Manages the affairs of the company in order to resolve debts owing

Directors' Duties Directors pay close attention to the company's financial situation. When a company becomes insolvent, the directors' primary duty shifts to the creditors of the company rather than its

shareholders, and directors can face a variety of sanctions if they allow an insolvent company to continue to trade to the detriment of its creditors.

Insolvency procedures best fist to enforce debt recovery A creditor has a limited range of insolvency tools to enforce recovery – comprising court action against a debtor's assets and/or liquidation of the company or bankruptcy of the individual. In many cases this action can be counterproductive by forcing a business to cease trading and depressing the realizable value of the assets. It is often preferable to ensure a business keeps trading to preserve value and future customers. This is dependent upon the directors cooperating in recognizing financial difficulty and implementing a rescue procedure such as administration or company voluntary arrangement. 19 This requires persuasion and negotiation with the creditor, who will sometimes use a threat to wind up the company as a lever. It is possible for a creditor to apply to court for an administration order against the directors' wishes

THE PROCESS OF WINDING UP A COMPANY IN UGANDA This depends on the 3 types of winding up of companies: -,

Creditors winding up.,.

Members voluntary winding up.

Compulsory winding up – under supervision.

Creditors Winding Up Procedure: 1. File an extraordinary resolution to wind up an account of the inability of the company to meet its liabilities. File a resolution appointing a liquidator and members of a committee of inspection.

The winding – up resolution and notice of the liquidator's appointment are Advertised in the Gazette and filed with the Registrar. The Liquidator assumes control of the Company's assets, makes calls upon the contributories (if necessary), discharges the Company's liabilities (paying the preferential debts first, and claiming the proceeds of assets subject to floating charges, if necessary) and distributes any surplus among shareholders according to their rights

The Liquidator **must file twice** yearly the final accounts with the Registrar a statement of receipts and expenditures. The Liquidator then files the final accounts with the Registrar.

Three months after, the Company is automatically dissolved 7.2 Member's Voluntary Winding Up Applicable Laws are:

The Companies Act No.1 of 2012The Insolvency Act, 2011 Procedure:

1. A company may within 30 days before the passing of the resolution to wind up, deliver to the Registrar and the Official Receiver a Statutory Declaration of Solvency, which includes a statement of company's assets and liabilities. Members pass a special resolution to wind up the company which is filed with the Registrar of Companies and the winding up commences at passing of the resolution.

A Copy of the registered resolution is sent to the Official Receiver.

File, Notice of the Resolution in the gazette and a newspaper of wide circulation within 14 days.

Advertise appointment of a Liquidator in the Gazette within 14 days of appointment Form 12 of Insolvency Regulations 2013. Register with the Registrar a copy of the Gazette Notice and deliver a

copy to the Official Receiver. Liquidator to File a Statement of Affairs for the Company-Form 20 of Insolvency Regulations. 20 8.

Liquidator summons a general meeting at the end of each year.

The liquidator gives a public notice of the preliminary or interim report of liquidation using Form 25.

When winding-up is completed, the liquidator calls for a final meeting of the company by at least 30 days' notice in the Gazette and newspaper and submits final accounts. The Return of Final Accounts is filed in Form 26 of Insolvency Regulations 2013.

File with the Registrar, a Return of the meeting in Form 105 of Insolvency Regulations 2013.

Three months later the company is automatically dissolved.

Compulsory Winding – up under Supervision This starts with a petition

1. Where a Company is being wound up voluntarily, any person who would have been entitled to petition for compulsory winding up may petition instead of the voluntary winding up to be continued subject to the supervision of court.
2. The Petitioner must prove that voluntary winding up cannot continue with fairness to all concerned parties.
3. 3. Court may then appoint an additional Liquidator or continue with the existing Liquidator to give security
4. 4. The Liquidator must file with the Registrar every three months a report of the progress of the liquidation.

INSOLVENCY PRACTITIONERS

An insolvency practitioner means an insolvency practitioner under section 203 of the Act. An IP is someone who is licensed and authorized to act in relation to an insolvent individual, partnership or company.

Qualifications to act as an Insolvency Practitioner A person is not qualified to be appointed or act as an insolvency practitioner unless

(a) he or she is a lawyer, an accountant or a chartered secretary who is a registered member of the relevant professional body or is a registered member of any other professional body as the minister may prescribe; and

(b) there is in force at the relevant time, security or professional indemnity for the proper performance of his or her duties in accordance with the prescribed requirements. Acting as insolvency practitioner without qualification is an offence. The following persons are not permitted or allowed act as liquidators, provisional liquidators, provisional administrators or administrators

(a) A creditor of the company in liquidation or under administration or of an associated company; or

(b) A person who has, within the previous two years been a shareholder, director, auditor or receiver of the company in liquidation or under liquidation or of any associated company. The following persons cannot be appointed or act as a receiver

(a) A charge of the property under receivership;

(b) A person who has, within the two years immediately preceding the commencement of the receivership, been a shareholder, director or auditor of any charge of the property in receivership; or

(c) A person who is disqualified from acting as a receiver by the appointing document.

A creditor of an individual may not be appointed or act as a supervisor of an Individual's arrangement or as trustee of his or her estate. Court may make a prohibition order where it is proved to the satisfaction of a court that a person is unfit to act as an insolvency practitioner by reason of

- Persistent failure to comply;
- The seriousness of a failure to comply; or
- Any other sufficient cause Responsibilities of an Insolvency Practitioner An insolvency practitioner should not act in any matter unless he or she has obtained a valid license from the official receiver. An insolvency practitioner is required to keep and maintain proper records for at least six years.

Insolvency practitioners must follow the law and their work is monitored by regulators to make sure that they perform as required and that they continue to be fit to carry out insolvency work. Insolvency practitioners are appointed to sort out difficult situations. An insolvency practitioner is able to advise on, and undertake appointments in, all formal insolvency procedures including, liquidations, company voluntary arrangement, administration, receiverships, and bankruptcy and individual voluntary arrangements. If that is not possible, the insolvency practitioner aims to:

- Sell the assets of the person or company who owes money (the debtor);
- Collect money due to the debtor;
- agree creditors' claims (if there is enough money to go round)
- Distribute the money collected after paying costs.

The insolvency practitioner is not personally liable for any money owed to creditors. In most cases, this also applies to money owed to creditors who have traded with a business after the insolvency process has started. The insolvency practitioner must follow the Insolvency Act and other relevant laws.

The law sets out the powers and duties of the Insolvency Practitioner. The Insolvency Practitioner's responsibilities include reporting on the conduct of the directors of a failed company. This report is confidential. In some cases, the insolvency practitioner gives advice to a debtor immediately before a formal insolvency process begins. In a voluntary liquidation (one which does not involve a 22 winding-up process through the courts), an insolvency practitioner helps the directors of the company to meet their legal duties for example, calling meetings of the shareholders and creditors to place the company into liquidation and appoint a liquidator.

In voluntary arrangements, the insolvency practitioner acts as the 'nominee' for the proposed arrangement. This means that the debtor has asked the insolvency practitioner to supervise the arrangement. As the nominee, the insolvency practitioner has to make sure that creditors receive all the details they need to make a decision at the meeting held to vote on the proposal for a voluntary arrangement. In receiverships and administration cases, the insolvency practitioner may advise the directors or a major creditor on the different insolvency options available. Involvement of creditors will usually be invited to a meeting early in the process. In some cases, they meet to appoint the Insolvency Practitioner. In others, the meeting is held to pass on information to creditors. Sometimes, the insolvency practitioner reports to creditors each year. In other cases, such as bankruptcies, this does not apply. Creditors can help the insolvency practitioner by providing information, for example, to help the IP trace and collect assets. Creditors may also form a committee to work with the Insolvency Practitioner. Fees and charges the fee usually relates to the time the Insolvency Practitioners and their staff spend working on the case. Sometimes, the Insolvency Practitioner's fee may be a percentage of the amounts they collect and distribute to the creditors. This fee is paid out of the funds the IP collects before any money is paid to the creditors.

Ethical Requirements; An insolvency practitioner owes duties to the public, including those who retain or employ him, to the profession of which he is a member, to fellow practitioners and, where relevant, to his partners. In carrying out his or her duties he or she should remember at all times the responsibility which has been placed upon him by law and ICPAU as his or her Professional Body. A practitioner should be prepared and be able to demonstrate to ICPAU that he or she has administered his practice in a manner such as to satisfy a reasonable person's view as to his proper conduct. Before accepting any appointment, the practitioner should consider the implications of such an appointment, in the light of the Code of Ethics for Professional Accountants. Clear written evidence of the matters considered and the conclusion reached should be recorded with the Practitioner's papers.

The practitioner should not accept appointment unless he is satisfied that he has sufficient resources to perform his duties. He or she should be able to demonstrate the thinking behind 23 allocations of resources to each aspect of the cases administered. The practitioner should have arrangements in place to progress his cases in the event of his prolonged incapacity. The practitioner should maintain a permanent and on-going record of training of practitioners and staff levels in a form such as to enable ICPAU, if it so requires, to review the extent, degree and adequacy of training and of keeping personnel up to date with changes in legislation and good insolvency practice. The practitioner should maintain adequate records for the methods by which each case is controlled and progressed through both commercial decisions and legal requirements. It is anticipated that this will require the establishment and maintenance of a system of permanent files with supporting progress checklists. As part of that system, practitioners should maintain adequate records to show that appropriate investigations have been carried out to satisfy the legal requirements.

Section 41 of the Accountants Act provides for disciplinary action against errant accountants. Complaints against the services of an Insolvency Practitioner Before making a complaint about an Insolvency Practitioner to the regulators, it is advisable that the complainant contact the insolvency practitioner directly. Concerns often arise as a result of misunderstandings about the insolvency practitioner's role and it is always best to try to raise these with the insolvency practitioner. If the insolvency practitioner is not able to solve the complaint, one may then take the complaint further with the regulatory authority.

SALIENT ISSUES REGARDING INSOLVENCY PRACTICE IN UGANDA

The following are some of the specific salient issues accountants should bear in mind.

•General duties of a liquidator (**Section 100),** shall among other duties, keep in accordance with generally acceptable accounting procedures and standards full accounts and records of receipts, expenditure and other transactions of the company; keep accounts and records of the receivership of the company under his management for a period not less than six years after the Insolvency Proceedings; prepare and submit to the Official Receiver regular reports on the state of affairs of the property.

• Insider dealings (**Section 18),** specifically targets transactions entered into with spouses, siblings, children and persons of close social close proximity to the insolvent, or his/her employees, professional advisors or service providers twelve months before commencement of insolvency.

• All properties vested in the bankrupt's estate **(Section 31)** are formally vested in the official receiver without any conveyance or transfer. The debtor however may retain his matrimonial home and other property of a value to be prescribed that the court may exempt, property held in trust for other persons, a portion of his salary as may be determined by Court; tools, books and equipment necessary for his business or vocation;

Protection of the Insolvent's estate, under voidable transactions, Preference (**Section 15).** Within one-year preceding bankruptcy. Presumption of preference in respect of transfer of property. Under value transactions (**Section16),** these are transactions entered into within a year proceedings bankruptcy whose value of consideration received by the company is significantly less than the value of the consideration provided by the company or individual. Wages & Salaries of employees of an Insolvent (**Section 48 of the Employment Act.**

Section 12 (5) of the Insolvency Act) require that, notwithstanding any other law to the contrary, on the bankruptcy or winding-up of an employer's business, the claim of an employee or those claiming on his or her behalf, wages and other payments to which he or she is entitled to under this Act shall have priority over all other claims which have accrued in respect of the 26 weeks immediately preceding the date on which the declaration of bankruptcy or winding-up is made. 9.1 Tax Matters

• Priority of Taxes (**Section 315 of Cap 110 & Section 36 of the Bankruptcy Act**) Require that, in the winding up of a company, there shall be paid in priority to all other debts.

All taxes and local rates due from the company at the relevant date and having become due and payable within 12 months next before that date not exceeding in the whole one year's assessment.

• The Receiver must **notify Uganda Revenue** Authority of his or her Appointment (Section 109 (1) ITA & Section 41 VAT Act).

• The Receiver is prohibited from parting with asset without prior written permission of the commissioner (Section 109 (3**) of the ITA).**

• Upon disposing off an asset, set aside and pay to Uganda Revenue Authority the amount required (Section 109 (4) of ITA). The Receiver is personally liable to pay tax if he or she doesn't set aside and pay to Uganda Revenue Authority (**Section 109 (5) of ITA**).

- Preferential Debts (Section 12); the amount of any tax withheld and not paid over to the Uganda Revenue Authority for 12 months prior to the commencement of insolvency.

Section 12 (6) of Insolvency Act. PAYE (**Section 116 of ITA)** Interest Payments , Dividends , Professional Fees , Purchase of an Asset by a resident from non- resident (Section 118B ITA 2013) Payments on winnings from sports or pool betting ϖ Premium for Re- Insurance by resident to non-resident (Section 118D ITA 2014).

APPENDIX C- DOCUMENTS FOR WINDING UP

THE REPUBLIC OF UGANDA

IN THE HIGH COURT AT KAMPALA

IN THE MATTER OF MB AUOTO TRADERS

AND IN THE MATTER OF THE COMPANIES ACT 2012

COMPANIES CAUSE NO. ……. OF 2006

PETITION

The humble petition of JJ traders Ltd of P.O.BOX 444, Kampala showed as follows: -

I. That MB AUTO TRADERS LTD (hereinafter called the company) was incorporated in Uganda in 1994 under the Companies Act, Cap 85 laws of Uganda 1964.

2. That the registered office of the company is at Kwame, P.O. Box 224, Kampala, Uganda.

3. That the nominal capital of the company is Uganda shillings 60 million divided into shares of Uganda shillings 1000 each. The amount of paid-up capital is shillings 60M.

4. That objects of which the company was established are to operate a business of selling auto spares, motor vehicles repair and service and other objects set forth in the memorandum and articles of association.

5. That the company is hereby indebted to your petitioner in sum of shillings 70 million in respect of spare parts supplies delivered to the company since 2002.

6. Your petitioner had made numerous demands to the company and served on the company by leaving it at the registered office of the company aforesaid a demand requiring the company to pay the sum as obtained herein before.

OBJECTION MY LORD

7. Over three (3) weeks have expired when the petitioner served the same but the company has failed to or neglected to pay or satisfy the said slim or part thereof.

8. The company is insolvent and unable to pay its debts.

9. That in the circumstances, your petitioner submits that the affairs of the company are in a hopeless financial situation and it is just and equitable that the company be wound up.

WHEREFORE the petitioner humbly prays.

(i) That the company be wound up by this honorable court under the provisions of the Companies Act.

(ii) Those costs of this petition be met by the respondent.

(iii) That any other such order be made in the promise of this honorable court as shall be just.

Dated this ……. day of …….. 20 ……

……..

PETITIONER/ COUNSEL FOR PETITIONER

Filed in the High Court of Uganda this ……. Day of …….. 20 ……

Note: It is intended to serve this petition on MB AUTO TRADERS L TD

……..

ISAAC CHRISTOPHER LUBOGO

THE REPUBLIC OF UGANDA

IN THE HIGH COURT AT KAMPALA

IN THE MATTER OF MB AUOTO TRADERS

AND IN THE MATTER OF THE COMPANIES ACT 2012

COMPANIES CAUSE NO. ……. OF 2006

AFFIDAVIT VERIFYING PETITION

(Under rule 25 of the Companies (Winding Up) Rules SI 110-

I, Sam O'Neal make oath and swear as follows:

I. THAT I am the Managing Director of JJ TRADERS LTD, the Petitioner in the above matter and I am duly authorized by the said petitioner to make this affidavit.

2. That such of the statements in the petition now produced and shown to me marked with letter A as relates to the Acts of the said petitioner are true and such of the statements as relate to the acts and deeds of any other person or persons, I believe to be true.

SWORN at Kampala this …… day of…… 20 ……. By the said SAM O'NE/\L.

DEPONENT

BEFORE ME

……..

COMMISSIONER FOR OATHS

Drawn and Filed By:

SUI GENERIS& Co. Advocates,

P.O. Box 0000

Kampala.

ISAAC CHRISTOPHER LUBOGO

THE REPUBLIC OF UGANDA'

IN THE HIGH COURT OF UGANDA AT KAMPALA

IN THE MATTER OF MB AUTOGARAGE LTD AND

IN MATTER OF THE COMPANIES ACT 2012

COMPANY CAUSE NO. …. OF 2002

ADVERTISEMENT OF PETITION BEFORE HEARING

(Under rule 23. Companies (Winding UP) Rules S 110-)

NOTICE is hereby given that a petition for winding up of the above-named company by the High Court, Holden at Kampala was on the …… day of ……. 20 …. presented to the said court by J.J TRADERS LTD P.O, 80) :(444, Kampala.

AND that the said petition is directed to be heard before the court sitting as the law courts, Kampala in Uganda on the ……. day of ……. 20 …… and any creditor or contributor of the said company, desirous to support or suppose the making of order on the said petition may appear at the time of the hearing in person or by his advocate for that purpose and a copy of the petition will be furnished by the_ undersigned to any creditor or contributory of the said company requiring such copy on payment of Shs …….. the regulated charge for the same.

Signed …….

COUNSEL FOR THE PETITIONER

SUI GENERIS&*CO.* AOVOCA TES

P.0. BOX 0000, KAMPALA

NOTE: Any person who intends to appear at the hearing of the said petition must serve or send by post to the above named

AMURO GORETTI OF SUI GENERIS & CO. ADVOCATES

P.O. BOX 0000, KAMPALA.

……

SUI GENERIS and Company Advocates

Our Ref: FMH/CC/04/2004 **Date: 28th Oct 06**

Your Ref:

TO: MIS MS AUTO TRADERS LTD

P.O. BOX 224, KAMPALA.

Dear Sir,

RE: STATUTORY DEMAND

FOR PAYMENT OF THE OUTSTANDING DEBT OF SHS: 70,000,000/= OWED TO J.J TRADERS LTD.

We act for and on behalf of *J.J* Traders Ltd on whose instructions we

address you as hereunder;

That in *2006* your company concluded a deal with our client company where it was agreed that our client supplies you with spare pans,

That our client has since then made deliveries of spare parts to you and has not been paid for the same which has accumulated to the tune of shs: 70,000,000/=. *That* you have on numerous occasions made promises to pay, which promises have not be fulfilled.

That your conduct prompted our client to institute a suit and secure judgment against the company and the Managing Director personally vide HCCS No.264/2002.

TAKE NOTICE that pursuant to section 223(a) of the companies Act, you are hereby required to pay the said sum within 21 days from the hereof.

TAKE FURTHER NOTICE that unless you comply with our clients' '. demands within the prescribed time, we have instructions to institute winding up proceedings against your company to your embarrassment, detriment, inconvenience and loss.

STAND WARNED

Yours faithfully,

ADVOCATE

B) BANKRUPTCY

The law applicable under this part of the study is;

Insolvency Act 2011

Insolvency Regulations, 2013

Distress for Rent (Bailiffs) Act Cap 76

Income Tax Act Cap 240

The Civil Procedure Act Cap 71

The Civil Procedure Rules SI 71-1

Parliamentary Elections Act (if the debtor is a member of parliament)

Presidential Elections Act (if the debtor is a president!)

Advocates (Remuneration and Taxation of Costs) Regulations SI 267-4

Case law

Common law and Doctrines of Equity

THE CHECKLIST/ MAJOR ISSUES FOR RESOLUTION INCLUDE;

- Whether one can be adjudged bankrupt/ whether there are any acts of bankruptcy?
- Who has capacity to petition for one's bankruptcy? (creditors, affected individual)
- What is the proof and priority of debts?
- What other relief can be sought by creditors? (e.g. distress for rent, civil suits, seizure, etc).
- What is the effect of a bankruptcy and receiving order?
- What is the forum, procedure and documents?

DOCUMENTS AND FORUM

The relevant documents differ depending on the party petitioning for bankruptcy. This will be discussed under the relevant heads. It must be noted that the jurisdiction to handle bankruptcy proceedings is mandated on the High Court by virtue of section 95 of the Bankruptcy Act.

ACTS OF BANKRUPTCY

Bankruptcy is not defined in the Insolvency Act. It is defined by **J.H. Thompson in The Principles of Bankruptcy** as the legal status of an individual against whom the adjudication has been made by the court primarily because of his inability to meet his financial liabilities. A debtor has been

described as one who owes an obligation to another, especially an obligation to pay money.[74] A bankrupt person is one in respect of whom a bankruptcy order has been made per **Section 2.**[75]

This is also stated under **REGULATION 7 OF INSOLVENCY REGULATIONS** which states that a debtor may petition court for his or her bankruptcy where the debtor has been served with a statutory demand and is unable to comply with the demand or is unable to pay his or her debts). This is also termed as voluntary bankruptcy. Other persons that can petition for bankruptcy may be creditors under **sec. 69**, directors under **sec. 271** and members of the company under **sec. 62** as seen in **RE IMPERIAL INVESTMENT FINANCE LTD**[76]

For one to sustain bankruptcy proceedings against an individual he should prove to court that the individual has committed acts of bankruptcy. Acts of bankruptcy are provided for in part 3 of the Insolvency Act. One commits an act of bankruptcy when he does any of the following;

1. Conveyance or assignment of property to a trustee for the benefit of creditors,
2. Fraudulent conveyance of a gift, delivery or transfer of his property, or of any of his property. This is conversed in **RE WOODS (1872) 7 CH. D 324** where court held that a conveyance in contemplation of bankruptcy with an intention to defraud creditors is an act of bankruptcy.
3. Creating a charge on Property,
4. Disappearance from Uganda with intent to defeat his creditors,
5. Keeping house
6. Execution levied against him by seizure in any civil proceedings against him.
7. If an individual file in court a declaration of his inability to pay his debtor presents a petition against himself.
8. If a debtor gives notice to any of his creditors that he has suspended or is about to suspend payment of any of his debts.

PROCEDURE

The starting point in bankruptcy proceedings is the inability to pay debts. This is discussed in **section 3** of the **Insolvency Act 2011.**

When an act of bankruptcy has been committed and the debtors or creditors want to petition for bankruptcy, such a person has to file a petition which should follow the law as prescribed. The law varies with regard to who presents the petition whether, the debtor or creditor. Creditor's petitions are governed by **Section 10 and 11 of Insolvency Act 2011.**

[74]Bryan. A. Garner, Black's law dictionary 9th edition Pg 464
[75] Insolvency Act 2011
[76] (2007) ULR571.

ON A CREDITOR'S PETITION;

Section 20(2) allows a creditor to bring up a claim that a debtor be ruled as bankrupt. The Act sets out conditions are given which should be fulfilled before. It is important to note that creditor's petition has to be verified by way of affidavit sworn by the creditor or some other person on behalf of creditor who has knowledge of the facts. Most importantly, on a petition for the liquidation of a company or bankruptcy order, evidence of failure to comply with statutory demand is paramount.

The creditor should fulfill the following conditions

1. The debt should amount to at least Shs. 1,000
2. The debt should be a liquidated sum payable immediately or at some certain future date
3. The Act of bankruptcy on which the petition is grounded should have occurred within three months before presentment of the petition.
4. The debtor should be domiciled in Uganda, or within a year before the date of presentment of the petition, has ordinarily resided or had a dwelling house or place of business or has carried on business in Uganda or by means of an agent or within that period has been a member of a firm or partnership which has carried on business in Uganda by means of a partner, partners, agent or manager
5. In case the petitioning creditor is a secured creditor, he or she must in his petition state that he is willing to give up his security for the benefit of the creditors if the debtor is adjudged bankrupt, or give an estimate of the value of his security as required in **section 10** of the **Insolvency Act 2011**

At the hearing court shall require proof of the debt of the petitioning creditor within the meaning of **Section 3** of the **Insolvency Act 2011.** Court has the discretion to dismiss the petition for lack of proof of the debts. This can be by way of agreements and any other written undertaking, leading evidence *inter alia.* Unsecured creditors may make a dated claim informally in writing. Subject to **section 10**[77]where the liquidator or trustee requires a claim to be made formally, the claimant shall submit a claim verified by a statutory declaration_

(a) Setting out in full the particulars of the claim; and

(b) Identifying documents, if any, that evidence or substantiate the claim.

APPROPRIATE STEPS ON A CREDITOR'S PETITION;

1. The creditor makes a statutory demand for payment of the debt per **section 4**[78]

[77] Insolvency Act 2011
[78] Insolvency Act 2011

2. The creditor then issues a bankruptcy notice on the debtor. The bankruptcy notice acts as a notice of intention to sue and failure to adhere to the bankruptcy notice by the debtor is an act of bankruptcy.

3. The creditors petition the High Court for a receiving order *inter alia.*

4. If Court is satisfied that the creditor has proved his case, then a receiving order is granted.

DOCUMENTS ON A CREDITOR'S PETITION;

- Statutory Demand for payment
- Bankruptcy Notice
- Notice of Petition (synonymous with a hearing notice)
- Petition verified by affidavit.
- Summary of Evidence, List of Witnesses, documents and Authorities

B. ON A DEBTOR'S PETITION;

Section 20(1) of the **Insolvency Act** 2011 provides that a debtor may petition court for bankruptcy alleging that the debtor is unable to pay his or her debts and the court may, subject to sections 21 and 22 make a bankruptcy order in respect of the debtor. This comes after the debtor has failed to satisfy a statutory demand made under **section 4.** Thereafter, a petition for bankruptcy shall be presented by a creditor or a debtor and the court may subject to sections 21 and 22 make a bankruptcy order in respect of the debtor. The bankruptcy order declares the debtor bankrupt and appoints the official receiver as interim receiver of the estate, for the preservation of the estate of the bankrupt. **Section 20(5)** states that the bankruptcy shall commence on the date on which the bankruptcy order is made.

APPROPRIATE STEPS ON A DEBTOR'S PETITION;

- Debtor files a petition in the High Court and alleges inability to pay debts. It must be noted that the petition is an act of Bankruptcy.
- He files a statement of affairs under **Section 21** the **Insolvency Act.**
- If court is satisfied, it makes a receiving order; whereby a receiver is appointed to receive the debtor's estate.

THE RECEIVER HAS THE FOLLOWING DUTIES:

- To call a meeting of creditors held for the sole purpose of considering whether a proposal for a composition or scheme of arrangement shall be accepted. This is conversed under the **section 24** of **Insolvency Act 2011.**
- Realizing the assets and reporting to the creditors.
- Acting as an interim receiver pending appointment of a trustee.
- Verifying affidavits and administering oaths.
- Making reports to the registrar concerning the state of affairs.
- Acting as trustee during vacancy in the office of the trustee.
- Authorizing special managers to raise money and issue forms of proxy.

DOCUMENTS ON A DEBTOR'S PETITION

Petition supported by affidavit.

Summary of Evidence, List of Witnesses, documents and Authorities.

GUIDELINES ON PETITIONS IN BANKRUPTCY CAUSES.

Rules 106 - 122 of The Bankruptcy Rules 1915 of UK set out the format in which petition should be presented. In a nutshell;

- The petition should state the title. It must be noted that the petition for is entitled "Bankruptcy cause". Under this title, is written "In the matter of a petition for a receiving order by XXXX- Creditor/Petitioner; and YYYY- Debtor/ Respondent".
- In the petition, the petitioning creditor should pray to Court for a receiving order to be made against the debtor which debtor's description and address have to be clearly spelt out.
- If the debtor has since changed his address, then both addresses should be stated both the old and new and the petition should have all other elements in order to qualify to be brought into existence.

The effect of a bankruptcy order is visible in **section 27** of the Insolvency Act 2011 which states that;

27 (a)the bankrupt's estate shall, vest first in the official receiver and then in the trustee, without any conveyance, assignment or transfer; and

(b)except with the trustee's written consent or with the leave of the court and in accordance with such terms as the court may impose, no proceedings, execution or other legal process may be commenced or continued and no distress may be levied against the bankrupt or the bankrupt's estate.

BANKRUPTCY NOTICE

This notice is drawn by the creditor/intending petitioner to the debtor stating that he or she intends to institute bankruptcy proceedings against the debtor if he or she does not secure or compound for the sum due within 7 days.

THE RECEIVING ORDER

A receiving order under the Insolvency Act is an order given to by the Court hearing the petition to protect the estate of the debtor. Upon grant of the receiving order, the Insolvency Act provides that; the official receiver thereby appointed is constituted as a receiver of the property of the debtor; and thereafter, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have the remedy against the property of a person of the debtor in respect of the debt, or shall commence any action or other legal proceedings, unless with leave of the court and on such terms as court may impose. **Section 176** of the **Insolvency Act** states that (1) Where the appointment of a receiver is made by court, the receivership shall commence and the appointment shall take effect as specified in the court order. The appointment of the receiver should be made known to the public through public notice showing the receiver's full name, address and date if commencement of the receivership.

It must be noted that where is appears to court that the petition is proved to be a mere abuse of court process, a receiving order will not be given. This is fortified in the English case of **RE BOND (1888) 21 QBD AT PAGE 17.** In particular regard to a creditor's petition, the receiving order shall not be granted if it appears to court that he/she has failed to comply with the conditions discussed above, or fails to prove any facts he may have to prove, or generally, he does not satisfy court that he is entitled to any of his prayers in the petition.

In the same way court may, under the Insolvency Act, stay any action against the person of the debtor if it seems so required. The receiver has powers to appoint a manager until a trustee in bankruptcy is appointed.

The effect of a receiving order on debtor as a person is that the order is not an adjudication of bankruptcy as such; it however does not divest a debtor of his property. He remains the only person who can sue, protect or recover her property and he cannot be ordered to give security for costs under such suit merely because a receiving order was made against him. This is fortified by **RHODES V DOWSON (1886) 16 QBD 548 CA.**

A receiving order does not vest any estate or interest in the receiver nor does it give him power of bringing or defending suits and it does not charge any interests or liability which would other be claimed against the debtor.

ADJUDICATION OF BANKRUPTCY

Proceedings for adjudication of a bankrupt commence upon grant of the receiving order and are discussed hereunder:

PROCEEDINGS CONSEQUENT TO THE RECEIVING ORDER

1. The receiving order is advertised in the Uganda Gazette within the meaning of the Act.

2. **Section 24 of the Insolvency Act** is to the effect that a general meeting of the debtor creditors has to be held. This is called the first meeting of creditors. Its purpose is to consider whether, in case a proposal, composition, or scheme of arrangement has been presented by the debtor, is acceptable to the creditors. On the other hand, to see whether it's better to proceed and have the debtor adjudged Bankrupt. The meeting will also see how to deal with the debtor's property in case he is adjudged bankrupt.

   The first schedule to the rules provides that, the meeting has to be summoned for a day not later than 6 days after the date of the receiving order but court can extend such time. Such notice will be given by the official receiver, it will show time and place of the meetings. It will be published in the Gazette.

3. The debtor then submits a statement of affairs to the official receiver verified by affidavit, and showing the particulars of the debtor's assets, liabilities inter alia; within the meaning of **section 21 of the Insolvency Act**. if it's a debtor's petition, this is submitted 3 days before presentment of the debtor's petition. In case it is a creditor's petition, it submitted within 14 days from the date of receiving order. A debtor who contravenes this commits an offence and is liable on conviction to a fine not exceeding twenty-four currency points or imprisonment not exceeding one year or both.

4. A public examination of the debtor on a day appointed by Court, under **section 22 of the Insolvency Act** to examine his conduct and dealings. **RE BOTTOMIER 84 LR KB 1020** enunciates the principle to the effect that a debtor is obliged to answer all questions put to him and the answers he gives have to be written down and signed by the debtor.

5. It must be noted that if a composition scheme is not approved within 14 days after the public examination of the debtor or if the creditors resolve that the debtor be adjudged bankrupt, then the debtor is adjudged bankrupt. This is fortified by the case of **RE MOON (1887) 19 QBD 669 ON** appeal).

6. Consequently, the creditors by ordinary resolution appoint a fit and proper person, under **section 25 of the Insolvency Act** to fill the office of Trustee in Bankruptcy. The trustee in bankruptcy so appointed may be required by court to give security. He is then given a certificate of Appointment. If the trustee is not appointed within 4 weeks from the date adjudication of bankrupt, the official receiver then reports to court which shall appoint someone to act as trustee.

7. Subject to **section 47** of the **Insolvency Act 2011,** Creditors go ahead to appoint a committee of Inspection for the purpose of superintending administration of the bankrupt's property by trustee.

TRUSTEE IN BANKRUPTCY

Trustee in Bankruptcy is consequently appointed by the creditors by ordinary resolution under section 25 of the Insolvency Act to fill the office of a Trustee in Bankruptcy. He / she may be required by court to give security. Upon appointment, he is given a certificate of Appointment.

It must be noted that if the trustee is not appointed within 4 weeks from the date adjudication of bankrupt, the official receiver then reports to court which shall appoint someone to act as trustee.

OFFICIAL RECEIVER

An official receiver is appointed upon grant of a receiving order. see section 198 of the Insolvency Act. He is endowed with the duty to receive the estate of the debtor. It must be noted further that an official receiver may act as a trustee in Bankruptcy, pending the appointment of the Trustee in Bankruptcy.

CONSEQUENCES OF ADJUDICATION/ DISQUALIFICATIONS OF A BANKRUPT

These are covered in the Insolvency Act, thus; one is disqualified from being a Justice of Peace, mayor, Alderman, Municipal Councilor, Member of Town Council, School Committee or Road Board, Member of Parliament (under **Article 80 (2) of the Constitution**), or being a President.

It must be noted that adjudication vests the property of the debtor in trustee in bankruptcy such property is liable for distribution. If it's a debtor who made the petition and he entered certain agreements such as lease agreement in which he found himself not to assign his property to any other the vesting of the property in trustee shall not be constructed as breach of such covenants.

Section 27(b) of the **Insolvency Act** states that except with the trustee's written consent or with the leave of the court and in accordance with such terms as the court may impose, no proceedings, execution or other legal process may be commenced or continued and no distress may be levied against the bankrupt or the bankrupt's estate.

ANNULMENT OF ADJUDICATION ORDER

This is conversed in **Section 33 (1)** of the Act. An adjudication order can be annulled when the bankruptcy has paid as full, or when it taken never to have been made, or if it was made as a result of an abuse of the court process. This was upheld in **Re Dunn (1949) CH 640 CA**

The order can also be annulled if it was made under a defective petition, which was not subsequently cured before the order was made.

According to **RE SHITTON (1877) 5 Ch. 979 CA**, an adjudication order can be annulled if the debtor was dead at the time of making the adjudication.

PROOF AND PRIORITY OF DEBTS

Proof of a debt. This may be done by **attaching court judgments** if any exists, statement of affairs duly certified by the official receiver and attested by a notary public in which the details of his creditors and debts are fully specified. This was also judicially expressed by James Ogoola, J (as he was then)in the case of **Thomas Kato**[79]as he stated that where a petitioner had proved his indebtedness by attaching court judgments which showed decretal sums which were against him or her as remaining unsatisfied and which fact that the very petitioner had indicated so in his statement of affairs then the court's conclusion would be that the petitioner had committed an act of bankruptcy and therefore consequential orders should follow.

A debtor may petition court for bankruptcy alleging that he is unable to pay his debts and the court may subject to submission of a statement of affairs and a public examination of the debtor make a bankruptcy order in respect of the debtor per **section 20(1).** The petition is accompanied by a *statement of affairs* under **section 21**[80]. A statement of affairs is a list of the person's assets and liabilities.

Existence of a due debt. The court in **SNP PANBUS V JURONYSHIPYARD LTD** noted that it is necessary for the creditor to have a Due debt which the debtor has neglected to pay or to secure or compound to the reasonable satisfaction of the creditor after it has been served with a statutory notice to pay. This means that the debt therefore should not be disputed debt.

Proof of a Contingent or prospective debts It is important to note that the nature of the failed debt need not necessarily be of due date. It can be failure to pay a debt payable in the future. This has been accordingly held so in **RE BARR (A BANKRUPT)**[81] where the appellant court held that the

[79] (Bankruptcy petition No.13 of 2002)
[80] Insolvency Act 2011.
[81](1990) Ch 773

petition had been wrongly dismissed; a petition for bankruptcy may be presented in respect of a debt payable immediately or at some future date. However, the requirement of a due debt does not prevent proof of inability to pay debt by other means such as proving contingent or prospective debts as against the debtor. Contingent or prospective debts are not presently due for payment but may be in the future. *A prospective debt* is one which will certainly become due in the future, either on some date which has already been determined or on some date determinable by reference to future events.

Where no debt exists. However, where court makes a finding that no debt exists court declares that there is no creditor and that the claimant has no locus standi. It follows that for any debt which is in dispute on some substantial grounds and not on frivolous grounds, or without substance and which the court should therefore ignore, the company is deemed solvent. This was the position in **RE GLOBAL TOURS AND TRAVELS**[82].

PROOF OF INABILITY TO PAY.

Inability to pay debts is presumed where[83]**;**

(a) The debtor has failed to comply with a statutory demand

(b) The execution issued against the debtor in respect of a judgment debt has been returned unsatisfied in whole or in part

(c) All or substantially all the property of the debtor is in the possession or control of a receiver or some other person enforcing a charge over that property.

Failure to comply with a statutory demand. Subject to **Regulation 9 (1) of the insolvency regulations**, a debtor's failure to satisfy a statutory demand and failure to apply for time extension to enable compliance to statutory demand can entitle a creditor to petition the court to make a bankruptcy order against the debtor. In the case of **General Parts (U) Ltd V NPART 30** where UCB initially sued General Parts (U) seeking a declaratory Judgment that it had properly appointed a receiver, court held that the demand must be unequivocal and must state the consequences. Thus, it should be detailed enough. It should include that a debtor has a right to apply to the court to set aside the statutory demand.

Reasonable attempts to repay back. It avails a good reason for a debtor to adduce evidence before court of his/her having taken reasonable steps to pay back their debts but has failed. This serves to back their petition for bankruptcy. In the **KAKYO CASE**, court considered the fact that the petitioner had tried to do poultry business to raise money and pay off her creditors but had failed. The freezing of her bank accounts and the seizure of the petitioner's home by the bank were also considered together with the fact that the petitioner did not have any more tangible or immovable property that could be used for ameliorating the situation and thus she was considered bankrupt.

Committal of an act of bankruptcy. An act of bankruptcy is committed when a debtor files before court a declaration of his inability to pay the debts stated in his statement of affairs and more so when he presents a bankruptcy petition against himself. A debtor commits an act of bankruptcy where he or she conveys or assigns all property to a trustee for the benefit of his creditors generally as was in

[82] (2001) 1 EA 195
[83] Section 3- Insolvency Act 2011

RE SPACKMAN[84] where it was stated that the assignment must be for the benefit of all creditors generally and not just a class. Similarly, a notice given without prejudice has been held to be admissible as proof of the acts of bankruptcy[85].

A debtor may also petition for bankruptcy if he or she does not have any properties that can be administered by the trustee in bankruptcy[86]. This is usually among the key aspects considered as soon as court declares one to be bankrupt although it is also a consideration in determining bankruptcy.

However, the debtor is not declared bankrupt until the court accepts and endorses the petition. This was expressed in the case of In **RE JACKSON EXPARTE JACKSON**[87] where it was held that it is not only presentation of the debtor's petition which makes a debtor bankrupt. It is the court's acceptance of the petition and endorsement of that acceptance. It is important to note that bankruptcy shall commence on the date on which the bankruptcy order is made in regards to the **Insolvency Act 2011.**[88]

It is important to note that the debtor is not declared bankrupt until the court accepts and endorses the petition as was expressed case of in **Re Jackson experte Jackson**[89] where it was held that it is not only presentation of the debtor's petition which makes a debtor bankrupt. It is the court's acceptance of the petition and endorsement of that acceptance. Furthermore, bankruptcy shall commence on the date on which the bankruptcy order is made.

B) PRIORITY OF DEBTS

Section 12 of the Insolvency Act provides for priority claims in the following order:

1) remuneration and expenses properly incurred by the liquidator;

2) any receiver's or provisional administrator's fees;

3) any reasonable costs of any person appearing on the petition whose costs are allowed by the court;

4) all wages or basic salary;

5) all amounts due in respect of workers' compensation;

6) all amounts that are preferential debts relating to liquidator's documents;

7) any amount of tax withheld; and

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[84] (1890) 24 QBD 128
[85]Re a debtor
[86]Kakyo case.
[87] 1989 EA at 145
[88] Section 20(5)
[89] 1989 EA at 145

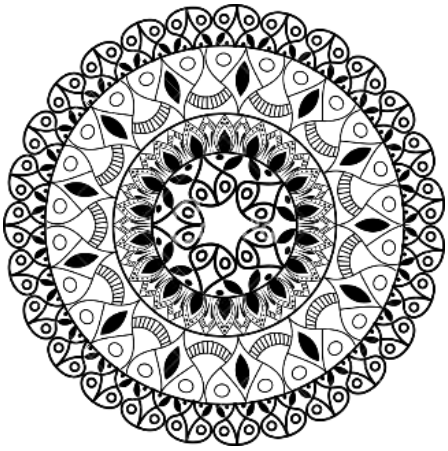
8) contributions payable under the National Social Security Fund Act.

Under the statutory provisions, these claims have priority over those of a secured creditor only insofar as the assets of the company are insufficient to meet all the claims.

BANKRUPTCY OFFENCES

These are covered in section 53, 54 and 55 of the Insolvency Act and these include the following:

- Where one is fraudulent debtor
- Where an undischarged bankrupt obtains credit without disclosing bankruptcy. Section 54
- Where a bankrupt commit one of the frauds
- Where a bankrupt is guilty of gambling
- Where a bankrupt fails to keep proper record
- Where a bankrupt absconds from jurisdiction with property
- Where a creditor makes a false claim or any proof, declaration or statement of account which is untrue.



INSOLVENCY PRACTICE

INSOLVENCY PRACTICE

This covers areas such as: interim protective order, individual voluntary arrangements, bankruptcy, provisional administration, administration, receivership, and liquidation.

PURPOSE OF INSOLVENCY PROCEEDINGS.

1. To ensure an equitable distribution of the property of the debtor among creditors according to their respective rights against the debtor.
2. To relieve the debtor of liability to the creditors and to enable the debtor make a fresh start in life free from the burden of debts and obligations
3. To protect the interests of the creditors and the public by providing for the investigation of the conduct of the debtor's affairs and for the imposition of punishment where there has been fraud or other misconduct on the part of the debtor.

GENERAL PRINCIPLES.

INABILITY TO PAY DEBTS

In RE TEDDY SEEZI CHEEYE (1996) IV KALR 116, the court held that in a bankruptcy petition, the two essential elements are, proof of a debt and proof of inability to pay debts. Court emphasized that failure to pay a judgement debt is proof of inability to pay debts.

OBJECTION MY LORD

IN RE TANGANYIKA PRODUCE AGENCY LTD (1957) EA 627, a petition to wind up a company with a new of enforcing payment of a disputed debt is an abuse of process of the court and will be dismissed with costs.

Section 2 of the insolvency act defines a debt as a debt or liability, present or future, certain or contingent and includes an ascertained debt or liability for damages.

Pursuant to **Section 3 (1)** of the insolvency act, one is presumed to be unable to pay debts if:

a) The debtor has failed to comply with a statutory demand

b) The execution issued against the debtor in respect of a judgement has been returned unsatisfied in whole or in part.

c) All or substantially all the property of the debtor is in the possession or control of a receiver or some other person enforcing a charge over than property.

The list above in **Section 3 (1) of insolvency Act** is inclusive and not exhaustive as one can prove inability to pay debts by any other means by virtual of **Section 3 (3) of the Act**. Under Section 5 (6) of the act, failure to comply with timelines to pay under **Section 5 (5)** is deemed inability to pay.

STATUTORY DEMAND.

It is issued onto the debtor under **Section 4 (1) of the insolvency Act**. It should be verified by statutory declarations unless it's in respect of a judgement debt.

Under **Section 4(2) of the insolvency Act**, the statutory demand must be made in respect of a debt that is not less than the prescribed amount and in the case of a debt owed by an individual is a judgment debtor or a company is an ascertained debt, but need not be a judgment debt.

The statutory demand takes the form prescribed in form 1 in schedule 1 of the insolvency regulations, 2013 as per **Regulation 4(1) of the regulations**.

Regulation 4(2) requires that the statutory demand specifies: the amount of the debt and in case of a debt arising out of judgment or order of a court, the details of the judgment or order. It must also state how the debtor may comply with the statutory demand, where the debt is secured, the nature of the security, whether and how the debtor may compound the debt or give a changeover property to secure the debt, that insolvency proceedings will be commenced against the debtor if they do not comply with the demand and the right of the debtor to apply to the court to set aside the statutory demand.

SERVICE OF THE STATUTORY DEMAND.

Section4 (2) (d) of the insolvency act and **Regulation 5(1)** of the regulation require that the statutory demand is served personally on the debtor. Failure to effect personal service of the statutory demand on the debtor is a ground for setting aside the statutory demand as was in the case of

However, under **Regulation 5(2)**, where the debtor cannot be found, the demand maybe served:

a) At the registered office or place of business of the debtor.

b) By sending it to the address of the debtor by registered mail

c) By serving the legal representative of the debtor if known

d) In any other manner determined by court.

PROOF OF SERVICE.

Under **Regulation 5(3)** proof of service of a statutory demand is by an affidavit of service stating the time and manner of service.

TIMELINES.

Section 4(2)(e) provides that the statutory demand must be complied within 20 working days after the date of service or a larger period as the court may order.

A petition founded on the statutory demand must be brought within 30 working days after the last date for compliance with the demand as per **Section 3(2) of the insolvency Act**.

SETTING ASIDE A STATUTORY DEMAND.

A court may pursuant to **Section 5 (1)** on application of the debtor, set aside a statutory demand.

TIMELINES.

Under **Section 5 (2) of the Act**, the application must be made within 10 working days after the date of service of the demand and should be served within 10 working days after the date of service of the demand.

Section 5 (3) of the Act empowers the court to extend any of the aforementioned timelines.

APPLICATION.

Pursuant to **Regulation 6(1)** of the regulations, the application is by notice of motion supported by an affidavit.

The application is brought pursuant to any of the grounds under **Section 5 (4) of the Act** and these are:

a) There is a substantial dispute whether the debt is owing or is due.

b) The debtor appears to have a counter claim, set-off or cross-demand and the amount specified in the demand less the amount of the counterclaim, set-off or cross demand.

c) That the creditor holds some property in respect of the debt claimed by the debtor and that the value of the security is equivalent to or exceeds the full amount of the debt.

d) The demand ought to be set aside on such grounds as it deems fit.

Note: under **Section 5 (7) of the Act**, a statutory demand cannot be set aside by reason only of a defect or irregularity, unless it's considered substantial.

POWER OF A COURT HEARING AN APPLICATION TO SET ASIDE.

Pursuant to **Section 5(5) of the Act**, if the court is satisfied that the debt is due and there is no counter claim, substantial dispute or cross demand, the court may order:

a) That the debtor pays the debt within a specified period and in default, the creditor may immediately petition for a liquidation or bankruptcy.

b) Dismiss the application and immediately make an order under **Section 20 or 92** on the grounds of inability to pay debts.

DISTRIBUTION OF ASSETS.

Pari passu. In keeping with the purpose of insolvency i.e., ensuring that the estate of an insolvent is distributed among all his or her or its creditors and bearing in mind that the available assets are usually not sufficient to cover all creditors fully, the principle of pari passu is applied when paying off creditors of an equal ranking.

The principle of pari passu holds that where in relation to preferential debts and ordinary debts, there is a shortfall between the totality of liability within the category of priority and the sum of money available to discharge these, debts of equal rank shall abet in equal proportions as between themselves.

The principle is codified under **Section 13 (2) of the insolvency Act** and applies in the payment of non-preferential debts. The distribution is done pro rata.

PREFERENTIAL DEBTS AND NON-PREFERENTIAL DEBTS.

Under **Section 12 (1) of the insolvency Act**, a liquidator or trustee must apply the assets realized to the preferential debts in the order listed under the section.

The preferential debts are listed under **subsections 4, 5, and 6**

Under sub-section 4, the first debts to be paid are:

1. Remuneration and expenses properly incurred by the liquidator or trustee.
2. Receivers or provisional administrators' indemnity under **Section 159 or 187** and any remuneration and expenses properly incurred by any receiver, liquidator, provisional liquidator, proposed supervisor or supervisor.
3. Reasonable costs of any person who petitioned court for a liquidation or bankruptcy order, including the reasonable costs of any person appearing on the petition whose costs are allowed by the court.

Second debts to be paid are:

1. All wages or basic salary wholly earned or earned in part by way of commission for four months.
2. All amounts due in respect of any compensation or liability for compensation under the worker's compensation act, accrued before the commencement of the liquidation or bankruptcy not exceeding the prescribed amount.
3. All amounts that are preferential debts under **Section 33 or 105**.

Third categories of debts after those above have been paid are:

1. The amount of tax withheld and not paid to the Uganda Revenue Authority for 12 months prior to the commencement of insolvency
2. Contributions payable under the national social security fund act.

Having paid off the preferential debits, all the other debts are non-prefential and are Paid under Section 13 of the insolvency act. Under **Section 13 (2)**, these debts rank equally and unless paid in full, they abate in equal proportions in line with the pari passu principle. The distribution is done pro rata.

4. ANTI-DEPRIVATION RULE.

It is a common law rule aimed at attempts to withdraw an asset on bankruptcy with the effect that the bankrupt's estate is reduced in value to the detriment of creditors.

The rule flows from the rule that parties cannot intentionally contract out of insolvency legislation.

IN BELMONT PARK INVESTEMTNS PTY LTD V BNY CORPORATE TRUSTEE SERVICES LTD (2012)1 ALL ER 505, the supreme court of the United Kingdom laid down the general principle that parties cannot contract out of the insolvency legislation. The court stated that the principle has to key aspects, of which these are:

1. The anti-deprivation rule, which is aimed at attempts to withdraw an asset on bankruptcy or liquidation or administration, thereby reducing the value of the insolvent estate to the detriment of creditors.

2. The pari passu rule, which reflects the principle that statutory provisions for pro rata distribution may not be excluded by a contract which gives one creditor more than its proper share.

The court further held that however, if a transaction makes good commercial sense, is entered into in good faith and does not intend to evade insolvency laws, then court will most likely uphold the transaction.

ESSENTIAL ELEMENTS FOR THE APPLICATION OF THE ANTI –DEPRIVATION PRINCIPLE.

1. Good faith.

For the principle to operate there must be a deliberate intention to evade insolvency laws. The intent is objectively assessed and can in certain instance be inferred from the parties' actions.

2. Reasons for deprivation.

The principle is intended to operate only in cases where the deprivation occurs on the insolvency of the relevant debtor.

If the trigger for the loss of asset is an event other than insolvency, then the principle cannot be relied upon.

Flawed assets.

In certain instances, where one party will grant a proprietary interest in an asset that will automatically determine on the insolvency of the grantee.

Such assets are said to fall outside the scope of the anti-deprivation principle. However, court will examine the nature of the flawed asset before deciding whether the principle applies.

5. Voidable transactions.

Under **Section 15 (1) (a)**, a transfer of property by an insolvent is voidable on the application of the creditor, receiver, liquidator or trustee where such transfer is made:

a) On account of an antecedent debt

b) At a time when the insolvent was unable to pay the debts.

The test for inability to pay debts is contained under **Section 15(2)** and it is if the transfer was made within six months preceding the commencement of the liquidation or bankruptcy unless the contrary is shown or the transfer was an account of a debt not incurred in the ordinary course of business unless the contrary is shown.

c) Within the year preceding the commencement of the liquidation or bankruptcy.

- The transaction is also voidable where the transfer enabled that person to receive more towards the satisfaction of the debt than the person would otherwise have received or

be likely to receive in the liquidation or bankruptcy (**Section 15 (1) (b).** See **BELMONT PARK INVESTEMENTS PTY LIMITED.**

EXCEPTION TO SECTION 15 (1) (B)

Under **Section 15(1)**, the transaction won't be voidable where the debt was incurred in the ordinary course of business of the insolvent and the transfer was made not later than 45 working days after the debt was incurred.

See: **RE GRAYS INN CONSTUCTION COLTD (1980)1 WLR 719**

See: **RE MODERN TRADING CO.LTD (1967) EA 182**, on the test of fraudulent preference.

See: **ARBUTHNOT LEASING INTERNATIONAL LTD V HAVELET LEASING LTD (NO.2) (1990) BCC 636**, on fraudulent transaction. The court held that whereas the motive of transfer was not necessarily dishonest, it was still done with the purpose of putting assets beyond creditors reach and thus was a fraudulent transaction and void.

TRANSACTIONS AT UNDER VALUE.

Under **Section 16**, a transaction may be set aside on application by a creditor, receiver, member or contributory, liquidator or trustee if such transaction:

a) Entered into within one year preceding the commencement of the liquidation or bankruptcy.

b) The value of the consideration received by the company or individual is significantly less than the value of the consideration provided by the insolvent.

c) When the transaction was entered the insolvent was unable to pay their debts, or incurred the obligations when required to do so.

d) The insolvent become unable to pay their debt as a result of the transaction.

e) The transaction was entered into to aid the insolvent to put assets beyond the reach of the creditors: see: **Arbuthnot leasing international ltd.**

In PHILLIPS V BREWIN DOLPHIN BELL LAWRIE (2001) UKHL 2, the court examined whether a series of arrangements could be understood as one "transaction" for the purposes of being an undervalue transaction under the insolvency act 1986. The brief facts are that the liquidator of AJ Bekhor and co sought to recover the 725,000 pounds and interest for a business and assets that been transferred to a subsidiary, which in turn was bought by Brewin Dolphin through a share purchase for one pound. The issue was whether that constituted a transaction at an under value. Brewin Dolphin contended that part of the agreement was that its parent company, private capital group ltd, would pay AJ Bekhor for yearly installments of 312,000 for renting computer equipment.

The House of Lords held that the transaction was effected at an under value, and was voidable under **Section 238**. The computer rental agreement was taken as consideration for the deal, but when assessing its value, reality and not speculative values should be taken into account. The collateral

agreement was precarious and worthless because the head lessors had immediately declared the transaction to be a repudiatory breach and it therefore had no value to Brewin Dolhin.

VOIDABLE CHARGES.

These are under **Section 17 (1)** of the act and relate to any charges created on antecedent debts within one year preceding the commencement of the liquidation or bankruptcy.

It is not a voidable charge however if the charge secured the actual price or value of property sold or supplied to the insolvent and at the value the insolvent was able to pay their debts. Under **Section 17 (2),** a charge created within 6 months preceding the commencement of insolvency proceeding unless proven otherwise, was created when the insolvent could not pay their debts.

The charge is also not voidable if it was given in substitution for a charge given more than one year preceding the commencement of the liquidation or bankruptcy.

INSIDER DEALINGS.

Under **Section 18 (1)**, any transaction entered into by an insolvent between them and their spouses, siblings, children, or any person with a close social proximity or employees, officers, professional or other service providers or business associates, partners, shareholders, directors or other similar persons within 12 months preceding insolvency is deemed to be a preference or transaction aimed at aiding the insolvent to put the assets of the insolvent's estate beyond the reach of creditors.

See: **ARBUTHNOT LEASING INTERNATIONAL LTD**, where the assets were transferred to a subsidiary.

APPLICATION TO SET ASIDE A VOIDABLE TRANSACTION.

Under Section 19 (1) (a), the application is by notice to court, specifying the transaction to be set aside or the value to be recovered. It is brought by either the liquidator, receiver, member or contributory, trustee or a creditor and served the person(s) from whom the recovery is sought.

Upon service, the person must within 20 working days lodge an application under S.19 (2) for an order that the transaction should not be set aside. Failure to do so the transaction shall be set aside from the 2oth day after the date of service of notice under

Section 19 (3). Application is by notice of motion with an affidavit in support as per REGULATION 189(3).

RIGHTS WHERE THE TRANSACTION IS SET ASIDE**.**

Under **Section 19 (5),** a person affected May after giving up the benefit as a creditor in the liquidation or bankruptcy.

EFFECT OF SETTING ASIDE OF A TRANSACTION ON 3RD PARTY.

The order pursuant to **Section 19 (6)** does not affect the title or interest of a person in property which that person has acquired:

a) From a person other than the insolvent

b) For valuable consideration and

c) Without knowledge of the circumstances of the transaction under which the person other than the insolvent acquired the property from the company or individual.

DEFENSE TO A NOTICE TO SET ASIDE A VOIDABLE TRANSACTION.

Under **Section 19 (7)** the order to set aside may be denied wholly or in part if the person from whom recovery is sought received the property in good faith and has altered his or her position in the reasonable belief that the transfer or payment of the property to the person was validly made and would not be aside and in the opinion of court its inequitable to order recovery for example where person obtained a mortgage and pledged the property as security.

BANKRUPTCY/INDIVIDUAL INSOLVENCY.

INTERIM REMEDIES**.**

An individual facing a looming commencement of insolvency proceedings may in view of one of the purposes of insolvency proceedings to wit allowing a debtor realign their finances so as to pay off his or her debts apply for an interim protective order.

WHAT INFORMS THE DECISION TO APPLY FOR AN INTERIM PROTECTIVE ORDER.

Under Section 119 (1), the application is informed by the intention of the debtor to make any arrangement with his or her creditors.

EFFECT OF AN INTERIM PROTECTIVE ORDER.

Pursuant to **Section 119 (2)**, during the subsistence of the order:

a) An application for bankruptcy relating to the debtor cannot be made or proceed.

b) A receiver of any property of the debtor cannot be appointed

c) Except with leave of court and in accordance with the terms imposed; no step can be taken to enforce a charge over any of the individual's property, no proceedings, execution or other legal process can be commenced or continued against the debtor or his or her property, and neither can distress be levied against the debtor or their property.

DURATION OF THE ORDER.

Pursuant to **Section 121**, the order is effective for only 14 working days. The duration may however be extended by court subject to the conditions under **Section 123 (2) and (30** or if it has expired order for its renewal.

Note: under **Section 120 (3),** court may stay any action, execution or other legal process against the property or person of a debtor where an application for an interim order is pending.

PROCEDURE AFTER ISSUANCE OF THE ORDER.

1. The debtor must submit to the proposed supervisor pursuant to Section 122 the following:
   a) A document setting out the terms of the arrangement which the debtor is proposing
   b) A statement of his or her affairs containing the particulars of the debtors, creditors, debts and assets.
2. The supervisor must within the 14 working days where the order is in effect call for a creditor meeting under **Section 124(1).** The notice of the meeting must be published in the gazette and in the official language in a newspaper of wide circulation as per **Section 124 (2).**
   - During the meeting, the creditors may agree to the proposed arrangement or with such modifications as agreed to by the debtor. **Section 124(5)**

EFFECT OF PROPOSED ARRANGEMENT ON SECURED CREDITORS AND PREFERENTIAL DEBTS.

Under **Section 124 (6)**, if the proposed arrangement affects the rights of a secured creditor to enforce their security, the creditors will seek the consent of the secured creditor otherwise they are not bound.

Under **Section 124 (7),** creditors cannot approve a proposed arrangement where a preferential debt is not paid before a non- preferential debt or where a preferential debt is paid in a lesser portion than another preferential debt under the same category.

The application for an interim protective order.

The application as per **Regulation 63 (1)** of the Insolvency regulations is by summons in chamber with an affidavit in support.

GROUNDS.

These are contained under **Section 120 (20**:

a) Debtor intends to make an arrangement

b) A named insolvency practitioner is willing to act as supervisor of the proposed arrangement.

c) The debtor is an un discharged bankrupt or is able to petition for his or her own bankrupt.

d) A previous application has not been made by the debtor for an interim order in the last 12 months

e) Making the order is appropriate for the purpose of facilitating, the consideration and implementation of the debtors proposed arrangement.

Forum

Court with pecuniary jurisdiction. If high court, it's the civil division if in Kampala.

Documents

- Chamber summons
- Affidavit

OBJECTION MY LORD

ARRANGEMENT ORDER.

If the creditors meeting approved the proposal, the court upon the filling of the report by the supervisor may issue an arrangement order under **Section 125 (3)**.

The supervisor must immediately upon issuance of the order send written notice to all known creditors notifying them that the arrangement has taken effect and to the public. Section 126

EFFECT OF AN ARRANGEMENT ORDER.

Section 127 (1) provides that an arrangement binds:

1. Making or proceeding with an application for bankruptcy

2. Appointing a receiver for any of the debtor's property.

3. Except with leave of court, not take any other steps to enforce a charge or commence or continue other proceedings or execution or levy distress on the debtor's property.

VARIATION OF ARRANGEMENT ORDER.

Under **Section 132 (1),** the order maybe varied by court on application by any party bound by the order. **Section.132 (2)** empowers a supervisor upon discovery of an asset after an arrangement order has been made to distribute the asset using the arrangement agreed upon and variation if any.

TERMINATION OF ARRANGEMENT.

The application is brought under Section 134 (1) by any person bound by the arrangement.

CONTENTS OF AN ARRANGEMENT

Preliminaries

- Title
- Law
- Name of debtor, address, telephone, email address
- Name of proposed supervisor and address
- Date of proposal.

Clauses

1. Introduction, brief facts
2. Debtors' assets with estimated values
3. Debtors' liabilities
4. Proposals
    - Which property are excluded
    - No assets other than the property of the debtor are included in the arrangement.
    - How to deal with debtors' property to pay debts
    - Schedule of payment
    - What money pays for what taking into account preferential creditors
    - Duration of arrangement
    - Supervisor opening/A/C

      DUTIES OF A SUPERVISOR.

        - The supervisor shall have the discretion to insert the funds surplus to the immediate requirements of the arrangement on deposit of money from time to time pending any distribution of such funds.
        - It is proposed that the supervisors' fees should be met out of the realizations under the arrangements as and when incurred or when funds so permit.
        - The supervisor's fees and expenses shall rank ahead of the claims of the creditor.
        - No further credit facilities are intended to be arranged for the debtor in the proposed arrangement.

      FUNCTIONS OF THE SUPERVISOR.

    a) To receive funds payable into the arrangement

    b) To make distributions to the creditor in due order of priority.

    c) To report to creditors as to the progress of the arrangement from to time

    d) To realize all assets comprised in the arrangement.
5. Variation
6. Confirmation of debtor that this document fairly sets out my proposals to my creditors for a voluntary arrangement and that to the best of my knowledge and belief all statements therein are true.

OBJECTION MY LORD

DATED

SIGNED BY

DEBTOR

Consent of supervisor and signature.

BANKRUPTCY PETITION.

A bankruptcy petition may be brought by either the debtor under **Section 20 (1)** in which case it's called a debtor's petition. Or may be brought by a creditor under **Section 20 (2)** in which case it's referred to as a creditor's petition.

PRE-CONDITIONS FOR BRINGING A CREDITORS PETITION.

1. Judgment creditor. **Section 4(2)(a)(1)** and execution has not realized the debt
2. Issue a statutory demand. **Section 20 (2), S.4 (2) (a) (1)** and **Section 3 (1) (a)**.

Therefore, the creditor must be a judgment creditor who has attempted to execute and the execution has been returned wholly or in part unsatisfied.

See**: SPRINGS INTERNATIONAL HOTEL V HOTEL DIPLOMATIC LTD AND ANOR H.C.C.MA NO.4227 OF 2019**, Justice Ssekana stated that it is trite law that the company's court is not, and should not to be used as a debt collecting court. The proper remedy for debt collecting is an execution upon a judgment, a distress, a garnishee order or some procedure.

In the present case, the respondent has not made any attempt to execute the order of taxation through the normal execution proceedings.

3. Where the debtor fails to comply with the statutory demand within 20 working days, then the creditor must bring the petition within 30 working days.

FORM AND CONTENT OF THE CREDITOR'S PETITION.

- The petition takes the form specified under form 3 in schedule 1 as per Regulation 9
- **Regulation 10(1)** requires that every petition is supported by an affidavit shown by the petitioner or one of the petitioners and where it's a company by a director, secretary or a person authorized.

SERVICE OF THE PETITION.

Regulation 11(2) requires that the petition is served personally on the debtor and **Regulation 11(3)** specifies that service should be affected by delivering a petition sealed by the court to the debtor. **Regulation 11(4)** provides for substituted service where the debtor cannot be found.

PUBLIC NOTICE OF THE PETITION.

Regulation 13(1) requires that the petitioner gives public notice of the petition within 7 working days. The notice is as prescribed in form 4 in schedule.

Procedure

1. All preliminaries must be satisfied
2. Petition lodged and served and notices issued accordingly
3. Failing of the statement of fairs by the debtor as required under **Section 21 (1)** of the act and this way be filed with a reply to the petition as provided for under **Regulation 14(1)**. **Regulation 14(2)** stipulates that the reply shall be supported by an affidavit setting out the grounds upon which the debtor opposes the petition
    - The statement of affairs should be served onto the official receiver for purposes of enabling him/her participate in the public examination as required under **Section 22(4)**
4. Court pursuant to **Section 22 (1)** appoints a date for public examination of the debtor.
5. Pursuant to **Section 22(9),** where the court is satisfied that the debtors affairs have been thoroughly investigated, it shall make an order that the examination is conclude and proceed to make a bankruptcy order under **Section 20(2)** where need be.
6. The bankruptcy order made declared the debtor bankrupt and appoints the official receiver as interim receiver of the estate. **Section 20 (3)**.
7. The official receiver calls a first creditors meeting and during the meeting, a trustee is appointed and also prior to the meeting is required within days from the date of commencement of bankruptcy to give public notice of the date of commencement of the bankruptcy. **Section 24 (a) (b) and Section 25**.
    - Bankruptcy commences on the date on which the bankruptcy order is made **(Section 20 (5).**
8. Trustee must then within 5 working days after their appointment give public notice of their full name, their address and the date of commencement of the bankruptcy. **Section 26**

Committee of inspection may be appointed pursuant to **Section 30 and 46 of the Insolvency Act**. its duties are under **Section 46 (1) of Insolvency Act**

EFFECT AND CONSEQUENCES OF A BANKRUPTCY ORDER.

EFFECT

1. Under **Section 27 (1)**, the order vests the bankrupt's estate into the official receiver and then into the trustee.

WHAT CONSTITUTES THE BANKRUPT'S ESTATE?

Section 31(1) provides that bankrupts estate comprises of all property belonging to or vested in the bankrupt at the time of commencement of the bankruptcy and any property falling under **Section 15, 16, 17 and 18** and a portion of the debtors' salary as court determines.

Section 31 (2) excludes from the estate:

a) Tools, books and other items of equipment used by the debtor for his trade, vocation or employment or for personal use being a value prescribed.

b) Clothing, beddings and provisions necessary for satisfying the basic domestic needs of the bankrupt and their family.

c) Property held in trust for any other person

d) Matrimonial home of the bankrupt.

2. Bars, except with written consent of the trustee or leave of court, any proceedings, execution or other legal process being commenced or continued and neither can distress be levied against the bankrupt. Section 27 (1) (b).

However, Section 27 (2). Subject to Section 11 allows a holder of a charge over property in the bankrupt's estate to enforce the charge during the bankruptcy.

CONSEQUENCES.

Section 45 (1) and (2) stipulate the consequences of a bankruptcy order to include:

a) Disqualification from being appointed or acting as a judge of any court in Uganda.

b) Disqualification from being elected to or holding or exercising the office of the president, Member of Parliament, minister, a member of the local government, council, board, authority or nay other governmental body.

Under **sub-section 2**, a public office or office of the justice of the peace immediately becomes vacant upon the person being adjudged bankrupt.

- The disqualifications cease to apply whereas per **Section 45(3)**

  a) The adjudication of bankruptcy against the individual is annulled

  b) A period of 5 years' elapses, from the date of discharge of the bankrupt

c) The individual obtains from the court their discharge with a certificate to the effect that the bankruptcy was caused by misfortune without misconduct on his/her part. Refusal to grant the certificate is appealable under Section 45(4)

Other consequences can be found in other legislations, for example

1. **Article 80(2)** of the constitution bars an un discharged bankrupt from seeking elections as a member of parliament.
2. **Article 102** bars a bankrupt from being a president
3. Under **Section188 of the company's Act,** an un discharged bankrupt cannot be a director or take part in management of any company except with leave of court.
4. Under **Section 11 (a)** of the advocates act, an un discharged bankrupt cannot practice law in the courts of Uganda.

TERMINATION OF BANKRUPTCY.

Under **Section 41 (1)**, a bankruptcy terminates when a bankrupt is discharged, the bankruptcy order is annulled or upon withdrawal of a bankruptcy petition with leave of court.

DISCHARGE

A bankrupt maybe discharged by court on application by the bankrupt under **Section 42 (1)**. Under **Section 42 (2)** the court will take into account the official receivers report on the bankruptcy and the conduct of the bankrupt during the bankruptcy.

Regulation.59 (1) stipulates that the application is by notice of motion supported by an affidavit. The application shall be served on the official receiver, the trustee and every creditor with an unsatisfied claim against the estate.

EFFECTS OF DISCHARGE

Under **Section 43 (1)** a discharge order releases a bankrupt from all bankruptcy debts however it does not affect; the functions of the trustee which remain to be carried out; right of any creditor to the bankrupt to claim in the bankruptcy for any debts from which the bankrupt is released; the right of any secured creditor of the bankrupt to enforce their security for the payment of a debt from which the bankrupt is released.

ANNULMENT, REVOCATION OR SETTING ASIDE OF BANKRUPT ORDER.

Under **Section 44(1)**, a court may whether the bankrupt has been discharged or not, annul, revoke or set aside a bankruptcy order if it appears to the court that basing on any grounds existing at the time, the order was made, the order ought not to have been made. Under **Section 44 (2)** the property of the bankrupt upon annulment, revocation vests in a person appointed by the court or in default, it reverts to the bankrupt As per **Regulation 57(2)**, the application is by notice of motion supported by an affidavit

DEFENSES TO A BANKRUPTCY PETITION.

1. Ability to pay

RE TEDDY SEEZI CHEEYE (1996) IV KALR 116

2. Disputed debt

MANN AND ANOTHER V GOLDSTEIN AND ANOR (1968) ALL ER 769. A holder of disputed debt is not a creditor and has no lows to present a petition. There is a substantial dispute if there is a plausible defense.

3. Using proceedings, a debt recovery mechanism.

SPRING INTERNATIONAL V HOTEL DIPLOMATIC AND ANOTHER.

4. Off set.

5. Debt not due

SPRING INTERNATIONAL V HOTEL DIPLOMATIC AND ANOR.

ISAAC CHRISTOPHER LUBOGO

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT

KAMPALA (CIVIL DIVISION)

IN THE MATTER OF AN APPLICATION FOR AN

INTERIM PROTECTIVE ORDER BY PHILIP

MPANGOYABONNA

BANKRUPTCY CAUSE NO.....OF 2020

CHAMBER SUMMONS.

(Under Regulation 63(1) of the insolvency regulations No.36 of 2013)

LET ALL PARTIES CONCERNED attend to the learned judge in chambers on the .....day of .....2020 at .....O'clock in the forenoon or soon thereafter as counsel for the applicant can be heard for orders that:

1. An interim protective order be granted in favor of Philip Mpangoyabonna

TAKE NOTICE that the grounds of this application are contained in the affidavit hereto annexed and deponed by Phillip Mpangoyabonna.

GIVEN under my hand and seal of this honorable court this.....day of .....2020.

REGISTRAR

Extracted by:

M/S SUIGENERIS AND CO. Advocates

P.O BOX 0000

Kampala.

OBJECTION MY LORD

AFFIDAVIT.

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

IN THE MATTER OF AN APPLICATION FOR AN INTERIM

PROTECTIVE ORDER BY PHILIP MPANGOYABONNA

BANKRUPTCY CAUSES NO.....OF 2020.

AFFIDAVIT IN SUPPORT

I PHILLIP MPANGOYABONNA C/O M/S SUI GENERIS & CO Advocates, P.O. Box 0000, Kampala, do hereby take oath and state as follows:

1. That I am a male adult Ugandan of sound mind the applicant herein in which capacity I swear this affidavit.

2. That I am indebted to four creditors to a turner of UGX 1,000,000,000 as particularized in the statement of affairs.(Attached hereto is a copy of the statement of affairs marked annexure A)

3. That I intend to enter into an arrangement with my creditors. (a copy of the proposed arrangement is hereto attached as annexure B).

4. That, Mr. SUI GENERIS, an insolvency practitioner has agreed to act as supervisor under any proposed arrangement. (A copy of the letter of consent to act as a superior is hereto attached as annexure C).

5. That I have not applied for an interim protective order within the past 12 months.

6. That I have USD 100,000 that was frozen on my bank account with standard chart bank which l hope to use in the arrangement once FIA in freezes the account. (A copy of my bank statement dated 20th September 2020 and a copy of the freezing order from FIA dated 3rd August 2020 are hereto attached as annexure D and E respectively.

7. That I am negotiating credit line supplies to revamp my business (copies of email correspondences with my prospective suppliers in China are hereto attached as annexure F).

8. That it is in my interest and that of my creditors that this application is granted to enable me re-arrange my finances to settle the creditors in full and sustain my business and myself.

9. That whatever I have stated herein is true and correct to the best of my knowledge and belief.

SWORN ON THIS.....day of .....2020 by the said PHILLIP MPANGOYABONA

DEPONENT

Before me

COMMISSIONER FOR OATH.

Drawn and filed by:

M/SSUIGENERIS AND CO Advocates,

P.O Box 0000,

Kampala.

OBJECTION MY LORD

PETITION FOR BANKRUPTCY.

THE REPUBLIC OF UGANDA AT KAMPALA.

(CIVIL DIVISION)

IN THE MATTER OF THE INSOLVENCY ACT, 2011

AND

IN THE MATTER OFA CREDITOR'S PETITION

TO ADJUDGE PHILLIP MPANGOYABONA

BANKRUPT AND

IN THE MATTER OF AN APPLICATION BY

BANKRUPTCY CAUSE NO.....OF 2020

PETITIONER/CREDITOR

VERSUS

PHILLIP MPANGOYABONA .....DEBTOR

PETITION

(Under S.20 (2), S.4 (2) (1) (a) and S.3 (1) (a) & (b) of the insolvency act and Rule 9 and 10 (1) of the insolvency regulations S I NO.36 OF 2013)

The humble petition of .....whose address is M/S SUIGENERIS & CO Advocates, law development Centre, Mbarara-campus, P.O BOX 0000, Kampala, states as follows:

1. That Phillip Mpangoyabona is justly and truly indebted to me, the petitioner in the aggregate sum of UGX being outstanding decretal amounts issued by the court in H.C.C.S NO.2 OF 2016 (A copy of the judgment and order are hereto attached as annexure A and B respectively.

2. That I have conducted execution proceedings against Phillip Mpangoyabona but the execution was returned unsatisfied (A copy of the return of execution is hereto attached as annexure C)

3. That having had the execution returned unsatisfied on the 21st day of August 2020, a statutory demand was served upon the debtor requiring him to pay the decretal sums amounting to UGX (a copy of the statutory demand is hereto attached as annexure D).

4. That to the best of my knowledge and belief, the demand has neither been complied with nor set aside and further it is to the best of my knowledge and belief that there is no application to set aside pending before this honorable court or any other court.

5. This matter is within the jurisdiction of this honorable court.

WHEREOF THE PETITIONER prays that this honorable court:

a) a bankruptcy order be issued against the debtor PHILLIP MPANGOYABONA

b) costs of this petition be born out of the estate of the debtor

Dated at Kampala this.....day of 2020

.....

COUNSEL FOR THE PETITIONER.

Drawn and filed by:

SUIGENERIS & CO Advocates

P.O BOX 0000,

Kampala.

- Should be verified by an affidavit.

CORPORATE INSOLVENCY.

Under this we cover: provisional administration, administration receivership and liquidation and informal corporate rescue option.

PROVISIONAL ADMINISTRATION.

This is a corporate rescue mechanism intended to allow the company progress as a going concern as it irons out its financial challenges.

Purpose

The purpose can be deduced from Section 140 (1)(b) which details some of the functions of the provisional administrator. The purpose of provisional administration is to:

a) Ensure the company survives in whole or part as a going concern

b) Allow for approval of an administration deed

c) Allow for a more advantageous realization of the company's assets would be effected in liquidation

See: **UGANDA TELECOWM LIMITED V ONDAMA SAMUEL T/A ALAKA AND CO. ADVOCATES H.C.MA NO00212 OF 2018.**

Procedure for commencement and appointment of a provisional administrator.

1. A company passes a special resolution agreeing that the company needs to make a settlement with the company creditors. **Section 139(3)**

2. The company having agreed to make a settlement then petitions court for an interim order. **Section 139(4)**

3. The company then by special resolution of board appoints a provisional administrator and issues a notice to that effect also stating the date of the interim order. **Section 139(1)**

- **Regulation 144(1)** requires that the notice is issued within seven working days from the date of the protective order. As per **Regulation 144 (2)**, the notice takes the form in form 12 in schedule 1.

Note: **Section 139 (5)**, bars the appointment of a provisional administrator when the company has gone into liquidation.

- **Section 139(2)** requires that the notice appointing the provisional administrator or includes a certificate signed by the appointer certifying that, at the time of the appointment, there is no reason to believe that the company is or will be unable to pay its debts within the meaning of Section 3

DUTIES OF A PROVISIONAL ADMINISTRATOR.

These are spelt out under **Section 141** and include:

a) Taking custody and control of all property that the company owns.

b) Keep company money separate from other money held by or under the control of the provision of administrator.

c) Ensure accountability in compliance with the acceptable accounting principles.

WHEN DOES PROVISIONAL ADMINISTRATION COMMENCE

Per **Section 142 (1)**, provisional administration commences when the interim protective order is made.

EFFECT OF PROVISIONAL ADMINISTRATION.

These are postulated under **Section 143 (1)** and are:

a) Liquidation by court cannot be commenced

b) Functions and powers of any liquidator are suspended

c) Resolution for liquidation cannot be made

d) No receiver can be appointed

e) Charges can only be enforced with the written consent of the provisional administrator or leave of court

f) Proceeding, execution or other legal process cannot be commenced or continued except with the written consent or leave of court. Reemphasized. In **UGANDA TELECOM LIMITED V ONDOMA SAMUEL C/A ALAKA AND CO ADVOCATES (SUPRA)**

Also see: **BENARD MWEITEISE & CO V UGANDA TELECOM LTD HCMA NO.66 OF 2019.**

DURATION OF PROVISIONAL ADMINISTRATION.

Section 145 (1) provides that provisional administration terminates where:

a) The period specified in the interim order lapses and the period is not more than 30 days.

b) An administration deed is executed under **Section 148**.

c) The provisional administrator gives the notices under **Section 151** and these include the following: the deed is not executed within the period of execution in **Section 150 (2)**, creditors resolve that the provisional administration should end, or the creditors don't pass a resolution under **Section 148**.

Per Regulation147, the notice is as prescribed in form 18 in schedule 1.

Other provisions

- **Section 153** lists the power of provisional admin
- **Section 154** provides for provisional administrations relation with 3rd parties.
- **Section 155** stipulates the role of directors and secretary during provisional administration.
- **Section 155 (1)** suspends any powers of the directors and secretary in the company while
- **Section 155 (2)** enjoins them to avail and give all assistance to the provisional administrator.

ADMINISTRATION.

COMMENCEMENT AND PROCESS.

a) MEETING TO CONSIDER PROPOSAL.

Section 147 (1) enjoins a provisional administrator to call a creditor meeting to consider his or her proposals. The public notice given must be for at least five working days and a written notice to cash creditors.

Regulation 146(1) requires that the notice is accompanied by the proposal to be considered.

It should also be accompanied by a report by the provisional admin about the company's business, property, affairs and financial circumstances among others under **Section 147 (3) (b).**

Section 148 (1) stipulates that the provisional admin is the chair of the meeting.

Under **Section 148 (3**) the creditors may during the meeting resolve that the company executes an administration deed, provisional admin ends, or that the company is liquidated.

CONTENTS OF THE ADMINISTRATION DEED

These are listed under **Section 149** and are:

1. Proposed administrator of the deed
2. Property available to pay the creditors

3. Nature and duration of any moratorium period or which the deed provides for.
4. Extent to which the company is to be released from its debts
5. Conditions, if any required for the deed to come into force(operation)
6. Order in which proceeds of realizing are to be distributed
7. Date when claims admissible under the deed should have a risen.

b) EXECUTION OF THE ADMINISTRATION DEED.

This is under **Section 150** and it is executed by the company and the proposed administrator. **Section 162** postulates that that marks the commencement of administration. The administration deed is executed during a general meeting.

c) **NOTICE OF ADMINISTRATION**.

The administrator is required under **Section 163** to give each know creditor notice of the administration and also issue a public notice. **Regulation 149,** provides that the notice is as in

Form 18 in schedule 1.

EFFECT OF ADMINISTRATION.

As per **Section 164(1)** the administration deed binds the company, directors and secretary, shareholders, administrator and all company's creditors in relations to claims arising on or before the day specified in the deed.

See: **UGANDA TELECOM LTD V ONDAMA T/A ALAKA AND CO ADVOCATES**, on the creditors bound by the deed and effect of the deed on contingent and future debts.

The aforementioned persons bound by the deed are precluded under **Section 164 (2)** from:

1. Making an application for liquidation or proceeding with one.
2. Except with leave of court, from taking steps to enforce any charge over the company property
3. Except with leave of court, commence or continue execution proceedings or other legal processes or levy distress against the company or its property.

FUNCTIONS OF THE ADMINISTRATOR.

Under **Section 165**, the major function of the administrator is to supervise the implementation of the administration deed.

VARIATION OF ADMINISTRATION DEED.

Section 167 (1) provides that the administration deed may be varied by a resolution passed a creditors meeting. An aggrieved administrator or creditor may petition court to cancel or confirm the variation in part or whole under **Section 167 (2**)

TERMINATION OF ADMINISTRATION.

Under **Section 168**, termination occurs where the court makes an order or the circumstances stipulated in a deed occur

The application for termination by court, as per **Section 169 (1**), may be brought by the administrator of the company, creditor of the company or any liquidator of the company.

Regulation 157(1) requires that an application by the administrator is accompanied by a progress report covering the period from the last progress report

An application by the creditor must state the grounds on which the administration should be terminated as per **Regulation 157 (2)**

Section 170 enjoins the administrator to give public notice of the termination and send written notices of termination and send written notices of termination to each of the creditors, shareholders and the official receiver.

LIQUIDATION.

Liquidation may be commenced in three ways:

1. (A) Members voluntary liquidation

    b. Creditors voluntary liquidation

2. Voluntary winding up

3. Liquidation by court.

LIQUIDATION BY COURT

Under **Section 92 (1) of the insolvency Act**, the court may appoint a liquidator. Order may also be made pursuant to **Section 5 (5) of the Insolvency Act**.

COURT WITH JURISDICTION.

The court with jurisdiction as per **Section 91of the Insolvency Act** is the high court.

WHO CAN PRESENT THE PETITION?

Section 92 (1) of the Insolvency Act and Regulation 85(1) of the insolvency regulations postulate that the petition may be brought by:

a. The company

b. A director of the company\

c. A shareholder of the company

d. A creditor of the company

e. A contributory

f. The official receiver

WHEN CAN THE PETITION BE PRESENTED.

Section 92 (2) of Insolvency Act and Regulation 85(2) postulate that the petition may be brought where the company:

a. Has been served with a statutory demand and is unable to comply with the demand

b. Unable to pay its debts

c. Has agreed to make a settlement with its creditors or entered into administration.

DOCUMENTS

1. Per **Regulation 86 of Insolvency Regulation**, the petition is the form prescribed in Form 19 in schedule 1 to the regulations and must state the items laid down in the regulation.

2. **Regulation 87(1)** requires that the petition is supported by an affidavit. The affidavit in the case of a company must be sworn by a director, secretary of the company or a person authorized by the company. In case of an individual, by the petitioner, or by one of the petitioners where there is more than one.

PROCESS.

1. Draft petition and affidavit

2. Pay necessary fees

3. Lodge petition and affidavit ad evidence of payment.

4. Service of the petition. **Regulation 88(1)** requires that the petition is served on the company, where it's not the petitioner, every it's not the petitioner, every known creditor, a contributory and the official receiver.

5. Publication of notice of the petition. The petitioner must within seven working days after filing the petition give public notice of the petition in form 4 in the schedule to the regulations. **Regulation 89**

6. A creditor, c contributory or company may within 15 working days after service reply to the petition. **Regulation 90(1)**. The reply to the petition is by way of affidavit and should be served in the same manner as the petition. **Regulation 90 (2)**.

7. Any creditor who intends to be heard must within 5 working days after publication of the notice of the petition give court and the petitioner notice of intention to appear and he heard on the petition as per **Regulation 91(1).** The notice is as prescribed in form 5 in schedule 1. If you don't give notice, you can only be heard with leave of court. **Regulation 91(3)**

8. Petitioner then prepares a list of creditors and their advocates, who have given notice to be heard, specifying their names and address. **Regulation 92(1)**. The list is in the form prescribed in form 6 in schedule 1 to the Regulations Against each name, petitioner must indicate whether they are in support or not, **Regulation 92 (3).**

PROVISIONAL ADMINISTRATOR.

- Appointed by court. It may be the official receiver or any other I.P and they are appointed to preserve the value of the company. **Section 94 and Regulation 97**
- Must give notice of appointment using form **12. Section 95 and Regulation 98**
- Must within 14 working days call a creditor meeting as per Form 10. **Regulation 99**

VOLUNTARY WINDING UP.

UNDER THE COMPANIES ACT(CA)

EFFECT.

Section 270 (1) of the Companies Act provides that from the commencement of voluntary liquidation, the company ceases to carry on business except so far as maybe required for the beneficial winding up of the company. **Section 270 (2)** postulates that the corporate status continues and its powers continue until it is dissolved.

WHEN TO INVOKE IT?

Section 271 of the Companies Act provides that directors of a company can commence liquidation where they have made a full inquiry into the affairs of the company and have formed the opinion that the company is able to pay its debts in full within a period not exceeding 12 months from the commencement of the liquidation.

The company must be solvent.

PROCEDURE

1. Directors of the company investigate the affairs of the company and then form an opinion that the company can pay its debts within a period of one year. **Section 271(1)**
2. The directors make a statement of the company's assets and liabilities
3. Directors call a board meeting to make a statutory declaration of solvency. **Section 271 (1).** Meeting is as per **Regulation 98 of Table A** or the articles of the company.
4. The declaration is filed together with the statement of assets and liabilities within a period of 30 days with the registrar of companies. **Section 271(2)(9)(a) and (b)**
5. Notice is issued to call for an EOGM under **Section 140** for purposes of winding up the company
6. A special resolution is passed. (**Section 268 of the Companies Act**)
7. The resolution is registered within 7 days with the registrar of companies. **Section 264 (2)**.
8. Advertise notice of the resolution to wind up in the Uganda gazette and a newspaper of wide circulation. **Section 264(1)**
    - **Section 272** provides for the application of the insolvency act to voluntary liquidation under the Companies Act with necessary modifications.
9. Appointment of liquidation through a meeting of members or board resolution. **Section 62 of Insolvency Act**.
10. Liquidator must within 14 days after their appointment publish in the gazette and deliver to the registrar for registration a notice with a copy of a caveat. **Regulation 98 of insolvency Regulations**, the public notice is the form prescribed in form 12 in the schedule.
11. Should the liquidation continue for more than 12 months, the liquidator must call for a general meeting as per **Section 66 of Insolvency Act**
12. Give a notice of final meeting in the gazette and in a newspaper of wide circulation specifying the time, place and object of the meeting at least 30 days before the meeting. **Section 67(2) of Insolvency Act**

13. The liquidator must then prepare an account of the liquidation showing how the liquidation was conducted. **Section 67(1)(a) of Insolvency Act**

14. Hold the general and final meeting of the company and provide an account of the liquidation, his acts and dealings. **Section 67(1)(b) of Insolvency Act**

15. Transmit a copy of the account to the registrar and make a return of the meeting and its date to the registrar within 14 days after the meeting **Section 67(3)(a) and (b)**

16. On expiration of 3 months from the date of registration of the return, the company is taken to be dissolved. **Section 67(6) of Insolvency Act**

UNDER THE INSOLVENCY ACT.

Section 58(1) of the Insolvency Act provides that a company may be liquidated voluntarily if it resolves by special resolution that it cannot by reason of its liability continue its business and that it is advisable to liquidate.

Section 58 (2) of the Insolvency Act stipulates that voluntary liquidation is taken to commerce at the time of passing the resolution for voluntary liquidation.

Under **Section 59(1)**, the company must within 14 days after passing the resolution give notice of the resolution in the gazette and in a newspaper of wide circulation

Section 59 (2) requires that the resolution is registered with the registrar within seven days and a copy sent to the official receiver.

EFFECT (SECTION 97)

1. The company ceases to carry on business

   - Liquidator takes custody and control of Company, **Section 97 (1) (a).**

2. Any transfer of shares not sanctioned by the liquidator is void. **Section 97 (1)(d)**

   - Officers of the company have no power though in office. **Section 97(1)(b**)

MEMBERS VOLUNTARY.

Section 62 (1), the company members by special resolution appoint one or more liquidators for the purpose of liquidating the company.

Section 62 (2) on his/her appointment, all the powers of the directors cease except where the company in a general meeting the liquidator sanctions the continuance of those powers.

Section 82 provides for public notice of appointment of the liquidator.

Section 67 provides for a final meeting.

CREDITOR'S VOLUNTARY MEETING.

Section 69 (1) provides that the company shall cause a meeting of the creditors of the company to be summoned on the same day as the meeting for the resolution for liquidation is to be proposed or on the following day and send to the creditor's notices for the meeting together with the notices for the meeting for proposing the resolution for liquidation.

Section 69 (2) provides that the notice for the meeting of the creditors shall be published in Gazette and in a newspaper with a wide circulation.

Section 69(3) obligates the directors to appoint one of them to preside at the meeting of creditors and present a statement of the company affairs and a list of the creditors and the estimated amount of their claims to the meeting of the creditors.

Under **Section 70(1),** the creditors and the company may at their respective meetings nominate a person to be liquidator and if they nominate different persons, the person nominated by the creditors will be the liquidator and if the creditors don't nominate any person, then the person nominated by the company is the liquidator.

PROCEDURE

1. Notice of Extra General Mitting **Section 69(1)**
2. Notice of creditors meeting in the Gazette and newspaper of wide circulation. **Section 69(2)**
3. Company meeting passes a special resolution that company cannot pay its debts and appoints a liquidator. **Section 58**
4. The creditors meeting convenes an and resolution is presented and a liquidator appointed and the committee of inspection
5. Company gives a notice of the special resolution in the gazette and in a newspaper of wide circulation within four days.
6. Liquidator gives public notice of appointment. **Section 82**
7. Committee of inspection sets liquidator's remuneration
8. Liquidator collects assets and distributes proceeds as per act
    - Read procedure under 11-16 under company winding up.

RECEIVERSHIP

A receiver receives or collects the income from a debtor's property for the benefit of a creditor.

Two types.

1. **Individual receivership;** where a receiver is appointed over the property or estate of an individual debtor.
2. **Corporate receivership**; where a receiver is appointed in respect of the property of the debtor company.

PEOPLE WHO CAN'T BE APPOINTED RECEIVERS (S.207)

1. A charge of the property under receivership
2. A person who is disqualified from acting as a receiver by the appointing document.
3. A person who has within the two years immediately preceding the commencement of the receivership, been a shareholder, director or auditor of any charge of the property in receivership.

Note: under **Section 203 (1) (a) and 204 of the Insolvency Act**, only an insolvency practitioner can be appointed as a receiver.

TYPES OF RECEIVERS.

a) **Receiver-manager**: is a receiver who also has power to operate or manage the debtor's business

b) **Receiver in simplicity**: is a receiver who is appointed to only realize the asset and apply the proceeds to settle the debts under which they are appointed.

c) **An administrative receiver** is appointed over the whole or substantially the whole of the property and undertaking of a grantor.

d) An administrative receiver is appointed by a creditor who has a security in the form of a floating charge.

e) The charge covers the whole or substantially the whole of the company's property.

The powers of an administrative receiver are subject to the instrument of appointment but generally are:

a) If the grantor is an individual, he or she can carry on any business of the grantor.

b) If it's a company, he or she can carry on the company business and manager its property, perform any functions and exercise any powers of the directors or the company secretary, change the company's registered address or postal office. Section 183(1)

MODES OF APPOINTMENT.

1. By court order.

The order may be by the H.C in exercise of its statutory power to make such an appointment e.g., S.22 of Mortgage act. It may also be in exercise of courts inherent powers.

2. Instrument

A receiver may be appointed by instrument e.g., under a mortgage deed or a debenture.

EMRELAD HOTEL V BARCLAYS BANK (HCT-00-CC-CS 170 of 2008) [2016]

DUTIES, POWERS AND OBLIGATIONS.

These are set out in **Section 179-189** of the insolvency act.

RECEIVER AS AN AGENT.

A receiver is typically designated as an "agent" of the debtor company. It's not a true agency but merely a device for making a debtor rather the creditor liable for the receiver's acts and omissions. However, the receiver owes a duty of good faith and a duty to manage the property with due diligence.

SILVER PROPERTIES LTD AND ANOR V ROYAL BANK OF SCOTLAND AND ORS (2004) 1 WLR 997

In DOUGLAS MEDFORTH V JAMES PETER BLAKE AND ORS (2000) CH 86, the receivers had according to the grantor mismanaged the pig farming business by failing to take large discounts from pig feed suppliers at the time it was on and buying later on when the discount was low. The court appeal held that the proposition that, in managing and carrying on the mortgaged business, the receiver ones the mortgagor .no duty other than that of good faith, offends commercial sense. The receiver is not obliged to carry on the business. He can decide not to do so. He can decide to close it down. In taking these decisions he is entitled and perhaps bound, to have regard to the interests of the mortgage in obtaining repayment of the secured debt provided he acts in good faith, he is entitled to sacrifice the interests of the mortgagor in pursuit of that end. But if he does decide to carry on the business he is expected to do so with reasonable competence. A receiver/manager who sells but fails to take reasonable care to obtain a proper price may incur liability notwithstanding the absence of fraud or malafide.

OBJECTION MY LORD

POWERS OF RECEIVER ON LIQUIDATOR.

Pursuant to **Section 194(1) of the insolvency Act**, unless the court orders otherwise, a receiver maybe appointed or continue to act as a receiver and exercise all the powers of a receiver in respect of any property of a company which have been put into liquidation or an individual in respect of whom a bankruptcy order has been made.

They however can only act as agents of the grantor only with approval of the court or with written consent of the liquidator or trustee. **Section 194(2) of the Insolvency Act**.

The debts incurred by the receiver are not a cost of liquidation. **Section 194 (3) OF Insolvency Act**.

EXECUTION OR ATTACHMENT AGAINST A COMPANY IN RECEIVERSHIP.

IN JOHN VERJEE AND ANOR V SIMON KALENZI AND ORS (1997-2001) UCLR 83, it was stated that once a receiver has taken possession of the property before attachment, that property cannot be attached by subsequent decree holders against the judgment debtor. A receiver holds the property to pay debts of the company and therefore, the receiver is in possession not on behalf of judgment debtor but for the mortgage.

PROCEDURE

1. Appointment is in writing i.e., by instrument of appointment. S.182 on indoor management rule is respect of appointment
2. Notice of the appointment of a receiver to the grantor and the public. S.178 of I.A
3. Notification of the official receiver.
4. Changing of company letter heads to indicate the status of receivership
5. Taking custody and control of the property under receivership
6. Preparation of an inventory (All company assets and lieu)
7. Within 14 working days after commencement of the receivership, give public notice using form 29 of schedule 1 to the regulations. **Section 178** and **Regulation 165**
8. Within 14 working days notify official receiver by delivering notice above.

COURT SUPERVISION

Receiver may apply under **Section195 (1) of the Insolvency Act**.

Others including receiver may also apply under **Section 195 (2) of the Insolvency Act**

COURT ACTION BY A GRANTOR.

Only the receiver can sue on behalf of and in the name of the company. But if the receiver, who being in control of the company, is at the same time a wrong doer and refuses to sue, a shareholder can bring a derivative action for fraud that is expropriation of the company's property.

ALLIED BANK INTERNATIONAL LTD V SADRU KARA AND ABDUL KARA, H.C.C.S NO 191 OF 2002.

Directors may also sue where they are challenging the validity of the security under which the appointment has taken place or in any other case where the vital interest of the company are at risk from the receiver or from elsewhere but the receiver neglects or declines to act.

SAROPE PETROLEUM LTD V ORIENT BANK LTD AND OTHERS HCMA NO.72 OF 2011.

The debtor may bring an action against the receiver secured creditor or appointees or any other person for wrongful appointment of the receiver, trespass and other unlawful acts which prejudice the rights and interests of the grantor. **Section 184 (1) (a) of the Insolvency Act**

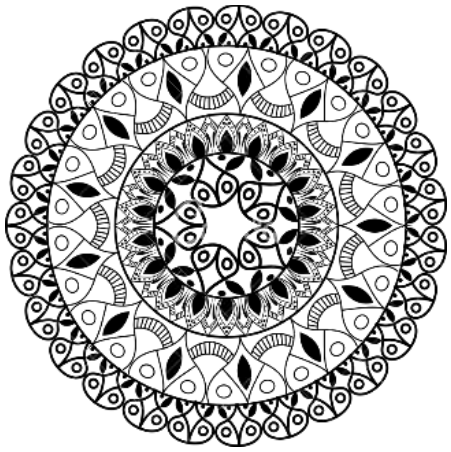
Debtor may also bring an action to preserve or protect the estate or interest in receivership where the receiver does not take action. **Section 184 (1) (b) of Insolvency Act**

Any other action cannot be brought without the consent and approval of the receiver. **Section 184 (1) (c)**

Removal and termination

Section 196, 197,206,209 OF Insolvency Act

Regulation 167, 170.



REGULATORY FRAMEWORK FOR FINANCIAL INSTITUTIONS AND FINANCIAL SERVICES.

MICRO FINANCE INSTITUTIONS.

These are in two types:

a) Those under the tier for microfinance institutions and money lenders act.

1. SACCOS
2. Non-deposit taking microfinance institutions
3. Self-help groups Section 99
4. Commodity based micro finance institutions Section 102

All the above are regulated by the Uganda microfinance regulatory authority as per Section 8 (1)

b) Deposit taking microfinance institutions under the micro finance deposit –taking act No.5 of 2003.

SACCOS

- Must be a registered society and licensed under the tier for act **Section 36(1)**

- It only provides financial services to its members. **Section 36(2)**
- Its powers under **Section 37** are inter alia to mobilize and receive savings from members, borrow in an aggregated amount not exceeding a limit prescribed by the authority, provide loans to its members.
- Must apply to UMRA for a license under **Section 38(1)** and application is a companied by the requirements in **Section 38(3)**
- Must use its name in its operations **Section 40**
- Look at **Section 39-61**, on annual fee, issue of a license, equity, shareholding, savings, and restrictions on borrowing, SACCO stabilization fund, and SACCO savings protection fund.

NON-DEPOSIT TAKING MICROFINANCE INSTITUTIONS.

- It's defined under **Section 5** of tier for as accompany or non-governmental organization licensed under **Section 62**
- Apply to UMRA for a license under **Section 62** of tier for
- Institutions may grant micro loans which are to be in Ugandan shillings and may be granted without collateral or with. **Section 67**
- A micro loan is defined under **Section 5** of the tier for to mean a loan of an amount not exceeding 1% of the core capital of the institution for an individual borrower or 5% of the core capital of the non-deposit taking micro fiancé total capital for the group borrower.
- Their scope of activities is set out under **Section 69** of the tier for act.
- They assist in the development of micro, small and medium sized business and expand access to micro loan resources to individuals for the promotion of their business, livelihoods and land holdings.

MICRO FINANCE DEPOSIT TAKING INSTITUTIONS

Section 2 of the Microfinance Deposit-Taking Institutions Act (MDI) defines a micro finance business to mean the business carried on a principal business of acceptance of deposits, employing such deposits wholly or partly by lending or extending credit for the account and such other activities as may be prescribed by the C.B.

Only a company in possession of valid license can carry on microfinance business. **Section 7** of Microfinance Deposit-Taking Institutions Act and must use Microfinance Deposit-Taking Institutions Act after its name **Section 5 (2)**

OBJECTION MY LORD

Minimum paid –up capital is UGX 500,000,000. **Section 15** of Microfinance Deposit-Taking Institutions Act and **Regulation 6 of Microfinance Deposit-Taking Institutions Act** (Capital adequacy) Regulations

No person or group of related persons can hold more than 30% of the shares of an institution. **Section 21 (1) of Microfinance Deposit-Taking Institutions Act**

Operations directed by a board consisting of at least 5 directors, headed by a chairperson who is a non-executive director of the institution. **Section 22 (1) of the Microfinance Deposit-Taking Institutions Act**.

There must be approved by the C.B which shall ensure that they are fit and proper person in line with 2nd schedule. Section 22 (2) of Microfinance Deposit-Taking Institutions Act

JOHN KIZITO V BOU, HCMA NO.244 OF 2016

Money lending business

- Law applicable is the tier four **(Section 2(1)(b)**
- Money lender is a company licensed under **Section 79, S.5**
- Money lender must be a company and not carrying on business of banking or insurance; a society registered under the Cooperative's society Act. **Section 78**

Some cases and their influence on Corporate Governance in the world.

- Enron case
- Lehman brothers
- Crane bank

Board of directors

- Company secretary
- CEOS
- Role of board chairman
- Payment of directors

CEO, Company secretary and auditors.

- Roles of each

Company meetings

- Statutory meetings
- AGMs

- EGMs
- Board meetings
- Notices required/protect rights of minorities.

Analyze the rational, relevancy on Corporate Governance

- Finance Institutions Act
- Company Act
- Anti-corruption Act

OBJECTION MY LORD

Appendix D- Documents for Bankruptcy.

"THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

BANKRUPTCY CAUSE NO. 1 OF 2006

RE: MARSHAL OTTO AND

RE: BANKRUPTCY ACT CAP 71

BANKRUPTCY NOTICE

TAKE. NOTICE that within 7 after service of this notice on you; excluding the day of such service, you must pay to JEJE NONO or his advocate MS SUI GENERIS and Co; 70.000.000 = claimed by it against you for spare supplies you, or you secure or compound for the said sum to their satisfaction or to the satisfaction of their advocates that you have a counter claim to set off or settle the demand .

Dated this …….. day of …….. 2020

YOU ARE SPECIALLY TO TAKE NOTE that the consequences of not complying with the requisitions of this notice are that you will have committed an act of bankruptcy which bankruptcy proceedings may be taken against you.

COUNSEL SUIGENERIS

Drawn and Filed by:

SUI GENERIS and co. Advocates

P.O. Box 0000. KAMPALA

BANKRUPTCY PETITION

ISAAC CHRISTOPHER LUBOGO

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

BANKRUPTCY CAUSE NO. 1 OF 2006

IN THE MATTER OF THE BANKRUPTCY ACT CAP 67

JEJE NONO …… PETITIONER/CREDITOR

MARSHALL OTTO …… RESPONDENT/ DEBTOR

PETITION

The humble petition of Jeje Nono Ltd of P.O.BOX 444, Kampala showed as follows: -

I. That your petitioner is a male adult and Ugandan of sound mind.

2. That the respondent an adult Ugandan of sound mind with a place of domicile at Buziga, Kampala.

3. That the respondent is indebted to the petitioner to the tune of 70 million which is above the statutory ceiling of 1,000 shillings.

5. That your petitioner executed the decree against the respondent by seizure of his property vide HCCS 244/2005, in an earlier agreement in which judgment and decree was in favor of your humble petitioner on the 8th of September 2006.

6. That your petitioner duly served the respondent with a bankruptcy notice which to this day, he has failed to comply with.

8. That the Respondent has committed acts of bankruptcy under paras 5 and 6 (above).

9. That this petition is supported by an affidavit by your humble petitioner.

OBJECTION MY LORD

9. That in the circumstances, your petitioner submits that the affairs of the respondent are in a hopeless financial situation and it is just and equitable that the respondent be adjudged bankrupt.

WHEREFORE the petitioner humbly prays.

(iv) That a receiving order be made against the Respondent

(v) That costs of this petition be met by the respondent.

(vi) That any other such order be made by this honourable court as it deems be just.

Dated this ……. day of ……. 20 ……

……..

PETITIONER/ COUNSEL FOR PETITIONER

Filed in the High Court of Uganda this ……. Day of …….. 20 ……

Note: It is intended to serve this petition on **MARSHALL OTTO**

……

ISAAC CHRISTOPHER LUBOGO

BANKRUPTCY PETITION

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

BANKRUPTCY CAUSE NO. 1 OF 2020

IN THE MATTER OF THE BANKRUPTCY ACT CAP 67

AFFIDAVIT VERIFYING PETITION

I, JEJE NONO do take oath and swear as follows;

I. That your petition is and adult Ugandan of sound mind and petitioner in this cause.

2. That the respondent an adult Ugandan of sound mind residing at Buziga, Kampala.

3. That sometime in April 2010, I gave the respondent spares parts to the tune of 70 million, which money was to be payable within six months from the date of issue. (see agreement attached and marked A), and as a result, the respondent is indebted to the petitioner to the tune of 70 million

4. That the Respondent has failed to pay the sums due despite numerous demands to do so (See demand letter marked B - F)

5. That the Respondent's conduct prompted your petitioner to institute summary proceeding against the said respondent in an earlier agreement vide HCCS 244/2005, in which judgment and decree was in favour of your humble petitioner.

6. That your petitioner executed the decree against the petitioner by seizure of his property.

7. That your petitioner duly served the respondent with a bankruptcy notice which to this day, he has failed to comply with.

8. That the Respondent has committed acts of bankruptcy under paras 6 and 7 (above).

9. That in the circumstances, your petitioner submits that the affairs of the respondent are in a hopeless financial situation and it is just and equitable that the respondent be adjudged bankrupt.

10. That whatever is stated herein is true to the best of my knowledge and belief.

……

DEPONENT

BEFORE ME: ……..

A COMMISSIONER FOR OATHS

Drawn and Filed by:

SUI GENERIS and co. Advocates

P.O. Box 0000. KAMPALA

ISAAC CHRISTOPHER LUBOGO

BANKRUPTCY PETITION

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

BANKRUPTCY CAUSE NO. 1 OF 2020

IN THE MATTER OF THE BANKRUPTCY ACT CAP 67

SUMMARY OF EVIDENCE

The petitioner will adduce evidence to show that the Respondent has committed acts of bankruptcy and as a result, a receiving order should be made him.

LIST OF DOCUMENTS

Agreements

Demand Notices

Bankruptcy Notice

Others with leave of court

LIST OF WITNESSES

Mr. JejeNono

Others with leave of Court

LIST OF AUTHORITIES

The Judicature Act Cap 13.

The Bankruptcy Act Cap 67

The Bankruptcy Rules (UK) 1915

Case law

Common law and doctrines of equity.

Others with leave of court

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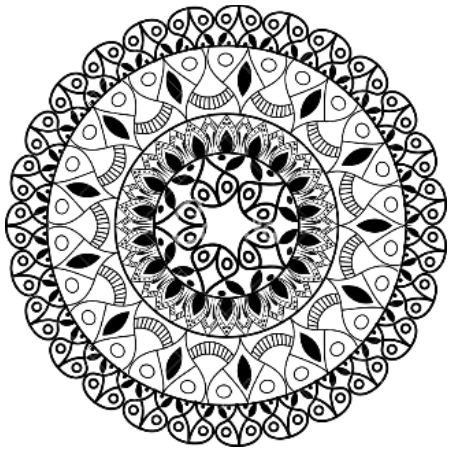


SALE OF GOODS AND SUPPLY OF SERVICES:

(A) SALE OF GOODS:

The law applicable to the area of the study includes the following:

Sale of Goods and supply of Services Act 2017

The Contract Act 2010

The Civil Procedure Act 71

The Civil Procedure Rules SI 71-1

Case law

Common law and Doctrines of Equity

THE CHECKLIST FOR SALE OF GOODS AND SUPPLY OF SERVICES ACT

Include the following issue for resolution

Whether there is a contract and if so; a sale of goods contract?

What are the formalities for formation of a sale of goods contract?

What are the terms and conditions in the facts given?

Whether there is passing of property and risk?

What is the effect of transfer of title by a non- owner?

What are the rights and obligations of the parties?

Whether there is breach of the contract of sale of goods?

What are the remedies available the parties?

What is the forum, procedure and documents?

DOCUMENTS

A plaint or a specially endorsed plaint for summary procedure;

A written statement of defense

DISTINCTION BETWEEN SALE OF GOODS CONTRACTS AND OTHER CONTRACTS

A contract for sale of goods defined in Section 2(1) of the Sale of goods and supply of services Act as a contract by which the seller transfers/agrees to transfer property in goods to use buyer for a monetary consideration called the price.

Other contracts include contract for supply of goods whereby goods are supplied under a contract but consideration is not monetary so the supplier transfers possession/ownership of goods to another person for a consideration which may not include money. Thus, contracts for barter; hire of goods, hire purchase where title doesn't pass but possession; there are not contracts for sale of goods.

Thus, in **ALDERIDGE V JOHNSON**[90]court held that where 32 Bullocks were to be transferred by Aldridge to knights and a hundred quarters of Barley and the difference in cash was regarded as a contract of Barter.

If the object of the contract is transfer for the price, then it's a contract of sale but if the object is performance of work, then it's a contract for work or materials. The rationale followed is enunciated in **Lockett Vs Charles**[91]by Blackburn J who stated that if a contract results into sale of a chattel, then a party can't sue for work and Labor but if the result of the contract is that the party has done his work which ends in nothing; that can't sue for goods sold and delivered.

[90]***(1875) F7, E & B 885***
[91].[1938] 4 All ER 170-[CRA].

OBJECTION MY LORD

FORMALITIES FOR FORMING A SALE OF GOODS CONTRACT

Section 4(1) of the Sale of Goods and supply of services Act, argues that the contract may be in writing or by word of mouth or partly by word of mouth or in writing or can be implied by both parties' conduct.

Section 5(1) affirms that a contract for the sale of goods of 200 shillings or more shall not be enforceable unless: -

(1) Buyer accepts part of goods so sold and receipt of them or

(2) Gives something to bind the contract or to part payment or

(3) Contract is in writing; made and signed by the party to be charged

Acceptance of good is deemed to mean in Section 5(3) that the buyer does something/an act in relation to the goods which recognizes a pre-existing contract of sale whether there is acceptance of performance of the contract or not.

TERMS OF THE CONTRACT

IMPLIED TERMS UNDER A CONTRACT FOR SALE OF GOODS AND SUPPLY OF SERVICES ACT (CONDITIONS/WARRANTY)

Terms include conditions and warranties; condition goes to the root of the contract; breach of which leads to termination of the contract.

Warranties are minor terms of the contract which don't get to the root of the contract. Breach of these doesn't lead to termination of the contract.

Section 13 of the sale of Good and Supply of Services Act, argues that there is

(1) An implied condition that seller has to sell goods

- In case an agreement to sell; he will have a right to sell the goods at the time the property passes.

(2) An implied warranty that buyer shall enjoy quiet possession of the goods.

(3) An implied warranty that goods free from any charge or encumbrance in favor of any third party; not declared or known to buyer before or at the time of when the contract is made.

The case of **BUTTERWORTHS VS KINGSWAY MOTORS (1954) 1 WLR 1286** establishes a few rules as hereunder;

- A buyer is entitled to repudiate a contract at a certain date and issue a written statement a cause of action.
- Defective title can be corrected if the buyer has not taken any step.
- A seller who buys a tithe in good faith from an earlier buyer who does not have title at the time is entitled to damages.

Court noted in **ALI KASSAM VIRANI VS U.A.C**[92]affirms that where a buyer is involved in a certain business; and the price is too low but however takes it; then this means that court will enforce knowledge on him.

In reference to **MICROBEADS VS VINEHAS (1975) 1 ALLER 529**; court held that the seller must have a right to sell the goods at the time of the sale and the seller must warrant quiet possession.

It must be noted further that section 14 of the Sale of Goods and Supply of Services Act gives an implied condition that goods do correspond with the description and if the sale is by sample; the sample should correspond with the description. This is edified by **CHRISTOPHER HILL LIMITED VS ASHINGTON PIGGERIES (1972) AC 441,** where court held that the buyer can fairly and unreasonably refuse to accept the physical goods; if they don't correspond with the part of what was said about them in the contract because this makes them goods of a different kind from those that he's agreed to buy. Court addressed two major issues thus:

- Quality of goods as implied by description.
- Extent to which goods are identified.

(a) Purpose of goods given to seller; relying on seller's skill for judgment and the description is in course of seller's business.

Court held **in INGRAM VS EMMA (1955)2 OB 366**; In the words of Lord Denning who stated that for this condition to anise, the customer/buyer must make known to the contractor/seller; expressly or by implication the particular purpose for which the materials are required so as to show that he relies on the contractor's skill or judgment. This term is dependent on proper disclosure for the customer of any relevant peculiarities known to the customer.

(b) Goods bought by description from a seller who deals in such goods; such goods should be of merchantable quality.

Lord Pearce stated in the **HARDWICK GRAIN FARM Case** that the question to ask is whether or not the goods were reasonably fir for the specific purpose. A particular purpose meaning a given purpose known to the parties.

(c) **Implied condition/warranty as to qualify/fitness** may be annexed by the usage of trade.

[92]**(1956) EA 178**

OBJECTION MY LORD

Section 16 of the Sale of Goods and Supply of Services Act talks of sale by sample. This is only endorsed where there is a term in the contract; express or implied so that effects.

Section 16(2) affirms that a contract is a sale by sample where there is:

- An implied condition that the bulk shall correspond with the sample in quality.

- An implied condition that the buyer shall have reasonable opportunity of comparing the bulk with the sample.

- An implied condition that goods shall be free from any defect rendering it unmarketable which would not be apparent on reasonable examination of sample.

In **CUDAHY PARKING CO. VS NAZINEN FIELD 3 F2D657 1924,** Court held that before there is a sale by sample it must be understood by both parties the goods exhibited constitute the standard of goods not exhibited and that the delivery will correspond to the standard.

Secondly; the seller selects the sample because he knows the condition and qualify of his own property.

SALE OF GOODS AND SUPPLY OF SERVICES (SGSSA).

CONTRACT OF SALE AND AGREEMENT TO SELL

Section 2(1) of Sale of Goods and Supply of Services Act (SGSSA) defines a contract of sale of goods as a contract by which the seller transfers or agrees to transfer the property in the goods to the buyer for a money consideration called price.

The contract of sale of goods is thus either a sale or an agreement to sell.

According to **Section 2 (4) of the Sale of Goods and Supply of Services Act**, where the property on the goods is transferred from the seller to the buyer, the contract is a sale.

Pursuant to **Section 2(5) of Sale of Goods and Supply of Services Act**, where the transfer of the property in the goods is to take place at a future time or subject to conditions to be fulfilled after the making of the contract, the contract is an agreement to sell.

Where an agreement to sell is breached, the sellers only remedy is an action for damages while in a sale, the seller can sue for the contract price and damages for non-acceptance of goods.

Where the agreement to sell is breached by the seller, the buyers only have personal remedy against the seller of specific performance where the goods are ascertained and specific.

Distinctive features of a sale and agreement to sell.

• Sale 1. Property passes 2. In the case of breach, the seller can sue for price of damages for non-acceptance while the buyer can sue for damages 3. Seller can't resolve and where goods are sold the buyer can bring a claim against the seller and purchaser to recover the goods unless the purchaser is bonafide purchaser 4. Risk passes to buyer.	• Agreement to sell • Property does not pass. It passes in future. • The remedy available to the buyer for breach is to sue for specific performance where the goods are ascertainable. • • The seller can resale the goods to a 3rd party and the buyer won't have a claim against a 3rd party. • • • Seller bears the risk. • • • •

MEANING OF GOODS

Section 1 of Sale of Goods and Supply of Services Act defines goods to include all things and personal chattels, including specially manufactured goods, which are movable at the time of identification to the contract of sale other than the money representing the price, investment securities and all things in action.

Goods also include emblements, growing crops, unborn young of animals and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

Goods further include computer software and individual share in goods held in common.

Goods may be classified as

a) Existing goods

b) Future goods

c) Ascertained goods

d) Unascertained goods.

EXISTING GOODS.

Under **Section 6 (1) of Sale of Goods and Supply of Services Act**, these are owned or possessed by the seller at the time of execution of the contract.

OBJECTION MY LORD

FUTURE GOODS

Section 1 defines these as goods to be manufactured or acquired by the seller after the making of the contract.

ASCERTAINED GOODS

Section 1 defines them as goods which have become identified subsequent to the formation of the contract.

UNASCERTAINED GOODS

Section 1 defines them as goods not identified and agreed upon at the time the contract is made.

FORMALITIES OF A CONTRACT OF SALE

According to **Section 5(1) of Sale of Goods and Supply of Services Act**, a contract of sale may be made in writing or by word of mouth or party in writing and party by word of mouth or in form of data message or maybe implied from the conduct of the parties.

CAPACITY TO CONTRACT

Under **Section 4 (1**), a person has capacity to enter a contract of sale where that person is 18 years and above, of sound mind and not disqualified from contracting by any law e.g., if the person was adjudged bankrupt.

However, where necessaries are the subject matter of the contract of sale, a minor or person who by reason of mental incapacity or drunkenness is incompetent to enter the contract will be liable to pay a reasonable price for the necessaries. **Section 4 (3)** of Sale of Goods and Supply of Services Act.

Necessaries are defined by **Section 4 (4)** of Sale of Goods and Supply of Services Act as goods suitable to the condition in life of a person under 18 years or other person to his or her actual requirements at the time of the sale and delivery.

SUBJECT MATTER OF THE CONTRACT.

Under **Section 6 (1)**, the contract of sale of goods may relate to existing or future goods. It may also be made were the acquisition of the goods by the seller depends upon a contingency which may or may not happen. **Section 6 (2) of Sale of Goods Supply of Services Act**.

Where the goods have perished at the time of execution of the contact without knowledge of the seller that the goods have actually perished, the contract executed is void. **Section 7 of Sale of Goods and Supply of Services Act.**

In the event of the goods perishing after an agreement of sell without any fault on the part of the seller or buyer and the risk had not passed to the buyer, the agreement is void. **Section 89 Sale of Goods and Supply of Services Act**.

PRICE.

Pursuant to **Section 9(1)**, the price in a contract of sale maybe fixed by the contract or maybe left to be determined in manner agreed by the contract or maybe determined by course of dealing between the parties.

Where the price is not determined, the buyer will pay a reasonable price**. Section 9 (2)** and reasonable price is a question of fact dependent on the circumstances of each case and may include a consideration of the prevailing market price.

RIGHTS AND DUTIES OF THE BUYER AND SELLER.

RIGHTS OF THE SELLER.

An unpaid seller who is defined under **Section 50(1)** as a seller whose contract price has not been paid in whole or tendered or when a bill of exchange is received as conditional payment and the condition on which it was received has not been fulfilled by reason of the dishonest of the instrument or otherwise.

The unpaid seller has the following rights pursuant to **Section 51 of Sale of Goods and Supply Services Act**:

1) A lien on the goods or right to retain them for the price while he or she is in possession of the goods

2) Stopping the goods in transit after he/she has parted with the possession of the goods and the buyer is insolvent.

3) A right of re-sale

4) Action for the price pursuant to Section 60 of Sale of Goods and Supply of Services Act.

OBJECTION MY LORD

LIEN

Under **Section 52(1) of Sale of Goods and Supply of Services Act**, an unpaid seller is entitled to retain possession of goods until payment or tender of the price where the goods were sold without any stipulation as to credit, goods were sold on credit but the term of credit has expired or the buyer has become insolvent.

Where the seller has made part delivery of the goods, the seller may exercise his or her right of lien on the remainder unless the part delivery was in such circumstances as to show an agreement by the seller of goods to waive the lien or right of retention. **Section 53 of the Sale of Goods and Supply of Services Act**.

The seller's right to a lien will terminate when they deliver the goods to a carrier or other Bailee for purposes of transmission to the buyer without reserving the right of disposal of the goods, when the buyer or his or her agent lawfully obtains possession of the goods or by waiver of the lien or right of retention. **Section 53 Sale of Goods and Supply Services Act**.

The seller's right to a lien will terminate when they deliver the goods to a carrier or other Bailee for purposes of transmission to the buyer without reserving the right of disposal of the goods, when the buyer or his or her agent lawfully obtains possession of the goods or by waiver of the lien or right of retention. **Section 52 (2) of Sale of Goods and Supply of Services Act**.

STOPPAGE IN TRANSIT.

Section 55 of Sale of Goods and Supply of Services Act grants a right to an unpaid seller who has parted with the possession of the goods has a right of stopping them in transit and resuming possession of the goods where the buyer is adjudged insolvent as long as the goods are in the course of transit and may retain them until payment or tender of the price.

The goods are said to be in transit from the time when they are delivered to a carrier by land, air or water or other Bailee for purposes of transmission to the buyer until when the buyer or their agent for purposes of taking delivery of them from that carrier or other bailees. **Section 56 of Sale of Goods and Supply of Services Act**.

Transit ends when the buyer or their agent obtains delivery of the goods before their arrival at the appointed destination.

Transit is not deemed to have ended if the buyer rejects the goods of the Bailee or carrier continues in possession of them even if the seller has refused to receive them back. **Section 56 (4) of Sale of Goods and Supply of Services Act.**

The seller may exercise their right of stoppage by either taking actual possession of the goods or by giving notice of his or her claim to the carrier or other bailee in whose possession the goods are. **Section 57 (1) of Sale of Goods and Supply of Services Act**.

WHERE THE BUYER RESALES THE GOODS.

The unpaid seller's right of lien or stoppage in transit is not affected by any sale or other disposition of the goods which the buyer has made unless the seller assented to it. **Section 58 (1) of Sale of Goods and Supply of Services Act**.

The right is only defeated where a document of title to goods has been lawfully transferred to any person as a buyer or owner and that person by way of sale transfers the document to a person who takes the document in good faith and for valuable consideration. **Section 58 (2) Sale of Goods and Supply of Services Act.**

RIGHT OF RESELL.

The seller passes on good title to a buyer when they exercise their right to re-sell. The new buyer acquires a good title to the goods as against the original buyer. **Section 59(2) of Sale of Goods and Supply of Services Act.**

ACTION FOR PRICE

The unpaid seller has a right to bring an action against the buyer for the price of the goods together with any incidental damages. **Section 60(1) of Sale of Goods and Supply of Services Act**.

RIGHTS OF THE BUYER.

1. Right to an action for non-delivery and recover damages. **Section 62 of Sale of Goods and Supply of Services Act**.

2. Right to specific performance

Where it's an action for breach of contract to deliver specific or ascertained goods court may order that the contract be specifically performed. **Section 63 (1) of Sale of Goods and Supply of Services Act**.

3. Right to reject goods and rescind the contract.

The rejection is however pursuant to the provisions of the SGSSA. **Section 48 (2) of Sale of Goods and Supply of Services Act**. requires that the buyer only rescind the contract if it is impossible for the seller to repair or replace the goods in comparison to other remedies available or it is disproportionate in comparison to an appropriate reduction in the purchase price or the buyer has required the seller to repair or replace the goods but the seller neglects or refuses to do so within a reasonable time and without significant inconvenience to the buyer.

4. Right of examining the goods.

Under **Section 42 (1) of the Sale of Goods and Supply of Services Act**., the buyer has a right of examining the goods which he or she has not previously examined and will not be taken to have received the goods until he/she has had a reasonable opportunity of examining the goods in order to ascertain whether they are in conformity with the contract.

DUTIES OF THE SELLER.

1. Transfer title in the goods free of incumbrancers.

Under Section 13(1) of Sale of Goods and Supply of Services Act., in a contract of sale, unless otherwise, there is an implied term that the seller has the right to sell the goods and in case of an agreement to sell that he or she will have such a right at the time when the property is to pass.

2. Deliver the goods.

Under **Section 34 of Sale of Goods and Supply of Services Act**., it's the duty of the seller to deliver the goods.

Delivery of the goods is defined in **Section 1 of Sale of Goods and Supply of Services Act**. as the voluntary transfer of possession from one person to another and includes an appropriation of goods to the contract that results in property in the goods being transferred to the buyer.

Under **Section 35 (1) of the Sale of Goods and Supply of Services Act**., delivery of goods and payment of the price are concurrent conditions. The seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

The various methods of delivery of goods include:

a) Physical transfer of the goods

b) Transfer of the means of control e.g., the keys to the store where the goods are

c) Delivery of documents of title

d) Constructive delivery that is where the person who bought the goods already had them but he did not have them as the owner of the goods but after the contract of sale he becomes the owner of the goods.

PLACE OF DELIVERY.

Under **Section 36 (1) of Sale of Goods and Supply of Services Act**. The question of the place of delivery is dependent on the contract of the parties. The term relating to place of delivery maybe implied or express.

Where there is no implied or express term as to the place of delivery, the place of delivery is the sellers place of business if the seller has one and if not the seller's residence **Section 36(2) of Sale of Goods and Supply of Services Act**.

Except where the contract is for sale of specific goods and this is known to the parties that the goods are in some other place, that place is the place of delivery. **Section 36 (3) of Sale of Goods and Supply of Services Act.**

TIME OF DELIVERY.

Section 36(4) of Sale of Goods and Supply of Services Act., if under the contract of sale, the seller is bound to send the goods to the buyer, but no time for sending them is stipulated then the seller is bound to send the goods within a reasonable time.

The delivery ought to be made at reasonable hour or it's considered in effectual and reasonable hour is question of fact. **Section 36 (6) of Sale of Goods and Supply of Services Act**.

Delivery of wrong quantity or description.

1. If the seller delivers to the buyer a quantity of goods less than the seller contracted to sell, the buyer may reject them but if they accept the goods so delivered then the buyer must pay for the goods at the contract rate. **Section 37 (1) of Sale of Goods and Supply of Services Act**.

2. Where the quantity of the goods is larger than contracted, the buyer may accept the goods including the contract and reject the rest or reject the whole but if he/she accepts the whole of the goods delivered, the buyer must pay for them at the contract rate. **Section 37 (2) of Sale of Goods and Supply of Services Act**.

3. Where the seller delivers to the buyer goods mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with contract and reject the rest or the buyer may reject the whole. **Section 37 (3) of Sale of Goods and Supply of Services Act**.

However, a buyer who is not a consumer may not reject all goods where the seller delivers a lesser or larger quantity unless if the shortfall or excess is so minor that it would be unreasonable for the buyer to do so. **Section 37 (4) (a) and (b) of Sale of Goods and Supply of Services Act**.

The burden is on the seller to show that a shortfall or excess is so minor. **Section 37(5) of Sale of Goods and Supply of Services Act**.

Section 1 of Sale of Goods and Supply of Services Act Defines a consumer as a person who purchases goods or services for final use or ownership rather than for resale or use in production.

The above is subject to any usage of trade, special agreement or course of dealing between the parties. **Section 37 (7) of Sale of Goods and Supply of Services Act**.

DELIVERY BY INSTALLMENT.

A buyer is not bound to accept delivery of goods by installments unless otherwise agreed. Section 39 (1) Sale of Goods and Supply of Services Act. **IN BEHREND AND CO LTD V PRODUCE BROKERS CO LTD (1920)3 KB 530**, in this case the sellers by two contracts of sale and in the events which happened, bound themselves to buyers to deliver in London on the steamship port

Inglis, to the buyer's craft alongside, two separate parcels of cotton seed, one of 176 tons and the other 400 tons. The buyers on their part had to pay for these parcels against shipping documents and to send craft to receive the goods. The buyers fulfilled both these obligations and received from the port Inglis some 15 tons of one parcel and 22 tons of the other.

When these had been delivered it was discovered that the rest of the seed was lying under the cargo for Hull, and the port Inglis stopped delivery and left for that port, promising to return and deliver the rest of the seed. She returned in about a fortnight's time and the seed was tendered to the buyers, but they had meantime informed the sellers that they regarded the departure of the port Inglis with the remainder of their seed on board as a failure to deliver and a breach of contract. They kept so much of the seed as had been delivered to them and demanded repayment of so much of the contract price as represented the seed undelivered. It was held in favor of the buyers.

In instances of delivery by installments, the facts giving rise to a breach of the contract entitling the aggrieved party to repudiation or merely compensation in respect of the installments, it is as the parties agreed. **Section 39 (2) Sale of Goods and Supply of Services Act**.

DELIVERY TO A CARRIER.

If the contract requires the seller or authorizes him or her to send the goods to the buyer, delivery of the goods to a carrier whether named by the buyer or not for purposes of transmission to the buyer, the act of delivery to the carrier is prima facie delivery to the buyer. **Section 40 (1) of Sale of Goods and Supply of Services Act**.

The seller must enter into a contract with the carrier on behalf of the buyer that is reasonable giving due regard to the nature of the goods and the other circumstances of the case. **Section 40 (2) of Sale of Goods and Supply of Services Act**.

If the seller omits to enter into a reasonable contract of carriage and the goods get lost or destroyed on the way, the buyer has a right to sue for damages or even reject the goods. **Section 40 (3) of Sale of Goods and Supply of Services Act**.

Where there is need for insurance of goods involving sea transit, the seller must give notice to the buyer so as to enable the buyer to insure them during their sea transit. **Section 40 (4) of Sale of Goods and Supply of Services Act**. Failure to give notice to the buyer it's deemed the seller bears the risk during the sea transit. **Section 40(5) of Sale of Goods and Supply of Services Act**.

DELIVERY TO AGENTS.

At common law, if the seller has the duty to deliver to the buyers' premises under the contract, if the seller finds a person at the premises who appears to be authorized to receive the goods, it's enough that the goods are given to that person found at the premises.

3. DUTY TO SUPPLY THE GOODS AT THE RIGHT TIME.

Section 11 (1) of the Sale of Goods and Supply of Services Act. is to the effect that unless a contrary intention appears from the terms of the contract, stipulations as time of payment are not of essence. It states further in **Section 11 (2) of the Sale of Goods and Supply of Services Act**. That any other stipulations as to time are of not essence unless the terms of the contract state so.

Therefore, where the contract stipulates the time of delivery of the goods, the seller has a duty to deliver the goods at the stipulated time. Failure to deliver within the stipulated times entitles the buyer to repudiate the contract.

IN BOWES V SHAND (1877)2 APP CAS 455.

Where the time of delivery is stipulated and is extended either by implication or express consent of the parties, the buyer is estopped from insisting on the earlier time stipulation. In order to make time of the essence again, he/she must notify the seller that the time will be of the essence. The notice must be reasonable.

In **CHARLES RICKARDS LTD V OPPENHAIM, (1950)1KB 616**, the plaintiff agreed to supply a Rolls-Royce chassis for the defendant to be ready at the latest on 20 march 1948. It was not ready on this day but the defendant continued to press for delivery, thereby impliedly waiting the conditions as the delivery date. By 29 June, the defendant had lost patience and wrote to the plaintiffs informing them that he would not accept delivery after 25th July. In fact, the chassis was not ready until 18th October and the defendant refused to accept it. C.A held that the defendant was entitled to reject the chassis as he had given the plaintiffs notice that delivery must be made by a certain date.

DUTY TO SUPPLY GOODS IN THE RIGHT QUANTITY.

- Refer to the notes under delivery of wrong quantity and description
- Refer to notes under deliver in installments.

DUTY TO SUPPLY GOODS OF THE RIGHT QUALITY.

SUPPLY OF SERVICES.

Section 1 of the sale of goods and supply of services Act defines a service to mean any service or facility provided for gain or reward or otherwise than free of charge.

Contract for supply of services.

Section 3 (1) provides that a contract for the supply of services means a contract where a person agrees to carry out a service whether goods are transferred or are to be transferred or boiled or are to be boiled by way of hire, under the contract, regardless of the nature of the consideration for which the service is to be carried out but does not entail contracts of service or apprenticeship.

In **ROBINSON V GROVES (1935)1 KB 597**, the court of appeal held that a contract by an artist to paint a client's portrait was not contract for the sale of goods, since the main element in the contract was the skill of the artist. The defendant had commissioned the claimant (artist) to paint the portrait of a lady.

The court stated that the substance of a contract of supply and services is the skill and Labor. Certain contracts of supply of a service may entail provision of goods. however, that does not make it a contract of sale of goods because the goods are merely incidental to the service.

Pre-requisites for the existence of a contract and supply of services.

1. Provision of a service. **Section 3(1) and Section 6(4) of the Sale of Goods and Supply of Services Act**.
2. Time. **Section 11(3) of the Sale of Goods and Supply of Services Act**.
3. Quality of materials used. **Section 16 of the Sale of Goods and Supply of Services Act**.
4. Skill and reasonable care. **Section 18 of the Sale of Goods and Supply of Services Act**.
5. Capacity to contract.

DUTIES OF BUYER.

1. To pay for the service. **Section 34 (2) of the Sale of Goods and Supply of Services Act**.

DUTIES OF SUPPLIER

1. To provide a service in accordance with the terms. **Section 34 (2) of the Sale of Goods and Supply of Services Act**.

NEMO DAT RULE.

It is to the effect that nobody can pass better title than they have in the goods. It is codified in **Section 29 (1) of the Sale of Goods and Supply of Services Act**.

The act provides for exceptions to the rule under **Section 29 (2) of the Sale of Goods and Supply of Services Act**. And these are:

1. Sale by order of court under **Section 29(2) (b) Sale of Goods and Supply of Services Act**.
2. Sale under the power of statute or common law under **Section 29(2)(b) Sale of Goods and Supply of Services Act**.

a) ESTOPPEL.

Where the owner of the goods conducts themselves in a manner as though the seller had the power to sell. In **HENDERSON AND CO. V WILLIAMS (1895)1QB 521,** the owner of goods lying at a warehouse was induced by the fraud of F to instruct the warehouse man to transfer the goods to the order of F, and the goods were accordingly placed at F's disposal. F then sold the goods to an innocent purchaser, who before paying the price obtained a statement from the warehouseman that he held the goods at the purchaser's order. On the discovery of F's fraud, the warehouseman refused to deliver the goods to the purchaser. In an auction by purchaser against the warehouseman. The court held that the warehouseman, having attained to the purchaser, was estopped from impeaching his title, that the refusal to deliver was a conversion and that the measure of damages was the market value of the goods at the date of the refusal.

b) SALE UNDER A MARKET OVERT.

The exception is applicable where goods are openly sold in a shop or market in the ordinary course of business of such a shop or market. The buyer acquires a good title provided they buy them in good faith and without notice of any defect or want of title on the part of the seller.

The purpose of the exception is to protect commercial transactions. It's designed to protect the integrity of the market.

In **BISHOPSGATE MOTOR FINANCE CORPN LTD V TRANSPORT BRAKES LTD (1949)1 ALL ER 37** Lord Denning held that in the development of our laws, two principals have striven for mastery. The first is for the protection of property, no one can give a better title than he himself possesses. The second is the protection of commercial transactions, the person who takes in good faith and for valued without notice should get a good title.''

In this case, in order to obtain good title to the vehicle which had been sold, the buyer had to prove that the vehicle been sold in market overt. Because the vehicle had been sold by private treaty the issue was whether it had been sold in a market overt. The court of appeal found that a vehicle can be sold by public auction or by private treaty in a market overt and in the circumstances, it had been sold in market overt and the buyer acquired good title.

SALE UNDER A VOIDABLE TITLE.

Under **Section 30 of the Act**, when the seller of goods has a voidable title to the goods, but their title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, if he or she buys them in good faith and without notice.

SECOND SALE WHERE SELLER RETAINED POSSESSION OF GOODS/TITLE TO THE GOODS.

Under **Section 32 (1) of the Act**, if the seller who has sold goods continues or is in possession of the goods or of the documents of title to the goods, sells those goods again to another person acting in

good faith and without notice of the previous sale, the person acquires good title and it is deemed that the seller had been expressly authorized by the owner of the goods to sell.

SALE BY A BUYER IN POSSESSION OF GOODS.

Under **Section 32(2) of the Sale of Goods and Supply of Services Act**. a buyer or a person who has agreed to buy obtains with the consent of the seller, possession of goods or the documents of title to the goods; they pass on good title if they transfer those goods to another person.

EFFECT OF A WARRANT OF ATTACHMENT.

Pursuant to **Section 33(1) of the Sale of Goods and Supply of Services Act**., a warrant of attachment or other warrant of attachment of execution against the goods binds the property in the goods from the time then the warrant is delivered to the bailiff to be executed.

Under **Section 33(3) of the Sale of Goods and Supply of Services Act**., a buyer obtains good title over goods subject to attachment in a warrant, if they acquired the goods in good faith and for valuable consideration and had no notice of the warrant of attachment at the time of purchase.

EFFECT OF THEFT OR FRAUD ON TITLE OF OWNER OF CONVERTED GOODS.

Under **Section 31 (1) of the Sale of Goods and Supply of Services Act**., upon conviction of the person who stole the goods, the title in them reverts to the person from whom the goods were stolen from notwithstanding any intermediate dealing.

However, under **Section 31(3) of the Sale of Goods and Supply of Services Act**., where the goods were obtained by fraud or other wrongful means not amounting to theft, the property in the goods does not revert in the person who was the owner of the goods by reason only of the conviction of the offender.

The person (original owner) who has lost possession of the goods pursuant to **Section 31 (2)**, by order of the trial court recover possession of the goods from any person being in possession of the goods.

PROPERTY AND RISK.

IN AN AGREEMENT TO SALE

Section 8 of the Sale of Goods and Supply of Services Act. postulates that where there is a contract for the sale of specific goods, and subsequently the goods, without any fault on the part of the buyer or seller, perish before risk passes to the buyer, the agreement is void.

PRESUMPTION OF ASSUMPTION OF RISK

Under **Section 27 (1)**, property passes with risk except if otherwise agreed

The buyer bears the risk whether delivery has been made or not. **Section 27 (2)**

Where delivery is delayed through the fault of either party, the goods are at the risk of the party at fault as regards any loss, which might not have occurred, but for that fault. **Section 27 (4)**.

RULES FOR ASCERTAINING INTENTION AS TO TIME WHEN PROPERTY PASSES.

These are laid under Section 26 of the Sale of Goods and Supply of Services Act.

MASTER SALES AND SERVICE AGREEMENT.

THE REPUBLIC OF UGANDA

MASTER SALES AND SERVICES AGREEMENT.

THIS FINAL SETTLMT AGREEMENT is made this .....day of 2020

BETWEEN

.....of..... (Hereinafter 'the seller/supplier'')

AND

.....of..... (Hereinafter 'the buyer'')

RECITALS:

OBJECTION MY LORD

WHEREAS:

NOWS THEREFORE THE PARTIES AGREE TO BE FOUND by the terms and conditions set out in the schedule hereto:

1. Particulars of the buyer
2. Definitions
3. Supply of goods or services
4. Specifications
5. Payment and consideration
6. Title and risk in the goods and services
7. Warranties
8. Termination
9. Force majeure
10. Waiver
11. Third parties
12. Dispute resolution
13. Choice of law and jurisdiction
14. Entire agreement: supersedes any prior agreement.

IN WITNESS WHEREOF THE PARTIES hereto have out their respective hands and seals the day and the year here in above written.

Seller: buyer:

In the presence of..... in the presence of.....

DIFFERENT MODES OF SALE OF GOODS.

a) By description (covered above)

b) By sample (covered) or

c) By trade name (Cf Section 14, 15(a) & (b of the Sale of Goods Act Cap 82.

PASSING OF PROPERTY AND RISK

Property is either in ascertained and unascertained goods property doesn't pass unless goods are ascertained. (Under **Section 17 of the Sale of Goods Act**).

Secondly property in ascertained goods passes when it's intended to pass (by the parties) as provided for in **section 18(1)**. Intention is derived from terms of the contract; conduct of the parties and circumstances of the case.

For specific goods there are five Rules (4 basically but the 4th has two alternatives) which are explained hereunder:

Rule 1:

Section 19 (a) where there is an unconditional contract for the sale of specific goods; in a deliverable state. Property passes to buyer when contract is made and its immaterial whether time of payment and delivery or both are postponed. This id fortified by the case of **DENNANT VS SKINNER &COLLOM (1948) 2 KB 164** where court held that though parties express an intention; it will have no effect if property has passed in accordance with Section 19 (an example of this is if property has passed by sale by auction).

The following ought to be noted:

- The contract should not be subject to any condition; subsequent or precedent.

- Specific goods are goods identifiable and agreed upon at time of making the contract of sale – Section (1) (a) as held in **Kursell v Timber Operators [1927] 1 KB 298.**

Rules 2 (under Section 19 (b)

Where there is a contract of sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until that thing is done and the has notice that such thing has been done. This was noted in **UNDERWOOD VS BURGH CASTLE BRICK [1922]1KB 343.**

Rule 3 (under Section 19 c)

In the section above; where there is a contract for sale of specific goods in a deliverable state but seller is bound to weigh measure test for do something with reference to goods for purpose of ascertaining the price, the property doesn't pass until the act/thing to be done is done and the buyer has notice of that. The words do some act or thing with reference to the goods for the purpose of ascertaining the Act (or price for this matter) must be read **ejusdem** with words but the seller is bound to weigh, measure or test.

Rule 4 (a) under section 19 d (ii)

When goods are delivered to the buyer on approval or on sale/return; property in goods passes when he signifies his or her approval or acceptance to the Seller or does any act adopting the transaction.

This is in line with **Section 35 of the Act** which states the buyer us deemed to have accepted the goods when he intimates to the seller that he has accepted them or upon delivery of goods to him; he has done an act which is inconsistent with the ownership of the seller inter alia.

This was followed in **KIRKHAM VS ATTENBOROUGH (1897) 1 QB 201** where court held that where a person obtains goods on sale/return or similar terms and then resells them or pledges them; this is an act of adopting the transaction. Thus, where there is a sale/return and the buyer is entitled to return the goods in a way which under ordinary circumstances and apart from any special terms is inconsistent with his right to return them; he loses the right to return them and the property passes to him.

Rule 4(b) Section 19 (d) ii)

When goods are delivered to the buyer on approval or on sale/return; property passes to the buyer if he does not signify his/her approval or acceptance to the seller but retains the goods without giving notice of rejection; then if a fine has been fixed for return; on the expiration of the fine and if no fine has been fixed on the expiry of a reasonable time. This was followed in **POOLE VS SMITH CAR SALES (BALHAM) LTD [1962] 2 ALL ER 482** where court held that a reasonable time is a question of fact and is inferred from the circumstances. It depends on the events of each case.

Below are the Rules for passing if property of unascertained goods. It must be noted that unascertained goods may fall under 3 categories.

(1) Goods manufactured/grown by seller.

(2) Goods forming part of a generic whole

(3) Goods forming part of a specific bulk.

General Rule in **RE WAITE (1927) 1 Ch. D 606** where court held that ascertained goods means goods identified in accordance with the agreement after the time a contract of sale is made, where goods are not appropriated; the legal property had not passed because these were future goods.

In a contract of sale of unascertained goods by description in a delivery state are unconditionally appropriated to the contract property passes thereupon to the buyer.

Unconditional appropriation is a way of passing of property under the Act thus goods are irrevocably attached to the contract and whether either party ascents that the property passes. It must be noted that delivery is the most common way unconditional appropriation.

Conditional appropriation is where the seller is given right to reason the goods on a condition.

TRANSFER OF TITLE BY NON-OWNER

Conversed in **Section 22;** where goods are sold by a person not owner, and who does not sell them under the authority or with the consent of the owner; the buyer acquires no better title to the goods than the seller had; unless the owner is precluded from denying the seller's authority to sell. In relation to (1) above court held in **ROWLAND VS DIVALL [1923] 2K. B 500** per **Atkin J** that there can be no sale of at all if goods to which the seller has no rights to sell (Nemo Dat Rule). This also works out when the sole purpose of the contract has failed and so when the seller has no title, then the sole purpose of the contract is removed.

The maxim "**Nemo det quod non habe**t", which means, "**no one can give what he has not got".**

The rationale of the rule is to protect the true owner of goods against anyone who buys his goods from a person who has sold without his authority or without having any right in them.

where the goods are sold by a person who is not the owner thereof and who does not sell either under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

Therefore, if a thief disposes of (sells) stolen property, the buyer acquires no title though he may have purchased the goods bonafide for value and the real owner of the goods is entitled to recover possession of the goods without paying anything to the buyer.

EXCEPTIONS TO THE RULE OF "NEMO DAT QUOD NON HABET"

There are the following exceptions to this rule. Under these exceptions, a valid title can be given by a person who is not the owner of the goods. The exceptions include;

I) AN UNAUTHORIZED SALE BY A MERCANTILE AGENT

A mercantile agent is an agent who in his customary course of business as such agent, has authority to sell goods or to buy goods or to raise money on the security of the goods. Thus as a rule, a mercantile agent having authority to sell goods conveys a good title to a buyer. Therefore, such agent can convey a good title to the buyer even though he sells goods without having any authority from the principal to do so, if the following conditions are fulfilled/satisfied; (in respect of the mercantile agent).

i) He should be in possession of the goods or documents of title to the goods in his capacity as

mercantile agent and with the consent of the owner.

ii) He should sell the goods while acting in his ordinary course of business

iii) The buyer should act in good faith without having any notice at the time of the contract that the agent has no authority to sell.

2. TRANSFER OF TITLE BY ESTOPPELS

Estoppel arises when one is precluded from denying the truth of anything that he has represented as a fact although it is not a fact. Thus, estoppel means that a person who by his conduct or words leads another to believe that a certain state of affairs existed, he would be estopped from denying later on that such a state of affairs did not exist. The essence of the rule of estoppel is that it will be unfair to allow a party to depart from a given state of affairs that he permitted another person to believe to be true.

Under sale of goods law, estoppel may arise in any of the following ways: -

-The owner standing by when the sale is effected, or

-The owner assisting in the sale, or

-The owner permits goods to go into the possession of another with the intent that the other party shall have such possession and title thereof.

-If he has otherwise acted or made representations so as to induce the buyer to alter his position to his prejudice. In **O'Connor V Clark**, M the owner of a wagon allowed one of his employees K, to have his name painted on it. M did so for the purpose of inducing the public to believe that the wagon belonged to K. C purchased the wagon from K in good faith. C acquired a good title as M was estopped from denying K's authority to sell.

3. SALE BY A JOINT OWNER

Where one of the several joint owners of goods has the sole possession of them by permission of the co-owners, the property in the goods is transferred to any person who buys them from such joint owner in good faith without notice of the fact that the seller has no authority to sell. Otherwise, the buyer would have obtained only the title as co-owner and become merely a co-owner with the other co-owners.

4. SALE BY SELLER IN POSSESSION AFTER SALE

Where a seller after having sold the goods to a buyer continues to be in possession of such goods or of the documents of title to them and again resells or pledges them either himself or through a mercantile agent, he will convey a good title to the buyer or the pledgee provided the buyer or the pledgee acts in good faith and without notice of the previous sale. For this exception to apply, it is

essential that the possession of the seller must be as seller and not as hirer or Bailee.

5. SALE BY BUYER IN POSSESSION AFTER "AGREEMENT TO BUY"

Where a buyer has agreed to buy the goods and has obtained possession of the same or the documents of title to them with the consent of the seller and he resells or pledges the goods, he will convey a good title to the buyer or the pledge provided the latter acts in good faith without notice of any other right of the original seller in respect of the goods.

Under this exception the person must have obtained possession of the goods under an agreement to sell. Where one has merely "an option to buy" e.g., in a hire purchase transaction, he can never pass a good title to a sub buyer.

6. SALE UNDER A VOIDABLE TITLE

When the seller of goods has a voidable title to such goods but his title has not been avoided at the time of the sale, the buyer acquires a good title provided he buys them in good faith and without notice of the seller's defect of title. In **PHILLIPS V BROOKS LTD. (1919**) A fraudulent person by the name of North entered the plaintiff shop and selected a diamond ring. North paid for the ring by cheque by falsely representing himself to be a well-known Lord, where upon, the plaintiff allowed him to take the ring. North pledged the ring with Brooks. The cheque was dishonored and the plaintiff sued the defendant for the recovery of the ring.

Held

Court held that there had been no mistake as to identify i.e., the plaintiff intended to deal with the person in the shop. The property in the goods had rightly passed to the purchaser.

7. SALE BY THE ORDER OF COURT

In a sale by order of a court of competent jurisdiction, or under any common law or statutory power of the sale, the buyer gets a good title.

8. SALE IN A MARKET OVERT

This is another very important exception under the Sale of Goods and Supply of Services Act. Where goods are sold in a market overt, a buyer acquires a good title to them provided he buys them in good faith and without notice of any defect. In this case the buyer can acquire a good title even though the seller has none at all.

The only exception is where the goods were stolen and the thief has been convicted or where the owner of the goods reported to the police immediately after the theft of the goods.

A market overt is an open public legally constituted market usually held at periodical intervals in some particular place for the sale of particular.

RIGHTS OF UN PAID SELLER

OBJECTION MY LORD

The un paid seller is defined as a seller of goods in relation or when the whole of the price has not been paid (tendered or when a bill of exchange or other negotiable instrument has been relieving as conditional payment and the condition on which it was received has not been fulfilled **(Section 38)**

RIGHTS OF UN PAID SELLER

1) Lien on the goods

2) Right to retain the goods for the prize while he's still in possession

3) In case of insolvency of the buyer; right of stopping goods in transit after the seller has parted with possession of the goods.

4) A right of resale

It must be noted that the unpaid seller's lien exists in the following cases: -

1) When goods have been sold without any stipulation as to credit

2) Where goods have been sold on credit; but the credit has expired

3) Buyer becomes insolvent

4) This right is exercisable whether he is in possession of goods as part or Bailee for the buyer.

TERMINATION OF THE RIGHT (LIEN)

1) Delivers goods to a carrier or other Bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods.

2) When the buyer/agent lawfully obtains possession of goods.

3) Waiver of the lien or right of retention

BREACH OF CONTRACT AND REMEDIES

Where one party doesn't perform his part of the contract. Depends on terms of the contract; if a term, doesn't lead to repudiation; if a condition, leads to repudiation of the contract.

IF THE BREACH IS BY BUYER

1) Seller can institute an action for price especially if buyer wrongfully reflects or refuses to pay for the goods according to terms of the contract **(Section 48).**

2) Seller can bring an action for non-acceptance if buyer refuses to accept the goods and pay for them. Sues for damages for non-acceptance.

IF THE BREACH IS BY SELLER.

1) Buyer brings an action for damages for non-delivery if seller refuses to deliver.

2) Buyer bears an action for specific performance

3) In case of breach of warranty; buyer maintains an action for breach of warranty.

PROCEDURE

It must be noted that the procedure under sale of goods, where one seeks redress is usually by way of plaint or summary procedure under Order 37 of the Civil Procedure Rule SI71-1

DOCUMENTS

These include a plaint, summary of evidence, list of witnesses, documents, authorities.

If the plaint is brought under Order 37, then the document is a specially endorsed plaint accompanied by an affidavit.

OBJECTION MY LORD

APPENDIX E- DOCUMENTS FOR SALE OF GOODS.

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

CENTRAL CIRCUIT AT NAKAWA

CIVIL SUIT NO. ……OF 2020

JADWONG BILL::} PLAINTIFF

VERSUS

MAGODE BANOT ::::::::::::::::::::::::::::::::::::} DEFENDANT

PLAINT:

1. The Plaintiff is male adult Ugandan of sound mind whose address of service for purposes of this suit is **C/O M/s. SUIGENERIS and Co. Advocates, P.O.BOX 71117, KAMPALA**

2. The Defendant is a male adult believed to be of sound mind and the Plaintiff's Advocates undertake to effect service of court process upon the First Defendant.

3. The Plaintiff's claim against the Defendant is for a 50,000,000 (fifty million shillings) for goods given the defendant worth the amount.

4. The facts constituting the cause of action are as follows:

   (a) The Plaintiff has a wholesale shop located at Mutungo, voyager suites dealing in agricultural goods and cereals.

(b) By an agreement dated the 1st day of August 2004 the Plaintiff duly gave the defendant 15,000 bags of maize for feeding his animals on his farm in Mubende, upon payment of half price, the later to be paid on delivery. (See copy of the Sale Agreement annexed hereto and marked Annexure "A").

(c) The delivery was effect on 22nd August 2005 at the defendant's farm at Mubende to which he acknowledged receipt thereof. (See copy of the acknowledgement of delivery annexed hereto and marked Annexure "B").

(d) The defendant only made the first payment and has since failed to effect payment on the second installment.

(e) The Plaintiff contends that the Defendants' act amounted to breach of contract and ought to be stopped by this Honorable Court.

(f) The Plaintiff further contends that by reason of the aforesaid Defendants' acts the Plaintiff has suffered substantial loss, damage and injury to commercial credit for which he holds the Defendant liable for which the Plaintiff will claim General Damages.

6. Notice of Intention to sue was duly communicated to the Defendants.

7. The cause of action arose at Mutungo, Nakawa Division within the jurisdiction of this Honorable Court.

WHEREFORE the Plaintiff prays that judgment be entered against the Defendant jointly and severally for:

a) General damages for breach of contract;

b) Costs of this suit;

c) Interest on (a) and (b) at court rate from the date of judgment till payment in full;

d) Any other relief as this Honorable Court may deem fit.

DATED at **KAMPALA** this ……..day of …….2006.

_____

FOR: SUI GENERISAND CO. ADVOCATES

COUNSEL FOR THE PLAINTIFF

DRAWN & FILED BY:

M/s SUI GENERIS and Co. Advocates,

P.O Box 0000,

KAMPALA.

OBJECTION MY LORD

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

CENTRAL CIRCUIT AT NAKAWA

CIVIL SUIT NO. ……OF 2020

JADWONG BILL::} PLAINTIFF

VERSUS

MAGODE BANOT ::::::::::::::::::::::::::::::::::::::} DEFENDANT

SUMMARY OF EVIDENCE:

The Plaintiff will lead evidence to show that he contracted with the defendant to supply him with 15,000 bags of maize, which he did. The plaintiff shall further adduce evidence to show that the defendant defaulted on clearing the balance.

LIST OF WITNESSES:

1. Jadwong Bill
2. Any other witnesses with leave of court

LIST OF DOCUMENTS:

1. The Sale Agreement
2. Acknowledgement of delivery
3. Receipt of first payment
4. Any other documents with leave of court

LIST OF AUTHORITIES:

1. The Constitution, 1995
2. The Judicature Act Cap 13
3. The Sale of Goods and Supply of services Act 2018
4. The Contract Act Cap 2010
5. The Civil Procedure Act Cap 71
6. The Civil Procedure Rules SI 71-1
7. Any other authorities to be produced with leave of Court.

DATED at **KAMPALA** this ……..day of …….2006.

_____

FOR: M/S SUI GENERIS& CO. ADVOCATES

COUNSEL FOR THE PLAINTIFF

DRAWN & FILED BY:

M/S SUI GENERIS& CO. ADVOCATES

P.O Box 0000, **KAMPALA.**

OBJECTION MY LORD

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

CENTRAL CIRCUIT AT NAKAWA

CIVIL SUIT NO. ……OF 2020

JADWONG BILL::} PLAINTIFF

VERSUS

MAGODE BANOT ::::::::::::::::::::::::::::::::::::} DEFENDANT

WRITTEN STATEMENT OF DEFENCE

1. Save as herein expressly admitted, the defendant denies each and every allegation contained in the plaint as if the same where herein expressly set out and traversed seriatim.

2. Paragraph 1 and 2 are admitted insofar and it is admitted that the defendant's address of service shall be SUI GENERIS and company Advocates, P.O.BOX 0000, Kampala.

3. Paragraph 3 and 4 are denied in *toto* and the plaintiff shall be put to strict proof of its contents thereof.

a) Save for the jurisdiction of this honourable court, paragraph 5,6, and 7 are denied

WHEREFORE the Defendant prays that judgment be entered against the Plaintiff for:

e) Suit be dismissed

f) Costs of this suit to the defendant

g) Any other relief as this Honourable Court may deem fit.

DATED at **KAMPALA** this ……..day of …….2020.

_____

FOR: SUI GENERISAND CO. ADVOCATES

COUNSEL FOR THE DEFENDANTS

DRAWN & FILED BY:

M/s SUI GENERIS and Co. Advocates,

P.O Box 0000,

KAMPALA.

OBJECTION MY LORD

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

CENTRAL CIRCUIT AT NAKAWA

CIVIL SUIT NO. ……OF 2006

JADWONG BILL::} PLAINTIFF

VERSUS

MAGODE BANOT ::::::::::::::::::::::::::::::::::::::} DEFENDANT

SUMMARY OF EVIDENCE:

The Defendant will lead evidence to show that he has never contracted with the purported plaintiff to supply him with 15,000 bags of maize.

LIST OF WITNESSES:

3. MagodeBanot
4. Any other witnesses with leave of court

LIST OF DOCUMENTS:

5. The Sale Agreement
6. Acknowledgement of delivery
7. Receipt of first payment
8. Any other documents with leave of court

LIST OF AUTHORITIES:

8. The Constitution, 1995

9. The Judicature Act Cap 13
10. The Sale of Goods and Supply of Services Act 2018
11. The Contract Act Cap 2010
12. The Civil Procedure Act Cap 71
13. The Civil Procedure Rules SI 71-1
14. Any other authorities to be produced with leave of Court.

DATED at **KAMPALA** this ……..day of …….2020.

_____

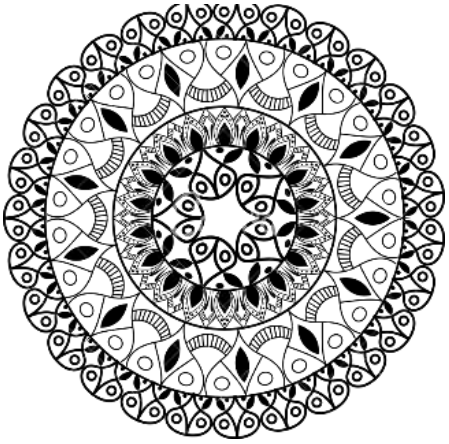
FOR: M/S SUI GENERIS& CO. ADVOCATES

COUNSEL FOR THE PLAINTIFF

DRAWN & FILED BY:

M/S SUI GENERIS& CO. ADVOCATES

P.O Box 0000, **KAMPALA.**



HIRE PURCHASE

The law applicable to this scope of study includes the following:

The Judicature Act Cap 13

Sale of Goods and supply of services Act 2018

The Hire Purchase Act No. 3 of 2009

The Contract Act 2010

The Civil Procedure Act 71

The Civil Procedure Rules SI 71-1

The Companies Act 2012

Hire Purchase Regulations, 2012

Companies (General) Regulations SI 110-1

The Companies (Fees) Rules SI 110-3

The Stamps Act Cap 342 as amended by Act 12/2002

Registration of Documents (Fees) Rules SI 81-2 as amended by SI 55 of 2005

Advocates (Remuneration and Taxation of Costs) Rules SI 267-4

Case law

Common law and Doctrines of Equity

The common issues which arise include the following

What type of contract can the parties enter into?

What are the formalities and preliminaries required to conclude the above contract?

What is the forum, procedure and documents?

What are the relevant fees?

Relevant Documents include:

A Sale Agreement

A HIRE PURCHASE AGREEMENT

A contract is defined in **Black's law Dictionary 6th Edition at page 322** as an agreement between two parties; intended to be legally binding or to create legal obligations. Thus, a hire purchase agreement is a contract between two or more parties.

The formalities for creation of the agreement include the following:

Drafting the sales agreement to reflect the intention of the seller to sell and the intention of the buyer to purchase,

Secondly, one drafts a hire purchase agreement to cater for the mode of credit financing or installments.

The sales agreement and the hire purchase agreement may be registered with the Registrar of document s under the provisions of the Registration of Documents Act Cap 81. The debenture is registered in the companies' registry under section 96 of the Companies Act, thus; it has to be registered within a period of 42 days from the date of creation. The format for registration is by filling out Form 4 in the schedule to the Companies (General) Regulations SI 110-1.

A case to illustrate a Hire Purchase Agreement is **NSAGGA VS KAYONGO [1979] HCB 138** where court held that under a hire purchase agreement, an individual has a right to exercise an option not to purchase, whereby the goods remain the property of the seller until the final installment is made. Secondly, it is basically a contract for hiring the goods.

The basic terms in the sale agreement include the following:

- The description of the parties.
- The intention of the parties
- The purchase price
- The mode of payment

- The description of the goods in question.
- Mode of delivery
- Passing of property and risk
- Dispute resolution
- Duration of agreement.
- Rights of the parties

Law applicable ***inter alia***

The basic terms in the hire purchase agreement include the following:

- The cash price
- Date due for the first payment
- Period for repayment of fund
- Interest rate
- Date due for the subsequent payments
- Right to recall for property by buyer in case of default in payment
- Security for repayment
- Exercise of the option to purchase
- Duty on hirer to keep property in good repair.

The basic terms in the debenture include the following:

A debenture is executed between the parties whereby one party (usually the buyer) acknowledges the debt and provides securities in case of default in payment.

- The description of the parties.
- The intention of the parties
- Acknowledgement of the debt
- Security for the debt
- Covenants

Appointment of receiver or manager on default by borrower

Remuneration of a receiver.

Section 3 of the Hire Purchase Act defines various aspects relating to hire purchase.

A contract of hire purchase can be defined as a bailment of goods coupled with an option to purchase them which may or may not be exercised.

Section 3(1) Defines a bailment to mean delivery of goods or movable personal property by one person to another in trust for the execution of a special object upon or in relation to goods beneficial either to the Bailor or Bailee or both and upon a contract, express crimpled, to perform the trust and carryout the object and either re deliver the goods to the bailer or dispose of the goods in conformity with the purpose of the trust.

PARTIES TO A HIRE PURCHASE AGREEMENT.

1. Owner is defined in **Section 3(1) of the Hire Purchase Act** as a person who hires goods to a hirer under a hire purchase agreement and includes a person to whom the owners' rights or liabilities under the agreement has passed by assignment or operation of law.
2. Heir is defined in **Section 3(1) of the Hire Purchase Act** as the person who takes goods from an owner under a hire purchase agreement and includes a person to whom the hirer's rights or liabilities under the agreement have passed by assignment or operation of law.
3. Guarantor is defined in **Section 3(1) of the Hire Purchase Act** as a person who agrees to perform the hirer's obligations in case the hirer defaults under a hire purchase agreement.

A hire purchase agreement is defined in **Section 3 of Hire Purchase A**ct as an agreement for the bailment of goods under which the Bailee may buy the goods or under which the property in the goods will or may pass to the hirer.

EXECUTION OF HIRE PURCHASE AGREEMENT.

1. WRITING

Section 4 (1) of The **Hire Purchase Act No. 3 of 2009**, the agreement must be in writing.

2. **CONTRACT OF GUARANTEE**.

Under **Section 4 (2) of Hire Purchase Act**, the contract of guarantee in relation to the hire purchase agreement must be executed by a guarantor. Failure to do so renders the hire purchase agreement voidable at the instance of the owner Section 4 (3) of Hire Purchase Act

3. **FULL DISCLOSURE OF ALL RELEVANT INFORMATION.**

Pursuant to **Section 4 (4) and (5) of Hire Purchase Act** the owner and hire must disclose all information relevant to the proposed agreement. Failure to give such information or falsification of the information given attract for the information to be disclosed.

4. OWNER MUST STATE THE CASH PRICE OF THE GOODS.

Pursuant to **Section 5(1) of Hire Purchase Act**, before a hire purchase agreement is entered, the owner must state in writing using form 7 in the schedule to the hire purchase regulations, 2021.

Section 3 Defines cash price as the price at which a creditor would have sold the goods to the buyer for cash on the date of the hire purchase agreement.

This is satisfied if the hirer inspected the goods and at the time of the inspection, the goods had price tags clear indicating their cash prices or the hire selected the goods from a catalogue, price lists or advertisement which clearly stipulated the price. **Section 5 (2) of the Hire Purchase Act**

Where the owner does not declare the cash price, he or she pursuant to **Section 5(3) of Hire Purchase Act** is not entitled to enforce a hire purchase agreement or a contract of guarantee relating to the hire purchase agreement.

WHAT MUST A HIRE PURCHASE AGREEMENT ENTAIL?

Under **Section 5(3) of Hire Purchase Agreement**, an owner can only enforce a hire purchase agreement and the contract of guarantee relating to it if there was a declaration of the cash price before the hire purchase agreement was executed and an agreement executed by the parties and a contract of guarantee executed in relation to the hire purchase agreement.

Under **Section 5(C) of Hire Purchase Act the agreement** must contain

1. The hire purchase price and then cash price of the goods
2. The amount of each of the installments by which the hire purchase price is to be paid and the date or the mode of determining the date upon which each installment is payable.
3. Late payment charges
4. A description of the goods sufficient to identify them
5. The date on which the agreement is taken to have commenced.
6. A notice of the rights to the hirer.

PROVISIONS NOT ALLOWED IN THE AGREEMENT.

These are under **Section 7 (1) of the Hire Purchase Act**

1. Excludes the Hirers right to terminate the agreement under Section 9(1) of Hire Purchase Act
2. Clause imposes any liability beyond that allowed under Section 9 upon termination.
3. Subjects the hirer to liability under contract in excess of that which they would have been liable for if the agreement hadn’t been terminated
4. Owner is relieved from the liability for the acts or defaults of a person acting on his or her behalf in connection with the formation or conclusion of the agreement.
5. A clause assigning the whole of the hirers wage as periodic payment for hired payment.

6. Clause authorizing the owner or their agent to enter the hirers premises without knowledge or express authority of the hirer for the purposes of the repossession of the hired property.

7. Clause prohibiting the hirer from purchasing the hired item under Section 10

IMPLIED CONDITIONS AND WARRANTIES.

Pursuant to **Section 8(1) of Hire Purchase Act**, the following conditions are warranties are implied:

a) a condition that the owner will have the right to sell the goods at the time when property is to pass.

b) a condition that the goods will be of satisfactory quality. **Section 3 of the Hire Purchase Act** Defines satisfactory quality as the state and conditions of goods and the following, among others are the aspects of the quality of goods:

   I. fitness for all the purposes for which the goods of the kind in question are commonly supplied

   II. appearance and finish

   III. safety

   IV. durability

c) a warranty that the hirer shall have and enjoy quiet possession of goods as long as there is no default.

d) A warranty that the goods will be free from any charge or encumbrance in favor of 3rd party at the time when the property is to pass

e) A condition that the hirer shall not take the goods out of Uganda without the consent of the owner.

Any condition above it not implied in instances regarding defects which the owner could not reasonably have been aware at the time of the execution of agreement or where the hirer examined the goods or a sample of them and the defects would with reasonable diligence have been revealed to them. **Section 8 (2) of Hire Purchase Act**

The condition and warranties above apply irrespective of the only clause excluding them in the party's agreement. Section 8 (3) of Hire Purchase Act

DUTIES OF THE OWNER.

1. Duty to ensure the goods are of satisfactory quality

2. Ensure he is licensed to carryout hire purchase business

Section 18 (1) of Hire Purchase Act bars any person from carrying on hire purchase business unless they are licensed by the authority.

Under **Section 18 (2**) of Hire Purchase Act only a company registered in Uganda is qualified to be licensed to carry on hire purchase business.

Section 23 (1) of Hire Purchase Act requires the entity to always display its license in a conspicuous place at all times.

Under **Regulation 2** of the Hire Purchase Regulations of 2012, the licensing authority is the commissioner for internal trade as declared in the Hire purchase (declaration of licensing authority) order 2011.

RIGHTS OF THE HIRER.

1. Inspection of the goods. Regulation 12 /Regulation 16(a)
2. Declaration of the cash price of the goods. Regulation 13
3. To terminate a Hire Purchase Act subject to **Section 9**
4. To quiet enjoyment of the goods free from any interruption. **Regulation 16(c)**
5. To complete the purchase of the goods before a time specified in the Hire **Purchase Act. Regulation 16(d)**
6. To lodge a caveat on a title of hired goods. **Regulation 16 (e).**

RIGHTS OF AN OWNER.

1. To take possession of the goods in case of a default in making payments to the owner by the hirer. **Regulation 17(a)**
2. To be paid a hire purchase price. **Regulation 17(b)**
3. To regularly and at reasonable times, give notice to the hirer in writing of the intention to enter and inspect the goods from the place where they are kept. **Regulation 17(b)**

DUTIES OF THE HIRER.

1. Insure the hired goods up to the value of the goods. **Regulation 18(2).**

Recovery of possession by owner.

Under **Section 15 (1)** of Hire Purchase Act, where 2/3 of the hire purchase price has been paid, the owner cannot enforce any right to receiver possession of goods from hirer otherwise them by suit.

Where he does so, the agreement shall be immediately terminated and the hirer will be released from all liability under the agreement and entitled to recover all sums paid by the hirer under the agreement or under any security in respect of the agreement and equally the guarantor if he/she has dispensed with money they are entitled to recover. **Section 15 (2)** of the Hire Purchase Act

APPENDIX F- DOCUMENTS FOR HIRE PURCHASE

THE REPUBLIC OF UGANDA

THE CONTRACT ACT NO.7 OF CAP 2010

THE SALE OF GOODS AND SUPPLY OF SERVICES ACT 2018

SALE AGREEMENT

This agreement is made this …… day of …….. 2018

BETWEEN

UGMA of P.O. Box 624 Kampala (Hereinafter referred to as "the Purchaser", which expression shall include its successors in title and assignees) on the one part

AND

DOLBY of P.O. Box 5318, Kampala (Hereinafter referred to as "the Vendor", which expression shall include its successors in title and assignees) on the Second part.

WHEREAS the Purchaser is desirous of purchasing equipment comprised in one **Nanimax Generator Div x bundled**, hereinafter referred to as the equipment the detailed description of which is contained in the schedule attached hereto and called "The First Schedule"

AND WHEREAS the Vendor is desirous of supplying to the Purchaser equipment comprised in, the above said equipment.

NOW THEREFORE, the Parties hereto agree as follows:

1. AGREEMENT TO SELL

The Vendor hereby agrees to sell and the Purchaser hereby undertakes to buy the products as specified in the schedule to this agreement.

2. PURCHASE PRICE

The purchase price shall be 80,000,000 (eight million shillings only)

3. MODE OF PAYMENT

The payment shall be in two equal installments: 40,000,000 before delivery and 40,000,000 after delivery.

4. JURISDICTION

The law applicable to this Contract shall be the domestic laws of the Republic of Uganda in relation to Sale of Goods.

5. **FORCE MAJEURE**

No party shall be responsible or liable for any failure or delay in performance of it's obligation under this agreement arising from or caused by acts of God or nature; intervention or acts of government; war, threat of war or conditions similar to war; acts of terrorism; equipment failures; poor weather conditions; shortages or delays of transportation; blockades; sanctions or embargoes; strikes; lockouts; or other causes or circumstances beyond the reasonable control of Vendor.

6. DISPUTE RESOLUTION

The Purchaser will attempt to resolve any claim, dispute, or controversy (whether in contract, tort or otherwise) against Vendor, arising out of or relating to this Agreement through negotiations with persons fully authorized to resolve the Dispute. Such persons will be appointed by either party to this contract.

9. DELIVERY

This shall be on the 10th day of January 2007 at the warehouse of the purchaser before 16.00 hours.

10. WARRANTY

The seller warrants that the goods shall be of good quality and the purchaser shall examine the goods.

THE COMPANY SEAL

of the **UGMA** }_____

was affixed hereto in the presence of:}_____ **CEO**

THE COMPANY SEAL

of the **DOLBY** }_____

Was affixed hereto in the presence of: }_____ *CEO*

OBJECTION MY LORD

DRAWN BY:

M/S SUIGENERIS AND CO ADVOCATES

P.O. Box 0000**,**

KAMPALA.

ISAAC CHRISTOPHER LUBOGO

THE REPUBLIC OF UGANDA

THE CONTRACT ACT CAP 2010

THE SALE OF GOODS AND SUPPLY OF SERVICES ACT 2020

HIRE PURCHASE AGREEMENT

This agreement is made this …… day of …….. 2020

BETWEEN

UGMA of P.O. Box 624 Kampala (Hereinafter referred to as "the hirers", which expression shall include its successors in title and assignees) on the one part

AND

DOLBY of P.O. Box 5318, Kampala (Hereinafter referred to as "Owners", which expression shall include its successors in title and assignees) on the Second part.

WHEREAS the Purchaser is desirous of purchasing equipment comprised in one **Nanimax Generator Div x bundled**, hereinafter referred to as the equipment .

AND WHEREAS the owner is desirous of supplying to the Purchaser equipment comprised in, the above said equipment.

NOW THEREFORE, the Parties hereto agree as follows:

1. **HIRE**

The owner of the machinery shall let and the hirer shall hire the machinery on terms as expressed hereunder.

2. **CASH PRICE**

The cash price shall be 80,000,000 (eighty thousand shillings only), in consideration of the option to purchase hereby granted.

3. **HIRE PRICE**

The hire price shall be 102,400,000 (one hundred two million and four hundred thousand). The hirer shall in continuance of the hiring pay a monthly price of shillings 7,700,000 (seven million seven hundred thousand).

4. **FIRST PAYMENT**

The first payment shall be made on the 1st day of November 2006 and a deposit of 10,000,000 by the hirer as a commitment fee for repayment of the hire price.

5. **DURATION OF PAYMENT**

The fund shall be paid over a period of 12 months commencing 1 November 2006 and shall attract an interest of 28% per annum calculated at an accrued balance on a monthly basis. The total interest shall be shillings 22,400,000.

6. **RECALL**

The owner shall exercise the right to recall the whole fund and realize its security; in default of payment of the hire price for a period exceeding 14 days.

7. **SECURITY**

The hirer shall execute a debenture to acknowledge the debt and provide security after execution of this agreement**.**

8. **LIEN ON MACHINERY**

The machinery shall remain the property of the owner until the payment is made in full.

9. **OPTION TO PURCHASE**

The hirer shall have the right to return the machinery at any time before completion of the final payment of the purchase fund.

10. **DUTY OF HIRER**

The hirer shall be duty bound to keep the machinery in good repair, exempting normal depreciation and to effect any major repairs that may arise during the repayment o the fund

THE COMPANY SEAL

of the **UGMA** }_____

was affixed hereto in the presence of:}_____ **CEO**

THE COMPANY SEAL

of the **DOLBY** }_____

ISAAC CHRISTOPHER LUBOGO

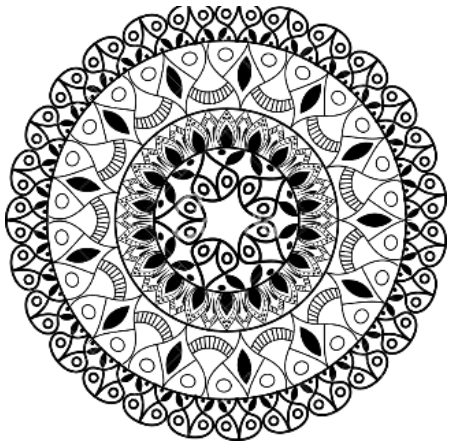
Was affixed hereto in the presence of: }_____ *CEO*

DRAWN BY:

M/S SUIGENERIS AND COMPANY ADVOCATES

P.O. BOX 0000**,**

KAMPALA.



NEGOTIABLE INSTRUMENTS:

The relevant law to look at includes the following;

Bills of Exchange Act Cap 68

The Penal Code Act Cap 120

The Contract Act Cap. 2010

The Civil Procedure Act Cap 71

The Civil Procedure Rules SI 71-1

Finance Act 2013 (Act 18 of 2013)

Financial Institutions(Amendment Act 2016)

Case law, Common law and doctrines of equity

The checklist worth noting includes the following

- Who are the parties to a bill?
- What is the capacity and authority of the parties?
- What is the effect of a forged signature in a bill?
- What are the rights and liabilities of the parties to a bill?
- What is the forum, procedure and documents in case a party wishes to institute an action on a bill?

The common document used to sustain an action is a specially endorsed plaint, supported by an affidavit under **Order 37** of the Civil Procedure Rules SI 71-1.

A bill of exchange is defined in **section 2 of the Bills of exchange Act Cap 68** as an unconditional order in writing addressed by one person to another; signed by the person giving it, requiring the person to whom it is addressed to pay on demand at a fixed or determinate future time, a sum certain in money to or order of a specified person or to the bearer.

A Cheque is defined on the other hand in **Section 72 of the Bills of exchange Act** as a bill drawn on a banker (drawer) payable on demand to the payee or drawer.

It must be noted that a bill is not invalid if it is not dated, does not specify value give, does not specify place of payment, antedated or postdated or bears a date on a Sunday.

Section 9 propounds that a bill is payable on demand if it is expressed to be payable on demand; or at sight or on presentation or in which no time for payment is expressed.

PARTIES TO A BILL

These include:

The drawer- who write the Cheque;

The drawee- bank at which the Cheque is to be cashed;

The Payee- person or institution that receives the money;

Endorser- person who writes out or draws the Cheque;

Endorsee- person to whom Cheque is written;

CAPACITY AND AUTHORITY OF PARTIES

Capacity of the parties is governed by the laws of contract. **Section 22 of the Bills of Exchange Act** provides that no person can be liable as a drawer, endorser or acceptor except that where that person signs a bill in a trade name, assumed name; he or she is liable on the bill.

It must be noted that by virtue of **Section 22(b) Bills of Exchange Act** the signature of the name of the firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm.

Section 23 Bills of Exchange Act states that a forged or unauthorized signature is wholly inoperative unless the party against whom it is it is sought to enforce payment is precluded from setting up a forgery or want of authority.

It is provided for in **Section 24 Bills of Exchange Act** that where the signature is obtained by procreation; it operates as notice that the agent has limited authority to sigh and the principal is only bound by such signature if the agent so signing was acting within the actual limits of his or her authority.

CONSIDERATION FOR A BILL

This is provided for in **Section 26 Bills of Exchange Act** and consideration is constituted by: -

- Any consideration sufficient to support a simple contract
- An antecedent debt or liability whether bill payable on demand or at a future time.

NEGOTIATION OF A BILL

Section 30 of the Bills of Exchange Act provides that a bill negotiated when transferred from a one person to another in such a manner as to constitute the transferee. It must be noted that If it is payable to the bearer, its negotiated by delivery; If it is payable to order; negotiated by endorsement of holder completed by delivery.

Section 30(4) Bills of Exchange Act provides that if the holder of a bill payable, transfers the bill for value without endorsing it, the transferor gives the transferee such title as the transferor acquires right to have endorsement of the transferor i.e.

- There must be a holder of a bill
- The bill should be payable with order
- The holder shall transfer without endorsing it
- Thereby rights of holder pass on the transferee

Section 31 (a) to (f) Bills of Exchange Act provides that for an endorsement to be valid, the following should be evident;

- It must be written on the bill and signed by the Endorser
- the endorsement should cover the entire bill
- if bill payable to order; payee /endorsee wrongly designated or the name is mis- spelt, a bill is endorsed as he is described in it, adding if he thinks fit his / her proper signature
- in case of two or more endorsements on a bill, each endorsement is deemed to have been made in the order in which it appears

- an endorsement may be made in blank or special; it may also contain terms making it restrictive

HOLDER AND HIS DUTIES

A holder is defined as a person in possession of a bill; who the bank undertakes to pay. He has various rights on the bill as enunciated under **Section 37 of the Bill of Exchange Act** as noted hereunder;

He has a right to sue in his or her name;

If he is a holder in due course, he holds the bill free from any defects in title of prior parties.

It his or her title is defective and he negotiates the bill to a holder in due course, such a holder obtains a good and complete title.

In addition, if the title is defective and he obtains payment; the person who pays him or her gets a valid discharge for the bill.

Duties of a holder are under **section 38 of the Bill of Exchange Act**; and are discussed hereunder;

- He or she has a duty to present the bill for acceptance if the bill is payable after sight.
- He or she has a duty to present the bill if it is payable after sight within a reasonable time and failure to do so discharges the drawer and or endorsers.

HOLDER IN DUE COURSE.

Section 28 of the Bills of Exchange Act defines a holder in due course as a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely:

(1) He becomes holder of the bill before it was overdue and without notice that it was previously dishonored.

(2) He or she took the bill in good faith and for value and at the time of negotiating the bill; he had no notice of any defect in the title of the person who negotiated it.

It must be noted that a holder who derives title from a holder in due course and who is not himself a party to any fraud or illegality affecting it has all the rights of the holder in due course as regards the acceptor and all parties to the bill prior to that holder.

LIABILITY OF PARTIES

Liability of the parties is covered in **Sections 53- 55 of the Bills of Exchange Act** thus;

(1) **Section 53 of the Bill of Exchange Act** provides that a drawer who does not accept bill to operate as an assignment of funds in the hands of the drawee is not liable on the instrument.

(2) Secondly, **Section 54 of the Bill of Exchange Act** provides that the acceptor will have liability in light of the following:

   a. Where he engages to pay the bill according to its tenure.

   b. He is precluded from denying to the holder in due course:

      i. The existence of the drawer, genuineness of the signature and capacity and authority to draw the bill.

      ii. Capacity of drawer to endorse a bill payable to the drawer's order.

      iii. Existence of the payee and his capacity to endorse the bill in case of payment to a third person.

(3) Thirdly, **Section 55 of the Bill of Exchange Act** provides that the drawer or endorser;

   a. Engages that on presentment, the bill is to be paid and if dishonored the holder can be compensated.

   b. Is precluded from denying to the holder in due course, the existence of the payee.

   c. Is precluded from denying to the holder in due course, the Guinness of the drawer's signature and previous endorsements.

   d. Is precluded from denying to the subsequent endorsee that the bill at the time of his or her endorsement was valid and subsisting.

(4) **Section 56 of the Bill of Exchange Act** provides that If a person signs the bill other than as drawer, acceptor, he or she thereby incurs the liabilities of an endorser to a holder in due course.

DISCHARGE OF A BILL

A bill is discharged in the following ways;

(1) By payment in due course by the drawee or on his behalf, under **Section 58 of the Bill of Exchange Act**

(2) If it is paid by the drawer to the order of a third party; the bill is not discharged but the drawer may enforce payment of it against the acceptor.

(3) When the acceptor of a bill becomes a holder of it after the date of maturity, the bill is discharged.

(4) When the holder, after maturity absolutely and unconditionally renounces the rights against the acceptor, the bill is discharged.

(5) When a bill is intentionally cancelled by the holder or his agent and cancellation is apparent on the bill.

BANKING AND FINANCE.

WHAT IS A BANK?

Banks are financial institutions according to the **Financial Institutions Amendment Act, 2016**

Section 3 of the Financial Institutions Amendment Act defines a financial institution to mean a company licensed to carry on or conduct financial institutions business in Uganda and includes a commercial bank, merchant bank, mortgage bank, post office savings bank, credit institutions, a building society, an acceptance house, a discount house, a finance house, an Islamic financial institution or any institution which by regulation is classified as a financial institution by the central bank.

Section 3 Financial Institutions Amendment Act 2016 further defines what amounts to financial business and this inter alia includes:

a) acceptance of deposits

b) Issue of deposit substitutes

c) Lending or extending credit on deposits engaging in foreign exchange business, issuing and administering means of payment, including credit cards, traveler's cheques and bank drafts, providing money transmission services among others.

The section further defines a bank to mean any company licensed to carry on financial institutions business as its principal business as specified in the second schedule to this act and includes all branches and offices of that company in Uganda.

This definition outlaws most of the prior definitions in the previous acts by virtual of **Section 133 of the Financial Institutions Amendment Act 2016** that gives precedent to the provisions of the act in cases of conflict. This includes definitions Section 1 of Bills of exchange act and the Evidence (Banker's book) Act.

Firms must comply with the Bank Secrecy Act and its implementing regulations ("AML rules"). The purpose of the AML rules is **to help detect and report suspicious activity including the predicate offenses to money laundering and terrorist financing, such as securities fraud and market manipulation**. AND in line with Legislation for the introduction of The Money Laundering and Terrorist Financing (Amendment) (No. 2) Regulations 2022 (the regulations) has now been passed by Parliament, with its provisions generally come into force from 1 September 2022.

CHARACTERISTICS OF BANKS.

These were laid down in the English decision of **UNITED DOMINIONS TRUST LTD V KIRKWOOD (1966) 2 QB 431**. The brief facts are that united dominions trust was a finance company which brought an action to recover payment of a loan which it had made to a dealer. The dealer defended the claim for repayment on the basis that the united dominion trust was not registered under the money lenders act 1900 and hence the loan contract was unlawful. United dominions trust claimed that it was exempt under S.6 (d) of the act because it conducted "banking business" in support of this it argued that it was recognized in the city as a bank, it enjoyed certain privileges given only to banks and it had a cleaning number.

Lord Denning in answer to the issue as to whether united dominions trust ltd was a banker held that normally a company would only constitute a bank if undertook certain activities:

1. The acceptance of money from and the collection of cheques for customers and the placing of the funds to the customer's credit.

2. Honoring cheques or orders drawn on the bank by their customers when presented for payment and the debiting of the customers' accounts accordingly.

3. Keeping some form of current or running accounts for entries of customer's credit and debits.

Lord Diplock further stated that whilst acceptance of deposits was a necessary condition of being a bank, it was not of itself a sufficient condition. An institution cannot be a bank unless it opens on behalf of customers' current accounts which are operable by cheque and into which customers can pay cheques and other financial instruments for collection.

WHO IS A CUSTOMER?

One becomes a customer if he or she opens an account with the condition where the relationship is not one which duration is of essence. Guideline 3 distinguish between a consumer and a customer that is a customer is an individual or a firm employing less than 10 individuals who are using or intend to use the services of a financial institution.

This is evident from a number of decisions e.g., **LADBROKE V TODD (1914)111 LJ43**, where the bank opened an account for a thief who as first transaction handed to the bank for collection a cheque which he had stolen. The court had to decide whether the thief was a customer of the bank or not. It was contended that the banker-customer relationship could only be established over a period of time, so the thief was not a customer. Court held that a person need not have a series of dealings with the bank before he gets the status of a customer. The person becomes a customer at the moment the bank receives money or a cheque and agrees to open an account for the person in the bank.

In WOODS V MARTIN BANK LTD (1958)3 ALL ER 166, court held that a mere likelihood that an account will be opened is enough to make a person a customer provided that the bank agreed to offer services to such a person.

In BARCLAYS BANK V OKENHARE (1966) 2 LIOYDS REP 87, court stated that the opening of an account even without a deposit was sufficient to constitute a person as a customer.

In **GREAT WESTERN RAILWAY CO V LONDON AND COUNTY BANKING CO.LTD. (1901) AC 414**, a man had for years been getting crossed cheques exchanged at the defendant bank but had no account there. Court held that casual services by a bank are a person does not make them a customer.

NATURE OF THE RELATIONSHIP BETWEEN A BANK AND THE CUSTOMER

IT IS CONTRACTUAL IN NATURE.

THE SUPREME COURT OF UGANDA IN ESSO PETROLEUM V UGANDA COMMERCIAL BANK, REAFFIRMED THE PRINCIPLE THAT THE RELATIONSHIP OF A BANKER AND A CUSTOMER IS CONTRACTUAL IN NATURE. THE OBLIGATIONS UNDER THE CONTRACT WERE LAID DOWN IN JOACHIMSON V SWISS BANK CORPORATION (1921)3 KB 110.

1. Debtor-creditor relationship

In FOLEY V HILL (1843-60) ALL ER Rep 16, the HOL held that the relationship between a banker and the customer is one of a debtor and creditor. The court held that a banker does not hold the sums in a bank account on trust for its customers. Instead, the relationship is that of debtor and creditor. When the customer deposits money in the account, it becomes the banks money and the bank has an obligation to repay an equivalent sum (and any agreed interest) to the customer on demand.

The demand is a pre-requisite before the bank pays back the sums. IN **JOANCHIMSON V SUITS BANK CORPORATION (1921) 3 KB 110**, court held that a customer does not have a right of action against its bank for repayment of sums until the customer makes a demand. For purposes of limitation periods, the time does not run until a demand for repayment must be made at the branch of bank where the account is kept. This position in light of the advance in banking is not applicable.

Lord Atkin further emphasized that there is only one contract made between a banker and its customer and that the terms of the contract involve obligations on both sides and require careful examination. The obligations include the following

a) That the bank undertakes to receive money and to collect bills for its customer's account

b) The proceeds so received are not held in trust for the customer but the bank borrows the same and undertakes to repay them within the ordinary course of business of the bank.

c) It's a term of this contract that a bank shall not cease to do business with a customer without giving the customer reasonable notice.

d) Customer undertakes to execute his or her written orders in such a way as not to mislead the bank or facilitate forgeries.

e) It's necessary a term of this contract that the bank is not liable to pay the customer the full amount of the balance on their account except upon demand. (Demand is a prerequisite upon payment).

DUTIES UNDER THE BANKER-CUSTOMER RELATIONSHIP.

DUTIES OF THE CUSTOMER.

a) Duty to act with reasonable care in the running of the account not to facilitate forgeries. Some of the careless conduct may include: issuing undated cheques, issuing open cheques, writing sums only in figures and not in words, disclosing their pins to other people.

In TAI HING COTTON MILL LTD V LIU CHONG HING BANK (1986) AC 80, court held that, the relationship between banker and customer is principally a contractual one between debtor and creditor. As between the banker and his customer, the risk of loss through forgery of the customer's signature falls on the banker unless negligence or other disentitling conduct of the customers precludes the customers claim. No wider duty should be imposed on the customer beyond a duty not to act in a way that facilitates forgery and to make the bank aware of any known forgeries occurred. "The business of banking is the business not of the customer but of the bank. They offer a service which is to honor their customer's cheques when drawn upon an account in credit or within an agreed overdraft limit. If they pay out upon cheques which are not his, they are acting outside their mandate and cannot plead his authority in justification of their debt to his account. This is a risk of the service which it is their business to affect."

IN NIGERIA ADVERTISING SERVICES LTD V UNITED BANK OF AFRICA (1968)1 A.l.R comm 6, court held that a bank customer who knows that his or her signature I being forged has a duty to inform the bank or be end-stopped from covering otherwise.

b) DISCLOSURE OF FORGERIES.

The customer has a duty to disclose any forgeries which come to their attention. **In GREENWOOD V MARTINS BANKLTD (1933) AC 51,** greenwood opened a cheque account with martin's bank. The wife forged his signatures and drew cheques on the account in her favor. Mr. Greenwood found out 11 months later but did not take any action allowing for 7 months to pass by since he got knowledge of the forgeries. The wife committed suicide and green wood claimed the bank could not debit his account for the cheques.

The HOL held that a banks customer has a duty to inform the bank of any forgery of a cheque purportedly drawn on the account as soon as he, the customer, becomes aware of it. The husband having failed to disclose that his signature had been forged by his wife was estopped from asserting the forgery against his bank.

c) DEMAND BEFORE REPAYMENT IS MADE.

Refer to **JOACHIMSON V SWISS BANK CORPORATION (1921)3 KB 110**.

DUTIES OF THE BANK.

DUTY TO ENSURE THAT THE MONEY ON THE ACCOUNT IS NOT LOST CARELESSLY. IN STANBIC BANK V UGANDA CROCS LIMITED.

a) Duty of the bank to pay the customer upon demand if the mandate is proper and there are sufficient funds.

Refer to **JOACHIMSON V SWISS BANK CORPORATION (1921) 3 KB 110.**

b) DUTY TO MAKE REFERENCE WHEN CUSTOMER IS OPENING UP ACCOUNT.

This duty is codified under **Regulation 7 of the** regulations, 2010 enacted under the Act. It is also further codified under Regulation. 19-27 of the anti-money laundering regulations 2015 enacted under the anti-money laundering act 2013 (as amended).

c) DUTY OF SECRECY.

One of the implied terms in the contract between a bank and a customer is that the bank is obliged to keep the affairs of its customer secret even after the account is closed and extends even after the customers death. The duty is legal and not merely moral breach of this duty would result in damages.

NOMINAL OR SUBSTANTIAL.

EXCEPTIONS TO THE DUTY

There are exceptions to the duty and these include:

a) Disclosure under compulsion of e.g., under **Section 6 of the Evidence (Bankers Bank) Act Cap 7.** Also, section 41 of the anti-corruption act and **Section 131(1) of Income Act**

b) Where there is a duty to the public to disclose. **Section 28 of the Leadership Code Act (as amended**)

c) Where the interest of the bank requires disclosure e.g., to the guarantor when the bank wishes to recover its dues. **SUNDERLAND V BARCLAYS BANK (1958) 5 L D A B 163**, bank dishonored cheques principally, because account had insufficient balances. Husband interceded and he was told that most cheques were drawn in favor of bookmakers. Wife sued for breach of confidence. Court held that the disclosure interest of the bank.

d) Disclosure by express or implied consent of the customer.

Should be in writing from the customer.

e) Inquiries of other banks.

The above exceptions were laid down in the case of **TOURNIER V NATIONAL PROVINCIAL AND UNION BANK OF ENGLAND (1924)1 KB 461**. In this case the bank disclosed to its customer's employer the fact that one of the customer's paid cheques was drawn in favor of a bookmakers account. As a result, the customer's employer did not renew his contract with the customer. The COA held that confidentiality was an implied term in the customer's contract and that any breach could give rise to liability in damages if loss result.

TYPES OF ACCOUNTS.

There are two types of accounts.

a) Demand deposits

b) Time deposits.

DEMAND DEPOSITS

Section 3 of Financial Institutions Act defines these to mean deposits repayable on demand and withdrawable by cheques order or any other means. These are generally referred to a current accounts/mercantile account/running account.

CURRENT ACCOUNT

Used regularly by clients for their financial transactions to discharge personal liability.

In **FOLEY V HILL (1848)2 HLC 28**, it was held that when an amount is paid to a customer's current account, be it by means of cash or a cheque payable, the sum in question is forthwith regarded as paid rent by the customer to the bank.

The amount on the account is recoverable on demand and the demand is made by drawing of cheque or by ATM.

The bank however is not obligated to honor a demand where:

I. The customers balance is inadequate except if the bank agreed to grant the customer an overdraft. **BANK OF NEW SOUTH WALES V LOIN (1954) AC 135**

II. The demand is presented during ordinary business hours.

FEATURES OF A CURRENT ACCOUNT

- Non interest bank account
- Minimum balance to be maintained
- Penalty may be charged for falling below the minimum balance
- Charges interest on the short-term funds borrowed
- Continuing nature with no fixed period to hold the account
- No restriction on number of withdraws.

OVERDRAFTS IN CURRENT ACCOUNTS

A customer may be granted an overdraft. In **ODUMOSU V AFRICAN CONTINENTAL BANK LTD 1976(1) ALR COMM. 53**, court stated that drawing a cheque or accepting bill payable at the bankers where there are no sufficient funds to meet it amounts to a request for an overdraft.

An overdraft is payable on demand only. Therefore, it is an implied term in the relationship between a banker and its customer that where:

a) Over draft facilitates are provided to the customer

b) Money is standing to the credit of the customer on his or her current account and in the absence of a special arrangement, a demand by the bank is a necessary pre requisite to an action by the other for money lent.

OVER –CREDITING OF ACCOUNT.

If a customer's account is over credited, if the customer honestly believes that the money is his or hers and alters his or her position in reliance on the statement, then the banker is estopped from recovering money from the customer. **IN LIOYDS BANK LTD V BROOKS (1950) 72 JIB 114,** it was held that there was duty on the banker not to over credit the customer's account and there is a duty on the banker not to induce the customer by representation, contained in the statements of account, to draw money from the account to which the customer is not entitled. The amount credited to the customer's account will be treated as being due to him. But the estoppel only operates after the customer has acted upon the representation.

OVER- DEBITING.

Usually occurs as a result of fraud or forgeries. **In KEPITINGALLA RUBBER ESTATES LTD V NATIONAL BANKOF INDIA LTD (1909) 2 K.B 1010**, the secretary of the company forged cheques drawn on a company's account over a period of two months. Statements had been given to the company but the directors had not examined them. The court held that the bank could

not charge the company with amount paid out on forged cheques and the plaintiffs were under no duty to organize their business in such a way that forgeries of cheques could not take place.

Lord Denning in **TAI HING COTTON MILL LTD,** noted that the duty to organize its business to minimize forgeries and fraud is on the bank. (Read holding under duty)

Also look at **STANBIC BANK V UGANDA CROCOS LIMITED**.

INTEREST.

A claim of interest by the bank according to the author of Paget's law of banking must be justified by the customer's acquiescence in the charging of interests.

SET OFF

It is a legal right according to which a debtor will take into account a debt owing to him by a creditor when he is required to settle the debt. **In HALESOWEN PRESSWORK AND ASSEMBLIES LTD V WEST MINISTER BANK,** lord cross stated where there have been mutual dealings between the debtor and someone who claims to prove as a creditor an account of mutual dealings shall be taken there be setoff of the sums mutually owing and it is only the balance that the creditor is to pay or prove for as the case may be.

In MUTTON V PEAT (1902)2 CH 79, stock brokers had a loan account and a current account with their bank. When they went bankrupt, their current account was in credit and loan account in debit. It was held that the two accounts should be treated as one so they could use the securities to satisfy the differences between the two accounts. The court favored more of having the accounts combined/consolidated which is a right a bank has.

SAVING ACCOUNTS.

Type of account which allows you to deposit money, keep it safe and withdraw while earning interests.

Features

- Main objective of saving account is to promote savings
- No restriction on the number and amount of deposits
- Withdrawals are allowed subject to certain restrictions
- Money can be withdrawn by withdrawal ship of the respective bank
- Rate of interest payable is very nominal usually

- Minimum amount must be maintained
- No loan facility is provided against saving account

WITHDRAWAL SLIP.

Account holders access their funds through a withdrawal slip. It is obtained out the bank, filled in and handed over to the teller, upon which the account specified is given to the customer.

Salient features.

- Date
- Account number
- Name of account holder (only drawn in that name)
- Amount to be withdrawn in number and words
- Signature.

CHEQUES AND OTHER NEGOTIABLE INSTRUMENTS.

Section 72 of the Bills of Exchange Act (BEA), defines a cheque to mean a bill of exchange frown on a banker, payable on demand.

Section 2 (1) of Bills of Exchange Act (BEA) defines a bill of exchange as an unconditional order in writing addressed by one person to another, signed by the person giving it requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to the order or to a specified person or to the bearer.

From the reading **of Section 2 together with S.72(1) of Bills of Exchange Act (BEA),** a cheque is an unconditional order in writing drawn by one person upon another who is a banker to pay on demand a sum certain in money to or to the order of a specified person.

UNCONDITIONAL ORDER

IN BAVINS JNR AND SIMS V LONDON AND SOUTH WESTERN BANL LTD (1899) 81 L.T 655, an instrument which was in the form of a cheque but with the order followed by the words

provided the receipt form at the foot thereof is duly signed. The court held that the receipt requirement was a condition which made the instrument not a cheque.

PARTIES

1. Drawer: a person who draws a cheque
2. Drawee bank : a banker on whom the cheque is drawn
3. Payee: a person who is being paid. In certain instances, there is no payee and so its payable to the bearer. **Section 6 (1) of Bills of Exchange Act (BEA**), provides that where a bill is not payable to the bearer, the payee must be named or otherwise indicated with reasonable certainty.

Section 2 (4) of Bills of Exchange Act (BEA), cheque without a date is not invalid.

PAYABLE ON DEMAND

A cheque must be payable on demand, however modern cheque forms rarely have the words 'on demand'. This is remedied however by **Section 9 of Bills of Exchange Act (BEA**) which provides that a bill is payable on demand which is expressed to be payable on demand or at sight or on presentation or in which no time for payment is expressed.

INCHOATE CHEQUES

S.19 of Bills of Exchange Act (BEA) deals with these. They arise were a drawer signs the cheque and arise were a drawer signs the cheque and leaves another person to complete it.

The instrument is lacking in some material particular and it's the holder to fill it up within a reasonable time and reasonable time is a question of fact. It must also be filled within the scope of authority given.

A HOLDER

Section 1 of Bills of Exchange Act (BEA) defines a holder to mean the payee or endorsee of a bill or note who is in possession of it, or the bearer of a bill/note. Under **Section 37 (a) of Bills of Exchange Act** (**BEA**), holder can sue on the bill in their name. under **Section 33(4) of Bills of Exchange Act (BEA)**, when a bill has been endorsed in blank, any holder may convert the blank endorsement into a special endorsement by writing above the endorsers signature a direction to pay the cheque to or to the order of himself or herself some other person.

Section 76 (2) Bills of Exchange Act where a cheque is uncrossed, the holder may cross it generally or specially.

Section 76 (3) Bills of Exchange Act where a cheque is crossed generally, the holder may cross it specially.

Section 76 (4) Bills of Exchange Act where a cheque is crossed generally or specially, the holder may add the words "not negotiable."

A holder of a cheque can presents it for payment at the drawee bank or present through his or her bank for collection if the cheque is crossed.

A HOLDER IN DUE COURSE

Section 28 (1) of Bills of Exchange Act (BEA) defines a holder in due course as a holder who has taken a bill, complete and regular on the face of it, under the following conditions:

a) They became the holder before it was overdue and without notice it had been previously dishonored

b) That they took the bill in good faith

c) That they took the bill for value

d) At the time the bill was negotiated to him/her they had no notice of any defect in title of the person who negotiated it.

HOLDER

Defined in S.1 of BEA. A payee cannot be a holder in due course. I**n RE JONES LTD V ARING AND GILLOW (1926) A.C .670,** respondents contended they were holders in due course and entitled to proceeds of a cheque. The court held that the expression holder in due course does not include the original payee of a cheque.

Section 28 (1) Bills of Exchange Act limits the scope of a holder in due course to a person to whom the cheque has been negotiated.

BILL MUST BE TAKEN COMPLETE AND REGULAR ON THE FACE OF IT.

Incomplete means that there is some material details missing e.g. names of payee, amount payable etc.

A cheque is regular on the fact of it whenever it is such as not to give rise to any doubt that it is the endorsement of the payee. **Section 28 of Bills of Exchange Act (BEA)** is instructive.

OBJECTION MY LORD

CHEQUE WAS NOT OVERDUE.

Under **Section 35 (3) of Bills of Exchange Act (BEA)**, a cheque is payable on demand and will be deemed overdue when it appears on the face of it to have been in circulation for unreasonable length of time.

According to the bank of Uganda clearing rules, a cheque is valid for a period of six months from the date of issue.

GOOD FAITH AND VALUE

Per **Section 89 of the Bills of Exchange Act (BEA)**, a thing is deemed to be done in good faith where it is in fact done honestly whether done negligently or not.

Section 1 of Bills of Exchange Act (BEA) defines value to mean valuable consideration. Under **Section 26 (1) (a) of the Bills of Exchange Act**, valuable consideration sufficient for a cheque maybe constituted by any consideration sufficient to support a simple contract. As per **Section 26 (2) Bills of Exchange Act**, where value has at any time been given for a bill, the holder is deemed to be a holder for value as regards the acceptor and the parties to the bill who became parties prior to that time.

In METALIMPEX V A.G LEVERITIS AND CO (NIGERIA) LTD (1976)1ALR COMM.20, court stated that a bill of exchange and promissory notes are presumed to be supported by valuable consideration and a party who alleges want of consideration therefore must prove.

c) NO NOTICE OF DEFECT IN TITLE.

Section 29 (2) of the Bills of Exchange Act (BEA) provides that in particular the title of a person who negotiates a bill is defective within the meaning of the act, when he/she obtained the bill or acceptance thereof by fraud, duress or force of fear or other unlawful means or for an illegal consideration or when he/she negotiates in breach of faith or under such circumstances as to amount to fraud.

DERIVING TITLE FROM A HOLDER IN DUE COURSE

Under **Section 28 (3) of (Bills of Exchange Act (BEA)**, a holder who derives his/her title to a bill through a holder in due course (whether for value or not) and he/herself is not a party to any fraud or illegality affecting it, has all rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder.

PRESUMPTION AS TO HOLDING IN DUE COURSE

Under **Section 29 (2) of Bills of Exchange Act (BEA**), every holder of a bill is primafacie deemed to be a holder in due course. **In HASSANALI ISSA AND CO V JEVAJ PRODUCE SHOP 1967(2) ALR COMM.64,** the court stated that under **Section 29 (2)**, a holder of a bill is

prima facie deemed to be a holder in due course but that, of course, is a presumption of fact which may be rebutted. It may e.g., be shown that no consideration was given, in which event the p/f would not be able to succeed on the cheque.

SUMMARY ON PROTECTION ENJOYED BY A HOLDER IN DUE COURSE

1. **Section 37(b) of the Bill of Exchange Act**; holds the bill free from any defect
2. **Section 37(c) (I) of the Bill of Exchange Act;** good and complete title to the bill where holder has a defective title.
3. **Section 20(2) of the Bill of Exchange Act:** unauthorized delivery will not affect a holder in due course
4. **Section 28(3) of the Bill of Exchange Act:** holder in due course can pass good title with all rights to a holder
5. **Section 11(b) of the Bill of Exchange Act:** is protected from a wrong date on a bill
6. **S1ection 9 (2): of the Bill of Exchange Act;** an inchoate instrument converted into a bill negotiated to a holder in due course is valid.
7. **Section 35 (5) of the Bill of Exchange Act:** a holder in due course is not affected with a dishonored overdue bill.
8. **Section 47 (a) of the Bill of Exchange Act:** a holder in due course's rights are not prejudiced by omission of notice of dishonor.
9. **Section 53(b) of the Bill of Exchange Act**: the acceptor is precluded from denying a holder in due course
10. **Section 54(1)(b) of the Bill of Exchange Act:** drawer is precluded from denying a holder in due course
11. **Section 4(2)(b) of the Bill of Exchange Act:** endorser is precluded from denying a holder in due course
12. **Section 55 of the Bill of Exchange Act:** a person who signs a bill incurs liabilities of an endorser to a holder in due course
13. **Section 63 of the Bill of Exchange Act:** a holder in due course is not affected by alteration of a bill.

LIABILITY OF PARTIES TO A CHEQUE.

OBJECTION MY LORD

DRAWER

Under **Section 54(1)(a) of the Bill of Exchange Act**, a drawer of a cheque by drawing it engages that on due presentation it shall be paid according to its character and if dishonored, he or she will compensate the holder or any endorser who is compelled to pay on it as long as the requisite proceedings on dishonor are duly taken. However, the drawer may limit liability under **Section 15 (a) of the Bill of Exchange Act** by inserting the words "without recourse to me" or "sanrecours."

ENDORSERS LIABILITY

Under **Section 54(2)(a) of the Bill of Exchange Act** , the endorser of a bill by endorsing it engages that on due presentation, it shall be accepted and paid according to its tenor and that if is dishonored he or she will compensate the holder or a subsequent endorser who is compelled to pay it, provided the requisite proceedings on dishonor are duly taken and under **Section 54(2)(c) of the Bill of Exchange Act** is precluded from denying to his or her immediate or a subsequent endorsee that the bill was at the time of his/her endorsement a valid and subsisting bill and that he/she had a good title to it.

Under **Section 15 (a) of the Bill of Exchange Act** an endorser may add an express stipulation negating or limiting his or her own liability to the holder.

TRANSFEROR BY DELIVERY

Under **Section 57 (1) of the Bill of Exchange Act**, where a holder of a bill payable to bearer negotiates it by delivery without endorsing it he is called a "transferor by delivery" and according to **Section 57 (2) of the Bill of Exchange Act** such transferor by delivery is not liable on the cheque.

However, **Section 57 (3) of the Bill of Exchange Act** provides that such person who negotiates a bill thereby warrants to his or her immediate transferee, being a holder of value

a) That the bill is what it purports to be

b) That he or she has a right to transfer it

c) That at the time of transfer, he or she is not aware of any fact which renders it valueless.

A banks liability is enhanced on account of acting negligently**. MAKAU NAIRUBA MABEL V CRANE BANK H.C.C.S No. 380 of 2009.**

d) Drawee.

1) If it pays on a forged mandate, it is liable.

2) Paying a 3rd party cheque immediately violates banking practice, duty of care and the Uganda clearing house rules and procedure.

ISAAC CHRISTOPHER LUBOGO

DEFENSES TO A CLAIM ON A CHEQUE

The main defenses to claims on a cheque are largely to a defense on a suit in contract. Section 20 (1) of the Bill of Exchange Act talks of every contract on a bill which means that the relationship of the parties is contractual.

1. FAILURE OR ABSENCE OF CONSIDERATION.

Section 26 of the Bill of Exchange Act codifies the common law rules relating to valuable consideration. Due to the presumption of valuable consideration under **Section 29 (1) of the Bill of Exchange Act,** the defense has the duty to rebut the presumption.

In **STERLING PRODUCTS (NIGERIA) LTD V DINKPA (1975) (2) ALR COMM.75,** the plaintiff brought an action against the defendant for the price. The court said that as regard the claim on a cheque this had to fail because the evidence showed that there was total failure of consideration. The goods for which the cheque was issued were returned to the plaintiff in the same condition as they were delivered to the defendant. There was therefore an entire failure of consideration and this is a valid defense to an action on a bill of exchange.

2. FAILURE TO PRESENT THE CHEQUE IN PROPER TIME.

Section 44 (3) (b) of the Bill of Exchange Act (BEA) stipulates that where the bill is payable on demand, presentment must be within a reasonable time. Should ideally be presented within six months.

However, under **Section 73 (a)** where a cheque is not presented for payment within a reasonable time of its issue, the drawer will only be discharged to the extent of any actual damage which he or she suffers as a result of such failure.

In ESSO PETROLEUM (UGANDA) LTD V UCB, CIVIL APPEAL NO.14/1192, the court stated that if a banker /as an agent for collection) fails to present a cheque within a reasonable time after it reaches it, it is liable to the customer for loss arising from the delay, the drawer or endorsee if any, is discharged to extent of damage he/she may have suffered by the failure to pay the cheque by the bank on which the cheque was drawn.

3. FAILURE TO GIVE NOTICE OF DISHONOR.

The act lays down rules relating to notice of dishonor. Under **Section 47 of the Bill of Exchange Act,** when a bill is dishonored by non-acceptance or by non-payment, notice of dishonor must be given to the drawer or endorser to whom the notice is not given is discharged.

Section 48 (1) of the Bill of Exchange Act requires that notice is given as soon as the bill is dishonored and must be given within a reasonable time.

In NANJI KHODABHAI V SOHAN SINGH (1957) EA 291, a cheque was dishonored on the 25th April 1955 and notice was not given until 29th April 1995. The court held that the defendant was discharged because there were no special circumstances to justify any delay and notice ought to have been given on 26th April 1955.

4. MATERIAL ALTERATIONS OF A CHEQUE.

Section 63(1) of the Bill of Exchange Act provides that where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided, except as against a party who has himself or herself made, authorized or assented to the alteration and subsequent endorsers. The defense does not apply to a holder in due course.

The following alterations as per **Section 63(2) of the Bill of Exchange Act** are material; date, sum payable, time of payment, place of payment and where a bill has been accepted generally, the addition of a place of payment without the acceptors consent.

In OVERMAN AND COV RAHEMTULLA (1930) 12K.L.R 131, the supreme court of Kenya held that the list in Section 63 (2) of the Bill of Exchange Act is not conclusive but are given as examples of alterations which would be considered material.

In KOCH V DICKS (1933)1 K.B 307, an alteration in which place of drawing of a bill was changed making it a foreign bill from an inland bill. The court found that was a material alteration. This notwithstanding that alteration of place of drawing is not enumerated in the equivalent of S.63 (2).

5. FORGED SIGNATURES.

Section 23 of Bill of Exchange Act (BEA) provides that a person cannot be liable where his/her signature has been forged or placed on the cheque without his authority.

Refer to **STANBIC BANK V UGANDA CROCS LTD.**

FICTITIOUS/ NON-EXISTING PERSON

Section 6 (3) of the Bill of Exchange Act provides that where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer. This was emphasized in the case of **BANK OF ENGLAND V VAGLIANO BROTHERS (1891) AC 107.**

The rule in **Section 6 (3**) was held in **BOMA MANUFACTARIES LTD V CANADIAN IMPERIAL BANKOF COMMERCE (1997) 23 CLB740**, to be an exception to the rule of **nemo dat quad non habet.** The policy behind the fictitious payee rule is that if the drawer drew a cheque payable to order, not intending that the payee receive payment, the drawer lost, by his/her conduct, the right of protection afforded to a bill payable to order and there was no reason why the defense of fictious payee was not available to the collecting banker.

In CLUTTON V ATTENBOROUGH AND SONS (1897) A.C 90, an employer was fraudulently induced by the clerk to draw cheque in favor of nonexistent payees whose endorsement was forged by the clerk in favor of a bonafide transferee for value. The 3rd party, the transferee who acted in good faith obtained payment of the cheques. Clutton, after discovering the fraud sued the third party for money they had received. The House of Lords held that the equivalent of **Section 6 (3)** applied and the money could not be recovered.

IMPERSONAL PAYEES.

Is a payee of a bill or note designated as cash, bills payable or order? They may be designated otherwise than in the name of a person, association, partnership or corporation.

The effect of drawing a bill in the name of an impersonal payee is that the instrument is payable to bearer and need not have other words of negotiability.

Under **Section 6 (3) of the Bill of Exchange Act**, a cheque is treated as being payable to the bearer only when the payee is a fictitious /nonexistent person. The word person is defined in Section 3 as including a body of persons whether incorporated or not. Obviously, this definition does not cover impersonal payees such as instrument drawn in a cheque form to order or bearer in favor of 'cash.' This issue arose **in KHAN STORES V DELAWER (1959) EA 714**, the document in issue was a cheque drawn on the national bank of India signed by the applicant, directing the bank to pay 'cash or bearer' the sum of shs.2000. The word 'cash' was in manuscript word ''bearer'' was printed. Law J, held that a person who uses cheque forms made out to blank or 'bearer' and who fills in the blank either the word 'cash 'or with the name of specified person without deleting the word bearer must be presumed to intend that the words or bearer and complying with other requirements of the act, and the plaintiff respondent as the person in possession of the cheque was the holder thereof within the meaning of the term's bearer and holder.

CROSSED CHEQUES

Section 75 of the Bill of Exchange Act provides for both general and special crossing of cheques.

Section 75 (1) of the Bill of Exchange Act provides for a general crossing as a cheque which bears a cross its face an addition of: a) the words and company between two parallel transverse lines either with or without the words "not negotiable "or

b) Two parallel transverse lines either with or without the words "not negotiable."(Account payee only")

Section 75(2) of the Bill of Exchange Act provides for a special crossing as where a cheque bears across its face an addition of the name of a banker, either with or without the words "non-negotiable" A crossing is an instruction by the customer to the bank to pay the proceeds of the cheque into a bank account (chosen by the payee) and not to cash it over the counter.

Further **Section 80 of the Bill of Exchange Act** provides that where a person takes a crossed cheque which bears on it the words "not negotiable" and shall not be capable of giving, a better title to the cheque than that which the person from whom he or she took it had.

Section 77 of the Bill of Exchange Act stipulates that a crossing is material part of the cheque and therefore it is not lawful for any person to obliterate, or add or alter the crossing except as provided by the act.

OBJECTION MY LORD

NEGOTIABILITY AND TRANSFERABILITY

Cheques are negotiable instruments. However, a crossed cheque with the words "not negotiable" ceases to be a negotiable instrument.

Section 7(1) of the Bill of Exchange Act provides that when a bill contains words prohibiting transfer or indicating an intention that it should not be transferable is valid as between the parties to it but it is not negotiable.

Section 35 (1) of the Bill of Exchange Act postulates that a bill which is negotiable in its origin continues to be negotiable until it has been either respectively endorsed or discharged by payment or otherwise.

ENDOR6SEMENT

Section 1 of the Bill of Exchange Act defines endorsement as an endorsement completed by delivery. Holden in his law of banking practice defines endorsement as signature on a cheque, usually on the back, by the holder or his/her authorized agent, followed by delivery of the instrument whereby the holder of a cheque payable to his or her order negotiates it to another person who takes it as a new holder.

Endorsement may be special or in blank. A special endorsement is provided for under S.33 (2) as one which specifies the person to whom or to whose order, the instrument is payable.

Section 33 (4) of the Bill of Exchange Act allows for the conversion of bill endorsed in blank to be endorsed specifically.

Section 31 (a) of the Bill of Exchange Act provides that an endorsement in order to operate as a negotiation must be written on the bill itself and be signed by the endorser.

AGENCY

Section 90(1) of the Bill of Exchange Act provides that where in the act any instrument or writing is required to be signed by the person, it is sufficient if his or her signature is written thereon by some other person by or under his or her authority.

Section 24 of the Bill of Exchange Act provides that a signature by procuration (agency) operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his or her authority.

WRONGFUL DISHONOR OF CHEQUES.

In UNDECHEMIST LTD V NATIONAL BANK OF NIGERIA LTD, 1976(1) ALR COMM. 143, that a banker is bound to pay cheques drawn on it by a customer in legal form provided there are in the bank at the time sufficient and available funds standing to the credit.

A bank that without justification dishonors its customers cheques is liable to the customer in damages for injury to his/her commercial credit. The customer must however prove damage suffered.

In ROLIN V STEWRAD 139 E.R. 245, three cheques were presented and dishonored. They were presented again the following day and they were honored. The plaintiff was a trader. In an action for damages no evidence was given to show that he suffered any injury or damage. He was awarded 200 pounds as substantial damages.

Damages are presumed when the person is a trader, it not so when a person isn't a trader. **EVANS V LONDON AND PROVINCIAL BANK (1917)3 L.D, A, B 152,** the plaintiff drew a cheque which owing to the mistake of the bank was dishonored. He was not in business and there was no suggestion of actual damage. Nominal damages were awarded.

The above decisions were applied by the high court of Uganda in **PATEL V GRINDLAYS BANK LTD 1968(3) A.L.R COMM 249**, that where the court said that a trader whose cheque is wrongfully dishonored need not plead and prove special damage in order to recover substantial damages for the bankers breach of contract; the refusal of payment is injurious to his/her trade, credit and commercial reputation and the damages should be reasonable compensation for the injury having regard to all the circumstances and commercial probabilities of the case; not excessive but temperate and neither punitive or exemplary.

The word 'trader' was enlarged in the case of **BALOGUM V NATIONAL BANK OF NIGERIA LTD, 109 E.R 842**, by the supreme court of Nigeria. The court replaced the owned trader with "person in trade". Court reasoned that while it is true that a trader is in business, all persons in business are not necessarily traders. Citizens running say private schools, although engaged in business are not necessarily traders. Therefore, the expression "a person in trade" is preferred as it refers to persons engaged in some occupation, usually skilled but not necessarily learned, as a way of livelihood. It was held that a legal practitioner was a person in business and therefore was entitled to substantial damages without proof of damages.

The above reasoning was applied in **JOHN KAWANGA AND ANOTHER V STANBIC BANK(U) LTD UCLR (2002-2004) 262,** were the plaintiffs being advocates were granted substantial damages for dishonor of their cheques without proving actual damages for dishonor of their cheques without proving actual damage or injury since they were persons in business.

DAMAGES FOR LIBEL

The common words used when dishonoring a cheque are "refer to drawer" or "R/D". These words were subject of adjudication in **DOGRA V BARCLAYS BANK (1955) EA 541,** the court held that those words were not defamatory as they indicate that the bank will not honor the

cheque on the instant presentment and the person who presented it and others concerned should contact the drawer for an explanation. The words are not published in any sort of connection or relation to the plaintiff's profession, trade or calling if they are to be held libelous, it must be shown that in the circumstances of the publication they subjected to the plaintiffs to hatred, ridicule or contempt. That these words do not subject the plaintiff necessarily to hatred ridicule or contempt.

The test for whether words used are libelous was laid down in **SIM V STRETCH (1936) 2 ALL ER 1237,** the words tend to lower the plaintiff in the estimation of right-thinking members of society generally. The use of words such as 'not sufficient' 'refer to drawer' 'not arranged for' and 'no account' would definitely have such an effect on the plaintiff.

In DAVIDSON V BARCLAYS BANK (1940) 1 ALL ER 316, the plaintiff's cheques were dishonored with the words 'not sufficient' and court held that that amounted to libel.

LIMITATION OF ACTIONS

Owing to **Section 3 (2) of the Limitation Act Cap 80**, an action relating to an account cannot be brought after the expiration of six years from the date on which it accrued.

The limitation applies to all actions on an account e.g.

In NATIONAL BANK OF NIGERIA V PETERS 1971(1) ALR COMM 262, the court held that a banker cannot recover a dormant overdraft more than six years after the last advance if the stature of limitation is pleaded nor can it recover interest which even within six years has in accordance with the ordinary practice of bankers been added to the principal from time to time and become part of the principal.

COMBINATION OF ACCOUNTS

Combination of accounts is a situation whereby a banker might treat two or more accounts opened between its customer and itself as though they were one whole account, entirely under its control by reason of which it might remove assets from one account to meet deficiencies in the other.

In **T AND H GREENWOOD TEATE O. WILLIAMS V WILLIAMS BROWN AND CO. (1894-1895) 11 T.L.R 56**, right to combine and set off at any time was restated by Lord Denning in **HALESOWEN PRESSWORK AND ASSEMBLIES LTD V WESTMINISTER BANK LTD (1971) 1 Q. B1**

Wright j held that a bank had the right to combine a customer's separate accounts subject to three exceptions:

a) The right to combine could be abrogated by a special agreement

b) It would be inapplicable where a special item of property was remitted to the bank and appropriated for a given purpose.

c) A bank could not combine a customer's private account with the one known to be a trust account or to be utilized for operations conducted by the customer as trustee.

IN OBED TASHOBYA V DFCU BANK LTD HCCS NO 742/2004, the plaintiffs UGX current account and USD account offset by monies from the UGX account. The issue was whether the defendant bank had correctly exercised the right of setoff. **Kiryabwire J** citing the Halsbury laws stated that unless precluded by agreement, express or implied, from the course of business, the banker is entitled to combine accounts kept by the customer in his own right, even though at different branches of the same bank and to treat the balance, if any as only amount really standing to his credit, but the banker may not arbitrarily combine a current account with a loan account.

In BARCLAYS BANK OF KENYA LTD V KEPHA NYABOR AND 191 ORS CIVIL APPEAL NO.169 OF 2007, the court explains the banks right to set off a debt owed to it by a customer who maintains more than one account. The court stated that a banker may combine two current accounts at any time without notice to the customer as though the accounts are maintained at different branches. In circumstances where a bank has a loan account and also a current account in credit with the same customer and holds security for the ultimate balance, the banker is at liberty to combine and consolidate the accounts and set off the accounts.

In NICHOLAS MAHIHU MURIITHI V BARCLAYS BANK KENYA LIMITED, CIVIL APPEAL NO.340 OF 2012, the appellant objected to the consolidation of his loan accounts in which the bank owing to default had written off with his current account that was in credit. The court held that the loan accounts could be consolidated with the current accounts despite having been written off. The writing off did not absolve the appellant of the money owed to the bank under the loan accounts as writing off is merely an internal mechanism to clear up the balance sheet for taxation purposes.

APPROBATION AND REPROBATION

This is a maxim/principle whereby a person cannot both approve and reject an instrument.

IN VERSCHURES CREAMERIES LTD V HULL AND NETHERLANDS STEAMSHIP CO. LTD (1921)2 KB 608, the court stated that the equitable principle that one cannot approbate and reprobate at the same time. The court stated that the principle is based on the doctrine of election and a person cannot say at one time that a transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid, and then turn around and say it is void for the purpose of securing some other advantage.

In **GOLF VIEW INN LTD V BARCLAYS BANK (U) LTD H.C.CS NO.358 2009**, court held that the plaintiff who had benefited from the SRA could not turn around to say it was illegal due to duress having obtained a benefit.

PERFORMANCE BONDS AND GUARANTEES

These are instruments taken out by a party to a contract, written by a third party guarantying the performance of a contract.

They include: performance bonds/guarantees and other guarantees such as advance payment guarantees.

The law on these instruments was summarized by Lord Denning

In **EDWARD OWEN ENGINEERING LTD V BARCLAYS BANK INTERNATIONAL LTD (1978)1 ALL ER 976**, he stated that the law applicable to them was similar to that applicable to letters of credits. He thus held that performance guarantees were virtually promissory notes payable on demand. The bank must pay if the documents are in order and the terms of the guarantees satisfied. Any dispute between the buyer and seller must be settled between themselves. The only exception is in case of what is called established or obvious fraud to the knowledge of the banker.

The learned author, Geraldine Mary Andrews in law of guarantees 2nd edition 1995 at page 443 and 444 states that "performance bonds are essentially unconditional undertakings to pay a specified amount of money to a named beneficiary usually on demand and sometimes on the presentation of certain documents. Therefore, it is established that if the beneficiary seeks payment in accordance with the terms of the bond, the bank must pay regardless of how unfair that might be to the account party.

The above position was cited with approval by Madrama j in

NATIONAL HOUSING AND CONSTRUCTION CO LTD V LION ASSURANCE COMPANY LIMITED H.C.C.S NO. 25 OF 2013, in which the defendants had declined to pay on a demand made on an advance payment guarantee issued of the benefit of the plaintiff. He went on to state that the demands made according to the terms of the performance bond must be paid.

PRINCIPLE OF MONEY HAD AND RECEIVED

It is a form of action that lays to recover money paid under a mistake or compulsion or for a failed consideration. It is available where a payment or transfer of value takes place voluntarily but is made under the compulsion of urgent and pressing necessity.

IN DR JAMES KASHUGYERA TUMWWINE AND ANOTHER V. SR. WILLIE MAGARA AND ANOTHER H.C.C.S NO .576 of 2004, court held that a claim for money had and received is an equitable action that may be maintained to prevent unjust enrichment by the defendant when it obtained money which in equity and good conscience belongs to the plaintiff.

IN MAHABIR KISHORE AND MADHYA PARADESH 1990 ALR 313, claim based on principles of unjust enrichment must satisfy the following requirements

1. That the defendant has been enriched by the receipt of a benefit
2. That this enrichment is at the expense of the plaintiff
3. That the retention of the enrichment is unjust.

In **SHENOI V MAXIMOR (2005)2 EA 280**, the court held that in an action for money had and received, the purpose for which the money was received is relevant when applying the principle.

In **DR. JAMES KASHUGYERA (supra)**, court stated that it is immaterial that the plaintiff was negligent to a certain degree. The plaintiff is not precluded from recovering the amount from the defendant as money had and received.

BANK AND CUSTOMER RELATIONSHIP

The banker – customer relationship is a contractual one whereby the banker is under a duty to honor the customer's demand and pay whenever the customer's account has sufficient funds. This principle was followed in **STANBIC BANK VS UGANDA CROSS LIMITED SCCA 4 0F 2004** where court was of the cardinal view that the banker has a duty to honor the customer's mandate. The court held in addition, that a banker is also under a duty of care to its customer not to act negligently.

The customer too, owes a duty to the bank not to act negligently as enunciated in **BARCLAYS BANK OF KENYA VS JANDY (2004) 1 EALR 8**

LEGISLATION FOR THE INTRODUCTION OF THE MONEY LAUNDERING AND TERRORIST FINANCING (AMENDMENT) (NO.2) REGULATIONS 2022

(The above regulations) have now been passed by Parliament, with its provisions generally coming into force from 1 September 2022.

These regulations update the existing UK anti-money laundering (AML) legislation by making some time sensitive updates to The Money Laundering Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (the MLRs).

The changes are being made to ensure that the UK continues to meet international standards on AML and counter-terrorist financing while also strengthening and clarifying how the UK's AML regime operates, following feedback from industry and supervisors.

The main changes, most applicable to firms, are outlined below.

Trust or company service provider services and business relationships

Regulation 4 widens the meaning of a trust or company service provider (TCSP) by amending regulation 12 of the MLRs to include the formation of all forms of business arrangement, not just companies and legal persons. By extending this to the formation of a 'firm', which is defined in regulation 3 of the MLRs, it will now specifically include Limited Partnerships which are registered in England and Wales or Northern Ireland (Scottish Limited Partnerships are already included as they are 'legal persons'). The amendment regulation will cover all business arrangements and services provided that are required to be registered with Companies House.

TCSPs will now also be required to conduct customer due diligence (CDD) when they are providing services outlined in regulation 12(2)(a), (b) and (d).

OBJECTION MY LORD

Discrepancy reporting

Effective 1 April 2023, Regulation 9 amends regulation 30A (1) of the MLRs to extend the scope of the discrepancy reporting regime so that it is an ongoing requirement and limiting the requirement to report only 'material discrepancies'. Regulation 30A of the MLRs requires relevant persons to report to the Registrar of Companies any discrepancies between the information they hold about the beneficial owners of companies, as a result of CDD measures, and the information recorded by Companies House on the public companies register. The requirement applies at the onboarding stage, "before establishing a business relationship" therefore the amendment aims to enhance the accuracy and integrity of the register by making the obligation ongoing.

Suspicious activity reports

Regulation 13 makes it clear that supervisory authorities can directly require members to show them Suspicious Activity Reports ('SARs') "to help them in fulfilling their supervisory functions, and driving greater consistency of approach to utilising SARs across supervisors".

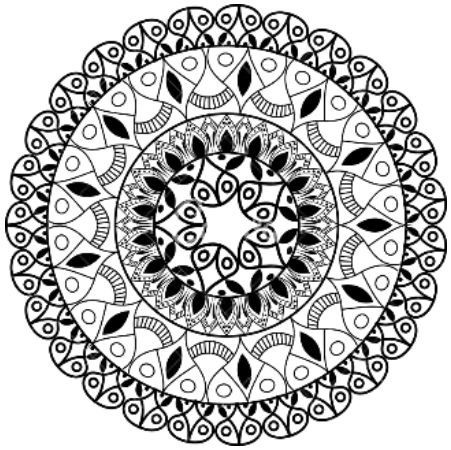
The amendments introduce an explicit legal right for supervisory authorities to access, view and consider the quality of the content is SARs submitted by supervised populations. This access will help supervisors deliver more effective training and clear feedback on the quality of SARs. At present, there is no standardised approach to accessing SARs due to the ambiguity of the MLRs.

PROLIFERATION FINANCING

Regulation 6 introduces a new requirement for all supervised firms to perform a proliferation financing (PF) risk assessment (similar to the AML firm-wide risk assessment). A definition of PF will be included in the MLRs to clarify the type of activity that would be considered.

AML SCOPE ON CRYPTOCURRENCIES

According to the legislative package, issuers of crypto assets and crypto asset service providers will also be subject to AML due diligence requirements as obliged entities. This will effectively constitute a ban on offering anonymous crypto wallets. In addition, payments in cryptocurrencies will be subject to the same identification requirements as payments by bank transfer. Consequently, crypto asset service providers will have to identify the sender and recipient of payments with cryptocurrencies above a certain threshold.



MONEY LENDING TRANSACTIONS

The law governing money lending includes the following:

The Bank of Uganda Act, Cap 51

The Companies Act, 2012

The Constitution of the Republic of Uganda 1995

The Contract Act, 2010

The Financial Institutions (amendment) Act, 2016

The Foreign Exchange Act, 2004

The Hire Purchase Act, No.3 of 2009

The Illiterates Protections Act, Cap 78

The Judicature Act, Cap 13

The Money Lenders Act 1952, Cap 273(Repealed)

The Tier4 Microfinance Institutions and Money Lenders Act, 2016

LIST OF STATUTORY INSTRUMENTS

The Financial Institutions (Credit Reference Bureau) Regulations, 2005

The Tier4 Microfinance Institutions and Money Lenders (Money Lenders) Regulations, 2018

LIST OF INTERNATIONAL STATUTES

Moneylenders Law, Chapter M7 (Laws of Lagos State) Nigeria

Kerala Money Lenders Act, 1958 (India)

The checklist includes the following issues

1. Whether there is a valid money lending agreement?
2. Whether the agreement for interest and penalties is enforceable?
3. What are the remedies available to an aggrieved party?
4. What's the forum, procedure and documents?

THE DOCUMENTS

Application for a money lender's certificate

Statement in of contents of **section 8(1)**

MONEY LENDERS

A money lender is defined in **Section 1(h) of The Tier 4 Microfinance Institutions and Money Lenders Act 2016** to include every person who is in the business of money lending or one who announces himself out in any way as carrying on a business that business whether he or she possesses or earns property or money derived from sources other than the lending of money and whether or not that person carries on the business as a principle or agent.

Money lending is the practice of giving out money inform of a loan to individuals by money lenders that is repaid at a high interest charge over a specified period[93]. Moneylenders are governed by the Tier4 **Microfinance Institutions and Money Lenders Act**[94]. However, its implementation has not been effective hence the need for a critical analysis of money lending provisions under the **Tier4 Microfinance Institutions and Moneylenders Act.**[95]

Money lending usually referred to as "loaning" has its roots from Europe.[96] However, throughout the 18th century money lending was totally disputed on moral grounds by the early authorities the Jews and Romans.[97] Among the first countries to prescribe a lawful interest rate was England in 1545 during the regime of Henry VIII at an interest rate of 10 percent. However, after seven years, it was repealed, and money lending was again totally abolished. Money lending was afterwards made lawful by enacting the **Money Lenders Act of 1900.** The Act[98] was enacted due to the report of the House of Commons Select Committee, on money lending which exposed the existence of serious illegalities associated with money lending transactions[99].

Money lending in Uganda started during the colonial period and established under the **Money Lenders Act**[100]which was transplanted from England.[101] The fact that money lenders finance monetary and social needs of the people without a lot of bureaucracy has led to the growth of money lending in the financial segment. Such needs include business loans, school fees, health issues like sickness, money to secure jobs abroad as some borrowers tend to borrow money from moneylenders to pay for passports, air ticket among others, they present their land titles as security for the money lent.[102]

It is on record that income earners and most especially the educated ones are the biggest customers of money lenders. This is because salary earners usually receive their payments when they have already incurred debts to solve their financial problems. As they wait for their salaries salary earners sometimes find themselves in dilemma and are left with no option. This however, put them in more debts as sometimes the due dates for repayment tend to reach before they receive their salaries and instead borrow from another lender to pay the first loan. An interest charge of 3.5% and 30% is charged daily or monthly respectively.[103] Borrowers who deposit land titles and logbooks for vehicles are in most cases blindly asked to sign transfer forms and hand them over to the money lenders before they receive the money.[104]

[93]http://www.citizensinformation accessed on 24/01/2018.
[94] 2016.
[95] 2016.
[96]G.A. Lutz, R. Johannes, and S. Susanne, "On the Viability of Group Lending when Microfinance Meets the Market. A Reconsideration of the Besley –CoateModel"Impact of Level of Education and Experience on.pdf 2012 (International Journal of Business management and economic research) 462.
[97]Uganda Law Reform Commission: Review of the Money Lenders Act Cap 273 p.4.
[98]Money Lenders Act Cap 273.
[99] Ibid no.5.
[100] Cap 273.
[101]Charles Musinguzi, 'Factors Constraining the Implementation of the Money - Lenders Act' 1.
[102]Uganda Law Reform Commission: Review of the Money Lenders Act Cap 273 (2014) p.5.
[103]Patrick Kagenda "Is the rise of money lenders a sign of a failed monetary system?" CEO Magazine (Apr 04, 2013) at http://www.theceomagazine-ug.com on December 9, 2017.
[104]Moses K. Alecho "Regularising the activities of money lenders in Uganda" New Vision (June 26th, 2014) at https://www.newvision.co.ug on 09/10/18.

Due to the high rates of defaulters, small claims court at Mengo Magistrates Court was introduced to deal with borrowers who default where the money is less than Ten Million Shillings. Since the start of the year 2013, 22 cases have been handled and have in effect served 149 demand notices to those who defaulted. According to one of the registrars at the court, money lenders are growing in big numbers since money lending certificates are obtained from any magistrate's court in their respective jurisdictions in the country and Resident District Commissioners offices.[105] Thus, it becomes hard to know the exact number of money lenders in Uganda. In the due course courts will be able to determine the number of money lenders basing on the cases filed. Specialists are of the view that money lending need to be supervised and properly regulated if its fruits are to be tapped into; without that, increased exposure to high interest rates could be a timing bomb especially at the family levels, since money lenders seldom lend to companies.[106]

Initially, money lending in Uganda was governed by the **Money Lenders Act**[107] that was enacted in 1952. According to the Act, a money lender included every person whose business is that of money lending or any person who advertises or announce himself to be a money lender whether that person have other property or money derived from other sources of income other than money lending.[108] In essence money lending business could be conducted by any person who wishes to engage in the business of money lending regardless of whether he or she has other business a long side money lending.

Money lending license was granted by the Magistrates court with jurisdiction over the place where money lending business is going to be conducted.[109] This however, was a big challenge to the magistrates who had a lot of court issues to execute at the same time grant money lenders license to carry out money lending business. This could be a reason as to why most money lenders in Uganda were not licensed. As it could take long for one to obtain a money lenders license.

Money lenders had a tendency of evading payment on the due dates making it impossible for a borrower to trace them. However, there was no any provision in the **Money Lenders Act**[110] that addressed this problem. Thus, many borrowers had to lose their property to unfaithful money lenders.

Despite the prohibition of high interest rate under the Money lenders Act,[111] Money lenders were still charging high interest rates. This was due to the ineffectiveness of the law since there was no Authority or body to monitor money lenders in Uganda. Magistrates who oversaw issuing of licenses were always busy with court issues and thus had little time to monitor and supervise money lenders.

In 2014, the Uganda Law Reform Commission reviewed the **Money Lenders Act**,[112] and highlighted various provisions to be considered basing on the economic changes in Uganda and the illegalities conducted by money lenders. For example, supervision of money lenders by the Magistrates Courts. Most money lenders disregard the requirement of reducing money lending transitions into writing contrary to **Section 20**.[113]

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[105]Ibid (no.11)
[106] Ibid no.15.
[107] Cap 273.
[108] Section 1.
[109] Section 3.
[110] Cap 273.
[111]Section 12 of the Money Lenders Act, cap 273.
[112] Ibid.
[113]Money Lenders Act, Cap 273.

Basing on the above, the Parliament of the Republic of Uganda proposed a bill on money lending that was assented to by His Excellency the President of the Republic of Uganda in August 2016 and was passed into a law, repealing and replacing the **Money Lenders Act.**[114] The enacted new law is the **Tier 4 Microfinance Institutions and Money Lenders Act**[115]. It was meant to regulate and cure all the illegalities in the money lending business as well as other micro finance institutions (the Tier4s) like Savings Credit Cooperatives (SACCOs), these are provided for under Part III of the Act,[116] non-deposit taking microfinance institutions[117], self-help groups[118] and community based micro finance institutions.[119] The Ac[120]therefore, provide a legal framework for regulating several transactions. This literature, however, focuses on part V of the Act[121] that provide for money lending transactions.

According to **Section 5**[122], a money lender is a company licensed under **Section 82**[123] meaning for any person to carry out money lending business must be a company licensed by the Uganda Microfinance Regulatory Authority that was established to regulate money lending and not the magistrate as it was before. Therefore, it is the Uganda Microfinance Regulatory Authority to award money lending license to any person who has satisfied the requirements set by the Act for one to qualify for the money lending license. In case a money lender evades payment, the **Tier4** gives the Authority powers to receive the money on behalf of the money lender.

Furthermore, it should be noted that, the Act[124]was enacted to regulate money lending business due to its rapid growth in Uganda. Even though money lenders are acting illegally, they however, solve peoples' social and economic problems by advancing loans to them. They help borrowers who cannot acquire loans from financial institutions due to the length procedures of financial institutions in advancing loans. The incompetence of borrowers to prepare and present practical loan project proposal, lack of collateral required by banks, poor record-keeping and lack of business minutes. Intensified speculation by employment searchers, urgent need to raise funds to offer bribes or acquire job, and the high cost of education, the breakdown in health and other social services have heightened the need for money lenders' services.[125]

Money lending was originally governed by the **Money Lenders Act.**[126]The Act defines a money lender to mean any person whose business is that of money lending or who advertises or announce himself or herself to be a money lender whether that person has other source of income besides money lending.[127] It should be noted that one had to obtain a certificate of money lending from a magistrate in his or her jurisdiction for him to legally conduct money lending business.

[114] Cap 273(2000 edition).
[115]2016, Act No. 18 of 2016).
[116]Tier4 Microfinance Institutions and Money Lenders At, 2016.
[117] Ibid part IV.
[118] Ibid Part VI.
[119] Ibid Section 4 & Part VII.
[120]Ibid.
[121]Ibid.
[122] Ibid.
[123]Ibid.
[124]Ibid.
[125]http://www.monitor.co.ug.
[126] Cap 273.
[127]Section 1(h).

Despite the law[128] emphasizing record keeping, it's on record that money lenders rarely issue receipts and keep records of their transactions. This was due to lack of supervision and monitoring of money lenders by the magistrates. Being unregulated money lenders could also make borrowers sign transfer agreements instead of loans agreements[129].

The **Money Lenders Act,[130]** prohibited harsh and unconscionable interest rates. The interest rate that was prescribed under the old regime was 24 percent per year. However, this was disregarded by most money lenders by exceeding the prescribed rate.

Similarly, the law prohibited charging compound interests where the borrower defaults to pay the money lent on the due dates. The money lender should charge simple interest rates. However, this was not the case as most money lenders charged compound interest or even double the principal amount, and the interest rate. This was all attributed to the laxity of the magistrates in supervising money lending business.

Therefore, the **Money Lenders Act,[131]**was repealed and replaced by the **Tier4 Microfinance Institutions and Money Lenders Act**,*[132]* to address the problems that were faced under the old regime. The most important change that was made, was to establish the Uganda Microfinance Regulatory Authority as the Regulatory body of money lending business in Uganda.

However, the illegalities that were conducted under the old regime are still happening even under the new regime for example, high interest rates, no record keeping, charging compound interest, and signing transfer agreements instead of loan agreements, among others. The issue is thus on the effectiveness of the provisions on money lending in Uganda under the **Tier4 Microfinance Institutions and Money Lenders Act, 2016 and the Regulations** thereto.

Thus, the study analyses the money lending provisions under the **Tier4 Microfinance Institutions and Money Lenders Act***[133]* as well as the **Tier4 Money Lending Regulations***[134]* to ascertain whether they have sufficiently provided a legal framework that regulates and promotes money lending business in Uganda.

It must be noted however that a money lender does not include the following:

- A person carrying on a business of banking or insurance, not having it primary objective of lending money.
- Any society under the Cooperative Societies Act

[128]Money Lenders Act, Cap 273.
[129]Uganda Law Reform Commission; Review of the Money Lenders Act, Cap 273 (2014) at p.5.
[130] Cap 273
[131] Ibid.
[132] 2016.
[133] 2016.
[134] 2018

- Anybody corporate, incorporated or empowered by Special Act to lend money in accordance with this act.
- Any person or body corporate exempted from this act by order of the minister.

A money lender is enjoined to take out a money lender's license under the provision of **section 2(1) of the Money Lenders' Act Section 3(3)** provides that a money lender shall apply for the certificate to a magistrate having jurisdiction in the place where the money lender's business is located.

PROCEDURE

A money lender applies for the certificate to a magistrate having jurisdiction in the place where the money lender's business is located as per **Section 3(3) of the Money Lenders Act** and **rule 3(1)** of the Money lenders (Licenses and Certificates) Order SI 273-1

Applicant serves a statement on the local police and invites the police to attend the hearing within the meaning **of rule 3(2) of the Money lenders (Licenses and Certificates) Order SI 273-1**.

The application is published in the gazette and in a local newspaper in circulation.

The applicant is enjoined to attend the hearing and shall answer questions put to him or her. Where the applications are by partners in the same firm, the court is enjoined to grant them a hearing on the same day under **rule 3(5) of the Money lenders (Licenses and Certificates) Order SI 273-1.** it must be noted that the police may oppose the application under **rule 3(4).**

If the court is satisfied that the requirements have been met, then it will proceed to grant the certificate under **Rule 3(3) of the Money lenders (Licenses and Certificates) Order SI 273-1.**

Upon grant of the certificate, the applicant applies for a license, which application is made to the District Commissioner; the application is made personally under **Rule 2 of the Money lenders (Licenses and Certificates) Order SI 273-1**.

The applicant has to produce the certificate and pay the statutory fee.

It must be noted that money lending contracts are illegal insofar as they provide directly or indirectly for compound interest under **Section 7 of the Money lenders Act**.

Secondly, **Section 8(1)** in respect of every contract for repayment of money under a money lenders contract; the money lender shall on reasonable demand in writing being made to the borrower at any time during the continuance of the contract, supply the borrower with or his agent a statement containing the following:

- Date on which loan was made and amount of principal on loan and the rate per cent per year.
- Amount of payment already received by the money lender in respect of the loan.
- Amount of every sum not yet due and date upon which it becomes due.

THE LEGAL AND INSTITUTIONAL FRAMEWORK OF MONEY LENDING IN UGANDA

Money lending business in Uganda was originally regulated by the Money Lenders Act[135] that was enacted in 1952. Money lenders were supervised by the Magistrates courts, which were also responsible for granting money lending license. Due to the rapid growth of money lending business, there were some new developments that came long. These developments were however, not covered in the Money Lenders Act.[136] This called for the repeal of the Money Lenders Act, it was replaced by the Tier4 Microfinance Institutions and Money Lenders Act[137] and the regulations[138] to the Act. Therefore, from the set objectives mentioned in chapter 1 **Subsection 5** the study analyses the effectiveness of the new laws on money lending considering the new developments, and their impact on money lending business in Uganda compared to the Money Lenders Act[139].

This study further considers other relevant laws like the 1995 Constitution of Uganda, the Bank of Uganda Act, the Illiterates Protection Act, and **the Chattel Securities Act.** Looking at their relationship with money lending business.

A comparative study of money lending laws of countries like Singapore, Nigeria, and Zambia will be considered

THE 1995 CONSTITUTION OF THE REPUBLIC OF UGANDA

As the supreme law of the republic of Uganda all laws and Acts that are passed or enacted by the parliament derive their authority from the Constitution,[140] that nothing in this article shall stop the Parliament from passing laws that aim at (a) implementing policies and programs aimed at redressing social, economic, educational or other imbalance in society; or (b) making such provision as is required or authorized to be made under this Constitution; Thus, the parliament of Uganda has the mandate to enact laws and policies that may help in implementing any policies aimed at solving social, economic among other imbalances.

This article further gives the parliament the mandate to enact provisions for example, provisions that may help to regulate money lending business since money lenders have played a big role in

[135] Cap 273.
[136] Ibid.
[137] 2016.
[138] Tier4 Microfinance Institutions and Money Lenders (Money Lenders), Regulations, 2018.
[139] Cap 273.
[140] Article 21(4).

solving social economic, educational, health issues. Therefore, in case of any illegalities in the money lending sector, the parliament has the mandate to enact laws to regulate money lending and programs for implementing policies to that effect. For example, the parliament enacted the **Tier4 Microfinance Institutions and Money Lenders, Act**,[141] the Bank of Uganda Act,[142] the Bank of Uganda regulations.

The Constitution*[143]* further under **Article 40** provides for economic rights that accord every citizen the right to practice his or her profession and involve him or herself in legal/lawful occupation, trade or business.[144] Therefore, any money lender who carry on lawful money lending business he or she enjoys his economic right. In this case, lawful money lending business means engaging in money lending business with a license.

THE BANK OF UGANDA ACT CAP 51

The **Bank of Uganda Act**[145] was enacted to regulate the issuing of legal tender, maintaining external reserves and for promoting the stability of the currency and a sound financial structure conducive to a balanced and sustained rate of growth of the economy and for other purposes related to the above. Basically, the **Bank of Uganda Act***[146]* was enacted to regulate financial institutions as provided for under the Financial Institutions Act*[147]*. Therefore, the Bank of Uganda being the financial regulator, money lenders were ignored, yet they partly do what other financial institutions do that needs that Bank of Uganda's intervention by controlling and supervising them and most importantly on the issue of discipline as most money lenders their character on financial matters is not good.

The Tier4 Microfinance Institutions and Money Lenders Act, 2016

The Tier4 Microfinance Institutions and Money Lenders Act was enacted in August 2016 repealing the **Money Lenders Act.[148]** It was enacted to regulate and monitor money lending transactions since a lot of illegalities have been happening in the money lending sector. For example, the definition of who a money lender was left open and any person could carry out money lending business, high interest rates, no record keeping among others. The Tier4 includes Savings and Credit Cooperative (SACCOs),[149] non- deposit taking microfinance institutions, self-help groups and community-based microfinance institutions. Money lending as the main gist of this chapter, is provided for under part V of the Act.[150]

DEFINITION OF A MONEY LENDER

[141] 2016.
[142] Cap 51.
[143]The 1995 Constitution of the Republic of Uganda.
[144] Article 40(2).
[145]Cap 51.
[146] Ibid.
[147] 2016.
[148]Cap 273 0f 1952.
[149]Section 5 of the Tier4 Microfinance Institutions and Money Lenders Act, 2016.
[150]Ibid.

A money lender is defined under **Section 5**[151] to mean a company licensed under **Section 82**. The section means a money lender is a company licensed to carry on money lending business. Section 82provides such a company must apply for the renewal of the license whenever it expires. For one to carry out money lending business must be a registered company. A company means a company formed and registered under the **Companies Act**[152] or an existing company or a re-registered company under this Act; this means that it's not that every person who wishes to carry out money lending can do so. A company must apply to the Uganda Microfinance Regulatory Authority that is established under section 6[153] for a money lending license. It is upon this authority, after being satisfied that the applicant qualifies for the license within three months issue the license to the applicant (a company).

A money lender was also defined in the case of **JAMES BALINTUMA V DR. HANDEL LESLIE**[154]where in this case the issue was whether the plaintiff was holding out as a money lender or advanced to the defendant a friendly loan. Justice Musota Steven referred to **Section 1 (h) of the Money Lenders Act**[155] that

Money Lender includes every person whose business is that of money-lending, or who advertises or announces himself or holds himself out in any way as carrying on that business whether or not that person also possesses or earns property or money derived from sources other than the lending of money and whether or not that person carries on the business as a principal or agent; but shall not include –

Any person bonafide carrying on the business of banking or insurance or any business not having for its primary object the lending money, in the course of which and for the purposes whereof he or she lends money ..."

However, this definition no longer applies since the **Money Lenders Act**[156] was repealed and replaced by the **Tier4 Microfinance Institutions and Money Lenders Act**[157] **that** defines a money lender to mean a company as discussed above.

Therefore, money lenders have complied with this provision. Before applying for the money lending license one must first register his business as a company. Thus, the new development in the money lending sector has helped borrowers to know where to borrow money from and do away with briefcase money lenders. As a company, it has a physical address and a name making it easy for the borrowers to access the lender whenever he wants. Unlike the old regime where any person who wants to conduct money lending business could apply for a money lenders license.

SUPERVISION OF MONEY LENDING BUSINESS

[151] Ibid.
[152] 2012.
[153]Tier4 Microfinance Institutions and Money Lenders Act, 2016.
[154] (Civil Suit No. 193 OF 2013) [2017] UGHCCD 58 (15 February 2017).
[155] Cap 273.
[156] Ibid.
[157] 2016.

For effective monitoring and regulation of money lending business, Uganda Microfinance Regulatory Authority was established to supervise money lending business as per **Section 77[158].** Unlike under the old regime money lenders were supervised by the Magistrates.

Among the supervisory functions or duties of the Uganda Microfinance Regulatory Authority is to grant, renew and revoke money lending licenses,[159] keep and maintain a register of money lenders,[160] sensitize the public about the money lending business,[161] and the laws governing and regulating money lending business since most of the public members are ignorant about the new law on money lending and how to conduct the business of money lending legally.

Regarding the duties of the Authority in supervising and sensitizing the public on the money lending laws, the Authority is trying its best. However, this is not effective since the public has not responded positively. Very few money lenders have applied for a money lenders license and very few members of the public have knowledge of the existing new law on money lending business.

The Authority has the role a supervisory body to conduct inspection and examination of books of accounts, returns and all other necessary documents of money lending transactions and premises of a money lending business.[162] This is because many money lending businesses rarely keep their financial records as was seen in the case of;

In **HAMWE INVESTMENTS LTD V BABIGUMIRA,[163]** the plaintiff a money lender advanced a loan of 65,450,000shs (Sixty-five million four hundred fifty thousand shillings) to the defendant at an interest rate of 1% per month for a period of 5 months and that is 5% respectively. The plaintiff contends that apart from the partial payment of 20,000,000sh.by the defendant, the defendant has refused or failed to pay the remaining balance.

However, the defendant in partial payment of the loan he surrendered his vehicles valued at 20,000,000shs (Twenty million shillings) leaving an outstanding balance of 53,012,474shs. (Fifty-three million, twelve thousand and seven hundred forty-seven shillings). The plaintiff changed himself and started charging 24% interest rate per month. The defendant contests this and denies borrowing the sum of 65, 450,000shs being a single loan. The defendant contends that it's a continuation of various loans he has been borrowing money from the plaintiff at 15% interest and has since paid 187,085,000 and had surrendered his property to the plaintiff, a plot of land and two motor vehicles. Therefore, the defendant requests for a review of the whole transaction.

In the submissions made by both counsels, it was found out that the plaintiff had no records of the transaction between him and the defendant. Judge Henry Peter Adonyo stated that; it is the duty of a moneylender to keep proper books of account and failure to do so would render such transactions not possible to be claimable in a court of law where there is no performance.

[158]Tier4 Microfinance Institutions and Money Lenders Act, 2016.
[159]Section 77(a).
[160]Section 77(b).
[161]Section 77 (c).
[162] Section 77 (d).
[163]Civil Suit No.24 of 2012.

Therefore, it's the duty of the supervisory authority to inspect and examine all records of accounts of money lenders to ensure they have proper records of their transactions.[164] To make inquiries or investigations[165] on how money lending businesses are conducted as this will help both the borrowers and the lenders in case, they want to enforce their rights in courts of law. It should be noted that where there are no proper records of the transactions it becomes hard for example, to claim for unpaid monies or where the lender would wish to reopen the transactions with the borrower as it was seen in the above case.

This however does not happen as the authority has not effectively supervise money lenders. A lot of illegalities are still happening in the money lending sector for example, they hardly keep records as no one will ask for them, money lenders are not registered and the fact that most people in the money lending sector are not aware of the new law, and high levels of illiteracy among the borrowers and lenders, money lenders do what suits their interests, thus, exploiting the borrowers. It has been observed that even the literate finds it hard to interpret the provisions of the law. This therefore calls for the implementation of this provision.[166]

Therefore, the researcher rightly concludes that despite the enactment of the new provisions regulating money lending business it is not yet useful to the money lending business in Uganda. The Authority should do a lot of sensitization regarding the provisions of money lending under the **Tier4 Microfinance Institutions and Money Lenders Act.[167]**

APPLICATION FOR THE MONEY LENDING LICENSE

Application for a money lending license is provided for under section 78[168] in conjunction with **Regulation 3,[169]** are to the effect that for one to apply for a money lending license must be a company. The law excludes companies like banks, insurance companies, cooperative societies but a company engaging in the business of money lending. It must be a company whose sole business is money lending. However, banks, co-operative societies, insurances companies, also advance or lend money as stipulated under the Financial Institutions Act.[170]

The provision further stipulates how the application for a money lending license must be made. It must be in writing accompanied with the certificate of incorporation of the company, a resolution of the particulars of the directors of the company, particulars of the secretary of the company, postal and physical address of the company, copies of National Identity Cards of directors and secretary, and evidence of payment of the prescribed fees. This provision means that whoever desires to engage in money lending business first must be a company incorporated under the Companies Act.[171]

Unlike under the old regime of money lending business, the Money Lenders Act Cap 273, that provided that every money lender before acquiring a money lenders license must first get a

[164] Regulation 17 (c).
[165] Section 77 (e).
[166] Section 77 of the Tier4 Microfinance Institutions and Money Lenders Act, 2016.
[167] 2016.
[168] Ibid.
[169] Tier4 Microfinance Institutions and Money Lenders (Money Lenders) Regulations, 2018.
[170] 2004
[171] 2012.

certificate of authorization to be granted a money lenders License.[172] Then proceeds under section 2[173] which was to the effect that every moneylender shall take out annually in respect of every address at which he or she carries on his or her business as moneylender, a moneylender's license.

The procedure of acquiring a money lenders license under the old regime was ambiguous. The law did not provide a clear procedure for applying for a money lenders license and the required documents. Therefore, with the enactment of the Tier4 Microfinance Institutions and **Money Lenders Act[174]and the Tier4 Microfinance Institutions and Money Lenders** (Money Lenders) **Regulations***[175]* the procedure was laid out clearly under **Section 78 (3)** of the Act and Regulation 3 of the Regulations to the Act.

ISSUING THE MONEY LENDING LICENSE

As a statutory duty of the authority to issue money lending license, the authority issues licenses to the applicants within three months unlike under the old regime, where moneylenders licence was granted by the Magistrates. After receiving the applications and the Authority is satisfied that the applicants have met all the requirements, [176]grant the applicant a money lenders licence. The requirements are determined by the authority, and the authority may from time to time add, change or substitute the conditions or requirement[177] for a company to qualify to be granted the money lending license. The license shall specify the name, (it must be only one name) and address under the money lender is authorized to carry on money lending business. And the license shall always get expired 31st on the (thirty first) December.

Therefore, for a company to be granted a money lending license, it must full fill all the necessary requirements for the company to qualify. For example, the conditions or requirements set under **Section 78**, an application to the authority accompanied by a certificate of incorporation, the resolution of the particulars of the directors of the company, a resolution of the particulars of the secretary of the company and the prescribed fees, and any other requirements that may be set by the authority as a mandate given to it under **Section 79(2).[178]**

Once the applicant has fulfilled the required conditions, the authority will within three months from the date of application issue the license to the applicant to start operating as a company involving in money lending business. The license will always get expired on the thirty first day of December. However, the question is for how long is the certificate valid? Is it a year? Suppose a company is granted a license in October, will the license still get expired on the thirty first day of December? The Act[179] and the regulations[180] are therefore not clear. The laws should make it clear on the period for which a license is valid. For example, if the license is for a year, then the time should start running the day a money lender acquired the license.

[172] Section 3 Money Lenders Act, Cap 273.
[173]Money Lenders Act Cap 273.
[174] 2016.
[175] 2018.
[176]Section 79.
[177] Section 78.
[178]Tier4 Microfinance Institutions and Money Lenders Act, 2016.
[179] Ibid.
[180]Tier4 Microfinance Institutions and Money Lenders (Money Lenders) Regulations, 2018.

The legal effect of having a money lending license makes the money lending transaction legal that can be enforced in courts of law. Where the money lender does not have a money lending license, any transaction between the lender and the borrowers is illegal and therefore unenforceable. Thus, in the case of **JAMBA SOITA ALI V DAVID SALAAM.**[181]The plaintiff's case against the defendant was for money had and received. It is his case that he advanced a loan to the defendant which he failed to pay back. The defendant did not deny receipt of some money from the plaintiff. However, he acknowledged the debt of Shs.1, 850,000/= and not Shs.9, 000,000/= as claimed by the plaintiff; the defendant further claimed to have paid the plaintiff the debt and even more.

It was discovered that the relationship of the plaintiff and the defendant was that of a lender and borrower and not money had and received. The transaction between the defendant and the plaintiff was a loan agreement. The principal sum attracted an interest of 25% per month. The transaction between the parties contravened the law since the plaintiff had no a money lenders license and thus illegal.

The same issue was determined in the case of **NAKS LTD –VS- KYOBESENYANGE,**[182] where it was held in that case that since the plaintiff had no money lending license, thus, any agreement or contract so made in default was illegal and could not be enforced by the Courts based on the maxim ex turpi causa. This Latin phrase, a contraction of a much longer phrase **ex turpi causa non orituractio** simply means that 'no claim arises from a base cause'.

The policy was well explained by Lord Mansfield, C. J in the case of **HOLMAN V JOHNSON**[183]The Claimant sold and delivered a quantity of tea to the Defendant. The contract was made in Dunkirk. The Defendant intended to smuggle the tea into England. The Claimant was aware of the Defendant's intention. The Defendant never paid for the tea and the Claimant brought an action for the price of the tea.

Court held that, the Claimant was entitled to recover. He had not himself committed any offence and played no part in the smuggling or received no benefit from it.

Lord Mansfield: observed that: -

…a contract is immoral or illegal as between plaintiff and defendant, always sounds very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; ex dolomalo non orituractio. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpicausâ, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, potiorest condition defendentis.

[181] HCT-00-CC-CS-0400-2005.
[182][1982] HCB 52.
[183](1775) 1 Cowp 341.

Meaning no court will lend its help or aid to a party in a money lending transaction whose cause of action is based on an immoral or illegal act. Therefore, where an unlicensed money lender enters into an agreement with a borrower, neither a money lender nor a borrower can enforce their rights in courts of law.

REFUSAL TO ISSUE A MONEY LENDING LICENSE

As there are requirements to be complied with before the applicant is granted the license, this means that if the company does not comply with the set requirements, the authority may refuse to issue the license to the said company, even if the applicant is renewing the license as in the case of **RE MARCUS OJAERO**,[184] the applicant had a license for two years, he applied for renewal in the third year, the police objected to it on legal grounds consequent upon which the magistrate refused to grant his certificate.

CHARACTER OR CONDUCT OF THE MONEY LENDER

Similarly, where the authority is unsatisfied that the shareholders and the persons responsible for the management of the company or firm are of good character, the Authority will not grant the applicant a money lenders license.[185]This is because the company is going to deal with people and money, of which one is required to be of good character, as he or she must be humane and understanding. This is however different as most money lenders are of bad character, in a way that most of them are rude towards the borrowers when they default in paying the loan in time. Most of them tend not to listen to the borrowers, and they decide to take away the security leaving the poor borrower in misery. This is supported by the findings of the study where a money lender revealed that, where a borrower defaults a money lender immediately takes the security or imposes a compound interest rate to be paid by the defaulting borrower.[186]

Furthermore, the Authority may refuse to grant the applicant license where the person responsible for the management of the company has been convicted of an offence relating to embezzlement or any other financial impropriety or indecency.[187] This implies that he may behave the same way with the company's money as he may disappear or misappropriate the money paid to him by the borrowers and deny that he has never receive the money, since in most cases there are no records kept in case of some payments. Thus, advocating for the implementation of the above provisions to ensure that people of bad characters do not engage in the money lending business.

OFFENCES IN RESPECT OF THE MONEY LENDING LICENSE

Section 84[188]stipulates that a person who carries on business of money lending or carries on the business in a name and address other than the name or address specified in the money lending license commits an offence and is liable on conviction to a fine of two hundred currency point on the first conviction and four hundred currency point on the second conviction. And on top of the

[184](1952) 20 NLR 77.
[185]Section 80 (a) Tier4 Microfinance Institutions and Money Lenders Act, 2016.
[186] Appendix II(b)
[187]Section 80 (b).
[188]Tier4 Microfinance Institutions and Money Lenders Act, 2016.

fine may suspend the money lending license and where one has been convicted of carrying on lending without a license, he will be disqualified from engaging in money lending business.

The fact that carrying on business of money lending without a license is an offence that is punishable by law as stipulated under **Section 84**,[189]which states that any person who conducts the business of money lending without a money lenders license or carries on business of money lending in a place and name other than that specified in the money lenders license commits an offence and is liable on the first conviction to a fine of two hundred currency point. On the second conviction will be liable to fine of five hundred currency points.

This however has not been implemented since most money lenders are conducting their money lending businesses without the license and no one has come out to implement the above provision of the law by disqualifying them from engaging in the lending business. And since they know they are acting illegally they have ended up exploiting the borrowers because they can claim not to be money lenders according to the definition provided for under the **Tier4 Microfinance Institutions and Money Lenders Act[190].**

However, it should be noted that since it is an offence to carry on money lending business without a license, it equally renders the whole transaction illegal and thus un enforceable in courts of law, this was illustrated in the case of **JAMES BALINTUMA V DR. HANDEL LESLIE,***[191]* where justice Musota dismissed the case with costs since the plaintiff had no Money Lending License and was carrying out business of Money Lending, any agreement or contract between him and defendant was illegal. Therefore, either way, this suit must fail for being time barred, or on the other hand being illegal and a base cause. Therefore, unlicensed money lenders having known that their claims are unenforceable in courts of laws have resorted to selling of the security of the borrower without delay.

Thus, to protect borrowers from unscrupulous money lenders, registration or acquiring of a licence must be made mandatory and the authority must put in place the possible tools to be used in implementing this provision.[192]

The provision is to the effect that where one carries on money lending business in a name and address that is not on the lending license on the first conviction, he will pay a fine of two hundred currency points and on second conviction four hundred currency points. The question what is the equivalence of two or four hundred currency points?

A currency point is equivalent to twenty thousand shillings[193] thus, two hundred currency points amounts to four million shillings (4,000,000/=) and four currency points amounts to eight million shillings (8,000,000/=)

The other issue is whether the two or four hundred currency points is enough to deter a money lender from committing the offence of carrying the business of money lending in a name and address that are not on the money lending license. The penalty seems to be enough, but the enforcement of the lack is not effective. Therefore, the fact that money lenders are still violating

[189]Ibid.
[190] 2016.
[191]Civil Suit No. 193of 2013.
[192] Section 84 of the Tier4 Microfinance Institutions and Money Lenders Act, 2016.
[193] Schedule to the Foreign Exchange Act, 2004.

the above provision the researcher appeals to the authority to implement the law. If the law is enforced, then money lenders will acquire money lenders license and operate in the names and place specified in the money lenders license. Hence the growth of money lending business in Uganda.

MONEY LENDING CONTRACT

According to **Section 85**[194] a money lending contract shall be in writing signed by the lender and the borrower and witnessed by a third party. The contract shall be inform of a note or a memorandum which shall explain the terms of the contract, most especially, the date on which the loan is taken and the date of repayment, the amount of the principal loan, the interest charged and shall be expressed in percentages per year, the nature of the security if any that is to say the contract must specify the type of security interest and the type of property taken as security of the loan, the nature of guarantor ship if any, the guarantor must be stated in the contract, and the right to early payment.

A guarantor was defined under **Section 68**[195] means a person who gives a guarantee or assurance. Therefore, a contract off guarantee means a contract to perform a promise or to discharge a liability of a third party in case the third-party defaults. Therefore, the purpose of a guarantor in a money lending transaction is to give assurance to the creditor that if the borrower defaults he will pay off the debtor. This was seen in the case of **ALICE NORAH MUKASA VS. CENTENARY BANK LIMITED AND BONNY NUWAGABA,**[196]where the court held that; the purpose of a guarantor to a loan is to render assurance to the lender that in the event where the borrower dies or fails to pay back the loan, the guarantor will pay the loan.

It should be noted that **Section 71**[197] provides for the extent of the guarantors' liability, that the liability of a guarantor shall be to the extent to which a principal debtor is liable, unless otherwise provided by the contract. The liability of a guarantor takes effect upon default by the principal debtor.[198]

Therefore, in the case of **UGANDA FINANCE TRUST V ALLOYS MUHUMUZA AND ANOR,**[199]in this case the 2nd respondent acted as a guarantor to the 1st respondent. A vehicle belonging to the 2nd respondent was attached after the 1st respondent had failed to pay the loan. Thus, citing section 71 of the Contract Act, 2010, that the guarantor shall be liable just like the principal debtor where he defaults unless otherwise provided by the contract. Therefore, in the instant case, the 2nd respondent being the guarantor to a loan of the 1st respondent, the 2nd respondent had to pay.

Similarly, in the case of **DFCU BANK V MANJIT KENT & ANOR,**[200] the defendant guaranteed to pay the plaintiff on demand of the loan owed by the customer of the plaintiff K. Pac Ltd, the sum of 100,000,000 shillings. Including charges and interests arising after the

[194]Tier4 Microfinance Institutions and Money Lenders Act, 2016.
[195]Contract Act, 2010.
[196]Civil Suit No. 77 of 2010.
[197]Contract Act, 2010.
[198] Ben. K, Twinomugisha, Principles of Law of Contract in Uganda. (2018), Kampala, Makerere University Printery p.257
[199]HCT-01-CV-CA-03 OF 2015.
[200] HCT-00-CC-CS-193-2000.

demand. The defendant denied having signed with the plaintiff any guarantee and if he did, so it was only 20,000,000 shillings.

The issue was whether the defendant guaranteed the overdraft facility and if so, whether the defendant was liable to pay the amount owing and other reliefs sought.

Court found out that the defendant had guaranteed the loan and held that, the extent of liability of the guarantor depends on the contract between the plaintiff and the principal debtor unless otherwise provided in the contract. Thus, a guarantor cannot be made liable for more than he has undertaken. Court therefore awarded the sum of 23,434,193shs, plus the interest and charges as stated in the contract of guarantee.

In reality some money lenders do not comply with section 85 of the law[201], for example on issues of expressing the interest charged in percentages, what they normally do is to tell the borrower the amount of money that he or she will repay for example if a borrowers takes 200,000 (two hundred thousand shillings), he or she is told to pay 250,000 on repayment, meaning the 50,000/= is the interest charged without any computation in percentages for the borrower to know the monthly or annual percentage charged respectively.

The contract must also state the mode of repayment of the loan, when making an agreement or contract it must clearly how the borrower should repay the loan whether in installments, how many installments and the interval.

It is also important to inform the guarantor if any, the extent of his liability in case the principal debtor fails to pay the loan. Unless the guarantor expressly specifies in the contract of guarantee the mount he undertakes to pay where the principal debtor defaults.

REPAYMENT OF THE MONEY BY THE BORROWER

Section 95,[202] provides that where a borrower wishes to repay the loan and the lender decides to hide or evades payment, to the extent that it becomes impossible for the borrower to find the lender, the borrower can deposit the money with the Uganda Microfinance Regulatory Authority, and the Authority will transmit the money to the money lender on behalf of the borrower. Unlike the old regime, the **Money Lenders Act**[203]was silent on the mode of repayment of the money borrowed and the realization of the collateral advanced as a security for the borrowed money.

It should be noted that **Section 95** only provides the mode of payment in situations where the lender evades payment, however, the provision does not go ahead to explain how the borrower can recover his property or security for the money advanced after depositing the money with the authority. This was however, clarified by the UMRA Executive Director, where he reported that in case a moneylender behaves in such a manner, they will be required to involve the police since it turns out to be a criminal case.[204]

It is on record that in most cases lenders usually ask for securities that doubles the amount lent. Therefore, even if the Authority is to compensate the borrower if the lender disappears for good,

[201] Tier4 Microfinance Institutions and Money Lenders Act, 2016.
[202]Ibid.
[203] Cap 273.
[204] Refer to Appendix I

the money might still be little compared to the value of the security advanced. Thus, the law[205] should further provide a mechanism under which a borrower can redeem his property for example, the Authority can make a provision ordering money lenders to always deposit the original titles to the securities to the Authority, so that if the borrower deposits the money with the Authority, the borrower gets back his property.

THE TIER 4 MICROFINANCE INSTITUTIONS AND MONEY LENDERS (MONEY LENDERS) REGULATIONS, 2018.

PURPOSE OF REGULATION

In 2016, Uganda reformed its laws by the enactment of the **Tier 4 Microfinance Institutions and Money Lenders Act, 2016 (the Act***).* The purpose of the Act was to legitimize and build confidence in microfinance institutions Savings and Credit Cooperatives (SACCOS), self-help groups, non-deposit taking and community-based microfinance institutions) and money lenders who had for a long time remained outside the radar of any regulator.

The enactment of the Act was not just recognition of the important role that informal lending arrangements play in promoting financial inclusion by reaching Uganda's large unbanked population. It was also meant to streamline the laws relating to borrowing and lending in Uganda. Section 112 of the Act[206] empowers the Minister of Finance to make regulations for the better carrying out of the provisions of the Act. In exercise of those powers, the Minister has now passed the **Tier 4 Microfinance Institutions and Money Lenders (Money Lenders) Regulations, 2018 (the Regulations).** The Regulations provide for the licensing and operation of money lending business in Uganda.

CHANGE IN MANAGEMENT.

The **Regulations to the Tier4**[207] are to the effect that a money lender shall not change its management except with the written authorization of the Authority. Where the Authority receives notice under **Regulation 7(C)** the Authority shall carry out due diligence on the directors and other persons to be involved in the management of the business and shall, (a) if satisfied that the new directors and the management of the money lender are fit to carry on the business of money lending, issue a notice of no objection to the change in management and directors;(b) if not satisfied that the new directors and the management of the money lender are fit to carry on the business of money lending, issue a notice of objection to the change in management and directors.(3) The notice referred to in sub **Regulation (2)** shall be in Form 4set out in Schedule 2 to these Regulations.[208]

The fact that the authority must be notified in case moneylenders want to change the management, this is however, different from what happens, since most businesses or moneylenders just change their management and sometimes sell their businesses at goodwill where the owner of the

[205] Ibid.
[206]Tier4Microfinance Institutions and Money Lenders Act, 2016.
[207]Regulation 8.
[208]Tier4 Microfinance Instructions and Money Lenders (Money Lenders') Regulation, 2018.

business sells it to another person, but the business remains under the name or brand of the first owner. The management changes but still operating under the names specified in the license.

The rationale for the notice of change in management is to inform the Authority and the public at large that the company is being operated or managed by new members other than those stated in the license. Secondly, for the Authority to issue a new license bearing the names of the new parties managing the company.

Therefore, the law should be more effective on this issue as borrowers have ended up being exploited for example in situations where a borrower took a loan and on the due date of repayment, he finds another person operating as the moneylender of the company where he borrowed the money and if he had given in his property as security for the money lent, it becomes hard for him to get back his property. Therefore, it is vital to notify the authority over change of management so that in case there is incomplete transactions should be recorded and see how to deal with them to protect the borrowers from being exploited.

DUTIES OF THE MONEY LENDER

Among the duties of a moneylender is to maintain a physical address and notify the Authority of any change in address within seven days after the change[209]. Notifying the authority after changing the location or address might be somehow challenging, because a money lender may decide to change the address in trying to evade payments for example, therefore it would be better if a money lender applies or notifies the authority before changing the address and give reasons as to why he may wish to change his address. And the authority if satisfied and thinks that it is ok to change the location or address grant the moneylender the authority to change.

Among the duties of the money lender under Regulation 18(3)[210] is the duty to determine the borrower's creditworthiness, and the capacity to repay the loan before advancing the loan to the borrower. In reality, money lenders do not check the creditworthiness of the borrower before advancing the loan to the borrower. What matters is the security advanced for the loan.

The creditworthiness of the borrower can be determined by the credit reference bureau (CRB). Regulation 18(1),[211] states that the CRB shall collect negative information relating to the credit history of persons or organizations regarding their no performing obligations. Further, Regulation 18 (2),[212] the CRB shall with the authority of the customer collect positive information regarding the economic, financial and commercial of persons or enterprises to determine their overall debt exposure, and their ability to repay the loan.

However, **Regulation 19 (1)**[213] provides that the CRB shall give credit information only to financial institutions regulated under the Financial Institutions Act,[214]and Micro finance Deposit Institutions (MDIs).[215]

[209] Regulation 17(d)
[210]Tier4 Microfinance Institutions and Money Lenders (Money Lenders) Regulations, 2018.
[211]Financial Institutions (Credit Reference Bureaus) Regulations, 2005.
[212] Ibid.
[213] Ibid.
[214] 2004.
[215] Regulation 3 of the Financial Institutions (Credit Reference Bureaus) Regulations, 2005.

Therefore, any institution that is not regulated under the Financial Institutions Act, 2004 and MDIs shall not access credit information from the Credit Reference Bureau. However, other institutions (users)[216] can only access information from the CRB under Regulation 19 (2),[217] the user shall seek permission in writing to the CRB to access the credit information of the borrower.

Therefore, before a money lender advances a loan to a borrower, may request in writing the CRB to collect both negative and positive information about the borrower. This will help a money lender to determine the creditworthiness of the borrower before he advances a loan to the borrower.

The credit reference bureau is also required to provide borrowers with financial cards as a means of checking the creditworthiness of the borrower. A financial card uniquely identifies the borrower using a biometric system. The financial card has a memory chip that is readable using a card reader provided by the CRB.[218] The financial card basically provides important information about the borrower that might help the lender to determine the credit worthiness of the borrower.

RECORD KEEPING

Under Regulation 17(c) it is the duty of the money lender to keep and maintain records including proper books of accounts, a cash book, ledger, register of securities, and register of debtors and such other books of accounts in such form and in such manner as the Authority may require. A money lender is required to make records of the transaction signed with the borrower, the amount of money lent to the borrower, the interest rate to be paid, when to pay the loan and the type of security advanced for the loan.

This is important in situations where parties may wish to reopen or review their transactions. This was illustrated in the case of **HAMWEINVESTIMENTS LTD V BABIGUMIRA,***[219]* Judge Henry Peter Adonyo stated that; "it is the duty of a moneylender to keep proper books of account and failure to do so would render such transactions not possible to be claimable in a court of law where there is no performance". Therefore, a money lender must keep records of all the transactions between him and the borrower.

COLLATERAL FOR MONEY ADVANCED

The regulations provide that a money lender shall not dispose of any collateral given by a debtor as a sale, pledge or collateral for the loan advanced to him, unless 60 days have passed since a written demand notice has been issued to the debtor requiring him or her to pay any outstanding monies on the money advanced.[220] Practically, most moneylenders do not issue a demand notice to the borrower or debtor on the unpaid money, what they usually do is to keep silent and wait

[216] Ibid, a user means any financial institution, micro finance depositing taking institution or a person, entity entitled to request credit information from the credit reference bureau.
[217] Ibid.
[218] E.T, Mutebile; Uganda's New Credit Reference Bureau, 2008 at http://www.bis.org>review accessed on September 8, 2019 at 3:00pm.
[219] Supra.
[220]Regulation 18(3).

for the due date, where the borrower defaults or fail to repay the loan what follows then is to dispose of the security or collateral even before the 60 days elapse.

The regulation[221] further provides that a money lender may dispose of the collateral given by the debtor by way of public auction or private treaty without recourse to a court of law. Moneylenders hardly auction the collateral given by the borrowers as it is always a private arrangement where a money lender contracts with someone who will give him the money he needs and, in most cases, they sell the collateral expensively, that doubles the principal amount lent plus the interests, and the excess of the money is not refunded to the borrower as provided for under subregulation7(c)

BORROWER DEPOSITING MONEY WITH THE AUTHORITY.

According **Regulation 19**[222] provides that, where a money lender refuses to accept any sum in repayment or where it becomes impracticable for the borrower to find the money lender and make a payment, the borrower may deposit the sum with the Authority; a receipt of the money received shall be issued to the borrower as evidence of payment. Then Authority shall, upon receiving money cause a written notice of the deposit to be served on the moneylender and require the money lender to appear before the Authority and receive the monies deposited and to reconcile the accounts of the borrower to reflect the money deposited as money duly paid.

The regulation gives the authority the power to receive the money on behalf of the money lender and helps the borrower to reconcile his accounts, however what the borrower will remain asking himself or herself is that what will happen in a situation where the lender has disposed of the collateral and of which the value of the collateral is much more than the loan advanced to the borrower, how will the borrower get back his property. For example, a moneylender in the names of Kamulali lent a couple five million for medical expenses and they give in a title to their house as collateral and before the due date, the money lender disposed of the house that was worthy millions of monies.

It should be noted that the regulations only catered for lost, damaged and destructed properties under the possession of the lender, where he must exercise reasonable care over the security given by the borrower and in case of destruction, damage, or loss the money lender is liable to pay.[223]

THE CHATTELS SECURITIES ACT, 2014 AND ITS IMPACT ON MONEY LENDING

The **Chattels Securities Act** was enacted to regulate the creation and enforcement of security interests in chattels. Chattels means any moveable property that can be completely transferred by delivery, these include machinery, book debts, stock and the natural increase of stock, wool or property in respect of which a valid document of title exists.[224]

A document of title therefore means a document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to

[221]Regulation 18 (4).
[222]*Tier4 Microfinance Institutions and Money Lenders (Money Lenders) Regulations, 2018.*
[223] Regulation 20.
[224] Section 2 of the *Chattel Securities Act, 2014*.

receive, hold and dispose of the goods it covers for example a land title, car log book, and includes receipts among others.[225]

A collateral means personal property that is subject to a security interest,[226] therefore any property that can be given as a security is referred to a collateral. Whereas a security interest, means a right that is enforceable against persons generally, arising out of an interest in a chattel paper, a document of title, goods, an intangible, money, or a negotiable instrument and includes a fixed and floating charge, an interest created by a chattel mortgage, a conditional sale agreement, hire purchase agreement, a pledge, a trust deed, a trust receipt, an assignment, a lease or a transfer of chattel paper, which secures a payment or performance of an obligation.[227]

It should be noted that the **Tier4 Microfinance Institutions and Money Lenders Act,**[228] excludes certain items to be held as security. It provides that a security interest shall not be taken in a money lending transaction where repayment of the loan and interest is affected by execution of a chattels transfer in which the interest provided is not in excess of nine percent per year.

Similarly, a security interest shall not be taken to a transaction where a bill of exchange is discounted at a rate of interest not exceeding nine percent per year.

CREATION OF SECURITY INTERESTS

Section 9[229] provides for creation of a security interest, it is created by a transaction that in substance secures payment or performance of an obligation, without regard to the form of the transaction, identity of the person who has title to the collateral, or whether title to the collateral is in the secured party.

It should be noted that according to **Section 9(2)**[230] for a transaction to create a security interest, it should be intended as security only; this means that a transaction must intend to create a security interest for it be treated as such even if it appears to outright sale. The effect with this is that transactions not intended to be a security would not be recognized as such even if on the face of it shows to be a security. Therefore, a genuine sale of property does not become a security even if it is followed by a lease back or letting on a hire purchase clause, similarly a sale of debts does not become a security simply because the seller gives recourse. However, a debt can be assigned in reduction of the assignor's own indebtedness to the assignee the transaction establishing a sale or security.

This was illustrated in the case of **SIEBE GORMAN CO. LTD V BARCLAYS BANK**,[231] the plaintiff requested for an outright assignment of bills held by their debtors with the respondent bank to be made in their favor. The respondent refused and made payment to the debtor's overdrawn account though the request expressly stated that the assignment was to a security for

[225] Ibid.
[226] Ibid.
[227] Supra.
[228] Section 98.
[229] Chattel Securities Act, 2014.
[230] Ibid.
[231] (1979) Lloyds Rep.142

the debtor's indebtedness to the plaintiff. On liquidation of the debtor, the plaintiff sued the respondent for recovery of the sums collected on the bills.

The defendant contended that the assignment to the plaintiff constituted a charge on books, which was void for want of registration. Slade J held that while the assignment was not a sale, it was not intended to be a security interest but was an outright transfer towards payment of the debtor's debts. Therefore, for a transaction to create a security interest it must be intended to be such as seen in the instant case however, much it appears to be an outright sale at the face of it, is not enough thus, it be intended to be a security.

Therefore, in a money lending transaction, the security advanced for the loan should be intended to be a security and not a sale. Thus, **Regulation 18 (3)**[232] provides that a money lender shall not dispose of any collateral given by a debtor as a sale for the loan advanced to him unless the debtor has defaulted.

THE ILLITERATE'S PROTECTION ACT, CAP 78

Section 1[233] **of the Illiterates Protection Act,** defines an illiterate to mean in relation to any document, a person who is unable to read and understand the script or language in which the document is written or printed. Regarding money lending contract, they are usually in English language, however, some borrowers and lenders do not know how to read English and thus cannot understand what the agreement is all about. In the case of **MUKIIBI JOSEPH V. ELITEK TECHNOLOGIES INTERNATIONAL LTD AND 4 ORS**[234]that the term "illiterate" is defined under Section 1(b) of the Illiterates Protection Act[235] to mean, in relation to any document, a person who is unable to read and understand the script or language in which the document is written and printed.

The **Tier4 Microfinance Institution and Money Lenders Act, 2016,**[236]does not specify the language in which a money lending contract should be written. However, in practice money lending agreements are always in English. The Act further states that the agreement should be in writing and signed by the lender and borrower.[237] However, no provision under the Tier4 Microfinance Institution and Money Lenders Act, 2016 and the Tier4 Microfinance Institution and Money Lenders (Money Lenders) Regulations, 2018,carters for illiterates in a money lending agreement. Thus, provisions of the Illiterates Protections Act, Cap 78 may be cited to protect an illiterate party in the money lending agreement.

VERIFICATION OF SIGNATURE OF ILLITERATES.

Section 2[238] is to the states that before an illiterate person append his mark (thumb) on a document; the document shall first be read and explained to him. The illiterate will then instruct a third party call him a witness, to write the name of the illiterate showing that the illiterate has

[232] Tier4 Microfinance Institutions and Money Lenders (Money Lenders) Regulations, 2018
[233]Illiterates Protection Act, cap 78
[234]Civil Suit No. 227 of 2010.
[235] Cap 78.
[236] Section 85.
[237] Ibid.
[238] Illiterates Protections Act, cap 78.

signed the document. Then the witness will also write his or her full names on the same document addressing himself or herself as a witness to the agreement.

This was illustrated in the case of **MUKIIBI JOSEPH V. ELITEK TECHNOLOGIES INTERNATIONAL LTDAND 4 ORS,**[239]that **Section 2** thereof provides for verification of the illiterate's mark on any document, and that prior to the illiterate appending his or her mark on the document it must be read over and explained to him or her.

Therefore, in a money lending agreement or contract provided for under section 85[240] that a money lending agreement shall be in writing and signed by the lender and the borrower and shall be witnessed by a third party. Thus, where the borrower is an illiterate person, the parties should follow the **Section 2**[241] by reading and explaining the content of the agreement to the illiterate before he appends his mark on the document.

In practice however, borrowers are usually given the agreement to sign without reading and explaining the content of the agreement to the borrower. Where a money lender happens to read and explain the content of the agreement to the borrower, a lender misrepresents the borrower. For example, instead of telling the borrower that the agreement is a sales agreement, he tells the borrower that it's a loan agreement.

VERIFICATION OF DOCUMENTS WRITTEN FOR ILLITERATES

Section 3[242] provides that any person who shall write any document for or at the request, on behalf or in the name of any illiterate shall also write on the document his or her own true and full name as the writer of the document and his or her true and full address, and his or her so doing shall imply a statement that he or she was instructed to write the document by the person for whom it purports to have been written and that it fully and correctly represents his or her instructions and was read over and explained to him or her.

This was illustrated in the case of **VIOLET NAKIWALA, SONDOLO JAMES &RWAKIBWENDE VS. EZEKIEL RWEKIBIRA& JOYCE KAIHAGWERWEKIBIRA,***[243]* the defendants and the late Eriya Kakoro, were the registered joint tenants of the suit land. The 1st defendant and the late EriyaKakoro were brothers and occupied the suit land with their respective families grazing their cattle thereon. EriyaKakoro died in 1998, and his family with which he had moved to another location in Kyasansuwa in search of fresh pasture for their cattle wanted to go back to the suit land. However, the 1st defendant informed them that the deceased before his death surrendered his interest in the suit land to the Defendants, and that as such the children and wife of the deceased no longer had any interest to claim in the suit land.

The 1st Defendant showed the plaintiffs a Memorandum of Surrender document stating that the deceased had surrendered his interest. Upon scrutiny of the document said to have been made by the deceased, the Plaintiffs state that they discovered it to be an outright forgery because by the time it was said to have been made, the deceased was terminally sick and could not have been a

[239] Supra.
[240]Tier4Microfinance Institutions and Money Lenders Act, 2016.
[241]Illiterates Protections Act Cap 78.
[242] Ibid
[243] Civil Suit No. 280 of 2006.

party to the said document. The Plaintiff also questioned the authenticity of the document because the deceased could not have done it without the express consent of his children and wife. The Plaintiffs further cast a lot of suspicion on the document since it was written in English and yet the deceased was illiterate, and therefore that the deceased's purported thumb print may be an outright forgery.

It was also established that there was no certificate of translation to show that the power of Attorney was read and explained to the deceased as a mandatory statutory requirement under **Section 3** of the **Illiterates Protections Act,**[244] and therefore the document was regarded to be null and void.

ENFORCEMENT OF LENDERS AND BORROWERS' RIGHTS IN A MONEY LENDING CONTRACT

In a money lending transaction, the contract or agreement between the lender and the borrower must state, the principal amount and the interest rate charged. The contract should further mention the date of payment of the money borrowed by the borrower, the duties of the borrower, the mode of payment, charges of late payment, the right to early repayment, and the nature of the security.[245] The right to redeem the security before it is disposed of and the conditions under which the collateral can be sold[246] subject to **Regulation 18**[247]as shall be discussed below reference made to Chapter 2.Therefore, this chapter discusses the enforcement of lenders and borrowers' rights accruing from a money lending agreement between the borrower and the lender.

MONEY LENDING LICENSE

It should be noted that, for a money lender to enforce his or her rights against the borrower, he or she must be a licensed money lender and that is a licensed company under section 82.[248] A money lender should also note that for him to enforce his or her rights in courts of law, must have records of his transactions between him and the borrower as stipulated under **Section 88**,[249] it provides that where a money lender applies to court to recover money lent or for the enforcement of security made or taken in respect of money lent, the money lender shall produce the records referred to under **Section 87**[250] of the **Tier4 Microfinance Institutions and Money Lenders Act, 2016.**

Thus, it should be noted that any transaction entered into by a money lender, where he does not have a money lenders license, renders the whole transaction illegal and cannot be enforced in courts of law. This was illustrated in the case of **BALINTUMA V DR. HANDEL LESLIE**[251]

[244] Cap 78.
[245] Section 85 Tier4 Microfinance Institutions and Money Lenders Act, 2016.
[246] Regulation 25.
[247]Tier4 Microfinance Institutions and Money Lenders (Money Lenders) Regulations, 2018.
[248] Section 5 of the Tier4 Microfinance Institutions and Money Lenders Act, 2016.
[249]Tier4 Microfinance Institutions and Money Lenders Act, 2016.
[250] Section 87, provides that a money lender shall issue a receipt to the borrower for every payment made on the loan, the receipt shall be made immediately after payment, every money lender shall keep a record which shall contain, the date on which the date was disbursed, the amount of the principal and the sum repaid on the loan and the date on which it was made.
[251] Civil Suit No. 193 of 2013.

in this case the issue for determination was whether the plaintiff was a money lender or was holding out as a money lender and thus bound by the **Money Lenders Act.** It was established that the relationship between the plaintiff and the defendant created a money lending agreement. The plaintiff is claiming money from the defendant as a Money Lender. The defendant took several Credit Loans from the plaintiff as pleaded in MA No. 395 of 2013 where the plaintiff's affidavit in reply, paragraph 16 unequivocally states that the defendant took loans of UGX. 91,750,000/=, UGX. 104,512,500/= and UGX. 28,500,500/=.

It was however, established that the plaintiff had no money lending license, and therefore held that, the plaintiff had no Money Lending License and was carrying out business of Money Lending illegally, therefore any agreement or contract between him and defendant was illegal and thus unenforceable in courts of law.

LIMITATION OF TIME FOR PROCEEDINGS

Under **Section 19(1),**[252] it is clear that no proceedings shall lie for the recovery by a money lender of any money lent by him or her or of any interest of that money, or for enforcement made or security taken, unless the proceedings are instituted before the expiration of twelve months (12 months) from the date on which the cause of action arose.

However, **Section 19(2)**[253] provides for exception to the limitation period under section 19(1).[254] There are three main exceptions, first where the borrower acknowledges in writing the amount due and acknowledges in writing to the lender that he is to pay that money. The time of instituting the proceedings for recovery of the money will commence within twelve months from the time of acknowledging the due debt.

Secondly, at the time when the cause of action accrued the person entitled to take the proceedings is non-compos mentis, and time will not start to count until that person ceases to be non-compos mentis or the dies;

Thirdly, if by the time the cause of action accrues either by the original due time or by undertaking and the borrower is not in Uganda, time will not start to count until he returns to Uganda.

As in the case of **BALINTUMA V DR. HANDEL LESLIE**[255]in this case the cause of action arose on 2nd May 2012. The suit was filed on 28/6/2013 which was clearly outside the limitation period. There were no exemptions pleaded by the plaintiff as provided for under section 19(2) of the Money Lenders Act. The suit was therefore dismissed for being time barred.

However, the **Tier4 Microfinance Institutions and Money Lenders Act,**[256] and the regulations[257] thereto are silent on the time in which a party can institute proceedings to enforce his or her rights. However, the **Section 3**[258] provides that actions of contract, tort and other actions shall not be brought after the expiration of six years from the date on which the cause of action

[252]Money Lenders Act Cap 273.
[253] Ibid.
[254] Supra.
[255] Supra.
[256] 2016.
[257]Tier4 Microfinance Institutions and Money Lenders (Money Lenders) Regulations, 2018.
[258]Limitation Act, Cap 80.

arose. Therefore, it is upon courts discretion to either consider the limitation period in the **Money Lenders Act, cap 273 or the limitation period under the Limitation Act Cap 80.**

Therefore, before a money lender thinks of enforcing his or her rights in courts of law, he or she must be licensed and must consider the time of instituting the proceedings for enforcing his rights.

PROCEDURE FOR RECOVERY OF MONEY LENT

DEMAND NOTICE

When a lender or creditor want to recover his money lent to the debtor or borrower, before commencing proceedings against the borrower in courts of laws, the lend shall issue a demand notice to the borrower instructing him or her to pay the outstanding balance due to the loan. **Section 4**,[259] provides that a demand by the creditor in respect of a debt shall be a demand notice and shall constitute a statutory demand. Thus, section 7,[260] provides that a notice (demand notice) shall be in writing. Furthermore **Rule 10**,[261] states that a person shall give a notice of demand[262] to the defendant before instituting a small claim within fourteen days from the date of receipt of the demand notice.

Small claims mean a matter whose subject matter does not exceed ten million shillings (10million).[263] Therefore, where a borrower has a loan that does not exceed ten million, a money lender can institute proceedings in small claim courts.[264]Where the value of the subject matter does not exceed twenty million, the lender can institute the proceedings to recover his or her money with the magistrates grade I.[265] where the value of the subject matter exceeds fifty million shillings, the proceedings to recover the money by a money lender or creditor shall be instituted in the Chief Magistrates Court.[266]

Therefore, a demand notice must be served to the defendant fourteen days before instituting proceedings to recover the money lent by the lender in a court with competent jurisdiction to try the matter depending on the amount of money.

This was illustrated in the case of **MUGOBI TRADERS LIMITED V STANDARD CHARTERED BANK***[267]*the applicant obtained a loan from the respondents. The applicant however, failed to pay the loan. After several months of non-payment respondent wrote a demand notice giving the applicant 45 days within which to pay the loan to avoid the sale of the security. It was thus held that the respondent was entitled to recover the money of the customers.

The **Tier4 Microfinance Institution and Money Lenders Act, 2016** and the Regulations thereto, do not provide for a demand notice. However, the **Insolvency Act, 2011,** provides that a

[259]Insolvency Act, 2011.
[260]Chattels Securities at, 2014.
[261]Judicature (Small Claims Procedure) Rules, 2011.
[262] Ibid schedule I
[263] Ibid Rule 3
[264] Ibid Rule 4, the Chief Justice may by notice publish in the Gazette designate a court
[265] Section 11(b) of the Magistrates Court (Amendment) Act, 2007.
[266] Ibid section 11 (a)
[267] Misc. Application No. 269 of 2016.

demand made by a lender or credit to the borrower to repay the loan is referred to as a demand notice. This is, however, different from what happens in practice, some money lenders do not write to the borrowers demanding the payment of the outstanding money.

COURT POWERS TO ENFORCE LENDERS RIGHTS

Where a borrower defaults in paying back the money, a money lender can apply to court to enforce his right to recover his money. **Section 88**,[268] provides that where a money lender applies to court for recovery of money lent or enforcement of an agreement or security made or in respect of money lent, court shall order the money lender to produce documents of the transaction between the borrower and the lender.

Section 88(2),[269] further provides that where court is satisfied that the borrower has defaulted in paying back the loan to the money lender as per the money lending agreement, court shall order the outstanding principal to be paid to the money lender with such interest as court may allow.

In the case of **ALPHA INTERNATIONAL INVESTMENTS LTD V NATHAN KIZITO***[270]* the defendant obtained a loan of Shs.5m from the Plaintiff. The defendant undertook to re-pay the loan within 3 months at an interest rate of 20% per month. He deposited his land title to land comprised in Private Mailo Block 337 Plot 274, at Mugogo, as security. The Defendant defaulted in repaying the loan and the Plaintiff tiled this summary suit for Shs.16, 450,000/= being the amount of principal and interest due and owing. The judgment was entered in favor of the plaintiff and court ordered the defendant to pay the full amount of five million (5m). However, the interest rate was reduced to 24% per annum.

DISPOSING OF THE COLLATERAL ADVANCED FOR MONEY LENT BY A MONEY LENDER

Where a money lender is in possession of the collateral advanced for the loan and would wish to recover his money lent to the borrower. **Regulation 18(3)[271]** provides for the mode of disposing of the collateral. It provides that a money lender shall not dispose of collateral given by a borrower as collateral for the loan advanced to the borrower unless sixty (60) days have elapsed.

SALE BY PUBLIC AUCTION OR PRIVATE TREATY

A public auction is a sale of property at auction where all and sundry interested can attend the auction and offer bids and normally it's the highest bidder who takes the auctioned property.[272]

Whereas a private treaty is a processing of selling property where by the negotiations are usually between the seller and the buyer without resorting to the process of auctioning the property.[273]

[268]Tier4 Microfinance Institutions and Money Lenders Act, 2016.
[269] Ibid.
[270] HICIC.S. No. 131 of 2001.
[271]Tier4 Microfinance Institutions and Money Lenders (Money Lenders) Regulations, 2018.
[272] https://thelawdictionary.org/public-auction/ accessed on 22/03/2019.
[273]https://uk.practicallaw.thomsonreuters.com/ accessed on 22/03/2019.

Regulation 18(4) is o the effect that a money lender may dispose of collateral by way of public auction or by a private treaty without going to courts of law. this means that after expiration of 60 days as per **sub-Regulation (3)**,[274] a money lender may sale a security either by calling upon highest bidders to buy the property or by a selling it to an individual without recourse to court. By selling the security a money lender will be able to realize or recover his money lent to the borrower.

In the case of **BANK OF AFRICA UGANDA V GANYANA& ANOR,**[275] the defendant defaulted in repaying the loan to the plaintiff amounting to Ugandan shillings 70,000,000/=. Upon default, the plaintiff was entitled to recover the money by selling the security and the sale was by public auction without applying to courts of law.

It should be noted that before a money lender sale the collateral by public auction or by a private treaty, he or she should first make a valuation of the security and obtain a forced value of the security to determine the market value of the property.[276] A forced vale sale means a price lender expect a property to reach at auction after the property has been repossessed. It is usually less than the market price usually around 70% of the market price.[277]

The security will not be sold at a price less than the forced sale value in the first two attempts of the auction, however, where the lender fails to sell the security in the two attempts, the security may be sold at a price less than the forced value.[278]This means that in the first two attempts at the auction the property may be sold at the forced value or even above the forced value. But where it fails, then the security may be sold at the

PROCEEDS FROM THE SALE OF THE COLLATERAL

Proceeds[279] means identifiable or traceable personal property in any form derived directly or indirectly from dealing with collateral or proceeds of a collateral, and includes; (a) a right to an insurance payment or any other payment as indemnity or compensation for loss or damage to the collateral or proceeds; and (b) a payment made in total or partial discharge or redemption of an intangible, a negotiable instrument, a security or chattel paper.

After the money lender has sold the security, he does not take the whole proceeds got from the sale. **The Tier4 Microfinance Institutions and Money Lenders (Money Lenders) Regulations**[280] provides for how the proceeds should be dealt with.

Regulation 18(7)[281] provides that, all the monies outstanding on the loan should be paid, then pay the expenses and costs properly incurred or incidental to the sale. Meaning any costs or expenses incurred in the due course of selling the security. If there is any balance after deducting

[274] Regulation 18 of the Tier4 Microfinance Institutions and Money Lenders (Money Lenders) Regulation, 2018.
[275] Civil Suit No 477 of 2011.
[276] Regulation 18(5).
[277]https://www.checkmyfile.com.
[278] Regulation 18(6).
[279]Chiliya Norman, Impact of Level of Education and Experience, (2012) athttps://ijbmer.com/doc/volumes/vol3issue1/ijbmer2012030110.pdf.
[280] 2018.
[281] Tier4 Microfinance Institutions and Money Lenders (Money Lenders) Regulation, 2018.

the outstanding monies on the loan and the expenses incurred in the sale, the balance should be paid to the borrower.

APPOINTMENT OF A RECEIVER

A receiver[282]means a manager or a receiver and includes a manager or a receiver or an administrative receiver appointed by court or by or under a document, to manage or oversee any property in dispute. A receiver being an individual or entity appointed to receive the property of the debtor when the property is likely to be mismanaged. The purpose of a receiver is to manage and keep the property. The receiver may further liquidate the property and distribute the proceeds in accordance with the law.[283]

In the case of **SINCLAIR V. MOORE,**[284] it was stated that the purpose of a receiver is to preserve and distribute properly the proceeds of the subject matter of litigation.

The **Chattel Securities Act,** *2014* provides for remedies in case the debtor is in default, this is provided for under **Section 73**, that where the debtor is in default, the creditor may, appoint a receiver under **Section 74**. **Section 74** provides that where a debtor is in default a receiver may be appointed in respect of the security by the secured party or by court. Thus, a money lender may appoint a receiver where the borrower has defaulted or may be appointed by court.

Therefore, in the case of **MULTI-CONSTRUCTORS LTD V UGANDA COMMERCIAL BANK,***285* The appellant defaulted in repaying a loan obtained from the Respondent. The loan was secured through a debenture deed whereby assets of the appellant including a building were charged as security. Pursuant to the powers in the debenture, the respondent appointed Receivers/ Managers in the names of Messrs. Ian Douglas Hunter and John B for purposes of realizing money to clear the debts of the appellant. The receivers /managers sold the building to the Respondent in order to clear the debts of the appellant.

It should be noted that the **Tier4 Microfinance Institution and Money Lenders Act***286* and the regulations thereto do not provide for receivership. It only provides for a sale by public auction.[287]

Therefore, in money lending transaction where the lender is in possession of the security, and the borrower defaults, the lender cannot deal with the property personally, the lender may appoint a receiver to deal with the security and pay back the loan.

Or the lender or creditor may take possession of the collateral as provided for under **Section 75**, or sale the security, the lender may also foreclose the right of the debtor to redeem the collateral.

However, money lenders rarely follow these provisions in case the borrower is in default, normally what most money lenders do is to dispose of the property without even notifying the borrower. It is on record that money lenders usually make the borrower to sign transfer

[282] Section 2 of the Insolvency Act, 2011.
[283]Aderson A.M, Receivership in North Carolina State Courts, (2015) Superior Courts Judges' Fall Conference p.1 accessed at https://www.sog.unc.edu/sites on 21/03/19.
[284] 228 N.C. 389, 395(1947).
[285] Civil Appeal No.25 of 1994.
[286] 2016.
[287] Regulation 18(4).

agreements stating that once the borrower defaults, ownership of the collateral advanced as a security for the loan will automatically pass over to the lender.[288] Giving the lender the right to dispose of the collateral at any time without consulting the borrower. Therefore, these provisions should be made effective by the authorities to avoid exploiting the borrowers.

ENFORCEMENT OF BORROWERS RIGHTS

The borrower has the right to repay the loan as early as he can. This right is provided for under **Section 85(h)** of the **Tier4 Microfinance Institutions and Money Lenders Act.**[289]Therefore, the borrower has the right to repay the loan before the due date and his right must be respected by the money lender.

DEPOSITING MONEY WITH THE AUTHORITY

Regulation 19[290] is to the effect that, where a borrower wants to repay the loan to the money lender, but a money lender refuses or it becomes hard impracticable for the borrower to find a money lender to make payment, a borrower may deposit the money with the Authority.[291] A receipt shall be issued to the borrower as evidence of payment.[292]

After the borrower has deposited the money with the Authority, the Authority shall write to the money lender to appear before the Authority to receive the money deposited by the borrower. The Authority shall therefore reconcile the accounts of the borrower to show that the borrower has duly paid the loan.[293] The effectiveness of these depends entirely on the authorities will to implement and practice its mandate fully.

RIGHT TO REDEEM THE COLLATERAL

Regulation 18(8)[294] provides that a borrower shall retain his or her right to redeem or get back his property advanced as the security for the loan before the property is sold, if the borrower pays the outstanding money and costs on the loan. This right is exercised before the lender disposes of the security.

Therefore, where a borrower wishes to exercise his rights to redeem his property, and a money lender refuse to accept or evade payment, the borrower can deposit the money with the Authority. The Authority will then write a notice to the money lender to appear before the Authority to receive his money and redeem the property of the borrower.[295]

It should be noted that the Authority does not have centers around the country. For example, in rural areas where money lending practices are being conducted. Money lenders from all corners

[288] Refer to Appendix II(b).
[289] 2016.
[290]Tier4 Microfinance Institutions and Money Lenders (Money Lenders) Regulations, 2018.
[291] Uganda Microfinance Regulatory Authority.
[292] Regulation 19(2).
[293] Regulation 19(3).
[294]Tier4 Microfinance Institutions and Money Lenders (Money Lenders) Regulations, 2018.
[295] Supra Regulation 19.

of the country must come to Kampala if they want to apply for the money lending license, renewal of the license among others.

REMEDIES

There are various remedies available to the aggrieved party in a contract, these include, compensation, damages (general and nominal damages), injunctions among others as explained below.

COMPENSATION

Where a money lender is in possession of the collateral and the collateral gets lost, damaged or destroyed, a money lender shall be liable to pay the value of the collateral or replacement value of the collateral after deducting the outstanding monies and the interest on the loan.[296] However, where a money lender fails to pay or replace the value of the collateral, a money lender will be required to pay compensation to the borrower for the loss suffered in addition to the value of the collateral.[297] Furthermore **Section 61(1**)[298] provides that where there is a breach of contract, the party who suffers the breach is entitled to receive from the party who breaches the contract, compensation for any loss or damage caused to him or her.

GENERAL DAMAGES

General damages are financial compensation awarded by a competent court to the victim for the loss or injuries suffered for which no amount of money can be enough. General damages may be as a result of breach of contract, loss, and pain suffered by the victim[299].Therefore, where a money lender or a borrower suffers any injury whose value or compensation cannot be calculated, court will award the victim general damages. It should be noted that general damages aim at restoring the victim to a position that he or she would have been had the injury not occurred. This was illustrated in the case of;

BUKENYA& ANOR V KIRUMIRA& 2 ORS*[300]* the defendant deprived the Plaintiffs of their title since 2007; a period of 10 years. The Plaintiff has been shown to be a farmer/businessman who would have used his title perhaps to expand his business. He has also suffered mental anguish and pain. The Court thus assumed a lost benefit of shillings. 2,000,000/- only (two million) per year from his title had it been availed to him for commercial use. Thus, court multiplied the 2,000,000 per year by 10 years amounting to 20,000,000'=

NOMINAL DAMAGES

Nominal damages refer to a small amount of money damage awarded by a court to the plaintiff when a legal wrong has occurred. There is no actual financial loss as a result of that legal wrong,

[296] Regulation 20(2) of the Tier4 Microfinance Institutions and Money Lenders (Money Lenders) Regulations, 2018.
[297] Ibid Regulation 20(3).
[298] Contract Act, 2010.
[299]https://legaldictionary.net.
[300]CIVIL SUIT NO. 220 OF 2008.

but it simply shows that the plaintiff was right in a suit.[301] For example where there is a breach of a warranty in a contract, but no loss suffered by the plaintiff. In the case of **WAIGLOBE (U) LIMITED V SAI BEVERAGES LIMITED***[302]* it was stated that Nominal damages will be awarded where the court decides in the light of all the facts that no actual damage has been sustained. The function of nominal damages is to mark the vindication, where no real damage has been suffered, of a right which is held to be so important that its infringement attracts a remedy.

Similarly, in the case of **BUKENYA & ANOR V KIRUMIRA&ORS***[303]* nominal damages were awarded to the plaintiff for the pain and suffering he went throughout the 10 years of litigation at the rate of shillings. 1,000,000/-. Thus shillings. 1,000,000/- per year was multiplied by 10 years that amounted to shs.10, 000,000/-) (ten million).

Therefore, the award of nominal damages to plaintiff was fair due to the loss he encountered in the ten (10) years, when his land was in the hands of money lenders. The plaintiff could not deal with the land in anyway. The fact that the plaintiff did not suffer actual financial loss, the award of one million per year is fair.

INJUNCTION

An injunction is a court order stopping an individual from doing an act that threatens or violates a legal right of another person, or a court order compelling a person to do an act.[304]An injunction was further defined in the case of **BYARUGABA V MUHOOZI&ANOR**[305] as a Court order requiring an individual to do or omit doing a specific action. There are different types of injunctions, namely permanent injunction and temporary injunction.

Section 38[306] gives the High Court powers to grant an injunction restraining from acting as may be specified by court. In the case of **BUKENYA & ANOR V KIRUMIRA&ORS,**[307] in this case court granted the plaintiff a permanent injunction against the defendants restraining the defendants from further interference with the plaintiff's land. Therefore, in a money lending agreement, a borrower can apply for an injunction from court restraining a money lender from disposing of the security where a borrower has paid the loan.

[301] D.J Bakibinga, Law of Contract in Uganda (2013) 2nded, Written Word Publishers India p.261
[302]CIVIL SUIT No. 0016 OF 2017.
[303] Supra.
[304] https://www.google.com.
[305]Miscellaneous Application No.215 of 2014.
[306]Judicature Act Cap 13.
[307] Supra.

APPENDIX G- DOCUMENTS FOR NEGOTIABLE INSTRUMENTS

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

CENTRAL CIRCUIT AT NAKAWA

CIVIL SUIT NO. ……OF 2006

JADWONG BILL::} PLAINTIFF

VERSUS

MAGODE BANOT ::} DEFENDANT

SPECIALLY ENDORSED PLAINT:

(O37 R1 CPR S1 71-1, Section 98 CPA)

1. The Plaintiff is male adult Ugandan of sound mind whose address of service for purposes of this suit is C/O **M/s. SUI GENERIS and Co. Advocates, P.O.BOX 71117, KAMPALA**

2. The Defendant is a male adult believed to be of sound mind and the Plaintiff's Advocates undertake to effect service of court process upon the First Defendant.

3. The Plaintiff's claim against the Defendant is for a 50,000,000 (fifty million shillings) for goods given the defendant worth the amount.

4. The facts constituting the cause of action are as follows:

a) The Plaintiff has a wholesale shop located at Mutungo, voyager suites dealing in agricultural goods and cereals.

b) By an agreement dated the 1st day of August 2004 the Plaintiff duly gave the defendant 15,000 bags of maize for feeding his animals on his farm in Mubende, upon which he would pay by cheque. (See copy of the Sale Agreement annexed hereto and marked Annexture "A").

c) The delivery was effect on 22nd August 2005 at the defendant's farm at Mubende to which he acknowledged receipt thereof. (See copy of the acknowledgement of delivery annexed hereto and marked Annexture "B").

d) The defendant gave a plaintiff a cheque No. 0121019598801 drawn on Stanbic Bank worth 50,000,000 which was returned with words "refer to the drawer".

e) The Plaintiff contends that the Defendants' act amounted to breach of contract and ought to be stopped by this Honourable Court.

f) The Plaintiff further contends that by reason of the aforesaid Defendants' acts the Plaintiff has suffered substantial loss, damage and injury to commercial credit for which he holds the Defendant liable for which the Plaintiff will claim General Damages.

5. The Plaintiff contends that the Defendant has no defense whatsoever.

6. Notice of Intention to sue was duly communicated to the Defendants.

7. The cause of action arose at Mutungo, Nakawa Division within the jurisdiction of this Honorable Court.

WHEREFORE the Plaintiff prays that judgment be entered against the Defendant jointly and severally for:

a) Leave should not be granted to the defendant to defend.

b) Judgment in summary suit.

c) General damages for breach of contract;

d) Costs of this suit;

e) Interest on (c) and (d) at court rate from the date of judgment till payment in full;

f) Any other relief as this Honorable Court may deem fit.

DATED at **KAMPALA** this ……..day of …….2006.

_____

ISAAC CHRISTOPHER LUBOGO

FOR: SUI GENERISAND CO. ADVOCATES

COUNSEL FOR THE PLAINTIFF

DRAWN & FILED BY:

M/s SUI GENERIS and Co. Advocates,

P.O Box 0000,

KAMPALA.

OBJECTION MY LORD

IN THE HIGH COURT OF UGANDA

CENTRAL CIRCUIT AT NAKAWA

CIVIL SUIT NO. ……OF 2006

JADWONG BILL::} PLAINTIFF

VERSUS

MAGODE BANOT ::::::::::::::::::::::::::::::::::::} DEFENDANT

AFFIDAVIT IN SUPPORT OF SPECIALLY ENDORSED PLAINT:

(O37 R1 CPR S1 71-1, Section 98 CPA)

I, Jadwong Bill, a male adult Ugandan of sound mind do solemnly swear and state as follows;

1. The Plaintiff has a wholesale shop located at Mutungo, voyager suites dealing in agricultural goods and cereals.

2. By an agreement dated the 1st day of August 2004 the Plaintiff duly gave the defendant 15,000 bags of maize for feeding his animals on his farm in Mubende, upon which he would pay by cheque. (See copy of the Sale Agreement annexed hereto and marked Annexture "A").

3. The delivery was effect on 22nd August 2005 at the defendant's farm at Mubende to which he acknowledged receipt thereof. (See copy of the acknowledgement of delivery annexed hereto and marked Annexture "B").

4. The defendant gave a plaintiff a cheque No. 0121019598801 in respect of supply of maize to the defendant to the tune of 50,000,000 (fifty million shillings) drawn on Stanbic Bank worth 50,000,000 which was returned with words "refer to the drawer".

5. That by reason of the aforesaid Defendants' acts, I have suffered substantial loss, damage and injury to commercial credit for which he holds the Defendant liable.

6. That I verily believe that the Plaintiff contends that the Defendant has no defence whatsoever.

7. That I swear this affidavit I support of a judgment in summary procedure.

…….

DEPONENT

BEFORE ME: …….

A COMMISSIONER. FOR OATHS

DRAWN & FILED BY:

M/S SUI GENERIS& CO. ADVOCATES

P.O Box 0000, **KAMPALA.**

OBJECTION MY LORD

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

CENTRAL CIRCUIT AT NAKAWA

CIVIL SUIT NO. ……OF 2006

JADWONG BILL::} PLAINTIFF

VERSUS

MAGODE BANOT ::::::::::::::::::::::::::::::::::::} DEFENDANT

SUMMARY OF EVIDENCE:

The Plaintiff will lead evidence to show that he contracted with the defendant to supply him with 15,000 bags of maize, which he did. The plaintiff shall further adduce evidence to show that the defendant offered payment by cheque which was not honored.

LIST OF WITNESSES:

1. Jadwong Bill
2. Any other witnesses with leave of court

LIST OF DOCUMENTS:

1. The Sale Agreement
2. The Cheque
3. Acknowledgement of delivery
4. Receipt of first payment
5. Any other documents with leave of court

LIST OF AUTHORITIES:

1. The Constitution, 1995
2. The Judicature Act Cap 13
3. The Sale of Goods and Supply of Services Act Cap 2018
4. The Contract Act Cap 2010
5. The Civil Procedure Act Cap 71
6. The Civil Procedure Rules SI 71-1
7. Any other authorities to be produced with leave of Court.

DATED at **KAMPALA** this ……..day of …….2018.

_____

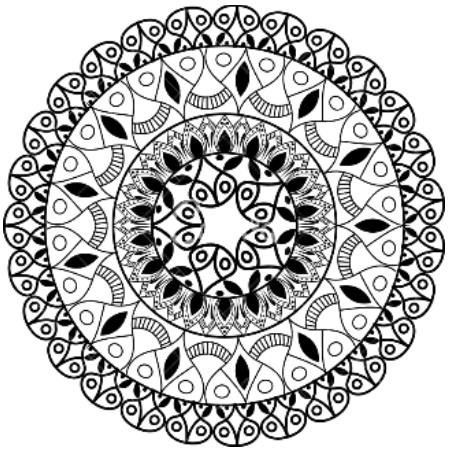
FOR: M/S SUI GENERIS& CO. ADVOCATES

COUNSEL FOR THE PLAINTIFF

DRAWN & FILED BY:

M/S SUI GENERIS& CO. ADVOCATES

P.O Box 0000, **KAMPALA.**



EMPLOYMENT CONTRACTS AND AGENCY:

LAW APPLICABLE:

1. The 1995 Constitution of the Republic of Uganda
2. The Contract Act Cap. 2010
3. The Companies Act 2012
4. The Employment Act, Act 6 of 2006
5. The Employment Regulations S.1 14/77
6. Civil Procedure Act Cap 71
7. Civil Procedure Rules S.1 71-1
8. Common law and Doctrines of Equity
9. The Evidence Act Cap 6
10. Case Law and Common Law
11. The Uganda Citizenship and Immigration Control Amendment Act 2009
12. Workers Compensation Act Cap 225
13. Workers Compensation Regulations SI 225-1
14. The Labor Disputes (Arbitration and Settlement) Act 8 of 2006
15. The Labor Unions Act, Act 7 of 2006
16. The NSSF Act 2022
17. The Income Tax Act Cap No.2 of 2021 as amended
18. The Children's Act Cap 59
19. The Occupational Safety and Health Act 9 of 2006
20. The Arbitration and Conciliation Act Cap 4

Checklist/ issues arising

1. Whether the intending employer has a recruitment permit?

2. Whether the prospective employees can be employed?
3. What are the formalities for the contract of employment?
4. What are the rights and obligations of the employees in the contract of employment?
5. What are the duties of the employers in the contract of employment?
6. What procedure should be followed in case of dispute settlement?

THE NECESSARY DOCUMENT TO BE DRAFTED IS THE EMPLOYMENT CONTRACT

EMPLOYMENT CONTRACTS

EMPLOYMENT UNDER EMPLOYMENT ACT, ACT 6 OF 2006 AND REGULATIONS

Section 2 of the Employment Act, Act 6 of 2006, defined contract of service to mean any contract whether oral or in writing, whether expressed or implied, to employ or to serve as an employee for any period of time and includes any contract of apprenticeship.

A contract of service as defined in the Employment Act should be distinguished from a contract for service. In **READY MIX (SE) LTD VS MINISTER OF PENSIONS [1968] 1 ALL ER 423;** court held that the difference is about control; thus, a contract of service is where the master does not order or require what ought to be done unlike a contract for service, whereby the master does order or require what ought to be done.

It ought to be stressed from the onset that the employment relationship is a contractual one; thus, governed by the principle of contract. One of these principles is that the employment relationship is one where one enters at his or her fee will. This is upheld in the **locus classics case** of **PRINTING AND NUMERICAL REGISTERING CO. –VS- SAMPSON (1875) LR19 E.g., 462** by SIR GEORGE JESSEL, where he held that Public Policy required that men of full age and competent understanding shall have the almost liberty in contracting and that their contracts, when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. The Legislature developed many in roads into this principle through codification in the Law of Employment where there is evidence of exploitation at the expense of an employee's rights.

RECRUITMENT

It must be noted that before an employer engages an employee, he or she must have a valid recruitment permit under **Section 38(1) of the Employment Act**. **Sub section 2** qualifies the need for a recruitment permit. It is not to be got by a person recruiting domestic servants or non-manual laborers for employment.

FORMALITIES:

INTRODUCTION

First and foremost, the contract can be in writing or oral except as otherwise provided for by the Act **Section 26** makes a mandate for a contract of employment to be attested where the employee is unable to read or understand the language in which the contract is written. Attestation is before a magistrate or a labor officer.

THE CONTENTS OF AN EMPLOYMENT CONTRACT SHOULD HAVE CLAUSES TO THE FOLLOWING EFFECT:

- The Name of the Employer, undertaking and place of employment,
- The name of the Employee, place of engagement, origin and particulars necessary for his or her identification,
- Nature of employment,
- Duration of employment,
- Rate of wages and methods of calculating wages,
- Manner and periodicity of payment of wages.
- Conditions of repatriation. Inter alia.,
- Termination of the contract,
- Summary dismissal
- Duties of the Employer,
- Right and Obligations of the Employee.

It must be noted that **Section 33 of the Employment Act** makes it a preliquisite for a prospective employee wishing to enter a contract of service to be first examined by a medical practitioner at the expense of the Employer.

FOREIGNERS

Foreigners who wish to work in Uganda have to be subjected to the provisions of the **Uganda Citizenship and Immigration Control Act Cap 66** as noted earlier under the discussion on companies.

LAW OF EMPLOYMENT

DEFINITIONS

These are defined under **Section 2 of the Employment Act, 2006.**

a) Contract of service is defined as any contract, whether oral or in writing, whether express or implied, where a person agrees in return for remuneration to works for an employer and includes a contract of apprenticeship

b) Employee is defined to mean any person who has entered into a contract of service or apprenticeship contract, including without limitation any person who is employed by or for the government of Uganda, including the Uganda public service, a local authority or parastatal organization but excludes a member of the UPDF.

c) Employer is defined to mean any person or group of persons including a company or corporation, a public ,regional or local authority governing body of an unincorporated association, partnership, parastatal organization or other institution or organization whatsoever, for whom an employee works or has worked or normally worked or sought to work, under a contract of service and includes the heirs, successors, assignees and transfers of any person or group of person for whom an employee works, has worked or normally works.

d) Dismissal from employment is defined as the discharge of an employee from employment at the initiative of his/her employer when the said employee has committed verifiable misconduct.

e) Termination of employment means the discharge of an employee from an employment at the initiative of the employer for justifiable reasons other than misconduct, such as expiry of contract, attainment of retirement age. Etc.

f) Wages means remuneration or earnings however designated or calculated, capable of being expressed in terms of money and fixed by mutual agreement or by national laws or regulations which are payable under an oral or written contract of service for work done or to be done or for services rendered or to be rendered but excluding any contributions made or to be made by the employer in respect of his/her employees insurance, medical care, welfare ,education, training ,invalidity, retirement pension, post service gratuity or severance allowance.

APPLICABILITY OF THE EMPLOYMENT ACT

Pursuant to **Section 3 (1) of the Employment Act**, the act applies to all employees employed by an employer under a contract of service.

Under **Section 3 (2) of the Employment Act** does not apply to

a) Employers and their dependent relatives when dependent relatives are the only employees in a family undertaking as long as the total number of dependent relatives does not exceed five

Section 2 of the Employment Act defines a dependent relative means a member of an employee's family who substantially depends on that employee for his or her livelihood.

b) The Uganda peoples defense forces other than their civilian employees.

EMPLOYER-EMPLOYEE RELATIONSHIP.

For there to subsist an employer-employee relationship, there must exist a contract of service as between the parties.

The most common test for whether there subsists a contract of service is the control test.

In **READY MIXED CONCRETE (SE) V MINISTER OF PENSIONS (1968) 1 ALL ER 433,** the court stated the existence of a master-servant relationship between the parties is dependent upon the provisions of the contract. If the contact provisions are such that the relationship is that of master-servant, it is irrelevant that the parties would have preferred a different conclusion.

A contract of service exists where there are three conditions:

a) The servant agrees that in consideration of a wage /other remuneration, he will provide his own and skill in the performance of some service for his master.

b) He agrees expressly/impliedly, that in the performance of that service, he will be subject to the others control in a sufficient degree to make that other the master.

c) There other provisions of the contract are consistent with its being a contract of service. Control includes the power of deciding the thing to be done the way, means of employment, time and place it's done. It must be to a sufficient degree to make one party the master and the other the servant.

In **GARRAD V SOUTHEY AND CO. AND ANOR V DAVEY ESTATES LTD(1952) 1 ALL ER 597**, court stated that to establish the degree of control requisite to fasten responsibility upon him(the hirer), the hirer must in some reasonable sense be shown to have authority to control the manner in which the workman does his work.

In **FUKASI KABUGO V ATTORNEY GENERAL (1975) HCB 338**, stated that the key features which would show control are:

1. The master's power of selection of his servants
2. Payment of wages
3. Masters right to control the method of doing the work
4. Masters right to suspend or dismiss.

CRITICISM FOR THE CONTROL TEST.

There are difficulties when it comes to skilled employees where the unskilled employer is less likely to control their work. Lord Parker in **MORREN V SURINTON AND PENDLEBURY BOROUGH COUNCIL (1965)2 ALL ER 349**, he stated that the factor of superintendence and control is of little use as a test whether a contract is or is not a contract of service where the person concerned is a professional man, engaged for his skill and experience. In such cases there can be no question of the employer telling him/her how to do work.

Other tests

1. **THE INTEGRATION TEST/ORGANIZATIONAL TEST.**

The integration test was explained by Lord Denning in **STEVENSON, JORDAN AND HARRISON LTD V MACDONALD AND EVANS (1951)1 W.L.R 101**

In which he stated that it is often easy to recognize a contract of service when you see it, but difficult to say wherein the difference lies.

A ships master, a chauffeur and a reporter on the staff of a newspaper are all employed under a contract of services. One feature which seems to run through the instance is that, under a contract of service, a man is employed as part of the business and his work is done as an integrated part of the business whereas under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.

2. SELF-CLASSIFICATION/CHARACTERIZATION.

Though courts will be inclined to attain the true meaning to a transaction entered by parties' whatever nature they call, courts are also hesitant to deviate from the express stipulations of the parties. In **NSSF V MTN (U) LTD AND ANOR H.C.CS no.94 of 2009,** where the question to be answered was who was the employer of the UNISIS temporary contract employees who worked for MTN under the control of MTN. justice Hellen Oburu rejected the control test suggested by the Ply's advocate and held that the intention of the parties insofar as who the employer was clearly stated in the contract which named UNISIS as the employer and not MTN.

3. THE MULTIPLE TEST/ECONOMIC REALITY TEST.

Courts under this test do not necessarily look at only the control test but at all the surrounding features thus applying what is in fact a multiple test. READY MIXED CONCRETE V MINISTER OF PENSIONS (1968)1 ALL ER 433.

4. MUTUALITY OF OBLIGATION TEST.

The question to be answered under this test is the employer obliged to offer work to workers and is the worker obliged to accept the work offered. There should be a contractual obligation on both sides to provide work and to do work in order for a contract of employment to exist. In the case of **CARMICHEAL V NATIONAL POWER PLC (1999) UK 47,** the house of lords held that there must be a formal legal obligation on both sides before a contract of employment and employee status can be found. In this case the claimant was offered employment as a tour guide on a casual basis. She performed work as when it arose, but she was not obliged to provide work and the company were not obliged to provide work and did not guarantee that work would be available. she was paid for hours worked and tax and national insurance contributions were deducted. The House of Lords held that she was not an employee. There was no obligation for the company to provide the work and the claimant had no obligation to do it when offered.

OBJECTION MY LORD

DISTINCTION BETWEEN CONTRACTS FOR SERVICES AND A CONTRACT OF SERVICE.

A contract for services gives rise an employer-independent contractor relationship while a contract of services once established creates an employer- employee relationship.

WHY THE DISTINCTION IS IMPORTANT?

1. **Vicarious liability.** Employers are liable for the torts of their employees committed in the course of employment. The employer except in certain special circumstances is not vicariously liable for the tots of an independent contractors committed during the execution of their work.

2. **COMPENSATION FOR INJURY.**

Under the **Workers Compensation Act cap 225,** employees are generally entitled to compensation for injuries sustained in the course of employment. In an employer-independent contractor relationship, the employer has no obligation to compensate the independent contractor for injuries sustained during work.

3. **MANDATORY CONTRIBUTION.**

Employers are by law mandate to remit certain contributions on behalf of employees for example PAYE, NSSF contributions under section 11and 12 of the NSSF act. These deductions are permitted under S.46 of the employment act.[308]

4. **EMPLOYMENT BENEFITS**.

Employment benefits such as sick leave among others are stipulated under the employment act only accrue to employees and not independent contractors.

EMPLOYMENT CONTRACTORS.

These are regulated by the Contract Act 2010 and the Employment Act 2006. **Section 25 of the Employment Act** provides that no person shall be employed under a contract of service except in accordance with the act. Further **Section 27(1) of the Employment Act** bars the exclusion of any provision of the employment act in any contract of service and states that such agreement is null and void.

However, in **sub-section 2,** the act allows for the parties to vary the provisions of the act in favor of terms and conditions which are more favorable to the employee than those stipulated in the act.

Requirements of an employment contract.

[308] NSSF V MTN AND ANOR. HCCS NO 94 OF 2009

As noted earlier, these are governed by the contracts act 2010 and the employment act 2006, with each creating various requirements.

Under **Section10 of the Contracts Act 2010**, the requirements are that there is

a) An offer and acceptance

b) Consideration

c) Lawful subject matter

d) Capacity to contract

e) Intention to be legally bound.

1. OFFER AND ACCEPTANCE.

Usually, the offer is made during the interviews or through a letter of appointment after the interviews. Negotiation if any are made and concluded during this period usually relating to the salary, other employment benefits and the starting date.

2. CONSIDERATION

The consideration in employment contracts is the employers promise to pay the agreed wages in return for the employee performing a particular task. In **DELANEY V STAPLES (1992) IRIR 191**, Lord Browne Wilkinson was of the view that the essential characteristic of wages is that they are contributions for work done or to be done under a contract of employment. If payment is not referable to an obligation on the employee under a subsisting contract of employment to render his services, it does not fall within the ordinary meaning of the word wages.

Section 41 (1) of the Employment Act provides that wages have to be paid in legal tender. Although the section also allows the employer to pay by cheque, postal order, money order or by direct payment to employee's bank account having sought the consent of the employee to do so.

3. CAPACITY.

Section 11(1) of the Contracts Act provides that a person has capacity to contract where such a person is of 18 years and above, of sound mind and not disqualified from contracting by any law to which he or she is subject.

Section 11(2) of the Contracts Act goes further to stipulate that a person of 16 years plus has the capacity to enter into a contract of employment as provided under **Article 34(4) and (5) of the 1995 constitution of the Republic of Uganda.**

4. The other requirement of a contract of service under the employment act are stipulated under the employment act under **Section 59 of the Employment Act** a contract and these include the following

    a) Full names and address of the parties.

b) The date on which employment began

c) Title of the job the employee is employed to do

d) Place where the employee's duties are to be performed

e) Wages which the employee is entitled to receive or the means by which they can be calculated intervals they are too paid in, the deductions or other conditions to which they shall be subject.

f) The rate of any overtime pay applicable to the employee

g) The employee's normal working hours and the shifts or days of the week on which such work is to be performed.

h) The number of days annual leave to which the employee is entitled and their entitlement during such leave.

i) The terms or conditions relating to incapacity for work due to sickness or injury, including a provision for sick pay.

j) Length of the notice of termination

k) Terms and conditions relating to incapacity for work due to sickness or injury, including any provision for sick pay.

5. ATTESTATION.

Section 26 of the Employment Act requires an employment contract made with an employee who is unable to read or understand the language in which the contract is written to be attested to. Attestation is by means of a written document drawn up by the magistrate or Labor officer.

FORMALITIES

1. ORAL AND WRITTEN CONTRACTS.

Section 25 of the Employment Act states that a contract of service other than a contract which is required by the employment act or any other act to be in writing maybe made orally and except as otherwise provide, the act applies equally to oral and written contracts.

2. WRITTEN PARTICULARS

Section 59 (1) of the Employment Act requires employers to provide employees with a notice in writing specifying the particulars of employment. The notice is called a statement of written particulars.

The notice must pursuant to **Section 59 (3) of the Employment Act** be given by the employer to the employee not later than 12 weeks after the date of which employment commenced.

The statement of written particulars is under **Section 60 (a) of the employment Act** admissible evidence in courts of law of the existence of the terms and conditions about which there is a dispute.

In addition, under **Section 60 (b) of the Employment Act**, the written statement of particulars creates a rebuttable presumption that the terms and conditions of employment are accurately stated in the written particulars and in any notified changes.

In SYSTEMS FLOORS (UK) LTD V DANIEL (1982) ICR 54, Browne- Wilkinson j stated that the written statement of particulars provides very strong prima facie evidence of what were the terms of the contract between the parties but does not constitute a written contract between the parties. Nor are the statements conclusive terms; at most they place a heavy burden on the employer to show that the actual terms of the contract are different from those which he/she has set out in the statutory statement.

OBJECTION MY LORD

EMPLOYMENT CONTRACT

THE REPUBLIC OF UGANDA

IN THE MATTER OF THE EMPLOYMENT ACT

6 OF 2006 AND

IN THE MATTER OF AN EMPLOYMENT

CONTRACT

EMPLOYMENT CONTRACT (EC)

This contract is made at Kampala on this 10th day of February 2020.

Between

BHALO TRAVELS LIMITED of P.O BOX 869, Kampala, Uganda,

(Hereinafter referred to as 'THE EMPLOYER" of one part:

And

(Hereinafter referred to as 'the employee'') of the other part:

WHEREAS.

1. The employer intends to engage the services of the employee and the employee is interested and desirous of offering his services to the employer.
2. The employer having represented to the employer that he has the required skills and expertise
3. The employee is desirous of taking up the employment and to provide the services on the terms and conditions set forth in this contract.

NOW THEREFORE, THIS CONTRACT IS WITNESSETH AS FOLLOWS:

1. JOB TITLE:

The employer shall employ the employee in the capacity of sales person for a period of 2 years from the date of execution of this contract.

2. PLACE OF WORK.

2.1 the employee shall sell he employers' products only within the required boundaries as stipulated in the first schedule to this contract

2.2 the employee shall not sell the products outside the stipulated boundaries in clause

2.2.1 except with the express written permission from the marketing manager

2.3 The employer reserves the right to relocate the employee to another location upon issuance of a 7 days' notice communicating the intention to transfer the employee.

3. DUTIES/RESPONSIBILITIES

The employee shall be expected to:

a) Diligently and faithfully perform the duties of a sales person and such other duties as may be required of them by the employer from time to time with a view of making profit for the employer.

b) Devote substantially the whole of their time and attention while at work to discharge of their duties which are clearly spelt out in the employee's job description specified in the second schedule of this contract.

c) Perform and meet daily, weekly and monthly performance targets that shall be set by the employer through the marketing manager or any duly authorized agent and these targets maybe adjusted by the management at any time without the employee's consent.

d) Failure to meet the target stipulated in clause 3(a) may lead to termination of this contract.

e) At all times comply with all other regulations and guidelines set by the employer

4. PERFORMANCE APPRAISALS.

4.1 The employer shall conduct performance appraisals through the employer's designated supervisor as a means of monitoring and evaluating the employee's performance for the year.

4.2 The final annual performance report shall be the only basis for promotion from the sales person position to senior sales person position or renewal of the employee's contract.

5. RENUMERATION

5.1 The employee shall be entitled to Gross monthly salary of UGX.600,000 (six hundred thousand shillings only)

5.2 The employee's remuneration shall be paid into their bank account

6. COMMISSION.

6.1 the employer shall pay to the employee a commission on all sales made

6.2 the commission payable on each sale of the employer's product made shall be 8% of the total amount paid on the product.

7. HOURS AND DAYS OF WORK.

7.1 The employee shall be expected to work for 8 hours per day for 6 days of the week

7.2 The working hours shall start at 8;00 am and end at 5;00pm with the time between 1:00pm and 2:00pm excluded for a lunch break.

7.3 The days of work shall be Monday to Saturday.

7.4 In case the employee reports to work later than 9:00am or leaves the work place earlier than 4:00pm, they shall be paid a wage for half a day.

7.5 The employee may be required to work past the set working hours where there is a target that needs to be met and the employer shall pay the employee for the overtime in such instances.

7.6 The employer reserves the right to call an employee to work on a weekly off in which case the employee shall be paid in the equivalent of 1.5 days wage.

8. ANNUAL LEAVE.

The employee shall be entitled to 21 days of paid annual leave or payment in lieu of the leave

9. SICK LEAVE

The employee shall be entitled to sick leave as stipulated in the employment act

10. **EMPLOYMENT BENEFITS**.

The employee shall be entitled to all benefits allowing to employees in the position of a sales person as stipulated in the human resource manual of the employer.

11. **MATERNITY OR PATERNITY LEAVE**.

The employee shall be entitled to a maternity for a period stipulated in the employment act or a paternity leave for the duration stated in the employment act.

12. CONFIDENTIALITY.

12.1 in the course of employment under their contract ,the employee will have access to and be entrusted with information in respect of the business, dealings, transactions and affairs of the employer.

12.2 The employee shall not during or after the period of employment under this contract, divulge and shall prevent the use , disclosure or publication to any unauthorized person whatsoever of any confidential information concerning the business, dealings, transactions and affairs of the employer.

13. **TERMINATION OF EMPLOLYMENT**.

13.1 **This employment shall terminate**:

a) Automatically on completion of the 2 years herein stated unless renewed with express consent in writing of both parties per this contract.

b) By either party by giving a written notice to the other party of not less than one month

13.2 The employer reserves the right to terminate the employee's contract on grounds of misconduct or poor performance and giving the employee a one months' notice or a month's salary in lieu.

13.3 The acts constituting misconduct are stipulated in the employer's human resource manual.

14. SUSPENSION

14.1 The employer may suspend the employee from duty pending investigation into the matter leading to such suspension.

14.2 The suspension shall not exceed 21 days' consecutive days.

14.3 The employee shall be entitled to half pay for the duration of the suspension

14.4 The employer shall accord the employee a fair hearing before an independent tribunal appointed by the employer and

a) If found that the reasons for the suspension are justified, the employee shall be dismissed from employment

b) If found that the reasons for the suspension are unjustified, the employee shall resume his/her duties.

15. SUMMARY DISMISSAL

The employer reserves the right to summarily dismiss the employee for any gross misconduct as stipulated in employer's human resource manual.

16. **RENEWAL OF THE CONTRACT**.

16.1 This contract maybe renewed pursuant to the provisions of this contract at the discretion of the employer depending on work availability and the employee's performance appraisal report.

16.2 The renewed contract shall be in the form of a new contract signed between the parties and it shall be the employee's duty to ensure that they obtain a new contract as and when this one expires.

17. DISPUTE RESOLUTION.

17.1 All disputes arising under this contract shall be resolved in line with the established company policies and rules.

17.2 Should the parties fail to amicably resolve the dispute, then a mediator from the CADER agreeable to both parties shall be appointed to resolve the dispute.

18. **LAW APPLICABLE**.

This contract shall be governed by the laws of Uganda.

in witness whereof, the parties hereto have caused this contract to be signed in their respective names as of the day and year first above mentioned.

Signed for and on behalf of the employer

SUI GENERIS

HEAD OF HUMAN RESOURCE

FOR BHALO TRAVELS LIMITED.

Signed by the said

NAME.....

SIGNATURE.....

EMPLOYEE. .....

In the presence of

NAME.....

PROFESSION.....

SIGNATURE.....

DOCUMENTATION AND INFORMATION CONTGAINED IN AN HUMAN RESOURCE FILE.

1. HUMAN RESOURCE MANUAL.

Is a document detailing an organizations policy regarding employee management and the relationship between managers and employees?

2. SEXUAL HARASSMENT POLICY.

Section 7 of the employment Act defines a sexual harassment as an unwelcome sexual advance, requests for sexual favors and other verbal or physical conduct of a sexual nature. **Regulation 2** expounds on the definition further.

Section 7 (4) mandates every employer who employees more than 25 employees to have in places measures to prevent sexual harassment occurring at their work place.

Regulation 3 of the employment (Sexual Harassment) regulations stipulates that the sexual harassment must be written and must be written and must include the following:

a) Notice to employees that sexual harassment at the workplace is unlawful

b) A statement that it is unlawful to retaliate against an employee for filing a complaint of sexual harassment or for co-operating in an investigation of sexual harassment complaint.

c) A description and examples of sexual harassment

d) A statement of the consequences for employers who are found to have committed sexual harassment.

e) A description of the process for filing sexual harassment complaints and the addresses and telephone numbers of the person to whom complaints should be made.

f) Education and training programs on sexual harassment for all employees on a regular basis.\

g) Additional training for the committee on sexual harassment, supervisory and managerial employees.

Regulation 8 requires an employer with more than 25 employees to designate a person who is gender sensitive to be in charge of sexual harassment complaints.

Under **Regulation 10**, the sexual harassment committee shall be constituted of four members who shall be persons knowledgeable in and sensitive to gender and sexual harassment issues. Any member of the committee may receive a sexual harassment complaint.

Regulation 4(1) requires that an employer provides each employee with a copy of the sexual harassment policy.

Regulation 6 necessitates that the sexual harassment policy is placed in a conspicuous area at the work place.

Pursuant to **Regulation 12,** a sexual harassment complaint maybe lodged by the employee with a labor officer where they are sexually harassed by the employer or their representative.

Regulation 13 provides for the procedure for handling such complaints

Where a labor commissioner to when a sexual harassment is made fails to dispose of the complaint, they may under **Regulation 14(1)** refer the complaint to the industrial court for hearing.

Further a person aggrieved by the decision of a Labor officer may within 21 days give a notice of appeal to the industrial court under **Regulation 14(2).** The notice is in the form prescribed in the 3rd schedule.

Regulation 15 states the principles that must be exhibited in a sexual harassment complaint procedure and these are:

e) Thoroughness

f) Impartiality

g) Timeliness

h) Gender sensitivity

i) Social dialogue

j) Discretion

k) Confidentially

l) The right to privacy of the victim of harassment.

Regulation 17(1) bars any form of retaliation and discrimination against persons involved in sexual harassment complaints. Sub regulation 3 defines discrimination under this regulation to include:

a) Termination

b) Denial of promotion

c) Demotion in title or duties

d) Transfer to a less favorable

e) Involuntary placement on leave

f) Hostile or abusive treatment

g) Decreasing remuneration or benefits

h) Coercion

i) Threats and intimidation

Under **Regulation 18(2)** false or frivolous sexual harassment complaints may attract disciplinary action against such an employee.

SPECIAL CATEGORIES OF EMPLOYEES.

CHILDREN

Article 34(4) and (5) of the 1995 constitution of the republic of Uganda states that a child of 16 years may enter into an employment contract.

Section 2 of the Employment Act defines a child to mean a person below the age of 18 years

S.**32 (1) of the Employment Act** bars absolutely the employment of children under the age of 12 in any business, undertaking or workplace.

Sub-section 2 of the Employment Act further bars the employment of children under the age of 14 in any business, undertaking or workplace except for light work carried out under the

supervision of an adult aged 18 years and which does not affect the child's education, social development etc.

Regulation 2 of the employment (employment of children) regulations 2012, defines light work to mean work which is

a) Not harmful to a child's health

b) Not harmful to a child's development

c) Not prejudicial to a child's attendance at school

d) Not prejudicial to a child's participation in vocational training and

e) Not in excess of 14 hours per week.

Regulation 6 designates a list of hazardous work not permitted for employment of a child

Section 32(5) of the Employment Act and Regulation. 12 of the employment act (employment of children) regulations bar right work for children. The provisions restrict a child's working work to be between 7:00am and 7:00pm.

Over time work is prohibited for children under **Regulation11.**

A child before engaging in any job must undergo a medical examination as per **Regulation 13 (1) and sub regulation 2** requires that a medical examination is done every 6 months. The child upon undergoing a medical examination under sub regulation 1 must be issued with a medical certificate in the form prescribed in the 4th schedule.

An employer is further required under **Regulation 14(1)** to obtain authorization from the commissioner before employing a child aged between 15 years to 17 years.

The employer must also maintain a register of the children he/she is engaging in employment as per **Regulation 15** and the register in this form is prescribed in the 5th schedule to the regulations.

EXPECTANT MOTHERS

Article 33 recognizes the special role women play in recreation and that the same must be taken into account.

These are pursuant to **Regulation 42(1) of the Employment Regulations 2011** not obliged to perform work which is harmful to their health.

The employer is mandated under Sub-regulation 2 to provide an expectant mother with any of the following alternatives:

1. Flexible hours of work
2. Lighter work load
3. Alternative arrangements of work

Section 75 (a) further emphasizes that a female employee's pregnancy or any other reason connected with her pregnancy shall not constitute a fair reason for dismissal or for the imposition of a disciplinary penalty.

CASUAL EMPLOYEES

Section 2 of the employment Act defines a casual employee to mean a person who works on a daily or hourly basis where payment of wages is due at the completion of each day's work.

In **KITAKA ERIMUS V AIM DISTRIBUTORS, LABOR DISPUTE REFRENCE NO 75 OF 2017**, the industrial court defined a casual laborer as one who gets paid per day after doing what he has been engaged to do. There is no guarantee that his employer will give him a job the next day and the obligations and responsibilities towards either the employee or the employer end with the work and payment of a particular day.

Under **Regulation 39(1) of the Employment Regulations 2011**, a person must not be employed as a casual employee for a period exceeding four months. Under sub-regulation 2, a causal employee engaged continuously for 4 months is entitled to a written contract and such employee ceases to be a casual employee and all rights and benefits enjoyed by other employees will apply to them.

IN KITAKA ERIMUS V AIM DISTRIBUTORS (SUPRA) , the industrial court defined the phrase 'continuous engagement'' as used in **Regulation 39(2) of the Employment Regulations** to connote engagement every day to do particular works over a certain period being four months in this case. For a person to rely on **Regulation 39(2),** they must lead evidence to show that they were 'continuous engagement for four months. Failure to do so means that the person was a casual laborer

In **WILSON WANYANA V DEVELOPMENT AND MANAGEMENT CONSULTANTS INTERNATIONAL[309],** it provides for test of a causal worker. Justice Yorokamu Bamwine stated that there are two main factors which identify a casual employee. First, he/she is not employed for more than 24 hours at a time and secondly his/her contract provides for payment at the end of each day.

MIGRANT WORKERS

Section 37 (2) of the Employment Act bars any person from employing a person whom he or she knows to be unlawfully present in Uganda. Sub section 3 criminalizes such action.

A person is unlawfully present in Uganda under **Section 53 (1) of the Uganda Citizenship and Immigration Control Act cap 66**. If such a person not being a citizen of Uganda enters or remains in Uganda without a valid entry permit, certificate of permanent residence or pass issued under the act.

[309]**HCT00 CS.0332 OF 2004**

Under **Section 53(4) of the Uganda Citizenship and Immigration Control Act**, a person can only take an employment in Uganda if they have been granted an entry permit class G as specified in the fourth schedule to the act.

Entry permit is applied for pursuant to **Section 54(2)** and the application is made to the National Citizenship and Immigration board as established under Article 16 of the 1995 constitution of the republic of Uganda.

Pursuant to **Regulation 19(1**) of the Uganda Citizenship and Immigration Control Regulations 2004, every employer must furnish a return of all the non-citizens employed by him or her to the commissioner for immigration every 6 months.

PERSONS WITH DISABILITIES.

Section 1(c) of the Persons with Disabilities Act 2019, defines a disability as a substantial functional limitation of a person's daily life activities caused by physical, mental or sensory impairment and environmental barriers resulting in limited participation in society on equal basis with others.

Section 6 (3) of the Employment Act bars discrimination in employment on the basis of disability. This is buttressed by **Section 9 of the persons with Disabilities Act of 2019**.

Regulation 35 of the employment regulations, 2011 impose various obligations on an employer in regard to employees with disabilities e.g.

1. To encourage person with disabilities to apply when advertising for vacancies subject to the inherent requirement of a particular job.
2. Avoid using screening methods during interviews which have the effect of discriminating against a person on grounds of their disability.
3. Ensure that the physical officers of a workplace are accessible and to provide assistance and devices required by an employee with disability to enable them execute their duties.

TRANSFER OF EMPLOYMENT

Under **Section 28 (1) of the Employment Act,** a contract of service cannot be transferred from one employer to another without the consent of the employee except as provided for in sub section 2.

Under **Regulation 29(1) of the Employment Regulations,** the consent must be sought at least 30 days before the employee is transferred.

Under **Regulation 29(2)** where the employee does not consent, they shall be paid all their terminal benefits, outstanding balances, wages and other accrued benefits and the contract terminated.

Sub-section 2 is to the effect that where a trade or business is transferred in whole or in part, the contracts of service of employees employed at the date of transfer will automatically be

transferred to the transferee, all nights and obligations between each employee and transferee will continue to apply as if they had been rights and obligations concluded between the employee and transferee.

The assumption of all obligations by the transferee was discussed in the case of **SHAKIL PATHAN ISMAIL V DFCU BANK LTD HCCS No.236 of 2017,** in which the court stated that the defendant having taken over crane bank took over all employment's contracts of the employees of crane bank and any obligations there under. Thus, whereas the deductions complained of by the plaintiff were by crane bank, the defendant having taken over was liable to pay back the deductions unlawfully deducted since it has assumed the employment contracts of crane banks former employees by virtual of operation of **Section 28 (2) of the employment Act**.

TERMINATION, DISMISSAL AND SUMMARY DISMISSAL

Under **Section 83 (2) of the Employment Act,** the employer has a duty to ensure conformity of employment, however where it's not possible then the employer may:

TERMINATION

Termination is defined under **Section 2 of the Employment Act** to mean the discharge of an employee from an employment at the initiative of the employer for justifiable reasons other than misconduct such as expiry of contract, attainment of retirement age etc.

In **FLORENCE MUFUMBA V UGANDA DEVELOPMENT BANK, LABOR CLAIM N0.138 of 2014**, the industrial court stated that in terminating the employment of an employee there must be circumstances that are justifiable but which may have no bearing on the fault or misconduct of the employee.

Under **Section 65 (1) of the Employment Act**, termination is deemed to take place where:

a) The contract of service is ended by the employer with notice

b) The contract of service being a contract for a fixed term or task ends with the expiry of the specified term or the completion of the specified task and is not renewed within a period of one week from the date of expiry on the same terms or terms not less favorable to the employee.

c) The contract of service is ended by the employee with or without notice as a consequence of unreasonable conduct on the part of the employer towards the employee.

d) The contract of service is ended by the employee in circumstances where the employee has received notice of termination of the contract of service from the employer but before the expiry of the notice.

The notice stated under **Section 65 (1) of the Employment Act, is governed by Section 58. Section 58 (1)** states that a contract of service shall not be terminated by an employer unless he or she gives notice to the employee.

Section 58 (2) requires that the notice is in writing and in a language the employee to whom it's related understands.

Section 58 (3) stipulates the notice periods and these are:

a) not less than 2 weeks, where the employee has been employed for a period of more than 6 months but less than one year

b) not less than one month, where the employee has been employed for a period of more than 12 months but less than 5 years

c) Not less than 2 months where the employee has been employed for period of 5, but less than 10 years.

d) Not less than 3 months where the service is 10 years or more.

Unfair termination.

DISMISSAL

Section 2 of the Employment Act defines dismissal from employment as the discharge of an employee from employment at the initiative of his/her employer when the said employee has committed verifiable conduct.

In BENON H KANYANGOGA AND ORS V BANK OF UGANDA, LABOR DISPUTE CLAIM n0. 80 OF 2014, the industrial court stated that in dismissing an employee, the employer must establish that there is verifiable misconduct on the part of the employee. Verifiable misconduct includes but is not limited to abuse of office, negligence, insubordination and allow circumstances that impute fault on the part of the employee which include incompetence.

Whereas an employer has the right to dismiss an employee, he\/she must do so in accordance with the established legal procedure.

The employer must also pursuant to Section 68(1) give a reason for the dismissal or else that would be construed as unfair dismissal/unlawful dismissal. **IN FLORENCE MUFUMBA V UGANDA DEVELOPMENT BANK, LABOR CLAIM NO.138/2014,** the industrial court held that whether the employer chooses to terminate or dismiss an employee, such employee is entitled to reasons for the dismissal or termination. 'in employing the employee, we stringy believe that the employer had reason to so employ him/her .in the same way, in terminating or dismissing the employee there ought to be reason for the decision.

CONSTRUCTIVE DISMISSAL.

In BYANJU JOSEPH V BOARD OF GOVERNORS OF ST AUGUSTINE COLLEGE WAKISO, LABOR DISPUTE NO.062 OF 2016, and the court relying on the black's law dictionary 9th edition defined constructive dismissal to mean a termination brought about by the employer making the employees working conditions so intolerable that the employee feels compelled to leave.

The court further laid down the ingredients of constructive dismissal as follows:

a) That the employer must be in breach of the contract of employment

b) The breach must be fundamental as to be considered as a repudiator breach

c) The employee must not delay in resigning after the breach has taken place.

WHAT AMOUNTS TO CONSTRUCTIVE DISMISSAL

IN BYANJU JOSEPH V BOARD OF GOVERNORS OF ST.AUGUSTINE COLLEGE WAKISO (SUPRA), court held that constructive dismissal does not require a formal termination but unilateral act by the employer to substantially change the contract of employment.

Lord Denning in **WESTERN EXCAVATING (ECC) LTD V SHARP (1978) ICR 222 CITIED IN BYANJU JOSEPH (SUPRA)** he stated that if the employer is guilty of conduct which is a significant breach going to the root of the contract or which shows that the employer no longer intends to be bound by one or more of the essential terms of a contract then the employee is entitled to treat himself as discharged from any further performance.

If he does so then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or alternatively he may give notice and say that he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once.

WRONGFUL DISMISSAL.

It arises where the employee disputes the reasons for his /her dismissal.

UNLAWFUL DISMISSAL

It arises where **Section 66 of the Employment Act** was not complied with. In this, the employee disputes the procedure adopted for their dismissal.

SUMMARY DISMISSAL

Under **Section 69 (1) of the Employment Act**, summary dismissals defined to mean when an employee terminates the services of an employee without notice or with notice than that to which the employee is entitled by any statutory provision or contractual terms.

Under **Section 69 (3)** an Employer is entitled to dismiss summarily and the dismissal is justified where the employee has fundamentally broken their contract of service.

In FRANCIS OYET OJERA V UGANDA TELECOM LTD, HCCS No.161 of 2010, court stated that

1. A single act of gross misconduct was sufficient to lead to summary dismissal

2. Even in summary dismissal, the person must be accorded a fair hearing under **Section 66 of the Employment Act.**

In FRED WAKIBI V Bank Of Uganda ,court held that the respondent acted lawfully under **S.69(1) and (3)** to summarily dismiss the claimant when he was terminated for financial embracement which was a fundamental breach of his contract as his employer was a bank regulator and the employees ought to be exemplary.

IN KABOJJA INTAL SCHOOL V OYESIGYA (LABOR DISPUTE APP NO.003 OF 2015, court found that failure to issue an exam amounted to fundamental breach of the teacher's employment contract.

SUSPENSIONS AND DISCIPLINARY SANCTIONS

The employment act no.6 of 2006 provides for two types of suspensions under the act. These are suspension as a disciplinary sanction or punishment and suspension pending an inquiry.

SUSPENSION AS A DISCIPLINARY SANCTION.

Pursuant to **Section 62 (1) of the Employment Act,** an employee may impose a disciplinary penalty onto the employee other than dismiss them where such employee was negligent, failed or allegedly failed to carry out their duties under the employment contract. **Section 62(3)** stipulates that an employer can only impose a disciplinary penalty where it is reasonable to do so and in deciding what is reasonable ,the employer is guided by the nature of the neglect, failure or alleged failure committed by the employee and the code of discipline set out in the 1st schedule to the act.

Under **Section 62 (2), the Employment Act** defines a disciplinary penalty to mean a written warning, reprimand or suspension from work. Under Sub-section 4 of the provision, an employer cannot be suspended from work for more than 15 days in any 6 months period.

Under S.**62(5), the Employment Act** an Employee who fails to impose a disciplinary penalty within 15 days from the time of occurrence or when he/she became aware of the occurrence giving rise to disciplinary action is deemed to have waived the right to do so.

SUSPENSION PENDING INQUIRY

Under **Section 63(1) of the Employment Act**, whenever an employer is conducting an inquiry into the conduct of an employee which they believe might reveal a cause for dismissal of an employee, the employer may suspend the employee with half pay.

Whether to suspend an employee with half pay or full pay is determined by what the employment contract and the human resource manual of the employer stipulates. For example, in **OKELLO NYMLORD V RIFTVALLEY RAILWAYS (U)LTD HCCS NO 195 OF 2009**, the human resource manual of the dependent stipulated that on suspension an employee is entitled to their full pay for the duration of the suspension. Pursuant to S.27(2) of the employment act, such a variation of the provisions of the act by the HR manual or employment contract which is in favor of the employee is permissible however any agreement between the employer and employee to allow for suspension without any pay at all is null and void by virtual of s.27(1).

OBJECTION MY LORD

The suspension according to **Section 63 (1) of the Employment Act** must not exceed four weeks or the duration of the inquiry whichever is shorter. **In OKELLO NYMLORD V RIFTVALLEY RAILWAYS (U) LTD, HCCS NO.195 OF 2009**, the plaintiff was suspended in excess of the four weeks permitted under **Section 63(2) of the Employment Act** was an unlawful suspension.

IN KATINDA V NNHP ENTERPRISES LABOR DISPUTE REFERENCE NO.169, court stated that it is important that the suspension letter clearly states that the suspension is an interim pending finding out whether or not the employee should be responsible for the allegation mentioned in the suspension letter.

ISAAC CHRISTOPHER LUBOGO

SUSPENSION LETTER.

FRAZER DISTILLERS LIMITED

P.O BOX 456, KAMPALA,

UGANDA.

DATE: 10TH FEBRAURY 2020.

MR.BONGO NKATA,

HEAD OF FINANCE.

Dear Sir,

RE: SUSPENSION FROM WORK

Reference is made to the above.

Following a forensic audit conducted on the 14th day of January 2020 by the external auditors and their findings contained in report dated 1st February 2020, it was discovered that funds amounting to UGX. 1.2 billion Were not fully accounted for. Further, forged receipts amounting to UGX.111 million were also found. The report is attached to this letter for your reference.

The above findings bring fourth allegations of fraud perpetuated by you as the head of the financial department which if proved would amount to misconduct as per regulation 6 (1) (b) of the company's Human Resource Manual.

Therefore, this letter is to inform you that you have been suspended from work from today until the 9th of March 2020 to allow for investigations into the allegations of fraud against you to take place. You're required to handover all company properties to the Human Resource Department by close of day and these among others include the company car and the keys to your office. During the duration of this suspension, you will receive half of your salary however all other benefits shall be suspended.

Yours faithfully

LUTIMBA ALLAN

HEAD HUMAN RESOURCE.

REMEDIES AVAILABLE TO AN EMPLOYEE FOR UNFAIR TERMINATION, UNFAIR DISMISSAL AND UNLAWFUL DISMISSAL.

The remedies are provided for in the employment act and under common law.

PAYMENT IN LIEU OF NOTICE.

Pursuant to **Section 58 (1) of the Employment Act**, an employment contract cannot be terminated by an employer without giving notice to the employee. Where such notice is not issued, then under **Section 58 (5)**, the employee who is terminated is entitled to payment in lieu of notice that her or she ought to have been given. In **BANK OF UGANDA V BETTY TINKAMANYIRE**[310]Tsekoko JSC held that 'in my opinion where any contract of employment like the present stipulates that a party may terminate it by giving notice of the specified period, such a contract can be terminated by giving the stipulated notice for the period . in default of such notice by the employer, the employee is entitled to receive payment in lieu of notice and where no period for notice is stipulated, compensation will be awarded for reasonable notice which should have been given depending on the notice and duration of employment.

Payment in lieu of notices can be viewed as an ordinary way of giving notice.

REINSTATEMENT.

In instances of unfair termination, an employee has the remedy of reinstatement when ordered by a court pursuant to **Section 71 (5) (a) of Employment Act**. in ordering the remedy court must under subsection 6 give due regard to whether the employee does wish to be reinstated, whether the circumstances surrounding the termination are such that a continued employment relationship would be intolerable and whether its reasonably practicable for the employer to reinstate the employee.

Courts are however very unlikely to issue this remedy despite the same being available to an aggrieved party under the act. **In STANBIC BANK V KIYEMBA MUTALE SCCA N0.2 OF 2010,** Justice Katureebe held that it is trite law that normally an employer cannot be forced to keep an employee against his will.

COMPENSATION

Under **Section 71 (5) (b) of the Employment Act**, the court if satisfied that the employee was unfairly terminated may order the employer to pay compensation to the employee. Under **Section 78 (1)** an order of compensation must include a basic compensatory order equal to the employees four weeks' wage. Pursuant to **Section 78 (2),** the compensatory order may include additional compensation which according to **sub-section 3** must not exceed an amount amounting to the employees 3 months' wage. In **OKELLO NYMLORD V RIFTVALLEY RAILWAYS (U) LTD**

[310]**SCCA NO.12 OF 2007**,

(SUPRA), Musota j held that where an employer unlawfully terminates the services of an employee the latter is entitled to compensatory orders under the E.A

SEVERANCE ALLOWANCE.

Subject to **Section 87 (a),** an employee is entitled to a severance allowance from the employer where the employee was unfairly dismissed.

Musota j in **OKELLO NYMLORD V RIFTVALLEY RAILWAYS (U) LTD (SUPRA)** held that where an employer unlawfully terminates the services of an employee, the latter is entitled to not only compensatory orders but also severance allowance or pay under the E.A.

DAMAGES

These are a common law remedy and include the following:

a) SEVERAL DAMAGES

In HADLEY V BAXENDALE (1894) 9 EXCH 341, court held that the purpose of damages is to put the injured party in the position he or she would have been if the injury had not occurred. In **STANBIC BANK V KIYEMBA MUTALE SCCA NO.2 OF 2010,** Justice Katureebe held that whereas an order of specific performance in employment contracts cannot be issued, the employer must be prepared to pay damages for wrongful dismissal. **IN GULLABHAI SHILLING V KAMPALA PHARMACEUTICAL LTD SCCS NO. 6 OF 1999**, Mulenga JSC held that a wronged employee is entitled to recover as damages, the equivalent of the remuneration for the period stipulated in the contract of notice.

b) AGGRAVATED DAMAGES.

In ISAAC NSEREKO V MTN UGANDA LTD[311], Justice Kabiito stated that aggravated damages compensate the victim of a wrong for mental distress in circumstances in which that injury has been caused or increased by the manner in which the defendant committed the wrong or by the defendants conduct subsequent to the wrong or by the defendant conduct subsequent to the wrong. They are damages awarded as compensation for the P/F mental distress, where the manner in which the defendant has committed the tort, or his motives in so doing or his conduct subsequent to the tort has upset or outraged the P/F. such conduct or motive 'aggravates' the injury done to the P/f and therefore warrant a greater or additional compensatory sum.

c) SPECIAL DAMAGES

These must be specifically pleaded and proved. Special damages in such cases may relate to outstanding bank loan obligations at the time when the employee was unfairly terminated, unfairly dismissed or unlawfully dismissed. **In NATIONAL FOREST AUTHORITY V SAM KIWANUKA CIVIL APPEALS NO.005 OF 2009**, the court of appeal held that special damages may be awarded where a party contracts a loan obligation but as a result of unlawful or wrongful act

[311]**HCCS no. 156 of 2012**

of another making the loan contractor fail to pay the loan, the latter is entitled to special damages of an amount equivalent to the outstanding bank loan at the time of the unlawful act. The victim is also entitled to general damages for the inconvenience and embarrassment caused to him as a result of the unlawful acts of the defendant.

JURISDICTION OF THE LABOR OFFICER AND THE INDUSTRIAL COURT.

Section 12 (1) of the Employment Act enshrines Labor officers with the jurisdiction to entertain and resolve Labor disputes arising from employment contracts or under the operation of the act. In addition, **Section 93(1) of the Employment Act** stipulates that the only remedy available to person claiming an infringement of any of the rights fronted under the employment act is to make a complaint to a Labor officer.

Under **Section 3 (1) of the Labor disputes (Arbitration and Settlement) Act No.8 of 2006**, Labor disputes whether existing or apprehended may be reported to Labor officers in writing. Section 2 of **the Labor disputes (Arbitration and Settlement) Act No.8 of 2006 (**L D (A&S) Act) defines a Labor dispute to mean any dispute or difference between an employer and employees or between Labor unions, connected with the employment or non-employment terms of employment, the conditions of Labor of any person or the economic and social interests of a worker or workers.

Under **Section 93(2) of the Employment Act,** the Labor officer has the jurisdiction to hear and settle by conciliation or mediation a complaint by a person alleging that another party is in breach of the employment contract between them.

PROCEDURE FOR LODGMENT OF A COMPLAINT.

The procedure is outlined under Regulations 7 and Regulations 8 of the Employment Regulations, 2011.

INDUSTRIAL COURT (I.C)

The Industrial Court is established by **Section 7 (1) of the Labor Disputes (arbitration and settlement Act No.8 of 2006.** In Justice **ASAPH RUHINDA NTENGYE AND ANOTHER V ATTORNEY GENERAL, CONST PET.NO.33 OF 2016**, the constitutional court stated that the industrial court is part of the courts of judicature although is not a superior court. It is a subordinate court established under **Article 12 of the constitution** even though it is at the same level as the high court in appellant ranks.

Jurisdiction.

Under **Section 8 (2) of the Labor disputes (arbitration and settlement) Act no.8 of 2006**, the jurisdiction of the I.C includes:

a) Arbitrate on Labor disputes referred to under the LD (A &S) Act.

b) Adjudicate upon questions of law and fact arising from references to the industrial court by any other law.

Pursuant to **Section 93 (7) of the Employment Act,** a complainant may pursue a claim before the I.C if the complaint is dismissed or the Labor officer has within 90 days not issued a decision.

Section 94 (1) of the Employment Act further states that a party who is not satisfied with the decision of a Labor officer on a complaint may appeal to the I.C.

According to **Section 94 (2) of the Employment Act,** the appeal must relate to a question of law and on question of fact only with leave of court.

COMPOSITION OF INDUSTRIAL COURT

Section 10(1) of the Labor Disputes (arbitration and settlement) Act (L.D (A &S) Act, states that the industrial court consists of a chief judge, a judge (both of whom must have similar qualifications as those of a high court judge and are appointed by the president on the recommendation of JSC under **Section 10(2),** an independent member, a representative of employers and a representative of employees.

PROCEDURE.

A matter may pursuant to **Rule 3 of the Labor disputes (Arbitration and settlement)(industrial court procedure) rules**, be referred to the industrial court either by a Labor officer at the request of a party to a dispute in which case the reference will be in form specified in the first schedule to the rules or a party to a dispute that has been reported to a Labor officer may refer the matter to the industrial court if the matter has not been referred by the Labor officer or otherwise disposed of the dispute within 8 weeks.

1. The reference in this case is in the form specified under the second schedule to the rules. The reference by the Labor officer must be accompanied by report of the Labor officer describing the nature of the disputes and steps taken to resolve the dispute and all documents and information furnished to him or her by the parties.

2. Upon receipt he references by the registrar of industrial court, he/she must as be required by rule 4 of L.D (A&S) (I.C procedure) rules file the reference and allocate it a reg number.

3. The registrar must under rule 5(1) give notice to the parties to the dispute that a reference has been made to the I.C within 7 days from the date of receipt of the notice.

4. The claimant must serve the memorandum onto the respondent

5. The claimant must then file 6 copies of the memorandum accompanied by an affidavit of service with the registrar of the I.C as stipulated in Rule 5(2)

6. **Rule 5(4) mandates** a respondent to file a reply to the memorandum within 7 days from the day of service of memorandum

7. Respondent must serve the reply onto the claimant and file 6 copies of the memorandum in reply accompanied by an affidavit of service.

Note: under Rule 6(1), a party to a dispute who fails to file documents within the prescribed time, may apply to the court for extension of time.

Appeals from Industrial Court

Under Section 22 of the **Labor Disputes (arbitration and settlement) Act (**L.D(A &S) Act and rule 23(1) & (2) of the L.D (A & S) (I.C procedure) rules an appeal from a decision of I.C is to the court of appeal and must only be on a point of law or on whether the I.C had jurisdiction over the matter.

The appeals are pursuant to **Rule 23(3)** governed by the judicature (court of appeal) rules S.I **NO.13-10**

COLLECTIVE TERMINATION.

Under Section 65 of the Employment Act, an employment contract may be terminated**.**

Section 2 of the Employment Act, defines what termination of employment mean

Under **Section 88 (2) of Employment Act,** the employer has a duty to ensure continuity of employment however where it is not possible then the employer may terminate in accordance with the law.

Under **Section 81(1) of the Employment Act,** if the employer contemplates termination of not less than 10 employers over a period of not more than 3 months for reasons of an economic, technological structural or similar nature then that is collective termination.

economic reasons, the employer is financially distressed and if nothing is done might be declared insolvent and any of the insolvency proceedings may happen that is receivership, administration or liquidation and therefore to avoid these, the company must lay off some workers so as to cut costs and stay afloat.

Technological reasons, the employer has acquired new efficient technology to perform a given tasks there by rendering the present employees doing that task surplus.

Structural changes e.g., change of mode of operation of the business

PROCEDURE.

1. Notify the employees affected of the pending termination. Notice periods in **Section 58 of the Employment Act** are applicable. **BEN KIMULI V SANYU 2000 No 126 of 2015**

2. Notify the representative of the Labor union if the employees affected are unionized as per **Section 81 (a) of Employment Act** and the minimum period for such notice is four weeks before the 1st termination.

3. Notify the commissioner for Labor in writing of the reasons for the termination, the number and categories of workers likely to be affected and the period over which the termination are intended to be carried out. **Section 81(b) of Employment Act.**

Regulation 44(a) of the Employment Regulations 2011 states that the notice must be in form prescribed in Part A and B of the 6 the schedule.

UNIONIZED EMPLOYES.

Labor union is defined in **Section 2 of the Labor Unions Act** 2006 to mean any organization of employees created by employees for the purpose of representing the rights and interests of employees and includes a registered Labor union at the time of coming into force of the act

RIGHT OF EMPLOYEES TO FORM LABOR UNIONS.

Article 29(1) (e) of the 1995 constitution of the republic of Uganda guarantees the right to freedom of association.

Further **Article 40 of the constitution** provides for the right to work which entails the formation of the Labor unions

Under **Section 3 of the Labor Unions Act**, employees have the right to organize themselves in any Labor union.

Right of employees in a Labor union

Under **Section 3 of the Labor Act,** unionized workers have the right:

a) To assist in the running of the Labor union

b) To bargain collectively through a representative of their own choosing

c) Withdraw their Labor and take industrial action. The industrial action may take the form of sit-down strikes.

In **UGANDA DEVELOPMENT BANK V FLORENCE MUFUMBA CACA NO.241 OF 2014.**

Holding.

1. An employee who terminates the contract of employment is not under an obligation to give reasons why they terminated the contract in the termination letter.

2. Wrongful dismissal/ termination is one and the same and they mean that the employee was dismissed or their services terminated without following the contractual/provisions of the employment act. Wrongful termination/dismissal is a common law cause of action concerning itself more with the reasons for dismissal or termination. The remedies for wrongful dismissal are founded in the common law while those for unfair termination are stipulated under the E.A

3. Wrongful dismissal being a breach of contract and statutory provisions, it follows that the employer repudiated the terms of the contract and the court can award reasonable remedies. The award of reasonable remedies is not tied to the contractual terms but the rather principle of restitution integrum which requires court to put the claimant in a position he/she would have been had the breach not occurred. The same principle applies in the assessment of

damages in claims for wrongful dismissal. The court should consider loss of income as the natural and probable consequence of dismissal and should classify these as special damages since they are capable of being quantified.

4. General and aggravated damages may be awarded but not for the same claim as they are same kind. Aggravated damages court looks at the employers conduct and manner of committing the tort which may have injured the proper feelings of the dignity and pride of the employee.

5. Remedies available to an employee for a claim of wrongful dismissal, do not include remedies for unfair dismissal such as severance pay and leave pay as provided under the Employment Act

WORKERS COMPENSATION

This is governed by the Workers Compensation Act Cap 225.

APPLICABILITY OF ACT.

Under Section 2, the act applies to all persons in private or government employment but does not apply to active members of the armed forces of Uganda.

KEY TERMS (S.1)

1. Worker means any person who performs services in exchange for remuneration, other than a person who performs services as an independent contractor or an apprentice who is engaged primarily for the purpose of receiving training in a trade or profession as per section 1 (1)(u)

2. Injury means an accident and a scheduled disease. Section 1(1)(i)

3. Total incapacity means incapacity whether of a temporary or permanent nature which incapacities a worker for any employment which he or she was capable of undertaking at the time when the accident occurred. Section 1(1)(t)

EMPLOYER'S LIABILITY.

Section 3 (1) for personal injury by accident arising out of and in the course of the worker's employment.

The following are deemed to be done out and in the course of employment:

1. Section 3 (3), when a worker acts to protect any person on the employer's premises where the worker believes to be injured or imperiled, or when a worker acts to protect the property on the employer's premises.

2. Section 3 (4), while the employee is travelling directly to or from his or her place of work for purpose of employment. As per Section 3 (5), it's upon the employee to prove that such travel was to or from work.

Section 3 (6), stipulates that compensation under the act is payable whether or not the incapacity or death of the worker was due to the recklessness or negligence of the worker.

Section 3 (2) excludes liability where the injury does not result into permanent injury or incapacity for less than 3 days.

WHO CAN CLAIM?

1. The worker. Worker is defined in Section 1(1)(u)
2. If the worker is deceased, then his/her family members who are dependent on his/her earnings. (Section 4(1), Section 1(1)(Q), defines member of the family to mean the wife, husband, father, mother, grandfather, grandmother, stepfather, step mother, son, daughter, grandson, granddaughter, stepson, step daughter, brother, sister, uncle, aunt, niece, nephew, cousin or adopted child.

COMPENSATION QUANTUM

1. Under **Section 4 (1)** where the deceased worker leaves any family members, the amount of compensation is 60 times their monthly earnings.

   Where the deceased has no any dependent family member, the employer only pays expenses of the medical aid provided and burial expenses of the deceased under **Section 4(2).** Note that there is a presumption that a worker has dependents unless the local authority of the home area of the deceased proves otherwise. **Section 4 (4**).

PERMANENT TOTAL INCAPACITY.

Except if the terms and conditions of service provide for a lighter compensation, the amount of compensation is 60 months' earnings. **Section 5 (1)**

If the injury is likely to require the injured worker to have constant assistance of another person on a permanent basis, then the compensation is 75 months earning.

Section 1(2) stipulates that permanent total incapacity results from an injury or from any combination of injuries specified in the 2nd schedule to the act where the percentage or aggregate specified in that schedule in relation to the injury or injuries amount to 100%.

PERMANENT PARTIAL INCAPACITY

2. The compensation payable here is such percentage of 60 times the workers monthly earnings as is specified in the 2nd schedule. The permanent partial incapacity relates to an injury specified in the 2nd schedule.

Where the injury is not scheduled in the 2nd schedule, each percentage of 60 times the workers monthly earnings as is proportionate to the loss of earning capacity permanently caused by the injury .S.6 (1) (b)

In the event that more than one injury under the 2nd schedule arises from the same accident, the compensation is aggregated but the amount of compensation payable must not be greater than amount that would have been payable if the accident had caused the worker to suffer permanent total incapacity.

TEMPORARY INCAPACITY.

3. Under **Section 7 (1)**, temporary incapacity, whether total or partial, resulting from injury, the compensation can be paid either in lump sum or periodically. The compensation payable shall take into account; the circumstances in which the accident happened, the probable duration of the incapacity of the worker, the injuries suffered by the worker and the financial consequences for the worker and his/her defendants.

   Under **Section 7(2),** period covered by hospitalization or absence from duty certified as necessary by a medical practitioner shall be regarded as a period of temporary total incapacity irrespective of the outcome of the injury and this will be inclusive of the period preceding final assessment of disability both periods being continuous of each other.

CALCULATION OF EARNINGS.

Section 1 (1) (f), defines earnings to include wages and any allowances paid by the employer to the worker, including the value of any food, accommodation or benefit in kind.

Under **Section 8(1**), the monthly earnings used are the worker's earnings during the 12 months immediately preceding the accident and the computation of annual earnings is multiplied of 12 of that sum.

DEDUCTIONS FROM COMPENSATION PAYABLE BY THE EMPLOYER.

Under **Section 8 (4**), an employer may deduct any sums paid to a worker pending the settlement of the claim arising under the act from the final compensation payable.

Section 11 (4) obliges an employee to pay for medical expenses during the period of temporary total incapacity.

MEDICAL EXPENSES EXPENDED AS REQUIRED.

Under **Section 24** and **Section11** (40 are not deductible neither is the cost of conducting the medical examination by a medical practitioner as per **Section 11 (1).**

Section 24 (1) mandates the employer to defray the reasonable costs incurred by a worker in respect of medical expenses and incidental costs.

NOTIFICATION OF ACCIDENT BY WORKER.

Section 9 (1) postulates that compensation may not be payable under the act unless notice of the accident has been given to the employer by or on behalf of the worker as soon as is reasonably practicable in any case within one month after the date when the accident occurred or within three months after the date the symptoms of the occupational disease became apparent.

No notice is required however where it is how that the employer was aware of the accident or disease at or about the time it occurred or at the time when the symptoms became evident or for any reasonable cause.

The form of the notice is specified under form1 in the 1st schedule to the worker's compensation regulations S.1.225-1 as per Regulation 2

NOTIFICATION BY EMPLOYER TO LABOR OFFICER.

Section 10 requires an employer, upon the accident happening causing injury to the worker which entitles him/her to compensation to notify the Labor officer within a reasonable time.

The form of the notice is specified under form 2 to the first schedule of S.1.225-1

CONTESTATION ON ASSESSMENT OF DISABILITY.

If the assessment made by a medical doctor under Section 11 is disputed by either party, the aggrieved party may apply to the Labor officer to request that the dispute be referred to the medical arbitration board. **Section 13 (1)**

The decision of the medical arbitration board is final unless the aggrieved party goes to court. **Section 13(3).**

DETERMINATION OF CLAIMS.

Where the worker and employer fail to agree on the amount of compensation after 21 days from when the employer received the notice, the worker may make an application for enforcing a claim to compensation to the court having jurisdiction in the place where the accident arose. **Section 14 (1)**

The application takes the form prescribed in form 1 of the 1st schedule to worker's compensation (rules of court) rules S.1. 225.4

The court has jurisdiction irrespective of the money involved. **Section 14 (2)**

Section 1 (1) (a) court under the act is defined to mean a magistrate's court presided over by a C/M or G1, having jurisdiction in the area where the accident to the worker occurred.

OCCUPATIONAL DISEASES.

Where a medical practitioner grants a certificate stating that a worker is suffering from a scheduled disease or that their death was as a result of a scheduled disease, and the disease was due to the nature of their work within the preceding 24 months, the worker is entitled to compensation as if that disablement or death arose from an accident. **Section 27(1).**

A disease is said contracted as per **Section 27 (2),** when the symptoms of the disease are clearly manifest in physiological or psychological signs or when first diagnosed by a medical practitioner.

LIABILITY

Under **Section 29(1)** the compensation is payable by the employer who last employed the worker during the period of 24 months referred to in **Section 27(1)(b)** unless that employer proves that the disease was not contracted while the worker was in his/her or its employment.

Under **Section 29 (3)**, the employer denying liability may take out 3rd party proceedings against the new employer.

CONTRACTS OF EMPLOYMENT AND TERMS OF CONTRACT

Payment of Wages

Section 2 of the Employment Act defines a wage as remuneration or earnings however86 designated or calculated capable of being expressed in terms of money payable to an employee under a contract of service. Wages are provided for in Part V of the Employment Act and in particular, section 41 makes it a mandate to the effect that the employee is entitled to wages.

An employee is not entitled to receive wages, under section 41(6) in respect of a period when he or she is absent from work without authorization or good cause except that in case of an employee who has completed at least three months continuous service with his or her employer, there are some scenarios which do not constitute absence without good cause, thus

- Absence attributed to occurrence of exceptional events preventing the employer from reaching his place of work.
- Absence attributed to a summons to attend a court of law or any other public authority having power to compel attendance.
- Absence attributed to death of a member of the employee's family or defendant relative, subject to a maximum of three days' absence on any occasion and a maximum of six days in any calendar year.

The above discussion is fortified by the principle of **RAMANBHAI VS MADHIVANI INTERNATIONAL COMPANY LTD (1992-93) HCB 189** where court held that where payment is due at the end of the month and it is not made; such a contract gives rise to a cause of action each month accrues and which once vested is not subsequently lost or divested of the servant's abandonment of the contract.

It must be noted that, under **Section 43 of the Employment Act**, the payment of wages shall take place at the Employee's place of work or if he or she works at more than one location, the premises of his or her employee from which he or she works or from which his work is administered.

The payment of wages to another person other than the employee entitled to it is prohibited in **section 44**.

The permitted deductions from remuneration of an employee are spelt out in **Section 46** and these include, an amount in respect of any tax, rate, subscription or contribution imposed by law, or where the employee has given his written consent to a deduction being made, deduction by way of

reasonable rent or other accommodation provided by the employer for the employee's family, or union dues inter alia.

SOCIAL SECURITY

This is a statutory protection whereby the employer is under a strict obligation to remit 5% of the employee's salary to National Social Security Fund. This is mandated in **Section 1 of the National Social Security Act 2022**.

Key among those were proposals addressing governance issues such as: putting a cap on the tenure of the Board; refusal of NSSF to lend directly to government; refusal to tax members' benefits at the time of payment; refusal to cap the levy paid to the regulator in the NSSF Act but rather apply the cap for other schemes as well, by amending the URBRA Regulations that prescribe the levy; putting a cap on the tenures of the Managing Director and the Deputy Managing Director; appointment of the Corporation Secretary by the Board of Directors; making the Managing Director an ex-officio member of the Board without voting rights. No doubt, members will benefit greatly from a fund that's clearly aligned with conventional governance principles.

Uganda Passed the National Social Security Fund (Amendment) Act, 2021 The NSSF (Amendment) Bill of 2021, which was tabled before Parliament in February 2021 and subsequently passed by the Parliament in November 2021 was assented to by the President of the Republic of Uganda on 2 January 2022.

This is a summary of the key amendments made to the NSSF Act (herein referred to as the Principal Act)

1. Amendment of the Definition of an "Employer" Previously, the Principal Act defined an "employer" to include: the Government and a manager or a subcontractor who provides employees for the principal contractor; - but where a person enters into a contract by which some other person is to provide employees for any lawful purpose of the first-mentioned person and it is not clear from the contract which of the two persons is the employer, the first-mentioned person shall be deemed, for this Act, to be the employer; This has been amended to include; - A company registered or incorporated under the Companies Act, 2012 - A partnership registered under the Partnership Act, 2010 - A trustee incorporated under the Trustees Incorporation Act, 165 - A business registered under any other law for the time being in force governing the establishment of business entities - The governing body of an unincorporated association Implication This implies that all companies/organizations falling under the brackets highlighted above would be considered employers for purposes of the NSSF Act and would be bound by the employer obligations stated in the Act. This widens the "employer" base and increases the contributions made to the Fund.

2. Amendment of the definition of a "Contributing Employer" Before, a "contributing employer" was defined as any employer who I belonged to a class or description of employers specified as contributing employers by an order made by the Minister; or ii. has registered voluntarily as a contributing employer; The Amendment Act repeals part (ii) of the definition above and defines a "contributing employer" to mean an employer who is registered under Section 7 of the Principal Act. Implication Based on the above, we note that voluntary registration for employers has been revoked and thus all employers defined under Section 7 of the Principal Act are now mandated to register and contribute to the NSSF Fund.

3. Compulsory registration of employers and eligible employees **Section 7(1) of the Principal Act**, which provides for compulsory registration of employers and eligible employees, has been amended to state that every eligible employee shall register as a member of the fund and shall make regular contributions to the fund per the Act and regulations made under the Act. The Act further amends **Section 7(2)** to state that every employer, irrespective of the number of employees (emphasis ours), shall register with the fund as a contributing employer and shall make contributions for his/or employees per the Act and regulations made under the Act. Considering the above amendments, the following sections in the Principal Act have subsequently been repealed; I. **Section 7(3)**: which provided for employers dissatisfied with the specification of the description of contributing employers by reference to the number of employees; II. **Section 9(b**): which provided that any person registered as a contributing employer throughout the 2 years immediately preceding his/her application who had employed less than the minimum number of employees required under the Act may apply for cancellation of his/ her registration; and III. Section 10: which provided for voluntary membership of employers. Implication This implies that the threshold of compulsory NSSF registration of 5 employees or more ceases to apply and all employers defined under item 3 above are now required to deduct and remit their contributions as per the percentages and due dates specified in the Principal Act.

4. Amendment of the definition of "Contribution" The Principal Act has been amended to define "Contribution" as a standard contribution, voluntary contribution, and the special contribution.

5. Voluntary Contributions The NSSF Amendment Act introduces "Voluntary Contributions" under Section 13A which provides for the following aspects; a. Persons eligible for voluntary contributions The Principal Act has been amended to provide that;

I. member of the fund may make voluntary contributions to the fund over and above his/ her standard contributions - **Section 13A (1)**. Therefore, members of the Fund who wish to make voluntary contributions over and above their standard contributions may authorize their employers in writing to deduct an agreed rate from their wages and remit the same to the Fund.

II. self-employed persons may apply for membership and make voluntary contributions to the Fund - Section 13A (4).

III. any other person not provided for above may apply for membership and make voluntary contributions to the fund – **Section 13A (5)**. b. Procedure for making voluntary contributions Procedures for making voluntary contributions and claiming benefits shall be prescribed by the Minister, by regulations, in consultation with the board - **Section 13A (7**).

> Penalties for non-compliance The Principal Act requires employers to remit the agreed voluntary contributions within fifteen days following the last month in which the wages were paid. Therefore, employers who fail to remit voluntary contributions made under part (a) (i) above commit an offence and are liable, upon conviction to –
> Remit to the fund any outstanding contribution due to the employee; and
> Pay a fine of twenty percent (20%) of the amount deducted. Implication Members can increase their savings by voluntarily contributing over and above the 5% statutory contributions. Admission of any other persons into the fund widens the "employee" base and provides more money for the fund's claims and investment.

6. Midterm Access to Benefits the Principal Act introduces Section 20A which allows access to an amount not exceeding twenty percent of the midterm benefits that have accrued from contributions

made to the Fund. Members who are forty-five years of age and above and have made contributions to the fund for at least 10 years are eligible for the midterm benefits above. Persons with disability are also eligible for midterm access amounting to fifty percent of their accrued benefits, provided they are forty years of age and above and have made contributions to the Fund for at least ten years. Terms and conditions and procedures for accessing the accrued midterm benefits will be prescribed by statutory instrument by the Minister, in consultation with the board. "Person with disability" carries the meaning assigned to it in the Persons with Disabilities Act, 2020 as stated under Section 1(va) of the Principal Act. Implication Members who meet the criteria above will be able to access 20% and 50% of their accrued benefits respectively once the statutory instrument is issued by the Minister.

7. Amendment of requirements for Withdraw Benefit Section 21(2) of the Principal Act previously provided that any person who ceases to be a member of the fund by being employed in excepted employment would be entitled to the full balance of his or her account in the fund if contributions were made during four financial years (emphasis ours). In any other case, he or she would be entitled to his or her contribution only and the rest shall be paid into the reserve account. This is amended to provide that any person who ceases to be a member of the fund by being employed in excepted employment shall be entitled to the full balance of his or her account in the fund if contributions have been paid in respect of that member. Implication Members leaving the Fund due to joining excepted employment can now claim their benefits in full irrespective of the number of years they have been contributing to the Fund.

8. Amendment of requirements for Emigration Benefit Previously, Section 23(1) of the Principal Act provided that persons who permanently emigrate from Uganda to a country with which no reciprocal arrangement under the Act had been made would be entitled to the full balance of their account in the fund if contributions were made during four financial years (emphasis ours). In any other case, those persons would be entitled to their contribution only and the rest would be paid into the reserve account. This has been amended to provide that a member of the fund who emigrates permanently from Uganda to a country with which no reciprocal arrangement under the Act has been made, where contributions under this Act have been paid in respect of that member of the fund, shall be entitled to the full balance of his or her account in the fund. Implication Members leaving the Fund upon permanent emigration from Uganda can now claim their benefits in full irrespective of the number of years they have been contributing to the Fund.

9. Additional Benefits **Section 19** of the Principal Act is amended under 19 (1a) to provide that additional benefits may be prescribed by the board, in consultation with the Minister, by Statutory Instrument.

10. Amendment of events leading to the closure of members' accounts Previously, **Section 34 (2)** of the Principal Act provided for events upon which a member's account would be closed or membership ceased, and these included: - Payment of an emigration grant; - Member attains the age of 60 years; - Member attains the age of 55 years and there is no balance on their account; and - Death of a member. This has been amended to substitute the events above with the following; - When an emigration grant is paid; - When a member opts out of the fund upon receipt of the member's total age benefit under **Section 20 of the NSSF** Act; - When a member dies and his or her survivor's benefits are paid out following Section 24 of the NSSF Act; Additionally, **Section 34 (3)** has been amended to provide that if any sum of money is still unclaimed for seven years after closing the member's account, then the money shall belong to the Minister of Finance who will pay it into the reserve account. Previously, the Principal Act provided for a subsequent period of six years, after

which the money would be paid into the reserve account. **Section 34 (3a)** was introduced to provide for the publication of the names and details of all dormant members' accounts every year in a newspaper of wide circulation within Uganda. Implication Members or members' beneficiaries should ensure that their claims are made within seven years after qualifying for receipt of the funds.

11. Increase in fines and penalties **Sections 43, 44 and 45 of the Principal Act** have been amended to substitute the words, "ten thousand shillings or to a term of imprisonment not exceeding six months or to both" with "five hundred currency points or imprisonment not exceeding one year or both". A currency point is equivalent to twenty currency points as highlighted in the Third Schedule of the Principal Act. Implication The increase in the fines payable upon conviction for committing an offence from ten thousand Uganda shillings to five hundred currency points (Ten million Uganda shillings) implies that members need to ensure compliance to avoid unnecessary fines and penalties.

12. Amendment of the composition of the Board of Directors Previously, **Section 3(1) of the Principal Act** provided that the governing body of the fund shall be a board of directors consisting of a chairperson, the managing director and not less than six nor more than eight other members. This has been amended to state that "the fund shall be governed by a stakeholder board of directors appointed by the Minister and consisting of – I. A chairperson II. The permanent secretary of the ministry responsible for labor III. The permanent secretary of the ministry responsible for finance IV. Four representatives of employees nominated by the Federations of Labor Unions V. Two representatives of employers nominated by the Federation of Uganda Employers, and VI. The managing director who shall be an ex-officio member without the right to vote as provided for under **Section 3 (6) of the Principal Act**, the Minister shall ensure that – a. A member of the board is a person of high moral character and proven integrity b. There is consideration of persons with disabilities, balance of gender, skills, and experience among the members of the board; and c. The members of the board provided for under (V) above, are contributing employers under **Section 7 of the NSSF Act**. Implication The provision above allows for different stakeholders to join the Fund's board of directors so that each of the category's views is heard and concerns are addressed.

13. Period of directorship **Section 3 (2) of the Principal Act** previously provided that the chairperson and the other members of the board, other than the managing director, shall be appointed by the Minister for three years and upon such terms and conditions as may be specified in the instruments of appointment and shall be eligible for reappointment. This has been amended to state that a member of the board, except for the permanent secretaries and managing director, shall hold office for a term of three years and may be reappointed for only one more term. Implication This provides a maximum period of 6 years for appointed chairperson, employer, and employee representatives to serve on the board and gives opportunity to different stakeholders to participate in the management of the NSSF Fund.

14. Termination of Directorship **Section 3(3) of the Principal Act** provides that the Minister shall revoke the appointment of the director— a. if he or she is unable to perform the functions of his or her office; b. if he or she is insolvent or bankrupt; or c. if he or she is convicted of an offence involving fraud or dishonesty. However, this has been amended to state that a member of the board may be removed from office by the Minister for – a. Abuse of office b. Corruption c. Incompetence d. Physical or mental incapacity that renders the member incapable of performing the functions of his/her office e. Misbehavior or misconduct f. Being adjudged bankrupt by a court of law g. Conviction for an offence involving dishonesty, fraud, or moral turpitude; or h. Failure to declare any conflict of interest in the execution of a member's mandate as a member of the board "Corruption" will carry the meaning assigned to it in the Anti-Corruption Act, 2009, as per Section

1(ga) of the Principal Act. The Principal Act has been further amended to indicate that a member of the board shall hold office on terms and conditions specified in his or her instrument of appointment and may resign from the board by giving notice of not less than one month in writing addressed to the Minister. Implication The provisions above give more clarity on conditions under which a member of the board is deemed unable to perform the functions of his/her office and thus removed from the board. They also introduce a notice period that must be given to the Minister upon resignation, which was previously not provided for in the Principal Act.

15. Amendment of the Managing Director's and Deputy Managing Director's appointment The Principal Act has been amended under Section 39 (1) to indicate that the Managing Director shall be appointed by the Minister, on the recommendation of the board. Section 39 (1a) has also been introduced to the Principal Act to provide that the Managing Director shall serve for five years and maybe re-appointed for one more term only, subject to satisfactory performance.

Similarly, the Deputy Managing Director shall be appointed by the Minister, on the recommendation of the board, and shall serve for five years and maybe re-appointed for one more term only, subject to satisfactory performance (Section 40 of the Principal Act).

16. Amendment of the Secretary's Appointment and period of service Section 41(1) of the Principal Act has been amended to state that the Secretary shall be appointed by the board for a term of five years and may be reappointed on such terms and conditions as specified in the instrument of appointment, subject to satisfactory performance. Therefore, the Secretary's appointment, which was previously done by the Minister and the Board, shall be only be done by the Board.

17. Investment of available funds Section 30 of the Principal Act has been amended to specify that all monies in the fund, including the reserve account, which are not required for the time being shall be invested as determined by the Board in consultation with the Minister responsible for Finance. The Principal Act has also been amended to allow the Fund to use in-house expertise or fund managers in the investment of the monies mentioned above.

TAXATION OF THE WAGES

Taxation is an allowable deduction under **Section 46(1) (a) of the Employment Act**. **Taxation is governed by the Income Tax Act Cap 340 As amended and section 116(1) of the Income Tax Act Cap 340** as amended allows an employer to withhold the tax notwithstanding any law providing that employment income of an employee shall not be deducted or be subject to attachment. An example of this withholding tax is P.A.Y.E

SAFETY AT WORK

This is governed by The Occupational Safety and Health Act Act9 of 2006 which repeals the Factories Act and the Workers Compensation Act. This is furthermore sanctioned by article 40(1)(a) of the Constitution 1995 which puts a duty on the employer to provide and ensure safety and welfare of the worker. This is fortified by the case of **ASILA VS. NYTIL [1975] HCB 292**, where court upheld the common law principle which is to the effect that the employer is under a duty and owes a duty of care towards his employees in terms of safety.

INSURANCE

This is a fascinating concept in the Employer- Employee relationship. The employer is under an obligation to provide insurance cover to the employee under section 18 of the Workers Compensation Act.

EMPLOYMENT OF YOUNG PERSONS AND WOMEN

Section 32(1) of the Employment Act provides that a child under the age of 12 years shall not be employed in any business undertaking or work place. **Section 32(2) of the Employment Act** provides that a child under the age of 14 years shall not be employed in any business undertaking or work place except for light work carried on under supervision of an adult aged over 18 years and which does not affect a child's education. This is in line within the constitution stand on this matter which is to the effect that a person below the age of 18 is considered a minor.

In relation to women, **Section 56(1) of the Employment Act** provides that female employees shall as a consequence of pregnancy have the right to a period of 60 working days leave from work on full wages hereafter referred to as maternity leave, of which at least four weeks shall follow the child birth or miscarriage.

TERMINATION OF CONTRACT

Section 58 gives the cardinal rule that a contract of service shall not be terminated by an employee unless he or she gives notice to the employee; except where a contract is terminated summarily under section 69 or where for reason of termination, is attainment of retirement age. The notice shall be in writing and shall be in a form and language that the employee to whom it relates can reasonably be expected to understand.

Section 65 provides for the different modes in which termination is deemed to take place thus;

a) Where the contract is ended by the employer on notice3

b) Where the task given in the contract of service expires.

c) Where the contract is ended by the employee as a consequence of unreasonable conduct

d) Where the contract of service is ended by the employee, where the employee has received notice of termination of the contract of service from the employer but before expiry of the notice.

WRONGFUL AND SUMMARY DISMISSAL

Summary dismissal is deemed to take place when an employer terminates the services of an employee without notice or with less notice than that to which the employee is entitled to by any statutory provision or contractual term. The conduct should be so gross that it affects one's line of employment. This was the principle in **AM JABI VS MBALE MUNICIPAL COUNCIL [1975] HCB 191**; court went on to state that dismissal [is wrongful] where it is affected without any justifiable cause and or reasonable notice. Summary and wrongful dismissal were discussed at length by Manyindo J; where he stated that for summary dismissal to occur, the act of the employee warranting the dismissal must be so grave; where in contract, it would amount to repudiation of the contract. Some of the examples of summary dismissal include the following:

- Alcoholism/ drunkardness;
- Incompetence (in line of duty)
- Misconduct for example fighting fellow staff.
- Immorality
- Disobedience of lawful orders.

Court held further in **DEEP SURFING VS INSAD (1886- 90) ALL ER 65** that a single act of misconduct can lead to a summary dismissal if it undermines the relationship between the Employer and the Employee. Wrongful dismissal on the other hand is the termination of the contract of service without regard to the terms of the contract; for example, dispensing with notice. Wrongful dismissal can lead to an award of general damages. This is fortified by the case of **JOHN KIWANUKA AND OTHERS VS. KIBOGA DISTRICT LOCAL GOVERNMENT COUNCIL HCCS NO. 588 OF 2000** where Okumu Wengi J awarded general damages. Before termination of services of an employee, it is proper to give someone a chance to be heard. Court held thus in **OBWOLO VS. BARCLAYS BANK (1992-93) HCB 179** and stated further that where no opportunity has been granted to a victim to be heard, and then the dismissal is wrongful. The justification for summary dismissal is evident in Mubiru Vs Barclays Bank SCCA 1 of 1998 where court held that an employee is empowered to summarily dismiss without notice if an employee is guilty of professional misconduct.

REMEDIES

The basic remedy is by bringing a complaint with the Labor Officer for settlement under section 93 0f the Employment Act.

PROCEDURE

Lodging a complaint to Labor Officer by way of ordinary letter; under section 93 of the Employment Act.

- The Labor officer shall then notify the other party and request for a reply.

- The officer shall then hear the matter and settle it by conciliation or mediation under section 92(2).

The relevant document at this stage:

A notice of complaint (by ordinary letter)

Must be noted that unlike the situation before the enactment of the new Employment Act, an aggrieved person would proceed by way of a civil suit to seek redress. It is now different; the complaint should first be lodged with the Labor Officer.

It must be noted that upon dismissal, reinstatement is not a common remedy as held in **AM JABI VS MBALE MUNICIPAL COUNCIL [1975] HCB 191.**

THE REPUBLIC OF UGANDA

EMPLOYMENT CONTRACT

This Agreement is made the …… day of …… 2020 **BETWEEN THE BOARD OF GOVERNORS OF BUTALEJA HIGH SCHOOL** of P.O. Box 912 Butaleja (hereinafter referred to as "Employer") of the one part and ……. Of P.O. Box ……. (hereinafter referred to as the "Employee") of the second part.

1.0: JOB TITLE AND TERM OF EMPLOYMENT.

The employer shall employ the employee from ……..day of …….. 2003 as …….. on permanent term for a period of …….. subject to termination as set out below and also in accordance with the job description whose details are separately annexed hereto.

2.0 DUTIES:

The employee shall:

- Diligently and faithfully perform the duties of ……. and such other duties as may be required of him during such hours and on such days as are normally worked by those holding similar posts at the said school or and devote the whole of the employee's time and attention to the service of the Employer.
- Act in all respects according to the instructions and directions given to the Employee by the Employer through the Employer's duly authorized officers; and.
- At all times comply with all other School Teacher's Service, Regulations, code of conduct and guidelines in force at the school as is required under the Education Act.

3.0: PLACE OF EMPLOYMENT:

The Employee shall work at **Butaleja High School** and in such other places as is necessary for the proper discharge of the Employee's duties under this agreement or as the employer shall from time to time direct and the employee shall be subject to posting for training or other duties in connection with this employment for such period as the employer may require.

4.0: HOURS OF EMPLOYMENT:

The Employee shall carry out his duties between **8.00 a.m. – 10.00 p.m**. and such further hours as may from time to time become necessary in order to meet the needs of the employer's business or during such hours as the employer's board may from time to time reasonably require of him and the employee shall not be entitling to receive any additional remuneration for work done outside his

normal hours of work. Or (there are no normal working hours for this employment and the employee is required to work at such time and for such period as are necessary for the efficient discharge of his duties) as may be appropriate.

5.0: REMUNERATION

The Remuneration of the employee shall be a gross salary at the rate of U Shs ……. per month (which shall be deemed to accrue from day to day) payable every month on the …… day of every month and any increment shall accrue at rates determined by the Board of Governors of the Employer on annual basis as and when money shall be available for such.

6.0: EXPENSES

The Employer shall reimburse the employee all reasonable expenses wholly and exclusively incurred by him in or about the performance of his duties under this agreement (provided that the employee furnishes the employer with receipts or other evidence of such expenses).

7.0: HOLIDAYS:

The Employee shall be entitled to take the usual public holidays and in addition, to take working days as holidays and the employee will be paid his normal basic remuneration during such holidays. However, the employee shall be free to go on holiday when the students break off from their normal school calendar but the length of such holiday shall be approved by the Employers School Management Team

The employee will be paid in respect of holidays accrued due but untaken as at the date of termination of employment or the employee will be entitled to payment in *lieu* of holidays accrued due but untaken as at the date of termination of employment.

8.0: ILLNESS:

In the event of absence from work on account of sickness or injury the Employee (or someone on his behalf) must inform the Employer of the reason for the employee's absence as soon as possible and must do so not later than the end of the working day on which absence first occurs.

In respect of absence lasting for seven or fewer calendar days the employee is not required to produce a medical certificate unless specifically so requested by the employer.

The employee shall continue to be paid during any period or periods of absence due to incapacity for a total of up to 4 consecutive weeks of employment under this agreement.

9.0: CONFIDENTIALITY:

The employee shall not (except in the proper course of his duties) during or after the period of his employment under this agreement divulge to any person whatsoever or otherwise make use of (and shall use his best endeavors to prevent the publication or disclosure of) any confidential information concerning the business dealings transactions and affairs of the employer.

10.0: TERMINATION OF EMPLOYMENT:

The employment of the employee may be determined by the employer without notice or payment in *lieu* of notice if the employee is guilty of any gross default or misconduct in connection with or affecting the business of the employer or in the event of any breach or non-observance by the employee of any of the stipulations contained in this agreement which is materially detrimental to the employer's interests.

By either party upon giving to the other not less than 30 days' notice in writing.

11.0: NOTICE:

Notices may be given by either party by letter addressed to the other party (in the case of the employer) its registered office for the time being and (in the case of employee) his last known address and any notice given at the time at which the letter would be delivered in the ordinary course of the post if delivered by hand upon delivery and in proving service by post it shall be sufficient to prove that the notice was properly addressed and posted.

12.0 MISCELLANEOUS:

This agreement is governed by and shall be construed in accordance with the laws of Uganda. The parties to this agreement submit to the jurisdiction of the Uganda courts.

AS WITNESS this Agreement is signed by the said as at the day first above mentioned

Employer: :……..

For: Butaleja High School

In the presence of: ……

Employee: …….

In the Presence of:

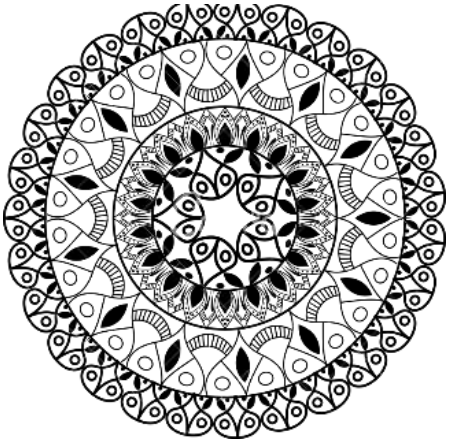
DRAWN BY:

SUI GENERIS AND COMPANY ADVOCATES

P.O.BOX 0000

OBJECTION MY LORD

KAMPALA



AGENCY

Introduction

Agency is the relationship that exists between two or persons when one called the, agent is considered in 'law to represent the other, called the principal In such a way as to be able to affect, the principal's legal position in respect of strangers to the relationship by the making of contracts or disposition of property, Hence agency can only be defined in terms of its consequences, Agency as a relationship is defendant upon the extent to which and ways in which one person can produce legal consequences for another.

The law applicable to Agency includes the following:

The Judicature Act Cap 13

The Civil Procedure Act Cap 71

The Civil Procedure Rules SI 71

The Contract Act Cap 2010

The Registration of Documents Act Cap 81

The Registration of Documents Rule SI 81-2 as amended by SI 55 of 2005.

The stamps Act Cap 342 as amended by Act 12 of 2002

The Companies Act 2012

The Advocates (Remuneration and Taxation of Costs) Rules SI 267-4

Common law and doctrines of Equity

The checklist for a prudent lawyer includes the following

Whether an agency can be formed in light of one's facts?

What happens in case the principal winds up business, or the principal's business is taken up by another individual or entity; when the agency agreement is still in force?

What are the relevant fees and duties?

PRINCIPAL AND AGENT RELATIONSHIP

The cardinal rule is evident in **KELNER VS BAXTER (1866) CR CP 174** where court held that a non-existing principal cannot appoint an agent. Thus, if the principal is a legal entity like a company; it should be in existence. It must be noted that the law of agency applies only when such representation or action of another person's behalf affects the latter's legal position, thus, his rights against and liabilities towards other people. The law of agency has no relevance to social or other non-legal obligations.

Secondly, the law of agency stresses the importance of the law in which the law regards the relationship that has been created. **CFSONELS V FIRCH [1977 AC 728**. It is the effect in law of the way the parties have conducted themselves, and not the conduct of parties considered apart from the law, or the language used by the parties that must be investigated, in order to determine whether the agency relationship has come into existence. Thirdly, the relationship connotes service; An agent performs a service for the principal. In order to understand the legal nature and function of the' agency relationship, the following must be put into consideration;

A) CONSENT OF THE PARTIES:

The definition of agency entails that principal arid agent has agreed, either in the form of a contract, or otherwise, that the agent should represent the principal. Agency is the fiduciary relationship which exists between 2 persons, one of whom expressly or impliedly consents that the other should represent him or act on his behalf and the other who similarly consents to represent the former or so to act. This is fortified by the locus classicus case of **GARNAC GRAIN CO. INC V HMF FAIRE &FALRCLOUQH LTD. [1967] 2 All ER. 353 at 358.**

It must be noted however, that there are possibilities when an agency relationship exists even where no consent and no contract exists. This was discussed in the case of **BOARDMAN -VS- PHIPPS (1967) 2 AC 46 or [1966] 3 All ER. 721.** This- case refers to self-appointed agents and further discusses tr3t it is not nice to base an agency relationship strictly on consent is because much of the law relating to agency is derived from equity, quasi - contract, or tort. Also see **BRANWHITE V WORCESTER _WORKS FINANCE LTD.**

B) AUTHORITY OF THE PARTIES

The question of authority of an agent is at the very core of agency. The authority of the agent helps define the relationship between principal and agent hence agency has sometimes been referred to as

a consensual relationship in which one (the agent) holds in trust for and subject to the control of another (the principal) a power to affect certain legal relations of that other.

FORMATION OF AN AGENCY

An agency is a relationship between two people, a principal and an agent to carry out an act for the principal as noted hereinabove. An agency may be created by express agreement or implication by conduct. In relation to an express appointment the appointment of the agent is made in writing, usually and this is a requirement of common law. It can be by word of mouth but this has its shortcomings.

THE SALIENT TERMS TO BE INCLUDED IN THE AGENCY AGREEMENT

1) Parties included.
2) Geographical Territory involved.
3) Products involved - description, catalogue.
4) Period of agreement - depends on the product, usually three years with right of renewal. A termination clause should be included - so many months' notices by either party or any time by mutual agreement.
5) Probationary period – (if necessary).
6) Provisions for renewal
7) Remuneration of the Agent
8) Prices - (if necessary).
9) Tax liability
10) Insurance
11) Restrictive covenants.
12) Discounts - promotional discounts and responsibilities. The agreement should include the principles to work on, not the detail.
13) Method and timing of payment.
14) Minimum orders.
15) Restraint of trade following termination of agreement.
16) Spares and stock - distributor to hold stock/spares only, not an agent.
17) Communication costs - each party to cover their own costs.

18) Performance measures.

19) Training and technical support.

20) Samples.

21) Advertising and promotion.

22) Ownership of brand.

23) Agent to protect trademarks, patents, etc.

24) Exchange of market information.

25) Procedures for defective goods.

26) Agent to keep books of accounts.

27) Relationship management - contact list, official addresses, etc.

28) Confidentiality.

29) Early termination for breach of agreement.

30) Transfer of rights - distribution rights cannot be transferred without permission.

31) Arbitration - a last resort and country in which legal action/arbitration to take precedence in case it is an international agency agreement.

32) Force Majeure.

33) Assignments, Waiver, Notice.

34) Modification/ Amendment

35) Law Applicable to the relationship

36) Legal Compliance.

37) Remedies to the parties.

38) Relationship between the parties.

39) Indemnity.

40) Action in case default.

THE PROCEDURE TO BE FOLLOWED:

1) By drafting an agency agreement which should be signed by the parties, and witnessed to.

2) The agreement is then registered with the Registrar of Documents for evidential value. The steps to be followed include the following.

a. Taking document to registrar of documents to have it assessed for duty.

b. Paying the requisite fees and lodging the document for registration.

The Document to be drafted is an agency agreement.

(See copy at end of sub topic)

RELATIONSHIP BETWEEN AGENT AND THIRD PARTIES

An agent acts on behalf of the principal in relation to third parties. This implies that whatever he or she does within the scope of his authority in relation to third parties is an act of the principal. It must be noted that an agent will be directly or personally liable to 3rd parties if the property belonging to the principal but held in the agent's possession for the principal is assigned or charged by the principal to or in favor of the third party. This is fortified by **WEBB VS SMITH (1885) 30 CH. D 192**

An agent will be liable to a 3rd party if the principal directs the agent to pay the 3rd party from money held by the agent to the use of the principal. The agent is only liable to pay if the principal has paid him the money as noted in the case of **SHAMIA VS FRANCIS (1958)1 QB 448.**

REMUNERATION OF AGENT

This stands out as the most important duty of the principal towards the agent. It must be noted however that this duty only exists where it has been created by an express or implied contract between the principal and agent. This is fortified by the case of **WAY VS LATILLA [1937] 3 ALL ER 759 AT 762**. In addition, the duty to pay remuneration only arises where the agent has earned it. In this respect, the agent must show not only that he has achieved what he was employed to do but also that his acts were not, merely incidental to that result but were essential to it happening. It must be noted that a principal is under no obligation to pay an agent where the transaction for which the agent was employed is illegal. This is fortified by **CROUCH AND LESS VS HARIDAS.**[312]

TERMINATION OF AGENCY

An agency created by an act of the parties can be terminated by:

- **Agreement, Revocation or Renunciation.**
- **Closure of the business**. This is fortified by the case of **RHODES VS. FORWOOD (1876) 1 App CAS 256**
- **Repudiation**

[312] (1972) 1 KB 751.

- **Operation of the law**

Operation of the law includes the following:

- Normal termination; thus, if the transaction to which the agent was led to has been performed.
- Subsequent physical events that render the transaction not possible to be performed for example if the goods are destroyed, principal/agent dies
- Subsequent legal events like bankruptcy of either party or the operation of the doctrine of frustration.

It must be noted that an agency created by operation of the law can terminate if the necessity to which caused its creation ends or the Agency from cohabitation terminates if the cohabitation ceases.

THE EFFECT OF TERMINATION OF THE AGENCY:

The principal can sue for breaches of contract or negligence committed by the agent before the agency was terminated.

The agent can sue for remuneration which would have been earned before termination and possibly the remuneration which would have been earned had the agency not been terminated.

The agency ceases to have any authority of the principal hence if he does anything with a third party after the termination, then the agent is personally liable.

THE REPUBLIC OF UGANDA

IN THE MATTER OF THE CONTRACT ACT CAP 73

AGENCY AGREEMENT

Agency Agreement (hereinafter referred to as "this Agreement") is made and entered into this …….. day of …… 20 ……

BETWEEN.

KOOL SOLUTIONS, under the laws of Uganda, having its legal domicile at 672, North Bluff, Wichita KS, United States (hereinafter referred to as the **"First Party")** of the one part; and

JEZITECH SOLUTIONS, a company established under the laws of Uganda, having its legal domicile at Plot 60 Jinja Road, Kampala, Uganda (hereinafter referred to as the **"Second Party")** of the other part.

WITNESSETH

WHEREAS, the First Party hereto is the legal and beneficial owner of "**NANS-FLASH DISKS**" and **"MICRO CHIPS"** trademark and engages in the business of sales and marketing of tooth paste products under the **"NANS-FLASH DISKS"** and **"MICRO CHIPS"** trademark (hereinafter referred to as "the Products") which are manufactured in the USA only.

WHEREAS, the Second Party hereof is desirous of being the Agent of the First Party's Product in Uganda.

NOW, THEREFORE, the Parties hereto agree to enter into this Agreement upon the terms and conditions as follows:

Article 1

DEFINITIONS

In this Agreement and the schedule, unless the context otherwise requires:

"First Party"

Shall mean Nans-Flash Disks Inc., a company established under the laws of the USA, having its legal domicile at 672N. Bluff, Wichita KS

"Second Party"

shall mean Clay Traders (D) Ltd., a company established under the laws of Uganda, having its legal domicile at Plot 66 Kampala Road, Kampala, Uganda.

"Force Majeure"

Shall mean circumstances beyond reasonable control of a party which occur without the fault or negligence of the party affected, and includes inevitable accident, storm, flood, earthquake, explosion, peril or navigation, strike, lockout, boycott or other industrial dispute, hostility, war, insurrection, executive or administrative order or act either general or particular application of a government, whether *de jure* or *de facto* or of any official purporting to act under the authority of such a government, prohibition or restriction by domestic or foreign laws, regulations, policies, quarantine or customs, restrictions and breakdown or damage to or confiscation of property.

"The parties"

Shall mean the first Party and the Second Party collectively.

"Products"

Shall mean tooth paste products manufactured in Indonesia only by the First Party under the "NANS-FLASH DISKS" trademark and "MICRO CHIPS" trade mark.

"Quota"

Shall mean a number at least 25 (twenty-five) of20 *feet* containers annually and increase to 10% (ten percent) annually from the above stated number hereto.

"Territory”

Shall mean Uganda territory.

Article 2

PRODUCTS

The product means in this Agreement the tooth paste products under "NANS-FLASH DISKS" and "MICRO CHIPS" trade mark that is legally registered under the name of the First Party and manufactured by the First Party on Indonesian territory only.

Article 3

IMPORT AUTHORIZATION

The first party, as long as it is able the First party shall use its best efforts in helping the Second Party in providing the documentation(s) required to acquire authorization to import the products should the need arise.

Article 4

TERRITORY

Under this Agreement, the Second Party shall be the only or Agent of the First Party's Products in the territory exclusively in Uganda. (here in after referred to as the "Territory").

Article 5

QUOTA

The Second Party hereby guarantees to the First Party that the Second Party will order the Products at least 25 (twenty-five) of 20 feet containers annually. Further, the Second Party also guarantees that the quota will be increased to 10% (ten percent) annually from the above stated number hereto.

Article 6

CURRENT BUSINESS LICENCES OF THE **SECOND PARTY**

(1) From time to time under the effective time of this agreement the Second Party shall carryon the business of an Agent of the Products in the Territory.

Article 7

ORDERS AND SHIPMENTS

The Second Party shall confirm in writing for the next period and delivery schedule to

the First Party at least 2 (two) months prior to the expected delivery time.

Article 8

PAYMENT FOR PRODUCTS ORDERED

At the latest of 14 (fourteen) days before the delivery scheduled, the Secondary Party hereby shall pay the down payment at least 50% (fifty percent) of the total amount of the products ordered to the First Party. All the payments for ordered Products placed by the Second Party shall be paid by Letter of Credit (L/C).

Article 9

INSPECTION

Immediately after the acceptance of the Purchase Order Confirmation, the Second Party shall take all necessary actions to inspect the ordered Products regarding the quantity and condition of the said Products ordered.

Any defects of the Products, either caused by the manufacturing or packaging faults, or the lack or excess of the ordered Products shall be notified in writing to the First Party at the latest of 3 (three) days after the acceptance any of the delivery order.

Article 10

PRODUCT QUALITY

The First Party hereby shall be responsible for maintaining its standards in all manufacturing and quality control matters relating to the Products delivered by the First Party to the Second Party.

The Parties hereby agree and bound themselves that the compensation shall be limited to either:

(a) Replacement of the Products which in the judgment of the First Party fails to meet the standard of the First Party's Products.

(b) Refunding the Second Party for the landed cost of the relevant Products.

Article 11

INDEMNITY

The Second Party hereby undertakes to indemnity the First Party against any loss or claim including but not limited to, any and all claims, losses, damages, charges, costs and expenses of any kind of nature, from anyone whomsoever, arising out or otherwise connected with the Second Part’s operation of business carried on by the Second Party other than action against the Parties with respect to alleged infringement of any trademark or trade name utilized by the Second Party in exercising the right granted by this Agreement of the registered trademark or patent or trade secret of third parties.

Article 13

CONFIDENTIAL INFORMATION

The First Party hereby undertakes from time to time under its judgment as may be necessary to furnish the Second Party with the confidential information and know-how, as it is reasonably sufficient to enable the Second Party to market and distribute the Products in the Territory.

The Second Party shall under no circumstances allow either to disclose or furnish to any person, firm, company or other third party regarding the confidential information and know-how supplied by the First Party, or either to use it for any other purpose other than the marketing and distribution purposes, except in the specific circumstances in which the confidential information and know-how shall be disclosed to any of the government agencies.

Article 14

EFFECTIVE DATE

This Agreement shall remain in force the duration 10 (ten) years, commencing from the date first above mentioned.

The terms of this Agreement can be extended or renewed only by the mutual agreement of the Parties hereto.

Article 15

DEFAULTS

Notwithstanding anything stated herein to the contrary, any breach by either party of any term or condition in this Agreement where such breach is capable of being remedied shall not give rise to a right of rescission or termination by the no defaulting party not to a claim for damages if such breach shall in fact be remedied within 30 (thirty) days from the receipt of a notice in writing from the non-defaulting party to the party in default.

Article 16

ASSIGNMENT

This agreement shall be binding upon and shall be enforceable by the Parties and Parties' respective successors and assigns. The Parties shall have no right to assign or transfer its rights or obligations hereunder except with the written consent from the other party.

Article 17

FORCE MAJEURE

A party affected by force majeure shall:

As soon as possible after being affected give to the each other party full particulars of the force majeure 9including why it is a circumstance beyond its reasonable control), the manner in which its performance is thereby prevented or delayed and its calculation of the estimated period of prevention or delay as a consequence of force majeure; and promptly and diligently take appropriate action to enable it to perform the obligations, compliance with which is prevented or delayed by force majeure except that a party is not obliged to settle a strike, lockout, boycott or other industrial dispute.

Article 18

WAIVER

Save as otherwise provided for herein, no failure on the part of any party to exercise and no delay on the part in exercising any right hereunder shall operate as a release or waiver thereof, nor shall any single or partial exercise of any right under this Agreement preclude any other or further exercise of it. The rights and remedies provided in this Agreement are cumulative and not exclusive of any right or remedy provided by law.

Article 19

NOTICE

All communications between the parties shall be sent to the following addresses:

a) The First Party:

NANS-FLASH DISKS INC., C/o Mr. Moses Lugemye, 672N. Bluff, Wichita Ks, USA

a) The Second Party:

JEZITECH SOLUTIONS, C/o Mr. Peter Wegulo, P.O.BOX 0000, Kampala, UG

All communications in writing 9including notices) between the Parties with respect to this Agreement shall be delivered by hand. or sent by pre-paid registered post with recorded delivery to the address of the other party as set out above or to such other address as the addresses may from time to time have notified the other party in writing for the purpose of this clause.

Article 20

MODIFICATIONS

This Agreement shall not be modified from time to time except by a written instrument executed by duly authorized representatives of the Parties hereto.

Article 21

GOVERNING LAW

This Agreement shall be governed by, and construed in accordance with, the laws of the republic of the republic of Uganda.

Article 22

DISPUTES

The Parties agree to settle amicably all disputes within the scope of the Agreement by conference and negotiation.

WHEREFORE THE PARTIES SET THEIR SEALS HEREINBELOW ON THE DATE FIRST ABOVE MENTIONED.

SEAL OF KOOL SOLUTIONS _____

In the presence of _____

SEAL OF JEZITECH SOLUTIONS _____

In the presence of _____

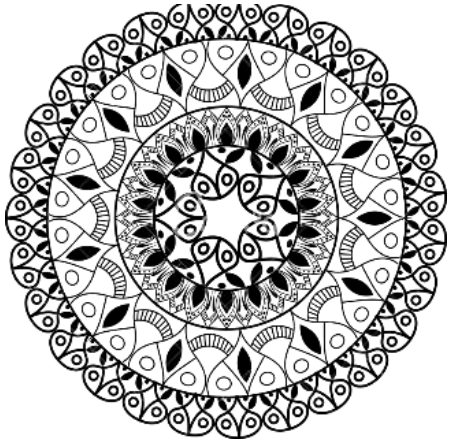
ISAAC CHRISTOPHER LUBOGO

Drawn and filed by;

Ojore and Co. Advocates

P.O.BOX 0000,

Kampala, UGANDA.



INTELLECTUAL PROPERTY:

(A) TRADEMARKS:

The law applicable under this scope of study includes the following;

The Trademarks Act, 2010 (Act 17 of 2010)

The Trademarks Rules SI 217-1

The Trademarks (Amendment) Rules SI 58 of 2005

The Trademarks (Costs) Rules SI 217-3

The Lusaka Agreement 1976

The Banjul Protocol on Marks of 1993

WTO Agreement

TRIPS Agreement 1994

NICE Agreement of 1957, revised 1967, 1977, amended 1979

The checklist in resolution of issues includes the following:

1) Whether the mark is registrable;
2) If so, what is the procedure, forum and documents?
3) Whether the mark can acquire international or regional protection?
4) Whether the registration of the mark can be opposed?

THE BASIC DOCUMENTS INCLUDE THE FOLLOWING:

Application for registration of a mark

Representation of the mark

INTRODUCTION

A trademark is defined in section 1 of the Trademarks 2010 (Act 17 of 2010) as a mark used or proposed to be used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right either as proprietor or registered user.

REGISTRATION OF TRADEMARKS

Registering a trademark is under **Section 2 AND 5 applications for registration of a search, section 16 for registration of the Trademarks Act**. And application for registration is section 7. The Register has two parts i.e. A & B; so, on application, you designate the part of choice for a trademark to be registered. It must be noted however that the mark should have distinctiveness for it to be registered in part A; in part B however; the mark should be capable of distinguishing, therefore; the mark must contain at least any of the following.

a) Name of company firm or individual represented in a particular manner.

b) Signature of Applicant or his predecessor in business.

c) An invented word.

d) Any word which has no reference to the character of the goods provided it's not a geographical name or surname

e) Any other distinctive mark

Registration in part B is for a trademark which is capable for distinguishing goods with which you connected from goods with which you are not connected.

THE PROCEDURE TO BE FOLLOWED IN REGISTERING THE MARK:

1) Procedure and duration is part III of the Trademarks Act and Rule and Rule 21 to the Trademarks Rules SI 217-1) by filling out form TM2; one applies to the Register of Trademarks in writing; thus

    b) Fill trademark form 2 and sign it (Rule 21)

    c) Put picture of Trademark on Trade Mark. form 3 i.e., the representation

d) Registrar carries out a search for any other trademark similar to it (Rule 30).

e) Upon satisfaction; the registrar advertises the Application ion the Gazette (per Rule 42).

f) Within 60 days of the advert running, and upon payment of the prescribed fee, the registrar may enter the mark on the register (under Rule 60 therein)

CERTIFICATION TRADEMARKS

These are registered in Part A of the Register in respect of the goods in the name of the proprietor. Such a mark is adopted to distinguish well from others in relation to the course of trade and they are certified by that person with due regard to origin, mode of manufacture, quality, and accuracy **inter alia.**

OPPOSITION TO APPLICATION FOR TRADEMARKS

- In case of objection; the Registration can be opposed Under Section 12 of the Trademarks Act (i.e. Notice of Opposition should be within 60 days from date of publication of advert as enunciated in Rules 46-58 of SI 217 -1).
- Registrar to set and listen to adverse parties.
- If opposition is dismissed; Registrar registers trademark under sec 21.
- The duration of the Registration (Under Section 22) is for 7 years.
- Upon expiration; renewed for a further period of 14 years; on application.
- The procedure for renewal; Rules 64-70.

RIGHTS OF TRADEMARK OWNERS

Rights accruing from registration of trademark are enunciated below and they include the following:

a) Right to use mark under Section 6 of the Trademarks Act.

b) Right to prevent other persons from using the mark (Section 6)

c) Right to assign the Mark (under Section 24)

d) Right to transmit the Mark (i.e., Selling business- goes on the mark – Section 24).

INFRINGEMENT.

In case of infringement of a mark, the aggrieved party can gain from any of these remedies. Court held in **ACONTRACTIEBOLAGET VS THE EAST AFRICAN MATCH [1964] EA 62** that the burden of proof of infringement of the mark is on the plaintiff who is mandated to prove the semblance between the marks in dispute.

- Filing a civil action; seek an injunction, damages, delivery up etc, under O5,7 or O41 of the CPR SI 71-1.

- instituting criminal proceedings and preferring charges, in respect to and contrary to sections 377-380 of the Penal Code Act.

- Rectification and correction of the Register.

- Obligation of owner of registered Mark.

- Duty to use a mark; or else application to strike mark off register (section 28).

INTERNATIONAL PROTECTION AGAINST TRADEMARK INFRINGEMENT

Protection of Trademark in other countries in possible with due regard to the following:

a) if one desires protection in the region, one can use **ARIPO (Africa Registered Intellectual Property Organization)** for registration of the mark in the region.) ARIPO was set up by the Lusaka agreement of 1976 which has protocols for implementing various parts of I.P.

- The Banjul Protocol – regulates Trademarks in African Region ARIPO registers trademarks (under Banjul Protocol) on behalf of contracting States.

PROCEDURE

- File application with National office which transmits it to ARIPO

- Or file application directly with ARIPO

- In application; indicate goods or services in respect of which you want protection; indicate classes of the goods (if Trademarks Rules; Schedule Two).

HOW COUNTRIES MANAGE THE CLASSES.

They use the NICE Agreements concerning international classification of goods and services for the purposes of registration of marks.

- ARIPO examines application and gives it a file date.
- ARIPO notifies designated states about the application.
- If there is no objection within period of 12 months, ARIPO registers the mark in all the designated states. (Uganda is a party to the Banjul Protocol).

It must be noted that it is impossible to get international protection of trademarks because

- System of international registration is governed by Madrid agreement concerning international registration of Marks (1891) which Uganda is not a signatory.

- However, if Uganda was a member to Madrid Agreement, an applicant would file an application with international bureau provided the Mark is registered in your own country (Uganda for this matter)

- the applicant designates these states where he or she want protection.

- The international bureau records mark and publish it in gazette and each contracting party where protection has been sought in enforced.

- If country wishes to refuse protection; it notifies bureau within 12 months.

- In case of no objection; International Registration effective for 10 years; renewal for a further period of 10 years at a payment of prescribed fees.

- Fees for registering trademarks are evident in the Trademarks Amendment Act SI 58 of 2005.

- Another International Instrument is the famous **Trips Agreement**. The Agreement in Trade Related Aspects of Intellectual Property Rights. It is an annexure to the **WTO Agreement**.

REMEDIES

The remedies available to a trademark owner on infringement include the following;

- ✓ Suit for damages, general and special;
- ✓ Application for an injunction.
- ✓ Delivery up of the goods or destruction of the goods
- ✓ Application to rectify the register.

APPENDIX J- DOCUMENTS FOR TRADEMARKS

THE UGANDA GOVERNMENT

THE TRADE MARKS ACT2010 (Act 17 of 2010)

APPLICATION FOR REGISTRATION OF A TRADE MARK IN PART OF THE REGISTER

Application is hereby made for Registration in Part* of the Register of the accompanying Trade Mark in Class…… in respect of

(a)

……..

…..……..……..

……..……..

……..

In the name of (b) ..……..……..

Whose trade or business address is (c)……..……..

……..

……..……..

trading as (d)

……..……
……..……

by whom it is (e) proposed to be used and who claim(s) to be the proprietor thereof

(f)

……..…
……..

…..……
…….……..

……
…….……..

……
……..……..

Dated the ……. Day of …….. 20 …..

(g)

……
……..

…..……
…….……..

To: THE REGISTRAR OF TRADE MARKS,

PARLIAMENTARY BUILDINGS,

P.O. BOX 6848,

KAMPALA

REGISTRAR OF TRADEMARKS RECORD FORM

TRADE MARK NO. …….. PART “A”/ ”B”

CLASS …….. (Schedule III)

I. SEARCH FOR SIMILARITY ……

Class: …… (Schedule III) and Class ……(Schedule III)

Similarity marks on the Register: ……..

TM. No. Class Description of Mark Owner

II. SEARCH BRITISH PHARMACOPIA:-

III. SEARCH WORLD ATLAS:-

Comments:-

(1) On Application:-

(2) Re association:-

Registrar's Decision on:-

(1) On Application:-

(3) Re association:-

ADVERTISEMENT OF TRADE MARK IN UGANDA GAZETTE

Application No:……. IN PART "A" / "B" ……
Class

Disclaimer: -
……

Restriction to Colors: -
……..

……..……

……..……

Association: - ……
……
……

Nature of Goods: - ……
……
……
……

Name of Applicant and Address:- ……
……
……

Address for Service:- ……
……
……

Date of Filing the Application: ……

Kampala ……

……
Assistant Registrar of Trade Marks

(B) COPYRIGHT:

The basic law applicable to Copyrights is the Copyrights and Neighboring Act 2006

WORKS ELIGIBLE FOR COPYRIGHT

Works eligible for copyright protection are provided for in the Copyright and Neighboring Act 2006 and these include, literally works, musical works, artistic works, cinematography works, gramophone records, broadcasts. Is it a statutory cardinal principle of the Act that the works will only be eligible if sufficient effort has been expended to make the work look original in character and form? Such work expended, can be recorded or written down **inter alia.** It must be noted further that one has to be a resident in Uganda or domiciled in Uganda to have copyright protection. The case of **SUPRA STUDIO VS TIP TOP CLOTHING, [1971] EA 489** provides to the effect that a copyright, given the fact that it is granted automatically; a copyright is granted on eligible works within the meaning of the Act and secondly a copyright does not require payment of a license.

Copyright

Copyright is the exclusive right to do and to authorize others to do certain acts in relation to literary, dramatic and musical works, artistic works, sound recordings, films, broadcasts, cable programmers and published editions of works.

Requirements for protection the right of protection to the work is only applicable where the work is original and is reduced in material form.

The word original was defined in the case of **UNIVERSITY OF LONDON PRESS LTD V UNIVERSITY, TUTORIAL PRESS LTD (1916) 2 CH 601** to mean that it should not demand original or inventive thought, and that the work should not be copied but originate from the author.

Copyright work is further considered original when the author has exercised the right kind of labor, skill, or effort otherwise known as 'intellectual creation' in producing the work (see the case of **LADBROKE V WILLIAM HILL (1964) ALLER 465 AT 469.**

The requirement of reducing the work in material form is essential in that ideas per se are not protected but the expression of the ideas **(Section 6 of the copyright &Neighboring Rights Act and Article 9:2 of the TRIPS Agreement.)**

The duration of protection granted for copyright varies with the nature of work however; general protection is for the life time of the author and fifty years after the death of the author. (See the Copyright & Neighboring Rights Act.)

Legislation provides for the protection not only of the creators of intellectual work but also the auxiliaries (performers, producers of phonograms and broadcasting organizations). The auxiliaries help in the dissemination of such works in respect of their own rights and these are rights related to

or “neighboring on” copyright.

The terms related and neighboring rights are used interchangeably however, it means the same thing. In the international conventions the term related right is used and in Uganda’s legislation, the term neighboring right is used.

The author of copyright in a protected work enjoys exclusive rights known as economic rights. These exclusive rights include rights to: copy the work (reproduction rights); issue copies of the work to the public (distribution right); rent or lend the work to the public (rental or lending right); perform, show or play the work in public (public performance right); and communicate the work to the public, make an adaptation of the work, or do any of the above acts in relation to adaptation (right of adaptation), and authorize others to carry out any of these activities. Note The nature of rights granted varies according to the type of work in question.

However, there are exceptions to these exclusive rights which must be in accordance with the three - step test provided in **Article 13** of the TRIPS Agreement. Creators of works further enjoy moral rights (rights held in perpetuity). Unlike the economic rights, moral rights are not assignable to any persons except for purposes of its enforcement. **See Section 10 (3)** of the Act of Article 9:1 TRIPS Agreement which provides that member states are not obliged to provide for rights conferred under Article 6 is of the Berne Convention on moral rights.

The moral rights of the creator of work include the rights to:- claim ownership of that work except where the work is included incidentally or accidentally in reporting current events by means of media or other means; have the author’s name or pseudonym mentioned or acknowledged each time the work is used or is used whenever any of the acts under the Act on economic rights are done in relation to the work except where it is not practicable to do so; and object to or seek relief in connection with any distortion, mutilation, alteration or modification of the work.

Section 46 the Act provides for infringement of copyright or neighboring rights. Infringement is deemed to occur where without a valid transfer, license, assignment or other authorization under the Act, any person deals with the work or performance contrary to the permitted free use and in particular where that person does or causes or permits another person to do the acts listed below; reproduce, fix, duplicate, extract, imitate or import into Uganda otherwise than for his or her own private use; distribute in Uganda by way of sale, hire, rental or like manner; or exhibit to the public for commercial purposes by way of broadcast, public performance or otherwise.

Section 15 of the Act provides for fair use of works protected by copyright and subsection 2 thereof provides for factors which determine what constitutes fair use. These are: the purpose and character of the use, including whether the use is of a commercial nature or is for non – profit education purposes; the nature of the protected work; the amount and substantiality of the portion used in relation to the protected work as a whole; and the effect of the use upon the potential market for the protected work.
Once fair use is established by any person using a protected copyright work, then infringement is excused.

Important to note is that, in all the intellectual property rights discussed above, for any person to claim infringement upon the intellectual property, she/he must establish a cause of action. A cause of action implies that you enjoyed a right, which has been violated, and the violation is by the person sued.
Once a cause of action has been established, the person alleging infringement upon his/her intellectual property has civil remedies available to him/her. Civil remedies are provided in section 45 of the Act.
Criminal offences and penalties in lieu of infringement are provided in section 47 of the Act. Note: The courts are using Alternative Dispute Resolution measures such as mediation to settle disputes. Other disputes are referred for arbitration.

ACQUISITION OF COPYRIGHT AND RIGHTS OF COPYRIGHT OWNERS

It must be noted that protection of copyrights is automatic; by statute.

There is no need for registration. The copyright work is vested in the author by virtue of the of Copyright and Neighboring Act.

Some of the principles to be followed are that; the person is either domiciled or resident in Uganda. In case of a corporation, it should be a body incorporated in Uganda

It must be noted that citizens and Companies of countries specified in the schedule to the copyrights and Neighboring Act (i.e. signatories to UCC, Berne Convention for the protection of literacy and Artistic Works can be protected in Uganda. This means that works having copyright protection in particular countries have statutory protection in Uganda. This is illustrated by the case of **JOHN MURRAY PUBLISHERS AND MACKEAN (VIZ INTRODUCTION TO BIOLOGY) VS SENKINDU HCCS 1018/1997** that given the fact that United Kingdom is one of the countries listed in the schedule to our laws, a copyright protected in UK can receive copyright protection in Uganda.

A work is eligible for copyright protection under the Act (re Musical work).

The form of protection under the Act on whether the work is published or unpublished, it must be noted that if the work is unpublished, the protection granted lasts for 50 years, after the copyright owner's death.

PROCEDURE

It must be noted that the mode of protection is customary thus, one simply writes copyright or uses the following format: © SUIGENERIS 2022.

INFRINGEMENT AND REMEDIES

The remedies available to a party whose work has been infringed include the following:

- Suit for damages, general and special;
- Application for an injunction.
- Delivery up of the goods or destruction of the goods
- Application for an Anton Pillar Order

The above remedies are fortified by **JOHN MURRAY PUBLISHERS AND MACKEAN (VIZ INTRODUCTION TO BIOLOGY) VS SENKINDU HCCS 1018/1997,** where Ntabgoba PJ awarded general damages, special damages, an injunction restraining the defendants from further infringement, delivery up of the books produced for destruction, and Interest.

DURATION OF A COPYRIGHT

If the work is unpublished literally, or musical or artistic work, the copyright lasts for 50 years after the end of the year of the author's death. In case there is joint ownership, the time of the right to the copyright begins to run from the death of the survivor.

Where the work is published literally, musical or artistic work; the duration is reflected in two scenarios; thus, either at the end of the year in which the author dies or 50 years after the end of the year in which the work or broadcast was made.

Where the work includes unpublished cinematography or film or gramophone record the duration of the copyright is 50 years after the end of the year in which the work or broadcast was made.

(C) PATENTS:

The law applicable to patents includes the following:

The Patents Act Cap 216

The Patents Regulations SI 216- 1

The Patent (Amendment) Act, Act 7 of 2002

The TRIPS Agreement 1994

Protocol on Patents and Industrial Designs (ARIPO) 1982

The Lusaka Agreement 1976

The Harare protocol on Patents and Industrial Designs 1982

The Paris Convention 1883

Patents Cooperation Treaty

THE CHECKLIST TO BE CONVERSANT WITH INCLUDES THE FOLLOWING:

Whether the product is patentable/ whether it is a patentable invention?

If so, what procedural steps should be taken to patent the product?

WHAT ARE THE FEES PAYABLE?

The requisite documents

Application for a patent

PATENTABLE INVENTIONS

A patent is a right given by a Government authority to an inventor exclusive right to exploit his invention for a given period of time. This document issued by a government authority to the owner of an invention, giving the patent owner the right for a term of years to prohibit others from making or selling the discovery unless they have permission from the owner is what is called a patent for invention.

An invention is defined in section 7 of the Patents Act to mean a solution to a specific technological problem and may be of may relate to a product or process.

OBJECTION MY LORD

Section 8 of the Patents Act provides that for an invention to be patentable, it must have three characteristics, thus;

- It must be new, (characteristic of novelty)
- It should involve an inventive step and
- It should be industrially applicable.

NOVELTY

This is considered under **Section 9(1) of the Patents Act**; thus an invention is new if it is not anticipated by prior art. This principle was enunciated in the case of **VANDER VS BAMFORD [1963] RPC PG 61.**

INVENTIVE STEP

Section 10 that an invention is considered as involving an inventive step if, having regard to the prior art within the meaning of section 9, it would not have been obvious to a person skilled in the art, on the date of the filing of the application or if priority is claimed, on the priority date validly claimed in respect of it.

INDUSTRIAL APPLICATION

This is considered under Section 11 of the Act thus; an invention is considered industrially applicable if, according to its nature, it can be made or used in any kind of industry.

It must be noted that Patents are granted to true inventors of a patentable invention. A patent may be applied for by any person who claims to be "true and first inventor" or by the assignee of such a person in respect of the right to apply.

UTILITY MODELS

Utility Models are covered under **Section 42 of Patents Act** and provide a type of Intellectual property protection similar to that of patents but with fewer requirements. Thus, an inventive step need not be proved under the patent law. This expression is a name given to certain inventions which contain provisions on utility Models but are actually in the mechanical field.

Utility Certificates have three characteristics which differentiate them from inventions for which patents are granted.

- Utility Certificates require either only novelty or industrial application but no inventive step for protection under section 42(1) of the Act
- The maximum term for protection is 7 years which is shorter than the term for protection for patents (see section) for is shorter.
- The fees required for obtaining and maintain the right are generally lower than patents.

ISAAC CHRISTOPHER LUBOGO

REGISTRATION OF PATENTS

An application for a patent is made to the Registrar of patents in the Ministry of Justice under section 13 of the Patents Act. The application is accompanied by the following (as provided for in **section 13(2) of the Patents Act)**

- A description of the invention.
- A clear and concise claim defining the matter for which protection is sought.
- Any drawing essential for understanding the invention.
- As abstract serving the purpose of technical information
- The prescribed fee

PROCEDURE

1. An application is lodged by making a request in Form 1 (Reg.17) of the Patents Regulations SI 216- 1. This form can be obtained from the registry located at the Ministry of Justice Headquarters. For a foreign application, copies of any communication received concerning the result of any search or examination carried out will be essential.

2. Upon receiving the application, the Registrar will accord it a filing date. Thereafter the application is forwarded to ARIPO (African Regional Industrial Property Organization) for examination. The report of this examination will then be submitted to the Registrar and the applicant.

3. If the application is not rejected a patent is granted and issued to the applicant in Form 2A (Certificate of Grant of a Patent).

4. Thereafter the patent granted is recorded in the register and the prescribe particulars of the Patent are published by the Registrar in the Uganda Gazette.

A patent protection last for fifteen years from the filling date. However, the owner of the patent may request for an extension. This request is made to the registrar in Form 3 (Regulation 32) of the Patents Regulations SI 216- 1

Utility models have a life span of seven years from the date of the grant of the application without the possibility of renewal.

HOW MUCH DOES IT COST TO OBTAIN A PATENT?

A typical application for the patent costs Ug Shs 180,000/= Under the Patent (Amendment) Act, Act 7 of 2002It must be noted that upon grant of a patent, the inventor pays a grant and publication fee of U. Shs. 300,000/=. To keep a patent in force an annual maintenance fee of Ug Shs 48,000/= for the first anniversary, and Ug.Shs. 12,000/= is paid every other year the patent will be in operation.

In case of extension of term of a patent, the inventor has to pay Ug Shs 60,000/= other costs involved may arise as of when and why it is necessary.

OBJECTION MY LORD

RIGHTS AND OBLIGATIONS OF A PATENT OWNER

These are covered in Part V of the Act; **Section 25(1)** provides that the owner of a patent has an exclusive right to make, use, exercise, exercise and vend the invention and may preclude any person from exploiting the patented invention without his or her authorization in any of the following ways:

Section 25(1)(a) provides that where the patent has been granted in respect of a product, the patent owner may preclude the making, importing, offering for sale and using the product, or stocking the product for the purpose of offering for sale, selling or using the product.

Section 25(1) (b) provides that where the patent has been granted in respect of a process, the patent owner may preclude the using of the process or doing any of the acts referred to in section, importing, offering for sale and using the product, or stocking the product for the purpose of offering for sale, selling or using the product.

The owner of a patent has the following obligations; as enunciated under **section 24(a) to (c)**

- To disclose the invention in a clear and complete manner and in particular indicate the best mode for carrying out the invention in accordance with the requirements and subject to the sanctions under the Act.

- To work the patented invention within the country in the prescribed time and,
- To pay the prescribed fees.

INFRINGEMENT (EXPLOITATION BY PERSONS NOT OWNERS OR LICENCEES)

This is defined in the context of **section 26** thus; where a person other than the owner or licensee of a patent or a licensee does acts spelt out in **section 25 (1)** (above); that act shall constitute an infringement.

If the owner of a patent feels that his patent has been infringed, he may institute infringement proceedings in the High Court for the following reliefs (under **section 26 (2)(a)- (c)**, thus: -

a) Damages

b) An injunction to prevent infringement

c) Any other civil remedy

The high court is granted jurisdiction under **section 45(1) of the Patents Act** to decide disputes relating to application of the Patents Act.

INTERNATIONAL PROTECTION AGAINST TRADEMARK INFRINGEMENT

Protection of a patent in other countries in possible with due regard to the following:

a) if one desires protection in the region, one can use **ARIPO (Africa Registered Intellectual Property Organization)** for registration of the mark in the region.) ARIPO was set up by the Lusaka agreement of 1976 which has protocols for implementing various parts of I.P.

- The ARIPO regulates patents in African Region. ARIPO registers patents (under Banjul Protocol) on behalf of contracting States.

PROCEDURE

- File application with National office which transmits it to ARIPO

- Or file application directly with ARIPO

- In application; indicate goods or services in respect of which you want protection; indicate classes of the goods (if Trademarks Rules; Schedule Two).

APPENDIX K- DOCUMENTS ON PATENTS

THE REPUBLIC OF UGANDA

THE PATENTS ACT CAP 216

APPLICATION FOR PATENTS

I /we the applicant(s) request(s) the grant of a Patent in respect of the following particulars.

1. TITLE OF INVENTION:

II. APPLICANT(S) ***(a)***

Name: .....

Address: .....

Nationality : .....

Country: .....,

Country of residence or principal place of business: ..... ,.....

III. REPRESENTATIVE:

Name: .....

Address: .....

IV. INVENTOR:

The Inventor is the applicant Yes/ No

If not

Name of applicant: .....

Address: .....

V. DIVISIONAL APPLICATION *(b)*

Initial Application No. .....

Date of Filing Initial Application: .....

VI. PRIORITY DECLARATION *(e)*

Country (d) .....

Filing Date: .....

Application No.: .....

IPC Symbol: .....

VII. CHECK LIST:

This application contains the following

1. Request
2. Description
3. claims
4. Abstract
5. Drawings
6. Power of Attorney
7. Statement specifying the basis of applicant's right to the patent
8. statement that certain disclosures be disregarded.
9. priority documents (certified)
10. English translation of earlier applications on which priority may be based.
11. other documents (please specify)

Drawing No. …… is suggested to accompany the abstract for publication.

VIII. SIGNED: ....

..... Date .....

*(a)*Data concerning each applicant must appear in this space. If this space is not sufficient put additional information on separate sheet.

*(b)*If divisional application supply reference to the initial application and indicate whether benefit from any priority claimed for initial application is sought.,

(c) if priority of more than one earlier application is claimed, the data should be indicated on additional sheet of paper.

(d) If earlier application is a regional or international application. Indicate here the office in which and the countries for which it was filed.

EXAMPLE

FACTS.

A group of four persons would like to set up a legal practice under the name; **DIVINELY INSPIRED LEGAL INC**. They want to set up a specialized law firm to explore synergies amongst public international law, international law and political advocacy. They hope to be among the top 3 firms in Uganda in the next five years. They would like the firm to outlive them and be up and running centuries after they have departed this world.

Nixon Zinde ("Nixon") is a student at the Law Development Centre. He is repeating the course after failing to sit for his final examinations and special exams because he was on his honey moon in **HO CHI MINH CITY**. He can't wait to appear in court and try out the skills he gathered from all the years he spent in school. He also wants to impress his newly wedded wife who cannot wait to see him in action in court amassing wealth like most famous lawyers in town. He hopes he can put up a mansion for their matrimonial home in Kololo before **Easter Sunday**

2019.

MAKUBUL SIMPSON (**"SIMPSON"**) was a renowned lawyer and a high flier starting in the year

1983 He was very much known for running a one –man law firm at Kampala Road majoring in expropriated properties. He however, fell sick in the year 2005 and has been bed ridden because of diabetes. This led to his landlord distressing for rent against **Simpson** and confiscation of all his law books including all clients' files. He has no idea what happened to the cases he had in court. He cares less and wants a fresh start with this group of young men who are ready to conquer the legal world.

Nabende Nicole ("Nicole") completed her master's degree at New York University where she majored in mercantile law. She enrolled to the New York Bar where she has practiced since

2009. She is a member of the International Bar Association. She wants to return home and bring her legal skills to Uganda. She also thinks she can interest her friend **Kifampa Dickson** who has a successful legal practice (**Kifampa & Partners**) in **Kigali** to work closely with her and her friends. This will enable them leverage Nicole's contacts in **Rwanda** so that **Kifampa & Partners** and **Divinely Inspired Legal Inc** and can practice across the **East African region**.

However, Nicole is worried that with her immense contacts, her partners may live off her when she brings in the bulk of clients and work. She wants an arrangement which takes this into account and protects her. She hopes she can keep some of the 'proceeds of her sweat' to herself. She was also not very amused by the manner in which Simpson hugged and groped her during their first meeting to lay strategy for the firm.

Sir. Kasansula Emmasa venture capitalist and a condominium mogul is ready to advance as much money to **Divinely Inspired Legal Inc** to start their practice as long as they are able to give him some returns when they **rake in the money** as they have promised him.

All four parties above would like to have a mutually respectful arrangement between themselves as equal partners with an equal stake, power and influence in their firm but mindful of their unique contributions. Advise the Parties before you on;

ISSUES

1. Whether the parties are qualified to practice law in Uganda?

2. Whether the firm name meets requirements for a generic name?

3. Whether cross border legal practice possible?

4. Whether parties have the legal expertise to establish a specialized law firm?

5. Whether Simpson is in breach professional conduct regulations?

6. Whether the firm is likely to experience challenges?

7. Whether a non-lawyer can be a partner in a law firm?

8. Whether there are legal formalities to be complied with?

9. Whether there are best practices to establish a modern practice?

10. Whether there are documents and agreements to be drafted?

LAW APPLICABLE

1. The Partnerships Act, 2010.
2. The Contracts Act No.7 of 2010
3. The Business Names Registration Act, Cap 109
4. The Registration of Documents Act, Cap 81
5. The Stamps Act, Cap 342 as amended
6. Uganda Registration Services Bureau Act, Cap 210
7. The Advocates Act Cap 267
8. The Business Names Registration Rules S.I 109-1.
9. The Business Names Registration (Amendment) Rules S.I 53 of 2005.
10. The Registration of Documents (Fees) (Amendment) Rules S.I 55 of 2005.
11. The Registration of Documents Rules S.I 81-2.
12. The Advocates (Professional Conduct) Regulations, S.I 267-2.

13. The Advocates (Inspection and Approval of Chambers) Regulations, SI 65 of 2005.
14. The Advocates (Use of Generic Names by Law Firms) Regulations, SI 16 of 2006
15. The Advocates (Enrollment and Certification) Regulations SI 267-1
16. The Protocol on the Establishment of the East African Community Common Market and the Annexes.

a) The qualities and considerations they should look out for from each other before establishing the practice.

Professional qualification*; o*ne of the major considerations they should look out for from each other is regarding the qualifications expected of any person intending to practice law as an advocate in Uganda. Firstly, the academic qualifications required of any person intending to practice law as an advocate in Uganda are contained in **Section 8(5) of the Advocates Act Cap.267** of Uganda as amended. This provides that any such person as stated above must be either the holder of a degree in law granted by a university in Uganda or other institution recognized by the law Council in a country operating the Common law System or has been enrolled as a legal practitioner by whatever name called, in any other country operating the common law system and designated by the law council by regulations; or holds a qualification that would qualify him or her to be enrolled in any country operating the common law system and designated by the Law Council by regulations. In addition, the person must then attend a bar course at the Law Development Centre after which they should be awarded a diploma in legal practice as provided for in regulation 2 of the Advocates (Enrollment and Certification) Regulations.

After getting enrolled, a person intending to practice law as an advocate must obtain a practicing certificate as per the provisions of Section 11 of the Advocates Act and regulation 4 of the regulations which shall be valid until the 31st day of December each year and must be renewed each year.

They should look out for the above qualifications because without them, a person is not authorized to practice law as an advocate in Uganda and according to **Section 64(1) of the Advocates Act,** any person other than an advocate who acts as an advocate either directly or indirectly commits an offence. Further Section 65 prohibits any person who is not an advocate from holding out as such. Therefore, the qualifications are an important consideration that they should look out for in each other. That is being an advocate with a valid practicing certificate

NON-LAWYERS; Further a person cannot be a partner in a law firm unless he or she is an advocate. Law firms are partnerships under the partnership Act which provides for professional partnerships under Section 2 of the Act. One feature of a partnership is that each partner is an agent of the firm and his or her other partners (Section 5 of the Act). However, S. 71 of the Advocates Act prohibits an advocate to be an agent an unqualified person. This means that if a person is not an advocate, he cannot be a partner in a law firm.

CITIZENSHIP; The other important consideration that they should look out for in each other is the issue of citizenship. This is because, under the Advocates Act, for a person who holds a degree from a university located outside Uganda to be considered for enrollment, they must be a Ugandan citizen, otherwise they are not eligible.

MOTIVES OF JOINING THE FIRM; they should equally consider each other's intentions for entering into this venture. This is because a law firm is a partnership and under Section 2 of the partnerships Act, a partnership is defined as a relationship between or among persons who carry on business in common with a view to making a profit.

PROFESSIONAL ETHICS AND INTEGRITY; They should also look out for qualities of ethics and integrity as expected of an advocate in Uganda. These are contained in the Advocates (Professional Conduct) Regulations SI 267-2. These include, among others, honesty, accountability and confidentiality. In **BOLTON V THE LAW SOCIETY | [1994] WLR 512,** it was held that a profession's most valuable asset is its collective reputation and confidence, which that inspires. The reputation of the profession is more important than the fortunes of any individual member. With that in mind, ethical considerations must be some of the qualities that the people intending to start the law firm must look out for in each other.

EXPERTISE; since the above persons are desirous of establishing a specialized law firm, they should find out if either of them possesses expertise in those areas of law that is public international law, international law and political advocacy. Experience knowledge of the law criminal record bankruptcy insolvency

b) The Likely challenges to the realization of their objectives

LACK OF QUALIFICATIONS TO PRACTICE LAW; The first likely challenge that they might face is the lack of qualifications of most of the members. Nixon has not completed the bar course, does not possess a valid practicing certificate and neither has his name been entered on the roll of advocates as required by the advocates act so he is unable to practice as an advocate which shall hinder his objective of showing off the legal skills and knowledge, he has acquired by handling cases in courts of law. Simpson has been out of practice for a long time and he therefore does not possess a valid practicing certificate. Further, Nicole has academic qualifications from a country which is not recognized by the law council under the regulations.

Use of a generic name; Secondly, they are likely to face a challenge with the registration of their firm name. Under **Section 4 of the Partnerships Act, 2010,** a firm carrying on business in Uganda under a business name which does not consist of the true surnames of all partners must register its name under the **Business Names Registration Act cap 109.** This is reiterated by **Section 2 of the Business Names Registration Act.**

However before registering a law firm name, **Regulation 5(3) of the Advocates (Inspection and Approval of Chambers) Rules** provides that a law firm with generic names shall only be approved if consent is sought from the Law Council prior to the registration of that name.

The Advocates (Use of Generic Names by Law Firms) Regulations 2005 provides for approval of generic names. A generic name is defined under regulation 1 to mean a name other than the name of a partner of a law firm. Regulation 3 requires a generic name to include the word "Advocates" at the end of the name of the law firm.

However, **Regulation 3(5)** provides that generic name shall not make any reference, actual or derived, to any symbolic, cultic, political, religious, sectarian and discriminatory or specialty classification.

Sub-regulation 6 further requires that a generic name should not be misleading.

The name chosen for this firm is **DIVINELY INSPIRED LEGAL INC;** it lacks the requirements for approval; it does not contain the word "Advocates", it has a religious connotation "divine inspired" and is misleading to believers that such a law firm is inspired by God. It is therefore likely not to be approved in its current form.

LACK OF EXPERTISE; They might equally face a challenge where expertise is concerned. According to the facts, these individuals intend to set up a firm which specializes in synergies amongst public international law, international law and political advocacy. However, there is no evidence that any of them has any special qualifications in that area and so they might lack expertise and fail to achieve their objectives.

PROFIT AND LOSS SHARING*;* the other challenge that they might face is in the area of profit and loss sharing. As it is, according to the facts, Nicole is already worried that the other partners might live off her contribution which implies that she might be expecting to be entitled to a larger percentage of the profits than the rest once the firm business commences. As such, this might be a source of conflict between her and the other partners which might pose a big challenge to the realization of their objectives.

MANAGEMENT; In close relation to the above, they might also face a challenge of failure to agree on management. They are likely to fail to agree on who among them should be the managing partner and also who has powers to bind the other members.

CROSS-BORDER PRACTICE may be yet another challenge that they face especially with trying to bring Kifampa and his successful practice on board. This is because, they intend to partner with him and practice law allover East Africa. Even though the Protocol to the Establishment of the East Africa Common Market under **Article 11** recognizes cross border professional practices, the common Labor market policy is yet to be adopted and implemented in the East African Community and as such, their objectives in that regard might prove difficult to realize.

PROFESSIONAL MISCONDUCT*;* The other challenge that they might face is with professional misconduct among some of the firm members. Firstly, Nixon's major concern is amassing wealth and impressing his new bride and this brings into question his ethical standards. Further, Simpson has committed a violation of the Advocates (professional conduct regulations) below when he abandoned his cases without formally withdrawing from them. Therefore, he may continue to violate other provisions which would reflect poorly on the firm.

INTERPERSONAL RELATIONSHIPS; the firm is likely to have mistrust among the partners; already Nicole is complained of how Simpson hugged and groped her when the met first time. This can lead to a breakdown in communication and trust.

FINANCIAL CHALLENGES; they have no money

Health challenges

C) THE LEGAL FORMALITIES THEY NEED TO SATISFY TO LAWFULLY ESTABLISH THEIR INTENDED PRACTICE.

OBJECTION MY LORD

ACQUIRING THE REQUIRED PROFESSIONAL SKILLS TO PRACTICE*;*

Nixon

Nixon is not an advocate. He therefore cannot practice in courts of law as he wants to. Nixon therefore has to fulfill certain legal requirements to become an advocate.

He must first complete his diploma in legal practice**. Regulation 2(a)** of the **Advocates (Enrollment and Certification) Regulations** is to the effect that the requirement s as to the acquisition of skill and experience under **Section (1)** of the Act shall be in the case of a person specified in **Section 8(8)(b)** Of the Act , attendance of the postgraduate bar course conducted by the law development center and award of the diploma in legal practice by the law development center on completion of the course.

After successfully completing and being awarded a diploma in legal practice he can apply to have his name entered on the roll by making an application to the law council and the Law Council if satisfied that the applicant is so eligible and is a fit and proper person to be an advocate shall issue to him or her a certificate to that effect. This is in accordance with **Section 8(2) of the Advocates Act**.

Regulation 5 of **Advocates (Enrollment and Certification) Regulations S. I 267-1** provides for the mode of applying for a certificate of eligibility and a form of the application is provided in **Form 1** of the Second **Schedule** of the same rules. And that the application and affidavit shall each be accompanied.

There after a certificate is issued by the Law Council whose form is provided for in in Form 2 of the 2nd Schedule to the Regulation.

After obtaining the certificate the person may apply to the Chief Justice to have his or her name entered on the roll and the Chief Justice shall unless cause to the contrary is shown to his or her satisfaction, direct the register on receipt of a fee to enter the name on the roll.

Regulation 8 of the **Advocates (Enrollment and Certification) Regulations** provides that an application for enrollment is made by petition to the Chief Justice accompanied by a certificate of enrollment issued by the Law council.

Section 11of the Advocates Act give authority to the registrar to issue a practicing certificate to every advocate whose name is on the roll and who applies for such a certificate on such form and on payment of such fees as the Law Council may by regulations prescribed the different fees may be prescribed for different categories of advocates.

Regulation 12 of the Advocates (Enrollment and Certification) Regulations provides that the form of the application is in Form 4 of the Second Schedule to the **Advocates (Enrollment and Certification) Regulations.**

After this Nixon will then be able to appear in court. **Regulation 13 of the Advocates (Enrollment and Certification) Regulations** provides that the person with such a certificate shall have a right of audience before magistrate's courts for a period of at least 9 months.

Makubul Simpson

Simpson can apply for renewal of his practicing certificate so that he can practice. Section 11(2) of the Advocates Act provides that the practicing certificate is to be renewed after its expiry on the thirty-first day of December every year.

Regulation 14 of the Advocates (Enrollment and Certification) Regulations provides that the application is provided for in form 5 of those rules in the third schedule. He has to lawfully withdraw from his cases.

Nicole

Nicole is a Ugandan citizen who has enrolled in New York. However, she is unable to practice in Uganda because the USA is not among the countries that are approved by the council under Section 8(8) of the amendment.

Sir Kasansula Emma

Kasansula will enter into a contract with the partners regarding the relevant loan which will be governed by the Contracts Act 2010 Laws of Uganda.

The overall formalities required for the parties to achieve the Partnership.

THE FIRM NAME.

They need a name that is acceptable by the Law Council. They need to change their firm name to a more acceptable name that the law council can approve as a generic name.

They have opted to use a generic name. A generic name is defined in Regulation 2 of the **Advocates (Use of Generic Names by Law Firms) Regulations S. I No. 7 of 2006** as a name other than the name of a partner of a law firm.

Regulation 3 of the Advocates (Use of generic names by Law Firms) Regulations, 2006 Provides that a generic name shall include the word ‘advocates’ at the end.

Regulation 5 of the **Advocates (Use of generic names by Law Firms) Regulations, 2006** also provides that a generic name shall not make any reference, actual or derived, to and symbolic, cultic, political, religious, sectarian, discriminatory or specialty classification.

The facts disclose that the parties are desirous to name the firm “Divinely Inspired legal Inc”.

The name does not end with the word advocates and it makes reference to religious classification which is contrary to the rules. Therefore, a more acceptable name would be recommended in order for the name to be registered with the registrar of business.

Regulation 5(1) of the Advocates (Use of Generic Names by Law Firms) Regulations S. I No.7 of 2006 is to the effect that a generic name cannot be registered with the registrar of Business unless it has been approved by the Law Council. Further Regulation 5(3) of the Advocates (Inspection and Approval of Chambers) Rules provides that a law firm with generic names shall only be approved if consent is sought from the Law Council prior to the registration of that name.

In order to use the firm name, it will require approval of the Law Council. This means that the partners should choose a different name without religious connotations and add the word "Advocate"

REGISTRATION OF THE BUSINESS NAME

In order to effectively carry out business, parties are advised to register their business name. **S. 4 of the Partnership Act 2010** provides for mandatory registration of a business name where persons are trading under a business name other than their true surnames. This is reiterated under S.2 of the Business Names Registration Act.

They should conduct a search and reserve a business name at the Uganda Registration Service Bureau offices by filling the respective forms and then apply for registration. There is need to pay for relevant fees.

THE PARTNERSHIP DEED.

The partners should write down a partnership deed providing for the rights, duties and obligations during their subsistence of their business relationship.

A partnership is defined under Section 2 (1) of the Partnership Act as a relationship which subsists between or among persons not exceeding twenty in number who carry on a business in common with a view of making profits

All the ingredients are existent among the parties for a partnership to be formed. Therefore, a deed which governs that relationship should be drafted.

EXECUTION AND REGISTRATION OF THE PARTNERSHIP DEED

There is no mandatory requirement for having a written agreement in order to establish a partnership. In **DR. OKELLO N. DAVID VS KOMAKECH STEVEN, HCCS NO. 30 OF 2004,** it was held; The fact that there is no partnership agreement is irrelevant because a partnership can be formed informally or by the conduct of the parties.

However, in order to protect the interests of the partners and for proper management of the business, we advise the clients to sign a properly drafted partnership deed that unequivocally encompasses all their concerns.

A Partnership deed1 is a contract defining the partners' rights and duties toward each other. Section10 (1) of the Contracts Act is to the effect that the parties are legally bound by the contract signed.

This Partnership deed can be registered for evidentiary purposes; however, this requirement is not mandatory. The case of **MOHAMMED KAFERO V J TURYAGENDA [1980] HCB 122** provides that the registration or non-registration of a document has no bearing on its validity or invalidity.

Registration shall consist in the filing of a copy (to be furnished by the person presenting the document for registration) of the document brought for registration after that copy has been certified by the registrar as a true copy as per **Section 5** of the **Registration of Documents Act Cap 81.**

In **Rule 2** of the **Registration of the Documents Rules Statutory Instrument 81 – 2**. It provides that copies of all documents presented to the registrar for filing under Sec 5 of the Act shall be either in manuscript and written in ink, or the original of type writing with a record ribbon on lined full scarp folio paper measuring approximately 13 inches in length and 8 inches in width and shall contain a margin of at least one- and one-half inches on the left-hand side of the paper, the paper to be written on one side only and to be bound or sown together in book form. The fees for registering is Sh.10, 000 under the Registration of Documents (Fees) (Amendment) Rules, 2005.

This is registered at the Uganda Registration Service Bureau (URSB) as provided for in section 4 (2) (a) of the Uganda Registration Service Bureau Act which gives it the mandate to carry out all registration required under the relevant laws.

PAYMENT OF STAMP DUTY

Stamp duty must be paid on all instruments executed or received in Uganda under the Stamps Act as amended. It is paid on all instruments received in Uganda within 30 days. Stamp duty rates are either fixed or ad valorem rates.

The clients shall pay stamp duty of UGX 10, 000/- (Uganda Shillings 10,000) as provided for Stamps (Amendment) Act 2016.

OPENING UP OF AN ACCOUNT

According to **Section 40 of the Advocates Act** the Law firm is required to have a separate account for the firm and another for the clients.

INSPECTION AND APPROVAL OF THE FIRM PREMISES

Then the premise from which the firm shall conduct its business is to be inspected by the law council.

Regulation 3 of the Advocates (inspection and Approval of Chambers) Regulations S. I No. 15 of 2005 makes it mandatory for chambers to be inspected yearly.

Regulation 5 of the same Regulations provides for the requirements to be met before approval (1) An advocate's chambers shall be well maintained with a professional appearance and must have—

(a) A suitable desk for an advocate;

(b) A separate room for each advocate and another for a clerk, secretary and cashier; (c) a secretarial desk and computer or typewriter;

(d) A reception with chairs or benches for clients; (e) a bookshelf;

(f) A chest of drawers or a filing cabinet;

(g) A reasonable collection of reference law books including a full set of the Revised Laws of

Uganda 2000;

(h) Access to a toilet and sanitary facilities; and

(i) Books of accounts.

(2) The headed paper of every law firm shall bear the names and qualifications of each partner, advocate and legal assistant in the firm.

(3) A law firm with generic names shall only be approved if consent is sought from the Law Council prior to the registration of that name.

(4) The consent referred to in **sub- regulation (3)** shall be in writing. (5) Trading shall not be carried on in any chambers.

(6) The Law Council may refuse to approve any chambers that do not meet any of the requirements set out in these Regulations and may order the closure of those chambers until the chambers meet the required standards set out in these Regulations.

After the inspection is completed, a certificate to that effect shall be issued by the Law Council. Regulation 6 provides that;

(1) A firm of advocates whose chambers have been approved shall be issued with a certificate of approval of chambers.

(2) A certificate of approval of chambers shall remain valid for one year.

The firm shall pay a fee of 62,000/- for the inspection of the premises according to the **Advocates (Council Fees) Regulations 2004.**

TRADING LICENSE

Under **Section 8** of the **Trade (Licensing) Act as amended 2015**, no person shall trade in any goods or carry on any business specified in the schedule to this Act unless he or she is in possession of a trading license granted to him or her for the purpose under this Act.

Section 1(h) defines trade or trading to mean the selling of goods in which a license under the act is required in any trading premises whether by retail or wholesale.

However, the process of granting trade licenses to law firms has been halted by an interim injunction in the case of **UGANDA LAW SOCIETY V KCCA AND ATTORNEY GENERAL HCMA 533 of**

2017.

NOTICE OF CESSATION OF BUSINESS

Simpson should notify the registrar of his intention to stop operating under his old business name.

Section 14 of the **Business Names Registration Act Cap 87** imposes a duty on a partner or individual to notify the registrar in case of cessation of business. **Rule 8** of the **Business Names Registration rules** provides for notice where firm or individual ceases to carry on business and provide that the notice is in the form D of the Second Schedule of the Rules.

(d)The best practices that will enable them establish the intended modern practice. Compliance with the law; have the name approved, chambers inspected and approved, get license, pay taxes etc.

Proper location of premise and well-equipped chambers the partners should consider a location that can be easily accessed by many people so as to get clients and the chambers should be approved by the low council as required by the Advocates (inspection and approval of chambers) regulations under regulation 5

Regulation 5; Requirements to be met before approval and inspection of chambers regulations

(1) An advocate's chambers shall be well maintained with a professional appearance and must

Have—

(a) A suitable desk for an advocate;

(b) A separate room for each advocate and another for a clerk, secretary and cashier;

(c) A secretarial desk and computer or typewriter; (d) a reception with chairs or benches for clients; (e) a bookshelf;

(f) A chest of drawers or a filing cabinet;

(g) A reasonable collection of reference law books including a full set of the Revised Laws of Uganda 2000;

(h) Access to a toilet and sanitary facilities; and

(i) Books of accounts.

(2) The headed paper of every law firm shall bear the names and qualifications of each partner, advocate and legal assistant in the firm.

(3) A law firm with generic names shall only be approved if consent is sought from the Law Council prior to the registration of that name.

(4) The consent referred to in sub- regulation (3) shall be in writing. (5) Trading shall not be carried on in any chambers.

(6) The Law Council may refuse to approve any chambers that do not meet any of the requirements set out in these Regulations and may order the closure of those chambers until the chambers meet the required standards set out in these Regulations.

OBJECTION MY LORD

Form A
THE REPUBLIC OF UGANDA

APPLICATION FOR REGISTRATION OF BUSINESS NAME.

THE BUSINESS NAMES REGISTRATION ACT 109

STATEMENT OF PARTICULARS REQUIRED TO BE GIVEN PURSUANT TO THE BUSINESS

NAME REGISTRATION ACT

IN CASE OF A FIRM

1. Business names to be registered: Simpson, Nixon, Nicole & CO ADVOCATES.

2. General nature of the business: LEGAL PRACTICE

3. Principle place of the business: KAMPALA WORKERS HOUSE 5th FLOOR (East Wing)

4. Present Christian name (s) and surname of each of the individuals who are partners: NIXON ZINDE, MAKUBUL SIMPSON, NABENDE NICOLE and KIFAMPA DICKSON.

5. Former Christian name (s) and surname (if any) of each of the individuals who are partners:

NON

6. Nationality of each of the individuals who are partners: ALL ARE UGANDA

7. Usual Place of residence of each of the individuals who are partners: UGANDA

8. Other business occupation (if any) of each of the individuals who are partners: NON

9. Date of commencement of business: 01 OCTOBER 2018

10. Corporate names of each corporation which is a partner: NON

11. Registered or principal office of each corporation which is a partner: KAMPALA WORKERS HOUSE 5th FLOOR (East Wing).

Sign ……..

Date *01*day of *October*2020

ISAAC CHRISTOPHER LUBOGO

STATUTORY DECLARATION

I,……..……
……

of……Uganda

DO SOLEMNLY AND SINCERELY declare that the particulars hereon are true and correct AND I make this solemn declaration conscientiously believing the same to be true and by virtue of the Oaths Act.

DECLARED at ……..in this……..…….District

Of……this…….day
of……20…… BEFORE ME,

……..……..

Magistrate/Commissioner for Oaths.

OBJECTION MY LORD

THE REPUBLIC OF UGANDA

CERTIFICATE OF REGISTRATION.
THE BUSINESS NAMES REGISTRATION ACT 109
FORM B

I certify that *Simpson, Nixon, Nicole and CO ADVOCATES* this *01* day of ***OCTOBER*** 20*18* has/have been duly registered pursuant to and in accordance with the provision of the Business Names Registration Act and the Rules made under that Act and has/have been entered under the number *LDC2H2018/19* in the index of registration.

Given under my hand at *KAMPALA* this *01* day of *OCTOBER* 20*18*.

Registrar of Business Names

THE REPUBLIC OF UGANDA

NOTICE OF CESSATION OF BUSINESS
PURSUANT TO THE REGISTRATION OF BUSINESS NAMES ACT

TO: THE REGISTRAR,

APPOINTED FOR THE PURPOSES OF THE ABOVE-MENTIONED ACT WHEREAS I/we the undersigned registered under the number…….. in the index of Registration have ceased to carry on business.

Now I/we hereby give notice that I/we hereby give notice that I/we have ceased to carry on business as.....……..as from the……..day of……...20……save for the purpose of winding up the said business.

Dated this ……..day of

……,20……

(Signed)

……..

……..

……..

SUI GENERIS ADVOCATES

P.O Box 0000,

KAMPALA, UGANDA.

THE SECRETARY LAW COUNCIL, P.O BOX 7183, KAMPALA

Dear Sir/Madam,

RE: APPLICATION FOR THE INSPECTION AND APPROVAL OF CHAMBERS.

As the above matter refers, we hereby do apply for the inspection and approval of chambers in the name and style of ..... All the necessary requirements have been

compiled. We look forward to your positive consideration.

Yours faithfully

Makubul Simpson

(For and on behalf of **SUI GENERIS ADVOCATES**)

SUI GENERIS ADVOCATES

P.O Box 0000, KAMPALA UGANDA

1st – OCT – 2018.

THE SECRETARY LAW COUNCIL, P.O BOX 7183, KAMPALA

Dear Sir/Madam,

RE: APPLICATION FOR THE USE OF GENERIC NAME.

The above subject matter refers and on which I wish to address you as follows;

1. That I am a practicing advocate enrolled under the laws of Uganda.

1. That I intend to open up a law firm operating in Uganda under the

Name .....Advocates.

3. That I do hereby seek your approval to use the name .....Advocates prior to the name reservation of my law firm.

Hoping my application will be put under your utmost consideration. Yours faithfully

Makubul Simpson

(For and on behalf of **SUI GENERIS ADVOCATES**) Makubul Simpson

OBJECTION MY LORD

THE REPUBLIC OF UGANDA

IN THE MATTER OF THE CONTRACT ACT 2010

CONTRACT AGREEMENT

This Contract Agreement is hereby made this 2nd day of October 2018 between Sir Kasansula Emmas and the future partners of *Simpson, Nixon, Nicole & CO ADVOCATES*) that go by the names of Nabende Nicole, Nixon Zinde and Makubul Simpson.

WHEREAS IT IS AGREED AS FOLLOWS,

The above-named persons enter into an agreement with Sir Kasansula Emmas in which he agrees to advance money to the partnership to enable it to start in exchange for a return of 10% of the firm's annual profit for the period in which the firm will exist.

Sir Kasansula and the partners thus agree as follows:

1. That Sir KasansulaEmmas shall advance as much money to the firm as it will need to start.

2. That as consideration for the above said advance, Sir Kasansula will receive an annual return of 10% of the firm's annual profits for a period of 25 years after commencement of business of the firm.

3. That in case of failure by the partners to advance the 10% returns, Sir.Kasansula will be entitled to legal action against the firm.

4. That the above contract does not entitle Sir Kasansula to the status of a partner in the firm but rather an associate of the firm. His actions therefore shall in no way bind the firm or its members.

In witness, have the above-mentioned person appended their respective signatures here under on this 2nd day of October 2018.

Sir Kasansula Emmas. .....

THE REPUBLIC OF UGANDA

IN THE MATTER OF THE PARTNERSHIP ACT 2010

PARTNERSHIP DEED

This partnership deed is made this **3rd day of October 2018** by and among NABENDE NICOLE, MAKUBUL SIMPSON and NIXON ZINDE of Kampala, Uganda being of sound mind and full age herein collectively referred to as partners.

WHEREAS the above-named partners have decided to establish the professional partnership business of legal practice have deemed it necessary and desirable to reduce the terms and conditions into writing as mentioned hereunder;

IT IS NOW HEREBY AGREED AS FOLLOWS;

1. **PARTNERSHIP**:

That the partners shall form a partnership to be governed by the Partnerships Act 2010 and all relevant laws governing partnerships in Uganda.

2. **NAME**:

That the partnership shall operate under the name ***Simpson, Nixon, Nicole & CO ADVOCATES***

3. NATURE OF BUSINESS:

That the partners shall engage in legal practice in the fields of Public International Law, International Law and Political Advocacy.

4. PRINCIPAL PLACE OF BUSINESS

The principal place of business of the Partnership shall be at Mapeera House Kampala

Road.

5. VISION

To be a leading specialized law firm in Uganda

6. MISSION

To explore synergies amongst public international law, international law and political advocacy.

To venture into cross border legal practice in East African region

To ensure the operation of the firm for centuries

7. STRATEGIC PLAN

The firm shall come up with a strategic plan every year.

8. COMMENCEMENT

The partnership will be deemed to have commenced upon the issuance of a certificate of registration of the business name.

9. **MANAGEMENT**

9.1**Leadership;**

i) All members shall be eligible to manage the business of the firm.

ii) The managing partner shall be agreed upon by all members whose term of office shall be two years. On expiration of the two years, another partner may take over the management of the firm for the same period.

9.2 **Meetings**;

The firm shall have meetings every first Monday of the month. The managing partner may call upon the partners for a meeting in case of any urgent issues with a day's notice.

10. RIGHTS AND DUTIES

10.1 Duties

Every partner shall;

i) Not engage in any business that compete with the firm

ii) Give accountability of all monies earned from running the firm's business

iii) Attend meetings except where such attendance is prevented by any genuine and reasonable cause.

iv) Execute their duties and with the legally required level of professionalism.

10.2 **RIGHTS**

Every partner has a right to take part in the management of the firm. ii. Has the right to inspect the books of account

11. FINANCES AND ACCOUNTABILITY

11.1 **Accounts**;

The firm shall run two accounts namely; the client's account and firm account. The accounts shall be opened at a financial institution to be agreed upon by the partners.

11.2 **Sources of Finances**

The firm may receive finances from non-partners upon agreement of the partners.

11.3 **Signatories to the Account;**

Money from the firm account shall only be withdrawn by the managing partner upon approval of the other partners.

11.4 Accountability;

11.5 All necessary and proper books of account shall be maintained at the office of the partnership and shall be conclusive and final between the partners. The firm shall employ a qualified accountant to handle the books of account. These books of account shall be audited after every 4 months so as to ensure proper accountability of the firm's finances

12. PROFIT AND LOSS SHARING

12.1 **Profits**

Partners shall have an equal share of the profits made from the firm business.

12.2 Losses;

Losses shall be borne by the partners in equal shares.

12.3 COMMISSION

Any partner who registers a new client for the firm shall be entitled to 30% of the fees paid by the client and the balance of 70% shall be shared equally among all the partners.

12.4 PARTNERSHIP PROPERTY

The Partnership shall own all its personal property as an entity. No Partner shall have any ownership interest in the Partnership personal property in his or her own individual name except as other of the Agreement may provide.

12. **BORROWING**

The written consent of all Partners will be required for the partnership to avail credit facilities from any financial institution or any other creditor. The money borrowed shall be partnership money and to be used for partnership purposes.

14. **ADMISSION**

The partners may agree to admit a new member into the partnership provided such person bears the required qualifications and expertise.

15. **CROSS BORDER PRACTICE**

The firm shall enter into partnership with law firms in other countries to ensure cross border practice within the East African region subject to the laws governing states within East Africa.

16. **AMENDMENT AND VARIATION**

The Partners may amend and or vary this Agreement at any time by signing a written agreement

17. **DISPUTE RESOLUTION**

The partners shall resolve disputes amicably among themselves. Failure to agree, the partners may refer the dispute for mediation.

Where mediation is unsuccessful, the aggrieved party may seek redress in the courts of law.

18. **LIABILITY**;

All partners are jointly and severally liable for all debts and obligations incurred by the firm while they are partners.

19. **TERMINATION OF PARTNER'S INTEREST**

A Partner's interest in the Partnership terminates upon the occurrence of any of the following:

(i.) Withdrawal or retirement of the Partner upon written notice to the other partners within a reasonable time.

(ii) suspension or disbarment from the practice of law by the law council which will automatically terminate the Partner's interest without any additional formal action; (iii) Death of the Partner.

(iv) where a partner is declared bankrupt, convicted of a crime, violating the partnership agreement or other actions that are harmful to the partnership upon a supermajority vote of three quarters of the partners.

20. **DISSOLUTION**

The partnership shall be dissolved by unanimous agreement of the partners. Death of a partner shall not dissolve the partnership but shall continue to be carried on by and between the surviving partners.

In witness hereof;

PARTNERS SIGNATURE

1. NABENDE NICOLE _____

2. MAKUBUL SIMPSON _____

3. NIXON ZINDE _____

EXAMPLE

BRIEF FACTS

Mendy hotels limited was incorporated in January 1999. Upon incorporation, started business in a house owned by Jasper which was converted into a guest house (comfort guest house). The company has now grown and owns a hotel called Mendy Country Resort in Bunga. From the time of incorporation, Ms. Akello has not been involved in the running of the business. The company has not heard from her ever since, but she hoped to come back after retirement. The company has held only one meeting since incorporation. During the meeting, shares were allotted to Jasper and Peter. It is indicated that Joel and Akello were not considered owing to the fact that they were not in attendance. Jasper and Peter have since paid up for their shares of shs.

150 million and 10 million respectively. In the same meeting, Mr. Mapendo Jamilu was appointed a company secretary. Upon retirement, Akello relocated to Canada however her brother Mackmot has presented proof that he paid 11.5 million shillings for Akello's stake in the company and he insists that he should be made party to the affairs of the company. Jasper has decided to marry Vivian who now wants to convert Comfort guest house into their matrimonial home and intends to make the company pay for the years they have been in occupancy of the house.

Issues

a. What breaches if any, of the Companies Act were committed, if so by whom and the

likely consequences thereof.?

b. Whether the intentions of Komu-luck with regard to the house in Busega are tenable, and how they will affect the company?

c. What is the status of Macmot with regard to the company?

d. What are the obligations of Akello to the company if any?

e. What potential actions can Akello and Macmot take against the company?

f. What response do you anticipate from the company and how will you respond to it?

g. What are the necessary documents above?

h. How can the company process the request from Akello and Mackmot?

i. What is the procedure of the company enforcing its rights if any?

j. What are the necessary documents to effect the above procedure?

Law Applicable

1. The Companies Act, No. 1 of 2012

2. The Stamps Act as amended

3. The companies General Regulations of 2016

4. Case law

RESOLUTION.

The breaches of the company if any, the following breaches were committed;

FAILURE TO HOLD ANNUAL GENERAL MEETINGS.

Company management is done through holding meetings from which resolutions are made and registered with the company registrar.

The Companies Act provides for 3 types of meetings - A statutory meeting, annual general meeting and extraordinary meetings.

(A) STATUTORY MEETING.

Section 137(1) of the Companies Act provides for a statutory meeting and it provides that a meeting shall be held for every company limited by shares not more than 3 months from the date of commencement of business. For other companies that are not public companies, the meeting is to be held upon receiving a certificate of incorporation.

Under the statutory meeting, there is a requirement for directors to forward a statutory report 14 days prior to the members. The format and content of such report is given in Section 137(4) (a-e). The report must be certified by not less than 2 directors especially for public companies. (This is for proper management).

However, private companies are exempted from this requirement under Section 137(11) Companies Act 2012.

ii. **THE ANNUAL GENERAL MEETING (AGM)**

This is a meeting which is held once a year and is applicable to both private and public companies.

The meeting is exclusive to members of the company and shareholders. (Section 138)

Under Section 138(2) of the Companies Act provides that a private company, at the requisition of a member can hold an Annual General Meeting. Subsection 4 provides that where default is made in holding a meeting of the company in accordance with subsection (2), the registrar may, on the application of any member of the company, call or direct the calling of a general meeting of the company and give such ancillary or consequential directions as the registrar thinks expedient including directions modifying or supplementing in relation to the calling, holding and conducting of the meeting, the operation of the company's articles.

In this meeting adequate notice 6should be given of at least 21 days. (Section 140)

The objective of the Annual General Meeting has generally been understood to mean an opportunity for the company to deliberate on directors, to look at the balance sheets, to look at the audited accounts of the company, to appoint a company secretary and appoint company auditors. The Annual General Meeting is technically referred to as the company meeting.

iii. **THE EXTRA-ORDINARY MEETING**

Where some matters were not discussed or if an important and emergent point arises a resolution may be made to sit an extra-ordinary meeting. This is provided for under S. 139 Companies Act 2012;This meeting can be by a requisition which should state the objectives of the meeting, which objective should be deposited at the requested office of the company.

For a member to requisition this meeting, they should have paid up10% of their shares. Once the requisition for the meeting is deposited, the directors have up to 21 days to convene this meeting

REQUIREMENTS AS TO MEETINGS;

The Act regulates procedures for conducting meetings and any violation of provisions relating to notices, quorum, and other matters specifically provided for under the Act may render the meeting null and void.

NOTICE.

Section 140 provides for a notice to hold a company meeting not to be shorter than 21 days. Notices are intended to give members full information, fair and reasonable disclosure, in order that members can make a decision as to whether or not to attend the meeting. Section 140(4) members can consent to meeting called on short notice.

Section 141(a) requires that the notice of the meeting of a company shall be served on every member of the company.

The notice should fully have the details of what is intended to be discussed in the meeting.

It was held in **RE PEARCE DUFF CO LTD [1960] 3 ALL ER 222** that the mere fact that all the members are present at the meeting and pass a particular resolution, either unanimously or by a majority holding 95 per cent of the voting rights, does not imply consent to short notice and anyone who voted for a resolution in these circumstances can later challenge it.

Notice of convening a meeting must be sufficient and specific to enable members decide whether to attend or not.

In **TIESSEN V. HENDERSON (1899) 1 CH. 861** it was held that notice of a company meeting must be full and specific enough to enable a shareholder to decide whether he wants to attend or not.

Notice of a general meeting must be sent to every member of the company and every director and if notice of a meeting is not given to every person entitled to notice, the proceedings and any resolution passed at the meeting will be invalid.

YOUNG V LADIES IMPERIAL CLUB [1920] 2 KB 523

Mrs. Young, who was a member of the club, was expelled by a resolution passed by the appropriate committee. The Duchess of Abercorn, who was a member of the committee, was not sent a notice of the meeting, it being understood that she would not be able to attend. In fact, she had previously informed the chairman that she would not be able to attend. Nevertheless, in this action which was concerned with the validity of the expulsion, it was held – by the Court of Appeal – that the failure to send a notice to the Duchess invalidated the proceedings of the committee and rendered the expulsion void.

Per Scrutton LJ: Every member of the committee ought, in my view, to be summoned to every meeting of the committee except in a case where summoning can have no possible result, as where the member is at such a distance that the summons cannot effectively reach the member in time to allow him or her to communicate with the committee. Extreme illness may be another ground, though I should myself require the illness to be extremely serious, because a member of the committee receiving a notice to attend may either write to ask for an adjournment of the meeting or express his views in writing to the committee, and I should require the illness to be such as to prevent that form of action being taken on receiving notice of such a meeting.

QUORUM.

Quorum refers to the number or members of any body of persons whose presence at the meeting is required in order that the business may be validly transacted. There is no agreed number for purposes of quorum and it is entirely dependent on the provisions of the articles in the absence of which recourse must be had to the company's Act or Table A, if the company so adopted it. S.141(c) of the Companies Act, the default position of quorum is 3 in public companies and 2 in private companies.

SHARP V DAWES (1876) 2 QBD 26

The Great Caradon Mine was run by a mining company in Cornwall and was carried on the cost-book system, being controlled by the Stannaries Act 1869. The company had offices in London, and on 22 December 1874 notice of a general meeting was properly given. The meeting was held, but only the secretary, Sharp, and one shareholder, a Mr. Silversides who held 25 shares, attended. Nevertheless, the business of the meeting was conducted with Silversides in the chair. Amongst other things, a call on shares was made and the defendant refused to pay it. He was sued by the secretary, Sharp, who brought the action on behalf of the company, and his defense was that calls had to be made at a meeting and there had been no meeting on this occasion.

Held – by the Court of Appeal – the call was invalid. According to the ordinary use of the English language, a meeting could not be constituted by one shareholder.

DIRECTORS' MEETINGS.

Definition.

Section 2 of the Companies Act defines director" to include any person occupying the position of Director by whatever name called and shall include a shadow director.

The word director was defined in the case of **R V CAMPS (1962) EA 403** that;

A person who acts as, and performs the functions of, a director, although not duly appointed as a director, is occupying the position of a director and includes a de facto director unless the context otherwise requires.

Under **section 185** every company must have at least one director. For public companies, there must at least be two directors. It is a legal requirement for every company to have at least one director. Under s. 186 the company in a general meeting has the right to appoint any number of directors and specify their general qualifications in accordance with the guidelines specified under the law. For public companies which have a share capital, a person is not capable of being appointed as a director unless that person has undertaken in writing and delivered for registration consent to act as a director of the company. Section 192of the Companies Act.

The directors should conduct a board of directors meeting to efficiently manage the affairs of the company.

Under **Article 98 of Table A**, it states that subject to the provisions of the articles, the directors may regulate the proceedings as they think fit and directors can't act individually unless they have been delegated powers by the BOD to do so.

The words as they 'think fit" were discussed in **RE PORTUGUESE CONSOLIDATED MINES LTD (1990) 42 CH D 160** where Lord Justice Bright stated "when you talk of thinking fit must they not meet in order to think. This requires issuance of notice to all persons supposed to attend a meeting. **RE PORTUGUESE CONSOLIDATED MINES LTD**" In this case an application was made for shares in a company and on the same day there was a meeting of 2 out of 4 of the directors. The other two not having been given sufficient notice, the meeting resolved that the 2 should form a quorum and allot the shares applied for. They adjourned the meeting till the next day. On that day, the allottee withdrew his application and again the meeting adjourned till the following day. On this 3rd occasion, 3 directors were present and one of those who had been previously absent approved the resolution relating to the quorum and the meeting to confer the allotment. The fourth director on the same day wrote approving the quorum and his letter was received the next day.

The Court of Appeal held that as there had been no notice of original meeting, none of the subsequent meetings was valid and the allotment was therefore bad and void.

This case is the authority for the rule that in general, the only way in which directors can exercise their powers is at or under the authority of a meeting which is properly convened or where proper notice had been given or where all directors are entitled to attend.

Slade, J., stated in **INDUSTRIAL COFFEE GROWERS (UGANDA) LTD V TAMALE HIGH COURT CIVIL CASE NO. 215 OF 1963** (UNREPORTED), 'It seems well settled law that a meeting of directors is not duly convened unless due notice has been given to all the directors and that any business transacted at a meeting not duly convened is invalid"

In MOHANLAL K RADIA VS ROSE KATO NAKEYENGA AND SIX OTHERS (HCT-00-CC-CS-0274-2005) The plaintiff contended that he has been a director of the company since 1965 through to 200 but when he appointed his son Radia Atul as his attorney to represent him on the board of directors, the defendants ignored Mr. Radia Atul, and did not invite him to meetings of the company. They did so contend that he is not a member of the company. There was a resolution of the company amending the memorandum of association of the company for the purpose of admitting new members. The meeting took place on 20th December 2000. No notice of this meeting was provided to the plaintiff or his attorney.

Held; Clearly calling meetings of the company without due notice to all members of the company is mismanagement of that company's affairs, especially to the detriment of the members not notified. Business transacted at such meetings is invalid.

That the defendants wrongfully excluded the plaintiff from the management of the company both in his capacity as a shareholder and director of the company, by not inviting him to general meetings of the company and its board of directors in accordance both with the Companies Act, and the Memorandum and Articles of Association of the Company.

In **RE HOMER DISTRICT CONSOLIDATED GOLD MINES LTD (1883) 39 CH D 546**

There was a quorum for the BOD meeting but the meeting was held at a few hours' notice, shorter than that prescribed by the company's articles and one of the directors did not receive the notice while another received it and sent his apologies that he would not be able to attend and court held that the resolution passed at the meeting was invalid.

From the facts, **the company has held only one meeting since incorporation whereat shares were allotted to Jasper Mulefu, and Peter Mbolimboli. Joel Bosiko and Akello Betty were not considered because they did not attend the meeting.**

This means that the company has failed to hold annual general meetings. Further the meeting that was called was not preceded by notice calling the rest of the members. This meeting was more of a board of directors meeting which was invalid as it did not issue to notice to the other two directors and as a result they were not considered for allotment of shares.

The directors were in breach of their duty to call meetings. The resulting effect is that any decision taken during such a meeting is invalid.

FAILURE TO FILE RELEVANT DOCUMENTS;

i**. RETURN OF ALLOTMENT**.

Under **section 61** of the company act that whenever a private company limited by shares or guarantee makes any allotment of its shares, the company has to within 60 days after date of allotment deliver the return of allotment to registrar for registration stating the number and nominal amount of the shares comprised in the allotment, the names, addresses and descriptions of the allottees and the amount if any, paid or due and payable on each share; and

(b) in the case of shares allotted as fully or partly paid up otherwise than in cash, a contract in writing constituting the title of the allottee to the allotment together with any contract of sale or services or other consideration in respect of which that allotment was made such contract being duly stamped

and a return stating the number and nominal amount of shares so allotted, the extent to which they are to be treated as paid up and the consideration for which they have been allotted.

Under **Section 61(3)** where default is made in complying with this section, every officer of the company who is in default is liable to a fine of twenty-five currency points and an additional fine of five currency points for every day during which the default continues.

The facts show that at the meeting, shares were allotted to two of the directors. However, the facts disclose that the only documents that have been filed are those documents attached to the file. This means that the directors are liable for failure to file a return of allotment to the registrar for registration.

ii. NOTICE OF APPOINTMENT OF SECRETARY;

Section 187 provides that (1) every company shall have a secretary. Article 110 of Table A states that a secretary shall be appointed by directors. Section 190 provides for qualifications of a company secretary. The person should be an advocate of the high court, capable of discharging those duties and should be a member of Chartered Public Accountant or Chartered Secretaries and Administration. The facts show that the meeting at which the secretary was appointed lacked quorum as the other directors were not there. The facts further so not show that Mr. Mapendo Jamilu the appointed secretary met the qualifications under Section 190.

Further **Section 228(1)** requires A company to keep at its registered office a register of its directors and secretaries.

Section 228(5) provides that the company shall, within the periods respectively mentioned in subsection (6), send to the registrar a return in the prescribed form containing the particulars specified in the register and a notification in the prescribed form of any change among its directors or in its secretary or in any of the particulars contained in the register, specifying the date of the change.

Under Subsection (6) the periods referred to in subsection (5) are the following—

(a) The period within which the return is to be sent shall be fourteen days from the appointment of the first directors of the company; and

(b) The period within which the notification of change is to be sent shall be fourteen days from the happening of the change.

Under **subsection (9)** where there is default in complying with subsection 6 the company and every officer of the company who is in default is liable to a default fine of twenty-five currency points.

Regulation 26(2) of the Companies General Regulations 2016 provides; Every company shall notify the registrar of the appointment of a director or secretary by filing a notice with the registrar in Form 20 in the Schedule.

The facts do not show compliance with this provision.

iii. NOTICE OF SITUATION OF REGISTERED OFFICE. SECTION 115 provides that**.**

(1) A company shall, as from the day on which it commences to carry on business or as from the fourteenth day after the date of its incorporation, whichever is the earlier, have a registered office and a registered postal address to which all communications and notices may be addressed.

(2) Where a company fails to comply with subsection (1), the registrar may give notice to the company giving it reasonable time in which to comply.

Section 116 Provides for Notification of the situation of the registered office, the registered postal address and of any change in them.

(1) Notice of the situation of the registered office and the registered postal address, and of any change in them shall be given within fourteen days after the date of incorporation of the company or of the change as the case may be, to the registrar, who shall record the change.

(2) The inclusion in the annual return of the company, of a statement as to the situation of its registered office or as to its registered postal address shall not be taken to satisfy the obligations imposed by this section.

(3) Where there is default in complying with this section, the company and every officer of the company who is in default is liable to a default fine of twenty-five currency points.

Regulation 25 provides that the notice of the situation of the registered office, postal address and of any change in them shall be filed with the registrar in Form 18 in the Schedule.

These documents were not filed.

iv. NOTICE OF REGISTER OF MEMBERS;

Section 119 provides that (1) a company shall keep a register of its members at the registered office of the company. Subsection 3 requires that a company shall send notice to the registrar of the place where its register of members is kept and of any change of place. Default in compliance for fourteen days in the company and every officer of the company who is in default is liable to a daily default fine of twenty-five currency points (sub section 6)

In the case of **MATHEW RUKIKAIRE V INCAFEX** supra, it was held that it is "the company" which has the obligation to enter each member on the members register. In this context the company's duty lies with the company secretary, whose duty it is to ensure that the company complies with relevant legislation and regulations.

v. FILING ANNUAL RETURNS;

Section 132 provides that (1) a company having a share capital shall, once at least in every year, make a return containing with respect to the registered office of the company, registers of members and debenture holders, shares and debentures indebtedness, past and present members and directors and secretary.

Subsection 4 provides that where a company fails to comply with this section, the company and every officer of the company who is in default is liable to a default fine of twenty-five currency points.

From the above, since the only documents were filed upon incorporations, it means there has been a failure by company officers to file documents subsequent to formation of the company.

If the intentions of Vivian Komu-luck with regard to the property in Busega are tenable, and how they will affect the company.

A company can own property independent from its members. This principle finds its roots in the case of **SALOMOM V SALOMON & CO. LTD. [1896] UKHL 1, [1897] AC 22**

As such it enjoys a variety of privileges that a natural individual enjoys amongst which include the right to own property.

This is a Constitutional right by virtue of Article 26 of the 1995 Uganda Constitution as amended. In **SHONIBARE V PROBATE REGISTRAR (1966) 2 A. L. L. COMM. 389,** it was held that an incorporated company is able to own property separately from its members.

Company property belong to the company and not its members; MACAURA V. NORTHERN ASSURANCE CO. LTD (1925) A.C. 619

The Appellant owner of a timber estate assigned the whole of the timber to a company known as Irish Canadian Saw mills Company Limited for a consideration of £42,000. Payment was effected by the allotment to the Appellant of 42,000 shares fully paid up in £1 shares in the company. No other shares were ever issued. The company proceeded with the cutting of the timber. In the course of these operations, the Appellant lent the company some £19,000. Apart from these the company's debts were minimal. The Appellant then insured the timber against fire by policies affected in his own name. Then the timber was destroyed by fire. The insurance company refused to pay any indemnity to the appellant on the ground that he had no insurable interest in the timber at the time of affecting the policy.

The court held that it was clear that the Appellant had no insurable interest in the timber and though he owned almost all the shares in the company and the company owed him a good deal of money, nevertheless, neither as creditor or shareholder could he insure the company's assets. That when Macaura sold the property to the company he ceased to enjoy any legal or equitable interest in it. The property was wholly and completely owned by the company.

Lord Buckmaster;

No shareholder has any right to any item of property owned by the company for he has no legal or equitable interest therein. If his contention were right, it would follow that any person would be at liberty to insure the furniture of his debtor and no such claim has ever been recognized by the courts.

In the instant facts, the house in Busega belongs to Jasper Mulefu and not the company. There is no indication that Jasper transferred ownership of the house to the Company or any indication that the company has paid any consideration for the utilization of the house.

Therefore, the house in Busega belongs to Jasper Mulefu and not the Company. The company has not been paying rent for the utilisation of the land and there is no formal arrangement between Jasper and the company as to how their relationship in relation to the house should work.

It follows then that Jasper can successfully occupy part of the house in Busega. On the issue of whether Vivian can get rent for the duration the company has used the house, it is submitted that she cannot.

Jasper let the company use the house without payment of rent. He should therefore not be heard to require for rent after his conduct made the company omit payment of rent during that period.

This is known as the principle of equitable estoppel.

In **PICKARD V SEERS (112 E. R. 179)** it was held that for one to rely on this kind of estoppel, he must prove the following:

a) That there was conduct in question, which led or caused him to believe something to be true;

b) That he acted on such belief by doing or omitting to do something and thereby altered his position to his detriment;

c) That as a result, denying the representation would be prejudicial to him. All these requirements are met by the conduct of Jasper and therefore the rent for the previous duration cannot be claimed.

However, when jasper and Vivian occupy the house, they can claim for rent of the remaining house occupied by the company moving forward.

In **KAMPALA COTTON CO. LTD V MADHVANI (1954) 21 EACA 129**, it was held that a company can occupy business premises as a tenant. Therefore, the company can begin to pay rent if jaspers require it. A company has capacity to be a tenant

HINDU DISPENSARY, ZANZIBAR V NA PATWA AND SONS [1958] 1 EA 74

Held;

(i) A trading company could be a "suitable tenant" of premises for the purposes of its business.

(ii) The suit premises, though intended to be occupied as a dwelling house were qua the Dispensary "business premises".

Per Curium– "A company can have possession of business premises by its servants or agents. In fact, that is the only way it can have physical possession."

Notably, Vivian cannot do all this in her individual capacity. All the rights to deal with the land are vested only in Jasper the owner. The consequences of the acts of Vivian on the company means that the company will start to pay rent and should enter into a tenancy agreement with Jasper.

3. The status of Mackmot with regard to the company.

Despite paying Akello for her stake in the company, Mackmot is not a member of the company n or a shareholder.

Section 47 of the Companies Act 2012 provides for two instances when a person is regarded as a member of the company.

(1) The subscribers to the memorandum of a company shall be taken to have agreed to become m embers of the company, and on its registration shall be entered as members in its register of members.

(2) A person who agrees to become a member of a company, and whose name is entered in its register of members shall be a member of the company.

In the case of **MATTHEW RUKIKAIRE V INCAFEX LIMITED SCCA NO. 3 OF 2015** it was stated that being on the register is evidence to prove membership. Hon. Lady Justice Prof Dr. Tibatemwa E clearly stated that an applicant for shares is neither a member nor a shareholder while his rights rest in contract until the issue of shares has been completed by registration.

In defining who shareholder is, she stated; who a shareholder or member of a Company is. The process of incorporating a company limited by shares involves registration of the company's memorandum and articles of association which are signed by subscribers. A 'subscriber' is the term applied to the first members of a private limited company who add their names to the memorandum of association during the company formation process. By so doing, they agree to form a company and become members/share- holders in the company.

However, other persons can become members of the company when shares in the company are allotted. When a person either individual or corporate is allotted shares subsequent to the formation of the company, that person becomes a 'shareholder', 'member' or 'owner' and stands in the same position as the subscriber. Such persons agree to become part of a company by taking a particular number of shares through a process known as allotment. She thus concluded that what can be deduced from Section 47 is that a person may become a member of a company in two ways;

(a) By subscribing to the memorandum of association; and

(b) By agreement to be a member subsequent to the formation of a company.

That that a person becomes a shareholder or member of a company if allotment is followed by registration. that it is "the company" which has the obligation to enter each member on the member s register. In this context the company's duty lies with the company secretary, whose duty it is to ensure that the company complies with relevant legislation and regulations.

Quoted; Lord Templeman in **NATIONAL WESTMINSTER OR BANK PLC VS. IRC (1995) A.C111 AT 126** held that "allotment does not make a person a member of the company. Entry in the register of members is also needed to give the allottee legal title to the shares. Allotment confers a right to be registered as a member." Lord Templeman further stated that an applicant (for shares) is neither a member nor a shareholder while his rights rest in contract until the issue of the shares has been completed by registration.

In this case, Akello is a subscriber to the memorandum of association of the company and hence is a member of the company. However, she sold her stake in the company to Mackmot who can't become a member until there is a valid transfer of shares and his name being reflected on the register.

If a person is not entered on the register yet he or she is a member, the remedy is provided for under **Section 125** whereby court has the power to rectify the register and payment by the company of an y damages sustained by any party aggrieved.

Despite the above, courts and learned authors have noted that a person who buys shares from a m ember, becomes a beneficial owner of those shares in equity and thereby obtains an equitable interest.

According to **Smith and Keenan's COMPANY LAW 14th edition 2009 at page 207**, the following legal transactions are involved in transfer of shares.

The purchase and sale of shares involves the following separate and distinct legal transactions:

(a) An unconditional contract is agreed between the transferor and transferee. The transferor then holds the shares as a trustee for the transferee (who has an equitable interest) until registration but is still a member of the company and retains the right to vote as he chooses.

(b) The transferee pays for the shares. The position remains as in (a) above except that the transferor must now vote as the transferee directs. An unpaid transferor has the right to vote the shares free from any obligation to comply with the transferee's requirements (**JRRT (INVESTMENTS) V HAYCRAFT** [**1993] BCLC 401).**

(c) The position remains as in (b) above while the transfer is approved by the directors and the transfer is stamped.

(d) The transferee's name is entered on the register of members. At this stage the transferor ceases to be a member of the company. The transferee becomes the member and acquires the legal title to the shares. Since membership and membership rights are only effective when the transferee is on the register of members, it may be necessary to ask the court to rectify the register of members under CA 2006, s 125 where the company is refusing to register the transferee, but only if this is contrary to the powers of the board.

In HAWKS V MCARTHUR AND OTHERS, [1951] 1 ALL ER 22, shares were transferred by M to two shareholders (R and F) without exhausting the pre-emption rights of other shareholders in accordance with a company's articles. R and F paid to M the full purchase price for the shares, but the shares were still registered in the name of M. On 4 October 1949, the plaintiff (who was also a member of the company) recovered judgment for £539 2s 4d and costs in an action against M, and was granted leave to proceed under the judgment. On the same day he obtained a charging order *nisi* on the shares in the company standing in M's name, and on 17 October the charging order was made absolute. F and R claimed that by 4 October the beneficial interest in the shares was in them and that M had no interest therein on which the charging order could operate.

Held – Notwithstanding the complete failure to comply with the company's articles in regard to the procedure to be followed before shares could be transferred, F and R, having paid to M the full consideration for the shares, had obtained equitable rights therein, and, as their rights accrued earlier than the equitable right of the plaintiff under the charging order, their rights must prevail over his claim.

VAISEY J.; The one thing, however, which seems to me to be important is that they paid Mr. McArthur the money, and I cannot bring myself to suppose that they got nothing by their bargain and that the whole property in the shares remained in Mr. McArthur, notwithstanding the transfers which had been executed and the money which he received.

HAKIM SEMUWEMBA V PIUS KAMUGISHA HCCS 0499 OF 2012. JUSTICE DAVID WAGUTUTSI;

The question that arises therefore is that when the Defendants paid the Plaintiff the 20,000,000/=(twenty million shillings), what was he paying for? What was the company to benefit? It must have been in the absence of any other explanation that they were paying for shares. What is important here is that they paid out money to the Plaintiff and I would find it very difficult that in paying, they got nothing for the bargain and that the whole property in the shares remained that of the Plaintiff,

He thus Concluded that the Plaintiff in receiving the 20,000,000/= (twenty million shillings) knew that it was payment for shares and indeed he severed all relations and interest in the 4th Defendant due to the conduct of the Plaintiff after payment as he stayed away from the company until 2011, over two years later. He did not attend meetings, nor question the company about company meetings or ask for payments as a shareholder.

The issue of beneficial ownership of shares before transfer has been considered in the case of ;

AMRIT GOYAL v HARI CHAND GOYAL and ors MISCELLANEOUS APPLICATION NO. 649 OF 2001

HELD; **Second,** it is trite law that pending the formal transfer of a company's shares, the transferee (whether such transferee is the buyer or donee of such shares or otherwise) enjoys a beneficial interest in those shares as the equitable owner thereof — see GOWER's **Principles of Modern Company Law (6th Edn. 1997), p. 348,** which explains that:

...only if and when the transfer is registered will the transferor cease to be a member and shareholder. However, notwithstanding that registration has not occurred, the Beneficial interest in the shares may have passed from the transferor to the transferee.

Notwithstanding that the transfer is not lodged for registration or registration is refused, the beneficial interest in the shares will, it seems, pass from the seller to the buyer.

The seller then becomes a trustee for the buyer and must account to him for any dividends he receives and vote in accordance with hi instructions (or appoint him as his proxy)." [Emphasis added]

See **HARDOON V. BELILIOS [1901] AC 118, P.C.** With regard to gifts (rather than sales of shares), it has been held that so long as the donor had done all he needs to do, the beneficial interest passes from him to the donee see **RE ROE [1949] CH 78,** AND **RE ROE [1952] CH 499 CA.**

Court thus declared the Plaintiff as the beneficial owner of the ROADMASTER CYCLE shares via a Memorandum of Family Arrangement and ordered for rectification of the share register of ROADMASTER CYCLES (U) LTD by deleting there from the name of the Fourth Defendant, and substituting therefore the name of the Plaintiff and his nominee as the true owner of the Fourth Defendant's shares in ROADMASTER CYCLES (U) LTD;

In conclusion therefore, Mackmot having paid Akello for her stake in the company obtained an equitable interest in her shares and is therefore a beneficial owner of those shares.

Example 4. The obligations of Akello to the company, if any.

Akello is a subscriber in the company and the article of association proved that the subscribers shall be the first directors of the company, which therefore makes her a director of the company.

A subscriber is a shareholder or guarantor who agrees to become a member of a company at the time of its incorporation - original members must subscribe their names to the memorandum, hence the name subscriber.

Section21 (1) of the Companies Act 2012, is to the effect that the memorandum and Articles shall when registered, bind the company and the members of the company to the same extent as if they had been signed and sealed by each member.

Section 47 of the Act provides that a person who agrees to become a member of a company and whose name is entered in its register of members shall be a member of the company.

In **OLIVE KIGONGO v MOSA COURTS APARTMENT LTD COMPANY CAUSE NO. 01 OF 2015, Justice Stephen Musota stated;**

My interpretation of the above provisions is that there are two ways of becoming a member of a company and these are:

(i) By being a subscriber to the Memorandum of Association of a company at the time of incorporation of that company as in **Section 47(1) of the Companies Act**; or

(ii) By acquiring shares in the company after incorporation that's **section 47(2) of the Companies Act**.

In interpreting option 1, the judge stated; To become a member as subscriber to the memorandum of association of a company one needs only to sign the memorandum as a subscriber and automatically will become a member of the company and holder of shares for which she or he has signed even if the company omits to fulfill its duty to put him on the register of members or to allot the shares to him or her. This was the position enunciated in **EVANS CASE [1867] L.R.2CH APP 424;** AND **BYTRUST HOLDING LIMITED VS I.R.C [1971] 1 W.L.R 1333.**

The rationale of this position is that an agreement between the company and the subscriber is that the subscriber shall become a member and the memorandum of association is a public document which makes publicity of the fact that the subscriber is a member of the company.

See; LUGAN 'S CASE [19 02] 1 Ch 707. In this option therefore entry on the register of members is not a condition precedent to being a member. All members are shareholders in the company but not all shareholders are members.

BORLAND'S TRUSTEE V STEEL BROTHERS & CO LTD [1901] 1 CH 279

Farwell J; A share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders inter se in accordance with **Section 16 of the Companies Act 1862.**The contract contained in the articles of association is one of the original incidents of the share. A share is not a sum of money settled in the way suggested, but is an interest

measured by a sum of money and made up of various rights contained in the contract, including the right to a sum of money of a more or less amount.

A shareholder is any person, company, or institution that owns at least one share of a company's stock. According to the facts Akello owns 15 shares in the company and thus making her a shareholder since she subscribed to the memorandum of association. She automatically becomes a member.

Therefore, a shareholder, she is obligated to observe all the conditions stipulated in the articles and memorandum of association.

As a shareholder she has a duty to pay up the full amount of her shares and as when called up, in case of liquidation of a company the shareholders are to be placed in the list of contributories. In certain cases, a transferor of a share is still liable for the unpaid shares of a company.

All the shareholders are bound to follow the decision of the majority shareholders unless the majority is guilty of mismanagement and oppression.

The main duty of shareholders is to pass resolutions at general meetings by voting in their shareholder capacity. This duty is particularly important as it allows the shareholders to exercise their ultimate control over the company and how it is managed.

The articles of association constitute a binding contract between the shareholders and the company as stated under **Section 21(1**). The Articles of association state some duties or obligations expected of a director, among which is the duty to manage the company and paying of all expenses incurred during the promotion of the company.

Section 198 of the Act provides for the duties of a director to include the following a) act in a manner that promotes the success of the business of the company.

Lord Greene MR in **RE SMITH AND FAWCETT LTD [1942] CH. 304** at page 306 held that the directors have to act bonafide in what they consider is in the company's interests and not for any collateral purpose.

b) exercise a degree of skill and care as a reasonable person would do looking after their own business

In **RE CITY EQUITABLE FIRE INSURANCE COMPANY LTD [1925] 1 Ch 407**, Romer J opined that in discharging company duties, a director must exercise such degree of skill and diligence as would amount to the reasonable care which an ordinary man might be expected to take in the circumstances, on his own behalf but such skill need not be of greater degree than reasonably expected of a person of his knowledge and experience, he isn't liable for mere errors of judgement.

C) Act in good faith in interest of the company as a whole

He also has an obligation to ensure compliance with this Act and any other law.

Section 225 and Article 84 table A of the Act is to the effect that a director has an obligation to notify the company in writing, before the expiration of five days beginning with the day if appointment, of the subsistence of his or her interests at that time and of the number of shares of each class and the amount of debentures of each class of, the company or other such body corporate in which each of his interest subsists at that time.

She also has a duty under **Section 213 of the Act** to disclose payment for loss of office made in connection with takeover or take over or transfer of shares in a company.

She also has an obligation under **Section 197** to disclose her age.

Liability; as a member of the company she is liable for the company's debts up to the amount of shares not fully paid up in case of winding up/liquidation. Shareholders have a duty not to compete with the company.

Assuming further that upon receiving the demand from **Mackmot** with a cover letter from **Akello** to back it up, the company has not responded thereto. **Mackmot**and **Akello's** reminders have fallen on 'deaf ears' with **Jasper** saying for as long as he is in charge, he will not be bothered by small issues of **Mackmot** and **Akello** who abandoned the company at its hour of need and now wants to 'reap where she didn't sow'. Jasper and Akello have waited for a period of 8 months for a response from the company, in vain; advise **Akello** and **Mackmot**on any potential action to take against the company. What response do you anticipate from the company and how will you respond to it?

The facts show that Akello agreed to transfer her shares in the Company. Shares are personal property and are transferable subject to any restriction contained in the articles.

The most famous definition of a share is that of Farwell J in **BORLAND'S TRUSTEE V STEEL BROTHERS AND CO LTD [1901] 1 CH 279**, where he states that:

... a share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders. A share is not a sum of money ... but is an interest measured by a sum of money and made up of various rights contained in the contract.

According to **Section 83** of the **Companies Act 2012, "**The shares or other interests of any member in a company shall be movable property transferrable in the manner provided by the articles of the company."

In a company therefore shares are really transferable and upon a transfer the assignee steps into the shoes of the assignor as a member of the company with full rights as a member.

Anything to do with transfer of shares has to be at the shareholder's free will. A shareholder has a right to transfer his or her own shares anytime he or she wants.

In **RE SMITH &FAWCET LTD (1942) 1 ALL ER, 542 lord Greene** stated that it is to be borne in mind that one of the normal rights of a shareholder is the right to deal freely with his property and to transfer it to whomsoever he pleases. That the shareholder has prima facie right, and that right is not to be cut down by uncertain language or doubtful implications.

Section 83 provides that transfer is subject to the Articles of Association. Therefore, unless the company's Articles provide otherwise, in a private company, a shareholder is entitled to transfer as he wishes.

According to the Articles of Association of Mendy Hotels (Uganda) Limited **Article 2b** provides that "The right to transfer shares shall be restricted as hereinafter prescribed." **Article 3** provides that the regulations contained in Table A of the First Schedule of the Act shall apply to the Company. Therefore, this means that in relation to transfer of shares recourse shall be taken to Table A which

has been adopted through the Companies Articles in line with **Section 13(1) of the Companies Act 2012**.

Section 85 of the **Companies Act** also provides that notwithstanding anything in the Articles of a Company, it is not lawful for the Company to register a transfer of shares in or debentures of the Company unless a proper instrument of transfer has been delivered to the company.

Article 22 of **Table A** provides that the instrument of any share shall be executed by or on behalf of the transferor and transferee, and the transferor shall be taken to remain a holder of the share until the name of the transferee is entered in the register of members in respect of the shares.

Article 23 of Table A further provides that subject to such of the restrictions of these Regulations as may be applicable, any member may transfer all or any of his or her shares by instrument in writing in any usual or common form or any other form which the directors may approve.

This means that there is no standard form as to what the transfer instrument should be used.

In **JASPAL SINGH SANDHU VS NOBLE BUILDERS (U) LTD & ANOR SCCA NO. 13/2002.** The Supreme Court agreed with the Court of Appeal that there was a valid transfer of shares where the parties used Company Form 8, **"Notification of Change of Directors or Secretaries or their particulars"** stating the husband agreed to cease to be a member of the company and was replaced by his wife who took his shares.

Therefore, the above procedure is the one the company has adopted in light of the transfer of shares and basing on the facts Akello gave Mackmot a cover letter stating that Mackmot paid up for her stake in the company and therefore her shares should be transferred to him. The cover letter in this case, would amount to a proper instrument of transfer.

Under Section **88 of the Companies Act** stats that on the application of the transferor of any share or interest in a company, the company shall enter in its register of members the name of the transferee in the same manner and subject to the same conditions as if the application for the entry were made by the transferee

However, the company may restrict transfer of shares and creates its own procedure on how shares are to be transferred. Buckley LJ explained the core company law position in **RE DISCOVERERS FINANCE**

CORPORATION LTD, LINDLAR'S CASE [1910] 1 CH 312 AT 316:

'The regulations [articles] of the company may impose fetters upon the right of transfer. In the absence of restrictions in the articles the shareholder has by virtue of the statute the right to transfer his shares without the consent of anybody to any transferee. Where a restriction is imposed, it binds parties as per **Section 21 of the Companies Act.**

According to **Section 21, Article 22 & 24 of Table A**, a company may restrict transfer of shares. And if the directors refuse a shareholder from transferring his shares, they have no duty to give reasons for the refusal. However, if the Articles lay down grounds for refusal of transfer, then the directors must adhere to those grounds or it must be in the company's interest.

RE SMITH &FAUCETT LTD 1942 1 ALL ER, 542, The articles of association of a private company provided that "the directors may at any time in their absolute and uncontrolled discretion

refuse to register any transfer of shares. Fawcett died and the newly appointed director refused to register Fawcett's shares in the name of executer unless he was willing to sell half of them to Smith. **Held** – having regard to the terms of the article, the only limitation on the directors' discretion was that it should be exercised bona fide in the interests of the company.

Court considered what constitutes the interest of a company and held that the directors of the company must act **bonafide** and not for any collateral purpose and in the interest of the company.

Court emphasized that in cases where articles are framed with some such limitation on the discretionary power of refusal, it follows on plain principle that, if they go outside the matters which the articles say are to be the only matters to which they are to have regard, the directors will have exceeded their powers

As to the meaning of bonafide for the benefit of a company as a whole, Lord Evershade in the case of **GREENHALGH V ADINE CINEMAS (NO.2) (1950) 2 ALL ER 1120** stated it is now plain that "*bona fide* for the benefit of the company as a whole" means not two things but one thing. It means that the shareholder must proceed on what, in his honest opinion, is for the benefit of the company as a whole. Secondly, the phrase, "the company as a whole," does not (at any rate in such a case as the present) mean the company as a commercial entity as distinct from the corporates. It means the corporates as a general body

Article 24 does indeed give the directors discretion to decline to register the transfer of a share. It states that, "The directors may decline to register the transfer of a share not being a fully paid share to a person of whom they do not approve, and they may also decline to register the transfer of a share on which the company has a lien."

However, the powers vested in directors to refuse to register a transfer must be exercised within a reasonable time.

In this respect **Section 89(1)** of the **Companies Act** provides that "Where a company refuses to register a transfer of any shares or debentures, the company shall, within sixty days after the date which the transfer was lodged with the Company send to the transferee notice of the refusal." This is also provided for under **Article 26** of table A**.**

RE SWALEDALE CLEANERS [1968] 3 ALL ER 619

The personal representatives of H and A had executed transfers of H and A shareholdings in favor of L, but S as director refused to register them purporting to exercise a power of refusal contained in the articles. There was no resolution either of the board or of the shareholders on the matter of refusal to register the transfers. On 11 December 1967 L began proceedings for rectification of the register, and on 18 December 1967 S appointed an additional director and the two directors formally refused to register the transfers.

Held – by the Court of Appeal – the register must be rectified to show L as the holder of the shares of H and A. The power to refuse a transfer must be construed strictly because a shareholder ordinarily has a right to transfer his shares. Furthermore, the delay in exercising the power of refusal, i.e. four months, had been unreasonable and the power was no longer capable of being exercised.

RE HACKNEY PAVILION LTD [1924] 1 CH 276

The company had three directors, Sunshine, Kramer and Rose, each of whom held 3,333 shares in the company. Sunshine died, having appointed his widow as his executrix. Her solicitors wrote to the company, enclosing a transfer of the 3,333 shares from herself as executrix to herself in an individual capacity. At a board meeting at which Kramer, Rose and the secretary were present, Rose proposed that the shares be registered, but Kramer objected in accordance with a provision in the articles. There was no casting vote. The secretary then wrote to the solicitors informing them that his directors had declined to register the transfer.

Held – by the High Court – the board's right to decline required to be actively expressed. The mere failure to pass the proposed resolution for registration was not a formal active exercise of the right to decline. The right to registration remained, and the register must be rectified

From the facts Mackmot and Akello have waited for a period of **8 months** for a response from the Company in vain.

Section 89(2) of the Companies Act provides that where the default is made in complying with this section, the company and every officer of the Company who is in default is liable to a default fine of twenty-five currency points. Therefore, already Jasper being an officer of the Company i.e. a director by virtue of Section **2** of the Act and the Company as well, he is liable by virtue of this section.

Therefore, in light of the above position I would advise Akello and Mackmot to cause Mackmot's name to be added as a member of the Company on the Company Registrar by the Registrar of Companies i.e. rectify the Register by applying to Court.

Section 125 of the Companies Act Provides for the power of the court to rectify register.

(1) Where—

(a) the name of a person is without sufficient cause entered in or omitted from the register of members of a company; or

(b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member, the person aggrieved or any member of the company or the company, may apply to the court for rectification of the register.

(2) Where an application is made under this section, the court may either refuse the application or may order rectification of the register and payment by the company of any damages sustained by any party aggrieved.

(3) On an application under this section the court may decide any question relating to the title of any person who is party to the application to have his or her name entered in or omitted from the register whether the question arises between members or alleged members on the one hand and the company on the other hand and generally may be decided for rectification of the register

In RE MILTON OBOTE FOUNDATION, COMPANY CAUSE NO 1. OF 1997, **held;** The High Court affirmed its jurisdiction to hear an application for rectification of the register of companies kept by the registrar of companies.

Court's power to rectify the register where no instrument of transfer It was held by the Court of Appeal in **RE HOICREST LTD [1999] 2 BCLC 346** that the power of the court to rectify the

membership register of a company could be used to effect a transfer where there was no instrument of transfer so that the company had not had an opportunity to refuse the transfer.

In **AMRIT GOYAL v HARI CHAND GOYAL and ors MISCELLANEOUS APPLICATION NO. 649 OF 2001**

It was held that when the court entertains an application to rectify a share register, it is bound togo into all the circumstances of the case, and to consider what equity the applicant has to call for its interposition — see **Halsbury's Laws of England, (4th Edn.), Vol. 7(1) para 394.** In this case even in absence of a transfer instrument Court declared the Plaintiff as the beneficial owner of the ROADMASTER CYCLE shares by relying on a Memorandum of Family Arrangement and ordered for rectification of the share register of ROADMASTER CYCLES (U) LTD by deleting there from the name of the Fourth Defendant, and substituting therefore the name of the Plaintiff and his nominee as the true owner of the Fourth Defendant's shares in ROADMASTER CYCLES (U) LTD

Therefore, the above is the potential action that Akello and Mackmot can take against the company.

The procedure is provided for under Order 38 rule 4 of the Civil Procedure Rues SI 71-1which states that Applications to rectify the register of members of a company shall be made by motion or summons in chambers.

THE COMPANIES ANTICIPATED RESPONSE

Article (24) of table A states that, "The directors may decline to register the transfer of a share not being a fully paid share to a person of whom they do not approve, and they may also decline to register the transfer of a share on which the company has a lien

The anticipated Company's response shall be that they have a right under the law to decline to register the transfer of a share not being a fully paid-up share when they called up the shares,

RESPONSE TO COMPANIES RESPONSE

The company waived its right to refuse.;

The company had sidelined Akello in the management of the company. The company has held only one meeting of which Akello was not even invited. Secondly, the company did not exercise their discretion to refuse registration and thereby waived their right to refuse. The company had sixty days within which to refuse registration and since its now 8 months, the right to exercise its discretion was waived in the circumstances. As was noted by the learned authors Smith and Keenan's COMPANY LAW supra on page 206

Any power of veto on transfer vested by the articles in the directors must be exercised within two months after the lodging of the transfer for registration and the transferee notified. If not, the company may be compelled to register the transferee as a member.

This is supported by the above case of **RE SWALEDALE CLEANERS [1968] 3 ALL ER 619**

ISAAC CHRISTOPHER LUBOGO

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA (COMMERCIAL DIVISION)

MISCELLANEOUS CAUSE NO**. … OF 2018**

1. AKELLO BETTY

2. MACKMOT ODONGO…….APPLICANTS

VERSUS

MENDY HOTELS (UGANDA) LIMITED.....RESPONDENT

NOTICE OF MOTION

(Under Order 38 Rule 4, 5(d) of the Civil Procedure Rules, SI 71-1)

ALL PARTIES CONCERNED attend the learned Judge in chambers on the ……. day of …… 2018 at ……. O'clock in the fore/afternoon or as soon as counsel for the applicant can be heard for Orders that:

a) The shares of the first plaintiff in the respondent company be transferred to the second applicant

b) The respondent's register be rectified by replacing the name of the first plaintiff with the second applicant

c) The respondent company pays damages to the applicant d) Any other order that court deems fit.

e) Costs of this application be provided for.

TAKE NOTICE that the grounds of this application are;

a) That the first plaintiff was a signatory to the Articles and Memorandum of Association. b) That the first plaintiff sold her stake in the company to the second plaintiff.

c) That the first plaintiff executed a transfer instrument of his shares to the second plaintiff d) That the plaintiffs informed the directors of the company about the sale and sought to

have the transfer of shares duly registered by the company.

e) That for eight months, the plaintiffs have waited for a response from the directors of the company in vain.

f) That the refusal to register the transfer of shares for 8 months without notice is unreasonable.

g) It is in the interest of justice that this application be granted.

OBJECTION MY LORD

TAKE FURTHER NOTICE that this application is supported by the affidavit of Akello Betty attached hereto.

Given under my hand and the seal of this Honourable court, at Kampala, this …… day of ……

2018

……

DEPUTY REGISTRAR

Drawn and Filed by:

SUI GENERIS & Co. Advocates

P.O Box, 7117, Kampala.

_____

ISAAC CHRISTOPHER LUBOGO

THE REPULIC OF UGANDA

IN THE HIGH OF UGANDA AT KAMPALA (COMMERCIAL DIVISION)

MISCELLANEOUS CAUSE NO**. … OF 2018**

1. AKELLO BETTY

2. MACKMOT JOHN ODONGO…….....PLAINTIFFS

VERSUS

MENDY HOTELS (UGANDA) LIMITED ……DEFENDANT

AFFIDAVIT IN SUPPORT OF MOTION

I**,** Akello Betty of SUI GENERIS & Co. Advocates, P.O Box 0000, Kampala, do hereby state on oath as follows:

1. That I am an adult female Ugandan of sound mind, one of the plaintiffs herein and I swear this affidavit in that capacity

2. That the defendant is a private company limited by shares, duly incorporated under the

Companies Act, with capacity to sue and be sued in its name.

3. That in January, 1999, the company was incorporated and I was one of the original signatories to its Memorandum and Articles of Association.

4. That from that time, I stayed away from the day to day running of the company because I had a full-time job as a police officer with the Uganda Police Force.

5. That upon retirement from the force in 2016, I relocated to Canada where I work as secondary school teacher.

6. That I decided to sell my stake in the Company to my brother, the second plaintiff for a consideration of shs, 11,500,000. (Find attached the receipt marked A)

7. That I duly executed a transfer instrument to that effect, which is hereby attached as annexureB

8. That the second plaintiff approached the company with proof of payment for my shares and the transfer instrument executed by me and requested that the transfer be registered by the company and that he be allowed to get involved in the affairs of the company.

9. That we have waited for a response from the company for eight months in vain despite issuing the directors a number of reminders.

10. That I am informed by my lawyers, which information I believe to be true, that the statutory period for the company to register a transfer of shares or issue a notice of refusal is sixty days and it already lapsed.

11. That the directors of the company have not offered us any substantial reason for refusing to register the transfer of shares.

12. That the second plaintiff and I have suffered great inconvenience resulting from this refusal.

13. That whatever I have stated above is true and correct to the best of my knowledge.

Sworn at Kampala by the said AKELLO BETTY this …….day of ……..2018.

……..

DEPONENT

BEFORE ME

…….

Drawn & Filed by

SUI GENERIS & Co. Advocates

P.O Box 0000, Kampala

COMMISSIONER FOR OATHS

Assuming that the company has decided to consider Mackmot and Akello's request,

Advise the company on

a. How to process the request from Akello and Mackmot

b. The procedure of enforcing its rights against Akello if any

Draft the necessary documents anticipated in 7 above

The best way to do this is through;

FIRST calling for **a board meeting** to approve the transfer. **Articles 24 and 25 of Table A**. Calling for a meeting and this would be conducting a board meeting called by a board of directors.

The Articles of the company provide that Table A would apply. **Section 13 of the Companies Act; (1**) Articles of association may adopt all or any of the regulations contained in **Table A (1) (2)** In the case of a company limited by shares and registered after the commencement of this Act, if articles are not registered or, if articles are registered in so far as the articles do not exclude or modify the regulations contained in Table A, those regulations shall, so far as applicable, be the regulations of the company in the same manner and to the same extent as if they were contained in the duly registered articles.

Table A under article 98 which is to the effect that "The directors may meet together for the dispatch of business, adjourn, and otherwise regulate their meetings, as they think fit. Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes, the chairperson shall have a second or casting vote. A director may, and the secretary on the requisition of a director shall, at any time summon a meeting of the directors. It shall not be necessary to give notice of a meeting of directors to any director for the time being absent from Uganda."

This could be through either a formal or an informal meeting. this is based on the decision in the case of **UK SAFETY GROUP LTD V HEANE [1998] 2 BCLC 208** where it was held that it is not necessary for a board meeting to meet formally in order to transact business. It may be possible for all directors to informally transact in business. Furthermore, the case of **RUNCIMAN VS WALTER RUNCHIMAN PLC [1992] BCLC 1084** stated that although the board's decision was made in an informal manner the directors had acquiescence and accordingly the decision had been validly made. When calling for a board of directors meeting there are a few requirements which must by law be fulfilled and among others include;

PRESENCE OF ALL DIRECTORS EXCEPT THOSE ABROAD

Every director has a right to attend and participate in all meetings of the board of directors. This is because a formally and duly appointed director cannot be excluded from a meeting by other directors as was held in the case of **HAYES VS BRISTOL PLANT HIRE LTD [1957]1 ALL ER 685** and on that basis, he can enforce his right.

Notice

A notice of all meetings must be given to all directors whose whereabouts are known except for those outside Uganda otherwise whatever decisions are made will be invalid. **Section 140 of the Companies Act** provides for the Length of notice for calling meetings and states that for all meetings at least a 21 days' notice in writing will be given before a meeting is conducted and except for insofar as the articles of a company make other provision in that behalf, a meeting of the company other than an adjourned meeting may be called by the twenty-one days' notice in writing.

The notice issued must also comply with some requirements for example;

OBJECTION MY LORD

1. THE ISSUING PERSON MUST HAVE AUTHORITY.

In the case of **AL-AMIN SEATRANS LTD VS OWNERS AND PARTY INTERESTED IN VESSEL MV LOYAL BIRD (1996)1 COMP LJCAL** it was held that notices issued by a secretary when she did not have power and authority to issue them was invalid.

2. FORM

Section 140(2) of the Companies Act is to the effect that every notice issued calling for and notifying persons of a meeting shall be in writing

3. TIME

SECTION 140(1) OF THE COMPANIES'ACT is to the effect that the notice will be for at least 21 days otherwise it will be invalid. this was further discussed in the case of **RE HOMER DISTRICT CONSOLIDATED GOLD MINES LTD EX PARTE SMITH (1888) 39 CH. D 546** that a meeting held after a few hours' notice did not amount to the statutory notice as required by law. Likewise, a letter sent.

On Sunday for a board meeting on Monday was declared inadequate by court in the case of **BENTLY AND STEVENS V JONES [1974] 1 WLR 638.**

The case of **N.V.R NAGAPPACHETTIAR V THE MADRAS RACE CLUB (1949) MLJ 662** discussed the aspect of what amounts to a day and stated that a day means clear day excluding both the date on which the notice for the meeting is served or expected to be served and the date of the meeting. The learned judge further held that the notice should be served at least 25 days before the meeting date to ensure that the 21 days' notice is given to the recipients of the notice.

4. SERVICE OF THE NOTICE

The notice at all times must have been duly served and if for any reason like service on wrong person or wrong time, the meeting is then irregular and any purported decisions taken through that meeting are invalid as was discussed in **RE PORTUGUESE CONSOLIDATED COPPER MINES LIMITED [1889]42 Ch. D 160**

***5.* QUORUM**

Table A Article 99 stated that the quorum necessary for transaction of the business of the

company may be fixed by directors and unless so fixed shall be two**.** the case of **NIDDLE INDUSTRIES INDIA LTD V NIDDLE INDUSTRIES NEWAY HOLDING LTD (1981) 50 COMP CASE 743 (S AND C)** where court held that provisions for quorum are not directory but mandatory and a decision taken by a lesser number than that quorum is void.

it is during this Board of Directors meeting that a decision regarding the request made by Mackmot and Akello would be considered. This decision is through a resolution which would be a board resolution as a board of directors meeting can only make **board resolutions**.

Section 152 of the Companies Act is to the effect that minutes of proceedings of meetings of dire ctors shall be entered in books kept for that purpose.

PROCEDURE FOR TRANSFER;

Under **Section 85 of the Companies Act** states that, it is not lawful for the company to register a transfer of shares in or debentures of the company unless a proper instrument of transfer has been delivered to the company. Therefore, a transferee should have a proper instrument of transfer which he delivers to the company for registration.

Under **Section 88** on the application of the transferor of any share or interest in a company, the company shall enter in its register of members the name of the transferee in the same manner and subject to the same conditions as if the application for the entry were made by the transferee

Upon transfer, the transferee is entitled to a share certificate. According to S. 90, a share certificate is prima facie evidence of title. The company is also required to notify the registrar of companies about the transfer of shares, and the transferee will be liable to pay a stamp duty assessed with regard to the share transfer.

Section 91 of the Companies Act 2012 (1) A company shall, within two months after the date on which a transfer of the shares, is lodged with the company, complete and have ready for delivery the certificates of all shares, transferred, unless the conditions of issue of the shares otherwise provide. Subsection two provides that For the purposes of subsection (1), "transfer" means a transfer duly stamped and otherwise valid and does not include a transfer which the company is for any reason entitled to refuse to register and does not register

In **RE BAHIA AND SAN FRANCISCO RAILWAY COMPANY (1868) LR 3 QB 584,** court held that a share certificate is prima facie evidence of the ownership of the person named thereon as shareholder. The company is estopped from denying as against a bonafide purchaser of the shares that the person named is entitled to the shares referred to.

The fees payable on Stamp duty is 1% of the Total Number of Shares as per Item 62(a) of the Stamps Amendment Act 2016.

The company should also file annual returns to reflect the new shareholding position as per Section 132 of the Companies Act 2012.

Documents Board Resolution Annual returns

Part b

What rights can be enforced and under what procedure

Before registering the transfer of shares, the company can make a call on the shares. The starting point is **Section 21**; Companies Act 2012 which states as follows:

Subject to this Act, the memorandum and articles shall, when registered, bind the company and the members of the company to the same extent as if they had been signed and sealed by each member and contained covenants on the part of each member to observe all the provisions of the memorandum and articles.

This has the effect of establishing the memorandum and articles as a ‘statutory contract’ between the company and its members, and among members inter se the terms of which can be enforced both by the company and the members

Reference may be made to the case of **HICKMAN V. KENT (1950) 1 Ch. D 881**

Justice Ashbury had the following to say: “That the law was clear and could be reduced to 3 propositions;

I That no Article can constitute a contract between the company and a third party;

ii No right merely purporting to be conferred by an article to any person whether a member or not in a capacity other than that of a member for example solicitor, promoter or director can be enforced against the company.

iii Articles regulating the rights and obligations of the members generally as such do create rights and obligations between members and the company”.

Therefore, it is on this premise that a company has rights that can be enforced against Akello. Generally, a share is a unit of capital. The most famous definition of a share is that of **Farwell J in BORLAND'S TRUSTEE V STEEL BROTHERS & CO LTD [1901] 1 Ch 279,** where he states that:

A share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders. A share is not a sum of money ... but is an interest measured by a sum of money and made up of various rights contained in the contract.

According to the facts at hand, shares of 15 in number were issued to Akello each at 2,000,000 shillings which were unpaid. The facts disclose that Akello sold her shares to her brother at 11,500,000 Million which means that out of 15, the number of shares issued to her which totaled up to

30,000000 Million each at 2,000,000 million, the balance of 18,500,000 Million was not paid up. Whenever a Company issues shares then those shares can either be fully paid or partly paid.

“**Fully paid shares**” are those shares for which full issue price has been paid by the shareholder to the Company.

On the other hand, “partly paid shares” are those shares for which the shareholder has paid only part of the issue price of the share. In case of partly paid shares, the Company has the right to demand from the shareholder the remaining payment on the partly paid shares as and when required by it.

“Call on shares” means the demand made by the Company on its shareholders holding partly paid shares to pay part or full unpaid amount on the shares. The board of directors of the Company makes such a call on shares in accordance with terms and conditions of issue of shares and as per articles of association of the Company.

The unpaid amount on partly paid shares is the liability of the shareholders to the Company and the Company has the right to call for payment of such liability as and when deemed fit by the board of directors of the Company. Generally, Companies prefer to collect the full amount of share issue price at the time of issue of shares. However, some companies may give the option to its shareholder to pay the share price in below installments:

- If a shareholder fails to pay the call money as demanded by the Company within the time period provided by the Company, then the Company may forfeit his shares.
- The articles of association of this company have provisions on calling of shares.

CALLS ON SHARES

The Directors may from time to time make calls upon the members in respect of any moneys unpaid on their shares provided that no call shall exceed two fourth of the nominal amount of the share, or be payable less than one month from the last call; and each member shall (subject to receiving at least fourteen days' notice specifying the time or times of payment) pay to the Company at the time or times so specified the amount called on his shares. A Call may be revoked or postponed as the Directors may determine of a sum called in respect of a share is not paid before or on the day appointed for payment thereof, the person from whom the sum is due shall pay interest upon the sum at the rate of eight per centum per annum from the day appointed for the payment thereof to the date of the actual payment, but the Directors shall be at liberty to waive payment of that interest wholly in part.

PROCEDURE TO MAKE A CALL ON SHARES.

A company which intends to make calls on its unpaid shares shall follow the following procedure:

BOARD RESOLUTION

The board of directors shall pass a board resolution to make calls on shares which shall clearly specify the time and place to make payment for a call on shares. A call is deemed to be made when a board resolution is passed in this regard, such call can be paid in installments also if so required.

CALL NOTICE.

The Company should send to each shareholder as mentioned in its register of members a 14 day

"Call notice" specifying the time and place for payment of calls. In the case of **RE NATIONAL BANK OF WALES, TAYLOR, PHILLIPS AND RICKARDS (1897)1 CH 298 AT 306** it was held that where shares have been transferred, the transferor remains liable for calls already made. Therefore, the company should make calls on shares of Akello before they are transferred to

Mackmot.

BOARD RESOLUTION
THE REPUBLIC OF UGANDA BOARD RESOLUTION

AT THE MEETING OF THE DIRECTORS OF..... Ltd Reg. No..... ("THE COMPANY 0R 0RGANISATION") held at Kampala on the ..... of _ 19.....

IT WAS RESOLVED:

1. That the Company admits a one Mackmot as a shareholder in the company having purchased the same form Akello and as such he will be registered on the members register.
2. That a call on shares has been made to shareholders who hold unpaid shares to pay up by 5th January 2019 through the Company's bank account of 147899383799843 Centenary Bank in the names of Mendy Hotels Uganda ltd.

.....Chairman

.....Secretary

.....Date

This document is to be certified by the registrar of companies of the republic of Uganda.

ISAAC CHRISTOPHER LUBOGO

REQUIREMENTS FOR ESTABLISHING A BUSINESS IN UGANDA

The legal system in Uganda is based on common law and customary law. The law applicable in Uganda is:

- Statutory law.
- Common law.
- Customary law.
- Doctrines of equity.

Customary law, however, is only effective to the extent that it does not contravene and is in statutory law.

BUSINESS VEHICLES

What are the main forms of business vehicle used in Uganda?

What are the advantages and disadvantages of each vehicle**?**

SOLE PROPRIETORSHIP

A sole proprietorship is a one-person business entity where an individual registers a business name with the Registrar of Business Names and an application is made for a trading licence with the local authority where the business operates. Note that registration of the business name is not mandatory.

The advantages of sole proprietorships are that:

- They are easy to establish.
- The owner pays personal income tax on the profits of the business.
- The owner is entitled to all the profits of the business.

The disadvantages of a sole proprietorship are that there is:

- Unlimited liability for the proprietor.
- A minimal distinction between the assets and liabilities of the business and the owner.

PARTNERSHIP

A partnership is a business arrangement, involving two or more people, the primary goal of which is making a profit. Assets are owned under the partnership name, but on dissolution they are shared in proportion between the partners according to the agreement dividing the profits, after settling all liabilities of the firm. A partnership is taxed as a firm.

Partnerships are categorized as either general partnerships or limited liability partnerships (LLPs). The liability of at least one of the partners (general partner) of an LLP should be unlimited. LLPs are designed to benefit partners who wish to participate in the business enterprise but not engage in the management of the business. LLPs are only liable to the extent of their contribution. These types of partnerships are traditionally used by professionals such as lawyers and accountants.

THE ADVANTAGES OF PARTNERSHIPS ARE THAT:

- Partners can jointly raise capital for their business.
- In a general partnership, liability (including for debts and obligations) is jointly and severally shared among partners.
- Filing documents are less onerous compared to private or public companies.

THE DISADVANTAGES OF LLPS ARE THAT:

- The partnership is dissolved if one of the partners dies, unless the partners previously agreed to the contrary.
- In a general partnership, the liability of partners is unlimited.

PRIVATE COMPANY

A private company is a business entity that is separate from its owner(s). It can sue and be sued. Liability is limited by shares or by guarantee.

The advantages of private companies are that:

- The company can easily raise capital through borrowing and charging its assets.
- The company can trade in its own name.
- The continuity of the company's existence is usually not affected by individual shareholder ownership.
- The company can own and transfer property.

The disadvantages of private companies are that:

- Growth is limited to maximum number of shareholders.
- There are restrictions on the transfer of shares

PUBLIC COMPANY

A public company is a company permitted to sell its shares to the general public. Its shares may be listed on the stock exchange through an initial public offering (IPO).

A public company has the following advantages:

- Unlimited number of shareholders means unlimited growth potential.

- Shares are freely transferable.

The disadvantages of public companies are that:

- Filing and disclosure filings are onerous.
- Costs associated with meeting regulatory requirements are higher.
- Liability risks are higher for the company and management.

ESTABLISHING A PRESENCE FROM ABROAD

COMMON OPTIONS FOR FOREIGN COMPANIES ESTABLISHING A BUSINESS PRESENCE IN UGANDA?

The most common options for foreign companies wishing to establish a business presence in Uganda is the incorporation of a local company or registering as a branch of a foreign company. Other options include:

- Appointing an agent.
- Appointing a distributor.
- Appointing a franchisee.
- Entering into a joint venture with a local company.

HOW CAN AN OVERSEAS COMPANY TRADE DIRECTLY IN UGANDA?

An overseas company can trade in Uganda by:

- Cross listing on the Uganda Securities Exchange.
- Registering a branch of a foreign company.
- Incorporating a local company.
- Appointing an agent, distributor or franchisee.

REGISTERING A BRANCH OF A FOREIGN COMPANY

An individual seeking to work in Uganda must first obtain the following to legalize his or her stay in Uganda:

- An entry permit/visa.
- Certificate of residence or work permit.

The investor must apply for an investment license from Uganda Investment Authority where applicable.

Investors seeking to register a foreign company must deliver the following to the Registrar of Companies to register the branch within the first 30 days of establishing a place of business:

- Certified copies of the charter, statutes, memorandum and articles of the foreign company.
- List of directors and secretary of the company.
- Name and address of any person(s) resident in Uganda for service of process and any notices.
- Full address of the principal office of the company.

On approval of compliance with the above requirements, the Registrar issues a Certificate of Registration.

A branch of a foreign company must:

- File the list of charges (if any) with the Registry.
- Make annual returns.
- File resolutions with the Registrar of Companies.

Each company is governed by the laws of Uganda and must exhibit in legible characters in every place of business:

- Billheads.
- Letters.
- The name of the company and a statement that it is limited.

Any alteration in the particulars of the company must be filed with the Registrar of Companies. The branch is governed by the laws of Uganda.

INCORPORATING A LOCAL COMPANY

Foreign nationals (alone or with Ugandan nationals) can establish a business by incorporating a local company. In this process, the shareholders of the foreign entity, or the entity itself, subscribe to the memorandum and articles of association of the local company

AGENCY

An overseas company can operate in Uganda by appointing an agent through granting a power of attorney, or by entering into an agency agreement with the agent or local company.

DISTRIBUTOR

An overseas company can trade in Uganda through appointing distributors to distribute its products. The best way is by entering into distributorship agreements with intended distributors in Uganda.

FRANCHISE

An overseas company can trade in Uganda by entering into franchise agreements with intended franchisee(s) within Uganda. The franchisee could be a locally registered company or a foreign company legally registered within Uganda.

FORMALITIES FOR SETTING UP A PARTNERSHIP?

The **Partnerships Act No. 2 of 2010** governs the establishment and regulation of partnerships in Uganda. The formalities of setting up a partnership in Uganda are:

- Two or more persons agree to enter into a business and sign a partnership deed. Persons who collectively enter business in partnership are referred to as a firm under the Partnerships Act.
- The partnership deed must be registered when a firm conducts business under a name other than the true surnames of all individual partners or under the corporate name of all partners that are corporations.
- An application must be made to reserve a business name with the Uganda Registration Services Bureau.

FORMALITIES FOR SETTING UP A JOINT VENTURE?

Joint ventures between a foreign company and a local company are normally established by joint venture agreements. Both co-operative arrangements and joint ventures with unincorporated bodies exist. Joint venture parties that are companies may opt to incorporate a joint venture company and sign shareholders' agreements.

TRUSTS ARE AVAILABLE IN UGANDA.

A trust can be used for a wide variety of personal and commercial purposes. If you are considering a trust as part of your estate plan or business structure, it will be important to understand what a trust is, the duties and powers of trustees, and the rights of beneficiaries.

WHAT IS A TRUST?

A trust is not a legal entity, although it is treated as such for Canadian tax purposes. A trust is simply the word used to describe the relationship created when property is transferred by one person (the "settlor") to another (the "trustee") to hold for the benefit of specified persons or a class of persons (the "beneficiaries").

Subject to tax and other considerations, it may be possible for the settlor and the trustee to be the same person. In some cases, a settlor or trustee might also be a beneficiary of the trust.

HOW IS A TRUST CREATED?

A trust can be created by an individual during his or her life (an "inter vivos trust") or as a consequence of his or her death (a "testamentary trust").

The terms of an inter vivos trust are usually set out in a document signed by the settlor. It will appoint a trustee or trustees and direct how assets are to be held, managed and distributed to or for the benefit of the beneficiaries. An inter vivos trust is created once the beneficiaries and the terms of the trust have been settled by the settlor and the trustee with sufficient certainty, and property has been transferred to the trustee to hold in accordance with the terms of the trust.

A testamentary trust, on the other hand, is created as a consequence of an individual's death, usually pursuant to the Will of the individual or a beneficiary designation made in respect of an insurance policy, a registered retirement savings plan or a registered retirement income fund. A testamentary trust only comes into existence on the death of the individual who made the Will or beneficiary designation.

WHY DO PEOPLE CREATE TRUSTS?

People create trusts for many reasons, including those set out below:

- trusts can provide protection for a minor beneficiary, or for a beneficiary who suffers from a physical or mental disability, has creditor concerns or a substance abuse problem;
- sometimes there is a cross-border component, such as an asset located in a foreign jurisdiction, an anticipated gift or inheritance from a relative who lives abroad, or a beneficiary who plans to leave Canada – these may all be reasons to consider a trust structure;
- a trust may offer tax savings in some circumstances and can be used to eliminate probate fees on the value of the assets transferred to it;
- trusts can be helpful as part of a succession plan for a family business or other legacy asset;
- a trust structure may be preferable to a power of attorney when it comes to incapacity planning; and
- a trust can also provide increased confidentiality in respect of an individual's affairs.

ROLE OF THE TRUSTEE

The trustee will control, administer and distribute the trust assets for the benefit of the beneficiaries in accordance with the terms of the trust and applicable law. Given the extensive powers of a trustee, it is important to choose someone who is trustworthy, but other factors should also be considered, such as:

- the age of the trustee;
- whether the trustee has experience or skills relevant to the role of trustee and the assets under administration;
- where the trustee resides and his or her citizenship status;
- the trustee's relationship to the beneficiaries; and
- whether the trustee's personal or financial circumstances might give rise to a conflict of interest that could interfere with the exercise of the trustee's duties.

DUTIES OF A TRUSTEE

The law imposes a number of responsibilities upon trustees, including the duty to:

- act personally in exercising certain trustee powers;

- avoid conflicts of interest and act exclusively for the benefit of the beneficiaries;
- maintain an appropriate level of skill and prudence when carrying out trustee duties and exercising the discretionary powers conferred upon the trustee by the terms of the trust and applicable law;
- act impartially as between the beneficiaries, also known as the duty to maintain an even hand; and
- maintain complete and proper accounting records in respect of the administration of the trust, including copies of all supporting cheques, invoices and other voucher material.

HOW IS A TRUSTEE COMPENSATED?

Unless the Will or trust document provides otherwise, the compensation payable to a trustee will be determined in accordance with applicable law. A trustee who wishes to be paid compensation must obtain approval of the amounts claimed from the beneficiaries who have an interest in the matter. If approval is not forthcoming, a trustee may apply to the Court to have the compensation approved.

Sometimes a Will or trust document will specify a formula for the calculation of compensation. For example, it might direct that a lump sum be paid to the trustee annually, or that the trustee be paid for time spent based on a specified hourly rate.

Professional trustees, such as trust companies, may require that a fee agreement setting the terms of their compensation be signed and incorporated into the Will or trust document.

Compensation will be taxed in a trustee's hands as income, and where the Will or trust document appoints more than one trustee, it will be shared between them. Sometimes it is shared equally. In other cases, particularly where one trustee assumes most of the work and responsibility associated with the trust, it may be divided on some other basis.

FORMING A PRIVATE COMPANY

How is a private limited liability company or equivalent corporate vehicle most commonly used by foreign companies to establish a business in Uganda formed**?**

REGULATORY FRAMEWORK

Legislation. The central pieces of legislation governing the formation, structure, governance and overall regulation of private companies are:

- Companies Act 2012 (No. 1 of 2012).
- Investment Code Act 1991.
- Uganda Revenue Authority Act 1991.
- Income tax Act (Cap 340).
- VAT Act (Cap 349).
- Land Act.

- Stamp Duty Act 1915 (Chapter 342).
- Uganda Registration Services Bureau Act (Chapter 210).

RELEVANT REGULATORY BODIES

The relevant regulatory bodies include:

- Uganda Registration Services Bureau (URSB): company registration.
- Uganda Revenue Authority (URA): taxation issues.
- National Environmental Management Authority (NEMA): environmental compliance.
- Directorate of Citizenship and Immigration Control (DCIC): work permits and visas.
- Ministry of Lands, Housing & Urban Development: land ownership verification.
- Uganda Investment Authority (UIA): investment license

TAILOR-MADE OR SHELF COMPANY

Shelf companies are not specifically provided for in the Companies Act. Companies are generally incorporated on a tailor-made basis. However, a company can be incorporated while it remains inactive but must file the necessary annual returns. It can then be purchased by way of transfer of shares and used to start business immediately.

FORMATION PROCESS

Documentation. To incorporate a private company the following documents must be filed with the Uganda Registration Services Bureau (URSB), together with the registration fees:

- Application for reservation of name.
- Form of registration of a company. Company Form A1 for nominal share capital.
- Company Form A2 for declaration of compliance with requirements of the Companies Act. The form must be witnessed by a commissioner of oaths or notary public.
- Company Form 7 for particulars of directors and secretaries.
- Company Form A.9 for notice of situation of registered office and the registered postal address.
- Form s18 for particulars of shareholders.
- Memorandum and articles of association.

Public companies must follow the same formation process but must additionally:

- File a prospectus or statement in lieu of prospectus which must then be cleared by Uganda's Capital Markets Authority (CMA).
- Adopt the code of Corporate Governance in accordance with Table F of the Companies Act.

Foreign companies must file the following documents with the URSB, together with the registration fees:

- Certified copies of the memorandum and articles of association or any other document certified by the registrar of companies in the country of origin.
- Certified copies of certificate of incorporation.
- Forms A19-A22.
- List of charges, if any.

The documents are paper filed and a registration certificate is issued as conclusive evidence for registration within three to seven days from filing.

Fees. General fees for new company incorporation are assessed at:

- Name reservation fees UGX20,000.
- Application for registration UGX20,000.
- Registration fees of UGX50,000 for companies of share capital below UGX5 million and 1% of share capital for companies of share capital above UGX5 million.
- Stamp duty 0.5% of incorporated share capital.

Fees for foreign companies consist of:

- Registration of a new company constitution or instrument: US$250 payable at the Uganda Revenue Authority (URA) exchange rate.
- Registration fees for company forms and resolutions (first three copies): US$55 payable at the prevalent URA exchange rate.
- Registration fees for company forms and resolutions (every copy after first three copies): US$10 payable at the prevailing URA exchange rate.
- Certification fees (first three copies): UGX20,000.
- Certification fees (every copy after first three copies): UGX10,000.

COMPANY CONSTITUTION

The main company documents are the memorandum and articles of association. Separate shareholder agreements can be used in addition to the constitutional documents.

The memorandum must specifically provide:

- The name of the company with "limited" as the last word of the company name.
- That the registered office is situated in Uganda.
- The objects of the company, and that the liability of members is limited. A public company must adopt the code of corporate governance in Table F of the Companies Act.

There are model articles under the Table A of the Act which may be adopted.

FINANCIAL REPORTING

WHAT FINANCIAL REPORTS MUST THE COMPANY SUBMIT EACH YEAR?

Ugandan law requires companies to file the following documents on an annual basis:

- Annual returns with balance sheet of true and fair view of the affairs of the company.
- Profit and loss account.
- Director's report showing the state of company affairs and dividends (if any) recommended.
- Auditors report on the financial statement of the company.

TRADING DISCLOSURE

What are the statutory trading disclosure and publication requirements for private companies?

A private company must display the name of the company with the last word as "limited". Private companies must also maintain a register of members at the registered office of the company. The register must display the names and postal addresses of the members. In the cases where a company has share capital, a statement of shares held by each member must be provided. Private companies must also disclose dates at which each person was entered into the register as a member and when each person ceased to be a member. Generally, private companies are not under any obligations to publish the status of businesses.

How do companies execute contracts or deeds?

Companies execute contracts or deeds by affixing the company seal on documents on the signature provision. The sealing must be witnessed by one or more directors of the company. Deeds are signed before a notary public or the Commissioner of Oaths.

Membership

Are there any restrictions on the minimum and maximum number of members?

Private companies must have a minimum of one member and a maximum of 100 members. Public companies must also have a minimum of two members but there are no restrictions on the maximum number of members.

The Companies Act 2012 (No. 1 of 2012) provides for single-member companies. Single-member companies must nominate two individuals. One of those individuals becomes the nominee director in the event the single member dies. The other acts as an alternate nominee director whenever the nominee is unavailable.

Minimum capital requirements

Is there a minimum investment amount or minimum share capital requirement for company formation?

There is no minimum share capital requirement for company formation under the Companies Act 2012 (No. 1 of 2012).

However, a company may need to apply for a licence to engage in certain business activities. A licensing or regulatory authority makes regulations on the minimum investment a company must have before a licence is granted.

Are there restrictions on the transfer of shares in private companies?

A private company's articles of incorporation must restrict the transfer of its shares and prohibit any invitation to the public to subscribe for its shares.

No restrictions on pre-emption rights, intra-group or family transfers are provided for under the Companies Act 2012 (No. 1 of 2012), however, restrictions can be made by the company through ordinary resolution.

SHAREHOLDERS AND VOTING RIGHTS

What protections are there for minority shareholders under local law? Can additional protections be given?

The Companies Act 2012 (No. 1 of 2012) provides protection for minority shareholders. For example, a company may become a party to an oppression case. Alternatively, a member of a company can complains to the Registrar (Uganda Registration Services Bureau (URSB)) and petition an order under section 247 of the Companies Act that the affairs of the company are being conducted in a manner that is oppressive to themselves or to other members.

The Companies Act allows for an inspector to investigate and make a report on the matter. The Companies Act further allows the Registrar to forward copies of the investigation report to the Attorney General and Director of Public Prosecutions if it appears to them that any person has in relation to the company under investigation committed an offence for which he is criminally liable.

Under the Companies Act, a member of the company can apply to the court by petition for an order on the ground that the company's affairs have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or to some part of its membership. Where the court is satisfied that a petition is well founded, it can make an order giving relief in respect of the matter complained of as it sees fit.

Are there any statutory restrictions on quorum or voting requirements at shareholder meetings? Do quorum or voting rights need to be proportionate to shareholdings?

Two members must be personally present to form a company quorum.

Where the company does not provide for special or preferential voting rights, every member of a company has one vote per share owned or each 20 currency points of stock individually held. In any other case, every member has one vote. A member who is unable to attend can appoint a proxy.

Are specific voting majorities required by law for any corporate actions (for example, increasing share capital, changing the company's constitution, appointing and removing directors, and so on)?

Any alterations to the objects under the memorandum must be by a resolution passed by holders of not less than 15% of nominal value of company's issued share capital, or if not limited by shares by 15% of company's members.

All business at an extraordinary meeting except for declaration of dividends, consideration of reports of auditors and directors, election and removal of directors and remuneration of auditors must be by special resolution. A resolution is special if passed by majority of at least three-quarters of members entitled to vote.

Reducing share capital must be made by special resolution, while increasing it is by ordinary resolution in a general meeting.

Can voting majorities required by law be disapplied to protect a minority shareholder (for example, through class rights or weighted voting)?

Voting majorities cannot be disapplied but minority shareholders are protected

SECTORAL RESTRICTIONS

What are the conditions or restrictions on establishing a business in specific industry sectors? Are there industry sectors in which it is not permitted to establish a business?

Certain sectors in Uganda are regulated and restrictions placed on foreign ownership and control. For example, there are restrictions on crop production and animal production under the Investment Code Act.

There is also a limitation on land ownership under the Land Act 1998 only on certain tenure systems. Under the Land Act, a foreign person can only acquire a leasehold interest in land.

Are there any restrictions on foreign shareholders?

There are no restrictions on foreign shareholders investing. However, foreign shareholders must have a valid work permit to reside in Uganda to manage their investment.

Foreign shareholders have different tax rules from local shareholders under the Uganda Income Tax Act (Chapter 340). Where an investment constitutes more than 50% of the shares of a company belonging to a foreigner, the company becomes a "foreign company" under the Investment Code Act and the Land Act 1998, for purposes of limitations on certain tenures.

examples of such limitations include:

- Limitation on foreigners to hold only leasehold tenure in land.
- Limitation on foreign investors to carry on the business of crop production, animal production or acquisition of lease land for the same.

Are there any exchange control or currency regulations?

The Bank of Uganda has oversight authority and administers exchange control rules under the Exchange Control Act (Chapter 171). There are no restrictions on residents and non-residents to remove capital from or bring capital into Uganda.

Are there restrictions on foreign ownership or occupation of real estate, or on foreign guarantees or security for ownership or occupation?

Both foreign companies and foreign persons are prohibited from acquiring freehold and Mailo title (a land tenure system similar to freehold in Uganda) and can only acquire leasehold titles of up to 99 years under the Land Act.

DIRECTORS

Are there any general restrictions or requirements on the appointment of directors?

Directors of companies in Uganda must:

- Be at least 18 years of age.
- Not have been previously disqualified as a director of any company.
- Not be an undischarged bankrupt, unless acting with the leave of the court. Undischarged bankrupts acting without leave commit an offence, punishable by imprisonment or fine.

Where it appears in the course of winding up a company that a person has committed any fraud in relation to a company, the court can make an order that the person must not become a director without the leave of the court.

There are no restrictions on nationality, residence, or provisions for gender quotas.

BOARD COMPOSITION

What are the legal requirements for the composition of a company's board of directors?

Structure

A public company must adopt the Code of Corporate Governance in accordance with Table F of the Companies Act 2012 (No. 1 of 2012), which provides a unitary and balanced board of executive and non-executive directors.

The non-executive directors must make up the majority of directors. A sufficient number of non-executive directors must be independent (that is, not nominated by a major shareholder).

Private companies are not required to adopt Table F.

NUMBER OF DIRECTORS OR MEMBERS

Under the Companies Act, the private company must have at least one director, and a public company must have at least two. The Company’s Act is silent on the maximum number of directors permitted.

EMPLOYEES' REPRESENTATION

There is no legal requirement for employees to be represented on the board of a company.

REREGISTERING AS A PUBLIC COMPANY

What are the requirements for a business to reregister as a public company?

Membership?

The following procedures can be pursued for a business wanting to register as a public company:

- Pass a special resolution to be re-registered as a public company.
- Make necessary alterations to the articles and memorandum.
- Make an application in the prescribed form and attach:
    - a copy of new articles and memorandum;
    - a written statement of opinion of auditors on the balance sheet and audited financial statements for a period of the last five years complying with international financial standards for an accounting period ending not more than six months prior to the proposed date of offer of the shares to the public;
    - an unqualified auditor report; and
    - a statutory declaration, as prescribed under the law.

The company must prepare and submit a prospectus to the Registrar of Companies within 14 days of alteration of its articles of association. It must then seek approval of its offer for shares to the public from the Capital Markets Authority (CMA). Once the offer is approved, the company registers the prospectus with the Registrar of Companies. The company must apply to the Uganda Securities Exchange (USE) for listing of its shares on the stock exchange.

SHARE CAPITAL

The issuer of shares to the public must have a minimum authorized, issued and fully paid-up share capital of 50,000 currency points and net assets of 100,000 currency points before the public offering of shares. A currency point is equivalent to UGX20,000.

For a listing on the Main Investment Market Segment, immediately following the public shares offering, at least 20% of the shares must be held by at least 1,000 shareholders.

WHAT MAIN TAXES ARE BUSINESSES SUBJECT TO IN YOUR JURISDICTION?

Businesses are subject to the following taxes in Uganda:

- Value added tax (VAT).
- Income tax, pay as you earn (PAYE) (on employee income) and corporation tax.
- Capital gains tax.
- Withholding tax.

WHAT ARE THE CIRCUMSTANCES UNDER WHICH A BUSINESS BECOMES LIABLE TO PAY TAX IN YOUR JURISDICTION?

A business is liable to pay tax when income is earned or sourced in Uganda.

Tax resident

A corporate entity is a tax resident for a year of income if that entity has:

- Been incorporated under the laws of Uganda.
- Management and control exercised in Uganda at any time during the year of income.

A company is also resident when it undertakes the majority of its operations in Uganda during the year of income.

Non-tax resident

A non-tax resident business becomes liable to pay tax in Uganda when its gross income is derived from sources in Uganda.

What is the tax position when profits are remitted abroad?

Uganda is a liberal economy. Profits can be remitted if income has been taxed.

What thin-capitalization rules and transfer pricing rules apply?

Thin-capitalization rules apply to foreign-controlled resident companies (that is, companies where more than 50% of their ownership is held by a non-resident person) which are not financial institutions. Where those companies have a foreign debt-to-equity ratio in excess of two-to-one at any time during the income tax year, they are not allowed to deduct the interest paid on that part of the debt that exceeds the ratio.

Grants and tax incentives

Are grants or tax incentives available for companies establishing a business in your jurisdiction?

Companies establishing business in Uganda must acquire an investment license to benefit from available incentives. The incentive regime for private investors includes:

- A uniform corporation tax rate of 30%.
- Duty draw back facility for exporters.
- VAT deferral on importation of plant and machinery.

The Uganda Investment Authority (UIA) will conduct an appraisal of the capacity of the business to contribute towards:

- Using local materials, supplies and services.
- Creating employment opportunities in Uganda.
- Introducing new or upgraded technology.
- Contributing to local or regional socioeconomic development.

- Any other objectives that the UIA considers relevant.

EMPLOYMENT

What are the main laws regulating employment relationships?

The main laws regulating employment relationships are:

- **The Constitution of the Republic of Uganda 1995.** Parliament is required under the Constitution to enact laws to provide for the rights of persons to:
    - ✓ work under satisfactory, safe and healthy conditions;
    - ✓ ensure equal payment for equal work without discrimination; and
    - ✓ ensure that every worker is accorded rest, reasonable working hours and periods of holidays with pay, as well as remuneration for public holidays.
- **Employment Act 2006 (No. 6 of 2006).** Employment relations in Uganda are primarily governed by this statute.
- **Workers' Compensation Act 2000 (Chapter 225).** This statute entitles employees to automatic compensation for any personal injury from an accident arising out of and in the course of their employment. It further details that, for an injury that leads to death, the employer must pay compensation equivalent to an employee's monthly pay multiplied by 60.
- **Occupational Safety and Health Act 2006 (No. 9 of 2006).** The Act applies to health and safety measures for every workplace or working environment as defined in section 2 of the Act. The Act extends to both private and public sector employers. but excludes men and officers of the armed forces.
- **Labour Unions Act 2006 (Act No. 7 of 2006).** This statute introduced a new array of rights for employees, including rights to:
    - organize themselves into labour unions and participate in their management;
    - collective bargaining;
    - engage in other lawful activities for the purpose of collective bargaining or any other mutual aid practice; and
    - withdraw their labour and take industrial action.
- **Labour Disputes (Arbitration and Settlement) Act 2006 (Act No. 8 of 2006).** This Act provides ways to resolve disputes involving workers, including:
    - the establishment of the Industrial Court, which is mandated to arbitrate on labour disputes referred to it under the Act and to adjudicate on questions of law and fact arising from references to the Industrial Court by any other law;
    - other dispute resolution mechanisms, such as references to the labour officer or a board of inquiry.

- **Minimum Wages Advisory Boards and Wages Councils Act 1957 (Chapter 164).** This Act establishes minimum wages advisory boards and wage councils. It also provides for the regulation of the remuneration and conditions of employment of employees.
- **Employment (Recruitment of Ugandan Migrant Workers Abroad) Regulations No. 62 of 2005.** The main objectives of these regulations are to (*section 2*):
    - promote full employment and equality of employment opportunities for all;
    - uphold the dignity and rights of Ugandan migrant workers;
    - allow deployment of Ugandans to countries which have existing labour and social laws or are signatories to international agreements protecting the rights of migrants;
    - protect every Ugandan desiring to work abroad by securing the best possible terms and conditions of employment; and
    - provide a mechanism for issuing licences to recruitment agencies.

What prior approvals (for example, work permits, visas, and/or residency permits) do foreign nationals require to work in your jurisdiction?

2. Work permits

All foreign nationals intending to work in Uganda must ensure that they are in possession of the relevant work permit. The requirements for the different categories or classes of work permits are:

- **Class A (Government and Diplomatic Service).** Applicants must be persons contracted for service in the Government of Uganda or diplomats accredited for service in Uganda.
- **Class A2 (government contractors).** Applicants must be persons on Government contracts, including persons serving in Government tertiary institutions (that is, institutions recognised by the Uganda National Council for Higher Education).
- **Class B (investment in agriculture)**. Applicants must be persons intending to invest in the business of agriculture or animal husbandry.
- **Class C (mining).** Applicants must be persons intending to invest in the business of prospecting for minerals or mining in Uganda.
- **Class D (business and trade).** Applicants must be persons intending to carry on the business or trade in Uganda.
- **Class E (manufacturers).** Applicants must be persons intending to engage in manufacturing business in Uganda.
- **Class F (professionals).** Applicants must be members of prescribed professionals intending to practice that profession in Uganda.
- **Class G1 (volunteers, non-governmental organisation (NGO) workers, and missionaries).**

- **Class G2 (employees).** Applicants must be persons intending to work as employees whether for gain or not in Uganda. Applicants under this category can only enter Uganda after grant and payment of their work permits.
- **Certificate of residence.**
- **Certificate of marriage.**

East African Community (EAC) Common Market Protocol

The EAC comprises the republics of Burundi, Kenya, Rwanda, the United Republic of Tanzania, and Uganda. Categories of workers from those countries allowed to work in Uganda under the EAC Common Market Protocol include chairmen of companies, civil engineers, aircraft and ship controllers and technicians. EAC nationals intending to work in Uganda under this category must:

- Complete a work permit form and fulfil requirements under the specific category of work permit sought (see above, **WORK PERMITS)**.
- Where they obtain work of more than 90 days, apply for work permits within 15 days from the date of entering the country. A special pass will be issued to EAC nationals, pending issuance of work permits.
- Where they obtain work 90 days or less, seek a special pass.
- Where they change employment, notify immigration within 15 days of change of employment and apply for new work permits.
- Where they cease employment for which a work permit was issued, notify immigration within 15 days of cessation of employment and apply for a pass to stay in Uganda or leave the country.

Employers must provide immigration with an annual return specifying EAC workers in their establishment.

PROPOSALS FOR REFORM

Are there any impending developments or proposals for reform?

Proposals for reform in immigration control have been discussed but not yet approved.

Various parties in Uganda have recently been discussing proposals to ease doing business in Uganda.

THE REGULATORY AUTHORITIES

THE UGANDA REGISTRATION SERVICES BUREAU (URSB)

Main activities. USRB is an autonomous, statutory body established by Chapter 210, Laws of Uganda 1998. It is responsible for the following:

- Business registration, including registration of companies and business names, partnerships, documents, debentures and transfer of chattels.
- Official receiver in liquidation of companies and bankruptcy matters.
- IP rights, including industrial designs, trademarks, service marks, and copyright and neighboring rights.
- Civil registration, including births, deaths, adoption orders granted by the courts and civil marriages.
- Collection of non-tax revenue.

UGANDA INVESTMENT AUTHORITY (UIA)

Main activities. The UIA was set up by the Investment Code Act with the aim of promoting and facilitating private sector investment in Uganda. The role of the UIA is to:

- Provide first-hand information on investment opportunities in Uganda.
- Issue investment licences.
- Assist in securing other licences and secondary approvals for investors.
- Help investors to implement their projects through assistance in locating relevant project support services.
- Provide assistance in the acquisition of industrial land.
- Help to obtain work permits and special passes for investors and their expatriate staff.
- Arrange contracts for potential investors and organise itineraries for visiting foreign missions in the country.
- Assist investors in seeking joint venture partners and funding.
- Review and make policy recommendations to Government about investment.

UGANDA REVENUE AUTHORITY (URA)

Main activities. The URA is a quasi-autonomous body that was established by the Uganda Revenue Authority Act 1991 as a central body for the assessment and collection of taxes and specified government revenue. It is responsible for administration and enforcement of laws relating to revenue and related matters.

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY (NEMA)

Main activities. NEMA is an autonomous institution established by the National Environment Management Act (Chapter 153) that co-ordinates, monitors, regulates and supervises all matters related to the environment in Uganda. It is mandated to create, establish and maintain an efficient mechanism for sustainable environmental and natural resources management at the national, district and community levels.

DIRECTORATE OF CITIZENSHIP AND IMMIGRATION CONTROL (DCIC)

Main activities. This is a public service institution under the Ministry of Internal Affairs which is responsible for managing migration to and from Uganda. All foreign nationals intending to work in Uganda must ensure that they are in possession of the relevant work permit. The details of the different categories or classes of work permit are available on the website.

NON-PROFIT ENTITIES IN UGANDA

Types of Organizations Ugandan law provides for the establishment of a variety of not-for-profit organizations (NPOs), and the country is host to a number of national, regional, and international organizations. NPOs interacting with foreign grant makers are most commonly constituted as:

A. non-governmental organizations (NGOs);
B. Trusts; and
C. Foundations.

NGOs are primarily governed by the Non-Governmental Organisations Act (2016) ("NGO Act"). This Act repealed the Non-Governmental Organisations Registration Act (1989) ("NGO Registration Act") and the Non-Governmental Organisations Registration (Amendment) Act (2006) ("NGO Registration (Amendment) Act"). The NGO Act defines an "organization" as "a legally constituted non-governmental organization…which may be a private voluntary grouping of individuals or associations established to provide voluntary services to the community or any part, but not for profit or commercial purposes" (NGO Act Section 3).

Trusts are covered by the Trustees Act Chapter 164 (1954) and the Trustees Incorporation Act Chapter 165 (1939). Foundations can be registered either under the Trustees Incorporation Act or as companies limited by guarantee under the Companies Act Chapter 110.

Tax Laws Uganda's Income Tax Act establishes a category of exempt organizations which includes those that are of a religious, charitable, educational, or public character. Qualifying organizations are exempt from tax on almost all categories of income. Individuals and legal entities are eligible for tax deductions for charitable contributions. Ugandan law subjects' certain sales of goods and services to VAT, with a fairly broad range of exempt activities. Foreign grants are exempt from VAT.

APPLICABLE LAWS

- Constitution of the Republic of Uganda (1995), as amended by Act 11 of 2005 and Act 21 of 2006 [3]
- Non-Governmental Organizations Act (2016)
- The Anti-Money Laundering Act (2013)
- The Non-Governmental Organizations Regulations (2017)
- The Companies Act (2012)
- The Human Rights (Enforcement) Act (2019)

- The Trustees Act, Chapter 164 (1954)
- The Trustees Incorporation Act, Chapter 165 (1939)
- Income Tax Act, Chapter 340 (1997), as amended by Act 10 of 2007
- Value Added Tax Act, Chapter 349 (1997), as amended by Act 12 of 2006
- The Value Added Tax (Amendment) Act (2005)
- The Value Added Tax (Amendment) Act (2015)
- East African Community Customs Management (EACCM) Act (2004)
- The Advocates (Legal Aid to Indigent Persons) Regulations, SI 12 (2007)
- Public Order Management Act (2013)

RELEVANT LEGAL FORMS

General Legal Forms Ugandan law provides for several types of not-for-profit organizations (NPOs), including NGOs, trusts, and foundations, grant makers, include: community-based organizations, cooperative societies, societies, communal land associations, political parties, religious entities, and trade unions. The NGO Act distinguishes between foreign, indigenous, and international organizations. An indigenous organization is wholly-controlled by Ugandan citizens. A foreign organization is one that does not have original incorporation in any country, is partially or wholly-controlled by citizens of other countries not among the Partner States of the East African Community, and is operating in Uganda under the authority of a permit issued by the National Bureau of Non-Governmental Organizations (hereinafter "Bureau").

An international organization is an organization that has its original incorporation in a country other than a Partner State of the East African Community, is partially or wholly-controlled by citizens of one or more countries other than those of the Partner States of the East African Community, and is operating in Uganda under the authority of a permit issued by the Bureau (NGO Act Section 3).

New regulations for the NGO Act were issued in 2017. Under the regulations – the Non-Governmental Organizations Regulations (2017) ("NGO Registration Regulations") – the registration application for a local NGO requires a fee of 100,000 Ugandan Shillings (approximately $28), while the application of a foreign company requires a fee of 520,000 Ugandan shillings (approximately $144) (NGO Registration Regulations (2017) Section 2).

The NGO Act (2016) defines an organization as "a legally constituted non-governmental organization…which may be a private voluntary grouping of individuals or associations established to provide voluntary services to the community or any part, but not for profit or commercial purposes" (NGO Act Section 3).

NGOs must register with the National Bureau of Non-Governmental Organizations (NGO Act Section 29(1)). Certain types of NGOs may be required to undertake supplementary registration. For

instance, NGOs that primarily provide legal aid must register with the Law Council (Advocates (Legal Aid to Indigent Persons) Regulations (2007) Section 4).

Section 6 of the Regulations requires Non-profit Organizations(NPOs) that provide legal aid to register as legal aid service providers with the Law Council. Trusts and Foundations. The Trustees Act and the Trustees Incorporation Act govern trusts and foundations. Trusts may be established by any person or association for any "religious, educational, literary, scientific, social or charitable purpose" upon issuance of a certificate of registration by the Minister of Lands, Housing and Urban Development (Trustees Incorporation Act **Section 1(1)**). Trusts and foundations are established to provide grants and, in some cases, loan financing at a more affordable rate to NGOs, community-based organizations, and private organizations in support of their goals and objectives.

PUBLIC BENEFIT STATUS

The NGO Act includes in its definition of "organizations" those that provide "voluntary services to the community or any part" (NGO Act Section 3). The Act, however, does not define the term "voluntary services." Nor does it otherwise confer a special status on voluntary or public benefit organizations. The Trustees Incorporation Act also does not define "charitable purpose" as the term is used in the section on establishing a trust. Notably, however, the Income Tax Act provides for an "exempt organization" status, for those organizations, institutions, or irrevocable trusts that a) qualify as religious, charitable, or educational institutions of a public character, and b) have been issued a written ruling by the Commissioner stating that they are an exempt organization (Income Tax Act Section 2(bb)).

CHARITABLE ORGANIZATIONS established under the Companies Act do not benefit from any tax exemptions. IV. Specific Questions Regarding Local Law A. Inurement Common law practice dictates that neither the income nor assets of a not-for-profit organization can be distributed to employees, directors, founders, or any other person other than for the fulfillment of the organization's statutory purposes. (Reasonable compensation for services rendered in the course of fulfilling the activities of an organization is allowed.)

According to local experts, as a matter of common law practice, this prohibition extends to NGOs, trusts, and foundations. An organization, member, or employee of the organization must not engage in profitable activities for personal gain. According to local experts, as a matter of common law practice, this expectation extends to all NPOs, including trusts and foundations. B. Proprietary Interest NGOs possess legal personality, so property is vested in the organization as a legal entity.

There are no express legal provisions that allow donors to retrieve donated property or determine the destination of their contributed assets outside applicable contract obligations. The use of donor-recipient contracts is common in Uganda, but a donor cannot enter into a contract with an organization that enables the donor to recoup his or her donation if the organization dissolves. According to local experts, as a matter of common law practice, this prohibition extends to trusts and foundations as well.

DISSOLUTION

Ugandan law does not provide for the distribution of assets upon liquidation of anon-profit Organizations(NPO). Rather, the law requires the constitution of each organization to establish procedures for the disposition of the organization's assets upon dissolution (NGO Act Section 49(1)).

Organizations that have made a resolution for voluntary dissolution must develop and submit to the NGO Bureau and to the official receiver a statement of their affairs, showing particulars of assets, liabilities, names, residence, and occupations of the creditors and the securities held by them (NGO Act Section 49(6).

According to local experts, the general practice is that upon dissolution and winding-up of an organization, its debts and liabilities are settled first and the remaining property is distributed to other organizations with similar aims and objectives. The law prohibits the distribution of assets among members.

ACTIVITIES

General Objective V of the Constitution on National Objective and Directive Principles provides that: (i) The State shall guarantee and respect institutions which are charged by the State with responsibility for protecting and promoting human rights by providing them with adequate resources to function effectively. (ii) The State shall guarantee and respect the independence of non-governmental organizations that promote human rights. At the same time, the NGO Act allows the Government of Uganda to exercise considerable control over the operation of NGOs. An NGO is prohibited from operating in Uganda unless it has a valid permit issued by the Bureau (NGO Act Section 31(1)). Applications for a permit are to include "(a) the operations of the organization; (b) the areas where the organization may carry out its activities; (c) staffing of the organization; (d) geographical area of coverage of the organization; (e) location of the organization's headquarters; and (f) date of expiry of the previous permit." (NGO Act Section 31(5)). Moreover, the NGO Act requires an NGO to: (a) not carry out activities in any part of the country unless it has received the approval of the District NGO Monitoring Committee (DNMC) and local government of that area and has signed a memorandum of understanding with the local government to that effect; (b) not extend its operations to any new area beyond the area it is permitted to operate in unless it has received a recommendation from the Bureau through the DNMC of that area; (c) co-operate with local councils in the area of its operation and relevant DNMC and Sub-county NGO Monitoring Committee (SNMC); (d) not engage in any act which is prejudicial to the security and laws of Uganda; (e) restrict its operations to the area of Uganda in which it is permitted to operate; (f) not engage in any act which is prejudicial to the interests of Uganda and the dignity of the people of Uganda; (g) be non-partisan and not engage in fundraising or campaigning to support or oppose any political party or candidate for an appointive office or elective political office, nor propose or register a candidate for elective political office; and (h) have a memorandum of understanding with its donors, sponsors, affiliates, local and foreigner partners, if any, specifying the terms and conditions of ownership, employment, resources mobilized for the organization and any other relevant matter (Section 44).

ECONOMIC ACTIVITIES

Non-profit Organizations (NPOs) in Uganda may not pursue economic activities as their sole purpose. The Income Tax Act, Chapter 340, Section 2(f) provides guidance on the types of economic activities that exempt organizations may engage in without becoming liable for income tax payments. The Income Tax Act provides that income other than property income or business income not related to the functions constituting the basis for an organization's existence will be subject to tax.

POLITICAL ACTIVITIES

The law does not impose a limit on the resources of an organization or share of its budget that can be devoted to lobbying or other legislative activities. As for "political" activities, Ugandan NGOs are

not permitted to belong to any political group. The NGO Act requires an NGO to be non-partisan and not engage in fundraising or campaigning to support or oppose any political party or candidate for an appointive office or elective political office, nor propose or register a candidate for elective political office (Section 44(g)).

NGOs can actively participate in the election process by conducting educational seminars on current topics of political concern, however, including understanding the platform of various candidates. Moreover, organizations are allowed to engage in monitoring and observing the electoral process, documenting election irregularities, cooperating with the Electoral Commission, and proposing improvements to the process of elections. In the past, organizations have also supported candidates in their bids to challenge election results.

DISCRIMINATION The Constitution of the Republic of Uganda prohibits discrimination in all spheres of political, social, and cultural life, as well as based on sex, race, color, tribe, origin, birth, social or economic standing, or disability (Constitution Article 21). In addition, the Constitution includes National Objectives and Directive Principles of State Policy, which provide that "The State shall take appropriate measures to afford every citizen equal opportunity to attain the highest educational standard possible" (Constitution Objective 18). These provisions bind all persons, including educational institutions.

Control of Organization Ugandan law does not restrict other organizations or persons from controlling a Ugandan NPO. A not-for-profit entity might establish an NPO and continue to control or own it. Likewise, a Ugandan NPO could be controlled by a foreign grantor charity.

FOREIGN GRANTS the NGO Act requires an organization to "submit to the Bureau annual returns and a report of the audited books of accounts by a certified auditor" (Section 39(3) (a)). Further, an organization must "declare and submit to the district technical planning committee, the DNMC [District Non-Governmental Organizations Monitoring Committee] and SNMC [Sub county Non-Governmental Organizations Monitoring Committee] of the area in which it operates, estimates of its income and expenditure, budget, work plan, information on funds received, and the sources of funds" (NGO Act Section 39(3)(b)).

TAX LAWS

Tax Exemption Uganda's Income Tax Act provides that an organization is exempt from paying income tax if it falls within the definition of "exempt organization" under Section 2(bb) of the Income Tax Act and has been issued a formal ruling from the Tax Commissioner qualifying it as an exempt organization. The Income Tax Act defines an exempt organization as a company, institution, or irrevocable trust that is: 1. An amateur sporting association; 2. A religious, charitable, or educational institution of a public character; or 3. A trade union, employees' association, an association of employers registered under any law of Uganda, or an association established for the purpose of promoting farming, mining, tourism, manufacturing, or commerce and industry in Uganda. All income of an exempt organization is exempt from income tax, with the exception of property income received by the organization. Rental income of immovable property, however, may be also exempt if it is used by the lessee exclusively for the activities of the organization specified in the Act. In addition, business income received by an NGO that is not related to the function constituting the basis of the organization's existence is subject to tax (Income Tax Act Section 21(f)). Individuals and legal entities are eligible for tax deductions for charitable contributions to a tax-exempt organization listed in Section 2(bb), (a), and (b) of the Income Tax Act. An individual may claim as a deduction up to 5

percent of that individual's taxable income for the year in which the gift is made. B. Value Added Tax The standard VAT rate is 18 percent (Value Added Tax (Amendment) Act (2005) Section 3). Foreign grants are not subject to VAT. Certain supplies are exempt from VAT, including: unprocessed foodstuffs and agricultural products; educational, medical, dental, or nursing services; social welfare services; and medical equipment (VAT Act Schedule 2 Section 19).

The legislation also provides for that certain supplies are zero-rated—that is, they are taxable but at a zero percent rate—including drugs and medicines, and educational materials (Section 24(4) and 3rd Schedule of VAT Act (1997) Chapter 34). The annual registration threshold is 150 million Uganda shillings (approximately $41,000) (Value Added Tax (Amendment) Act of 2015 Section 7(2)). C.

IMPORT DUTIES

The East African Community Customs Management (EACCM) Act regulates the management and administration of customs duties on imports in Uganda and the region. Goods and equipment used in aid funded projects are exempt from customs duties (EACCM Act Section 114 Schedule 5(10)). However, the Act does not define "aid funded projects." In addition, goods imported by international and regional organizations with diplomatic accreditation as well as donor agencies are similarly exempt from paying import duties (EACCM Act Section 114 Schedule 5(6)). The Act does not list local or national NGOs as entities entitled to an automatic exemption on imports. Certain agricultural and health-related items are listed as exempt from import duties (Schedule 5 Part B). D. Double Tax Treaties No tax treaties have been entered into between Uganda and most countries.

Due to their limited interaction with U.S. grant makers, community-based organizations (CBOs), trade unions, cooperatives, cooperative societies, political parties, and religious entities will not be covered by this Note.

The Ugandan Parliament passed the Non-Governmental Organizations Act (2016) (NGO Act) in 2015. The President assented to the Act in January 2016. The Act repealed the old regulations cited as "Non- Governmental Organizations Registration Regulations (2009)," which implemented the old Act. Thereafter, new regulations were adopted: the Non-Governmental Organizations Regulations, 2017. In addition, the Non-Governmental Organizations (Fees) Regulations, 2017, were also adopted for the purposes of prescribing the fees payable upon registration. Prior to the passing of this law, the Office of the Prime Minister (OPM) embarked on the formulation of a National NGO Policy within the framework of Article 108 of the 1995 Constitution of Uganda that mandates the Prime Minister to be responsible for coordinating the implementation of government policies across ministries, departments, and other public institutions. Various stakeholders including government agencies, NGOs, and donor representatives were consulted to provide input into the NGO Policy.

The Policy was approved by the Cabinet in October 2010 and is now in force. However, there is a pending court case that may affect the Policy. The Policy Impacts **Section 5 of the NGO Act**, which provides for the establishment and composition of the National Bureau of Non-Governmental Organizations (hereinafter "Bureau"). The Bureau has authority to monitor NGO operations and develop policy guidelines for NGOs and community-based organizations (CBOs) (NGO Act Section 6). Additionally, NGOs are required to obtain a periodic permit to operate (NGOs are not absolved from the requirement that they register with the Bureau). The NGO Act also expanded the powers of the Ministry to regulate the dissolution of NGOs.

The Bureau has branch offices which supervise District Non-Governmental Organizations Monitoring Committees (DNMC) (NGO Act Section 19). Each district has a DNMC which is composed of the Chief Administrative Officer, District Community Development Officer, District Internal Security Officer, District Health Officer, District Education Officer, Secretary for Gender and Community Services, and a representative of NGOs in the district. At the sub county level, the Bureau is represented by the Sub County Non-Governmental Organizations Monitoring Committee (SNMC), which is composed of the Senior Assistant Chief Administrative Officer, Sub- County Community Development Officer, Gombolola (sub county) Internal Security Officer, Sub- County Health Inspector, and a representative of NGOs in the sub county.

The Policy also impacts Section 6 of the NGO Act. Under the Policy, the Bureau shall in addition to the functions provided under the Act be responsible for: a) Conducting background checks and scrutinizing the credentials and status of all international NGOs seeking to register and operate in Uganda; b) Considering applications for the renewal of NGO permits; c) Monitoring compliance by all registered NGOs with the terms and conditions of their certificates of registration/incorporation and their constitutions; d) Providing appropriate guidelines for the operationalization of the NGO Policy at line ministry and lower levels of the district administration consistent with the principles of the Policy; e) In liaison with designated officers in line ministries and local government authorities, monitoring district relations with NGOs to ensure compliance with set guidelines; f) Coordinating government engagement with the NGO sector; g) Coordinating government engagement with other stakeholders to establish a reliable database and information system on the NGO sector; and h) In consultation with the lead Ministry and NGO umbrella organizations, preparing periodic reports on the status, contribution, and impact of the NGO sector on national development.

Uganda's legal system is based on English Common Law and African Customary Law. Customary law governs to the extent that it does not contradict the statutory laws, although the 1995 Constitution, as amended, is the supreme law of the land. The articles of the Constitution referenced in this Note are those of the Constitution of the Republic of Uganda, as amended in February 2006.
A community-based organization, or CBO, is an organization "operating at a sub-county level and below, whose objective is to promote and advance the well-being of the members of the community" (NGO Act Section 3).

CBOs typically are formed to accomplish one specific purpose: examples include forming groups to work collectively on members' farms or to support funeral ceremony preparations. A few groups take a wider community development role. CBOs are relatively small (usually involving 10-20 households).

Microcredit associations that engage in business may be registered as Non-Profit Organizations(NPOs) with the sole purpose of doing business.

CAPITAL MARKETS

Definition introductions:

A capital market is a place or mechanism where money is raised by issuing securities to the public (primary market). A capital market also facilitates the buying and selling of the shares which have been issued to the public (secondary market)[313].

A capital market also refers to the capital available from persons and institutions who want to buy securities, either with an intention of holding them as an investment or trade them for a profit.

A capital market is a financial market in which long-term debt (over a year) or equity-backed securities are bought and sold. Capital markets channel the wealth of savers to those who can put it to long-term productive use, such as companies or governments making long-term investments.

Securities:

Securities refer to the instrument which evidences the holder's ownership rights in a firm (e.g., shares) or by which a debt acknowledges a debt (e.g., a bond). Securities include the following[314]:

- **Debentures or bonds issued or proposed to be issued by a government;**
- **Debentures, shares, bond or notes issued or proposed to be issued by a body corporate;**
- **Any right, warrant, option or future in respect of any debentures, shares ,bonds, notes, depository receipts or in respect of commodities or derivatives;**
- **Units, interests or share offered under a collective investment scheme;**
- **Investment contracts;**
- **Any financial instruments, commonly known as securities but does not include bills of exchange promissory notes and certificates of deposit issued by a bank or financial institution;**
- **Any other instrument prescribed by the authority to be a security.**

Note that Shares and stocks are examples of equity securities: Bonds, debentures, commercial paper and notes are example of debt securities.

Shares and Stocks:

Shares and stocks are units of ownership or equity in a company.

Bonds:

A bond is a formal contract whereby the holder of the bond (the creditor) advances money to the issuer (debtor), the principal sum has to be repaid at a later date in the meantime; the issuer

[313] The trading of securities is now done on an electronic trading platform. An electronic trading system comprises software, hardware communications and network system for the automatic matching of orders for buying and selling securities.

[314] See Section 1(hh) of the Capital Markets Authority Act.

pays interest on the principal amount to the holder at agreed intervals e.g. monthly, quarterly bi-annually or annually. And the principal sum is paid at the agreed maturity date.

The Capital Markets Corporate Bond Guidelines 2003 define a bond as a debt instrument with a maturity of one year or more, and is evidence of a loan extended by a creditor (who later becomes a bondholder) to a corporation or other borrower such as government or local authority. The purpose is to meet long term financing requirements. The borrower is obligated to pay the holder a specified interest at specific intervals and to repay the principal amount of the loan at maturity. Bonds signify indebtedness of the issuer to the bondholder but do not have corporate ownership privileges as shareholders[315].

The salient characteristics of a bond:

- **Nominal, principal, par or face amount. This is the amount on which the issuer pays interest and typically has to be repaid on the maturity date.**
- **Issue price. The price at which the issuer offers the bond when it is first issued, investors buy the bond at this price when it is first issued.**
- **Maturity date. The date on which the issuer has to repay the nominal or principal amount. The period of time from the date of purchase until the maturity date is referred to as the term or tenor or maturity of a bond.**
- **Coupon. The interest rate that the issuer pays to the bond holder.**
- **Transferability either by physical delivery (bearer bounds) or by executing a document of transfer. A bond is a marketable instrument. It can be resold on the secondary market. An investor may sell the security before it matures.**

Note that the issuance of corporate bonds is subject to regulatory clearance of the Capital Market Authority (CMA). The issuer must also undertake to comply with the continuous disclosure requirement of the Capital Markets Authority. Where the bond is listed on an approved stock exchange, the issuer must comply with the listing rules of that securities exchange.

The issuer of a corporate bond must submit to the CMA, and upon obtaining the approval of the CMA, publish an offer document in the form of a Prospectus or Information Memorandum which complies with all the requirements for the issue of securities as prescribed under the Capital Markets (Prospectus Requirements) Regulations as amended.

Under the Capital Markets Corporate Bond Guidelines 2003, a company qualifies to issue corporate bonds if it satisfies the following requirements:

[315] A bond holder does not have an equity stake in the company. He only has a creditor stake as a lender. However, convertible bonds have an option to convert the bond into equity (shares) in the issuing company. When a bondholder opts to convert his bonds to equity the company has to issue shares in order to redeem the bonds.

c) ***Payments up share capital and reserves should not be less than Shs. 1, 000, 0000,000 and must be maintained at the level during the period the bond remains outstanding.***

d) ***In the event that the issuer does not have a minimum paid capital and reserves of Shs, 1,000,000,000/= the issuer must obtain from a bank or any other institution recognized by the CMA, a financial guarantee to support the issue.***

e) ***The issuer must have made profits in at least two of the last three financial years preceding the issue.***

f) ***The issuer's total indebtedness including the new issues of bonds should not exceed 400% of the company's net worth (or gearing ratio 4:1) as at the date of the latest balance sheet.***

g) ***The issuer's funds from operations to total debt for the three accounting periods preceding the issues be maintained at a weighted average of 40% or more.***

h) ***The conditions in paragraphs (a) and (b) must be maintained for as long as the bond remains outstanding.***

i) ***The minimum size of the issue is Shs 500,000,000;***

j) ***The minimum issue of lots is Shs 100,000;***

k) ***The issuer's offer document must be accompanied by an accountant's report relating to its audited accounts of at least three years preceding the issue.***

Commercial Paper:

According to The Capital Markets Corporate Bond Guidelines 2003, commercial paper is a debt instrument with a maturity of less than one year and is evidence of a loan extended by a creditor to a corporation. Commercial Papers enable the issuer to obtain medium term financing from the capital markets. Commercial Paper is usually available in various maturities. It is typically issued at a discount i.e. the amount payable on the maturity date is less than the amount at which the Commercial Paper is issued. The procedures and requirements for issuing commercial paper are principally the same as those for a bond.

Notes:

A note is a written promise by one party to pay money to the other party or to bearer. An example is a promissory note[316]. A note is a negotiable instrument.

Major players in the capital markets:

The major player in capital markets are the following;

- **The Issuer;**

[316] See part IV of the Bills of Exchange Act. Promissory notes are not securities within the Jurisdiction of the Capital Markets Authority.

This is the company which is offering its securities to the public in the capital market.

- **The Regulator;**

The Capital Markets Authority, according to the long title to the establishing Act, its purpose is to promote and facilitate the development of an orderly, fair and efficient capital markets industry in Uganda. The Capital Markets Authority has power to enact subsidiary legislation and guidelines for the capital market industry[317].

Under section 1 of the Act as amended, the Authority is also mandated to implement the East African Community Council regulations, directives, decisions or recommendations relating to the securities markets in the East African region.

Under section 1 of the Act as amended, the Authority is also mandated to implement the East African Community Council regulations, directives, decisions or recommendations relating to the securities markets in the East region.

Under Article 13 of the Protocol on the Establishment of the East African Common Market, the Partner States undertake to co-ordinate and harmonize their financial sector policies and regulatory frameworks. Article 13 requires Partner States to approximate their national Laws and harmonize their policies and systems for purposes of implementing the Protocol. Article 16 of the Treaty Establishing the East African Community provides that subject to the provisions of the Treaty, the regulations, directives and decisions of the Council of Ministers taken or given in pursuance of the provisions of the Treaty are binding on the Partner States. The East African Community Council of Ministers has therefore also issued a number of Directives relating to the Legal and regulatory framework of the securities industry in the community. Partner States must bring into force laws, regulations and administrative provisions necessary to comply with the Directives. The following Directives have been issued:

- **Directives on Collective Investment Schemes;**
- **Directives on Admission to Trading on a Secondary Market;**
- **Directives on Public Offers (Equity) in the Securities Market;**
- **Directives on Regional Listing in the Securities Market;**
- **Directives on Asset Backed Securities;**
- **Directives on Corporate Governance for Securities Market Intermediaries;**

The following Directives are in the Pipeline;

1. **Directives on Real Estate Investment Trust(REITS);**
2. **Directives on Central Securities Depositories;**
3. **Directive on Business Continuity of Securities Markets;**

[317] See Section 5 of the Capital Markets Authority Act

4. **Directive on the Competent Authorities;**
5. **Directive on the Registration of Credit Rating Agencies;**
6. **Directive on Evaluative and Analytical Services;**
7. **Directive on Regulated Activities;**

- **The Market operators:**

These are the intermediaries in the securities market. They include the following;

i. **The Stock/ securities exchange;**

The stock exchange is a market, exchange or other place at which securities are offered for sale, purchase or exchange including any clearing, settlement or transfer services connected with it. The stock market is a market exchange or other place at which or a facility by means of which offers to sell, purchase of exchange of securities are regularly made or accepted.

In Uganda there are currently two approved stock exchanges the Uganda Securities Exchange Ltd (USE) and ALT Xchange Limited.

ii. **Dealers and Brokers:**

Dealer means a person who carries on business of dealing in securities on his own account. A broker deals in securities as agent of investors. A broker must be a director of a company or partner in a firm which deals in securities on a stock exchange.

Dealing in securities means making or offering to make with any person or inducing or attempting to induce any person to enter into or to offer to enter into:

- ***Any agreement for or with a view to acquiring ,disposing of subscribing for or underwriting securities or;***
- ***Any agreement the purpose or intended purpose of which is to secure a profit to any of the parties from the yield of securities or by reference to fluctuations in the price of securities.***

- **Investment Advisors:**

An investment advisor according to the definition section of the Capital Markets Authority Act; , is a person who;

l) Carries on a business of advising others concerning securities;

ii) As part of a regular business, issues or publishes, analyses or reports concerning securities or;

iii) Under a contract or arrangement which a client undertakes on behalf of the client whether on a discretionary authority granted by the client or otherwise the management of a portfolio of securities for the purpose of investment.

- **The Investors:**

These are persons or institutions who buy and sell securities in capital markets.

Procedure for Going Public (Offering Share To The Public):

When a company offers shares to the public for the first time, it is said to be going public. The company must be a public company[318]. If a private company wants to go public it must be converted into a public company[319]. It must pass a special resolution of the members to re-register as a public company and to make the necessary amendments to the articles of association.

An Initial Public Offering (IPO) sometimes called a flotation is the process by which public company offers its shares to the public for the first time. It may also have its shares listed and admitted to be traded on a stock exchange i.e. listing. Listing on a stock exchange is not mandatory. A company may lawfully offer its shares to the public even if those shares will not list for trading on a stock exchange.

Key Players in an IPO:

The key players who are vital to a successful IPO include the following:

The Company Directors:

Directors being responsible for the business of the company are ultimately responsible for providing accurate information for inclusion in the prospectus and accompanying documents and otherwise steering the IPO to successful completion.

Sponsoring Broker:

The responsibilities of a sponsoring broker include the following:

9. **Presenting the listing application for admission to listing to the securities exchange.**
10. **Providing to the exchange any information or explanation known to it in such form and within such limited time as the exchange may reasonably require for the purpose of verifying whether the Listing Rules as being and/ or have been complied with by it or by an Issuer.**
11. **Facilitating as necessary, communication between the issuer and exchange.**

[318] Section 90AC of the Capital Markets Authority Act specifically prohibits a private company from issuing a prospectus. Contravention is a criminal offence.
[319] This is under Section 29 (1) (c) of the Companies Act, the articles of a private company prohibit any invitation to the public to subscribe for any shares or debentures of the company.

12. **Submitting all documentation required the Listing Rules.**
13. **Ensuring the correctness and completeness of all documentation submitted to the exchange and Capital Markets Authority.**
14. **Carrying out any activities incidental to the application requested by the exchange in relation to the listing including briefings;**
15. **To give a return of total subscription after the issue.**

Accountants:

The capital Market Authority and stock exchanges require the company to have audited accounts for a prescribed period. The accountant prepares the requisite reports and compile all necessary financial information in a way which makes the company's securities acceptable to the regulator and the securities exchange and also attractive to investors.

Lawyers:

Lawyers with competencies in corporate finance play a pivotal role in an IPO. They give legal advice to the different role players in the process to ensure that all legal requirements are complied with and to avoid or mitigate risks of legal liability. The following are some of the key roles played by lawyers in the IPO process:

1. **Drafting documents e.g resolutions, agreement, the prospectus etc;**
2. **Attending meeting with other role players to discuss the process, meetings to discuss a draft prospectus etc.;**
3. **Due diligence. The purpose of a legal due diligence is to investigate the company and compile information which confirms that the company is fully compliant with all legal prerequisites for flotation. This information will be used in the prospectus. The important areas of investigation include the following corporate status and structure the nature of the business, assets, environmental compliance, key contracts/long terms agreements or commitments, insurance, financial information e.g., accounts, tax matters, information technology, intellectual property rights, employees, pending litigation.**

Underwriters:

Section 1 of the Capital Markets Authority (Amendment) Act, 2016, defined an "underwriter" to mean a body corporate approved by the Authority to carry on or conduct the function of underwriting;

In exchange for a negotiated fee, underwriters undertake to take up any shares which will not have been subscribed for after IPO. If the IPO is fully subscribed or oversubscribed there will be no shares left over so the underwriter will not be bound to take any shares. The sponsor financial advisor or broker usually takes the role of underwriter.

Underwriters are trained insurance professionals who understand risks and how to prevent them. They have specialized knowledge in risk assessment and use this knowledge to determine whether they will insure something or someone, and at what cost the insurance underwriter is the insurance company's appointed risk taker, the one who decides to take on the financial responsibility to the insured if he believes in the risk. He or she reviews all the information your agent provides and decides if the company is willing to take a gamble on you.

Receiving Bank:

After flotation, the receiving bank receives the application forms for the shares and payment therefore.

Public relations consultants:

These are responsible for building and maintaining a positive image of the company before during and after IPO. They also manage media and press relations and effective communication of information.

Printers:

An IPO requires a lot of documents which have to be professionally printed while maintaining confidentially.

THE PROSPECTUS

The Prospectus is the main document for marketing an IPO to the public. It is required for offering securities to the public, whether or not the securities will be listed on a stock exchange.

Section 90G of the Capital Market Authority (Amendment) Act, 2011 prohibits the offering of securities without a prospectus duly approved by the Capital Markets Authority and registered with the Registrar of Companies. A prospectus is defined in section 90A of the Capital Markets Authority (Amendment) Act, 2011 to mean a prospectus notice, circular, advertisement or other invitation offering to the public securities for subscription or purchase. It includes a prospectus relating to an offer of debt securities to the public or any other offer of securities to the public.

According to the case of *Nash Vs Lynd (1929) AC 158*, for a document to amount to a prospectus, not only must it be delivered but also there must be some publicity with the aim of inducing subscription e.g. if a thief stole the document and publicized the issue of shares which the public purport to buy, the document does not amount to a prospectus.

It goes without saying that for a document to amount to a prospectus, it must be issued to the public.

Then what amounts to the Public?

A public means a public whether selected by members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner. In *Re Govt Stocks & other Securities investment Co. Ltd Vs Christopher (1956) 1 WLR 237,* a company issued

a circular in which it offered to acquire shares in another company in return for its own shares. The question was did that circular amount to a prospectus. The court held that where an offer is acceptable only by the shareholders of a company, such an offer is deemed not to be to the public unless the shares are to be issued under renounceable letters or terms. (Renounceable letters are contracts of allotment of shares under which the allotees can pass those shares to third parties. Where the shares have been issued at non-renounceable terms, the allottee cannot sell them to a third party.

Secondly, the invitation must be one inviting the public to subscribe or purchase the securities. The terms subscribe or purchase means taking or agreeing to take securities for cash.

Offer to the public includes:

a) **Offering securities to a section of a public, however selected whether, selected of the public as clients, employees or a purchaser of goods from the offeror or a promoter of the securities or being the holder of securities previously issued by the issuer or promoter of the securities.**

b) **Offering the securities to individual members of the public selected at random or;**

c) **Offering securities to a person if the person became known to the offeror as a result of an advertisement made by or on behalf of the offeror or that was intended or likely to result in the public seeking further information or advice about an investment opportunity or services.**

Form and content of a prospectus:

There are elaborate requirements in the Capital markets Authority Act and the rules made there under, which are meant to ensure disclosure of information to potential investors. This is information which investors and professional advisors would reasonably require and reasonably expect to find, for the purpose of making an informed assessment of the financial position of the company and the rights attaching to the security.

The Capital Markets Authority Act[320] and the Capital Markets Authority (prospectus Requirements) regulations require a prospectus must comply with the following:

- **It must be dated.**
- **It must be signed by every director or person named in the prospectus as a proposed director of the issuer, or by his agent authorized in writing.**
- **Where it contains a statement by an expert or an extract from a report, memorandum or valuation. It must be the date of that statement, report, memorandum or valuation and a copy of that expert's consent.**
- **A prospectus must state in clearly legible and prominent letters on its first page, a section headed '' CAUTION'' and with the following words:**

[320] See section 90M of the CMA Act

'' a copy of this prospectus has been delivered to the Registrar of companies for registration. However, the securities that are the subject of the prospectus have neither been approved nor disapproved by the Capital Markets Authority''.

Prospective investors should pay due attention to the risk factors outlined in the prospectus''.

A prospectus must include the following information.

- **Rights of holders of the shares as regards dividends, capital, preemptive rights to subscribe to shares, redemption (where applicable), voting rights and the creation or issue of further shares of equal priority with the shares.**
- **Information on bankers.**
- **A statement on legal status and affairs of the issuer;**
- **Information relating to directors.**
- **Capital of issuer.**
- **Debt of issuer.**
- **Land and fixed assets of issuer and subsidiaries;**
- **Valuation report.**
- **Material contracts.**
- **Risk factors.**
- **Use of proceeds of the issue; and**
- **Summary – a statement containing a summary of the matters specified above.**

Where the prospectus relates to the securities dealt in on an approved stock exchange or states that an application will be made to an approved stock for permission to deal in securities, the prospectus must be accompanied by a certificate from stock exchange. The certificate is to the effect that prospectus has been scrutinized by the stock exchange, and the exchange's requirements relating to its contents have been satisfied.

QN: What is the liability for a defective prospectus?

Approval of prospectus by capital markets Authority and registration by Registrar of Companies.

The prospectus must be presented to the Capital Markets Authority for approval. It must be accompanied by the following documents:

- **A statement showing the financial performance of the issuer and its subsidiaries during the preceding five financial years.**
- **A statement by the directors of the issuer analyzing the financial statements included in the prospectus, and other statistical data, that serves to explain the present and prospective financial conditions of the issuer.**
- **The issuer must also provide the following items;**
- **A copy of its memorandum and articles of association.**
- **A copy of all authorizations with respect to its memorandum and articles of association and to the changes in its structure;**
- **Where applicable, a copy of its proposed underwriting agreements and contracts, proposed agreements with the securities exchanges for the listing of the securities to be offered (where applicable), proposed contracts or agreements with a registrar; and**
- **With respect to the public distribution of debt securities, a copy of the proposed trustee agreement, and a proposed contract with a guarantor where applicable.**
- **Fees for the approval of a prospectus in the case of debt or fixed income, security- 0.1% of the value of issue.**

For the approval of a prospectus in the case of an equity security – 0.2% of the value of the issue. If the prospectus complies with all the legal requirements, the Authority will approve it in writing. After approval by the Authority, the prospectus is presented to the registrar of companies for registration. It is registered in the register of companies.

The registrar must within three days after registering the prospectus send a copy thereof to the Capital Markets Authority.

Publishing the prospectus:

When a prospectus has been approved by the Capital Markets Authority, it may be published. Publication may be by advertisement in papers, inserting in newspapers, distributing free copies of the prospectus to the public, posting the prospectus on the Company's website etc.

Supplementary prospectus.

If after approval of the prospectus-

e) There is a significant change affecting any matter contained in the prospectus;

f) A significant new matter arises; or

g) There is a significant inaccuracy in the prospectus;

The offeror must on his own motion, with the consent of the Capital Markets Authority or if required by the Authority publishes a supplementary prospectus containing particulars of the

change or new matter or correction of the inaccuracy. The supplementary prospectus must be delivered to the Registrar of Companies for registration.

Suspension or cancellation of Prospectus:

The Capital Markets Authority has power to suspend or cancel the approval of a prospectus. This arises where it subsequently discovers that a registered prospectus is false or misleading in a material particular, omits any material particular, does not comply with the Act or regulations or in case of a listed issuer does not comply with the listing rules.

Liability for misstatement and untrue statements in Prospectus;

Any person who;

a) **Is a director at the time of the issue of a prospectus;**

b) **Allows to be named as a director or having agreed to become a director;**

c) **Is a promoter;**

d) **Authorizes or causes the issue of a prospectus;**

Is liable to pay compensation to a person who subscribes for or purchases securities on the faith of a prospectus for any loss or damage sustained by reason of an untrue statement in the prospectus or the willful non-disclosure in the prospectus of a matter of which he had knowledge and which he knew to be material. Such a person is also liable for a criminal offence in respect of the untrue statement.

Application for shares:

After publication of the prospectus, interested investors are required to fill an application form for shares and return it to the receiving bank (with payment)' before expiry of the prescribed deadline. Applications for allotment must be received before the expiration of six months after the date of registration of the prospectus.

A binding contract or legally enforceable obligation (other than a bona fide underwriting agreement in respect of any shares or debenture cannot be entered into in response to an invitation to the public in response of shares or debentures of a public company until after the expiration of waiting period. Waiting period means seven days after first publication of a prospectus which has been lodged or a longer period stated in the prospectus as the period before the expiration of which applications, offers or acceptances in response to the prospectus will not be accepted or treated as binding.

An over scribed offer is one where the number of shares applied for exceeds the shares offered. In that case, the applicants will not receive all the shares applied for. The board will decide the formula for allotting the shares so that each applicant gets a proportion of shares applied for. For example, the USE Listing Rules require that in the event of an over subscription, the formula for the allotment should be calculated in such a way that persons within the same category of applicants are treated in a fair and equal manner with regard to their applications.

An under subscribed offer is one where the number of shares applied for is less than the shares offered.

The function of the receiving bank is to collect payment for the shares from the successful applicants and account to the company. In case of an oversubscribed offer, money for the proportion of shares not allotted is refunded to the respective applicants. The company then sends shares certificates or letters of acceptance to the successful applicants. Letters of regret will be sent to unsuccessful applicants.

Application To List:

In corporate finance, a listing refers to the company's shares being on the list (or board) of stock that are officially traded on a stock exchange. Some stock exchanges allow shares of a foreign company to be listed and may allow dual listing, subject to conditions.

If the company (the Issuer) wishes to list its shares on the stock exchange, if must apply for the securities to be listed on the stock exchange i.e., admitted to the official list of the Securities Exchange.

Market Segments:

The Official List of the Uganda Securities Exchange is categorized into four different market segments. The segments have different eligibility and listing criteria.

The ALT Xchange has two market segments. The ALTX growth Market is for small and mid-capitalized issuers. The ALT X main Board is for larger more established issuers.

An Issuer may transfer from one segment to another by marking a written application to the Listing Committee, starting the reasons for the request. The Issuer should meet the market requirements for the segment to which it wishes to transfer to.

Main Investment Market Segment (MIMS):

This is the main market segment on the USE with stringent eligibility listing and disclosure requirement. The Issuer should have a minimum authorized, issued and fully paid-up share capital of 50,000 currency points and net assets of 10,000 currency points before the public offering of shares.

The Issuer must have published audited financial statements or a period of 5 years complying with International Accounting Standards for an accounting period ending on a date not more than six (6) months prior to the proposed date of the offer.

Growth Enterprise Market Segment (GEMS):

This applies to a public company limited by shares which has been recently incorporated and has been in existence for a period of one year or less and has provided a statement of its assets and liabilities. However, it does not meet at least one of the requirements for listing on the Main Investment Market Segment (MIMS).

Alternative Investment Market Segment (AIMS):

This market segment provides capital too small to medium size high growth companies that do not meet eligibility requirements of MMS and is meant for institutional and high net worth investors.

The Issuer should have a minimum authorized, issued and fully paid capital of 10,000 currency points and net assets of 20,000 currency points before seeking listing.

Fixed Income Securities Market Segment (FISMS):

Provides a separate market for Government bonds, commercial paper, preference shares, debenture stocks and any other fixed income instruments. The Issuer should have net assets of 100,000 currency points before the public offering of the securities. In the event that the issuer does not meet these net assets requirements, the issuer must obtain a guarantee from a bank or other financial institution acceptable to the Listing Committee.

The Issuer must have published audited financial statements for a period of the three years complying with International Accounting Standards for an accounting period ending on a date not more than six (6) months prior to the proposed date of the other offer.

Methods for listing securities on the exchange:

The following are the most common methods of floating a company's shares on a securities exchange:

Public Offer:

A public offer is an invitation to the public to acquire shares in the company. The invitation may be to buy shares from existing shareholders (offer for sale) or to subscribe for new share (offer for subscription) or a combination of the two.

In an offer for sale, no money is raised by the company because the proceeds of sale will go the shareholders who are selling their shares.

In an offer for subscription the public is invited to subscribe for shares not yet issued. When the company is floated, it issues the shares to the subscribers and thereby raises money for company.

If a company wants to raise money from the issue of new shares and at the same time shareholders want to sell their shares, the public offer will involve both an offer for sale and an offer for subscription.

A placing:

The shares are not offered to the public but only specified persons or clients of the sponsor. Usually, the shares are offered to institutional investors.

An Introduction:

In an introduction, a company shares are admitted to listing on the securities exchange but no new securities are issued or marketed to the public.

Listing securities on the Uganda Securities Exchange:

The detailed application procedure and requirements are found in the Uganda Securities Listing Rules, 2003. Briefly, the major requirements for listing are as follows:

- **Approval of the Capital Market Authority.**
- **Directors and senior management of an Issuer must have appropriate expertise and experience for the management of the Issuer's business.**
- **Financial statement must be drawn in accordance with the issuer's national laws, prepared and audited in accordance with International Accounting Standards.**
- **The securities for which a listing is sought must be issued in conformity with the laws of the issuer's country of incorporation or establishment and in conformity with the issuer's memorandum and articles of association.**
- **The securities for which a listing is sought must be paid and fully transferable.**
- **The issuer must also comply with the specific listing requirements of the relevant market segment on which it seeks to list e.g. capitalization, minimum proportion of shares being held by the public.**
- **Initial Listing Fees and Annual Listing Fees are payable to the Uganda Securities Exchange.**

Documents to be submitted for listing:

The following documents must be submitted in support of an application for admission to listing and approved by the Listing Committee of USE prior to listing being granted;

- **Application for listing;**
- **Authorization;**
- **Issuer's Board resolution to list;**
- **Capital Markets Authority approval Letter;**
- **Shareholders resolution;**
- **Letter of no objection from other exchanges where they are listed, if applicable;**
- **Contracts entered into in connection with the issue;**
- **Underwriting agreements, if any;**
- **Contracts with registrars where applicable;**
- **Certificate of Incorporation of the Issuer or any other incorporation document;**
- **Declaration by the sponsoring broker;**
- **Memorandum and Articles of Association of the Issuer or any other constitutive documents;**

- **Draft Prospectus/ Information and copies of documents provided for inspection pursuant to the proposed issue;**
- **Financial reports for the prescribed period;**
- **A list of existing shareholders;**
- **Management Contracts if applicable;**
- **Specimen share certificate;**
- **Letter of undertaking;**
- **Material Contracts;**
- **Any other documents required by the Committee.**

Delisting and suspension of listing:

The listing Committee may delist securities due to failure by an Issuer to satisfy conditions for listing. The Listing Committee also has power to suspend a listing of securities in the interest of market fairness, transparency or efficiency or if the issuer has failed to comply with the Listing Rules. Alternatively, an issuer may also voluntarily request a suspension of the listing of its securities.

Continuing Obligations:

Observance of continuing obligation is essential to the maintenance of an orderly market in securities and to ensure that all users of the market have simultaneous access to the same information[321].

A listed company must comply with continuing obligations for as long as it remains listed. The issuer must keep the stock exchange informed promptly of any information relating to the issuer and its subsidiaries, if any that;

- **Is necessary to enable them and the public to appraise the financial position of the issuer and of its subsidiaries.**
- **Might reasonably be expected materially to affect market activity in the price of its securities of or otherwise affect its subsidiaries or;**
- **Might reasonably be expected materially to affect market activity in the price of its securities.**
- **Rule 9 of the USE Listing Rules requires disclosure of the following:**

[321] See Section 90AD of the Capital markets Authority Act.

- **Circumstances or events that have or are likely to have a material effect on the financial results, the financial position or cash flow of the Issuer or information necessary to enable holders of the Issuer's listed securities.**
- **New developments in its sphere of activity which are not public knowledge and which may lead to material movements in the ruling prices of its listed securities.**
- **Any other material information which requires notification.**

Rule 40 of the Uganda Securities Exchange Listing Rules requires an issuer to submit to the Exchange and publish a cautionary statement as soon as possible after it is possession of any material price-sensitive information[322]. If at any time the necessary degree of confidentiality cannot be maintained or if the Issuer suspects that confidentially has or may have been breached. An issuer who has published a cautionary statement must provide updates on it

Material information refers to any information that may affect the price of the Issuer's securities or influence investment decisions. Every Issuer, whose securities are traded on or subject to the rules of the Exchange, must disclose any such information. Material information includes

- **a merger, acquisition or joint venture;**
- **a block split or stock dividend**
- **earnings and dividends of a unusual nature;**
- **the acquisition or loss of a significant contract;**
- **a significant new product or discovery;**
- **a change in control significant change in management;**
- **a call of securities for redemption;**
- **a public or private sale of a significant number of additional securities;**
- **the purchase or sale of significant asset;**
- **a significant labor dispute;**
- **a significant law suit against the issuer;**
- **establishment of a programme to make purchases of the issuer's own shares.**

In case of securities that are not listed on the stock exchange, the issuer must promptly inform the Capital Markets Authority and issue press releases informing the public of the matters listed above[323].

[322] Price Sensitive information is information which would be likely to have an effect on the price of the securities.
[323] Section 90Ad of the capital markets Authority Act.

The declaration of an intention to pay dividends and /or interest in respect of listed securities must be communicated to the Exchange forthwith but in any event not later than 24 hours after the decision to pay ids made. A copy of the announcement must be published and sent to shareholders.

Interim reports must be published through a daily newspaper of nationwide circulation printed in the English language as early as possible after the expiration of the first six months of a financial year, but not later than three months after the date. The newspaper announcement should include information on the address at which a shareholder can obtain a copy of the report

Every Issuer must within four months after the end of each financial year and at least twenty-one days before the date of the annual general meeting, distribute to all shareholders and submit to the Exchange and publish;

- **a notice of annual general meeting and;**
- **The annual financial statements for the relevant financial statements should have been reported upon by the Issuer's auditors.**

If insolvency proceedings are commenced against a listed company the company must within fourteen working days notify the Capital Markets Authority in writing of the fact of commencement of the proceedings.

Cross-Border Listings:

Introduction is a process whereby securities which are already listed and trading on a stock exchange in another jurisdiction (primary jurisdiction) are listed on a Ugandan securities exchange[324].

An introduction must be approved by the Capital Market Authority.

An applicant for the approval of an Introduction must meet the following criteria:

a) A company limited by shares and registered as a public company under the companies' law of its primary jurisdiction or a foreign company registered as operating in Uganda in accordance with the Companies Ac;

b) A minimum authorized issued and fully paid-up capital of not less than Uganda Shillings One Billion upon currency conversion at the prevailing exchange rate;

c) Net assets of not less than Uganda Shillings Two Billion upon Currency conversion at the prevailing exchange rate;

d) At least one hundred thousand shareholders comprising at least 20% of the total shareholding;

[324] Introductions are governed by the Capital Markets (cross Border Introductions) Regulations, S I No. 43 of 2004 as amended by S.I No. 3 of 2016.

e) Shares must be freely transferable and not subject to any restriction on marketability of pre-emption rights;

f) Published audited financial statements complying with International Financial Reporting Standards for an accounting period of at least five years ending on a date not longer than three months prior to the proposed introduction;

g) If more than three months have elapsed since the end of the applicant's last accounting period for which financial statements have been prepared, the applicant must prepare unaudited interim financial statements from the end of the last accounting period. The period covered by the unaudited interim financial statement should not exceed six months;

h) Has audited financial statements for the latest accounting period on a going concern basis and the accompanying audit report must not contain any emphasis of matter or qualifications;

i) Not be in breach of any loan covenants (if it has any) at the time of the application;

j) At the date of the application and for a period of at least two years prior to the date of the application, none of the directors of the applicant should have;

i) Any petition under bankruptcy laws filed against him (for individual directors) or any winding up petition pending (for corporate directors);

ii) Any criminal proceedings in which he has been convicted of fraud or felony;

iii) Been subject of any ruling of a court of competent jurisdiction or any governmental body the effect of which is to permanently or temporarily prohibit him for acting s fund manager, director, broker, dealer or employee of any financial institution or engaging in any business practice or activity

- **must have declared profits after tax attributable to shareholders in at least three of the last five completed accounting periods prior to the proposed date of the introduction and;**
- **not insolvent;**

The application for approval is accompanied by the following:

3. **An information Memorandum. This contains a caution statement executive summary, key information about the applicant, business of the applicant, risk factors, rights and obligations of shareholders, merger and acquisitions, information on bankers and other advisers, information on service providers, legal opinion, trading and settlement procedures, information relating directors and senior management, capital of the applicant, borrowing powers of the applicant, debt of the applicant, land and fixed assets, material contracts, financial statement for the preceding five accounting periods, share performance, dividend policy and modalities of payment, details of other stock exchange where the applicant's shares are already listed, statement that the Laws of Uganda shall be applicable to the application, tax policy on income from the transfer of shares both in the primary jurisdiction and in Uganda and other additional information as may be required or directed to be included by the Authority.**

4. **Certified copies of the applicant's Certificate of Incorporation;**
5. **Certified copies of the Memorandum and Articles of Association;**
6. **Copies of material contract if any;**
7. **Copies of all required authorizations from professional advisors;**
8. **A letter of ''No Objection'' from the applicant's primary regulator (the securities regulator in the applicant's primary jurisdiction.**
9. **A letter of ''No Objection'' from the applicant's primary exchange (the exchange where the applicant's securities were first listed.**
10. **In the case where the applicant is a bank or an insurance company or any other regulated corporate body a letter of ''No Objection'' from the relevant regulatory authority and;**
11. **The prescribed fees.**

After approval and being listed, the company must comply with the continuing obligation of the exchange.

Market Abuse:

Part IX of the Capital Market Authority creates criminal liability for the following acts or omissions;

Section 82- False trading and market rigging transactions:

A person who creates or causes to be created or does anything that is likely to create a false or misleading appearance of active trading in any securities on a stock exchange in Uganda or a false or misleading appearance with respect to the market for or the price of any such securities commits an offence.

A person who by means of purchase or sales of any securities that do not involve a change in the beneficial ownership of those securities or by any factitious transactions or devices, maintains, inflates, depresses or causes fluctuation in the market price of any securities , commits an offence.

Section 83- Stock Market Manipulation:

Any person who effects takes part in is concerned in or carries out either directly or indirectly two or more transactions in securities of a body corporate which are transactions that have or are likely to have the effect of corporate on a stock exchange in Uganda with intent to induce other persons to sell, purchase or subscribe for securities of the body corporate or of a related body corporate commits an offence.

Section 84– False or misleading statements:

A person commits an offence if he makes a statement or disseminates misleading information that is false or misleading in a material particular statement that is likely to induce the sale or

purchase of securities by the other persons or is likely to have the effect of raising, lowering, maintaining or stabilizing the market price of securities if, when he makes or disseminates the information;

- **he does not care whether the statement or information is true or;**
- **he does or ought reasonably to have known that the statement or information is false or misleading in a material particular.**

Section 85- Fraudulently inducing persons to deal in securities:

A person commits an offence if he induces or attempts to induce another person to deal in securities.

a) **By making or publishing any statement ,promise or forecast which he knows to be misleading, false or deceptive**

b) **By any dishonest concealment of material facts by the reckless making or publishing, dishonesty or otherwise of any statement, promise or forecast that is misleading false or deceptive.**

c) **By recording or storing in, or by means of , any mechanical electronic or other device information that he knows to be false or misleading in a material particular.**

Section 86-Dissemination of illegal Statement:

A person commits an offence if he circulates or disseminates any statement to the effect that the price of any securities of a body corporate will or is likely to rise or fall or be maintained by any transaction entered into or other act or thing done in relation to securities of that body corporate in contravene of any provision of this Part where:

- **the person or a person associated with the person ,he entered into any such transaction or done any such act or thing; or**
- **the person has received or expects to receive directly or indirectly any consideration or benefit for circulating or disseminating or authorizing or being concerned in the circulation or dissemination of the statement or information.**

Section 87- Employment of manipulative and deceptive devices:

It is an offence for any person directly or indirectly in common with the purchase or sale of any securities.

a) **To employ any device, scheme or artifice defraud**

b) **To engage in any act practice or course of business which operates or would operate as a fraud or deceit upon any person ,or**

c) **To make any untrue statement of a material fact or to omit to state a material fact necessary with the result that the statements made in the light of the circumstances under which they were made, appear truthful.**

Section 88- Prohibition of dealings in securities by insiders:

A person who is or has at any time in the six months immediately preceding a specific deal been connected with a body corporate shall not deal in any securities of that body corporate if by reason of his association he is in possession of information that is not generally available but if it were might materially affect the price of those securities.

A person who is or has at any time in the preceding six months immediately preceding a specific deal been connected with a body corporate shall not deal in any securities of another body corporate if by reasons of his being or having been connected with the first mentioned body corporate he is in possession of information that

- **Is not generally available but, if it were, would be likely to affect materially the price of those securities and**
- **Relates to any transaction whether actual or expected involving both those bodies corporate or involving one of them and securities of the other.**

A person who contravenes any of the provisions of Part IX is liable on conviction

4. **In the case of a person not being a body corporate to a fine not exceeding ten million shillings or imprisonment not exceeding five years or both or**
5. **In the case of a person being a body corporate to a fine not exceeding twelve million shillings.**

A convicted person is also liable to pay compensation to any person who in a transaction for the purchase or sale of securities entered into with him or with a person acting for or his behalf suffer loss.

NEW CHANGES INTRODUCED TO COMPANIES AND INSOLVENCY LAWS UNDER THE 2022 AMENDMENT ACTS

The corporate sector in Uganda is mainly regulated by the *Companies Act* 2012 and the *Insolvency Act* 2011. Both legislation with the companies' law replaced the previous Companies Act Cap 110 (that dated to1923) and the insolvency law as the legislation on both corporate and individual insolvency have not had any amendments since their enactment and both coming into force in 2013.

The amendments to the companies' and insolvency laws were by way of amendment Bills tabled before Parliament on August 12, 2022 and were assented to by the President on September 7, 2022 and, in effect, passed into law. The *Companies (Amendment) Act* 2022 amends the current 2012 Act to remove inconsistencies in the law, introduce flexibility in its implementation and streamline operations of the companies in Uganda. The rationale for the amendment was that there were inadequate provisions in the 2012 Act on the transparency and disclosure of beneficial owners' information and threshold (this is the subject of a separate ALP Alert dated September 7, 2022). The 2012 Act also had inadequate provisions on, among others, the striking off of defunct companies on the register, absence of a time frame for when a dissolved company name can be made available for reuse, and inadequate provisions for deregistration of a company.

On the other hand, the *Insolvency (Amendment) Act*2022 amends the 2011 Act on the premise that the registration services bureau (URSB) has had a challenge of addressing the administrative and operational shortcomings in the law and meeting international standards. The 2011 Act further had inadequate provisions as well as contradictions that created challenges in implementing the law and, as such, the 2022 amendments sought to cure these defects in the law.

THE COMPANIES (AMENDMENT) ACT 2022

The Companies (Amendment) Act 2022 amends the current 2012 Act to remove inconsistencies in the law, introduce flexibility in its implementation and streamline operations of the companies in Uganda

The 2022 amendments to companies and insolvency laws seek to streamline operations of companies (and insolvent companies and individuals) by addressing inadequacies as well as administrative and operational shortcomings in the laws.

NEW CHANGES INTRODUCED BY THE 2022 AMENDMENT ACTS

COMPANIES (AMENDMENT) ACT 2022

The amendments to the companies' law are as follows:

(a) ***Incorporation:*** **The Act changes the current form of registration and replaces it with a new precise but comprehensive form, i.e., Company Form 1 which contains details of name of company, proposed address, postal address, nominal capital, details of subscribers, and nature of articles of association. The rationale is to make the process of incorporation quick, easy and cheap.**

(b) ***Discretion to use a Memorandum of Association:*** **The Act empowers any person registering a company to have the discretion to use a memorandum of association as a form of incorporation of a company. The registration of a memorandum of association is an optional requirement. This is because the amendment provides for a mandatory requirement for a person who intends to incorporate a company to fill in particulars contained in the registration form (Company Form 1) rendering the memorandum of association redundant since it only provides for the objectives of the company as other details are covered in the form.**

(c) ***Default Code of Corporate Governance:*** **The Act makes the code of corporate governance in Table F the default code of corporate governance for every public company that does not comply with any corporate governance provisions or code prescribed under any other law.**

(d) ***Meaning of a public company:*** **The meaning of a public company is amended to mean a company that is not a private and which has at least seven shareholders at the time of incorporation. This provision would thus make a statutory minimum of shareholders for a public company as seven (7).**

(e) ***Change from company limited by guarantee to company limited by shares:*** **The Act introduces a new provision that allows a company which is registered as limited by guarantee to be re-registered as company limited by shares if a special resolution is passed on that basis. It should however be noted that this amendment replaces Section 23 of the Act (that provided for re-registration of an unlimited company as a limited company). In effect, this means that there shall be no provision allowing re-registration from unlimited to limited companies.**

(f) ***Notice of cessation by foreign companies:*** **The Act introduces a provision that a foreign company that intends to cease business in Uganda shall publish the notice of cessation in the newspaper of wide circulation specifying that the company is solvent and intends to cease business after 30 days from date of publication.**

(g) ***Company registrar as an accountable person:*** **The Act empowers the registrar, with the duty as an accountable person, to maintain a register of beneficial owners, to verify identity of beneficial owners and to enforce provisions of, among others, the *anti-money laundering law*.**

(h) ***Beneficial ownership:*** **This is addressed in a separate ALP Alert (https://www.alp-ea.com/post/anti-money-laundering-and-combating-the-financing-of-terrorism-in-uganda).**

(i)*Defunct companies:* **The Act gives powers to the registrar to strike off defunct companies from the register either on his or her own accord or at the request of the company. This is because there are several dormant or defunct companies on the register, which is a challenge**

to the URSB, as it restricts the use of the names by prospective companies and, in certain instances, aiding fraud.

(j) ***Power of registrar in voluntary winding up:*** **The Act gives the registrar the powers to strike off a company from the register without applying the provisions of the *Insolvency Act*, 2011 where the company passes a resolution for voluntary winding up and the registrar is satisfied that the company has no assets or liabilities.**

(k) ***Repeal of issuance of share warrants:*** **The Act repeals all provisions allowing the issuance of share warrants to bearer because it does not allow for transparency and disclosure of information which allows tax payers to conceal information from the registration services bureau (URSB) and tax authority (URA).**

(l) ***Repeal of exemption of common wealth countries from filing annual returns:*** **The Act repeals the exemption of section 256 which exempts companies incorporated in commonwealth countries from filing returns, balance sheets, and profit and loss accounts with the Registrar of companies. This means that all foreign companies shall file annual returns at the URSB.**

INSOLVENCY (AMENDMENT) ACT 2022

The amendments to the insolvency law are as follows:

(a) ***Cross border insolvency:*** **The Act repeals the provisions of Part IX relating to cross border insolvency and reciprocal arrangements. The rationale is making the Act compliant with the UNCITRAL Model Law on cross border insolvency, the World Bank recommendations on the ease of doing business. As such the Act eliminates the hefty procedures and lowers the cost of doing cross border business.**

(b) ***Unlawful dealing with assets:*** **The Act creates an offence for a person who conceals, disposes of, or creates a charge on the property or removes any part of it with the intention of depriving or delaying creditor's claims within two (2) years before the commencement of insolvency proceedings.**

(c) ***Reduction of years of bankruptcy restrictions:*** **The Act reduces the period in respect of restrictions on a discharged bankrupt from 5 to 2 years. The rationale is to reduce stigmatisation and encourage rehabilitation of bankrupts.**

(d) ***Flow of documentation between the Official Receiver and the Registrar of Titles:*** **The Act amends the process of insolvency to allow all documents or orders to be served upon the registrar within seven (7) days after making of any such order or decision. This is meant to ensure a seamless flow of documentation between the Official Receiver and the Registrar of Companies.**

(e) ***Post-arrangement financing and post-administration financing:*** **The Act allows insolvent persons, with the consent of the creditors and with the approval of court, to obtain or borrow finances and grant security over the property of the debtor for purposes of implementing an arrangement or administration deed. However, the Act provides that such financing shall not exceed the value of debtors' unnumbered assets at the time of arrangement or assignment.**

(f) ***Interim protective order by creditor:*** **The Act grants rights to a creditor to apply for an interim protective order.**

(g) ***Administration order:*** **The Act extends the process of administration by providing for an administration order to create clear evidence of the commencement of administration. The Act provides that after an administration deed is executed, it shall be filed in court who shall issue an administration order.**

(h) ***Access to data:*** **The Act grants persons the right to access information or data in possession of a trustee, receiver, liquidator, administrator or supervisor in order to promote transparency and accountability in insolvency proceedings.**

(i) ***Additional qualifications for insolvency practitioners:*** **The Act confer powers on the Minister to prescribe additional qualifications for a person to be appointed or act as an insolvency practitioner.**

Conclusion

The new amendments are a welcome addition to the corporate sector as they address the current gaps in the existing laws and should transform company registration and management procedures as well as insolvency of companies and individuals in Uganda.

ISLAMIC BANKING

Islamic financing refers to a system of Banking or financing activity which is consistent with the principles of Shari'ah. An Islamic financial institution is therefore one whose statutes, rules and procedures expressly state its commitment to the principles of Shari'ah and to the banning of the receipt and payment of interest in any of its operations.

Similarly, the Tier 4 Microfinance Institutions & Money Lenders Act was assented to by the President in July 2016 & this provides guidelines for implementing Islamic Microfinance. The Microfinance Support Centre was identified by the government of Uganda to spearhead the implementation in the microfinance sector. The company, with support from Islamic Development Bank & Bank of Khartoum started full implementation in 2017

In Uganda, the Financial Institutions Act, 2004 (FIA) was amended to cater for Islamic Finance in January 2016. The amendment became effective on 4th February, 2016. Bank of Uganda as the regulating Body is mandated to promote and ensure stability in the Islamic Financing sector.

In line with its constitutional mandate, Bank of Uganda (BoU) worked with Parliament to ensure that legislation enabling the introduction of Islamic banking products in Uganda was enacted. Consequently, the Financial Institutions Act 2004 was amended in 2016. The amendments included specific provisions allowing for the establishment of fully fledged Islamic

Financial Institutions and for existing Financial Institutions to offer Islamic Banking alongside their conventional banking services.

But what then is Islamic banking? In essence, it is a banking system based on the principles of Islamic or Sharia law. It is underpinned in application by concepts derived from the Quran and the writings of Islamic scholars. These concepts revolve around the value of a sound currency and fairness in transactional dealings, the latter being structured within the bounds of Sharia law. Parties to any transaction in this banking system are obliged to conduct their business affairs, with a focus on what is permissible and lawful under Sharia law.

As indicated earlier, Islamic banking transactions are guided by morals and value system as derived from Sharia Law, and this demand: transparency and full disclosure between parties to a transaction; good faith in conduct by the parties to a transaction; and participation in transactions that do no harm to the wider society. Consequently, transactions in Islamic Banking are often viewed as a culturally distinct but religiously motivated form of ethical investing.

And last but not least, the central premise in Islamic Banking is that money, in of itself has no intrinsic value, but rather it must be used to generate income through trade and / or investment in tangible assets; whence it derives its value. Any gains arising from the trading are shared between the party providing the capital and the one borrowing the money and providing the expertise. In supplement to this fundamental premise, there are four key principles that provide additional anchor for this type of banking, namely:

THE FOUR KEY PRINCIPLES OF ISLAMIC BANKING

a) Prohibition of payment and receipt of interest

Interest represents any fixed or guaranteed payment on cash advances or on deposits, therefore representing a sure gain to the lender regardless of the performance of the borrower's business or commercial undertaking. This is precisely what Islamic Banking prohibits. However, Islamic Banks are permitted to engage in trade and commerce, and the value they create is through the profits earned in trading or participating in other forms of commercial enterprise. But this option is not available to conventional banks, since the value they create is through the earning of interest.

b) Mutuality of risk sharing-profit and loss

In Islamic Banking, the Banks and their customers are partners, and share in a predetermined and agreed ratio, the profits or losses arising from this "joint venture". This of course demands full disclosure or rather minimal information asymmetry from both the lender and borrower with respect to the said transaction.

c) Prohibition of investment in harmful sectors / Businesses

Islamic Banking integrates Islamic moral and ethical value systems, and as such, prohibits the financing of harmful products and or activities. The definition of what constitutes harmful is derived from Sharia Law, and thus Islamic banks cannot therefore finance businesses such as casinos, nightclubs or any such activity.

d) Prohibition of uncertainty and speculation

There are strict rules in Islamic finance or banking against transactions that are highly uncertain or speculative or that may cause any injustice or deceit against any of the parties. For example: the sale of goods or assets of uncertain quality or delivery or payment; or contracts not drawn out in clear and unambiguous terms; are some of the many transactions prohibited under Islamic banking. This prohibition extends to transactions or contracts where uncertainty is combined with one party taking advantage of the property of the other, or where one party can only benefit when the other party loses. And by extension, speculative transactions are also prohibited since no asset is created.

HOW ISLAMIC BANKING OPERATES IN UGANDA

In operation, Islamic Banks mobilize customer deposits and provide financing arrangements to customers by structuring various types of financial contracts. These contracts or transactions must uphold the four (4) key principles of Islamic Banking.

Mobilization of Deposits:

Under mobilization on deposits or funds, the existing legal and regulatory framework in Uganda allows for customer deposit mobilization through the following arrangements:

Profit Sharing Investment Accounts

These are akin to fixed deposit accounts in that the account holder allows the bank to invest the funds on their behalf either in projects specified by the account holder or in unspecified projects. The bank and the account holder share profits / losses arising from the investments.

Profit Earning Investment Accounts

These in operation are akin to savings accounts in conventional banking. With these accounts, the customer earns a profit on their deposits held with the financial institution.

Non-profit-bearing deposit accounts

These are akin to current accounts in conventional financial institutions. The depositor does not earn any profit on their deposits.

Disbursement of Credit: Regarding funds mobilized in a Sharia compliant manner, Islamic banks provide and extend Sharia compliant credit facilities in the following forms:

Sale Based Financing (Cost-Plus Mark-up); in this contract, the financial institution purchases an asset directly from a supplier and sells it to customer at a pre-determined price. The selling price includes the original cost plus a negotiated profit margin.

Lease Based Financing: where the financial institution purchases an asset directly from a supplier and leases it to the customer for a certain period at a fixed rental charge. The repayments made by the customer comprise the cost price plus the financial institution's profit.

Equity Partnership: Financing; these contracts are based on Profit or Loss Sharing arrangements and they mainly take two broad forms: Trust Financing and Partnership as indicated below:

i) Trust financing: The financial institution provides the entire capital needed to finance a project, and the customer provides the expertise, management and labor. The profits from the project are shared by both parties on a pre-agreed (fixed ratio) basis. However, in case of losses, the entire loss is borne by the bank.

ii) Partnership: These are similar to joint venture agreements, in which a bank and an entrepreneur jointly contribute capital and manage the business project. Any profit or loss from the project is shared in accordance with a pre-determined ratio. The financial institution would ordinarily terminate the joint venture gradually after a certain period or upon the fulfillment of a certain condition.

REGULATORY FRAME WORK ISLAMIC BANKING

Regulatory framework: As indicated earlier, The Financial Institutions Act 2004 was amended in 2016 to enable Islamic Banking. The amendments therein included exemptions offered to licensed Islamic Financial Institutions with respect to restrictions on engaging in trade and

commerce, activities not allowed for in conventional banks. Subsequently, Bank of Uganda issued the Financial Institutions (Islamic Banking) Regulations in February 2018 to cater for the technical aspects unique to Islamic financing, and to operationalize the amendments related to Islamic Banking in the Financial Institutions Act 2004.

This regulation covers the "how" and "what" for the licensing and regulation of Islamic banking in Uganda, and a proviso that outside of the specific exemptions granted in the amended Financial Institutions Act 2004, Islamic financial institutions are still bound to comply with all existing regulatory requirements.

One key requirement of the abovementioned Regulation is the establishment of a Shariáh Advisory Council (SAC) at the Bank of Uganda. This SAC is responsible for ensuring that all Islamic financial products presented and marketed as such, meet Shariáh based criteria for the said products and services. The establishment of this SAC should be concluded once consensus has been gotten with the relevant stakeholders.

ISLAMIC BANKING IN UGANDA, WHERE WE ARE TODAY

Various entities have expressed interest in establishing Islamic Banking entities in Uganda. Bank of Uganda is currently processing applications: one for an Islamic products window by a locally domiciled conventional Bank, and two applications by foreign entities interested in establishing fully fledged Islamic Banks.

It should be noted that Islamic Banking is practiced in various jurisdictions around the World. In Africa, this includes countries like South Africa, Nigeria, Mauritius, Botswana, Kenya, Tanzania, Rwanda, Senegal, Algeria, Egypt, Sudan and Tunisia. The diversity of the dominant religious belief systems of the nations on the list above, underscore the fact that Islamic banking is not a preserve of Islamic states or nations.

CORE PRINCIPLES

Prohibition of Interest (Riba):

This prohibits the payment and receipt of interest because it does not consider money as a commodity for exchange. Instead, money is a medium of exchange and a store of value. Mutuality of Risk Sharing: ϖPartners in an Islamic Financial transaction share profits and losses in accordance with a pre-determined ratio.

Prohibition of investment in certain businesses: ϖ Islamic Banks cannot finance businesses such as; Piggery, wine factories, casinos, nightclubs or any activity which is prohibited by Islam or is known to be harmful to society.

Partnership Based Modes MUSHARAKA (Partnership based)

♦ Musharaka means a joint enterprise or venture between two or more partners in which the partners contribute capital (musharakah capital) and share the profits and losses generated by the venture in accordance with the percentage contribution to the Musharakah Contract.

♦ Origin of the word in Arabic is "Shirkah", which means partnership or company.

♦ Characteristics / All parties share in the capital / All parties share profits as well as losses / Profits are distributed as per agreed ratio / Loss is borne by the parties as per capital ratio / Every partner is an agent of the other TYPES OF MUSHARAKAH

♦ According to Islamic jurits, market and banking practices, there are 3 types of musharakah. 1. Permanent or constant musharakah:

♦ Musharakah to continue without specifying a date for its termination 2. Diminishing or medium term musharakah MUDARABA

♦ Mudarabah is a partnership in profit sharing between two parties; the first party is the financier or the investment capital owner (Rab-Almal), provides the investment capital and the other party who operates the business (Mudarib) provides entrepreneurship and effort to run the business

♦ One partner (Rab al Mal) contributes capital and the other (Mudarib) contributes his skills or services to the venture

♦ Venture may for a fixed period or purpose

♦ Both share profit in pre-agreed ratio

♦ Loss is borne by Rab al Mal (only when it is proven beyond doubt that it was not due to negligence), Mudarib loses his services Trade Based Islamic Modes Bai /Trade Base Modes There are many types of trade-based modes but usually the following are used in Islamic Microfinance.

♦ Murabahah (Cost plus)

♦ Salam (forward sale)

♦ Muqawala

♦ Istisna Murabahah (Cost-plus/Asset financing) Murabahah means a sale transaction with profit. It is a transaction of sale of goods at cost plus an agreed profit mark up.

♦ Murabahah is a particular kind of sale where the seller discloses the cost and profit charged thereon.

♦ The price in this sale can be both on spot and deferred.

♦ It is a contract wherein the institution, upon request by the customer, purchases a asset from the third party usually a supplier/vendor and resells the same to the customer either against immediate payment or on a deferred payment basis. Murabahah

♦ Murabahah can be used to purchase mainly Machinery. Is an equivalent Asset financing in conventional financing modes

Uganda is a member of ISFIN (Islamic Finance Network) and are their exclusive legal practice of choice for Uganda. ISFIN covers over 60 Countries worldwide and brings together a unique network of professionals dealing in and providing Islamic Finance and the halaal product concept, Government provided input into the amendments to the financial institutions legislations to bring Islamic banking into practice.

HALAAL PRODUCT CONCEPT

Halal is everything that contributes to a better life, in a responsible, balanced, healthy and respectful manner, both at individual level and also in our personal and social relationships.

Unequivocally rooted in the Islamic spiritual practice, "halal", in the 21st century means committing and responding to a series of challenges and opportunities, making this concept a key element in international relations and trade nowadays, and of course, in our national reality.

The Halal or Islamic Economy is currently valued in more than 3 trillion dollars, with the Food & Beverage Industry representing more than a third of this quantity.

Food is probably the more commonly associated concept with halal, but there are other emerging economic segments, with a steady growth, such as Muslim-friendly Tourism, Halal Cosmetics and Pharma, Modest Fashion, Islamic Edutainment, etc, aimed at offering suitable products and services to the millions of consumers requesting them.

Cosmetics, pharmaceuticals, fashion, retailing and logistics are all sectors with impressive figures in the halal global market. We may think that "halal" products are addressed for a narrow segment of consumers, bit it will actually reach beyond the 1,600 million muslims in the planet, including other people who find in the halal product and service an indicator of ethical background, quality product, committed management and trust. Only in Spain, 30% of halal product consumers are non-muslim.

Halal is therefore a great opportunity which is already acknowledged by World Trade Organisation and other international institutions. But, as any other business, it requires conquering new markets, for which it is essential to acquire specific knowledge and implement certain requirements that will guarantee a successful access to the new global economy.

HALAL STANDARDS

Halal is a broad concept, and it is more specifically expressed in the various standards extant in the world. They regulate halal production and marketing, be it products or services. The variety of halal standards reflects the great diversity of Islam and the existence of different juridical schools which operate in a particular cultural background. On the other hand, halal standards integrate other technical aspects, such as hygiene, good manufacturing practice, sustainable production, environmental concerns, food safety, quality, etc.

Having a Halal Quality Management System in place is essential, for it is a requirement for exports bound to particular destinations. It is a must to enter and move up this market. To know the different standards, halal schemes, markets, preferences and consumers will help the producers to gain an optimum position for their products in these attractive and dynamic markets.

HALAL MARKETS

The world of businesses is changing, and it is not only because of the new forms of production and trade, but, as the case of the halal markets, because the emergence of new commercial paradigms.

The global halal market, based on the preferences and needs of more than 1,6 billion muslims worldwide, emerges as a new powerful economic scenario. This represents relevant opportunities for companies, wishing to enter this market valued at 3 trillion dollars. The Halal Sector is more and more attractive for the public and private sector due to is great growth potential.

THE 3 TRILLION USD MARKET

According to the report State of the Global Islamic Economy 2016-2017 by Thomson &Reuters and Dinar Standard, the Islamic Economy will reach 3 trillion USD by 2021.

Considering the economic sectors, Islamic finance will reach $2 trillion in investments. Food and beverages expenditure was valued at $1.17 trillion in 2015, followed by Modest Fashion, with $243 billion, mass media and entertainment reached $189 billion, travelling and tourism, $151 billion, and pharmaceuticals and cosmetics, which reached $133 billion.

MORTGAGES THAT ARE OFFERED UNDER CONVENTIONAL BANKING AND THOSE THAT ARE REGULATED BY THE ISLAMIC BANKING SYSTEM

Islamically, as mentioned above a mortgage is termed as Rahn and the property mortgaged must be such as one permitted under Shari'ah law and not one prohibited like alcohol.[325]

The sharia law is the primary law that governs Islamic baking. Most provisions of this law are contained under the teachings of Prophet Muhammad – Peace be upon him. The Financial

[325] Dr. H.H Hassa, Introduction to the Study of Islamic Law, Adam Publishers and Distributers New Delhi-110002. 2007

Institutions (Islamic Banking) Regulations, 2018 is the secondary law that governs mortgages acquired under Islamic banking in Uganda.

Since there is no consolidated statute that provides for Islamic banking, the Sharia is going to be my main law of reference in as regards the legal provisions of mortgages under Islamic banking. The sharia not only includes the teachings of Prophet Muhammad (peace be upon Him) but also includes the interpretation of various Muslim scholars.

As mentioned above, there are two kinds of mortgages under the Islamic banking system which are; Murabaha (differed sale finance),Ijara (lease to own) and Musharakah.

The law regulating ijarah mortgages issued under Islamic banking

Ijara (lease to own)

This type of mortgage under Islamic banking takes the form of a lease on the property.

The term Ijara stems from the Arab term 'ajara' which commonly means rewarding or recompensing. Ijarah emanates from the noun 'al-ajr' which means compensation, reward or consideration, return or counter value (al-iwad) against the use of a property. [326]Under Islamic banking, this can be referred to leasing or hiring.

In general, Muslim scholars define ijarah as owning a specific benefit of an asset against a consideration[327]

In particular, there are various definitions of ijarah cited by the Muslim scholars as the four schools of jurisprudence have given different explanations to the meaning of ijarah, which are illustrated as follow:

The Maliki School defines ijarah as a transfer of ownership of permitted usufruct for a known period in exchange for compensation (price).[328]

The Hanbali School has described ijarah as a contract where the subject matter is lawful and for defined use (manfa'ah); corporeal object ('ayn) is also lawful and determined; and for a specific period of time.[329]

The Hanafis define ijarah as a contract intended to give ownership of a determined and legitimate usufruct (manfa'ah) of a rented corporeal object ('ayn) against a consideration.[330]

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[326]Wabah. Al-Zuhayli, Tafsir al-munir, (Financial Transactions) (Persatuan Ulama Malaysia, 2002),160

[327] See: E. Hill, Al-Sanhuri and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of 'Abd al-Razzaq Ahmad al-Sanhuri, Egyptian Jurist and Scholar, 1895-1971 [Part II] Source: Arab Law Quarterly, Vol. 3, No. 2 (May, 1988), 182-218

[328] This is the opinion of Al-Dardīr and Al-Qarāfī from the Maliki School

[329] This definition is given by 'Ibn Qudāmah, Al-Buhūtī and 'Ibn Qayyim Al-Jawziyyah from the Hanbali School

[330] 'Ibn Al-Humām, Al-Kāsānī and 'Ibn 'Ābidīn from the Hanafi School provide this definition.; see also AI-Zuhayli, Financial Transactions, v. 1, p. 370

The Shafi'is view ijarah as a contract where the subject matter is the determined, legitimate, assignable and lawful usufruct of an object against a fixed consideration.[331]

Much as the above definitions are different in their phraseologies, they actually agree on the basic meaning of ijarah. All four schools of jurisprudence unanimously agree that ijarah is a contract for utilizing the usufructs (manfa'ah) of a defined object against a determined consideration.

The above juristic definitions lead to three significant aspects of ijarah contract. Firstly, ijarah contract is well-understood as a contract to give the ownership of a particular usufruct.[332]For example, the hirer has absolute freedom to use the usufruct of an asset within an agreed period of time. Secondly, the definitions comprise three essential pillars of an ijarah contract, namely, consent of the contracting parties, a specific asset to be leased out and rental payments. Thirdly, the usufruct which is the subject of ijarah contract must be identified and capable of being legally and reasonably utilized. [333]

Ijarah is a process by which usufruct of a particular property is transferred to another person in exchange for a rent claimed from him. [334]Under the context of Islamic banking, it has been viewed as a lease contract under which the bank or financial institution leases equipment or a building to one of its clients against a fixed charge. [335]Therefore, regarding the Islamic commercial context, ijarah is a contractual relationship between an owner of a property and a person who wishes to lease the property.

Both parties will enter into a lease contract which can also be referred to as a hire contract. The bank will usually put the property up for rent every time the lease period terminates, so the property will not remain unutilized for a long period of time. The title of the property remains with the bank; hence it assumes the risk of depreciation and other risks related with ownership.

From the above-given definitions, ijarah has been well understood as a contract in which the owner of a property transfers a legal right to use and derive profit from the property, to another person, for an agreed period, at an agreed consideration. In this instance, the owner is called a lessor (mu'ajir); the person who uses the property is known as a lessee or hirer (musta'jir); the subject matter is the usufruct of the property (manfa'ah); and the consideration refers to a rent (ujrah).

Validity of Ijarah

[331] This is the definition provided by A-Khatīb Al-Shirbīnī from the Shafi'i School
[332] Al-Sanhuri, supra
[333] Ibid
[334] Nadwvi and Ar Ahmad, Jamliarat al-Qaivä `id al-Figlliyya Ii al-Mu `ämalat al- M Iiyya, Riyadh: (Printed for al-Rajhi Bank, 2000) 45.
[335] Salleh (1986)

The many Muslim jurists grounded their permission of the ijarah contract on the Qur'an, the Sunnah and the consensus of Muslims. There are several Qur'anic verses which are commonly mentioned as evidence for ijarah contract. Among these verses are:

Lodge them where ye dwell, according to your wealth, and harass them not so as to straighten life for them. And if they are with child, then spend for them till they bring forth their burden. Then, if they give suck for you, give them their due payment and consult together in kindness; but if ye make difficulties for one another, then let some other woman give suck for him (the father of the child). [336]

"One of the two women said: O my father! Hire him! For the best (man) that thou canst hire is the strong, the trustworthy. He said: Lo! I fain would marry thee to one of these two daughters of mine on condition that thou hirest thyself to me for (the term of) eight pilgrimages. Then if thou completest ten it will be of thine own accord, for I would not make it hard for thee. Allah willing, thou wilt find me of the righteous [337]

The second verse indicates that the ijarah contract had been used in the time of Moses. According to al-Shāfiʿī, the above verses show clearly that the ijarah contract is lawful in any permissible transactions.

There are also several hadith that support the practice of leasing.

"He who hires a person should inform him of his fee." [338] **And, "Give a worker his fee before his sweat dries up."** [339]

Prophet Muhammad (Peace be upon him) and Abu Bakr hired a man from the tribe of Bani Ad-Dil as an expert guide who was a pagan. They gave him their two riding camels and took a promise from him (expert guide) to bring their riding camels in the morning of the third day to the Cave of Thaur.

The above-mentioned hadith provide evidence for the legitimacy of ijarah. It was practiced by Prophet Muhammad (Peace be upon him) and his companions. Prophet Muhammad (Peace be upon him) also laid down some guidelines and manners of conducting ijarah.

It is also known that the Muslim jurists during the time of the companions that the Prophet Muhammad (Peace be upon him) reached a consensus on the permissibility of ijarah.[340]**The practice of ijarah was permitted at that time, because there was a need for such transactions.**

[336] At-Talaq: 6
[337] Al-Qasas: 26-27
[338] Hadith narrated by ʻAbd-ar-Razzaq and al-Baihaqi.
[339] Hadith narrated by Abu Ya'la, Ibnu Majah, At-Tabrani and At-Tirmizi.
[340] (Al-Zuhayli, 2003).

Ijarah is a significant contract like sale. If sale is permitted for the purpose of acquiring a property, thus, ijarah is necessarily allowed for purpose of using a usufruct of the property.[341]

Application of Ijarah in Islamic Banking and Finance

One of the products offered by Islamic banks is the Islamic hire-purchase or Al-Ijārah Thumma al-Bay' (hereafter AITAB) facility which is designed to meet the current demand and avoid certain risks in the financing of consumer durables. Most literatures refer AITAB to ijārah wa iqtinā' or al-ijārah al-muntahiyyah bit-Tamlīk. These terms are used interchangeably.

AITAB refers to possessing the benefit of certain assets for a prescribed time, by paying an agreed sum of rental, with an understanding that the owner will transfer the rented asset to the lessor at the end of the agreed period or during the period, provided that all rental payments or instalments have been made in entirety.[342]The transfer of ownership is affected by a new and independent contract, either by giving the asset as a gift, or selling it at an agreed price. Al-Sanhuri asserts that this arrangement comprises an ijarah contract which is then followed by contract of sale, thus, each contract is independent and not combined in one agreement[343].

In a commercial context, ijarah wa iqtinā' or AITAB is a mode of financing adopted by Islamic banks and other financial institutions offering Islamic products. It is a contract under which the bank finances an asset such as equipment, building or other facilities for the customer against an agreed rental together with an undertaking from the customer to make additional payments in an account which will eventually enable him to purchase the asset. The rental and the purchase price are fixed so that the bank gets back its principal sum along with some profit which is usually determined in advance

Like any other contracts, AITAB has to fulfill all conditions of a valid contract stipulated by the Shari'ah. The contract should be executed by mutual agreement, responsibilities and benefits of both parties should be clearly spelt out, and the agreement should be for a known period and against a known price. In particular, AITAB has to adhere to both principles of leasing (ijārah) and sale (bay') contract in respect of conditions imposed onto the contracting parties, offer and acceptance, consideration and subject matter of the contract.

Under the first contract, the lessee leases a property from a lessor at an agreed rental over a specified period. Upon expiry of the leasing or rental period, the lessee enters into a second contract to purchase the goods from the lessor at an agreed price. In the current practice, AITAB involves three main parties: customer, financing company, and vendor. As seen below:

(a) Finance Company buys the property from Vendor or real estate dealer, based on the order of the Customer.

(b) Finance Company rents property to the Customer at a rate agreed upon for a specified period of time. The Customer (hirer) agrees to pay for property tax and insurance coverage. He also will be responsible for its maintenance.

[341] (Sulaiman, 1992).
[342] Wahbah al-Zuhayli (2002), supra
[343] Refer to Al-Zuhaili, W. (2002) supra. Al-Mu'amalat Al-Maliyah Al-Mu'asarah Contemporary Financial Transactions, (Damsyik, Syiria, Darul Fikr). 48

(c) At the end of the period the Finance Company and the Customer will sign the sale and purchase agreement.

The Necessary Conditions for Ijarah

A valid ijarah contract must be formed from required pillars and satisfy several conditions attached thereof. Majority of Muslim scholars have agreed on four essential pillars for the formation of an ijārah contract:[344]

The Two Contracting Parties

There must be at least two parties entering into an ijarah contract; a person giving a lease or lessor; and a person accepting the lease or lessee. Both contracting parties should be fully qualified and possess legal capacity to execute the contract. They must be sane and adult unless they are represented by a legal representative or wali or guardian in the case of a child. Furthermore, both contracting parties must freely consent to the ijārah. When one of the parties executes the contract against his free will, then the contract will become voidable.[345]

Offer and Acceptance

This is the same in any kind of contract. In ijarah the ījab and qabul refer a situation where one party offers to give an object on lease and another party accepts such offer. The general rules of contract have laid down some guidelines for perfecting a valid offer and acceptance. Firstly, an offer and acceptance must be expressed clearly to show the party's intention. Such expressions may be indicated orally, or by writing, or signal etc. Secondly, a definite acceptance is made in response to a definite offer in the same session. Thirdly, acceptance must correspond exactly with an offer. For example, a person said, "I lease this house to you", the other party must pronounce his consent by saying, "I accept the leased house" or "I accept".

Subject Matter

A subject matter of an ijārah contract refers to a usufruct or manfa'ah derived from a specific property; thus, a usufruct will only exist when the property in which such usufruct is attached to, is in existence. For example, in the case of renting a house, the house must physically exist, because the benefit of renting the house will not be obtained if there is no house in existence (except in forward ijarah).

The usufruct to be leased out must satisfy certain conditions, namely, it must be legitimate in Sharia; it is known by both lessor and lessee; it is a benefit that is capable to be handed over to the lessee; it has no defect which could make it incompetence to give intended benefit to the lessee; and its use is limited to certain agreed period. The property in which the usufruct is attached to must be in the form of tangible asset or property. It must comply with certain conditions as follows:

[344] However, the Hanafis affirms on one pillar only, i.e., offer and acceptance. Other essentials such as the contracting parties, subject matter and consideration are included in conditions of a valid ijārah contract, not its pillars

[345] This rule is based on surah al-Nisā' (4) verse 29 which means: "O ye who believe! Eat not up your property among yourselves in vanities; But let there be amongst you traffic and trade by mutual good-will; …"

- **It must have a valuable use, thus, a thing having no usufruct at all cannot be leased[346]**

- **It must not be perishable for the whole period of lease [347]. It must be actually and legally attainable, thus, to lease something which cannot be delivered is not permitted.[348]**

- **It should be precisely specific.**

- **It is necessary to make known the purpose for which the asset is rented. It must be free from ambiguity (jahala) and uncertainty (gharar).**

- **In commercial sectors, it is not permitted to lease a property to a company that will use it for Sharia prohibited activities, such as to convert it into a gambling center or bar.[349]**

The period for using it must be fixed and agreed upon by both parties. Renewal terms must also be stated clearly and should not be left to the lessor's discretion (Usmani 2002).

Obligations of the lessor:

- **He must have full possession and legal ownership of the property before an ijārah contract is made operative.**

- **After the conclusion of the ijārah contract, the Lessor must hand over the possession of the leased property to the lessee, although he will retain the ownership title of the property.**

[346] Usmani, Muhammad Imran Ashraf, Meezan Bank's Guide to Islamic Banking., (Dar-ul-Ishaat Karachi, 2002)

[347] Sulaiman 1992

[348] Enid.H, Al-Sanhuri and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of 'Abd al-Razzaq Ahmad al-Sanhuri, Egyptian Jurist and Scholar, 1895-1971 [Part II] Source: Arab Law Quarterly, Vol. 3, No. 2 (May, 1988),

[349] However, according to Al-Rajhi Bank (2001), it is permissible to lease the property to those whose major activities are Íalāl or permissible even they involve some secondary prohibited activities

- **The property must be delivered on time, i.e. on the date of commencement of ijārah or the date agreed upon by both parties, together with all the necessary conditions to enable the property be effectively utilized by the lessee.**

- **It is the duty of the lessor to maintain the leased property in order to retain its benefit which is to be used by the lessee.**

- **As an owner, he will bear all liabilities arising from the ownership. For example, in a case of renting a house all taxes concerning the house such as taxes, insurance expenses, and other major maintenance expenses that are related to ownership risks must be borne by him.**[350]

- **In the event of any damage that occurs to the leased property due to the lessee/hirer's negligence, the owner shall have a right to claim compensation.**

- **The owner must respect the lessee's right for quite possession and enjoyment in the leased property.**

Obligations of the lessee

- **He shall act as a trustee of the lessor in treating the leased property properly.**

- **He must take reasonable care of the leased property and cannot use it in a harmful way.**

- **If the lessor damages the property, he shall be responsible for the repairs and restoring the property back to its original condition.**

- **In the event of negligence or misuse on part of the lessee, which may have damaged the leased property, he shall be obligated to compensate the lessor.**

[350] Al-Rajhi Bank (2001) propounds that the lessor also bears most liabilities attached to the leased object such as damage to the object, cost of replacement of durable parts and other costs of basic maintenance. The lessor can give permission to the lessee to undertake all the above liabilities, but the costs must still be borne by the lessor

- **It is the lessee's duty to bear any cost of ordinary routine costs, for example in the case of a house, utility bills like water and electricity would be the lessee's responsibility.**

- **Unless the contract stipulates otherwise, the lessee can only use the property according to the prescribed purposes. [351] If a house is rented for personal use as stipulated in the contract, he cannot turn it into a shop or school.**

Conditions of establishing a rent price

- **Ijārah contract is executed between the contracting parties against a consideration which is known as rent. The conditions of rent are:**

- **The amount of rent must be specified in order to avoid deceit and dispute in the future[352]**

- **There must be a clear term stating whether the rent will be flat for the whole period of the agreement, or it will be renewed depending on the prevailing market condition. In the later situation, the renewal terms must be stated as to when such action will be taken (i.e. annually or in every 6 months) and the percentage of the probable increase or decrease (e.g. 5%) [353].**

- **It should be certain and known to both parties [354]**

- **The rent money has to be legal in Sharia. Thus, it is not permissible to pay the rent with illegal things such as wine and pork.[355]**

- **The manner of paying the rent has to be agreed by both parties[356]. It must be clearly specified whether the payment is to be made on daily, weekly or monthly basis.**

- **In addition, they must also agree on methods of paying the rent, either by cash, or cheque, or standing order through the bank account. If there is no such agreement, then the local custom that governs such transaction will be referred to[357].**

- **The rent shall fall due from the date of delivery of the leased object, not the date of signing the contract.**

- **The rent must be paid on an agreed time, failure to do so will amount to a default which will lead to a termination of ijārah.**

[351] If no such purpose is specified in the contract, the lessee can use it in a reasonable and ordinary manner. If he intends to use it for an uncommon purpose, he must obtain the owner's express permission in advance

[352] The Prophet Mohamed (Peace be upon him) commanded, "He who hires a person should inform him of his wages"] (Al-Jazairi 1976).

[353] Usmani 2002

[354] Al-Zuhayli, 2003

[355] Kharofa, 1997.

[356] Sulaiman 1992

[357] For example, in the case of renting a house, the local people usually pays in cash at the beginning of every month, so the parties of an ijārah contract may adopt such practices.

- **At the expiry of the lease agreement any new term cannot be pre-determined, but the parties can enter into a new agreement to this effect. This includes continuation of the lease, or sale of the leased asset to the lessee. So, if the owner intends to sell the leased object after the lease period has expired, the price can only be fixed under the new agreement. Thus, a pre-determined sale price is not permitted.[358]**

- **If the lessee pays the rental for the total period of lease and the lease agreement is terminated prior to maturity; the lessor is entitled to the rental for the period in which the lessee used the property. The rental for the period that is not utilized by the lessee should be returned to the lessee provided that the lessor agrees to the termination of the lease agreement.**

- **The parties are entitled to amend and vary the rental provided that this is related to the remaining duration which agreement is yet to be signed or effected.**

- **Among all conditions listed above, three major conditions must be applied to the ijārah contract; firstly, the nature of the usufruct must be precisely defined; secondly, the consideration i.e., rental must be of fixed value; and thirdly, the leasing period must be precisely determined[359].**

Termination and consequences of lease arrangement

In the case of financial lease, the Islamic bank may not be able to transfer the ownership of the property to the client due to a certain condition, even though the client has been paying rental of more than market rate in order to own the property. In this circumstance, a question arises as to how the bank and the client will treat the rental that has been paid. The Islamic bank is obliged to review the rental and adjust the rental accordingly. For example, if the client is paying UGX 1,500,000 (One million five Hundred thousand Shillings) as monthly rental instalment in finance lease attached with conditional gift or normal gift. The UGX 1,000,000/= (One Million Shillings) is the normal market rental price for such kind of the property but the client agrees to pay additional UGX 500,000 /= (Five Hundred Thousand) as purchasing price. Once the Islamic bank is not able to transfer the property, all of the UGX 500,000/= (Five Hundred Thousand) part payments that have been paid should be returned to the client from the first instalment.

In cases where the leased property may be impaired prior to the maturity, the interest of the client in the property is affected. In such instances the client is entitled to reject the property in which case all additional rental instalment paid by the client in order to own the property should be returned to the client.

Right of Subleasing

By entering into lease agreement, the lessee owns the benefit of the leased property. As a principle, an owner of usage is entitled to sublease it to another party. The requirement for

[358] The rational is to avoid gharār or uncertainty in the transaction. The price must be fixed by taking into account certain factors, i.e., market price, condition of the property and mode of payment (cash or deferred).
[359] Coulson, 1984; Al-Sanhuri, undated

subleasing is that the sub lessee's usage of the property should not be more than the usage of the current lessee or sub lessee's usage detrimental to the leased property. However, the right of the lessee to sublease is subject to the terms of the agreement. If the agreement indicates that subleasing is not permitted, then the lessee must comply with this condition.

Murabaha

According to Mufti Muhammad Taqi Usmani, Murabahah is a mode used by the majority of Islamic banks and Financial Institutions in financing. Murabahah refers to some kind of sale.[360]

The Islamic concepts, all resolve on the idea that the whole universe is created and controlled by one, the only God (Allah) who has created man and appointed him vicegerent on earth to fulfill certain objectives through obeying his commands[361] .

While the conventional banking system categorizes banking into two sectors, the capital and the entrepreneur as the two factors of production where the former gets interest and the latter is entitled to profits. Interest refers to a fixed return for providing capital while profit can be earned only if there is a surplus after distributing the return. Islamically however, there is nothing like capital and entrepreneur as any person who contributes capital in the form of money to a commercial enterprise assumes the risk of loss and thereafter is entitled to a proportionate share in the actual profit.[362]

Simply this is a contract where the seller discloses to the buyer the actual cost of the item and the markup.[363]

Murabaha comes from the Arabic root word (rabiha) meaning to grow in business or to succeed.[364] The concept of murabaha is based on models of early Islamic banking where the principles of profit and loss sharing were used. In regard to equity-based financing, such a model of financing was considered far more superior compared to conventional banking in as far as fairness, ethics and social justice are concerned.

Character traits of the concept of murabahah

It should be noted that Murabahah is not a loan given on interest. It is the sale of a commodity for a deferred price which includes an agreed profit added to the cost.

Secondly being a sale, and not a loan, the murabahah should fulfil all the conditions necessary for a valid sale, like the payment in full for the product. [365]

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[360] Muhammad Taqi Usmani, An Introduction to Islamic Finance (Kluwer Law International, 2002) 37
[361] Supra at page 14
[362] Usmani, Muhammad Imran Ashraf, 2002. Meezan Bank's Guide to Islamic Banking. Karachi, Dar-ul-Ishaat.

[363] Hans Visser, Islamic Finance: Principles and Practice (Edward Elgar Publishing, 2009), 57
[364] I. Madoor and M.B Makram, Lisa Al Arab (The Language of Arab), Beirut Dar Alkotob Ali imikyah
[365] Usmani, An Introduction to Islamic Finance, 38

Thirdly Murabahah cannot be used as a mode of financing except where the client needs funds to actually purchase some commodities. For example, if he wants funds to purchase cotton as a raw material for his ginning factory, the Bank can sell him the cotton on the basis of murabahah. But where the funds are required for some other purposes, like paying the price of commodities already purchased by him, or the bills of electricity or other utilities or for paying the salaries of his staff, murabahah cannot be effected, because murabahah requires a real sale of some commodities, and not merely advancing a loan.

Fourthly the financier must have owned the commodity before he sells it to his client.

Fifthly the commodity must come into the possession of the financier, whether physical or constructive, in the sense that the commodity must be in his risk, though for a short period.[366]

Sixthly the best way for murabahah, according to Shari'ah, is that the financier himself purchases the commodity and keeps it in his own possession, or purchases the commodity through a third person appointed by him as agent, before he sells it to the customer. [367]However, in exceptional cases, where direct purchase from the supplier is not practicable for some reason, it is also allowed that he makes the customer himself his agent to buy the commodity on his behalf. In this case the client first purchases the commodity on behalf of his financier and takes its possession as such. Thereafter, he purchases the commodity from the financier for a deferred price. [368]

Seventhly as mentioned earlier, the sale cannot take place unless the commodity comes into the possession of the seller, but the seller can promise to sell even when the commodity is not in his possession. The same rule is applicable to murabahah.

In the light of the aforementioned principles, a financial institution can use the murabahah as a mode of finance by adopting the following procedure:

Firstly: The client and the institution sign an over-all agreement whereby the institution promises to sell and the client promises to buy the commodities from time to time on an agreed ratio of profit added to the cost. This agreement may specify the limit up to which the facility may be availed. [369]

Secondly: When a specific commodity is required by the customer, the institution appoints the client as his agent for purchasing the commodity on its behalf, and an agreement of agency is signed by both the parties. [370]

Thirdly: The client purchases the commodity on behalf of the institution and takes its possession as an agent of the institution.[371]

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[366] Usmani, An Introduction to Islamic Finance, 38-40
[367] ibid
[368] Andrew Hart and Alex Childs, Butterworths Journal Of International Banking And Financial Law: Murabaha: A New Era (July/August 2011) 1-2
[369] ibid
[370] Andrew Hart and Alex Childs, Butterworths Journal Of International Banking And Financial Law: Murabaha: A New Era (July/August 2011) 1-2
[371] Ibid

Fourthly: The client informs the institution that he has purchased the commodity on his behalf, and at the same time, makes an offer to purchase it from the institution. [372]

Fifthly: The institution accepts the offer and the sale is concluded whereby the ownership as well as the risk of the commodity is transferred to the client. All these five stages are necessary to effect a valid murabahah. If the institution purchases the commodity directly from the supplier (which is preferable) it does not need any agency agreement. In this case, the second phase will be dropped and at the third stage the institution itself will purchase the commodity from the supplier and the fourth phase will be restricted to making an offer by the client.

The most essential element of the transaction is that the commodity must remain in the risk of the institution during the period between the third and the fifth stage. This is the only feature of murabahah which can distinguish it from an interest-based transaction. [373]Therefore, it must be observed with due diligence at all costs, otherwise the murabahah transaction becomes invalid according to Shari'ah.

It is also a necessary condition for the validity of murabahah that the commodity is purchased from a third party. The purchase of the commodity from the client himself on 'buy back' agreement is not allowed in Shari'ah. Thus, murabahah based on 'buy back' agreement is nothing more than an interest-based transaction.

The above-mentioned procedure of the murabahah financing is a complex transaction where the parties involved have different capacities at different stages. (a) At the first stage, the institution and the client promise to sell and purchase a commodity in future. This is not an actual sale. It is just a promise to affect a sale in future on murabahah basis. Thus, at this stage the relation between the institution and the client is that of a promisor and a promise. (b) At the second stage, the relation between the parties is that of a principal and an agent. (c) At the third stage, the relation between the institution and the supplier is that of a buyer and seller. (d) At the fourth and fifth stage, the relation of buyer and seller comes into operation between the institution and the client, and since the sale is effected on deferred payment basis, the relation of a debtor and creditor also emerges between them simultaneously. All these capacities must be kept in mind and must come into operation with all their consequential effects, each at its relevant stage, and these different capacities should never be mixed up or confused with each other. [374]

The institution may ask the client to furnish a security to its satisfaction for the prompt payment of the deferred price. He may also ask him to sign a promissory note or a bill of exchange, but it must be after the actual sale takes place, i.e., at the fifth stage mentioned above. [375]The reason is that the promissory note is signed by a debtor in favor of his creditor, but the relation of debtor and creditor between the institution and the client begins only at the fifth stage, whereupon the actual sale takes place between them. [376]

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[372] Ayub Muhammad. Understanding Islamic Finance, (John Wiley and Sons Ltd England ,2007) 310
[373] Ayub Muhammad. Understanding Islamic Finance, (John Wiley and Sons Ltd England ,2007) 307.

[374] See Usmani Muhammad Taqi, 1998. Understanding Islamic Islamic Finance, p. 240. Karachi, Idart-ul-Maarif.

[375] Usmani, An Introduction to Islamic Finance, 44.
[376] Ibid

In the case of default by the buyer in the payment of price at the due date, the price cannot be increased. However, if he has undertaken, in the agreement to pay an amount for a charitable purpose, as mentioned in paragraph 7 of the rules of Bai' Mu'ajjal, he shall be liable to pay the amount undertaken by him. But the amount so recovered from the buyer shall not form part of the income of the seller / the financier. He is bound to spend it for a charitable purpose on behalf of the buyer, as will be explained later in detail. Some Issues Involved in Murabahah so far, the basic concept of murabahah has been explained. Now, it is proposed to discuss some relevant issues with reference to the underlying Islamic principles and their practical applicability in murabahah transaction, because without correct understanding of these issues, the concept may remain ambiguous and its practical application may be susceptible to errors and misconceptions.

There are different structures of Murabaha

Two – Party Structure[377]

The easiest possible structure emerges when the transaction involves two parties only; the buyer and the seller. The seller is usually the bank, sells the item to the buyer, its customer, on a deferred payment basis.

From Shari'a point of view, such a structure is the model one. Its profits are fully warranted by the risk it assumes as a seller and there is no notion of riba (interest).

This arrangement can be used in property financing projects. The bank in this case has its own properties from where its customers may purchase these properties (buildings or land) on a deferred payment basis.

Three – Party Structure[378]

In some cases, however, the arrangement involves three parties - the seller or supplier, the bank and the customer. In this case, the bank will buy the property from the original seller; then will resell the property in turn to the customer.

There are therefore two distinct sale contracts that occur at different points of time. The first contract is between the seller and the bank and second contract is between the bank and its customer.

Three – Party Structure with Customer as Agent

An alternative scenario exists when the bank wants to indirectly deal with the seller in connection with the first purchase/sale of the item. In this case, the bank will retain the customer as its agent who would transact with the seller as far as the first purchase/sale of the

[377] David Miles, Christoph Shulz,:Common Islamic Finance Structures (Covington & Burling LLP 2017) https://www.cov.com/files/upload/Common_Islamic_Finance_Structures.pdf (accessed on 12.0ctober 2018)

[378] A.Hart and A,Childs, Butterworths Journal of International Banking and Financial Law: Murabaha : A New Era (July/August 2011)

item is concerned. Once the bank purchased the commodity, the agency agreement with the customer is cancelled and the customer now will purchase the good from the bank.

This arrangement where the customer acts as the agent of the bank for the first sale transaction, is ideal where the customer requires specialized equipment or knowledge about the property and is better informed than the bank about the product(s) and source(s) of supply.

This arrangement may also be desirable for recurring trade financing transactions or working capital financing. In the first stage, the connection between them is that of a promisee and promisor; it then changes into a principal-agent relationship; in the third part, it is between a seller and a buyer; and finally, when the sale is on a postponed payment basis, it is a creditor-debtor relationship. Therefore, it is important that at each stage, their roles, rights, duties and their repercussions are clearly agreed.

The elements of a Murabaha contract

In order for there to be a valid Murabaha contract that is acceptable in sharia law, the following conditions have to be properly met by the parties involved. The rules of sale contract in Islamic jurisprudence are extensive, as described in. However, the main elements for any sale contract to be considered as valid are: [379]

- **The substance of sale must be existing at the time of sale.[380]**
- **The subject of sale must be in the ownership of the seller at the time of sale.[381]**
- **The subject of sale must be in the physical or constructive possession of the seller when he sells it to another person.[382]**
- **The conveyance of the sold commodity to the buyer must be definite and should not be contingent on a possibility or chance.**
- **The subject of sale must be precisely known and identified to the buyer. [383]**
- **The subject of sale must be a property of value.[384]**
- **The subject of sale should not be a thing which is not used except for a haram purpose, like pork, wine etc.**
- **The cost of the subject of sale must be known and established.**
- **The certainty of price is a required condition for the legitimacy of a sale. If the price is undefined, the sale is void. [385]**

[379] Usmani, An Introduction to Islamic Finance, 38
[380] Ibid ,39
[381] Ibid 42
[382] ibid
[383] Usmani, An Introduction to Islamic Finance, 38
[384] Ibid 38 - 40
[385] Usmani (2002, pp. 38-40)

- **The seller must explicitly disclose the cost of the sold property he has incurred, and sells it to another party by adding profit or mark-up.[386]**
- **The profit in Murabaha can be determined by mutual consent, either in lump sum or through an agreed ratio of profit to be charged over the cost.[387]**
- **All the expenditures incurred by the seller in obtaining the property like taxes or stamp duty etc. shall be incorporated in the cost price, and the mark-up can be added on the cumulative price.**

Considerations for the determination of profit.

The most way to determine the profit or mark-up in the sale of the property is through mutual agreement of the parties. This is as is prescribed in the Quran.

***"O you who believe! Do not devour your property among yourselves falsely, except that it be trading by your mutual consent"*[388]**

It is acceptable practice for the price to be determined by the buyer and seller through mutual agreement. Usually, it is done through a study of the market value of property or through the processes of demand and supply. However, where there is price manipulation of the properties it is then necessary for the government authorities to intervene and determine or regulate the prices of commodities or infrastructure.[389] It is however important to note, that in matters of properties for example infrastructure, land, and buildings, it is rare fir government to get involved.

Profit determination can also be based on a known market reference rate like LIBOR, as long as it is only used as a yardstick and is not unequivocally declared as the profit margin. Quoting Mufti Taqi Usmani:[390]

"If a murabahah transaction fulfils all the conditions enumerated in this chapter, merely using the interest rate as a benchmark for determining the profit of murabahah does not render the transaction as invalid, haram or prohibited, because the deal itself does not contain interest. The rate of interest has been used only as an indicator or as a benchmark."

How to acquire property through Murabaha in Islamic banking.

- **Customer establishes and approaches Seller or supplier of the item that he wishes to acquire which may be land, building, etc., and collects all the necessary information.**
- **Customer contacts the bank for murabaha financing for the item he wishes to acquire. He will present full explanation and thoroughdescription including the source of supply.**

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[386] Ibid
[387] ibid
[388] Quran 4:29.
[389] Al-Qaisi and Dr S. Kamil. Ma'aeer Al Ribh wa dhawabituhu fi at tashree' al Islami (Profit Standards and its Controls in Islamic Jurisprudence). Dubai: Islamic Affairs & Charitable Activities Department. 2008
[390] ibid

- **The bank will run a credit evaluation, the same way this is done in a conventional bank.[391]**

- **If the customer request is acceptable the bank offers to purchase the item and sell it to the customer at a mutually agreed marked-up price. [392]**

- **5. This markup price will be quoted, most probably as a per annum flat rate based on the total cost of acquiring the item by the bank, which needs price, and all related expenses. [393]**

- **6. Both the customer and the bank know beforehand the price of the item and the markup, which the bank is going to charge. The marked-up price specified in the murabaha agreement cannot be changed.**

- **7. If the profit margin and terms of the murabaha is accepted, then the customer will be asked to sign a pledge contract obligating to buy the item once it is under the ownership of the bank. If the bank owns it within the agreed-upon time with exactly the required conditions, then honoring this pledge is mandatory for the customer. It means that, if the customer fails to honor his promise, he will be responsible for any loss that may ensue due to such failure. The arrangement stipulates inter alia, the amount due from the customer, and the method and period of its repayment. The customer can repay either in lump sum at an agreed date, or in installments over a mutually agreed period. [394]**

- **8. As part of the murabaha transaction, the customer is usually asked to present some securities to the bank at the time of signing the pledge. These securities can be in the form of cash or in any other liquid asset, equivalent to about 5% to 10% of the deal. This is called, in Islamic banking Jargon, (or Seriousness Margin) i.e., evidence that the customer is serious. This will be used to compensate the bank in case the latter have failed to honor his obligation to purchase. It is to be noted that this is not a down-payment, because the sale contract is yet to be concluded and in Sharia, no sale is to be made unless the seller actually has the items to be sold under his custody.**

- **9. The bank makes payment of base price to the seller. Seller transfers ownership of item to the bank**

- **10. Once the good is ready, the customer will be asked to sign the contract and receive the item.**

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[391] Ahmed Ali Siddiqui Vice President & Manager Product Development & Shariah Compliance Meezan Bank Limited, Murabaha Process: Documentation & Application of Murabaha, www.alhudacibe.com/.../Bai%20(Murabahah.../Murabaha%20-%20Process, %20Docu... (Accessed on the 12th October 2018)

[392] ibid

[393]Ahmed Ali Siddiqui Vice President & Manager Product Development & Shariah Compliance Meezan Bank Limited, Murabaha Process: Documentation & Application of Murabaha, www.alhudacibe.com/.../Bai%20(Murabahah.../Murabaha%20-%20Process, %20Docu... (Accessed on the 12th October 2018)

[394] ibid

- **11. After receiving the item, the customer becomes the legal owner of it, and a debtor to the bank for the amount of the marked-up price.**
- **12. The customer pays marked-up price in full or in parts over future (known) time period(s)**

Musharakah

It's an Arabic word coming from another word '*Shirkah*'[395] meaning sharing and in the business language, it means a joint venture.

Unlike in the modern capitalist sector where interest is the sole instrument indiscriminately used in financing every type, Islam prohibits interest (ribah) and as such concepts like Musharakah play a vital role in an Islamic economy[396].

Musharakah' is a word of Arabic origin which literally means sharing. In the context of business and trade it means a joint enterprise in which all the partners share the profit or loss of the joint venture. [397]The concept can be ideal alternative for the interest-based financing with far reaching effects on both production and distribution. Islam has termed interest as an unjust instrument of financing because it results in injustice either to the creditor or to the debtor.

If the debtor suffers a loss, it is unjust on the part of the creditor to claim a fixed rate of return; and if the debtor earns a very high rate of profit, it is injustice to the creditor to give him only a small proportion of the profit leaving the rest for the debtor. In the modern economic system, it is the banks which advance depositors' money as loans to industrialists and traders.

The rate of interest is the main cause for imbalances in the system of distribution, which has a constant tendency in favor of the rich and against the interests of the poor. Conversely, Islam has a clear-cut principle for the financier. According to Islamic principles, a financier must determine whether he is advancing a loan to assist the debtor on humanitarian grounds or he desires to share his profits. If he wants to assist the debtor, he should resist from claiming any excess on the principal of his loan, because his aim is to assist him[398].

However, if he wants to have a share in the profits of his debtor, it is necessary that he should also share him in his losses. The concept has been divided into two kinds: (1) *Shirkat-ul-Milk:* meaning joint ownership of two or more persons in a particular property. This kind of "shirkah" may come into existence in two different ways: At times, it comes into operation at the option of the parties. For example, if two or more persons purchase an equipment, it will be owned jointly by both of them and the relationship between them with regard to that. The relationship has come into existence at their own option, as they themselves opt to purchase the equipment jointly. There are also cases where this kind of "shirkah" comes to operate automatically without any action taken by the parties. For example, after the death of a person,

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[395] See; Hadiths-e-Qudsi "Allah Subhan-o-Tallah has declared that He will become a partner in a business between two Mushariks until they indulge in cheating or breach of trust (Khayanah)."
[396]Surat Al-Rum 30:39
[397] A. Muhammad, Understanding Islamic Finance., (John Wiley and Sons Ltd England,2007) 307
[398] Usmani. Muhammad Taqi,. An introduction to Islamic Finance, (Idart-ul-Maarif. Karachi, 1998). 240

all his heirs inherit his property which comes into their joint ownership as an automatic consequence of the death of that person.

The second version is Shirkat-ul-'Aqd:[399] This means "a partnership effected by a mutual contract". For the purpose of brevity, it may also be translated as "joint commercial enterprise." Shirkat-ul-'aqd is further divided into three kinds: (i) Shirkat-ul-Amwal[400]where all the partners invest some capital into a commercial enterprise. (ii) Shirkat-ul-A'mal[401] where all the partners jointly undertake to render some services for their customers, and the fee charged from them is distributed among them according to an agreed ratio. For example, if two persons agree to undertake tailoring services for their customers on the condition that the wages so earned will go to a joint pool which shall be distributed between them irrespective of the size of work each partner has actually done, this partnership will be a shirkat-ul-a'mal which is also called Shirkat-ut-taqabbul or Shirkat-us-sana'i' or Shirkat-ul-abdan. (iii) The third kind of Shirkat-ul-'aqd is Shirkat-ul-wujooh. Here the partners have no investment at all. All they do is that they purchase the commodities on a deferred price and sell them at spot. The profit so earned is distributed between them at an agreed ratio.

All these modes of "Sharing" or partnership are termed as "shirkah" in the terminology of Islamic Fiqh, while the term "musharakah" is not found in the books of Fiqh. This term (i.e., musharakah) has been introduced recently by those who have written on the subject of Islamic modes of financing and it is normally restricted to a particular type of "Shirkah", that is, the Shirkat-ul-amwal, where two or more persons invest some of their capital in a joint commercial venture.

Sometimes however the term includes Shirkat-ul-a'mal also where partnership takes place in the business of services. It is evident from this discussion that the term "Shirkah" has a much wider sense than the term "musharakah" as is being used today. The latter is limited to the "Shirkat-ul-amwal" only, while the former includes all types of joint ownership and those of partnership.

The partners may agree upon a condition that the management shall be carried out by one of them, and no other partner shall work for the musharakah. But in this case the sleeping partner shall be entitled to the profit only to the extent of his investment, and the ratio of profit allocated to him should not exceed the ratio of his investment, as discussed earlier.

However, if all the partners agree to work for the joint venture, each one of them shall be treated as the agent of the other in all the matters of the business and any work done by one of them in the normal course of business shall be deemed to be authorized by all the partners.

Seemingly termination of Musharakah is synonymous to that of the partnership Act[402] and it can happen in any one of the following events: (1) every partner has a right to terminate the musharakah at any time after giving his partner a notice to this effect, whereby the musharakah will come to an end. In this case, if the assets of the musharakah are in cash form, all of them will be distributed pro rata between the partners. But if the assets are not liquidated, the

[399]Accounting, Auditing and Shariah Standards for Islamic Financial Institutions, (Bahrain, Manama. AAOIFI. 2004-5a) 200

[400] Ibid

[401] ibid

[402] Sections 34 to 46 Partnerships Act, 2010 of the laws of Uganda

partners may agree either on the liquidation of the assets, or on their distribution or partition between the partners as they are. If there is a dispute between the partners in this matter i.e., one partner seeks liquidation while the other wants partition or distribution of the non-liquid assets themselves, the latter shall be preferred, because after the termination of musharakah, all the assets are in the joint ownership of the partners, and a co-owner has a right to seek partition or separation, and no one can compel him on liquidation. However, if the assets are such that they cannot be separated or partitioned, such as machinery, then they shall be sold and the sale-proceeds shall be distributed. (2) If any one of the partners dies during the currency of musharakah, the contract of musharakah with him stands terminated. His heirs in this case, will have the option either to draw the share of the deceased from the business, or to continue with the contract of musharakah.

Thirdly If any one of the partners becomes insane or otherwise becomes incapable of effecting commercial transactions, the musharakah stands terminated.

If one of the partners wants termination of the musharakah, while the other partner or partners like to continue with the business, this purpose can be achieved by mutual agreement. The partners who want to run the business may purchase the share of the partner who wants to terminate his partnership, because the termination of musharakah with one partner does not imply its termination between the other partners.

However, in this case, the price of the share of the leaving partner must be determined by mutual consent, and if there is a dispute about the valuation of the share and the partners do not arrive at an agreed price, the leaving partner may compel other partners on the liquidation or on the distribution of the assets themselves. The question arises whether the partners can agree, while entering into the contract of the musharakah, on a condition that the liquidation or separation of the business shall not be effected unless all the partners, or the majority of them wants to do so.

Mudarabah is another type of profit-sharing and a typical mode of financing. It is a special kind of partnership where one partner gives money to another for investing it in a commercial enterprise. The investment comes from the first partner who is called "rabb-ulmal", while the management and work is an exclusive responsibility of the other, who is called "mudarib". The difference between musharakah and mudarabah can be summarized in the following points:

The first one being that the investment in musharakah comes from all the partners, while in mudarabah, investment is the sole responsibility of rabb-ulmal.

The second in Musharakah, all the partners can participate in the management of the business and can work for it, while in mudarabah, the rabb-ul-mal has no right to participate in the management which is carried out by the mudarib only.

The third in Musharakah all the partners share the loss to the extent of the ratio of their investment while in mudarabah the loss, if any, is suffered by the rabb-ul-mal only, because the mudarib does not invest anything. His loss is restricted to the fact that his labor has gone in vain and his work has not brought any fruit to him. However, this principle is subject to a condition that the mudarib has worked with due diligence which is normally required for the business of that type. If he has worked with negligence or has committed dishonesty, he shall be liable for the loss caused by his negligence or misconduct.

Fourthly the liability of the partners in musharakah is normally unlimited. Therefore, if the liabilities of the business exceed its assets and the business goes in liquidation, all the exceeding liabilities shall be borne pro rata by all the partners. However, if all the partners have agreed that no partner shall incur any debt during the course of business, then the exceeding liabilities shall be borne by that partner alone who has incurred a debt on the business in violation of the aforesaid condition. Contrary to this is the case of mudarabah. Here the liability of rabb-ul-mal is limited to his investment, unless he has permitted the mudarib to incur debts on his behalf.

Fifthly in musharakah, as soon as the partners mix up their capital in a joint pool, all the assets of the musharakah become jointly owned by all of them according to the proportion of their respective investment. Therefore, each one of them can benefit from the appreciation in the value of the assets, even if profit has not accrued through sales. The case of mudarabah is different. Here all the goods purchased by the mudarib are solely owned by the rabb-ul-mal, and the mudarib can earn his share in the profit only in case he sells the goods profitably. Therefore, he is not entitled to claim his share in the assets themselves, even if their value has increased.

Business of the Mudarabah The rabb-ul-mal may specify a particular business for the mudarib, in which case he shall invest the money in that particular business only. This is called al-mudarabah al-muqayyadah (restricted mudarabah). But if he has left it open for the mudarib to undertake whatever business he wishes, the mudarib shall be authorized to invest the money in any business he deems fit. This type of mudarabah is called "al-mudarabah al-mutlaqah" (unrestricted mudarabah) A rabbul-mal can contract mudarabah with more than one person through a single transaction.

A contract of Mudarabah can be terminated at any time by either of the two parties. The only condition is to give a notice to the other party. If all the assets of the mudarabah are in cash form at the time of termination, and some profit has been earned on the principal amount, it shall be distributed between the parties according to the agreed ratio. However, if the assets of the mudarabah are not in the cash form, the mudarib shall be given an opportunity to sell and liquidate them, so that the actual profit may be determined.8 There is a difference of opinion among the Muslim jurists about the question whether the contract of mudarabah can be effected for a specified period after which it terminates automatically. The Hanafi and Hanbali schools are of the view that the mudarabah can be restricted to a particular term, like one year, six months, etc., after which it will come to an end without a notice whereas other schools like the Al-Kasani on the contrary are of the opinion that the mudarabah cannot be restricted to a particular time.

The combination of Musharakah and Mudarabah, a contract of mudarabah normally presumes that the mudarib has not invested anything to the mudarabah. He is responsible for the management only, while all the investment comes from rabb-ulmal. But there may be situations where mudarib also wants to invest some of his money into the business of mudarabah. In such cases, musharakah and mudarabah are combined together. For instance, Ismeal gave to Faisal Shs. 1,000,000/- in a contract of mudarabah. Faisal added Shs. 50,000/- from his own pocket with the permission of Ismeal. This type of partnership will be treated as a combination of musharakah and mudarabah. Here the mudarib may allocate for himself a certain percentage of profit on account of his investment as a Sharik, and at the same time he may allocate another percentage for his management and work as a mudarib. However, when the subscribed money is employed in purchasing non-liquid assets like land, building,

machinery, raw material, furniture etc. the musharakah certificates will represent the holders' proportionate ownership in these assets.

A combination of Musharakah and Mudarabah can be used more easily for financing a single transaction. Apart from fulfilling the day to-day needs of small traders, these instruments can be employed for financing imports and exports. An importer can approach a financier to finance him for that single transaction of import alone on the basis of musharakah or mudarabah.

The major difficulties in these cases arise in the calculation of indirect expenses, like depreciation of the machinery, salaries of the staff etc. In order to solve this problem, the parties may agree on the principle that, instead of net profit, the gross profit will be distributed between the parties, that is, the indirect expenses shall not be deducted from the distribute able profit.

COMPERATIVE ANALYSIS OF THE DIFERENT MORTGAGES IN ISLAMIC BANKING

The rationale for the law on mortgages can be gathered through the long title of the Act that regulates mortgages, case law, the previous statutes that provided for mortgages and the Hansard. In appreciating the rationale of the law, it is important to compare the objectives set out in the long title and the interpretation of the mortgage Act by the various courts.

The Mortgage Act 2009 has a long title which is to the effect that:

"An Act to consolidate the law relating to mortgages; to repeal and replace the Mortgage Act; to provide for the creation of mortgages; for the duties of mortgagors and mortgagees regarding mortgages; for mortgages of matrimonial homes; to make mortgages take effect only as security; to provide for priority, tacking, consolidation and variation of mortgages; to provide for suits by mortgagors; the discharge of mortgages; covenants, conditions implied in every mortgage; the remedies of mortgagors and mortgagees in respect of mortgages; for the power of court in respect of mortgages; and for related matters."

In order to properly examine the rationale for this Law, a detailed analysis will be made on each of the objectives as described in the long title.

In consideration of the objective of consolidating the law relating to mortgages, it is important to look at the history of the law of mortgages. Formerly, the law on Mortgages was regulated by the Registration of Titles Act Cap 230 whose commencement date was 1st May 1924this earlier version of the law that provided for mortgages. The provisions in regard to mortgages under this particular statute were limited. The law on receivership in as regards mortgages was not provided for, issues of foreclosure among others were never given consideration under the Registration of Titles Act.

On the 9thof August 1974, the Mortgage Act Cap 229 commenced. These statutes in unison made up the law of mortgages. The new statute amended and provided for additional aspects that were previously not provided for in the Registration of titles Act. The concepts of receivership, foreclosure, liability of guarantors among others were added to the Mortgage Act.[403]Despite the addition to the law that regulated Mortgages through the existence of two statutes, there were

[403] Sections 4, 5,6,8,9 of the Mortgage act cap 229

still other aspects that were not provided for under the existing laws. These aspects included the mortgaging of marital property, a distinct list of the powers and duties of the mortgagee and mortgagor among others. Therefore, in order to consolidate the law regarding mortgages, provide for aspects that were previously not provided for and protect the rights of the mortgagor and mortgagee, the Mortgage Act No.8 of 2009 was passed and all other preceding laws governing mortgages repealed.

To provide for the duties of mortgagors and mortgagees.

This objective can be gathered from the use of case law, comparison with the previous law regulating mortgages and the current law on mortgages.

Formerly the law on mortgages under the Registration of Titles Act Cap 230 provided a limited insight into the duties of a mortgagor and mortgagee[404]. Which provides for the duties of a mortgagee to pay the mortgage and act in good faith to ensure that the mortgaged property is taken care of or repair the property that is under mortgage. The Mortgage Act cap 229 added very little insight in as far as defining the duties of the mortgagor and mortgagee both during the subsistence of the mortgage and during the sale of the mortgage were concerned. Different common law cases came in to supplement in way of defining the duties of these parties for example;

IN FOUR-MAIDS LTD. V DUDLEY MARSHALL (PROPERTIES) LTD. Where it was held that unless the mortgage expressly or impliedly provides otherwise (e.g., in the case of a fixed sum loan payable by installments for the purchase of a dwelling), the mortgagee has the right to possession before the ink is dry on the mortgage, whether there is a default or not.[405] Cases like this helped to define the rights of mortgagees and show that mortgages do not operate as a transfer of property.

There needed to be a more distinct and conclusive way to define the duties of a mortgagor and mortgagee which would be a benchmark for individuals who enter into mortgage contracts. These duties are properly listed and provided for in the Mortgages Act No. 8 of 2009[406] which provides for the implied conditions and the powers of the Mortgagor and Mortgagee. In as far as defining the rights of the parties to a mortgage agreement, the Mortgage Act No. 8 of 2009 conclusively consolidates them as set out in the objective.

To provide for mortgages of matrimonial homes

The laws that previously provided for mortgages had no provisions for the mortgage of matrimonial homes. The mortgage act no.8 of 2009 was passed to remedy this loophole and protect the both parties to the marriage.

Article 31 (1) of the 1995 constitution of the republic of Uganda is to the effect that

"Men and women of the age of eighteen years and above have the right to marry and to found a family and are entitled to equal rights in marriage, during marriage and at its dissolution."

[404] See section 118, Mortgage Act Cap 229
[405] Four-Maids Ltd. v Dudley Marshall (Properties) Ltd [1957] Ch. 317
[406] See Part IV and V of the Mortgage Act

There had previously been a problem with individual spouses dealing with the matrimonial property without the consent of the other spouse or spouses. This left an inequality in the institution of marriage especially in as far as property was concerned. In order for there to be a protection of these rights, it was necessary for a law that protects all spouses in a marriage to be established. The Mortgage Act No.8 of 2009 provides for the protection of a matrimonial home.[407] Case law has also been developed in light of these provisions for example;

In Wamono Shem V Equity Bank ltd & Constance Wakeba[408], where Madrama Izama J held that the mortgagee can only establish whether the property is matrimonial property by first establishing that the mortgagor is a married person. This is done by pursuing the register of marriages which operates as constructive notice to the whole world. In this case in order to rely customary marriage registered under the provisions of the Customary Marriages (Registration) Act[409].

This case stipulated the ambits of marital property that have to be proved in the subsistence of the marriage. This law not only protects the institution of marriage but ensures that the parties to the marriage enjoy the same rights.

To make mortgages take effect only as security

The principle that a mortgage was only a security and did not pass on ownership of the property was reflected in the Registration Of titles act cap 230. [410]This provision was never included in the mortgage act cap 229 although in the current mortgage Act no.8 of 2009, the same provision does exist under section 8. It unequivocally states that a mortgage operates only as security and not as a transfer of ownership.

This specific principle is a common law principle that has been interpreted by different courts. For example, in Stanley Vs Wilde where Lindley MR [411] His lordship stated;

"The principle is a mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debtor or discharge of some other obligation for which it is given. This is the idea of a mortgage and the security is redeemable on the payment of or discharge of such debt or obligation. Any provision to the contrary notwithstanding any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption and therefore void…A clog or fetter is something inconsistent with idea of "security"

In order to best protect the rights of the individuals that enter into the contracts of mortgages, it was necessary to unequivocally provide for it in the law which is what the Mortgage Act No.8 of 2009 does.

To provide for priority, tacking, consolidation and variation of mortgages

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[407] Section 5 and 6
[408] Wamono Shem V Equity Bank ltd & Constance Wakeba C.A(2013)1HCB No. 80
[409] Cap 248 Laws of Uganda
[410] Section 116
[411] Stanley Vs Wilde (1899)2 Ch. 474

The former laws that provided for mortgages overlooked the principles of tacking, consolidation and variation of mortgages. These were neither provided for in the subsequent Mortgage act cap 229.

With the development in the products offered by banks, there had to be a development in the laws relating to tacking in Uganda.

"The laws relating to consolidation and tacking can be traced back to a time before 1919 by John Delatre Falconbridge[412] in his book he describes consolidation as

"A mortgagee who holds two or more distinct mortgages upon different parcels of land made by the same mortgagor if the mortgages are no longer redeemable at law but are redeemable only in equity, may, within certain limits, and against certain persons, "consolidate" them, that is, treat them as one, and decline to be redeemed as to any unless he is redeemed as to both or all (a). This is the doctrine of consolidation"

There are two forms of tacking

- **The *tabula in naufragio* (" the plank in the shipwreck")**
- **The tacking of further advances.**

The first kind of mortgage is not common in the contemporary dealings of tacking therefore the focus will be on the second kind of tacking which is most commonly used.

The tacking of further advances is where a mortgagee lends money and later makes another advance to the mortgagor. In this case a mortgagor can tack the further advance on the mortgage.[413]

This form of tacking is common in the conventional banking system where banks usually consider the value of the property that is offered as security. There the security offered is of a value way more than the money borrowed by the customer, the option of tacking could be made available to the customer.

Since the previous legislation did not provide for the aspects of tacking, consolidation or variation of mortgages, there was need to create a legislation that regulated and protected the rights of parties who chose to initiate mortgage contracts that involved these aspects.

The Mortgage Act No. 8 of 2009 provides for the aspects of tacking, consolidation and variation of mortgages[414].

To provide for suits by mortgagors

Before it was repealed, The Registration of Title's Act provided the law on suits by mortgagors. It provided for a mortgagor not instituting a suit in their own name which a mortgagee could have instituted without their permission.[415] This provision of the law was meant for the

[412] Falconbridge J.D, "The Law of Mortgages of Real Estate", Canada Law Book Company Limited, 1919, 136.
[413] Hayton D.J, "Megarry's manual of the law of real property" 6th Ed, London, Stevens & Sons ltd, 1982,513.
[414] See; sections 9, 10, 11 and 12 of the Mortgage Act No. 8 0f 2009
[415] See; section 122 of the former Registration of Titles Act Cap 230

protection of the rights of the mortgagee despite the fact that a mortgagor retained ownership of the property.

A detailed provision of this aspect of the law was reintroduced in the current section of the Mortgage Act[416] which gives a detailed stipulation on how a mortgagor can bring an action in respect to mortgaged property. It is to the effect that the mortgagor should inform the mortgagee of the suit in writing about the nature of the suit. The current law goes ahead to provide for the different options available to the mortgagee on having received a written request for permission to bring the suit which are;

The option of being joined to the suit at the mortgagor's own expense.

The option of pursuing the suit without the participation of the mortgagor.

Do nothing and let the mortgagor pursue the suit, the law goes ahead to provide for instances where the mortgagor is awarded money by way of damages for the damage made on the mortgaged property, the mortgagee may apply to court that such sum or a portion of the monies awarded be paid to the mortgagee in settlement or part payment of the mortgage.

The Mortgage Act No. 8 of 2009 in this case adequately progresses on the law relating to suits brought by Mortgagors.

The discharge of mortgages

Formerly under the registration of titles act, only two sections provided for the discharge of mortgages. It provided for the presentation of the document of release from a mortgage in prescribed form which was contained in the Twelfth Schedule of the Act. These provisions were inadequate in as far as providing for the discharge of mortgages was concerned.

This shortfall was rectified under the mortgages act which provides more definitive provisions for the discharge of mortgages. The Act provides a detailed recourse for the discharge and release of mortgages.[417]

This part of the Act goes ahead to provide detailed provisions for to protect mortgagors in cases where the mortgagee cannot be found in Uganda. This is provided for under section 16 of the Act[418]. This specific provision protects the mortgagors who usually had a problem with unscrupulous money lenders who used the lacunas in the law to defraud the mortgagors' thorough refusing payment or absenting themselves from the country during the time the discharge or full payment of the mortgage price was due. This Act therefore more efficiently protects the rights of the mortgagors.

To provide for covenants and conditions implied in every mortgage

Covenants and conditions implied in mortgages were first stipulated in the Registration of Titles Act Cap 230 [419]which basically provided for the implied condition to pay the mortgage price and the interest thereon, take reasonable care and repairs on the property.

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[416] section 13 of the Mortgage Act No.8 of 2009
[417] Sections 14 to 17 The Mortgage Act No. 8 Of 2009
[418] Mortgage Act No.8 Of 2009
[419] section 118

The Mortgage Act Cap 229 had no additional provisions in the way of the conditions implied in every mortgage.

It was until the enactment of the Mortgage Act No.8 of 2009 that more detailed provisions were provided for. These provisions included the different instances in regard to mortgaged land, for example cases where the mortgage is for agricultural land and also included aspects of taking out insurance on the mortgaged property in order to protect the rights and interests of the mortgagee. The mortgage act in this case succeeds in the provision of the law relating to implied conditions on mortgages.[420]

To provide for the remedies of mortgagors and mortgagees in respect of mortgages.

Formerly the remedies for mortgagors and mortgagees were provided for under the mortgage act cap 229 which included, suing the mortgagor for the payment of the mortgage price, realize the security under the mortgage which can be through:[421]

- **Taking possession of the mortgaged land**
- **Appointment of a receiver**
- **Fore closure.**

The act went ahead to give the different of sale which were sale by foreclosure and sale other than by foreclosure along with the procedure for implementing each of these remedies.

These same rights were maintained in the Mortgage Act[422] along with various other powers which were provided for in much more detail. These include the mortgagee's powers to lease and the legal provision regarding the protection of the purchaser. In this case the Mortgage act no.8 of 2009 rationale to provide for the rights of mortgagors and mortgagees is well catered for.

To provide for the power of court in respect of mortgages

The previous provisions of the law did not provide for the powers of courts in relation to mortgages. The Mortgage Act No.8 of 2009 introduced provisions for the powers of courts in relation to mortgages. The powers of the court briefly include; the power for court to offer relief to a mortgagor and the powers of courts to review certain mortgages[423]. These provisions offered means of recourse to parties who were previously not protected under the law. The Mortgage Act No.8 2009 fulfills the rationale and the need to define the powers of courts in relation to mortgages.

Rationale for the laws relating to mortgages issued under the Islamic banking system.

To cultivate a culture of honesty among the business dealings of believers

[420] See; section 18 of The Mortgage Act No. 8 of 2009
[421] See; sections 3,4,5,6,7,8,9,10,11 of The Mortgage Act Cap 229
[422] No. 8 of 2009, Part V; Powers of the Mortgagee
[423] Sections 33 to 38 of The Mortgage Act No.8 Of 2009

Honesty while conducting business is the most basic principle under the Quran. It could simply be reduced into the following verse.

"Give full measure when you measure and weigh with a balance that is straight." [424]

This verse underlies the basic principle of the sharia in every form of business transaction. The teachings and commands of Allah are intended to cultivate (require) a culture of honesty while conducting business hence the provisions that require full disclosure during the conduct of business.

To create harmony among believers of the Islamic faith

The desire for Mohammed (PBUH) to create a society of mutual understanding and respect among believers when it came to dealing in property or business. This rationale can be derived from his teachings condemning the destruction of each other for the sake of property.

"O you who believe! Do not devour your property among yourselves falsely, except that it be trading by your mutual consent" [425]

To protect against unjust enrichment through riba

Riba is a word derived from an Arabic word raba which basically means 'to grow' or 'expand' or 'increase' or 'inflate' or 'excess'. [426]

The Quran is however very clear in its teachings forbidding riba.

"O you who believe! Do not devour riba multiplying it over, and observe your duty to Allah that you may prosper" [427]

"*And whatever you lay out with the people in order to obtain an increased return, this increases you nothing with Allah, but whatever you give in alms, seeking Allah's pleasure, it is those who receive multiplied recompense",* [428]

"Because of the sinfulness of the Jews, We have forbidden to them certain good things that were permitted to them, and for their hindering many from Allah's Way. And for their taking riba, though they were forbidden, and that they devoured people's wealth in falsehood, and we have prepared for the unbelievers among them a grievous chastisement" [429]

There are numerous other teachings in which the Prophet (PBUH) taught against the use of riba in order to prosper. These teachings were all to guard against unjust enrichment, oppression of the poor and greed. The principles under the mortgages issued under Islamic banking embody these principles.

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[424] Quran 17:35
[425] (4:29).
[426] Al-Raghib Al-Isfahani, Al-Husain, Al-Mufradat Fi Gharaib Al-Qur'an, Cairo, 1961, pp.186-187
[427] 'Al `Imran (The Family of Imran (3:130).
[428] Chapter al-Rum (The Romans) 39.
[429] Al-Nisa` (Women), 160-161.

To protect Muslims against participating or coming into contact with things considered haram

There are activities considered haram under the Muslim faith. These are basically taboos and unacceptable for any Muslim believer to engage in.

Holy Quran says*: "O you who have believed, indeed, intoxicants, gambling, stone alters, and divining arrows are but defilement from the work of satan, so avoid it that you may be successful."* [430]

This is to protect the Muslim believers from destructive behavior. The laws regarding mortgages under Islamic law go ahead to forbid the use of mortgages or any of the agreements for forbidden activities for example the taking of intoxicants, gambling among others. Such activities are forbidden in Islam and while Muslims enter into contracts, it is barred for them to involve such unholy activities.

These provisions of the sharia therefore protect the Muslim believers from destructive behavior.

To promote the principles of ethics, social justice and fairness

The underlying principles of ethics, fairness and social justice are prevalent throughout all the principles governing the mortgages under Islamic banking law.

These principles are for example enshrined in the murabaha mortgage where the seller is supposed to disclose the profit and how they arrived at the profit or markup which is supposed to be agreed on by both parties. Furthermore, the principles enshrined in the Ijarah mortgage all embody principles of fairness and social justice.

Advantages and disadvantages under the respective banking systems

- **Conventional banking is governed by all the man-made principles and no divine guidance is followed by these banks. Much as this may be seen as a disadvantage, it is an advantage as the principles of mortgages under conventional banking are more flexible and can be adjusted to suit the changing trends in finance compared to Islamic banking whose principles are much more rigid and are harder to transform in relation to the changes in society. The mortgages issued under the Islamic banking sector are governed by the sharia law, despite the fact that the law evolves, the principles of the sharia are constant and provisions that go against these principles cannot be considered despite the changing needs of society.**

- **Conventional banking is based on capitalistic practices which allow for the use of the finances for any purposes. This means that mortgages under conventional banking are much more inclusive and they can be accessed by any individual despite their intended activities. Furthermore, no form of money can be rejected due to the means in which it is procured (activities considered haram) nor are there any restrictions on what practices one is supposed to follow. This is contrary to mortgages under Islamic banking law which forbid any connection with practices forbidden by the Holy Quran while**

[430](5:90)

conducting any business including mortgages. These practices include selling of intoxicants and gambling among other things.

- **Mortgages under conventional banking are easily accessible to potential customers. This is based on the fact that there are more banks offering mortgage services under the conventional banking system than the banks offering mortgages under Islamic banking. This is not only based on the fact that the establishment of Islamic banks is quite recent but also very few people outside the Islamic faith have knowledge of these services in order to make informed choices or even opt for mortgages under the Islamic banking system.**

However, on the other hand, the mortgages under the Islamic banking system have numerous advantages which are;

The mortgages under the Islamic banking system are more stable. No speculative transaction is allowed, interest-based transactions are prohibited and unbridled profit at the cost of another party is discouraged. The murabaha mortgage under Islamic banking provides for the markup to be agreed on before time. These prices remain constant despite the changes in the market.

Mortgages under conventional banking are to maximize profits only. This is very disadvantageous to the customers especially due to the high interest rates imposed by the banks in order to maintain a profit. On the other hand, for mortgages issued under the Islamic banking system, no interest is charged as it is considered a taboo.

Under the money borrowed in Islamic mortgages, The borrower shares the amount of profit, if the business faces loss and the principle is lost, the borrower is not bound to pay back to the bank, neither principle nor markup. This is in the masharaka theory that envisages profit and loss sharing.

No extra money is charged by the bank for late payment of the loan. This also includes other fees normally charged by other banks in extension of the different services. The bank offering mortgages under Islamic banking may impose a penalty which goes to charity in order to deter customers from willingly holding back payments when it is due. However, the banks will take time to investigate the reasons for the delay before imposing such payments. This is different from conventional banks which charge a penalty on all late payments.

The principles of mortgages under Islamic banking are based on principles of equity, social justice and ethics. The Ijarah, Marabaha and masharaka efficiently embody these principles since the sharia that governs these mortgages demands the practice of all these principles during the conduct of business. These principles make the mortgages issued under this system of banking more user friendly. This is different when compared to mortgages issued under the conventional banking system which is based on capitalistic principles. Under this system the business is more cut throat and gives very little regard to the customers as the objective of the banks is to make as much profit as is legally possible. Zahid Hussain, the Governor of the SBP expressed himself about the failure of the West in these words:

"The economic system of the west has created almostinsoluble problems for humanity……It hasfailed to do justice between man and man and eradicate friction from the international field.On the contrary, it was largely responsible for two world wars. The Western World in spite of its advantages of mechanization and industrial efficiency, is in worse mess than ever before with the

basic principles and history. The adoption of Western economic theory and practices will not help us in achieving our goal of creating a happy and contended people."[431]

In this regard, Islamic mortgages promote justice between man and are therefore more user friendly.

FRIST ISLAMIC BANKING IN UGANDA

Uganda's Finance Trust Bank in October 2022 launched the country's first Islamic Sharia compliant account called Halal. Prominent Muslim personalities attended the launch event held in the country's capital Kampala. Trust Halal savings account for individuals and businesses. This is the first time for a Sharia compliant account to be officially launched in the country. "The Halal account does not charge interest on money clients borrow from the bank. Sharia compliant banking is not only for Muslims but for all of humanity.

In July, the country's Cabinet approved a law to allow commercial banks to offer Islamic banking so that low-income population has wider access to credit.

DIGITAL MONEY UGANDA AND CRYPTOCURRENCY

PUBLIC STATEMENT ON CRYPTO-CURRENCIES

[431] Mujahid, Sharif-al,. Economic Equality for All: Economic Insight, (2003) 10.

OBJECTION MY LORD

1. The government of Uganda has noted the emergence of the practice of using, holding and trading crypto-currencies in Uganda.

2. Crypto-currencies are digital assets that are designed to effect electronic payments without the participation of a central authority or intermediary such as a Central Bank or licensed financial institution. Crypto-currencies may therefore be used to effect anonymous electronic payments or bought and held for speculative purposes in the expectation that their value will rise at a future time, whereupon they could be sold for a profit.

3. Hundreds of crypto-currencies have been designed and launched around the world, and the most well-known examples include Bitcoin and Ethereum. Such crypto-currencies are not issued or regulated by ant government or central bank. This is to inform the general public that: - a. The government of Uganda does not recognize any crypto-currency as legal tender in Uganda. b. The government of Uganda has not licensed any organization in Uganda to sell crypto-currencies or to facilitate the trade in crypto-currencies and so these organizations are not regulated by the Government or any of its agencies.

4. As such, unlike other owners of financial assets who are protected by Government regulation, holders of crypto-currencies in Uganda do not enjoy any consumer protection should they lose the value assigned to their holdings of crypto-currencies, or should organization facilitating the use, holding or trading of crypto-currencies fail for whatever reason to deliver the services or value they have promised.

Mission "To formulate sound economic policies, maximize revenue mobilization, ensure efficient allocation and accountability for public resources so as to achieve the most rapid and sustainable economic growth and development" The general public is further advised of the following risks associated with crypto-currencies;

a. Most crypto-currencies such as Bitcoin and Ethereum are not backed by assets or government guarantees, therefore holders of these crypto-currencies are fully exposed to the risk of loss or diminishing value as the issuers are not obliged to exchange them for legal currency or other value.

b. Crypto-currencies tend to change value rapidly over time. While holders of crypto-currencies may make profits when their value rises, they will be exposed to losses when their value falls.

c. The nature of crypto-currencies makes them attractive for use in criminal transactions such as money laundering, sale of prohibited goods and services, and fraudulent venture such as Ponzi and pyramid schemes.

Further legal analysis is required in order to have an exhaustive appraisal on digital money in Uganda look at the law on appraise themselves of the risks associated with cyber-currencies, and exercise caution before they make transactions involving such products.

Uganda's central bank is considering whether to issue a digital currency and has not banned cryptocurrencies, but has concerns about risks from the technology including consumer protection and financial inclusion.

"Bank of Uganda is currently doing preliminary studies on whether or not a central bank digital currency should be considered ... and especially explore what policy objectives it would address.

African governments have approached digital currencies differently. Nigeria's central bank barred local banks from working with cryptocurrencies last year before launching its own digital currency, while Central African Republic last month adopted bitcoin as an official currency, an African first Cryptocurrencies were already informally in use in Uganda, but the central bank has cautioned licensed payments service providers to go slow on them while the regulator studies the technology and develops regulatory mechanisms.

Ugandans have received cryptocurrency worth the equivalent of about $4.8 billion between March 2019 and March 2022, according to blockchain data platform Chainalysis."So Bank of Uganda hasn't banned cryptocurrency, but have simply applied some speed brakes,"

UGANDA CRYPTOCURRENCY LAWS

REGULATION OF DIGITAL CURRENCIES: CRYPTOCURRENCY, BITCOINS, BLOCKCHAIN TECHNOLOGY

Since cryptocurrencies are not regulated by the government or central bank, market participants trade and invest entirely at their own risk in Uganda. For this reason, cryptocurrencies are not backed by assets or government guarantees, and issuers are not required to exchange them for legal currency or other value.

In December 2020, the Financial Intelligence Authority (FIA) published a letter amending the Anti-Money Laundering Act to include virtual asset service providers (VASPs) among the list of "accountable persons" subject to supervision and monitoring by the FIA.[46] Executive Director of the FIA, Sydney Asubo, however, has expressed her concerns with the substantial noncompliance of market participants to the agency's licensing requirements, exposing market participants to even greater risks of money laundering, terrorism financing, investment scams, and more. In a recent report by the FIA, it was announced that "only a few [VASPs had] registered." Consequently, the FIA of Uganda is seeking assistance from the country's finance ministry to establish more extensive crypto regulations, particularly with regards to these crypto service providers.

Cryptocurrency is not considered legal tender in Uganda, and the government has not licensed any entity to sell or facilitate the trade of cryptocurrencies as of this time.

Most jurisdictions and authorities have yet to enact laws governing cryptocurrencies, meaning that, for most countries, the legality of crypto mining remains unclear.

Under the Financial Crimes Enforcement Network (FinCEN), crypto miners are considered money transmitters, so they may be subject to the laws that govern that activity. In Israel, for instance, crypto mining is treated as a business and is subject to corporate income tax. In India and elsewhere, regulatory uncertainty persists, although Canada and the United States are relatively friendly to crypto mining.

However, apart from jurisdictions that have specifically banned cryptocurrency-related activities, very few countries prohibit crypto mining.

The Central Bank also referred members of the public to a 2019 circular by the Ministry of Finance in which it gave government's position in regards the use of cryptocurrency in Uganda.

According to the 2019 circular, the Finance Ministry said despite the emergence of the practice of using, holding, and trading in cryptocurrencies in the country, the holders bear the risk since the same is not issued or regulated by any government or central bank in any part of the world.

"This is to inform the general public that the government of Uganda does not recognize any crypto-currency as legal tender in Uganda. The government of Uganda has also not licensed any organization in Uganda to sell crypto-currencies or to facilitate the trade in crypto-currencies and so these organizations are not regulated by the government or any of its agencies," the 2019 circular reads in part.

Cryptocurrency

Cryptocurrencies are digital assets that are designed to effect electronic payments without the participation of a central authority or intermediary such as a Central Bank or licensed financial institution.

Cryptocurrencies may be used to effect anonymous electronic payments or bought and held for speculative purposes in the expectation that their value will rise at a future time, whereupon they could be sold for a profit. However, this digital payment system doesn't rely on banks to verify transactions presenting a risk to members of the public.

The development comes at time when 1,000 Ugandans lost over shs3 billion in online digital transactions between 2018 and 2020 to a quack cryptocurrency dealer.

READ THE BOOK LAW OF CRYPTOCURRENCY & CRYPTOGRAPHY IN UGANDA BY ISAAC CHRISTOPHER LUBOGO (2022) JESCHO PUBLISHING LTD Find it at Lubogo.org