OBJECTION MY LORD

LEGAL PRACTICE DEMYSTIFIED

FIRST EDITION

ISAAC CHRISTOPHER LUBOGO

OBJECTION MY LORD

"Legal Practice Demystified"

CORPORATE AND COMMERCIAL PRACTICE

OBJECTION MY LORD: LEGAL PRACTICE DEMYSTIFIED

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FIRST EDITION

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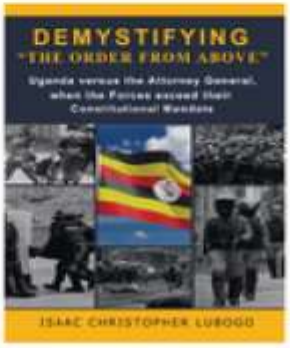

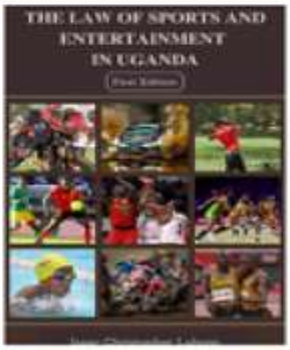

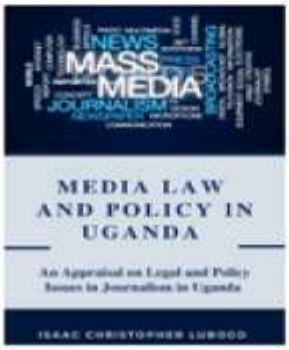

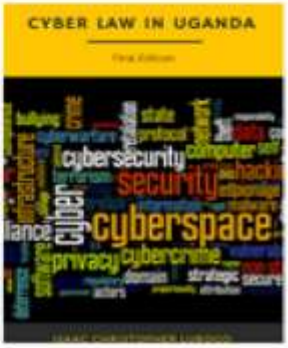

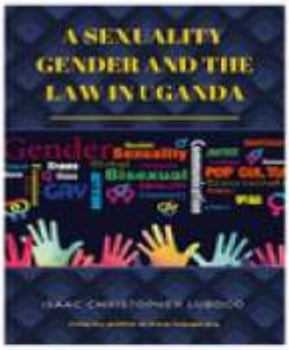

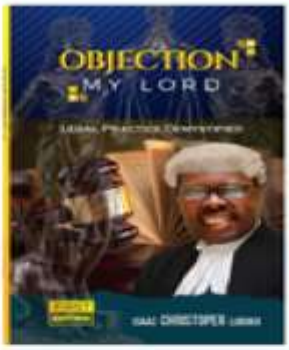

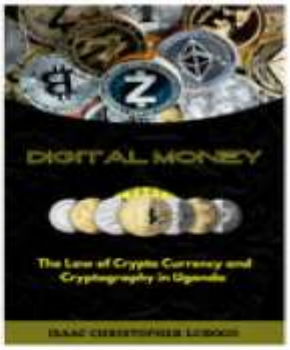

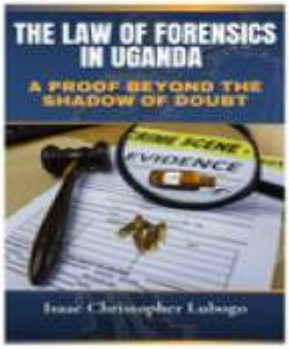

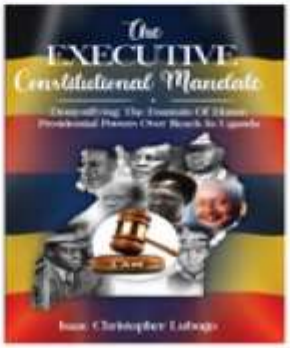

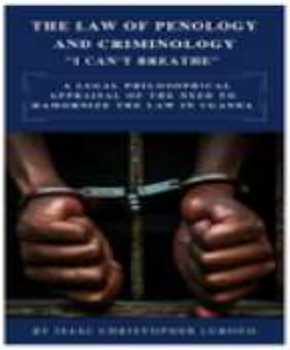

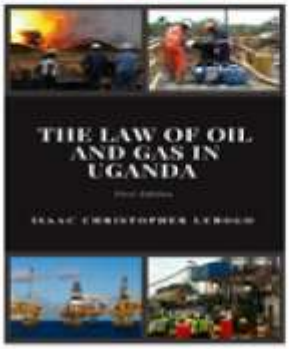

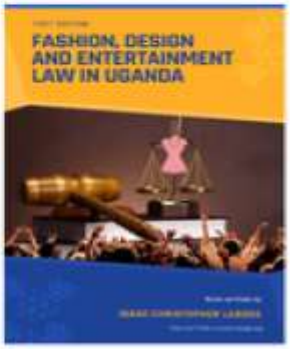

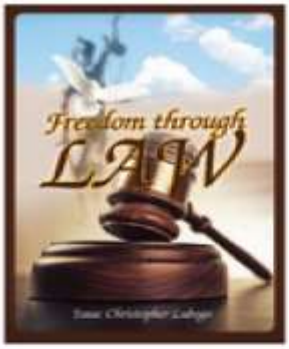

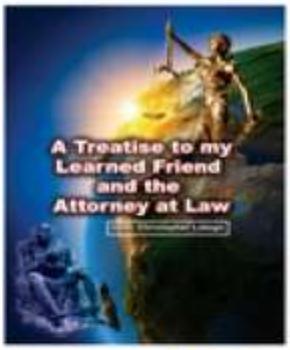

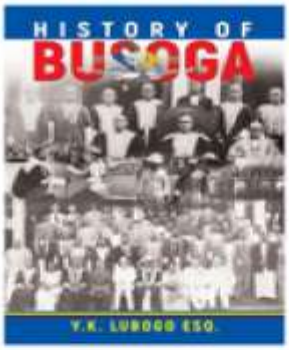

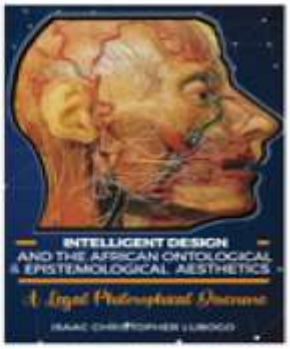

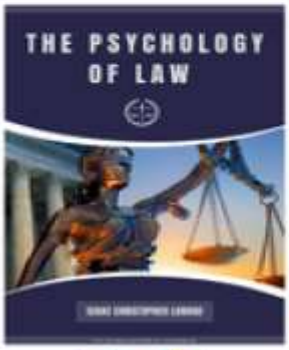

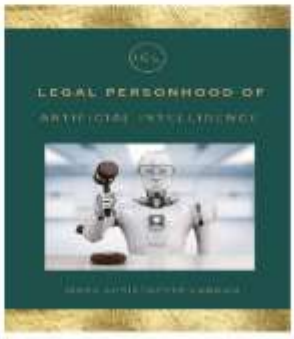

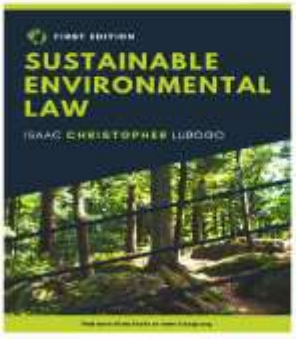

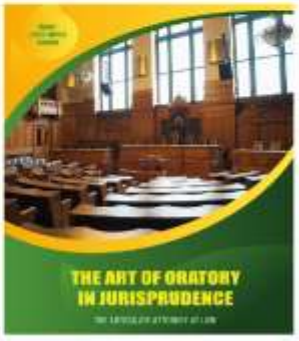

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DEDICATION

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

Obey God's law first before considering the laws of man.

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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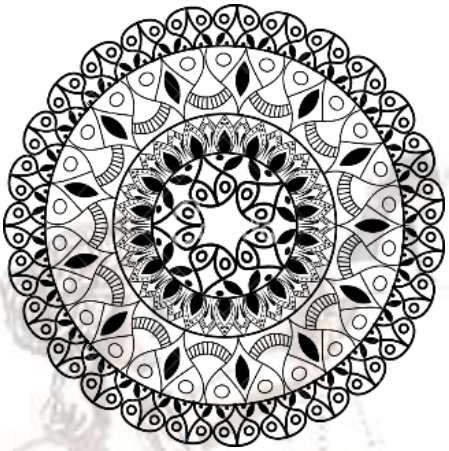


PARTNERSHIPS

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 Cap 73

The Cooperative Societies Act Cap

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 under section 372 of the Companies Act 2012 (hereinafter referred to as the Companies Act) and stated in **Akinose vs. AITCO (1961) WNLR 215**.

In **W v Commissioner of tax** , the court held that whether the 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.

2. Carrying on a business

Sharing profits per person does not create a partnership relationship and neither does joint ownership of property. S.1 (a) of the partnership ACT defines a business to include; trade, occupation or profession. It must have a commercial element to it.

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 **khan and others v Miah** and others , 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 e repeated for example in **Smith v Anderson,** 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.

S.34 (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.

4. **View to make profit**

The partnership must 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 (**khan and others and miah** and others).

In **Francis sembunya v all port services (u) ltd**, 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.

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.

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 **Lovelt vs. Bearchamp (1834) 5 D& Act 1925** 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. This principle has been codified in our statute books in section 12 of the Partnership Act.

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 **Wonge vs. Toymbee (1910)** where court held that a person who is mentally incapacitated can not 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 61 (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 cut procedure in the Partnership Act, or regulations to effect it purposes there under.

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 DEED 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

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

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).

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

S.3 of the partnership Act.

RELATIONSHIP BETWEEN PARTNERS

The relationship between the parties is of a fiduciary nature.

In **British and west building society v Mathew 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

1. Duty of disclosure (S.30 of PA)

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 J.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.

2. Duty not to make a secret profit (S.31 of PA)

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

In ***Olson v Gullo***, 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.

3. Duty not to compete with the firm. (S.32 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.

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)**

S.47 (3), the liability of partners unlike in general partnerships is limited to extent under taken by each partner. However every LLP must have a general partner (s). A general partner is subject to the unlimited personal liability for the debts of the company. (**Section 47(2)** of the partnership Act 2010).

S.47 (2) puts the cap of the partners in a LLP act 20 partners.

S.47 (4) bars a limited liability partner from withdrawing part or in while directly or indirectly any of his or her capital contributed to the firm during the continuance of the partnership.

S.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**.**

S.50 on the registration of LLP in is in form of regulations.

3. Professional partnerships

These are partnerships formed for purposes of carrying on a profession. S.2 (2) of P.A puts the CAP of partners for such firs at 50 who must be professional.

S.1 of the PA 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 PA takes cognicence of the same.

a) Right of a partner to the management of the firm.

According to S.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 .

S.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. (s.26 (9)
- No change to the nature of the partnership can be effected without the nature of the partnership can be affected without the consent of all parties though ordinary business can be by a majority.

In Highly v Walker (1910) 26 TLR, two of three partners agreed to the admission of one their sons to e 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 exercised with utmost good faith and the majority cannot bind the minority giving them the opportunity for decision.

b) Right to indemnify, remuneration and interest.

According to S.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, a an account of the firm and in the course of the partnership business are referred to as partnership property (**s.22 PA)**

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.

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

Under **S.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 partners name. in **Foster v Hale**, 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.

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 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 act and fortified by the case of

Section 10 provides that every partner in a firm is jointly liable for all debts of a firm while as a partner and after his death, his or her estate is severally liable in due course of administration of these debts and obligations.

A firm is liable for the wrongs of its partners under section 13 of the 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 33 of the Partnership Act.
- Duty to protect partnership property.
- Duty to keep honesty.

DISSOLUTION OF A PARTNERSHIP

This is covered in sections 35, 36 of the Partnership Act. This is discussed as follows;

Section 35 provides that It can be dissolved by expiration of the fixed term, or termination of the undertaking of the firm, or if it is for an undefined period, by the partner(s) giving notice to other partners of his intention to dissolve the partnership.

Section 36(1) provides that subject to an agreement, a partnership is dissolved by the death or bankruptcy of a member.

Under section 36(2), a partnership can be dissolved at the option of other members; if any of the partners suffers his/ her share to a charge.

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 O37r4 of the Civil Procedure Rules SI 71-1, or by chamber summons under O30r11 of the Civil Procedure Rules SI 71-1.

PARTNERSHIPS ACT 2010

Sec 2 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 profits.

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 Comm 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.

Sec 3 of the Act provides a criteria for determining the existance 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 los sharing ; the reciept 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 s.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 doesnot create a partnership.

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

NUMBER OF PARTNERS.

Sec 2[1] limits the number to 20 people

Sec 2[2] 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 Comm 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 S. 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 meble kente 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 Mbale Kente [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. Mbale Kente (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.

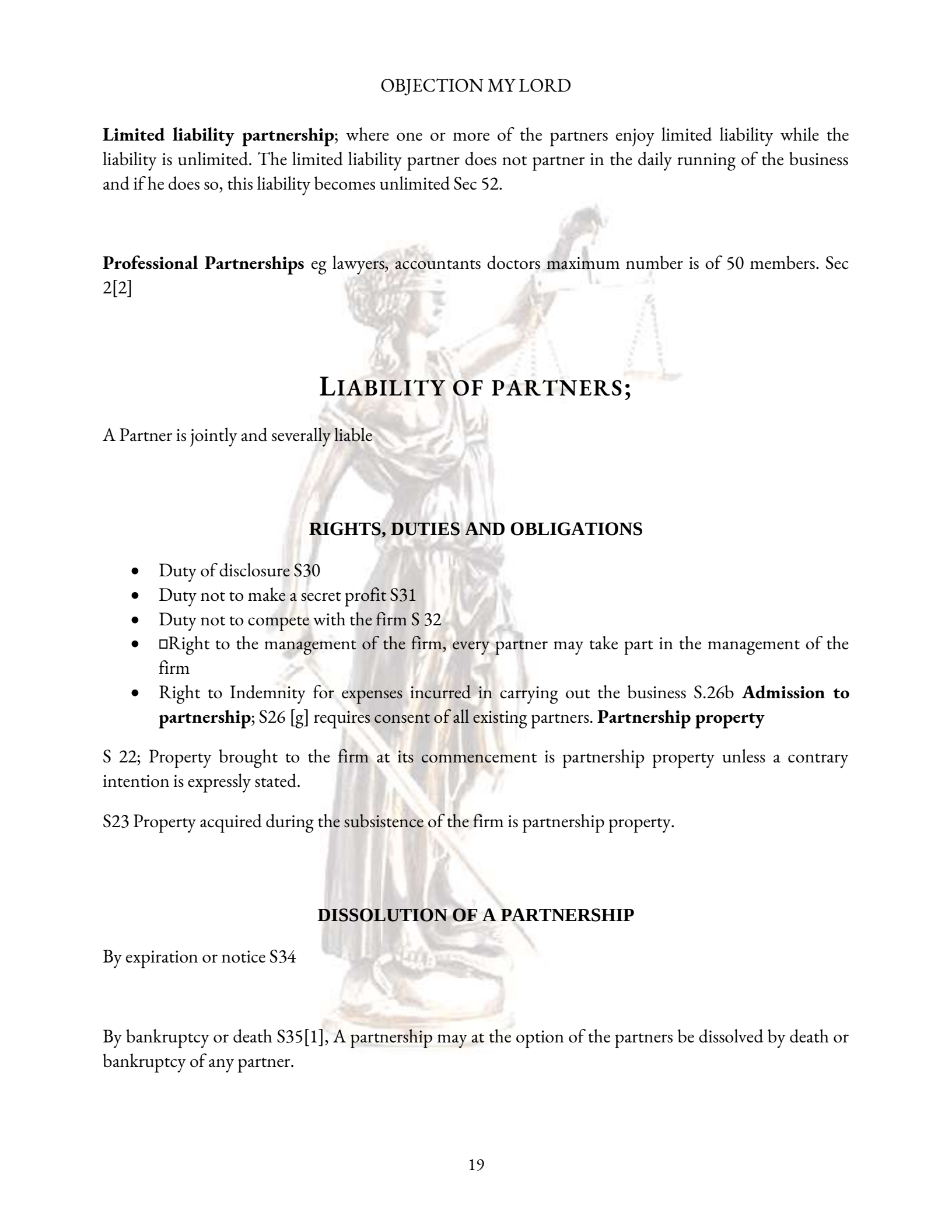
Sec 10 of the Act provides that a minor may be admitted to the benefits of a partnership but cannot be personally liable for any obligation of the firm.

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 Sec 52.

Professional Partnerships eg lawyers, accountants doctors maximum number is of 50 members. Sec 2[2]



LIABILITY OF PARTNERS;

A Partner is jointly and severally liable

RIGHTS, DUTIES AND OBLIGATIONS

- Duty of disclosure S30
- Duty not to make a secret profit S31
- Duty not to compete with the firm S 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 S.26b **Admission to partnership**; S26 [g] requires consent of all existing partners. **Partnership property**

S 22; Property brought to the firm at its commencement is partnership property unless a contrary intention is expressly stated.

S23 Property acquired during the subsistence of the firm is partnership property.

DISSOLUTION OF A PARTNERSHIP

By expiration or notice S34

By bankruptcy or death S35[1], A partnership may at the option of the partners be dissolved by death or bankruptcy of any partner.

FORMALITIES

1. REGISTRATION OF PARTNERSHIP

S.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 S2 thereof reiterates the above position.

Before registration, its prudent practice that a search is carried out to establish the availability of the suggested business name and if its 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 **Kafero V Turyagenda**, registration is important for evidential purposes .The deed is registered with the registrar documents.

BUSINESS NAMES REGISTRATION ACT CAP 109

S1 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 mean an unincorporated body of two or more individuals or one or more individuals and one or more corporations..... who have entered in to partnership with one another with a view of carrying ob business for profit.

OBJECTION MY LORD

S2 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.

S4 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

S 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 S8 failure to furnish the registrar with particulars or change in particulars, every partner in the firm commits an offence.

S14 Provides for removal of the firms name from the register where the firm ceases to carry on business. This is the duty of every partner which should be done with in 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. 2 defines "registrar" to mean the registrar of documents or any assistant registrar of documents appointed.

S. 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.

S. 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.

S. 5 provides for how **Registration is effected.** 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.

S. 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 S. 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 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.

OBJECTION MY LORD

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

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.

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 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

8.1 **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.

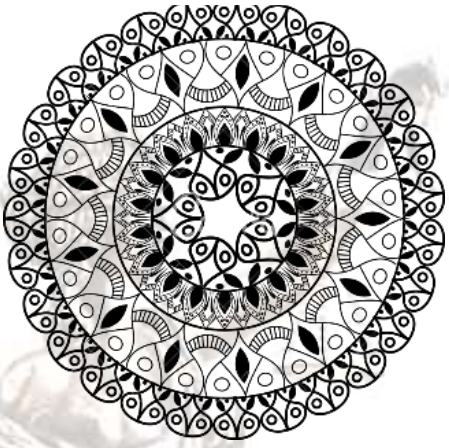
Where mediation is unsuccessful, the aggrieved party may seek redress in the courts of law.

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 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) Regulations SI 267-4

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 SI 267-

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 the 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.

Reg. 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...

Reg. 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;

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

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.

TRUST BANK ACCOUNT.

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

ADVOCATES ACT CAP 267

S.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 roll.

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

S.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.

S.8(3) 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.

S.8(4) Every application made under the section should be advertised in a manner as prescribed by the regulations made by the Law Council.

S.8(5) 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.

S.8(6) .The fee mentioned in S.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.

S.11.The registrar shall issue a PC 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.

S.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.

S.(1)(3) Every advocate who has in force a PC may practice as such in the High court or in any court su..... 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(S.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 .(S.77(1) (f) .

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

THE ADVOCATES ENROLLEMENT AND CERTIFICATION) REGULATIONS S.1.267

Reg. 2 requirements to the acquisition of professional skill and experience under section 891) of 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 Act.

REG.4 APPLICATION FOR CERTIFICATE OF ELIGIBILITY.

In an application for a certificate under S.8(2) of the Act, the applicant shall state;

1. the name and address of the applicant

2. the qualifications of the applicant being one or more of the qualifications set out in section 8(50 of the Act and the date qualifications.

3. the date and place of birth of the applicant

c) if the applicant was not born in Uganda the aggregate period of continuous residence in Uganda during the twelve months immediate 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 (Kenya, TZ, Zambia any other country in reciprocal arrangements in force in favour of Uganda.

d) Whether the applicant is at the date of the applications subject to any disentitlement or disciplinary proceedings and whether he or she has been convicted in or is subject to any pending or present convinal proceedings.

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

-The applications shall conclude with a prayer that the applicant be granted a certificate of eligibility for enrollment as an advocate.

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

MODE OF APPLICATION REG.5

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 skills and 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.

Reg 6. advertisement of application for a certificate of eligibility for enrollment in one of the issue of the Gazette in the prescribed form.

Form 1 in the second schedule of the Regulations.

Reg 8 an application for enrollment shall be by petition of the chief Justice paying that the name of the petitioner be entered on the roll of advocates.

The petition is accompanied by ; a) certificate of eligibility for enrollment issued by the law council (b) a certified copy of the statement referred to in regulations. 4(1) i.e the application for the certificate ;c) certificate or other document which the petitioner submits as evidence of his or her qualifications ,professional skill and experience; d) the fee shall be returned if the application is refused, e)testimonials from the 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.

Reg 9. advertisement of an application for enrollment shall be made by publication of the advertisement in one of the issue of the Gazette and shall be in form 3 of the second schedule to these Regulations.

Reg 10 if the chief Justice has given directions for that purpose the applicant shall appear before the chief Justice at such time and plan as may be notified by the registration. The registrar shall notify the applicant for enrollment of the decision of the chief Justice in respect of the application.

Reg.11 Whenever the name of the 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 by a certificate of enrollment.

Reg.12. Application for practicing certificate

- it is by application in the form provided for in the second schedule to the regulations (form 4)

It should be accompanied by a statutory declaration though that the applicant is not a person to whom ***S.12 (b)*** of the Act applies and the fee specified in the third schedule to the regulations.

Reg. 13. Right of audience. A person who normally resides in Uganda or is a Ugandan citizen and who just entered on the roll of advocates shall for a period of not less than 9 months after the entry have a right of audience only in the magistrates court and the Pc as issued to him or her shall be endorsed accordingly.

Reg.14 application for renewal of a PC shall be in form 5 of the second schedule of these regulations and there shall be paid the fee prescribed in the third schedule.

Reg 15-the Form of application of renewal of a PC shall be accompanied by: a statutory declaration on oath that the applicant is not a person to whom S.12(1) of the Act applies and a receipt or any other document that satisfies that he/she paid subscription for a current year as a member of Uganda Law Society and a fee specified in the third schedule to these regulations.

Reg 16. Special practicing certificate under S.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 Reg.(Kenya,TZ

Zambia and any other country with reciprocal arrangements in force in favour 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

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

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

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

Reg 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.

Reg 5. requirements to be met before approval;

1. An advocates 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.

Reg 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.

Reg.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

Reg .8 application of inspection of chambers shall be accompanied by the fees prescribed in the Advocates (fees) Regulations 2004 .

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

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.

Regulation29, 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 IBA 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. nIt should have proper management of finances by opening an office account, client account and a trust account as per S. 40 of the Advocates Act.

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.

S,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

S. 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 LWA FIRMS)REG 2006.NO.16

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

A law firm that uses a generic name shall have the partners names and qualifications appearing on the letter head of the law firm.(Reg.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 (Reg3.(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.(Reg 3(4)

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

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

Reg 4- where a firm changes its name of a from 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 years.

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

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

THE ADVOCATES (REMUNERATION AND TAXATION OF COSTS) REG

S.1 267-4

Reg 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.

Reg.14 scale of changes in non contentious matters fifth schedule scale of fees in respect of business the remuneration for which is not otherwise prescribed.

i. Instructions for drawing and perusing deeds, deed rolls, affidavit and other documents 10,000/= (in ordinary cases per folia)

ii. Attendances in person or by telephone, per 15mins -10,000/=

4. Journeys from home.

a) for everyday of not less than 6hrs employed on business or in travelling-300,000/=

5.Time engaged where change is so based in lieu of charges per from hour, or part of an HR-50,000/=

6.Correspondence

a) Letter or per folio-20,000 and 4,000/= respectively.

b) Receiving and praising a letter 5000/= per folio 1,000/=

7.Opinion formed written opinion ,charge such fee as may be reasonable in the circumstances having regard to the same considerations as set out above for the assessment of instruction but not less than 65000/=

THE UGANDAN LAW SOCIETY ACT CAP 276

Sec 2 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.

S.3 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.

S.4 MEMBERSHIP

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

Any person entitled to practice by virtue of S.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.

S.5 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.

S.6 annual subscription by all members except the honorary membership. No entrance fee is to be paid (S.7)

S.8.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.

S.9Contitution of the council

President ,VP,AG,SG a secretary ,a treasurer and are elected annually by the society in general meeting

S.10.POWERS OF THE COUNCIL

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

S.15 general meetings -every after 31st day of December as soon as convenient.

S.16.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.

S.17.VOTING

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

S.18. 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.(S.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 BNRA,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 PC
- -Firm
- -Registration S.4 of the PA and BNRA

- -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 -S.8

2.Holder of a post Graduate Bar Course Diploma in Legal practice conducted by LDC

PROCEDURE AND DOCUMENT FOR ENROLLMENT

Reg.4 formal application

Supported with a certified copy of original degree certificate, original Dip Lp certificate, affidavit sworn by the applicant, recommendations from 2 advocates whose homes are on the Roll.

discrepancy in name -sign attach a statutory declaration-

three recent passport photos

Note that the affidavit and S.D must be commissioned by commissioner for Oaths and registered with the Registrar of documents at the URSB at Georgian house, Plot 5 George street, Kampala.

Law council is at Georgian House,7th Floor

Reg 5-application in triplicate

Inspection of chambers

Reg3.

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

The 1st Pc limits an advocate to practice only in Magistrate Court Reg 13.

Generic names.

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 U Shs. 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.

ISAAC CHRISTOPHER LUBOGO

THE REPUBLIC OF UGANDA

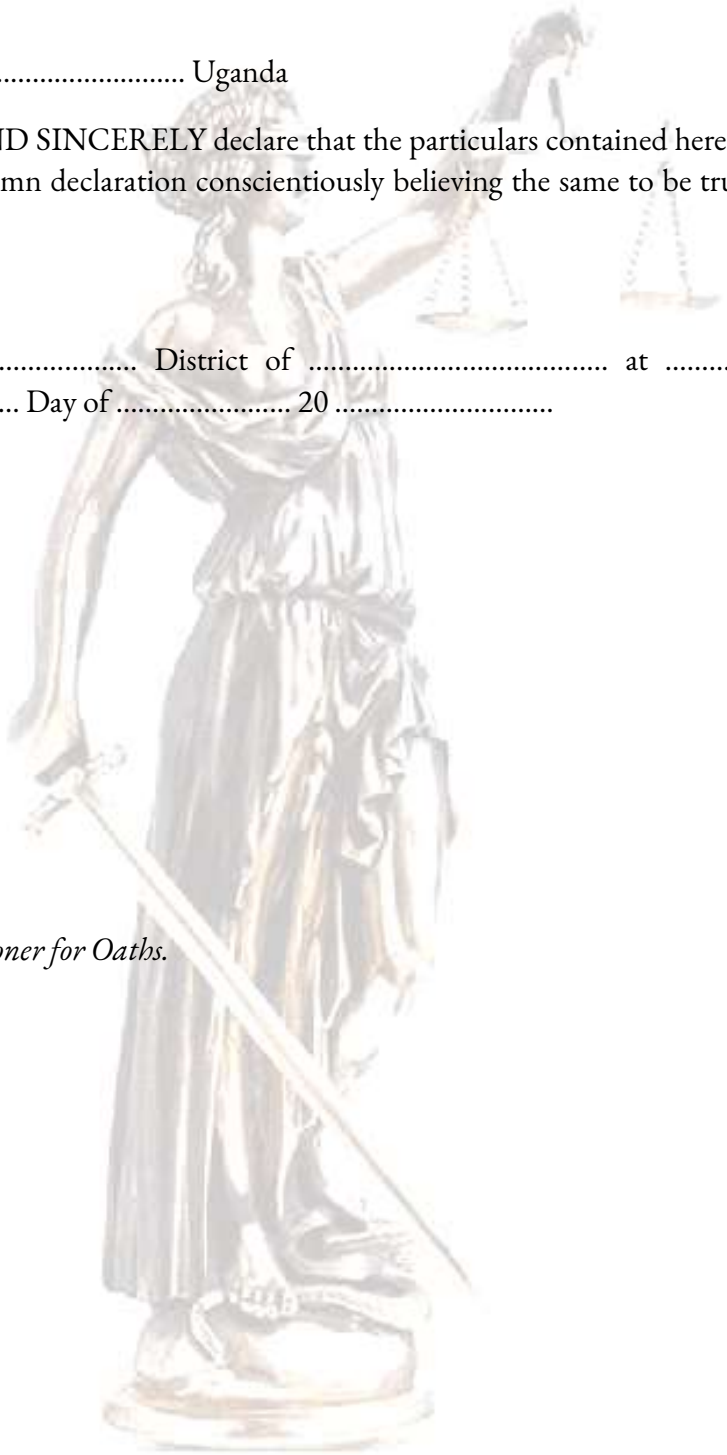
STATEMENT OF PARTICULARS REQUIRED TO BE GIVEN PURSUANT TO THE BUSINESS NAME REGISTRATION ACT IN CASE OF A FIRM

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.	.. . .

6.-Nationality of each of the individuals who are partners.	.. . .

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 7117,

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 7117,

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:

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 registaration 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 7117,

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.

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 7117, 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.

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

ISAAC CHRISTOPHER LUBOGO

SIGNATURE

DESIGNATION

Drawn by:

Sui generis

P.o box 7117.

Kampala.

FORM 1. (S.1-267-1) Reg 6.

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 Babirye Nakiyaga.Denise 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.

Form 2 **Reg 7(3)**

Law council

Certificate of Eligibility for Enrollment

Advocates Act

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

_____

Chairperson Law council

FEE NOTE/DEBIT NOTE

D3 & CO.ADVOCATES

D3/CV/2014/200 VAT NO:19318-D Date:10.10.2014

P.O Box 7117 **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.

S.1 267-1)

Form 3 **Reg 9.**

Application for Enrollment of Advocate

The Advocates Act.

It is notified that a petition has been presented to the chief Justice by Babirye Nakiyaga L.Denise 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

Form 4 **Reg 1**

APPLICATION FOR PRACTICING CERTIFICATE

The Advocate Act

To: The Registrar

The High Court of Uganda

Kampala

I_____(name and address of applicant)where name was entered in the roll of advocates for Uganda on_____(date) apply for the issue of a practicing certificate.

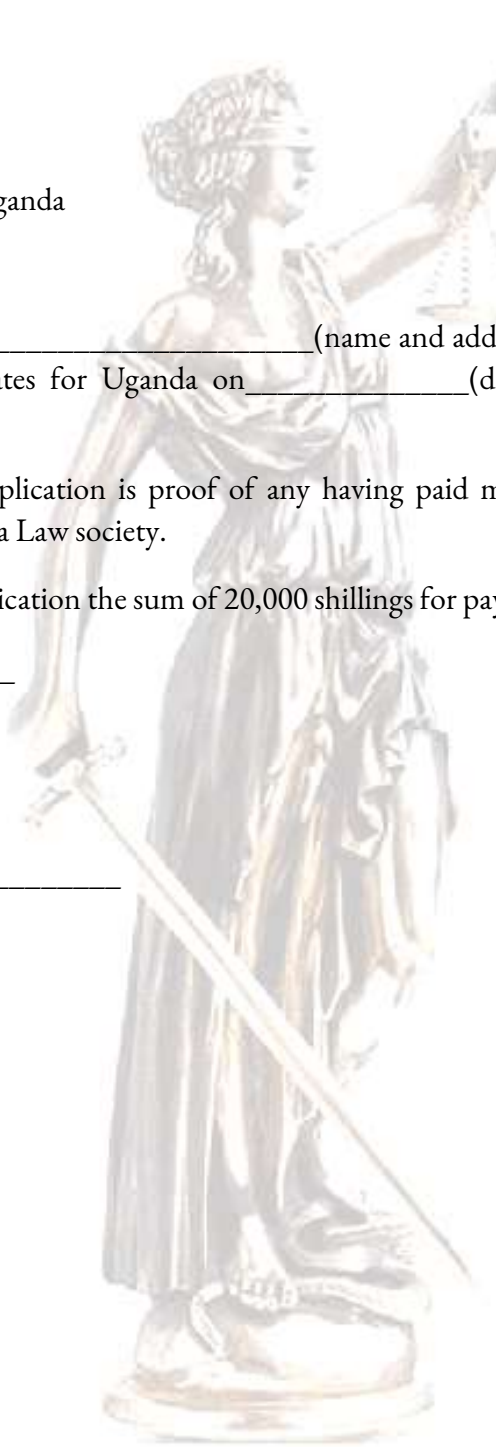
2.Attached to this application is proof of any having paid my subscription for the current year as a member of the Uganda Law society.

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

_____

signed

Date_____20_____



FORM 5 **Reg 14,15**

APPLICATION FOR RENEWAL OF PRACTICING CERTIFICATE

The Advocates Act

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.

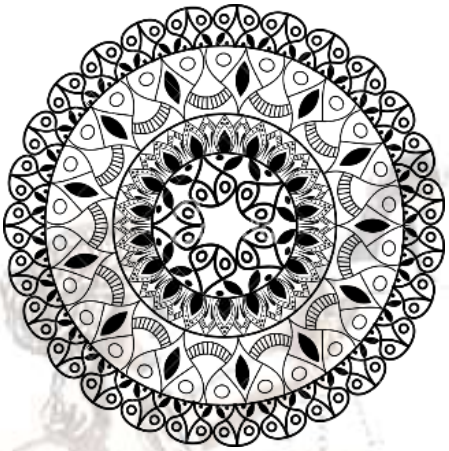
2.Attached to this application is proof of my having paid subscription for the current year as a member of the Uganda law society.

3.I send with this application of 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 (Licencing 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

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.

S.2 of the CA 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 Gravescend 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 Dec 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.

2.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.

3.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 de facto 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 R (1959) E.A 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 S.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: S.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.

Btn 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 f 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 S.211 of the 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 petitioners 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.

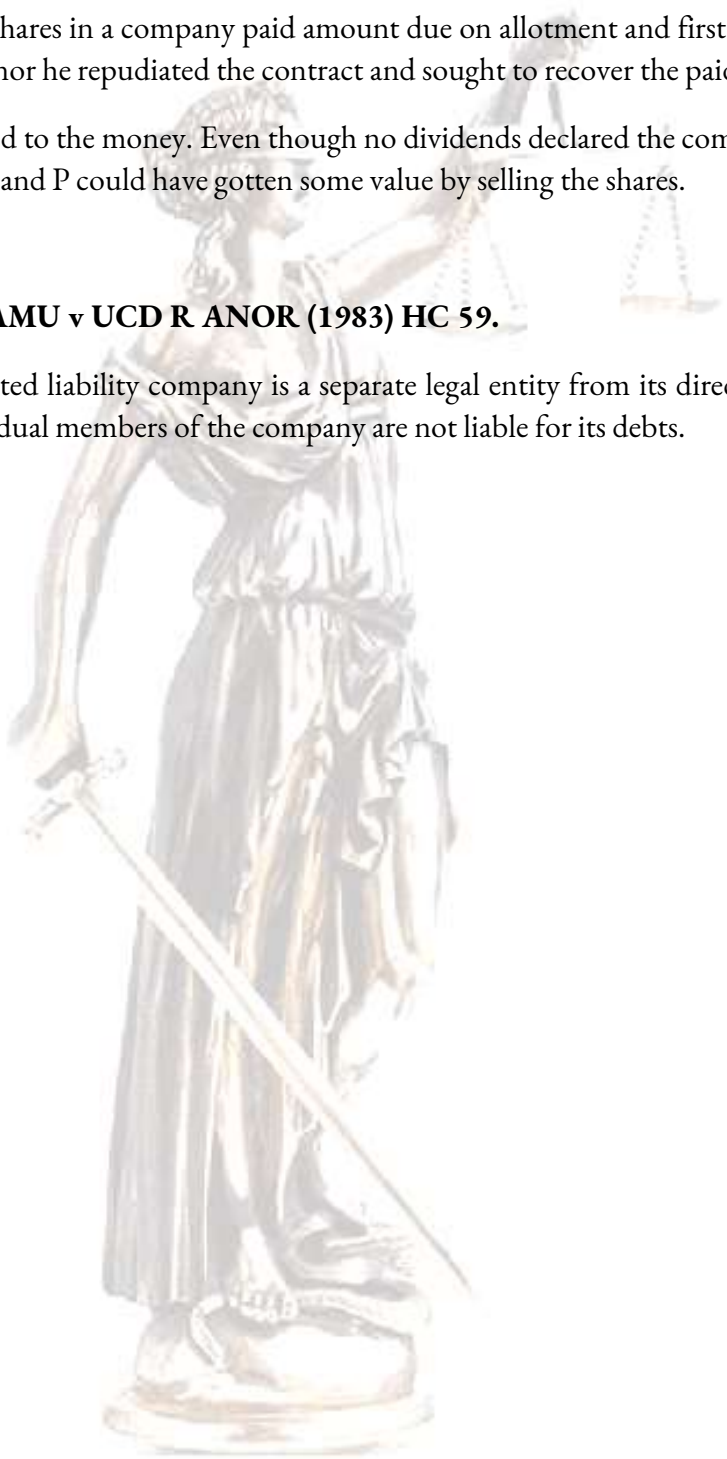
STEINBERG V SCALA (LEEDS) LTD (1923) 2.Ch 452

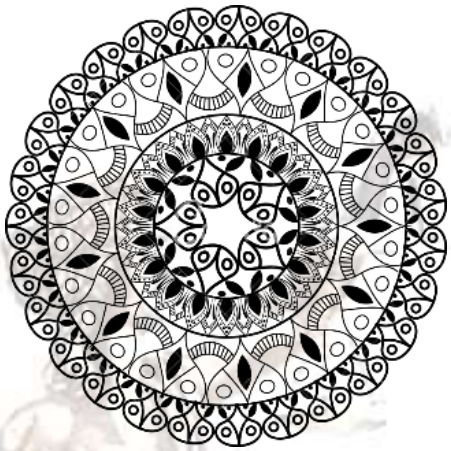
P(minor) applied for shares in a company paid amount due on allotment and first call made on shares,18 months after still a minor he repudiated the contract and sought to recover the paid money.

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,S.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.(professionals < 50 persons S.2)

S.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.

S.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(S.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.

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.

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 1.12 ,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 eg 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.

S.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.s.5(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 S.6 of the companies Act as one which is not a private company under S.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

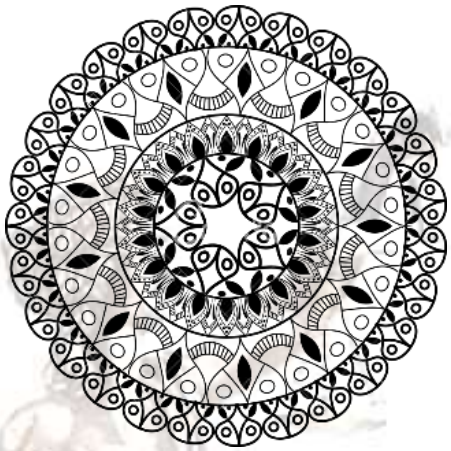
Obtaining a certificate of commencement.

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.

Quick decision making for members and they can easily be consulted and make prompt decisions.



CHARITABLE ORANISATIONS

COMPANIES LIMITED OR GUARANTEE

S.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.

S.1 of the Trustees incorporation Act Cap 165 provides that trustees may be appointed by anybody or association of persons established for any religious educational ,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 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.

S.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

documents

Application in form 1

fees

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/=

Forum

Mister for lands.

NON-GOVERNMENTAL ORGANISATIONS

S.2 of the NGO Registration Act, Cap 113 provides that no organization shall operate in Uganda unless it has been duly registered and has said permit.

S.2(1) (b) of the NGO Registration Act Cap 113 as amended by NGO registration (Amendment) Act 2006 provides that no organization shall be registered by the Board without prior application having been made to the Registrar of Companies to have its proposed name reserved and approved for registration.

S.3 provides that an organization shall apply for registration under this Act to the secretary to the board.

Reg 4 of the NGO Registration Regs 2009 provided under Sub reg (1) that an application under S.3 shall be in Form A as specified in the schedule to the Regulations.

Reg 5 provides for the requirements for registration .....by at least two.....

It is stated that the permit identifies the area of operation and scope of activities

Document

- Application to reserve a name
- Application to the board (Form A)

fees

- Companies (fees) Rules 2005
- Reserving the name-25000/=
- Non-Governmental Organizations Registration regulations 2009

Reg.10(1) fees of the certificate

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

Nongovernmental organizations Registration Reg .2009

Reg 10(20 fees (permit)

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

Forum

S.4 of the NGO Registration Act as amended Establishment and composition of the Board establishes a board known as National Board for NGOs.

S.2(5) provides that an organization which carries out any activity without a valid permit commits an offence.

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

Interview guide and Additional information

Greetings

Preliminaries

Obtaining facts

OBJECTION MY LORD

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 fro MUK institute of Language.

HOW TO EXCHANGE DOCUMENTS

1. By email;S.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. 6,14 (2) (a) of the Electronic signatures Act No.7 of 2011 provides that a document signed with a digital signature shall be as legally binding as a document signed with a hand written signature

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 judgement 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 workers compensation act. The issue whether the deceased was a worker within the meaning of the workers 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 effect 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 share holder 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**. 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 not invalidate the proceedings. **In CONSTRUCTION ENGINEERS ABD 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.

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

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 Art.237 (2) (c) of the constitution and S.40 (4) of the Land Act cap 227, a non-citizen company cannot acquire or hold mailo or freehold land.

S.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 are 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.

S.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 companies 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. S.50 provides for single member companies.

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

PRIVATE COMPANY (SECTION 29) OF THE (COMPANIES ACT HEREIN AFTER KNOWN AS CA)

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.

[5] (1959) EA 678

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.*

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.

ELANGER V NEW SOMBERO PHOSPHATE CO.

PRE –INCORPORATION CONTRACTS.

These are transactions entered into before the company is incorporated. The rule in **SOLOMON V SOLOMON**, 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 S.54 (1) of C.A, 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.

S.54 (2), 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. S.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.

S.36 (1) of C.A grants the registrar of company's power to reserve a name of a company. Under S.36 (2), registrar is prohibited from reserving and registration of names considered to be undesirable.

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

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

Reg 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.

S.2 of C.A defines a memo 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. S.7 of C.A 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.

S.8 states that it must be dated and signed by each subscriber in the presence of at least one attesting witness. S.19 provides for registration of the memorandum. The form for a memo 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 companies act.

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

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.

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

The companies 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. S.246 of the Companies Act(inspection the documents.)

Reservation of name S.36(1) 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.(S.2(g) of the URSBA Cap 210) fee 20,000

by formal letter

Under S.36(2) 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 S.37 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 S.18(1) a company shall be registered by filling in the particulars contained in the registration form in the 2nd schedule.

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

Registrar of companies

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

Memorandum and Articles on registration, the .....and articles if any shall be delivered .....registrar and he/she shall retain and .....them and shall assign a registration.....to each company so registered (S.19(1)

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

S.7 (1) provides that the memorandum of every company is printed in English language stating the name of the company with "Limited "incase 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 its wound up.(S.7(2) and (2) respectively)

S.7(4) 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.

S.8 -it should be dated and signed by each subscriber in the presence of atleast 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 ,S.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.

S.13 -AOA may adopt all or any of the regulations contained in table A.(S.13(2) incase 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.

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

S.21.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 is 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 MOA and AOA

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 S.115 and S.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 ,S.22 of the companies Act , a certificate of incorporation shall be conclusive evidence that all the requirements of registration have been complied with.

S.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.

S.10 of C.A provides for the mode and extent to which objects of the company may be altered. S.9 places restrictions on the alteration of the memo 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

S.10 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. S.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 S.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. S.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. S.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 S.10 (3), the application shall be made to the registrar within 21 days after the date on which the resolution was made.
- Under S.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. S.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 S.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 S.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 S.71 of C.A, 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 S.71 (2), the alteration in S.71 (1) is through an ordinary resolution in a general meeting. Reg 44 and 45 of table A provide for the ordinary resolution. Must be registered under S.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 S.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. S.76 (2). Must be registered under S.150(1)

- The company must then apply to court for any order confirming the reduction under S.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 S.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 S.70

The company can under S.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 S.82.

5. Re-organization of capital under S.207.

6. Subscription clause.

Includes the name, address of occupation of each subscriber to the memo of association. S.7 (4) (b) states that a subscriber to memo may not take less than a share. S.7(4) (c) requires that he/she writes opposite his/her name the number of shares he/she is taking. S.8 requires that every subscriber signs on the memo in the presence of at least one attesting witness.

B) Articles of association.

S.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.

S.13 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 S.15 of C.A

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.

S.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.

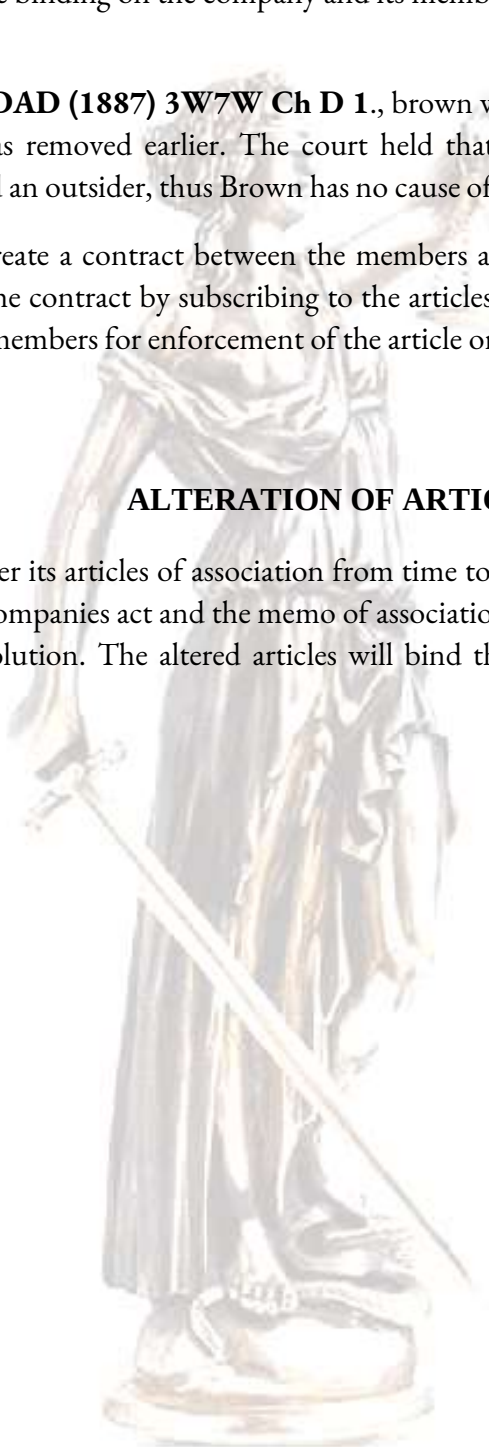
The articles are binding on the company and its members, however they don't bind the company to outsiders.

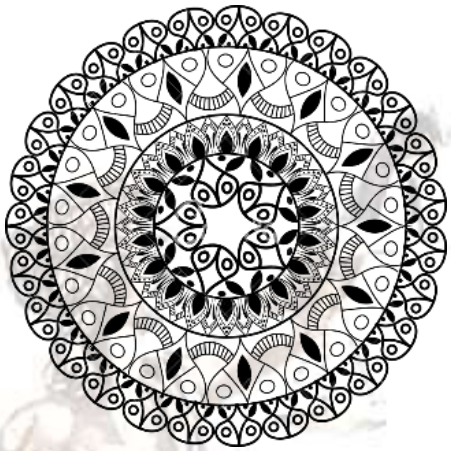
BROWN V TRINIDAD (1887) 3W7W Ch D 1., brown was to be appointed until 1888 as provided in the articles but was removed earlier. The court held that theatricals do not constitute a contract between company and an outsider, thus Brown has no cause of action against the company.

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 370 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 principle 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 principle office of the company.

ESTABLISHMENT OF A FOREIGN COMPANY

Application for a investment license S.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

S.9(2) in which more than 50% of the shares are held by a person who is not a citizen of Uganda (S.9(1) (b)

According to S.10 no investor shall operate a business enterprise without an investment license.

S.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 amount 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 S.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.

S.14(4) the authority within 7 days informs the applicant of its decisions.

S.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.S.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 (S.252)1) (a)

i) a list of the director and secretary of the company containing the particulars in S.5(2) (form A.19)

ii) Incase 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 principle office and its postal address.(S.252(2)

c) A statement of all subsisting charges created by the company being the kinds set out in S.105(2) and not being charges comprising solely property situated outside Uganda.(Form A20)

d) Name and postal addresses of one or more persons 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 S..252 and shall be conducive that the company has registered or is registered as a foreign company.(S.253(i)

S.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 S.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.

S.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

S.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 i.e. 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. S.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 SMC 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 S.192(1) (a) CA.

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 A.49 with a notice, ordinary resolution is passed appointing the director.

Form 20 for S.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.

S.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, 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.

S.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 S.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 S.1998/201 of CA

f) An undercharged bankrupt is prohibited by sec.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 (S.228(5).

The appointment of a director or secretary is notified to the Registrar using company form 20.

REGISTER OF DIRECTORS

S.228(2) CA 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 CA 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

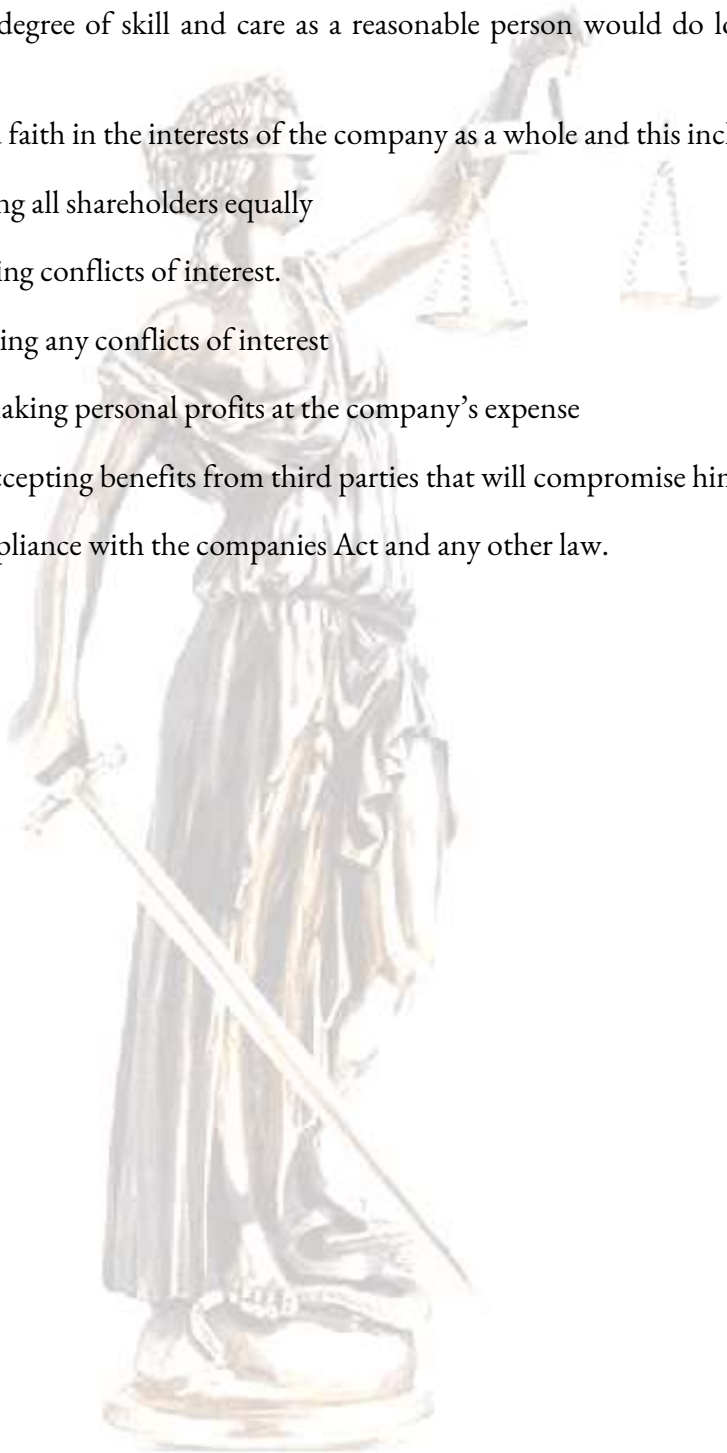
   (ii) Avoiding conflicts of interest.

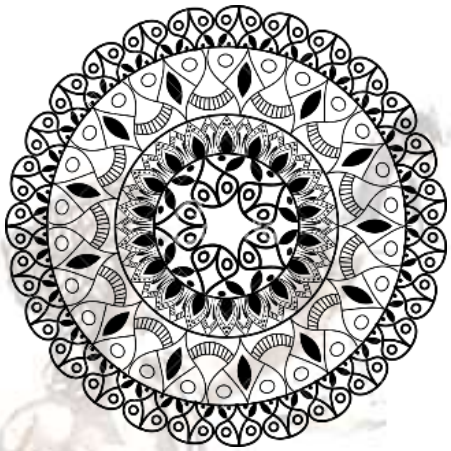
   (iii) Declaring any conflicts of interest

   (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 S.66 of CA, 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 shares 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 S.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 Art.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 S.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 these is restricted transfer of shares to the public. S.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 S.71(1)(a) of C.A and a notice of increase of share capital under S.73(1) of C.A 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) Regs 2016.

Reg.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 S.183 (2) (b) and (c) of C.A.

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 S.67 (1) of the C.A. the issue of shares at a discount must pursuant to S.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 reposes 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 S.105 (1) of the C.A.

An unregistered debenture is pursuant to S.105 (1) of CA void against the liquidator or a creditor of the company.

Pursuant to S.105 (1) of CA, the debenture must be registered within 42 days after its creation.

Under S.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 Reg 23.

A certificate of registration of a charge is then issued upon registration pursuant to S.108(1) of CA 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 r 3(e) for an order to conSUI GENERISreduction 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 any thing to do with reduction of share capital)

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

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 Reg.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 CA, 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 Reg.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 Reg 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 (Reg.99), majority vote is required to pass the resolution. (Reg 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. Reg.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. (Reg. 33 of Table A)

Notice must name a further date than that specified in the demand notice. (Reg.34 of Table A).

COMPANY MEMBERSHIP.

Who is a member?

A member is defined under S.47 of the CA. S.47(1) states that the subscribers to the memo 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 S.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 ones 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 ones name on the annual report.

DUTY TO MAINTAIN THE REGISTER OF MEMBERS.

S.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 members name cannot be vested on him/her and will be allowed to adduce other evidence to prove membership.

MEETINGS

EXTRA ORDINARY GENERAL MEETINGS

S.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 S.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.

S.141 (2) provides that notice of the meeting shall be served on every member of the company.

A 50 (1) Table A provides that every general meeting shall be called by at 21 days notice in writing.

A.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.

A.52 all business that is transacted at an extra ordinary meeting shall be taken to be special.

Quorum,S.141(c) provides that 2 members of a private company personally present shall form a quorum.A.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 .A 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.

S.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.(S.152 (2) 3)

Table A.A .48 provides that all general meetings other than the Annual General meetings shall be called extra ordinary general meetings.

A.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.

A.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.

A.99 sets out the quorum and this may be fixed by the directors and if not fixed the quorum is two.

According to A.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 A.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 directors 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 (S.140 (2) and A.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 Ovs Rushway 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

S.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 favour 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) (S.150 (5)

Filing a special resolution out of time S.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.

S.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 S.150 finance Act 2013 for any resolution filed under the companies Act 3 copies 20,000/=

APPOINTMENT OF DIRECTORS

S.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.

A 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

A.94 provides that the company may from time to time by ordinary resolution increase or reduce the number of directors.

A.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.A.49 Table 4 the director may convene an EGM whenever they think fit.

Ordinary resolution is passed appointing the director.

A.94 Table A the company may be ordinary resolution increase or reduce the number of directors.

S.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

S.192 (1) Restrictions on appointment or advertisement of director.

S.193 share qualifications of directors (S.193 (1) (2)

A.77 of Table A -share holding qualifications.

S.196 Age limit

S.193 (3) 5 director vacates for loss of qualifications

S.200 undisclosed bankruptcy

201 Fraudulent persons.

APPOINTMENT OF COMPANY SECRETARY

S.187 is to the effect that a company shall have a secretary.

A.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.

S.90 qualification of company secretaries

A.11 Table A prohibited persons as secretary S.188 prohibition of certain persons being sole director or secretary.

REPRESENTATIVES OF CORPORATIONS

A.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)

S.146 (1) (6) 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

S.150 companies Act -with 30 days be

registered to the Registrar

Special resolution for the AOA

Board resolution /Resolutions

ordinary resolution

DUTIES OF THE COMPANY SECRETARY

K.A Kristina v Indo Union Assurance Co.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 S.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 (CA 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 S.90 (3) (b)

Re Fredrick slobart and Co (1902) Ch 507 the duty of the secretary includes certifying transfers and receiving and registering notices on behalf of the company.

d) Custodian of the company seal

A.113,Table A to which the seal is applied shall be signed by the director and counter signed by the secretary. A-113 (3) every instrument.

e) Receives court summons and represents the company in legal matters.

Q.26 R.2 the 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.

S.59 a document requiring authentication may be signed by a company secretary.

g) File company resolution and returns.

S.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.

S.2 of CA defines a director as any person occupying the position of director by whatever nature name called and includes a shadow director.

S.198 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 Art.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

This is conversed in section131 and 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 132 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.

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 (c. f. section 132 of the Companies Act in its entirety)

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 a 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 135

In case one wishes to move court to order for a meeting, the procedure is by filing a summons in chambers under 0.38 r.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,

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 **MATTHEW RUKIKAIRE V INCAFEX** 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.

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 S.47 (2) of CA. Upon entry into the register of members.

Rights of subscribers, shareholders and members in a company.

SUBSCRIBERS

Pursuant to S.47 (1) of CA, upon registration, the subscribers to a memo of a company are deemed to have agreed to become members and should be registered in the register of members.

S.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 MATTHEW RUKIKAIRE V INCAFEX, 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 S.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 RUKIKAIRE 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 members 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 members 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 Reg 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 WSD accompanied by an SD.

2. A member's register kept by the registrar of companies. This can be rectified by court order pursuant to S.125 of the company act. When proceeding pursuant to S.125, you proceed to court under O.38 r 4 of CPR 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. (cf characteristics of a private limited company discussed above). Consent is required from the other members before the transfer takes place.

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 O37 r5 CPR 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

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.

NON-GOVERNMENTAL ORGANISATIONS

In this part of the study, the law applicable includes;

The NGO Registration Act Cap 113

The NGO Registration Regulations SI 113-1

The Companies Act

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 organisation).

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 Organisation).

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.

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 Salomon Vs Salomon (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 licence, 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

S. 68 of the contracts acts 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.

S. 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 S. 10 (6) Contracts Act
- Offer by guarantor and acceptance by the bank.

- Consensus all item
- Consideration S. 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 S. 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 S. 71 (a).

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 an 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 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.

[9] (1973) Ac 331
[10] S.71(1)

RIGHTS OF A GUARANTOR

S. 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.

S. 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.

S. 85 provides for the right of indemnification.

S. 85(1) stipulates that in every contract of guarantee, there is an implied promise by a principal debtor to indemnity a guarantor.

S. 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.

S, 74 rights to consent to variance in terms of the contract.

DISCHARGE OF A GUARANTOR

S. 74 of the contracts Act, 2010, any variance made i SCCA No. 23/2000n 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.

BoU vs Banco Arabe Espanol[12], 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 is unsubstantial or one which cannot be prejudicial to the surety or unless it is provided for in the guarantee.

[11] ***HCCS*** No 179/2004

[12]

S. 76 – discharge of guarantor when creditor compromises which gives time to or agrees not to sue the principal debtor.

S. 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.

S. 82(2) Discharge of Guarantor where the creditor loses or puts with the security without the consent of the guarantor.

S. 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.

S. 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

S. 83 of the Contracts Act 2010, a guarantee which is obtained by misrepresentation made bya credito5r 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 B.o.U 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**

S. 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.

S. 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**

S. 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. S. 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 S. 15 (fraud). Is there an obligation to explain to the Guarantor the indebtedness of the principal debtor by the Bank.

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.[13]

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 customers financial position or business habits.

Hamilton Vs – Watson[14] 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.[15]

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 customers financial position or business habits. In Hamilton Vs – Watson, Lord Campse II 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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[13] Daner vs Condom and provincial making insurance co (1878) 8 Ch. D 469 act 475.
[14] (1914) S.C 259
[15] (1878)8 ch. D 469 at 975.

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[16]; 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, seetership or 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 contract of surerships and 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

[16] (1983) I WLR 463 at 489

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.

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[17]; 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 45/200***8, 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 Sebuliba Kayondo and Berkeley Education Ent. Ltd. Vs Barclays Bank of Uganda ltd***[18]

In ***George Sembule vs Barclays Bank***[19] where a mortgage was created, the extent of the guarantor's obligation is constrained by the obligation under the mortgage.

Bills of Exchange

S.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.

[17] HCMA No. 411/12
[18] HCMA No. 325/2008.
[19] ***HCMA*** No. 267/2008

S.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 .

S.2 (2) any instrument which does not comply to the conditions in S.2(1) or the orders any act to be done in addition to the payment of money is not a bill of exchange.

S. 22 – no person is liable as drawer, endorser or acceptor of a bill who has not signed.

S.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.

S.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.

S.5(1) the drawee must be named or otherwise indicated in a bill with reasonable certainty.

S.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.

S.6(1) where a bill is not payable to bearer, the payer must be named or otherwise indicated in it the reasonable certainty.

S.7(2) a negotiable bill may be payable either to order or to bearer.

S.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.

S.8(1) with sum payable by a bill is a sum certain within the meaning of this act.

S.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.

S.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. VsCebtebnart Rural Development Bank[20]; 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.

S. 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 ofa 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).

S. 63(2) in particular, the following alteration are material;

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 accepters consent.

S. 68 replacement of a lost bill.

CHEQUES

S. 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 S. 22 and S. 2(1)

[20] HCCS No. 48/2004

2. Capacity to it i.e. general laws of it S. 21
3. It should be in writing
4. Offer and acceptance – S.2(1)
5. Consideration S.2(1)
6. Delivery S.20

PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS

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.

S.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?

S.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.

S.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 S.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 is 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 S.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 S.2 (19) of the PPDPA.

I. The acquisition of an asset or of equipment where the asset or of equipment iaw being disposed of another procuring and disposing entity in accordance with S.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 S.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 S.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 S.4 of the BOU Act.

i) Any other procuring and disposal entity as maybe prescribed by the minister.

BASIC PROCUREMENT AND DISPOSAL PRINCIPALS.

Pursuant to S.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 (S.44)

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. (S.45)

All procurement and disposal processes must be conducted in a manner which promotes transparency, accountability and fairness to all involved.

c) Competition(S.46)

All procurement and disposal must be conducted in a manner that maximizes competition and achieves value for money.

d) Confidentiality (S.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. (S.47 (1)).

S.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 (s.48)

Procurement and disposal must be conducted in a manner which promotes economy, efficiency and value for money.

f) Ethics (S.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.

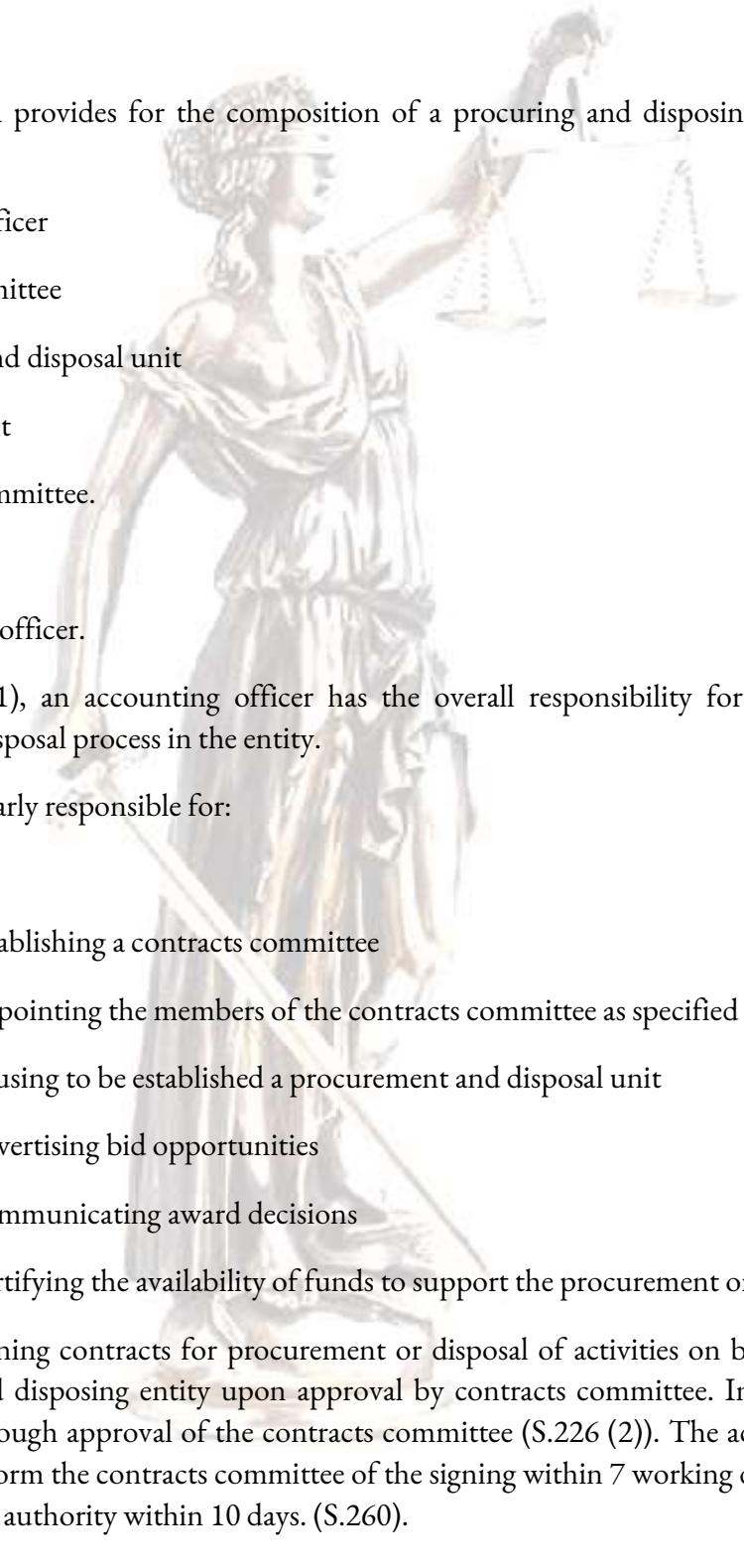
Under S.93 (1) of PPDPA, public officers and experts engaged to deliver services must sign on to the code of ethical conduct provided in the 5th schedule to the act.

S.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.



S.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 S.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 (S.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. (S.260).

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 S.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.

S.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 S.39 delegate certain procurement and disposal functions of accounting officer, contracts committee or procurement and disposal unit.

b) CONTRACTS COMMITTIE

S.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. (S.27 (2)) The appointment is as prescribed in form 1 of the 2nd schedule of the PPDPA (procuring and disposing entity regulations.) also Reg. 9(1) of the PPDPA 9procuring and entities) regulations.

Under S.27 (2a), 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 S.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 S.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 S.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.

S.3 defines PDU as a division in each procuring and disposing entity responsible for the execution of the procurement and disposal function.

S.30 mandates every procuring and disposing entity to establish a procurement and disposal unit.

Functions of the PDU.

These are stated under S.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, reg, 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 S.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 advise from the authority

Where a PDU disagrees with the views of the contracts committee on its recommendations under S.33 (1)(a), the PDU may pursuant to S.33(2) request for advice from the authority.

Procedure for seeking advice from the authority.

S.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.

S.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 S.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 S.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 S.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 S.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 S.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 S.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. (Reg 9).

OBJECTION MY LORD

MULAGO SCHOOL

OF NURSING AND

MIDWIFERY

P.O BOX 212

KAMPALA.

Date: 6th/01/2020

KUNYIGA 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.

1. PROCUREMENT PLAN AND BUDGETING.

S.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.

S.58 (7) bars the carrying out of any procurement outside the procurement plan except in emergency situations.

Process

User departments are pursuant to reg 3(2) of PPDA (PDEs) Regs 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 Reg 3(1) of PPDA (PDEs) Reg 2014

OBJECTION MY LORD

The consolidated plans are sent to the accounting officer for approval pursuant to Reg 3(4) of the PPDA (PDEs) 2014.

The procurement plans are approved by the board/council/management

The accounting officer pursuant to s.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 S.58(6) of the PPDPA and the website of ministry of finance and authority. 2. PROCUREMENT REQUISITION.

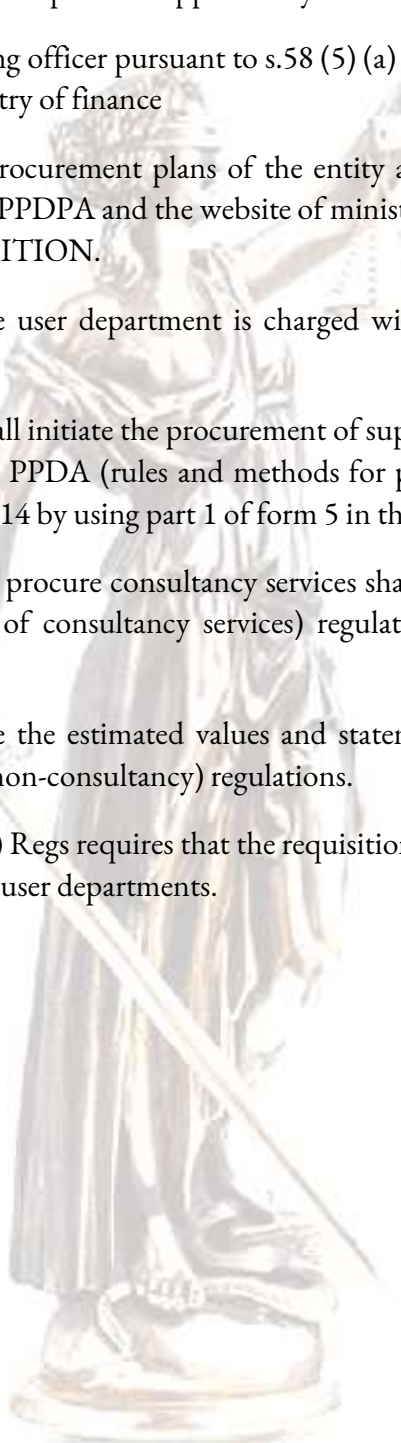
Under S.34(1)(b), the user department is charged with the duty to initiate procurement and disposal requirements.

A user department shall initiate the procurement of supplies, works and non consultancy services according to Reg. 3(5) of the PPDA (rules and methods for procurement of supplies, works and non-consultancy services) Regs. 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 reg 3(5) of the PPDA (procurement of consultancy services) regulations by using part 1 of form 18 in the schedule to the regs.

The requisition must include the estimated values and statements of requirements as per Reg. 24 of PPDA (Supplies, works and non-consultancy) regulations.

Reg 3(2) of the PPDA (PDEs) Regs requires that the requisition is approved/confirmed by an authorized officer usually the head of the user departments.



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

OBJECTION MY LORD

Request for procurement

Name: OKOT RONALD

Signature.....

Title: MANAGER ESTATES

Date: 31st/12/2019

(Member of user department)

confirmation of request

LUMALA JOEL

.....

DIRECTOR ESTATES

2nd /01/2020

(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

3. ASSESSMENT OF MARKET PRICE.

Pursuant to S.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 Reg 5(1) of the PPDA (supplies, works and non –consultancy0 Regs and the PPDA(consultancy) Regs, 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.

4. CONFIRMATION OF AVAILABILITY OF FUNDS.

Pursuant to S.26 (f) of PPDPA, the accounting officer must confirm the availability of funds as per approved budget.

Reg 4 (1) of the PPDA (supplies, works and non-consultancy) reg's 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.

Reg 4(3) supplies, work and non-consultancy Reg's of 2014 and consultancy Reg's of 2014.

5. PREPARATION OF BID DOCUMENTS.

S.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 Reg 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 S.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 Reg.33 (1) of the PPDA (supplies, works and non-consultancy) Regs 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 Reg 34 of the PPDA (supplies, works and non-consultancy) Regs 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 Reg 35 of the PPDA (supplies, works and non –consultancy) regs 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.(Reg 37).

6. APPROVAL OF PROCUREMENT METHOD, BIDDING DOCUMENTS AND THE EVALUATION COMMITTEE.

The contracts committee pursuant to S.28 of PPDPA approves procurement method, bidding documents or any addenda and the valuation committee. S.28 and S.29

s. 79(2) of the act.

7. 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 S.31 of PPDPA.

Reg 41(1) of the PPDA (supplies, works and non-consultancy) regs 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.

Reg 42 (1) of the PPDA (supplies, works and non-consultancy) Regs mandates that the bid notices be published in at least one newspaper of wide circulation.

Sub reg (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 Reg 45(1) of the PPDA (supplies, works and non-consultancy) Reg's 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 Reg 46(1) (a), the minimum bidding period in respect of open domestic bidding method is 20 working days.
2. Pursuant to Reg 46(1) (b), the minimum bidding period in respect of open international bidding method is 30 working days.
3. Pursuant to Reg 46(1) (c), the minimum bidding period in respect of restricted domestic bidding method is 12 working days.
4. Pursuant to Reg 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 quotations method is 5 working days as per Reg.46 (1) (e).
6. There is no minimum bidding period for direct procurement method. Reg 46(2)).

Issue and sale of bidding documents.

Under Reg 47(1) of PPDA (works, supplies and non-consultancy) Regs 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 Reg 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. Reg 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. Reg 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. Reg 47(5)

Pre-qualification.

Pre-qualification is defined under S.3 of PPDPA as a screening process designed to ensure that invitations to bid are confined to capable providers.

Under Reg 18(1) of PPDA (supplies, works and non-consultancy) Reg 2014, a procuring and disposing entity any use pre-qualification under open domestic or open international bidding to obtain a shortlist of bidders.

Reg 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 (Reg 18(3)) and published on the notice board of the entity for atleast..

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. Reg 18(4) (a)-(d).

Pre-qualification notices and documents.

Under reg 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.

Reg 19(2) requires that the notice is published in at least one newspaper of wide circulation.

Bidding periods in pre-qualification.

Pursuant to Reg 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 Reg 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.

8. **RECEIPT AND OBTAINING OF BIDS.**

S.69 provides that every bidding process must include a formal bid receipt and a bid opening. Reg 58(1) of the PPDA (supplies, works and non-consultancy) Regs 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 reg 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.

The procedure for public bid opening is stipulated under Reg 65 of PPDA (supplies, works and non-consultancy) Reg.2014

Sub Reg (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) Regs (Reg 65(9)

9. **EVALUATON OF BIDS.**

Pursuant to reg 5 of the PPDA(evaluation) Regs 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) its done by the evaluation committee.

10. **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. Reg 4 of the PPDA(contracts) Reg 2014.

11. 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 provide to the accounting officer who signs it on behalf of the entity under S.26 of the PPDPA and the contract must be approved by the A.G where necessary before it's signed. Section 52 of PPDA contract will be signed with the best evaluated bidder.

12. **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.

S.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 Reg 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 Reg 8(3), where an emergency situation is used as the criteria for determing 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 (Reg 8 (4))

Before an entity uses direct procurement it must give priority to other competitive procurement methods (reg 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.(REG 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. (Reg 8 (7))

Where the value of the requirement requires the use of the quotations method, a procuring and disposing entity must before deciding to use direct procurement, consider using the quotations method with appropriate modifications. (Reg 8(8))

Under Reg 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 theses regs

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 S.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, S. 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. (Reg 6(4)).

Reg 6(3) of the PPDA (supplies, works and non p-consultancy) Regs 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, SUPPLIES, AND NON –CONST.

1. Open domestic bidding

Is provided for under S.80 of the PPDA, S.80 (20 defines the method as one which is open to participation on equal terms by all providers through advertisement of the procurement opportunity.

S.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. Reg 12(1) of PPDA, (Supplies, works and non-const) regs.

Pre-qualification maybe used upon advertisement of a pre-qualification notice in at least one newspapers of wide national circulation. Reg12 (2)

2. Open international bidding

Its defined in S.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 .S.81 (2) of PPDA.

Reg 13(1) of PPDA (supplies, works and non-const) Regs require a bid to be published in at least one publication of international circulation.

Pre-qualification maybe applied upon publication of the pre-qualification notice in at least one publication of wide international circulation. Reg13 (2)

3. Restricted domestic bidding

It's defined under S.82 (1) of PPDA as a procurement method where bids are obtained by direct invitation without open advertisements.

It is applicable pursuant to S.82 (2) of PPDA to obtain competition and value for money where the same cannot be obtained or the circumstances donot justify or permit the open bidding procedure.

Reg 14(1) of PPDA, (supplies, works and non-const) regs, 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. (Reg 14(2)(a)) and before issuing the bidding documents ,publish a notice of restricted bidding on the website of the authority. Reg 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.

4. Restricted international bidding

It's defined in S.83 (1) as a procurement method were bids are obtained by direct invitation without open advertisement and the limited bidders include foreign products.

Its used to obtain competition and value for money to the extent possible where the value or circumstances donot justify or permit an open bidding method and short listed bidders include foreign products .S.83(2)

5. Quotation method.

It's a simplified procurement method which compares price, quotations obtained from a number of providers. (S.84 (1).

Schedule 4 paragraph 5(1) (b) writes that value of the procurement must not exceed the method stated of the procurement guidelines.

S.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 donot justify or permit open or restricted bidding procedures.

The method is only applicable in works and supplies (S.84 (3)).

Pursuant to Reg 15(1) of PPDA, supplies, works and non-const) Regs, the procurement using the quotations method must be by selection of bidders using a shortlist.

The entity must obtain at least 3 quotations. Reg 15(2)

There is no requirement to have the opening of the quotations in public. Reg 15

6. Micro procurement.

It is used for very low value procurement requirements. S.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 Reg 16(1) of PPDA (supplies, works and non-const) Regs 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.

7. Direct procurement.

Its 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. Reg 17.

METHODS FOR CONSULTANCY SERVICES.

S.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 Reg 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 Reg 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: Reg 6 (a)-(c)

1. Publishing a notice inviting expression of interest.

Reg 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. (Reg 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 Reg 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 Reg 16(1)

The single consultant must be identified from a number of consultants able to provide the consultancy service. Reg 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. Reg 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. Reg 16(3).

DISPOSAL

S.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.

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

Regulation 4 of the PPDA (Disposal of public assets) Regs 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.

Reg 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. Reg 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. Reg 5(7) (9).

The minimum bidding period is 15 working days. Reg 5(11) and the bid are evaluated using the 'price only' methodology. Reg 5(12).

PUBLIC AUCTION.

It shall be where there is a large number of potential bidders 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 an site auction is arranged to avoid transport costs. Reg 6(1)

The sale under this method must be at a reserve price. Reg 6(2)

The entity solicits for bids by publishing an invitation notice to the public Reg 7(3) in at least one newspaper of national circulation. Reg 7(4) and the notice displayed on the entity's notice board Reg 7(5).

The entity must appoint an auctioneer and handover the asset to them to conduct the auction on the entity's behalf. Reg 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. Reg 7(8).

Bidding is made orally at the auction Reg 7(9) and the auctioneer will announce the successful bidder who must immediately after the announcement pay at least 50% of the contract price. Reg 7(12) and the balance within 5 days. Reg 7 (13).

DIRECT NEGOTIATION

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. Reg 9

The entity must obtain a valuation for the asset before the negotiations are conducted .Reg 10(3).

The entity solicits for bids by issuing bid documents .Reg 10(4).

The minimum bidding period for disposal by direct negotiations is 3 working days. Reg 10(6) and the bid are evaluated using a 'price only' methodology.

SALE TO PUBLIC OFFICERS.

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. Reg 11(1) (a) and (b).

The sale is done by an independent agent Reg 11(2) and the asset is sold to the public officer for their personal use and not for business or commercial use. Reg 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. Reg 12(3).

The bidding period must not be less than 10 working days .Reg 12(11) of the bids are evaluated using the 'price only' methodology.

DESTRUCTION OF THE ASSET.

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. Reg 13(a) and (b).

Conversion or classification.

Reg 15 (a) and (b) as in Reg 13(a) and (b) above.

TRADE IN

Pursuant to Reg 17(1) and (2). Its only used where the asset of the PDE will be upgraded in a converment, economic and efficient way, by trading in a surplus asset of the entity to off set 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

Applicable where the entity cannot obtain payment for the asset using any of the other methods and neither can the asset be transferred. Reg 21 (a) and (b)

DISPOSAL CYCLE.

1. Accounting officer institutes a board of suvey.

   Reg 3(2)

   - Identification of disposal items
   - Determination of reverse price.

2. Preparation of disposal pan.

   Reg 2(1)

   - Approval of the same by ministry of finance and if disposing strategic assets.

3. User department initiates disposal process.

   Reg 3(1)

   - Preparation of statement of requirements.

4. PDU prepares bidding does

   This applies to disposal by public bidding and sale to public officers. Reg 5,6,7

5. Contracts committee approves disposal method ,bidding document and evaluation committee .Reg 3(1)
6. PDU advertises and invites bids .Reg 5(4)
7. PDU receives and opens bids
8. Evaluation of bids. Reg 5(12)
9. Contract committee reviews evaluation report.
10. Signing of contract
11. Contract management. Reg 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.

S.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.

S.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**.

S.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.

1. 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.

2. 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

S.169 of CA

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**

S.130 (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 were 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 potest delegare.*

In **ALLAN AND CO LTD V EUROPA POSTER SERVICES LTD**[21]. 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 potest delegare* to such relationship is founded on the confidential nature of the relationship.

S.125 (1) of contracts act duty to act personally where agent undertook to act personally.

S.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.

S.125 (3) if the agency permits, then agent may employ a sub-agent.

S.126 (1) where a sub-agent is duly appointed, he/she binds the principal.

S.126 (2) an agent is responsible for the acts of the sub agent to the principal

S.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

[21] **(1968) 1 ALL ER** 826

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 principals 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.**

S.150 of the C.A 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),[22] 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 S.153 of C.A

[22] **3 APP CAS.254**,

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 its 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[23] 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[24] 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[25], 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 effected 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.

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.

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[23] **(1887), 58 L.T .96,**
[24] **(1889) 6 T.L.R .30**,
[25] **(1863) 14 C.B.N.S 681**

Under S.154 of CA, 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.

S.158 (1) of CA, 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. S.158 of the CA.

4. right of principal to repudiate when agent deals without the consent of the principal.

REMEDIES AVAILABLE TO PARTIES UPON BREACH OF AGENCY.

PRINCIPAL

1. **Dismissal S.137 of CA / 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.

2. **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

3. **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 a san 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.

S.135 of contracts act lays down the ways in which an agency maybe 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

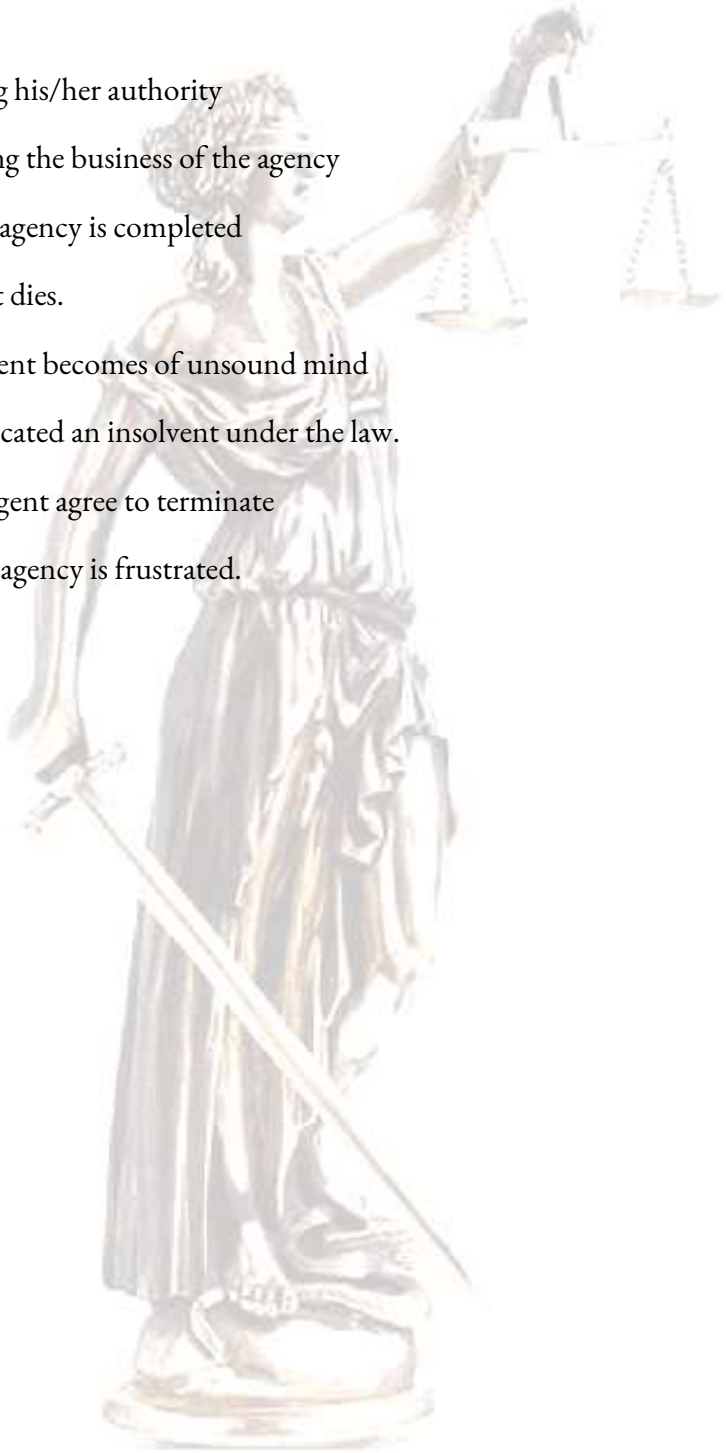
d) A principal or agent dies.

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.



OBJECTION MY LORD

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.

OBJECTION MY LORD

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 ## KAMPALA (Hereinafter referred to as the "franchisor"

AND

Yyy OF P.O BOX ## 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.

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**

OBJECTION MY LORD

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 ### KAMPALA (hereinafter referred to as the "supplier")

AND

Yyy of P.O BOX ## 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:

.. ..

Registrar of Companies

1st day of November 2003

Reserved name

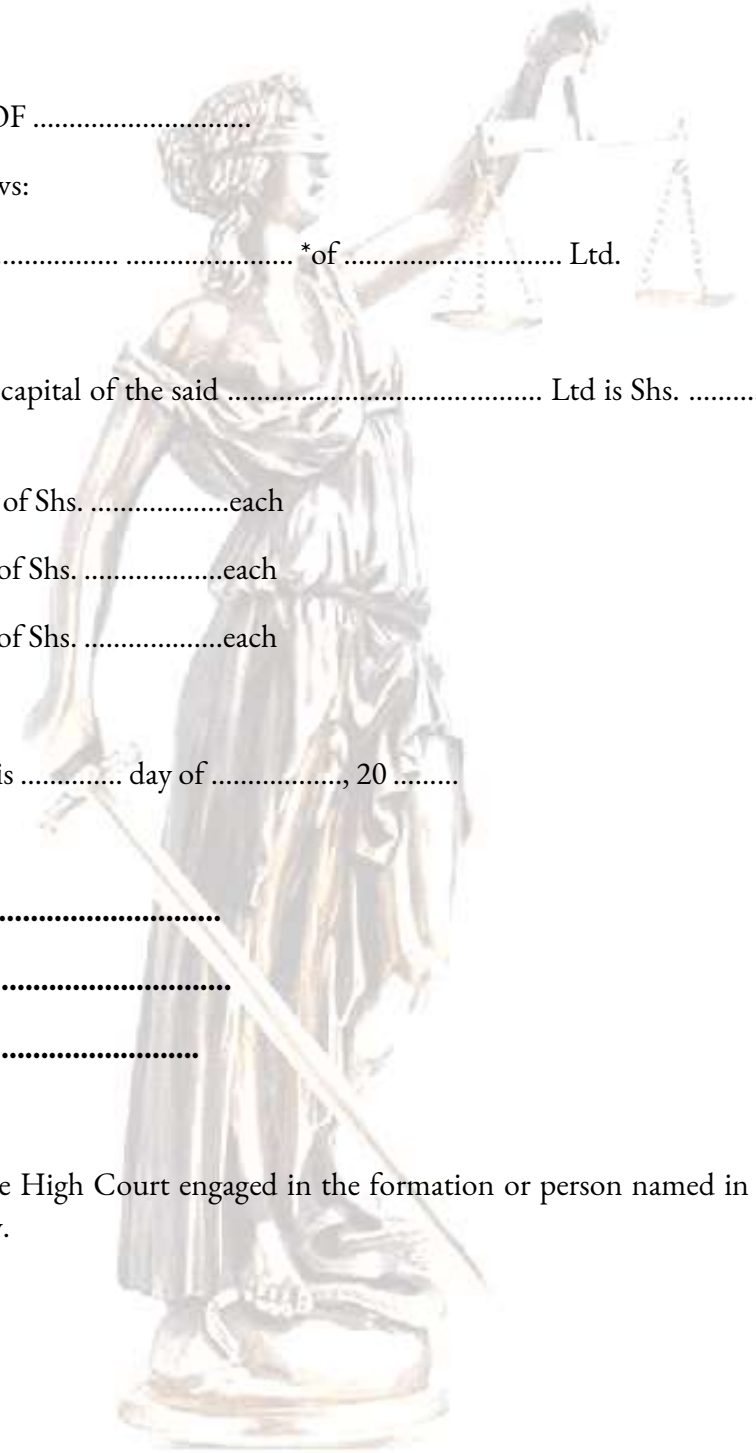
.. ..

For: Promoters, 11th November 2( )3.

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.

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 matters 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.

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 situate 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.

OBJECTION MY LORD

WITNESS TO THE ABOVE SIGNATURES:

FULL NAMES: .....

POSTAL ADDRESS: .....

OCCUPATION: .....

SIGNATURE: .....

Total Shares taken - 600

Dated this ..... day of ..... 2006.

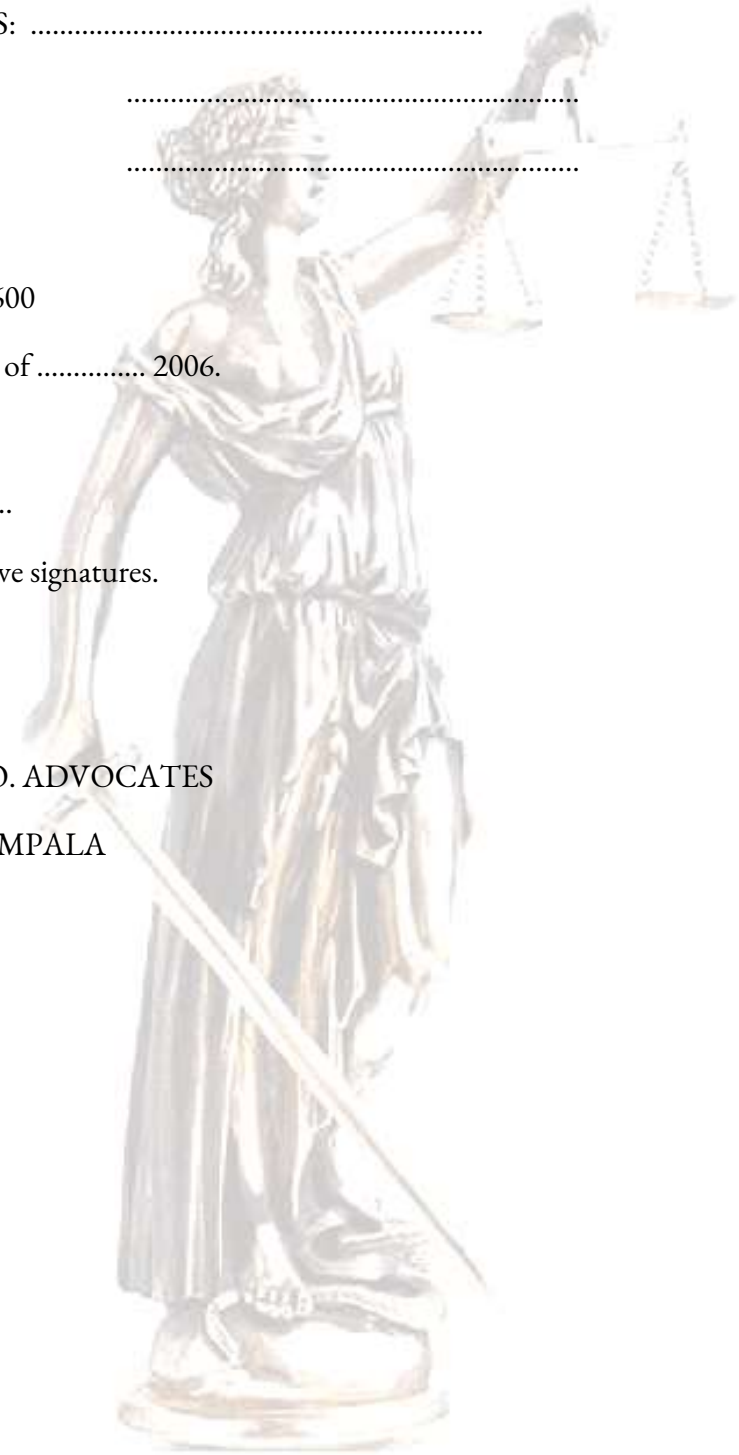
.....

Witnessed to the above signatures.

DRAWN BY:

SUI GENERIS& CO. ADVOCATES

P.O. BOX 7117, KAMPALA



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
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 S.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 day:, 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**

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. Sect 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 .....

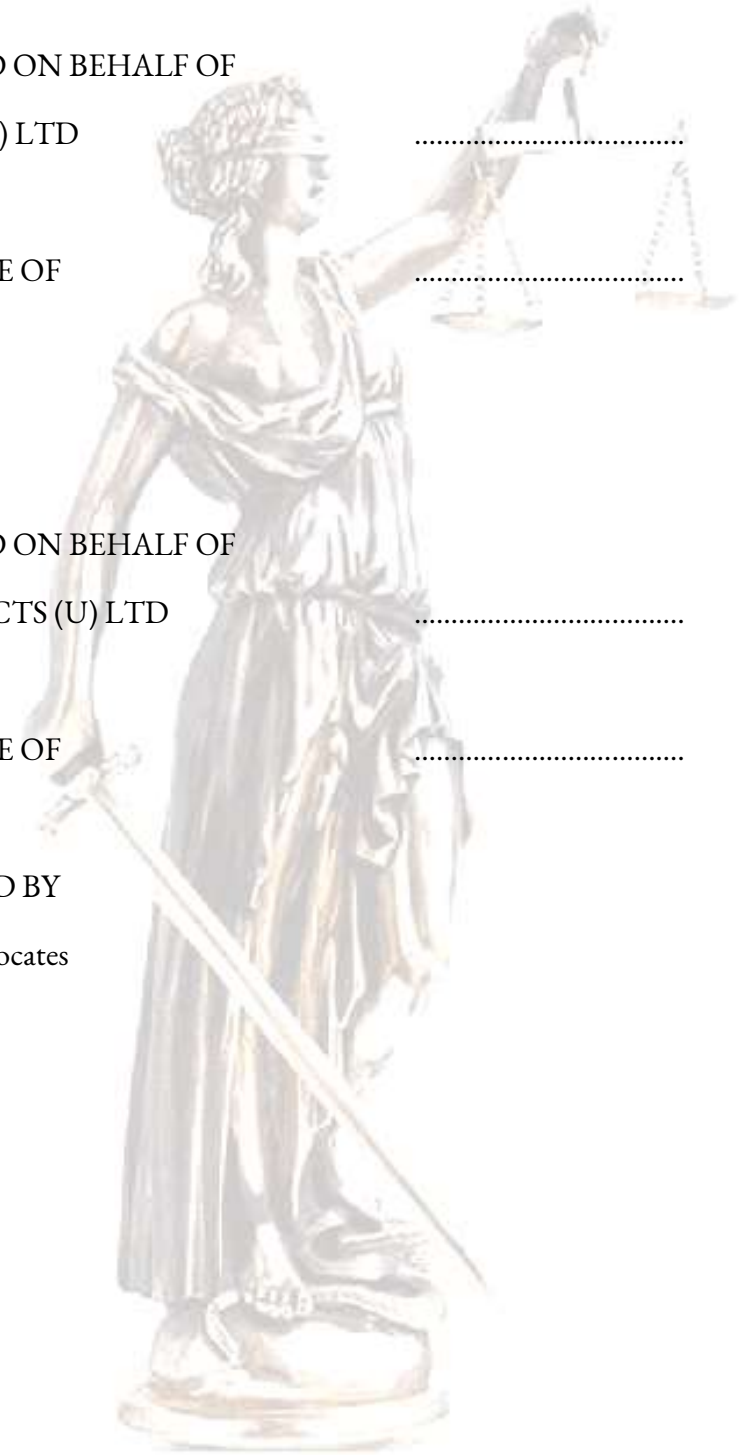
IN THE PRESENCE OF .....

DRWN AND FILED BY

Firm C and Co. Advocates

P.O.BOX 7117,

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 7117, 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

OBJECTION MY LORD

APPLICANT.

Form 5

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 7117, 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 7117, KAMPALA.

Dated this 7th day of November 2022.

MPIIMA BLAISO

ISAAC CHRISTOPHER LUBOGO

NOMINEE DIRECTOR.

OBJECTION MY LORD

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.

OBJECTION MY LORD

Form of Annual return.

REPUBLIC OF UGANDA

THE COMPANIES ACT

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.

S.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 S.115 (2) of CA, 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 S.116(10 of CA 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.

S.192(4) of CA 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.

Reg. 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 S.192 (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 S.228 (6) (a).

Notification of change shall be within 14 days from date of change pursuant to S.228 (6) (b).

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.

OBJECTION MY LORD

Notice of particulars of directors.

THE REPUBLICOF UGAMDA

THE COMPANIES ACT

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.

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

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? (cf section 222 of the Companies Act)?
- If so who has capacity to initiate winding up of the company? (modes of winding up thus cf sections 212, 276- 278, 286,288 *inter alia*)?
- What the mode of proof and priority of debts (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;

MODES OF WINDING UP

VOLUNTARY WINDING UP.

This is provided for under section 276 – 278 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

COMPULSORY WINDING UP

This is where individual(s) being creditors or contributories petition court to wind up a company. This is provided for in section 224 of the Companies Act.

The procedure is as follows:

- One makes a petition under section 224(1). The petition follows Rule 21 of the Companies (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 25 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 23 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.

- Section 223 puts a mandates 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 Section 212(1) (a) of the Companies Act. The relevant circumstances which have to be present before winding up by court is done are evident in section 222 (a) to (g) of the Companies Act. 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 section 218 of the Companies Act. The procedure is by petition as provided for in section 224(1) of the Companies Act.
- 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 section 222 (a) to (g) of the Companies Act) 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 directors 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 section 315 of the Companies Act 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 section 351 of the Companies Act.

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.

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 showeth 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 Kawempe, 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.

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) That costs of this petition be met by the respondent.

(iii) That any other such order be made in the promise of this honourable 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

.....

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 7117

Kampala.

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 7117, 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 7117, 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.[26] A bankrupt person is one in respect of whom a bankruptcy order has been made per **Section 2.**[27]

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***[28]

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 files in court a declaration of his inability to pay his debtor presents a petition against himself.

[26] Bryan.A.Garner,Black's law dictionary 9th edition Pg 464
[27] Insolvency Act 2011
[28] (2007) ULR571.

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 Insolvecy Act 2011.***

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 1,000 Shs.
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 erquired 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 **Insolvecny 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**[29] 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**[30]
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 petitions 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.

[29] Insolvency Act 2011
[30] Insolvency Act 2011

- 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 satutory 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 decalrs the debtor bankrupt and appoints the official receiver as interm reciver 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 reciever'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 bound 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 *Munange Ogoola, J* (as he was then)in the case of **Thomas I kato**[31] 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**[32]. 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)**[33] where the appellant court held that the 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

[31] (Bankruptcy petition No.13 of 2002)
[32] Insolvency Act 2011.
[33] (1990) Ch 773

court should therefore ignore, the company is deemed solvent. This was the position in ***Re Global Tours and Travels***[34].

PROOF OF INABILITY TO PAY.

Inability to pay debts is presumed where[35]**;**

(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 NPART30*** 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 **Re Spackman**[36] 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[37].

[34] (2001) 1 EA 195
[35] Section 3- Insolvency Act 2011
[36] (1890) 24 QBD 128
[37] Re a debtor

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[38]. 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***[39] 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.**[40]

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 exparte Jackson***[41] 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

8) contributions payable under the National Social Security Fund Act.

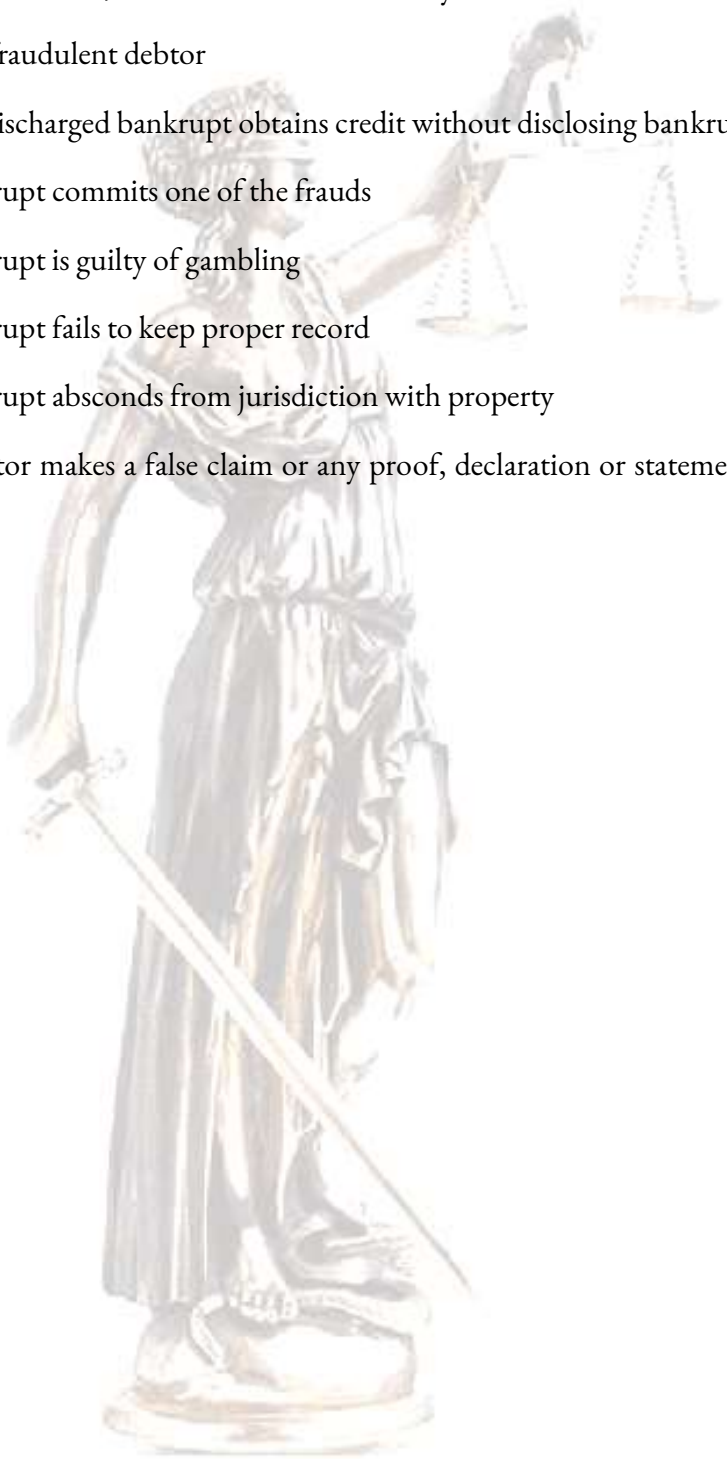
Under the statutory provisions, these claims have priority over those of a secured creditor only insofar as the assets of the company are insufficient to meet all the claims.

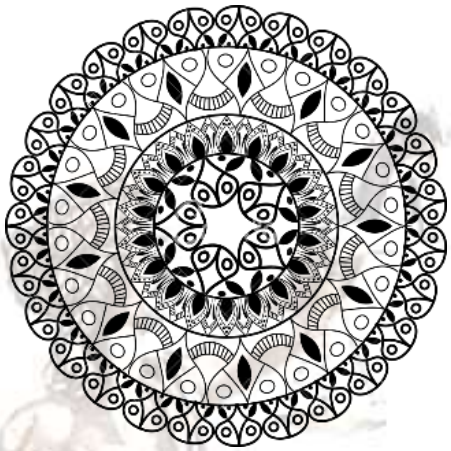
[38] Kakyo case.
[39] 1989 EA at 145
[40] Section 20(5)
[41] 1989 EA at 145

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 commits 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 debtors 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.

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.

S.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 S.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 S.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 S.3 (3) of the act. Under S.5 (6) of the act, failure to comply with timelines to pay under S.5 (5) is deemed inability to pay.

STATUTORY DEMAND.

It is issued onto the debtor under S.4 (1) of the insolvency act. It should be verified by a statutory declarations unless it's in respect of a judgement debt.

Under S.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 judgement debtor or a company is an ascertained debt, but need not be a judgement debt.

The statutory demand takes the form prescribed in form 1 in schedule 1 of the insolvency regulations, 2013 as per Reg. 4(1) of the regulations.

Reg 4(2) requires that the statutory demand specifies: the amount of the debt and in case of a debt arising out of judgement or order of a court, the details of the judgement 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 donot 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.

S.4 (2) (d) of the insolvency act and Reg 5(1) of the regs 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 Reg 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 Reg 5(3) proof of service of a statutory demand is by an affidavit of service stating the time and manner of service.

TIMELINES.

S.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 S.3(2) of the insolvency act.

SETTING ASIDE A STATUTORY DEMAND.

A court may pursuant to S.5 (1) on application of the debtor, set aside a statutory demand.

TIMELINES.

Under S.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.

S.5 (3) of the act empowers the court to extend any of the aforementioned timelines.

APPLICATION.

Pursuant to Reg. 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 S.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 S.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 S.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 pay 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 S.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 abte in equal proportions as between themselves.

The principle is codified under S.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 S.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 S.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 workers compensation act, accrued before the commencement of the liquidation or bankruptcy not exceeding the prescribed amount.
3. All amounts that are preferential debts under S.33 or 105.

Third category of debts after those above been paid are:

1. The amount of tax withheld and not paid to the URA 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 S.13 of the insolvency act. Under S.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 S.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 S.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 (S.15 (1) (b)). See **BELMONT PARK INVESTEMENTS PTY LIMITED.**

EXCEPTION TO S.15 (1) (B)

Under S.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 S.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 HOL held that the transaction was effected at an undervalue, and was voidable under S.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 S.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 S.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 S.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 insolvents 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 S.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

S.19 (3). Application is by notice of motion with an affidavit in support as per REG 189(3).

RIGHTS WHERE THE TRANSACTION IS SET ASIDE.

Under S.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 S.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 S.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 S.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 S.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 S.121, the order is effective for only 14 working days. The duration may however be extended by court subject to the conditions under S.123 (2) and (30 or if it has expired order for its renewal.

Note: under S.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 S.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 creditors meeting under S.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 S.124 (2).

   - During the meeting, the creditors may agree to the proposed arrangement or with such modifications as agreed to by the debtor. S.124(5)

EFFECT OF PROPOSED ARRANGEMENT ON SECURED CREDITORS AND PREFERENTIAL DEBTS.

Under S.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.

OBJECTION MY LORD

Under S.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 Reg.63 (1) of the insolvency regulations is by summons in chamber with an affidavit in support.

GROUNDS.

These are contained under S.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 undischarged 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

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 S.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. S.126

EFFECT OF AN ARRANGEMENT ORDER.

S.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 S.132 (1), the order maybe varied by court on application by any party bound by the order.

S.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 S.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.
5. 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.

6. Variation

7. 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.

DATED

SIGNED BY

DEBTOR

Consent of supervisor and signature.

BANKRUPTCY PETITION.

A bankruptcy petition may be brought by either the debtor under S.20 (1) in which case it's called a debtors petition. Or

May be brought by a creditor under S.20 (2) in which case it's referred to as a creditor's petition.

PRE-CONDITIONS FOR BRINGING A CREDITORS PETITION.

1. Judgement creditor. S.4(2)(a)(1) and execution has not realized the debt

2. Issue a statutory demand. S.20 (2), S.4 (2) (a) (1) and S.3 (1) (a).

Therefore, the creditor must be a judgement 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 sekana 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 judgement, 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.

Reg 11(2) requires that the petition is served personally on the debtor and REg 11(3) specifies that service should be effected by delivering a petition sealed by the court to the debtor. Reg 11(4) provides for substituted service where the debtor cannot be found.

PUBLIC NOTICE OF THE PETITION.

Reg 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 S.21 (1) of the act and this way be filed with a reply to the petition as provided for under Reg 14(1). Reg 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 S.22(4)
4. Court pursuant to S.22 (1) appoints a date for public examination of the debtor.

5. Pursuant to S.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 S.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. S.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. S.24 (a) (b) and S.25.

    - Bankruptcy commences on the date on which the bankruptcy order is made (S.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. S.26

Committee of inspection may be appointed pursuant to S.30 and 46 of the I.A. its duties are under S.46 (1) of I.A

EFFECT AND CONSEQUENCES OF A BANKRUPTCY ORDER.

Effect

1. Under S.27 (1), the order vest the bankrupts estate into the official receiver and then into the trustee.

What constitutes the bankrupts estate.

S.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 S.15,16,17 and 18 and a portion of the debtors salary as court determines.

S.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. S.27 (1) (b).

However, S.27 (2). Subject to S.11 allows a holder of a charge over property in the bankrupt's estate to enforce the charge during the bankruptcy.

CONSEQUENCES.

S.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, MP, 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 S.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 S.45(4)

Other consequences can be found in other legislations, for example

1. Article 80(2) of the constitution bars an undischarged bankrupt from seeking elections as a member of parliament.
2. Article 102 bars a bankrupt from being a president
3. Under S.188 of the company's act, an undischarged bankrupt cannot be a director or take part in management of any company except with leave of court.

4. Under S.11 (a) of the advocates act, an undischarged bankrupt cannot practice law in the courts of Uganda.

TERMINATION OF BANKRUPTCY.

Under S.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 S.42 (1). Under S.42 (2) the court will take into account the official receivers report on the bankruptcy and the conduct of the bankrupt during the bankruptcy.

Reg.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 S.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 S.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 S.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 Reg 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 DI AND CO Advocates

Law development Centre,

Mbarara-campus.

P.O BOX 7117

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 CAUSE NO.....OF 2020.

AFFIDAVIT IN SUPPORT

I PHILLIP MPANGOYABONNA C/O M/S SUI GENERIS & CO Advocates, P.O. Box 7117, 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:

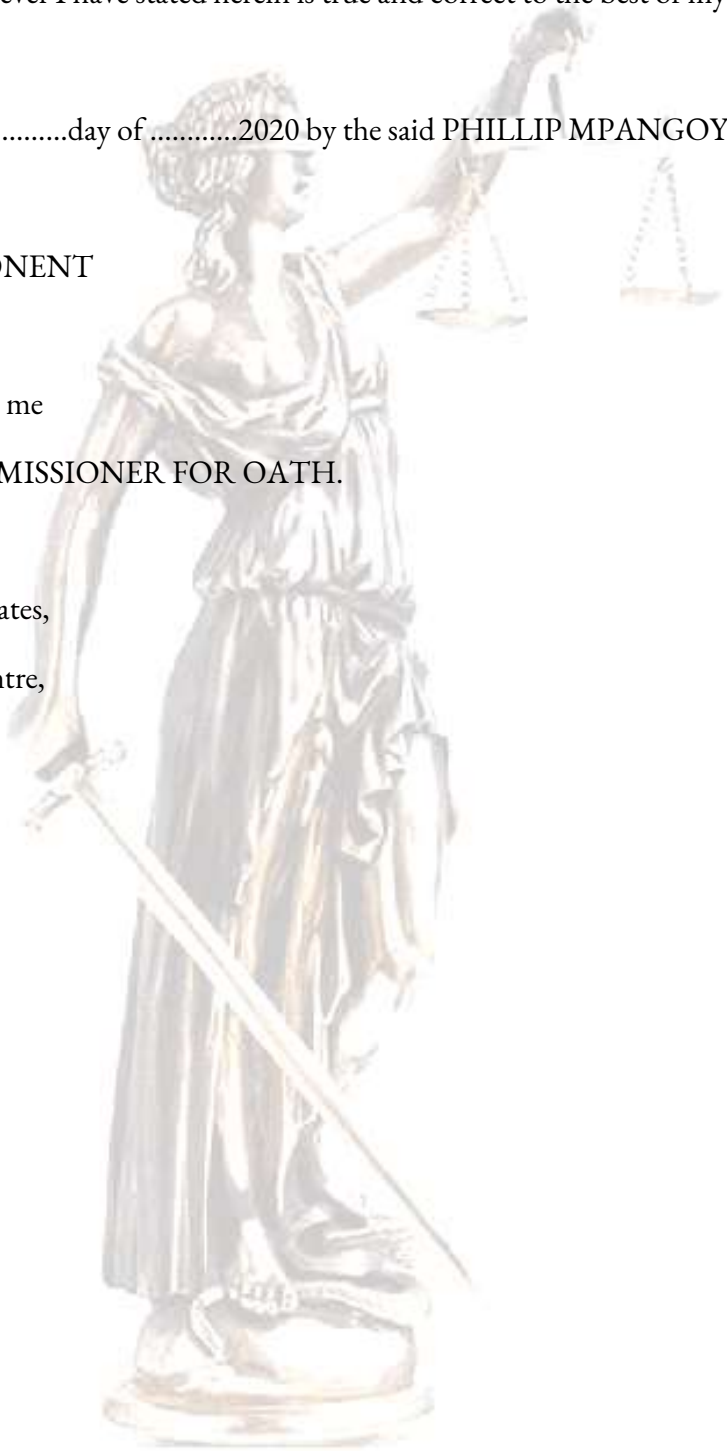
M/S DI & CO Advocates,

Law development Centre,

LAW FIRM

P.O Box 7117,

Kampala.



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 DI & CO Advocates, law development Centre, Mbarara-campus, P.O BOX 7117, 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 judgement 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:

DI & CO Advocates

Law development Centre,

Mbarara-Campus

P.O BOX 7117,

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 S.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. S.139(3)

2. The company having agreed to make a settlement then petitions court for an interim order. S.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. S.139(1)

- Regulation 144(1) requires that the notice is issued within seven working days from the date of the protective order. As per Reg.144 (2), the notice takes the form in form 12 in schedule 1.

Note: S.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 S.3

DUTIES OF A PROVISIONAL ADMINISTRATOR.

These are spelt out under S.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 S.142 (1), provisional administration commences when the interim protective order is made.

EFFECT OF PROVISIONAL ADMINISTRATION.

These are postulated under S.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.

S.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 S.148.

c) The provisional administrator gives the notices under S.151 and these include the following: the deed is not executed within the period of execution in S.150 (2), creditors resolve that the provisional administration should end, or the creditors don't pass a resolution under S.148.

Per Reg 147, the notice is as prescribed in form 18 in schedule 1.

Other provisions

- S.153 lists the power of provisional admin
- S.154 provides for provisional admins relation with 3rd parties.
- S.155 stipulates the role of directors and secretary during provisional administration. S.155 (1) suspends any powers of the directors and secretary in the company while S.155 (2) enjoins them to avail and give all assistance to the provisional administrator.

ADMINISTRATION.

COMMENCEMENT AND PROCESS.

a) Meeting to consider proposal.

S.147 (1) enjoins a provisional administrator to call a creditors 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.

Reg 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 S.147 (3) (b).

S.148 (1) stipulates that the provisional admin is the chair of the meeting.

Under S.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 S.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 S.150 and it is executed by the company and the proposed administrator. S.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 S.163 to give each know creditor notice of the administration and also issue a public notice. . REG 149, provides that the notice is as in

Form 18 in schedule 1.

Effect of administration.

As per S.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 S.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 S.165, the major function of the administrator is to supervise the implementation of the administration deed.

VARIATION OF ADMINSTRATION DEED.

S.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 S.167 (2)

TERMINATION OF ADMINISTRATION.

Under S.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 S.169 (1), may be brought by the administrator of the company, creditor of the company or any liquidator of the company.

Reg 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 Reg.157 (2)

S.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 S.92 (1) of the insolvency act, the court may appoint a liquidator. Order may also be made pursuant to S.5 (5) of the I.A.

COURT WITH JURISDICTION.

The court with jurisdiction as per S.91of the insolvency act is the high court.

Who can present the petition.

S.92 (1) of the I.A and Reg .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.

S.92 (2) of I.A and Reg 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 Reg 86 of I.R, 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. Reg 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. Reg 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. Reg 89
6. A creditor, c contributory or company may within 15 working days after service reply to the petition. Reg 90(1). The reply to the petition is by way of affidavit and should be served in the same manner as the petition. Reg.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 Reg 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. Reg 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. Reg 92(1). The list is in the form prescribed in form 6 in schedule 1 to the Regs. Against each name, petitioner must indicate whether they are in support or not, Reg.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. S.94 and Reg.97
- Must give notice of appointment using form 12. S.95 and Reg 98
- Must within 14 working days call a creditors meeting as per form 10. Reg 99

VOLUNTARY WINDING UP.

UNDER THE COMPANIES ACT.

Effect.

S.270 (1) of the CA 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.

S.270 (2) postulates that the corporate status continues and its powers continue until it is dissolved.

When to invoke it.

S.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. S.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. S.271 (1). Meeting is as per Reg .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. S.271(2)(9)(a) and (b)
5. Notice is issued to call for an EOGM under S.140 for purposes of winding up the company
6. A special resolution is passed.(S.268 of the CA)
7. The resolution is registered within 7 days with the registrar of companies. S.264 (2).

8. Advertise notice of the resolution to wind up in the Uganda gazette and a newspaper of wide circulation. S.264(1)

    - S.272 provides for the application of the insolvency act to voluntary liquidation under the CA with necessary modifications.

9. Appointment of a liquidation through a meeting of members or board resolution. S.62 OF I.A

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. Reg 98 of insolvency Regs, 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 S.66 of I.A

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 .S.67(2) of I.A

13. The liquidator must then prepare an account of the liquidation showing how the liquidation was conducted. S.67(1)(a) of I.A

14. Hold the general and final meeting of the company and provide an account of the liquidation, his acts and dealings. S.67(1)(b) of I.A

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 S.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. S.67(6) of I.A

UNDER THE INSOLVENCY ACT.

S.58(1) of the I.A 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.

S.58 (2) stipulates that voluntary liquidation is taken to commerce at the time of passing the resolution for voluntary liquidation.

Under S.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

S.59 (2) requires that the resolution is registered with the registrar within seven days and a copy sent to the official receiver.

Effect (S.97)

1. The company ceases to carry on business
   - Liquidator takes custody and control of Co. S.97 (1) (a).
2. Any transfer of shares not sanctioned by the liquidator is void. S.97 (1)(d)
   - Officers of the company have no power though in office. S.97(1)(b)

MEMBERS VOLUNTARY.

S.62 (1), the company members by special resolution appoint one or more liquidators for the purpose of liquidating the company.

S.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.

S.82 provides for public notice of appointment of the liquidator.

S.67 provides for a final meeting.

CREDITOR'S VOLUNTARY MEETING.

S.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 creditors notices for the meeting together with the notices for the meeting for proposing the resolution for liquidation.

S.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.

S.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 S.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 EGM S.69(1)
2. Notice of creditors meeting in the Gazette and newspaper of wide circulation. S.69(2)
3. Company meeting passes a special resolution that company cannot pay its debts and appoints a liquidator. S.58
4. The creditors meeting convene a 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. S.82
7. Committee of inspection sets liquidators 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 S.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 debtors 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.

An administrative receiver is appointed by a creditor who has a security in the form of a floating charge.

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. S.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.

DUTIES, POWERS AND OBLIGATIONS.

These are set out in S.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 malafides.

POWERS OF RECEIVER ON LIQUIDATOR.

Pursuant to S.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. S .194(2) of the insolvency act.

The debts incurred by the receiver ai'nt a cost of liquidation. S.194 (3) OF I.A

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 judgement debtor. A receiver holds the property to pay debts of the company and therefore, the receiver is in possession not on behalf of judgement 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. S.178 and Reg 165
8. Within 14 working days notify official receiver by delivering notice above.

Court supervision

Receiver may apply under S.195 (1) of the I.A.

Others including receiver may also apply under S.195 (2) of the I.A

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. S.184 (1) (a) of the I.A

Debtor may also bring an action to preserve or protect the estate or interest in receivership where the receiver does not take action. S.184 (1) (b) of I.A

Any other action cannot be brought without the consent and approval of the receiver. S.184 (1) (c)

Removal and termination

-S.196, 197,206,209 OF I.A

-Reg 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 S.99
   4. Commodity based micro finance institutions S.102

All the above are regulated by the Uganda microfinance regulatory authority as per S.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 S.36(1)
- It only provides financial services to its members. S.36(2)
- Its powers under S.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 S.38(1) and application is a companied by the requirements in S.38(3)
- Must use its name in its operations S.40
- Look at S.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.

- Its defined under S.5 of tier for as accompany or non-governmental organization licensed under S.62
- Apply to UMRA for a license under S.62 of tier for
- Institutions may grant micro loans which are to be in Ugandan shillings and may be granted without collateral or with. S.67
- A micro loan is defined under S.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 S.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

S.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. S.7 of MDI act and must use MDI after its name S.5 (2)

Minimum paid –up capital is UGX 500,000,000. S.15 of MDI and Reg 6 of MDI (Capital adequacy) Regs.

No person or group of related persons can hold more than 30% of the shares of an institution. S.21 (1) of MDI

Operations directed by a board consisting of at least 5 directors, headed by a chairperson who is a non-executive director of the institution. S.22 (1) of the MDI.

There must be approved by the C.B which shall ensure that they are fit and proper person in line with 2nd schedule. S.22 (2) of MDI

JOHN KIZITO V BOU, HCMA NO.244 OF 2016

Money lending business

- Law applicable is the tier four (S.2(1)(b)
- Money lender is a company licensed under S.79, S.5
- Money lender must be a company and not carrying on business of banking or insurance; a society registered under the cooperatives society act. S.78

Some cases and their influence on C.G in the world.

- Enron case
- Lelman brothers
- Crane bank

Board of directors

- Company secretary

- CEOS
- Role of board chairman
- Payment of directors

CEO, Company secretary and auditors.

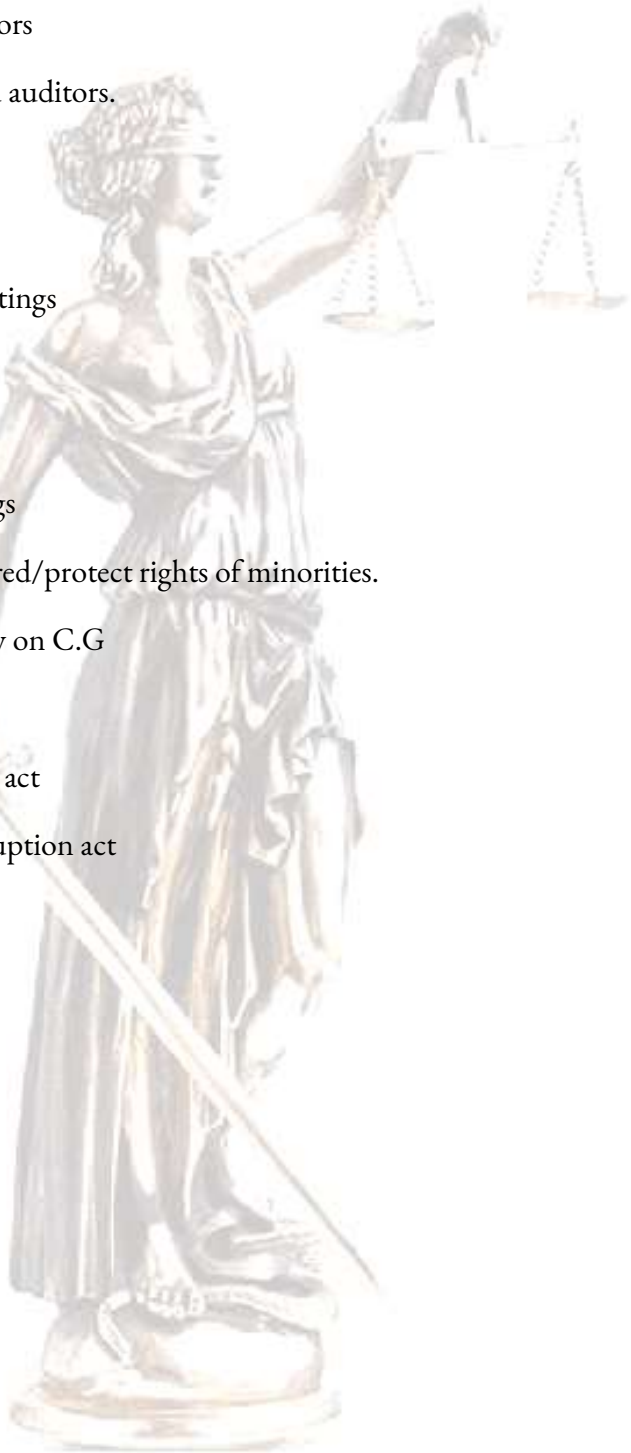
- Roles of each

Company meetings

- Statutory meetings
- AGMs
- EGMs
- Board meetings
- Notices required/protect rights of minorities.

Analyze the rational, relevancy on C.G

- FIA
- Company act
- Anti-corruption act



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 2006

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 JJ TRADERS

Drawn and Filed by:

SUI GENERIS and co. Advocates

P.O.Box7117. KAMPALA

BANKRUPTCY PETITION

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 showeth 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 favour 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.

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**

.....

OBJECTION MY LORD

BANKRUPTCY PETITION

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

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 2005, 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.

.....

ISAAC CHRISTOPHER LUBOGO

DEPONENT

BEFORE ME: .....

A COMMISSIONER FOR OATHS

Drawn and Filed by:

SUI GENERIS and co. Advocates

P.O. Box 7117. KAMPALA

OBJECTION MY LORD

BANKRUPTCY PETITION

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

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. Jeje Nono

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

.....

SALE OF GOODS AND NEGOTIABLE INSTRUMENTS:

(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***[42] court held that where 32 Bullocks were to be transferred by Alderidge to knights and a hundred quarters of Barley and the difference in cash was regarded as a contract of Barter.

[42] ***(1875) F7, E & B 885***

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**[43] 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 cant sues for goods sold and delivered.

FORMALITIES FOR FORMING A SALE OF GOODS CONTRACT

Section 4(1) of the Sale of Goods and supply of services Act, argues that a 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.

Sec 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 (CONDITIONS/WARRANTY).

Terms include conditions and warranties; condition go 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.

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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 favour 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***[44] 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 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,**

[44] **(1956) EA 178**

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.

Section 15 of the Sale of Goods Act provides for an implied condition as to the quality of the goods for any purpose which covers three areas as hereunder;

(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 FarmCase** 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.

Section 16 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 S.2 (4) of the SGSSA, where the property on the goods is transferred from the seller to the buyer, the contract is a sale.

Pursuant to S.2(5) of SGSSA, 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 has 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.

S.1 of SGSSA 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 tgo or forming part of the land which are agreed to be severed before sale or undedr the contract of sale.

Goods futher includes 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 S.6 (1) of SGSSA, these are owned or possed by the seller at the time of execution of the contract.

FUTURE GOODS

S.1 defines these as goods to be manufactured or acquired by the seller after the making of the contract.

ASCERTAINED GOODS

S.1 defines them as goods which have become identified subsequent to the formation of the contract.

UNASCERTAINED GOODS.

S.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 S.5(1) of SGSSA, 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 S.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 ofsale, 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. S.4 (3) of SGSSA.

Necessaries are defined by S.4 (4) of SGSSA 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 S.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. S.6 (2) of SGSSA

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. S.7 of SGSSA.

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. S.89 SGSSA.

Price.

Pursuant to S.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. S.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 S.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 S.51 of SGSSA:

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 S.60 of SGSSA.

LIEN

Under S.52(1) of SGSSA, 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 lein or right of retention. S.53 of the SGSSA.

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. S.53 SGSSA.

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. S.52 (2) of SGSSA.

STOPPAGE IN TRANSIT.

S.55 of SGSSA 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. S.56 of SGSSA.

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. S.56 (4) of SGSSA.

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. S.57 (1) of SGSSA.

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. S.58 (1) of SGSSA.

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. S.58 (2).

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. S.59(2) of SGSSA.

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. S.60(1) OF SGSSA.

RIGHTS OF THE BUYER.

1. Right to an action for non-delivery and recover damages. S.62 of SGSSA.
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. S.63 (1) of SGSSA.

3. Right to reject goods and rescind the contract.

The rejection is however pursuant to the provisions of the SGSSA. S.48 (2) of SGSSA 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 S.42(1) of the SGSSA, 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 S.13(1) of SGSSA, 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 S.34 of SGSSA, it's the duty of the seller to deliver the goods.

Delivery of the goods is defined in S.1 of SGSSA 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 S.35 (1) of the SGSSA, 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.

OBJECTION MY LORD

PLACE OF DELIVERY.

Under S.36 (1) of SGSSA 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 S.36(2) of SGSSA.

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. S.36 (3) of SGSSA.

TIME OF DELIVERY.

S.36(4) of SGSSA, 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. S.36 (6) of SGSSA.

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. S.37 (1) of SGSSA.
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. S.37 (2) of SGSSA.
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. S.37 (3) of SGSSA.

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. S.37 (4) (a) and (b) of SGSSA.

The burden is on the seller to show that a shortfall or excess is so minor.(S.37(5)) of SGSSA.

S.1 of SGSSA 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. S.37 (7) of SGSSA.

DELIVERY BY INSTALLMENT.

A buyer is not bound to accept delivery of goods by installments unless otherwise agreed. S.39 (1). 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. S.39 (2).

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. S.40 (1) of SGSSA.

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. S.40 (2) of SGSSA.

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 use for damages or even reject the goods. S.40 (3) of SGSSA.

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. S.40 (4) of SGSSA. Failure to give notice to the buyer it's deemed the seller bears the risk during the sea transit. S.40(5) of SGSSA.

OBJECTION MY LORD

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, its enough that the goods are given to that person found at the premises.

3. DUTY TO SUPPLY THE GOODS AT THE RIGHT TIME.

S.11 (1) of the SGSSA 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 S.11 (2) of the SGSSA that any other stipulations as to time is 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.

S.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.

S.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. S.3(1) and S.6(4) of the act
2. Time .S.11(3) of the act
3. Quality of materials used. S.16 of the Act.
4. Skill and reasonable care. S.18 of the act
5. Capacity to contract.

DUTIES OF BUYER.

1. To pay for the service .S.34(2) of the act

Duties of supplier

1. To provide a service in accordance with the terms. S.34 (2) of the 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 S.29 (1) of the sale of goods and supply of services act.

The act provides for exceptions to the rule under S.29 (2) of act and these are:

1. Sale by order of court under S.29(2)(b)
2. Sale under the power of statute or common law under S.29(2)(b) e.g.
    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 S.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 S.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 S.32(2) of the 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 S.33(1) of the 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 S.33(3) of the 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 S.31 (1) of the 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 S.31(3) of the 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 S.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

S.8 of the 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 S.27 (1), property passes with risk except if otherwise agreed

The buyer bears the risk whether delivery has been made or not. S.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. S.27 (4).

RULES FOR ASCERTAINING INTENTION AS TO TIME WHEN PROPERTY PASSES.

These are laid under S.26 of the act.

MASTER SALES AND SERVICE AGREEMENT.

OBJECTION MY LORD

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:

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 Sec 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:

Sec 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 sec 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 – Sect (1) (a) as held in **Kursell Vs Timber operators.**

Rules 2 (under Sec 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]1**

KB 343.

Rule 3 (under Sec 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. This principle was followed in **Mbugwa Vs Nwangi**, where court held 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 sec 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 sec 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 looses the right to return them and the property passes to him.

Rule 4(b) Sec 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 sec 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.

RIGHTS OF UN PAID SELLER

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 (Sec 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 (Sec 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 O37 of the CPR SI71-1

Documents

These include a plaint, summary of evidence, list of witnesses, documents, authorities.

If the plaint is brought under O37, then the document is a specially endorsed plaint accompanied by an affidavit.

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 2006

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. SUI GENERISand 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 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 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 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.

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 Honourable 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 Honourable 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 7117,

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 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 Act Cap 82
4. The Contract Act Cap 73
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 7117, ***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

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 GENERISand company Advocates, P.O.BOX 7117, 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 .....2006.

_____

FOR: SUI GENERISAND CO. ADVOCATES

COUNSEL FOR THE DEFENDANTS

DRAWN & FILED BY:

M/s SUI GENERISand Co. Advocates,

P.O Box 7117,

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. Magode Banot
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 Act Cap 82
11. The Contract Act Cap 73
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 .....2006.

_____

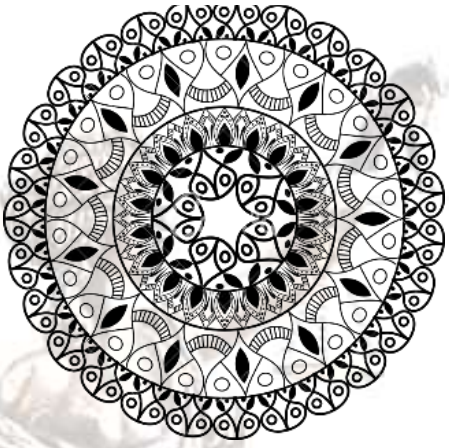
FOR: M/S SUI GENERIS& CO. ADVOCATES

COUNSEL FOR THE PLAINTIFF

DRAWN & FILED BY:

M/S SUI GENERIS& CO. ADVOCATES

P.O Box 7117, ***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 2017

The Contract Act 2010

The Civil Procedure Act 71

The Civil Procedure Rules SI 71-1

The Companies Act 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 **Blacks 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.

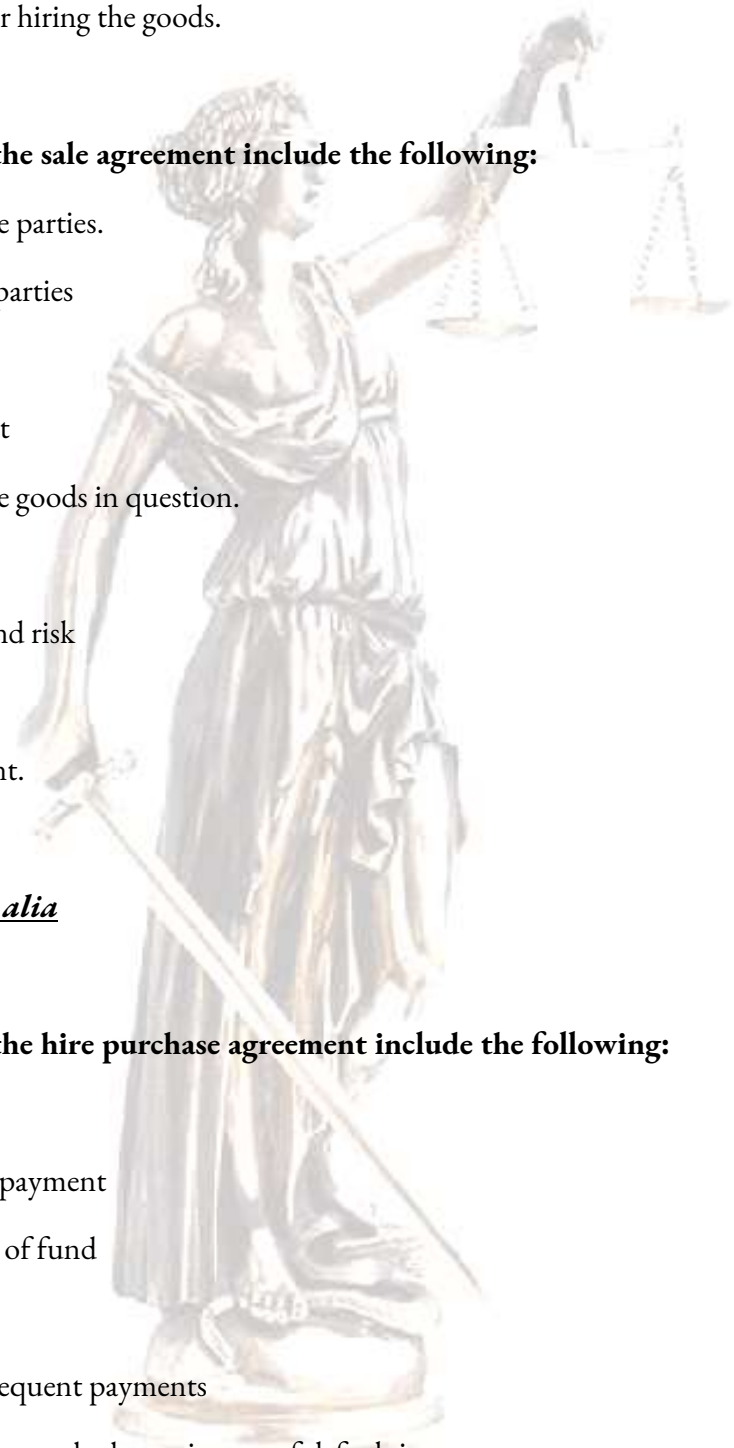
The formalities for creation of the agreement include the following:

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.

S.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.

S.3 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 S.3 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 S.3 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 S.3 of the H.P.A 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 S.3 of H.P.A 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

S.4 (1) of H.P.A, the agreement must be in writing.

2. Contract of guarantee.

Under S.4 (2) of H.P.A, 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 S.4 (3) of H.P.A

3. Full disclosure of all relevant information.

Pursuant to S.4 (4) and (5) of H.P.A 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 S.5(1) of H.P.A, 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.

S.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. S.5 (2) of the H.P.A.

Where the owner does not declare the cash price, he or she pursuant to S.5(3) of H.P.A 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 S.5(3) of H.P.A, 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 S.5(C) of H.P.A the agreement must contain

1. The hire purchase price and then cash price of the goods
2. The amount of each of the instalments 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 S.7 (1) of the H.P.A

1. Excludes the Hirers right to terminate the agreement under S.9(1) of H.P.A.
2. Clause imposes any liability beyond that allowed under S.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 S.10

IMPLIED CONDITIONS AND WARRANTIES.

Pursuant to S.8(1) of H.P.A, 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. S.3 of the H.P.A 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. S.8 (2) of H.P.A

The condition and warranties above apply irrespective of the only clause excluding them in the parties agreement .S.8 (3) of H.P.A

DUTIES OF THE OWNER.

1. Duty to ensure the goods are of satisfactory quality
2. Ensure he is licensed to carryout hire purchase business

S.18 (1) of H.P.A bars any person from carrying on hire purchase business unless they are licensed by the authority.

Under S.18 (2) of H.P.A only a company registered in Uganda is qualified to be licensed to carry on hire purchase business.

S.23 (1) of H.P.A requires the entity to always display its license in a conspicuous place at all times.

Under Reg.2 of the H.P.Rs 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. Reg 12 /Reg 16(a)
2. Declaration of the cash price of the goods. Reg 13
3. To terminate an H.P.A subject to S.9
4. To quiet enjoyment of the goods free from any interruption. Reg 16(c)
5. To complete the purchase of the goods before a time specified in the H.P.A. Reg. 16(d)
6. To lodge a caveat on a title of hired goods. Reg.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. Reg 17(a)
2. To be paid a hire purchase price. Reg 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. Reg 17(b)

DUTIES OF THE HIRER.

1. Insure the hired goods up to the value of the goods. Reg 18(2)

Recovery of possession by owner.

Under S.15 (1) of H.P.A, 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. S.15 (2) of the H.P.A.

APPENDIX F- DOCUMENTS FOR HIRE PURCHASE

THE REPUBLIC OF UGANDA

THE CONTRACT ACT CAP 73

THE SALE OF GOODS ACT CAP 82

SALE AGREEMENT

This agreement is made this ..... day of 2006

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*

DRAWN BY:

M/S Obol Ogolla Advocates

P.O. Box 7117,

KAMPALA.

OBJECTION MY LORD

THE REPUBLIC OF UGANDA

THE CONTRACT ACT CAP 73

THE SALE OF GOODS ACT CAP 82

HIRE PURCHASE AGREEMENT

This agreement is made this ..... day of 2006

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**

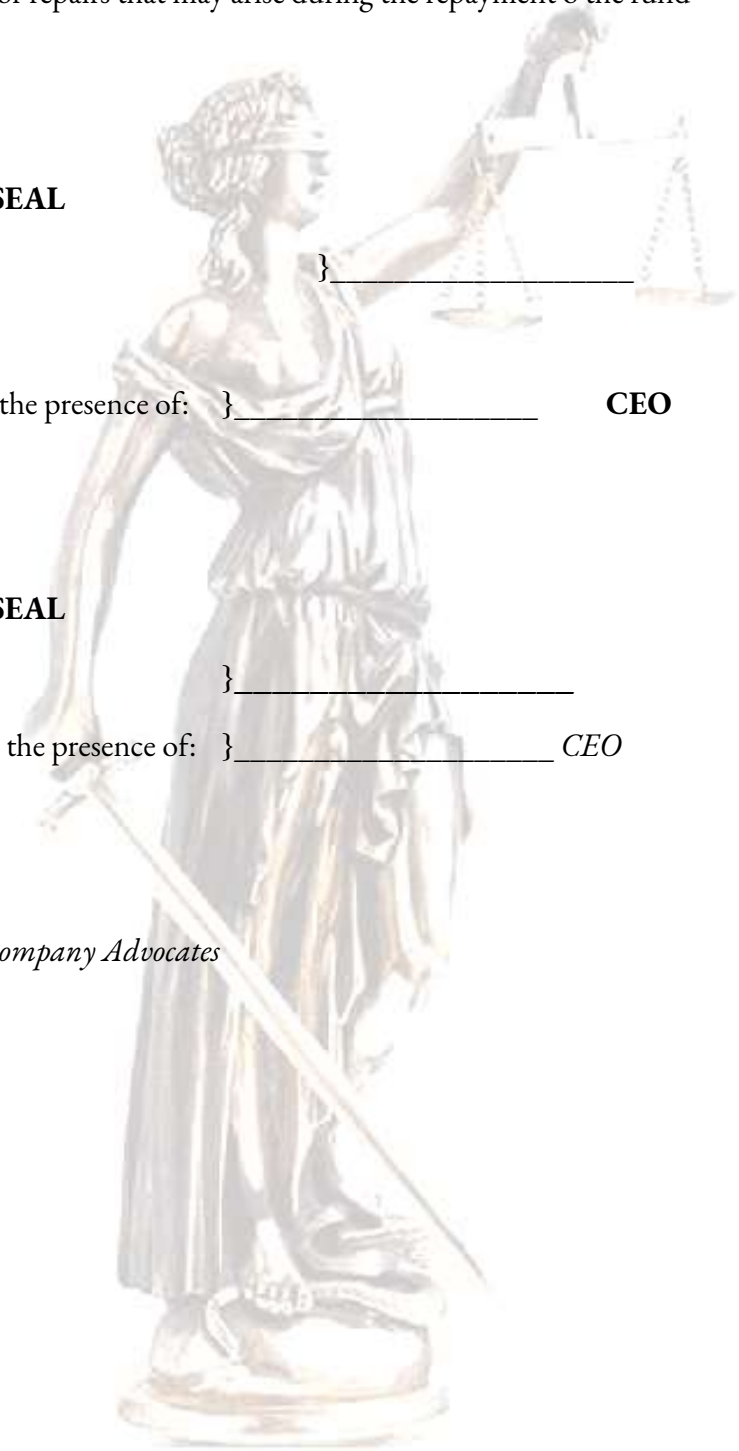
The machinery shall remain the property of the owner until the payment is made in full.

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 top 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** }_____

Was affixed hereto in the presence of: }_____ *CEO*

DRAWN BY:

M/S Suigeneris and company Advocates

P.O. Box 7117,

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 73

The Civil Procedure Act Cap 71

The Civil Procedure Rules SI 71-1

Finance Act Cap 180

Financial Institutions Act 2/2004

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 O 37 of the CPR 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) 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 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 that where the signature is obtained by procuration; 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 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 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) 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) 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 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 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 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 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

(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 act,2204 (as amended).

S.3 of the FIA 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.

S.3 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 bankers 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 S.133 of the FIA that gives precedent to the provisions of the act in cases of conflict. This includes definitions S.1 of Bills of exchange act and the evidence (banker's book) act.

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 customers 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 is a person does not make them a customer.

NATURE OF THE RELATIONSHIP BETWEEN A BANK AND THE CUSTOMER

1. 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.**

2. 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 customers 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) Its 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 faciliatate 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 en-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.

a) Duty to ensure that the money on the account is not lost carelessly. **In STANBIC BANK V UGANDA CROCS LIMITED.**

b) 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.**

c) Duty to make reference when customer is opening up account.

This duty is codified under reg 7 of the FI (A.M.L) regulations, 2010 enacted under the FIA.

It is also further codified under Regs. 19-27 of the anti-money laundering regulations 2015 enacted under the anti-money laundering act 2013 (as amended).

d) 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 S.6 of the evidence (bankers bank) act cap 7. Also section 41 of the anti-corruption act and S.131(1) of income act

b) Where there is a duty to the public to disclose. S.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

S.3 of FIA 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.

S.72 of the Bills of Exchange Act (BEA), defines a cheque to mean a bill of exchange frown on a banker, payable on demand.

S.2 (1) of 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 S.2 together with S.72(1) of 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. S.6 (1) of BEA, provides that where a bill is not payable to the bearer, the payee must be named or otherwise indicated with reasonable certainty.

S.2 (4) of 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 S.9 of 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 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

S.1 of 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 S.37 (a) of BEA, holder can sue on the bill in their name. under S.33(4) of 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.

S.76 (2) where a cheque is uncrossed, the holder may cross it generally or specially.

S.76 (3) where a cheque is crossed generally, the holder may cross it specially.

S.76 (4) where a cheque is crossed generally or specially, the holder may add the words "not negotiable."

A holder of a cheque can present 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

S.28 (1) of 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.

S.28 (1) 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. S.28 of BEA is instructive.

CHEQUE WAS NOT OVERDUE.

Under S.35 (3) of 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 S.89 of the BEA, a thing is deemed to be done in good faith where it is in fact done honestly whether done negligently or not.

S.1 of BEA defines value to mean valuable consideration. Under S.26 (1) (a), valuable consideration sufficient for a cheque maybe constituted by any consideration sufficient to support a simple contract. As per S.26 (2), 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.

S.29 (2) of 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 S.28 (3) of 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 aint 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 S.29 (2) of 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 S.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. S.37(b) ; holds the bill free from any defect
2. S.37(c) (I): good and complete title to the bill where holder has a defective title.
3. S.20(2) : unauthorized delivery will not affect a holder in due course
4. S.28(3): holder in due course can pass good tittle with all rights to a holder
5. S.11(b): is protected from a wrong date on a bill
6. S.19 (2): an inchoate instrument converted into a bill negotiated to a holder in due course is valid.
7. S.35 (5): a holder in due course is not affected with a dishonored overdue bill.
8. S.47 (a): a holder in due course's rights are not prejudiced by omission of notice of dishonor.
9. S.53(b): the acceptor is precluded from denying a holder in due course
10. S.54(1)(b) : drawer is precluded from denying a holder in due course
11. S.54(2)(b): endorser is precluded from denying a holder in due course
12. S.55: a person who signs a bill incurs liabilities of an endorser to a holder in due course

13. S.63: a holder in due course is not affected by alteration of a bill.

LIABILITY OF PARTIES TO A CHEQUE.

DRAWER

Under S.54(1)(a), 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 S.15 (a) by inserting the words "without recourse to me" or "san recours."

ENDORSERS LIABILITY

Under S.54(2)(a), 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 S.54(2)(c) 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 S.15 (a) an endorser may add an express stipulation negating or limiting his or her own liability to the holder.

TRANSFER OR BY DELIVERY

Under S.57 (1), 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 S.57 (2) such transferor by delivery is not liable on the cheque.

However S.57 (3) 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.

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. S.20 (1) talks of every contract on a bill which means that the relationship of the parties is contractual.

1. **Failure or absence of consideration.**

S.26 codifies the common law rules relating to valuable consideration. Due to the presumption of valuable consideration under S.29 (1), 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.**

S.44 (3) (b) of 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 S.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 S.47, 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.

S.48 (1) 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.

S.63(1) 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 S.63(2) 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 S.63 (2) 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.

S.23 of 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

S.6 (3) 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 S.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 HOL held that the equivalent of S.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 S.6 (3), 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 S.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 terms bearer and holder.

CROSSED CHEQUES

S.75 provides for both general and special crossing of cheques.

S.75 (1) 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")

S.75(2) 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 S.80 provides that where a person takes a crossed cheque which bears on it the words "not negotiable", he or she shall not have 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.

S.77 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.

NEGOTIABILITY AND TRANSFERABILITY

Cheques are negotiable instruments. However, a crossed cheque with the words "not negotiable" ceases to be a negotiable instrument.

S.7(1) 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.

S.35 (1) 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.

ENDORSEMENT

S.1 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.

S.33 (4) allows for the conversion of bill endorsed in blank to be endorsed specifically.

S.31 (a) 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

S.90(1) 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.

S.24 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 was dishonored with the words 'not sufficient' and court held that that amounted to libel.

LIMITATION OF ACTIONS

Owing to S.3 (2) of the limitation act cap80, 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 too 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 guaranting 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.

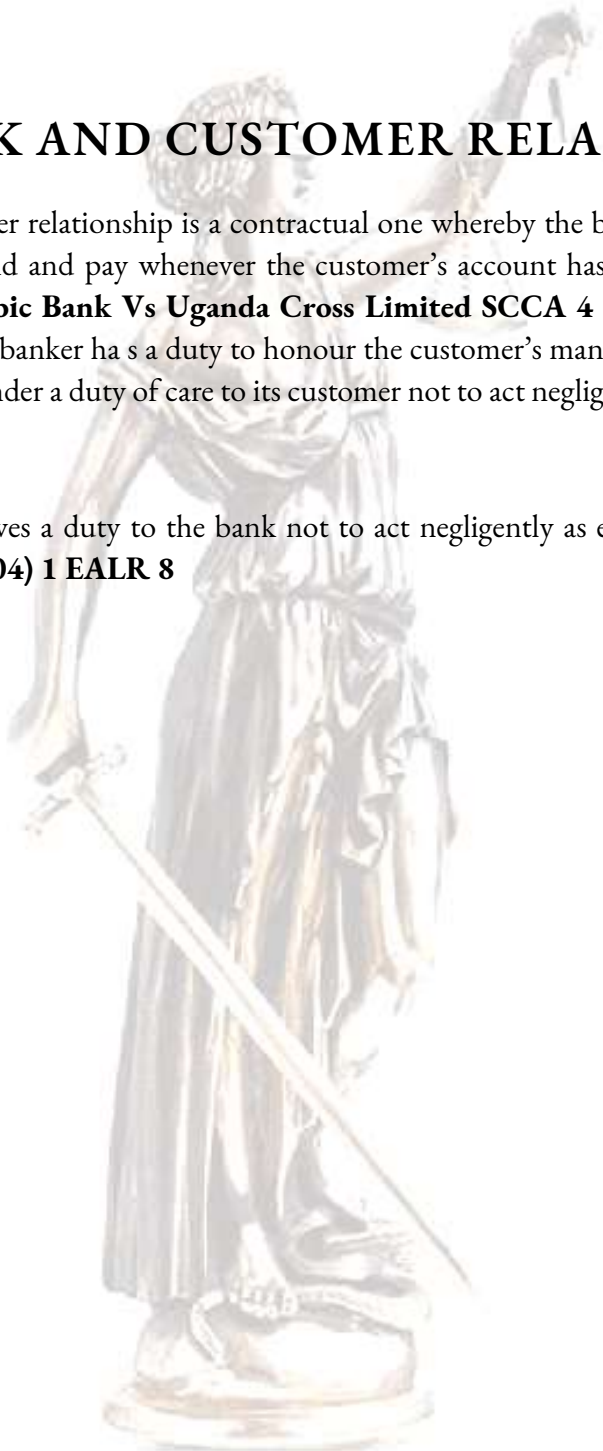
IN DR JAMES KASHUGYERA TUMWWINE AND ANOTHER V. SR.WILLIE MAGARA AND ANOTHER H.C.C.S NO .576 of 2004, court held that a claim for money had and received is an equitable action that may be maintained to prevent unjust enrichment by the defendant when it obtained money which in equity and good conscience 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 honour 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 ha s a duty to honour 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**

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

Whether there is a valid money lending agreement?

Whether the agreement for interest and penalties is enforceable?

What is the remedies available to an aggrieved party?

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 istitutions 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[45]. Moneylenders are governed by the *Tier4 Microfinance Institutions and Money lenders Act*[46]. However, its implementation has not been effective

[45] *http://www.citizensinformation accessed on 24/01/2018.*
[46] *2016.*

hence the need for a critical analysis of money lending provisions under the *Tier4 Microfinance Institutions and Moneylenders Act*.[47]

Money lending usually referred to as "loaning" has its roots from Europe.[48] However, throughout the 18th century money lending was totally disputed on moral grounds by the early authorities the Jews and Romans.[49] 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[50] 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[51].

Money lending in Uganda started during the colonial period and established under the *Money Lenders Act*[52]which was transplanted from England.[53] 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.[54]

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 monthlyrespectively.[55] 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.[56]

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[47] 2016.

[48]G.A. Lutz, R. Johannes, and S. Susanne, "On the Viability of Group Lending when Microfinance Meets the Market. A Reconsideration of the Besley –Coate Model"*Impact of Level of Education and Experience on.pdf 2012 (International Journal of Business management and economic research) 462.*

*[49]*Uganda Law Reform Commission*: Review of the Money Lenders Act Cap 273 p.4.*

[50]Money Lenders Act Cap 273.

[51] Ibid no.5.

[52] Cap 273.

*[53]*Charles Musinguzi*, 'Factors Constraining the Implementation of the Money - Lenders Act' 1.*

*[54]*Uganda Law Reform Commission*: Review of the Money Lenders Act Cap 273 (2014) p.5.*

[55]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.

*[56]*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.[57] 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.[58]

Initially, money lending in Uganda was governed by the *Money Lenders Act*[59] 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.[60] 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.[61] 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*[62] 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,[63] 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.

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[57] Ibid (no.11)
[58] *Ibid no.15.*
[59] *Cap 273.*
[60] *Section 1.*
[61] *Section 3.*
[62] *Cap 273.*
[63] Section 12 of the *Money Lenders Act, cap 273.*

In 2014, the Uganda Law Reform Commission reviewed the *Money Lenders Act*,[64] 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.[65]

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*.[66] The enacted new law is the *Tier 4 Microfinance Institutions and Money Lenders Ac*[67]*t*. 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,[68] non-deposit taking microfinance institutions[69], self-help groups[70] and community based micro finance institutions.[71] The Ac[72]therefore, provide a legal framework for regulating several transactions. This literature, however, focuses on part V of the Act[73] that provide for money lending transactions.

According to section 5[74], a money lender is a company licensed under section 82[75] 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 licence. 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[76]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

[64] *Ibid.*
[65] *Money Lenders Act, Cap 273.*
[66] *Cap 273(2000 edition).*
[67] 2016, Act No. 18 of 2016).
[68] *Tier4 Microfinance Institutions and Money Lenders At, 2016.*
[69] Ibid part IV.
[70] Ibid Part VI.
[71] Ibid Section 4 & Part VII.
[72] Ibid.
[73] Ibid.
[74] Ibid.
[75] Ibid.
[76] Ibid.

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.[77]

Money lending was originally governed by the *Money Lenders Act.*[78]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.[79] 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.

Despite the law[80] 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[81].

The *Money Lenders Act*,[82] 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*,[83]was repealed and replaced by the *Tier4 Microfinance Institutions and Money Lenders Act,*[84] 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.

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[77]http://www.monitor.co.ug.
[78] *Cap 273.*
[79]Section 1(h).
[80]*Money Lenders Act, Cap 273.*
[81]Uganda Law Reform Commission; Review of the *Money Lenders Act, Cap 273 (2014) at p.5.*
[82] *Cap 273*
[83] Ibid.
[84] 2016.

Thus, the study analyses the money lending provisions under *the Tier4 Microfinance Institutions and Money Lenders Act*[85] as well as the *Tier4 Money Lending Regulations*[86] 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
- Any body 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 Act and rule 3(1) of the Money lenders (Licences 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 (Licences 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 (Licences and Certificates) Order SI 273-1. it must be noted that the police may oppose the application under r3(4).

[85] *2016.*
[86] *2018.*

If the court is satisfied that the requirements have been met, then it will proceed to grant the certificate under R3(3) of the Money lenders (Licences and Certificates) Order SI 273-1.

Upon grant of the certificate, the applicant applies for a licence, which application is made to the District Commissioner; the application is made personally under Rule 2 of the Money lenders (Licences 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*[87] that was enacted in 1952. Money lenders were supervised by the Magistrates courts, which were also responsible for granting money lending licence. 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*.[88] This called for the repeal of the Money Lenders Act, it was replaced by the *Tier4 Microfinance Institutions and Money Lenders Act*[89] and the regulations[90] to the Act.

[87] Cap 273.
[88] Ibid.
[89] 2016.
[90] *Tier4 Microfinance Institutions and Money Lenders (Money Lenders), Regulations, 2018.*

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*[91].

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,[92] 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 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*,[93] the *Bank of Uganda Act*,[94] the *Bank of Uganda regulations.*

The *Constitution*[95] further under Article 40 that provides for economic rights that accords every citizen the right to practice his or her profession and involve himself or herself in legal/lawful occupation, trade or business.[96] 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

[91] Cap 273.
[92] Article 21(4).
[93] 2016.
[94] Cap 51.
[95] *The 1995 Constitution of the Republic of Uganda.*
[96] Article 40(2).

The *Bank of Uganda Act*[97] 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*[98] was enacted to regulate financial institutions as provided for under the *Financial Institutions Act*[99]. 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 there 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*.[100] 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),[101] 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.[102]

Definition of a Money Lender

A money lender is defined under section 5[103] 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*[104] 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

[97]Cap 51.
[98] Ibid.
[99] 2016.
[100]Cap 273 0f 1952.
[101]Section 5 of the *Tier4 Microfinance Institutions and Money Lenders Act, 2016.*
[102]Ibid.
[103] Ibid.
[104] 2012.

under section 6[105] for a money lending licence. 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***[106]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*[107] 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*[108] was repealed and replaced by the *Tier4 Microfinance Institutions and Money Lenders Act*[109] 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 licence 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 licence.

SUPERVISION OF MONEY LENDING BUSINESS

For effective monitoring and regulation of money lending business, Uganda Microfinance Regulatory Authority was established to supervise money lending business as per *section 77*[110]. 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,[111] keep and maintain a register of money lenders,[112]

[105] *Tier4 Microfinance Institutions and Money Lenders Act, 2016.*
[106] (Civil Suit No. 193 OF 2013) [2017] UGHCCD 58 (15 February 2017).
[107] Cap 273.
[108] Ibid.
[109] 2016.
[110] *Tier4 Microfinance Institutions and Money Lenders Act, 2016*.

sensitize the public about the money lending business,[113] 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 licence 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.[114] 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,***[115] 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 counsel, 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.

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.[116] To make inquiries or

[111]Section 77(a).
[112]Section 77(b).
[113]Section 77 (c).
[114] Section 77 (d).
[115]Civil Suit No.24 of 2012.
[116] Regulation 17 (c).

investigations[117] 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.[118]

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.*[119]

Application for the Money Lending License

Application for a money lending license is provided for under section 78[120] in conjunction with Regulation 3,[121] 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*.[122]

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.*[123]

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[117] Section 77 (e).
[118] Section 77 of the *Tier4 Microfinance Institutions and Money Lenders Act, 2016.*
[119] 2016.
[120] Ibid.
[121] *Tier4 Microfinance Institutions and Money Lenders (Money Lenders) Regulations, 2018.*
[122] 2004
[123] 2012.

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 licence must first get a certificate of authorisation to be granted a money lenders Licence.[124] Then proceeds under section 2[125] 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 licence.

The procedure of acquiring a money lenders licence under the old regime was ambiguous. The law did not provide a clear procedure for applying for a money lenders licence and the required documents. Therefore, with the enactment of the *Tier4 Microfinance Institutions and Money Lenders Act*[126]and the *Tier4 Microfinance Institutions and Money Lenders (Money Lenders) Regulations*[127] 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,[128]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[129] 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).[130]

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.

[124] Section 3 *Money Lenders Act, Cap 273.*
[125]*Money Lenders Act Cap 273.*
[126] 2016.
[127] 2018.
[128]Section 79.
[129] Section 78.
[130]*Tier4 Microfinance Institutions and Money Lenders Act, 2016.*

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 licence still get expired on the thirty first day of December? The Act[131] and the regulations[132] are therefore not clear. The laws should make it clear on the period for which a licence is valid. For example, if the licence is for a year, then the time should start running the day a money lender acquired the licence.

The legal effect of having a money lending licence makes the money lending transaction legal that can be enforced in courts of law. Where the money lender does not have a money lending licence, any transaction between the lender and the borrowers is illegal and therefore unenforceable. Thus, in the case of ***Jamba Soita Ali V David Salaam.***[133]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 licence and thus illegal.

The same issue was determined in the case of ***Naks Ltd –Vs- Kyobe Senyange,***[134] where it was held in that case that since the plaintiff had no money lending licence, 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***;[135]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: -

[131] Ibid.
[132] *Tier4 Microfinance Institutions and Money Lenders (Money Lenders) Regulations, 2018.*
[133] HCT-00-CC-CS-0400-2005.
[134] [1982] HCB 52.
[135] (1775) 1 Cowp 341.

...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*.

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 licence as in the case of ***Re Marcus Ojaero***,[136] the applicant had a licence 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 licence.[137]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

[136](1952) 20 NLR 77.

[137]Section 80 (a) *Tier4 Microfinance Institutions and Money Lenders Act, 2016.*

defaults a money lender immediately takes the security or imposes a compound interest rate to be paid by the defaulting borrower.[138]

Furthermore, the Authority may refuse to grant the applicant licence 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.[139] 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[140]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 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,[141]which states that any person who conducts the business of money lending without a money lenders licence or carries on business of money lending in a place and name other than that specified in the money lenders licence 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*[142].

However, it should be noted that since it is an offence to carry on money lending business without a licence, it equally renders the whole transaction illegal and thus un enforceable in courts of law, this

[138] Appendix II(b)
[139]Section 80 (b).
[140]*Tier4 Microfinance Institutions and Money Lenders Act, 2016.*
[141]Ibid.
[142] 2016.

was illustrated in the case of ***James Balintuma V Dr. Handel Leslie,***[143] 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.[144]

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[145] 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 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 licence and operate in the names and place specified in the money lenders licence. Hence the growth of money lending business in Uganda.

MONEY LENDING CONTRACT

According to section 85[146] 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.

[143]Civil Suit No. 193of 2013.

[144] Section 84 of the *Tier4 Microfinance Institutions and Money Lenders Act, 2016.*

[145] Schedule to the *Foreign Exchange Act, 2004.*

[146]*Tier4 Microfinance Institutions and Money Lenders Act, 2016.*

A guarantor was defined under section 68[147] 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,***[148]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[149] 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.[150]

Therefore, in the case of ***Uganda Finance Trust v Alloys Muhumuza and Anor,***[151]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,***[152] 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 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.

[147]*Contract Act, 2010.*
[148]Civil Suit No. 77 of 2010.
[149]*Contract Act, 2010.*
[150] Ben. K, Twinomugisha, *Principles of Law of Contract in Uganda*. (2018), Kampala, Makerere University Printery p.257
[151]HCT-01-CV-CA-03 OF 2015.
[152] HCT-00-CC-CS-193-2000.

In reality some money lenders do not comply with section 85 of the law[153], 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,[154] 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[155]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.[156]

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, the money might still be little compared to the value of the security advanced. Thus, the law[157] 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

[153] *Tier4 Microfinance Institutions and Money Lenders Act, 2016.*
[154] *Ibid.*
[155] Cap 273.
[156] Refer to Appendix I
[157] Ibid.

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 a 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[158] 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[159] are to the effect that a money lender shall not change its management except with the written authorisation 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.[160]

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

[158] *Tier4Microfinance Institutions and Money Lenders Act, 2016.*
[159] Regulation 8.
[160] *Tier4 Microfinance Instructions and Money Lenders (Money Lenders') Regulation, 2018.*

their management and sometimes sell their businesses at goodwill where the owner of the 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 licence. Secondly, for the Authority to issue a new licence 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 are 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[161]. 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)[162] 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),[163] 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),[164] 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.

[161] Regulation 17(d)
[162] *Tier4 Microfinance Institutions and Money Lenders (Money Lenders) Regulations, 2018.*
[163] *Financial Institutions (Credit Reference Bureaus) Regulations, 2005.*
[164] Ibid.

However, Regulation 19 (1)[165] provides that the CRB shall give credit information only to financial institutions regulated under the Financial Institutions Act,[166]and Micro finance Deposit Institutions (MDIs).[167]

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)[168] can only access information from the CRB under Regulation 19 (2),[169] 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.[170] 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 ***Hamwe Investiments Ltd v Babigumira,***[171] 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.

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[165] Ibid.

[166] 2004.

[167] Regulation 3 of the *Financial Institutions (Credit Reference Bureaus) Regulations, 2005.*

[168] 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.

[169] Ibid.

[170] E.T, Mutebile; Uganda's New Credit Reference Bureau, 2008 at http://www.bis.org>review accessed on September 8, 2019 at 3:00pm.

[171] Supra.

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.[172] 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 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[173] 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[174] 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 a collateral and before the due date, the money lender disposed of the house that was worthy millions of monies.

[172]Regulation 18(3).
[173]Regulation 18 (4).
[174]*Tier4 Microfinance Institutions and Money Lenders (Money Lenders) Regulations, 2018.*

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.[175]

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.[176]

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 receive, hold and dispose of the goods it covers for example a land title, car log book, and includes receipts among others.[177]

A collateral means personal property that is subject to a security interest,[178] 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.[179]

It should be noted that the *Tier4 Microfinance Institutions and Money Lenders Act*,[180] 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[181] 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,

[175] Regulation 20.
[176] Section 2 of the *Chattel Securities Act, 2014*.
[177] Ibid.
[178]Ibid.
[179] Supra.
[180] Section 98.
[181]*Chattel Securities Act, 2014.*

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)[182] 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***,[183] the plaintiff requested for an outright assignment of bills held by their debtors with the respondent bank to be made in their favour. 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 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)[184] 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 Illiterates Protection Act, Cap 78

Section 1[185] 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***[186]that the term

[182]Ibid.

[183](1979) Lloyds Rep.142

[184] *Tier4 Microfinance Institutions and Money Lenders (Money Lenders) Regulations, 2018*

[185]*Illiterates Protection Act, cap 78*

[186]Civil Suit No. 227 of 2010.

"illiterate" is defined under Section 1(b) of the Illiterates Protection Act[187] 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,*[188]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.[189] 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[190] 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 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,***[191]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[192] 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[193] 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

[187] Cap 78.
[188] Section 85.
[189] Ibid.
[190] *Illiterates Protections Act, cap 78.*
[191] Supra.
[192] *Tier4Microfinance Institutions and Money Lenders Act, 2016.*
[193] *Illiterates Protections Act Cap 78.*

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[194] 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 Kaihagwe Rwekibira,***[195] the defendants and the late Eriya Kakoro, were the registered joint tenants of the suit land. The 1st defendant and the late Eriya Kakoro were brothers and occupied the suit land with their respective families grazing their cattle thereon. Eriya Kakoro 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 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,*[196] and therefore the document was regarded to be null and void.

[194] Ibid.
[195] Civil Suit No. 280 of 2006.
[196] Cap 78.

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.[197] The right to redeem the security before it is disposed of and the conditions under which the collateral can be sold[198] subject to Regulation 18[199]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 LICENCE

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.[200] 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,[201] 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[202] 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 licence, 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***[203] 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/=.

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[197] Section 85 *Tier4 Microfinance Institutions and Money Lenders Act, 2016.*

[198] Regulation 25.

[199] *Tier4 Microfinance Institutions and Money Lenders (Money Lenders) Regulations, 2018.*

[200] Section 5 of the *Tier4 Microfinance Institutions and Money Lenders Act, 2016.*

[201] *Tier4 Microfinance Institutions and Money Lenders Act, 2016*.

[202] 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.

[203] Civil Suit No. 193 of 2013.

It was however, established that the plaintiff had no money lending licence, 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),[204] 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)[205] provides for exception to the limitation period under section 19(1).[206] 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***[207]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*,[208] and the regulations[209] thereto are silent on the time in which a party can institute proceedings to enforce his or her rights. However, the section 3[210] 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 arose. Therefore, it be 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.*

[204] *Money Lenders Act Cap 273.*
[205] Ibid.
[206] Supra.
[207] Supra.
[208] 2016.
[209] *Tier4 Microfinance Institutions and Money Lenders (Money Lenders) Regulations, 2018.*
[210] *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,[211] 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,[212] provides that a notice (demand notice) shall be in writing. Furthermore Rule 10,[213] states that a person shall give a notice of demand[214] 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).[215] Therefore, where a borrower has a loan that does not exceed ten million, a money lender can institute proceedings in small claim courts.[216] 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.[217] 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.[218]

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***[219]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.

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[211] *Insolvency Act, 2011.*
[212] *Chattels Securities At, 2014.*
[213] *Judicature (Small Claims Procedure) Rules, 2011.*
[214] Ibid schedule I
[215] Ibid Rule 3
[216] Ibid *Rule 4,* the Chief Justice may by notice publish in the Gazette designate a court
[217] Section 11(b) of the *Magistrates Court (Amendment) Act, 2007.*
[218] Ibid section 11 (a)
[219] Misc. Application No. 269 of 2016.

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 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,[220] 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),[221] 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***[222] 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 favour 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)[223] provides for the mode of disposing of the collateral. It provides that a money lender shall not dispose of a collateral given by a borrower as a collateral for the loan advanced to the borrower unless sixty (60) days have elapsed.

[220] *Tier4 Microfinance Institutions and Money Lenders Act, 2016*.
[221] Ibid.
[222] HICIC.S. No. 131 of 2001.
[223] *Tier4 Microfinance Institutions and Money Lenders (Money Lenders) Regulations, 2018.*

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.[224]

Whereas a private treaty is a processing of selling property whereby the negotiations are usually between the seller and the buyer without resorting to the process of auctioning the property.[225]

Regulation 18(4) is o the effect that a money lender may dispose of a 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),[226] 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,***[227] 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.[228] A forced vale sale means a price lenders 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.[229]

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.[230]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[231] 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

[224] https://thelawdictionary.org/public-auction/ accessed on 22/03/2019.
[225]https://uk.practicallaw.thomsonreuters.com/ accessed on 22/03/2019.
[226] Regulation 18 of the *Tier4 Microfinance Institutions and Money Lenders (Money Lenders) Regulation, 2018.*
[227] Civil Suit No 477 of 2011.
[228] Regulation 18(5).
[229]https://www.checkmyfile.com.
[230] Regulation 18(6).
[231]Chiliya Norman, *Impact of Level of Education and Experience, (*2012) athttps://ijbmer.com/doc/volumes/vol3issue1/ijbmer2012030110.pdf.

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*[232] provides for how the proceeds should be dealt with.

Regulation 18(7)[233] 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 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[234]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.[235]

In the case of ***Sinclair v. Moore,***[236] 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,***[237] 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

[232] 2018.
[233] *Tier4 Microfinance Institutions and Money Lenders (Money Lenders) Regulation, 2018.*
[234] Section 2 of the *Insolvency Act, 2011.*
[235]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.
[236] 228 N.C. 389, 395(1947).
[237] Civil Appeal No.25 of 1994.

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*[238] and the regulations thereto do not provide for receivership. It only provides for a sale by public auction.[239]

Therefore, in a 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 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.[240] 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.*[241]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[242] 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.[243] A receipt shall be issued to the borrower as evidence of payment.[244]

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[238] 2016.
[239] Regulation 18(4).
[240] Refer to Appendix II(b).
[241] 2016.
[242] *Tier4 Microfinance Institutions and Money Lenders (Money Lenders) Regulations, 2018*.
[243] Uganda Microfinance Regulatory Authority.
[244] Regulation 19(2).

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.[245] 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),[246] 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.[247]

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 of the country must come to Kampala if they want to apply for the money lending licence, renewal of the licence 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.[248] 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.[249] Furthermore section 61(1)[250] provides that where there is a breach of contract, the party who suffers

[245] Regulation 19(3).
[246] *Tier4 Microfinance Institutions and Money Lenders (Money Lenders) Regulations, 2018.*
[247] Supra Regulation 19.
[248] Regulation 20(2) of the *Tier4 Microfinance Institutions and Money Lenders (Money Lenders) Regulations, 2018.*
[249] Ibid Regulation 20(3).
[250] Contract Act, 2010.

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[251].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[252] 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, but it simply shows that the plaintiff was right in a suit.[253] 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***[254] 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***[255] 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).

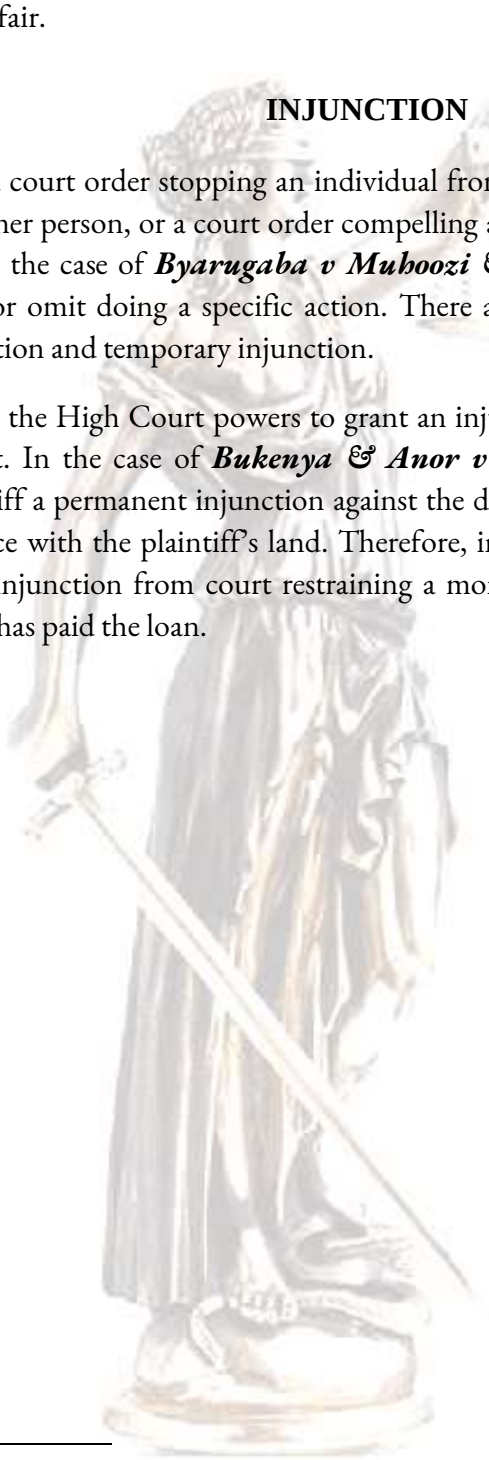
[251]https://legaldictionary.net.
[252]CIVIL SUIT NO. 220 OF 2008.
[253] D.J Bakibinga, Law of Contract in Uganda (2013) 2nded, Written Word Publishers India p.261
[254]CIVIL SUIT No. 0016 OF 2017.
[255] Supra.

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.[256]An injunction was further defined in the case of ***Byarugaba v Muhoozi & anor***[257] 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[258] 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,***[259] 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.



[256] https://www.google.com.
[257] *Miscellaneous Application No.215 of 2014.*
[258] *Judicature Act Cap 13.*
[259] 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 defence 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 Honourable 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 Honourable 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 GENERISand Co. Advocates,

P.O Box 7117,

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 7117, ***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 honoured.

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 Act Cap 82
4. The Contract Act Cap 73
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 7117, ***KAMPALA.***

EMPLOYMENT CONTRACTS AND AGENCY:

LAW APPLICABLE:

1. The 1995 Constitution of the Republic of Uganda
2. The Contract Act Cap. 73
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 Act Cap 66
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 Cap 222
17. The Income Tax Act Cap 340
18. The Children's Act Cap 59

19. The Occupational Safety and Health Act Act9 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 enter at his or her fee will. This is upheld in the ***locus classicus* 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 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 S.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 S.3 (1) of the Employment Act, the act applies to all employees employed by an employer under a contract of service.

Under S.3 (2) of the Act does not apply to

a) Employers and their dependent relatives when dependent relatives are the only employees in a family undertaking as along as the total number of dependent relatives does not exceed five

S.2 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 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 donot 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 HOL 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.

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.[260]

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. S.25 of the employment act provides that no person shall be employed under a contract of service except in accordance with the act. Further s.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.

[260] NSSF V MTN AND ANOR. HCCS NO 94 OF 2009

Requirements of an employment contract.

As noted earlier, these are governed by the contracts act 2010 and the employment act 2006, with each creating various requirements.

Under S.10 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.

S.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) 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 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 employees 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.

S.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.

S.25 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

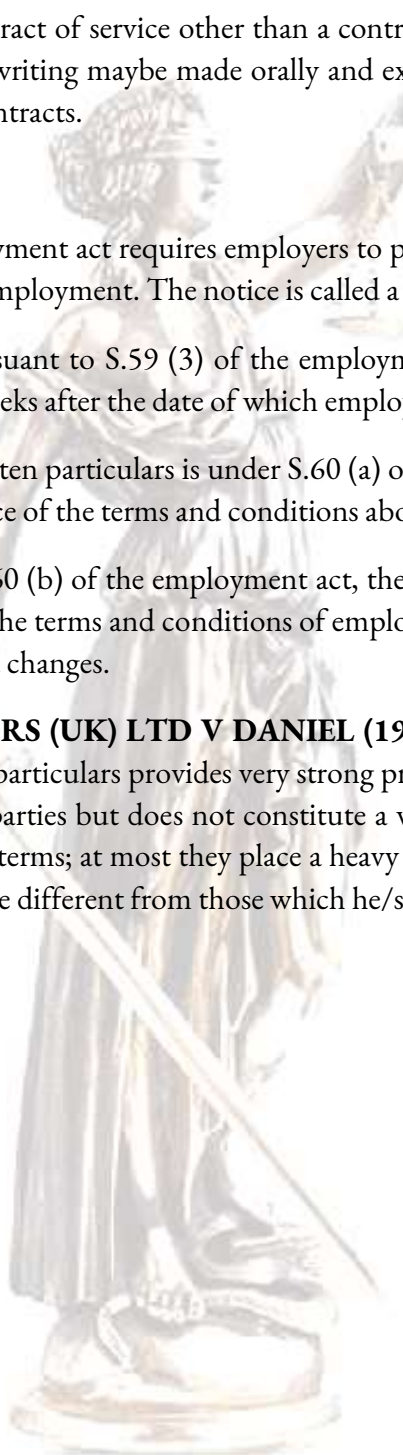
S.59 (1) of the employment act requires employers to provide employees with a notice in writing specifying the particulars of employment. The notice is called a statement of written particulars.

The notice must pursuant to S.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 S.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 S.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.



ISAAC CHRISTOPHER LUBOGO

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

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 employees 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 employees 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 employers 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 employees 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 employers 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 employees 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.....

DOCUMENTATIONAL 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.

S.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. Reg 2 expounds on the definition further.

S.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 Reg14(2). The notice is in the form prescribed in the 3rd schedule.

Reg 15 states the principles that must be exhibited in a sexual harassment complaint procedure and these are:

a) Thoroughness

b) Impartiality

c) Timeliness

d) Gender sensitivity

e) Social dialogue

f) Discretion

g) Confidentially

h) The right to privacy of the victim of harassment.

Reg 17(1) bars any form of retaliation and discrimination against persons involved in sexual harassment complaints. Sub reg 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 Reg 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.

S.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 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.

Reg 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.

Reg 6 designates a list of hazardous work not permitted for employment of a child

Section 32(5) of the employment act and Reg. 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 Reg.11.

A child before engaging in any job must undergo a medical examination as per Reg.13 (1) and sub reg 2 requires that a medical examination is done every 6 months. The child upon undergoing a medical examination under sub reg 1 must be issued with a medical certificate in the form prescribed in the 4th schedule.

An employer is further required under Reg.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 Reg 15 and the register is in form 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 Reg 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

S.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

S.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-reg 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 Reg 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 Reg 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[261],** it provides for test of a causal worker. Justice Yorokamu Bamwine stated that there are to 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

S.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 S.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.

Under S.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 S.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.

[261] **.HCT00 CS.0332 OF 2004**

PERSONS WITH DISABILITIES.

S.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.

S.6 (3) of the employment act bars discrimination in employment on the basis of disability. This is buttressed by S.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 S.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 Reg 29(1) of the employment regs, the consent must be sought at least 30 days before the employee is transferred.

Under Reg 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 employments 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 S.28 (2) of the employment act.

TERMINATION, DISMISSAL AND SUMMARY DISMISSAL

Under S.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 S.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 S.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 S.65 (1) of the employment act, is governed by S.58. S.58 (1) states that a contract of service shall not be terminated by an employer unless he or she gives notice to the employee.

S.58 (2) requires that the notice is in writing and in a language the employee to whom it's related understands.

S.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

S.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 S.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 repudiatory 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 S.66 of the employment act was not complied with. In this, the employee disputes the procedure adopted for their dismissal.

SUMMARY DISMISSAL

Under S.69 (1), 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 S.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 S.66 of the employment act.

In FRED WAKIBI V BOU ,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 S.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. S.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 S.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), 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 S.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).

The suspension according to S.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 S.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.

OBJECTION MY LORD

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.

1. PAYMENT IN LIEU OF NOTICE.

Pursuant to S.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 S.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***[262] 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 notice can be viewed as an ordinary way of giving notice.

2. REINSTATEMENT.

In instances of unfair termination, an employee has the remedy of reinstatement when ordered by a court pursuant to S.71 (5) (a) of E.A. 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.

3.COMPENSATION

Under S.71 (5) (b) of the employment at, the court if satisfied that the employee was unfairly terminated may order the employer to pay compensation to the employee. Under S.78 (1) an order of compensation must include a basic compensatory order equal to the employees four weeks wage. Pursuant to S.78 (2), the compensatory order may include additional compensation which according to

[262] **SCCA NO.12 OF 2007**,

sub-section 3 must not exceed an amount amounting to the employees 3 months wage. In **OKELLO NYMLORD V RIFTVALLEY RAILWAYS (U) LTD (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

4.SEVERANCE ALLOWANCE.

Subject to S.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.

5.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[263], 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

[263] **HCCS no. 156 of 2012**

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 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.

S.12 (1) of the EA 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 EA 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 S.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. S.2 of 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 S.93(2) of the EA, 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 I.C is established by S.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 S.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 S.93 (7) of the E.A, 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.

S.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 S.94 (2) of the EA, the appeal must relate to a question of law and on question of fact only with leave of court.

Composition of I.C

S.10(1) of the 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 S.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 reference by the registrar of industrial court, he/she must as 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 I.C

Under S.22 of the 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 S.65 of the EA, an employment contract may be terminated.

Section 2 of the EA, defines what termination of employment mean

Under S.88 (2) of E.A, 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 S.81(1) of the E.A, 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 S.58 of the E.A are applicable. **BEN KIMULI V SANYU 2000.**
2. Notify the representative of the Labor union if the employees affected are unionized as per S.81 (a) of E.A 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. S.81(b) of E.A

Reg 44(a) of the employment Regs 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 S.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 Art.40 of the constitution provides for the right to work which entails the formation of the Labor unions

Under S.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 S.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 are 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 in 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 E.A

WORKERS COMPENSATION.

This is governed by the workers compensation act cap 225.

Applicability of act.

Under S.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.S.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. S.1(1)(t)

Employer's liability.

S.3 (1) for personal injury by accident arising out of and in the course of the workers employment.

The following are deemed to be done out and in the course of employment:

1. S.3 (3), when a worker acts to protect any person on the employers premises where the worker believes to be injured or imperiled, or when a workers acts to protect the property on the employers premises.
2. S.3 (4), while the employee is travelling directly to or from his or her place of work for purpose of employment. As per S.3 (5), it's upon the employee to prove that such travel was to or from work.

S.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.

S.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 S.1(1)(u)
2. If the worker is deceased, then his/her family members who are dependent on his/her earnings. (S.4(1), S.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 S.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 S.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. (S.4 (4)).

Permanent total incapacity.

2. Except if the terms and conditions of service provide for a lighter compensation, the amount of compensation is 60 months earnings. (S.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.

S.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

3. 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 aint 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.

4. Under S.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 S.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.

S.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 S.8(1), the monthly earnings used are the workers 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 S.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.

S.11 (4) obliges an employee to pay for medical expenses during the period of temporary total incapacity.

Medical expenses expended as required.

Under S.24 and S.11 (40 are not deductible neither is the cost of conducting the medical examination by a medical practitioner as per S.11 (1).

S.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.

S.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 workers compensation regulations S.1.225-1 as per Reg 2

Notification by employer to Labor officer.

S.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 S.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. S.13 (1)

The decision of the medical arbitration board is final unless the aggrieved party goes to court. S.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. S.14 (1)

The application takes the form prescribed in form 1 of the 1st schedule to workers compensation (rules of court) rules S.1. 225.4

The court has jurisdiction irrespective of the money involved. S.14 (2)

S.1 (1) (a) court under the act is defined to mean a magistrates 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. S.27 (1).

A disease is said contracted as per S.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 S.29(1) the compensation is payable by the employer who last employed the worker during the period of 24 months referred to in S.27(1)(b) unless that employer proves that the disease was not contracted while the worker was in his/her or its employment.

Under S.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 10(2) of the National social Security Act Cap 222.

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 and section 116(1) of the Income Tax Act Cap 340 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 effected 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, 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 ..... 2003 **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 employees 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 entitle 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

OBJECTION MY LORD

Employer: :.....

For: Butaleja High School

In the presence of: .....

Employee: :.....

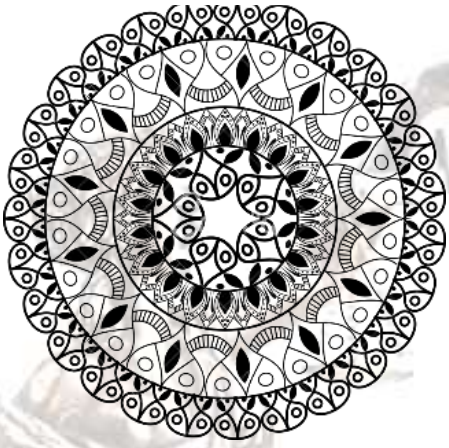
In the Presence of:

DRAWN BY:

SUI GENERIS and Company Advocates

P.O.BOX 7117

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 away 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 73

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

OBJECTION MY LORD

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. **Cf Sonels 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 have 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 or 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' notice by either party and 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 favour 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 he 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 its 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.**[264]

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**
- **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.

[264] (1972) 1 KB 751.

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. (hereinafter 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 7117, 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.

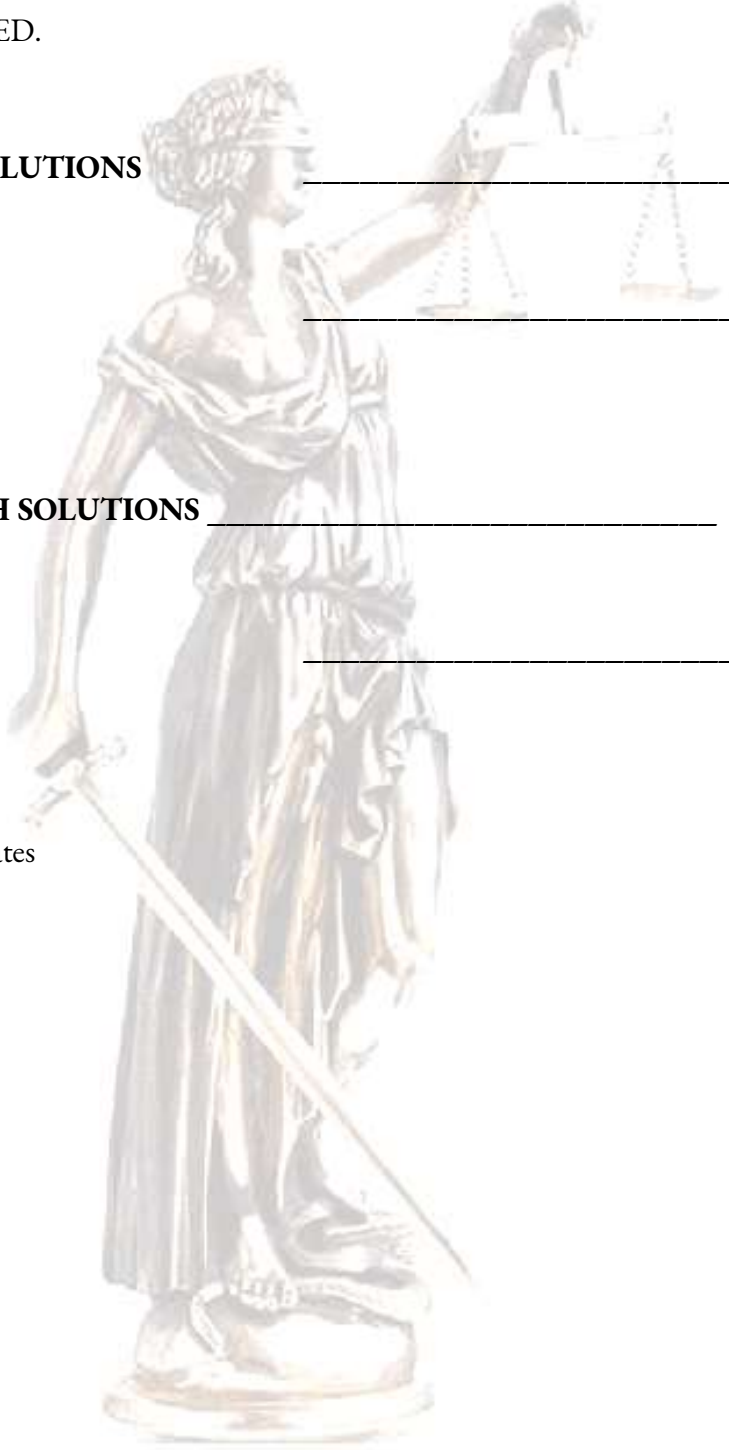
Article 22

DISPUTES

OBJECTION MY LORD

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 _____

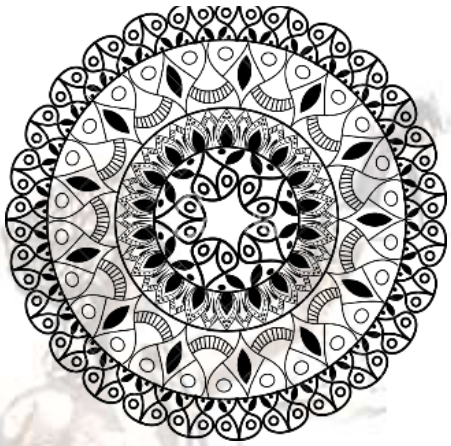
In the presence of _____

Drawn and filed by;

Ojore and Co. Advocates

P.O.BOX 7117,

Kampala, UGANDA.



INTELLECTUAL PROPERTY:

(A) TRADEMARKS:

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

The Trademarks Act cap 217

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 Act Cap 217 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 11 & 12 of the Trademarks Act. 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. Under section 12 therefore; the mark must contain at least any of the following (Under Section 12).

a) Name of company firm or individual represented in a particular manner.

b) Signature of Applicant or his predecessor in business e.g. Art

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 (Under Sec 12).

THE PROCEDURE TO BE FOLLOWED IN REGISTERING THE MARK:

1) Mode of application (Sec 19 & 20 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

    a) Fill trademark form 2 and sign it (Rule 21)

    b) Put picture of Trademark on T.M. form 3 i.e. the representation

    c) Registrar carries out a search for any other trademark similar to it (Rule 30).

    d) Upon satisfaction; the registrar advertises the Application ion the Gazette (per Rule 42).

    e) 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 good 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 Sec 20 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 Sec 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 – Sec 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 Organisation)** 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 publishes 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 ACT

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 Niegbouring Act 2006

WORKS ELIGIBLE FOR COPYRIGHT

Works eligible for copyright protection are provided for in the Copyright and neighbouring Act 2006 and theses 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 licence.

Copyright

Copyright is the exclusive right to do and to authorise others to do certain acts in relation to literary, dramatic and musical works, artistic works, sound recordings, films, broadcasts, cable programmes and published editions of works.6Requirements 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 labour, 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 & Neighbouring 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 "neighbouring on" copyright.

The terms related and neighbouring 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 neighbouring 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 authorise 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 cf Article 9:1 TRIPS Agreement which provides that member states are not obliged to provide for rights conferred under Article 6 bis 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, licence, 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 neigbouring 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 neighbouring 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 whichthe 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 rights 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.

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.

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 Organisation) 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 (Reg. 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 2002 It 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 U.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.

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 authorisation 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 licencee of a patent or a licencee 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 Organisation)** 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: ....

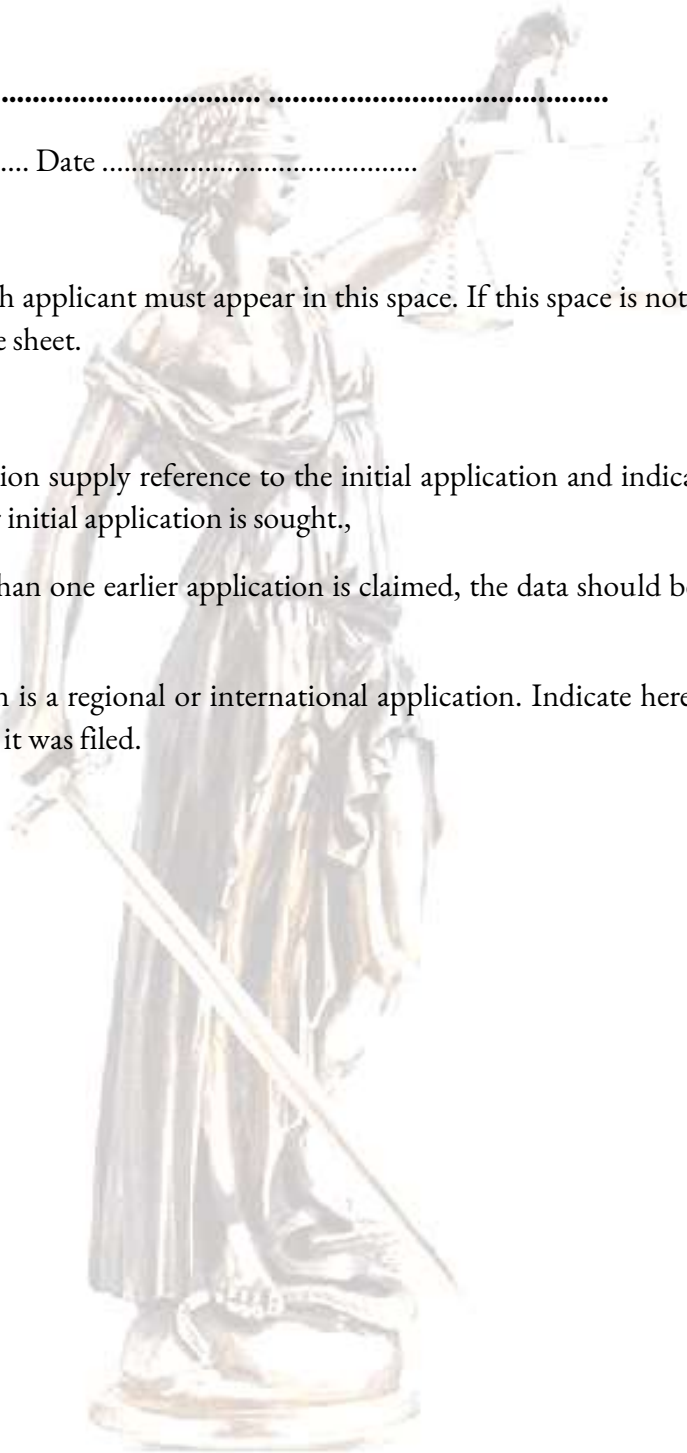
..... Date .....

*(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 Emmas a 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 S.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 (S.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 Law Society**, 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 S. 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, Reg 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 contributions 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-boarder 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 break down 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.

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 s.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. Section 10 (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 premises 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 licences 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.

S. 14 of the **Business Names Registration Act** 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.

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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.

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.

Regulation29, 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 IBA 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 S. 40 of the Advocates Act.

E. Documents and Agreements.

Search Fees-Shs.25.000/=

Form A
THE REPUBLIC OF UGANDA

APPLICATION FOR REGISTRATION OF BUSINESS NAME.

THE BUSINESS NAMES REGISTRATION ACT

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

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
FORM B

I certify that *Simpson, Nixon, Nicole & 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 7117,

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 7117, 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 Kasansula Emmas 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;

i. 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.

13.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.

1. 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.**

i. A statutory meeting.

S. 137(1) 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 S.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 S. 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. (S.138)

Under S.138(2) 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. (S.140)

The objective of the AGM 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 AGM 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.

S.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.

S. 140(4) members can consent to meeting called on short notice.

S. 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 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 defence 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.

S.2 of the Companies Act defines director" to include any person occupying the position of

Director by whatever name called.

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 s. 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 a consent to act as a director of the company. s. 192.

The directors should conduct a board of director's meeting to efficiently manage the affairs of

the company.

Under Art 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 individ ually 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 contending 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 S. 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;

S. 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 Accountanta 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 S. 228(1) requires A company to keep at its registered office a register of its directors and secretaries.

S. 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. S. 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.

S. **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;

S. 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 (subsection 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;

S. 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.

2. 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**.

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 effected 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 effecting 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 Curiam– "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.

S. 47 of the Companies Act 2012 provides for two instances when a person is regarded as a mem ber 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 mem bers.

(2) A person who agrees to become a member of a company, and whose name is entered in its reg ister 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 be ing on the register is evidence to prove membership. Hon. Lady Justice Prof Dr. Tibatemwa E cle arly 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 me morandum 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 al lotted. 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 sa me position as the subscriber. Such persons agree to become part of a company by taking a partic ular number of shares through a process known as allotment.

She thus concluded that what can be deduced from S. 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 re gistration. 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 un der S. 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 legalk 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.2**

Ch 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.

S ee; L u gan '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 s 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 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 are 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 take over 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.

5. 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***

& 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 share

holder 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 share holder 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.

S. 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 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 S.**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

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 **s.21**

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

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 corporators. It means the corporators 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.**

Re Swaledale Cleaners [1968] 3 All ER 619

The personal representatives of H and A had executed transfers of H and A shareholdings in favour 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) 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.

S. **125. 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 to

go 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**

OBJECTION MY LORD

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.

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.

_____

OBJECTION MY LORD

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 7117, 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 annexure B

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.

.....

OBJECTION MY LORD

DEPONENT

BEFORE ME

.....

Drawn & Filed by

SUI GENERIS & Co. Advocates

P.O Box 7117, 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. S. 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 boards decision was made in an informal manner the directors had acquiescenced 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;

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 lj cal 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 Nagappa Chettiar 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 S. 85, 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 regsistration.

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Under S.**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.

S.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 er S. 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 S. 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 *i. That no Article can constitute a contract between the company and a third party;*

ii *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 *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,* 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 s hillings 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 totalled 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 pai d 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 t he Company has the right to call for payment of such liability as and when deemed fit by the boa rd of directors of the Company. Generally, Companies prefer to collect the full amount of share is sue price at the time of issue of shares. However, some companies may give the option to its shar eholder to pay the share price in below instalments:

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 has provisions on calling of shares. CALLS ON SHARES

16. 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

17. If 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 instalments also if so required.

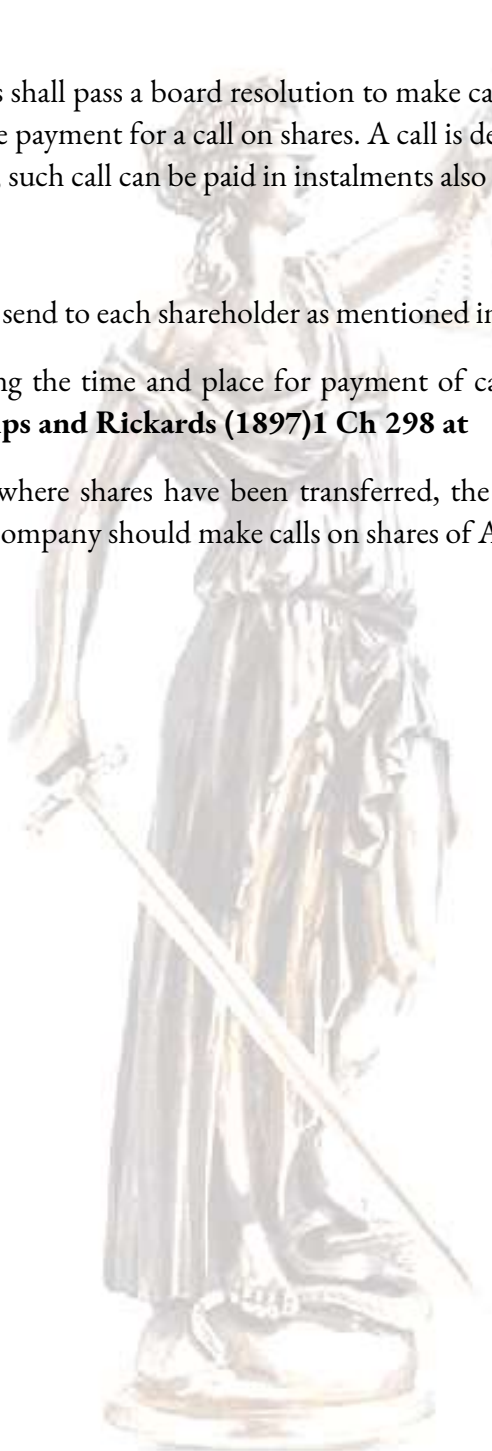
Call notice

The Company should send to each shareholder as mentioned in its register of members a 14 day

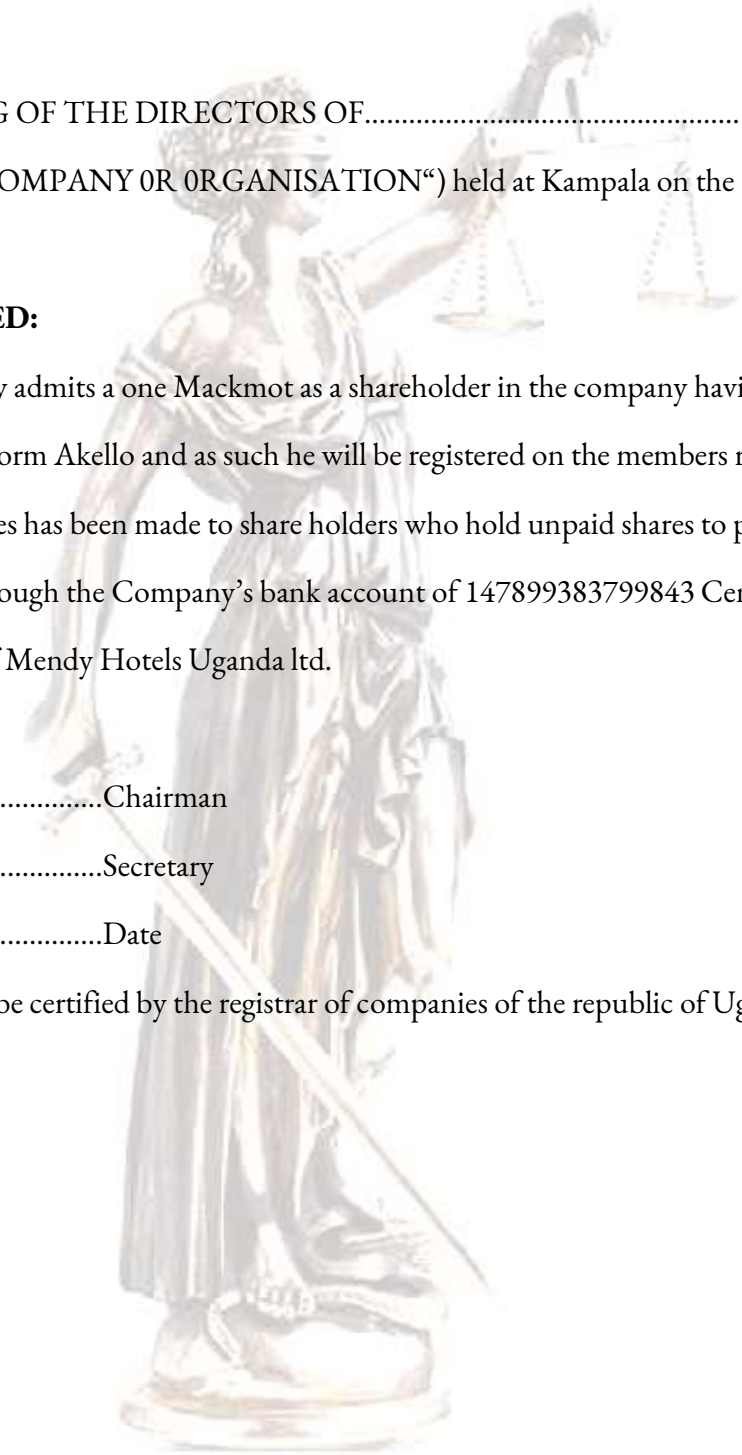
"Call notice" specifying the time and place for payment of calls. In the case of **Re National Bank of Wales, Taylor, Phillips and Rickards (1897)1 Ch 298 at**

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 share holders 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.