THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

HCT-00-CC-MA-0394 of 2004 & 0395/2004
(Arising from HCT-00-CC-CS-0409-2004)

1. KIKUNGWE ISSA
2. SALAAMU MUSUMBA
3. OKUPA ELIJAH
4. CHARLES BYARUHANGA
5. NANDALA MAFABI NATHAN ::::::::::
APPLICANTS/PLAINTIFFS

VERSUS

1. **STANDARD BANK INVESTMENT CORPORATION**
2. **STANBIC BANK (U) LIMITED**
3. **KNIGHT FRANK (U) LIMITED**
4. **THE CHIEF REGISTRAR OF TITLES ::::::**
RESPONDENT/DEFENDANTS

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE

R U L I N G

This application originally came by way of Notice of Motion (Exparte) under Articles 126 of The Constitution of the Republic of Uganda, Section 33 of the Judicature Act (Cap 13), Section 98 of the Civil Procedure Act (Cap 71) and Order 37 rr 1, 1 & 9, and Order 48 r 1 and 3 of the Civil Procedure Rules as amended. The said application sought for orders and/or directions that;

"a) An interim order do issue against the 1st, 2nd and 3rd Respondents, their agents and/or servants restraining them

from selling, transferring and/or otherwise disposing of land comprised in LRV 589 Folio 22 Plot 12 Kampala Road – Kampala until the final disposal of the application for a Temporary Injunction in the above suit.

b) *The Chief Registrar of titles be restrained and/or directed not to register any instrument of transfer or dealing in land comprised in LRV 589 Folio 22 Plot 12 Kampala Road - Kampala until the final disposal of the application for a temporary injunction in the above suit.*

c) *Costs of this application be provided for."*

The general grounds for the application were in the Notice of Motion (Exparte) and were:

1. The Applicants/plaintiffs as members of Parliament have on their own behalf and on behalf of the people of Uganda instituted HCCS No. 409 of 2004, inter alia, seeking for declarations that land comprised in LRV 589 Folio 22 Plot 12 Kampala is a public asset and property of the Government of Uganda and a permanent injunction restraining 1st, 2nd and 3rd respondents from disposal of the suit property.

2. Subsequent to filing HCCS No. 409 of 2004, the Applicants files an application seeking for a Temporary injunction vide Misc. Application No. 394 of 2004 against the Respondents to forestall the impending sale and/or transfer of land comprised in LRV 589

Folio 22 Plot 12 Kampala Road (herein referred as the “Suit Land”) registered in the names of UCBL which is yet to be fixed for hearing by this Honourable Court.

3. The Uganda Commercial Bank Ltd. (UCBL) formerly a public company with 100% shares held by the Government of Uganda in trust for the people of Uganda was privatized and its management taken over by the Bank of Uganda under provisions of the Financial Institutions Statute (FIS).

4. The 1st Respondent on invitation for bids purchase 80% of the shares of the Government of Uganda in UCBL under an agreement of sale whose full text and contents particularly Appendix A which contains the assets and liabilities excluded from the purchase of UCBL’s properties has deliberately been concealed from public.

5. The 1st Respondent in its bid for the purchase of assets and liabilities of UCBL expressly excluded the purchase of the Head Office, (City Branch and Corporate Branch), herein referred to as the suit property comprised LRV 589 Folio 22 Plot 12 Kampala Road, Nkrumah Road Branch, Non-core real Estate and staff loans then existing in UCBL.

6. The 2nd Respondent in 2002 acquired the remaining 20% of the 100% shares held by the Government of Uganda in UCBL pursuant to a resolution of UCBL.

7. Despite lack of any claim on the suit land the 3rd Respondent acting on purported express instruction on the 2nd Respondent has issued Newspaper advertisements inviting for tenders and/or bids from the public and opening bids was completed on Monday 14th June, 2004, thus the suit land is likely to be sold, disposed of and/or alienated anytime to the detriment and/or substantial loss of the people of Uganda who have an interest therein.

8. The suit land being the property of Government of Uganda is thus a public asset and/or property entitled to protection by citizens for illegal and/or unlawful sale/transfer by non-owners, misuse and wastage under Article 17 of the Constitution of the Republic of Uganda.

9. That if the impending sale of land comprised in LRV 589 Folio 22 Plot 12 is not stopped, the people of Uganda are likely to suffer extensive economic, commercial and financial loss since no consideration was ever furnished by the 1st and 2nd Respondents for the purported acquisition of the suit land, which an award of damages cannot be sufficient and adequately remedy.

10. In view of the impending sale, the matter ought to be treated as urgent and handled with utmost expediency in which case the justice of the case requires that this application be heard and granted ex parte pending the disposal of Misc. Application No. 394 of 2004.

11. It is fair and just that an interim order be granted restraining the 1st, 2nd and 3rd Respondents, their agents and/or their servants from selling, transferring and in any other way disposing of the suit land and the 4th Respondent be restrained and/or directed not to register any instrument of transfer or dealing in land comprised in LRV 589 Folio 22 Plot 12 Kampala Road – Kampala until the disposal of the application for a temporary injunction vide Misc. Application No. 394 of 2004.

The other grounds in support of the application were to be found in the affidavit of Kikungwe Issa, an Applicant and Member of Parliament for Kyadondo South Constituency. The Applicants had also filed a Civil Suit No. 409 of 2004 out of which the exparte application arose and from which the Applicants/Plaintiffs sought.

From the above it could be summarized that the Applicants pursuant to Article 17 of the 1995 Uganda Constitution were asserting their Constitutional duty to protect and preserve public property. The property in question, which they say is public property, is comprised in LRV 589, Folio 22 Plot 12 Kampala Road or popularly known the past as "UCB Main Buildig".

They argue that Plot 12 Kampala Road was in danger of being wasted as a result of an illegal/unlawful sale by the Respondents. This is because the Respondents especially the 1st, 2nd and 3rd did not own the said Plot 12 Kampala Road. It is their contention that Plot 12 Kampala

Road though part of the assets of the Commercial Bank Limited (UCBL) was not part of the assets of UCBL that were privatized by the Government of Uganda and sold to the 1st and 2nd Respondents. In support of their contention they referred Court to the Bid form dated 29th August 2001 (annexed as "BID" to the Notice of Motion Ex parte) and signed by the Managing Director of the 1st Respondent. The said BID Form at its second page (pages were not numbered) shows that the Bidder/Prospective Acquirer exercised its opinion to exclude certain assets and liabilities from the bid the Head Officer (City Branch and Corporate Branch) which without doubt refers to Plot 12 Kampala Road – Kampala. In further support of their contention, the Applicants referred Court to a copy of a Sale Agreement between Bank of Uganda and Standard Bank Investment Corporation Limited (a second party) and Government of the Republic of Uganda (a third party) and the Uganda Commercial Bank Limited (a fourth party) dated 20th November 2001 (annex called "Agree" to the ex parte application and hereafter called "The Agreement of Sale of 2001"). The Agreement of Sale of 2001 had paragraph 6.5 which stated;

> ***"Exclusion of certain Assets and Liabilities***
>
> *The parties will remove from the assets and liabilities of the Company prior to the closing date the Assets and Liabilities listed on Annex 'A' attached hereto."*

However no Annex A was attached to the Agreement of Sale of 2001 which would give guidance on the matter. MR. Kikungwe Issa in his affidavit in support of the application at paragraph 4 stated;

> *"...Appendix A, which contains the assets and liabilities, excluded from the sale of UCBL to the 1st Respondent which has been concealed from the public..."*

It was argued for the applicants that the Bid document when read with what was available of the Agreement of Sale of 2001 showed that the respondents did not have the right to sell Plot 12 Kampala Road as they were trying to do and that therefore the building remained Public Property about to be wasted through an unlawful sale.

Having listened to the arguments by Mr. Mbabazi for the Applicants and perused the documents presented before Court, I was satisfied that a prima facie case for an Interim Order stopping the sale had been made out which could only be displaced by the Respondents coming to Court and clarifying the matter. I therefore granted the Interim Order and ordered the hearing of the application *"inter parte"* within 24 hours (i.e. 24th June at 3.00 p.m.) so that the Respondents were offered an opportunity to respond to these clearly serious allegations of fact and law. Since the Applicants had also filed an application by Chamber Summons for a Temporary Injunction which for all purposes was similar to the Application ex parte for an Interim Order I also ordered that for the better management of these applications, the hearing of the Notice of Motion

now inter parte and Chamber Summons would be consolidated and heard at the same time.

When the "inter parte" hearing came up on the 28th June 2004 all the Respondents except the Chief Registrar of Titles were represented by counsel in Court. Mr. Masembe Kanyerezi and Mr. J. F. Kanyemibwa appeared for the 1st and 2nd Respondents, while Mr. D. Mpanga and Mr. Kalibala appeared for the 3rd Respondent. The matter then immediately proceeded with the hearing of the application for a Temporary Injunction.

Mr. Mbabazi for the Applicants sought to rely of the affidavits of Mr. Issa Kikungwe of 17th June 2004 and that of Mr. Nandala Mafabi of the 28th June 2004 (both Applicants also being Honourable Members of Parliament). Mr. Mbabazi made the following legal arguments in support of the application.

He said that the applicants had filed HCCS No. 409 of 2004 against the Respondents which sought among other things declarations that the Respondents/Defendants did not have the legal right to dispose of Plot 12 Kampala Road – Kampala. HCCS No. 409 of 2004 was therefore still pending final disposal, so in the Interim, a Temporary Injunction was prayed for to maintain the status quo.

Mr. Mbabazi argued that by HCCS No. 409 of 2004 they had established a prima facie case against the Defendants with a high probability of success. He relied on the affidavits of Mr. Nandala Mafabi who described himself as a Member of Parliament for Budadiri West, who had been

appointed on the Adhoc Committee on the sale of UCBL. Mr. Mafabi depones at paragraph 5.

> *"That I know the Committee was first availed an incomplete Agreement for sale of the Majority 80% shares in Uganda Commercial Bank Limited (UCBL) and sale of all the Assets, Liabilities, and Bank of Uganda Commercial Bank Ltd. as a going concern dated 20th November 2001 between Bank of Uganda, the 1st Respondent, the Government of the Republic of Uganda and joined in by the Uganda Commercial Bank Ltd. ["the Share Sale Agreement"] without the corresponding annextures, appendices and schedules by the Minister of State (General Duties) vide his letter of the 28th May 2002 hereto annexed as Annexture "A"."*

Without reproducing the said letter (Annexture 'A') the Minister of State (General Duties) Hon. Mwesigwa Rukutana, I find the Minister did not actually forward the said "Share Sale Agreement". The Minister in his said letter addressed to 'The Chairman Adhoc Committee Investigating UCBL' wrote that the documents;

> *"...were laid on the table of Parliament and are deemed to be in your possession. <u>Please confirm whether you have the documents and/or if we are required to re-submit any of them...</u>" (emphasis mine).*

Be that as it may Mr. Mafabi in his paragraph 6 states that the Adhoc Committee requested people who appeared before it to submit the contentious Annex 'A' to the Agreement of Sale of 2001 to the Committee.

According to the affidavit of Mr. Mafabi three (3) persons responded to the request by the Adhoc Committee.

The first was Mr. J. K. Virani by a letter dated 4th June 2002, which included an *appendix 1* which was a list of excluded assets and liabilities dated 31st December 2001. However I dare say even at this stage that *appendix 1* was not the actual contentious *Appendix !* to the Agreement of Sale 2001. That notwithstanding, Mr. Virani's letter did not show Plot 12 Kampala Road as an excluded Asset.

The second response was from Dr. Louis Kasekende, Deputy Governor Bank of Uganda, in his letter dated 20th June 2002 to the Chairman of the Adhoc Committee. This letter also did not attach the contentious *Appendix A.* Paragraph 9 or Dr. Louis Kasekende's letter however reads;

> *"Excluded Assets and Liabilities*
>
> *Annex 'A' of the Transfer of Assets and Liabilities agreement signed on 21st February 2001 showed excluded assets and liabilities amounting to Shs.1,487,292,434/=.*

Dr. Louis Kasekende then further writes at para 11 of his letter towards the end;

"...as it turned out, Stanbic was willing to include the Head Officer building in the sale, and assets worth only Shs.1.478 Billion were excluded from the sale which were marched by the exclusion of liabilities worth Shs.1.487 Billion. This is to the advantage of Government, because it has been spared the trouble of trying to sell a building which is probably worth far less on the market than its book value."

The 3rd response came from M/S Peat Marwick Certified Public Accountants (KPMG) in a letter to the Chairman of the Adhoc Committee dated 4th June 2002. This third letter also did not have attached to it the contentious *Appendix A.* However, para 1 of the KPMG letter refers to two schedules to the letter which may have reflected on the contentious Appendix "A", but MR. Mafabi did not provide the said schedules as part of this document which he relies on in his affidavit. I must say this was not very helpful. Anyhow the para 1 of the KPMG letter reads in detail.

"Exclusions

The initial outline of the assets and liabilities to be excluded from the assumption by the new investor is provided under Annex A of the Sale Agreement between Bank of Uganda, Stanbic, Government of Uganda and Uganda Commercial Bank Limited. That initial outline which was based on June 2001 results was subsequently modified by a further agreement executed on 20th February 2002. The latter schedule reflects the final position on exclusions following an agreement to that effect by the relevant parties. We have attached

both the schedule (see schedule 1 which is the annex before finalisation and schedule 2 which reflects the final position)". As I have said we are not much the wiser by this evidence as the said schedules were not attached.

Mr. Mbabazi then attacked the affidavit in reply dated 24th June 2004 of Mr. Kitili Mbathi the Managing Director of the 2nd Respondent who said he also had authority to make the same affidavit by the 1st Respondent. Now Mr. Mbathi had annexed to his affidavit what I have now called the contentious Annex A to the Agreement of Sale of 2001. Mr. Mbabazi relying on para 10 of Mr. Mafabi's affidavit disputes the said Annex 'A', and says it's a "modified Annex A" and not the original Annex 'A' <u>that formed an integral part of the Share Sale Agreement dated 20th November 2001"</u> (emphasis mine).

In other words, in the view of the Applicants, the contentious Annex 'A' continues to be concealed and prima facie therefore Plot 12 Kampala Road was excluded. Mr. Mbabazi also goes on to attack annex 'C' to Mr. Mbathi's affidavit, which is a Merger Agreement between Stanbic Bank and UCBL (this apparently was not dated). This Merger Agreement in para 4 inter alia transfers immovable property from UCBL to Stanbic Bank. Annex 13 of the Merger Agreement lists the Immovable Core Fixed Properties so transferred to include item '4' which is Plot 12 Kampala Road. Mr. Mbabazi says that this is not a merger agreement but yet another sale leading to another set of contentious annexutures.

Finally on the issue of the Applicants having proved a prima facie triable case Mr. Mbabazi argues that the land titles for Plot 12 Kampala Road is still in the names of UCBL which was struck off the Register of Companies and hence does not exist today. He therefore argues that property of UCBL such as Plot 12 Kampala Road which applicants say was not sold to Stanbic becomes 'Bona Vacantia" within the meaning of Section 344 of the Companies Act and hence is state property. All in all the Applicants see themselves with a good and winnable case.

Mr. Mbabazi then goes on to argue a second test for Court to consider in granting a temporary injunction. This test is that if the temporary injunction is not granted all Ugandans would suffer irreparable loss, which cannot be atoned by any award in damages. Again referring to para 9 of the affidavit of Mr. Mafabi, Mr. Mbabazi draws Court's attention to annex 'E' thereof which is Report and Valuation of Uganda Commercial Bank assets prepared by Target Engineers and Associates dated July 1996. This report puts the value of Plot 12 Kampala Road at Shs.13,830,000,000/= or using the prevailing rate of exchange to dollars at the time ($=Shs.1,040/=) is about US$12 million (my calculation is a bit more at US$13.29 million). However, the current sale of Plot 12 Kampala Road is expected to be US$5.7 million (a difference of about US$7.59 million). The Applicants having brought their action under Article 17 of the 1995 Constitution argue that this is a big loss to the people of Uganda.

On the third legal test on where the current balance of convenience lies, Mr. Mbabazi simply argues that it lies in granting the application as the building is not going, in his words to “run away”.

Lastly, Mr. Mbabazi briefly addressed Court on the locus standi of the applicants. He says that the claim is brought under Article 17 (1) (d) of the Constitution. He then adds that if this is contested by the Respondents then it will require an immediate reference to the Constitutional Court for interpretation under Article 137 of the same constitution.

For the Respondents I was addressed by several advocates. The lead presentation was by Mr. Masembe Kanyerezi who argued that the application must fail. He on the outset saw a procedural issue regarding the locus standi of the Applicants. He however chose to deal with the substantive issues first.

On the prima facie case Mr. Kanyerezi argued that the real issue for determination was whether Plot 12 Kampala Road was excluded in the privatization of UCBL. Mr. Kanyerezi draws heavily from the two affidavits of Mr. Kitili Mbathi, the Managing Director of Stanbic Bank, dated 24th June 2004 and 28th June 2004. He points out that the Agreement of Sale of 2001 deals with two sales, one of the Government Shares in UCBL and the other of the Assets and Liabilities which were under the control of Bank of Uganda under part iv of the Financial Institutions Act (Cap 54). Government of Uganda sold 80% of its shares in UCBL for a token of (U)

Sha.1,000/=; very reminiscent of sale of one of Britain's oldest Banks called Bearing Bank PLC which was sold for one pound. The Assets and Liabilities on the other hand were subject to para 6.5 of the Agreement of Sale of 2001 which through Annex 'A' allowed the buyer the right to exclude certain assets. He said that the contentious Annex 'A' is attached to the Agreement of Sale 2001 exhibited as annex 'A' to the affidavit of Mr. Mbathi. This annex 'A' at page 2 shows the following excluded fixed assets.

"Fixed Assets

		Balances as of June 2001
Nkrumah Road Building Premises	-	2,080
Less; Depreciation	-	520
Non-Core Real Estate	-	4,454
Less Depreciation	-	1,200
Net Fixed Assets	-	4,814 "

Plot 12 Kampala Road is not referred to in Annex 'A', so it is not excluded. However, Mr. Masembe does concede that there was a modification of Annex A at a subsequent time. he relies on the second affidavit of Mr. Mbathi dated 28th June 2004 at para 3 which states that Annex 'A' was modified by another agreement termed "The Transfer of Assets and Liabilities Agreement of 20th February 2002 (attached as Annex 'E' to the said affidavit). That not withstanding, Mr. Mbathi depones that the modification was immaterial to the matters now in dispute as the modified

Annexture ‘A’ did not exclude Plot 12 Kampala Road. The said modified Annex ‘A’ shows at the relevant part on Assets.

Balances as at 31st December 2001

Ug.Shs.

“Property and Equipment

Nkrumah Road Building	-	1,310,000,000/=
(Less Depreciation)	-	(158,575,000)/= “

Save for the change in figures, Plot 12 Kampala Road is not reflected as excluded.

With regard to annex ‘C’ which is the Merger agreement, Mr. Masembe says that in order to understand it one has to read the whole agreement. He confirms that it is indeed a merger agreement and not another agreement of sale where Stanbic Bank becomes successor in title of UCBL with regard to inter alia the assets and liabilities listed therein. Inclusive of the assets which Stanbic Bank became successor to is Plot 12 Kampala Road and said property was succeeded to by Stanbic Bank in the merger with UCBL; so Stanbic Bank can dispose of it.

On the test of irreparable loss Mr. Masembe begins by saying that the 2nd Respondent is a formidable Bank capable of paying any loss through damages should it lose the case. In this regard he relies on para 3 of Mr.

Mbathi's first affidavit where the 2nd Respondent is even willing to give an undertaking to secure the lifting of the Interim Injunction.

However, Mr. Masembe says that the Applicants should give a cross undertaking in the event that they lose the case as a form of compensation to the Respondents for loss or inconvenience occasioned to them. He relies on paragraphs 4 and 5 of Mr. Mbathi's first affidavit which reads;

> "4. That on the other hand the 2nd Respondent is likely to suffer substantial loss to it if it continues to be restrained from concluding a sale of the property at the highest offer of US$5.7 million. The highest bid is likely to be lost if the matters in dispute are not finalized within the ensuing 10 days as the next highest bid was US$4.7 million, the 2nd Respondent is likely to lose a sum excess of US$ 1 million if the Interim Injunction is not lifted.
>
> 5. That I am advised by our lawyers that if Court is inclined to grant the Temporary Injunction, the 2nd Respondent will be entitled to a cross undertaking in damages from the Applicants personally... of US$ 1 million..."

On the cross undertaking he refers me to the authorities of;

1. Halsbury's Laws of England 4th Edition paragraphs 865 and 982

2. An Article in Cambridge Law Journal by A.A.S. Zucherman entitled The undertaking in Damages – Substantive and Procedural Dimensions"

3. The Judgment of Platt J.S.C. in the case of *Shiv Construction Co. Ltd. –vs- Endesha Enterprises Ltd.* CA No. 34 of 1992.

I shall discuss these in a little detail later.

On the test of balance of convenience, Mr. Masembe referred me to para 6 of Mr. Mbathi's first affidavit which states;

> *"That I am advised by my lawyers that in light of the willingness of the 2nd Respondent to undertake to pay the value of the property if the suit is successful the balance of convenience lies in refusing the Injunction."*

Mr. Masembe then moved on to address the procedural issue of the locus standi of the Applicants under Article 17 of the Constitution. He said that Article 17 of the Constitution referred to duties of citizens. He said locus to institute suits should be based on rights and not duties. He further argued that in the case of public interest litigations such cases should be based on violated rights under Article 50 of the 1995 Constitution. In this regard he referred me to the authorities involving various environmental action groups which I will refer to later in my ruling.

Mr. Masembe argued that the Applicants were not shareholders of UCBL and therefore had not rights to protect; they could not even under the

famous case of *Foss -Vs- Harbottle* bring a derivative action as minority shareholders. He argued that if the Applicants wanted to exercise their duty they could complain to the Police or the IGG as avenues open to them. He lastly argued that to give the Applicants locus standi under Article 17 of the Constitution would mean to open up the "flood gates" of such matters to the Courts which could not have been the intention of the article.

The second Advocate to address Court for the Respondents was Mr. J.F. Kanyemibwa. MR. Kanyemibwa associated himself with the submissions of Mr. Masembe but wanted to add a few more observations in support of their case.

Mr. Kanyemibwa referred me to appendix 'C' of Mr. Mafabi's affidavit (one of the Applicants) at para 11, which is a letter from Dr. Louis Kasekende to prove that the building was for sale. I have already discussed this letter earlier.

Secondly he referred me to the affidavit of Mr. Joseph Bossa (of the 24th June 2004) who is the legal counsel of Bank of Uganda. He said that Mr. Bossa in his affidavit in para 2(b) clearly stated that Plot 12 Kampala Road was not among the excluded assets in para 6.5 of the Agreement of 2001 and its annex 'A'.

Thirdly he argued that even though the land title for Plot 12 Kampala Road was still in the names of UCBL the property in the building had passed to Stanbic Bank by virtue of the Merger Agreement. That being the case

Stanbic Bank could transfer the Title into its names at any time since the Registration of Titles Act did not provide a time limit for such transfers to happen. He later availed to Court the authority *Ismail allibhai and Others –vs- Nandalal Harjivan Karia and Another* (SC) CA 53 of 1995 (The Judgment of **Order JSC**) to support his argument.

Mr. Kanyemibwa concluded by saying that I could dismiss the application solely on the failure of the Applicants to prove a prima facie case.

The third Advocate to address me for the Respondents was Mr. D. Mpanga for Knight Frank the Real Estate Company which had arranged for the bids. Mr. Mpanga argued that no liable could be visited on his clients. This is because like a broker or auctioneer who work for a commission they cannot be liable for conversion if the vendor was found not entitled to sell in the first place. In this regard he referred me to the case of *Barker –vs- Furlong* [1891] 2 ch 172.

These in general terms were the arguments that were made before me. On my part I will address them in reverse order starting with locus standi and ending with the tests for granting or otherwise a temporary injunction.

The Applicants rest their locus standi on Article 17(1)(d) of the Constitution of Uganda which reads – *"It is the duty of every citizen of Uganda (d) to protect and preserve public property."*

My research has shown that this is probably the first case of this nature to come to the Courts of Law. A lot has been argued as to whether or not the Applicants can rest their locus standi on what has been called this constitutional duty. Mr. Masembe has argued that this constitutional duty does not amount to a constitutional right actionable under Article 50 of The Constitution under article 50 which provides;

"1. Any person who claims that a fundamental or other right or freedom guaranteed under this constitution has been infringed or threatened, is entitle to apply to a competent Court for redress which may include compensation.

2. Any person or organization may bring an action against the violation of another person's or group's human rights."

The reference to <u>any person</u> in Article 50(1) and (2) and the reference to bringing an action against the violation of <u>another person's or group's</u> human rights has now become the basis of public interest litigation in Uganda. This has been settled in <u>*The Environments Action Network Limited –vs- (1) The Attorney General, (2) The National Environment Management Authority*</u> MA 39 of 2001.

In that case the learned Principal Judge Justice J.H. Ntabgoba disapplied the need for locus standi in an Article 50 of the Constitution action. In so doing the learned Principal Judge drew so heavily from the now celebrated judgment of Lord Diplock in the case of <u>*Reg –vs- IRC Exp. Federation of Self Employed H.L.E.*</u> [1982] AC 643.

Lord Diplock was quoted as saying;

"It would, in my view, be a great lacuna in our system of Public Law if a pressure groups, like the Federation or even a single Public Spirited tax payer, were prevented by our-dated technical rules of *locus standi* from bringing the matter to the attention of the Court to vindicate the rule of law and get unlawful conduct stopped."

The learned Principal Judge also followed the Tanzanian case of Rev. Mtikill –vs- TheAttorney General in Tanzania Civil suit No. 5 of 1993 (un reported) where Rukangira. J. while observing that Tanzania is a poor country where many people cannot afford to engage lawyers to pursue their rights and the perversion of the constitution held in part;

> *"Given all these and others, if there should spring up a public spirited individual and seek Court's intervention against legislation or actions to pervert the Constitution, the Court as guardian and trustee of the Constitution and what it stands for, is under an obligation to rise to the rise occasion and grant him standing".*

As pointed out earlier, Mr. Masembe has sought to distinguish the above authorities by stating that there is a difference between rights expressly enforceable in Court and duties. He suggested that those who wanted to exercise their constitutional duty under Article 17 (1)(d) could lodge complaints with the IGG or even the Police or even the

Police otherwise this would open the floodgates or such cases to the Courts.

Mr. Mbabazi responded that by Mr. Masembe contesting whether his clients can bring an Article 17(1)(d) action I should immediately refer the matter to the Constitutional Court under Article 137 of the Constitution. I am not clear why Mr. Mbabazi would want a reference to the Constitutional Court at this time, as this would mean staying the current proceedings to allow the reference. Section 33 of the Judicature Act (Cap 13) provides;

> *"The High Court shall in the exercise of the jurisdiction vested in it by the Constitution, this Act of any written law, grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim brought before it, so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matters avoided."* (emphasis mine).

I see my duty in this matter as to apply the law that has been cited to me, as I see it in order to enforce it. In this regard I draw guidance from the judgment pf the Hon. Justice Kanyeihamba in *Attorney General –vs- David Tinyefuza* (Constitutional Appeal No. 1 of 1997) on how Article 137 applications are to be made. In that judgment he held that the jurisdiction

of the Constitutional Court as derived from Article 137(3) is concurrent with the jurisdiction of other Courts which may apply and enforce the constitution (I do not think those article that he enumerated were exclusive). He pointed out that there was a big difference between applying and enforcing the provisions of the Constitution and interpreting it. The applicant is before me to enforce a provision of the constitution, if parties wish an authoritative interpretation they can do so by separate petition. I in applying and enforcing the provisions of the constitution will not allow a multiplicity of this action, which will cause delay.

Without repeating here all the legal arguments presented to me and authorities cited on the question of locus standi, it is quite clear from the authorities in particular that with regard to public law the rules relating to locus standi have been relaxed. This appears to be gaining ground in other Commonwealth Jurisdictions. In Fiji for example in the case of CHANDRIKA PRASAD –vs- The Republic of Fiji and The Attorney General of Fiji Action No. HBC 0217.00L (unreported but downloaded from the Internet). The Fiji High Court (unfortunately the Judge is not named) on the issue of standing observed quite a number of things.

It quoted Rose L.J. in RV Secretary of State for Foreign and Commonwealth Affairs ex parte World Development Movement Ltd. (1995) 1 WLR at page 3958 where he held;

> *"The authorities referred to me to indicate an increasingly liberal approach to standing on the part of the Courts during the last 12 years".*

Further quoting from the IRC exparte Case (Supra) the Fiji Court said that a simple test for standing in all public law cases is that of "sufficient interest". The real question being whether the Applicant can show some substantial default or abuse and not whether his personal rights or interests are involved. The Fiji Court is granting locus standi also found that;

- The issues raised for decision are sufficiently grave
- The issues are also of sufficient public importance
- They involve high constitutional principle.

I agree with Mr. Masembe that what is in issue in this application is the application of a constitutional duty.

"to protect and preserve public property"

Unlike Article 50 of the same constitution Article 17 (1)(d) is silent as to how this duty is to be carried out.

Black's Law Dictionary 7th Edition defines a duty in may ways depending on the circumstances. In the context of this case I think the constitutional duty given to the citizen according to Black's Law Dictionary could appropriately be called one of "affirmative duty" defined as "A duty to take a positive step to do something".

That in my view grants the citizen so effecting this constitutional duty a wide latitude of choice. He could elect to go to the IGG or Police as suggested. However, even such an election may leave to legal actions in Court so that is not necessarily a safeguard against the "flood gate" theory.

I think what is important and I trust this is what MR. Masembe was driving at is that the applicant should show that he/she is not a mere busybody and has tried to exhaust other remedies available before coming to Court. It should not be automatic. Court should in all cases be a last resort step when all else has failed.

In this case there is evidence that the issue of whether or not Plot 12 Kampala Road was part of the assets sold to Stanbic Bank was the subject of an investigation in 2002 by Parliament by the Adhoc Committee chaired by the Hon. Prof. E. Kamuntu. The Applicants happened also to be Members of Parliament and Mr. Mafabi was a member of that committee. Court of course takes judicial notice of the fact that the privatization of UCBL was full of difficulties and it is not surprising that such an Adhoc Committee of Parliament was established to investigate the sale. What is surprising is that despite the investigations f the Adhoc Committee, the Applicants and Respondents continue to "battle" the issue of whether Plot 12 Kampala Road was part of the sale as late as today in 2004. This seems to be the "concealment theory" of annex 'A' alleged by the Applicants in their Chamber Summons.

Strangely enough though the Respondents deny concealment, Mr. Mbathi in his first affidavit at para 7 depones;

"That the terms of the Agreement aforementioned are confidential. This confidentially notwithstanding, the Bank of Uganda availed to the Parliament of Uganda the said agreements including all the annexes thereto upon request by the said Parliament. It is not correct therefore (that) the 2nd Respondent concealed the said agreement or any part thereof from the public" (emphasis mine).

I think that it is this sense of confidentiality that has led to this dispute. It is a matter of full disclosure. I wonder how the privatization of a once public institution can be viewed as confidential in this era of transparency and public accountability! It is for this reason that I considered it fit for the actual Agreement of Sale of 2001 to be brought to Court for inspection. I find on basis of the authorities I have reviewed that the Applicants being Public-spirited. Citizens have locus standi under Article 17 (1) (d) of the Constitution, our public law to bring this action. To rule otherwise in the words of Lord Diplock in IRC exparte case would be to create *"... a grave lacuna"* in our system of public law if a public spirited citizen in exercise of his constitutional duty were "prevented by outdated technical rules of locus standi" from bringing the matter to the attention of the Court to vindicate the rule of law and get unlawful conduct stopped."

However, to be clear in this point the granting of locus standi by the Courts on the authorities cited is one of judicial discretion. The Applicant must show:

1. That he/she is a citizen of Uganda.
2. "Sufficient Interest" in the matter and must not be a mere busybody.
3. That the issues raised for decision are sufficiently grave and of sufficient public importance.
4. That they involve a high constitutional principle.

Conversely the Applicant should show Court what other steps he/she has taken to protect and preserve the public property in question and that those steps led to nothing before Court can exercise its discretion to grant him/her locus standi. These tests have been met in this case.

I shall now address the issues relating to the application for a temporary injunction. The tests for Court to consider in the granting of a temporary injunction are now well settled. In East Africa and Uganda the *"locus classicus"* as to the tests/grounds to be considered is *Giella –Vs- Casman Brown* [1973] EA 358 (CA).

In Uganda the more often cited case is *E.L.T Kiyimba-Kaggwa –Vs- Haji Abdu Nasser Katende* [1985] HCB 43.

A review of these cases above shows that the granting of temporary injunction is an exercise of judicial discretion for the purpose of preserving the status quo until the questions to be investigated in the suit can finally

be disposed of. The Applicant first shows a prima facie case with a probability of success.

Secondly, a temporary injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which cannot be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide the application on the balance of convenience.

Let me start with what all counsel have argued as the "prima facie case". Mr. Masembe drew Court's attention to what appears to be a charge in emphasis in this test. The current thinking on the authorities he argues, appears to be whether there are serious questions to be tried rather than a prima facie case with a probability of success. This was touched upon *per incuriam* by Justice B.J. Odoki (as he then was) in the *Kiyimba-Kaggwa* case (Supra).

Halsbury's Laws of England 4th Edition Vol. 24 para 855 has this to say on serious questions to be tried.

> "855. **Serious questions to be tried.** On an application for an interlocutory injunction the Court must be satisfied that there are serious questions to be tried. The material available to Court at the hearing of the application must disclose that the Plaintiff has real prospects for succeeding in his claim for a permanent injunction at the trial." (emphasis mine).

I am not sure that the serious questions to be tried test is overtly different in substance from the prima facie test on the authority of Halsbury's.

However, I must agree that the serious question test gives better guidance for the exercise of judicial discretion and so that is what I shall follow in the instant application. For consistency with the submissions made to Court I shall use the term "*prima facie case*."

The Applicants say that Plot 12 Kampala Road was clearly not part of the bid by the Respondents as shown in the bid document and was excluded by the contentious annex 'A' of the Agreement of Sale 2001. They have exhibited to Court the Agreement of Sale of 2001 which was presented to Parliament, which they say concealed annex 'A' which shows that Plot 12 Kampala Road was excluded from the sale in line with the bid document. The Applicants have argued that the Annex 'A' was not the original annex 'A' that formed an integral part of the shareholders agreement dated 20th November 2001. They have argued that the fact that Plot 12 Kampala Road is still in the names of UCBL is testimony of its having been excluded from the sale. Since UCBL was struck off the Registrar of Companies, Plot 12 Kampala Road becomes '*Bona vacantia'* (a property without apparent owner which becomes a property of the state) for which the Respondents have no right of sale and should therefore be stopped from carrying out the sale.

The Respondents see things differently they have produced the original contentious Annex 'A' which shows that Plot 12 Kampala Road was not excluded. The MD of Stanbic Bank and the Legal counsel to Bank of Uganda have shown affidavits to that effect. They have produced a merger agreement to show that the asset they bought from UCBL were

inclusive of Plot 12 Kampala Road and have been merged with Stanbic Bank and the transfer of title could take place at any time. Clearly there is a serious question as to Annex 'A' and what it contains. However if what has been produced in Court by the Respondents is only a modified Annex 'A' as alleged by the Applicants, where therefore is the original Annex 'A'?

I think that Annexture 'C' to Mr. Mafabi's (one of the Applicants) at para 11 seeks to throw some light on this controversy. This is the letter of Dr. Louis Kasekende, then Deputy Governor of Bank of Uganda, to Prof. Kamuntu then Chairman of the Adhoc Committee into the sale of UCBL which I have quoted earlier in my Ruling. Dr. Kasekende tells the committee that despite the bid documents Stanbic was willing to *"... include the Head Office building (i.e. Plot 12 Kampala Road) in the sale ..."* Dr. Kasekende seemed to be relieved by the decision of Stanbic to take the building because *"... Government has been spared the trouble of trying to sell a building which is probably worth far less on the market than its book value ..."* To Dr. Kasekende in other words, it was good riddance! This brings into good perspective the affidavits of the MD of Stanbic Bank and the Legal counsel of Bank of Uganda.

I have looked at the original Sale Agreement of 2001 as produced by the Respondents and its Annex 'A' and they appear on the face to be genuine. The onus at the hearing of this application is for the Applicant/Plaintiffs to disclose that it has real prospects for succeeding in his claim at the trial. To do this the Applicants have to my mind be aware of section 110 of the Evidence Act (Cap 6) which reads:

*"**Burden of proof as to ownership***

When the question is whether any person is owner of anything of which he or she is shown to be in possession, the burden of proving that he or she is not the owner is on the person who affirms that he/she is not the owner."

And section 103 of the Evidence Act which reads:

*"**Burden of proof as to particular fact***

The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie of any particular person."

In other words if the Applicants allege that the Annex 'A' produced by the Respondents is not genuine or is modified let them prove it. It is not enough to allege that it is concealed, that was acceptable during the ex parte, but not now at the inter parte hearing. The Applicants best chance of succeeding is to produce before Court what they consider to be the real Annex 'A'. On this point the plaint is silent. It's only there after that the Court can properly try the issue of "*Bona vacantia.*" However without going into the issues of legal transfer, from a corporate practice and governance point of view I find it unacceptable that Stanbic has been laxed about the issue of transfer of ownership of such a big asset on the grounds that they can do it anytime, I am sure their external auditors will have a lot to say about that!

As it stands now even though serious questions have been raised, the Applicants do not strike me as having real prospects of success unless they can produce the contentious Annex 'A' which up to now they have not.

On the test of irreparable loss which cannot be atoned by damages Mr. Mbabazi argues that the Respondents seek to sell Plot 12 Kampala Road at US $5.7m, whereas in 1996 it had been valued around US $12m, a difference I found in the region of US $7.59m. One cannot help thinking that this is the situation Dr. Kasekende in his letter (supra) sought Government to run away from. Court has not been given a later valuation than 1996 which is eight (8) years old nor the trends in the property market over the years. It is none the less a big difference. At best it can be said market price for plot 12 Kampala Road is the highest bid the Respondents have so far got for it. Mr. Masembe says that his client is a formidable bank and can pay the damages and as such are willing to give an undertaking to secure the lifting of the interim order of this Court. He however seeks a cross undertaking from the Applicants personally of US $1m. He referred to a number of authorities already outlined in my Ruling including order 37 r 2 (2) of the CPR on this. Mr. Mbabazi on the other hand said that the relevant authority as section 65 of the Civil Procedure Rules (Cap 71) which provides:

> *"65. (1) where, in any suit in which .... a temporary injunction <u>has been granted,</u>*
>
> *(a). it appears to Court that the .... injunction was applied for on insufficient grounds; or*

(b). *the suit of the Plaintiff fails and it appears to the Court*

that there were no reasonable or probable grounds for

instituting the suit.

The Defendant may apply to Court and the Court may, upon that application, award against the Plaintiff by its order such amount, not exceeding Shs.2,000-, as it deems reasonable compensation to the Defendant for the expense or injury caused to him or her; except that a Court shall not award under this section an amount exceeding the limits of its pecuniary jurisdiction" (emphasis mine).

It seems to be the experience of this Court that orders for cross undertaking are indeed rare.

Even in the case cited to me of Shiv Construction Co. Ltd –Vs- Endesha Enterprises Ltd. CA No. 34 of 1992.

Which is a Ugandan example on the subject, **Justice H.G. Platt** J.S.C as he then was) did not give clear guidelines on when such undertakings should be given. The issue of an undertaking was not argued before the Court and the Judge raised it on his own without setting a figure.

If this cross undertaking is to be grounded on 0. 37 r 2 (2) then it is to be discretionary as the Court thinks fit. On the other hand if it is grounded on section 65 of the Civil Procedure Act then the application is premature because no temporary injunction has been granted yet.

In this case I am not inclined to exercise my discretion in favour of a cross undertaking in light of the very unique nature of the matter before Court which I believe to be in the nature of a Public Interest Litigation.

On the issue of irreparable loss which cannot be atoned by damages I take greater comfort in the Respondent's willingness to provide an undertaking as to damages being a fairly big bank.

If there is still any doubt as to how I am to view this application then the third test of deciding on the balance of convenience has to be considered. For the Applicants it has been argued that Plot 12 Kampala Road is not going anywhere so the balance of convenience is with granting the temporary injunction. However, the Respondents say that time is not on their side and since they are willing to give an undertaking as to the value of the building, then the balance of convenience lies in refusing the injunction.

Currently there is little doubt that the Respondents are in actual possession of Plot 12 Kampala Road, and have gone through an elaborate process of having it sold. Bids have been opened and matters are in a fairly advanced stage.

Order 37 r 1 grants the Court the power to "*grant a temporary injunction to restrain ... or make such other order for the purpose of staying and preventing the wasting, damaging, alienating, sale removal or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders.*"

The discretion given to Court is very wide. On the balance of convenience I am inclined not to grant the temporary injunction, but rather take up the clear offer of the undertaking given by the 2nd Respondent on its own motion and in good faith in the event that it is proved not to have the legal right to sale. In this way the concerns of the citizens of Uganda and the commercial interests of the Respondents which are also important shall be met.

In conclusion therefore, I give the following orders:

1. That the application for a temporary injunction against the Respondents is denied.

2. That the 2nd Respondent provide to Court an undertaking in the form of an on demand bond on itself or other reputable financial institution acceptable to the Registrar of this Court equal to value of the highest bid received for Plot 12 Kampala Road, Kampala, (i.e. US $5.7m). This undertaking shall lapse if on the final disposal of this case the Applicants lose or the matter is settled by the parties.

3. The Interim Order against the Respondents dated 21st June 2004 will automatically be vacated, on the 2nd Respondent providing Court the said undertaking above.

4. Given the very unique issues raised in this application, I believe justice is best served if all parties bear their own costs at this stage.

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Geoffrey Kiryabwire

Ag. J U D G E

22/07/2004

22/7/2004:

Mr. Mbabazi for the Applicants.

Mr. Kanyemibwa and Mr. Mulumba for 1st & 2nd Respondents.

Mr. D. Mpanga and Mr. Kalibala for the 3rd Respondent.

Mr. William Kasozi - Company Secretary for 2nd Respondent in Court.

Rose Emeru – Court clerk.

Court: Ruling read in open Court in the presence of the above persons.

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Geoffrey Kiryabwire

Ag. J U D G E

22/7/2004

Court: I would like to fix the main case for scheduling.

(Mr. Masembe also appears in Court).

Masembe: I propose the 15th September 2004 in the afternoon.

Mbabazi: It is okay.

Court: This matter is adjourned for scheduling on the 15th September, 2004 at 3.00 p.m. Parties are to file before then a memorandum relating to the scheduling.

(SIGNED)

Geoffrey Kiryabwire

Ag. J U D G E

22/7/2004