

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
HCT-00-CC-CS-0692-2007**

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**SPEAR MOTORS
LTD. :::::::::::::::::::::::::::::::::::PLAINTIFF**

VERSUS

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**1. ATTORNEY GENERAL
2. MOTORCARE (U) LTD
 :::::::::::::::::::::::::::::DEFENDANTS
3. INTERCAR (U) LTD**

BEFORE: HON. LADY JUSTICE IRENE MULYAGONJA KAKOOZA

15

RULING

The plaintiff is a limited liability company incorporated in Uganda who participated in a bid to supply motor vehicles to the Government of Uganda for use of VIPs that would attend the Commonwealth Heads of State and Government Meeting (CHOGM) which took place in Uganda in September 2007. She brought this suit against the defendants jointly and severally for breach of both the tendering and the contract of supply and for unlawful interference with contractual relations. She therefore sought the recovery of €1,311,902 as special damages with interest at commercial rate from 1/06/2007 until payment in full, as well as general damages for procuring a breach of contract and the costs of the suit. Before the hearing of the suit could begin, counsel for the 1st defendant raised several objections to the plaintiff's reliance on certain document in her evidence, and so this ruling.

In order to facilitate a better understanding of the context in which the objections arose and my decision in this ruling, it is important that I first set out the background to the objections. Preliminary hearings in the suit were held before me under rule 6 of Statutory Instrument-Constitution 6, The Constitution (Commercial Court) (Practice) Directions (referred to at the Court as "Constitution-6") with all the parties advocates present on 6/09/2011, 17/11/2011 and 8/12/2011. Rule 6 of Constitution-6 provides for preliminary hearings and sub-rule (6) thereof specifically provides that at such hearings all interlocutory matters should be dealt with, including the discovery and production of documents. The objections raised here have therefore had the effect of relegating this suit back to a stage that the court thought had been successfully concluded.

At the preliminary hearing held on the 6/09/2011, court proposed to counsel for all parties that they file and exchange witness statements to be used at the hearing, and that they also exchange and file bundles containing all documents to be relied upon at the hearing. This mode of proceeding was proposed in view of the large volume of documents that was already on file when I took on the matter. All counsel for the parties agreed to this plan of action for it was agreed that the evidence that was required in the matter was largely in documents and putting them in good order as a preliminary matter would save the parties and court a lot of time. Court then ordered that documents filed in court would constitute the exhibits to be relied upon by the parties and therefore bundles of documents had to be filed properly marked and tagged as exhibits, with an index to indicate page numbers at which each document was to be found. None of counsel for the parties objected

to this plan of action or to the order. Counsel for all of the parties finally complied with the order.

The plaintiff at the time still required the 1st defendant to produce certain documents to be relied upon to prove her case and they had
5 been indicated in a letter dated 5/05/2011 addressed to the Attorney General, for the attention of Ms Margaret Nabakooza (PSA). However, that letter did not clearly specify the documents that the plaintiff required but while before court on 6/09/2011, Mr. Frederick Mpanga for the plaintiff undertook to provide a detailed list of
10 documents which the plaintiff required the Attorney General to produce. Subsequently, by letter dated 3/10/2011 addressed to the Attorney General, Mr. Mpanga forwarded a list in two parts (A and B) as documents that the plaintiff required the Attorney General to disclose before the hearing as follows:

15 **PART A**

1. Minutes of the Tender Committee that made the award of the
8th May 2007;
2. Correspondence between the Ministry of Works & Transport
20 (MoWT) and Ministry of Finance, Planning & Economic Development (MoFPED), including but not limited to a letter dated the **3rd May 2007** referenced BPD 86/107/02;
3. Correspondence between the MoWT and Ministry of Foreign
25 Affairs (MoFA), including but not limited to a letter dated **24th November 2006** referenced MFA/CHOGM/37 and the letter from the Permanent Secretary MoWT to the MoFA and the CHOGM Cabinet Sub-Committee referred to by Mrs. Hilda Musubira in her letter of the **30th May 2005;**

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4. Correspondence between the MoWT or the MoFPED on the one hand and the office of the Vice President (OVP) on the other, including but not limited to a letter dated **28th May 2007** referenced OVP/IMC/08/6/12 and a letter dated the **9th July 2007** from the PPS to the Vice President, to the PS MoWT referenced OVP/IMC/08/6/12;
5. Minutes of the Technical Committee referred to in the letter dated **28th May 2007** referenced OVP/IMC/08/6/12;
6. Page 2 of the letter dated the **19th April 2007** from the Solicitor General to the Chairperson, Evaluation Committee, MoWT;
7. Correspondence between the Solicitor General, on the one hand, and the MoWT, the MoFA and the MoFPED, on the other, in respect of the tendering of vehicles for CHOGM;
8. Minutes of the CHOGM Cabinet Sub-Committee held on the **28th May 2007**;
9. Copy of request to PPDA and copy of PPDA approval for Direct sourcing;
10. Minutes of the Contracts Committee (CC) of the MoWT approving direct sourcing; And minutes of CC approving direct sourcing SBD;
11. Copy of Direct sourcing SBD/Solicitation Document in response to which Intercar/Motorcare bided to lease and supply; and A copy of the Motorcare/Intercar bid made in response to the direct sourcing; and
12. Report of the Evaluation Committee that evaluated the Motorcare/Intercar Tender (Direct Sourcing); and Minutes of the Contracts Committee approving the Motorcare/Intercar bid.

PART B

- 5
- i) Letter referenced ADM 51/97/01 dated **19th April 2007** from the Chairperson of the Evaluation Committee Ministry of Works and Transport to the Solicitor General.
- 10
- ii) Letter dated **13th April 2007** from Chairperson of Evaluation Committee to the Solicitor General which is referred to or is replied to by the Solicitor General's letter ref: 100/19 of **19th April 2007**.
- 15
- iii) Letter ref: ADM/F 185/195/1 written by the Permanent Secretary Ministry of Works and Transport to the Manager Spear Motors Ltd dated **8th May 2007**.
- 20
- iv) Letter dated **24th April 2007** written to the Permanent Secretary of Ministry of Works and Transport by the Executive Director, Public Procurement and Disposal of Public Assets Authority.
- 25
- v) Letter reference ADM/51/97/0/ dated **9th May, 2007** from the Permanent Secretary, Ministry of Works and Transport to the Principal Private Secretary to His Excellency the Vice President of Uganda.
- 30
- vi) Letter ref: PPDA/M 20/000 dated **5th April 2007** written to the Permanent Secretary, Ministry of Works and Transport by the Executive Director, PPDA.
- 35
- vii) Letter dated **17th November 2009** written by Permanent Secretary, Ministry of Works and Transport referred to/replied to by the Executive Director of PPDA in his letter of **18th November 2009** ref: PPDA/M 20/000 (Alluded to in the Attorney General's "other documents").
- viii) Letter dated **5th April 2007** ref: CHG 72/276/01 from the Secretary CHOGM Secretariat, to H.E. The President of Uganda.

On 11/10/2011, counsel for the Attorney General wrote to M/s Kalenge, Bwanika, Ssawa & Co, counsel for the plaintiff to inform them that her office was in the process of collecting the documents that the plaintiff sought disclosure of. In the same letter, counsel
5 pointed out that it was evident from the plaintiff's document bundles that were then before court and also in the possession of the Attorney General that the plaintiff already had possession of the documents in items i) to vii) of Part B of the list above. She did not object to the said documents forming part of the plaintiff's evidence
10 which as is evident from the list above were all correspondence between government departments, and also between them and the CHOGM Secretariat, and his H.E The President of Uganda.

Finally still in the process of disclosure, on 15/11/2011, the Attorney General wrote to all of the Advocates representing the plaintiff, i.e.
15 Kalenge, Bwanika, Ssawa & Co., Shonubi Musoke & Co., and A. F. Mpanga, Advocates in response to Mr. Mpanga's letter of 3/10/2011 as follows:

RE: CIVIL SUIT NO. 692 OF 2007
SPEAR MOTORS v. ATTORNEY GENERAL & OTHERS
(DISCLOSURE OF DOCUMENTS)

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The above matter refers and specific reference is made to yours dated 03.10.2011 of ref: CS-07-1488-07 and ours dated 11.10.2011 of ref: 692/2007.

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We have consciously addressed our minds to your notice requesting the production of documents and keenly considered the relevant law. Enclosed herewith are nearly all the documents under Part A of your list save for the one in paragraph 8 (Minutes of the CHOGM Cabinet Sub-Committee held on 28th May, 2007).

It is our considered opinion that:

5 a) The Minutes of the CHOGM Cabinet Sub-Committee are protected from disclosure by virtue of section 25 of the Access to Information Act, 6 of 2005 and sections 122 and 123 of the Evidence Act, Cap 6.

10 b) The Chairman of the CHOGM Cabinet Sub-Committee formally communicated the decision in regard to procurement of CHOGM vehicles vide his letters dated 28th May, 2007 and 30th May, 2007. The said letters are attached to the amended Written Statement of Defence and are reflected in Annexures "G" and "H" respectively.

15 c) The Minutes of the CHOGM Cabinet Sub-Committee are not necessary for the determination of the issues before court.

Our instructions therefore, are to decline to produce the said document under paragraph 8.

20 The document in Part B, paragraph (vii) which was not in your possession has also been availed."

25 A set of documents was attached to the letter and it was sent to the advocates and to court. It is apparent that by this letter, the Attorney General purported to control the manner in which the plaintiff would make out her case. He stood where the court should have stood to determine the relevance or admissibility of the minutes of the CHOGM Cabinet Sub-Committee Meeting that was held on 28/05/2007.

30 The parties went on and exchanged and filed witness statements and bundles of documents for the trial. The plaintiff filed altogether five Volumes of documents that she sought to rely on in evidence and the last of them was filed on 20/11/2011. The plaintiff's witnesses made written statements and they had all been filed by

20/11/2011. The Attorney General received all of the statements and bundles of documents filed in court and his representatives confirmed so when they appeared in court at the last preliminary hearing which was held on 8/12/2011. The transcript for those proceedings show that they did not object to any of the documents contained in the plaintiff's trial bundles becoming evidence in the suit nor express a need to go through them and then get back to the plaintiff's advocates.

The dates for the hearing of the suit had been fixed at the preliminary hearing that took place on 17/11/2011, and it was understood by all parties that the plaintiff's case would be heard on the 12/03/2012 and 13/03/2012. It was also agreed at that hearing that by 8/12/2011, all disclosure should have been completed and all witness statements filed for the witnesses to be called by all parties. That had not happened by the 8/12/2011 for all parties because the Attorney General was yet to file witness statements. But by the 8/12/2012 the plaintiff had filed all of her documents as well as all the witness statements for the two witnesses that she proposed to call to prove her case and served the Attorney General.

When the parties and their counsel appeared in court for the last preliminary hearing on 8/12/2011, it was understood that the witness statements would form the evidence in-chief led by the parties and that witnesses would appear in court only to verify on oath their written statements and then be cross-examined on them. Counsel for the Attorney General did not object to this plan and it was assumed that it was agreed between all parties that the

documents contained in the bundles of documents filed by all parties were documents that would form part of the evidence in the suit, of course subject to cross-examination on any of them and rejection if the court deemed it fit.

5 That being the process of the preliminary hearings, the parties and counsel appeared for the first scheduled hearing on 12/03/2012. But before the hearing could commence, Ms. Margaret Nabakooza for the Attorney General raised an objection or objections about the admission into evidence of certain documents that were referred to
10 by the plaintiff's 1st witness, Gordon Babala Kasibante Wavamuno in his statement filed in court on 16/11/2011. For a start she said the Attorney General never agreed to them being brought in evidence and they should be expunged from the record.

In her general objection, Ms. Margaret Nabakooza (PSA) submitted
15 that the Report of the Public Accounts Committee on CHOGM (hereinafter "the PAC Report on CHOGM" or "the PAC Report") referred to in the statement of Gordon Wavamuno, filed in court on 16/11/2011 and contained in Volume IV of the plaintiff's bundle of documents, could not be produced by the plaintiff and relied upon in
20 evidence because it was still a working document before Parliament. She asserted that the PAC Report had not be adopted by Parliament as is required by rule 177 (2), (3) and (4) of the Rules of Procedure of the Parliament of Uganda, and therefore it was not a part of the records of Parliament. She charged that the plaintiff had first to
25 prove that the report was adopted before she could rely on it in evidence. Ms. Nabakooza went on to submit that the CHOGM PAC Report could not be adduced in evidence by the plaintiff without

special leave of Parliament as is provided by Article 97 (2) of the Constitution. Further that s.73 of the Evidence Act defines public documents but the PAC Report on CHOGM did not fall within that definition. She thus prayed that the report be expunged from the
5 record.

Ms. Nabakooza also objected to the documents contained in Vol. II of the plaintiff's document bundles on the ground that they were all news paper articles. She said that the plaintiff was not in a position to tender them in evidence because the contents of the articles
10 would be hearsay evidence. She submitted that for the whole of Vol. II to be admitted in evidence the plaintiff had to call the authors of the articles or the editors of the various newspapers to tender them in and to testify about their contents. She relied on the decision of the Supreme Court in **Attorney General v. David Tineyfuza,**
15 **Constitutional Appeal No.1 of 1997.**

Counsel for the Attorney General also objected to an unspecified set of correspondence referred to in Gordon Wavumuno's statement dated 16/11/2011. She said the Attorney General objected to them unless they were produced by the addressees, or officers from the
20 Ministry of Works from whence they originated or the various government departments. She said there were about 15 - 20 documents objected to and they all had to be expunged from the record of the court since they could only be admitted if the plaintiff called competent witnesses to testify and produce them.

25 Ms. Nabakooza further complained that the plaintiff sought to rely on a series of minutes of the CHOGM Cabinet Sub-Committee

contained in Vol. V of the plaintiff's bundle of documents because they were all not signed. She also objected to the plaintiff relying on any of the minutes of that Committee because they were protected from disclosure by s.25 of the Access to Information Act which
5 prohibits access to Cabinet minutes except by authorized officers. She also relied on s.122 of the Evidence Act for the submission that unpublished official records shall not be admissible save with the permission of the head of department from whence they originated. She also referred to Article 111 (4) of the Constitution and
10 submitted that the plaintiff's witness was not in a position to testify about the contents of the minutes except if they were first produced in evidence by the Secretary to Cabinet who is in charge of their custody.

Counsel for the Attorney General also demanded that the plaintiff
15 produce the original of a letter dated 8/05/2007 from the PS Ministry of Works & Transport to the plaintiff before it is admitted in evidence. And that short of that, the photocopy that was contained in Vol. I of the plaintiff's bundle of documents should be expunged from the record before the plaintiff's witnesses are cross-examined
20 on it. Ms Nabakooza stated that she raised the objections at the time that she did because the court indicated at the preliminary hearing that there would be no examination in-chief of witnesses testifying in the matter and that witnesses would appear in court only to be cross-examined on written statements. That as a result,
25 no opportunity was availed to her to object to any of the documents referred to in the plaintiffs' witnesses' statements.

In reply Mr. Bwanika and Mr. Mpanga for the plaintiff complained that counsel for the Attorney General had ambushed them with her objections. That she could have notified them of the intention to raise them earlier on because the documents and statements
5 complained about had been in her possession since December 2011 before the matter was called on for the last preliminary hearing. Further that the list of documents objected to by the Attorney General was not so specific as to enable them to make a comprehensive reply immediately. They also complained that the
10 objections were raised with the intention of frustrating and/or delaying the hearing of the case. They thus requested that counsel for the Attorney General do clarify the specific correspondence from government departments to which she objected, so that they could respond to her objections. She then produced a list headed
15 “Documents in Issue” showing the specific documents objected to as follows:

- i) A letter dated 8/05/2007, from the PS Ministry of Works and Transport, C. Muganzi, to the Manager Spear Motors Ltd. captioned EVALUATION REPORT FOR THE PROCUREMENT OF
20 EXECUTIVE SALOON CARS FOR VIP USE DURING CHOGM, 2007;
- ii) Letter dated 22/02/2007 which was included at page 142A of Vol. I of the Plaintiff’s bundle of documents, from H.E the President of Uganda to Ms. Hilda Musubira, the Executive Director of the CHOGM Secretariat;
- 25 iii) Letter dated 5/04/2007 from the Executive Director of the CHOGM Secretariat to H.E the President of Uganda which was included at page 142B of Vol. I of the Plaintiff’s bundle of documents;

- iv) News paper articles that were included in Vol. II of the plaintiff's bundle of documents;
- v) All the contents of Vol. III of the plaintiff's bundle of documents, which consisted of computations by the plaintiff's officers of loss said to have been incurred by the plaintiff as a result of the cancellation of the tender for the CHOGM vehicles;
- vi) Correspondence and any other documents obtained from a certified copy of the Public Accounts Committee Report based on the Special Audit Report of the Auditor General on CHOGM 2007 which was contained in Vol. IV of the Plaintiff's bundle of documents at B and Marked GW2;
- vii) Proceedings in HCT-00-ACD-00-CSC-94-2011, wherein Professor Gilbert Bukenya, who was the Chairperson of the Cabinet Sub-Committee on CHOGM, was charged for abuse of office c/s 11 of the Anti Corruption Act, 2009 (at pages 390-414 of Vol. IV of the plaintiff's bundle of documents;
- viii) Statement of the IGG contained in Vol. IV of the plaintiff's bundle of documents (at page 415) wherein it was stated that the proceedings in the above criminal case against Professor Gilbert Bukenya were discontinued to make way for the hearing of the instant case;
- ix) Minutes of the Cabinet Sub-Committee Meeting held on the 28/05/2007 at the Cabinet Board Room, contained in Vol. IV of the plaintiff's bundle of documents at page 416;
- x) Four sets of copies of minutes of meetings of the Cabinet Sub-Committee on CHOGM held in diverse places on 11/07/2006, 28/10/2006, 20/11/2006 and 12/02/2007 contained in Vol. V of the plaintiff's bundle of documents from page 88-134.

Court then adjourned to enable counsel for the plaintiff to respond to the objections and they did so on the 13/03/2012. Regarding the objection to admission of the PAC Report, or any of its Annexure, Mr. Bwanika said that the report in issue was dated 11/05/2010 and that an original of the document duly certified by the Clerk to Parliament had been availed to court. The printed report itself was shown to the court and retained as part of the record. Mr. Bwanika also submitted that the report had been tabled, debated and the debate concluded. That a motion had in fact been adopted about the report and as far as Parliament was concerned the consideration of the PAC Report was concluded though the report was shelved. He relied on a copy of the Parliament of Uganda eNewsletter, Vol. 4 Issue No.27 for the period Monday April 11, 2011 to Friday April 15, 2011 for his submissions. Court was availed the opportunity to observe the web page on a computer in the possession of counsel for the plaintiff but the specific copy of the newsletter was later downloaded from the website of the Parliament of Uganda.¹

Mr. Bwanika went on to submit that under rule 177 of the Rules of Procedure of Parliament it was required that the report be signed by at least 1/3 of the Committee and laid on the table. That the report produced and relied on by Mr. Wavumuno in his statement showed that it was signed by 12 out of 20 members of the PAC. That the debate on the report was concluded and prosecution of some of the people that were implicated in the report ensued. He further submitted that under s.73 (a) (iii) of the Evidence Act, the report was already a public document because it is a record of the legislative arm of government. He produced a letter dated

¹ <http://www.parliament.go.ug/enewsletter>

16/11/2011 in which M/s Shonubi, Musoke & Co, for the plaintiff applied for a certified copy of the report from the Clerk to Parliament and relied on s.75 of the Evidence Act for the submission that it was duly certified by the Clerk as is required by law.

5 Mr. Bwanika also referred me to s.78 of the Evidence Act for the submission that court ought to presume from the certificate on the document that it was duly certified and that rebuttal of the fact would be by producing evidence to the contrary. He also called on court to take judicial notice of the fact that the report was debated
10 by Parliament and concluded and that it was in the public domain and discussed by members of the public and the media. He referred me to the decision in the case of **Sam Osingida v. David Opolot [1993] 1 KLR 102**, where court took judicial notice of a state of insurgency in eastern Uganda, for the principles applicable where
15 courts take judicial notice of facts.

Mr. Bwanika went on to submit that counsel for the Attorney General misled court when she relied on Article 97 of the Constitution for the assertion that the report could not be relied on in evidence. He said that the prohibition in the provision relates to
20 Members of Parliament (MPs) and other officers of Parliament and not to third parties relying on documents or records of Parliament in evidence. He explained that an MP and an officer are defined in s.1 of the Parliamentary (Powers and Privileges) Act and Article 97 of the Constitution was intended to protect MPs and officers and to
25 maintain parliamentary privilege. It therefore did not preclude third parties from relying on records of Parliament as evidence in court for they are public documents.

Mr. Bwanika then asserted that the plaintiff was protected by Article 41 of the Constitution which guarantees the right of citizens to access information in the possession of the State or any other organ or agency of the State except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to the privacy of any person. He went on to state that the foundation on which the PAC Report was produced and relied on by the plaintiff's witness was well laid out in his statement where he explained how he became privy to the report which had come into the public domain. He asserted that the PAC Report and the Auditor General's Report from which it originated came into the public domain and all that was contained in them ceased to be secret information. That as a result any person that tried to stifle the production of the CHOGM PAC Report would be trying to hide something and in this case, trying to prevent a fair hearing.

Mr. Bwanika also complained that the State did not adduce evidence to show that the use of the PAC Report in evidence in these proceedings would be prejudicial in the terms of Article 41 (1) of the Constitution, other than alleging a technicality to prevent its use. He referred me to the case of **Attorney General v. David Tinyefuza** (above) in which a similar situation arose and where the Constitutional Court, and the Supreme Court after it, found that the burden to prove that the use of the information would be prejudicial lies on the State. Further that the Supreme Court in the same case warned other courts against the use of technicalities of this nature to stifle the production of evidence. He pointed out that the circumstances of the case were such that evidence that is said to be

privileged is already in the public domain and before court. Further that the relevance of the report was not in its recommendations but in the information revealed in documents attached to the report which came to light during the investigations carried out by the
5 Public Accounts Committee and the Auditor General. That the said documents would not have become available to the plaintiff had the PAC Report not come into the public domain.

About the relevance of the documents in issue, he demonstrated it with a letter of the then Vice President dated 28/05/2007 to the
10 Executive Director of the CHOGM Secretariat contained in the 1st defendant's trail bundle at section "G." He pointed out that in the said letter Professor Bukenya referred to the minutes of the CHOGM Cabinet Sub-Committee that are in contention here. He then submitted that the minutes are a very important piece of evidence
15 for the plaintiff's case and they had come into the public domain; they were talked about even on the streets following the Auditor General's Report. That in the proceedings before the Anti-Corruption Court certain matters in those minutes were extracted verbatim. He then asserted that the plaintiff would not have a fair hearing if she
20 was prevented from relying on the minutes in contention. He referred me to the provisions of s.4 of the Evidence Act which provides for matters that are relevant to prove a claim.

Mr. Bwanika went on to state that it was on record that the plaintiff made an effort to go through the process of discovery as is provided
25 for by the Civil Procedure Rules (CPR) but the Attorney General in a letter dated 15/11/2011 only selectively made disclosure and informed the plaintiff that certain documents were not necessary to

prove her case. Regarding the letter dated 8/05/2007, copy of which the Attorney General demanded that the plaintiff produces the original of, Mr. Bwanika said his client could not trace it in her records. He prayed that court admits the photocopy supplied in
5 evidence under the provisions of the Evidence Act. That the Attorney General intended to rely on the same letter save that the copy that was included in his bundle of documents at section “F” had a marking that read “cancelled” superimposed across it.

With regard to the sets of minutes of the CHOGM Cabinet Sub-
10 Committee which counsel for the Attorney General complained were not signed, Mr. Bwanika said that signed copies were included in the PAC Report that was filed in court. He then submitted that the probative value of the documents objected to would be determined by the court and therefore, the 1st defendant should not stifle the
15 trial by objecting to documents. He prayed that the trial do proceed on its merits and not on technicalities.

Mr. Mpanga, also for the plaintiff, addressed the objection to the newspaper articles in Vol. II of the plaintiff’s bundle of documents. He said that they were not produced to prove the contents of the
20 stories in them; rather they were to prove that there was media frenzy when the tender that had been awarded to the plaintiff was cancelled. He also submitted that the media frenzy referred to by Mr. Wavumuno in his statement was negative publicity for the plaintiff because a brand is one of the valuable assets held by a
25 company. And that how the public perceives the brand is shaped by the media, among other things. He charged that the image of the plaintiff was injured because she was at the time that the stories

were published associated with corruption and dodgy and sham procurement processes. That as a result the plaintiff would rely on the fact that these stories were published as negative publicity in its proof of general damages.

5 Mr. Mpanga then referred court to the text in Adrian Keane's Modern Law of Evidence at page 176 for a definition of hearsay evidence and to page 182 for the exceptions to the hearsay rule. He then submitted that the articles to be relied on by the plaintiff did not constitute hearsay evidence but proved a fact that had occurred;
10 that the plaintiff participated in the tendering process for CHOGM vehicles and lost the tender. He asserted that this too was in the public domain and it reflected badly on her.

Mr. Mpanga pointed out that there was an issue here as to whether what was contested was to do with admissibility or the weight to be
15 attached to particular evidence. That the fact that we have an adversarial judicial process in Uganda should not mean that parties should have a contest about everything in a case. He relied on the provisions of Article 41 of the Constitution and the Evidence Act on relevancy of facts and submitted that the evidence in contention
20 was admissible and court would attach its own weight to it.

Mr. Mpanga pointed out that if the court were to order that documents complained about be expunged from the plaintiff's witness statements that would not be the end of the matter. They would be expunged but the plaintiff would still pursue other means
25 of having the documents brought before court, say by calling witnesses to produce them who were, though from government

departments, capable and compellable witnesses. That the trial would be delayed but there still would be a trial after those witnesses are summoned to produce the documents. He also drew it to the attention of court that the plaintiff had since the objection to the proceedings from the Anti-Corruption Court was raised obtained a certified copy of them which was deposited in court. In the spirit of Article 126 (2) (e) of the Constitution he prayed that the objections be overruled.

Mr. Kibaya co-counsel for the plaintiff emphasized the distinction between producing the newspaper articles in Vol. II of the plaintiff's bundle of documents for their contents as different from producing them for having been published. He referred to the decision in **Attorney General v. David Tinyefuza** (above) for his submissions. He emphasized the supremacy of the Constitution as it relates to the Attorney General's objections and relied on the decision in **Greenwatch (U) Ltd. v. Attorney General HCCS 139/2001**, where it was held that a company just as does a citizen has the right of access to information in the terms of Article 41 of the Constitution. He prayed that the objections be overruled with costs and that a certificate ought to be issued for three counsel.

In rejoinder, Ms. Nabakooza submitted that the burden was upon the plaintiff to produce a copy of the Hansard, the official report of Parliament, to prove that the PAC Report was adopted by Parliament. Further that the plaintiff had no authority to sever the annexure to the CHOGM PAC Report from it for they too had to be adopted by Parliament. She complained that the plaintiff produced a letter in which she sought to use the report in evidence but it was

dated 13/03/2012, a day after the objection was made. She submitted that the plaintiff's efforts to seek for permission to use the report in evidence were belated and they should not be accepted by court. Rather the report should be expunged from the record as earlier prayed.

Regarding the submission that the plaintiff is entitled to access to cabinet minutes, she said that they are specifically protected by s.25 of the Access to Information Act which is specific about how they should be accessed. In her view, the main issue here was that the plaintiff was under the obligation to follow the law in her efforts to access information, not circumvent it by producing secondary evidence. She said that the assertion in the Attorney General's letter of 15/11/2011 was a warning to the plaintiff that there would be an objection to the use of the minutes of the Cabinet Sub-Committee on CHOGM; that the plaintiff's counsel ought to have heeded this warning and not included the minutes in her witness's statements.

Going on to the letter of 8/05/2007, Ms Nabakooza said that counsel's plea from the bar that the original could not be found and so a Photostat copy ought to be allowed in evidence was belated. She said that it was strange that the plaintiff now could not find the original when the 1st defendant had pleaded in paragraph 6 (g) of her amended WSD that the version produced by the plaintiff would be contested since it was not the correct version. She asserted that the correct version of the letter had writing on both sides while that which was produced by the plaintiff had writing on only one side. She maintained that the Attorney General objected to it and relied on the decision of Mulenga, JSC (as he then was) in **Attorney**

General v. David Tinyefuza for the submission that originals of documents attached to pleadings should be produced in evidence. She relied on the same decision for the submission that witnesses should always be called to produce such documents, except where
5 the opposite party agrees to their admission.

Ms. Nabakooza concluded her submissions with the assertion that the minutes that were not signed and all the documents referred to by the plaintiff's witnesses in their statements were fundamentally flawed and they ought to be expunged from the record. She then
10 threw caution to the wind and asserted that if the plaintiff wishes to rely on the contested documents then she should call the witnesses that have custody of them or other competent witnesses to produce them in court. She said that the plaintiff's witnesses could not even be cross-examined upon the documents as they stand for it is not
15 worth it.

Counsel for the Attorney General went on to complain that there were no guidelines as to when a party could object to use of documents brought in through a written statement of a witness. She asserted that because of that her objections were brought at the
20 right time, i.e. before any cross-examination of the witnesses could take place. She finally submitted that costs were not due to the plaintiff's counsel on account of the objections raised for they would form part of the costs for the whole suit. She prayed that the costs be disallowed and that the objections be upheld.

25 Several issues fall for determination of this court arising from the submissions above as follows:

- i) Whether the witness statements filed by the plaintiff constituted part of the court record at the time that the objections were raised so that they could be expunged from it;
- ii) Whether the CHOGM PAC Report was adopted by Parliament within the meaning of rule 177 of the Rules of Procedure of the Parliament of Uganda;
- iii) Whether the CHOGM PAC Report forms part of the records of the Parliament of Uganda;
- iv) Whether the CHOGM PAC Report is a public document within the meaning of s. 78 of the Evidence Act;
- v) Whether the CHOGM PAC Report and all Annexure to it constituted information that is protected by the Parliament (Powers and Privileges) Act and Article 97 of the Constitution of the Republic of Uganda ; and if not,
- vi) Whether the plaintiff could produce in court and rely on the correspondence from government departments that were Annexure to the CHOGM PAC report as evidence in her suit without calling the authors, recipients or other competent witnesses to produce them;
- vii) Whether the plaintiff could rely on the minutes of the Cabinet Sub-Committee Meeting on CHOGM contained in the PAC Report without calling an authorised officer as a witness to produce them in court.
- viii) Whether the plaintiff could produce in evidence the information about the losses said to have been sustained by cancellation of the tender in dispute which is contained in Vol. III of her document bundles.
- ix) Whether the newspaper articles in Vol. II of the plaintiff's document bundle are hearsay evidence and therefore

inadmissible till the plaintiff calls the authors of the articles to produce them.

Regarding the 1st issue, there are no rules of court in Uganda to guide the use of witness statements. However, witness statements
5 have been used in the Commercial Court from as far back as 2004 and practice had developed as to how they are employed. In other jurisdictions, there are rules and practice directions in that regard. For example, Part 32 of the U.K. Civil Procedure Rules of 1998 provides for evidence including the use of witness statements. It is
10 supplemented by Practice Direction 32 which articulates the contents of the rules and informs practice.

The genesis of the use of witness statements in the Commercial Court is to be found in Constitution-6.” Rule 5 thereof provides that the ordinary rules of procedure of the High Court will apply to all
15 commercial actions, subject to the clarifications set forth in the Practice Direction. It is further provided that procedure in and progress of a commercial action shall be under the direct control of the commercial judge who will, to the extent possible, be proactive. One of the practices that has developed from this rule is the use of
20 witness statements and many disputes have been concluded using them. The practice was endorsed by the judges of this court and Administrative Circular No. 1 of 2012 was issued by the Head of the Court on 16/01/2012 and posted at doors of the court here.

The witness statements filed here were attacked for referring to
25 information that is alleged to be restricted by law. However, the statements were not taken under oath and the witnesses had not

yet taken oath before court in order for them to verify that they made them. It is only after a witness verifies on oath that he/she did make a statement that it is admitted in evidence as his testimony after which the witness may further testify orally on matters not
5 included in the written statement. Thereafter he/she is cross-examined on any matters contained in the statement and any additional testimony given orally. Since the witnesses had not yet taken their oaths or verified the statements as their own, they were still merely statements on the record. They were not evidence and
10 thus cannot be expunged.

Going on to the issue whether the CHOGM PAC Report was adopted by Parliament within the meaning of rule 177 (2) of the Rules of Procedure of the Parliament of Uganda, the extract of the said rules which counsel for the 1st defendant referred me to did not state
15 which Parliament they related to. I say so because it is the practice that each Parliament makes its own rules and is not necessarily bound by the rules of the previous Parliament. However, I later established that the 9th Parliament still operates under the Rules of Procedure that came into force on 14/06/2006, though it is in the
20 process of amending them to suit its purposes. Rule 177 thereof provides as follows:

“177. Report to be signed by Chairperson and Members

A report of a Committee shall be signed by at least one third
25 of all the Members of the Committee, and shall be laid on the Table.

(1) Debate on a report of a Committee shall take place at least three days after it has been laid on the Table by the

Chairperson or the Deputy Chairperson or a Member nominated by the Committee or by the Speaker.

(2) The Chairperson or a Member of the Committee may move in the House that the report from the Committee be adopted.

5 (3) The report of the Committee shall form part of the record of the House.”

I perused the copy of the eNewsletter of the Parliament of Uganda, (Vol. 4 Issue No 27) which was produced and relied upon by counsel for the plaintiff to assert that the CHOGM PAC Report was debated
10 and concluded and became a record of Parliament. The document states that it is published by the Parliament Public Relations and Information Office. The public is invited to subscribe to the newsletter and the address is provided in it.² The eNewsletter is therefore available to the public without restrictions. For that
15 reason, I do not agree with the submission of counsel for the Attorney General that proof that the CHOGM PAC Report was debated and concluded could only come by way of a copy of the Hansard detailing the proceedings where it was debated. In the eNewsletter produced by the plaintiff’s counsel, it was reported as
20 follows:

*Parliament concluded debate and consideration of the PAC CHOGM report by adopting a motion tabled by Rukungiri Woman MP Winfred Masiko who proposed that all political
25 leaders adversely mentioned in the report and (sic) had explained their involvement in CHOGM preparations to the satisfaction of Parliament be excluded from the report. The motion also sought to have all government officials adversely mentioned in the PAC report explain their circumstances to*

² <http://www.parliament.go.ug/enewsletter/index.php/home/subscribe>

the head of public service. MPs also approved that all private companies and individuals mentioned in the PAC report be exonerated. MPs encouraged other government departments to continue carrying out investigations into CHOGM independently. The opposition walked out of the chamber of Parliament before consideration of the motion.”

The Newsletter further stated that the consideration of the CHOGM 2007 PAC Report was thereby concluded, meaning that the proposed resolutions were carried on that motion not to do anything about the recommendations in the report in as far as they related to political leaders who had satisfactorily explained their actions to Parliament. However, government officials still had to explain away the adverse reports about them to the Head of the Public Service while private companies adversely mentioned were exonerated. There is no doubt that the motion was carried to deal with the report in the manner proposed since all members of the opposition walked out of the house before consideration of the motion. No action was to be taken against persons implicated and so recommendations were not adopted. I believe that is why counsel for the plaintiff stated that the report was “shelved.”

As to whether the report then became a record of Parliament within the meaning of rule 177 (3) of the Rules of Procedure is to be inferred from the fact that it was “shelved.” Ordinarily records of public bodies are shelved and so it was with this report. But in addition to that, rule 198 of the Rules of Procedure of Parliament provides for records in the following terms:

198. Records

(1) The Clerk shall-

(a) be responsible for making entries and records of things done and approved or passed in the House;

(b) have custody of all records and other documents belonging or presented to the House; and

5 (c) keep secret all matters required by the House to be treated as secret and not discuss them before they are officially published.

10 (2) The records kept under this rule shall be open to the inspection of Members under such arrangements as the Speaker may direct.

The word “records” is not defined by the Rules of Procedure of Parliament but s.4 of the Access to Information Act defines the term “record” to mean “any recorded information, in any format, including an electronic format in the possession and control of a public body, whether or not that body created it.”

My understanding of rule 177 (3) of the Rules of Procedure of Parliament is therefore that it automatically follows from the main rule 177. That once the signed report is laid on the table it becomes a record of the House under sub-rule (3). The debate and adoption of the report are two other separate matters and whether or not the report of a committee of Parliament is adopted or not seems to me to be irrelevant to its becoming a record of Parliament. I therefore could not read it into sub-rule (3) that it is in any way connected to sub-rule (2) of rule 177 of the Rules of Procedure of Parliament. If the framers of the rule had meant to make the reports of the committees of Parliament records only after they were adopted by the House, then they would have specifically said so.

Going on to the 4th issue, which was whether the CHOGM PAC Report then became a public document, s.73 of the Evidence Act defines public documents. It is there provided that documents forming the acts or records of the acts of the sovereign authority, the official
5 bodies and tribunals and the public officers (legislative, judicial and executive) whether of Uganda or any other part of the Commonwealth, Ireland or a foreign country, as well as public records kept of private documents are all public documents. The CHOGM PAC report became part of the records of the Uganda
10 legislature when it was tabled before Parliament, debated and “shelved.” It is thus a public document accessible according to the rules relating to access to such documents.

The 5th issue was whether the CHOGM PAC Report and all annexure to it constituted information that is protected by parliamentary
15 privilege. Starting with the Constitution, Article 97 (1) provides that the Speaker, the Deputy Speaker, members of Parliament and any other person participating or assisting in or acting in connection with or reporting the proceedings of Parliament or any of its committees shall be entitled to such immunities and privileges as Parliament
20 shall by law prescribe. The immunities and privileges are then provided for in the Parliament (Powers and Privileges) Act.

Article 97 (2) which is what counsel for the Attorney General sought to rely on goes on to provide that:

25 **“Notwithstanding article 41 of this Constitution, *no member or officer of Parliament and no person employed to take minutes of evidence before Parliament or any committee of Parliament shall give evidence elsewhere in respect of the contents of such minutes of evidence***

or the contents of any document laid before Parliament or any such committee, as the case may be, or in respect of any proceedings or examination held before Parliament or such committee, without the special leave of Parliament first obtained.” {My Emphasis}

5

There is no doubt in my mind that the provision above is very specific about its intent. It prohibits MPs and other officers of Parliament and other persons employed to take minutes of Parliament and its committees from giving evidence about the contents of the minutes taken before the two components of Parliament in any forum outside Parliament. The provision is reproduced in s.14 of the Parliament (Powers and Privileges) Act. The rationale for the provision is to be found in s.13 (1) of the same Act which provides that,

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“Every person summoned to attend to give evidence or to produce any paper, book, record or document before Parliament or a committee of Parliament shall be entitled, in respect of the evidence or the disclosure of any communication or the production of any such paper, book, record or document to the same right or privilege as before a court of law.”

20

But what is the protection or privilege accorded to witnesses regarding the evidence given before Parliament or its Committee? This was the subject of the decision of the Supreme Court in **Attorney General v. Tinnyefuza** and Oder, JSC (RIP) explained it at page 55 of his judgment. The witness is entitled to immunity from civil action (mostly slander) for his/her utterances or from prosecution for any criminal offence. If he is an employee of the government then he is protected from any disciplinary proceedings

25

as a result of his utterances. It is for that sole purpose that the evidence taken before a committee of Parliament or Parliament is protected from disclosure. And so in the **Tinyefuza case**, the Supreme Court ruled that Major General David Tinyefuza was
5 immune to disciplinary action by his employers on account of the disclosures that he made to the Parliamentary Sessional Committee on Defence and Internal Affairs about the war in Northern Uganda. Any threat to discipline him regarding the evidence he gave before the Committee was found to be in contravention of Article 97 of the
10 Constitution.

I must next consider whether the CHOGM PAC Report falls within the ambit of what is prohibited by Article 97 and s.14 of the Parliament (Powers and Privileges) Act. I think that the privilege or protection that is accorded by the two provisions is with regard to minutes of
15 evidence – i.e. the words uttered by a person before Parliament or any of its committees and documents produced. And such protection is in respect of the use of the evidence in any other forum against that person for purposes of prosecution or disciplinary action against of that person, or in an action for slander.

20 Now, the CHOGM PAC Report does not contain minutes of evidence before the Public Accounts Committee. In fact the report sanitises the evidence and presents a picture of what PAC perceived from the evidence. It only reveals the general findings and recommendations that resulted from the evidence taken by PAC without stating what
25 information was given by any particular witness that appeared before it. I therefore did not perceive that the rule in s. 14 (1) of the Parliament (Powers and Privileges) Act extends to the report.

Regarding the documents annexed to it, the plaintiff seeks to rely on the following documents as stated in paragraphs 28, 29 and 34 of the witness statement of Gordon Wavamuno:

5 i) A letter from the Ministry of Internal Affairs Ref. MFA/CHOGM/34 dated 24/11/2006 addressed to the Minister of Works and Transport and signed by Sam K. Kuteesa (Annex 4 (e) to the report);

10 ii) Annex 41 to the report, a letter from Sam K. Kuteesa & Co, Advocates to Posta (U) Ltd. and a form containing the Particulars of Directors and Secretaries of Intercar (U) Ltd presented by Capital Law Partners to the Registrar of Companies, as well as the memorandum and articles of association of that company prepared by the same law firm;

15 iii) Minutes of the Emergency CHOGM Cabinet Sub Committee Meeting on Transport called by the Vice President and held on 28/05/2007 attached to Annexure 4C of the report;

iv) Minutes of the CHOGM Cabinet Sub Committee Meeting on Transport held on the 4/12/2006, Annex 36 to the PAC Report;

20 The other correspondence sought to be relied upon was in the letter of 3/10/2011 and counsel for the Attorney General noted that the plaintiff had copies of it in her letter dated 11/10/2011 but she did not object to its coming in as evidence. Mr. Wavamuno stated in paragraph 36 of his statement that the Attorney General refused to disclose documents during the preliminary hearings in this suit.
25 Although only the minutes of the Emergency CHOGM Cabinet Sub Committee Meeting on Transport held on 28/05/2007 were requested for, the Attorney General's counsel stated in her letter

dated 15/11/2011 that she had instructions not to produce them because they were protected by s.25 of the Access to Information Act and ss. 122 and 123 of the Evidence Act. I believe the same response would have been obtained if the plaintiff had requested for
5 other minutes of the CHOGM Cabinet Sub-Committee Meetings on Transport. The plaintiff claims that it is for that reason that her officers engaged in other processes to discover these documents and then chanced upon them in the CHOGM PAC Report.

There is no doubt that the documents became available to the
10 Public Accounts Committee during its sessions where the witnesses before it enjoyed immunity. Whether the document fall within the ambit of Article 97 of the Constitution and s. 14 of Parliament (Powers and Privileges) Act is what has got to be determined, among other things. The two provisions as is shown above are
15 identical. The prohibition to appear and give evidence about the contents of documents adduced in evidence is directed at “members, persons employed to take minutes of evidence before Parliament or any committee.” The prohibited material is the content of the minutes or documents produced before Parliament or
20 any of its committees. It is those persons that have to obtain special leave of Parliament before they can testify about the contents of the minutes or the contents of documents adduced in evidence. And with all due respect to counsel for the Attorney General, the certification of a document to be relied upon in evidence is not
25 testimony before a court. It is the person that produces the document that testifies about it or its contents. I am also unable to say that the prohibition extends to reports of the Committees that have become records of Parliament, as is the case here. It is also my

view that when the documents above stated were annexed to the PAC Report, they ceased to be evidence before PAC and became part of the PAC Report.

5 Would the minutes of the CHOGM Cabinet Sub-Committee on transport then still maintain their protection under s.25 of the Access to Information Act? S. 25 of the Act provides that cabinet minutes and those of its committees shall not be accessible to any person other than an authorised officer. The authorised officer is not defined by the Act but the Attorney General also pleaded protection
10 of the minutes by s.122 of the Evidence Act which provides as follows:

“122. Evidence as to affairs of State.

15 No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold that permission as he or she thinks fit.”

In this case, as I have already found, the minutes were no longer
20 minutes *per se*. They had become part of an official record and a public document, the CHOGM PAC Report. By letter dated 16/11/2011 before the PAC Report was deposited in this court as part of the plaintiff’s trial bundle, M/s Shonubi Musoke & Co. Advocates wrote to the Clerk to Parliament. They informed him that
25 they were conducting this suit in court and requested him to certify copies of the CHOGM PAC Report. He obliged and certified copies of the report, which it is apparent from the letter the plaintiff already had in her possession, and they were.

As was pointed out by counsel for the plaintiff, the provisions of s.122 of the Evidence Act were also the subject of the decision of the Supreme Court in **Attorney General v. David Tinyefuza**. In that case the petitioner produced before the Constitutional Court and relied upon a transcript of a radio message from the President of Uganda to the Minister of State for Defence. It referred to the petitioner's testimony before a Parliamentary Sessional Committee where the petitioner had testified about the war in Northern Uganda as an officer in the National Resistance Army. The document was objected to when produced in evidence before the Constitutional Court but the objection was overruled. The Supreme Court found that the Constitutional Court was correct when it overruled the objection. It then held that the transcript formed part of public records.

Regarding the provisions of s.121 (now 122) of the Evidence Act, Oder JSC ruled:

"The effect of this section is that where a matter (is) related to the affairs of state evidence of it could be inadmissible in court if it came from unpublished official records relating to any affairs of State except with the permission of the officer at the head of the department. In the instant case consent was not available. From the perusal of a passage in Field's Law of Evidence, it is clear that it is not enough for the officer at the head of the department or counsel for the State to claim privilege. The State has a duty to establish that privilege. The State has a duty to establish that the privilege applies. It is possible for a court to find that the privilege does not apply, depending on the facts of a case."

The learned judge went on to discuss the principles behind s.122 of the Evidence Act and he quoted from Fields Law of Evidence at page 5289 where the first principle was enunciated with regard to s.123 of the Indian Evidence Act, similar to s.122 of the Uganda Evidence Act that:

“It is no doubt true that section 123 is a recognition of the principle that interests of all subjects of the State is superior to the interest of anyone of them, but at the same time, the State must show that the claim of privilege strictly falls within the four corners of the provisions of the law which tends to deprive the subject of evidence on matters directly in issue.”

In this case, the particular copy of the minutes that were requested for by the plaintiff was not availed to her on the ground that they were protected by s.25 of the Access to Information Act. However, the reason for the privilege that they enjoyed has never been established. In her letter of 15/11/2011, in response to the request for the minutes of the CHOGM Cabinet Sub-Committee Meeting, among others, counsel for the Attorney General did not state why the State declined to produce the minutes. She merely cited the law and said that they were protected. Neither did she inform court in her submissions here why the particular set requested for and all the others contained in Vol. V of the plaintiff’s bundles should not be allowed in evidence. All she said was that some of the minutes were not signed. In response to that the plaintiff now intends to rely on copies of the minutes contained as Annexure to the CHOGM PAC Report and they are all signed.

Perhaps it is pertinent to the determination of the particular objection that I lay down the reasons why the Attorney General should not object to production of the minutes in dispute for I am of the opinion that they are not privileged. The suit that is now before
5 court is a result of the workings of government in the procurement of vehicles for an important event that occurred in this country. Procurement in Uganda is governed by the Public Procurement and Disposal of Assets Act (hereinafter “the PPDA Act”). The Act lays down definite structures in government that should take charge of
10 and carry out procurement of goods and services for government departments and local governments in s.24. Under that provision, procuring and disposing entities are defined and they are to be headed by an accounting officer. There should be a contracts committee or tender board, a procurement and disposal unit, a user
15 department and an evaluation committee.

The basic principles of public procurement and disposal are set out in Part IV of the Act and they are non-discrimination, transparency, accountability and fairness, ethics, and confidentiality, among others. Under confidentiality, i.e. in s.47 of the Act, it is provided
20 that a procuring and disposing entity shall not, except when required to do so by an order of court, disclose any information where the disclosure would amount to a breach of law, impede law enforcement, prejudice legitimate commercial interests of the parties, inhibit fair competition or in any way not be in the public
25 interest. Because of these principles, a procuring and disposing entity is by s.56 of the Act required to maintain detailed records of all its proceedings and to preserve, maintain and safeguard all

relevant documents it issues and receives, lest the procurement or disposal process is challenged or questioned.

Regarding the procurement of goods and services for CHOGM, it seems government introduced parallel structures in entities that got
5 involved in the procurement including the CHOGM Cabinet Sub-Committee on Transport. These entities unfortunately included ministers and the Vice-President in this case. If the parallel entities that participated in procurement operated under the PPDA Act, then the minutes of the Cabinet Sub-Committees could not remain
10 privileged. It appears to me that they were some sort of procuring entity for they awarded tenders. Having done so, they now have to be subjected to the same standards set for all procurement entities under the Act.

Counsel for the plaintiff submitted that there cannot be a fair
15 hearing in this matter if the minutes in dispute are left out of the evidence because they are relevant, and I agree. In the **Tinyefuza** case, Oder JSC discussed the right of access to information in Article 41 with particular reference to the right to a fair hearing which is guaranteed by Article 28 of the Constitution. At page 39 of his
20 judgment he said:

“Fair hearing connotes that in accordance with the law a party is given the necessary opportunity to canvass all such facts as are necessary to establish his case. ...

*The right to a fair hearing is non-derogable from under
25 article 44(c) of the Constitution. This Article prohibits any derogation from the enjoyment of the rights set out in Article 44 regardless of anything else in the constitution. It*

is a complete and full protection of a right to a fair hearing.”

This court therefore heeds the warning in the **Tinyefuza case** to guard against the invocation of s.122 of the Evidence Act as a technical advantage and its limitations expressed by the Supreme Court. I therefore find that the plea of cabinet privilege with regard to the minutes in dispute cannot hold. The whole process of procurement that is in dispute in this case can and should be opened up as was envisaged by legislature when it enacted the PPDA Act. The information about how the tender to the plaintiff was cancelled and how the new tender to her competitors was selectively awarded is most relevant and perhaps crucial to the proof of the plaintiff’s case. It cannot be denied to the plaintiff, and therefore to this court.

Going on to whether the plaintiff has got to call the Secretary to Cabinet to produce the minutes as is implied by Article 111 (4) of the Constitution, I think that is totally uncalled for in the circumstances. The certified copy of the CHOGM PAC Report where the minutes are annexure is already before the court. It would be a mere technicality to require that a busy officer of government come to court and produce what is already before it. Moreover, the provisions of Order 10 rule 14 empower this court to order the production of any document required in the suit as follows:

“14. Production of documents.

The court may, at any time during the pendency of any suit, order the production by any party to the suit, upon oath, of such of the documents in his or her possession or power, relating to any matter in question in the suit, as the court

shall think right; and the court may deal with the documents,
when produced, in such manner as shall appear just.”

If it is the originals of the contested minutes that the Attorney
General wishes to have in court to clear any doubt that the minutes
5 contained as annexure to the PAC Report are genuine, then those
minutes are in his power and in the possession of an employee of
government. It should be the Attorney General to produce them, if
counsel representing him here so wish. Otherwise, as far as this
court is concerned the annexure to the PAC Report will be sufficient
10 for its purposes.

The 7th issue was whether the plaintiff could produce in evidence
and rely on the correspondence from government departments that
were Annexure to the CHOGM PAC Report without calling the
authors, recipients or other competent witnesses to produce them.
15 The letters in dispute include correspondence between the officials
of the MoWT and Cabinet Ministers, the Executive Director of
CHOGM and officials of MoWT, the Director CHOGM and H.E the
President. All these are contained in the CHOGM PAC Report as
Annexure. Counsel for the plaintiff submitted that they can be
20 admitted in evidence as secondary evidence under the provisions of
the Evidence Act because of their source - the PAC Report, while Ms.
Nabakooza insisted that the plaintiff should call competent
witnesses from government departments to produce them. Mr.
Mpanga pointed out that it would take a long time for a trial to
25 materialise if that procedure was to be adopted but the witnesses
that can produce the documents are all competent and compellable
and they can be summoned to do so.

I am mindful of the general rule in s.63 of the Evidence Act that all documents must be produced as primary evidence. I am also mindful of the decision of Mulenga JSC (as he then was) in the **Tinyefuza case**, which was referred to by Ms. Nabakooza, that
5 whenever a document is to be relied on in a trial and a copy of it is annexed to the pleadings as is required by the rules of procedure, that copy unless with consent of the opposite party does not form part of the evidence. That the original must be produced by a witness competent to do so, such as the maker or author, the
10 intended recipient or the custodian, except where the annexure is produced with the consent of the opposite party.

I agree that such would be the case with regard to documents that were annexed to the plaintiff's pleadings, and in particular, the letter dated 8/05/2007 from the PS Ministry of Works and Transport
15 to the plaintiff because it was Annexure "E" to the plaint. But the plaintiff now says the original cannot be traced and she wishes to rely on a photocopy. The 1st defendant challenges the letter in paragraph 6 (g) of the amended WSD filed on 23/04/2010 stating that he letter was never issued because the tender award was
20 cancelled. I think that the 1st defendant's case can only be made out if the plaintiff produces the photocopy so that it is contrasted with the one that the Attorney General alleges was not issued. It would therefore be self-defeating of the Attorney General if the plaintiff is not allowed to produce the Photostat copy in her possession. It will
25 thus be admitted in that form under the provisions of s.64 (c) of the Evidence Act.

Going on to the rest of the correspondence that are Annexure to the CHOGM PAC Report, such as the letter dated 22/02/2007 from H.E the President of Uganda to Ms. Hilda Musubira, and the letter dated 5/04/2007 from the Executive Director of the CHOGM Secretariat to H.E the President of Uganda, the said letters were included in the PAC Report as Annexure and other correspondence between government ministries, the CHOGM Secretariat and PPDA, the letter of 5/04/2007 from the Executive Director of the CHOGM Secretariat to the President was one of the documents requested for by the plaintiff earlier on in the proceedings but it was not produced. Counsel for the Attorney General said she would not produce it because the plaintiff had shown that she already had a copy for it was included in her trial bundle. Section 64 (1) of the Evidence Act provides that secondary evidence may be given of the existence, condition or contents of a document in the following cases when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the court, or of any person legally bound to produce it, and when, after the notice mentioned in s.65, that person does not produce it.

Correspondence that the plaintiff thought was crucial to the prosecution of her case was requested for in the letter dated 3/10/2011 addressed to the Attorney General, with which Mr. Mpanga forwarded the list of documents as is shown above. I believe that letter is enough complicity with the provisions of s.65 of the Evidence Act. After the issuance of the notice, only one letter was supplied because according to counsel for the Attorney General the plaintiff already had the rest. The plaintiff chanced upon the

CHOGM PAC Report which revealed the series of correspondence that she thought was required to prove her case. I think that the case at hand presents a situation where the plaintiff ought to be allowed to produce the correspondence as secondary evidence
5 which is already before the court, under the provisions of s.64 (1) of the Evidence Act. The same goes for the Minutes of the CHOGM Cabinet sub-Committee since they relate to the procurement that is in contention and that resolves the 7th issue framed above.

It is again important to note that the court has the power to order
10 the Attorney General to produce the correspondence in issue and the Minutes of the CHOGM Cabinet Sub-Committee under the provisions of Order 10 rule 14 CPR. The Attorney General would then have to call a witness or witnesses to produced each of the documents on oath and given that all the authors and recipients are
15 busy government officers, one cannot tell how long that process would take. All I can say in conclusion is that it would amount to playing into the hands of counsel for the Attorney General and allowing the hearing of this suit to descend into a trial on the technicalities contrary to the provisions of Article 126 (2) (e) of the
20 Constitution. It would also turn this trial into a circus where technicalities are played out at the whims of the Attorney General whose counsel is interested in sticking to the traditional common law rules of evidence.

The days when courts strictly required parties to produce originals
25 of documents are long gone. This court encourages and enforces full and frank disclosure of documents at the beginning of every trial in order to prevent unnecessary adjournments and interruptions of any

hearing. The best evidence rule which requires the originals of documents to be produced in evidence cannot be upheld due to the fact that the court also often requires copies of trial document bundles to be filed before the trial in duplicate. This is a comparatively old matter in this court which was filed in 2007. It has already been to the Court of Appeal and back on a technicality to do with the parties to the suit and it was thus delayed. It forms part of the backlog in this court and it should not be delayed any longer because of technicalities to do with the manner in which documentary evidence is adduced.

Regarding the documents contained in Vol. III of the plaintiff's trial bundle, counsel for the Attorney General mentioned that they would challenge the contents thereof. The Volume contains computations by the officers of the plaintiff of loss said to have been occasioned on the CHOGM tender of vehicles. It also contains the bid that was submitted for the tender showing the details of what was proposed by the plaintiff. In paragraph 30 of his written statement, Mr. Wavamuno states that the plaintiff had also proposed to supply vehicles on the lease option as did the 2nd and 3rd defendants here. I therefore think that the information in the documents is relevant to the proof of the special and general damages sought by the plaintiff and is therefore admissible. I see no reason for disallowing the plaintiff's own document from coming onto the record.

Going on to the final issue whether the newspaper clippings in Vol. II of the plaintiff's document bundle ought to be allowed on to the record or expunged, I agree with the decision in the **Tinyefuza case** that the statement in the newspapers in that case amounted

to hearsay evidence because the person who was reported to have made the statement in issue in the case did not testify. But in his judgment at page 45, Oder JSC ruled that in certain cases, hearsay statements are admissible under the *res gestae* principle, though
5 that did not apply to the statement in contest in the case. Osborn's Concise Law Dictionary (7th Edition) defines *res gestae* as "the facts surrounding or accompanying a transaction which is the subject of legal proceedings; or, all facts so connected with a fact in issue as to introduce it, explain its nature, or form in connection with it as one
10 continuous transaction."

In paragraph 11 of his written statement, Emmanuel Ahairwe states that the plaintiff suffered humiliation and financial embarrassment when the tender in dispute here was cancelled. That there was a lot of publicity and media frenzy when this happened and that the
15 articles in Vol. II of the plaintiff's trial bundle demonstrate that fact. I reviewed the articles in Vol. II of the plaintiff's document bundles and I am satisfied that they refer to the cancelled tender process and what followed thereafter. The plaintiff is mentioned as one of the unsuccessful bidders in the articles and that is a fact. The
20 publication of the articles in the press therefore forms part of the happenings when the tender awarded to the plaintiff was cancelled because they are *res gestae*.

The publication of the articles did take place as is shown and there is no other way of showing that it did other than by producing the
25 articles in evidence that it did. In that connection, they are admissible and the plaintiff need not call the editors to produce them for newspapers are available for the general public to

purchase and read. As to whether the court will attach weight to the contents of the articles in assessing the plaintiff's loss is yet to be determined.

In addition to the above, s. 4 of the Evidence Act provides that
5 evidence may be given in any suit or proceeding of the existence or
nonexistence of every fact in issue, and of such other facts as are
hereafter declared to be relevant, and of no others. And by s. 5 of
the same Act it is provided that facts which, though not in issue, are
10 so connected with a fact in issue as to form part of the same
transaction are relevant, whether they occurred at the same time
and place or at different times and places. I therefore see no reason
why the contents of Vol. II should be locked away as evidence for
they are relevant for showing that when the tender was cancelled
the press did write about it and the plaintiff in that connection in
15 numerous articles.

The Attorney General also objected to the plaintiff's reliance on a
copy of the proceedings in HCT-00-ACD-00-CSC-94-2011, wherein
Professor Gilbert Bukenya, who was the Chairperson of the Cabinet
Sub-Committee on CHOGM, was charged for abuse of office in the
20 Anti-Corruption Court. Counsel did so because the copy that was
included in the plaintiff's bundle was not certified. Counsel for the
plaintiff while responding to the preliminary objection produced a
certified copy of the proceedings and that resolves that objection.

Regarding the objection taken about the statement of IGG contained
25 in Vol. IV of the plaintiff's bundle of documents (at page 415)
wherein it was stated that the proceedings in the above criminal

case against Professor Gilbert Bukenya were discontinued to make way for the hearing of the instant case, that is a fact that this court takes judicial notice of for it was broadcasted to the public that was keenly following the proceedings in court. There therefore needs be
5 no contest of what transpired regarding that case.

In conclusion, the 1st defendant's objections are hereby overruled and the documents in contest shall form part of the evidence adduced by the plaintiff in this case. The costs of the objection shall be in the cause.

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Irene Mulyagonja Kakooza
JUDGE
19/03/2012

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