

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(COMMERCIAL DIVISION)**

5 **H.C.C.S NO. 088 OF 2012**

**AHLUL BAIT (A.S) ISLAMIC FOUNDATION UGANDA LTD**  
**(ABIFU) ..... PLAINTIFF**

10 **VERSUS**

- 1. UGANDA ELECTRICITY DISTRIBUTION COMPANY LTD (UEDCL)**
- 2. UGANDA ELECTRICITY BAORD (IN RECEIVERSHIP)**
- 3. ATTORNEY GENERAL ..... DEFENDANTS**

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**BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN**

**RULING**

Brief Facts:

20 In 1997, Uganda Electricity Board (UEB) invited prospective investors in the power sector to extend electricity to their (investors) commercially viable investment sites on agreed terms. The Plaintiff expressed interest and an agreement was entered into on 11.11.1998, between it and the Second Defendant for the construction of a power line from Lugolole to Ikulwe.

The costs of construction of the power line was to be annuitized over a six year period through rebate in the monthly bill.

25 The works practical completion was on 25.08.2000, when the work was handed over to the Second Defendant. In 1999, the Electricity Act, 1999, Cap 145, came into force and resulted into disbanding of the Second Defendant in 2001; under the Public Enterprise Reform and Divesture Act, and created three companies namely:- Uganda Electricity Generation Co. Ltd, Uganda Electricity Co. Ltd, and Uganda Electricity Distribution Co. Ltd, to which assets and  
30 liabilities of the Second Defendant were transferred. The Second Defendant remained in place for winding up and dissolution purposes.

At the time of disbanding the Second Defendant, the project costs had not been paid through the rebates or refunded to the Plaintiff. As discussions went on, the Plaintiff on 02.04.03 demanded for refund of \$316,700 as the cost of construction of the power line from Lugolole to Ikulwe. Correspondences between the parties continued but the payments were not forthcoming, hence the suit by the Plaintiff filed on 06.03.12.

The Plaintiff contended in the plaint that the rebates scheme established a valid contract between it and the First Defendant, which came to an end on the rebates cessation date of 25.08.06, without the Plaintiff receiving the refund of \$331,770 as project costs.

The Plaintiff was amended twice to include the Second and Third Defendants respectively. The First and Second Defendants each filed a written statement of defence, denying the claim and raised the preliminary points of law that the plaint does not disclose a cause of action, and the suit is barred by law and therefore ought to be dismissed with costs.

When the suit was called for hearing on 10.03.15, Counsel for the First and Second Defendants raised the preliminary objections, praying that the plaint be struck out under 0.7 r 11 (a) and (e) and 0.6 r 30 (1) C.P.R for non disclosure of cause of action against the First Defendant, and that the suit is barred against the First Defendant partially, and wholly against the Second Defendant.

He relied upon the case of **Auto Garage vs. Matokov [1971] EA 514**, cited in the case of **Kebirungi Justine vs. Road Taylors Side and Others CACA 121/2003**.

Counsel pointed out that under paragraphs 11 and 12 of the plaint, it is alleged that the First Defendant is a successor to the Second Defendant's liabilities under the contract and hence the alleged cause of action against the First Defendant. But that although the Plaintiff relies on the Public Enterprises reform and Divestiture Statute, the instrument is clear on assets and liabilities diverted to the First Defendant as part successor to the Second Defendant. Rule 2 (c) and (e) refers to the assets and liabilities specified in the third schedule and delivered to the First Defendant.

In the third schedule, Counsel insisted, Igagu substation the subject matter before court is identified in part 1 as an asset divested to the First Defendant., while the liabilities to the Second Defendant are stipulated in part II of the third schedule, and Igagu substitution is not one of them. The only conclusion therefore is that the liability remained with the Second Defendant under rule 2 (e) and the Plaintiff does not disclose how First Defendant is liable.

**Limitation of Action:** In this respect, Counsel submitted that the plaint is barred by law and ought to be struck out. S.2 (1) (a) of the Limitation Act was cited. It bars a cause of action

founded on a contract or tort after six years from the date the cause of action arose. Referring to paragraphs 7 and 31 of the amended complaint, it was contended that the Plaintiff had a contract with the Second Defendant, and under paragraph 9, the contract rebate was to be paid over a six year period with effect from 25.08.2002. That since the suit against the First Defendant was filed in March 2012, part of the suit was time barred and the only cause of action is the one that arose between 03.06 and August, 2006.

The suit against Second Defendant was filed in May, 2014, over eight years from the date the cause of action arose and it was therefore barred by limitation. The case of **Hilton vs. Salton Steam Laundry [1946] KB 81**, and **Madhivani International S.A vs. Attorney General SCCA 23/2010** in support. Adding that, the statute of Limitation is of strict compliance and the Plaintiff cannot defeat the same by importing equitable principles that Defendant unjustly enriched themselves.

Relying on the case of **Erukana Kuwe vs. Raishranban Darugi CACA 21/2002** cited in the case of **Hussein Hemidai vs. UEB HCCS 584/2003**, Counsel argued that the remedies sought arise in equity and are misconceived and should be struck out or dismissed. S.98 CPA, 07 r 11 and 06. R 29 C.P.R were also relied upon.

It was the submission of Counsel for the Plaintiff that the suit was not time barred as the monies claimed is as a result of breach of contract and understanding between the Plaintiff and Second Defendant. The sum expended by the Plaintiff in setting up the transmission lines was recoverable through rebate appropriately annuitized monthly bill. The line was set up and handed over to Second Defendant on 25.08.2002, when the rebate took effect, and was to last for six years, up to 26.08.08. No rebate was ever received and time began to run from 25.08.08 whereas the suit was filed on 06.03.12.

Counsel argued that the Defendants are stopped from raising the issue of Limitation as the cause of action arose on 02.08.08. And that the representative of the Second Defendant wrote to the Plaintiff referring them to the First Defendant – Annexure H to the plaint.

The Second Defendant also wrote to the First Defendant on 03.08.08 and copied to the Plaintiff and a write up and documents relating to the rebate scheme were passed on to the Second Defendant's Managing Director for verification and follow up. The First Defendant informed the Plaintiff of the steps taken by First and Second Defendant in relation to the scheme, stating that the same had been passed on to the Ministry of Finance for verification and implementation, in the same letter, the First Defendant implored the Plaintiff to pay its outstanding electricity bills pending the verification exercise. By virtue of that

communication, Counsel argued and until the final position was communicated to the plaintiff, the cause of action did not accrue. The case of **Charles Lubowa and 4 Others vs. Makerere University SCCA 02/2011** was cited in support of the argument. No communication has been received by the Plaintiff in that regard. The case of **National Insurance Corporation vs. Span International Ltd [1997 – 2001]** was also referred to.

Further that, the matters raised by the defence are of an evidential nature and require evidence to be led to prove them. And according to the First Defendant written statement of defence, the claim should be lodged against Second Defendant and Government of Uganda. – 0.1 r 3 and 0.1 r 7 C.P.R.

Counsel also stated that First Defendant took over assets of Second Defendant under SI No. 28 2002 and under PII, third Schedule, paragraphs B; the First Defendant took over all existing consumer deposits which is part of the Plaintiff's claim. And that according to case law, where matters of evidence are going to resolve issues, preliminary objection should not be upheld as it would amount to a travesty of justice.

In respect of liability, while Counsel agreed with the authority cited by Counsel for the Defendants, he argued that the court should look at the plaint as a whole as per the case of **Ismail Serugo vs. KCC and Another C.A. 02/98** and pointed out that the major conditions of the rebate scheme between Plaintiff and Second Defendant are outlined.

As regards the First Defendant not being a party to the contract, it was submitted that S I 28/2002, the divesture liability under the rebate scheme was treated as consumer deposits by virtue of the third schedule paragraph 2 (b), and therefore all existing consumer deposits as a liability vest into the First Defendant which inherited that liability. Counsel argued that one cannot take the assets to which liabilities are apportioned and then deny liability.

Counsel prayed that the objection be overruled.

In rejoinder, Counsel for the First and Second Defendants insisted that each monthly bill constituted a separate and distinct cause of action as the contract was monthly and time ran out on the Plaintiff as against First Defendant.

That under the Limitation Act, court can only depart from the provisions thereof if the party proves either disability under S. 21 or acknowledgment that and part payment of the debt under S.22 – 24 of the Act. But that there was never any disability or acknowledgment or part payment of the debt in this case.

Estopped, Counsel argued can never operate in respect of clear provisions of the statute and that the case of **Lubowa (Supra)** is distinguishable from the facts of the present case. In

Lubowa's case the parties did not have all the facts and documentation which is not the case here. The Plaintiff cannot explain why it took six years to file claim against Second Defendant.

5 The purchase of the lines and equipment could not amount to consumer deposits within the ordinary and literal meaning of the term as applied in the instrument. And that the question as to how an instrument can vest assets and not liabilities is a question for the makers of SI and not for court. And that under rule 2 (e) of the instrument in cases of ambiguity all matters not specifically listed are referred to Second Defendant.

10 Looking at Plaintiff and annexures is sufficient to determine **whether case is time barred or discloses a cause of action.**

Both Counsel did not frame any issues but their submissions raise the following issues:-

- 1) Whether the plaintiff discloses a cause of action.
- 2) Whether the suit is barred by law
- 3) What remedies are available to the parties.

15 The issues will be dealt with in that order.

**Whether plaintiff discloses a cause of action or should be rejected.**

Under O.7r 11 (a) C.P.R a plaintiff is rejected where it does not disclose a cause of action. In order to determine whether the plaintiff discloses a cause of action, it must be looked at in its entirety – **Tororo Cement Co. Ltd vs. Frokina International Ltd. SCCA. 02/2001.**

20 And decided cases have established that a plaintiff discloses a cause of action where it shows that ***“the plaintiff enjoyed a right, the right has been violated, and that the Defendant is liable. If any of those essentials is missing, no cause of action has been shown .....”***  
Refer to **Auto Garage and Others vs. Moto Kov (NO. 3) [1971] EA 514** at PS. 519D

25 In the present cases, paragraphs 6, 8 show that Plaintiff entered into a contract with second Defendant to construct a power line and the project costs would be annuitized over a six year period by granting rebates to the Plaintiff in the monthly electricity bills.

The terms and the conditions of the rebate scheme are set out paragraph 8.

The project was completed and handed over to the Second Defendant on 25.08.2000 and by then the Second Defendant owed Plaintiff \$331,770 as the cost of the project to be refunded.

30 – Paragraph 9.

For all those reason, court finds that the Plaintiff proved that it enjoyed a right.

It's the contention of the Plaintiff that the Second and Third Defendants its successor failed and or neglected to refund the money owed to the Plaintiff and for rebates, on or before 25.08.06 and hence the suit. It is the contention of the Plaintiff that between the transfer and takeover of the work, the Second Defendant failed to provide the Plaintiff with the promised rebates in the monthly bill. And between transfer and rebate cessation debt, the First Defendant failed to grant or provide the Plaintiff with rebates in the monthly bill.

Further that the Plaintiff was forced to pay cash to the First Defendant and the Second Defendant subjected the Plaintiff to power disconnections for non-payment of bills. The Plaintiff complained to the First and Second Defendants and other government offices regarding the First Defendant's failure to implement the rebate scheme seeking for a settlement. - See Annextures "E" F1 and F2.

The Managing Director of the First Defendant acknowledged the Plaintiff's claim for rebate or refund in her correspondence with the Plaintiff and the Minister of State for Finance (Privatization); and the First Defendant revealed that the verification and payment of the Plaintiff's claim had been delegated to the Second Defendant. Thus the Plaintiff claim was improper, illegal and in excess of the First Defendant's power and that First Defendant also failed to follow up the matter.

Also that, all relevant documents for the claim were submitted to the Second Defendant Liquidator but that on 02.09.08, the Second Defendant's Liquidator informed the Plaintiff that in light of the C.ACA case **No. 96/2004, Mavunwa Edison and Amiti Tom is Uganda Generation Co. Ltd**, the Second Defendant was not liable for the Plaintiff's claim and would therefore not go ahead with verification and payment of the claims for the rebate Scheme – Annexure 11.

The Plaintiff was advised to submit the claim to the successor of the Second Defendant Company, which was not named.

It's the Plaintiff's further contention that by failing to conduct an independent inventory, account, audit, inquiry or verification of all rights, assets and liabilities of Second Defendant transferred to it especially the rebate scheme the First Defendant committed a breach of statutory duty of care to uphold, protect, preserve and honor all rights, assets and liabilities of Second Defendant transferred to it.

And that, the First Defendant committed a violation or dereliction of constitutional, contractual, judiciary and other legal or equitable obligations to compensate the Plaintiff

when it inherited the suit line but failed to accept liability for the sum claimed and that First Defendant unjustly enriched itself.

The Plaintiff's claim reveals several causes of action that include breach of contract, tort, breach of rights, and trust that resulted into loss or damage to the Plaintiff. The claim for special damages has to be proved through evidence, and so will be the liability of the Defendants.

For all those reasons, court finds that the plaint discloses a cause/ causes of action. The liability of the Defendants if any can only be determined after hearing evidence from parties.

Court now proceeds to determine if the suit is time barred.

10 Under S.3 of the Limitation Act, where an action is formed on contract or that it cannot be brought after the expiration of six years from the date on which the cause of action arose. The time is measured from the date of the accrual of the right of action.

In the present case, the Plaintiff put up the electricity line for a sum of \$331,770. The money spent was to be annuitized through rebates in monthly bills for six years from 25.08.2000.

15 The Second Defendant failed, neglected or refused to refund the said sum of money to me Plaintiff. On 29.03.01 all assets, liabilities and obligations of the Second Defendant were transferred to the First Defendant under SS 2(1) and 2(C) of the Public Enterprises Reform and Divesture (vesting of undertaking of UEB) S I 28/2002.

The First Defendant also failed to meet its obligations to the plaintiff.

20 The suit was filed on 06.03.12 and was amended twice to include the Second and Third Defendants.

The suit was filed on 06.03.12 that is five years and seven months from the 25.08.06, which was the rebate cessation date. Since it was not yet six years from the date of rebate cessation, this court finds that the suit was filed within time.

25 Court has also noted that, under paragraph 16 and 17 of the plaint and annexures F1 and F2 dated on 03.12.04, the Managing Director of the First Defendant admitted or acknowledged the Plaintiff's claim for rebates or refund under the rebates scheme, in correspondence to the Plaintiff and the then Minister of State for Finance (Privatizations).

30 The First Defendant revealed that it had delegated the verification and payment of the plaintiff's claim to Second Defendant (in Liquidation).

The Ministry of Finance (Privatization) had also directed the Managing Director of First Defendant to establish the genuineness of the Plaintiff's claim and recommend action and to liaise with the Second Defendant.

5 A write up and other documentation were according to the Plaintiff passed on to the Director of the Second Defendant for her verification and follow up to its logical conclusion. By the time the suit was filed, there had been no feedback and a resolution was being ascertained regarding the rebate scheme which had never been implemented.

10 There were also various other communications between the Minister of State for Finance (Privatization), First Defendant and the Plaintiff, referring to telephone conversations in respect of the matter. It was pointed out in the communications that the issues of rebate had been exhaustively handled by various stakeholders, and that Second Defendant had furnished the First Defendant with all information related to the rebate scheme and Second Defendant had in turn passed over the same to the Ministry of Finance for verification and **implementation thereafter**.

15 The Plaintiff was urged to settle the outstanding dues related to the power construction while awaiting for verification exercise to be completed.

This court finds that, the several communications by the Managing Director of the First Defendant promising **"implementation after verification"** amounted to admission or acknowledgment of liability of the rebate amounts.

20 Under S.22 of the Limitation Act – where ***"any right of action has accrued to recover any debt or other liquated pecuniary claim,... And the person liable or accountable acknowledges the claim or makes part payment in respect of the claim, the right shall be deemed to have accrued on and not before the date of acknowledgment...."***

25 The acknowledgement in this case was in writing and signed by the Managing Director of the First Defendant as required under S. 23 of the Limitation Act. – And according to the case of *Dungate vs. Dungate* [1965] 3 AU ER 818 at 820 ***"there is clear authority that acknowledgment under the Limitation Act, 1939, need not identify the amount of the debt and may acknowledge a general indebtedness, provided the amount of the debt can be ascertained by extraneous evidence. And time under the Limitation Act begins to run a***  
30 ***fresh from the date of acknowledgment"***

The suit against the parties is therefore not time barred as time began to run a fresh from the time of acknowledgment.



From the correspondences, it is also clear that negotiations were still going on between the parties.

However, it is contended from the Second Defendant that the suit against it is wholly time barred as it was brought eight years from the date cause of action arose. The Second Defendant was added to the suit in 2013. But having found that time began to run a fresh from acknowledgement of the debt, the Second Defendant's contention cannot be sustained.

In September, 2008, there was communication between the liquidation of Second Defendant and the Plaintiff – to the effect that the liquidation had sought services of a valuer to evaluate the power line from Lugolole to Ikulwe but it had not been done and the liquidation could not proceed with the claim due to the mistaken belief that court had ruled that UEB (Second Defendant) ceased to exist in 1999 and all assets and liabilities were the responsibility of the successor companies and they were therefore not liable for the claim. – This was based on the decision in the case of **Mavunwa Edison and Amiti Tom vs. Uganda Electricity Generation Co. Ltd CACA 96/2004**.

Had it not been for that mistaken belief. The Liquidator of Second Defendant clearly acknowledged the debt. The legal position was made clear in the case of **Nyamarere vs. UEB (in liquidation) CACA 55/2008** by Twinomujuni J\_ as he then was when he stated that ***“I must repeat for the avoidance of any doubt that the Court of Appeal never decided that UEB in liquidation did not exist”***.

With that clarification which the Liquidator had relied upon to decline to pay, the limitation period began to run a fresh from 02.09.08.

The suit against Second Defendant is not time barred.

The other objection raised was that the First Defendant was a wrong party to be sued; since the contract was entered into between 1997 and 1998, when First Defendant was not yet in existence.

It was submitted that while the Plaintiff relies on the PERD Statute (vesting of undertaking by UEB (No 2) instrument, the instrument is explicit about the assets and liabilities divested to the First Defendant as part successor of the Second Defendant.

Counsel argued that rr 2 (c ) and (e) – (c ) refers to assets and liabilities specified in the third schedule delivered to the First Defendant; and that the liabilities in paragraph II of the schedule do not include the subject matter of the suit. That therefore, the liability remained with UEB under r 2 (e) and the First Defendant should not have been added as a party.

All the property, rights and liabilities to which UEB was entitled/subject became the property rights and liabilities of the successor company – S.126 (1) of the Electricity Act and S.29 (1) of the PERD Act.

The successor companies include the following:-

- 5 a) Uganda Electricity Generation Co. Ltd (UEGCL) – which owns the hydro power plants at Nalubaale and Kiira and the liabilities thereto – First Schedule.
- b) Uganda Electricity Transmission Co. Ltd (UETCL) which owns and operates the transmission infrastructure above 33KV and the liabilities as per Second Schedule.
- 10 c) Uganda Electricity Distribution Co. Ltd (UEDCL) that owns and operates the distribution network at 33KV and below and the liabilities in part II as per the Third Schedule. Item A of the liabilities relates to the agreements; while item B relates to all existing and consumer deposits.
- d) ....
- e) All assets and liabilities that are not listed in the instrument shall in the meantime remain  
15 vested in UEB **that remained in place for the purpose of winding up and dissolution.**

The Plaintiff had an agreement with UEB to provide a power line which was thereafter handed over on the terms already mentioned in this ruling – See Take over Certificate Annexure “C”. Upon handover, the power then became the property of UEB which then agreed to refund the material costs appropriately annuitized over a six year period through  
20 rebates in the monthly bill – Annexure A.

The issue therefore is whether the amount to be refunded to the Plaintiff through the rebate system amounted to a deposit.

“Deposit” *“means the act of giving money or other property to another who promises to preserve it or to use it and return it in kind or the money or property so given”* – Black’s  
25 Law Dictionary P 471. 471.

In the present case, the amount was payable in installments on account of the power construction by the Plaintiff – in essence, the amount spent on the line had been deposited with UEB by the Plaintiff to be returned in the manner described. It accordingly amounted to consumer deposits. It fell with liabilities that were inherited by the First Defendant under  
30 paragraphs (c) of rule 2 of the PERD Statute.

Under S. 30 (C) of the PERD Act, *“all contracts, agreement etc .... Are binding on and enforceable by, against or in favor of its successor company as fully and effectively in every*

*respect as it, instead of the public enterprise, the successor company had been the person by whom they were entered into, with whom they were given or to whom they were addressed, as the case may be”.*

5 The First Defendant is accordingly bound by the rights and obligations attached to the properties vested in it and was rightfully made a party to the suit.

The purpose of joining the Second and Third Defendants to the suit was to enable court determine effectively and finally all the issues in controversy arising within the suit.

10 Court notes that many of the matters raised by the defence are of evidential nature and can only be properly determined when the parties have been heard. Each party will have an opportunity to be heard and no prejudice will be occasioned to either of them.

For all those reasons, the preliminary objection is overruled. The suit shall be fixed for hearing. Costs will abide the outcome of the suit.

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**FLAVIA SENOGA ANGLIN**

**JUDGE**

**09.09.15**