

The plaintiffs separately instituted civil suits No. 4 and 616 of 2007 against the defendant claiming for amounts due to them that were proved in liquidation and interest thereon. It was the plaintiffs' case that the defendant had a statutory duty to pay the plaintiffs claims by virtue of **Section 2 and 34** of the **Public Enterprise Reform and Divesture Act** (PERD Statute) and
5 under **Section 21** of the **PERD (Amendment) Statue, 2000**. It was the plaintiffs' further contention that in total disregard of the Attorney General's and Solicitor General's advice that the plaintiffs ought to be paid, Government officials neglected/refused to pay the plaintiffs. When the matter came up for hearing, the suits were consolidated considering that the claims were similar in substance and the defendant was the same.

10 In its written statement of defence, the defendant contended that it was not legally bound by requests from liquidators to remit any funds in respect of the plaintiffs' claims and that the **PERD Statute, 1993**, was inapplicable to the present case and did not entitle the plaintiffs to any claim against Government. Further, that there were no funds on the Divesture Account which could be used to pay the plaintiffs claims, which in any case were payable in liquidation and not
15 from the Divesture Account.

At the scheduling conference, the following issues were agreed upon for determination:-

1. *Whether the Minister of Finance and the Divesture and Reform Implementation Committee have a statutory duty to pay the plaintiffs' claim under the **PERD Act**.*
2. *Whether the Development Credit Agreement was incorporated by reference into the
20 **PERD Act**.*
3. *Whether the plaintiffs are entitled to the prayers in the plaint.*

At the commencement of the hearing, and at the request of Counsel for the defendant, the following additional issue was allowed for determination:-

- 25 *Whether or not the suit was filed with the authority of the 1st, 10th, 13th, 15th, 16th, 18th, 19th, 22nd and 23rd plaintiffs.*

I shall rearrange the issues in the following order:

1. *Whether or not the suit was filed with the authority of the 1st, 10th, 13th, 15th, 16th, 18th, 19th, 22nd and 23rd plaintiffs*

2. *Whether the Minister of Finance and the Divesture and Reform Implementation Committee have a statutory duty to pay the plaintiffs' claim under the **PERD Act**.*
3. *Whether the Development Credit Agreement was incorporated by reference into the **PERD Act**.*
- 5 4. *Whether the plaintiffs are entitled to the prayers in the plaint*

At the hearing, the plaintiffs were represented by Mr. Everest Mugabi and Mr. Asa Mugenyi and the defendant was represented by Ms. Margaret Nabakooza.

ISSUE 1: *Whether or not the suit was filed with the authority of the 1st, 10th, 13th, 15th, 16th, 18th, 19th, 22nd and 23rd plaintiffs.*

10 At the hearing of the case, Counsel for the defendant raised a point of law that while the present matter was not a representative action, the 1st to the 23rd plaintiffs had never appeared in court and neither of them had filed witness statements in support of the case. In that regard, Counsel contended that the suit was instituted without the authority from the plaintiffs.

Counsel made reference to the letter from the Registrar of Companies dated 20th August, 2015, 15 (EXH D3) to the Director, Privatization Unit in the Ministry of Finance, Planning and Economic Development, indicating that upon conducting a search, the first plaintiff was not reflected in the records. Further, that the evidence of Moses B. Mwase (DW1), who was the Director of Privatization Unit, also indicated that from a Search conducted with the Uganda Registration Services Bureau, the 2nd, 4th and 13th plaintiffs were not reflected in their system. Counsel 20 submitted that the plaintiffs who were non-existent could not have authorized the institution of the present suit. Counsel cited ***Kilembe Mines Limited Versus Uganda Gold Mines Limited, High Court Miscellaneous Application No.312 of 2012***, to support the above submission.

Counsel further submitted that the plaint was drawn by M/S Mugenyi & Co Advocates and a Notice of Change of Advocates was drawn and filed by Mugabi & Co Advocates and the same 25 was filed on the 28th October, 2014. However, that there was no evidence to show that the said law firms were instructed to institute the present suit on behalf of the plaintiffs stated above. Counsel contended that the burden was then shifted onto Counsel for the said plaintiffs to prove that authority to institute the suit had been obtained from the said plaintiffs. Counsel relied on ***Soon Production Ltd Vs Soon Yeon Hong & Another, Miscellaneous Application No.190 of***

2005, and submitted that to bring an action in the name of a company, there must be authorization of the company's relevant organs; the board of directors or the general meeting.

Counsel further submitted that neither of the plaintiffs stated above had ever been represented by a Director in court and there was no correspondence whatsoever communicating instructions to the Advocates who originally instituted the plaint in the present suit or who supposedly took over instructions to represent the said plaintiffs in 2014.

Counsel prayed that the suit brought in respect of the 1st, 10th, 13th, 15th, 16th, 18th, 19th, 22nd and 23rd plaintiffs as well as the 2nd, 3rd, 4th, 5th, 7th, 11th, 14th, 21st and 26th plaintiffs should to be dismissed /struck out for lack of authority to institute the suit on their behalf.

In reply, Counsel for the plaintiffs submitted that the same Firm of Advocates had assisted the plaintiffs in proving in liquidation and the plaintiffs had appeared in person or with a representative before the liquidators to prove their claims. Further, that the defendant had known the plaintiffs since 1994 when they proved their claims and that the plaintiffs' witnesses had disclosed the addresses of the plaintiffs to the defendant in their respective witness statements filed in the present suit.

Counsel cited **Section 101(1)** of the **Evidence Act** where it is provided that in order for any court to give judgment as to any legal right or liability dependant on the existence of facts which he or she asserts must prove that those facts exist. Counsel submitted that the defendant had failed to prove on a balance of probabilities that the listed plaintiffs did not instruct Counsel to file the suit. Counsel contended that once the plaintiffs were agreed as proved creditors at the scheduling conference, there was no need to call them to testify in this matter. Further, that the plaintiffs who were free attended and were pointed out to the court, and this was the same procedure adopted in a similar matter in ***High Court Civil Suit No. 63 of 2008; Specioza Kalungi and others Versus Attorney General.***

I have carefully considered the submissions of Counsel on either side, the evidence, law and authorities relied upon. From the submissions of counsel, this issue raises two points of law questioning the legal existence of the 1st, 10th, 13th, 15th, 16th, 18th, 19th, 22nd and 23rd plaintiffs, and whether authority was obtained from the plaintiffs before instituting the present suit.

Counsel for the plaintiffs was of the view that the objection in regard to the legal existence of the plaintiffs could not be raised at this point considering that it was not pleaded by the defendant. I do not accept the above submission because points of law can be raised at any stage of the proceedings regardless of the fact that they were not raised in the pleadings. In **Mathias Lwanga Kaganda Vs Uganda Electricity Board, High Court Civil Suit No.124 of 2003**, the court cited with approval the decision in **Ndaula Ronald Vs Haji Nadduli Abdul, Election Petition No.20 of 2006**, where it was held as follows:

10 *“On points of law, it is settled by the courts that illegality of an issue is a question of law which can be raised at any time or at any stage of the proceedings, with or without prior knowledge of the parties”.*

The argument by Counsel for plaintiffs that the above issue could not therefore be raised at this stage is therefore unsustainable. Besides, Counsel had the opportunity to respond to the same during his submissions.

15 It was the contention of Counsel for the defendant that the 1st, 2nd 4th and 13th plaintiffs were nonexistent and could not have, therefore, authorized the institution of the present suit. It is trite law that a suit instituted in the names of a nonexistent person/entity is a nullity. In **Mulangira Ssimbwa Vs The Board of Trustees, Miracle Centre & Anor, Misc Application No.576 of 2006**, it was stated that;

20 *“The law is now settled. A suit in the names of a wrong Plaintiff or Defendant cannot be cured by amendment...while Order 1 Rule 10(2) empowers Court to add or strike out a party improperly joined; and Order 1 Rule 10(4) allows amendment of a plaint where the Defendant is added or substituted, such amendments of the plaint can only be made if they are minor matters of form, not affecting the substance of the identity of the parties to the suit:...where the amendment by way of substitution of a party purports to replace a*
25 *party that has no legal existence, the plaint, must be rejected as it is no plaint at all...”*

Counsel for the defendant made reference to the letter dated 20th August, 2015, from the Registrar General to the Director Privatization Unit indicating that the first plaintiff was not reflected in the records of the Uganda Registration Services Bureau. Further, that by letter dated 16th June, 2015, it had been ascertained from the Uganda Registration Services Bureau that the

2nd, 4th and 13th plaintiffs were not reflected in their system. In that regard, Counsel contended that the above plaintiffs were non-existent.

At the scheduling conference, it was agreed that the plaintiffs were proved creditors during the liquidation, including the plaintiffs whom the defendant is currently alleging were non-existent. I do not find it logical that the claims could have been accepted by the liquidators if the plaintiffs were not in existence at the time, unless fraud was being imputed on the liquidators. In that regard, I do not accept the submission of Counsel for the defendant that the above stated plaintiffs were nonexistent, in the circumstances of this case.

The second limb to this objection is that this suit was instituted without the instructions from the plaintiffs. Counsel for the defendant submitted that the plaint was drawn by M/S Mugenyi & Co. Advocates and subsequently a Notice of Change of Advocates was filed by Mugabi & Co. Advocates. However, that there was no evidence that any of the above Firms of Advocates had been instructed by the plaintiffs to institute the suit. Further, that neither of the plaintiffs had ever appeared in Court and there were no resolutions from the plaintiff Companies to prove that a decision to institute the suit had been taken in accordance with the law.

The Advocates (Professional Conduct) Regulations provide that no advocate shall act for any person unless he/she has received instructions from that person or his/her authorized agent. The question whether a advocate represents a party is a question of fact and is usually a matter between the client and the advocate. Generally, without a complaint from the plaintiff, it is to be presumed that Counsel representing a party has instructions unless the contrary is proved. (*See Ayebazibwe Raymond Vs Barclays Bank, High Court Civil Suit No.165 of 2012*).

In the present case, I have taken into consideration that some of the plaintiffs have never appeared in court and neither of the plaintiffs testified at the hearing of the suit. However, I do not find that the above in itself is evidence that the plaintiffs did not instruct Counsel to file the suit. It is trite that a person may represent him/herself or may be represented by counsel. As long as there is evidence on record to support the claim, it is not mandatory that a party to a suit should give evidence in court or even attend court hearings, as long as they are duly represented. In the present case, it is an agreed fact that the plaintiffs had proved their claims in liquidation. Therefore, it would not be mandatory for all the plaintiffs to testify in court or to appear at the hearing personally if they are represented by Counsel.

Further, Counsel for the plaintiffs indicated that they had assisted the plaintiffs during the proof in liquidation of the claims and the defendant did not rebut this argument. This also points to the fact that the plaintiffs authorized the plaintiffs to represent them in this suit. Even the plaintiffs who appeared at the hearing did not raise any complaint that they had not instructed Counsel to
5 institute the suit.

In the circumstances of this case, I find that the defendant has not proved on a balance of probabilities that the suit was instituted without the instructions of the plaintiffs.

Issue 1 is, therefore, answered in the negative.

**ISSUE 2: *Whether the Minister of Finance and the Divesture and Reform
10 Implementation Committee have a statutory duty to pay the plaintiffs’
 claim under the PERD Act.***

PW1, Yesero Mugenyi testified that he was an Advocate and a sole proprietor of the 24th plaintiff. It was his testimony that the 24th plaintiff, which was a Firm of Advocates rendered legal services to a public enterprise then known as Uganda Transport Company (1975) Limited
15 (UTC) which was a Government concern, able and regularly paying the said plaintiff’s legal fees. On or about 9th June, 1994, the Minister of Works, Transport and Communications called a meeting of all creditors of UTC, including the 24th plaintiff and read to them the preamble of the **PERD Statute** and from the Gazette No.48 of 1st November, 1991, and informed them that UTC was under liquidation. Further, that at that time, UTC had accumulated unpaid bills for legal
20 services rendered by the 24th plaintiff of up to UGX 72,807,994/= and the same claim was sent to the defendant to arrange for payment. Upon refusal by the defendant to pay, the 24th plaintiff instituted a suit that terminated in Supreme Court Civil Appeal No.43 of 1995, and the court made an order for the plaintiff to prove its claim in liquidation.

It was his further testimony that the 24th plaintiff proved its claim in liquidation with the
25 appointed liquidators, which was to be paid by the defendant in terms of the **PERD Statute**. On the 20th July, 1999, the liquidators drew up their final report to the Registrar of Companies indicating that UTC had been wound up by the joint liquidators under Members Voluntary Winding Up, and a Statement of Account was also filed which indicated that the 24th plaintiff was a creditor who had not been paid in full. Further, that in August, 2005, the defendant

acknowledged the outstanding balance of UGX 65,527,150/= due to the plaintiffs but only paid UGX 13,105,430/= leaving the plaintiffs claim of UGX 52,421,620/= unpaid.

It was PW1's further evidence that the defendant's liability to pay was created by the **PERD Statute** and by **Section 1** of the Development Credit Agreement entered into by the Republic of Uganda and the World Bank, to create the Public Enterprises Reform and Divesture Program under the **PERD Statute**, which the defendant was implementing in divesting UTC and other public agencies and parastatals. Further, that the **PERD Statute** incorporated the Development Credit Agreement and made it part and parcel of the **PERD Statute**, where a Divesture Account was established, which was controlled and supervised by the defendant. It was his further testimony that in exercising the above control and supervision, the defendant also had an obligation of applying for budgetary contributions in case of insufficiency of funds in the Divesture Account to pay liabilities such as that of the 24th plaintiff.

PW2, Darius Ruta, testified that he was the Manager, Official Receiver and Liquidator at Uganda Registration Services Bureau. It was his testimony that he had perused the records contained on the file of Uganda General Merchandise Limited, and in particular a status report on the liquidation exercise of the liquidation of the above stated Company, and the report was tendered in evidence. The said report indicated that the liquidators were appointed under the **PERD Statute** and that the sale proceeds were little compared to the liabilities.

PW3, Louis Kiyingi, testified that he was an employee of Uganda General Merchandise at the time of its liquidation where he was the Manager of its Uganda Duty Free Shop then located at International Conference Centre. It was his testimony that he had business dealings with all the plaintiffs at the time of the Company's liquidation in 1994.

On the other hand, the defendant led the evidence of Moses. B. Mwase, who testified that he was the Director, Privatization Unit, Ministry of Finance, Planning and Economic Development. It was his testimony that no legal duty was created requiring the defendant to settle liabilities and creditors of Uganda Transport Company (1975) Ltd and Uganda General Merchandise Ltd, and that Government did not undertake or assume any legal obligation to pay. Further, that the defendant had never acknowledged that it was liable for the outstanding balance of UGX 65,527,150/ as had been alleged by DW1 and that the payment which was effected to the

plaintiffs was purely on ex-gratia basis and in final settlement of what was owing to the said creditors.

It was DW1's further testimony that on the 13th March, 2003, the Attorney General clarified on the application of ex-gratia payments relating to not only payments to the plaintiffs but also of
5 other liquidations that had been carried out and further advised on the percentage to be applied as ex-gratia payment, which communication superseded all earlier communications relating to creditors of liquidated enterprises.

Further, that **Sections 2 and 34 of the PERD Statute** as well as **Section 21 of the PERD (Amendment) Statute, 2000**, were not applicable and did not entitle the plaintiffs to claim from
10 the defendant. It was his contention that the plaintiffs claim was only payable in liquidation and the claim could only be made to the liquidators. Further, that upon the winding up of the public enterprises stated herein, no surplus funds were available for payment into the liquidation account. It was his contention that no funds were ever deposited into the Divesture Account from the proceeds in the liquidation of the companies stated herein. He further stated that the
15 Development Credit Agreement was not incorporated into the PERD Statute and that even if it were, still the defendant was not liable to pay the plaintiffs' claims.

Counsel for the plaintiffs and the defendant filed written submissions in support of and in opposition of the claim respectively.

Counsel for the 24th plaintiff submitted that the **Companies Act Cap 110**, and the **PERD Statute** provided for both voluntary and involuntary winding up and UTC was wound up
20 voluntarily by resolution of the directors. Counsel was of the view that the defendant could not allege that the company was not solvent and that if the company was insolvent, the winding up should not have been voluntary. Counsel made reference to the evidence of DW1 and further submitted that for the said witness to say that the Company was voluntarily wound up under the
25 Companies Act but the **PERD Statute** was used not to pay creditors, that would mean that the latter Act was enacted with the view to defraud creditors of public enterprises. Counsel further submitted that the **PERD Statute** was enacted with a view of addressing the shortfalls the Government would encounter when voluntarily winding up a company under the Companies Act. Counsel relied on *Kalungi and 62 others Vs Attorney General, Court of Appeal Civil*

Appeal No.76 of 2011, where it was held that the Government could use budgetary contributions to pay creditors.

Counsel for the 1st to the 24th plaintiffs submitted that the Companies in issue herein were going concerns but were divested through liquidation under the PERD Statute. Counsel indicated that
5 no Certificate of Solvency was filed by the shareholders as was required under the Companies Act, and the plaintiffs have been left unpaid for over 22 years.

Further, that the Development Credit Agreement was incorporated by reference into the **PERD Statute**. It was counsel's submission that the duty of the Divesture Reform and Implementation Committee (DRIC) was to estimate the net liabilities likely to arise from the mode of Divesture
10 and seek for budgetary support from the relevant authority, deposit money into the Divesture Account and then pay the creditors.

Counsel further submitted that there were funds in the Divesture Account and under the PERD (Amendment) Act, the Minister of Finance was obligated to use proceeds of divesture in the Divesture Account to meet the liabilities of public enterprises.

15 In reply, Counsel for the defendant submitted that there was no single provision in the PERD Statute that indicated that the defendant had a statutory duty to pay the plaintiffs as had been claimed, and that the fact that the Government carried out the process of divesting the Companies by liquidation did not indicate that it had taken over or assumed the liabilities of the said Companies. Further, that there was no evidence to show that at the time the companies were
20 liquidated they were solvent and that since no funds were ever paid into the Divesture Account arising from the liquidation of the Companies from which the plaintiffs were claiming, the Government was not obliged to pay the plaintiffs from the Divesture Account. Further, that the defendant did not have a statutory duty to seek budgetary contribution for purposes of making any payments to the plaintiffs.

25 Counsel relied on **Priamit Enterprises Ltd Versus Attorney General, Supreme Court Civil Appeal No.10 of 2001**, where it was held that for a plaint to disclose a cause of action on the basis of section 23(a) of the PERD Statute, it must aver that the debtor public enterprise had been sold and the proceeds of sale were on the Divesture Account. Counsel submitted that there was no averment in the present suit that the proceeds of sale were ever deposited on the Divesture
30 Account, and that therefore there was no cause of action against the defendant. Counsel

contended that the Supreme Court decision in the *Priamit Enterprises (Supra)* was binding on the Court of Appeal case of *Specioza Kalungi & 62 Others Versus Attorney General, Court of Appeal Civil Appeal No.76 of 2011*, as well as this Court.

5 It was counsel's further submission that the Development Credit Agreement was not incorporated into the **PERD Statute** and even if it were, the defendant was still not liable to pay the plaintiffs claim. She contended that if the drafters of the **PERD Statute** had intended for the defendant to be liable for the liabilities of the divested Companies, a specific provision in that regard would have been included in the said Statute.

10 Counsel further made reference to *Specioza Kalungi & 62 others Versus Attorney General (Supra)*, where it was held that divesture was not complete until all creditors had been paid and submitted that the above did not unconditionally place liability of payment on the defendant.

15 It was counsel's further submission that from the correspondences between the Attorney General's Office and the Minister of State for Finance, Planning and Economic Development, the Attorney General recommended ex-gratia payments to creditors of the Companies stated herein. However, that the Government did not assume or take over the liabilities of the liquidated companies. Counsel cited **Jowitt's Dictionary Of English Law, Third Edition, Volume 1**, where *Ex gratiais* is defined as being usually payment of sums of money and most frequently seen in the context of non-contractual payments to employees and office holders.

20 Counsel further submitted that some of the plaintiffs including the 1st, 25th, 25th and 26th plaintiffs were not included on the list of creditors attached to the Status Report by the Liquidators. Further, that PW2 had testified that although the said report was in their records, the same was not registered by the Uganda Registration Services Bureau, and that he could not verify the contents of the said report. It was counsel's submission that the evidence of a non-completed liquidation exercise was not relevant in determining this matter and that what was on record was
25 a mere Status Report.

In rejoinder, Counsel for the 24th plaintiff submitted that under the **PERD Statute**, all proceeds of liquidation of the various Companies were supposed to be deposited in the Divesture Account and used to pay off all the creditors of the Companies in which the Government had an interest. There was no requirement under the **PERD Act** that the Government could pay each Company's
30 creditors from its own proceeds.

In regard to the *Priamit Enterprises Limited Versus Attorney General*, Counsel submitted that the said case involved a preliminary objection raised at the beginning of the trial as to whether the plaintiff disclosed a cause of action. In the present case, the defendant did not raise a preliminary objection to show that the facts in the plaintiff did not necessitate it to go for trial. It was counsel's submission that the *Priamit Enterprises case* was at this stage not helpful and misleading considering that it was not a disputed fact that the proceeds from the sale were not deposited on the Divesture Account. Counsel contended that subject of the case of *Priamit* and that of *Specioza Kalungi* did not relate to each other because while the latter dealt with evidence, the former dealt with pleadings.

Counsel for the 1st to 23rd plaintiffs submitted in rejoinder that it was the duty of the defendant to pay under the **PERD Statute** and the **PERD (Amendment) Act 2002**. Counsel contended that whereas under the 1993 Statute, a Company whose sale did not put money in the Divesture Account could not get its creditors paid from the same, after the amendment, payment of creditors could be done from the said account. Further, that there was an alternative to seek budgetary support from the relevant authority.

I have carefully considered the evidence adduced by the parties, the law and the submissions of Counsel in regard to this issue.

It was an agreed fact at the scheduling conference that the plaintiffs were proved creditors of public enterprises that were divested in liquidation under the **PERD Statute** as amended. The first point of dispute is whether the defendant had a duty to pay the plaintiffs under the **PERD Statute** upon the liquidation of the public entities where the plaintiffs were proved creditors.

From the evidence of DW1, **Section 2** and **Section 34** of the **PERD Statute** as well as **Section 21** of the **PERD (Amendment) Statute**, were not applicable and did not in any way entitle the plaintiffs to make claims from the defendant. Further, that the plaintiffs' claims were only payable in liquidation and that the defendant could not be held responsible beyond the liability of the divested public companies. The plaintiffs on the other hand claimed that the defendant's liability arose from the **PERD Statute** and the Development Credit Agreement entered into between Uganda and the International Credit Association (World Bank) which provided for budgetary contributions where there were insufficient funds in the Divesture Account.

Section 1 of the **PERD Statute** defines the Divesture Account as an account established by virtue of the Development Credit Agreement. According to the said Act, all proceeds of divesture of a public enterprise would be deposited in the divesture account. The above proceeds deposited in the Divesture Account would apparently be used to settle liabilities of the divested companies.

In the present case, upon the liquidation of the divested companies, the liquidators filed a report indicating that there was a shortfall to creditors, which meant that there were no surplus funds available for payment into the Divesture Account. I agree with the evidence of the defendant that the plaintiffs could only be paid from the Divesture Account if any funds were deposited in the said account from the liquidation proceeds of the companies under which they claimed. (*Also see Specioza Kalungi & 62 Others Vs The Attorney General Court of Appeal Civil Appeal No. 76 of 2011*).

The plaintiff raised an argument that the defendant had a statutory duty to seek budgetary contribution in order to pay the plaintiffs. Counsel for the plaintiffs cited **Section 34** of the **PERD Statute**, where it was provided that divesture would not prejudice the right of any person who had suffered damage from obtaining fair, adequate and prompt redress in respect of the damage. In Counsel's view, the defendant had a duty to meet the plaintiffs' claims considering that the liquidation was forced upon them as a result of the Government policy.

I find that this case is closely similar to that of *Specioza Klaungi & 62 Others Vs The Attorney General (Supra)*; in both cases, the claimants were proved creditors of public entities that were divested but whose proceeds were not sufficient to meet the claims of the creditors. Counsel for the defendant invited this Court to consider as binding the decision of *Priamit Enterprises Ltd Versus Attorney General (Supra)*, where it was held that for a plaint to disclose a cause of action on the basis of **Section 23(a)** of the **PERD Statute**, it must aver that the debtor public enterprise had been sold and the proceeds of sale were on the Divesture Account. I agree with the submission of Counsel for the plaintiffs that the above case is distinguishable from the present one. First, the *Priamit Enterprises* case was based on a preliminary point of law that the plaint did not disclose a cause of action. In *Specioza Kaluungi* which has similar facts like the present case, the court distinguished the *Priamit* case and stated that in the said case, UTC was a corporate body with capacity to sue and be sued since by the time, the divesture process had not yet been complete. Further, that in the said case, the plaint did not indicate in its pleadings that

the creditors were claiming under **Section 23** of the **PERD Statute** but was founded on the allegation that by the Government being the sole shareholder, the Attorney General was responsible. The court further held as follows:

5 *“This case is quite dissimilar to the Priamit Enterprises case and that of Mugenyi and Company Advocates because the plaint clearly shows that there was divesture and designated persons in authority to take care of the issues pertaining to claims by the creditors of the liquidation. These included the Ministry of Finance and the Liquidators that were appointed on behalf of the Government, who are represented by the Office of the Attorney General”.*

10 The court further identified that there was a lacuna in the law since there was no express provision to cater for a situation where the money from the assets of the divested companies was not enough to pay off all creditors. The court made a finding that the above did not mean that the creditors did not have a remedy, and that it was incumbent upon the Minister of Finance to find or seek a budgetary support and pay the creditors. The above decision is binding on this court,
15 and I do not find any reason to find otherwise.

Further, I am not convinced by the argument raised by Counsel for defendant that this was an ordinary voluntary liquidation of companies where a solvent company can choose to wind up its business and pay all its creditors. In my view, in such an instance, the company has no option but to fully pay up its creditors; which was not the case herein. In the present case, the divesture was
20 carried out on the basis of the **PERD Statute** and not on the basis of the Companies Act. The liquidators were also appointed under the **PERD Statute**. In my view, this was generally a liquidation generally carried out under the **PERD Statute**.

I have also considered the argument raised by the defendant that the plaintiffs had been given ex-gratia payments in full settlement of their claims. The defendant relies on the letter dated 26th
25 May, 2006, where the Director, Privatization Unit wrote to M/S Kampala Associated Advocates as follows:

*“RE: EX-GRATIA PAYMENTS TO THE CREDITORS OF UGANDA
TRANSPORT COMPANY (UTC)*

We refer to yours dated the 18th February, 2005 on the matter above.

Following the Attorney General's advice that the proven creditors of UTC be paid an ex-gratia payment, we duly sought the sanction of the Treasury and the Divesture Reform Implementation Committee (DRIC) who have instructed us to advise you as follows:

- a) That Government will pay each of the creditors a total of 20% of their individual claims as ex-gratia;
- b) That this payment shall be in full and final settlement of their claims and the creditors will be required to sign discharge forms on the terms above.

We also wish to advise that we have been receiving individual claimants who have told us that you do not represent them. We therefore ask you to provide us with a list of the creditors who instructed you together with proof of their instructions so that we can forward their payments to you”.

By letter dated 31st May, 2005, Kampala Associated Advocates wrote to the Director, Privatization Unit, indicating that they had been instructed by UTC creditors to receive the above stated ex-gratia payment on their behalf.

In reference to the above stated ex-gratia payments made, or which the defendant alleges that the plaintiffs were free to claim, the court in ***Specioza Kalungi & 62 Others Vs The Attorney General (Supra)*** held as follows:

“The Attorney General recommended an ex gratia payment to the plaintiffs and also indicated that the money could be paid from the compensation fund in the Attorney General's chambers.

In law, an ex gratia payment is made without the giver accepting liability or legal obligation. This does not, in law, takeaway the obligation to pay the debt...”.

In view of the above, I find that the promise to pay or the payment of the ex gratia did not extinguish the defendant's liability to pay the creditors what was owing to them.

Accordingly, I find that although there was no express provision in the **PERD Statute** to provide for instances where the money realized from the proceeds from the sale of the assets of the divested companies were not enough to pay off all the creditors, the defendant, through the

Ministry of Finance was under a duty to seek for budgetary support so as to be able to pay the plaintiffs.

Accordingly, this issue is answered in the affirmative.

**ISSUE 2: Whether the Development Credit Agreement was incorporated by
5 reference into the PERD Act.**

Counsel for the plaintiff reiterated his submissions in issue 1 above as his submissions on this issue. He submitted that **Section 2** of the **PERD Statute** was sufficient in answering the present issue.

10 In reply, Counsel for the defendant submitted that the Development Credit Agreement was not incorporated into the **PERD Statute**, and that even if it were so incorporated, it did not make the defendant liable to pay the plaintiffs' claim. Further, that the Development Credit Agreement did not specifically provide that the defendant was legally responsible for the liabilities of the divested companies in the event that the proceeds from the Divestiture were insufficient to pay off the creditors.

15 Counsel made reference to the evidence of DW1 that the Development Credit Agreement resulted into the setting up of a project called Passip, which operated from 2000 until 2006, before being closed by the World Bank. It was his contention that the Divestiture Account was in existence before the **PERD Statute**.

20 Counsel further submitted that Article 1.02 (z) of the Development Credit Agreement was not mandatory in as far as it stated that the Divestiture Account was to be supported by the borrower with annual budgetary contributions. Further, that this issue could not hold water in light of the findings of the Supreme Court in the *Priamit* case.

25 In rejoinder, Counsel for the plaintiffs submitted that the defendant had a statutory duty to seek for budgetary support under Article 1.02 (z) of the Development Agreement. Further, that this was the approach adopted in *Godfrey Baguma & Others Vs The Executive Director PERD, High Court Civil Suit No.659 of 1999*.

I have already made a finding above that the defendant had a duty to seek for a budgetary contribution in order to pay the plaintiffs the amounts proved and owing to them as creditors of the public divested companies. In view of the above, this issue has been addressed in issue 1. I,

therefore, do not find any reason to further address it considering that it has been answered in substance above.

Accordingly, this issue is answered in the affirmative.

ISSUE 4: *Whether the plaintiffs are entitled to the prayers in the plaint.*

5 Counsel for the plaintiffs submitted that the plaintiffs claimed for the amounts they proved in liquidation and the same were stated in the liquidators report. He also submitted that the plaintiffs were also claiming for 25% interest on the above stated sums of money from the time when the said amounts were proved in liquidation. Further, that the plaintiffs were claiming for aggravated and punitive damages, owing to the unbecoming conduct of the defendant's officials
10 who were in charge of the privatization process for failure to seek budgetary support from the time they became aware that the liquidation of the divested companies could not yield enough funds to pay all the creditors.

In reply, Counsel for defendant submitted that the annexure "F" which was relied upon by Counsel for plaintiff as being the list of the creditors including the plaintiffs with their proved
15 claims, was non-existent on the Court record and that the annexures to the plaint only stopped on annexure "E" and not "F". Further, that the said annexure "F" was merely plucked from the attachments on annexure "B", and that the said annexure was never tendered in the evidence.

Counsel submitted that the plaintiffs had a burden to prove that they were entitled to the remedies sought. Counsel relied on *Sebuliba Busuulwa Vs Cooperative Bank (1982) HCB 129*
20 and *J.K Patel and Spear Motors Limited, Supreme Court Civil Appeal No.4 of 1991*, to support the above submission.

In regard to the prayer for aggravated damages by the plaintiffs, Counsel for the defendant submitted that the plaintiffs did not suffer any loss whatsoever which was occasioned by the defendant. Further, that the exceptional circumstances that warrant the award of aggravated
25 damages had not been proved by the plaintiffs.

Counsel submitted that Counsel for the plaintiff had smuggled in a claim for general damages yet the same was never pleaded in the plaint. Counsel invited Court to disregard the said claim considering that it was a departure from the pleadings.

Counsel prayed that in the event that this court was to grant interest, it should award the same at court rate from the date of Judgment.

In rejoinder, Counsel for the plaintiffs submitted that annexure “F” was one of the agreed upon documents during the scheduling conference and that there was no further need to prove the
5 same.

I have considered the submissions of Counsel and the evidence on record in regard to this issue.

The first order sought by the plaintiffs was for an award of the claims proved in liquidation in public entities that were divested and liquidated under the PERD Statute.

At the joint scheduling conference, it was an agreed fact that the plaintiffs were proved creditors
10 of the divested companies. However, Counsel for the defendant intimated that annexure “F” to the plaint which was a compilation of the plaintiffs and the amounts that were proved in liquidation was never part of the record of this court.

In the circumstances, I award the plaintiffs the amounts proved in liquidation, on condition that each plaintiff shall individually or through their agents/representatives present their proved
15 amounts in liquidation to the respondent for approval, within 60 days from the date hereof.

The defendant also prayed for punitive damages and aggravated damages against the defendant.

Exemplary/punitive damages may be awarded in cases where the behavior of the defendant is oppressive, arrogant and high handed. In ***Rookes Vs Barnard, [1964] ALL ER***, It was stated that there are only three categories of cases in which exemplary damages are awarded;

- 20
- a. *Where there has been oppressive, arbitrary, or unconstitutional action by the servants of the government.*
 - b. *Where the defendant’s conduct has been calculated by him to make profit which may well exceed the compensation payable to the plaintiff; and*
 - c. *Where some law for the time being in force authorizes the award of exemplary*
25 *damages.*

It is apparent that the actions of the defendant did not fall in any of the above categories warranting the award of exemplary/punitive damages. This claim is, therefore, disallowed.

On the other hand, aggravated damages are compensation to the plaintiff for injury to his feelings and dignity caused by the manner in which the defendant acted (*See Obongo and Another Versus Municipal Council of Kisumu [1971] EA 91*). In the present case, I find that there were no aggravating circumstances that warrant an award of aggravated damages. I find that there was
5 no proof that the defendant acted maliciously or arrogantly in any way toward the plaintiffs. This award is therefore also denied.

With regard to the prayer for general damages, it is apparent that the same was not pleaded by the plaintiffs. It is trite law that damages have to be proved in order to be awarded. (*See Bishanga Silagi Vs Bataha Joselin, High Court Civil Sui No.15 of 2011*). In the present case,
10 Counsel for the plaintiffs merely prayed for the award of the general damages, yet the same had not been pleaded or proved in evidence. I, therefore, decline to make an award for general damages in the present case.

In conclusion, the suit against the defendant succeeds and I order that the defendant, shall make a budgetary allocation in order to pay the plaintiffs their proved claims, with interest of 12% per
15 annum from the date when the claims were proved in liquidation till payment in full.

The costs of this suit are awarded to the plaintiffs.

I so order.

20 **B. Kainamura**

Judge

28.10.2016