

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

CIVIL SUIT NOS 266, 267 AND 268 OF 2016

CLET WANDUI MASIGA}.....PLAINTIFF

VERSUS

ASSOCIATION FOR STRENGTHENING}

AGRICULTURE IN EASTERN}

AND CENTRAL AFRICA}DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

This ruling is made pursuant to a preliminary objection to the Plaintiff's suit on the ground that the defendant enjoys immunity against legal process in Uganda. The defendant is represented by Counsel Patson Arinaitwe of Messrs Sebalu and Lule Advocates while the Plaintiff is represented by Counsel Khaukha Dennis of Messrs P. Wettaka Advocates. The issue of whether the defendant enjoys immunity from legal process in the Ugandan Courts is a preliminary matter and has the potential of wholly resolving the suit on a point of law and will be tried first as stipulated by Order 15 rule 2 of the Civil Procedure Rules.

The basic facts of the preliminary objection are that the plaintiff is a former employee of the defendant and filed this suit against the defendant and alleged that he is the author of the literary work entitled "Improving Livestock Productivity through Enhanced Breeding Programs: African Goat Improvement Network". The plaintiff alleges that the defendant infringed his Copyright in the literary works by illegally producing it and setting up projects based on the style of the literary works in various parts of Uganda. It is seeking inter alia a permanent injunction against the defendant from infringement of his rights, general damages and costs of the suit. Secondly the plaintiff claims to be the author of the literary work entitled "Capacity Development for Sustainable Plant Genetic Resources (PTR S), Utilisation and Conservation in Eastern Africa". He also alleges that the defendant infringed his Copyright. The plaintiff alleges that the defendant and Dr Francis Wachira who is the defendant's executive secretary jointly and severally procured diplomatic immunity for the defendants and the defendants have abused their diplomatic status. He also seeks a declaration that the health-related the instruments by which they were accorded immunity and did not deserve diplomatic immunity.

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The defence of the defendant in all the suits includes the bar of diplomatic immunity from legal process. The defendants counsel submitted that this point of law would be sufficient to dispose of all disputes without the need for hearing and relied on the case of Human Rights Network for Journalists & Another versus Uganda Communications Commission & Six Others High Court Miscellaneous Cause Number 219 of 2013. The court held that pure points of law include objection to jurisdiction, the plea of limitation, arbitration and the plea of res judicata. Pure points of law are sufficient to dispose of the whole action without the need for trial.

The question is **whether the defendants enjoy immunity against legal process?**

The defendants counsel submitted that the defendants are clothed with Diplomatic Immunity under the Diplomatic Privileges Act, Cap 201 and the Diplomatic Privileges (Extension to Prescribed Organisation) (Amendment) Regulations, 2014. Secondly he submitted that the defendants enjoy functional immunity based on the Headquarters (Amended) Agreement between the Government of the Republic of Uganda and the defendant dated 6th of December 2011.

The defendants counsel submitted that the defendant is an intergovernmental organisation with membership of the Republic of Burundi, Democratic Republic of Congo, Eritrea, Ethiopia, Kenya, Madagascar, Rwanda, Sudan, Tanzania, Uganda and states that became members subsequent to the execution of the constitution of the defendant.

As an intergovernmental organisation, the defendant possesses legal personality both under public international law and admissible to the member states hosting its headquarters which is in Uganda. Pursuant to the constitution of the defendant, the defendant executed an agreement with the government of Uganda for the establishment of the defendant's regional headquarters in Entebbe, Uganda. Under article 11 and 13 of the headquarters agreement, the government of Uganda covenanted to grant the defendant immunity from all legal processes. Pursuant to the agreement, all diplomatic privileges and immunities under the Diplomatic Privileges Act were extended to the defendant by amending the Diplomatic Privileges (Extension to Prescribed Organisation) Regulations Statutory Instrument 201 – 1 to include the defendant. Article 11 of the headquarters agreement read together with the article 22 (three) of the schedule to the Diplomatic Privileges Act and the Diplomatic Privileges (Extension to Prescribed Organisations) (Amendment) Regulations, 2014, the defendant and its officials or are non-Ugandans are clothed with diplomatic immunity from every form of legal process. The diplomatic immunity is further buttressed by the Diplomatic Privileges Act, the provisions which were extended to the defendant and the above regulations and rule 2 (c) of the Diplomatic Privileges (Extension To Prescribed Organisations) Regulations which provides that the immunity and privileges conferred on diplomatic agents extend to organisations prescribed in the schedule to the regulations are to be representatives, officials and employees of those organisations. The Diplomatic Privileges Act which domesticated certain provisions of the Vienna Convention on

Diplomatic Relations confers immunity on diplomatic agents from criminal, civil and administrative jurisdiction of the receiving state. Article 31 (1) of the Diplomatic Privileges Act provides that a diplomatic agent shall enjoy immunity from criminal, civil and administrative jurisdiction of the receiving state.

Counsel further submitted that an analytical reading of article 31 reveals that the immunity is conferred on the diplomatic agent for all his or her official functions and excepted for any actions not related to his or her official functions. He contended that both the defendants constitution and headquarters (amended) agreement provide absolute immunity to the defendant, its officials, spouses and children of its officials among others, from criminal and civil process in their official capacities. International bodies like the defendant are creatures of sovereign states which determine their legal status, capacities, privileges and immunities. As a general rule, international organisations are exempted from the jurisdictions of domestic and contracting authorities and are therefore not subject to any suits, claims or enforcement proceedings in such domestic forum.

The defendants counsel further submitted that the nature of the immunity of the defendants is referred to as charter immunity. Charter immunity is absolute and is derived from the constitutional instruments of the organisation in question and any other domestic law or regulation specifically extending immunity to the organisation. In this respect, charter immunity is distinguishable from state immunity which is predicated upon the claim for sovereign immunity. He relied on High Court Miscellaneous Application Number 651 of 2010; Nelson Ndibihirwa vs. Agro - Management (U) Ltd. in that case the applicant's counsel sought to examine the directors of the respondent company, who are East African Development Bank and the international finance Corporation and the court held that its officials had immunity from such legal process. His Lordship relied on the court of appeal of Tanzania decision in civil appeal number 110 of 2009: Blueline Enterprises Ltd versus East African Development Bank. It was said that such immunity was proper for the purposes of achieving the objectives of the organisation and is granted by the sovereign states.

The defendants counsel further submitted that to determine the extent of the defendant diplomatic immunity, one would have to establish what the defendant's official functions are and whether the allegations in the suit relate to the exercise of the defendant's official functions. He submitted that in HCCS number 266 of 2016, relates to the defendant's research in "Improving Livestock Productivity to Enhance Breeding Programs: African Goat Improvement Network". Secondly HCCS number 267 of 2016 relates to the defendant's research in "Capacity Development for Sustainable Plant Genetic Resources (PGRs), Utilisation and Conservation in Eastern Africa". Both allegations in the above suits relate to the defendant's mandate as established under article 7 of its Constitution and article 2 (1) of the Headquarters (Amended) Agreement. The objective and function of the defendant is to develop policies and programs aimed at widening and deepening cooperation among Member States in agricultural research and policy for the mutual benefit of the stakeholders in the agricultural sector. The defendant

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submitted that in the absence of an express waiver, it enjoys immunity from claims brought against it by persons deriving claims from its members. The second defendant who is the Kenyan national and the executive secretary of the defendant also enjoys immunity from such legal processes.

Finally the defendants counsel submitted that pursuant to article 31 of the Diplomatic Privileges Act, articles 11 and 13 of the Headquarters Agreement and Regulation two of The Diplomatic Privileges (Extension to Prescribed Organisations) (Amendment) Regulations, 2014, the defendants are immune from all legal process unless they waive the immunity. Such a waiver was never sought nor obtained by the plaintiff before commencing proceedings. In the premises HCCS numbers 266, 267 and 268 of 2016 together with their obligations arising there under should be dismissed with costs.

Reply of the plaintiff to the preliminary points of law.

The plaintiff's case is that he is a former employee of the defendant and his by profession a conservation biologist and geneticist with specialised skills in Genes or DNA analysis. He is the specialised consultant, research, development specialists, author and activist in the field of conservation biology and genetics.

The plaintiffs case is that is the author of the literary works entitled: "Improving Livestock Productivity to Enhance Breeding Programs: African Goat Improvement Network" which is worth US\$300,000; and "Capacity Development for Sustainable Plant Genetic Resources (PGRs), Utilisation and Conservation in Eastern Africa" which is worth US\$10 million for which he has exclusive copyright duly registered in Uganda. The plaintiff commenced the three suits in the High Court that court division and upon the written request of the defendants counsel of the suits were transferred to the Commercial Court Division and filed as detailed above.

When the defendant intimated that it would raise an objection on the ground of the defendant being immune from legal process, the plaintiff informed the court that the very essence of HCCS 268 is to challenge the purported diplomatic immunity of the defendant. This is clearly disclosed in the plaint and the plaintiff intends to prove that the defendant as an organisation is not clothed with any immunity whatsoever and only a few individuals in the organisation enjoys some measure of immunity but which was obtained fraudulently. Moreover the small measure of immunity has been grossly abused and should be cancelled. The plaintiff intended to argue that the early immunity of the defendant is not an absolute immunity as if it were a diplomatic mission or supranational like that of the United Nations. The small measure of immunity of the defendant is purely contractual and is well spelt out in the Headquarters (Amended) Agreement.

The Plaintiff's Counsel Submitted That the Nature and Extent of Immunity Extended to a Regional Organisation Depends on the Agreement Providing for That Immunity and As Documented in the "Privileges and Immunities for Diplomatic Corps and International/Regional

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Organisation in Uganda by the Ministry of Foreign Affairs of the Republic of Uganda 2012." It provides inter alia that the status of members of staff of different international/regional organisations is primarily governed by the agreement/memoranda of understanding. The privileges extended to those organisations and their staffs are therefore based on those agreements subject to the laws of Uganda. He submitted that the headquarters (amended) agreement between Uganda and the respondent does not confer any immunity to the respondent as an organisation according to article 11 thereof which only grant immunity to officials, spouses, children and dependent relatives of the professional staff of the secretariat other than Uganda National's residents of Uganda or foreign nationals employed locally. He therefore contended that it is a limited section of the staff that enjoys a measure of immunity and not the respondent as an organisation. Furthermore that is why article 2 (4) gives the respondent the capacity to sue and be sued in its own name. For the same reason Uganda government which is a party to the agreement is not immune from legal process with or against the respondent. In the premises he concluded that the respondent does not enjoy any immunity.

Furthermore, the plaintiff contests Uganda limited immunity given some section of the respondent workers. The limited immunity is not only being misused and abused but was obtained fraudulently. He contended that the plaintiff without the appropriate time bring all the necessary evidence and even apply for discovery of very important documents from the defendant and from the relevant Ministry to prove the averments in HCCS 268/2016. It was therefore premature for the defendant to seek to rely on the ground unless its sole intention is to frustrate the administration of justice when it is mandated and article 14 (1) of the said agreement to cooperate with the appropriate authorities of government facilitate the proper administration of justice. The matter can then be determined after a full hearing.

Furthermore counsel submitted that the plaintiff intends to apply for discovery of important documents show that the defendants procured diplomatic status fraudulently; abused it for personal gain and were not furthering the functions and objectives of the organisation. The plaintiff further intends to adduce evidence to prove that some of the key staff involved in these fraudulent and legal wrongs has since been dismissed from the organisation by the Board of Directors of the defendant.

When the plaintiff informed the court about the essence of HCCS 268 of 2016, the defendants counsel argued that this honourable court does not have jurisdiction to hear it. The plaintiff's counsel submitted that first and foremost, it is counsel for the defendant will expressly asked the court at Nakawa to transfer or files to this honourable court and they did so in writing and the letter is on record. All the courts are there but they preferred the commercial court. The question is why the matter is before the very core of the desired to handle matters. The preliminary point of law is therefore not brought in good faith especially considering that the raise the first point in this court cannot handle the case because of the purported diplomatic immunity. The rules of the commercial court empowers the court to deliver to the commercial community an efficient, and

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cost-effective mode of adjudicating disputes that affect directly and significantly the economic, commercial and financial life of Uganda.

The plaintiff's counsel submitted that the catch words are "disputes that affect directly and significantly the economic, commercial and financial life in Uganda". He submitted that HCCS 268/2016 is intertwined with HCCS 266 and 267 of 2016. The plaintiff's counsel submitted that attempts by the defendant to rely on diplomatic immunity have a direct and significant effect on the economic, commercial and financial life of Uganda. A lot of the issues in HCCS 268/2016 affect the economic, commercial and financial life in Uganda including fraudulently obtaining diplomatic immunity for some members, defrauding a range of commercial laws under the false guise of diplomatic immunity. The plaintiff proposes to rely on documents including audit reports and other financial and economic documents and a series of e-mail correspondences which will clearly show the economic, commercial and financial life of Uganda is being affected. For purposes of emphasis one of the literary works of the plaintiff is worth Uganda shillings 1,000,000,000/= and another is worth Uganda shillings 33,000,000,000/=. The value does not include the value of genes and publications that will arise after successful implementation of the plaintiffs work.

The plaintiff's counsel further contended that above all this honourable court is the High Court of Uganda established by the Constitution and the Judicature Act with all original and unlimited jurisdiction.

The plaintiff's counsel complained that the defendant only served what he entitled "skeleton submissions" not "submissions". He contended that this shows a lack of courtesy. The entire submissions are based on diplomatic immunity which is supposed to be determined in HCCS 268 of 2016 by this court. On the issue that waiver of immunity or 12 firsts been obtained, the plaintiff's counsel relies on civil appeal number 11 of 2009 Concorp International Ltd versus East & Southern African Trade & Development Bank which is authority that a waiver is not necessary in the circumstances of regional bodies. In the premises he prayed that the court dismisses what he calls the disjointed submissions or arguments which are vague and premature.

The plaintiff filed the submissions of 5 September 2016. Subsequently and without the leave of court the plaintiff filed an additional submission on 27 October 2016.

Ruling

The Question before the court is **whether the defendant enjoys immunity from legal process**. The question of whether the defendant enjoys immunity is a preliminary point of law.

I have carefully considered, the submissions of the plaintiff's counsel that in High Court civil suit number 268 of 2016, the plaintiff intends to prove that the immunity that the defendant was to rely upon was obtained fraudulently and therefore the preliminary point of law raised by the

defendant and which relies on diplomatic immunity as a bar to the suit is premature. On the other hand the defendants counsel submitted that the defendant is clothed with diplomatic immunity under the Diplomatic Privileges Act, Cap 201 and the Diplomatic Privileges (Extension to Prescribed Organisations) (Amendment) Regulations, 2016.

I do not agree with the plaintiff's counsel that the issue of whether the defendant enjoys immunity from legal process should await the outcome of HCCS 268 of 2016 where the plaintiff alleges that the diplomatic immunity was obtained fraudulently. The defendant relies on the laws of Uganda to plead its immunity from judicial process and the matter can be decided by interpreting the law. The alleged law is an operational law and has to be considered as it is. For avoidance of doubt I have considered the pleadings in HCCS 268 of 2016. The plaintiff filed a suit for declaration that the defendant had infringed his copyright to the literary work in issue, a permanent injunction, general damages, compensation, costs, interest and any other remedy. On the other hand the Defendant intimated that as a matter of law it enjoys diplomatic immunity from every form of legal process and therefore this suit cannot be sustained against the defendant. In reply the plaintiff asserted that the defendant does not enjoy any immunity and the purported immunity is that the applicable law is it absolute or omnibus in its scope. It is averred that the plaintiff was an employee of the defendant and further that the defendant workers tricked him and wrongfully and unlawfully terminated the contract of employment with the aim of hijacking his Copyright and the matter was in the industrial court. I do not see any averment challenging the law or how the defendant obtained immunity from legal process.

I have further considered HCCS 267 of 2016 in which the plaintiff alleges that the defendants jointly and severally abused their diplomatic immunity. It is further averred that the defendants fraudulently procured the diplomatic status of the first defendant. Thirdly they have violated the instruments by which they were accorded a certain degree of immunity. There must have been a wrong civil suit number quoted in the submissions of the plaintiff's counsel. However, the question of whether somebody enjoys immunity from legal process is a question of law. As I have noted above, the defendant relies on an Act of Parliament and a Statutory Instrument. In the premises I will go ahead to consider the submissions of counsel is whether the defendant enjoys immunity from legal process on the basis of the law.

The defendant relies on article 11 and 13 of the headquarters agreement in which he submitted that the government of Uganda granted the defendant immunity from all legal processes. I have carefully considered article 11 of the headquarters agreement. Specifically the category of the persons granted immunity are:

"Officials, spouses, children and dependent relatives of the professional staff of the Secretariat, other than Ugandan nationals or residents of Uganda or foreign nationals employed locally..."

The above article 11 does not apply to the defendant which is a Corporation sole. It only applies to its officials, spouses, children and dependent relatives of professional staff of the Secretariat.

Article 13 furthermore provides that the privileges and immunities accorded in the agreement are accorded in the interest of the Association and not for the personal benefit of the individuals themselves. It further provides that that immunity may be waived.

Because it deals with the staff, spouses and children and dependent relatives of professional staff, it is inapplicable to the first defendant.

Additionally, the defendant relies on the diplomatic immunity status derived under the Diplomatic Privileges Act, by virtue of the Diplomatic Privileges (Extension to Prescribed Organisations) Regulations Statutory Instrument 201 – 1. Particularly, the defendant relies on rule 2 (b) thereof which provides that:

"The immunities and privileges conferred on diplomatic agent by virtue of the Act extend to the organisations prescribed in the schedule to these regulations and to their representatives, officials and employees of those organisations who are not citizens of Uganda or persons permanently or ordinarily resident in Uganda."

I have carefully considered the Diplomatic Privileges (Extension to Prescribed Organisations) (Amendment) Regulations, 2014. It provides under regulation 2 thereof that the schedule was amended to insert among the organisations The Nile Basin Initiative and The Association for Strengthening Agricultural Research in Eastern and Central Africa (the defendant).

Regulation 2 of the Diplomatic Privileges (Extension to Prescribed Organisations) Regulations, 2003, Statutory Instrument 39 shows that the extension to organisations was made under section 2 of the Diplomatic Privileges Act 1965. The amendment to these regulations in 2014 which was quoted above also extends the number of organisations to include the defendant. It follows that the privileges and immunities conferred on diplomatic agent by virtue of the Diplomatic Privileges Act were conferred on the defendant and staff. This statutory instrument was issued by the President of the Republic of Uganda.

Section 2 of the Diplomatic Privileges Act Cap 201 provides as follows:

"2. International organisations.

The President may, by statutory instrument, make regulations extending any or all of the immunities and privileges conferred on diplomatic agents by virtue of this Act to prescribed organisations and prescribed representatives and officials, subject to such conditions and limitations as may be prescribed."

Immunity is granted by articles 31 and 32 of the Vienna Convention which is domesticated by the Diplomatic Privileges Act Cap 201. Articles 31 and 32 are reproduced herein below for ease of reference:

“Article 31.

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

(a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

(b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

2. A diplomatic agent is not obliged to give evidence as a witness.

3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under sub-paragraphs (a), (b) and (c) of paragraph 1 of this Article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.

Article 32.

1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending State.

2. Waiver must always be express.

3. The initiation of proceedings by a diplomatic agent or by a person enjoying the immunity from jurisdiction under Article 37 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.”

The immunity conferred on international organisations by virtue of extension of immunity under the above article from civil and administrative process is not absolute. There are several exceptions which include an action relating to private immovable property situated in the territory of the receiving State. Secondly an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee is excepted. Most importantly an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions is also excepted.

The narrower question therefore is whether the plaintiff’s action is an action relating to any professional or commercial activity exercised by the defendant outside its official functions. The defendants counsel submitted that the defendant’s constitution and the headquarters agreement provide absolute immunity to the defendant, its officials, spouses and children of its officials among other things from criminal and civil process in their official capacity. He contended that is the general rule and as a matter of statutory law, international organisations such as the defendant are exempted from the jurisdiction of domestic and contracting authorities and are therefore not subject of suits, claims or enforcement proceedings in the domestic forum. He contended that this was a chapter immunity which is absolute and derived from the instruments creating the organisation. He further submitted that to determine the extent of the immunity, the court has to consider the defendant's official functions. He submitted that the suit related to the official functions with regard to the defendant's research. The defendants counsel relied on article 7 of the Constitution of the defendant which gives the objectives and functions of the Association. Article 7 provides that the main objective of the Association is to develop policies and programs aimed at widening and deepening co-operation among the member states in agricultural research and policy for the mutual benefit of all the stakeholders in the agricultural sector.

The second objective which complements article 7 (1) provides that the defendant shall carry out the following functions namely:

- Develop a shared vision and sub-regional goals
- empower end users of the problems the Association to ensure the meaningful participation in developing priorities for agricultural research, training, extension and education;
- coordinate collective action at the sub regional level on agricultural research, training, extension and education;
- contribute to the development of appropriate knowledge, methodologies, information and technologies;
- facilitate the transfer of knowledge, information and technology;

- mobilise and allocate resources for agricultural research, training and education;
- strengthen capacity for agricultural research extension and agricultural training and education for development;
- facilitate the efficient operation of the National agricultural search systems at the national level;
- enhance the sub regional reputation of the Association and its members in the original and international fora;
- work towards the conservation of natural resources and the adoption of improved methods of agricultural production; and
- Undertake such other activities that shall further the objectives of the Association as the members shall from time to time decide.

I agree that the Plaintiffs actions are about his copyright to certain literary works namely to the work entitled "Improving Livestock Productivity to Enhance Breeding Programs: African Goat Improvement Network" and "Capacity Development for Sustainable Plant Genetic Resources (PGRs), Utilisation and Conservation in Eastern Africa". I agree with the defendant's counsel that the above works by their titles suggest that they relate to the work of the defendant in enhancing research, empowerment in agricultural research, contributing to appropriate knowledge, methodologies and technologies among other objectives and functions of the Defendant. The question to be determined is whether the issue of alleged infringement of copyright arises from the actions of the Defendant when performing its functions and has something to do with the objectives and functions of the defendant. As noted materials in contention in the suits suggests that the literary works in dispute are actually directly connected to the functions of the defendant. The plaintiff claims to have exclusive copyright to two literary works. Secondly, the Plaintiff has averred that the Defendant used these works in the performance of its functions.

I have duly considered the relevant authorities I was referred to. The case of Concorp International Ltd vs. East and Southern African Trade and Development Bank Supreme Court Civil Appeal No. 11 of 2009 dealt with whether the Bank enjoyed immunity with regard to suit brought against it by third parties other than member states. The Judgment of G.M. Okello JSC on this point is material and he held that the immunity in chapter 53 domesticated the Eastern and Southern African Trade and Development Bank charter. After considering the issue of whether the immunity granted by chapter 53 applied to suits filed by third parties other than member states against the bank, he concluded that the immunity in cap 53 was not intended to extend to transactions between the respondent and a third-party like the appellant. Consequently the terms "every form of legal process" in article 43 (3) should be restricted to transactions between the respondent bank and the government of Uganda because the object of Cap 53 was to regulate the relationship between them. To confer on the respondent absolute immunity would be contrary to public policy. The court considered whether the loan transaction which gave rise to

the appeal was governed by the immunity provisions, giving the bank immunity from every form of legal process. He held that commercial transactions of the respondent with a third-party are not governed by the immunity provisions in Chapter 53. He relied on the principle of functionality based on article 43 (1) of the charter on the scope of the immunity accorded to the respondent which was to enable the bank to achieve its objectives and perform the functions with which it is entrusted. He relied on the first ground that the immunity did not extend to third parties. Secondly the loan transaction was not covered by the provisions conferring immunity on the respondent anyway.

In reaching their decisions, the Supreme Court of Uganda construed the provisions of the charter creating the Eastern and Southern African Development Bank and the domesticated provisions in the laws of Uganda under chapter 53.

In the case of Eastern and Southern African Trade and Development Bank (PTA bank) versus Ogang [2001] 1 EA 46 the COMESA court held that the fountain and origin of the powers, privileges and immunities of all organs and institutions of COMESA is the treaty itself. Secondly they noted that the treaty does not provide for the existence of a rogue organ or institution flouting with impunity all the rules of the organisation from which it derive birth. Lastly they noted that it was the member states to domesticate the privileges and immunities granted to the organisation.

I have carefully considered the authorities and it is imperative that the instrument creating the defendant has to be considered. Secondly the agreement and the laws applicable to the defendant should also be considered. This is supported by Malcolm N. Shaw in "International Law" Fourth edition Cambridge University Press when considering privileges and immunities of international institutions between pages 923 and 929. He makes a distinction between international institutions created by conventions such as UN bodies and creatures of bilateral and multilateral treaties.

In this case I do not have to deal with a treaty organisation per se. I note that the defendant is a creature of a multilateral agreement between several Eastern and South African states. It is primarily governed by the constitution creating the defendant and executed by several states. Secondly it is governed by domestic law domesticating among other things privileges and immunities to be enjoyed by the staff of the organisation and by the defendant organisation.

At page 927 Malcolm N. Shaw in "International Law" writes that:

"As far as other international organisations are concerned, the relevant agreements have to be consulted, since there are no general rules but rather particular treaties.

International agreements concerning privileges and immunities have been implemented into domestic law by specific legislation in a number of states, examples being the UK International Organisations Act 1968 and the US International Organisations Immunities

Act of 1945. The usual pattern under such legislation is for the general empowering provisions contained in those Acts to be applied to named international organisations by specific secondary Acts."

For that reason I have considered the headquarters agreement as well as the constitution governing the defendant. The constitution creating and governing the defendant is executed by the Republic of Burundi, the Democratic Republic of Congo, the state of Eritrea, the Federal Democratic Republic of Ethiopia, the Republic of Kenya, the Republic of Madagascar, the Republic of Rwanda, the Republic of the Sudan, the United Republic of Tanzania and the Republic of Uganda. The constitution is a contract between all the above states and is equivalent to a treaty. Article 29 of the constitution confers the defendant the following immunities and privileges namely:

- "1. The Association shall enjoy international legal personality.
2. The Association, the delegates of the members of the Association, the Chairperson of the Association, the Executive Director and the staff of the Secretariat shall enjoy, in the territory of the Association's host country, such rights, privileges and immunities necessary to enable the Association to operate effectively and efficiently towards the attainment of its mission.
3. The Member States agree to extend to the Association and its personnel, privileges and immunities as are accorded the personnel of other regional or international organisations or omission.

In accordance with article 29 of the constitution, the Ugandan government which was designated the country where the headquarters of the defendant would be, executed an agreement with the defendant which is called the headquarters agreement. The provisions of the headquarters agreement in clause 11 thereof does not confer immunity on the defendant but only on its officials, spouses, children and dependent relatives of the professional staff of the secretariat and other than the Ugandan nationals or residents of Uganda of foreign nationals employed locally. However in accordance with article 29 (3) of the constitution, the Ugandan government by statutory instrument extended to the defendant the immunities granted to other international organisations. I have already referred to the legal provisions namely Regulation 2 of the Diplomatic Privileges (Extension to Prescribed Organisations) Regulations, 2003, Statutory Instrument 39 made under section 2 of the Diplomatic Privileges Act cap 201. The privileges and immunities extended to personnel were extended to the defendant. A further critical analysis made above shows that the defendant is immune from legal process in the execution of its functions. All that the plaintiff could show was that the acts of the defendant were outside the functions. I have demonstrated above that the acts of the defendant are within the functions of the defendant and this is supported by the pleadings of the plaintiff. In all the suits it is averred

that the defendant used the plaintiff's materials in its projects. That being the case, and based on the instruments quoted above, the defendant enjoys immunity from legal process for acts done in the performance of its functions.

I have further considered the case of Eastern and Southern African Trade and Development Bank (PTA bank) versus Ogang [2001] 1 EA 46 where the COMESA court held that the treaty does not provide for the existence of a rogue organ or institution flouting with impunity all the rules of the organisation from which it derives birth.

The Headquarters Agreement and particularly article 14 thereof provides for cooperation between the Association and the Government to facilitate the administration of justice. It provides as follows:

"1. The Association shall, at all times, corporate with the appropriate authorities of the Government to facilitate the proper administration of justice, secure the observance of privileges, immunities and facilities granted under this Agreement.

2. If the Government considers that there has been any abuse of privileges or immunities conferred by this Agreement, consultation shall be held between the Government and the Association to determine whether any such abuse has occurred, and if so, the Association shall take the necessary measures to remedy the situation and to ensure that no repetition occurs."

The remedy of the plaintiff in this case, is to report the matter to the government so that the alleged abuse of his Copyright is addressed on the merits.

Secondly, the Headquarters Agreement and article 17 thereof provides for settlement of disputes. I have carefully considered article 17 (1) of the Headquarters Agreement and it clearly envisages the Association and the government of Uganda making provision for appropriate modes of settlement of disputes of a private law character to which the Association is a party and third parties. It provides as follows:

"1. The Association shall, by agreement with the Government, make provision for appropriate modes of settlement of:

- (a) Disputes arising out of contracts or other disputes of a private law character to which the Association is a party; and
- (b) Disputes involving any official of the Association who, by reason of his official position, enjoys immunity; if immunity has not been waived by the Association..."

I am of the considered opinion that article 17 (1) (a) envisages disputes arising out of contracts or other disputes of a private law character against the Association or by the Association and third parties other than the Government of Uganda.

The conclusion is that the government of Uganda in accordance with article 29 of the constitution creating the defendant, by statutory instrument applied article 31 of the Vienna Convention on treaties imported by the Diplomatic Privileges Act cap 201. Article 31 (1) of the Vienna Convention on diplomatic relations 1961 which is imported by chapter 201 of the laws of Uganda give the defendant functional immunity from civil and administrative jurisdiction. That immunity is only applicable where the cause of action arises from the exercise by the defendant of its official functions or acts done in the fulfilment of its objectives and functions.

Secondly, the constitution creating the defendant as well as the headquarters agreement with the government of Uganda gives an aggrieved party a remedy in the case of an action seeking redress against the defendant or in the case of the defendant seeking redress. Where the defendant has not waived its immunity, the defendant and the government of Uganda are supposed to have an agreement in place on how to resolve such disputes. The plaintiff therefore is not without any remedy against the defendant for the alleged cause of action. The question is whether any agreement has been reached between the defendant and the government of Uganda to facilitate among other things the administration of justice by creating a mechanism for resolution of disputes with third parties. The plaintiff is entitled to seek a remedy or redress or adjudication whether by arbitration and mediation or whatever mechanism the defendant and the government of Uganda are obliged to set up for the resolution of these disputes that the plaintiff has filed in the three suits namely HCCS 266, 267 and 268 of 2016 formally filed in the Nakawa High Court division as HCCS No. 456 of 2015, 455 of 2015 and 630 of 2015. The same immunity bars the suits against Dr. Francis Wachira.

In the premises the plaintiff's suits namely HCCS 266, 267 and 268 of 2016 formally filed in the Nakawa High Court division as HCCS No. 456 of 2015, 455 of 2015 and 630 of 2015 are dismissed with each party to bear its own costs.

The dismissal shall not bar the Plaintiff from pursuing remedies using the mechanism envisaged by article 17 of the Headquarters Agreement between the Defendant and the Government of Uganda.

Ruling delivered on the 20th of December 2016

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Khauka Dennis for the Plaintiff

Patson Arinaitwe for the defendant

Human Resource Manager of Defendant Jolly Basemera in court

Plaintiff is absent

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge