

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

HCCS NO 383 OF 2010

ROYAL GROUP OF PAKISTAN}.....PLAINTIFF

VERSUS

MAVID PHARMACEUTICALS LTD}DEFENDANT

- 1. MAVID PHARMACEUTICALS LTD}**
- 2. SULEIMAN BUKENYA}COUNTER CLAIMANTS**

VERSUS

- 1. ROYAL GROUP OF PAKISTAN}**
- 2. ABACUS PHARMA (AFRICA) LTD}**
- 3. NATIONAL DRUG AUTHORITY}COUNTER DEFENDANTS**

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff commenced this action against the first and second counterclaimants and later on proceeded against the Defendant. The Plaintiffs claim in the plaint against the first and second Defendants jointly and severally is for recovery of US\$73,629.03 and a further aggregate claim simply against the first Defendant for the sum of US\$435,675 for loss of income or dues together with special damages, general damages arising out of breach of agreement, interests and costs of the suit.

The Plaintiff claimed that for a period of over 15 years it transacted with the first and second Defendants as the supplier of assorted pharmaceutical products and subsequently as the Plaintiffs Local Technical Representative (LTR) within National Drug Authority in accordance with the National Drug Authority Act. On 14th September, 2006 the managing director of the Plaintiff and the second Defendant and one Amin Lalani agreed to establish and form a trading company called Mavid Pharma East Africa Ltd also known as MPEAL. The joint-venture company was to market and sell the Plaintiff's pharmaceutical products in and around the African continent. The shareholders of the joint-venture understood that supplies by the Plaintiff would be made under a credit facility and specific terms of payment. It was also agreed that the Plaintiff would have a lien on all goods supplied until receipt of full payment for all supplies made. Upon registration of

MPEAL the Plaintiff started supplying pharmaceutical products to it and it was exclusively managed by the second Defendant who is the managing director of the first Defendant and one Amin Lalani. Owing to various reasons it was resolved that the second Defendant makes appropriate payment for the stock. As a result the second Defendant accrued debt and his liability to pay the stock taken within stipulated time lines the whole of the MPEAL business venture collapsed. A meeting was held on 13th November, 2007 the memorandum of understanding between shareholders and directors of the joint-venture company including the second Defendant and the Plaintiff resolved to close the operations of MPEAL. The local partners in Uganda were to settle all the company's stock, receivables, assets, profits and investment. They were to pay back to the Plaintiff and the shareholders. Mavid Pharma EA Ltd Pakistan original stock was to be sold to Mavid Pharmaceuticals. All future business was to be conducted in the manner agreed namely:

All future business to be done exclusively as follows; Pakistan business with Mavid Pharmaceuticals Ltd. China business with Matrix (U) Ltd; the monthly turnover by each party was agreed at a minimum of US\$80,000 and shipments would be paid for by either cash or through letters of credit 90 days basis, for two years. The local technical representative for both Pakistan and China goods were to remain with Mavid Pharmaceuticals Ltd. All national drug authority matters were to be handled by Suleiman Bukenya of Mavid Pharmaceuticals Ltd.

Upon execution of the memorandum of understanding the second Defendant proceeded to collect all the Plaintiff's Pakistan origin products and took them to the first Defendant's stores upon relying on the terms agreed to as such. Pursuant to the collection of all Pakistan origin goods, the second Defendant duly confirmed receipt and offered the Plaintiff a payment plan to settle all the accrued monies from the stock valued at US\$267,000. The first Defendant subsequently made partial remittance to settle the indebtedness. The other party to the same transaction Mr Amin Lalani completed payment for all the stock taken by him without much ado to the satisfaction of the Plaintiff. Failure to make payments by the second Defendant led to the deterioration of relationship between the Plaintiff and the first and second Defendants. Under the memorandum of understanding the Defendant had agreed to make monthly turnover sales of US\$80,000 on the basis of having exclusivity to all the Plaintiff's Pakistan business for at least two years. The party started afresh and separate trade relationship which was duly consummated by the first Defendant proceeded to act upon the terms agreed upon.

Not so long after the establishment of the new trading relations, the first Defendant reverted to delaying or failing to make payments for supplies made as agreed. Invariably the first Defendant breached the agreement by failing to pay. The breach included failure to meet the agreed minimum monthly turnover of US\$80,000; failure to make cash payment within 90 days or by letter of credit; failure to meet the terms for at least two years; failure and deliberate inaction to perform the functions of an LTR under the National Drug Authority Act and finally none payment of outstanding invoices for goods duly received. The first Defendant unilaterally

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stopped making payments and placing orders for products and purported to reject products already in its possession waiting payment. Secondly the first Defendant reneged on his obligations as the LTR with the NDA requiring him to clear or assent to any import into the country thereby frustrating all supplies into Uganda and the entire business activity of the Plaintiff. The first Defendant and the second Defendant instead opted to holding the Plaintiff at ransom and demanded for a sum of US\$500,000, in complete breach of trust and agreement between the parties for the first Defendant to fulfil its obligations under the local technical representative mandate and trade transactions. As a consequence thereof, the Plaintiff suffered loss, inconvenience, loss of market shares, trade time and damage for which the Plaintiff prays for compensation in special loss and damages amounting to US\$549,026.53. The Plaintiff intended to prove through adducing evidence continued loss as a result of the activities of the first and second Defendant.

The second and third Defendants in their amended written statement of defence and counterclaim contest the Plaintiffs claim and aver that the Plaintiff is not entitled to the remedies sought in the plaint. As far as the case is concerned, during the 15 years the first Defendant was the local technical representative of the Plaintiff, the first Defendant established a business network of pharmacies throughout Uganda. Additionally the first Defendant introduced, registered and marketed the Plaintiff's products and acquired goodwill throughout Uganda. In the period the first Defendant acted as an LTR, it made the financial arrangements of letters of credit, overdraft, camera loans and personal guarantees to finance the business of importation and distribution of pharmaceutical products amounting to over US\$1 million per annum. The critical role of the LTR is recognised by the National Drug Authority and it has the policy to the effect that change of LTR is to be consensual and the LTR had to issue in no objection to the change. It was the result of the relationship between the Plaintiff and the first Defendant that an exclusive of this petition or franchise of medical and pharmaceutical supplies/products from the Plaintiff to the Defendant was made under some terms. The Plaintiff would exclusively supply the required medical and pharmaceutical products to the first Defendant. The first Defendant would distribute the medical and pharmaceutical products. Each party had a mark up in the chain of distribution of 30% for the Plaintiff and 40% for the first Defendant.

On the basis of the LTR and exclusive distributorship/franchise delayed from a 15 year relationship, both parties set targets/benchmarks. The first Defendant would import from the Plaintiff pharmaceutical products worth US\$80,000 per month which orders would be paid by letters of credit. The first Defendant would earn US\$400,000 annually as gross profits. The first Defendant performed its part by giving confirmed annual orders payable by letters of credit. On the other hand the Plaintiff failed to issue pro forma invoices as agreed. Furthermore the Plaintiff instead sought to initiate the first Defendant into an illegal scheme of distribution of fake drugs from China coupled with supplies of fake raw materials contrary to law and regulations. Owing to the non-cooperation of the Defendants, the Plaintiff sought to terminate the elevated status of

the first Defendant on 24th November, 2008 and replace it with the second counter Defendant. As a result the Plaintiff withheld supplies to the first Defendant and instead instructed the first Defendant to endorse pro forma invoices in favour of Abacus Pharma (Africa) Ltd contrary to the exclusive distributor agreement and this mode of doing business was queried by the National Drug Authority. Furthermore in collusion and connivance with the national drug authority Abacus family (Africa) Ltd, the termination of the LTR status of the first Defendant was approved as terminated on 6th March, 2009 contrary to the law and regulations and policy. The first Defendant was forced out of business through ill will, malice and bad faith. The Plaintiff sought to windup the first Defendant in order to decimate the Plaintiff, Shelley and drive it out of business. The first Defendant settled the purported debt under the winding up petition.

The first Defendant relying on the assurances of national drug authority policy, continue doing business as LTR and investing in the operation of the import and distribution business including establishing the pharmacy branch network, goodwill, promotion and financial arrangements with the banks to facilitate the business. The Plaintiff's action in collusion and connivance with NDA and Abacus Pharma (Africa) Ltd caused the first Defendant financial, economic and pecuniary damage loss and injury. Accordingly the first Defendant claims loss of business names from November, 2008 for 36 months, costs of financial arrangements to facilitate business operations, costs of closure of branches and dismantling of the pharmacy network, loss of business from local sales in pharmacies for 36 months, loss of stock of pharmacies, sales and marketing and business promotion costs and expenses, interest on loans and other financial arrangements, Labour demobilisation and termination of employment and the legal costs amounting to Uganda shillings 3,082,895,850/=.

By counterclaim, the counterclaimants/Defendants to the main suit contended that the first counter Defendant/Plaintiffs action in collusion with the third counter Defendant namely national drug authority and the second counter Defendant namely Abacus Pharma (Africa) Ltd caused the first counterclaimant/Defendant financial, economic and pecuniary damage, loss and injury amounting to Uganda shillings 3,082,895,850/=. This was because the first counterclaimant/Defendant suffered pecuniary, financial and monetary loss for the good will it had established as an LTR of the first counter Defendant/Plaintiff and distributor of pharmaceutical products. The first counterclaimant/Defendant registered and promoted products during the 15 years it was an LTR of the Plaintiff. Furthermore it alleges that the Defendants to the counterclaim namely the first counter Defendant, the second counter Defendant in collusion with the third counter Defendant connived to terminate the first Defendant/counterclaimant as an LTR which acts are illegal, malicious and done in bad faith to cripple the first Defendant out of the drug and pharmaceutical business. Consequently the counterclaimant prays for a declaration that termination of the first Defendant LTR letters was illegal and unlawful and a nullity. Secondly, it seeks for an order directing the third counter Defendant to comply with the law, regulations and policy before terminating the first Defendant's LTR status. Thirdly, an injunction

to restrain the second counter Defendant from acting as an LTR of the Plaintiff until the first Defendant is lawfully and legally terminated as an LTR. It further claims special damages as written above together with the US\$1,200,000 and interest at 20% per annum from the date of judgment till payment in full as well as general/punitive and exemplary damages and costs of the suit.

In defence the Plaintiff/Defendant to the counterclaim denies all the claims of the first Defendant and asserts that if there was any business network and goodwill, it was established by the Plaintiff. The goodwill of the Plaintiff's goods or products only belongs to the Plaintiff and not to a third party. On the contrary it is the Defendants who breached fundamental terms of the local technical representative agreement. It denied that the LTR status was terminated unlawfully and asserted that it was terminated for the first Defendant's fundamental breach and total failure to perform as mandated but instead the first Defendant turned against the Plaintiff's interests and requirements contrary to the local technical representative requirements/mandate. The Plaintiff denied that the Defendant suffered any injuries and if they did it was entirely self-inflicted.

In defence to the counterclaim, the Plaintiff denies any collusion and connivance with national drug authority and Abacus Pharma (Africa) Ltd and every action regarding change of local technical representative was done legally. Consequently the Plaintiff denies that the Defendant suffered any financial, economic or pecuniary damage as alleged.

The third counter Defendant national drug authority denied the counterclaim. It asserts that change of local technical representative was done in accordance with the law, regulation and policy and in exercise of its statutory mandate under the National Drug Policy and Authority Act. Secondly as a regulator of the pharmaceutical industry is not a party to any commercial dispute between the parties involved as that would be outside its statutory mandate. Lastly it denies any bad faith, illegality and malice alleged by the counterclaimants.

Representations:

The Plaintiff is represented by Masembe, Makubuya, Adriko, Karugaba & Ssekatawa advocates. The first and second Defendants are represented by NYANZI, Kiboneka & Mbabazi advocates as well as Semuyaba, Iga & company advocates. The second counter Defendant is represented by Messieurs Bitangaro & company advocates while the third counter Defendant is represented jointly by Ligomarc advocates as well as Murungi, Kairu & company advocates.

Abbreviations used:

1. LTR: Local Technical Representative
2. NDA: National Drug Authority

Submissions of Counsels:

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Due to the protracted nature of the proceedings and the number of Counsel involved inclusive of the sheer volume of evidential data, the facts and evidence in this suit are summarised in the various written submissions of Counsel and where there are factual controversies, they are addressed in the judgment of the court.

Summary of written submissions of the Plaintiff

The Plaintiff's Counsel submitted as follows:

On 12th September, 2006 the Plaintiffs managing director Zahid Maker, the Defendants managing director Mr Suleiman Bukenya and Mr Amin Lalani incorporated Mavid Pharma East Africa Ltd whose essential object was to market the products of the Plaintiff throughout Africa. Mavid Pharma East Africa Ltd was effectively ran and managed by Mr Suleiman Bukenya. Unfortunately the parties disagreed on the manner in which the business was run and as a result resolved on 13th November, 2007 to end this business. The closure of the business was formalised in a memorandum of understanding executed on 13th November, 2009 between the Plaintiff, the Defendant and Matrix (U) Ltd. Pursuant to clause 4 of the memorandum of understanding, it was agreed that Mavid Pharma East Africa Ltd Pakistan original stock shall be sold to the Defendant with a monthly turnover of US\$80,000. Thereafter the Defendant obtained the products from the Plaintiff on the understanding which was not fully paid for. As a result of the Defendants conduct, the Plaintiff severed relationship with the Defendant. The Defendant denies that it owes the Plaintiff any monies and contends on the other hand is that the Plaintiff connived with the second and third counter Defendants to unlawfully terminate its LTR status and as a result it suffered damages. The counter Defendants denied any such connivance and contended that the claim of the Defendant is misconceived.

Agreed facts and issues in the joint scheduling memorandum:

1. The Plaintiff and the Defendant for a period of 15 years transacted in the supply and sale of pharmaceutical products;
2. In 2006 the Plaintiff's managing director, Zahid Maker, Suleiman Bukenya and Amin Lalani formed Mavid Pharma East Africa Ltd to procure, supply and sell pharmaceutical products in and around the African continent;
3. The business relationship between the Plaintiff and the Defendant was terminated.
4. The Defendant was the LTR of the Plaintiff and the Plaintiff changed LTR from the Defendant to the second counter Defendant.
5. At the closure of Mavid the Pharma East Africa Ltd, the Defendant obtained a stock that was supplied to it by the Plaintiff.

Agreed issues

- a. Whether the Defendant/counterclaimant is indebted to the Plaintiff in the amount claimed?
- b. Whether the approval of the second counter Defendant as the LTR to the first counter Defendant was done legally?
- c. Whether the Plaintiff is liable to the counterclaimant/Defendant loss of business due to cancellation of the LTR status?
- d. What remedies are available to the parties?

The Plaintiff relies on the testimony of one witness Mr Zahid Maker PW1 who testified as the only witness for the Plaintiff while the Defendant/counterclaimant called two witnesses namely Mr Suleiman Bukenya DW1 and Mr Kakande Sam who testified as DW2. The second counter Defendant called no witnesses. The third counter Defendant called one witness. The suit originally filed against the Defendant and Mr Suleiman Bukenya was dropped against Suleiman Bukenya and proceeded against Mavid Pharmaceuticals Ltd as the sole Defendant.

Whether the Defendant/counterclaimant is indebted to the Plaintiff in the amount claimed?

The Plaintiff seeks recovery of a total of US\$409,314.03 as claimed in paragraph 6 of the plaint. The sum arises out of receivables valued at US\$73,639.03, loss of business for the period November 2007 October 2009 at a monthly turnover fee agreed that US\$80,000 being an average rate of 30% of the value of actual shipments and equity participation and return on investment valued at US\$18,750. The Defendant made the general denial in the defence without specifically traversing the plea that they are indebted to the Plaintiff.

The Plaintiff's Counsel relied on section 101 of the Evidence Act for the proposition that the burden on the party who desires the court to give judgment as to any legal right or liability to prove the existence of facts which prove the cause of action. Accordingly PW1 testified that upon execution of the memorandum of understanding which was admitted as exhibit P2, the Defendant received the products from the Plaintiff valued at US\$267,000. The Defendant confirmed that it had received products from the Plaintiff as alleged on 7th December, 2007 and the Defendant sent an e-mail exhibit P3 (d) the Plaintiffs managing director, Mr Zahid Maker acknowledging a debt of US\$267,000 and giving a payment plan according to the quotation from the e-mail that acknowledges a total of US\$267,000. The last instalment was 31st of March 2008 of US\$32,000. Counsel submitted that by this time, the business of Mavid Pharma East Africa Ltd had been closed as stipulated in clause 4 of the memorandum of understanding exhibit P2. The Defendant was to take delivery of the Plaintiff's goods originating from Pakistan and paid the Plaintiff. This payment was the subject of the e-mail dated 7th of December 2007 exhibit P3 (d). The Defendant made partial payment leaving a balance of US\$73,639.03 which was not settled and a copy of the accounts is exhibit P5. The accounts demonstrate payments made by the Defendant and the balance. This constitutes the first item of indebtedness of the Defendant.

Counsel further submitted that the second item of indebtedness of the Defendant to the Plaintiff arose out of dealings in the memorandum of understanding exhibit P2 and relates to the sum mentioned in clause 4 thereof which is a monthly turnover of US\$80,000. It provided that all future business will be done exclusively according to the terms stated therein and a monthly turnover agreed that is a minimum of US\$80,000 by each party. Shipments would either be on cash basis or by letter of credit 90 days basis for two years. Loss was calculated to amount to US\$416,925 being the average of 30% profitability based on actual goods shipped by the Plaintiff.

DW1 in paragraph 14 of 16 of his witness statement admitted the memorandum of understanding and indicated that the stock had been received in paragraph 16 of his written testimony. It is therefore clear that the Defendant received stock from the Plaintiff which it admittedly struggled to pay for. The import of the testimony of DW1 in paragraph 19 of his written statement is that the Defendant failed to settle its use and live up to the memorandum of understanding exhibit P2. As a result, the Plaintiff filed a petition from which a consent judgment exhibit D11 at page 66 of the trial bundle was entered. At this point the Defendant was struggling to meet its end of the bargain. The Defendant contends that the sum of US\$73,639.03 was owed by Mavid Pharmaceuticals East Africa Ltd and that it was settled. Secondly the sum was owed to the Plaintiff. It was not in contention that the Defendant in the memorandum of understanding agreed to take the goods of Mavid Pharmaceuticals East Africa Ltd and paid the Plaintiff would reference to clause 2 of exhibit P2 (memorandum of understanding). Counsel submitted that the loss of about US\$416,925 arises from lost business for the duration of the memorandum of understanding. The Plaintiff according to the testimony of PW1 had a thriving business dealing with the Defendant. This business culminated into the memorandum of understanding which was to run for two years and in a minimum monthly turnover for the Plaintiff of US\$80,000. The Plaintiff was entitled to Anne US\$1,000,920 for the fixed term of two years for the entire duration of the contract which commenced on 13th November, 2007 and 13th November, 2009. The Defendant's LTR was changed on 6th March, 2009.

The Plaintiff's Counsel further submitted that the Plaintiff's claim of US\$1,435,553 is therefore below the estimated earnings pursuant to the memorandum of understanding exhibit P2.

The Plaintiff's Counsel further relied on the testimony of PW1 that the Defendant breached the memorandum of understanding by importing counterfeit products, failing to pay for the deliveries made and becoming hostile to the Plaintiff. As a result, the party's relationship was severed solely on account of the Defendant's conduct. The Defendant repudiated the contract executed with the Plaintiff. The Plaintiff relies on the case of Gulaballi Ushillani vs. Kampala Pharmaceuticals Ltd S.C.C.A. No. 6 of 1998. In that case the appellant executed a fixed term employment contract with the respondent. The relationship was brought to an end before the due termination date and it was held that where termination occurs before the due date, and there is no provision for termination prior to expiry of the fixed period, the Plaintiff would be entitled to *Decision of Hon. Mr. Justice Christopher Madrama Izama* *^*~ *&*\$\$# xtra+ *maximum735securityx 2017 style*

recover as damages, the equivalent of remuneration for the balance of the contract period. Where there is a wrong of the employee, he would be entitled to recover as damages the equivalent of remuneration for the period stipulated in the contract for notice.

Counsel submitted that the Plaintiff would have been entitled to payment as damages from the date of termination of his relationship with the Defendant. However since no payment was ever made by the Defendant for the agreed turnover of US\$80,000 for the two years, the Plaintiff is entitled to recover the sums due to it being US\$1,920,000 for the entire duration of the contract and the first issue ought to be answered in the affirmative.

Submissions in reply by the Defendants Counsel on the first issue of whether the first Defendant/counterclaimant is indebted to the Plaintiff in the amount claimed in the plaint?

In reply the Defendant's Counsel submitted that the relevant facts are as follows: the Plaintiff and the first counter Defendant and the Defendants/counterclaimants were trading partners in the business of pharmaceutical products. The Plaintiff was a licence holder for various pharmaceutical products whereas the first counterclaimant/Defendant was the LTR for the Plaintiff and did all the marketing of its products in Uganda. The business relationship lasted for a period of 15 years and was ended in March 2009 when the Plaintiff replaced the Defendants/counterclaimants with the second counter Defendant as its LTR. The second counter Defendant was a customer of the counterclaimants knowledgeable about the trading relationship including profitability between the Plaintiff and the counter claimants. He contended that prior to the termination of the trading relationship, the cancellation of the LTR status and the eventual appointment of the second counter Defendant as the local technical representative (LTR), the counterclaimant and first counter Defendant and in the month of November 2007 set trading objectives for a period of at least two years. A monthly turnover of US\$80,000 by each party was agreed to. It was also agreed that the first counterclaimant would remain the LTR to the first counter Defendant and the second counterclaimant would be responsible to handle NDA related matters. The counterclaimants executed various financial arrangements with the banks and managed to offer the Plaintiffs orders fully backed with letters of credit for the period of the memorandum of understanding dated 27th November, 2007.

In the process the Plaintiff sought to engage the counterclaimants into importation of products of unregistered drugs, contrary to the law and policy of the third counter Defendant. The counterclaimants declined and the Plaintiff sought to terminate the LTR status of the first counterclaimant and replace it with the second counter Defendant. The counterclaimants sought for an amicable resolution together with a fair reimbursement for the efforts invested in the project, before they could approve the transfer of the LTR status to the second counter Defendant.

In or about the year 1997, it was the working and policy of the third counter Defendant that prior to change of LTR status, the previous LTR had to issue to the third counter Defendant approval in the form of a no objection letter on a number of occasions the third counter Defendant issued to the counterclaimants written assurance that it was their policy unknown of working that they would only endorse a change of LTR after receiving a 'no objection' letter from the previous LTR. The subject transfer of the LTR from the first counterclaimant to the second counter Defendant was done without receiving a 'no objection' letter from the first counterclaimant, despite efforts of the counterclaimants to inform all the counter Defendants to follow the established practice and policy in change of LTR. The counterclaimants contend that the transfer was done contrary to law and policy and out of collusion by the counter Defendants.

The counterclaimants had existing financial commitments arising from the agreements with the Plaintiff, the trading relationship with the Plaintiff and as LTR, had established a sound brand name for the pharmaceutical products of the Plaintiff in Uganda. They had grossly invested due to the representations and assurances of the third counter Defendant on changes of LTR and accordingly set up a defence as established in their written statement of defence and also raised a counterclaim against all the counter Defendants for various reliefs set out in the counterclaim.

In reply to the arguments of the Plaintiff's Counsel, the Defendants Counsel submitted that the object to the claim on the ground of competence to the extent that it barred by the doctrine of res judicata. The first counterclaimant's objections are based on Exhibits D6 and D10. These exhibits demonstrate that the Plaintiff in company cause number 19 of 2009 moved the court to windup Mavid pharmaceuticals, the Defendant hearing on grounds that the Defendant had failed to pay its debts. In paragraph 5 of exhibit D6, there is a winding up petition dated 14th of April 2009 and the petitioner which is the Plaintiff in this suit stated that the company is indebted to the petitioner in the sum of US\$23,439.70 at the time of filing the petition. In paragraph 5 (g), 6 and 7 it is averred that on 20th November, 2008, the petitioner made a demand for payment of the debts and the company was unable to pay its debts and thereby this prompted the filing of the petition to windup the company.

The Defendant's Counsels submit that in the instant case the Plaintiff bases its claim on debts arising out of transactions that were executed between November 2007 and June 2008. In exhibit D3 which is the approval of change of local technical representative, this clear that the Plaintiff and the Defendant did not do any further business after 6 March 2009. The same argument is that the Plaintiff and the Defendant never did any business after March 2009 and this is supported by exhibit D9 which contains a customer statement issued by the Plaintiff to the first Defendant showing that the business did not go on after 15th January, 2009. Furthermore exhibit D 12 which is an e-mail also supports the same contention.

DW1 Mr Suleiman Bukenya testified in paragraph 23 of his written statement that the Defendant Company never did any business with the Plaintiff after the filing of the winding up petition in

April 2009. Company causes on winding up are specialised proceedings that offer company creditors opportunities to present their claims/dates in court and obtain relief to the proceedings. At the time of filing of the petition, The Companies (Winding up) Rules S I 110 – 2 provides an elaborate procedure between rules 21 to 35 on summoning and communication to all creditors to present all their claims in the event a petition is presented for winding up the company. Counsel further submitted that when the petitioner who is now the Plaintiff presented its petition, be presented or ought to have presented or its claims for money that was due to it and no subsequent suit based on monies owing could be legally sustainable by the Plaintiff against the Defendant. He relied on the rule of res judicata imported by section 7 of the Civil Procedure Act. Furthermore explanation seven of section 7 of the Civil Procedure Act provides that any matter which might and ought to have been made a ground of defence or attack in the former suit shall be deemed to have been made a matter directly and substantially in issue in that suit. The Defendant’s Counsels relied on the case of **Kamunye and Others vs. Pioneer General Assurance Society Ltd [1971] EA 263** for the test of whether or not a suit is barred by the doctrine of res judicata. It was held that the Plaintiff should in the second suit tried to bring before the court in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. The plea of res judicata applies not only to points upon which the first court actually was required to adjudicate upon but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at that time.

It is the submission of the Defendants Counsels that all claims associated to debts (if any) owed by the Defendant to the Petitioner/Plaintiff ought to have been included in the winding up petition. It follows that the Plaintiff’s suit ought to be dismissed with costs and the Defendant.

Alternatively, he submitted for the Defendants that the provisions of section 101 of the Evidence Act on prove of facts and the duty of the person asserting the facts to adduce evidence is the correct provision of law. Counsel also agrees that special damages must be pleaded and strictly proved. In the premises, the Plaintiff claimed that the Defendant owed it US\$73,639.03. While the claim was pleaded as special damages, no evidence was adduced to strictly prove it. That is a general allegation that the Defendant owes money but not effort to establish the basis of the claim. The memorandum exhibit P2 upon which the Plaintiff attempts to make it as a basis is not mentioned US\$73,639.03. There is no connection between the memorandum of understanding and the claim.

Furthermore, the Plaintiff relied on exhibit P3 (d) and argued that it was the balance of the commitment to pay which was made therein. They also related it to exhibit P5 which is the statement of account. In reply the Defendants Counsel submitted that there is no indication that the first Defendant owed the Plaintiff a sum of money in the amount of US\$73,639.03. Exhibit P5 does not mention anywhere that the statement of account belonged to the first Defendant. It

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does not reveal any details regarding the dates and the transactions relating to the first Defendant. The statement creates figures that do not distinguish between a date, invoice number, receipt number, credit or debit. It is a mere concoction of figures meant to mislead the court. Furthermore Counsel submitted that PW1 never made any explanation how the debt arose after making a general allegation. In the premises the court ought to find that there was no proof for the claimed special damages.

On the other hand the Defendants Counsel submitted that DW1 Mr Suleiman Bukenya informed the court where the Plaintiff seeks to base its claim on transactions that the first Defendant had with Mavid Pharmaceuticals East Africa Ltd, or monies that the first Defendant owed to Mavid Pharmaceuticals East Africa Ltd as a result of the memorandum of understanding admitted as exhibit P2 were paid. He also testified that the invoices used to make the claim of US\$73,629.03 were already cleared or paid for by Mavid Pharma East Africa Ltd. He referred to a demand letter from Bitangaro & company advocates acting on behalf of Mavid Pharma EA Ltd demanding for payment. This was exhibit D16. It is clear that the debt (if any) belonged to Mavid Pharma EA Ltd, a separate legal entity from the Plaintiff. Furthermore the Defendant's argument that the Plaintiff has no claim against it is supported by exhibits D6, D9 and the 10. Exhibit D6 is a winding up petition earlier on mentioned where all debts ought to have been included in the winding up petition. Exhibit D9 is the written statement of defence and annexure as of the Plaintiff in HCCS 319 of 2009. Annexure "F" thereto is the first Defendant's account of transactions with the Plaintiff by 15th January 2009. The outstanding balance by the first Defendant to the Plaintiff in the said statement was US\$19,421.61. Moreover DW1 testified that the first Defendant never transacted with the Plaintiff after 15th of January 2009 and it is therefore no basis to claim US\$73,639.03. Finally exhibit D10 is the decree in Company Cause No 19 of 2009 which proves that all the debts that the first Defendant had to settle with the Plaintiff were settled. Exhibit D13 also supports the argument that there existed no debt upon which the Plaintiff would present the suit. In the premises the claim for 73,639.03 was baseless and non-existent and made in abuse of the process of court.

Regarding the claim for loss of business of US\$416,925, which is a claim for the period November 2007 to October 2009, the claim was made as special damages which has to be strictly proved as earlier submitted.

Secondly as to the weight of evidence adduced, Counsel relies on the same submissions relating to the claim for a debt of US\$73,639.03 and emphasises that no evidence was adduced by the Plaintiff in support its claim.

In addition the claim is based on a memorandum of understanding which could only be performed if the business relationship continued. Articles 4 and 5 of exhibit P2 provided that all future business this would be done exclusively in the manner indicated. With reference to the above clauses memorandum could only be performed provided the first Defendant remained the

exclusive distributor of the Pakistan products and also LTR of the Plaintiff. This is an agreed fact that the Plaintiff terminated the trading relationship between itself and the first Defendant. It was a unilateral decision done at its instance and could therefore not have expected the Defendant to meet its part of the bargain when the Plaintiff decided to transact with another trading partner under the first Defendant. The Defendant cannot be held liable for the unilateral decision of the Plaintiff.

Secondly, there is evidence to show that the Defendant duly performed its part in ensuring that the memorandum was performed. Exhibit D8 contains a copy of the credit facility taken out by the Defendant to cater for the import of assorted medicine from Pakistan between the months of October 2008 and October 2009. It was a revolving letter of credit that would cater for all shipments/orders for the period of the memorandum of understanding. The same exhibit D8 constitutes confirmed letters of credit together with a shipment plan for the products that the first Defendant had ordered from the Plaintiff for the year 2008 up to December 2008. By that arrangement the first Defendant had made preparations for the achievement of the said targets of the turnover of US\$80,000 and could not be blamed for the failure of the Plaintiff. In the premises, Counsels prayed that the claims are disregarded and the suit dismissed.

Lastly on the claim for US\$509,314 and US\$1,920,000 presented in paragraph 17 and 19 in the submissions of the Plaintiff, both claims are not pleaded in the plaint. The Plaintiff made its claims in paragraph 6 (i) and (iii) and 11 of the plaint. The Plaintiff cannot alter its case without amendment and the claim should be disregarded. Counsels relied on *Interfreight Forwarders (U) Ltd versus East African Development Bank SCCA 33 of 1992*. Secondly, damages can only be awarded if the party seeking them proved to the court that it suffered as a result of the actions of the Defendant. Counsel relied on the case of *Rutaama Godfrey & Misango Abel vs. Attorney General and Apac District Court of Appeal Civil Appeal 80/2012*. Counsel submitted that no evidence had been adduced to prove that the Plaintiff suffered in any way as a result of the first Defendant's action. The trading relationship was terminated at the instance of the Plaintiff and the allegations that the Defendant imported counterfeit products were never supported by evidence. In the premises the claim for damages should also fail. In the premises Counsel prayed that the Plaintiffs suit is dismissed with costs.

Rejoinder of Plaintiff's Counsel on issue 1

In rejoinder the Plaintiff's Counsel submitted that the Defendant's case is that the claim under the memorandum of understanding exhibit P2 could only be made if the business relationship envisaged therein continued and because the relationship was terminated, the Plaintiff should not make any claim under the memorandum. Secondly, the Defendant had made an arrangement by way of letters of credit to settle all supplies made by the Plaintiff.

In rejoinder to these arguments, Counsel submitted that it did not address the Plaintiff's claim. The winding up petition did not touch claims that originated from the memorandum of understanding. In an e-mail exhibit P4 (d), the Defendant gave a payment plan for US\$267,000 and made partial payments leaving a balance of US\$73,639.03. Ideally, to extinguish this claim, the defence should demonstrate that there was no such payment plan and in any case parties entered into a memorandum and the Defendant met its part of the bargain.

With reference to exhibit P4 (d), the Defendant through its management wrote to the Plaintiffs managing director indicating liabilities. To properly understand the claim, he drew the courts attention to the following; firstly, the Defendant made a payment plan indicating the last payment as 31st of March 2008. Secondly the memorandum of understanding was executed in November 2007 and the Defendant was not a party to it. In clauses 3 and four of exhibit P2, both the Plaintiff and the Defendant agreed that Mavid Pharmaceuticals East Africa Ltd which was the joint-venture, had stock from Pakistan to be sold to the Defendant. Thirdly in clause 2 of exhibit P2 is provided that the second Defendant, the managing director of the first Defendant shall settle all Mavid Pharmaceuticals East Africa limited stock and paid the Plaintiff and that a plan shall be prepared for this.

On 7th December, 2007, the second Defendant wrote an e-mail exhibit P4 (d) with the payment plan in respect of US\$267,000. This plan became operative from 1 December 2007 and was acknowledging a debt of US\$267,000. This payment therefore has no bearing with the continuity of the joint-venture business. The debt is acknowledged and was reduced to US\$73,639.03. No evidence has been adduced that this money was paid.

Resolution of issue number one:

Whether the Defendant/counterclaimant is indebted to the Plaintiff in the amount claimed?

I have carefully considered issue number one that was opposed by the Defendant on the basis that it is res judicata pursuant to a winding up petition filed by the Plaintiff that was settled.

Starting with the evidence, I have considered the petition filed by the Plaintiff Company Cause Number 19 of 2009. The exhibit I have examined does not have a clear date as to when it was received by the court. What is apparent is that it was signed by Messieurs Bitangaro & company advocates, Counsel for the petitioner on 14th April, 2009. Paragraph 5 thereof of the petition exhibited D6 avers as follows:

"The company is indebted to your petitioner in the sum of (...) US\$23,439.70 as at the present day arising out of supply by the petitioner to the respondent of various pharmaceutical products under documents against acceptance terms, which arose under the circumstances any related the below: -...

In the facts and circumstances related in paragraphs 5 (a) – (g) the facts included dates in paragraph 5 (g) that the petitioner on 20th November, 2009 through its legal Counsel made a demand for payment of the debt. The petition could only have been filed after the demand letter which is specifically referred to in paragraph 5 (g). This situation is not made any easier by the parties including a written document signifying an order/decreed in Company Cause No 19 of 2009 indicating that it was filed on 3rd November, 2009. It was also issued by the registrar on 4th November, 2009 in which by consent of the parties the petition was settled. The fact that the petition was determined by consent is not in dispute. There is however an anomaly as to when the petition was actually filed because of the reference in the facts in support of the petition which included the date of 20th of November 2009 prior to the settlement of the petition. (It could only mean 2008).

I have further considered other evidence of the petition inclusive of the special audit report exhibit D17 which includes a copy of the petition. The affidavit verifying the petition was signed on 20th April, 2009. The demand notice referred to is dated 20th of November 2009 and was received on 23rd January, 2009 by Mavid Pharmaceuticals Ltd. In the demand letter of Bitangaro & company advocates it is written as follows:

"We act for Royal Group of Pakistan who has instructed us to write to you and demand as follows:

As you are no doubt well aware you are indebted to our client in the sum of United States dollars twenty three thousand four hundred and thirty nine cents seventy (US\$ 23,439.70) arising out of supply by our client to you of various pharmaceutical products.

The goods were supplied to you under documents against acceptance terms as Orient bank Ltd Kampala, as presenting bank, which you have blatantly breached leaving you indebted to our client in the aforesaid sums.

Please note that unless you pay our client to the sum of US\$23,439.70 and US\$3000 being our legal costs within three days from the date hereof, our instructions are to commence legal proceedings including but not limited to the winding up of your company.

Yours truly,

Bitangaro & Co. Advocates"

I have also noted that the affidavit in reply of Mr Syed Tariq Ali was filed on 20th August, 2009 responding to an affidavit of the respondent. In paragraph 3 thereof he deposes that the petition was sealed by the court on 13th August, 2009. The only plausible and positive interpretation is that there could be an error in the date of the demand letter. However, because it was received in

January 2009 this is likely the case. There are therefore anomalies in the petition document presented to the court.

I have further considered the rejoinder of the Plaintiff's Counsel to the preliminary objection on the ground that the Plaintiff's suit against Mavid pharmaceuticals Ltd is barred by the doctrine of res judicata. In paragraph 3 of the affidavit in rejoinder some facts are conceded to by the Plaintiff's Counsel and include that the last payment plan by the Defendant made to the Plaintiff show that the last payment was to be made on 31st March, 2008. It relied on exhibit P2 which is also a memorandum of understanding executed in November 2008. He also relied on an e-mail exhibit D4 dated 7th December, 2007 which became operational on 31st December, 2007 acknowledging a debt of US\$267,000. It is the contention that part of that debt was paid leaving a balance of US\$73,639.03 which the Plaintiff claims against the Defendant. I have considered copies of the e-mail which include the payment plan and is dated 7th of December, 2007. I agree that there was a payment plan and for a total of US\$467,000 written to the Plaintiff by the Defendant's managing director Mr Suleiman Bukenya.

The only conclusion I can reach is that the petition had been filed by August 2009 and the indebtedness of the Defendant according to the petition arose prior to that date. It must have included all the indebtedness of the first Defendant Messrs Mavid Pharmaceuticals Ltd. The facts pleaded in the plaint related to transactions prior to the filing of the petition for winding up the Defendant. The petition itself relates to transactions between the Plaintiff and the Defendant for the supply of various pharmaceutical products under documents against acceptance terms. They include facts of the request to supply dated 29th of June, 2008 up to November 2008. In paragraph 7 of the petition it is averred that the company is indebted to your petitioner and is insolvent and unable to pay its debts. The sum claimed in the petition was settled by consent of the parties.

On the other hand the Defendant claims in the written statement of defence that the Plaintiff in collusion with the National Drug Authority and the second counter Defendant terminated the LTR status of the first Defendant on 6th March, 2009 contrary to the law. National drug authority averred in their written statement of defence responding to the Defendant's counterclaim that the change of LTR status was done in accordance with the law. The change of LTR status was admitted by the Plaintiff in its written statement of defence to the counterclaim. I have also considered the evidence of PW1 Mr Zahid Maker. In paragraph 47 of the written testimony taken in context of the previous paragraphs explaining the defaults of the first Defendant, the relationship between the parties came to an end according to an e-mail dated 11th November, 2008 part of exhibit D13.

I have also considered the admitted fact that the business relationship between the Plaintiff and the first Defendant was terminated. The question is when was it terminated? I have considered the testimony of one Suleiman Bukenya and DW1 in paragraph 23 of his written statement and I

agree that by early 2009, there were no further business dealings between the Plaintiff and the Defendant. The climax of the deterioration of the relationship between the parties is the change of LTR status confirmed by letter in March 2009. Thereafter there was no further business dealings between the parties by the time the pleadings in company cause number 19 of 2009 was completed around August 2009. Company cause number 19 of 2009 in which the Plaintiff is the petitioner against the Defendant was settled by consent of the parties by a consent document filed in court on 3rd November, 2009.

I considered a similar matter in HCCS No. 170 of 2010 **FROSTMARK EHF (suing through Attorney John Kabandize vs. UGANDA FISH PACKERS LTD.** In that suit there was a consent order selling a company winding up petition filed by the Plaintiff against the Defendant. It was agreed inter alia that the Respondent shall pay to the petitioner a total sum of 738,426 Euros subject to interest plus legal costs of Euros 10,000 and the terms of payment were also agreed. The Petitioner subsequently filed a suit for the same debt and the plea of res judicata succeeded.

Section 7 of the Civil Procedure Act provides for the statutory bar of res judicata. It provides as follows:

“7. Res judicata.

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court.

Explanation 4.—Any matter which might and ought to have been made a ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in that suit.”

It bars a court of law from trying any suit in which the subject matter was directly or substantially in issue in a former suit between the same parties. The bar of res judicata was considered by the Court of Appeal of Uganda in **Semakula vs. Magala & Others [1979] HCB 90**. It was held in determining whether a suit is barred by res judicata, the test is whether the Plaintiff in the second suit is trying to bring before the court in another way in the form of a new cause of action a transaction which has already been presented before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If this is answered in the affirmative then the plea of res judicata will then not only apply to all issues upon which the first court was called upon to adjudicate but also to the very issue which properly belonged to the subject of litigation and which might have been raised at the time, through the exercise of due

diligence by the parties. This interprets explanation 4 of section 7 of the Civil Procedure Act that:

“Any matter which might and ought to have been made a ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in that suit.”

The provision was also interpreted by the East African Court of Appeal per Law Ag. VP in **Kamunye and Others vs. The Pioneer General Assurance Society Ltd, [1971] E.A. 263** with the concurrence of Spry Ag. P. and Mustafa J.A. at page 265 paragraph F – G. The test is:

“The test whether or not a suit is barred by res judicata seems to me to be – is the Plaintiff in the second suit trying to bring before the court, in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of res judicata applies not only to points upon which the first court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time... The subject matter in the subsequent suit must be covered by the previous suit, for res judicata to apply...”

Was Company Cause No. 19 of 2009 a suit between the parties for res judicata to apply? The purpose of the winding up petition was for the Petitioner who is now the Plaintiff to prove its debts and have the same paid. The petition was commenced under the repealed Companies Act Cap 110. Section 224 provides that a petition for winding up may be presented by a creditor or creditors. Where a winding up petition is filed a suit against the company sought to be wound up may be stayed pending winding up proceedings. Secondly, section 227 provides that after commencement of winding up proceedings any disposition of property and transfer of shares or alteration of the status of members of the company unless ordered by the court is void. The intention is to ensure that after commencement of the petition, property is available to all creditors who can prove the indebtedness of the debtor company sought to be wound up. This is ensured by the process of giving notice to all creditors of the winding up petition and ensuring that they are treated equally according to the order of priority. The proceeding should determine the liability of the company to each creditor.

The effect of a winding up order is provided for by section 232 of the Companies Act cap 110 (repealed). It provides that:

“232. Effect of a winding up order.

An order for winding up a company shall operate in favour of all the creditors and of all the contributories of the company as if made on the joint petition of a creditor and of a contributory.”

The Plaintiff could not therefore bring a petition to prove its own debts only but all the debts of the Defendant. Debts have to be proved within a limited time. This is provided by section 262 and 263:

“262. Power to exclude creditors not proving in time.

The court may fix a time within which creditors are to prove their debts or claims or to be excluded from the benefit of any distribution made before those debts are proved.

263. Adjustment of rights of contributories.

The court shall adjust the rights of the contributories among themselves and distribute any surplus among the persons entitled thereto.”

Finally a winding up petition is a Company Cause commenced under Order 38 of the Civil Procedure Rules. Order 38 rules 8 of the Civil Procedure Rules prescribes how a petition is presented. It follows that a petition is a suit instituted in such manner as prescribed by the rules and as defined by section 19 of the Civil Procedure Act. A suit is defined by section 2 of the Civil Procedure Act as “civil proceedings commenced in any manner prescribed”. The petition in effect was a civil proceedings commenced in a matter prescribed in which all creditors were required to prove all their claims and to do so within a limited time or be barred from presenting it without leave of court. It resulted in a consent order for the payment of all debts owing and as described in the petition. Other debts not claimed in the petition could not be subsequently proved piecemeal on the following grounds.

A consent judgment is an agreement which cannot be discharged or varied unless obtained by fraud or collusion or by an agreement contrary to the policy of court (See *Brooke Bond (T) Ltd vs. Mallya* [1975] EA 266). A consent judgment is a contract and cannot be varied except on grounds for setting aside a contract of the parties (See *Hassanali vs. City Motor Accessories and Others* [1972] EA 423). Last but not least a consent order or judgment operates as estoppels against the parties thereto from asserting something contrary to the agreement. This was the holding in **Huddersfield Banking Company Ltd vs. Henry Lister and Sons Ltd (1895) 2 CH D. P. 273** by Lindley LJ at page 280:

“A Consent Order I agree is an order and so long as it stands it must be treated as such, and so long as it stands it is as good an estoppels as any other order. I have not the slightest doubt that a Consent Order can be impeached, not only on the ground of fraud, but upon any ground that would invalidate it.”

The petition ought to have determined the issue of the indebtedness of the Defendant. It determined that the whole amount claimed in the petition was payable to the Plaintiff and the Defendant paid the same according to the testimony of DW1. In other words the indebtedness of the Defendant as at the time of filing the petition and by the time pleadings were closed in August 2009 was settled by the consent of the parties. All the indebtedness of the Defendant by the time of filing the petition was a matter that was directly in issue and ought to have been the subject matter of the petition. If the Defendant had been wound up how would a subsequent claim be brought? All the claims of the Plaintiff in the suit are classifiable as debts arising from the facts pleaded in the petition which clearly was about transactions between the parties prior to the suit. If it was not raised, it ought to have and the doctrine of estoppels bars the Plaintiff from bringing other claims of indebtedness arising directly or indirectly from what is pleaded in the petition. The entire indebtedness of the Defendant was a matter directly and substantially in issue in the winding up petition. The known indebtedness of the Defendant was admitted and paid by the Defendant and the matter was closed. The question of liability of the Defendant for the sum claimed in the plaint was directly and substantially in issue and issue Number 1 of whether the Defendant/counterclaimant is indebted to the Plaintiff is answered in the negative. The Plaintiff's action in respect thereto is res judicata.

The second issue is whether the approval of the second counter Defendant as LTR to the first counter Defendant was done legally?

Whether this issue is intertwined with the third issue as to the consequences, if any, of cancellation of the LTR status, it is my considered view that the corollary issue arising from the first issue as to whether the Plaintiff can maintain an action for transactions prior to the filing of Company Cause Number 19 of 2009 needs to be resolved in the relation to issue number three as well which issue is whether the Plaintiff is liable to the counterclaimant for loss of LTR status on a point of law as well. The point of law is whether the matter is res judicata. It follows that issues number 2 and 3 are intertwined. For that reason issues number 2 and 3 will be considered together. They are: Whether the approval of the second counter Defendant as LTR to the first counter Defendant was done legally? Whether the Plaintiff is liable to the Counterclaimant/Defendants for loss of business due to cancellation of the LTR status?

I would first consider an aspect of issue 3 whether the Plaintiff is liable to the Counterclaimant/Defendants for loss of business due to cancellation of the LTR status on the basis of a point of law arising from issue 1 whether the Plaintiffs action is res judicata.

ISSUE NO 3: Whether the Plaintiff is liable to the Counterclaimant/Defendants for loss of business due to cancellation of the LTR status?

The first issue as to whether the petition and settlement between the parties for the claim of the Plaintiff made the subsequent suit res judicata was answered in the affirmative. This raises a

corollary issue as to whether the Defendant can claim for causes of action arising prior to the filing of Company Cause No. 19 of 2009 and HCCS No 319 of 2009. Such an issue was not addressed by Counsels.

I have carefully considered the submissions on the third issue and the Plaintiff addressed the issue on the merits on the assumption that the cause of action was not barred by the doctrine of res judicata which has been discussed in the first issue. From the submissions of the counterclaimants Counsels, special damages worth US\$1,200,000 arises out of loss of earnings for a period of 36 months and economic loss of Uganda shillings 3,082,895,850/= arising out of expenditures, interest, fees and taxes incurred as a result of the termination of the LTR status. The cause of action arises primarily on account of or as a consequence of change of LTR status of the counterclaimant.

As against the Plaintiff/first counter Defendant, the issue has to be considered after establishing whether it is the subject matter that belongs to the Company Cause No. 19 of 2009 and HCCS No 319 of 2009. To do this I had to consider the defence of the Defendant to the company cause. The affidavit in reply of Suleiman Bukenya Managing Director of Mavid Pharmaceuticals Ltd is included in exhibit D17 which includes among the documents there under, documents in relation to Company Cause No 19 of 2009. The particular affidavit was affirmed in reply to an application by the petitioner for the appointment of an interim liquidator. The affidavit in reply is affirmed by Bukenya Sulaiman and was filed on record on 22nd September 2009. The affidavit is very elaborate as to the defence of the Defendant/respondent to the petition. In paragraph 4 he deposed that it is not true that the respondent is indebted to the applicant/petitioner to the tune of US\$23,439.7 as alleged. And in response to the claim, he sets out the ground that the respondent had been the Local Technical Representative and local distributor of the applicant/petitioner for the sale and distribution of its various pharmaceutical drugs in Uganda for over 10 years and dutifully fulfilled its obligations there under. He also made reference to the memorandum of understanding which reaffirmed the LTR status of the Defendant which granted the Defendant exclusive rights to the importation of its pharmaceutical products from Pakistan. He alleged that the petitioner breached the exclusivity agreement in the memorandum by supplying pharmaceutical drugs to another company thereby causing massive losses to the respondent.

Thirdly, the respondent contested prices of some of the pharmaceutical drugs the petitioner supplied as being inflated. Fourthly in another dealing, the petitioner had supplied the respondent with wrong materials and packaging materials for the local manufacture of Semodex Ointment which was rejected by the National Drug Authority. Thereafter the petitioner cancelled the authorisation of the respondent for the local manufacture of "Semodex Ointment". In paragraph 4 (1) of the reply Suleiman Bukenya deposed as follows:

"That the applicant/petitioner thereafter cancelled the authorisation of the respondent for the local manufacture of "*Semodex ointment*" which left the respondent with unusable

raw materials and packaging materials which he had paid for. The respondent has incurred and claims against the petitioner the sum of US\$62,093.73 (...) for materials supplied and US\$4500 for freight and clearing charges."

The managing director of the Defendant in response to the claims of the petitioner/Plaintiff further deposes that the respondent has since filed HCCS Number 319 of 2009 against the petitioner seeking to recover a total of US\$67,168.79. Finally in paragraph 4 (o) he deposes as follows:

"That in reply to paragraph 5 of the said affidavit this application and Petition are all premature as the date on which the money demanded is to be paid has not yet lapsed."

In paragraph 16 deposed as follows:

"That in further reply to paragraph 18 of the said affidavit the applicants had made a claim of US\$150,000 as an alleged debt and another of US\$600,000 through its High Commission in December 2008 (copies of e-mail correspondence and communication to the High Commission in Kenya are attached hereto as annexure "V" & "W".

In paragraph 17 of the affidavit he deposed that the petitioners advertisement of the petition caused the bankers of the Defendant with whom they had a good working relationship to withhold credit facilities to the respondent according to an attached a letter from Orient bank and Bank of Africa.

Did this defence survive the settlement of the petition for a sum certain in money by which the Defendant in the suit objected to the Plaintiffs claim and also determination of the counterclaimant's suit mentioned in the company cause?

The answer to this question depends on resolving issues relating to the nature of the counterclaim and whether that counterclaim was a defence to the company cause. Furthermore, whether in the winding up petition, the respondent can make any claim against the alleged creditor? The issue is further complicated by the consideration that the Defendant/counterclaimant objected to the petitioner who is now the Plaintiff from further claiming against the Defendant further sums in addition to that in the winding up petition, and the objection succeeded under issue one. The issue was raised by the Defendants Counsel. To what extent is the defendants counterclaim also barred by the doctrine of res judicata? The wording of section 7 of the Civil Procedure Act by itself applies to both the claim and the defence. In other words it applies to issues in controversy in the previous suit. An issue in controversy only arises in terms of Order 15 rule 1 of the Civil Procedure Rules where one party makes an affirmation that is denied by another. A matter is also deemed to belong to a former dispute if it ought to have been litigated when a suit is resolved on similar facts and issues in a former suit. For purposes of res judicata it is only a general principle that an issue for determination by the court arises from the pleadings. Issues which ought to have

been included by exercise of due diligence are deemed to be res judicata too. In considering this question I was therefore constrained to further consider the reply of the respondent through one Syed Tariq Ali, the general manager (marketing) of the petitioner.

In that affidavit in reply which was filed on 20th August 2009 replies to the affidavits of Suleiman Bukenya, which I found to be conspicuously in the first documents. He deposes that it is true that the respondent was the petitioners Local Technical Representative. In paragraph 8 he affirmed that the respondent failed to settle monies owed to the petitioner and meet the minimum monthly order values of US\$80,000, to issue letters of credit according to the memorandum of understanding. Furthermore on 7th December 2007 the respondent presented a payment plan for settlement of the petitioner's deals under the memorandum and until the date of the petition, the money remained outstanding (i.e. the US\$270,000). In paragraph 10 he denied that the respondent incurred marketing and branding costs for the petitioner's products. He affirmed that the petitioner incurred all the marketing, promotion, factory registration, product registration costs and retention fees.

The issue of change of LTR was considered in paragraph 16 of the affidavit where he deposes as follows:

"That the National Drug Authority having been satisfied with the petitioners application to change the Local Technical Representative authorised the Petitioner to appoint another Local Technical Representative.

There are several other depositions of fact in relation to the controversy before this court. This includes paragraph 29 of the affidavit in rejoinder where the petitioners managing director (marketing) denied the respondents claim in the sum of US\$62,093.73 for raw materials supplied and US\$4500 for freight and clearing charges as being frivolous, vexatious and as unsubstantiated and without any merits. He denied that the sum was the total cost of Semodex ointment from materials. The amount included US\$45,000 outstanding monies due and owing to the petitioner from various supplies. Thirdly, the Semodex raw material was worth US\$23,414 and not US\$62,093.73. In paragraph 33 he deposed that the respondent could not claim for freight and storage charges for goods he received and sold for its exclusive benefit and the claim for US\$3050 was frivolous and unsubstantiated. The petitioner requested the respondent to provide a bank guarantee which is in the respondent's names and at the conclusion of the suit it shall be the respondent to take benefit of the money. He also alleged that the respondent received due consideration for the guarantee from the petitioner as it was in lieu of the cash payment issued with pharmaceutical drugs by the petitioner against the money for the bank guarantee. He asserted that once the guarantee was released and this suit settled in favour of the petitioner, the respondent shall invariably have a double benefit. The petitioner denied the respondents claim of US\$8000 as technical fees for services rendered to the petitioner as LTR. There are several other

depositions of fact and contentions which culminated in the statement that the claims raised by the respondent were a sham intended to defeat the course of justice.

Counterclaim/setoff and the doctrine of res judicata

According to **Odger's Principles of Pleading and Practice in Civil Actions in the High Court of Justice 22nd Edition page 199:**

"Even though the Plaintiff was the first to commence litigation it may happen that the Defendant has a claim of some kind against the Plaintiff. If so, the question at once arises, must the Defendant issue a separate writ for this, or can he set up his claim in the Plaintiff's action?"

If the Defendants claim can be tried without the inconvenience at the same time and by the same tribunal as the Plaintiffs, the Defendant would be allowed to plead in the Plaintiff's action (a) in some cases a "setoff", (b) in all cases a "counterclaim." The distinction between setoff and counterclaim should be carefully noted, though it must be said that the modern tendency is rather to slur over the differences and emphasise the similarities.

... Both are to a large extent the creatures of statute law.

I agree with the above statement and accordingly have considered the statutory basis for a counterclaim or setoff under Order 8 rule 2 of the Civil Procedure Rules and it provides that:

"Setoff and counterclaim.

- (1) The Defendant in an action may set off, or set up by way of counterclaim against the claims of the Plaintiff, any right or claim, whether the setoff or counterclaim sounds in damages or not, and the setoff or counterclaim shall have the same effect as a cross action –, so as to enable the court to pronounce a final judgment in the same action, both on the original and on the cross-claim. But the court may on the application of the Plaintiff before trial, if in the opinion of the court the setoff or counterclaim cannot be conveniently disposed off in the pending action, or ought not to be allowed, refuse permission to the Defendant to avail himself or herself of it.
- (2) Where a Defendant includes a counterclaim in the defence, the Defendant shall accompany it with a brief summary of evidence to be adduced, a list of witnesses, a list of documents and a list of authorities to be relied on."

The discretionary right to include a counterclaim does not mean discretion whether to include it then or file it at a later time. It means discretion whether to have a counterclaim or set off at all and this is supported by the following analysis. It follows if my analysis is correct that a

Defendant who wishes to set up a counterclaim or setoff should file it with the defence as dictated by Order 8 rules 7 and 8 of the Civil Procedure Rules.

According to **Halsbury's laws of England fourth edition reissue volume 42 and paragraph 496**, where a claim by a Defendant to a sum of money (whether ascertained or not) is relied on as a total or partial defence to a claim, the Defendant may include it in his defence and claim it as a set off against the Plaintiff's claim whether or not it is also added as a counterclaim. This is based on Order 18 rule 17 of the Rules of the Supreme Court (RSC). It is further provided that:

"Where a Defendant counterclaims, he must add the counterclaim after his defence. A counterclaim must be pleaded where the action is still in existence, before the Plaintiffs claim is satisfied."

In the case of **CSI International Company Ltd vs. Archway Personnel (Middle East) Ltd [1980] 3 All ER 215** Roskill LJ considered Order 15 rule 2 of the RSC on counterclaims against a Plaintiff that:

"(1) Subject to rule 5(2) a Defendant in any action who alleges that he has any claim or is entitled to any relief or remedy against a Plaintiff in the action in respect of any matter (whenever and however arising) may, instead of bringing a separate action, make [notice the word is 'make' and not 'make or raise'] a counterclaim in respect of that matter; and whether he does so he must add the counterclaim to his defence ... "

This rule is similar to the Ugandan Order 8 rule 2 (1) quoted above and only differs on the wording. Roskill LJ said:

"Counsel put in the forefront of his argument, as he did before the judge that it was not possible to have a counterclaim in any circumstances unless there was a defence to which that counterclaim could be attached. The deputy judge dealt with that point in his judgment. After setting out the rules and orders to which I have referred, he said:

'In my judgment these absurdities and anomalies are not necessary if one gives to the rule the meaning that the counterclaim must be added to the defence where a defence has been delivered and to reject a meaning that a counterclaim must be pursued by a separate action where no defence has been delivered. It seems to me, although it is not necessary to my decision, that the reason for the requirement is to minimise the number of pleadings and that is linked with RSC Ord 18, r 3(3) where a Plaintiff is required to serve a defence and reply to a counterclaim in the same document.'

On that point I find myself, with respect, in complete agreement with the deputy judge, and I have nothing more to say on it."

At 220 he further held that a counterclaim should be filed with the defence to the Plaintiff's action:

“If Counsel’s argument is taken to its logical conclusion, then notwithstanding that the Plaintiffs had obtained full satisfaction of the judgment, the Defendants can, years later, as it were, out of the blue, serve a counterclaim. I do not think that is right. It may be that certain amendments are required and could, with advantage, be made to the rules in order to make clear what the position is. But I rest my decision on this simple point: where a counterclaim, even if it has previously been raised, has not been the subject of a summons for directions, or, when required, of a formal pleading before the time when the Plaintiff has received full satisfaction of the judgment which he has obtained against the Defendant, I do not think there is still extant any action by the Plaintiff in which the Defendant could properly counterclaim against him. The action has, for all practical purposes, come to an end when satisfaction of the judgment has been obtained.”

Under the Ugandan Order 8 rule 7 of the Civil Procedure Rules a Defendant who wishes to include a counterclaim shall in the statement of claim specifically state that he or she does so by way of counterclaim. Under rule 12 of Order 8 (supra) the Plaintiff may apply to the court for an order that the counterclaim be excluded from trial in the Plaintiff’s suit and be tried in an independent suit and the court may grant the order. Last but not least the counterclaimant may include other parties to the counterclaim to avoid multiplicities of proceedings.

According to paragraph 509 of Halsbury's laws of England (supra), a counterclaim made by a Defendant may be proceeded with notwithstanding that judgment is given for the Plaintiff in the action or that the action is stayed, discontinued or dismissed. However, the Defendant must have made his counterclaim before the Plaintiff has obtained and been paid on his judgment according to the authority of **CSI International Company Ltd vs. Archway Personnel (Middle East) Ltd** (supra).

It is generally good practice prescribed by section 33 of the Judicature Act that all controversies involving the parties before the court be determined to avoid multiplicities of proceedings. Specifically such multiplicities are avoided by having all necessary pleadings completed before the trial and necessary parties added. Section 33 of the Judicature Act provides as follows:

“33. General provisions as to remedies.

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

Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~ *&*\$\$# xtra+
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According to Odger's (supra) generally a set off may be described as a shield which operates only as a defence to the Plaintiffs action and the counterclaim as a sword with which the Plaintiff may be attacked but which does not afford the Defendant any protection unless it is of such a nature that it can also be pleaded as a set-off. In the case of **Hale v Victoria Plumbing Co Ltd and En-Tout-Cas Co Ltd [1966] 2 All ER 672** the Court of Appeal considered the equitable right of set off. In that case a judgment debtor had a claim against E Ltd for work done. The judgment creditor obtained a garnishee order absolute against E Ltd but the evidence did not establish the nature of E Ltd's debt to the judgment debtor. On behalf of E Ltd it was deposed that E Ltd had claims against the judgment debtor for breaches of contract for bad work as sub-contractor under a building contract which exceeded the amount of claim made by the Judgment debtor. They held on the facts that E Ltd had an equitable right of setoff against the claim of the judgment debtor. The holding applied the practical result of a defence of setoff mathematically. Danckwerts LJ held at page 673:

“Moreover, as has been pointed out, RSC, Ord 18, r 17 really provides for exactly the sort of situation which has arisen in the present case; and the result of the Supreme Court of Judicature (Consolidation) Act, 1925 is that at any rate claims arising out of the same transaction between two parties can be set off against each other, the leading case on that being *Morgan & Sons Ltd v S Martin Johnson & Co Ltd*, a decision also of the Court of Appeal and a very well known case.

We have been told (though the affidavits on both sides could have been more explicit) that the transactions between the garnishee and the judgment debtor arose out of building contracts in which the plumbing company, the judgment debtor, had been employed as sub-contractors and had not done the work well. The claim against the garnishee arose in respect of the work alleged to have been done by the judgment debtor. It seems to me that that is clearly a case within the principles stated in the note in the Annual Practice (1966), p 406 and a case in which a set-off would be allowable and would either extinguish the claim or leave (as we are told) possibly a very small balance due.”

I note that the basis of the ruling on the first issue is that a creditor who files a winding up petition should prove all debts against the debtor by the time of filing the petition. The petition is made and has the effect of being for the benefit of all creditors who are notified under the rules of court of the petition and requested to lodge their claims if any as well. It defeats logic for the Plaintiff/petitioner to withhold making some of the claims due against the respondent at the time of filing a petition to wind up the respondent for failure to pay debts. Conversely it defeats logic and the rules of practice for the respondent against whom a debt is being proved not to set up a counterclaim or setoff which could extinguish the alleged debt. It is not sufficient to set up a defence when there is a counterclaim. The respondent should show that he is not liable to pay the debt and the issue of who owes what ought to be tried before a final decision is made on the winding up of the company. In any case it is a defence to winding up.

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Last but not least the counterclaimant's cause of action specifies that it arises among other things also as a consequence of termination of the LTR status. The LTR status of the Defendant was changed in March 2009 and the petition pleadings were concluded in September 2009. The respondent as noted in the above pleadings claims consequential losses and set off in answer to the petition. However, the respondent opted not to have the petition determined on the merits and it was settled by consent of the parties. The respondent paid the petition for the indebtedness. The issue of indebtedness between the parties inclusive of loss of business or damages arising from loss of LTR status was as far as the petition is concerned was conclusively determined according to the submission of the Defendant on the objection to the Plaintiffs claim on ground of res judicata. That is now the controversy which I must resolve.

This is because the legal doctrine is that res judicata does not only apply to the petitioner or Plaintiff but to the respondent or Defendant (parties to the former suit or representatives in title) and matters in controversy in the petition or suit decided or which ought to have been raised in the petition or suit and decided prior in time. Is the matter in controversy to be raised supposed to be restricted to such matters only as answer the debt claimed? I have found the issue an issue of a novel nature which must partially be resolved on the basis of the effect of a winding up petition and claims for or against the debtor company.

Ordinarily res judicata and the counterclaimants claim would be covered by the explanation 4 to section 7 of the Civil Procedure Act which provides as follows:

“7. Res judicata.

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court.

Explanation 4.—Any matter which might and ought to have been made a ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in that suit.”

The controversy is to the extent to which the matter could be a defence or even a ground of attack in terms of setoff and counterclaim. From that analysis the matter of loss on account of the Plaintiffs actions culminating to change of LTR status (and which the respondent/Defendant/counterclaimant averred in the petition) ought to have been made a ground of defence or attack in the winding up petition but the question remains as to what extent. In the least the issue is whether it should have been part of the Counterclaimants suit in HCCS 319 of 2009. It was a defence to the winding up action that the Defendant did not owe the petition anything and in fact had a setoff exceeding what the Petitioner was claiming. Last but not least it

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would be strange indeed for the Defendant to succeed on the plea of res judicata based on a claim which arises from transactions between the parties prior to the filing of Company Cause No. 19 of 2009 and the Defendant is not barred by the same doctrine based on the same transactions from making a counterclaim arising there from. Loss of profit in the counterclaim is claimed as a special damage and in the least as a set off or counterclaim to a claim for a liquidated demand by the petitioner/Plaintiff. The fact that the doctrine of res judicata also applies to a claim or defence which ought to have been made in a previous decided suit through the exercise of diligence by the parties is emphasised by the East African Court of Appeal per Law Ag. VP in **Kamunye and Others vs. The Pioneer General Assurance Society Ltd, [1971] E.A. 263** at page 265:

“the plea of res judicata applies not only to points upon which the first court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time... The subject matter in the subsequent suit must be covered by the previous suit, for res judicata to apply...”

The doctrine also bars the Defendant from filing a subsequent suit which could have been a counterclaim or setoff in the same action according to the English authorities I have set out above. Last but not least the question of liability of the Plaintiff depends on what the counterclaimant claims in this suit. Was it something that ought to have been filed in the petition and the corollary suit? In paragraph 8 of the defence of the Defendant, the Defendant sets up a defence that the Plaintiff’s action in collusion and connivance with the National Drug Authority and Abacus Pharma (Africa) Ltd caused it financial, economic and pecuniary damage, loss and injury.

The defence is that the loss of business earnings and profits as LTR was from the period November 2008 for a period of 36 months. This period is both before and after the Company Cause No 19 of 2009. It amounts to a period of three years at an annual net profit of US\$400,000 giving a total of US\$1,200,000 claimed as loss of profit. The counterclaimant claims other financial loss amounting to 3,082,895,850/= Uganda shillings for consequential loss for close of the business which include financial arrangements to facilitate business operations including arrangement and commitment fees as well as stamp duty. Costs of closure of branches and dismantling of pharmacy network, loss of business from local sales in pharmacies for 36 months, loss of stock at the pharmacies, sales and marketing and business promotion costs and expenses, interest on loans and other financial arrangements, Labour demobilisation and termination of employment and legal costs.

While this is a defence to the Plaintiff's suit, it is also a counterclaim against the first Defendant to the counterclaim who is the Plaintiff as well as Abacus Pharma (Africa) Ltd and National Drug Authority who are new parties to the suit had the petition and HCCS No 19 of 2009 been heard on the merits.

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In the prayers the counterclaimant seeks a declaration that the termination of the first Defendants LTR status was illegal, unlawful and a nullity. Secondly, it seeks an order directing the third counter Defendant namely National Drug Authority, to comply with the law, regulations and policy before terminating the first Defendants LTR status. Thirdly an injunction restraining the second counter Defendant from acting as LTR of the Plaintiff until the first Defendant/counterclaimant is lawfully and legally terminated as LTR. The special damages referred to of US\$1,200,000 and Uganda shillings 3,082,895,850/=, general and punitive and exemplary damages. As to the claims against the Plaintiff we need to explore res judicata first but for purposes of completeness I need to explore other issues affecting the other parties as well.

On the first issue my conclusion that the Plaintiff's suit is res judicata was driven by the fact that a creditor wants a debtor company wound up ought to put up all the liability of the debtor so that when other creditors also put in their claims, all the indebtedness of the respondent company is taken into account in the distribution of the assets. I noted that it was illogical not to claim the entire liability of the respondent company in the petition for winding up the company.

On the other hand, where the petitioner puts the claim and the respondent has a counterclaim, it would be a defence to the entire winding up petition to pay up the entire debt claimed by the petitioner before any winding up. The question therefore is whether the settlement of the petition by payment of a particular amount bars the Defendant/counterclaimant from lodging additional claims against the petitioner in a subsequent suit. What of suits which had been filed at the time of the petition? The Companies Act cap 110 laws of Uganda (repealed) which was the applicable law in the year 2009 when the Company Cause Number 19 of 2009 makes provision for pending suits when a winding up petition is filed. Section 226 of the Companies Act cap 110 provides that:

“226. Power to stay or restrain proceedings against a company.

At any time after the presentation of a winding up petition, and before a winding up order has been made, the company, or any creditor or contributory, may—

(a) where any suit or proceeding against the company is pending in the High Court or Court of Appeal apply to the court in which the suit or proceeding is pending for a stay of proceedings therein; and

(b) where any other suit or proceeding is pending against the company, apply to the court having jurisdiction to wind up the company to restrain further proceedings in the suit or proceeding, and the court to which application is so made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit.”

Other proceedings may be stayed pending the hearing of the winding up petition. It specifically applies to proceedings pending against the company sought to be wound up. It does not apply to

proceedings commenced by the company against other persons. Secondly, where a winding up petition has been brought up, the company said to be wound up is forbidden from disposing of its property. The clear intention that comes out is that, the property of the company should not be paid out in preference to other persons other than the potential creditors. This includes fraudulent preference by paying other debts in order to defraud other creditors whose claims are brought in the winding up petition. On the other hand the company sought to be wound up is entitled to proceed to recover any monies against other persons since this does not prejudice other creditors. This is further made more apparent by section 231 of the repealed Companies Act Cap 110 which provides that upon the making of a winding up order, or where an interim liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court may impose. The provision does not deal with suits the company has brought against other persons. It deals with proceedings against the company sought to be wound up.

Last but not least all the property of a company against whom a winding up order has been made shall be vested in the liquidator according to section 243 of the Companies Act Cap 110 (repealed). Most importantly and as far as the question of res judicata is concerned, the liquidator in the winding up by the court has powers with the sanction of the court audit committee of inspection to bring or defend any action or other legal proceeding in the name of and on behalf of the company. Section 244 (1) (a) provides as follows:

“244. Powers of the liquidator.

(1) The liquidator in a winding up by the court shall have power, with the sanction either of the court or of the committee of inspection—

(a) to bring or defend any action or other legal proceeding in the name and on behalf of the company;”

In the facts and circumstances of this suit, the counterclaimant was the respondent in Company Cause Number 19 of 2009. Secondly, the company cause was resolved by a written agreement of the parties in which the amount claimed in the petition by the first Defendant to the counterclaim being a sum of US\$23,439.70 was settled. A sum of US\$10,000 was supposed to be paid by the counterclaimant before 15th November, 2009. Secondly a sum of US\$4000 was supposed to be paid on or before 30th November, 2009. Thirdly a sum of US\$4000 was supposed to be paid on or before 31st December, 2009. Lastly a sum of 5439.70 was supposed to be paid on or before the 31st of February 2010. DW1 Suleiman Bukenya testified that he cleared the indebtedness and there was nothing owing to the Plaintiff.

Most importantly, no winding up order was made against the Defendant Mavid Pharmaceuticals Ltd who is now the counterclaimant. No liquidator was appointed. In other words upon the payment of the amount in the company cause being the sum of US\$23,409.70, the claims of the
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Plaintiff were extinguished. The company cause was resolved by payment of the amount of money claimed by the petition. The nagging question of whether the respondent was deemed to have resolved its indebtedness to the Plaintiff seems not to go away for the simple reason that the indebtedness was a liquidated sum which was paid off and no further proceedings were taken in the winding up suit. The Defendant now counterclaims for further sums against the Plaintiff.

The consent judgment was entered on 3rd November, 2009. Where there any other pending matters between the parties at the time of settlement of the suit? The Plaintiff filed the current suit on 25th October, 2010 after the winding up company cause had been terminated in November 2009 about 11 months later. Similarly the counterclaim was filed after 25 October 2010. There was therefore no pending action claiming what is claimed in the current counterclaim though there was a pending action High Court Civil Suit Number 319 of 2009. It is specifically mentioned by Suleiman Bukenya in the affidavit in reply to Miscellaneous Application Number 456 of 2009 arising from Company Cause Number 19 of 2009 and filed on 22nd September, 2009 as follows:

- L). "That the applicant/petitioner thereafter cancelled the authorisation of the respondent for the local manufacture of "Semodex ointment" which left the respondent with unusable raw materials and packaging materials which he had paid for. The respondent has incurred and claims against the petitioner the sum of US\$62,093.73 for the materials supplied and US\$4500 for freight and clearing charges.
- m). That after the cancellation of the authorisation the respondent through its lawyers advised the petitioner to collect all the pharmaceutical and packaging materials it had supplied to the respondent for the manufacture of "Semodex ointment".
- n). That the respondent has since filed HCCS number 319 of 2009 against the applicants hearing wherein they are seeking to recover a total of US\$67,169.79.
- o). That the applicant/petitioner seeks this order is to prevent the respondent from pursuing its claims against the petitioner as shown in paragraph above which are far in excess of the alleged indebtedness."

I have further considered HCCS 319 of 2009 included in exhibit D17 among the documents. Mavid Pharmaceuticals Ltd filed a suit against Royal Group of Pakistan for immediate payment of US\$62,093.79 or its equivalent in Uganda shillings for purchase of goods paid for but not used and US\$5075 or its equivalent in Uganda shillings, shillings 600,160 Uganda shillings for destruction charges of the goods, supervision thereof, storage, clearing agency fee and transport plus general damages for breach of contract and costs of the suit. The case also relates to the revocation of authority to manufacture "Semodex ointment".

The Plaintiff who is the Defendant in that suit raised an objection to HCCS No. 319 of 2009 on the ground that the settlement of Company Cause No. 19 of 2009 rendered it res judicata. The issue of whether the suit is res judicata was stayed because the pleadings relied on were incomplete to establish whether the respondent to the petition that has been settled by consent had claimed the sums also claimed in HCCS No. 319 of 2009. Ruling of the court was delivered on the 22nd of November 2013.

I have now established that the Defendant/Counterclaimant indicated that the amount of US\$62,093.79 was claimed in HCCS No. 319 of 2009. This was the pleading in Company Cause No. 19 of 2009. Company Cause 19 of 2009 was settled without reference to the pending suit. The suit remained pending after the settlement of the Company Cause and was decided in 2015. In those circumstances, the issue of the US\$62,093.79 cannot be tried in this suit since there is a prior suit in which it was alleged. Furthermore, the suit was decided on the on the 24th of July 2015. In the judgment the Defendant who was the Plaintiff in that suit was awarded US\$ 32,093.79 as value of raw materials, Uganda shillings 600,160/- as clearing charges and other costs, US\$ 30,000 as general damages together with interest and costs.

However beyond the settlement of the US\$23,409.70 by the counterclaimant in the Company Cause, the rest of the claim in the counterclaim can be tested on points of law but after considering the evidence and pleadings before a final conclusion can be made as decided in High Court Civil Suit NO. 319 of 2009, which was a pending suit, by the time the Company Cause was settled.

A further perusal of the judgment in HCCS No. 319 of 2009 between MAVID Pharmaceuticals Ltd as Plaintiff and Royal Group of Pakistan reveals pertinent issues for consideration in the current suit filed by Royal Group of Pakistan and the Counterclaim of Mavid Pharmaceuticals Ltd as far as the LTR status of the Defendant/counterclaimant is concerned. In the judgment I noted that the authority to Manufacturer Semodex Ointment according to testimony of Sulaiman Bukunya was revoked by letter dated 17th of Feb 2009. However it was alleged by the witness that the Defendant illegally terminated the LTR status of Mavid Pharmaceuticals Ltd on the 24th of November 2008 and thereafter the authority to manufacture Semodex. The Plaintiff who is now the counterclaimant did not sue Royal Group of Pakistan for the alleged illegal termination and has sought to bring its claims piecemeal.

In this suit the Counterclaimant again relies on exhibit D4 which is a letter dated November 18th 2008 objecting to the change of LTR addressed to NDA. Another objection letter is dated 9th March 2009 exhibit D5. Exhibit D3 is a letter from NDA approving change of LTR on 6th of March 2009. Finally the Plaintiff had written in a letter dated 24th November 2008 advising the NDA about its appointment of a new LTR namely Messrs Abacus Pharma (Africa) Ltd. The Defendant/counterclaimant did not consent to change of LTR.

The above facts were within the knowledge of the parties by the time Company Cause No. 19 of 2009 was filed in August 2009. As a matter of fact gleaned from the record of proceeding the affidavit of Service of the petition for winding up was served by one Ogola Abdallah and paragraph 2 thereof deposes that he received the petition for service on the respondent on the 14th of August 2009. Secondly, HCCS No. 319 of 2009 was filed on 27th of August 2009. Finally HCCS No. 383 of 2010 which is the current suit was filed in October 2010 about a year later. The facts of change of LTR were therefore within the knowledge of the counterclaimant and the first counter Defendant by the time the Company Cause and HCCS 319 of 2009 were filed. I have also established from the testimony of the DW1 that he withheld consent by the Defendant/counterclaimant to change of LTR from the counterclaimant to Abacus Pharma (Africa) Ltd.

Notwithstanding the issue of res judicata I will conclude the issue after consideration of the facts adduced for and against the issue of illegal approval of the second counter Defendant because it is a new party in the matter. The third counter Defendant is also a new party.

The second issue for instance is whether the approval of the 2nd Counter Defendant as the LTR to the 1st Counter – Defendant was done legally?

Whether the approval of the 2nd Counter Defendant as the LTR to the 1st Counter – Defendant was done legally?

On this issue the Plaintiff's Counsel submitted that illegality is defined as an act that is not authorised by law according to Black's Law Dictionary 9th edition at page 815. He submitted that the evidence of DW1 does not by any means prove that the Defendant's LTR was illegally terminated. No evidence was adduced to prove any of the particulars. No evidence was adduced to prove that the Defendants to the counterclaim breached any law in changing the LTR. On the other hand PW1 testified that the Plaintiff was forced to change its LTR on account of the Defendant's conduct. This was because the relationship became difficult when the second counterclaimant had unreasonably withheld consent with the knowledge of the third counter Defendant as the regulator.

The National Drug Authority Guidelines exhibit D2 is not law. It is directory as strictly speaking a guideline for the conduct of business. In the case of National Drug Authority versus Parkview Pharmacy DC Ltd Civil Appeal Number 65 of 2000 to the appellant clause that the respondent's premises and in the course of the closure drugs were lost. The appellant inter alia contended that it was mandated under its guidelines to close the respondent's business premises. The court of appeal while addressing the legality of the guidelines held that the guidelines do not originate from either the National Drug Policy and Authority statute or statutory instrument made under it. They are therefore of no legal consequence as the origin, authorship and time of making is not disclosed.

The contention that the counter Defendants illegally terminated LTR status therefore has no legal basis. The witness from national drug authority Mr Michael Mutyaba testified on how the counterclaimants LTR status was changed to the second counter Defendant. All parties were hard prior to the cancellation and appointment of the second counter Defendant as LTR of the first counter Defendant. The matter was made worse by the resignation of the counterclaimants supervising pharmacists. He testified that they had to close the counterclaimant because there was no supervising pharmacists and the only one they had, had resigned.

The Plaintiff's Counsel further submitted that the additional demonstration of law which was infringed to create an illegality in the appointment of the second counter Defendant. On the other hand it was apparent that the Defendant was not willing to give up its status and efforts by the third counter Defendant who averred the hostility towards the Plaintiff was fruitless. He invited the court to resolve the issue in the affirmative by holding that the approval of the second counter Defendant as the LTR to the first counter Defendant was done legally.

Additionally the Plaintiff's Counsel submitted that it is an agreed fact that the Plaintiff's local technical representative was the first counterclaimant. The second counterclaimant was only a managing director of the first counterclaimant. There was no contract between the Plaintiff and the second counterclaimant and the first counterclaimant it is a body corporate with an independent legal personality. The second counterclaimant has no cause of action to challenge the appointment of the second counter Defendant as was never privy to the appointment of the first counterclaimant and his claim to that extent ought to be dismissed with costs.

As far as the second counter Defendant is concerned, Messrs Abacus Pharma (East Africa) Ltd were not alleged to have done anything in relation to their appointment other than collusion and connivance to get that appointment (and the business of the counterclaimant). They could not appoint themselves.

The written submissions of the second counter Defendant's Counsel makes reference to the pleadings of Mavid Pharmaceuticals Ltd which allege collusion and connivance with the national drug authority to terminate the first Defendant/counterclaimant as LTR. In bad faith is also alleged. He submitted that from the pleadings there was no contractual relationship between Mavid pharmaceuticals and Abacus (Pharma) (East Africa) Ltd. He contended that the alleged wrongful acts of the second counter Defendant which injured the counterclaimant was the acceptance by Abacus Pharma (East Africa) Ltd to be the local technical representative of the Plaintiff. This alleged wrongful act was allegedly procured by the second counter Defendant in collusion and connivance with the Plaintiff and the third counter Defendant in bad faith and with malice. It is also alleged that the wrongful act was illegal. The counterclaimant claims consequential loss as pleaded. With reference to whether the approval of the counter Defendant as LTR to the first counter Defendant was done legally, the question is whether it has been

proved that the act was illegal, procured in bad faith and malice and through collusion and connivance.

He submitted on the burden of proof and the standard of proof with reference to section 101 and 102 of the Evidence Act. The burden of proof is the person who would fail if no evidence were given on either side. The burden of proof as to any particular fact lies on the personal who wishes the court to believe in its existence, unless it is provided by any law that the proof of the facts lies on any other person. This section was considered by the Supreme Court in Presidential Election Petition Number 1 of 2016 Amama Mbabazi versus Yoweri Kaguta Museveni, the Electoral Commission and the Attorney General.

He submitted the counterclaimant failed to adduce any credible evidence in support of its allegations and did not discharge the burden of proof which never shifted to Abacus Pharma (East Africa) Ltd. The counterclaimant was required to prove to the required standard that there was illegality in the procurement of the LTR, through collusion, connivance, bad faith and malice. He supported the submissions of the Plaintiff's Counsel on the definition of Black's Law Dictionary, ninth edition 815 for the definition of what is illegal. It is something forbidden by law, unlawful. He further relied on the long run dictionary of law eighth edition which defines it as the violation of the law, or rule which has the force of law. For the counter Defendant shall be liable, there has to be a violation of the law or a rule of law having the force of law. For the alleged cause of action to succeed, the second counter Defendant had to be liable for the appointment and acceptance of her LTR status and for determination of Mavid pharmaceuticals as LTR in violation of the law or a rule of law having the force of law.

With reference to the submission of the counter Defendants Counsel that section 5 (i) of the National Drug Policy and Authority Act Cap 206 empowers the National Drug Authority to establish and revise professional guidelines and disseminate information to health professionals and the public, the powers to make regulations by statutory instruments for the better carrying out of the provisions of the Act are vested in the Minister and not NDA. Furthermore Counsel for the second counter Defendant submitted on the basis of the Interpretation Act on the definition of a written law. He contended that under that act, the guidelines relied on by the counterclaimant do not constitute written law. He also submitted that it was not a statutory instrument according to the Act. Every statutory instrument is required to be published in the Gazette and can be judicially noticed. The testimony of Michael Mutyaba, the NDA acting head of drug assessment and registration is that the guidelines have never been published in the Uganda Gazette although the guidelines had been disseminated to the public. Counsel further went on to define a guideline. He also relied on the case of **National Drug Authority versus Parkview Pharmacy DC Ltd Civil Appeal Number 65/2002** for the proposition that the guidelines were not law and the case of **De Falso vs. Crawley Borough Council [1980] 1 QB 460** for the proposition that the authority can't depart from guidelines if they thought fit. He concluded that the guidelines do not constitute law nor do they have the force of law and any departure from it is not an illegality.

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Furthermore the dispute between the Plaintiff and the Defendant is of a purely commercial nature and there are no technical issues involved. Furthermore the guidelines do not envisage NDA becoming involved in commercial disputes. DW1 Mr Bukenya agreed that the change of LTR was based on a commercial dispute.

Furthermore according to the testimony of Mr Michael Mutyaba, where there is an intention to change the LTR, NDA notifies the LTR and then considers any objections raised. Where the objections have technical merit NDA will not approve the change. In paragraph 11 stated that there were unresolved commercial disputes regarding termination of the LTR. In such cases NDA may attempt to mediate but normally advises the parties to use other fora to resolve the issues because NDA is only mandated and competent to resolve technical aspects of the LTR. This testimony was not challenged and consequently the second counter Defendant's Counsel submitted that there were valid grounds for the NDA to depart from its previous insistence on the letter of no objection from the LTR since such objection would only be required in relation to technical issues and therefore it acted lawfully.

Regarding bad faith is synonymous, according to the case of **Frederick Zaabwe verses Orient Bank Ltd Supreme Court Civil Appeal No. 4 of 2006**, with "fraud" and which is also synonymous with dishonesty, infidelity, faithlessness, perfidy, and unfairness etc. Thirdly malice is the intentional commission of a wrongful act, absent justification with the intent to cause harm to others, conscious violation of the law that injures another individual, a mental state indicating a disposition in disregard of social duty and a tendency towards malfeasance.

‘Collusion’ is normally an agreement, usually secret for some deceitful or unlawful purpose while ‘connivance’ is a passive consent or cooperation in relation to wrongdoing. Furthermore dishonesty means intentionally lacking an element of truth, probity or integrity.

With regard to particulars of bad faith, illegality and malice the second Defendant to counterclaim’s Counsel submitted that with regard to the Plaintiff withholding supplies to the first Defendant when the first Defendant had made confirmed orders for the supplies and had also obtained other financial facilities to do the business, there is no evidence to show that the second counter Defendant was privy to the failure or refusal to supply the orders as alleged. The second Defendant had no role to play in determination of exclusivity given to the Defendant under the memorandum of understanding.

Concerning terminating the LTR status of the first Defendant illegally and unlawfully, there is no law to bar the Plaintiff from terminating the LTR status of the Defendant. Concerning the bribing or corruption of National Drug Authority officials to approve the termination of the first Defendant’s LTR status contrary to the rule, regulations and or policy as well as practice, there is no evidence to support the contention.

Furthermore because the counterclaimant did not discharge the burden and standard of prove to show bribery and corrupting influence on NDA officials to act in its favour for the change of LTR status, the burden did not shift to the second counter Defendant to disprove anything.

There is no evidence to support the allegation that through email, telephone and other communication between the counter Defendants and NDA, they systematically schemed to take away the business of the 1st Defendant who was earning US\$ 400,000 per annum. Furthermore, the second counter Defendants Counsel submitted that there was no evidence to support the contention that they Defendants to counterclaim were fishing for all reasons to destroy the counterclaimant i.e. by closing pharmacies owing to intended resignation of a pharmacists before the actual resignation.

Counsel also submitted that there is no evidence to support the allegation that the second counter Defendant acted to promote opportunities for the second counter Defendant against the first counter Defendant. The allegations do not show who was acting under what kind of influence etc. No evidence links the second counter Defendant to the alleged unilateral increase of prices, alteration of agreed terms, supply of pharmaceutical products from unregistered facilities in China, contrary to law. There is no evidence to link the second counter Defendant to supply of fake raw materials or petition to wind up the counter claimant or disorganise or disrupt its business operations. In the premises, Counsel prayed that issue number (ii) is answered in the negative.

In reply to the counterclaim, the third Defendants to the counterclaim emphasised that the crux of the counterclaimant's case is a suit for damages for alleged illegal termination of the local technical representative status that formed the basis of their business dealings with the first counter Defendant. The counterclaimant drugged the second and third counter Defendants into the dispute and contended that they connived and colluded with the Plaintiff in the alleged illegal termination of the LTR. It is contended that the counter Defendant acted maliciously with the intention of crippling the first Defendant/counterclaimant out of the drug pharmaceutical business. Counsel submitted that it is critical to determine whether the counterclaimant adduced any evidence to prove connivance, collusion, malice and bad faith, or illegality on the part of the third counter Defendant in the termination of the LTR.

The third counter Defendants Counsel further emphasised that while the Plaintiff and the Defendant entered into a business relationship for about 15 years, the business increasingly grew hostile and volatile at the end leading to the appointment of the second counterclaimant as the Plaintiffs LTR. According to the testimony of Mr Michael Mutyaba, during the years 2005 – 2008 the parties three times contended, the LTR status. Each dispute led to the suspension of the importation of drugs listed under the LTR as the two parties sorted out their differences. It invariably causes a potential risk to the supply and availability of drugs in the country. As a regulator charged with ensuring adequate supply of drugs, this could not go on for too long.

Secondly, circumstances related to the counter Defendant's approval of changing LTR. And it is the uncontested fact that under the guidelines the counter Defendant was required to approve change of LTR upon presentation among others of a letter of no objection from the previous LTR. It is an admitted fact that under the general framework of the guidelines, a previous LTR holder could make objections to the proposed change. However, the counter Defendant could only entertain and uphold objections of a technical nature. The second counterclaimant objected to the proposed change in LTR and the question is how goes objections were treated by the third counter Defendant or whether they were considered at all.

Whenever the parties fell out, the counterclaimant and the Plaintiff tried to sort it out by relying on existing guidelines and restrictions on the change of LTR. The counterclaimant relied on the third counter Defendants and guidelines to withhold consent to the change in LTR and negotiated more favourable terms of business at the expense of the required steady supply of drugs into the country. With increased dispute between the two parties, there was bad precedent set for other licensees and there was a need to address the matter conclusively by addressing the regulatory risk of causing a drug shortage in the country. The third counterclaimant ultimately founded the need to amend the guidelines to do away with the requirement of obtaining consent of the previous LTR because of the experience in this case. It was a selfish and narrow profit driven interest of the Defendant that led to this suit against the third counter Defendant for executing its mandate.

On the question of whether the approval of the second counter Defendant as LTR by the first counter Defendant was done legally, the third counter Defendants Counsel, Counsel contended that the second counterclaimant has no pleadings and therefore cause of action against the third counter Defendant. He relied on Supreme Court Constitutional Appeal Number 1 of 1997 Attorney General versus Major General David Tinyefunza & SCCA 16 of 2009 Narattan Bhatia vs. Boutique Shazim Ltd. Counsel also relied on the three ingredients to constitute a cause of action as held in the case of Auto Garage versus Motokov (1971) EA 514 and other authorities to the same effect. He contended that the third counter Defendant's dealings were with the first counterclaimant both in the pleadings and Indian evidence. The counterclaimant is the holder of allowances and LTR status. The second counterclaimant was only a director of the first counterclaimant and has no right to support any claims for judgment. Accordingly the suit should be dismissed with costs.

With regard to the approval of the second counter Defendant as LTR of the first counter Defendant, the question included whether there was any illegality in the approval. The crux of the submission according to the third counter Defendants Counsel is that the change was effected without obtaining consent or a letter of no objection from the counterclaimant. He relied on the testimony of Mr Michael Mutyaba for the essence of a Local Technical Representative (LTR). It is a regulatory framework through which the counter Defendant is able to monitor and regulate foreign manufacturers licensed to supply drugs in Uganda. It allows a licensed foreign
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manufacturer or supplier of drugs to appoint a Local Technical Representative as a distributor of drugs. For regulatory purposes, the LTR takes responsibility and is answerable to the third counter Defendant for the quality and safety of the drugs supplied to Uganda.

When regard to the interpretation of illegality, Counsel associated with earlier submissions of his colleagues and submitted that for an instrument issued by anybody other than payment to have legislative force, legislature must have passed an act of Parliament delegating its legislative function to the body to make the instrument in issue. He contended that this is how minister's sparse statutory instruments or municipal councils pass bylaws etc. Under sections 19, 26, 39, 47 and 65 of the National Drug Authority Act legislature specifically delegated legislative function to the Minister by allowing him or her to make subsidiary laws for the better regulation of specific aspects of drugs in Uganda. Under section 64 the Minister was empowered to pass regulations for the better implementation of the Act.

Resolution of issues 2 and 3

There are other submissions that I have taken into account. Suffice it at this stage to note that the action for damages must be founded on a cause of action that has been proved on the balance of probabilities. There are matters of law which need to be addressed before the issue of remedies or consequential relief can be considered on the evidence and on the law. The issue of damages flows from one of the basic premises advanced by the counterclaimant which is on the issue of whether the approval of the second counter Defendant as LTR to the first counter Defendant was done legally.

The issue raised challenges the authority both of the Plaintiff to appoint a new LTR or the third counter Defendant to approve the appointment of the second counter Defendant.

As far as the Plaintiff is concerned, the counterclaimant had filed HCCS No 319 of 2009 which was referred to in Company Cause No. 19 of 2009. In terms of the authorities I have referred to above the counterclaimant ought to have raised the issue of collusion and connivance together with the claim in HCCS No. 319 of 2009 as against the Plaintiff and my conclusion is that the causes of action arose way before the Company Cause No 19 of 2009 was filed in August 2009. The grievance of the counterclaimant against the Plaintiff arose in November 2008. The 3rd Counterclaimant approved the appointment of LTR in March 2009. The alleged loss on account of change of LTR arose thereafter and even before in 2008. The counterclaim in that respect against the first counter Defendant/Plaintiff to the main action is res judicata and cannot be tried.

As far as the 3rd Counter Defendant Messrs NDA is concerned, I have carefully considered the premises on which the Counsels submitted and my conclusion is that it is an administrative law suit as far as the 3rd Counter Defendant is concerned. I have further considered submissions on the term illegality and I agree with the counter Defendants submissions on this point.

A dictionary definition of Illegality by **Osborn's Concise Law Dictionary Eleventh Edition page 216** provides that the term "illegal" means an act which the law forbids. It can be contrasted with acts which the law will disregard, such as a void contract. Where the Counterclaimant alleged breach of the law or failure to obey the law against a Public Authority what is its remedy? First of all the court has to consider whether there has been a breach of a statutory provision constituting a tort. The tort of breach of statutory provisions exists independently of other causes of action. Breach of statutory duty is a tort at common law and entitles a Plaintiff upon proof to damages or an injunction or to both. In the case of **Dawson vs. Bingley Urban Council [1911] 2 KB 149**, it was held by Farwell L.J. at page 156 that breach of a statutory duty created for the benefit of an individual or a class is a tortious act, entitling anyone who suffers special advantages there from to recover such damages against the tortfeasor. Kennedy L.J. held that the proper remedy for a breach of statute is an action for damages especially where the statute lays no rule for non-compliance or breach and in appropriate cases an injunction. So like the issue of illegality being based on a violation of law, likewise breach of statute requires a statutory provision that has been violated for there to be a cause of action and none has been advanced by the Counterclaimant.

The third counter Defendant is a public authority and corporation with perpetual succession and a common seal established by section 3 of the National Drug Policy and Authority Act cap 206 laws of Uganda. Secondly it has functions of a public nature under section 5 of the Act. Section 5 provides as follows:

“5. Functions of the drug authority.

The drug authority shall be charged with the implementation of the national drug policy and, in particular, but without derogation of the foregoing, shall—

- (a) deal with the development and regulation of the pharmacies and drugs in the country;
- (b) approve the national list of essential drugs and supervise the revisions of the list in a manner provided by the Minister;
- (c) estimate drug needs to ensure that the needs are met as economically as possible;
- (d) control the importation, exportation and sale of pharmaceuticals;
- (e) control the quality of drugs;
- (f) promote and control local production of essential drugs;
- (g) encourage research and development of herbal medicines;
- (h) promote rational use of drugs through appropriate professional training;

- (i) establish and revise professional guidelines and disseminate information to health professionals and the public;
- (j) provide advice and guidance to the Minister and bodies concerned with drugs on the implementation of the national drug policy; and
- (k) perform any other function that is connected with the above or that may be accorded to it by law.”

The section gives the authority power to control the manufacture of drugs and the importation and exportation thereof among other things. The allegation that the authority approved a change of LTR illegally means that the approval was contrary to law. While no law has been cited, as far as law is concerned, a challenge to the authority in the performance of its actions would be an administrative law suit which may lead to declarations, injunctions, damages etc as we shall demonstrate below.

According to **W.H.R Wade in Administrative Law Fifth Edition**, the simple proposition that a public authority may not act outside its powers (ultra vires) might fitly be called the central principle of administrative law. He writes that an act which for any reason is in excess of power is often described as being outside jurisdiction. Consequently any administrative act or order which is ultra vires or outside jurisdiction is void in law or deprived of legal effect. He notes at page 39 as follows:

"Any administrative act or order which is ultra vires or outside jurisdiction is void in law, i.e. deprived of legal effect. This is because in order to be valid it needs statutory authorisation, and if it is not within the powers given by the Act, it has no legal leg to stand on. The court will then quash it or declare it to be unlawful or prohibit any action to enforce it."

The central principle of ultra vires is that the authority will act according to the prescription of law. An act which is contrary to law is ultra vires the powers of the administrative tribunal or official and can be quashed by the courts. In Uganda an action is commenced ordinarily for declarations, injunctions or even damages by way of an application for judicial review as prescribed under the **Judicature (Judicial Review) Rules, 2009**. Rule 3 (3) of **the Judicature (Judicial Review) Rules, 2009** provides that an application:

“for a **d**eclaration or an injunction (not being an injunction mentioned in subrule (1) (b) may be made by way of application for judicial review, and on such an application, the High Court may grant the declaration or injunction claimed if it considers that, having regard to—

(a) the nature of the matter in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari;

(b) the nature of the persons and bodies against whom relief may be granted by way of such an order; and

(c) all the circumstances of the case, it would be just and convenient for the declaration or injunction to be granted on an application for judicial review.”

The counterclaimant prayed for declaration that the termination of the 1st Defendant’s LTR status was illegal and unlawful and a nullity. Secondly it prayed for an order directing the 3rd Counter Defendant (NDA) to comply with the law and regulations and policy before terminating the first Defendants LTR status. Finally on the same issue the counter Defendant sought an injunction restraining the second counter Defendant from acting as LTR of the Plaintiff until the 1st Defendant is lawfully and legally terminated as LTR.

I take the legal point that the orders sought are orders which could have been sought by way of an application for judicial review of the action of the 3rd Counter Defendant who by letter dated 6th March 2009 admitted in evidence as exhibit D3 wrote to the Second counter Defendants lawyers as follows:

“Reference is made to your application for change of Local technical Representative (LTR) from Mavid Pharmaceuticals to Abacus Pharma (A) Ltd submitted to National Drug Authority (NDA) sometime last year.

This is to inform you that your application for change of LTR from Mavid Pharmaceuticals to Abacus Pharma (A) Ltd for all Royal Group products has been approved.

You are therefore informed that Abacus Pharma (A) Ltd is your recognized LTR with effect from the date of this letter.”

The letter was copied to Royal Group of Pakistan. This also followed appointment by Royal Group of Pakistan by letter dated 24th of November 2008 notified to NDA. I further note that the counterclaimant through Messrs Kiwanuka & Karugire Advocates & Solicitors wrote on the 18th of November 2008 in exhibit D4 objecting to change of LTR pursuant to notice by NDA that an application for change of LTR had been made. The letter addressed to the Executive Secretary/Registrar of NDA raised several grounds of objection on behalf of the counterclaimant. Again by letter dated 9th March 2009 admitted as exhibit D5 Messrs Kiwanuka & Karugire Advocates & Solicitors writing on behalf of the Counterclaimant objected to exhibit D3 which is the approval of the second Counter Defendant as LTR. They requested for reasons for the

decision to be communicated to them to enable them pursue further remedies. The last paragraph of the letter reads as follows:

“We also request that the reasons for the decision arrived at by the Executive Secretary/Registrar, NDA be communicated to us for transparency and to enable us pursue further remedies on our client’s behalf.”

In exhibit D6 the Plaintiff filed a petition to wind up the counter Defendant. Finally there are correspondences which prove that NDA considered the matter under its powers and decided the issue of change of LTR. Subsequently the Counter Defendant filed HCCS 319 of 2009. The rules of procedure namely **the Judicature (Judicial Review) Rules, 2009** and rule 5 thereof requires an application for judicial review to be made promptly and in any event within three months from the date when the grounds of the application first arose. Ample grounds were raised in exhibit D5 of 9th March, 2009 which gives some grounds which include the assertion that change of LTR despite clear directive of Parliament on the matter would be illegal. Secondly, the letter attached grounds of objection to change of LTR advanced in exhibit D4. These grounds are in a letter dated 18th November, 2008. All these matters arose in 2008 and early 2009 before the filing of Company Cause No. 19 of 2009 and HCCS No 319 of 2009. The applicant did not challenge the 3rd Counter Defendant within three months from the date the grounds for challenge arose.

Rule 5 (1) of the Judicature (Judicial Review) Rules, 2009 provides as follows:

“5. Time for applying for judicial review.

(1) An application for judicial review shall be made promptly and in any event within three months from the date when the grounds of the application first arose, unless the Court considers that there is good reason for extending the period within which the application shall be made.

(2) Where the relief sought is an order of certiorari in respect of any judgment, order, conviction or other proceedings, the date when the grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceedings if that decision is delivered in open court, but where the judgment, order, conviction or proceedings is ordered to be sent to the parties, or their advocates, (if any), the date when the decision was delivered to the parties, their advocates or prison officers, or sent by registered post.

(3) This rule shall apply, without prejudice, to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made.”

The High Court may extend the time within which the application for judicial review may be made. There is no application for extension of time. Last but not least as against the 3rd Counter Defendant the remedies sought are remedies which may be granted in an application for judicial review. The orders sought are declaration that the termination of the 1st Defendant's LTR status was illegal and unlawful and a nullity. This is an order that may be made in an application for judicial review. Secondly, an order directing the 3rd Counter Defendant (NDA) to comply with the law and regulations and policy before terminating the first Defendants LTR status. Again this is an order that may be made in an application for judicial review. The counter Defendant also sought an injunction restraining the second counter Defendant from acting as LTR of the Plaintiff until the 1st Defendant is lawfully and legally terminated as LTR. This last order can only be made after proceeding against the 3rd Counter Defendant successfully.

Last but not least an order of mandamus, prohibition or certiorari cannot be made by the High Court under its other procedures as it can only be made in an application for judicial review. This is made apparent by section 36 (2) of the Judicature Act cap 13 laws of Uganda which provides as follows:

“36. Prerogative orders.

(1) The High Court may make an order, as the case may be, of—

- (a) mandamus, requiring any act to be done;
- (b) prohibition, prohibiting any proceedings or matter; or
- (c) certiorari, removing any proceedings or matter to the High Court.

(2) No order of mandamus, prohibition or certiorari shall be made in any case in which the High Court is empowered, by the exercise of the powers of review or revision contained in this or any other enactment, to make an order having the like effect as the order applied for or where the order applied for would be rendered unnecessary.

While it is not mentioned the counterclaimant seeks an order of Mandamus directing the third Defendant. It also seeks an order of prohibition, prohibiting the operation of the change of LTR approval. Under section 36 (2) of the Judicature Act where the High Court is empowered to make an order in an application for review of mandamus, prohibition or certiorari, it shall not make the order in any other proceeding except in an application for judicial review. It follows that the counter claimant's suit against the 3rd counterclaimant is barred by section 36 because it has to be made in an application for judicial review. Secondly, even if it was made in an application for judicial review, the order cannot be made before an application is made to extend the limitation period of three months. In other words the applications suit against the third counter Defendant is time barred.

It follows that the suit is misconceived and because it raises issues of illegality and consequences of cancellation of LTR and the prayer for consequential remedies of damages cannot be granted.

Last but not least the suit against the 2nd counter Defendant challenges the acts of the Plaintiff against whom the matter is res judicata. Secondly, it challenges the acts of the 3rd counter Defendant against whom these proceedings are barred. The remedies sought against the 2nd counter Defendant flow from the suit challenging change of LTR and alleging consequential loss. Last but not least the suit against the second counter defendant is predicated on a suit against the plaintiff which changed the LTR and the 3rd Counterclaimant. If the suit against the 1st and 3rd Counter defendants are barred as I have held above the matter cannot proceed against the second counter defendant. In the premises this suit also fails as the second counter Defendant is not responsible for change of LTR status.

The counterclaimant's action against the three counterclaimants is accordingly dismissed.

The final orders are that the Plaintiff's suit stands dismissed with costs and the counterclaimants suit stands dismissed with costs for the reasons given above.

The suit by Suleiman Bukenya discloses no cause of action against the counter defendants and the Plaint by way of counterclaim is rejected with no order as to costs.

Judgment delivered in open Court on the 11th of January 2017

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Counsel Peter Nkurunziza for the Second Counter Defendant

Counsel Justin Semuyaba for the Defendants

Counsel Karamagi Kabito for the 3rd Counter Defendant

Counsel Alex Ntale holding brief for Isaac Walukagga for the Plaintiff

Suleiman Bukenya Second Defendant and MD of First Defendant present

Anantharanman N Chief Executive Officer of second Counter Defendant

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

11th January 2017