

**THE REPUBLIC OF UGANDA,  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL DIVISION)  
CIVIL SUIT NO 147 OF 2016**

**MESSRS SENDEGE SENYONDO & CO ADVOCATES} .....PLAINTIFF**

**VERSUS**

**KAMPALA CAPITAL CITY AUTHORITY} .....DEFENDANT**

**BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA**

**JUDGMENT**

This matter proceeded by agreement of the parties according to the amended case filed under Order 35 of the Civil Procedure Rules by way of a case stated for decision of the court. The following facts are agreed to by the parties to this suit and endorsed by the Parties under their various signatures:

The case stated is as follows:

1. The Undersigned having failed to resolve the above questions by themselves, move court under Order 35 of the Civil Procedure Rules to state the following case:
2. The following facts have been agreed to by the parties:
  - a. The Plaintiff entered into a written agreement for the provision of legal services to the Defendant's predecessor in title Kampala City Council (KCC) as its external lawyers. The agreement expired on 31<sup>st</sup> December, 2005.
  - b. The Plaintiff would receive written instructions on the case by case basis.
  - c. After the expiry of the said agreement, the Plaintiff continued to receive written instructions from KCC and the Plaintiff continued to provide legal services to KCC.
  - d. Even after the inception of the Defendant in 2011, the Plaintiff continued to handle court cases it had conduct of prior to the cessation of Kampala City Council and a few other cases filed against the Defendant in the year 2011.
  - e. The Defendant requested the Plaintiff to surrender the case files of all matters it was handling on behalf of Kampala City Council but the latter declined to do so claiming it had a lien on the same due to its unpaid legal fees.
  - f. As a result the Plaintiff continued to handle all matters to do with prosecuting, defending and settlement of the Defendant's cases until the 14<sup>th</sup> December, 2015 when

- the Plaintiff received a letter dated 10<sup>th</sup> of December, 2015 from the Defendant withdrawing instructions from them.
- g. It is not contested that in handling these matters, it is the Plaintiff who has been paying for disbursements such as court fees, transport charges, witness allowances, commissioning fees for affidavits etc for the Defendant's cases.
  - h. Sometime back the Plaintiff started demanding for payment for the legal services it has provided to the Defendant and its predecessor in title; but the Defendant refused to pay arguing that there were some irregularities in the way the Plaintiff's services were engaged.
  - i. On 21<sup>st</sup> of January, 2011 the solicitor general Mr Francis Atooke convened a meeting attended by the director legal advisory services Mr C Gashirabake and representatives of the Plaintiff and the Defendant. The meeting resolved that:
    - (i) The Plaintiff's claim can be classified into two parts i.e. first part being the cases whose instructions were received by the Plaintiff prior to 1<sup>st</sup> January, 2006 and the second being those cases whose instructions were received after the 1<sup>st</sup> of January, 2006.
    - (ii) The legal fees for the first part be computed by the law firm and submitted to KCCA for payment as government considers avenues on how to resolve the fees with regard to the second part.
  - j. Following the resolutions of the said meeting, the Plaintiff prepared an advocate – client bill of costs for 122 court cases falling in the first part of the Plaintiffs claim and submitted the same to the Defendant. The bills were submitted to the Defendant on 30<sup>th</sup> of May, 2014. The total amount claimed on those bills at the time of submission was Uganda shillings 3,182,344,164/= which was on the request of the Defendant subjected to a contractual rebate of 25% that brings the figure down to Uganda shillings 2,386,758,123/=. The Plaintiff also made a demand for retainer fees for the years 1998 – 2005 amounting to Uganda shillings 96,000,000/=.
  - k. The said bills have to date not been paid.
  - l. On 6<sup>th</sup> November, 2014, the Executive Director of the Defendant authority wrote to the solicitor general requesting for a formal legal opinion in respect of the Plaintiffs claims.
  - m. On 19<sup>th</sup> of December, 2014, the Solicitor General, gave an opinion to the Defendant where he advised as follows:
    - i. That the Plaintiff's claim in the first part (cases whose instructions were received by the Plaintiff prior to 1<sup>st</sup> January, 2006) should be verified for payment.

- ii. In respect of the second part (cases whose instructions were received by the Plaintiff after first of January, 2006) after the lapse of the contract, he advised the Defendant to follow the decision of *Messieurs Finishing Touches versus Attorney General HCCS No 144 of 2010*.
  - n. On 3<sup>rd</sup> February, 2015, the Defendant wrote informing the Plaintiff that Uganda shillings 889,447,046/= would be deducted from the amounts due to the firm for the period ending 31<sup>st</sup> December, 2005 as money the Plaintiff had received from KCC.
  - o. The Plaintiff duly responded to this letter pointing out items that should be dropped from the list attached. The Defendant did not pay the Plaintiffs claim nonetheless.
  - p. Following the Solicitor General's advice in respect of the second part of the Plaintiffs claim, the Plaintiff prepared an advocate/client bill of costs for 171 court cases and submitted the same to the Defendant. The bills were submitted to the Defendant on 23<sup>rd</sup> July, 2015. The total amount claimed on those bills at the time of submission was Uganda shillings 7,371,325,390/=.
  - q. The Defendant has not paid the said amount to date.
  - r. The Plaintiff indicated to the Defendant that its bills of costs shall bear interest at the rate of 6% per annum with effect from 30 days from the date of submission of the same.
  - s. On 12<sup>th</sup> October, 2015, at the meeting convened by the Executive Director of the Defendant and attended by representatives of the Plaintiff and members of the Defendants directorate of legal affairs, the Defendant informed the Plaintiff that the Plaintiff's claims would not be paid because of two reasons namely;
    - a. In respect of the first part, the claim could not be paid because the contract between KCC and the Plaintiff falls within the ambit of section 50 of the Advocates Act and did not satisfy the requirements of section 51 of the said Act.
    - b. In respect of the second part, that the claim could not be paid because the services of the Plaintiff were not properly procured for the period under the PPDA Act.
  - t. In the said meeting the Plaintiff maintained that it is entitled to payment from the Defendant in respect of all his claims i.e. the first part and the second part.
  - u. The Defendant advised the Plaintiff to have the matter referred to court for the court's opinion.
3. The questions on which the opinion of the court is sought are:
- a. Whether the agreement dated 11<sup>th</sup> October, 1996 complies with the Advocates Act and Regulations made there under?
  - b. Whether the Plaintiff's claim from first of January 2006 complies with the public procurement laws in Uganda?

- c. Whether the Plaintiff, irrespective of questions (a) and (b) above is entitled to payment for the Defendants instructions carried out?
  - d. If any or all of the above questions are answered in favour of the Defendant, whether the Defendant is entitled to have possession of the files relating to matters which the Plaintiff handled without any payment?
4. It was further agreed by the parties that:
- a. If any of the questions (a), (b) and (c) are answered in favour of the Plaintiff, the Plaintiff shall bill the Defendant for all the services rendered to it since the dates of growing the respective advocate/client bills of costs for the periods/parts herein contained and submitted to the Defendant on the dates indicated above.
  - b. The Plaintiff shall file all the bills referred to in 2 (j), 2 (p) and 4 (a) above in court and the same shall be placed before a taxing master for taxation.
  - c. In the event that any or all of the questions in 3 (a), (b) and (c) above are answered in favour of the Plaintiff, it is agreed that the Plaintiff shall upon receipt of full payment in respect of all its advocate/client bills of costs surrender to the Defendant all the case files relating to all the matters it handled on behalf of the Defendant.
  - d. And it is agreed that if question 3 (d) is answered in favour of the Defendant, that the Plaintiff to surrender to the Defendant all the case files relating to matters it handled on the behalf of the Defendant.
  - e. It has been agreed by the parties that the costs of this case shall follow the event.
5. The value of the subject matter is in the range of Uganda shillings 10,000,000,000/=.

On the 14<sup>th</sup> of November 2016 the court agreed that issues 3 (a) – (d) were proper for trial and because the basic facts were not contentious they would be tried on points of law and interpretation of facts, the court would be addressed in written submissions.

The Plaintiff is represented in court by Counsel James Mukasa Sebugenyi of Messrs Sebalu and Lule Advocates assisted by Counsel Richard Lubaale while the Defendant was represented in court by Counsel Dennis Byaruhanga of the Defendant’s Directorate of Legal Affairs.

**Whether the Agreement dated 11<sup>th</sup> October 1996 complies with the Advocates Act and Regulations made there under,**

The Plaintiff’s Counsel submitted that the parties seek the decision of the court on whether this agreement between the parties falls within the ambit of Section 50 and 51 of the Advocates Act. Counsel relied on **Section 50(1) of the Advocates Act** which provides that;

‘Notwithstanding any rules for the time being in force, an advocate may make an agreement with his or her client as to his or her remuneration in respect of

any contentious business done or to be done by him or her providing that he or she shall be remunerated either by a gross sum or by salary.’

The Plaintiff's Counsel submitted that Exhibit P4 Annexure A which is the agreement indicates that the Defendant's predecessor (KCC) appointed the Plaintiff as its external advocates on retainer which means that there was a legal contract for services. The Plaintiff's Counsel relied on **Black's Law Dictionary 8th edition** for the definition of a retainer. Counsel submitted that the agreement does not provide that remuneration shall be by gross sum or salary but rather provides for the application of the scales set out in the Advocates (Remuneration and Taxation of Costs) Rules and submitted that **Sections 48 and 50 of the Advocates Act** does not apply to this type of agreement considering its objective and purpose. Counsel relied on the case of **Kituuma Magala & Co. Advocates vs. Celtel (U) Ltd SCCA No. 09 of 2010**, where Katureebe JSC (as he then was), while holding that the agreement in that case failed to satisfy the condition in Section 51 of the Advocates Act, also observed that the advocate, in that case had the option of stipulating that his fees would be governed by the Advocates Remuneration and Taxation of Costs Rules but did not exercise that option but rather opted to accept remuneration as stipulated in the Debt Collection Agreement.

Counsel submitted that the gist of the holding is that where fees are stipulated in an agreement to be governed by the Advocates Remuneration and Taxation of Costs Rules that agreement ceases to be a remuneration agreement within the meaning of **Section 50 of the Advocates Act** and as such the requirements of **Section 51 of the same Act** would not apply to it. He submitted that this agreement should be treated the same way because from the wording of clause 3 the intention of the parties was to be guided by the said rules in coming up with the fees chargeable by the Plaintiff and prayed that court resolves this issue in the Plaintiff's favour.

In reply, the Defendant's Counsel submitted that the Defendant's Executive Director requested the Solicitor General to advice on the legal status of the claims relating to the legal fees due to the Plaintiff for the periods 1996 to 2005 and 2006 to date. The Solicitor General advised that the contract between Kampala City Council and the Plaintiff dated 11<sup>th</sup> October 1996 for a term of five years with a clause for automatic extension for a similar period is not in dispute; with respect to the legal services rendered after lapse of the contract in December 2005, Kampala Capital City Authority acknowledged that the Plaintiff continued to render services to the Defendant without a formal contract and advised that recourse be had to the case of **Finishing Touches v Attorney General of Uganda Civil Suit NO.144 of 2010**, where the judge held that a service provider is entitled to the quantum that is not in dispute. Counsel submitted that the decision in **Finishing Touches v Attorney General of Uganda Civil Suit NO.144 of 2010** is not applicable to this matter since the manner in which legal services can be retained by a public entity or body has been settled by the case of **Attorney Decision of Hon. Mr. Justice Christopher Madrama Izama** \*^\*~ \*&\*\$\$# xtra+ maximum735securityx 2017 style

**General of Uganda and Peter Nyombi v Uganda Law Society High Court Miscellaneous Cause NO.321 of 2013** wherein it was held that; *legal services retained in breach of procurement laws were illegal and of no effect.* Secondly, that in light of the decision in **Attorney General of Uganda and Peter Nyombi v Uganda Law Society High Court Miscellaneous Cause No. 321 of 2013**, there is no basis in law for payment of any and all fees due to the Plaintiff for the period after the expiry of their contract as such the Solicitor General misdirected himself in respect of the Plaintiff's claim. The Defendant's Counsel submitted that the remuneration agreement in issue was not drafted in accordance with **Section 51 of the Advocates Act** which requires that remuneration Agreements drawn pursuant to **Sections 48 and 50 of the Advocates Act** should fulfil certain special requirements namely that it should be in writing, signed by the person(s) bound by it, contain a certificate of a notary public and that the said certificate should be sent to the Secretary Law Council by prepaid registered post. Under subsection 2 of the same section, if the said requirements are not met, then the remuneration agreement is unenforceable and any attempt to enforce it is an act of professional misconduct. Counsel submitted that the agreement before this court was not notarized as required by law which makes it illegal, null, void and unenforceable. The Defendant's Counsel further relied on the case of **Shell (U) Ltd and 9 others v Muwema & Mugerwa Advocates & Solicitors & Another SCCA No.02 of 2013**, where court considered that; 'advocates are free to enter into remuneration agreements with their clients in terms of section 48 and 50 of the Advocates Act as long as these agreements comply with the requirements provided by section 51 of the Act otherwise they are not enforceable. In the same case, it was considered that the parties entering into the remuneration agreement must have the authority to do so.'

He submitted that this agreement cannot therefore form the legal basis for payment of the Plaintiff's claim since it run afoul of the decision in **Attorney General of Uganda and Peter Nyombi v Uganda Law Society High Court Miscellaneous Cause No.321 of 2013** and prayed that court find this issue in favour of the Defendant.

In rejoinder the Plaintiff's Counsel reiterated earlier submissions and submitted that no reply was made challenging the Plaintiff's submissions and the Defendant does not have the mandate to question the opinion of the Solicitor General. He submitted that the only options available to the Defendant were to seek clarification from the Solicitor General if its officials believed that the Solicitor General's advice was evasive or to comply with the Solicitor General's advice. With respect to this Counsel relied on the case of **Bank of Uganda Vs Banco Arabe Espanal, SCCA No.1 of 2001** where **Kanyehamba JSC (as he then was)** held that:

'...the opinion of the Attorney General as authenticated by his own hand and signature regarding the laws of Uganda and their effect or binding nature on any agreement, contract or legal transaction should be accorded the highest respect by

*Decision of Hon. Mr. Justice Christopher Madrama Izama \*^\*~ \*&\*\$\$# xtra+ maximum735securityx 2017 style*

government and public institutions and their agents...It is also my view that it is improper and untenable for government, bank of Uganda and any other public institution or body in which the government of Uganda has an interest to question the correctness or validity of that opinion in so far as it affects the rights and interests of third parties"

Furthermore the Plaintiffs Counsel submitted that the case of **Attorney General & Anor vs Uganda Law Society, HCMA NO 321 of 2013** which had been cited by the Defendant's Counsel is irrelevant and out of context on the issue and the Defendant has not shown this court how the agreement dated 11<sup>th</sup> October, 1996 falls within the ambit of **Sections 48 and 50** of the **Advocates Act** for it to be tested against the provisions of **Section 51** of the **same Act**. The claim in the Plaintiff's suit before court does not make any reference to a gross sum or salary in the agreement dated 11<sup>th</sup> October, 1996 and there is no reference to a commission. On the contrary there is specific provision that the services of the advocates (Plaintiff) would be remunerated in accordance with the Advocates (Remuneration and Taxation of Costs) Regulations. Counsel prayed that court find that the agreement dated 11<sup>th</sup> October, 1996 does not fall within the ambit of **Sections 48 and 50** of the **Advocates Act** and as such the provisions of **Section 51** of the **same Act** do not apply to it.

### **Whether the Plaintiff's claim from 1<sup>st</sup> January, 2006 complies with the public procurement laws in Uganda?**

The Plaintiff's Counsel submitted that after the expiry of the contract dated 11<sup>th</sup> October, 1996, the Defendant and its predecessor in title (KCC) continued giving the Plaintiff instructions to handle its court cases and the Plaintiff continued to act for and file pleadings in responses or suits on behalf of the Defendant because the Defendant was understaffed. Counsel submitted that the Defendant withdrew instructions from the Plaintiff on 14<sup>th</sup> December, 2015 by letter dated 10<sup>th</sup> December, 2015. He further submitted that the duty to comply with the requirements of the procurement laws was on the Defendant as the procuring entity and not on the Plaintiff. He cited the case of **Kampala Capital City Authority vs Hajjat Zahara T/ A Keep Warm Restaurant (HCCA No. 31 of 2014) where Justice Elizabeth Musoke**, as she then was, held that the duty to comply with the provisions of the Procurement laws is placed on the relevant authorities for instance the Contracts Committee and the Procuring and Disposal Unit. The respondent did not have any power to ensure that the laws had been complied with; that is a matter of indoor management. The failure to comply with the law cannot be visited on the respondent but rather the respective officials of the appellant. It would therefore be unfair and unjust for the appellant not to be remunerated when the alleged acts of non-compliance with the laws are attributable to the appellant's officials."

*Decision of Hon. Mr. Justice Christopher Madrama Izama \*^\*~ \*&\*\$\$# xtra+ maximum735securityx 2017 style*

Consequently the Plaintiff's Counsel submitted that the duty here was not imposed on the Plaintiff but on the officials of KCC who instructed them. He submitted that to find otherwise would work a serious injustice on the said law firm who provided legal services to the Defendant. The Plaintiff cannot be blamed for any compliance issues of the public procurement laws of Uganda since they provided legal services to the Defendant upon instruction and the Defendant does not deny taking benefit of the services provided.

In reply on this issue learned Counsel for the Defendant submitted that the engagement of the Plaintiff's professional services by Kampala City Council was done outside the procurement process according to all the available records yet the law requires that remuneration for services could only be addressed in a duly procured and executed contract and in the absence of which no payment can be made. He submitted that the legal opinion of the Solicitor General dated 19<sup>th</sup> September, 2012 was to the effect that since Kampala Capital City Authority is a public body, it is subject to Public Procurement and Disposal of Public Assets Act and that in the instant case where there is no evidence of compliance with the procurement laws, no contract exists between Kampala Capital City Authority and the Plaintiff. As such Kampala Capital City Authority cannot pay for services rendered in contravention of the law. Counsel relied on **The Constitution (Exemption of Particular Contracts from Attorney General's Legal Advice) Instrument. Statutory Instrument - Constitution 12** in particular Regulation 2 (1) thereof which provides that an agreement or contract involving an amount of 50 Million or less was exempted from the application of article 119 (5) of the Constitution. He submitted that in the instant case the subject matter of the remuneration contract exceeded 50 million and therefore required Attorney General's clearance. Counsel cited **Section 98 (3) of the PPDA Act** which mandatorily required that procuring and disposing entities shall within twelve months after this Act comes into force bring their practices in conformity with this Act. Basing on this he acknowledged that the PPDA Act was enacted in the year 2003, long after the initial term of the legal services agreement was signed between KCC and the Plaintiff. Counsel submitted that for there to exist a valid and enforceable client -advocate relationship between KCC and the Plaintiff from the year 2004, the professional legal services of the Plaintiff ought to have been procured in accordance with the Public procurement laws and Regulations. Evidence that the then KCC and the Plaintiff ever took any steps to bring their contractual relationship to accord with the PPDA laws and Regulations as required by **section 98 (3) of the PPDA Act** or at all is not there and as such this contract was illegal. In support of this argument he relied on **Attorney General and Nyombi Peter vs. Uganda Law Society Miscellaneous Cause No. 321 of 2013**, where it was held that failure to procure legal services in accordance with the PPDA Act and the Regulations there under rendered such instructions irregular and illegal. He also



cited the case of **Makula International Ltd vs. His Eminence Cardinal Nsubuga and another [1982] HCB 11**, where court held that "a court of law cannot sanction what is illegal and illegality once brought to the attention of the court, overrides all questions of pleading, including any admissions made thereon." He prayed that Court finds this issue in the Defendant's favour.

In rejoinder the Plaintiff's Counsel submitted that the provisions of the procurement laws cited by the Defendant particularly **section 59 (3), 98 (3) of the Public Procurement and Disposal of Public Assets Act, 2003 and Regulation 17 of the Local Government (Public Procurement & Disposal of Public Assets) Regulations, 2006** all place the responsibility of initiating and complying with the procurement process on the Defendant and its officials. He submitted that the Plaintiff was instructed by the Defendant on a case-by-case basis and based on those instructions; the Plaintiff diligently represented the Defendant in court. with regard to the case of **Makula International Ltd vs Cardinal Nsubuga & Anor** as cited by the Defendant, Counsel submitted that it is the Defendant who did not comply with the procurement laws. He relied on **Kampala Capital City Authority vs Hajjat Zahara T / A Keep Warm Restaurant (HCCA No. 31 of 2014)** where court held that there is no express provision that states that non-compliance with the Act/regulations makes a claim illegal and unenforceable.

He submitted that the legalistic defence of noncompliance to procurement laws by the Legal Department of the Defendant puts them in a dangerous position of abuse of office and fraudulent misrepresentation.

**Whether the Plaintiff, irrespective of questions (a) and (b) above is entitled to payment for the Defendant's instructions carried out.**

On this issue the Plaintiff's Counsel submitted that in light of the submissions and facts of this case irrespective of questions (a) and (b) above, it is entitled to payment for carrying out the Defendant's instructions under the principle of Quantum Meruit. He relied on **Black's Law Dictionary 8<sup>th</sup> Edition** for the definition of Quantum Meruit to mean:

“as much as deserved or reasonable value for services, damages award in amounts considered reasonable to compensate a person who has rendered services in a quasi-contractual relationship”.

Counsel further relied on the cases of **Arnold Brooklyn & Co. Ltd vs. KCCA HCCS No. 435 of 2011; Joka Investments Ltd vs KCCA HCCS No. 54 of 2014 and Agri-Industrial Management Agency Ltd. vs. Kayonza Growers Tea Factory Ltd and another HCCS No. 819 of 2004** for the same principle. He submitted that the agreed facts and exhibits clearly show that the Plaintiff received

instructions on a case by case basis from the Defendant and carried out the instructions to the satisfaction of the Defendant but the Defendant does not want to pay.

In reply to this issue learned Counsel for the Defendant contended that having failed to comply with the Advocates Act and the Procurement laws aforementioned, the Plaintiff cannot base its claim under the principle of quantum Meruit. The Defendant's Counsel maintained that the principle of quantum Meruit does not apply to an illegal transaction and there is no known law to the contrary and as such it does not apply to the Plaintiff's case.

In rejoinder the Plaintiff's Counsel submitted that the Defendant's Counsel conceded that the Plaintiff rendered legal services to it upon receipt of instructions on a case by case basis and the services rendered were to the satisfaction of the Defendant. He submitted that the Defendant has not shown court why the Plaintiff should not be paid under the principle of Quantum Meruit in respect of the legal services rendered and invited court to find this issue in their favour.

**If (any or all of the above questions (3 (a), b and (c) above) are answered in favour of the Defendant, whether the Defendant is entitled to have possession of the files relating to matters which the Plaintiff handled without any payment.**

On this issue the Plaintiff's Counsel submitted that it is not in dispute that the Defendant gave instructions to the Plaintiff on a *case by case basis* and that the Plaintiff in carrying out these instructions used its own resources as can be seen from **Exhibit PI Tab D** and as has been confirmed in **Exhibit P2 Tab 0 pages 481 to 484**. He also submitted that the Defendant is not entitled to forcefully demand for the files from the Plaintiff as the Plaintiff has a lawful lien over the files because they contain its hard work, labour and professional input for which the Defendant has categorically refused to pay for. Counsel prayed that court be pleased to answer all the questions in favour of the Plaintiff and refer the parties to a Taxing Master as provided for under the Advocates (Remuneration and Taxation of Costs) Rules, S.1. 267-4 with an award of costs of the suit to the Plaintiff.

In reply on this issue the Defendant's Counsel relied on the **Rules of Missouri Supreme Court Advisory Committee & Legal Ethics of the United States of America on file Retention & Relinquishing it to the Client** and submitted that since they are persuasive the Defendant is entitled to have possession of the photocopied files relating to matters which the Plaintiff handled without any payment but not the original which the Plaintiff has refused to provide on request to the Defendant. He prayed that Court find this issue in favour of the Defendant as the case against the Defendant lacks merit and should be *Decision of Hon. Mr. Justice Christopher Madrama Izama* \*^\*~ \*&\*\$\$# xtra+ *maximum735securityx 2017 style*

dismissed with costs.

In rejoinder the Plaintiff's Counsel submitted that for one to be entitled to possession of a case file from an advocate, they must not only qualify to be a client but must also have duly instructed the advocate to act on their behalf as per **Rule 2 (1) of the Advocates (Professional Conduct) Regulations S.I. 267**. In the instant case it is not in dispute that the Defendant, through its various officials, duly instructed the Plaintiff on a "case by case basis", had a retainer and was until 10<sup>th</sup> December, 2015 a client of the Plaintiff and is still in possession of the said files until its fees and disbursements are paid. Counsel submitted that the Plaintiff has a lien on those files to which he referred to **Osborn's Concise Law Dictionary, 9<sup>th</sup> Edition, Sweet & Maxwell 2001**, to define a lien to mean "The right to hold the property of another as security for the performance of an obligation." He submitted that the Plaintiff is entitled to retain possession of and has a lien over the case files until the outstanding fees and disbursements are paid by the Defendant as these case files are essential to the Plaintiff's claim since the contents therein prove actual work done on behalf of the Defendant. He prayed that court find that the Defendant is not entitled to have possession of the files relating to matters which the Plaintiff handled without payment.

### **Judgment**

I have carefully considered the questions on which the opinion of the court is sought. The parties proceeded under Order 35 of the Civil Procedure Rules. Order 35 rule 1 of the Civil Procedure Rules provides that the parties claiming to be interested in a decision on any question of law or fact may enter into an agreement in writing stating the question in the form of a case for the opinion of the court, and providing that, upon the finding of the court with respect to the question, any sum of money fixed by the parties sought to be determined by the court shall be paid by one of the parties to the other of them. Or some property, movable or removable, specified in the agreement, shall be delivered by one of the parties to the other of them or one or more of the parties shall do or refrain from doing some other particular act specified in the agreement. This suit proceeded under Order 35 rule (1(1) (a) and (c) of the Civil Procedure Rules which allows the parties to seek for determination by the court, any question as to whether money should be paid by one of the parties and secondly whether one of the parties shall do or refrain from doing a particular act.

The questions on which the opinion of the court is sought are the following:

Whether the agreement dated 11<sup>th</sup> October, 1996 complies with the Advocates Act and Regulations made there under? Whether the Plaintiffs claim from 1<sup>st</sup> of January 2006 complies with the public procurement laws in Uganda? Whether the Plaintiff, irrespective of questions (a) and (b) above is entitled to payment for the Defendants instructions carried out? If any or all of the above questions are answered in favour of the Defendant, whether the Defendant is entitled

to have possession of the files relating to matters which the Plaintiff handled without any payment?

I have duly considered the written submissions of the Counsels for the parties as well as the agreed facts and documents and the authorities relied upon by the parties. I will address the issues as framed by the parties and in the order in which they were framed save for issues numbers 2 and 3 which will be handled together starting with issue No. 3.

**1. Whether the agreement dated 11<sup>th</sup> October, 1996 complies with the Advocates Act and Regulations made there under?**

The Defendant's argument is that the agreement dated 11<sup>th</sup> October, 1996 does not comply with and was made contrary to section 51 of the Advocates Act which provides for the form of an agreement under sections 48 or 50 of the Advocates Act. The Plaintiff's argument simply is that the agreement in question does not fall within the ambit of the statutory provisions relied upon by the Defendant to object to the agreement. He based his arguments on a reading of sections 48 and 50 of the Advocates Act Cap 267.

I have duly considered section 48 of the Advocates Act, and it deals with agreements with respect to remuneration of an advocate for non - contentious business. Particularly, section 48 (1) of the Advocates Act provides as follows:

“48. Agreements with respect to remuneration for non-contentious business

(1) Notwithstanding any rules as to remuneration for the time being in force, an advocate and his or her client may, either before or after or in the course of the transaction of any noncontentious business by the advocate, make an agreement as to the remuneration of the advocate in respect of that transaction.”

By using the words "Notwithstanding any rules as to remuneration for the time being in force, an advocate and his client or her client may, either before or after...they can agree as to the remuneration of the advocate in respect of the transaction", it means that the agreement is made notwithstanding any rules as to the remuneration of an advocate in force. The Plaintiff's argument simply is that the parties did not make any agreement notwithstanding any rules as to remuneration of an advocate for the time being in force. This is because annexure "A" which is the agreement dated 11<sup>th</sup> of October 1996 between Kampala City Council and the Plaintiff in the clause 3 thereof provides that the advocates fees for all the Counsels specific cases and transactions/agreements and shall be based on the relevant scales set out in the Advocates (Remuneration and Taxation of Costs) (Amendment) Rules, 1996 or such amendments thereof as shall be in force at the material time and shall be subject to an automatic rebate/discount of 25%. On the basis of the wording of the agreement, the Plaintiff submitted that section 48 of the

*Decision of Hon. Mr. Justice Christopher Madrama Izama \*^\*~ \*&\*\$\$# xtra+ maximum735securityx 2017 style*

Advocates Act is inapplicable and therefore the authorities cited by the Defendants Counsel on agreements made which are contrary to section 51 of the Advocates Act are inapplicable.

I have carefully considered the relevant clause 3 of the agreement as well as section 48 (1) of the Advocates Act and I agree that section 48 deals with agreements that are made notwithstanding rules as to remuneration for the time being in force, of an advocate by his or her client. Section 48 deals with non-contentious matters.

As far as contentious matters are concerned, a similar provision is made by section 50 (1) of the Advocates Act which provides as follows:

“50. Power to make agreements as to remuneration for contentious business  
(1) Notwithstanding any rules for the time being in force, an advocate may make an agreement with his or her client as to his or her remuneration in respect of any contentious business done or to be done by him or her providing that he or she shall be remunerated either by a gross sum or by salary.”

Section 50 (1) of the Advocates Act clearly provides that notwithstanding any rules for the time being in force, an advocate may make an agreement with his or her client as to his or her remuneration in respect of any contentious business.

Clause 3 of the agreement dated 11<sup>th</sup> of October 1996 deals with contentious and non-contentious business handled by the advocates and clearly provides that it will be handled in accordance with the relevant scale set out in the **Advocates (Remuneration and Taxation of Costs) (Amendment) Rules, 1996** or such other amendments thereof as shall be in force at the material time and subject to an automatic rebate/discount of 25%. It follows that, the agreement of the parties was not made notwithstanding the provisions of the rules in force for remuneration of advocates but made to be in compliance thereof save for an agreed a discount of 25%.

Finally section 51 of the Advocates Act which is the specific provision on which the Defendant’s Counsel relied has a head note which clearly provides that it deals with special requirements of agreements under sections 48 and 50. It provides as follows:

“51. Special requirements of agreements under sections 48 and 50.

(1) An agreement under section 48 or 50 shall—

(a) be in writing;

(b) be signed by the person to be bound by it; and

(c) contain a certificate signed by a notary public (other than a notary public who is a party to the agreement) to the effect that the person bound by the agreement had explained to him or her the nature of the agreement and appeared to understand the agreement. A copy of the certificate shall be sent to the secretary of the Law Council by prepaid registered post.

(2) An agreement under section 48 or 50 shall not be enforceable if any of the requirements of subsection (1) have not been satisfied in relation to the agreement, and any advocate who obtains or seeks to obtain any benefit under any agreement which is unenforceable by virtue of the provisions of this section shall be guilty of professional misconduct.”

The Defendant's argument is that because the agreement dated 11<sup>th</sup> of October 1996 did not fulfil the formal and substantive requirements of section 51 of the Advocates Act, the agreement was unenforceable. Learned Counsel relied on several authorities to this effect.

I agree with the Plaintiff's Counsel that section 51 is inapplicable to the agreement of 11<sup>th</sup> of October 1996 because the agreement of the parties applies the rules for remuneration of advocates for the time being in force. Sections 48 and 50 envisaged an agreement for remuneration of an advocate notwithstanding the rules in force for remuneration of an advocate for the time being. It deals with situations where the parties choose to make their own agreement as to remuneration notwithstanding the rules for reimbursement of an advocate in force. For that reason, the Defendant's arguments are inapplicable to the agreement dated 11<sup>th</sup> October, 1996 and the provisions of law quoted namely section 51 of the Advocates Act does not apply to the said agreement. It follows that the agreement for remuneration in accordance with the rules in force for remuneration of an advocate for the time being in force, is enforceable. It follows that the agreement dated 11<sup>th</sup> of October 1996 complies with the Advocates Act and regulations made there under.

I must add that the framing of issue No. 1 was slightly misleading because the issue is not whether the agreement complies with the Advocates Act, which issue implies that the agreement was made in accordance with but rather the issue argued and determined is whether the agreement is contrary to the Advocates Act and therefore illegal, null and void and unenforceable. In the premises the agreement of 11<sup>th</sup> October 1996 is not illegal, null, void or unenforceable.

**2. Whether the Plaintiffs claim from first of January 2006 complies with the Public Procurement Laws in Uganda?**

**3. Whether the Plaintiff, irrespective of questions (a) and (b) above is entitled to payment for the Defendants instructions carried out?**

I have carefully considered the above two issues: Issue number 3 is framed in such a way that its disposal does not depend on the resolution of issue number 1 and if it is determined in the affirmative, there would be no need to determine issue number 2 which is the contention that the contract is unenforceable because it is illegal.

In the premises I will start with issue number 3. The Plaintiff submitted that the Plaintiff is entitled to payment for services rendered irrespective of the legality of the contract on the ground that the Defendant instructed the Plaintiff to provide the services and did enjoy the services.

I have carefully considered the evidence and starting with the PPDA Act and particularly sections 98 (3) and (6) thereof, the law did not apply completely to local government procurement until after about a year allowing for conversion and adaptation of the new system ushered by the new law from the date of commencement of the PPDA Act. This is deduced from the wording of section 98 (3) that provide for a transitional period between the previous procurement law and the new enactment in the following words:

“98. Transitional provisions.

(3) Except as provided for under this Act, this Act shall take precedence over all other enactments establishing Tender Boards or like mechanisms, and the responsible procuring and disposing entities shall within twelve months after this Act comes into force, bring their practices in conformity with this Act.”

The above section 98 (3) of the PPDA Act permitted procurement done under previous mechanism to continue except that the procuring and disposal entities were required within twelve months after the Act came into force to bring their practices in conformity with the Act. From the Public Procurement and Disposal of Public Assets Act (Commencement) Instrument, 2003 Statutory Instrument No. 10 of 2003 the 21<sup>st</sup> of February, 2003 was deemed to be the date on which the Act came into force. Thereafter at least for one year there was a grace period to move away from old processes to bring practices into the new processes ushered in by the PPDA Act 2003. In general this meant that a contract with a period that had been executed under the old law would continue in force until after it expires. With the above law in perspective there are some peculiar facts and contentions that need to be addressed in relation to the status of the contract dated 11<sup>th</sup> October 1996.

It is an agreed fact under paragraph 2 of the agreed facts that the agreement of 11<sup>th</sup> of October 1996 expired on the 31<sup>st</sup> of December 2005. Secondly in paragraph 2 (b) it is further agreed that the Plaintiff continued to receive instructions on a case by case basis. Thirdly the Solicitor General was of the opinion communicated to both parties that the Defendant should sever pre-2006 contracts and assess payment separately while the post 2005 contracts would be assessed on its merits. This opinion was contested in the written submissions of the Defendant’s Counsel.

He contended that the opinion of the Solicitor General did not unequivocally sanction payment for the period beginning January 2006 to date. He submitted that the question of whether the public entity or body cannot retain legal services was settled in the case of **Attorney General and Peter Nyombi versus Uganda Law Society HCMA No. 321 of 2013**. I have carefully considered the decision of Hon. Mr. Justice Musota; a judge of the High Court who held that the procurement of Kampala Associated Advocates by the Attorney General to represent him was subject to the procurement law and because the law was not followed it was irregular. The order he made was for disqualification of Kampala Associated Advocates from representing the Attorney General. He never made any order as to any remuneration of Kampala Associated Advocates which is the dispute in this case. The question of whether the firm of advocates were entitled to payment under a quantum meruit claim was never raised neither was the court addressed on the effect of non-compliance with the Act where the services were rendered without objection from the consumer of the services. Lastly, the objection was made and not on behalf of the Attorney General or the government but by a private organisation. This suit is therefore distinguishable from the facts of this case because in this case the Defendant is raising its own alleged illegality to avoid paying for legal services provided. In the **Attorney General and Peter Nyombi vs Uganda Law Society** case (supra) the services were stopped.

I have accordingly considered the evidence further. On 30<sup>th</sup> September, 2013 the Executive Director of KCCA wrote to the Principal Private Secretary to H.E, The President of the Republic of Uganda on the question of the representation of KCCA by the Plaintiff. They wrote that the Plaintiff received instructions from Kampala City Council and various Urban Division Councils through the office of the City Advocate to represent the local governments in court cases and this went on for approximately for 11 years. The services were provided by the Plaintiff without any disbursements from KCCA for the administrative and court expenses and remuneration. The Plaintiff continued to provide KCCA with regular reports on the cases it was handling and there was no basis to question the professionalism of the Plaintiff. In a meeting held between the Plaintiff, KCCA and the Solicitor General, the Solicitor General advised that the PPDA Act 2003 did not apply to cases whose instructions were received by the Plaintiff firm prior to the expiry of the contract ending 31<sup>st</sup> of December 2005 since the firm had a contract preceding the commencement of the PPDA Act 2003. He consequently advised that the remuneration issue for cases whose instructions were received by the Plaintiff prior to 1<sup>st</sup> January, 2006 be segregated from those received after 1<sup>st</sup> January, 2006. He also advised the Defendant to pay for cases handled prior to January 2006 while the government considers how to resolve the question of the fees with regard to the second part namely the post 1<sup>st</sup> January, 2006 period. Subsequently in a letter dated 6<sup>th</sup> January, 2014 the Acting Executive Director of KCCA wrote to the Plaintiff as follows:

"Following our engagement with various government departments on the legality of the transactions between yourself and the defunct Kampala City Council and Kampala



Capital City Authority as its successor, it was concluded that no contract existed between your firm and the then KCC from 2001, and as a consequence no payment should be made for the services rendered by your firm for that time ....

It is in this premise that we can neither disburse any funds nor maintain any further relationship in this regard with your firm.

We hereby demand for the return of all the case files and all relevant documentation pertaining to the same, by 10<sup>th</sup> January, 2014..."

On 10<sup>th</sup> December, 2015 the Defendant wrote to the Plaintiff formally withdrawing instructions in respect of all matters handled by the Plaintiff on behalf of the former Kampala City Council and its successor KCCA. It is an agreed fact that this formal withdrawal was communicated on the 14<sup>th</sup> of December, 2015. Last but not least the opinion of the Solicitor General addressed to the Defendant and dated 19<sup>th</sup> December, 2014 and is as follows:

"We advise as follows –

1. The contract between Kampala City Council and M/S Sendege, Senyondo & Co. Advocates dated 11<sup>th</sup> October, 1996 for a term of five years with a clause for automatic extension for a similar period is not disputed. It is therefore imperative that the claim for professional fees for the said contract period should be verified for payment as agreed in the meeting we held on the 21<sup>st</sup> January, 2014.
2. In respect of legal services rendered after lapse of the contract in December, 2005, you acknowledge that M/S Sendege, Senyondo & Co. Advocates continued to render services to the entity without a formal contract. We are of the opinion that on the basis of the judgment in the case of M/S Finishing Touches versus Attorney General of Uganda Civil Suit No. 144 of 2010, the judge held that the service provider is entitled to the quantum that is not in dispute."

## **Quantum Meruit**

In this suit it is an agreed fact that the Plaintiff's services were engaged and the Defendant used and enjoyed those services and there is no question as to the quality or effectiveness of the legal services provided by the Plaintiff. The Defendants Executive Director noted that the Plaintiffs professionalism in the provision of those services was not in doubt. The question is whether if the contract is held to be illegal for non compliance with the PPDA Act or article 119 of the Constitution, the Plaintiff's suit for payment could still be allowed under the doctrine of quantum meruit. The arguments however proceeded on wrong assumptions. What is a contract envisaged in the law under the circumstances? In each case the Defendant from the written documentary evidence and opinion concluded that there was no formal contract between the parties. The

Solicitor General shared the same view and this is an agreed fact presented to court in the agreement for opinion. In fact the questions I pose at this stage are the following:

- The Solicitor General cleared the contract for the period predating 1<sup>st</sup> January, 2006. Can the Defendant challenge the legality of these transactions based on a contract which, it is agreed expired in December 2005?
- The Plaintiff received instructions on a case by case basis. Was each instruction the basis of the alleged illegal contract or contracts since the Defendant maintained that there was no formal contract?
- Was each transaction a formal contract?

According to the **Oxford Dictionary of Law Fifth Edition**, *quantum meruit* is part of a field of law known as quasi contract:

“A field of law covering cases in which one person has been unduly enriched at the expense of another and is under an obligation *quasi ex contractu* (as if from a contract) to make restitution to him. In many cases of quasi-contract, the Defendant has received the benefit from the claimant himself. The claimant may have paid money to him under a mistake of fact, or under a void contract, or may have supplied services under the mistaken belief that he was contractually bound to do so. In that case, he is entitled to be paid a reasonable sum and is said to sue on a ***quantum meruit*** (as much as he deserved).”

Secondly, according to **Osborn’s Concise Law Dictionary Eleventh Edition** *quantum meruit* is a remedy in quasi contract inter alia when work was done and accepted under a void contract which was believed to be valid. The question I pose is if the Defendant believed the instructions to be invalid, why did they continue giving written instructions to the Plaintiff to provide it various legal services especially in light of the contention that there was no formal contract?

The fact that the Defendant or predecessor in title instructed the Plaintiff or that the Plaintiff did the work is not in dispute. According to **Halsbury’s Laws of England Volume 9 (1) Fourth Edition Reissue in paragraph 1156** ‘claims for a quantum meruit in respect of work voluntarily done under a contract terminated for breach or under an unenforceable, void or illegal contract are properly regarded as restitutionary. Secondly, under paragraph 1158 it is written that the Plaintiff may recover on quantum meruit in respect of work done under a contract which is unenforceable, void or illegal as is alleged in this suit by the Defendant:

"In some circumstances, a Plaintiff may recover on a quantum meruit in respect of work done under a contract which is unenforceable, void or illegal. Where a contract is unenforceable, as a general rule the Defendant is not precluded by the fact of performance by the Plaintiff from pleading the unenforceability. If, however, the contract has been performed by the Plaintiff, and the work has been done by the Plaintiff at the

request of the Defendant and of which he has had the benefit, the Plaintiff can recover on quantum meruit notwithstanding the unenforceability of the contract.

Where a contract is void as being made without authority, the Plaintiff who has rendered services under it may be entitled to recover on a quantum meruit. For example where a contract purporting to appoint a person as managing director of a company was found to be a nullity, that person was allowed to recover on a quantum meruit for services rendered and accepted after the date of his purported appointment."

The underlying principle is that a person who has accepted goods and services should not be allowed to enrich himself or herself at the expense of the supplier of the goods or services. The consumer of the goods or services would have got free services or taken the goods from the supplier and thereafter raise the question of enforceability of the contract.

The obligation to pay for services or goods had and consumed by the Defendant is imposed by a rule of law. In the case of **Craven-Ellis v Canons Ltd [1936] 2 All ER 1066** (Judgment of the Court of Appeal of England). The Plaintiff worked for the Defendant Company as a Managing Director but his service agreement was void because he was appointed by those who did not have the share qualification shares and he too did not qualify for appointment. He was allowed to recover his remuneration on a quantum meruit. It was held by Greer LJ that the obligation to pay is imposed by a rule of law and not by inference of fact from the acceptance of the goods or services: He held at 1073 that:

“The decisions in *Clarke v Cuckfield Union Guardians* and *Lawford v Billericay Rural District Council*, are also authorities to the effect that the implied obligation to pay is an obligation imposed by law, and not an inference of fact, *arising from the performance and acceptance of services*. In the last mentioned case the work in respect of which the Plaintiff sued was done in pursuance of express instructions given by the Defendant council, but was not binding on the Defendants because no agreement had been executed under their seal. It was impossible to say as a matter of logical inference from the facts that by accepting the advantage of the Plaintiff’s work they had promised to pay him a reasonable sum therefore. Both parties assumed that there was a contract between them, and the acceptance of the work by the Defendants could not in fact give rise to the inference of a promise to pay the reasonable value. For these reasons this case seems to me to show that the obligation is one which is imposed by law in all cases where the acts are purported to be done on the faith of an agreement which is supposed to be but is not a binding contract between the parties.” (Emphasis added)

The Defendant’s predecessor in title and the Defendant gave the instructions and kept on giving the Plaintiff instructions for about 11 years and accepted the services based on those instructions as professional. The Plaintiff accepted to provide the services and the Defendant accepted the

*Decision of Hon. Mr. Justice Christopher Madrama Izama \*^\*~ \*&\*\$\$# xtra+ maximum735securityx 2017 style*

services and only raised the question of illegality of contract to avoid liability to pay for services. Moreover in the last issue the Defendant wants this court to hold that it is entitled to receive back files for the matters or causes where it had instructed the Plaintiff to provide it legal services. What is the public interest or purpose of receiving services from a service provider on the instructions of the Defendant, accepting the services and using and appreciating services and later on denying liability to pay on the ground that the Defendant's officials were not authorized or did not follow the proper procedure in procuring the services? What is the end of justice or public interest in such a proposition? I find that having given instructions and accepted and used the services on a case by case basis the Defendant cannot plead lack of authority or nullity of the contract to refuse to pay for them on the ground that the instructions it gave were variously unenforceable. The services were already given. The Plaintiff can recover on the principle of quantum meruit. This is further illustrated by my decision in **Engineer Investments Ltd versus Attorney General and Kampala Capital City Authority HCCS No 0331 of 2012** delivered on the 7<sup>th</sup> Oct 2016 on the issue of whether non compliance with the PPDA Act renders the contract unenforceable. I make reference to the above decision also in relation to issue 2 which is:

**Whether the Plaintiffs claim from first of January 2006 complies with the Public Procurement Laws in Uganda?**

Resolution of issue 2 depends on basic facts. This suit proceeded by an agreement of the parties to forward certain issues for determination. It is not for trial of issues of fact but rather is for trial of questions of law. The facts are agreed. It is agreed that the Plaintiff entered into a retainer agreement for the provision of legal services with the predecessor in title of the Defendant namely Kampala City Council as its external lawyers. Secondly after the expiration of the agreement in December, 2005 the Plaintiff continued to receive written instructions from KCC and the Plaintiff continued to provide legal services to KCC. After the inception of the Defendant in 2011 the Plaintiff continued to handle court cases it had conduct of prior to the dissolution of Kampala City Council and its replacement by the Defendant and handled other cases filed against the Defendant in the year 2011. Specifically the agreement dated 11<sup>th</sup> of October 1996 clause 5 thereof provides that the appointment of the Plaintiff as external legal Counsel was for a term of five years effective from 1<sup>st</sup> January, 1996 and automatically renewable for a similar period of time unless earlier on determined by either party by giving to the other six months written notice of intention to do so within the duration of five-year term. The agreement was signed on behalf of the Defendant (then KCC) by the Mayor of KCC as well as the Town Clerk who is the accounting officer of the Defendant as the witness. The Plaintiff also signed.

I have duly considered the submissions of both Counsels which are set out at the very beginning of this judgment. A relevant matter of fact is that the Plaintiff continued providing legal services

on the basis of written instructions from the Defendant and which instructions are not in dispute. The Plaintiff was given numerous other instructions by KCC and then KCCA. On 9<sup>th</sup> June, 2011 the Defendant published an advertisement inviting bids for the provision of legal services but did not withdraw instructions from the Plaintiff. The Defendant withdrew instructions from the Plaintiff formally on 14<sup>th</sup> December, 2015 by letter dated 10<sup>th</sup> December, 2015.

The basis of the Plaintiff's answer to the Defendant's contention for non-compliance with the Public Procurement and Disposal of Public Assets Act 2003 and regulations made thereunder is that it is the Defendant's officials and not the Plaintiff who did not comply with public procurement requirements under the law. He relied on the decision of this court in **Finishing Touches Ltd versus Attorney General HCCS Number 144 of 2010** for the proposition that the duty breached was the duty imposed on the procurement and disposal entity or unit. It followed that the Plaintiff could not be blamed for any noncompliance issues with the public procurement laws of Uganda since it provided the legal services which were accepted and used based on the Defendants own various instructions.

On the other hand the Defendant argued that the Public Procurement and Disposal of Public Assets Act, 2003 was the governing law at the material time the Plaintiff provided the services. In accordance with the public procurement law as well as **regulation 17 (1) of the Local Government (Public Procurement and Disposal of Public Assets) Regulations S.I. No. 39 of 2006 non-compliance was fatal to the contract and therefore the claim for payment.** Counsel also relied on article 119 (5) of the 1995 Constitution of the Republic of Uganda and case law for the submission that failure to obtain consent of the Attorney General rendered the contract an illegality. I must add that at this stage the court is not addressing itself to a written contract dated 11<sup>th</sup> Oct 1996 but the informal arrangement where the Plaintiff received various written instructions on several other matters without objection and provided and continued to provide legal services without objections being raised.

In the other decisions there were formal written contracts. Article 119 (5) of the Constitution which was relied upon by the Defendant to avoid liability for services had in the previous decision and in this case deals with formal agreements. In this case going by the Defendants objections and facts there was no formal contract. Secondly, there is no evidence that each written instruction was over **50,000,000/= Uganda shillings** and therefore required approval by the Attorney General.

In **Engineer Investments Ltd versus Attorney General and Kampala Capital City Authority HCCS No 0331 of 2012** where partial judgment was delivered on the 7<sup>th</sup> Oct 2016 the same point of law relating to illegality for failure to comply with provisions of the PPDA Act and article 119 of the Constitution were raised. In that suit the points of law raised for determination were

1. Whether the contract in question was illegal on two grounds namely:

*Decision of Hon. Mr. Justice Christopher Madrama Izama* \*^\*~ \*&\*\$\$# xtra+  
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- a. Failure to obtain the consent of the Attorney General under article 119 (5) of the Constitution of the Republic of Uganda;
- b. Where it is a nullity for non compliance with the provisions of the Public Procurement and Disposal of Public Assets Act 2003.

The decision of the court followed an earlier decision on the very same point in **Finishing Touches vs. Attorney General** (supra) that the question of whether a statute prohibits something and makes breach illegal depends on the language used in the enactment. **According H.W.R. Wade in, Administrative Law Fifth Edition** at page 218:

"Non-observance of a mandatory condition is fatal to the validity of the action. But if the condition is held to be merely directory, its non-observance will not matter for this purpose."

The question is therefore whether the provisions of the PPDA Act which were not complied with cited by the Defendant were mandatory and non compliance rendered the acts done in disregard of them void or whether they were directory and the acts done in disregard were not void. According **H.W.R. Wade** the same condition may be mandatory and directory at the same time; it may be mandatory as to substantial compliance, but directory as to precise compliance." In the previous precedents, I reproduced the authorities which included **Cullimore v Lyme Regis Corporation [1961] 3 All ER 1008** and the decision of Edmund Davies J at pages 1011 – 1012 quoting the general principles for determination of whether an enactment is mandatory or directory from Maxwell on Interpretation of Statutes:

“Maxwell on Interpretation of Statutes (10<sup>th</sup> Edition), at p 376:

“It has been said that no rule can be laid down for determining whether the command is to be considered as a mere direction or instruction involving no invalidating consequence in its disregard, or as imperative, with an implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment ... *But when a public duty is imposed and the statute requires that it shall be performed in a certain manner, or within a certain time, or under other specified conditions, such prescriptions may well be regarded as intended to be directory only in cases when injustice or inconvenience to others who have no control over those exercising the duty would result if such requirements were essential and imperative.*” (Emphasis added)

From the above quotation where a public duty is imposed by the enactment and the duty is required to be performed in a certain manner or under specified conditions, the prescription is ordinarily to be regarded as intended to be directory in cases where injustice or inconvenience to others who have no control over the exercise of the duty by the authority would result. In consideration the issue the court takes into account include the intention of legislature to

*Decision of Hon. Mr. Justice Christopher Madrama Izama \*^\*~ \*&\*\$\$# xtra+ maximum735securityx 2017 style*

establish whether there was substantial compliance with it. The Plaintiff does not determine and cannot influence how the Defendant's Officials initiate any written instructions to him to provide legal services on a case by case basis.

From the facts of this suit, the duty as held in **Finishing Touches vs. Attorney General** (supra) is on the Procurement and Disposal Entity, to advertise and follow the procurement law in selecting a service provider. Where they give express instructions to someone to provide specified legal services on the basis of a law passed after the contract expired, should the service provider advocate ask the officials to first advertise for the services in each written instruction and then compete for the instructions to provide services? In the circumstances of this suit the Defendant gave written instructions on a case by case basis but what was the foundation of this? Was it the 1996 agreement? The answer should be in the negative because it is agreed that after 1<sup>st</sup> January 2006 the contract had expired and the parties would thereafter have been operating under a mistaken belief that the contract executed before the law was enacted was the governing agreement. The decision of the Solicitor General clears the period prior to January 2006 and I agree with the Plaintiff's Counsel's submissions and authority relied on that the opinion is binding on the Defendant. In any case the contract was in force by the time the PPDA Act, 2003 came into force and under section 98 (3) thereof it was within the grace period of one year from the date of commencement of the Act for the authorities to bring their practices into conformity with the new law. A subsisting contract could not be amended without agreement and was not void by the time the PPDA Act came into force.

Last but not least on the written agreement this court has held that before 2006 when additional rules namely **Local Government Regulations 2006** were passed, article 119 of the Constitution did not apply to a local authority but only to Central Government. This was in **Engineer Investments Ltd versus Attorney General and Kampala Capital City Authority HCCS No 0331 of 2012**. The decision is based on several articles whose meanings are not controversial as to require interpretation by the Constitutional Court. They articles quoted can be read and enforced as clearly interpreted without any controversy and the High Court has jurisdiction to enforce them. I will quote extensively for the holding and this was the ruling delivered on the 11<sup>th</sup> of December 2015:

“The preliminary objection of the Attorney General is based on Article 119 of the Constitution of the Republic of Uganda. I particularly consider clauses 3, 4, 5 and 6 of Article 119 quoted above. The parts of Article 119 of the Constitution which I have considered to resolve the issue is reproduced hereunder for ease of reference:

“119. Attorney General.

(1)...

(3) The Attorney General shall be the principal legal adviser of the Government.

*Decision of Hon. Mr. Justice Christopher Madrama Izama \*^\*~ \*&\*\$\$# xtra+ maximum735securityx 2017 style*

- (4) The functions of the Attorney General shall include the following—
- (a) to give legal advice and legal services to the Government on any subject;
  - (b) to draw and peruse agreements, contracts, treaties, conventions and documents by whatever name called, to which the Government is a party or in respect of which the Government has an interest;
  - (c) to represent the Government in courts or any other legal proceedings to which the Government is a party; and
  - (d) to perform such other functions as may be assigned to him or her by the President or by law.
- (5) Subject to the provisions of this Constitution, no agreement, contract, treaty, convention or document by whatever name called, to which the Government is a party or in respect of which the Government has an interest, shall be concluded without legal advice from the Attorney General, except in such cases and subject to such conditions as Parliament may by law prescribe.
- (6) Until Parliament makes the law referred to in clause (5) of this Article, the Attorney General may, by statutory instrument, exempt any particular category of agreement or contract none of the parties to which is a foreign government or its agency or an international organisation from the application of that clause.”

From a plain reading of the above provisions the Attorney General is the Principal Legal Adviser of the Government. The word "Government" has the letter “G” capitalised. I wish to underline the word "Government" for emphasis of the point. Secondly role of the Attorney General under the cited clause 5 of Article 119 is to draw and peruse agreements, contracts, treaties, conventions and documents by whatever name called in which the Government is a party or in respect of which the Government has an interest.

I want to emphasise (and italicise) the question as to which are the, agreements, contracts, treaties, conventions and the documents by whatever name called *in which the Government is a party or in respect of which the Government has an interest?*

Furthermore it is provided that no agreement, contract, treaty, convention or document by whatever name called, to which the Government is a party or in respect of which the Government has an interest shall be concluded without the legal advice of the Attorney General subject to cases which the Parliament may by law prescribe. The relevant question to be answered is who is the Government? The expression "Government" found under Article 119 has been defined by Article 257 to mean the Government of Uganda. Secondly a "district council" has been defined to mean a district council established under



Article 180 of the Constitution. Furthermore the expression "local government council" means a Council referred to in Article 180 of the Constitution. It will immediately be noticed upon perusal of Article 257 of the Constitution that the letter "g" in the word "government" in the phrase "local government council" is not capitalised. It suggests that it means something different from the word "Government" found under Article 119 of the Constitution because it carries the letter "G" which is deliberately capitalised.

The second Defendant is a local government council as far as its corporate status is concerned. It is not "Government". And the question is therefore whether the contract sought to be impugned under the provisions of Article 119 of the Constitution of the Republic of Uganda for want of the legal advice of the Attorney General is one in which the Government is a party or in which the Government has an interest.

First of all the Government is not a party to the contract because the contract was executed for and on behalf of Kawempe Division which division is a "local government council" which council has a corporate status. Secondly the government does not have an interest in contracts of local government. It has no material interests since the allocation of resources is duly demarcated. Local governments manage their own resources and services. Article 180 (1) of the Constitution of the Republic of Uganda clearly provides that a local government shall be based on a council which enjoys legislative and executive powers in its area of jurisdiction. It provides as follows:

"180. Local government councils.

(1) A local government shall be based on a council which shall be the highest political authority within its area of jurisdiction and which shall have legislative and executive powers to be exercised in accordance with this Constitution.

(2) Parliament shall by law prescribe the composition, qualifications, functions and electoral procedures in respect of local government councils, except that—..."

Last but not least one of the cardinal principles for the creation of the local government system is decentralisation of powers and services. Article 176 of the Constitution the Republic of Uganda among other things gives the applicable principles that apply to the local government system and one of them is decentralisation and devolution of powers. Article 176 provides that:

"176. Local government system.

(1) The system of local government in Uganda shall be based on the district as a unit under which there shall be such lower local governments and administrative units as Parliament may by law provide.

(2) The following principles shall apply to the local government system—

(a) the system shall be such as to ensure that functions, powers and responsibilities are devolved and transferred from the Government to local government units in a coordinated manner;

(b) decentralisation shall be a principle applying to all levels of local government and, in particular, from higher to lower local government units to ensure peoples' participation and democratic control in decision making;

(c) the system shall be such as to ensure the full realisation of democratic governance at all local government levels;

(d) there shall be established for each local government unit a sound financial base with reliable sources of revenue;

(e) appropriate measures shall be taken to enable local government units to plan, initiate and execute policies in respect of all matters affecting the people within their jurisdictions;

(f) persons in the service of local government shall be employed by the local governments; and

(g) the local governments shall oversee the performance of persons employed by the Government to provide services in their areas and to monitor the provision of Government services or the implementation of projects in their areas.

(3) The system of local government shall be based on democratically elected councils on the basis of universal adult suffrage in accordance with Article 181 (4) of this Constitution.”

One of the important principles is devolution of power. Leaving powers of drafting and vetting contracts in the hands of the Attorney General is centralisation of power as opposed to devolution of power espoused by Article 176 (2) (a), (e), (f) and (g). Moreover, the Attorney General under Article 119 of the Constitution is not the principal legal advisor of “local government councils” but that of “Government”. Local government units are supposed to plan, initiate and execute policies in respect of all matters affecting the people within their jurisdiction. Persons providing services are under their control through employing them under Article 176 (f) or are under their supervision if employed by Government (See Article 176 (g)). Apart from the functions of Government which are specified in the Sixth Schedule to the Constitution, the rest of the powers are exercisable by local governments. For instance local government councils can engage their own Counsel to provide them with legal services. They are not precluded

from seeking the consent of the Attorney General but this is not under Article 119 of the Constitution.

Finally I would like to refer to the precedents referred to by Counsels in their submissions. In the case of **Nsimbe Holdings Limited versus Attorney General and Inspector General of Government Constitutional Petition No. 2 of 2006**, the Constitutional Court commented on Article 119 (5) of the Constitution and the advice of the Attorney General about it. The relevant Article provides that "no agreement, contract, treaty, convention or document by whatever name called to which the Government is a party or in respect of which the Government has an interest, shall be concluded without the legal advice from the Attorney General." According to the opinion of the Attorney General quoted by the Constitutional Court, the advice of the Attorney General is mandatory in contracts in which Government has an interest. The Attorney General also noted that NSSF is a Government body, and the Government had an interest in the joint-venture between Premier Developments Ltd and Mugoya Construction Ltd. Consequently it was a requirement for the joint-venture agreement to be submitted to the Attorney General for legal advice. The Constitutional Court noted that NSSF is a public company established by statute and wholly controlled by the Government of Uganda on behalf of workers and beneficiaries.

On the basis of the finding that the Government had an interest in NSSF the Constitutional Court held that the agreement/transaction in question should not have proceeded without advice of the Attorney General in accordance with Article 119 (5) of the Constitution. They further held that the agreement was null and void by virtue of Article 2 of the Constitution which provides that any law or act which contravenes the Constitution is void to the extent of the contravention. In the premises they held that the merger agreement contravened among others Article 119 (5) of the Constitution and was null and void.

The Constitutional Petition of **Nsimbe Holdings versus Attorney General and another** (supra) is clearly distinguishable from the facts before this court. In that case it was held by the Constitutional Court that the Government had an interest in NSSF. It was on the basis of that finding that they held that Article 119 (5) of the Constitution was applicable. In the case before this court, it cannot be held that the government has an interest in Kawempe Division Local Council which council is a corporation with decentralised powers. They can retain their own lawyers to give them advisory services or even employ a district local government attorney. Secondly, a 'local government council' has clearly been distinguished from 'Government' by virtue of the various definitions under Article 257 of the Constitution. According to Article 256 (1) (r) a "local government council" means a council referred to in Article 180 of this Constitution" whereas the word "Government" means the Government of Uganda. I was also referred to the case of

*Decision of Hon. Mr. Justice Christopher Madrama Izama* \*^\*~ \*&\*\$\$# xtra+  
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**Uganda Broadcasting Corporation versus SINBA (K) Ltd and three others Court of Appeal Civil Application Number 12 of 2004.** I have carefully considered the judgment and it does not decide anything about Article 119 (5) of the Constitution. It only addresses the broad doctrine that once a court of law finds that a contract is illegal, it cannot enforce it.

In the case of **Anold Brooklyn & Company versus Kampala Capital City Authority and the Attorney General Constitutional Petition Number 23 of 2013.** The facts of the petition are similar to this case. In that case at the instance of KCCA on the 19<sup>th</sup> of January 2009 the parties entered into a contract in which the Plaintiff/petitioner was to supply 1540 books of business levy and licenses. The books were duly delivered under the contract on 16<sup>th</sup> December, 2010. On 7<sup>th</sup> April, 2011 KCCA paid to the Petitioner US \$ 83,160.80 leaving an outstanding balance of US\$ 156,371.52. When the Plaintiff/Petitioner demanded payment KCCA refused to pay on the ground that the contract was not enforceable. The Principal State Attorney who appeared in that suit prayed for the issue to be referred to the Constitutional Court for determination.

At the hearing of the reference in the Constitutional Court it was submitted for the Attorney General that non-compliance with Article 119 (5) of the Constitution is a bar to payment even if goods have been supplied and consumed. The Principal State Attorney who appeared also relied on the Local Government Regulations 2006 which stipulates that there shall be no conveying of an acceptance of a contract prior to obtaining approval from the Attorney General. The Constitutional Court held that the way the questions were framed would only lead to one answer that contravention of Article 119 (5) of the Constitution meant that the contract made in disregard of it was a nullity by virtue of Article 2 of the Constitution. They noted that there was no question for interpretation of the Constitution and the Court had no power to amend the questions referred for interpretation. They however noted that the issue of whether the advice of the Attorney General must be given prior to the signing of any agreement, contract, treaty, convention or document to which Government is a party or whether such advice would be given after the signing of such an agreement, contract, treaty, convention or document but before such an agreement, contract, treaty, convention or document is concluded was an important questions that needed to be answered. They noted that although the reference question had been answered, it did not resolve the legal dispute between the parties. For emphasis the legal dispute was whether the first respondent was liable to pay the Plaintiff and the question in the reference was framed as:

"Whether non-compliance with Article 119 (5) of the Constitution by not obtaining the advice from the Attorney General in the contract is a bar to payment where goods and services are supplied, to and consumed by a government entity.

The reference was not meant to determine what a “government entity” is and therefore the decision is distinguishable. The Constitutional Court was never addressed on the issue of whether Kampala Capital City Authority is “Government” as defined by Article 257 which definition clearly applies to Article 119 (5) of the Constitution of the Republic of Uganda. The word “government entity” does not appear in Article 119 (5) of the Constitution. What appears is the word “Government” and also “where (in the contract) Government has an interest”.

There is no appellate decision or a decision of the Constitutional Court on whether a local government as provided for under Article 176 and 180 of the Constitution of the Republic of Uganda is "Government" within the meaning of Article 119 (5) of the Constitution of the Republic of Uganda.

In this suit and in my ruling there is no question for reference as far as the clear definition of Article 257 of what is meant by "Government" as compared to local government is concerned. The word “Government” under Article 119 of the Constitution means the “Government of Uganda” and therefore it means the Central Government as opposed to a local government.

In the premises a local government council has the right to obtain the legal services of a private practitioner or the Attorney General at their sole discretion as Article 119 does not apply to a local government council. In the premises the contract in question in this suit is not null and void by virtue of Article 119 (5) of the Constitution of the Republic of Uganda. Article 119 (5) of the Constitution does not make reference to any agreement, contract, treaty, convention or document by whatever name called, to which a local government is a party or in respect of which a local government has an interest. It only refers to an: “agreement, contract, treaty, convention or document by whatever name called, to which the *Government is a party or in respect of which the Government has an interest*” (Emphasis added).

The preliminary objection on the basis of failure to obtain the advice of the Attorney General under Article 119 of the Constitution is overruled.

As far as the Local Government Regulations 2006 are concerned it has no retrospective effect on a contract executed in 2004 and I need not refer to it or even consider it in this suit.”

In this suit the formal contract dated 11<sup>th</sup> of Oct 1996 falls under the same category as in my extensive judgment above and I have nothing to add. The contract was not illegal and even the Solicitor General cleared it subsequently by advising payment for this period in the above quoted letter dated 19<sup>th</sup> December, 2014 for instructions based on that contract prior to January 2006. No prejudice in the circumstances has been suffered by anybody and the Plaintiff is entitled to

*Decision of Hon. Mr. Justice Christopher Madrama Izama* \*^\*~ \*&\*\$\$# xtra+  
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payment for the period before 2006 without further arguments. In the premises the contract is not illegal. Secondly the instructions given by the Defendant's officials cannot be raised against the Plaintiff who provided the services and are also payable on a quantum meruit basis.

The Plaintiff had no control over the internal workings of the Defendant. Moreover, there was a subsisting contract signed in 1996 under which the parties continued to operate and whose provisions allowed continuity. The Defendant used the services continuously without raising questions of illegality under the PPDA Act 2003 which was promulgated later on in 2003 or **Regulation 17 (1) of the Local Government (Public Procurement and Disposal of Public Assets) Regulations S.I. No. 39 of 2006** which regulations came into force much later. The duty was on the Defendant to bring its practices of giving written instructions to the Plaintiff on a case by case basis into conformity with the PPDA Act 2003.

There is no evidence that the Plaintiff solicited for services independently. The parties operated under a purported agreement which it is agreed is not a formal contract. I must emphasise that article 119 of the Constitution envisages the clearing of formal contracts. The role of the Attorney General under clause 5 of Article 119 of the Constitution is to draw and peruse agreements, contracts, treaties, conventions and documents by whatever name called in which the Government is a party or in respect of which the Government has an interest. It does not deal with informal contracts.

As far as alleged illegality is concerned I agree with the Plaintiff's Counsel that **section 59 (3), of the Public Procurement and Disposal of Public Assets Act, 2003** provides that all procurement or disposal requirements shall be initiated and approved by the Accounting Officer (who is the Town Clerk in the case of the Defendant) and therefore places the responsibility of initiating and commencement of procurement on the Defendant.

According to **Halsbury's laws of England Fourth Edition Reissue volume 44 (1) paragraph 1238:**

"Requirements are construed as directory if they relate to the performance of a public duty, and the case is such that to hold void acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, without at the same time promoting the main object of legislature."

The alleged culpability of officials of the Defendant for non compliance with the law to bring the procurement of legal services in conformity with the PPDA Act cannot be visited on the Plaintiff in the absence of any corrupt practice in getting the instructions on the part of the Plaintiff which has to be proved. According to **H.W.R. Wade** (supra) very often legislature does not prescribe the consequences of non compliance and the court must determine the question when he wrote at page 219:

*Decision of Hon. Mr. Justice Christopher Madrama Izama \*^\*~ \*&\*\$\$# xtra+ maximum735securityx 2017 style*

"It is a question of construction, to be settled by looking at the whole scheme and purpose of the Act and by weighing the importance of the condition, the prejudice to private rights and the claims of the public interest."

A review of the relevant statutory provisions shows that it does not specify any consequences for non compliance. Section 55 of the Public Procurement and Disposal of Public Assets Act 2003 provides that:

"All public procurement and disposal shall be carried out in accordance with the rules set out in this Part of the Act, any regulations and guidelines made under this Act".

The section prescribes the procedure to be followed by the Defendant's officials and places no duty on the Plaintiff. Secondly, section 59 (3) of the Public Procurement and Disposal of Public Assets Act 2003 provides that:

"All procurement or disposal requirements shall be approved by the Accounting Officer prior to the commencement of any procurement or disposal process."

The Town Clerk signed the contract and so did the Mayor of KCC. If there is any culpability it is their culpability. The Plaintiff cannot be deemed to know and is not required to inquire whether the accounting officers approved the procurement prior to getting the written instructions. As noted above both parties were operating under an existing more than a decade long arrangement. Furthermore Regulation 17 (1) and (2) of the Local Government (Public Procurement and Disposal of Public Assets) Regulations S.I. No. 39 of 2006 was promulgated after the contract was signed in 1996 and the Defendant continued giving the Plaintiff instructions according to the volume of exhibits admitted by consent of the parties until when instructions were formally withdrawn in 2015. No fresh mandate was sought and the issue of consent of the Attorney General did not arise afresh on the 1996 agreement.

According to **Halsbury's Laws of England 4<sup>th</sup> Edition reissue Volume 9** (1) Paragraph 836 at page 595:

"Some contracts may be illegal in the sense that they involve the commission of a legal wrong, whether by statute or the common law or because they offend against the fundamental principles of order and morality. Less objectionable contracts may be simply void by common law or statute"

In the Plaintiff's case what is alleged is the prohibition of statute. However, there is no evidence of illegality in formation of the contract in 1996. So what is alleged touches on the continuation of the provision of legal services under the PPDA Act 2003 legal regime. The more accurate view is that the Defendant has raised illegality of its own officials who gave the Plaintiff written instructions to provide legal services. It is premised on the assumption that the Plaintiff ought to

have refused to provide those services because they were non compliant with provisions of the PPDA Act. Furthermore, in attending to the whole scope and intention of legislature in the enactment of the Public Procurement and Disposal of Public Assets Act, 2003, I have considered the purpose for which the Public Procurement and Disposal of Public Assets Authority was established and the objectives in the implementation of the Act under section 6 thereof. Particularly I wish to highlight section 6 (a) of the PPDA Act, but will quote the entire objectives of the PPDA Authority:

6. Objectives of the Authority.

The objectives of the Authority are to—

- (a) ensure the application of fair, competitive, transparent, nondiscriminatory and value for money procurement and disposal standards and practices;
- (b) advise Government, local governments and other procuring and disposing entities on procurement and disposal policies, systems and practices and where necessary, on their harmonisation;
- (c) set standards for the public procurement and disposal systems in Uganda;
- (d) monitor compliance of procuring and disposing entities; and
- (e) build procurement and disposal capacity in Uganda.

The main objective for the enactment of the PPDA Act, 2003 is clearly captured by section 6 (a) and is for the “**fair, competitive, transparent, nondiscriminatory and value for money procurement and disposal standards and practices**”. It was also meant to improve on existing system for the procurement and disposal of goods and services and to create acceptable standards for public procurement and disposal. From the correspondence referred to emanating from the Defendant, the Plaintiff was not faulted for the professionalism by which it handled legal services for the Defendant. Secondly, the aspect of valuable services for consideration is taken care of by the Plaintiff charging in accordance with the rules for remuneration of advocates for the time being in force. Moreover, the Plaintiff had agreed in the initial formal agreement that had expired, that there would be a rebate of 25% of the fees charged under the rules governing the remuneration of advocates for the time being in force. My conclusion is that the Defendant, not only got good value, but is required to pay according to the rules prescribed by statutory instrument for the remuneration of advocates a prescribed amounts on a statutory scale of fees. The procurement would bring value for money and indeed the value had already been consumed or used by the Defendant. In the premises, there was substantial compliance with the objectives of the Public Procurement and Disposal of Public Assets Act, 2003 on the aspect of getting valuable services. Secondly, it is the Defendants officials who kept on giving instructions.



Services should not be procured without a budget for it. What happened to the budget for the services? Hiding the culpability of local government officials in sourcing for valuable services would be the result of the approach adopted by the Defendant. Services should always be backed by a budget line and accumulation of charges for services supplied is outright abuse of office since it would be contrary to principles of management of public funds. Where the services are professional such as giving staff medical attention when in need, and the services are appreciated, the officials who procured the services may be held accountable for the way they procured the services and may be subjected to disciplinary hearing. That would not avoid liability for the services which have been consumed. The principles for establishing whether the statutory provision which was breached is directory or mandatory are part of the laws of Uganda imported by Parliament. It is the common law which was initially imported by the Judicature Act, Act 11 of 1967 and also the Interpretation Act section 2 (n) which defines common law to mean “the common law of England”. The principles of common law for interpretation of statutes were imported into Uganda by legislature and are part of our laws under section 14 of the Judicature Act Cap 13 laws of Uganda. Section 14 (2) (b) (i) of the Judicature Act provides that where the written law does not extend or apply, the jurisdiction of the High Court shall be applied in conformity with the common law. Section 14 (3) further provides that the common law and doctrines of equity shall be in force in so far as the circumstances of Uganda and of its people permit. And subject to such qualifications as circumstances may render necessary.

In **Engineers Ltd vs. Attorney General** (Supra), this court held that the way the provisions of the Public Procurement and Disposal of Public Assets Act 2003 were applied by the second Defendant was meant to defraud the Plaintiff of the consideration for services provided contrary to doctrines of equity and good conscience. In this case the provisions of the law are being used to deny the Plaintiff payment for services rendered and appreciated and which services were delivered upon the express instructions of the Defendant. The intention for enactment of the Public Procurement and Disposal of Public Assets, Act 2003, cannot be to avoid liability for services procured and appreciated albeit not in accordance with the procedure and principles of the enactment. I must emphasise that there may be culpability on the part of the Defendants officials. The correct remedy would be to subject the officials to scrutiny and establish whether there was any disciplinary offence or abuse of public office involved in the writing of express instructions for the provision of legal services. Section 58 of the PPDA Act particularly provides that the procuring and disposing entity shall apply in its procurement and disposal in a rational manner and shall avoid among other things emergency procurement and disposal wherever possible. Secondly it is required to aggregate its requirements wherever possible and make use wherever possible of the provision of an efficient, cost-effective and flexible means to procure works, services or supplies that are required continuously or repeatedly over a set period of time. It is required to avoid splitting of procurement or disposal is to defeat the use of appropriate procurement or disposal methods. In otherwise the piecemeal procurement was not recommended because aggregation would enable the entity to invite bids for the provision of

*Decision of Hon. Mr. Justice Christopher Madrama Izama* \*^\*~ \*&\*\$\$# xtra+  
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services over a period of time. However, piecemeal procurement was not expressly forbidden. If the Defendant had a case filed against it and were supposed to take legal action within a prescribed period, it cannot advertise for the provision of services in order to take the prescribed action in a suit. It can in the meantime give instructions to handle the suit. In other words the problem of the Defendant was failure to aggregate its requirements for legal services and invite bids in order to apply the best practices under the Public Procurement and Disposal of Public Assets Act. Instead they kept on giving piecemeal instructions to the Plaintiff over a period of time. They also had a legal Department which could handle the services. In the premises, the provisions of the PPDA Act were directory and that the services provided were not based on a null and void instruction.

It follows that the attempt to avoid liability for services procured, albeit irregularly, by the Defendant amounts to an attempt to defraud or avoid liability for services that have been used and appreciated and the principle in the case of **Engineers Ltd vs. Attorney General** (Supra) is applicable. In that case Court applied the equitable doctrine in **Rochefoucauld vs. Boustead [1897] 1 Ch. 196** per Lindley L.J. in agreement with submissions of the Plaintiff in that case that the general principle is that a statute should not be used as an instrument of fraud.

Applying the principle to the facts and circumstances of this case, the Defendant should not be allowed to avoid liability for services had and appreciated based on its express instructions.

In the premises issues number two and three are resolved in favour of the Plaintiff.

The last issue is **whether the files on which instructions were carried out on behalf of the Defendant should be returned or handed over to the client/Defendant.**

I have carefully considered the applicable principles and submissions of Counsel on this issue. Upon resolution of issues one, two and three, it is my further finding that there was an advocate/client relationship between the Plaintiff and the Defendant.

The High Court has jurisdiction under section 56 of the Advocates Act Cap 267 to order an advocate to hand over documents. It provides as follows:

“56. Power of court to order advocate to deliver his or her bill, deeds, etc.

(1) The jurisdiction of the court to make orders for the delivery by an advocate of a bill of costs and for the delivery up of, or otherwise in relation to, any deeds, documents or papers in his or her possession, custody or power, is declared to extend to cases in which no business has been done by him or her in the court.

(2) In this and sections 57, 58 and 59, the expression “advocate” includes the executors, administrators and assignees of the advocate in question.”

The jurisdiction of the court to order delivery of the documents in his or her possession, custody or power, should be exercised in the interest of justice. My first observation is that in a client/advocate relationship, the advocate keeps records of his dealings and transactions and is entitled to file those records for his references. There are documents which are kept on behalf of the client such as original is of correspondence, documents of title etc used by the advocate in the clients matter or in the general interest of the client. Such documents are kept on behalf of the client. There is the other situation where, documents are kept as part of the record of the advocate in handling a clients matter. This includes minutes of meetings, proceedings in a court of law etc. What the advocate can be ordered to hand over therefore depends on the document in question and what it contains.

Rule 2 of the **Advocates (Professional Conduct) Regulations** Statutory Instrument 267 – 2 requires an advocate to act with due diligence, including, in particular, the answering of correspondence dealing with the affairs of his or her clients. Rule four provides that an advocate shall not prejudice the former client by accepting instructions from any person in respect of a contentious or non-contentious matter if the matter involves the former client and the advocate as a result of acting for the former client is aware of any facts which may be prejudicial to the client in that matter. In other words information in the hands of an advocate may prejudice a former client and the advocate is duty bound to protect his client or former client. Rule 6 of the above cited rules provides that an advocate is personally responsible for the client's work. Furthermore regulation 7 imposes a duty on an advocate not to disclose or divulge any information obtained or acquired as a result of acting on behalf of a client except when it becomes necessary in the conduct of the affairs of that client or is otherwise acquired by the law.

From the principles deduced from the **Advocates (Professional Conduct) Regulations**, an advocate keeps information which may be used for his clients benefit and is obliged for instance where there are notes that are relevant for further proceedings in a suit, to hand over that information or copies of information that may be needed in the interest of the client. The blanket referenced the files is not sufficient to cover all aspects of information kept by an advocate on his clients matter. The advocate cannot get rid of all his records. It is generally correct to say that the advocate is obliged to hand over a file that is required for the further conduct of the clients matter. Under the facts and circumstances of this case, the advocate or the Plaintiff is willing to hand over the findings and proposes that he has a lien on the files in order to enforce his right to payment. Having filed an action in a court of law, the advocate is no longer has any need to hold onto the files of his clients, which he is willing to hand over. Indeed the advocate has a duty to hand over all relevant information that his client requires, for its own interests including for information to better handle the matter with another advocate or internally.

It is therefore my holding that the Plaintiff is obliged to hand over all material information that the Defendant may require for the matters the Plaintiff has handled over the years and as requested by the former client which information may be in the best interest of the former client.

*Decision of Hon. Mr. Justice Christopher Madrama Izama \*^\*~ \*&\*\$\$# xtra+ maximum735securityx 2017 style*

The overall result of this judgement is that the Plaintiff's action based on questions submitted for resolution of this suit succeeds. The Plaintiff has already submitted his Bill of costs to the client for payment and the Defendant shall proceed to immediately make provisions for payment of the Plaintiff for the all unpaid services provided by the Plaintiff on the express instructions of the Defendant up to the time when instructions were formally withdrawn from the Plaintiff by the Defendant.

The quantum of professional fees of the Plaintiff is known to both parties and in any case is not a matter for determination in this suit. However the Plaintiff having succeeded in the suit, the question of costs is referred to the Taxing Master for taxation in accordance with the Advocates (Remuneration and Taxation of Costs Rules) S.I. 267 – 4.

The Plaintiff shall handover the files that his former client requires for the further conduct of its matters save for the need for files required for taxation of costs between Advocate and Client without much ado.

This suit succeeds with costs to the Plaintiff.

Judgment delivered in open court on 3<sup>rd</sup> March 2017

**Christopher Madrama Izama**

**Judge**

Judgment delivered in the presence of:

Counsel James Mukasa Sebugenyi together with Counsel Richard Lubaale and Counsel Ritah Nsubuga Sendege for the Plaintiffs

Counsel Dennis Byaruhanga for the Defendant

Charles Okuni: Court Clerk

Julian T. Nabaasa: Research Officer Legal

**Christopher Madrama Izama**

**Judge**

**3<sup>rd</sup> March 2017**

*Decision of Hon. Mr. Justice Christopher Madrama Izama \*^\*~ \*&\*\$\$\$# xtra+ maximum735securityx 2017 style*