

**THE REPUBLIC OF UGANDA,  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL DIVISION)  
CIVIL SUIT NO 424 OF 2012**

- 1. SANDE PANDE NDIMWIBO}**
- 2. LPN INTERNATIONAL & CIVIL ENGINEERING LTD}.....PLAINTIFFS**

**VERSUS**

**UGANDA REVENUE AUTHORITY}.....DEFENDANT**

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

**PRELIMINARY JUDGMENT ON AGREED POINTS OF LAW**

The Plaintiff's claim against the Defendant is for a declaratory order that the actions of the Defendant of unreasonably assessing and collecting certain sums of money from the Plaintiff's bank accounts is illegal and unlawful, recovery of monies unlawfully drawn by the Defendant from the Plaintiff's bank account, general damages for loss of income/profits, inconvenience and costs.

The facts disclosed in the plaint are that on 14<sup>th</sup> July, 2011 the Defendant issued the 1<sup>st</sup> Plaintiff with an individual income tax assessment invoice for the period between 2006 and 2010 and provisional tax estimates for 2011 for the sum of Uganda Shillings 265, 620,000/=. The 1<sup>st</sup> Plaintiff through its advocates objected to the said assessment demanding justification for the same as it was contended that the assessment was erroneous and based on false assumptions. On the 25<sup>th</sup> August, 2011 the Defendant in its reply to the objection insisted that the tax was due and collectable without providing any particulars. On 16<sup>th</sup> September, 2011 the 1<sup>st</sup> Plaintiff received another individual income assessment from the Defendant for a sum of Uganda Shillings 1,256,305,500/= in respect of disposal of the 1<sup>st</sup> Plaintiff's shares in SureTelecom (U) Ltd. On the same date the second assessment was issued the Defendant issued agency notices to the 1<sup>st</sup> Plaintiff's bankers, M/s Standard Chartered Bank (U) Ltd and M/s Orient Bank (U) Ltd requiring them to collect from the Plaintiff's accounts a sum of Uganda Shillings 256,620,000/= and Uganda Shillings 1,256,305,500/=. In compliance with the said agency notices, the 1<sup>st</sup> Plaintiff's account No. 0100113190500 was debited in favour of the Defendant with Uganda Shillings 999,963,747/=. On 19<sup>th</sup> September, 2011 the Defendant issued the 2<sup>nd</sup> Plaintiff's bankers M/s Standard Chartered Bank (U) Ltd with an agency notice under sections 40 and 48 of the Value Added Tax Act requiring them to pay the Defendant a sum of Uganda Shillings 5,553,634,271/= being tax allegedly due to the 1<sup>st</sup> Plaintiff under the said Act. On 21<sup>st</sup> September, 2011 the 2<sup>nd</sup>

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Plaintiff received a demand notice together with a copy of the agency notices bestowing on the 1<sup>st</sup> Plaintiff's alleged tax liability of Uganda Shillings 5,553,634,271/=. The 2<sup>nd</sup> Plaintiff's bankers consequently transferred USD 800,000 to the Defendant. The said liability of Uganda Shillings 5,553,634,271/= was issued allegedly in respect of the criminal liability of SureTelecom (U) Ltd arising from an alleged fraudulent claim for VAT returns and had previously been a subject of dispute before this court in HCCS No. 229 of 2011, SureTelecom (U) Ltd vs. Uganda Revenue Authority. By consent of the parties in the said suit the parties agreed to vacate the tax liability from SureTelecom (U) Ltd and transfer liability to the 1<sup>st</sup> Plaintiff. The 1<sup>st</sup> Plaintiff as a result of the drastic collections of sums from his account was compelled to file income returns to the tune of Uganda Shillings 1,194,064,922/=. At the instance of the Defendant the 1<sup>st</sup> Plaintiff was prosecuted by the Defendant and charged the 1<sup>st</sup> Plaintiff with among others criminal charges of procuring the fraudulent VAT refunds, making false Vat claims to the Defendant. The high court in criminal session case No. 032 of 2012 returned a conviction of the 1<sup>st</sup> Plaintiff and ordered him to refund a sum of Uganda Shillings 970,623,348/= however, the 1<sup>st</sup> Plaintiff appealed against the decision vide Criminal Appeal No. 799 of 2015 where the 1<sup>st</sup> Plaintiff was acquitted of all the charges, sentence and orders were quashed by the Court of Appeal.

The Defendant's facts were as follows;

The 1st Plaintiff was a shareholder/director in SureTelecom Uganda Limited. SureTelecom Uganda Limited had been issued with an assessment of a sum of Uganda Shillings 5,553,634,271 (Uganda Shillings Five Billion Five Hundred Three Million six hundred thirty-four thousand two hundred seventy-one) vide assessment dated 6th June, 2011, SureTelecom Uganda Limited objected to this assessment and filed a suit vide H.C.C.S No. 229 of 2011. By Consent in the aforesaid suit (H.C.C.S NO.229 of 2011), the parties agreed to vacate the tax liability imposed on the company. By the Defendant's letter dated 16th of September 2011, the liability imposed on SureTelecom Uganda Limited of Uganda shillings 5,553,634,271 (Uganda Shillings Five Billion Five Hundred Three Million six hundred thirty-four thousand two hundred seventy-one) was transferred to the 1st Plaintiff. On the 19th of September 2011, the Defendant issued a demand letter to the 2nd Plaintiff's directors demanding to recover the sum of Uganda shillings 5,553,634,271 (Uganda Shillings Five Billion Five Hundred Three Million six hundred thirty-four thousand two hundred seventy-one) on account of the 1st Plaintiff's liability and on the same date (19th September 2011) the Defendant, issued the 2<sup>nd</sup> Plaintiff's Bankers, M/s Standard Chartered Bank (U) Ltd with an agency notice under sections 40 and 48 of the Value Added Tax Act requiring them to pay the Defendant a sum of Uganda Shillings 5,553,634,271/= (Uganda Shillings Five Billion Five Hundred Three Million six hundred thirty four thousand two hundred seventy one being tax due to the 1<sup>st</sup> Plaintiff.

On the 21<sup>st</sup> of September 2011, the 2<sup>nd</sup> Plaintiff received a demand notice, together with a copy of the agency notices bestowing on it the 1<sup>st</sup> Plaintiff's tax liability of Uganda shillings  
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5,553,634,271 (Uganda Shillings Five Billion Five Hundred Fifty Three Million Six Hundred Thirty-Four Thousand Two Hundred Seventy-Four). The 2<sup>nd</sup> Plaintiff's Bankers consequently transferred US\$ 800,000 (United States Dollars Eight Hundred Thousand) to the Defendant. The Defendant further prosecuted the 1<sup>st</sup> Plaintiff vide High Court Criminal case NO.32 of 2012 with various offences of obtaining money by false pretences, making false Value Added tax claims, procuring another to do an act, forgery etc. The High Court returned a conviction and ordered the 1<sup>st</sup> Plaintiff to refund a sum of Uganda shillings 970,624,348/= (Nine hundred seventy million shillings six hundred twenty four thousand three hundred forty eight shillings). The 1<sup>st</sup> Plaintiff appealed against the judgment, sentence and order vide Criminal Appeal No.799 of 2015. The Court of Appeal quashed the conviction and set aside the sentence and orders of the High Court. The Plaintiffs had sometime in 2011 filed this suit (civil suit No. 424 of 2012), seeking orders among others for recovery of Uganda Shillings 999, 963,747/= collected from the 1st Plaintiff and US\$ 800000 collected from the 2<sup>nd</sup> Plaintiff.

The Plaintiff was represented by Counsel Robert Bautu while the Defendant was represented by Counsel Baluku Ronald.

Both parties addressed the court in written submissions. Five issues were agreed upon by the parties in the joint scheduling memorandum filed in court on 1<sup>st</sup> March, 2016 as follows:

1. Whether the Defendant's decision to collect from the 1<sup>st</sup> Plaintiff's bank account the sum of Uganda Shillings 999,963,747/= was legal and justified?
2. Whether the Defendant's decision to impose and transfer a tax liability of Uganda Shillings 5,553,634,271/= from SureTelecom to the 1<sup>st</sup> Plaintiff was legal?
3. Whether the Defendant's acts of issuing agency notices to and subsequently collecting USD 800,000 from the 2<sup>nd</sup> Plaintiff's bankers in respect of the 1<sup>st</sup> Plaintiff's tax liability is lawful or legal?
4. What is the extent of the 1<sup>st</sup> Plaintiff's income tax liability for the period 2006 to 2011?
5. What remedies are available to the parties?

Counsels opted to resolve issues 2 and 3 which are on points of law before adducing evidence and they are as follows;

**Whether the Defendant's decision to impose and transfer a tax liability of Uganda Shillings 5,553,634,271/= from SureTelecom Uganda Limited to the 1<sup>st</sup> Plaintiff was legal?**

**Whether the Defendant's acts of issuing demand and agency notices to and subsequently collecting US\$ 800,000 from the 2<sup>nd</sup> Plaintiff's bankers in respect of the 1<sup>st</sup> Plaintiff's tax liability is lawful or legal?**

**ISSUE 1: Whether the Defendant's decision to impose and transfer a tax liability of Uganda Shillings 5,553,634,271/= from SureTelecom Uganda Limited to the 1st Plaintiff was legal?**

**The Plaintiff's Counsel** submitted that the 1<sup>st</sup> Plaintiff contends and submits that the transfer of tax liability of Uganda shillings 5,553,634,271 from SureTelecom to the Plaintiff was illegal and the Plaintiff was not party to the proceedings in H.C.C.S NO.229 of 2011.

The Plaintiff's Counsel submitted from the premises of the right to be heard under **Article 28 of the Constitution of Uganda 1995** which provides for the right to be heard. Everyone is entitled to a right to be heard and to a fair hearing. Further still, Article 44 provides that the right to be heard is non derogable. In the first place the liability of Uganda Shillings 5,553,634,271/= was assessed by the Defendant as payable by SureTelecom. It is not disputed that the Defendant, a Statutory Corporation, upon being informed by SureTelecom Limited's Advocates Messrs Mugerwa & Muwema Advocates, proceeded to vacate the tax liability and fines imposed on the later and visited them on the 1<sup>st</sup> Plaintiff. Suffice to note, the Plaintiff was never a party to **Civil Suit No.22 of 2011:- SureTelecom Uganda Limited vs. Uganda Revenue Authority**. The Plaintiff was never called or given an opportunity to explain himself. Instead acting in a high handed manner, the Defendant merely went ahead to issue demand and Agency Notices to the 1<sup>st</sup> Plaintiff's Bankers collecting substantial sums as tax due to it. Indeed, the wording of the demand notice lends credit to this submission. The Defendant demanded that the 1<sup>st</sup> Plaintiff pays the liability assessed against SureTelecom because the Company informed them that he was liable.

Counsel submitted that had the 1<sup>st</sup> Plaintiff been given an opportunity be heard, the liability of SureTelecom would never have been imposed on him. Needless to say the Court Appeal in **Sande Pande Ndimwibo vs. Uganda (URA)** was alive to this fact declaring that the Plaintiff was not guilty of any wrong doing. Such a decision is no decision at all according to **Gold Leaves Hotels and Resorts Limited vs. Uganda Revenue Authority Civil Appeal 64 of 2008**.

Accordingly, Counsel invited the Court to a finding that the decision to transfer the liability of SureTelecom Limited on the 1<sup>st</sup> Plaintiff without affording him' an opportunity to be heard contravened the provisions of Article 28 of .the Constitution and to that extent such decision is null and void.

In regard to Power to determine, /transfer tax Liability, the Plaintiff's Counsel submitted that it is important to note that the Tax Liability of Uganda Shillings 5,553,634,271/= was initially assessed against SureTelecom Limited. Reading from the demand letter to the 1<sup>st</sup> Plaintiff dated 16<sup>th</sup> September 2011, the said liability arose from falsified refunds claims made by SureTelecom to the Defendant totalling to Uganda Shillings 1,636,422,530. Indeed, this money was paid to SureTelecom Accounts. The Defendant after hearing to SureTelecom Uganda

decided that the said Company was not guilty of Tax fraud, vacated the same and instead imposed the liability on the 1<sup>st</sup> Plaintiff. He submitted that the above decision was a mutiny on the power of the Judiciary. Per Article 128 of the Constitution, Judicial power is vested in the people and it is only exercised by the Courts of law and Established Tribunals on their behalf. **Bushobozi Eric vs. Uganda Misc. Cause 11 of 2015.**

The Plaintiff's Counsel further submitted that for a decision as the one that the Defendant made to impose fines arising from the liability of SureTelecom on the 1<sup>st</sup> Plaintiff can only be made after he has been fully prosecuted and found liable by the Court as per **Joshua Kasibo vs. Uganda Revenue Authority M.A 44 of 2007.**

Needless to say, the Commissioner is empowered to assess Value Added Tax on an individual under specific circumstances, including where a person fails to file a return or where he is not satisfied with such return that was filed. **Section 32 of the Value Added Tax Act.** The Act does not vest any power in the Defendant to transfer tax liability of certain individuals to others. Such action can only be done by a court of law in proceedings to determine that it is the third party who is liable to pay the liability of another. Accordingly, the actions of the Defendant were illegal and no liability would stem from such action. Counsel invited the Court to find so per **Makula International vs. Cardinal Nsubuga 1981 H.C.B.**

Further still, the claim of the aforesaid sums arises from the fraudulent V.A.T refunds and allegedly sums claimed out of time as per explanation in letter (i). In essence the claim was fraud and therefore it could not be treated as a claim under the V.A.T Act for it to attract penalties and interest per **Golden Leaves vs. U.R.A.**

With reference to the Procedure adopted the Plaintiff's Counsel submitted that even if the V.A.T Claim was legitimate, the procedure adopted by the Defendant in collecting the impugned Uganda Shillings 5,553,634,271 was illegal as it was in total breach of the procedures laid down in the Value Added Tax Act. Whereas the 1<sup>st</sup> Plaintiff was assessed to pay fine, he was not allowed the mandatory period of 45 days within which to object. It is not by mistake that the act expressly set this time frame. It is meant to enable the Tax Payer to assess his incomes and have an opportunity to lodge his objection. In this Case, the 1<sup>st</sup> Plaintiff was served with a demand notice for the said sum? On the 19<sup>th</sup> day of November 2011. On the very day a demand issued to the 2<sup>nd</sup> Plaintiff demanding it to satisfy the said liability on behalf of the Plaintiff. Further still agency notices were issued on the 16<sup>th</sup> day of September 2011 to the 1<sup>st</sup> Plaintiff's bankers who deposited all his money. The 2<sup>nd</sup> Plaintiff's money was equally taken off his account in answer to the said liability. Such procedure was not only illegal but highhanded and invited the Court to find so.

**In reply, the Defendant's Counsel submitted that** the transfer of liability to the 1st Plaintiff was lawful. He cited the case of **Salmon v Salmon & Co. Ltd [1897] AC 22**, it was stated that a company is separate and distinct from its shareholders and directors, and that liability cannot be visited on them. However, in **Salim Jamal & 2 others vs. Uganda Oxygen Ltd & 2 others (1997) II KALR 38** the Supreme Court held that corporate personality cannot be used as a cloak or mask for fraud. Where this is shown to be the case the veil of incorporation may be lifted to ensure that justice is done and the court does not look helplessly in the face of such fraud. From this authority, Court upon an application can lift the veil of incorporation and have the directors and shareholders liable for any fraud committed by them.

Counsel submitted that there are instances, when a party need not apply to Court to have the veil of incorporation lifted. This is under section 175 of the Companies Act which is to the effect that the Inspector as appointed by the Registrar may pierce the corporate veil of another company which is part of the same group of companies. The corporate veil may be lifted for tax purposes or to prevent tax evasion

Counsel also cited **Section 62 (1) of the VAT Act** which provides that where an offence is committed by a company, every person who at the time of the commission of the offence:

“(a) was a nominated officer, director, general manager, secretary, or other similar officer of the company; or

(b) was acting or purporting to act in that capacity is deemed to have committed the offence.”

However, **subsection 62 (2) of the VAT Act** provides the following exceptions:

(a) the offence was committed without that person's consent or knowledge; and;

(b) the person exercised all diligence to prevent the commission of the offence as ought to have been exercised having regard to the nature of the person's functions and all circumstances.

Counsel submitted that the above section has been interpreted in the authority of **Sheoratan Agarwal vs. State of Madhya Pradesh A.IR.1984 S.C 1824 at page 1825,1826** in respect of vicarious liability of the officers of the Company and is as follows:

"The section appears to our mind to be plain enough. if the contravention of the order made under section 3 is by a company ,the persons who may be held guilty and punished are (1) the company, itself (2) every person who, at the time of contravention was committed, was in charge of ,and was responsible to, the company for the conduct of the business of the company whom for short we shall described as the person in charge of the Company, and(3) any director, manager, secretary or other officer of the company with

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whose consent or connivance or because of neglect attributable to whom the offence has been committed, whom for short we shall describe as an officer of the Company. Anyone of them may be prosecuted and punished. The company alone may be prosecuted. Naturally, before the person in charge of the company is held guilty in that capacity, it must be established that there has been a contravention of the order of the Company".

He cited the case of **State of Madras vs. C.V Parekh A.I.R.1971 S.C.447**; where the Court held that there should be a finding that the contravention was by the company before the accused could be convicted and not that the company itself should have been prosecuted along with the accused person.

Counsel submitted that in the instant case, the Defendant established that SureTelecom in which the 1<sup>st</sup> Plaintiff was a director fraudulently obtained VAT refunds upon which an assessment of Uganda Shillings 5, 553,634,271 was raised against the Company. SureTelecom through its Advocates Messrs Muwema & Mugerwa Advocates informed the Defendant that it was the 1<sup>st</sup> Plaintiff who masterminded the fraud. This is evidenced by annexure F of the Defendant's written statement of defence. Upon receipt of the said letter, the Defendant carried out investigations and established that it's the 1<sup>st</sup> Plaintiff who masterminded the fraud and thus transferred the liability to the 1st Plaintiff. In the instant case, the Company was liable for the fraudulent refunds but the liability was transferred to the Director since he is the one who masterminded the fraud.

**Issue 2; Whether the Defendant's acts of issuing demand and agency notices to and subsequently collecting USD 800,000 from the 2<sup>nd</sup> Plaintiff's bankers in respect of the 1<sup>st</sup> Plaintiff's tax liability is lawful or legal?**

The Plaintiff's Counsel submitted that the transfer of liability to the 2<sup>nd</sup> Plaintiff was premised on the facts as discerned in the Defendant's written statement of defence in paragraphs (r, s, t) and annexure (h) dated 19<sup>th</sup> December, 2011 in respect of an alleged fraudulent V.A.T claim. The Defendant claiming that the 1st Plaintiff had a tax liability with the Defendant as set out in their letter. Counsel also contended that the transfer of the tax liability to the 2<sup>nd</sup> Plaintiff was inconsequential and void ab initio. Members of a Company cannot be liable to its debts neither can the Directors be liable thereof because all the parties are different from each other per **Sentamu vs. Uganda Commercial Bank [1983] HCB 59**. The above principle equally applies in circumstances where liability of a company is sought to be vested on its members.

The 2<sup>nd</sup> Plaintiff's money was illegally attached by the Defendant in satisfaction of the 1<sup>st</sup> Plaintiff's alleged debt. With due respect the same was illegal as both the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff's are different persons at law with different rights and obligations. If the Defendant so wished to, it should have applied to Court to lift the 2<sup>nd</sup> Plaintiff's veil and in any event the same would not be sustainable as there is no fraud or other act committed by the Plaintiff's warranting lifting of the

veil. Counsel invited the Court to find that the attachment of the 2<sup>nd</sup> Plaintiff's money in satisfaction of the alleged liability of the 1<sup>st</sup> respondent was illegal. He prayed for an order that the Sum of US\$ 800,000 (United states Dollars Eight Hundred Thousand) belonging to the 2<sup>nd</sup> Plaintiff was illegally taken in satisfaction of the 1<sup>st</sup> Plaintiff's debt and should hence forth be repaid to the 2<sup>nd</sup> Plaintiff and for Interest at the Commercial rate from the date of the impugned actions till payment in full. Section 27 of the Civil Procedure Act empowers this Court to award interest. Per the case of **Harbutt's Plasticine Ltd vs. Wayne Tank & Pump Company Limited [1970] 1 QB 447:**

An award of interest is discretionary. It seems to me that the basis of an award for interest is that the Defendant has kept the Plaintiff out of use of his money and the Defendant has had to use it himself. So he ought to compensate the Plaintiff Accordingly"

Counsel submitted that the Defendant took the Plaintiff's money and has since been taking benefit of it. Accordingly, the 2<sup>nd</sup> Plaintiff is entitled to interest and prayed for the Costs of the suit.

**In reply, the Defendant's Counsel** cited **Section 40 (1) of the Value Added Tax Act** which provides that where a person liable fails to pay tax on the due date, the Commissioner General may by notice in writing require any person;-

(b) holding or who may subsequently hold money ,or on account of the person liable. Counsel contended that in the instant case, the Defendant having found the 1st Plaintiff liable for masterminding fraudulent refunds, and further established that the 2<sup>nd</sup> Plaintiff was holding the 1st Plaintiff's money, issued agency notices to pay the tax liability. In the premises, he submitted that the act of the Defendant to issue an agency notice on the 2nd Plaintiff was lawful and prayed that the suit should be dismissed with costs.

**In rejoinder the Plaintiff's Counsel** reiterated their earlier submissions and submitted that the Defendant concedes to the transfer of liability from SureTelecom Uganda Limited to the 1st Plaintiff, however claims that the transfer of liability was lawful.

The Plaintiff's Counsel submitted that in the first place, upon vacation of the liability in H.CC.S No. 229 of 2011, then no liability existed as against the company and its agents/officers and therefore there was no liability to transfer.

He submitted that the liability extinguished upon the conclusion of the Consent judgment in H.C.C.S. No. 229 of 2011.

Counsel further submitted that the terms/ wordings of the consent judgment are evidently clear and to their effect as hereinafter paraphrased:



“(a) That the Defendant's assessment against the Plaintiff dated 6th June, 2011 in the sum of Ug.shs 5,553,634,271/= [Uganda shillings Five billion Five hundred fifty three million six hundred thirty four thousand two hundred seventy one only be vacated.”

He submitted that the above stated term of the consent judgment is very instructive in the sense that, in the first place, the assessment was against the company and not the Plaintiff and therefore if there was any liability, the same related to the company and the same was now concluded and determined in that consent. Secondly, the 1<sup>st</sup> Plaintiff was never previously assessed with any VAT claims or joined as a party to that suit and therefore liability would not arise.

Counsel submitted that liability against the 1st Plaintiff arises by creation of **Section 62 (1) of the V.A.T Act** and by virtue of **Section 175 of the Companies Act**

He contended that Defendants misconstrue the above sections; **Section 62 (1) of V.A.T Act** only creates liability for officers for offences committed by the Company whilst in the service of the company and that liability is only to the extent of accusation and prosecution and subject to determination by Court and not prima-facie determination on accord by the Defendants.

The Plaintiff's Counsel submitted that if they were offences under the Act committed by the officers of SureTelecom as such stated in their submission "it was established that SureTelecom in which the 1<sup>st</sup> Defendant was a director fraudulently obtained VAT refunds upon which an assessment of Uganda Shillings 5,553,634,271/- was raised", then all officers of that company as envisaged by the **Section 62 (1)** ought to have been charged and prosecuted before court and liability determined by court in that regard. This is not what the Defendant did. They instead created liability against the 1<sup>st</sup> Plaintiff only without due process of law, attached money of the 2nd Plaintiff allegedly on the account that the 1st Plaintiff was a shareholder and director, without due process of law. This we contend is glaringly illegal and unlawful. Further, the argument that under **Section 175 of the Companies Act**, the corporate veil may be lifted by the Defendants for tax purposes or to prevent tax evasion is melancholy to say the least.

The aforesaid Section of the Companies Act does not authorize them to lift the veil and it's very instructive on procedure. In order for the Defendants to seek refuge in lifting the corporate veil as they fashion to be, they ought to have obtained an order of court. In any case Section 175 is only in respect of the Power of the Registrar to investigate the affairs of the company and any other body and not to lift the corporate veil. The citation and the case authorities relied on by the Defendant are therefore misplaced and comic.

The Plaintiff's Counsel submitted that in an haphazard manner, the Defendants in their submissions claim that it was established that SureTelecom (U) Ltd in which the 1st Defendant was a director fraudulently obtained VAT refunds upon which an assessment of Uganda Shillings 5,553,634,271/= were raised and that by letter of Messrs Muwema & Mugerwa Advocates, the Defendants formed a basis to transfer liability to the 1st Plaintiff. We have already said if the liability arose through the company where the 1st Plaintiff was a director, then upon vacating the liability the 1st Plaintiff, as director would not be a subject of any liability.

Secondly, the 1<sup>st</sup> Plaintiff was charged after the Defendants had attached the money of the 2<sup>nd</sup> Plaintiff with Criminal Charges under the Penal code inter alia obtaining money by false pretences, being director and was privy to falsification of company documents etc. and with a claim of Uganda Shillings 970,624,348/= as money obtained fraudulently and not with the sum of Uganda Shillings 5,553,634,271/= as sums fraudulently claimed. Counsel submitted that it's inconceivable that whereas the Defendants claim against SureTelecom (U) Ltd was Uganda Shillings 5,553,634,271 the 1st Plaintiff was thus charged with a lesser amount of obtaining Uganda Shillings 970,624,348/= and yet the Defendants attached much more money from the 2nd Plaintiff's accounts than what was the basis of prosecution in Criminal case No.032 of 2012. He contended that the actions by the Defendants to attach the 2nd Plaintiff monies more than what the claim against the 1st Plaintiff was, amounts to an admission that the claim against the 1st Plaintiff was unknown and unlawful.

Conversely, the Court of Appeal has since the 25th of April 2016 returned a no conviction of the 1st Plaintiff as per the Judgment in Criminal Appeal No. 799 of 2015. It therefore follows that the Defendants should have refunded all the monies attached and due to the 2nd Plaintiff on alleged account-of the 1st Plaintiff by virtue of **Section 44 (l) (e) of the Value Added Tax Act**. Counsel reiterated their earlier submissions as regards the prayers and or reliefs sought and prayed that if the Court does not award interest at Commercial rate as earlier prayed then Court should be obliged to follow the Law as afore- stated in **Section 44 (1) (c)** and award the Plaintiff the sums of United States Dollars Eight Hundred Thousand (US\$ 800,000) with interest.

## **Judgment**

I have duly considered the Plaintiff's suit as disclosed in the plaint as well as the defence as disclosed in the written statement of defence. The Plaintiffs action against the Defendant is jointly and severally for recovery of Uganda shillings 999,963,747/= collected from the first Plaintiff by the Defendant on 16<sup>th</sup> September, 2011 and US\$800,000 collected from the second Defendant on 19<sup>th</sup> of September 2011 as special damages, a declaration that the Defendant's assessment and collection of the monies from

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the Plaintiffs bank accounts was illegal and unlawful, general and punitive damages and costs of the suit. The Plaintiff further seeks an order declaring the actions of the Defendant as an unreasonable assessment and collection of money from the first Defendant's bank accounts and illegal and unlawful. Secondly, an order declaring the Defendant's act of issuing an agency notice and drawing/collecting money from the second Plaintiff's bank account as illegal and unlawful. Thirdly, for refund of Uganda shillings 999,963,747/= money illegally collected from the first Plaintiff's accounts. Fourthly, for refund of a sum of US\$800,000 on the ground that it was illegally and unlawfully drawn from the second Plaintiff's bank account. Fifthly, it is for general damages and punitive damages. Sixthly, it is for interest on the liquidated demands. Seventhly, it is for interest on the general and punitive damages from the date of judgment till payment in full. Finally it is also for costs of the suit to be provided for.

The Defendant denied the claims and sought for dismissal of the Plaintiff's suit. In a joint scheduling memorandum filed on court record on 9<sup>th</sup> March, 2017 and executed by Counsel of both parties certain facts are agreed to namely:

On 14<sup>th</sup> July, 2011 the Defendant raised/issued to the Plaintiff estimated individual income tax assessment for the period 2006 – 2011 for the sum of Uganda shillings 265,620,000/=. The first Plaintiff's lawyers in a letter dated 3<sup>rd</sup> of August 2011 objected to the assessment. The Defendant in a letter dated 25<sup>th</sup> August, 2011 insisted that the tax was due and collectable. On 16<sup>th</sup> September, 2011, the first Plaintiff received another individual income tax assessment from the Defendant for a sum of Uganda shillings 1,256,305,500/= in respect of disposal of the first Plaintiff's shares in SureTelecom (U) Ltd. On the same date the second assessment was issued, the Defendant issued agency notices to the first Plaintiff's bankers Messieurs Standard Chartered bank (U) Ltd and Messieurs Orient bank (U) Ltd requiring them to collect from the Plaintiffs account a sum of Uganda shillings 256,620,000/= and Uganda shillings 1,256,305,500/=. Consequently and in compliance with the said agency notices, the first Plaintiffs account number 0100113190500 with Standard Chartered bank was debited in favour of the Defendant with Uganda shillings 999,963,747/=. The first Plaintiff was shareholder/director in SureTelecom Uganda limited and had been issued with an assessment of Uganda shillings 5,553,634,271/= according to an assessment 6<sup>th</sup> June, 2011 which SureTelecom Uganda limited objected to and filed High Court Civil Suit Number 229 of 2011. By consent of the parties in H.C.C.S. No. 229 of 2011 the parties agreed to vacate the tax liability imposed on the company. By the Defendant's letter dated 16<sup>th</sup> September, 2011, the liability imposed on SureTelecom Uganda Limited of Uganda shillings 5,553,634,271/= was transferred to the first Plaintiff. The first Plaintiff is a director and shareholder of the second Plaintiff. On 19<sup>th</sup> September, 2011, the Defendant issued a demand letter to the second Plaintiff's directors demanding to recover a sum of Uganda shillings

5,553,634,271/= on account of the first Plaintiff's liability and on the same date the Defendant issued the second Plaintiff's bankers Messieurs Standard Chartered bank (U) Ltd with an agency notice under sections 40 and 48 of the VAT Act requiring them to pay the Defendant a sum of Uganda shillings 5,553,634,271/= being tax due to the first Plaintiff under the VAT Act (Value Added Tax Act). On 21<sup>st</sup> September, 2011, the first Plaintiff received a demand notice together with a copy of the agency notices bestowing on the first Plaintiff's alleging tax liability of Uganda shillings 5, 573,634,271/= on the second Plaintiff. The second Plaintiff's bankers consequently transferred US\$ 800,000 to the Defendant. The first Defendant further prosecuted the first Plaintiff in High Court Criminal Session Case No 32 of 2012 with various offences of obtaining money by false pretences, making false value added tax claims, procuring another to do an act or not to do an act which could constitute an offence etc. The High Court returned a conviction and ordered the first Plaintiff to refund the sum of Uganda shillings 970,624,348/=. The first Plaintiff appealed against the judgment and sentence in the Court of Appeal Criminal Appeal No 799 of 2015 and the Court of Appeal quashed the conviction and set aside the sentence and orders of the High Court.

The first Plaintiff commenced an action challenging the income tax assessment upon which he was required to file his income tax returns. On 30<sup>th</sup> May, 2012 the first Plaintiff filed his self assessment income tax returns amounting to Uganda shillings 1,194,064,922/= and by the Defendants letters dated 30<sup>th</sup> April, 2012, the Plaintiff was advised to pay the self assessed sums and further on 5<sup>th</sup> June, 2012 the Defendants advised the first Plaintiff to pay to avoid recovery measures as the Defendant owed no money to the first Plaintiff. Sometime on 15<sup>th</sup> June, 2015, the first Plaintiff through the Defendants E Portal filing system amended his income tax returns upon which he declared tax liability of Uganda shillings 246,684,632/=. By a letter dated 2<sup>nd</sup> December, 2016 the first Plaintiff through his advocates forwarded his income tax returns to the Defendant. The letter dated 2<sup>nd</sup> December, 2016 was a follow up of various meetings between the Plaintiffs, his lawyers and the Defendant's officials dated 16<sup>th</sup> of August 2016 and 18<sup>th</sup> November 2016. The Plaintiff further through his lawyers communicated via e-mail as a follow up on the status of the income tax returns in lieu of the proposed settlement of the suit but his lawyers/agents were advised to write directly to the Assistant Commissioner compliance in the Department of Domestic Taxes of the Defendant. The auditors by a letter dated 12<sup>th</sup> January, 2017 forwarded amended income tax returns. The Defendant rejected the first Plaintiff's amended income tax returns. On 31<sup>st</sup> January, 2017 the first Plaintiff received an acknowledgement of receipt of the objection.

Most of the documents relied on were admitted by consent of the parties. The agreed issues in the scheduling memorandum are as follows:

1. Whether the income tax assessment of the first Plaintiff was lawful or justified and if so the consequent collection of Uganda shillings 999,963,271/= from the first Plaintiffs account was legal and justified. (a) What is the amount payable?
2. Whether the Defendant's decision to impose and transfer a tax liability of Uganda shillings 5,553,634,271/= from SureTelecom Uganda Limited to the first Plaintiff was legal?
3. Whether the Defendant acts of issuing demand and agency notices to and subsequently collection of US\$ 800,000 from the second Plaintiff's bankers in respect of the first Plaintiff's tax liability is lawful or legal?
4. The remedies available to the parties.

I have duly considered the written submissions of Counsel and scrutinised in detail the documentary exhibits which also gives a chronology of events in this matter.

In the written submissions of the Plaintiff's Counsel, the Plaintiff addressed the issue of whether the Defendant's decision to impose and transfer tax liability of Uganda shillings 5,573,634,271/= from SureTelecom Uganda limited to the first Plaintiff was legal? Secondly, whether the Defendant acts of issuing demand and agency notices and subsequently collecting US\$800,000 from the second Plaintiff's bankers in respect of the first Plaintiff's tax liabilities is lawful or legal? Lastly, they addressed the court on the remedies available to the parties.

In the above written submissions, the Plaintiff's Counsel relied on article 28 of the Constitution of the Republic of Uganda and authorities to submit that the first Plaintiff was never given a hearing when a tax liability of Uganda shillings 5,553,634,271/= was transferred to the first Plaintiff. Had the first Plaintiff been heard, such a liability would not have been transferred to him.

In the second limb of his argument, he considered the power of the Commissioner of the Defendant to transfer tax liability and submitted that it could only be done by a court of law and not the Defendant and therefore the action was an illegality. Alternatively the procedure adopted by the Defendant in collecting the amount of 5,553,634,271/= was illegal and in breach of the procedures laid out in the Value Added Tax Act.

In reply the Defendant's Counsel submitted that by the consent judgment in H.C.C.S No. 229 of 2011 the parties to the consent judgment agreed to vacate tax liability imposed on SureTelecom Uganda limited. Subsequently by letter of 16<sup>th</sup> September, 2011, the liability imposed on SureTelecom Uganda limited of Uganda shillings 5,553,634,271/= was transferred to the first Plaintiff. The Defendant issued demand notices for the said amount. The second Plaintiff's bankers consequently transferred US\$800,000 to the Defendant and the Plaintiff was prosecuted and convicted and ordered to refund the sum

of Uganda shillings 970,624,348/=. Thereafter the Court of Appeal in the Criminal Appeal Number 799 of 2015 quashed the conviction and sentence of the High Court.

On the question of whether the Defendant's decision to impose and transfer tax liability of Uganda shillings 5,553,634,271/= from SureTelecom Uganda Ltd to the first Plaintiff was legal? He contended that the transfer of liability was lawful. He relied on the doctrine of separate personality between a company and its shareholders in **Salmon vs. Salmon and Company Limited [1897] AC 22** for the holding that the company is separate and distinct person from its shareholders and directors and that the liability of the company cannot be visited on the members. However, the veil of incorporation cannot be used to conceal fraud. He further relied on instances under the Companies Act when a party need not apply to the court to lift the veil of incorporation. He relied on section 175 of the Companies Act. Counsel also relied on section 62 (1) of the VAT Act which allows a person in charge of the company to be held accountable for the crimes of the company. He moved from the premises that the Defendant established that SureTelecom in which the first Plaintiff was a director fraudulently obtained VAT refunds upon which an assessment of Uganda shillings 5,553,634,271/= was raised against the company. The company's lawyers informed the Defendant that it was the first Plaintiff who masterminded the fraud and the Defendant carried out investigations and established that this was true. The liability was transferred to the first Plaintiff.

In rejoinder the Plaintiff's Counsel submitted that where there is no liability against the company, none can be transferred. The liability of the company namely SureTelecom Uganda Limited was vacated by consent judgment in H.C.C.S. No. 229 of 2011 and that liability was extinguished. The wording of the consent judgment itself confirms the extinguishment of the liability of the company. Secondly, section 62 (1) of the VAT Act was misconstrued because it only creates liability of officers for the offences committed by the company. He contended that all officers of the company ought to be charged and prosecuted before the court. Instead they created a liability against the first Plaintiff only without due process of law and attached the money of the second Plaintiff on account of the first Plaintiff who is a shareholder and director without due process of law. Furthermore section 175 of the Companies Act does not authorise the lifting of the veil of incorporation by the Defendant. They ought to have first obtained leave of court to do so. In any case the section deals with the powers of the Registrar to investigate the affairs of the company and any other body and not to lift the corporate veil. The premise on which the Defendant's Counsel submitted was that the company had fraudulently obtained VAT refunds leading to an assessment of the amount in question. The Defendant relied on a letter from the company's advocates to transfer liability to the first Plaintiff. However upon vacating the liability of the first Plaintiff, the director cannot be subjected to any liability. Secondly, the first Plaintiff was charged after the Defendants had attached

money of the second Plaintiff and he was however charged with a much lesser amount of Uganda shillings 970,624,348/=. On the other hand the Defendant attached much more money from the second Plaintiff's account than what was contained in the charge and prosecution proceedings.

Furthermore since 25<sup>th</sup> April, 2016 upon the quashing of the conviction and setting aside the sentence against the first Plaintiff, the monies attached ought to have been refunded by virtue of section 44 (1) (c) of the Value Added Tax Act.

The facts and submissions are complex and there is a need to give a chronological account of the facts before resolution of the two agreed issues. At the close of the scheduling conference, Counsel for the parties agreed that the court should resolve two points of law before calling witnesses. However, the points of law also depend on some facts which were agreed upon. Secondly, all the documents referred to were agreed upon and are not in controversy. Before setting out the issues I have deemed it absolutely necessary to give a chronological account of the facts from the documents adduced in evidence and from the agreed facts.

This suit has had a long and chequered history commencing about July 2011. The subject matter of the suit has also been the subject matter of H.C.C.S. No. 299 of 2011 between SureTelecom (U) Limited as Plaintiff and Uganda Revenue Authority as Defendant which suit was resolved by consent judgment. I have considered several income tax assessments issued to the first Plaintiff on 14<sup>th</sup> July, 2011 and the letter of the Assistant Commissioner Compliance dated 14<sup>th</sup> July, 2011 addressed to the first Plaintiff giving estimated assessments for the year 2006 – 2011 for the sum of Uganda shillings 265,620,000/= and advising the first Plaintiff to immediately clear the outstanding tax liability. Apparently the first Plaintiff objected to the assessment by letter dated 22<sup>nd</sup> August, 2011 and referred to in the letter of the Defendant dated 25<sup>th</sup> August, 2011. The first Plaintiff was advised in the letter to file individual income tax returns under provisional returns for the period in question and was advised that in the meantime the tax amounting to Uganda shillings 265,620,000/= was due and payable. By letter dated September 16<sup>th</sup>, 2011 the Defendant wrote another letter pursuant to the provisions of section 95 (4) and 96 (3) of the Income Tax Act written by the Acting Manager Medium Taxpayers Office and advised the first Plaintiff on the issue of disposal of his shares in SureTelecom Uganda Limited at the value of US\$1,500,000 and advised that the chargeable income in Uganda shillings was 4,187,685,000/=. In respect thereof, the first Plaintiff was assessed income tax at 30% amounting to Uganda shillings 1,256,305,500/=. Also in evidence is the transfer of the share/stock in SureTelecom (U) Ltd dated 16<sup>th</sup> September, 2011 wherein the first Plaintiff transferred his shares to Hill Trading Ltd.

By letter dated 16<sup>th</sup> September, 2011 the Commissioner General wrote to Standard Chartered Bank Uganda Limited giving a third-party agency notice under section 106 of the Income Tax Act, advising the bank to pay the authority Uganda shillings 256,620,000/= being tax payable by the first Plaintiff. In the second agency notice dated 16<sup>th</sup> of September, 2011, the Commissioner General appointed the Managing Director of Standard Chartered bank to be a collecting agent in respect of Uganda shillings 5,553,634,271/= against the first Plaintiff. The third agency notice is dated 19<sup>th</sup> September, 2011 and also addressed to the Managing Director of Standard Chartered bank Uganda limited in respect of payment of Uganda shillings 5,553,634,271/= on behalf of LPN International Construction Ltd (the second Plaintiff) where the first Plaintiff is a shareholder and director.

On the same day of 16<sup>th</sup> September, 2011 the Commissioner General wrote to the first Plaintiff demanding for VAT refunds obtained fraudulently amounting to Uganda shillings 5,553,634,271/=. The demand note discloses that it was in respect of claims for VAT refund by SureTelecom Uganda Limited. The particulars of the demand are that it is alleged that the Defendant discovered that SureTelecom Uganda Limited had requested for refunds totalling to Uganda shillings 1,636,422,530/= which the Defendant paid to the accounts as advised. It was later discovered that the refunds were claimed fraudulently and a demand for it to be refunded was initiated against the company (SureTelecom Uganda Limited) with full penalties and interest and the total liability demanded with penal tax and interest was Uganda shillings 5,553,634,271/=. Paragraphs 4, 5 and 6 of the letter, is very revealing about what actually happened in the transfer of liability to the first Plaintiff, where the Commissioner General wrote as follows:

- "4. SureTelecom Uganda Ltd has now confirmed to us in writing that you as the director and shareholder personally committed the fraud and you are liable to pay the money received illegally and all the penal taxes.
5. We are therefore demanding this full liability from you with immediate effect.
6. This therefore to advise you to pay shillings 5,553,634,271/= (and in words) immediately as money received from URA illegally with all accruing penalties and interest."

In a letter dated 19<sup>th</sup> September 2011 and addressed to the Managing Director of the second Plaintiff LPN International Construction Ltd, the Commissioner Domestic Taxes Department wrote a demand for VAT refunds obtained fraudulently of Uganda shillings 5,553,634,271/=. The letter is to the effect that the first Plaintiff had that tax liability according to the records of the Defendant. Secondly they wrote that the Defendant discovered that LPN International Construction Ltd was holding funds for the first Plaintiff who has the above written total liability as demanded together with the penal tax



and interest. The Defendant demanded therefore that the full liability should be settled from the second Plaintiff according to an agency notice to that effect.

With reference to the letter from SureTelecom (U) Ltd as disclosed in the demand letter addressed to the first Plaintiff, it is not included in the agreed documents. The Plaintiff relied on annexure F to the amended written statement of defence. In that letter deemed admitted by the Plaintiff, Messrs Muwema and Mugerwa Advocates wrote that one Sande Pande a director of their client (SureTelecom (U) Ltd) personally committed fraudulent acts in relation to tax refunds and they gave particulars of the alleged fraud where two gentlemen namely Patrick Wante claiming to be chairman of SureTelecom (U) Ltd and Mukama Abdul managed an account on behalf of the company on forged documents). They recommended that the incidence of liability should be visited on Sande Pande. This letter is dated 15<sup>th</sup> August 2011 and was received by the Medium Tax Offices of the Defendant on 16<sup>th</sup> September 2011.

In the agreed documents there is another letter from Muwema and Mugerwa advocates dated 20<sup>th</sup> September 2011 addressed to the Assistant Commissioner Litigation Uganda Revenue Authority on the subject of **H.C.C.S. No. 229 of 2011 SureTelecom (U) Ltd vs. the Commissioner General, Uganda Revenue Authority**. In that letter reference is made to another letter of 15<sup>th</sup> of August 2011 addressed to the Defendant. Paragraph 2 of the letter reads as follows:

"As suggested in our above letter, the incidence of liability in this matter rests with a one Sande Pande. On our client's part, it shall fully cooperate with the authority in all present and future efforts to recover monies due from the said Sande Pande.

We therefore propose that the above suit be settled in the following terms:

- 1) That the Defendants assessment against the Plaintiff dated sixth of June, 2011 in the sum of Uganda shillings 5,553,634,271/= (also in words) be vacated.
- 2) That the Plaintiff shall fully cooperate with the Defendant in the present and future efforts to recover monies due from Sande Pande and shall render full disclosure of any payments made to him.
- 3) That each party bears its own costs.

"Please receive consent order in the above terms for your perusal and signature.

Yours faithfully,

For: MUWEMA & MUGERWA ADVOCATES"

The above letter proves that the initial assessment had been made against SureTelecom (U) Ltd. Secondly, the said company had filed a suit against Uganda Revenue Authority vide **High Court**

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

**Civil Suit No. 229 of 2011** on the same subject matter of VAT refund plus penalty and interest which had been claimed against it. The consent decree in **High Court Civil Suit No. 229 of 2011** was also admitted in evidence by consent of the parties and for purposes of ease of reference reads as follows:

"By Consent of both Parties represented by Mr Fred Muwema Counsel for the Plaintiff and Mr Ali Ssekatawa Counsel for the Defendant, it is hereby mutually agreed that the suit be settled amicably on the following terms:

- (a) That the Defendant's Assessment against the Plaintiff dated 6th of June, 2011 in the sum of Uganda shillings 5,553,634,271/= (also in words), be vacated.
- (b) That the Plaintiff abandons its claim for general and exemplary damages.
- (c) That each Party bears its own costs."

The consent decree was duly endorsed by the court on 26<sup>th</sup> September, 2011. Before taking leave of the matter, it is evident that subsequent demands were made on the first Plaintiff and also on the second Plaintiff in relation to the liability disclosed in the consent judgment above. The first Plaintiff was also prosecuted in the High Court. The judgment of the court in High Court Criminal Session Number 32 of 2012 was delivered by Honourable Lady Justice Jane Alividza on 8<sup>th</sup> August, 2014. The case is **Uganda versus Mpoya Seth alias Wante Patrick and Sande Pande Ndimwibo**. In Count 1 the accused were charged with obtaining money by false pretences contrary to section 305 of the Penal Code Act. In count number 2, they were accused of making false documents contrary to section 345 (a) of the Penal Code Act. The third count is making a false documents contrary to section 345 (a) of the PC. The fourth count is making a false document contrary to section 345 (d) and (ii) of the PC. The fifth count is procuring another to do or not to do an act which would constitute an offence contrary to section 19 (2) of the PC. Count number six is being a director of the Corporation and privy to the act or falsification of the company documents contrary to section 323 (b) (1) of the PC. Accused number one pleaded guilty and testified against the first Plaintiff.

In relation to the offences of making false documents and counts two, three and four, the court acquitted the second accused/first Plaintiff.

In relation to count 6 of being a director of the Corporation who was privy to the act or falsification of company documents contrary to section 323 (b) (i) of the PC, the court found that the prosecution proved the case beyond reasonable doubt and convicted the first Plaintiff/second accused accordingly.

In relation to count 1 of obtaining money by false pretences contrary to section 305 of the PC, the court found that the second accused/the first Plaintiff to this suit guilty of obtaining money by false pretences contrary to section 305 of the Penal Code Act and convicted him on count 1.

In relation to count five of procuring another to do an act which would constitute an offence contrary to section 19 (2) of the PC, the court found that the accused/first Plaintiff involved in the conspiracy and convicted him of obtaining money by false pretence contrary to section 305. He was also found guilty of the offence under section 19 (2) of the PC. In summary he was convicted on count 1, 5 and 6 and sentenced accordingly. The High Court further ordered that the first Plaintiff/second accused refunds to Uganda Revenue Authority a sum of Uganda shillings 970,624,348/=. The sentence of the court is in the following words:

"Refund of 970,624,348/=. It is a constitutional right of every victim of crime to be compensated by monetary terms. URA and were especially the taxpayer is entitled to compensation. Despite the fact that URA had impounded the company's money (3.2 billion) is another matter before the commercial court, I still order for refund of 970,624,348/= by the convict. The parties can offset the amount for refund of the sized funds.

Right of appeal and explained to the convict"

The first Plaintiff/second accused appealed to the Court of Appeal in the Criminal Appeal Number 799 of 2013 and his conviction on all the three counts was quashed and the sentence set aside. The order for compensation of Uganda Revenue Authority in the amount of Uganda shillings 970,624,348/= by the Appellant was also set aside.

It should be noted that the court was aware of the proceedings before the Commercial Court challenging assessment of the first Plaintiff for Uganda shillings 5,553,634,271/=. In fact summons to file a defence was issued by the court in this suit on 9<sup>th</sup> November, 2011. The suit had been filed in the same day (on 9<sup>th</sup> November, 2011). In the sentencing judgment the honourable judge wrote that despite the fact that Uganda Revenue Authority had impounded the convict's money in the sum of Uganda shillings 3.2 billion in the other matter before the commercial court, she would order refund of Uganda shillings 970,624,348/= by the convict and "the parties can offset the amount for refund from the seized funds".

There is no need to talk about the order for compensation in the points of law because it was set aside by the Court of Appeal and is of no consequence to the issues agreed upon for determination by the court.

Issue number three deals with the legality of the transfer of liability from SureTelecom Uganda Limited to the first Plaintiff. The issue was framed as follows:

**Whether the Defendant's decision to impose and transfer the tax liability of Uganda shillings 5,553,634,271/= from SureTelecom Uganda Limited to the first Plaintiff was legal?**

The Plaintiff's submission is that the fundamental rights of the first Plaintiff were infringed by not affording him a right to be heard by the time the liability was transferred. Counsel relies on article 44 (c) of the Constitution the Republic of Uganda which provides that there shall be no derogation from the right to a fair hearing. The Defendant on the other hand never addressed the court on the right to a fair hearing as proposed by the Plaintiff's Counsel. He only relied on section 175 of the Companies Act for the proposition that the corporate veil of SureTelecom Ltd had to be lifted for tax purposes or to prevent tax evasion. Secondly, under section 62 (1) of the VAT Act, where an offence is committed by the company, every person who at the time of the commission of the offence was a nominated officer, director, general manager, secretary or other similar officer of the company is deemed to have committed the offence.

I will start with the issue of fundamental rights as enshrined in the Constitution of the Republic of Uganda. The Plaintiff's Counsel contended that the first Plaintiff was never a party to **H.C.C.S. No. 229 of 2011 SureTelecom Uganda Limited versus Uganda Revenue Authority**. It is true that the first Plaintiff was not a party to the above suit. The question is whether there was any order transferring liability to the first Plaintiff in that suit. This is because the right of hearing in that suit must have something to do with any prejudicial order made against the first Plaintiff. Generally an order is only binding to the parties thereto. In **H.C.C.S No. 229 of 2011** the Plaintiff Messieurs SureTelecom Uganda Limited sued the Commissioner General Uganda Revenue Authority for assessment dated 6<sup>th</sup> of June 2011 in the sum of **Uganda shillings 5,553,634,271/=**. While the alleged assessment dated 6<sup>th</sup> of June 2011 is not in evidence, the details of the liability are contained in the letter of the Commissioner General to the first Plaintiff dated 16<sup>th</sup> September, 2011 demanding the same amount from the first Plaintiff. The basis of the amount is a demand for VAT refunds allegedly obtained fraudulently. It is alleged in that letter that SureTelecom Uganda Limited requested for refunds totalling to Uganda shillings 1,636,422,530/= which the Defendant paid as advised. It was later discovered that the refund was claimed fraudulently and a demand for it to be refunded was initiated against SureTelecom Uganda Limited with the full penalties and interest. This brought to the total amount of liability to about Uganda shillings 5.5 billion claimed against the first Plaintiff by way of transfer of liability.

By the time the first Plaintiff was written a demand letter for VAT refunds on 16<sup>th</sup> September, 2011 the suit between **SureTelecom Uganda Limited and Uganda Revenue Authority** was pending in the High Court. A consent decree was entered between the parties by the Court on 26<sup>th</sup> September, 2011 about 10 days after the demand was made on the Plaintiff. Nonetheless, the consent decree clearly decrees that the Defendants assessment against SureTelecom Uganda Limited dated 6<sup>th</sup> June, 2011 for the sum of Uganda shillings 5,558,634,271/= be vacated. Secondly, the Plaintiff abandoned its claims for general and exemplary damages. Each party was to bear its own costs. The suit was resolved by consent of the parties and the only positive order was for the Defendant being the Commissioner General, Uganda Revenue Authority, to vacate

the assessment dated 6<sup>th</sup> June, 2011. No other order was made against a third party such as the first Plaintiff to this suit. The right of hearing cannot therefore be considered on the basis of **H.C.C.S No. 229 of 2011** which did not concern the first Plaintiff and no order was made against the first Plaintiff.

Flowing from the wording of article 28 of the Constitution of the Republic of Uganda, the first Plaintiff to this suit was not entitled to a hearing in **HCCS Number 229 of 2011, SureTelecom Uganda Ltd vs. the Commissioner General Uganda Revenue Authority**. The consent decree did not infringe the first Plaintiff's fundamental rights and freedoms.

From the correspondence on record, the basis for imposing the liability on the first Plaintiff was the Defendant's independent action which is to the effect and also contained in the letter dated 16<sup>th</sup> September, 2011 written by the Commissioner General that SureTelecom Uganda Limited confirmed in writing that the first Plaintiff as a director and shareholder personally committed fraud and was liable to pay the money received illegally together with all the penal taxes. The Defendant went ahead to demand for refund together with penalties from the first Plaintiff.

The matter falls under the Value Added Tax Act under which a demand had been made on the first Plaintiff to the current suit. I agree with the submissions of the Plaintiff's Counsel that the liability of SureTelecom Uganda Limited had been vacated and could not be transferred. However, that is a matter of law which must be confined to the terms of the consent judgment/decree and which was confined to the parties to the consent judgment. The consent judgment never concerned the first Plaintiff who was not a party. To that extent, there was no order in the consent judgment to hold the Plaintiff liable for any liability. For ease of reference I will again quote paragraphs 4, 5 and 6 of the demand written by the Commissioner General to the first Plaintiff. The wording of the demand demonstrates that the liability was not on the face of the demand letter transferred as such but imposed on the basis of alleged fraudulent acts of the first Plaintiff. The Commissioner General wrote as follows:

"4. SureTelecom Uganda Ltd has now confirmed to us in writing that you as the director and shareholder personally committed the fraud and you are liable to pay the money received illegally and all the penal taxes.

5 We are therefore demanding this full liability from you with immediate effect.

6 This therefore to advise you to pay shillings 5,553,634,271/= (and in words) immediately as money received from URA illegally with all accruing penalties and interest."

Third-party agency notices were further issued by the Commissioner General on 19<sup>th</sup> September, 2011 as earlier indicated. As a matter of fact, it is confirmed in a letter dated 16<sup>th</sup> July, 2014

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written by the Assistant Commissioner Litigation of the Defendant that monies withheld by the Defendant pursuant to the recovery measures was Uganda shillings 3,200,000,000/=.

The question of whether the first Plaintiff was given a hearing before the imposition of liability has to be considered from the provisions of the VAT Act cap 349 laws of Uganda 2000. Assessments are provided for under section 32 and 33 of the VAT Act and for the moment are not relevant since that procedure was not followed. The Defendants Counsel rightly relied on section 62 (1) of the Value Added Tax Act. It provides that where an offence is committed by a company, every person who at the time of the commission of the offence was the nominated officer, director, general manager, secretary, or other similar office of the company; or was acting or purporting to act in that capacity, is deemed to have committed the offence. It is a defence under subsection 2 thereof that the offence was committed without the persons consent or knowledge or that the person exercised all diligence to prevent the commission of the offence as ought to have been exercised having regard to the nature of the person's functions and all the circumstances. Provisions relating to offences are prescribed under different sections. Section 51 of the VAT Act deals with offences related to registration. Section 52 deals with offences related to tax invoices, credit notes, and debit notes. There are many other offences prescribed in the law and it is not material for the moment to refer to all of them. Suffice it to say that offences are prescribed between sections 51 and 62 of the Value Added Tax Act. Section 62 assumes that the offence was committed by a company.

I have carefully considered the powers of the Commissioner General in relation to the offences prescribed under the Value Added Tax Act. The Commissioner may compound an offence under the provisions of section 64 of the VAT Act prior to the commencement of court proceedings. Section 64 (2) provides that the Commissioner General shall only compound an offence under that section if the person concerned admits in writing that he or she has committed the offence. That is not the situation in the Plaintiff's case. I have further considered the provisions relating to the imposition of VAT Penal Tax. Particularly section 65 (6) of the Value Added Tax Act Cap 349 is material to the situation at hand and provides as follows in 65 (6):

“(6) Where a person knowingly or recklessly—

(a) makes a statement or declaration to an official of the Uganda Revenue Authority that is false or misleading in a material particular; or

(b) omits from a statement made to an official of the Uganda Revenue Authority any matter or thing without which the statement is misleading in a material particular, and

(i) the tax properly payable by the person exceeds the tax that was assessed as payable based on the false or misleading information;

(ii) the amount of refund claimed was false; or

(iii) the person submitted a return with an incorrect offset claim,

that person is liable to pay penal tax equal to double the amount of the excess tax, refund or claim.

(7) Section 59 (4) applies in determining whether a person has made a statement to an official of the Uganda Revenue Authority.”

Section 59 (4) of the VAT Act further provides as follows:

“(4) A reference in this section to a statement made to an officer of the Uganda Revenue Authority is a reference to a statement made orally, in writing or in any other form to that officer acting in the performance of his or her duties under this Act and includes a statement made-

(a) in an application, certificate, declaration, notification, return, objection or other document made, prepared, given, filed or furnished under this Act;

(b) in information required to be furnished under this Act;

(c) in a document furnished to an officer of the Uganda Revenue Authority otherwise than under this Act;

(d) in answer to a question of a person by an officer of the Uganda Revenue Authority; or

(e) to another person with the knowledge or reasonable expectation that the statement would be conveyed to an officer of the Uganda Revenue Authority.”

The Commissioner is deemed to have applied the provisions of section 65 (5) (b) (ii) and (iii) of the VAT Act which provides that the person is liable to pay penal tax equal to double the amount of the excess tax, refund or claim where that person gives an amount of the refund claim which is false. The information could have been in the false claims submitted in terms of section 65 (7) and 59 (4) of the Value Added Tax Act. A further perusal of section 59 (1) of the Value Added Tax Act shows that a person who makes a false statement to an officer of the Uganda Revenue Authority commits an offence. A person who commits an offence is liable under section 59 (2) of the Value Added Tax Act. Reading this together with section 62 of the Value Added Tax Act, it is provided that where the offences are committed by a company or an officer of the company is deemed to have committed the offence.

While I agree with the Defendant’s Counsel, that the allegations against the Plaintiff or against SureTelecom Uganda Limited disclose an offence for which the company may be liable or an officer or director in that company may be deemed to have committed the offence, the provisions prescribing the offences between sections 51 and 62 of the VAT Act, apart from provisions

relating to compounding offences under section 64 require prosecution of the accused person, accused with the commission of a penal offence. Section 65 (6) which imposes penalties also presupposes that an offence has been committed.

Where the Commissioner compounds the offence, the person should have admitted the offence which is not the case here. The admission shall be in writing. In cases where the offence is compounded, the taxpayer or person accused with the commission of the offence may be ordered to pay a sum of money specified by the Commissioner General not exceeding the amount of the fine prescribed for the offence. The offence has to be compounded prior to the commencement of the court proceedings. As I have noted above, the first Plaintiff did not admit the offence in writing and the procedure prescribed by section 64 (3) of the VAT Act was not followed.

Under section 62 (1) of the VAT Act where an officer or director such as the first Plaintiff is deemed to have committed the offence committed by a company, that officer or director is entitled to due process of law prescribed by section 64 or a proceeding in a court with competent jurisdiction where the person shall be charged with the offence alleged to have been committed.

Article 28 (1) of the Constitution of the Republic of Uganda provides that in the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law. Specifically, the first Plaintiff was supposed to be charged before an independent and impartial tribunal established by law. The head note of article 28 is the right to a fair hearing and the clauses and paragraphs deal with the basic ingredients of a fair hearing. For instance article 28 (3) (a) provides that a person charged with an offence shall be presumed innocent until proved guilty or until that person pleads guilty. Article 28 (3) (c) provides that the person shall be given adequate time and facilities for the preparation of his or her defence. There is also the burden of proof. The trial shall take place in the presence of the accused. Several other provisions relating to the trial of the person accused of an offence were violated. These include article 28 (12) of the Constitution of the Republic of Uganda which provides as follows:

"(12) Except for contempt of court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law."

While the first Plaintiff had not been convicted of any offence by the time the demand for the penal tax was imposed on him by the Defendant, the provisions for imposition of penal tax under section 65 of the VAT Act envisage a trial before an independent tribunal established by law consistent with article 28 (12) of the Constitution of the Republic of Uganda. This means that the person who among other things is presumed innocent until convicted cannot pay the penalty prescribed for a convict unless he has admitted the offence or pleaded guilty. This is made particularly pertinent by sections 66 (2) and (3) of the VAT Act which deals with recovery or penal tax and which provide as follows:

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"(2) Subject to subsection (3), the imposition of a penal tax is in addition to any penalty imposed as a result of the conviction for an offence under Sections 51 to 64.

(3) No penal tax is payable under section 65 where the person has been convicted of an offence under section 51, 55, 59 in respect of the same act or omission."

Section 66 (2) envisages the imposition of penal tax after conviction for an offence under the penal provisions of the VAT Act namely sections 51 to 64. In other words a penal tax cannot be imposed without a conviction save for the provisions of subsection (3). Where there was no proceeding before an independent tribunal or court of law established by law in terms of article 28 of the constitution of the Republic of Uganda, it is possible that the Commissioner General and the team who advised her proceeded under section 59 in the allegation of fraud against the first Plaintiff. This is however not material to the conclusion I have reached. If it was material, section 66 (3) of the VAT Act provides that where a person has been convicted of an offence under section 59, penal tax shall not be imposed. The first Plaintiff had not been convicted of any offence under sections 51 – 62 of the VAT Act and therefore the provisions do not apply.

The conclusion is that the imposition of a tax of Uganda shillings 5,553,634,271/= by the Defendant on the first Plaintiff being a purported transfer of liability from SureTelecom Uganda Limited was unlawful because it infringed the right of the first Plaintiff to be charged before a court of law or an independent tribunal and tried for the offences for which penal tax may be imposed by the Commissioner General. There was no compounding of an offence under the VAT Act and therefore the Commissioner General could not impose an appropriate penalty not exceeding that prescribed by penal provisions of the VAT Act. The right to fair hearing of the first Plaintiff enshrined in article 28 of the Constitution of the Republic of Uganda and entrenched by article 44 (c) was infringed. Anything done in violation of an article of the Constitution is a nullity and of no effect under article 2 of the Constitution of the Republic of Uganda which gives The Constitution of the Republic of Uganda supremacy over all other laws. Infringement entitled an aggrieved person to apply to a court of competent jurisdiction for redress under article 50 of the Constitution and redress can include a declaration of an infringement and payment of compensation. Moreover article 152 (1) of the Constitution clearly provides that no tax shall be imposed except under the authority of an Act of Parliament. Non-compliance with the provisions of the Value Added Tax Act which is the law imposing tax under the authority of Parliament renders the act of the Commissioner General a nullity in law for noncompliance with provisions relating to imposition of penal tax. It was necessary before imposing the penal tax or any tax at all, for the first Plaintiff who was being accused of the commission of an offence by fraudulently misrepresenting the tax affairs of the company to the Defendant, to be given a hearing. Because he was being accused of the commission of a criminal offence, he needed to be charged before an independent tribunal established by law, if he did not admit the commission of an offence. If he was not to be charged he needed to be given adequate notice so that he objects to the assessment for penal tax.

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Finally I have considered the fact that the first Plaintiff was indeed charged with an offence but for a lesser amount. The fact that he was charged with an offence according to the judgment of the High Court in Criminal Session Case Number 32 of 2012, if any for a lesser amount is no longer material. In any case the criminal charges were preferred after the penalty charges had been imposed on him and third party notices issued in September 2011. For the moment, the conviction and sentence of the first Plaintiff for the alleged offence was quashed and sentence set aside by the Court of Appeal in the Criminal Appeal Number 799 of 2014. The appellant/first Plaintiff is not a convict and therefore no liability for the transferred amount can be imputed on him. The liability could not be transferred under section 62 of the Value Added Tax Act by virtue of the fact that he was a director without being charged before an independent and impartial tribunal established by law. The provisions for assessment under section 32 and 33 of the Value Added Tax Act do not apply to the liability imposed on the first Plaintiff determined in issue number three. In the premises issue number three is resolved in favour of the Plaintiffs.

Issue number 4:

Whether the Defendant acts of issuing demand and agency notices to and subsequently collecting US\$800,000 from the second Plaintiff's bankers in respect of the first Plaintiff's tax liability is lawful or legal?

Having resolved issue number 3 in favour of the first Plaintiff, issue number 4 is consequentially resolved in favour of both Plaintiffs. I can only conclude that it was not lawful to issue demand and agency notices without due process of law in establishing the liability of the first Plaintiff as resolved in issue number three.

Issues on remedies available:

It was agreed that only the two points of law on issue number 2 and 3 would be determined. The remaining issues are:

Issue 1: Whether the Defendant's decision to collect from the 1<sup>st</sup> Plaintiff's bank account the sum of Uganda Shillings 999,963,747/= was legal and justified? Issue 4: What is the extent of the 1<sup>st</sup> Plaintiff's income tax liability for the period 2006 to 2011? Issue 5: What remedies are available to the parties?

The court will be addressed on the remainder of the issues which relate to issues number 1, 4, and 5 with regard to remedies available.

Judgment on agreed points of law delivered in open court on 26<sup>th</sup> May, 2017.

**Christopher Madrama Izama**

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**Judge**

Judgment delivered in the presence of:

Counsel Robert Bautu for the Plaintiff

First Plaintiff is in court and is a Director of the Second Plaintiff

Counsel Ronald Baluku for the Defendant in court

Charles Okuni: Court Clerk

Julian T. Nabaasa: Research Officer Legal

**Christopher Madrama Izama**

**Judge**

**26<sup>th</sup> May, 2017.**