THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT No. 0954 OF 2020

DEMOCRATIC GOVERNANCE FACILITY …… PLAINTIFF

VERSUS

1. UGANDA YOUTH NERTWORK }
2. LILLIAN BAGALA } …… DEFENDANTS
3. VICTOR BIGIRWA }
4. ASIIMWE RUTH }
5. ISABIRYE HANNINGTON }

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

The Democratic Governance Facility (DGF) was established in July 2011 by eight of Uganda's Development Partners: Austria, Denmark, Ireland, the Netherlands, Norway, Sweden, the United Kingdom and the European Union. Its operations are based on a five-year governance programme aimed at providing harmonised, coherent and well-coordinated support to state and non-state entities to strengthen democratisation, protect human rights, improve access to justice and enhance accountability in Uganda. The Programme goal is to contribute to equitable growth, poverty eradication, rule of law and long term stability in Uganda. Currently the DGF is implementing its second 5-year phase (January 2018 – December 2022) with support from seven Development Partners: Austria, Denmark, Ireland, the Netherlands, Norway, Sweden, and the European Union.

The Democratic Governance Facility (DGF) instituted a suit though the Royal Danish Embassy seeking recovery of shs. 336,385,421/= arising from alleged breach of partnership agreements by the defendants. They as well seek recovery of assets produced by the 1st defendant under the partnership agreement, or payment of shs. 180,842,745/= in lieu thereof, general damages for breach of contract, interest and costs.

b. The Preliminary Objection;

When the suit came up for hearing, the defendants raised a preliminary objection under the provisions of Order 6 rule 28 of *The Civil Procedure Rules*, The defendants contend that the plaintiff has no capacity to sue in that name.

c. Submissions of counsel for the defendants.

Counsel for the defendants, M/s Oulanyah & Co, Advocates together with M/s J. B. Byamukama and Co, Advocates submitted that the plaintiff has no *locus standi* and therefore no cause of action against any of the defendants. As a multi donor funding mechanism, the plaintiff is a non- existent entity and therefore has no capacity to sue. The Royal Danish Embassy is named as its authorised agent. Suita can only be instituted by corporations sole, corporations aggregate and natural persons. A group of persons may not institute a suit under an assumed name that has no separate legal existence. An unincorporated association does not have legal capacity to sue notwithstanding that the members of the association may be persons or entities with legal capacity to sue or be sued. Clause 30 of the memorandum of understanding which that set up the Democratic Governance Facility expressly states that "This MoU does not create any rights or obligations under International Law." In any event by reason of the diplomatic immunity extended to the Royal Danish Embassy in Uganda, it follows that a person that is protected from the process of court cannot simultaneously be empowered against other court users.

d. Submissions of counsel for the plaintiff.

Counsel for the respondents, M/s S & L Advocates submitted that the several developmental partners are sovereign nations with capacity to commence suits before this Court. The Democratic Governance Facility has no capacity to bring the suit and as such it had to bring it in the name of the Royal Danish Embassy which has the capacity to bring the suit on its behalf. The memorandum of understanding between sovereign states that set up the Democratic Governance Facility is akin to a treaty. The issue of the duration of the capacity conferred on the Royal Danish Embassy is an issue that requires the parties to adduce evidence and cannot be resolved as a preliminary point in

light of the defendants not having pleaded the issue in their respective defences which could have given the Plaintiff an opportunity to rebut the same.

e. The decision.

The issue of *locus standi* is a pure point of law that can properly be raised as a preliminary objection. In determining such a point, the court is perfectly entitled to look at the pleadings and other relevant matter in its records (see *Mukisa Biscuit v. West End Distributors [1969] EA 696* and *Omondi v. National Bank of Kenya Ltd and others, [2001] 1 EA 177*). The term *locus standi* literally means a place of standing. It means a right to appear in court, and, conversely, to say that a person has no *locus standi* means that he has no right to appear or be heard in a specified proceeding (see *Njau and others v. City Council of Nairobi [1976–1985] 1 EA 397 at 407*). To say that a person has no *locus standi* means the person cannot be heard, even on whether or not he has a case worth listening to.

In Uganda's judicial system, any person who suffers some damage or injury from the act of a private individual or of the state can approach the court. The issue of *locus standi* is technically a preliminary one. The doctrine of "*locus standi*" ensures that only the bonafide parties come to court. In this process, it is essential to demonstrate that the person approaching the court suffered some injury or his legal right has been violated. In other words, there has to be a sufficient nexus between the injury caused and the person approaching the court. Its implication is that a person can only approach the court when his or her personal interest has suffered or an injury is inflicted upon him or her. In accordance with this maxim, one needs to show his or her legal capacity before approaching the court.

Personality is the legal capacity to bear rights and duties. The "person," as a physical embodiment of a bundle of rights and duties, or as a physical entity to which such a bundle of rights and duties is imputed, is the basic unit in law necessary for devising legal relationships. Only "persons" can be a subject and an object of legal relations. Consequently, suits can be filed by two kinds of persons: human and non-human. While natural persons acquire legal personality "naturally," by birth, juridical persons must have legal personality conferred on them by some legal process, and

it is for this reason that they are sometimes called “artificial” persons. A legal person is any legal entity that can do the things a human person is usually able to do in law, such as enter into contracts, sue and be sued, own property, and so on. One must either have the capacity to act or the capacity to claim-rights in order to qualify as a potential litigant.

Legal entities are structures with legal personality created in one of three ways; (i) an entity that holds entitlements and burdens that constitute the incidents of legal personhood and hence their holder into legal personhood (corporation sole). In this sense legal persons are simply integrated and separate bundles of legal positions; (ii) by a bundle of legal entitlements and burdens being defined into separate existence (incorporation by statute or registration). Incorporation defines an aggregation of human or artificial persons into separate existence. The creation of a corporation does not necessarily entail the conferral of legal personhood on any pre-existing entity. Rather, a new institutional fact simply comes into existence. Attribution of this status is only possible for entities that can hold or claim rights or can perform acts. They are typically named using “Limited” as part of their names or other designations in order to distinguish the particular mode of existence from other modes; (iii) on basis of sovereignty (states, international organisations, and some intergovernmental organisations are juridical persons in public international law).

The concept of juridical person is understood to mean any entity having its own existence and being responsible for its own actions, separately and distinctly from those of its members or organisers, and classified as a juridical person in accordance with the law of the place of its organisation. The key elements of active legal personhood are centred on legal responsibility and legal competences. Each State will therefore have its own rules and methods to determine which entities have legal personality in its domestic legal system. An important aspect of being a legal person is that one corresponds to at least one legal platform; incorporation by statute or by registration, meaning that it is incorporation that confers the capacity to bear duties and to claim rights.

On the other hand, international legal personality has generally been understood as a legal status denoting the ability of entities, usually states, to act as subjects exercising rights and bearing duties within the international legal order. The possession of personality in this sense can be regarded as

equivalent to membership in the international community. Actors need this status to deal effectively and meaningfully with other members of the international club. Traditionally, sovereign states were the only international legal persons recognised by public international law. Only legal persons could enter into formal international legal relations.

Although sovereign states are not the only entities with international legal personality, they are the main subjects of international law. However, the emergence of intergovernmental organisations considerably changed the horizontal structure of inter-state relations. Besides the states, international organisations are also accepted as international persons capable of having rights and assume obligations in the international order, such as the United Nations, the African Union (AU), and the European Union, among others. These international organisations, in order to fulfil their duties, must also have international legal personality. A separate legal personality of international and intergovernmental organisations has therefore emerged as a practical concept giving the organisations the capacity to operate in their own right, both in legal proceedings and as entities possessing their own rights and obligations. Intergovernmental organisations have their own international personality and are therefore subjects of international law. Unlike states, which possess rights and obligations automatically, international and intergovernmental organisations derive their rights and duties in international law directly from particular instruments.

The international legal personality must therefore not be confused with the domestic legal personality. The latter is a personality effective in the domestic legal system of a specific State. The question of legal personality for international and intergovernmental organisations arises in different legal orders as a result of the fact these organisations generally perform legal activities in various legal orders. The Democratic Governance Facility is an intergovernmental organisation. In general, intergovernmental organisations enjoy both international and national (or domestic) legal personality. However, the question of international legal personality as opposed to the domestic counterpart must be decided based on international law.

The key factor controlling the international personality of organisations is the actual rights and competences given to them under the constituent instrument. The advisory opinion given by the International Court of Justice in 1949 concerning the *"Reparation for Injuries Suffered in the*

Service of the United Nations," Advisory Opinion: I.C.J. Reports 1949, p. 174, found that international personality of the United Nations was necessary to achieve the objectives assigned to the organisation. It also found evidence of this in the Charter by mentioning the following relevant factors: existence of organs and tasks; obligation for members to give assistance to the organisation in action undertaken by it and to respect decisions taken; recognition of legal capacity and privileges in municipal systems of members; conclusion of international agreements. Concluding on the question of personality, the Court admitted that the organisation "was intended to enjoy, and is in fact exercising and enjoying rights which can only be explained on the basis of the possession...of international personality". Therefore "it must be acknowledged that it's Members, by entrusting certain functions to it... have clothed it with the competence required to enable those functions to be effectively discharged".

It is apparent from that decision that when determining the legal personality under international law, the court is guided by the will of the States Parties as expressed in the organisation's constituent instrument. The determination of whether or not an international organisation can be said to possess international legal personality must therefore centre on these two elements; a character of independence and an intention behind this status. The court will determine whether that status is a reasonable, objective one, logically deduced from, or presumed on the basis of, an examination of the constituent instrument and confirmed by the practice of the organisation.

Intergovernmental organisations are usually constituted by an international legal instrument (such as a treaty). Since some treaties have established an administrative apparatus without being granted international legal personality, for an intergovernmental organisation as a collective entity established by a solemn act between sovereign states to be deemed to have been granted legal status it must have three characteristic elements: (a) its creation must be done by an international agreement; (b) it should be an institution built under the Public International Law rules; and (c) it should have at least one decision-making body with a collective will, different from the will of the States Parties.

Legal personality simply reflects the autonomy of the organisation and its ability to act on its own. By using these common denominators, an international or intergovernmental organisation may be

described as an autonomous entity, set up by a constituent instrument, which expresses its independent will through common organs and has a capacity to act on an international plane. Modern day intergovernmental organisational decisions are often made without the continuous consent of their member states. Legal status will thus be granted to an intergovernmental organisation if that reflects the will of national governments under the instrument which set it up.

a. Whether the Democratic Governance Facility was created by an international agreement;

States opt for international cooperation through the establishment of and participation in international organisations to achieve their common objectives. States under the international legal system are the repositories of legitimated authority over peoples and territories and appropriately must be the ultimate legally traceable source for the international legal personality for all non-state entities. The capacity of states to enter into contractual relationships with other states and to create legally binding rules for themselves, is a result of states' international legal personality, a prerogative attributed to all sovereign states. The international legal personality of non-state entities must be discernibly transferred from states to the non-state entity through some legal instrument, general principle of law, or rule of customary international law. Without that transfer, non-state entities should not be taken to have either international legal personality or the consequent legal standing or legal capacity to assert international law rights and duties directly in international law for a or private law rights and duties directly in municipal fora.

A treaty entered into by the States becoming members of an organisation, might be considered a special treaty insofar as its purpose is that of creating an organisation, and it could be looked upon as a type of constitution. The Democratic Governance Facility is a multi-donor facility established by eight development partners (Austria, Denmark, Ireland, the Netherlands, Norway, Sweden, the UK and the European Union) under a government-to-government agreement signed on 5th July, 2011 with the Government of Uganda, with the aim of providing substantial, well-coordinated support towards enhanced democratic governance in Uganda over 5-year periods at a time. It partners with Ugandan state and non-state institutions to promote strengthened democratic

processes, the protection of human rights, and access to justice, peaceful co-existence and improved accountability in Uganda.

b. Whether it is an institution built under the Public International Law rules.

The intergovernmental organisation must have been created by way of an act of international law as opposed to the act of domestic law creating the non-governmental organisation. As international institutions established to administer particular treaty regimes, intergovernmental organisations must be set up in accordance with principles found in the body of law created through the interactions between nations. These principles or body of legal rules, norms, and standards that apply between sovereign states and other entities that are legally recognised as international actors are to be found in general principles of law, treaties, custom, and interpretations by both domestic judiciaries and international tribunals. This requires the examination of existing treaties, decisions of domestic courts, domestic legislation, positions taken by States and intergovernmental organisations in various fora, and academic commentary.

Customary international law is typically identified through the application of the "two-element approach" articulated by the International Court of Justice, which directs one to ascertain whether the rule being invoked is supported by "general" or "settled" practice and *opinio juris sive necessitatis*, that is, the conviction that conformity with the practice is required by the law. To establish a principle of customary international law, there must be: (i) a general and uniform state practice supporting that principle (state practice), and (ii) this practice must be done out of a sense of legal duty (*opinio juris*). The obvious first step for tackling the question of whether the Democratic Governance Facility is an institution built under general international law is thus to look at whether States have been creating such institutions through treaties with the belief that such an arrangement is legally required.

A treaty is a binding formal agreement, contract, or other written instrument that establishes obligations between two or more subjects of international law (primarily states and international organisations). According to article 2 (1) (a) of *The Vienna Convention on the Law of Treaties, 1969*, treaty "means an international agreement concluded between States in written form and

governed by international law." Treaties do not need to follow any special form; there is no prescribed form or procedure for making or concluding treaties. A treaty often takes the form of a contract, but it may be a joint declaration or an exchange of notes. They take a variety of forms including conventions, agreements, arrangements, protocols, covenants, charters, and acts. They may be drafted between heads of state or between government departments. The most crucial element in the conclusion of a treaty is the signalling of the state's consent, which may be done by signature, an exchange of instruments, ratification, or accession. Ratification is the usual method of declaring consent, unless the agreement is a low-level one, in which case a signature is usually sufficient. The key distinguishing feature of a treaty is that it is binding. A treaty is expected to be interpreted in good faith and in accordance with the ordinary meanings of its terms, given the context, object, and purpose of the treaty.

A country's signature is often sufficient to manifest its intention to be bound by ta treaty, especially in the case of bilateral treaties. In multilateral (general) treaties, however, a country's signature is normally subject to formal ratification by the government unless it has explicitly waived this right. Apart from such an express provision, the instrument does not become formally binding until ratifications have been exchanged.

In the instant case the constituent instrument is the "*Memorandum of Understanding between Development Partners Supporting the Democratic Governance Facility in Uganda*." It was signed by the respective diplomatic agents of the State Parties on diverse dates during the months of May and June, 2011. Clause 32 thereof stated that it would come into effect after it had been signed by all signatories thereto and was to remain in force for the duration of the Democratic Governance Facility.

c. <u>Whether it has at least one decision-making body with a collective will, different from the will of the States Parties.</u>

The constituent instrument is the expression of the will of the States parties to it and it should be considered as the source of the international personality of the organisation. The will of the States parties can be inferred and the court will have to seek the intention behind the constituent treaty in

every case to ascertain whether or not legal personality was intended for the organisation. It is therefore necessary to examine the constituent treaty establishing a new entity to verify whether the founding States Parties actually wanted to set up an organisation possessing an international personality distinct from the States Parties. That question will be answered in the affirmative if the organisation occupies a position in certain respects in detachment from its founding States Parties. The organisation must have an autonomous will in order to have legal personality.

The legal status and capacities of an entity are determined by its "personal" law. The "personal" law of international and intergovernmental organisations is international law. While it is the text of the treaty that must be taken as the authentic expression of the agreement of the parties, the treaty is to be read as a whole and respect paid to its object and purpose, rather than simply taking words that are the subject of controversy and digging out their meaning solely from dictionary, grammar, and syntax. Clause 30 of the MOU which states that it does not "create any rights or obligations under international law," cannot be construed as excluding the applicability of international law principles in the interpretation of the MOU, but rather as an exemption clause which attempts to regulate contractual liability by either limiting or excluding States Parties' liability to each other on account of rights or obligations existing under international law; it prevents the enforcement of rights and duties between them upon the international plane.

The status of an intergovernmental organisation in international law is totally dependent on the intention of the States creating it. In the instant case, the constituent instrument is the "*Memorandum of Understanding between Development Partners Supporting the Democratic Governance Facility in Uganda*." Clause 2 of that document defines the Democratic Governance Facility as a "joint programme management unit" wherein Denmark accepted to let the unit act "by proxy for the embassy of Denmark." Although the signatories to the memorandum agreed to share costs, risks and responsibilities, "ultimate legal responsibility rests with the Embassy of Denmark." The Embassy of Denmark delegated authority to the unit by letter of delegation to administer and manage its programme.

As far as intergovernmental organisations are concerned, the important aspect is of course that they possess international rights and duties in their own name, as opposed to in the name of the

States Parties. If the organisation did not have its own legal personality on the international plane, the potential responsibility would be a collective one shared by all the States Parties. This could result in practical problems and conflicts between States Parties. Under the Objectives clause 3, of the *Memorandum of Understanding between Development Partners Supporting the Democratic Governance Facility in Uganda* (the MOU), it was agreed by the States Parties that;

> A Democratic Governance Facility has been developed as an expression of the collective commitment of the signatories to the MOU to support democratic governance in Uganda in a coherent, well-coordinated and effectively targeted way, and in line with the Aid Effectiveness Agenda as spelled out in the Paris Declaration and Accra Agenda for Action, regarding especially harmonisation and alignment.

According to Article 31 (1) of *The Vienna Convention on the Law of Treaties, 1969* a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The memorandum sets the DGF as a unit governed by a Board that provides strategic direction and performs the general oversight role for the programme. It is constituted by the State Minister for Finance, Planning and Economic Development, the Heads of Missions of the eight Development Partners or sponsoring agencies funding it, and three eminent Ugandan experts. It also has a Steering Committee composed of governance experts from the same Development Partners, which committee makes the operational decisions regarding the DGF's initiatives. Lastly it has the Facility Management Unit (FMU) which is composed of international and national professionals who ensure the day-to-day running of the programme. The FMU team works closely with the implementing partners to execute the mandate of the programme and is managed by the Head of Facility who oversees daily operations and reports to the Steering Committee and the Board.

It was necessary to achieve the objectives assigned to it as a joint programme management unit that it exercises a degree of autonomy from the States Parties. In that regard, Clause 9 of the MOU vests the DGF Board, Steering Committee with the responsibility for the overall implementation and management of the programme. Clause 10 thereof vests it with the mandate to determine its overall strategy and direction, including deciding on the admission of new development partners, deciding on issues of high policy engagement and public relations and deciding on programme

implementation issues / activities with perceived high political risks. Clause 20 further vests it with the authority to "take legal measures to stop, investigate and prosecute in accordance with Ugandan law, any person suspected of corruption or other intentional misuse of resources." These powers given to the DGF are distinct from the legal powers of the States Parties, thus creating a distinction of potential rights, duties and liabilities conferred upon it different from those of its founding States Parties. In this regard the DGF has a will of its own, not subordinated any other authority, in relation to the States Parties.

The DGF has since then in its own right executed multiple "partnership agreements" with participants in its programmes of support. This provides confirmation of the existence of a separate legal personality since legal personality must already exist for the organisation to be able to conclude agreements. The exercise of functions and rights springing out of a character of independent separate legal personality must have been intended by its founding States Parties. The DGF has its own voice separate from the States Parties, thus giving it the right to enforce contractual obligations.

If the DGF did not have its own legal personality, the responsibility to "take legal measures to stop, investigate and prosecute in accordance with Ugandan law, any person suspected of corruption or other intentional misuse of resources" would be a collective one shared by all the States Parties. This could result in practical problems and conflicts between States Parties and could create problems because all the States Parties would have to agree. It is much more practical that the DGF itself can handle these situations without all the States Parties being obliged to both getting involved and also jeopardising their relations. A separate legal personality therefore emerges as a practical concept giving the DGF the capacity to operate in its own right, both in legal proceedings and as an entity possessing its own rights and obligations.

The International Court of Justice in its 1949 advisory opinion concerning the *"Reparation for Injuries Suffered in the Service of the United Nations," Advisory Opinion: I.C.J. Reports 1949, p. 174,* asserts that legal personality has to be "indispensable," and this suggests that the interpretation of what is implied in the constituent document is closely intertwined with a principle of effectiveness. Therefore it must be acknowledged that the States Parties, by entrusting the specified

functions to the DGF, clothed it with the competence required to enable those functions to be effectively discharged. In doing so the States Parties vested it with powers and duties performed in its own name, as opposed to in the name of the States Parties. The DGF does not carry out its own programs: it provides financial and technical support to Ugandan state and non-state institutions. By its structure which enables it to make organisational decisions without the continuous consent of the member states, it was the clear intention of the Development Partners and the government of Uganda that the Democratic Governance Facility is clothed with the legal personality of the Government of Denmark, by virtue of which the Embassy of Denmark chairs both the Board and the Steering Committee.

No doubt as an intergovernmental organisation the DGF is controlled by its States Parties, but that is achieved through their participation in its organs where such procedures are followed as may be provided by the MOU as its constituent instrument that establishes it and other internal rules that regulate its functioning. To that extent it expresses a *volonté distincte* (distinct will) through its organs. Thus the discernible will of the States Parties to the MOU is that the DGF was intended to and is in fact exercising powers and performing duties which can only be explained on the basis of the possession of international personality.

The Democratic Governance Facility and States Parties that set it up constitute separate legal persons. The sovereign States Parties set up the Democratic Governance Facility to act in their stead. It is an entity which was set up by means of a treaty concluded by States to engage in co-operation in a particular field and which has its own organs that are responsible for engaging in independent activities. I therefore find that the Democratic Governance Facility has an international legal personality separate from that of its States Parties.

The legal status and capacities of an entity are determined by its "personal" law. The "personal" law of international and intergovernmental organisations is international law, and recognition of the domestic legal personality of the organisation would therefore follow from the existence of legal personality on the international plane. In these cases, the domestic legal personality results directly from the international legal personality (see *International Tin Council v. Amalgamet Inc., 645 F. Supp. 879 (S.D.N.Y. 1986)*; *524 NYS 2d [1988] p. 971*). An international juridical person

organised in accordance with an international agreement between States Parties or a resolution of an international organisation is governed by the provisions of the agreement or resolution that established such person and is recognised by operation of law as a subject of private law in all the States Parties in the same way as private juridical persons, without prejudice to the right of such person to invoke immunity from jurisdiction where appropriate. In general, intergovernmental and international organisations enjoy both international and national or domestic legal personality. I find in this case that the DGF has both international and national or domestic legal personality.

It was argued by counsel for the defendants that the Democratic Governance Facility enjoys immunity by reason of the diplomatic immunity extended to the Royal Danish Embassy in Uganda, and that it follows that a person that is protected from the process of court cannot simultaneously be empowered against other court users. Diplomatic immunity is a principle of international law by which certain foreign government officials are not subject to the jurisdiction of local courts and other authorities for both their official and, to a large extent, their personal activities. The underlying concept is that foreign representatives can carry out their duties effectively only if they are accorded a certain degree of insulation from the application of standard law enforcement practices of the host country.

Intergovernmental organisations may also derive jurisdictional immunity from other multilateral treaties on privileges and immunities; bilateral treaties, such as host nation agreements; or national legislation, such as *The Diplomatic Privileges Act*. While intergovernmental organisations derive their jurisdictional immunity primarily from their constituent instruments, in Uganda, diplomatic immunity is conferred under *The Diplomatic Privileges Act.*

To enable intergovernmental organisations to fulfil their functions, their member States accord them certain privileges and immunities, including immunity from legal process. These privileges and immunities protect intergovernmental organisations from the jurisdiction and enforcement measures of their member States. Jurisdictional immunity bars a national court from subjecting these intergovernmental organisations to judicial process or adjudicating their legal relations. Staff of these intergovernmental organisations also enjoy jurisdictional immunity for acts performed in

the discharge of their official duties. Under international law, intergovernmental organisations generally are immune from legal process unless the organisation expressly waives the immunity.

Jurisdictional immunity prevents interference by member States, through their national courts, in the administration, management and operation of intergovernmental organisations. It ultimately serves to protect intergovernmental organisations from becoming subject to national laws and regulations. Jurisdictional immunity protects both the intergovernmental organisations and their member States by preventing their various national courts from unilaterally determining the legal validity of the acts of the intergovernmental organisations in the exercise of their functions. Immunity allows intergovernmental organisations to fulfil their functions effectively, efficiently and economically. These functions or activities of Intergovernmental organisations are determined and defined by the member States.

It has long been accepted that, as a general rule found in customary international law that States enjoy immunity from exercises of jurisdiction by other States. The principle underlying the customary position on State immunity is sovereign equality: the domestic courts of a State must not adjudicate upon the rights and obligations of another State because *par in parem non habet imperium*, equals do not have authority over one another. Until relatively recently, States did not seem to believe that they were obliged to grant immunities to intergovernmental organisations in the absence of treaty obligations. There was much inconsistency in the views taken by domestic courts and commentators on this issue and that treaties conferring immunities on intergovernmental organisations did not plausibly evidence a general practice in the field, let alone *opinio juris*. For those reasons, it could not be said that there was a "general practice accepted as law" establishing a customary rule of immunity for intergovernmental organisations (see M Wood, "*Do International Organisations Enjoy Immunity under Customary International Law?*" (2013) 10 Intl Organisations L Rev 287, at 317).

However, while intergovernmental organisations are not "sovereign," they are self-governing institutions created by States to operate outside the jurisdiction of their members. It is suggested therefore that treating States and intergovernmental organisations similarly under general international law presents itself as the most coherent solution for the situation of uncertainty The

main justification for the jurisdictional immunity of intergovernmental organisations has been summed up in the case of *Broadbent v. Organisation of American States, 202 U.S. App. D.C. 27, 628 F.2d 27, [D.C. Cir. 1980]* as follows:

> Intergovernmental organisations, which carry out their functions not only in their headquarters State but in the territories of all their members, must, in order to deal equitably with all their members, be able to operate on the basis of uniform, i.e., international, law, rather than on the basis of the diverse laws of particular member States. If any State could, through its courts, bend the operations of an organisation to the laws of that State, all other States could do likewise with respect to their laws, thus possibly paralyzing or fragmenting the organisation.

It so happens that the Democratic Governance Facility operates only in Uganda and not in any of the territories of the development partners involved in setting it up. Where no agreement concerning immunities has been negotiated with a State hosting it, an intergovernmental organisation will not be able to rely, in relation to that State, on any general provisions, not included in the treaty establishing it, providing for appropriate immunities as an international obligation of that State.

On the other hand, under *The Vienna Convention on Diplomatic Relations, 1961* domesticated in Uganda by *The Diplomatic Privileges Act,* it is the diplomat who enjoys immunity from local jurisdiction not only because he or she is representing another sovereign but his or her subjugation to the laws of another state would be incompatible with his duties to the sovereign. The protection is given to diplomatic agents defined as "the head of the mission or a member of the diplomatic staff of the mission" and not to organisations.

Uganda though has a legal mechanism for extending immunity to international and intergovernmental organisations. According to section 2 of *The Diplomatic Privileges Act*, the President may, by statutory instrument, make regulations extending any or all of the immunities and privileges conferred on diplomatic agents by virtue of the Act to prescribed organisations and prescribed representatives and officials, subject to such conditions and limitations as may be prescribed. No instrument has been brought to the attention of court by which any or all of the immunities and privileges conferred on diplomatic agents by virtue of the Act have been extended to the Democratic Governance Facility.

Diplomatic immunity primarily serves the needs of the foreign sovereign. According to The *Vienna Convention*, waiver of diplomatic immunity must be express by the sending state (see Article 32). However, sovereign immunity may be waived either expressly or by implication. For example in *National City Bank of New York v. Republic of China, 348 U.S. 356 (1955)*, the Republic of China sued an American bank in a Federal District Court to recover US $ 200,000 deposited in the bank by a governmental agency of the Republic. The bank filed counterclaim seeking an affirmative judgment for US $ 1,634,432 on defaulted treasury notes of the Republic. The Republic pleaded sovereign immunity against the counterclaim. The court observed that the case did not involve an attempt to bring a recognised foreign government into court as a defendant. A foreign government was instead invoking the law of another state, but at the same time resisting a claim against it which fairly would curtail its recovery. The court held that by conduct the Republic of China had waived her immunity extending, at most, to counterclaims which were based upon the subject matter of the suit. On appeal the Supreme Court too held that although China was entitled to immunity from suit, the filing of their claim served as an implied waiver to suit on a counterclaim not even arising out of the same transactions or occurrences. Waiver thus does not alter the status of the diplomatic immunity, it is a voluntary relinquishment of a known right.

That decision is consistent with by *The Diplomatic Privileges Act* of Uganda. The Schedule to that Act is a reproduction of *The Vienna Convention on Diplomatic Relations, 1961*. Article 32 (3) thereof provides as follows;

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

Under that provision, the diplomat's voluntary initiation of a suit serves as a waiver by implication with reference to any directly related claims that may be brought by the party opponents. It follows that participation in litigation by a foreign state without an affirmative assertion of immunity constitutes an implied waiver. An embassy is simply a representation of another country in Uganda and has no existence independent of the state it represents. It seems to follow from this premise

that if the sovereign has waived immunity with respect to certain proceedings, that the agent's derivative immunity is consequently waived as well.

It is also within the discretion of a trial court to determine that the conduct of a litigant is of such a character as to qualify as a waiver that cannot be withdrawn for purpose of the specific proceedings. The Royal Danish Embassy is an agent of the Kingdom of Denmark. It follows therefore that through her agent in Uganda, by voluntary initiation of this suit had the embassy had capacity to sue, the Kingdom of Denmark would have waived her sovereign immunity. However, the law in Uganda is that an agent has no capacity to sue in his or her name. An agent must institute the suit in the name of the principal (see *Ayigihugu & Company Advocates v. Mary Muteteri Munyankindi [1988-90] HCB 161*). It was thus superfluous to refer to the DGF as suing though the Royal Danish Embassy. That aspect of the plaint is consequently struck out.

The right to bring claims is intrinsic to legal personality. Capacity to sue is linked to the ability of a party to demonstrate to the court sufficient connection to and harm from the law or action challenged to support that party's participation in the case. Judicial redress is available to a person who has suffered a legal injury by reason of violation of his legal right or a legally protected interest by the impugned action of another person, the State or a public authority or who is likely to suffer a legal injury by such reason. The court decides whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. When the plaintiff is found lacking standing to file the suit, the court will not hear their complaint.

However I have found in the instant case that the Democratic Governance Facility has both the capacity and *locus standi* to sue. The plaint discloses a cause of action against each of the defendants. The objection is accordingly overruled. The costs of the objection are to abide the result of the suit. The suit is now fixed for mention on 11th November, 2021 at 9.00 am.

Delivered electronically this 3rd day of November, 2021 ……Stephen Mubiru……..

Stephen Mubiru
Judge,
3rd November, 2021.