THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION No. 0671 OF 2022

(Arising from Civil Suit No. 0424 of 2022)

1. SIMBA PROPERTIES INVESTMENT CO. LTD }
2. SIMBA TELECOM LIMITED } …… APPLICANTS

VERSUS

1. ROBERT KIRUNDA }
2. NOAH SHAMAH WASIGE }
3. FESTUS KATEREGGA } …… RESPONDENTS
4. COMMISSIONER LAND REGISTRATION }

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

The 1st and 2nd respondents are advocates practicing law under the name and style of M/s Kirunda and Wasige Advocates. The 3rd respondent is a bailiff practicing under the name and style of M/s Quick Way Auctioneers and Court Bailiffs. The 4th respondent is responsible for supervising and ensuring the proper custody and updating the national land register and certificates of titles. On or about Wednesday 18th May, 2022 at page 9 of *The daily Monitor* newspaper, acting on the instructions of M/s Vantage Mezzanine Fund II Partnership as mortgagee, the 1st to the 3rd respondents advertised for sale by public auction, multiple properties belonging to the applicants as mortgagors in default. The properties include; "Elizabeth Apartments" at Kololo in Kampala, "Protea Hotel-Naguru (Sky's Hotel) in Kampala, and "Moyo Close Apartments," Kololo gardens in Kampala. By that sale, the first three respondents seek to recover over US $ 32,064,075.8 being an overdue debt which the applicants owe the said M/s Vantage Mezzanine Fund II Partnership.

That advertisement follows a history of litigation between the applicants and the said M/s Vantage Mezzanine Fund II Partnership. It all began on or about 11th December, 2014 when the applicants executed an agreement (the Mezzanine Term facility Agreement) with the M/s Vantage Mezzanine Fund II Partnership by which the said applicants borrowed a sum of money, secured by property

registered in the names of the applicants. Differences having arisen between the parties regarding the repayment of that loan, the applicants filed Civil Suit No. 988 of 2019 in this Court. The respondents filed a defence to the suit by which they indicated they would contest the propriety of the proceedings and the jurisdiction of the Court. The respondents thereafter filed Miscellaneous Application No. 201 of 2020 by which they sought a stay of the suit on account of the fact that the Mezzanine Term facility Agreement contained a valid, binding and enforceable arbitration agreement / clause between the parties, by virtue of which the dispute should be referred to and resolved through arbitration.

In a ruling delivered on 16th June 2021, the court decided that since there existed a "valid, operative arbitration clause capable of being performed, and that there [was] an arbitrable dispute between the parties herein, it [was] ordered that the matter be and [was] accordingly referred to arbitration" in accordance with Section 5 of *The Arbitration and Conciliation Act*. Accordingly, Civil Suit No. 988 of 2019 and all legal proceedings and orders thereunder were dismissed and / or vacated or set aside by the Court. The costs of the application, those of the suit and the proceedings thereunder were awarded to the current 1st respondent, as the then applicant therein.

M/s Vantage Mezzanine Fund II Partnership has since that decision commenced arbitral proceedings at the International Chamber of Commerce in London, but it also filed High Court Miscellaneous Cause No. 205 of 2022 in the Civil Division of this Court, seeking orders of certiorari, mandamus and prohibition against the Registrar of Companies in relation to documents submitted by it for registration of a transfer of shares in Simba Properties Investment Company Limited, Simba Properties Limited, Linda Properties Limited and Elgon Terrace Hotel Limited. The applicants applied and joined as respondents. The application was dismissed on 9th May, 2022 on account of the ongoing arbitration. The 1tst respondent was further granted powers of attorney authorising him to initiate a private prosecution against two of the directors of the applicants. He consequently filed a complaint on oath before the Chief Magistrate's Court at Buganda Road. The applicants sought to have the prosecution stayed on account of pending contempt of court proceedings initiated against the 1st respondent together with others, but in a ruling delivered on 24th May, 2022 that application was dismissed for being misconceived. The applicants then filed a suit against the respondents, on basis of which the current application is now presented.

b. The application;

This application by Chamber summons is made under the provisions of section 33 of *The Judicature Act*, section 98 of *The Civil Procedure Act*, and Order 41 rules 1 (a), 2 (1) and 9 of *The Civil Procedure Rules* seeking an order of temporary injunction, restraining the respondents, from selling, alienating, disposing of, and taking possession of the applicants' properties comprised in; LRV 3903 Folio 13 Plot 32 Elizabeth Avenue, Kololo; LRV 3891 Folio 18 Plot 1 Water Lane, Naguru, Kampala; LRV 3895 Folio 3 Plot 5 Water Lane, Naguru, Kampala; LRV 3895 Folio 4 Plot 3 Water Lane, Naguru, Kampala; LRV 3435 Folio 10 Plot 12 Water Lane, Naguru, Kampala; and LRV 34294 Folio 20 Plot 12 Moyo Close, Kololo Gardens, Kampala until hearing and final determination of High Court Civil Suit No. 0424 of 2022 which is still at the pleadings stage before this court.

It is the applicants' case that the said suit has a very high likelihood of success considering that the purported mortgagee is non-existent, yet the respondents by advertising the property for sale, have not only occasioned severe damage to the applicants' names and business reputation, but have also caused and continue to cause irreparable damage to the applicants. The advertisement was made for the sole purpose of embarrassing and irredeemably damaging the name and business reputation of the applicants. The applicants stand to suffer more irreparable injury in the event that the respondents are not restrained from that conduct, yet the balance of convenience is in the applicants' favour.

c. Affidavits in reply;

In their joint affidavit in reply sworn by the 2nd respondent, the 1st and 2nd respondents contend that the application is misconceived in so far as it is against persons acting as agents of a known and disclosed principal. Considering that the suit seeks to challenge the legality of a mortgage and notices issued under it, which issues are already before an arbitrator, the court has no jurisdiction over the subject matter of the suit and therefore it has no likelihood of success. The application constitutes an abuse of court process by re-litigating matter over which the curt has already made conclusive pronouncements. The application and the underlying suit are founded on a

misinterpretation of the court decision in High Court Miscellaneous Cause No. 205 of 2022 which only declared a lack of capacity of M/s Vantage Mezzanine Fund II Partnership to sue, but never declared the said entity non-existent as contended by the applicants. One of the directors of the applicants has since issued a public statement acknowledging the debt and therefore advertising the applicants properties for sale on account of default in repayment, is incapable of embarrassing and irredeemably damaging the name and business reputation of the applicants. Advertising the mortgaged property for sale is a legally mandated step in the process of recovery of an unpaid secured loan. Any resultant loss of reputation is attributable to the applicants' reluctance to pay. By their conduct, the applicants are estopped from denying the existence of M/s Vantage Mezzanine Fund II Partnership.

In his affidavit in reply, the 3rd respondent contends that he was duly instructed to advertise the applicants' mortgaged property for sale upon the applicants' default on a loan advanced to them by M/s Vantage Mezzanine Fund II Partnership. He has since read a public statement issued by one of the directors of the applicants, acknowledging the debt. Advertising the mortgaged property for sale is a legally mandated step in the process of recovery of an unpaid secured loan. In advertising the property for sale, he acted as an agent of a known and disclosed principal.

d. Submissions of counsel for the applicants.

M/s Muwema and Co. Advocates and Solicitors together with M/s. Mugisha and Co. Advocates, on behalf of the applicants submitted that the applicant has a pending suit which raises serious triable issues relating to the action of publishing a notice of sale. The cause of action is a claim over unlawful intention to sell. The respondents claim to be acting on the instructions of a mortgagee Vantage Mezzanine Fund II Partnership who is the subject of a declaratory ruling in High Court Misc. Application No. 205 of 2021 which found that the party did not have presence, capacity or locus because they did not comply with the mandatory requirements of registration under section 4 of *The Partnership Act*. It prohibits those who do not register and yet operate business and penalises them to a custodial sentence or a fine. What doing business means under *The Partnership Act* was not canvased though in the decision. What was canvassed was Vantage Mezzanine Fund II Partnership activities in Uganda. It had attempted to cause a transfer of shares

and registration of resolutions. A declaratory judgment was made that is unenforceable and if a party would like to enforce it that arty has to file suit, as per the case of *Gladys Nyangire Karumu v. Mohammed Kalisa, H. C. Misc. Application No. 731 of 2015*. One of the remedies is filing a new suit. Item No. 9 on the list of authorities is an article on declaratory judgments. At page 5 of that article, a declaratory judgment is defined as one which proclaims the existence of a legal relationship, but does not contain any order which may be enforced against the defendant. The respondents claim to be agents of Vantage Mezzanine Fund II Partnership with no presence, capacity, or locus. It was pleaded that Vantage Mezzanine Fund II Partnership existed in South Africa but the court found that the respondents never proved it. The respondents claim to be agents of a principal that does not have these capacities.

As regards irreparable loss, the properties advertised house hospitality business. The advert shows the name of the 1st applicant and that of the respective businesses. The respondents as the persons intending to sell the property advertised do not name Vantage Mezzanine Fund II Partnership as their principal and it is the reason that they are sued in their personal capacities. In their individual capacities, they may not have the resources to return or pay back the value of the properties once they are sold. The value of the property is more than US $ 100,000,000/= which once lost will not be recoverable from them when they lose the suit. The applicants will have suffered irreparable damage. The property was mortgaged under what then was believed to be a valid mortgage but now the court has already determined that the purported mortgagee had no capacity. The sale might end the franchisees of the applicants in the hospitality business and the applicants will then be black listed. Vantage Mezzanine Fund II Partnership claim is secured by the properties whose value exceeds what the applicants are demanding for by far. Bing real property, it is appreciating in value and therefore they do not stand to lose in case they win the suit. The two or so years it may take to finalise the litigation is not too long a period to wait. Since there is a *prima fa*cie case with triable issues, the court ought to grant the injunction. I refer to the case of *Humphrey Nzeyi v. Bank of Uganda and another, Constitutional Application No. 1 of 2013*. We have raised several issues. No amount of damages can compensate the applicants when their businesses are lost by fall of a hammer. The applicants will be obliterated. The applicants will suffer irreparable loss if the sale is not sopped. There will be hardship occasioned in the event that the 30% deposit requirement, or any other financial condition, for stoppage of sale by mortgage is imposed.

e. Submissions of counsel for the 1st and 2nd respondents.

M/s Simon Tendo Kabenge Advocates on behalf of the 1st and 2nd respondents submitted that the matter in the main suit is about capacity of the respondents to sell on behalf of Vantage Mezzanine Fund II Partnership. The court has already found it had no jurisdiction in a similar suit that was filed before. The arbitration is ongoing and the applicants have raised the same issues in London. Their answer to the arbitral claim in annexure "F" attached to the answer to the request. In 2017 the applicants sought and were granted protective measures on the pretext of intending to take the matter to arbitration, but never did. During the year 2019 the applicants obtained similar orders but still never went to arbitration. In High Court Miscellaneous Cause No. 205 of 2022 it is the applicants that applied to join as private parties and they were added to a matter of public law taken against the Uganda Registration Services Bureau. The arbitration taken out by Vantage Mezzanine Fund II Partnership is alive since the arbitrator has asked the parties to identify issues. Annexure "E1" shows that the arbitration clause was incorporated the mortgage. It adopted the arbitration clause in the facility agreement. The 1st and 2nd respondents are a law firm which represents a disclosed principal. The partners in Vantage Mezzanine Fund II Partnership have instructed the 1st and 2nd respondents as advocates. The applicants are privy to the facility agreement. The suit is *res judicata* for suing the 1st and 2nd respondents as lawyer representing a litigant. The suit is intended to intimidate them. The injunction if granted will affect the interests of Vantage Mezzanine Fund II Partnership as third parties who are not in court yet they are to be restrained in the pursuit of their interests. Suing the respondents is a calculated step taken by the applicants to avoid their well-known creditor. There are no declaratory orders to be enforced. The simply dismissed the application. The issues of capacity and jurisdiction are already decided by this court. Annexure "R" in volume 2 of the 1st and 2nd respondent's affidavit in reply defined what a "business" is for purpose of *The Partnership Act.* Vantage Mezzanine Fund II Partnership did not engage in business activity that required its registration in Uganda.

f. Submissions of counsel for the 3rd respondent;

M/s Kirunda and Wasige Advocates on behalf of the 3rd respondent submitted that the existence of a partnership is a question of fact and the rules are specified in section 3 of *The Contract Act*.

The applicants relied on an incomplete agreement when they secured an interpretation by court on the capacity of Vantage Mezzanine Fund II Partnership yet the evidence before court is complete; as per annexure "H" is in volume 1 of the 1st and 2nd respondent's in reply. In the decision the Judge said for "completeness." Annexure "G" is a confirmation of instructions. One cannot maintain action against an agent as party. Annexure "J" a press release the deponent provides the genesis. The application constitutes an abuse of the process of court. The applicants are prevented by estoppel by conduct to challenge the capacity of the respondents to act as agents of Vantage Mezzanine Fund II Partnership. They recognised its existence when they executed the facility agreement, the mortgage and when they obtained interim protective measures

g. Submissions of counsel for the applicants in reply;

Counsel for the applicant submitted that the decision to file a suit and then seek a temporary injunction thereunder instead of seeking interim protective measures under the relevant provisions of *The Arbitration and Conciliation Act* is not an abuse of process. It was informed by their interpretation of the decision in High Court Miscellaneous Cause No. 205 of 2022 which the respondents themselves had initiated. It was ruled that Vantage Mezzanine Fund II Partnership had no capacity to sue and did not exist and therefore the respondents cannot purport to act on its behalf. The respondents had to be sued in their individual capacities.

The decision.

When the application came up for hearing on 10th June, 2022, having considered the submissions of all counsel, the averments contained in the respective pleadings of the parties, addressed my mind to the law regarding applications of this nature, I found and decided *ex-tempore* that there was no merit to the application, dismissed it with costs to the respondents and struck out the underlying suit. I undertook to explain in a detailed ruling the reasons behind that decision, hence this ruling.

It has been established by the law and the decided cases that, the main purpose for issuance of a temporary injunction order is the preservation of the suit property and the maintenance of the *status*

quo between the parties pending the disposal of the main suit. The conditions for the grant of an interlocutory injunction are now, well settled. First, an applicant must show a *prima faci*e case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience (see *E.A. Industries v. Trufoods, [1972] E.A. 420*). The conditions that have to be fulfilled before court exercises its discretion to grant an interlocutory injunction have been well laid out as the following:-

1. The Applicant has shown a *prima facie* case with a probability of success.
2. The likelihood of the applicants suffering irreparable damage which would not be adequately compensated by award of damages.
3. Where in doubt in respect of the above 2 considerations, then the application will be decided on a balance of convenience (see *Fellowes and Son v. Fisher [1976] I QB 122*).

These principles can be found in such cases as *American Cyanamid Co v. Ethicon Limited [1975] AC 396*; *Geilla v Cassman Brown Co. Ltd [1973] E.A. 358* and *GAPCO Uganda Limited v. Kaweesa and another H.C. Misc Application No. 259 of 2013*.

First, a preliminary assessment must be made of the merits of the underlying suit that has been filed against the respondents, to ensure that there is a "serious question to be tried." One of the criteria to be applied when considering whether or not to grant a temporary injunction is disclosure by the applicant's pleadings, of a "serious triable issue," with a possibility of success, not necessarily one that has a probability of success (see *American Cyanamid v. Ethicon [1975] AC 396; [1975] ALL ER 504; Godfrey Sekitoleko and four others v. Seezi Peter Mutabazi and two others, [2001 –2005] HCB 80* and *Nsubuga and another v. Mutawe [1974] E.A 487*). There is no need to be satisfied that a permanent injunction is probable at trial; the court only needs be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried. A serious question is thus any question that is not frivolous or vexatious. As long as the claim is not frivolous or vexatious, the requirement of a *prima facie* case is met.

The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried, and that there is at least a reasonable chance that the applicant will succeed at trial. The applicant needs to show only a reasonable likelihood of success on the merits. The applicant's burden on this part of the test is relatively low, and in most cases an applicant will be able to show that there is a serious question to be tried. The applicant is required to provide reasonably available evidence to satisfy the court with a sufficient degree of certainty that the applicant is the rights-holder and that his or her rights are being infringed, or that such infringement is imminent. The applicant must show a strong probability that the feared conduct and resulting damage will occur.

An interlocutory injunction is a court order to compel or prevent a party from doing certain acts pending the final determination of the case. It is an equitable remedy which aims to preserve the status quo by preventing one party from committing, repeating or continuing a wrongful act prior to the trial. It is an order made at an interim stage during the trial, and is usually issued to maintain the status quo until judgment can be made. For that reason, there must be a subsisting suit pending before the court, from which the application is sought, that forms the basis from which the interlocutory application arises (see *In the matter of C. Kasozi Ddamba [1980] HCB 115* and *M/S Muwayire Nakana & Co. Advocates v. Departed Asians Property Custodian Board and another [1987] HCB 91*). It is only then that an application for interlocutory relief can be considered.

In the instant case, the applicants on 2nd June, 2022 filed High Court Civil Suit No. 0424 of 2022 against the respondents. In that suit, the applicants seek to challenge the validity of the respondents' advertisement of a notice of sale of the applicants' mortgaged property, on grounds that the mortgagee, Vantage Mezzanine Fund II Partnership, whom the respondents purport to represent was in High Court Miscellaneous Cause No. 205 of 2022 declared a non-existent legal entity owing to its failure to register as a partnership as required by the law, hence lacked the requisite *locus standi* to institute legal proceedings. The applicants thus seek a declaration that the purported mortgage is unenforceable, that the properties constituting the subject of that mortgage are not liable for sale, the respondents acted in breach of their professional duties when they advertised the property for sale and therefore should pay general damages to the applicants for loss of reputation, goodwill and business. The ruling in High Court Miscellaneous Cause No. 205 of

2022 was for all intents and purposes a declaratory judgment which authoritatively pronounced Vantage Mezzanine Fund II Partnership' s lack of legal status, capacity and inability to exercise legal rights in property or otherwise.

That notwithstanding, the respondents have submitted evidence to show that on or about 16th December, 2021 the 1st and 2nd respondents on behalf of M/s Vantage Mezzanine Fund II Partnership submitted a request for arbitration to the International Court of Arbitration of the International Chamber of Commerce (annexure "K" to the 1st and 2nd respondent's affidavit in reply). The applicants are among the six named respondents to that request. A summary of the dispute submitted for arbitration is specified in the following terms;

> The dispute principally concerns the respondents' default on their loan obligations under a Mezzanine Term Facility Agreement, their efforts to frustrate recovery of the outstanding loan amounts; their efforts to circumvent [the] claimants' rights as creditors through amendment of their Articles of Association to reverse controls on the borrowing powers vested in the Boards of Directors in respect of the borrowing of sums in excess of US $ 50,000.

In their undated answer and counterclaim to that request for arbitration, the applicants challenged the selection of London as the seat of arbitration, sought to have the submission to arbitration nullified, argued that M/s Vantage Mezzanine Fund II Partnership is non-existent entity by virtue of the determination of the Uganda Registration Services Bureau, a decision that was by then pending re-consideration on judicial review in High Court Miscellaneous Cause No. 205 of 2022, and hence the arbitral proceedings should be stayed awaiting the outcome of that litigation. The applicants further objected to joinder of one of the partners in M/s Vantage Mezzanine Fund II Partnership as a party to the arbitral proceedings. M/s Vantage Mezzanine Fund II Partnership has from time to time unreasonably prevented the applicants from accessing re-financing of the loan by other willing creditors.

The above processes undertaken by the parties are consistent with the ruling of this court which on 16th June 2021 decided that since there exists a valid and operative arbitration clause capable of being performed, and considering that there had emerged an arbitrable dispute between the parties herein, the dispute was referred to arbitration. According to section 5 (1) of *The Arbitration*

and Conciliation Act, a judge before whom proceedings are being brought in a matter which is the subject of an arbitration agreement is required, if a party so applies after the filing of a statement of defence and both parties having been given a hearing, refer the matter back to the arbitration.

Clause 43.1 (a) of the Mezzanine Term Facility Agreement executed between the parties on 11th December, 2014 provides as follows;

> Any dispute, claim, difference or controversy arising out of, relating to or having any connection with this agreement, including any dispute as to its existence, validity, interpretation, performance, breach or termination or the consequences of its nullity and any dispute relating to any non-contractual obligations arising out of or in connection with it (for the purpose of this clause, a Dispute). Shall be refereed to and finally resolved by arbitration under the International Chamber of Commerce (ICC) Arbitration Rules (for the purpose of this clause, the Rules).

A dispute connotes a conflict or controversy; a conflict of claims or rights; an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other. For purposes of a submission to arbitration, a dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons. Different views of parties in respect of certain facts and situations become a "divergence" when they are mutually aware of their disagreement. It crystallises as a "dispute" as soon as one of the parties decides to have it solved, whether or not by a third party. It is not sufficient for one party to a suit to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its nonexistence nor is it adequate to show that the interests of the two parties to such a case are in conflict. It is a matter for objective determination. The two sides must be shown to hold clearly opposite views concerning the question of the performance or non-performance of their contractual obligations. It must be shown that the claim of one party is positively opposed by the other. Where a party has admitted liability or compromised his stand, by some admission capable of altering the position of the parties in respect of the matter in dispute, the matter can no longer be for reference to an arbitration.

A dispute must relate to clearly identified issues and must have specific consequences in order to serve as a basis for arbitration. The existence of a dispute presupposes a certain degree of

communication between the parties before the initiation of proceedings, in which the parties expressed clearly opposing views concerning their contractual obligations. The matter must have been taken up with the other party, which must have opposed the claimant's position. A dispute will be characterised by a certain amount of communication demonstrating opposing demands and denials. The difference of views must have formed the subject of an active exchange between the parties under circumstances which indicate that the parties wish to resolve the difference, be it before a third party or otherwise. It is the type of claim that is put forward and the prescription that is invoked that decides whether a dispute is arbitrable or not.

In High Court Civil Suit No. 0424 of 2022 the applicants seek a declaration that the mortgages created as collateral to the Mezzanine Term Facility Agreement are unenforceable by virtue of the mortgagee being "non-existent," that the properties constituting the subject of those mortgages are not liable for sale; that the respondents acted in breach of their professional duties when they advertised the property for sale and therefore should pay general damages to the applicants for loss of reputation, goodwill and business. These clearly are disputes relating to the existence, validity, interpretation, performance, breach or termination or the consequences of its nullity which are matters "arising out of, relating to or having [a] connection with" the Mezzanine Term Facility Agreement, which are the subject of the reference to arbitration, already underway.

The right of parties to resolve their dispute by arbitration must be upheld and given effect to by courts. According to section 9 of *The Arbitration and Conciliation Act*, except as provided in the Act, no court should intervene in matters submitted to arbitration (see *One Solutions Ltd v. Eastern and Southern African Management Institute, H. C. Misc. Cause No. 33 of 2015*). The court must grant a stay of any proceeding brought before it regarding a dispute that is the subject of a submission to arbitration, unless the arbitration agreement is null and void, inoperative or incapable of being performed. It is contended though by counsel for the applicants that despite these statutory provisions, the underlying suit is competent in light of the decision of the Civil Division of this Court, in High Court Miscellaneous Cause No. 205 of 2022 which declared M/s Vantage Mezzanine Fund II Partnership non-existent.

With due respect, this argument is misconceived. In that application, M/s Vantage Mezzanine Fund II Partnership sought prerogative orders to issue concerning the decision by the Uganda Registration Survives Bureau's refusal to register a transfer of shares in its favour, in each of the applicant companies as requested for by the firm. It was a proceeding in public law intended to force a public body to perform a public duty. When the court allowed the applicants to join the proceedings, it erroneously permitted the ventilation of private rights in a process that is intended to address public law issues exclusively. Nevertheless, the court never made any binding pronouncements regarding the existence of M/s Vantage Mezzanine Fund II Partnership, but rather its capacity to sue on account of non-registration under *The Partnership Act, No. 2 of 2010*. The issues presented for determination were; (i) whether the applicant had locus to bring these judicial review proceedings; (ii) whether the applicant set out a proper case for judicial review; (iii) whether the application raised any grounds for judicial review; and (iv) whether the applicant was entitled to reliefs sought. When resolving the issues; his Lordship stated that;

> It is not clear whether the applicant partnership is duly registered in South Africa and it would appear it is not a requirement to register the same in that country although a business name should be registered as such…..The Ugandan law under *The Partnership Act* makes it a mandatory requirement for certain partnerships to register and the failure to register may have serious consequences to the existence of the partnership entity…. The law in Uganda is prohibitive of such a partnership to operate without registration and penalizes the offending party continuously for offending the provision for registration under the partnership Act. In the present case the applicant contends that it is a partnership, which means that it must comply with the law which requires registration in order to have capacity to sue or not to sue in Uganda. The applicant's status as a recognized entity in South Africa has not be proved to the satisfaction of this court since there is no single registered document that has been produced before this court apart from a few pages of the unregistered partnership agreement….. International partnerships or foreign partnerships just like the Ugandan partnership cannot be recognized once they are not registered since their identities are unknown and it may open the door wide for fraud in their transactions and dealings. The locus standi or standing to sue (capacity)in a partnership name should be by mandatory registration under the Partnership Act and Business Names Registration Act which sets out the regulatory framework for partnerships in Uganda. For the reasons hereinabove stated, the applicant has no legal presence and locus (capacity) to commence this application.

It is apparent from the above extract that expressions made relating to the existence or otherwise of M/s Vantage Mezzanine Fund II Partnership are not part of the *ratio decidendi* but rather constitute *obiter dicta*. When a Judge delivers a decision in a case, the Judge outlines the facts which he or she finds have been proved on the evidence. Then he or she applies the law to those facts and arrives at a decision, for which the reason (*ratio decidendi*) is stated. The judge may go on to speculate about what his decision would or might have been if the facts of the case had been different. This is an *obiter dictum*. The comments, suggestions, or observation made by the trial judge that were not necessary for resolving the application, as such, are not legally binding on other courts. The binding part of a judicial decision is the ratio decidendi. An *obiter dictum* is not binding in later cases because it was not strictly relevant to the matter in issue in the original case.

The *ratio decidendi* in respect of the first issue as to whether the applicant had *locus standi* to bring the judicial review proceedings, is to the effect that being unregistered in Uganda, M/s Vantage Mezzanine Fund II Partnership had no *locus standi* to do so. That finding as well may validly be the subject of justified criticism considering that neither the parties nor the honourable trial judge in arriving at that conclusion ventilated the expression "a firm carrying on business in Uganda" provided for in section 4 of *The Partnership Act, No. 2 of 2010*.

A partnership is the relation which subsists between two or among persons, not exceeding twenty in number, who carry on a business in common with a view to making profit (see section 3 of *The Partnership Act, No. 2 of 2010*). Therefore there are five elements which constitute of a partnership namely: (i) there must be a contract; (ii) between two or more persons; (iii) who agree to carry on a business; (iv) with the object of sharing profits and (v) the business must be carried on by all or any of them acting for all. Partnership is the result of a contract. It does not arise from status or operation of law. It is but a convenient name for an aggregate of individuals, and the rights and duties recognised and imposed by law are those of the individual partners. The formation of a partnership requires a voluntary association of persons who then co-own the business and intend to conduct the business for profit. Persons can form a partnership by written or oral agreement. The existence of a partnership clearly does not depend on registration. Unlike a corporation, a partnership is created by agreement not by registration. Although partnerships are legally recognised, they are not legal persons, unlike corporations.

Once started, business partnerships have the ability to sell goods and services anywhere in the world by virtue of the internet. It could not have been the intention of Parliament in legislating section 4 of *The Partnership Act, No. 2 of 2010* that all firms digitally and remotely carrying on business, without a physical presence in Uganda, but under business names which do not consist of the true surnames of all partners who are individuals and the corporate names of all partners which are corporations in the partnership without any addition other than the true first names of individual partners or initials of the first names; and the corporate names of all partners which are corporations, should register their name under *The Business Names Registration Act*. To hold otherwise would create an absurdity in the wake of the modern exponential growth of global digital businesses with increased international business relations, cross-border transactions, and mobility. It would be an absurdity if all foreign firms engaged in such transactions are to be required to engage in multijurisdictional recognition before they can undertake enforcement efforts for the collection of debts.

It is clear from reading section 4 of the Act that registration is mandatory for only those firms "carrying on business in Uganda." In this context, carrying on business connotes regular business activities; a routine and continuous involvement in an activity undertaken for the purpose of making profit, gain or adding wealth to a person or entity by resorting to financial transaction to get a margin of profit on such transactions. It involves repetition and regularity of business activities. There must be evidence of the prosecution or pursuit of a particular avocation or form of business or professional practice as a continuous and permanent occupation and substantial employment. A single act or business transaction is not sufficient, but the systematic and habitual repetition of the same act may be. For example in *Dry Goods Co. v. Lester, 60 Ark. 120, 29 S. W. 34, 27 L. It. A. 505, 40 Am. St. Rep. 102*, the taking of a single mortgage by a foreign corporation to secure a past due debt, with no parent intention to transact other business within the state, was held not to constitute "doing business" within the statutory prohibition. Therefore, a single act or transaction may amount to carrying on a business only if it is intended to be repeated.

It is evident that having an intention to make a profit can indicate a business activity, however that by itself it is not enough. Actual intention can only be determined objectively, usually on the basis of the so-called "badges of trade" (see *Marson v. Morton [1986] 1 WLR 1343 at 1348-1349*).

Although a single transaction can amount to a business activity, it is more indicative if there are repeated and systematic transactions of a similar nature over a relatively short period of time. A persuasive Supreme Court of Canada decision has defined "carrying on business" in a province, as a question of fact requiring: (i) actual presence (such as maintaining physical premises); and (ii) business activity for a sustained period of time (see *H.M.B. Holdings Ltd. v. Antigua and Barbuda, 2021 SCC 44*). Actual presence in the jurisdiction might involve, for example, maintaining a physical office or other premises, or regularly visiting the territory of the particular jurisdiction and engaging directly with customers. "Carrying on business in Uganda" therefore refers to partnerships' actual presence in Uganda, plus a degree of business activity that is sustained for a period of time. Virtual presence alone will not suffice. It was held in *H.M.B. Holdings Ltd. v. Antigua and Barbuda, 2021 SCC 44* that a court faced with such an issue is required to consider factors such as whether the business entity has established a fixed place of business in the other country from which it has carried on its own business, or a representative of the business entity has been carrying on the entity's business in the other country from some fixed place of business.

In assessing whether a representative has been carrying on the entity's business or has been doing no more than carrying on its own business, it was suggested that the court will consider factors such as: (i) whether or not the fixed place of business from which the representative operates was originally acquired for the purpose of enabling them to act on behalf of the foreign entity; (ii) whether the foreign entity has directly reimbursed the representative for the cost of their accommodation at the fixed place of business and the cost of their staff; (iii) what other contributions the foreign entity makes to the financing of the business carried on by the representative; (iv) whether the representative is remunerated by commission, fixed regular payments or in some other way; (v) the degree of control the foreign entity exercises over the running of the business; (vi) whether the representative reserves part of their accommodation and part of their staff for conducting business related to the foreign entity; (vii) whether the representative displays the foreign entity's name at their premises or on their stationery to indicate that they are a representative of the foreign entity; (viii) what business, if any, the representative transacts as principal exclusively on their own behalf; (ix) whether the representative makes contracts with customers or other third parties in the name of the foreign entity or otherwise in such manner as to bind it; and (x) if so, whether the representative requires specific authority in

advance before binding the foreign entity to contractual obligations. In all cases, some kind of actual presence, whether direct or indirect, is required. A virtual presence that falls short of an actual presence will not suffice.

Similarly when interpreting the meaning of "carrying on business," Lord Justice Slade writing for a unanimous court in *Adams v. Cape Industries Plc. [1990] 1 Ch. 433* at 530 held that English courts will be likely to treat a foreign corporation as present within the jurisdiction of the courts of another country only if either: (i) it has established and maintained at its own expense, whether as owner or lessee, a fixed place of business of its own in the other country and for more than a minimal period of time has carried on its own business at or from such premises by its servants or agents; or (ii) a representative of the foreign corporation has for more than a minimal period of time been carrying on the corporation's business in the other country at or from some fixed place of business. In both of these two cases, the foreign corporation's presence can be established only if it can be said that its business has been transacted at or from the fixed place of business.

To determine whether or not a foreign business organisation, be it a corporation or firm, is carrying on business in Uganda, the court must inquire into whether that entity has some direct or indirect presence in Uganda, accompanied by a degree of business activity that is sustained for a period of time. I have carefully perused the ruling by the Civil Division in High Court Miscellaneous Cause No. 205 of 2022 but have not found reference to any factual indicia that ordinarily supports such a determination. To the extent that my brother Judge did not have before him such facts as were necessary for that determination, and indeed did not engage in this analysis before coming to the conclusion that M/s Vantage Mezzanine Fund II Partnership had no capacity to sue for want of registration in Uganda, I find myself unable to follow his decision, most especially considering the fact that it is not binding on me.

The High Court is bound by decisions of the Supreme Court, the Court of Appeal and the Constitutional Court, but is not bound by other High Court decisions. In any event, a decision which is reached *per incuriam* is one reached by manifest slip, error or glaring mistake, such that some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong and therefore can be avoided (see *Morelle v. Wakeling [1955]*

2 QB 379). Having found that that this specific factual finding of my brother Judge is not evidence-based, and more so, it is not entitled to deference as a precedent binding on this court, I respectfully depart from it and find that there was no basis for counsel for the applicants to have chosen to file a suit intended to enforce what they considered to be a declaratory decision in that ruling.

On the basis of the misconception of the non-existence of the mortgagee, the 1st and 3rd respondents have been sued simply because counsel for the applicants consider them to be acting in their individual capacities since, in counsel's view, M/s Vantage Mezzanine Fund II Partnership was in High Court Miscellaneous Cause No. 205 of 2022 declared no-existent. Firstly, a person who acts for a disclosed principal is not liable to the plaintiff in respect of particular transactions (see *Friendship Container Manufacturers Ltd v. Mitchell Cotts (K) Ltd [2001] 2 EA 338*). A person who acts as another's agents in a transaction, with the knowledge of the plaintiff, is not liable to the plaintiff in respect of that particular transaction. In undertaking the impugned advertisement, the 1st to 3rd respondents acted as agents of M/s Vantage Mezzanine Fund II Partnership with instruction to enforce its rights as an unpaid mortgagee under the Mezzanine Term facility Agreement, which agreement specifies the corporate and human partners undertaking business under that name. At common law, in such circumstances the only person who can sue and be sued is the principal (see *Pheneas Agaba v. Swift Freight, H. C. Civil Suit No. 1000 of 1999*).

Secondly, as regards the 1st and 2nd respondents, I can do no better than restate the observations I made in an earlier application, H. C. Misc. Application No. 331 of 2022, of similar purport over more or less the same subject matter, that suing advocates in circumstances of this nature is an affront to the right to legal representation. Advocates should be able to practice independently and in freedom. The United Nations *Basic Principles on the Role of Lawyers, 1990* define the fundamental requirements to guarantee that everyone has access to independent legal counsel. Principle 18 thereof provides that "Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions" however popular or unpopular it may be (see also Principle G (3) (e) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003*). Therefore advocates should not suffer, or be threatened with, suits, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognised professional duties, standards and ethics. Advocates therefore should be able to

perform all of their professional functions without intimidation, hindrance, harassment or improper interference.

The Basic Principles on the Role of Lawyers constitute a landmark instrument recognising the principle of independence of the legal profession as an essential component of a democratic society and the rule of law, and a necessary prerequisite for the effective enforcement of human rights. Identifying lawyers with their clients or their clients' causes amounts to nothing less than intimidation and harassment prohibited by Principle 18 thereof. It is a bedrock principle of the rule of law that lawyers should not be identified with their clients or their clients' causes as a result of discharging their function. Such vexatious suits set a precedent that endangers the ability of advocates to effectively represent their clients. An advocate must at all times be allowed to advance a client's rights without obstruction or impediment, or fear of suits or prosecution for carrying out his or her duties as an officer of the court. Any unwarranted interference with the discharge of such duties is a serious violation of the independence of the legal profession. To grant an injunction against the 1st and 2nd respondents, restraining them from performing their role as advocates representing a client, would be an affront to the right to legal representation.

It was argued by counsel for the respondents that these entire proceedings and the underlying suit constitute an abuse of process. Abuse of process is described as misusing a criminal or civil process against another party for an unintended, malicious, or perverse reason or purpose, different from the proceeding's intended purposes. It is the malicious and deliberate misuse of regularly issued civil or criminal court process that is not justified by the underlying legal action. It involves an illegal or improper use of process, with an ulterior motive or improper purpose. There is no exhaustive list of situations where a court might stay a proceeding for an abuse of process, but includes litigation instituted in bad faith with the intention of delaying the delivery of justice. filing Examples include filing a suit without a genuine legal basis in order to obtain information, force payment through fear of legal entanglement or gain an unfair or illegal advantage. Usually the circumstances should be so unfair and wrong, where the proceedings have become a tool used primarily for harming another, rather than for redressing wrongs, that the court should not allow a party to proceed with the litigation.

In a country observing the rule of law, courts remain the most vital arena for the protection and enforcement of individual rights and liberties. The average citizen can use these powerful institutions to confront and seek relief against the largest and most powerful entities, and has the same rights to the legal process as those entities. It is the duty of the courts to prevent and curtail the improper use of its process. It is important to understand though that simply because the other party has a weak case does not mean that there is an abuse of process, even if that party eventually loses the case. The key elements of abuse of process is the malicious and deliberate misuse of regularly issued civil or criminal court process that is not justified by the underlying legal action, and that the abuser of process is interested only in accomplishing some improper purpose similar to the proper object of the process. Abuse of process is an intentional tort that arises when a litigant deliberately misuses a court process that is not justified by the underlying civil or criminal legal action. It consists of the existence of an ulterior motive or purpose in using the process, and an act in the use of the process that is not proper in the regular prosecution of the legal proceedings.

To my mind, the relief sought in this application could have been pursued by seeking interim protective measures. Under section 6 (1) of *The Arbitration and Conciliation Act*, a party to an arbitration agreement may apply to the court, before or during arbitral proceedings, for an interim measure of protection, and the court may grant that measure. The purpose of granting an interim measure of protection is the preservation of the parties' legal rights pending the arbitration. The court doesn't determine the legal rights that are the subject of the arbitration but merely preserves the status quo until the parties' respective rights can be established or declared by the arbitrator. The court will be inclined to grant an injunction if the failure to do so might compromise the applicants' ability to assert their claimed rights, when there is a very high likelihood of occasioning a loss that cannot be compensated for with money, and in the case of doubt, where the balance of convenience favours the grant of the restraining order. In the mind of counsel for the applicants, adopting this procedure has the semblance of recognising the existence of M/s Vantage Mezzanine Fund II Partnership and the arbitral process commenced by it, a fact they are unwilling to countenance under any circumstances, or touch even with a long stick.

Sometimes abuse of process may occur accidentally, such as where an honest belief in mistaken facts forms the basis of filing a suit against an improper party. Having analysed pleadings filed

and arguments advanced by counsel for the applicants in previous and current litigation over the same subject matter, as well as their answer filed in response to the invitation to arbitration, it appears to me that the applicants are labouring under an honest but mistaken belief that it was decided by the Civil Division of this Court in High Court Miscellaneous Cause No. 205 of 2022 that M/s Vantage Mezzanine Fund II Partnership does not exist. The failure to disabuse themselves of that misconception has clouded their judgment so deeply that they have gone to great lengths to avoid any stance that has a semblance of recognising the existence of that entity. That, in my view, is the predominant reason, rather than a deliberate misuse of court process, that explains the current application. Although I have not found clear evidence of an ulterior motive or purpose in the filing of this process, unfortunately, the misconceived application and the underlying suit have the undesirable effect of delaying the delivery of justice.

On basis of all the foregoing considerations, I found that this application and the underlying suit were entirely misconceived on account of the fact that they were instituted against agents of a known principal, and on ground that the matters placed in issue in the suit are already the subject of a subsisting arbitral process. This court had on two occasions before already declared that it will not exercise jurisdiction over the matter in light of the submission to arbitration that is valid, binding, operative and enforceable. I found it unnecessary in the circumstances to consider the rest of the criteria for the grant of a temporary injunction.

In the result, I found that a *prima facie* case had not been established. There were no serious questions of law and fact to be tried by this court to justify the grant of a temporary injunction. The application was thus dismissed with costs to the respondents and the underlying suit was struck out with costs to the defendants.

Delivered electronically this 15th day of June, 2022

……Stephen Mubiru……..
Stephen Mubiru
Judge,
15th June, 2022.