

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

MISCELLANEOUS APPLICATION No. 0004 OF 2022

5 (Arising from East African Court of Justice Reference No. 0021 of 2019)

1. M/s SEMUYABA, IGA &CO. ADVOCATES } APPLICANTS
2. YU SUNG CONSTRUCTION LIMITED }

VERSUS

10 1. ATTORNEY GENERAL OF THE REPUBLIC }
OF SOUTH SUDAN }
RESPONDENT
2. AFRICAN EXPORT-IMPORT BANK } GARNISHEE
3. NILE PETROLEUM CORPORATION } GARNISHEE

15 **Before: Hon Justice Stephen Mubiru.**

RULING

a. Background.

20 The 2nd applicant is a private limited liability company incorporated in Kenya but also registered in the Republic of South Sudan. Following a commercial dispute between the 2nd applicant, and the Government of the Republic of South Sudan (GoSS) regarding contracts of construction of facilities for the army, the “Dr. John Garang Military Academy” and the “Natinga Warehouses,” the 2nd respondent on 1st November, 2019 instructed the 1st applicant law firm jointly with another law firm based in Nairobi, Kenya, to take out proceedings against the Attorney General
25 of the Republic of South Sudan (the respondent), before the First Instance Division of the East African Court of Justice. Those proceedings resulted in a consent judgment executed by the parties on 26th November, 2020 obliging the 1st respondent to pay a total sum of US \$ 49,398,473.91 and costs (subsequently taxed and allowed on 4th February, 2021 at US \$ 8,025,382.38), in four instalments, the last one of which was due on 30th September, 2021.
30 Despite several correspondences written thereafter by the Ministry of Justice and Constitutional Affairs of the Republic of South Sudan acknowledging that debt and undertaking to pay it, the sum decreed remained unpaid. The applicant together with the Kenya based law firm took out certificates of order requiring the Government of the Republic of South Sudan (GoSS) to pay the

decretal sum and costs awarded by the Court, without success. The applicants then took out garnishee proceedings before the Commercial Division of the High Court of Uganda against the 2nd and 3rd respondent, seeking recovery of the decretal sum and costs.

5 By the application as originally filed, the applicants sought the adoption, for purposes of enforcement, the decree and certificate of costs issued the East African Court of Justice. The applicants sought an order directing the 1st and 2nd garnishee, within seven days of the order, to furnish the applicants with a full account of all monies held in favour of the applicants / judgment creditors, sufficient to pay the applicants the travel costs of US \$ 8,025,382.38, and an
10 order directing the 1st and 2nd garnishee to remit to the applicants the said sum of US \$ 8,025,382.38 in satisfaction of the certificate of costs issued by the East African Court of Justice on 4th February, 2021 in the applicants' favour.

Upon amending their application, with the leave of court, the applicants now seek an order of
15 attachment of shares held by the Government of the Republic of South Sudan (GoSS) in the 2nd and 3rd respondents, and another prohibiting their transfer and the holders thereof from receiving any dividends due by virtue of those shares. They further seek an order directing the 2nd and 3rd garnishees to transfer any dividends due by virtue of those shares, to the benefit of the applicants until full and final settlement of the amount due as the decretal sum and costs. The applicants
20 further seek an order directing the 2nd and 3rd respondents to account for all monies they have received on behalf of the Government of the Republic of South Sudan and to disclose assets that exist elsewhere belonging to the Government of the Republic of South Sudan, that are capable of liquidating the decretal sum and costs due.

25b. The Preliminary Objections.

When the application came up for hearing Counsel for the 1st and 2nd garnishees raised a series of preliminary objections, contending that; the 1st applicant has no *locus standi* and was wrongly joined as a party to the application; the 1st garnishee enjoys procedural immunity from these
30 types of proceedings; there was no effective service of process upon the 1st garnishee; the application for execution is an abuse of process as a disguised application for discovery; the 2nd

applicant did not furnish an affidavit in support of the garnishee proceedings; this court cannot exercise territorial jurisdiction over the 2nd garnishee who is domiciled in the Republic of South Sudan; the applicant has not specified any amount by which the 2nd garnishee is indebted to the respondent but seeks to attach shares which are not a debt attachable; as a body corporate, the 2nd garnishee cannot be held liable for the obligations of its shareholders.

c. Submissions of counsel for the 1st Garnishee.

M/s AF Mpanga Advocates on behalf of the 1st Garnishee submitted that the 1st Garnishee enjoys process immunity in matters arising against persons acting for or deriving claims from a shareholder. The applicant's claim is derived from a claim against one of the 1st garnishee's shareholders; the Government of the Republic of South Sudan (GoSS). By virtue of the branch office agreement of the 1st garnishee, service can only be effected at its branch in Kampala with the express permission of its president. In absence of proof of such authorisation, service was not effective upon the 1st garnishee. The decree sought to be executed was signed by the Registrar of the East African Court of Justice and sent to the High Court of Kenya for execution. There is no order of transfer of the decree to the High Court of Uganda for purposes of its execution. The applicants have not provided court with the full set of documents required for execution of decrees sent to it from other courts. Although it is a credit and finance institution, the 1st garnishee does not carry-on banking business as defined by the law and thus the order for discovery sought against it is misconceived. Its immunity against process cannot be waived on account of the business transaction exception since it has not engaged in any business with the applicants. The 1st applicant, being only an advocate engaged by the 2nd applicant to represent it, is wrongly joined as a party to the application. The 1st applicant has never been a party to the proceedings before the East African Court of Justice, hence is incapable of seeking execution of the decree in that capacity.

d. Submissions of counsel for the 2nd Garnishee

M/s Elgon Advocates on behalf of the 2nd Garnishee submitted that contrary to the requirements of the rules of procedure, the application is supported by only one affidavit, that of the 1st

applicant. The 2nd applicant did not support the application with an affidavit. The applicant has not furnished evidence to show that the 2nd garnishee owes the judgment debtor any money. The application, characterised by its lack of precision, is a fishing expedition for such evidence. It is an application for discovery disguised as one for garnishee. The 1st applicant as the law form that represented the 2nd applicant in the underlying proceedings that led to the decree were not parties to the suit. The 1st applicant is not a decree holder and thus cannot take out garnishee proceedings. The costs sought to be recovered were awarded to the 2nd applicant and not the 1st applicant. The 1st applicant therefore has no locus standi in the matter. The 2nd Garnishee is a state corporation, incorporated and operating in the Republic of South Sudan. Courts in Uganda do not have jurisdiction over the 2nd Garnishee. When the application was amended, the applicants are now seeking the attachment of shares only; its character as a garnishee application ceased upon that amendment. Shares are not a debt and therefore are not attachable by garnishee.

e. Submissions of counsel for the applicants

M/s Semuyaba, Iga and Co. Advocates and Solicitors on behalf of the plaintiff submitted that upon the amendment of the application, the character of the application as one for garnishee was abandoned. As initially filed and subsequently as amended, the application has the component of requiring the 1st and 2nd garnishees to furnish the applicants with the specified information. The documents required were listed and served upon the 1st and 2nd garnishees in accordance with the rules of discovery. The 1st garnishee, although its headquarters are in Cairo, Egypt it has a branch in Kampala. Its operations in Uganda were ratified by *The African Export-Import Agreement (Implementation) Act, 2018*. On 19th September, 2017 the Republic of South Sudan acceded to the agreement establishing the African Export-Import Bank. Under that agreement, participating states become shareholders in the bank. The application for discovery seeks to prove that the respondents hold shares in the bank. The East African Court of Justice does not have a direct enforcement mechanism for its judgments. Its judgments are enforced following the civil procedure rules of the partner state where the execution is to take place. This Court has jurisdiction to issue an order against the Attorney General of the Republic of South Sudan requiring compliance with the obligation to satisfy the decree and order of costs. The Government of the Republic of South Sudan (GoSS) hold 99% shares in the 2nd garnishee and

upon amendment of the application, it ceased being a garnishee but remained a necessary party to the proceedings for the attachment of this shares. The 1st applicant seeks to enforce the decree as an agent of the 2nd applicant.

5f. The decision.

A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit (see *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] EA* 10 696). It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It is thus based on a commonly accepted set of facts as pleaded by both parties. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. Preliminary objections relate to points of law, raised at the outset of a case by the defence without going into the merits of the case. In any preliminary objection therefore, 15 there is no room for ascertainment of facts through affidavit or oral evidence. I have found that all objections raised by both garnishees in the instant case are based on the assumption that all the relevant facts pleaded by the applicants are correct, and do not require ascertainment through affidavit or oral evidence.

20 i. Whether service was effective upon the 1st garnishee.

The requirements of the right to a fair trial prohibit Courts from exercising jurisdiction over a person unless that person has proper notice of the court's proceedings. Personal jurisdiction is obtained through service of process, which is required in all *non-exparte* judicial 25 proceedings. Without proper service, no valid proceedings may take place. It is only after a plaintiff or applicant obtains proper service upon the defendant or respondent that the court obtains jurisdiction over the defendant or respondent to impose an enforceable judgment or ruling. If the plaintiff fails to obtain proper service upon the defendant or respondent, the proceeding must be dismissed due to the court's lack of jurisdiction.

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Generally, court process must be either given directly to the person against whom the proceedings have been initiated or left with a suitable person at their home or place of business. When court process is served on the adversary personally, service will be presumed effective. However, in cases where the adversary cannot be found or is either evasive or elusive of the process, the law provides alternative and substituted modes of service which when complied with will render service either effective or at least good.

Therefore, in determining whether or not service was effective, court looks at a plethora of factors inter alia; the process server, the conduct of the adversary, the circumstances surrounding the service and the availability of the adversary to deduce whether service was effective or merely good. Effective service is defined as, that having the desired effect or producing the intended result, whereby the desired result of serving court process is to make the adversary aware of the impending suit against him or her and give him or her an opportunity to respond to it by either defending himself herself, or admitting liability and submitting to judgement (see *Geoffrey Gatete and another v. William Kyobe, S.C. Civil Appeal No. 7 of 2005*). Where the adversary is a corporation, service must be effected upon a secretary, any director or other principal officer of the corporation, i.e. senior officers of the corporation who are responsible for the management of the corporation and therefore who are in a position to take action on behalf of the corporation (see *Kampala City Council v. Apollo Hotel Corporation [1985] HCB 77*). Process can only be served on someone the rules and statutes say can be served.

Service of process must be made on a recognised agent of the corporation in order to constitute valid personal service on a principal. Service on an administrative assistant, receptionist, secretary, part-time hourly worker, or other employee who is not a registered or recognised agent for receipt of process, may not satisfy the personal service requirement, regardless of whether the defendant received actual notice of the suit. Further, it is necessary that an employee who receives service should have “managerial or supervisory” responsibilities in the corporation and that the employee’s position affords reasonable assurance the he/she would inform the corporation that process has been served. In general, that is only a responsible person who is likely to make sure those documents end up in the hands of someone who can file a timely legal response for the defendant. If the corporation has a registered office, then service elsewhere not

being its registered office would be bad and not effective (*see Crane Bank Ltd v. Kabuye Victoria (Mrs)*, H. C. Misc. Application No. 719 of 2007).

5 The above position also applies to inter-jurisdictional service. The issuance and service of an originating process are fundamental issues that afford or rob a court of jurisdiction to adjudicate over a matter. Although the High Court exercises unlimited original jurisdiction, that jurisdiction is exercised within a clearly specified territory as provided for under the Constitution (see articles 5 (3), 139 (1) and the second schedule of *The Constitution of the Republic of Uganda, 1995*). as a general rule, the unlimited original jurisdiction of the High Court of Uganda is
10 confined to persons, assets and events occurring within those territorial boundaries. The Court will exercise jurisdiction in any action *in personam*, where the defendant is present or resides or carries on business within the territorial jurisdiction of the Court and such defendant has been served with the originating process. Thus, jurisdiction can be invoked either by residence or simply by presence within jurisdiction, where such defendant submits to the court's jurisdiction
15 or waives his or her right to raise a jurisdictional challenge.

Submission may be express, where the defendant signed a jurisdiction agreement or forum selection clause agreeing to submit all disputes to the courts of a particular legal system for adjudication either on an exclusive or non-exclusive basis. Submission may also be implied
20 where the defendant is served with a court process issued by a court other than where he resides or carries on business and the defendant enters an unconditional appearance and/or defends the case on the merit. It is important to note that as an attribute of the concept of sovereignty, the exercise of jurisdiction by a court of one State over persons in another State is *prima facie* an infringement of the sovereignty of the other State.

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To determine whether service was effective, Court will consider whether the objective of service was achieved instead of strictly applying literal stipulation of the rules. The process of deciding that must necessarily depend on a case-by-case approach. It is not possible to countenance a situation in which the adversary, though present in the Court, is still allowed to insist that unless
30 proper service of process be made upon him or her, he or she should be deemed to be unaware of the proceeding. Where therefore adversaries on their own motion file responses to the merits of

an application, it becomes superfluous to still insist that process should be served upon them (see *Rashida Abdul Karim Hanali v. Suleiman Adrisi, H. C. Misc. Civil Application No. 9 of 2017*). Once the facts show that the respondent has submitted himself to the jurisdiction of the court by conduct, the defence of lack of jurisdiction over his person or ineffective service is no longer available to him by reason of waiver.

The general requirements for waiver are relatively well-established and do not require detailed discussion. In essence, waiver can take the form of waiver by estoppel or waiver by election. The former refers to the situation where one party has (a) made a clear and unequivocal representation and (b) the other party has relied on that representation to his detriment. If both of these requirements are met it would be inequitable to allow the representing party to rely on his strict legal rights and therefore, he has waived those legal rights by estoppel. A representation does not need to take any specified form: it can be express or implied, and it can be by words or conduct. Mere silence or inaction will not normally suffice because it is equivocal. In certain exceptional circumstances, particularly where there is a duty to speak, mere silence may amount to a representation, or where one would factually have been expected to speak up, and therefore the silence becomes “significant” (see *Greenwood (Pauper) v. Martins Bank Limited [1933] AC 51*). If the court considers a defendant's conduct sufficiently dilatory or inconsistent with the later assertion of the defence of lack of jurisdiction or ineffective service, such conduct will be declared a waiver. Seen in this light, it would generally be the case that filing a substantive response to the claim without raising the objection to service, would be inconsistent with any subsequent position that the service was invalid.

There exists a strong policy to conserve judicial time and effort by reason whereof preliminary matters such as defective service, personal jurisdiction and venue should be raised and disposed of before the court considers the merits or quasi-merits of a controversy. It is important to note that a defendant waives the defence of ineffective service of process if it is not raised in the first responsive pleading or filing submitted by the defendant. According to Order 9 rule 3 (1) (b) of *The Civil Procedure Rules*, a defendant who wishes to dispute the jurisdiction of the court in the proceedings by reason of an irregularity in the service of the summons, or in any order giving leave to serve the summons out of the jurisdiction or on any other ground, should give notice of

intention to defend the proceedings and, within the time limited for service of a defence, apply to the court for an order declaring that the summons has not been duly served on him or her. This constitutes a special appearance which does not subject such a litigant to the jurisdiction of the court. The plaintiff's case may as well be subject to dismissal if the defendant preserves the
5 defence in his first responsive pleading.

However, on the other hand, if a defendant fails to raise the defence of lack of jurisdiction over his person by timely motion or answer, the defence is waived. A defendant makes a voluntary appearance in a suit commenced against him when he submits himself by accepting service of
10 process, filing an answer without having been served with process, entering his appearance on record, or doing any other overt act which will constitute a general appearance. A voluntary general appearance is equivalent to personal service of summons on defendant and waives objections to the jurisdiction of the court over his person. A general appearance waives any defects in the jurisdiction of the court for want of valid summons or of proper service thereof.

15 In the instant case, Article VII (1) of *The African Export- Import Bank Agreement (Implementation) Act, 2018* provides as follows;

20 Actions may be brought against the Bank in any court of competent jurisdiction in the territory of the state where the headquarters of the Bank is situated or in which the Bank has a representative or branch office or a subsidiary or has carried out any operation or appointed an agent for the purpose of accepting service or notice of process or has otherwise agreed to be sued. No such action against the Bank shall be brought by: (a) a Participating State; (b) a shareholder or a former shareholder of the
25 Bank or persons acting for or deriving claims from a shareholder or a former shareholder; or (c) any natural or legal persons in respect of: (i) transactions governed by arbitration agreements; (ii) matters pending before an arbitral tribunal; and (iii) personnel matters.

30 By virtue of Article V (4) of that Act, the state in whose territory a branch or representative office or a subsidiary is to be located is required to sign with the Bank, and take all necessary measures to make effective in its territory, an agreement regarding the location of the respective branch or representative office or subsidiary. Accordingly, the agreement to host the African

Export-Import Bank branch in Uganda (the Branch Office Agreement) signed on 20th September, 2019 under Article VI (1) provides as follows;

5 The Kampala Branch Office shall be inviolable. No Officer or official of the Republic of Uganda, be they administrative, judicial, military or police or other person exercising any public authority within the republic of Uganda shall enter the Kampala Branch to perform any duties therein except with the consent of and under conditions approved by, the President. The service of legal process, including the seizure of private property, shall not take place within the Kampala Branch except
10 with the express consent of the President

Whereas it is correct that by virtues of article 123 of *The Constitution of the Republic of Uganda, 1995* treaties are not self-executing, contrary to the submissions of counsel for the applicant, according to section 2 (a) of *The Ratification of Treaties Act*, agreements of this type are ratified
15 by Cabinet and do not require a statutory instrument to have legal effect. The only requirement is that the instrument of ratification should be signed, sealed and deposited by the Minister responsible for foreign affairs, and laid before Parliament as soon as possible.

By virtue of that agreement, service of legal process upon the 1st Garnishee cannot not take place
20 within the Kampala Branch except with the express consent of the President of the Bank. This application was filed on 3rd February, 2022 and a copy thereof was served on the 1st garnishee at its branch office in Uganda on an unspecified date and upon an undisclosed person. On 11th April, 2022 the 1st garnishee filed an affidavit in reply thereto by its Regional Chief Operating Officer but in paragraph two thereof indicated that it did not, by that fact alone, waive its right to
25 challenge the competence of the application. The 1st garnishee therefore neither submitted to the court's jurisdiction nor waived its right to raise a jurisdictional challenge.

A corporation may have a registered office (usually the headquarters) as well as a branch office, and each office type serves a different role within the corporation. The registered office is usually
30 the hub of the corporation and often serves as the central location where top decisions are made. The registered office is generally where the executives of the corporation, including the CEO, maintain their offices. Branch offices spread elsewhere take their direction on corporate policy and practices from the decisions made at the corporate office. Someone may or may not be

present as an authorised or recognised agent at a branch office, to receive service of legal documents during normal business hours. Another risk is that staff at the branch office may mishandle or ignore the documents because of a lack of training, or may be busy with their own regular work or distracted by personal issues. Seldom will branch offices be equipped to handle legal process in a timely manner.

While a company registered in Uganda can be served at its registered office or any place of business of the company, within the jurisdiction which has a real connection with the claim, unless duly authorised the branch office of an international corporation is generally not a recognised agent for purposes of service. Where a place of service has been nominated to accept service of proceedings and the address for service has been given, service of proceedings on any other address is not valid service and may lead to the striking out of the claim (see *Nanglegan v. Royal Free Hospital NHS Trust* [2002] 1 WLR 1043). Delivery of process on a person who is not a recognised agent of the person to be served does not amount to service even though the process reached that person (see *Narbheram Chakubhai v. Patel* (1948) 6 ULR 211).

The bottom line when it comes to service of process upon corporations is that the person served must be either authorised by the law or the corporation to accept service on its behalf. In the instant case, there is no proof that any person at the Kampala Branch Office is expressly authorised by the President of the 1st garnishee to receive process on its behalf, yet neither is there proof that the person served thereat had “managerial or supervisory” responsibilities in the corporation or a position that affords reasonable assurance the he/she would inform the 1st garnishee at its headquarters in Cairo that process has been served. For those reasons this objection is upheld. Service was not effective upon the 1st garnishee, a reason that justifies dismissal of the application against it.

ii. Whether this court is seized with jurisdiction to enforce the decree of the East African Court of Justice.

It is trite that every judgment of court must be obeyed and is effective from the date of its delivery or from such a date stated in the judgment itself. A judgment of a Court of competent

jurisdiction, it must be noted is valid until set aside on appeal and as such must be obeyed. Although courts hand down judgments, they do not proceed to enforce them on behalf of the successful party or judgment creditor without further action. If a judgment debtor fails to comply voluntarily with what the enforceable judgment imposes on him or her, the judgment creditor may apply to the court for judicial enforcement or execution. Enforcement is the last stage of the judicial process after the legal right, claim or interest has been determined on the merit in a Judgment or Order by the Court which remains to be enforced. The process of enforcement is broadly referred to as execution. Lord Denning aptly summarized the process when he stated in the case of *Re, Overseas Aviation Engineering (GB) Ltd. (1963) 24 Ch 39 at 40*;

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Execution means quite simply the process for enforcing or giving effect to the Judgment of the court..... In case when execution was had by means of a common law Writ when such as *fiery facias*..... It was legal execution; when it was had by means of an equitable remedy, such as the appointment of a Receiver, then it was equitable execution because it was the process for enforcing or giving effect to the judgment of the Court.

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A decree may be executed by the court which passed the judgement and decree, or by some other court which has the competence to implement the judgement passed by such other court. The general principle of international law applicable cases of this type is that a state exercises the right to examine foreign state judgments and those of regional courts, for four causes: (i) to determine if the court that issued the judgment had jurisdiction; (ii) to determine whether the defendant was properly notified of the action; (iii) to determine if the proceedings were vitiated by fraud; and (iv) to establish that the judgment is not contrary to the public policy of the foreign country. In general, the recognition and enforcement of foreign judgments and those of regional courts is governed by local domestic law and the principles of comity, reciprocity and *res judicata*. Generally, a judgment is enforceable if none of the parties challenge it within stipulated deadlines and the matter becomes *res judicata*.

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Foreign judgments may be recognised based on bilateral or multilateral treaties or conventions or other International Instruments. The “recognition” of a foreign judgment occurs when the court of one country accepts a judicial decision made by the courts of another “foreign” country, and issues a judgment in substantially identical terms without rehearing the substance of the original

suit. Recognition of a judgment will be denied if the judgment is substantively incompatible with basic fundamental legal principles in the recognising country.

5 *The East African Community (EAC) Treaty* established the East African Court of Justice in 1999 and was inaugurated in November 2001. The Court's major responsibility is to ensure the adherence to law in the interpretation, application of and compliance with *The East African Community Treaty* (see Article 23 of the Treaty), thus ensuring the uniform interpretation of Community law. Certainty and effectiveness of the East African Court of Justice decisions as a Court of competent jurisdiction, requires an international legal regime that governs the
10 recognition and enforcement of its judgments, resulting from proceedings based on the treaty, by providing for a system of registration to facilitate the direct enforcement of decrees by the States Parties.

It is important to bear in mind that the rule of law is seriously undermined, and the credibility of
15 any judicial system is seriously tarnished when judicial decisions cannot be enforced without any justifiable reason. Judgments of the East African Court of Justice are enforced on the principle that where it, as a court of competent jurisdiction, has adjudicated upon a claim in civil or commercial matters, a legal obligation arises for the execution courts of competent jurisdiction within the Partners States' Courts where the judgment needs to be enforced, to ensure
20 satisfaction of that claim. The execution court is one within whose local jurisdiction the judgment debtor has his or her permanent residence, registered office or where the debtor has assets. It must be shown that there exists a real and substantial connection between that court and the judgment debtor. A fleeting or relatively unimportant connection will not be enough to give courts in Uganda jurisdiction. An entity or person other than a natural person is considered to be
25 resident in the State; - a) where it has its statutory seat; b) under whose law it was incorporated or formed; c) where it has its central administration; or d) where it has its principal place of business.

Enforcement of a judgment of a foreign or international Court involves an interplay between the
30 international legal system and national laws amidst a range of bilateral and international treaties. In order to enforce a foreign judgment, the High Court of Uganda must first recognise, and it will

do so where such judgment is final, the court that issued it had the necessary jurisdiction to do so and the judgment was not otherwise obtained by fraud or in breach of natural justice or public policy. Unless a defence to recognition and enforcement is shown to exist, a foreign judgment is enforceable either on basis of reciprocity or obligation (see *Christopher Sales v. Attorney General Civil Suit 91 of 2011*), where such judgment; - (a) comes from a court of competent jurisdiction, (b) is final and conclusive and (c) the order is adequately precise.

A decision is final and conclusive when the foreign or international Court that pronounced the it no longer has the power to rescind it. To be executable, the judgment must be final and complete, as to the entire subject matter and all the causes of action; it must effectively determine the litigation on the merits, and not merely interlocutory or intermediate steps therein; and it must fully determine the rights of the parties so that nothing remains to be done by the trial court. The fact that a judgment is under appeal does not undermine its finality. Rule 87 (1) of *The East African Court of Justice Rules of Procedure, 2019* specifically provides that an appeal does not operate as a stay of proceedings or of the decree or order appealed from except so far as the Court may order, nor should execution of a decree or order be stayed by reason only of an appeal having been preferred from the decree or order; but the Court may for sufficient cause order stay of execution of such decree or order.

The three purposes of finality are; first, the domestic court knows precisely what it is agreeing to recognise and enforce. Second, finality removes the risk of the injustice that would be done to the party against whom the foreign judgment is enforced if that judgment is subsequently changed. Third, finality removes the risk of undermining public confidence that might arise if the domestic court were to issue a recognition judgment and permit its enforcement, only to have the foundation of that order, namely the foreign judgment, disappear. This Court therefore may in a proper case exercise its discretion to delay or stay the execution of a judgment of that court within its jurisdiction, pending the determination of the appeal of that judgment by the East African Court of Justice.

By signing the Treaty for the Establishment of the East African Community, a Partner State of the East African Community undertakes to comply with the decisions of the Court in any case to

which it is a party in keeping with the principle of *pacta sunt servanda*, as codified in Article 26 of the *Vienna Convention on the Law of Treaties* thus; “every treaty in force is binding upon the parties to it and must be performed by them in good faith.” Article 38 (3) of *The East African Community Treaty* requires member states and the EAC Council to take immediately and without
5 delay, all measures necessary to implement a Court judgment. Any award which imposes a financial damages obligation will be enforced through civil procedure rules of the member state where the judgment is enforced.

The general principle of private international law is that the procedure for recognition,
10 declaration of enforceability or registration for enforcement, and the enforcement of a judgment of a foreign or international Court, is governed by the law of the requested State unless the Convention establishing the regional Court provides otherwise. Article 44 of *The East African Community Treaty* provides that;

15 The execution of a judgment of the Court which imposes a pecuniary obligation on a person shall be governed by the rules of civil procedure in force in the Partner State in which execution is to take place. The order for execution shall be appended to the judgment of the Court which shall require only the verification of the authenticity of the judgment by the Registrar whereupon, the party in whose favour execution is to
20 take place, may proceed to execute the judgment.

Similarly, rule 85 (2) of *The East African Court of Justice Rules of Procedure, 2019* stipulates that where a judgment of the Court imposes a pecuniary obligation on a person, its execution is governed by the Rules of Civil Procedure in the Partner State in which the execution is to take
25 place. Under both provisions, a judgment which imposes a pecuniary obligation on a judgment creditor is recognised only if; (i) it is declared authentic by way of verification by the Registrar of the East African Court of Justice; and (ii) it is found enforceable under the rules of civil procedure in force in the Partner State where it is sent for execution. Recognition or enforcement
30 of Justice or if the time limit for seeking ordinary review has not expired. A refusal does not prevent a subsequent application for recognition or enforcement of the judgment.

It is to be borne in mind that, in empowering the East African Court of Justice to transfer decrees for execution, the competency of Courts in respect of jurisdiction is kept in view, such that decrees can be transferred only to a Court competent to try the same in respect of its nature or pecuniary value. According to section 33 (1) of *The Civil Procedure Act* and Order 22 rule 6 of *The Civil Procedure Rules*, the court executing a decree sent to it has the same powers in executing the decree as if it had been passed by itself. Where the court to which the decree is sent for execution is the High Court, the decree is executed by that court in the same manner as if it had been passed by that court in the exercise of its ordinary original civil jurisdiction. In this regard, therefore, I am of opinion that the pecuniary jurisdiction to entertain the suit would be the criterion for determining the jurisdiction for executing the decree passed thereon. A Court is deemed to be a Court of competent jurisdiction if, at the time of making the application for the transfer of decree to it, such Court would have pecuniary jurisdiction to try the suit in which such decree was passed. By virtue of its unlimited pecuniary jurisdiction, thus court would be competent to execute a decree sent to it by the East African Court of Justice, for execution.

Ordinarily an application for execution is expected to be filed in the first instance, only in the court which passed the decree. It is only in cases where the Court which passed the decree is unable to execute it, that the provisions for the transfer or transmission of such decree and the procedure prescribed therefor, come into play. The Circumstances in which the High Court of Uganda will be seized with jurisdiction to execute decrees transferred to it are guided by section 33 of *The Civil Procedure Act*, which states as follows;

31. Transfer of decree.

- (1) The court which passed a decree may, on the application of the decree holder, send it for execution to another court—
- (a) if the person against whom the decree is passed actually and voluntarily resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of that other court;
 - (b) if that person has no property within the local limits of the jurisdiction of the court which passed the decree sufficient to satisfy the decree and has property within the local limits of the jurisdiction of that other court;

(c) if the decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of the court which has passed it; or

(d) if the court which has passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by that other court.

(2) The court which passed a decree may of its own motion send it for execution to any court of inferior but competent jurisdiction.

Therefore, before making the application, a judgment creditor must determine whether the above criteria is met. If what is sought is execution by way of attachment of assets, the judgment creditor must ascertain that there exists disposable property of the judgment creditor within the territory of Uganda. Disposable property means any property which may be attached and sold in execution, situated within Uganda, which includes both movable and immovable property and also incorporeal assets, such as book debts. The jurisdiction of the High Court of Uganda as a transferee Court ceases when the copy of the decree is returned by it to the East African Court of Justice that transferred the decree, stating the fact of such execution or where it fails to execute the same, the circumstances attending such failure with a certificate of non-satisfaction (see section 32 of *The Civil Procedure Act*).

Procedurally, transfer of the decree for execution is regulated by rule 85 (1) and (3) of *The East African Court of Justice Rules of Procedure, 2019* which requires a party who wishes to execute a decree or order of the Court in accordance with Article 44 of the Treaty to make an application for an execution order in accordance with Form 9 in the Second Schedule of the Rules. The rule empowers the East African Court of Justice which passed the decree, to transfer the same for execution to a Court of competent jurisdiction within the Partner State where it is to be executed, on the application of the decree-holder. The order for execution has to be appended to the copy of the judgment verified by the Registrar, whereupon the party in whose favour execution is to take place, may initiate execution proceedings. By virtue of the above provisions, the party seeking recognition for purposes of enforcement of a decree of the East African Court of Justice should produce; - (a) a complete and verified copy of the judgment; and (b) an order for execution of the decree appended to the copy of the judgment verified by the Registrar. The

transferee Court gets jurisdiction to execute the decree only when it receives a complete set of these documents.

5 Although there is no provision in *The East African Court of Justice Rules of Procedure, 2019* which prevents a decree-holder from seeking the execution a decree against the property of the judgment-debtor simultaneously in more than one Partner State, a decree cannot be executed by the High Court of Uganda, as a transferee Court, in the absence of a proper transmission made by the East African Court of Justice which passed the decree. In any event, simultaneous execution proceedings in more than one Partner State, although possible, is ideally a power that should be
10 used in a restricted manner, in exceptional cases by imposing proper terms so that the judgment debtors do not face any hardship because of several executions being allowed to be proceeded with at the same time, since it may also enable the decree-holder to proceed in fraud of the judgment-debtor by way of over-attachment. It helps though that the prescribed application for an execution order, FORM 9 of *The East African Community Court of Justice Rules of*
15 *Procedure, 2019* requires the judgment debtor to state whether the decree has been satisfied in part or not and if so to what extent. Ideally therefore, a subsequent order for execution of a decree ought to be issued when the previous one is returned by a bailiff *nulla bona*, because there is no ascertainable property within the relevant jurisdiction which may be seized in satisfaction of the judgment, or disposable property sufficient to satisfy it.

20

From the provisions of rule 85 (1) and (3) of *The East African Court of Justice Rules of Procedure, 2019* it would be seen that the East African Court of Justice is not only required to transmit to this Court a complete and verified copy of the judgment but also pass an order for transfer of the decree specifically to this Court. A mere order directing the decree to be
25 transferred for execution would by itself not suffice. Therefore, unless the decree is accompanied by the order of transfer and the certificate of non-satisfaction, the decree-holder would not be expected to take further steps in the matter by filing an execution application in the transferee Court since it would not be seized with jurisdiction over the decree.

30 In the instant case, the applicants have neither furnished this court with a verified copy of the judgment nor a specific order for transfer of the decree to this Court. The order of transfer of the

decreed attached to the application dated 25th February, 2021 is addressed to “The Registrar, High Court of Kenya, Milimani Commercial Courts, Nairobi, Kenya.” The decree is not transferred to this Court but to another Court in another Partner State. The jurisdiction of this court to enforce the judgments and decrees of the East African Court of justice is conferred by o a specific and proper order for transfer of the decree to this Court. To purport to act on a decree of that Court without proper transfer, would be tantamount to a usurpation of jurisdiction by this Court. For that reason, this objection too is upheld.

iii. Whether the 2nd applicant is a proper party to the proceedings.

Rule 85 (1) and (3) thereof envisage that it is “a party who wishes to execute a decree or order of the Court in accordance with Article 44 of the Treaty,” that may make an application for its execution. Similarly, Order 22 rule 7 of *The Civil Procedure Rules*, provides that “where the holder of a decree desires to execute it, he or she shall apply to the court which passed the decree, or, if the decree has been sent.....to another court, then to that court...” By way of comparison, section 1 (d) of *The Foreign Judgments (Reciprocal Enforcement) Act*, defines a “judgment creditor” as “the person in whose favour the judgment was given, and includes any person in whom the rights under the judgment have become vested by succession or assignment or otherwise.” Rule 2 of *The East African Court of Justice Rules of Procedure, 2019* defines a “party” to mean any person who is appearing in any proceedings before the Court as an appellant, applicant, claimant, respondent, third party or intervener. In any event, the prescribed application for an execution order, FORM 9 of *The East African Community Court of Justice Rules of Procedure, 2019* is to be made and signed by a “decree holder.”

It follows that the only persons who may file an application for execution of a decree are: - the decree-holder; the legal representatives of the decree-holder, if the decree-holder is dead; an agent of the decree-holder; and any person claiming under the decree-holder as transferee of the decree. A person who is neither a decree-holder nor has a right to execute a decree cannot apply for its execution. Similarly, a third party or a stranger has not right to apply for execution even if he is a beneficiary under a compromise.

The 1st applicant acknowledges that it was not a party to the proceedings that led to the decree now sought to be enforced, since it was only retained as counsel representing the 2nd applicant. However, the 1st applicant argues that it has the capacity to appear as a party in this application in its own right as an agent of the 2nd respondent. Unfortunately, this submission is
5 misconceived. It is trite that an agent does not have the capacity to take out proceedings in his or her own name and such proceedings will be struck out as a nullity (see *Ayigihugu and Company Advocates v. Mary Muteteri Munyankindi [1988-90] HCB 161*). An agent can only sue in the name of the principal (see *Kateregga Paul v. Tugume Jackson, H.C. Misc. Application No. 885 of 2014* and *Boutique Shazim Ltd v. Norattam Bhatia and another, C. A. Civil Appeal No. 36 of*
10 *1997*). For that reason, this objection too is upheld.

iv. Whether it is proper for the applicants to seek discovery in aid of execution.

The judgment creditor has a number of supplementary reliefs available to enjoin the conveyance
15 or dissipation of the debtor's property, to preserve such property, to have it disclosed and restored or to acquire such other relief as may be necessary and appropriate. Among such reliefs is post-judgment discovery in aid of execution. The judgment creditor may apply for supplementary relief at any time after judgment has been entered in his or her favour. The filing of an application for execution is not a prerequisite for seeking such relief; rather, it is the right of a
20 judgment creditor to apply as a matter of course. Since this proceeding may be invoked before execution, no unsuccessful attempt to discover the judgment debtor's property need be shown. The application though may be filed separately or concurrently with one seeking any of the modes of execution. Order 10 rule 12 of *The Civil procedure Rules* coupled with section 34 of *The Civil Procedure Act* allow for the judgment creditor, at any time before a judgment is
25 satisfied or vacated, to compel disclosure of all matters relevant to the satisfaction of the judgment.

Since the right to conduct discovery applies both before and after judgment, it is crucial to distinguish between pre-trial discovery and post-judgment discovery in aid of execution. There
30 are differences between merits pre-trial discovery and post-judgment enforcement discovery. In fact, the two mechanisms are similar only in that they both lead to the production of information.

Beyond that, they have different purposes, different standards, different presumptions, different means to deter bad faith conduct, and differing interests.

5 Pre-trial discovery aims to achieve the following; (i) to give greater assistance to the parties in ascertaining the truth and in checking and preventing perjury; (ii) to provide an effective means of detecting and exposing false, fraudulent and sham claims and defences; (iii) to make available, in a simple, convenient and inexpensive way, facts which otherwise could not be proved except with great difficulty; (iv) to educate the parties in advance of trial as to the real value of their claims and defences, thereby encouraging settlements; (v) to expedite litigation; (vi) to safeguard
10 against surprise; (vii) to prevent delay; (viii) to simplify and narrow the issues; and, (ix) to expedite and facilitate both preparation and trial. Pretrial merits discovery serves to avoid surprise and the possible miscarriage of justice, to disclose fully the nature and scope of the controversy, to narrow, simplify, and frame the issues involved, and to enable a party to obtain the information needed to prepare for trial. Parties may obtain discovery regarding any
15 nonprivileged matter that is relevant to any party's claim or defence. an item of information sought is relevant to a claim or defence if the requesting party can articulate a logical relationship between the information sought and possible proof or refutation of the claim or defence at trial.

In pre-trial discovery, an application or request must specify the items to be produced or
20 inspected, either by individual item or by category, and describe with reasonable particularity each item and category. The applicant must properly identify the documents being sought and also establish their relevance and likelihood that they will materially assist the party's case. Court has a duty to limit discovery where it is unreasonably cumulative or duplicative, where there has already been ample opportunity to obtain the information sought, or where the
25 discovery is not proportional to the needs of the case. There is also no pre-trial discovery available against non-party witnesses other than those falling within the limited scope of *Norwich Pharmacal discovery* (i.e., discovery against third parties who got innocently mixed up in the wrongdoings of others; see *Norwich Pharmacal Company and others v. Customs and Excise [1974] AC 133*).

30

The court must guard carefully against discovery requests calculated to impose expense or to force settlement, rather than to produce useful information. Pre-trial discovery is meant to allow the parties to flesh out allegations for which they initially have at least a modicum of objective support. It turns into a fishing expedition when the request goes beyond allegations of fact contained in the pleadings, and into an attempt at finding additional violations or claims (see *John Kato v. Muhlbauer AG and another H. C. Misc. Application No. 175 of 2011*). It is a fishing expedition when the process is used to discover whether there is a case at all, rather than to support well-founded grounds. It is in essence a speculative search for information in order to discover something the applicant knows nothing about, which could allow him or her to present a case of which he or she is not currently aware, and without any real expectation of the result of the search or its relevance to the case.

For example, in *O. Co v. M. Co [1996] 2 Lloyd's Rep 347 at 351*, Colman J, while considering the corresponding English position, rightly frowned on “discovery demands which would involve parties to civil litigation being required to turn out the contents of their filing systems as if under criminal investigation on the off-chance that something might show up from which some relatively weak inference prejudicial to the case of the disclosing party might be drawn.” He added that the document or class of documents must be shown by the applicant “to offer a real probability of evidential materiality in the sense that it must be a document or class of documents which in the ordinary way can be expected to yield information of substantial evidential materiality to the pleaded claim and the defence to it.”

On the other hand, post-judgment discovery and interrogatories in aid of execution by necessity partake of different values than pretrial discovery. They allow the prevailing party to ascertain the existence, nature and location of assets, if any, the judgment debtor has to satisfy the judgment debt. Another purpose is to discover concealed or fraudulently transferred assets. It may also be invoked to compel disclosure of the location of a known but missing piece of property. The process of post-judgment discovery may include common tools known in civil or criminal cases such as depositions, interrogatories, requests for admissions, and demands for the production of documents, but typically consists of interrogatories and requests to produce. By the debtor’s failure to answer the post-judgment discovery, the creditor can file a motion to compel

the responses required by the post-judgment discovery. In aid of the judgment or execution, the judgment creditor or a successor in interest whose interest appears of record may obtain discovery from the judgment debtor,

5 Post-judgment discovery works more or less the same way as pre-trial discovery, and is governed similarly by court rules that dictate what information or documents the parties may exchange, timeframes for exchanging it, and penalties for defying discovery requests. Post-judgment discovery though can be more extensive, intrusive, and very broad in scope as it is designed to allow the judgment creditor to cast a long shadow over the assets potentially
10 available to satisfy its judgment, although procedure and due process remain sacrosanct. The judgment creditor is permitted to make a broad inquiry to discover any hidden or concealed assets of a judgment debtor. Through post-judgment inspection demands, the judgment creditor may obtain documents disclosing the debtor's assets or earnings, e.g., tax returns, financial statements, payroll stubs, real property deeds, stock certificates, passbooks, deposit account
15 statements, bonds, trust deeds, motor vehicle ownership certificates, promissory notes, etc. Discovery may be sought not only of assets currently owned by the debtor, or information reasonably calculated to lead to assets currently owned by the debtor, but also of information on any assets that may have been owned by the debtor during the pendency of the dispute or the debt. There is a presumption in favour of full discovery of any matters arguably related to the
20 creditor's efforts to trace the debtor's assets and otherwise to enforce the judgment. The type of property to be disclosed is unlimited; it may be real or personal, tangible or intangible.

Even though post-judgment discovery may resemble the proverbial fishing expedition, a judgment creditor is entitled to fish for assets of the judgment debtor otherwise he or she will
25 rarely obtain satisfaction of his judgment from a reluctant judgment debtor. While the permissible scope of discovery is wider than that at the pre-trial stage, nevertheless the courts may justifiably restrict it to require disclosure of the whereabouts only of a particular item or category asset of assets, rather than allow the judgment creditor to attempt a fishing expedition. The Court will not permit parties to embark on a "fishing expedition" in the hope of locating
30 disposable property; there must be a basis beyond mere speculation. post-judgment discovery may amount to a fishing expedition in circumstances where the judgment creditor has no idea

whether there are any fish in the pond. The court should balance the judgment creditors right to discovery with the need to prevent fishing expeditions. Vague, overbroad, from a time perspective, and unduly burdensome requests will be rejected. Post-judgment asset discovery must be “relevant” to satisfying the judgment. If an asset cannot be seized, sold, and applied to a judgment, it cannot be “relevant” to satisfaction of a judgment.

An order of post judgment discovery permits the judgment creditor to inspect and copy documents in the possession, custody or control of the judgment debtor in the same manner and in the same time provided in Order 10 rule 12 of *The Civil procedure Rules*. A judgment creditor does not ordinarily have any right to require the disclosure of assets of persons other than the judgment debtor. This is because according to Order 10 rule 12 (1) of *The Civil procedure Rules*, “any party may, without filing any affidavit, apply to the court for an order directing any other party to the suit...” The plain language of the rule, therefore, and the use of the term “directing any other party to the suit,” rather than “any person,” presupposes that the rule does not envisage that there may be non-parties to the judgment or underlying litigation from whom the judgment creditor may need to obtain discovery in order to aid in the collection of the judgment.

However, and only exceptionally, a non-party may be subject to post judgment discovery where the judgment creditor can provide a good reason and close link between the unrelated entity and the judgment debtor. The most common form of post-judgment discovery directed towards a non-party occurs under circumstances where the non-party is in possession and /or control of some of the judgment debtor’s assets. The judgment creditor is permitted to guess that a certain person has knowledge of the judgment debtor’s property and, on that basis, have him or her ordered to disclose its whereabouts. It must be disclosed in the application the reasons of belief that the third party has some property or thing in action belonging to the judgment debtor, which is not exempt from execution.

The judgment creditor may then apply to the court for an order, upon a sound basis for such belief, allowing the judgment creditor to examine, under oath, any third party in possession or control of the property of the judgment debtor or who is himself indebted to the judgment debtor. Inquiries of non-parties must be kept pertinent to the goal of discovering concealed assets of the

judgment debtor and not be allowed to become a means of harassment of the non-parties. A third party's personal assets are not subject to discovery or execution merely because the individual also serves as the managing agent of a judgment debtor in a representative capacity. Discovery must be relevant to finding assets of the judgment debtor and cannot be used for harassment or to discover assets of the third party itself.

A judgment creditor has the right to discover any assets the judgment debtor might have that could be subject to execution to satisfy the judgment, or assets that the debtor might have recently transferred. Save for that fact that some of the orders sought, such as that seeking an account "for the monies they have received for and on behalf of the respondent" would have been rejected for being too broad, I find in this case that the facts pleaded by the applicants establish the requisite close link between the judgment debtor and the two garnishees beyond mere speculation and good reason to warrant discovery orders against both garnishees. The information sought from the garnishees is necessary and relevant for applicants to determine whether the respondent has attachable assets in their custody and control, or is transferring them in order to evade collection of the judgment. However, by reason of the fact that other objections of a fundamental nature have already been upheld, these orders cannot now issue.

v. Whether the 1st garnishee enjoys process immunity and the respondent together with the 2nd garnishee, jurisdictional immunity.

In principle the theoretical justification for state immunity from execution is that it protects the sovereign state from finding itself in a situation of inability to perform its public service functions, because of the seizure of its property. Inasmuch as some public service missions of the State are carried out by public corporations or by state-owned enterprises created by the State, these entities also enjoy immunity from execution. While State immunity derives from the principle of sovereign equality of States, it is widely accepted that the immunity of international organisations is based on the principle of functional necessity: immunities are necessary to shield such organisations from unilateral intervention by member States, so as to ensure their ability to function autonomously and effectively. The 1st garnishee claims process immunity on account of

Article VII (1) (b) of *The African Export- Import Bank Agreement (Implementation) Act, 2018* which provides that;

5 No such action against the Bank shall be brought by: (a) a Participating State; (b) a shareholder or a former shareholder of the Bank or persons acting for or deriving claims from a shareholder or a former shareholder; or (c) any natural or legal persons in respect of: (i) transactions governed by arbitration agreements; (ii) matters pending before an arbitral tribunal; and (iii) personnel matters.

10 An international organisation cannot truly act for the common interests of all member states, unless it can act independently from control or influence of any individual state. One of the most effective and threatening means of control is to subject the organisation's act to a state's national jurisdiction. The primary explanation of the immunities of international organisations is thus as a guarantee of the international status that they require in order to fulfil their functions. In agreeing
15 to the immunity of an international organisation each Partner State undertakes not to seek any undue influence or obtain any undue benefit from the organisation, by refraining from the exercise of jurisdiction over it. A violation of this undertaking is therefore not only a violation of the principle of *pacta sunt servanda* (to the extent it involves a breach of treaty), but also, as an infringement of the jurisdictional rules which reserve a genuinely independent place for the
20 organisation. one of the most important protections granted to international organisations is immunity from suits by Participating States or shareholders of the organisation in suits arising out of such status.

There is a debate on the scope of immunity from execution as to whether claims against a state
25 arising from commercial activities, known as *acta jure gestionis*, should be allowed enforcement, as opposed to sovereign activities, known as *acta jure imperii*. This debate attempts to draw a demarcation line between immune and non-immune State activities. As a general principle, a foreign state is not immune from the jurisdiction of the courts of Uganda in any case in which the action is based upon a commercial activity carried on in Uganda by the foreign state; or upon an
30 act performed in Uganda in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of Uganda in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in Uganda.

By extension, the Courts may condition or limit the enjoyment by international organisations of any such immunity in light of the functions performed by the international organisations in question. It is not clear though that the lending activity of international development banks, such as those that make conditional loans to governments, qualifies as commercial activity. The commercial character of an activity is therefore determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose. In this context, a commercial activity is either a regular course of commercial conduct or a particular commercial transaction or act.

10 A literal interpretation of Article VII (1) (b) of *The African Export- Import Bank Agreement (Implementation) Act, 2018* leads to the conclusion that it does not call for immunity of the 1st garnishee from suit before the domestic courts of Uganda, where its branch is located, unless a person sues it on behalf of one (or more) of the Participating States or a shareholder or a former shareholder of the Bank or persons acting for or deriving claims from a shareholder or a former
15 shareholder. In essence the 1st garnishee enjoys immunity from every form of legal process, except in cases arising out of or in connection with the exercise of its powers to borrow or lend money, to guarantee obligations, or to buy and sell or underwrite the sale of securities, in which cases suits may be brought against the Bank in a court of competent jurisdiction in Uganda where it has its branch office.

20 Shares are merely a right of participation in the corporation on the terms of its constituent documents. Shareholders can claim for direct injury to their rights as shareholders, such as the right to vote and to receive any declared dividends. Shareholder's direct rights are often also considered to include protection against expropriation of company assets. To the extent that the
25 applicants seek to attach shares and any dividends accruing therefrom, the nature of this application is of "persons deriving claims from a shareholder." A claim is deemed to be derived from that of shareholder when it has not its origin in itself, but owes its existence to the rights enjoyed by a shareholder; it is not original in character but dependant on such rights. The applicants have no personal claim against the 1st garnishee; their claim is through the respondent
30 on account of her being a shareholder of the 1st garnishee. Indeed the 1st garnishee enjoys process immunity against applications of this nature.

As regards the 2nd garnishee, which is a state corporation whose operations are in the Republic of South Sudan, what the applicants seek to obtain from this Court is a transnational asset discovery order. Transnational asset discovery typically runs into two roadblocks: restrictions on discovery and restrictions on execution. Firstly, the property of foreign sovereigns and foreign sovereign instrumentalities is immune from execution. It may be the subject of execution only when it is located in Uganda and if the property itself is used for commercial purposes. There must be some direct or indirect presence of that foreign sovereign or its instrumentality within the jurisdiction of this court, coupled with a degree of business activity sustained for a period of time. Some form of tangible presence in Uganda is required, such as maintaining a physical office. To obtain specific jurisdiction, there must be a connection between the non-party's contacts with the forum and the discovery at issue and if these minimum contacts exist, determine if exercising jurisdiction comports with fair play and substantial justice.

Secondly, in order to confer jurisdiction upon this Court in a suit *in personam*, the process must be served upon its principal officers is a rule of practice founded only on the necessity of giving notice to a person who really represents the company, with respect to the subject-matter of the suit. Apart from express or implied submission to the jurisdiction of this Court, the third basis for the valid exercise of the jurisdiction of a High Court of Uganda is where the court grants leave for the issuance and service of the originating process on a defendant outside the court's territorial boundaries. The power of courts to exercise jurisdiction beyond a Court's territorial boundaries has been variously described as "extra-territorial jurisdiction," "long-arm jurisdiction," "assumed jurisdiction" or even "exorbitant jurisdiction." However, the power is only activated using the instrumentality of the grant of leave for the issuance and service of such originating process outside jurisdiction.

While applying for leave, the applicant must convince the court that there exists a special reason for it to exercise its long arm to reach a party outside its jurisdiction. The special reasons which must be established by a claimant are contained in Order 5 rule 22 of *The Civil Procedure Rules*. Where none of the conditions outlined in that provision are met, the court must refuse the application for leave for lack of a real and substantial connection between the cause of action and the jurisdiction of Uganda and therefore no special reason to justify the exercise of the court's

long arm jurisdiction. The failure of an applicant to seek leave to issue and serve an originating process on an adversary outside jurisdiction, is not a rule of mere technicality. This is because this Court is wary of putting an adversary who is outside jurisdiction through the trouble and expense of answering a claim that can be more conveniently tried elsewhere. Secondly, the Court has to satisfy itself before granting leave that the proceedings are not frivolous, vexatious, or oppressive to the adversary who is ordinarily resident outside jurisdiction. Thirdly, the Court, on grounds of comity, is wary of exercising jurisdiction over a foreign adversary who is ordinarily subject to the judicial powers of a sovereign foreign state.

Further, even where it is established that the applicant's case falls within one or more of those jurisdictional pathways contained in Order 5 rule 22 of *The Civil Procedure Rules.*, the applicant is nevertheless not entitled as of right to be granted leave and the court is not automatically bound to grant leave as a matter of course. The applicant must still demonstrate to the Court that it is the *forum conveniens* to hear and determine the claim. In the instant case, it has not been shown that either the respondent or the 2nd garnishee has any physical presence in Uganda and that the property against which the disclosure order is sought has been used in Uganda for commercial purposes. Thus, the discovery sought abroad does not arise out of or relate to the respondent or the 2nd garnishee's activities in Uganda. I therefore find that the 1st garnishee enjoys process immunity while the 2nd garnishee has jurisdictional immunity.

Since almost all the preliminary objections have been upheld, the application stands dismissed with costs to the respondent and the garnishees.

Delivered electronically this 6th day of January, 2023

.....Stephen Mubiru.....
Stephen Mubiru
Judge,
6th January, 2023.