THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

(CORAM: ODOKI, CJ, ODER, TSEKOOKO, KAROKORA, AND MULENGA JJ.S.C.)

CIVIL APPEAL NO. 10 OF 2000

B E T W E E N

PRIAMIT ENTERPRISES LTD: :::::::::::::::::: APPELLANT

AND

ATTORNEY GENERAL: :::::::::::::::::: RESPONDENT.

(Appeal from the decision of the Court of Appeal at Kampala (Manyindo, DCJ, Tivinomujuni, and Berko, JJ.A) dated 26.4.2000 in Civil Appeal No. 3 of 1999).

JUDGMENT OF ODER - JSC.

This is a second appeal. It is against the judgment of the Court of Appeal, upholding the High Court Ruling upholding a preliminary objection by the respondent that the appellant's plaint in the suit in the High Court did not disclose a cause of action.

The appellant instituted a suit in the High Court against the respondent. The amended plaint stated, inter alia:

"**3.** ***The plaintiffs claim against the defendant is for shs. 8,812,500= arising as hereunder:***

4. Prior to 8th June, 1994 the plaintiff supplied tyres to Uganda Transport Co. (1975) Ltd. (herein after referred to as "the company"), a company which the Uganda Government is the sole shareholder.

5. ***The said company owes the plaintiff Shs.8,812,5000= for the tyres supplied. Documents pertaining to the supply of the tyres to this company are hereto attached as annexture "A1" to "A".***

6. ***The Company has defaulted to pay the said amount and despite several repeated demands by the plaintiff to the company to pay the latter has refused, neglected and/or failed to pay the same or any part thereof.***

7. ***The Uganda Government, in order to liquidate the company, caused General Notice No. 35 of 1994 and an advertisement to be put in the Uganda Gazzette of 01-07-94 and in the New Vision newspaper of 02-08-94, respectively so as to sell the company's assets and terminate its existence. Copies of the said Gazzette and the New Vision newspaper cuttings are attached hereto marked "B" and "C" respectively.***

8. ***The Uganda Government is the sole shareholder/ member/proprietor of the company and at all material times operated/ran it as such A copy of the articles and memorandum of association which were filed for the registration of the company and only signed by the ministers of the Uganda Government in their official capacity are attached hereto and marked annexture "D".***

9. ***The plaintiff shall contend that by reason of the above mentioned facts and section 23 of the PERD statute, the Government is liable to pay the plaintiff from the divesture account set up under the said statute the sum of Shs.8,812,500= incurred by the company".***

The respondent defended the suit and averred in his written statement of defence, inter alia:

"3. In reply to paragraph 7 the defendant avers that S.33 of the companies Act is inapplicable to this case. The defendant therefore contends that the company was fully incorporated as a body corporate with limited liability and the Government cannot be liable for its debts or liabilities if any.

4. ***In the alternative but without prejudice to the foregoing the defendant contends that the plaintiff was or ought to have been aware of the legal status of the company and dealt with it as a legal entity with limited liability and is therefore estopped from turning around claiming that the Government should be liable for the debts of the company if any."***

At the commencement of the hearing of the suit, the respondent's counsel Mr. Matsiko, took a preliminary objection that the appellant's amended plaint disclosed no cause of action against the appellant. The objection was based on the ground that the company to which the tyres had been supplied was a body corporate with capacity to sue and be sued. There was, therefore, no basis whatsoever for the Government to be liable for actions of such a company (hereinafter referred to as ***"UTC")*** which was duly incorporated with limited liability. The company was a legal person independent of the Government. Mr. Mugenyi, the appellant's counsel at the trial opposed the respondent's objection on the ground that it had been taken prematurely. The objection should have been made after evidence had been heard, when it would have been known whether a right existed, whether such a right had been violated and whether the respondent was liable. In any case, counsel contended, the appellant's cause of action had been disclosed by the appellant's pleading of section 23 of the of the Public Enterprises Reform and Divestiture Statute, 1993 (*"the Statute").*

The learned trial judge upheld the respondent's preliminary objection and struck out the plaint on the ground that the wrong party was sued.

The appellant's appeal to the Court of Appeal was dismissed and the learned trial judge's ruling was upheld. Hence this appeal, in which, originally there was only one ground of appeal. This Court granted leave to the appellant to amend its memorandum of appeal by adding a second ground, but the same was subsequently abandoned by the appellant. In the result, only the original ground was argued. It is that:

> ***"The learned Judges erred in law and fact in upholding the finding of the High Court Judge that the appellant's plaint in the original suit did not disclose a cause of action and in particular failed to take into account the relevant considerations in an application to strike out pleadings and thereby arrived at a wrong decision"***

In my view the ground of appeal offends rule 81(1) of the Rules of this Court, in that it is argumentative. However, since both parties did not address us on the point, we left the ground to stand as it is.

Both parties to the appeal filed written statements of their respective arguments under rule 93(1) of the Rules of the Court. The appellant's written submission was filed by Mr. Byenkya Ebert of M/s. Byenkya, Kihika and Co. Advocates, and that of the respondent was filed by Mr. Joseph Matsiko, Senior State Attorney of the Attorney General's Chambers.

The substance of the appellant's written statement of its arguments is that the learned Justices of Appeal erred in law and in fact when they found that the plaint did not disclose a cause of action against the respondent. On the contrary, it is

contended that the wording of the plaint clearly showed that the claim against the respondent was based on a combination of facts and law. The appellant's learned counsel relied on the case of ***Wycliff Kiggundu -vs- Attorney General, Civil Appeal No. 27/92 (S.C.) (unreported).***

The decision in that case has established the principles on which an application to reject a plaint should be decided when the claim in the plaint is comprised of a combination of facts and law. In the instant case, the plaint showed that the Government was in the process of liquidating the UTC which was indebted to the appellant. The plaint then asserted that by virtue of the said liquidation and the operation of section 23 of the Statute the Government was liable to pay its debts from a designated fund called the ***"Divestiture Account."*** Whether or not the facts alleged in the plaint would make the Government liable to pay the appellant from the divestiture account, it is contended, would require a construction of section 23 in the context of the statute as a whole, and an application of the section to the facts alleged in the plaint. On the principle of ***Kiggundu's*** case (supra), counsel contended, this necessitated an investigation of the facts alleged and a trial in the instant case.

Further, on the authority of ***Kiggundu's*** case (supra) the appellant's learned counsel contended that a distinction must be drawn between an application to reject a plaint and one in which a matter of law is set down for argument as a preliminary point. This distinction was clearly explained in ***Nurdin All Dewji and Others -vs- Meghji and Others (1953), 20 EACA 132.*** The distinction is that under order 7 rule 11(a) of the Civil Procedure Rules, an inherent defect in the plaint must be shown rather than that the suit is not maintainable in law. In the latter case a preliminary point should be set down for hearing as a matter of law. If a party insists that as a matter of law no suit can be brought the opposite party should not try to have the plaint rejected under 0.7 rule 11; but it should apply to have the suit dismissed as a preliminary point of law.

Learned counsel contended that in the instant case the respondent's objection of the plaint consisted of two parts. The first was that UTC was a limited liability company with Corporate personality for whose debt the Government was not liable. The gist of this objection, counsel contended, was that the suit was not maintainable in law against the respondent. Counsel argued that this is the sort of case which this Court found in ***Kiggundu's*** case (supra) could not be appropriately decided by an application to reject a plaint under O.7 r. 11. The appellant's counsel contended that it was never the appellant's case that the Government was liable simply because it was a shareholder in UTC. The appellant's contention was simply that Government was liable because the Statute made it liable in cases where it chose to divest from a public enterprise.

The respondent's second objection, the appellant's counsel contended, was that in terms of section 23 of the Statute the Government would be liable to pay creditors of a divested company from the divestiture account if such enterprise had been sold and the proceeds banked into the divestiture account. Once again that was essentially an objection that as a matter of law the suit was not maintainable. Counsel contended that as ***Kiggundu's*** case (supra) shows, that objection was not maintainable under O7 r. 11.

In the circumstances, the appellant's counsel submitted that the Court of Appeal, when faced with mixed questions of fact and law as set out in the amended plaint in the instant case, erred in principle in entertaining the application to reject the plaint under 0.7, r. 11 and in granting it without ordering a full trial on the merit. I understand the learned counsel in this regard to be criticising the Court of Appeal for upholding the trial court's decision to strike out the plaint on the respondent's preliminary objection.

The appellant's learned counsel then proceeded to discuss facts and the law alleged in the plaint which he contended disclosed a cause of action. He contended that the application of the Statute should not have been restricted to s.23 only as the Court

of Appeal did. By so doing, the Court of Appeal contravened a cardinal rule of statutory interpretation which is that a court does not look at a single provision in isolation but should interpret the provisions in the context of the statute as a whole. Reliance was placed on ***Canada Sugar Refining Company Ltd. -vs- The Queen (1898) 13, Appeal Cases (H.L.)*** in support of this submission. On the basis of these authorities it is contended, the Court of Appeal's interpretation of s.23 of the Statute should have been more inclusive, because by referring to section 23 the appellant made the entire statute and the agreements referred to in it relevant to the suit.

In paragraph nine of its plaint the appellant referred to ***"Divestiture Account"*** which is defined in s.2 of the statute as meaning the Divestiture Account established by virtue of the Development Credit Agreement. The appellant's learned counsel contended that by virtue of that definition the agreement is incorporated in the statute.

Further, if the Court of Appeal interpreted the statute as a whole, it is contended, it would have found that the process of liquidation of the UTC, alleged in the plaint, was not the result of ordinary insolvency or winding up under the Companies Act, but a form of divestiture carried out under the authority of the statute. The Company is listed as public enterprise number 38 under class IV in the schedule to the statute. It was one of those public enterprises from which the State was required to divest fully. The liquidation of the company was therefore, not the result of economic necessity but the implementation of a political decision that had the force of law. UTC was not being divested because of its inability to pay its debts. According to the definition of ***"divestiture"*** in s.2 of the statute, it is a broader legal concept that can be satisfied without alleging the sale of a public enterprise. It is contended that the appellant's pleading in paragraph seven of its plaint sufficiently alleged that divestiture had taken place.

Learned counsel further contended that the provisions of s.34 of the statute was intended to ensure that no private person would be adversely affected by the

political decision to divest from public enterprises. The right to take legal action was expressly preserved by that section to survive the divestiture. It follows that such a right of action could not be against the divested enterprises (which would no longer be inexistence or would have lost all their assets) but against the entity for taking the said political decision. In the light of the provision of section 34, and contrary to the conclusion in the lead judgment of Twinomujuni, JA, it was not a discretion of Government to pay or not to pay the creditors of a public enterprise. The Government was liable to do so.

The appellant's counsel also referred to the definition of the Development Credit Agreement by virtue of which the divestiture account was established. Under s.2 of the statute, ***"Development Credit Agreement"*** means the Development Credit Agreement entered into on the 9th day of January 1992, between the Republic of Uganda and the International Development Association.

The appellant's learned counsel submitted that the definition means that the agreement in question is incorporated in the statute and that the statute and the agreement should be read together. It would be impossible to make a proper judgment of the scope of the Divesture account without doing so. Although the agreement was not tendered to the trial court or the Court of Appeal, learned counsel said from the Bar that it has been attached to the appellant's list of authorities submitted to this Court.

Learned counsel also referred to the definition of "Divestiture Account" in section 2 of the statute. It "means a separate account to be established in Uganda Shillings in the Divestiture Secretariat under the direct control and supervision of the co-ordinator of PERD, to handle all proceeds from, and claim relating to, the implementation of the P.E. divestiture program and to be supported by the borrower with annual budgetary contributions, as required, determined on the basis of estimates of net liabilities expected to arise in each year."

In the learned counsel's view, this definition of the ***"Divestiture Account"*** has the following effects:

(a) The divestiture account was intended to handle all claims relating to the implementation of the divestiture program without exception.

(b) All sales proceeds whether arising from the sale of the enterprise itself or from the sale of assets in a liquidation process would be remitted to the divestiture account. All proceeds must be deposited in the divestiture account. Only the co-ordinator of PERD had power to deal with the said account. The liquidator/receiver is, therefore, not authorized by law to settle obligations to creditors.

The appellant's learned counsel concluded that in view of his submission made above the appellant had met all the criteria laid down by the case of ***Auto Garage - vs- Motokov (1971) EA 514,*** for establishing that it had a cause of action against the respondent, that:

(i) it enjoyed a right against a public enterprise, namely it was owed money by UTC;

(ii) its right had been violated by UTC which had not paid the appellant;

(iii) the defendant was liable as it had put UTC in liquidation under the statute and was consequently liable to settle the appellant's claim against UTC from funds in the divestiture account.

All three elements having been satisfied, it is submitted, the Court of Appeal was in error in finding that the appellant's plaint did not disclose a cause of action. This appeal should, therefore, be allowed.

The respondent opposed the appeal. The gist of its written submission in reply is that respondent's objection to the plaint was made under O.7, r. 11(a) of the CPR, which provides that ***"a plaint shall be rejected where it does not disclose a cause of action."*** It is contended that the rule is mandatory. The case of ***Auto Garage & Others -vs- Motokov*** (supra) is cited in support of this submission. It is submitted that the appellant's pleading in paragraphs four to nine of its plaint failed to meet the three tests laid down in ***Motokov's*** case (supra), which was followed by this Court in ***Mugenyi & Co. Advocates -vs- The Attorney General*** (supra) the facts of which were similar to those in the instant case. In that case a firm of advocates sued the Attorney General in the High Court for recovery of their legal fees, owed by M/s. Uganda Transport Company (1975) Ltd. and lost. Their appeal to this Court was dismissed on the ground that the Government was wrongly sued as UTC was an incorporated company with legal personality separate from the Government.

The respondent's counsel further submitted that on the authority of ***Everett -vs- Ribbonds & Another (1952) 2QB. 198,*** where there is a point of law which may dispose of a litigation, it should be taken so at the close of the pleading or shortly thereafter. It is contended therefore, that in the instant case, the learned Justices of Appeal were correct in holding that for the reason that UTC is a limited liability company responsible for its own debts, the appellant's plaint disclosed no cause of action against the respondent.

With regard to s.23 of the statute, learned counsel submitted that the original plaint made no mention of that section. The original plaint founded the appellant's case on the allegation that by reason of the Government being the sole shareholder of UTC; and by virtue of s.33 of the Companies Act (cap. 85), the Government was liable for UTC's debt to the appellant. On the authority of ***Mugenyi & Co. Advocates -vs-***

Attorney General (supra), the appellant's original plaint disclosed no cause of action as laid down by ***Auto Garage*** (supra). No amendment in law was permissible. The plaint was a nullity from the beginning for not having disclosed a cause of action. Amendment by introduction of section 23 of the statute did not, therefore, validate the plaint.

The respondent's learned counsel submitted in the alternative that in any case, amending the plaint by including s.23 of the statute, did not save the plaint. It did not disclose any cause of action. This is because firstly, the section does not give a creditor of a public enterprise unfettered right to be paid from the Divestiture Account. The legislature used the phrase ***"may use the proceeds.*** This left the Executive with a discretion on how to use the proceeds of sale from the Divesture Account. Secondly, the money to be paid from that Account to a creditor of a public enterprise must be from the proceeds of the sale of the debtor public enterprise.

The respondent's learned counsel submitted that for a plaint to disclose a cause of action on the basis of section 23, it must show that the debtor public enterprise was sold, and that the proceeds of sale are on the Divestiture Account. If such averments are missing from the plaint, then there would be no cause of action. The original and the amended plaint in the instant case did not make such averments. No cause of action was therefore disclosed.

Regarding the appellant's submission that, on the authority of ***Kiggundu's*** case (supra) the Court of Appeal should have ordered a trial of the suit on merit, the respondent's learned counsel replied firstly, that no such facts which necessitated such a course of action by the Court of Appeal had been pleaded in the appellant's plaint. Secondly, ***Kiggundu's*** case (supra) is distinguishable from the instant case. In that case, it was common ground that under regulation 36 of the Public Service Commission Regulations, interdiction could only last a reasonable time. This court held in that case that a reasonable time might depend on construction of the Regulations on whether or not the facts alleged would fit within that construction. If

the facts alleged necessitated construction of the Regulations then the issue must go on trial. In other words there must be facts alleged in the pleadings so as to create necessity for interpretation of the legal provision. There must be questions of facts arising from the pleadings, so that the court would have to determine whether or not the facts fit within the construction of the legal provision.

It is submitted that in both the original and amended plaint no cause of action was disclosed. The original plaint merely reiterated that the Government was liable to the appellant because it was the sole shareholder in UTC. In the purported amended plaint it was stated that under s.23 of the statute, the Government was liable to pay the appellant. No facts were alleged in the plaint to indicate why Government is liable under s.23. There was no indication that Government had sold UTC or that proceeds of sale had been placed in the Divestiture Account. In the circumstances no facts were pleaded which made the s.23 applicable.

Regarding the appellant's criticism of the Court of Appeal that it restricted its interpretation of the statute to s.23 only the respondent's learned counsel submitted that there were no facts pleaded in the plaint which required consideration of other provisions of the statute. Section 23 is an unambiguous provision. The authorities cited by the appellant in this regard are irrelevant as their effect is that it is necessary to look at a legislation as a whole only if it is necessary to do so to clear any inaccuracy or inconsistency which was not necessary for purposes of construction of s.23.

The respondent's learned counsel submitted that the Development Credit Agreement was not part of the statute as it was not incorporated in it. Further, the plaint did not bring the Agreement into issue by pleading it.

The learned counsel contended that the allegations that the liquidation of UTC was not a result of economic necessity, but the implementation of a political decision are

attempts by the appellant to adduce evidence from the bar, which this Honourable Court should not allow to be done.

Regarding section 34 of the statute, the respondent's learned counsel submitted that whereas the section saves the right to seek redress in respect of a divested public enterprise that redress must be sought against the proper party.

The definition of divestiture under section 2 of the statute includes where necessary the winding up or dissolution of a public enterprise. The respondent's learned counsel submitted that the Government could wind a company up or dissolve it as a form of divesture. There is no indication that the liabilities of such a public enterprise are assumed by the Government. It is contended therefore, that the mere pleading in a plaint that a public enterprise is being liquidated does not disclose a cause of action against the Government. Were it so, this Court in ***Mugenyi & Co. Advocates -vs- Attorney General*** (supra) would have held that the Government was liable for UTC's debt. In the circumstances the fact that the Government commenced the process of divesting UTC by liquidation alone did not make the Government assume the liabilities of UTC. The mere pleading that UTC was being liquidated did not disclose a cause of action.

Finally, with regard to the elements of a cause of action as laid down in the case of ***Auto Garage and Others -vs- Motokov*** (supra) the respondent's learned counsel submitted that those elements were missing in the instant case.

The respondent's learned counsel then prayed that this appeal should be dismissed with costs.

The respondent's preliminary objection to the plaint in the High Court does not appear to have been based on any rule of procedure. However on appeal in the

Court of Appeal it was common ground that the relevant rule was 0.7 r. 11(a) of the Civil Procedure Rules which as far as it is relevant provides:

"11. The plaint shall be rejected in the following cases -(a) where it does not disclose a cause of action"

The application of the rule has been considered by this court and its predecessors in many cases. In the case of ***Auto Garage and Others -vs- Motokov*** (supra) a history of the application of the rule in East Africa and elsewhere was traced extensively by Spry, V.P. in his judgment with which the other members of that court agreed. Some of the salient points which emerge from the authorities are that where the rule applies the provision that a plaint ***"shall be rejected,"*** appears to be mandatory; in the absence of allegations of the necessary facts in a plaint, there is no pleading and a cause of action; where there is a point of law which, if decided in one way, is going to be decisive of the litigation, then advantage ought to be taken of the opportunity afforded by the Rules to have the case disposed of at the close of pleadings or very shortly thereafter.

In the ***Auto Garage*** case (supra), it was said that for a plaint to disclose a cause of action, three essential elements must be disclosed to support the cause of action.

These are that:

(1) ***The plaintiff enjoyed a right;***

(2) ***The right has been violated and***

(3) ***The defendant is liable.***

In the instant case, the Court of Appeal followed ***Auto Garage*** (supra), and earlier or subsequent cases with similar conclusions. As I see it the Court of Appeal's decision consists of two parts. I shall consider the submissions of the learned counsel for the appellant and for the respondent in the same contexts.

The first part relates to the application of the decision in the case of ***Mugenyi & Co. Advocates*** (supra) to the instant case. This is that UTC was an incorporated company with limited liability, and had a capacity to sue and be sued. As such it was an independent legal personality separate from the Uganda Government, which was its sole shareholder. As a result the Government was not and could not be liable for UTC's debts it owed to the appellant. The appellant's plaint therefore disclosed no cause of action.

I entirely agree with that holding.

In its original and amended plaint, the appellant's claim was partly based on the allegation that the Government was liable for the UTC's debt owed to the appellant, because Government was its sole shareholder. In its written submission filed in this court, the appellant's learned counsel minimized the importance of that basis of the appellant's claim as pleaded in the plaint. The written submission reads:

> ***"The objections raised by the Attorney General in the present case were essentially that the suit was not maintainable in law. It was argued firstly, that as UTC was a limited company with corporate personality, the Government even if it were a sole shareholder was not liable for its debts. (It should be noted that though the trial judge and the Judges of the Court of Appeal spent sometime considering and upholding this objection, it was in fact never the basis of the plaintiff's case that the Government was liable simply because it was a shareholder in the UTC). This is clear from the wording of paragraph 9 of the amended plaint."***

In my opinion this criticism of the learned Justices of Appeal, with respect, is unjustified, in view of the appellant's pleading in paragraphs 3 to 8 of the plaint.

Except for the passage which I have just reproduced above, the learned

counsel for the appellant in his written submission completely ignored this aspect of the appellant's original case as stated in the paragraphs of the amended plaint to which I have just referred and the decision of the Court of Appeal in that regard. The attack of the judgments of the learned Justices of Appeal is concentrated on their alleged failure to properly apply s.23 of the statute to the instant case, an aspect of the appeal to which I shall now turn. This relates to the second part of the judgments of the learned Justices of Appeal.

The statute came into force on 8th October, 1993, by virtue of the provisions of Statutory Instrument, 1993 No. 72. It was subsequently amended by the Public Enterprises Reform and Divestiture (Amendment) Act, 2000, which came into force on 6 th January, 2000.

The original plaint was dated 24-04-1998. The date of filing it in court is not clear from the record. Paragraph 9 of the original plaint did not mention s.23 of the statute. The section was introduced by an amendment of that paragraph which was granted by the trial court on an application by the appellant.

In the circumstances, it means that when the plaint was amended to plead s.23 of the statute; when the respondent's preliminary objection to the plaint was taken on 08-06-98, and when the learned trial judge upheld the objection on 02-07-98, it was s.23 of the statute before the amendment of the statute which was in operation. The appeal to the Court of Appeal was commenced by a notice of appeal filed on 10-07-98, the appeal was heard on 17-03-99, and that court's judgment was dated 26-04-2000. In the circumstances, the amended s.23 which became effective on 06-01-2000, is not applicable to the instant case. The operation of that new section is not retrospective, any way.

The Respondent's learned counsel has submitted that because the original plaint did not disclose a cause of action the subsequent amendment of the same was null and

void. With respect, I do not accept that argument, because the respondent, represented at the trial by the same counsel as now, did not object to the appellant's application for the amendment at the material time. The learned counsel made his preliminary objection to the plaint, which was upheld by the learned trial judge on the basis of the amended plaint. It is far too late now to raise an objection to the amended plaint.

As far as it is relevant, s.23 of the statute provides:

"23. Government through the responsible Minister and the Board of Directors and Management of the Public Enterprise may use the proceeds of sale in the Divestiture Account: -

(a) to pay off debts, if any, or otherwise compromise with creditors of the public enterprise.

(b)

.....

(c)

.....

"

In his lead judgment, Twinomujuni, JA, set out the provisions of section 23 of the statute and proceeded:

"In my judgment, I would agree with the learned trial judge that section 23 PERD Statute -

(a) ***authorizes Government through its agents to pay creditors of a public enterprise from the Divestiture Account;***

(b) ***the money to be paid must be from the proceeds of the sale of the debtor public enterprise;***

(c) to pay or not to pay is in the discretion of Government through its agents.

It follows therefore, that for a plaint to disclose a cause of action on the basis of section 23(a) PERD Statute, it must aver that the debtor public enterprise has been sold and the proceeds of sale are on the Divestiture Account. If no such averment is made in the plaint, then the plaint does not disclose a cause of action."

I agree with that interpretation of s.23(a) of the statute.
The learned Justice of Appeal then proceeded to apply that interpretation to the pleading in the appellant's plaint. He said:

"A critical examination of paragraphs six to nine of the amended plaint (supra) will reveal that it was averred that UTC, a wholly Government owned company, had defaulted in paying for tyres supplied to it by the appellant. It is stated that Government had advertised its intention to sell the company in the Uganda Gazette and the New Vision News Paper and the cuttings were attached to the plaint. It is no where stated in the plaint that UTC has been sold and that proceeds of sale are on the Divestiture Account. All it says is that Government intends to sell UTC. Does that give the appellant a cause of action in the circumstances of this case? In my opinion it does not. In fact

one of the advertisements especially the one in the Uganda Gazette i.e. General Notice No. 85 of 1994 is very instructive. The notice reads:

'General Notice No. 85 of 1994, UGANDA TRANSPORT COMPANY (1975) LIMITED - IN LIQUIDATION NOTICE APPOINTMENT OF LIQUIDATORS.

Notice is hereby GIVEN TO GENERAL PUBLIC THAT THE Hon. Minister of Works, Transport and Communication appointed G. W. Egaddu and F. Mungereza as Joint Liquidators of Uganda Transport Company (1975) Limited on 10th June, 1994.

Please, therefore, take notice that all suppliers, creditors, customers, directors, employees and the general public at large that the whole of the assets were vested in the liquidators.

All suppliers of goods and services having claim on the company are hereby required to submit such claims to the liquidators. All persons owing monies or other assets to the company are hereby notified to settle their debts to the company within 14 days from the date of this notice.....

G. W. Egaddu & F. Mungereza Joint
Liquidators. Kampala
23rd June, 1994.'" The Learned Justice then continued -

"The *contents of this notice are very clear. It required creditors of UTC including the appellant who had a genuine claim to lodge their claim with the liquidator. It is not clear whether the appellant did so. It is also very clear that the company at that stage was not yet sold. It seems to be premature for the appellant to sue the Government what it has not yet become liable and at a time when its authorized agents are inviting creditors to lodge their claims.*

It seems to me that the appellant had three choices -

(a) To prove its debt in liquidation.

(b) To sue UTC for the debt.

(c) To wait until UTC is sold and then if Government does not settle the debt, to sue it.

In my Judgment, the suit against the Attorney General was prematurely filed. The plaint did not disclose any cause of action against him and the trial Judge was correct to dismiss the suit. In my view, the appeal should fail."

Given the construction of s.23 of the statute made by the learned Justice of Appeal and the application of that construction to the appellant's pleading in his plaint, with which I agree as correct, it is inevitable to conclude that even under s.23 of the statute the plaint disclosed no cause of action. This in my view, is because, the plaint did not plead facts to necessitate the application of that section to the appellant's allegations in the plaint.

The case of ***Wycliff Kiggundu*** (supra) is a decision on which the appellant's learned counsel strongly relied in support of his contention that when an application to reject a plaint comprises of a combination of facts and law an investigation of the facts is necessary and a trial on merit should be ordered. I agree with the decision in ***Wycliff Kiggundu's*** case and I think that it is still good law, but my opinion, with respect, is that the case is distinguishable from the instant one. In ***Kiggundu's case*** the facts of the circumstances in which ***Kiggundu*** was interdicted from his office as the Ag. Director of the Uganda Civil Aviation Authority for over two years were well stated in his plaint. He averred in his plaint inter alia, that his interdiction for

over two years was ultra vires the Public Service Commission Regulations. Regulation 36(1) of those Regulations allowed interdiction of a public officer if proceedings for his dismissal are about to be taken or if criminal proceedings are being instituted against him. ***Wicliff Kiggundu,*** who had been interdicted under the Regulations, remained interdicted for over two years. In the end he was retired in the public interest. He sued the Government that he had been wrongly interdicted and later had been wrongly retired from the Public Service in the public interest. At the beginning of the trial, the Attorney General applied for the plaint to be rejected. The learned trial judge agreed with the preliminary objection and rejected the plaint under O.7. r.11(a) of the C.P.R. On appeal it was common ground that Regulation 36 allowed interdiction for only a reasonable time and not indefinitely as the learned trial judge had held.

This Court held that what a reasonable period of interdiction might be, would depend upon the true construction of Regulation 36 and whether or not the facts alleged ***"would fit within that construction"*** (as the Court put it). In the circumstances, this Court held that once questions of facts arose, then the issue should go to a full trial.

In the instant case, the facts as pleaded in the plaint did not, in my view call for construction and application of s.23 of the statute. There were no facts alleged in the plaint which necessitated the case to go for trial on merit.

The appellant's learned counsel also criticized the learned Justices of Appeal for not considering all the provisions of the statute other than s.23, and for not applying to the case certain definitions made in section 2 of the statute. These are: ***"Divestiture", "Divestiture Account" and "Development Agreement."*** The learned counsel also strongly argued that s.34 of the statute protected the rights, inter alia, of creditors of public enterprises being divested. The right to take legal action is expressly preserved by that section to survive divestiture of public enterprises.

I shall comment briefly on the appellant's submission in this regard. In my opinion, consideration of the relevance of these words or expressions and of section 34 to this case would arise only if s.23 of the statute was applicable to the appellant's suit as set out in the plaint. I have already said that the learned Justices of Appeal were correct in holding that it is not, because no facts were pleaded in the plaint to necessitate the application of s.23 to the appellant's suit.

In the circumstances, the only ground of appeal should fail. In the result, I would dismiss this appeal with costs to the respondent, here and in the courts below.

JUDGMENT OF ODOKI, CJ

I have had the advantage of reading in draft the Judgment of Oder JSC, and I agree with him that this appeal should be dismissed with costs here and in the courts below.

As the other members of the Court also agree with the Judgment of Oder JSC and the orders proposed by him, this appeal is dismissed with costs here and in the courts below.

JUDGMENT OF TSEKOOKO JSC:

I have read in draft the judgment prepared by my learned brother, the Hon. Mr. Justice Oder, Jsc., and which he has just delivered, and I agree with him that the decisions of the courts below are correct and that the appeal should be dismissed, that the appellant must pay the respondent's cost both here and in the courts below.

JUDGMENT OF KAROKORA, JSC.

I have had the benefit of reading in draft the judgment prepared by my learned brother, the Hon. Justice Oder, JSC, and I do agree with him that the Court of Appeal was perfectly correct in confirming the decision of the High Court which had upheld the preliminary objection raised by the respondent that the appellant's plaint had disclosed no cause of action.

In the result, I agree that the appeal should be dismissed with costs here and in the courts below.

Delivered at Mengo this 20th day of December 2002.