

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

HCCS NO 0331 OF 2012

ENGINEER INVESTMENTS LTD}.....PLAINTIFF

VS

- 1. ATTORNEY GENERAL}**
 - 2. KAMPALA CAPITAL CITY AUTHORITY}.....DEFENDANTS**
- BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA**

RULING

The Plaintiffs action against the Defendants jointly or severally is for breach of contract and the recovery of **Uganda shillings 139,981,222/=**, interest thereon at 23% per calculated from 14 June 2010 until payment in full, general damages and costs of the suit.

It is averred by the Plaintiff in the plaint that on the 3rd of May 2004, the Plaintiff, Ministry of local government and Kampala City Council executed a contract for solid waste management within Kawempe Division identification number ASD/SWM.K AW – 01 whereupon the Plaintiff executed the assignment and upon completing it was issued with a certificate of completion on 17 March 2005 by the Project Manager. On 19 October 2006 and on 27 July 2009, the Plaintiff made a demand for payment from the second Defendant for an outstanding amount of Uganda shillings 71,312,426/=. Subsequently the Plaintiff upon acknowledgement of the debt by the second Defendant received Uganda shillings 30,000,000/= in part payment.

The Defendants denied liability to the Plaintiff. The second Defendant does not deny the facts but asserts that it is a procuring and disposal entity whose procurement activities are regulated by the applicable procurement laws of Uganda and that there was no observance of the process prescribed by the law. That is when the second Defendant's Kawempe Division Council purported to engage the Plaintiff to offer services of garbage collection. The Defendant admits the facts of the execution of the contract as well as the partial payment of Uganda shillings 30,000,000/= but denies that the Plaintiff is entitled to payment of the sum of Uganda shillings 41,312,430/= that was outstanding. Instead the Defendant counterclaimed for recovery of the partial payment of Uganda shillings 30,000,000/=. This is on the ground that the contract was illegal and irregular and the payment was an illegality/irregularity. The second Defendant wants the counterclaim to succeed with interest at commercial rate from the date of judgment until payment in full and costs of the counterclaim. Initially the Attorney General had not filed any written statement of defence.

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The Plaintiff is represented by Counsel Isaac Bakayana while the Attorney General is represented by State Attorney Sandra Mwesigye. Dennis Byaruhanga appeared as Counsel for the second Defendant.

All three Counsels agreed that the suit should be determined on a point of law and further agreed to file a memorandum of agreed facts and issues for the procedure to be acceptable. It was agreed that the Attorney General's written statement of defence would be accepted out of time.

The Attorney General's defence is that the Plaintiff is not entitled to any of the remedies sought on the basis of a preliminary point of law. The Attorney General asserts that the Plaintiff's suit is barred in law, misconceived, frivolous and vexatious and ought to be dismissed with costs.

Counsels for the parties filed an agreed memorandum of facts and issues on the court record on 16 September 2015 and thereafter addressed the court in written submissions. The agreed facts are as follows:

1. The Plaintiff entered into a contract for the provision of solid waste management services with the then Kampala City Council and the Ministry of Local Government.
2. The Plaintiff provided solid waste management services to the second Defendant.
3. The Plaintiff was issued a certificate of completion on 17 March 2005 by the project manager of the second Defendant, an engineer of Kawempe division.
4. A sum of Uganda shillings 30,000,000/= was paid by the Defendants to the Plaintiff as part payment for the services rendered, leaving a balance of Uganda shillings 41,312,436/=, payable within a prescribed time but attracting interest thereafter if not paid.
5. The Defendants declined to pay the outstanding amount and requested the Plaintiff to refund the amount paid to them on the ground that the contract signed between them is illegal and unenforceable for non-compliance with the procurement process and in particular failure to obtain the advise and or approval of the Solicitor General.

The agreed issues are:

- (a) Whether the Defendants are in breach of their contract with the Plaintiff?
- (b) What are the remedies to the aggrieved party?

Written submissions of the Plaintiff:

Whether the Defendants are in breach of the contract with the Plaintiff?

The above issue was sought to be resolved on a point of law by way of a preliminary objection to the suit. It is a contention that there could be no breach of contract because the contract was illegal and unenforceable. The Plaintiff's Counsel commenced submissions and relied on section 57 of the Evidence Act for the assertion that no fact need be proved in any proceedings which the parties to the proceedings agreed to admit at the hearing. Secondly he contends that it is trite law *Decision of Hon. Mr. Justice Christopher Madrama Izama* *^*~?+:

that parties are bound by the terms of the contract that they execute according to the case of **Behange versus School Outfitters (U) Ltd (2000) 1 EA 20** being a judgment of the Court of Appeal.

Under the agreement dated 3rd of May 2004, the parties agreed that the employer (Ministry of Local Government and Kampala City Council) would pay the contractor upon completion of the works and the remedying of defects under clause 4 of the agreement. Under clause 43 and section III of the conditions of contract, the employer was supposed to pay the contractor amount certified by the project manager within 56 days of the date of each certificate. On 17 March 2005 the project manager issued the certificate of practical completion. Thereafter in line with clause 23 of the agreement, the Defendants were to pay the Plaintiff within 56 days. The Defendants as at 11 March 2005 according to their own document were indebted to the Plaintiff to and owed Uganda shillings 71,312,436/= to the Plaintiff.

In the premises the Defendant is obliged to pay the sums outstanding with interest and costs of the suit. By failure to meet contractual obligations, the Defendants are in breach of their contractual obligations to the Plaintiff (**see United Building Services Ltd versus Yafesi Muzira t/a Quick set Builders and Company HCCS 154 of 2005**).

Regarding the written statement of defence of the second Defendant and paragraphs 4 (a), (b) and 5 alleging that the procurement process was not followed, the argument should be rejected. The Plaintiff's Counsel submitted that the laws prevailing at the time of the procurement of the Plaintiff's services were the Public Procurement and Disposal of Public Assets Act, 2003. Section 55 thereof provides that all procurement was to be done in accordance with Part V and the second Defendant has not stated in its defence which specific part was not complied with. On the other hand the Plaintiff in the reply indicated that there was a public advertisement inviting bidders to supply solid waste management services in Kawempe and the advertisement copy was attached. Consequently a bid was submitted to the second Defendant who considered the same and made the contract award to the Plaintiff.

The Plaintiff's Counsel further submitted that Article 119 of the Constitution requires that before any contract in which the government is a party is signed, the advice of the Attorney General is sought. However in the written statement of defence of the Attorney General, there is no averment that this advice was never sought or given. Counsel further contended that even if it is true that the Attorney General's advice was never sought, the Defendants admit to the following. The second Defendant signed the contract and it consumed the Plaintiff's services and even made partial payment. The court shall not permit the Defendants to benefit from the Plaintiff's services without paying for it according to the case of **Finishing Touches versus Attorney General Civil Suit 144 of 2010**. Secondly Counsel contended that the constitutional provision referred to is directory and not mandatory and does not provide for the consequence of non – compliance. The Supreme Court in **Mukasa Anthony Harris versus Dr Bayiga Michael Philip Election Petition Appeal No 18 of 2007** considered the use of the word "shall" in legislation as *Decision of Hon. Mr. Justice Christopher Madrama Izama* *^*~?+:

to whether it is directory or mandatory. Since Article 119 of the constitution does not carry a consequence for non-compliance, the Defendants cannot seek to rely on the same provision to nullify their obligation to settle the money due to the Plaintiff. Furthermore the Defendants would on the principle of quantum meruit still be obliged to pay the sums due to the Plaintiff. The Plaintiff's Counsel invited the court to read **Black's Law Dictionary at page 1361** for the definition of quantum meruit. He further relied on the Kenyan case of **Nabro Properties Ltd versus Sky Structures Ltd and Two Others (2002) 2 KLR** for the Maxim of law recognised and established that no man shall take advantage of his own wrongs. In the premises the Plaintiff asserts that the Defendants are in breach of the contractual duty to the Plaintiff and should settle all sums due to it in accordance with the terms of the contract executed between the parties.

In reply the Attorney General's Counsel submitted that it is an agreed fact that the Plaintiff signed the contract with the first Defendant's agent on the 3rd of May 2004. The circumstances under which the contract was executed render it invalid because it did not meet the requirements of Article 119 (5) of the Constitution of the Republic of Uganda that requires all contracts to be approved by the Solicitor General/Attorney General. Counsel submitted that this was in contravention of a fundamental constitutional provision and renders the contract null and void and therefore unenforceable.

In reply to the submission of the Plaintiff's Counsel that the constitutional provision in Article 119 is directory and not mandatory for failure to provide for the consequences of non-compliance, the question was whether the provision should be considered mandatory or directory. With reference to the decision of this court in **Finishing Touches versus Attorney General HCCS 144 of 2010**, it was held that the question as to whether the provision is mandatory or directory is decided by the court through examining the purpose of the enactment and the importance of the condition imposed in the section or rule. The court also considers the claims of public interest in the enactment. The whole scope and purpose of the enactment has to be considered to assess the importance of the provision that has been disregarded and the relation of that provision to the general object intended to be secured by the enactment.

According to the Attorney General's Counsel, the importance of this constitutional requirement is that no agreement, contract, treaty, convention or document to which the Government is a party shall be concluded without the legal advice of the Attorney General. This protects the public interest and prevents Government from entering into contracts that may be detrimental to the country. It ensures the safeguard against the misuse of public resources and against entering into unprofitable ventures with unscrupulous members of the public. The provision has a fundamental role and one which cannot be relegated to any other body due to its sensitivity. The issue of whether the provisions of Article 119 (5) of the Constitution of the Republic of Uganda is mandatory has been settled in the case of **Nsimbe Holdings versus Attorney General and another Constitutional Petition Number 2 of 2006** where the constitutional court held that a merger agreement executed between National Social Security Fund and Mugoya Estates without

informing the Attorney General was unlawful and could not stand. Furthermore any law or act that contravenes the constitution is void to the extent of the contravention. In other words the agreement is null and void ab initio. The decision in the above constitutional petition is applicable in all respects to the current case.

The Attorney General further submitted that the contract was never approved by a properly constituted contracts committee as required by section 55 of the Public Procurement and Disposal of Public Assets Act which provides that all public procurement and disposal shall be carried out in accordance with the rules set out and any regulations made there under. The Local Governments (Public Procurement and Disposal of Public Assets) Regulations SI Number 39 of 2006 and particularly regulation 17 (1) outlines the role of the Contracts Committee to include approving pleading and contract documents. Sub-regulation 2 thereof provides that the Contracts Committee shall award contracts in accordance with applicable procurement and disposal procedures as the case may be. Counsel contended that from the evidence on record, there is no minute by the Kawempe Division Contracts Committee awarding the contract to the Plaintiff Company and the illegality renders the contract invalid. He relied on the celebrated case of **Makula International Ltd versus Cardinal Nsubuga and another (1982) HCB 11** where the Court of Appeal held that a court of law cannot sanction what is illegal and an illegality once brought to the attention of the court, overrides all questions of pleading including any admissions made thereon. In **Eladam Enterprises Ltd versus SGS (U) Ltd, SGS (K) Ltd, Societe General De Surveillance (SA)** the Supreme Court held that damages flow from liability whether in contract or in breach of a statutory duty where such liability is established.

In the case before the court the contract between the Plaintiff and Kawempe division is a nullity and the Plaintiff should not be able to derive any benefit from it. The Defendants should therefore not be held liable for damages arising from breach of an illegal contract.

Regarding the principle of quantum meruit as defined; it is defined as "as much as the service" and is an equitable doctrine where someone who has provided services may be able to recover from an opponent who has breached the contract. The Attorney General contends that common law principles cannot override the statutory provisions which render the actions of the procuring authority and the Plaintiff null and void. He relied on **Mark Foley versus United Africa Company Ltd (West Africa (PC) 27 Nov 1961** where Lord Denning held that where an act is void and is in law a nullity, it is not only bad but incurably bad.

He further submitted that the mandatory constitutional requirement of approval from the Attorney General could not be waived and renders the subsequent contract null and void and all subsequent steps taken after it. The Plaintiffs claim is based on a nullity and the contract is therefore unenforceable. Counsel supported the Attorney General's defence with the case of **Kisugu Quarries versus Administrator General (1999) 1 EA 158** where it was held that the court cannot be used to enforce an illegal contract even if both parties executed it willingly.

Reply of the second Defendant's Counsel.

The second Defendant's Counsel wrongly entitled his submissions as that of the first Defendant. No prejudice has been occasioned since he wrongly described Kampala Capital City Authority as the first Defendant whereas it is the second Defendant.

On the issue of whether the Defendants are in breach of the contract he submitted that a contract is an agreement made with the free consent of the parties who have the capacity to contract and with a lawful object and an intention to be legally bound under the provisions of section 10 (1) of the Contracts Act 2010. Obviously the Contracts Act 2010 is not applicable since we are considering a contract of 2004 though it codifies the common law applicable on the definition of a contract. Nonetheless and second Defendants Counsel relies on section 3 of the Public Procurement and Disposal of Public Assets Act 2003 on the definition of a contract. It is an agreement between the procuring and disposing entity and a provider resulting from the application of the appropriate and approved procurement or disposal procedures and proceedings as the case may be, concluded in pursuance of the bid award decision of the Contracts Committee or any other appropriate authority.

The second Defendant's Counsel further relies on the provisions for initiation of procurement or disposal requirements under section 59 of the Public Procurement and Disposal of Public Assets Act 2003. Under that provision initiation is done by the Accounting Officer prior to the commencement of any procurement process. Article 119 (5) of the Constitution also requires the consent of the Attorney General before any contract is executed. Counsel primarily supports the submissions of the Attorney General which I do not need to repeat.

He further reiterated submissions that there is no evidence on court record that the procurement processes were adhered to and there is no decision of the Contracts Committee awarding the contract or approving any procurement method. Furthermore there is no evidence of adherence to Article 119 of the Constitution. In further support of the contention he relies on the case of **Uganda Broadcasting Corporation versus SINBA (K) Ltd & Others CACA No 12 of 2014** for the same proposition of law that a contract executed in violation of the Constitution is void and cannot be enforced.

The second Defendant's Counsel further relied on the case of **Clear Channel Independent Uganda Ltd versus Public Procurement and Disposal of Public Assets Authority HCMA 380 of 2008** for the holding that if a statute prescribes or statutory rules or regulations binding on a domestic tribunal prescribe the procedure to be followed, that procedure must be observed. Finally he reiterated submissions that the court cannot sanction that which is illegal and an illegality once brought to the attention of the court overrides all questions of pleading, including any admissions made thereon according to the case of **Makula International Ltd versus His Eminence Cardinal Nsubuga and another (supra)**.

The action of the officers of the Defendants cannot fetter the law and the court should not rely on the mistakes of a public officer in deciding a matter of this nature. Requisitions for the services were illegally made. Counsel further relied on the case of **Nsimbe Holdings Limited versus Attorney General and another** (supra).

Submissions of the Plaintiff's Counsel in rejoinder:

In rejoinder to the second Defendant's submissions which were filed earlier than the rejoinder to the first Defendant's submissions, Counsel submitted that reference to section 59 of the Public Procurement and Disposal of Public Assets Act, 2003 cited without demonstrating its relevance to the case before the court. He contended that the provision is irrelevant.

Regarding submissions on the basis of regulation 17 (1) of the Local Governments (Public Procurement and Disposal of Public Assets) Regulations S.I Number 39 of 2006, they were irrelevant because they did not have retrospective effect. The regulations were passed in 2006 and do not apply to a contract dated 3rd of May 2004.

Furthermore he submitted that the processes of the Contracts Committee, procurement and disposal units were all the responsibility of the second respondent and its predecessor in title namely Kampala City Council which was internal to it. Under section 65 (2) of the Local Government Act, the designated accounting officer is the town clerk. Under section 26 of the Public Procurement and Disposal of Public Assets Act 2003, the accounting officer has the overall responsibility of the execution process of the procurement entity. Furthermore Article 174 (1) of the Constitution provides that the Ministry or Department of Government of Uganda shall be under the supervision of the Permanent Secretary. The town clerk and the Permanent Secretary officials with their statutory role to do what is stated above did sign the contract and must have satisfied themselves with the internal processes that the Defendant refers to. He contended that it is unimaginable that the second Defendant can now seek to question the Plaintiff on account of processes that the Plaintiff has no mandate or control over.

The Plaintiff's Counsel further contended that under section 86 (1) of the Kampala Capital City Authority Act, the authority took over all rights, liabilities and obligations of the former Kampala City Council and this included the acknowledged debt owing to the Plaintiff. Section 86 (1) of The KCCA Act does not permit the second Defendant to question the Plaintiff's contract.

With reference to Article 119 of the Constitution, the argument should be rejected. The Plaintiff's Counsel submitted that Constitutional Petition No. 23 of 2013 between Anold Brooklyn and Co versus Kampala Capital City Authority, and the Attorney General left open the question whether the advice of the Attorney General referred to in the Constitution must be given prior to the signing of any agreement, contract, treaty, convention or document to which Government is a party or whether such advice could be given after the signing of such agreement, contract, treaty, convention or document but before such an agreement, contract,

treaty, convention or document is concluded. The Court concluded that this was a very important question which required an answer. He contends that the second Defendant has not produced any authority which addresses the question and cannot therefore seek to invoke the argument that the Plaintiff's contract was unlawful.

With regard to the first Defendant, the Attorney General filed a written statement of defence which does not deny ever giving the approval within the terms of Article 119 of the Constitution. The Plaintiff's Counsel submitted that the party supposed to approve the contract does not dispute its approval and it was not possible for the second Defendant to make the argument since they are bound by their pleadings.

Without prejudice the Plaintiff's Counsel submitted that Article 119 (3) of the Constitution provides that the Attorney General is the principal legal adviser of the Government while Article 119 (4) outlines the functions of the Attorney General in its advisory role to the government. On that basis there was no way that the Plaintiff who is not a Government entity could seek the Attorney General's advice. It was the duty of the Defendant's who failed to do so and that failure should not be visited on the Plaintiff. Counsel relied on the case of **Ahmed Ibrahim Bholm vs. Car and General Ltd CA number 12 of 2002** where it was held that it would be contrary to common sense and even presumptuous to assume that the Respondent issued to the appellant a contract of employment when it was not properly executed. The Supreme Court held that it was the responsibility of the Respondent to obtain a work permit for the Appellant and the Respondent cannot therefore avoid fulfilling its obligations under the contract of getting the work permit for the Appellant by turning around and claiming that the Appellant's employment was an illegally because he had no permit.

With reference to the authority of **Nsimbe Holdings vs. Attorney General** (supra) the Appellants Counsel submitted that it is not applicable to the case before the court because in that case the IGG made a specific finding that the NSSF failed to obtain the advice of the Attorney General. In the case before the court the Attorney General in his written statement of defence never indicated that it never gave the approval as alleged by the second Defendant.

Counsel further sought to distinguish the case of **Clear Channel Independent (U) Ltd** (supra) on the ground that the PPDA made a report highlighting specific incidents of non-compliance with the Act. The trial judge held that there were procedural flaws in the entire tender process and held that the process had not been done in strict compliance with law.

Counsel further submitted that the entire defence is premised on the single assumption that the proper channels of authority were never sought and given prior to the execution of the agreement. The second respondent admits executing the contract and admits that the Plaintiff performed the contract. Counsel submitted that the court has a duty to ensure that such unfairness is not perpetrated in Uganda as legal system otherwise the Defendants would keep seeking

services and refuse to obtain the first Defendant's approval whereupon they would turn around and claim that the contract is illegal and refuse to pay the contractual sums.

In rejoinder to the submissions of the Attorney General's Counsel the Plaintiff's Counsel reiterated submissions in rejoinder to the second Defendant submissions.

In specific reply Counsel reiterated submissions that the provisions of Article 119 (5) of the Constitution were not pleaded at all and it is trite law that each party is bound by their pleadings.

Judgment

Resolution of the first issue: Whether the Defendants are in breach of the contract with the Plaintiff?

I have carefully considered the point of law for resolution agreed to by Counsel for resolution of this suit. From the point of law, the basic argument which depends on the agreed facts is whether failure to seek the consent of the Attorney General under Article 119 (5) of the Constitution of the Republic of Uganda rendered the contract an illegality and therefore null and void. Pursuant to the agreement of the parties to have this suit resolved on the points of law, I observed that a court would not be able to determine any point of law if there was any relevant fact in controversy which is material for its determination.

A point of law may be raised either in the pleadings or by agreement of the parties according to Order 6 rule 28 of the Civil Procedure Rules which provides that:

"Any party may be entitled to raise by his or her pleadings any point of law, and any point so raised shall be disposed of by the court at or after the hearing; except that by consent of the parties, or by order of the court on the application of either party, a point of law may be set down for hearing and disposed of at any time before the hearing.

The above rule 28 quoted envisage a point of law raised by the pleadings. In the written statement of defence of Kampala Capital City Authority a point of law is raised in paragraph 5 of the written statement of defence. In which the Defendant after admitting that indeed the certificate of completion of work worth Uganda shillings 71,312,436/= was issued to the Plaintiff out of which Uganda shillings 30,000,000/= was paid leaving a balance of Uganda shillings 41,312,430/=, the second Defendant maintains that after discovering that the award of contract to the Plaintiff did not follow the Procurement Procedures or Guidelines Contract of the Public Procurement and Disposal of Public Assets Act, 2003 and the Local Government Public Procurement and Disposal of Public Assets Regulations 2006, denies that the Plaintiff is entitled to the payment of the balance. In the counterclaim the second Defendant seeks a refund of the

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Uganda shillings 30,000,000/=. In paragraph 3 (b) of the counterclaim the second Defendant asserts that the contract was illegal and irregular under the PPDA Act and regulations made there under. The pleadings repeats the averments that the second Defendant refused to pay the sum of Uganda shillings 41,312,430/= as a consequence of the alleged illegal and irregular contract awarded in disregard of the PPDA Act 2003. In other words the controversy raised, as far as the second Defendant is concerned, relates to the procedure for the procurement of services under the Public Procurement and Disposal of Public Assets Act, 2003 and regulations made there under.

In reply the Plaintiff averred that sometime in early 2003, the Kawempe division through its advertisement invited for bids for eligible bidders for execution of solid waste management services within Kawempe division according to annexure "J" which is an invitation for bids published in the newspapers. The invitation for bids was published in January 2003 and invitations and pre-bidding meeting were supposed to be held on Friday 21st of February 2003.

Subsequently the first Defendant who is the Attorney General filed a written statement of defence in which in paragraph 8 it avers that it would raise a preliminary point of law that the suit is barred in law, misconceived, frivolous, and vexatious and prolix and ought to be dismissed with costs. The issue of the consent of the Attorney General was raised at the scheduling conference and is not contained in any of the pleadings. As far as the Attorney General's contention is concerned, the specific area of law which makes the suit barred in law or misconceived is not averred in the pleadings. However in light of the case of **Makula International versus His Eminence Cardinal Nsubuga and Another** (supra) that a court of law cannot sanction what is illegal and an illegality once brought to the attention of the court overrides all questions of pleadings including any admissions made therein, the issue of whether failure to obtain the consent of the Attorney General vitiated the contract could be tried if it was agreed that such a consent was not obtained. Surprisingly the Plaintiff's Counsel included a controversy as to whether such consent was obtained. Can the court in the premises try this suit on the basis of a point of law only? I will deal with this issue at a later stage.

Regarding the contention that the bidding process and award of contract under the Public Procurement and Disposal of Public Assets Act 2003 was not followed, Counsels for the parties filed an agreed memorandum of facts and issues on the court record on 16 September 2015 and thereafter addressed the court in written submissions. The question is whether the agreed facts are sufficient and not controversial to form the basis for considering the issues of law that the parties have agreed to. The following are the agreed facts endorsed under the hand of Counsels:

1. The Plaintiff entered into a contract for the provision of solid waste management services with the then Kampala City Council and the Ministry of Local Government.
2. The Plaintiff provided solid waste management services to the second Defendant.
3. The Plaintiff was issued a certificate of completion on 17 March 2005 by the project manager of the second Defendant, an engineer of Kawempe division.

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4. A sum of Uganda shillings 30,000,000/= was paid by the Defendants to the Plaintiff as part payment for the services rendered, leaving a balance of Uganda shillings 41,312,436/=, payable within a prescribed time but attracting interest thereafter if not paid.
5. The Defendants declined to pay the outstanding amount and requested the Plaintiff to refund the amount paid to them on the ground that the contract signed between them is illegal and unenforceable for non-compliance with the procurement process and in particular failure to obtain the advise and or approval of the Solicitor General.

The first observation I would like to make is that the question of when the contract was executed is not specifically included in the memorandum of facts. However the second Defendant in the written statement of defence admits executing a certain contract with the Plaintiff. The Plaintiff attached a copy of the contract described as identification number ASD/SWM.KAW – 01 in paragraph 5 (a) of the plaint as annexure "A". It is dated 3rd of May 2004. The second Defendant admits this contract in paragraph 4 (b) of the written statement of defence. The second Defendant also admits that a certificate of completion was issued by Kawempe division on 17 March 2005 certifying the successful completion of the works. The certificate of completion has the further details that it concerns solid waste management services rendered in October 2004 according to a letter of the Plaintiff attached.

It is crucial that the facts in support of a point of law are either agreed to at the scheduling conference or admitted in the pleadings. In the absence of such an agreement, the point of law ought to await the trial of this suit. In the case of **NAS Airport Services Limited v The Attorney-General of Kenya [1959] 1 EA 53** the Court of Appeal for East and Africa sitting at Nairobi considered the equivalent of Order 6 rule 28 of the Civil Procedure Rules and Windham JA at page 58 said:

"I turn to the appeal. Order 6, r. 27, under which the order appealed from was made reads as follows:

“27. Any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the court at or after the hearing, provided that by consent of the parties, or by order of the court on the application of either party, the same may be set down for hearing and disposed of at any time before the hearing.”

This rule reproduces in all essentials the English O. 25, r. 2 of the Rules of the Supreme Court, as it stood before its amendment in 1958. Its general object and scope are summarized in the following words by Romer, L.J., in *Everett v. Ribbands* (4), [1952] 2 Q.B. 198 at p. 206:

“I think where you have a point of law which, if decided in one way, is going to be decisive of litigation, then advantage ought to be taken of the facilities afforded by the Rules of Court to have it disposed of at the close of pleadings or very shortly after the close of pleadings.”

Clearly the object of the rule is expedition. But to achieve that end the point of law must be one which can be decided fairly and squarely, one way or the other, on facts agreed or not in issue on the pleadings, and not one which will not arise if some fact or facts in issue should be proved; for in such a case the short-cut, as is so often the way with short-cuts, would prove longer in the end.”

The assertion in the reply to the written statement of defence of the second Defendant of the Plaintiff is that there was a bidding process by advertisement in January 2003. The Act was supposed to come into force on a date to be appointed by the Minister by statutory instrument under section 1 (2). The Public Procurement and Disposal of Public Assets Act (Commencement) Instrument, 2003 and Regulation 2 thereof provides that 21 February, 2003 is appointed to be the date on which the Public Procurement and Disposal of Public Assets Act, 2003, shall be deemed to have come into force. So the question remains as to when the contract was awarded? Such an issue would consider whether at that time the PPDA Act was in force (when bids were invited) (what are the applicable laws to the bids?) The second issue concerns whether the requisite processes under the PPDA Act were followed assuming that the Act was in force. Such an assumption cannot be made and evidence as to be led about it.

Secondly regarding the second point as to whether the consent of the Attorney General was obtained, the Plaintiff's Counsel also raised the same issue. He asserted that it was neither pleaded nor has it been denied that the consent was obtained. It is not a matter arising from the pleadings. In the agreed facts however it is an agreed fact that the consent of the Solicitor general was not obtained. The Solicitor General acts as the arm of the Attorney General.

I have carefully considered the second point and have come to the conclusion that the point could be raised if only the fact of whether the consent of the Attorney General was sought or not was admitted.

Having considered the law and the authorities interpreting Article 119 (5) of the Constitution of the Republic of Uganda the issue here is whether failure to obtain the consent renders the contract a nullity. The parties can decide among themselves whether such a consent or approval of the Attorney General in terms of Article 119 of the Constitution of the Republic of Uganda was actually got. I can however consider the effects of failure to do so by raising my concerns about the preliminary objection. Obviously the preliminary objection is not based on fact but a general principle of law. Is it applicable to this suit?

I would therefore consider the question of whether even if the preliminary objections succeeded, on a matter of principle whether it would apply in the circumstances of this case.

The preliminary objection of the Attorney General is based on Article 119 of the Constitution of the Republic of Uganda. I particularly consider clauses 3, 4, 5 and 6 of Article 119 quoted above. The parts of Article 119 of the Constitution which I have considered to resolve the issue is reproduced hereunder for ease of reference:

“119. Attorney General.

(1)...

(3) The Attorney General shall be the principal legal adviser of the Government.

(4) The functions of the Attorney General shall include the following—

(a) to give legal advice and legal services to the Government on any subject;

(b) to draw and peruse agreements, contracts, treaties, conventions and documents by whatever name called, to which the Government is a party or in respect of which the Government has an interest;

(c) to represent the Government in courts or any other legal proceedings to which the Government is a party; and

(d) to perform such other functions as may be assigned to him or her by the President or by law.

(5) Subject to the provisions of this Constitution, no agreement, contract, treaty, convention or document by whatever name called, to which the Government is a party or in respect of which the Government has an interest, shall be concluded without legal advice from the Attorney General, except in such cases and subject to such conditions as Parliament may by law prescribe.

(6) Until Parliament makes the law referred to in clause (5) of this Article, the Attorney General may, by statutory instrument, exempt any particular category of agreement or contract none of the parties to which is a foreign government or its agency or an international organisation from the application of that clause.”

From a plain reading of the above provisions the Attorney General is the Principal Legal Adviser of the Government. The word "Government" has the letter “G” capitalised. I wish to underline the word "Government" for emphasis of the point. Secondly role of the Attorney General under the cited clause 5 of Article 119 is to draw and peruse agreements, contracts, treaties, conventions and documents by whatever name called in which the Government is a party or in respect of which the Government has an interest.

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I want to emphasise (and italicise) the question as to which are the, agreements, contracts, treaties, conventions and the documents by whatever name called *in which the Government is a party or in respect of which the Government has an interest?*

Furthermore it is provided that no agreement, contract, treaty, convention or document by whatever name called, to which the Government is a party or in respect of which the Government has an interest shall be concluded without the legal advice of the Attorney General subject to cases which the Parliament may by law prescribe. The relevant question to be answered is who is the Government? The expression "Government" found under Article 119 has been defined by Article 257 to mean the Government of Uganda. Secondly a "district council" has been defined to mean a district council established under Article 180 of the Constitution. Furthermore the expression "local government council" means a Council referred to in Article 180 of the Constitution. It will immediately be noticed upon perusal of Article 257 of the Constitution that the letter "g" in the word "government" in the phrase "local government council" is not capitalised. It suggests that it means something different from the word "Government" found under Article 119 of the Constitution because it carries the letter "G" which is deliberately capitalised.

The second Defendant is a local government council as far as its corporate status is concerned. It is not "Government". And the question is therefore whether the contract sought to be impugned under the provisions of Article 119 of the Constitution of the Republic of Uganda for want of the legal advice of the Attorney General is one in which the Government is a party or in which the Government has an interest.

First of all the Government is not a party to the contract because the contract was executed for and on behalf of Kawempe Division which division is a "local government council" which council has a corporate status. Secondly the government does not have an interest in contracts of local government. It has no material interests since the allocation of resources is duly demarcated. Local governments manage their own resources and services. Article 180 (1) of the Constitution of the Republic of Uganda clearly provides that a local government shall be based on a council which enjoys legislative and executive powers in its area of jurisdiction. It provides as follows:

"180. Local government councils.

(1) A local government shall be based on a council which shall be the highest political authority within its area of jurisdiction and which shall have legislative and executive powers to be exercised in accordance with this Constitution.

(2) Parliament shall by law prescribe the composition, qualifications, functions and electoral procedures in respect of local government councils, except that—..."

Last but not least one of the cardinal principles for the creation of the local government system is decentralisation of powers and services. Article 176 of the Constitution the Republic of Uganda among other things gives the applicable principles that apply to the local government system and one of them is decentralisation and devolution of powers. Article 176 provides that:

“176. Local government system.

(1) The system of local government in Uganda shall be based on the district as a unit under which there shall be such lower local governments and administrative units as Parliament may by law provide.

(2) The following principles shall apply to the local government system—

(a) the system shall be such as to ensure that functions, powers and responsibilities are devolved and transferred from the Government to local government units in a coordinated manner;

(b) decentralisation shall be a principle applying to all levels of local government and, in particular, from higher to lower local government units to ensure peoples’ participation and democratic control in decision making;

(c) the system shall be such as to ensure the full realisation of democratic governance at all local government levels;

(d) there shall be established for each local government unit a sound financial base with reliable sources of revenue;

(e) appropriate measures shall be taken to enable local government units to plan, initiate and execute policies in respect of all matters affecting the people within their jurisdictions;

(f) persons in the service of local government shall be employed by the local governments; and

(g) the local governments shall oversee the performance of persons employed by the Government to provide services in their areas and to monitor the provision of Government services or the implementation of projects in their areas.

(3) The system of local government shall be based on democratically elected councils on the basis of universal adult suffrage in accordance with Article 181 (4) of this Constitution.”

One of the important principles is devolution of power. Leaving powers of drafting and vetting contracts in the hands of the Attorney General is centralisation of power as opposed to devolution of power espoused by Article 176 (2) (a), (e), (f) and (g). Moreover, the Attorney *Decision of Hon. Mr. Justice Christopher Madrama Izama* *^*~?+:

General under Article 119 of the Constitution is not the principal legal advisor of “local government councils” but that of “Government”. Local government units are supposed to plan, initiate and execute policies in respect of all matters affecting the people within their jurisdiction. Persons providing services are under their control through employing them under Article 176 (f) or are under their supervision if employed by Government (See Article 176 (g)). Apart from the functions of Government which are specified in the Sixth Schedule to the Constitution, the rest of the powers are exercisable by local governments. For instance local government councils can engage their own counsel to provide them with legal services. They are not precluded from seeking the consent of the Attorney General but this is not under Article 119 of the Constitution.

Finally I would like to refer to the precedents referred to by Counsels in their submissions. In the case of **Nsimbe Holdings Limited versus Attorney General and Inspector General of Government Constitutional Petition No. 2 of 2006**, the Constitutional Court commented on Article 119 (5) of the Constitution and the advice of the Attorney General about it. The relevant Article provides that "no agreement, contract, treaty, convention or document by whatever name called to which the Government is a party or in respect of which the Government has an interest, shall be concluded without the legal advice from the Attorney General." According to the opinion of the Attorney General quoted by the Constitutional Court, the advice of the Attorney General is mandatory in contracts in which Government has an interest. The Attorney General also noted that NSSF is a Government body, and the Government had an interest in the joint-venture between Premier Developments Ltd and Mugoya Construction Ltd. Consequently it was a requirement for the joint-venture agreement to be submitted to the Attorney General for legal advice. The Constitutional Court noted that NSSF is a public company established by statute and wholly controlled by the Government of Uganda on behalf of workers and beneficiaries.

On the basis of the finding that the Government had an interest in NSSF the Constitutional Court held that the agreement/transaction in question should not have proceeded without advice of the Attorney General in accordance with Article 119 (5) of the Constitution. They further held that the agreement was null and void by virtue of Article 2 of the Constitution which provides that any law or act which contravenes the Constitution is void to the extent of the contravention. In the premises they held that the merger agreement contravened among others Article 119 (5) of the Constitution and was null and void.

The Constitutional Petition of **Nsimbe Holdings versus Attorney General and another** (supra) is clearly distinguishable from the facts before this court. In that case it was held by the Constitutional Court that the Government had an interest in NSSF. It was on the basis of that finding that they held that Article 119 (5) of the Constitution was applicable. In the case before this court, it cannot be held that the government has an interest in Kawempe Division Local Council which council is a corporation with decentralised powers. They can retain their own lawyers to give them advisory services or even employ a district local government attorney. Secondly a ‘local government council’ has clearly been distinguished from ‘Government’ by

virtue of the various definitions under Article 257 of the Constitution. According to Article 256 (1) (r) a “local government council” means a council referred to in Article 180 of this Constitution" whereas the word "Government" means the Government of Uganda. I was also referred to the case of **Uganda Broadcasting Corporation versus SINBA (K) Ltd and three others Court of Appeal Civil Application Number 12 of 2004**. I have carefully considered the judgment and it does not decide anything about Article 119 (5) of the Constitution. It only addresses the broad doctrine that once a court of law finds that a contract is illegal, it cannot enforce it.

In the case of **Anold Brooklyn & Company versus Kampala Capital City Authority and the Attorney General Constitutional Petition Number 23 of 2013**. The facts of the petition are similar to this case. In that case at the instance of KCCA on the 19th of January 2009 the parties entered into a contract in which the Plaintiff/petitioner was to supply 1540 books of business levy and licenses. The books were duly delivered under the contract on 16th December 2010. On 7th April 2011 KCCA paid to the Petitioner US \$ 83,160.80 leaving an outstanding balance of US\$ 156,371.52. When the Plaintiff/Petitioner demanded payment KCCA refused to pay on the ground that the contract was not enforceable. The Principal State Attorney who appeared in that suit prayed for the issue to be referred to the Constitutional Court for determination.

At the hearing of the reference in the Constitutional Court it was submitted for the Attorney General that non-compliance with Article 119 (5) of the Constitution is a bar to payment even if goods have been supplied and consumed. The Principal State Attorney who appeared also relied on the Local Government Regulations 2006 which stipulates that there shall be no conveying of an acceptance of a contract prior to obtaining approval from the Attorney General. The Constitutional Court held that the way the questions were framed would only lead to one answer that contravention of Article 119 (5) of the Constitution meant that the contract made in disregard of it was a nullity by virtue of Article 2 of the Constitution. They noted that there was no question for interpretation of the Constitution and the Court had no power to amend the questions referred for interpretation. They however noted that the issue of whether the advice of the Attorney General must be given prior to the signing of any agreement, contract, treaty, convention or document to which Government is a party or whether such advice would be given after the signing of such an agreement, contract, treaty, convention or document but before such an agreement, contract, treaty, convention or document is concluded was an important questions that needed to be answered. They noted that although the reference question had been answered, it did not resolve the legal dispute between the parties. For emphasis the legal dispute was whether the first respondent was liable to pay the Plaintiff and the question in the reference was framed as:

"Whether non-compliance with Article 119 (5) of the Constitution by not obtaining the advice from the Attorney General in the contract is a bar to payment where goods and services are supplied, to and consumed by a government entity.

The reference was not meant to determine what a “government entity” is and therefore the decision is distinguishable. The Constitutional Court was never addressed on the issue of whether Kampala Capital City Authority is “Government” as defined by Article 257 which definition clearly applies to Article 119 (5) of the Constitution of the Republic of Uganda. The word “government entity” does not appear in Article 119 (5) of the Constitution. What appears is the word “Government” and also “where (in the contract) Government has an interest”.

There is no appellate decision or a decision of the Constitutional Court on whether a local government as provided for under Article 176 and 180 of the Constitution of the Republic of Uganda is "Government" within the meaning of Article 119 (5) of the Constitution of the Republic of Uganda.

In this suit and in my ruling there is no question for reference as far as the clear definition of Article 257 of what is meant by "Government" as compared to local government is concerned. The word “Government” under Article 119 of the Constitution means the “Government of Uganda” and therefore it means the Central Government as opposed to a local government.

In the premises a local government council has the right to obtain the legal services of a private practitioner or the Attorney General at their sole discretion as Article 119 does not apply to a local government council. In the premises the contract in question in this suit is not null and void by virtue of Article 119 (5) of the Constitution of the Republic of Uganda. Article 119 (5) of the Constitution does not make reference to any agreement, contract, treaty, convention or document by whatever name called, to which a local government is a party or in respect of which a local government has an interest. It only refers to an: “agreement, contract, treaty, convention or document by whatever name called, to which the *Government is a party or in respect of which the Government has an interest*” (Emphasis added).

The preliminary objection on the basis of failure to obtain the advice of the Attorney General under Article 119 of the Constitution is overruled.

As far as the Local Government Regulations 2006 are concerned it has no retrospective effect on a contract executed in 2004 and I need not refer to it or even consider it in this suit.

Lastly the issue of whether the contract is a nullity by virtue of the PPDA Act 2003 for non compliance with its provisions cannot be tried in the absence of evidence of how the services of the Plaintiff were procured and when.

The plaintiff inter alia averred that a bid was invited in January 2003. Were the proceedings thereafter proceedings under the PPDA Act 2003? Certain relevant factual evidence in relation to the point of law sought to be argued must be adduced or agreed to before the point of law can be resolved.

The point of law is stayed pending the agreement to or adducing of the relevant evidence.

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~?+:*

The preliminary objection based on article 119 (5) of the Constitution overruled is with costs to the Plaintiff.

Ruling delivered in open court on the 15th of day of December 2015

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Adams Byarugaba standing in for Isaac Bakayana Counsel for the Plaintiff.

Dennis Byaruhanga Counsel for KCCA

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

15th December 2015