THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA [CORAM: ODOKI, CJ., TSEKOOKO, KATUREEBE TUMWESIGYE, KISAAKYE, JJ.S.C]

CIVIL APPEAL NO.10 OF 2010

PENTECOSTAL ASSEMBLIES OF GOD LTD ::::::::::::::::::::::::::::::APPELLANT/JUDGMENT CREDITOR

1. TRANS SAHARA **INTERNATIONAL (U) LTD::RESPONDENT/JUDGMENT DEBTOR**

2. THE UNITED NATIONS AFRICAN INSTITUTE FOR THE PREVENTION OF CRIME AND TREATMENT OF OFFENDERS (UNAFRI) .....RESPONDENT/OBJECTOR

[Appeal** arising from **the Judgment** of the **Court of Appeal (Mpagi-Bahigeine, Engwau, Kitumba, JJ.A.) dated 4th December, 2008 in Civil Appeal No.* **23** *of 2006].

This is a second appeal against the Judgment of the Court of Appeal in Civil Appeal No. 23 of 2006 which upheld the ruling of the High Court releasing from attachment a Park Yard belonging to the respondent/objector, the United Nations African Institute for Prevention of Crime and Treatment of Offenders, (hereinafter referred to as UNAFRI). The appellants, (Pentecostal Assemblies of God Ltd), had sought to attach the said Park Yard in satisfaction of a judgment debt owed to them by the respondent/judgment

debtor, Transsahara International (U) Ltd., (hereinafter called the first respondent), in High Court Civil Suit No. 711 of 2004.

On 1st October 2003, UNAFRI entered into a 5 year lease agreement with the first respondent where UNAFRI agreed to hire out the parking yard to the respondent at a cost of Uganda shillings 5,000,000/= per month.

In 2004, the appellant entered into an agreement with the first respondent for the sale of a Toyota Hilux Double Cabin Pick Up at a cost of 40,000,000/= million Uganda Shillings. The appellant paid the first respondent through 2 cheques, which were acknowledged by the first respondent's lawyers vide a receipt dated 30th June 2004. The first respondent failed to deliver the vehicle.

On 22nd September 2004, the appellant filed High Court Civil Suit No. 711 of2004 against the first respondent, seeking recovery of the amount paid, costs of the suit and any other relief that the court deemed appropriate. On 16th November 2004, the parties entered into a consent judgment, where the first respondent agreed to pay the appellant Uganda shilling 44,000,000/= million Uganda Shillings, in three installments. If the first respondent defaulted in paying any installment, the whole amount would become payable plus interest at the rate of 10% per annum.

The first respondent failed to pay the first installment of 10,000,000/= million Uganda shillings, which was due on 26th November 2004. Consequently the appellant applied for a warrant of execution, which the High Court issued on *7th* December 2004, on following terms:-

"By way of attachment and sale of judgment debtor's unregistered lease interest in immovable property to wit - Inland Car Depot (ICD) called TRANSSAHARA INTERNATIONAL (U) LTD on Plot 1, *Naguru Road near UNAFRI, plus demurrage, storage and all fees due to Transsahara International (U) Ltd., exclusive of Government taxes to recover Uganda shillings 48,000,000/= plus costs of execution estimated value of Uganda shillings 50,000,000/="*

By the time the warrant of attachment was issued, UNAFRI had issued the first respondent with a letter dated November 17, 2004 threatening to terminate the lease agreement for non-payment of rent, which was in arrears.

According to the warrant of attachment, no sale could take place until after 14 days from the publication or notification of the sale. There is no evidence on the record of appeal to show what steps the appellant's counsel took to execute the warrant.

On 7th January 2005, the day that the warrant was returnable to court, UNAFRI filed High Court Miscellaneous Application No. 10 of2005. Proceeding under Order 19 rules 55 (2), 56 and 57 of the Civil Procedure Rules, UNAFRI sought for the unconditional release from attachment the leased park yard, on grounds, among others, that:

"(a) the judgment debtor's lease with the second respondent had been terminated for failure to pay rent and

(b) the subject property which had been attached was not the property of the second respondent, who was merely in temporary occupation. "

The application was heard by Mukasa J., who ruled in favour of UNAFRI on 13th January 2006. He accordingly released the parking yard from any envisaged attachment and also awarded costs to UNAFRI.

The appellant then filed Civil Appeal No. 23 of 2006 in the Court of Appeal, which dismissed the appeal. Being dissatisfied with the Court's decision, the appellant filed this appeal relying on four grounds of appeal which will be reproduced later in this judgment. The appellants prayed to this Court to allow their appeal, set aside the judgment and orders of the Court of Appeal and the High Court and to also award them the costs of this appeal and in the courts below.

The appellant was represented by Kasozi, Omongole & Co. Advocates while Munanura Mugabi & Co. Advocates represented UNAFRI. Both counsel filed written submissions in support and against the appeal. Counsel for the appellant argued each ground of appeal separately while counsel for UNAFRI argued all the grounds jointly. No submissions were filed for the first respondent. I will handle ground 1, grounds 2 and 3 together and ground 4 separately.

Ground 1 of appeal

1. *That the Honourable learned Justices of the Court of Appeal erred in law and fact in holding that UNAFRI had legal capacity to sue and be sued.*

In arguing this ground, counsel for the appellant submitted that the learned Justices of Appeal erred in law and fact in holding that UNAFRI had legal capacity to sue and be sued. He contended that the UNAFRI Statute was never ratified by the Parliament of Uganda, as was required by the 1967 Constitution of Uganda and that it did not therefore have the effect of law. He disputed the contention of counsel for UNAFRI that the Statute was not a Treaty under the 1967 or the 1995 Constitution, but a Statute adopted by the United Nations pursuant to the United Nations Resolution 1979/40.

Counsel for the appellant further argued that the Cabinet Minutes of 16/7/87 minute 320 which UNAFRI sought to rely on, was only a Cabinet decision, where the Cabinet agreed that the Minister of Internal Affairs should be responsible for the circulation of the relevant pages on the establishment of UNAFRI. He contended that the minute did not amount to ratification, as there was no mention of ratification of the Statute, which was necessary to make it a law in Uganda.

Counsel for the appellant also reiterated his earlier argument before Court of Appeal that the process whereby the Minister signed the UNAFRI Statute on 23rd May 1988 was only an *accession of the Statute*, and that this did not confer any legal rights on UNAFRI in Uganda.

On the other hand, counsel for UNAFRI supported the findings and the decision of the Court of Appeal. He argued that while the Uganda Government had not ratified the UNAFRI Statute as was required by Article 76 of the 1967 Uganda Constitution, which was then in force in Uganda, the Ugandan Government indeed signed the UNAFRI Statute on May 23, 1998. He further argued that it is this Statute that granted UNAFRI the capacity to sue and to be sued.

Secondly, he argued that Uganda had also signed an agreement agreeing to host the headquarters of UNAFRI in Kampala Uganda. He urged this court to uphold the Court of Appeal's finding that UNAFRI had capacity to sue and to be sued.

Let me now turn to examine the legal provisions relied on by counsel for the appellant regarding the issue of ratification of the UNAFRI Statute. Article 76 of the 1967 Constitution of Uganda provided as follows:

" *(1)* ***Subject to the provisions of this article, the President or a person authorized by him in that behalf may make treaties, conventions, agreements or other***

arrangements between Uganda and any other country or between Uganda and any international organization or body in respect of any matter.

(2) A treaty made under the provision of this article shall be in such terms as may be approved by the Cabinet and, subject to the provisions of clause (3) of this article, shall be subject to ratification by the Cabinet.

(3) Any treaty, convention, agreement or other arrangements made by virtue of this article which relates to armistice, neutrality or peace shall be subject to ratification by the National Assembly signified by resolution of the Assembly. "

It should be noted that this article, under clause (1), differently referred to *"treaties, conventions, agreements or any other arrangements."* By so doing, it is evident that the framers of the Constitution envisaged that these four items could mean different things and that the Government of Uganda could enter into anyone of the mentioned arrangements with either another country or any international organization. It is also important to note that clause (2) of the same article only mentioned "treaties" made under article 76 as requiring the ratification of Cabinet, unless they were covered by clause 76(3) and yet under clause (3), *"all treaties, conventions, agreements or any other arrangements which relate to armistice, neutrality or peace were required to be ratified by the National Assembly (which was then the Parliament a/Uganda)."*

Following the promulgation of the new Constitution of Uganda in 1995, the execution of treaties, conventions and agreements was provided for in similar terms under Article 123 as follows:

"(1) The President or a person authorized by the President may make treaties, conventions, agreements between Uganda and any international organization or body, in respect of any matter.

(2) Parliament shall make laws to govern ratification of treaties, conventions, agreements or other arrangements made under clause (1) *of this article."*

In 1998, Parliament passed the Ratification of Treaties Act, Chapter 204, Laws of Uganda, in accordance with the Constitution. Section 2 of the Act provides for ratification of treaties as follows:

"All treaties shall be ratified as follows:

(a) By the Cabinet in the case of any treaty other than a treaty referred to in paragraph(b) of this section: or

(b) By Parliament by resolution---

(i*i) Where the treaty relates to armistice, neutrality or peace; or*

(ii) In the case of a treaty in respect of which the Attorney General has certified in writing that its implementation in Uganda would require an amendment of the Constitution. "

Turning to the present appeal, the question is whether the UNAFRI Statute was a Treaty. Counsel for the appellant did not adduce any evidence before court to prove that the UNAFRI Statute was a Treaty and hence failed to discharge his burden of proof.

But even if this court were to find that indeed the UNAFRI Statute was a Treaty, I find that neither article 76 of the 1967 Constitution of Uganda, nor article 123 of the Ugandan Constitution 1995, read together with section 2 of the Ratification of Treaties Act, required the UNAFRI Statute to be laid before the Ugandan Parliament for ratification, as counsel for the appellant argued. This is because the UNAFRI Statute does not relate to *"armistice, neutrality or peace"* and there is no evidence on the record of appeal that was adduced by counsel for the appellant to show that the Attorney

General had certified that the implementation of the UNAFRI Statute required an amendment of the Constitution.

Furthermore, Article 287 of the Uganda Constitution saved any treaties and agreements to which Uganda was a party before the coming into force of the 1995 Constitution. It provides as follows:

> *"Where ---*
>
> *(a) Any treaty, agreement or convention with any country or international organization was made or affirmed by Uganda or the Government on or after the ninth day of October,* 1962, *and was still in force immediately before the coming into force of this Constitution; or*
>
> (b) *Uganda or the Government was otherwise a party immediately before the coming into force of this Constitution; and Uganda or the Government, as the case may be, shall continue to be a party to it."*

In light of the above findings, I have found no legal basis for the arguments of counsel for the appellant with respect to the issue of ratification of the UNAFRI Statute.

I will now turn to examine the issue of whether UNAFRI had capacity to sue or to be sued. Having disposed of the appellant's Constitutional contentions about ratification, the issue of whether UNAFRI had capacity to sue or not to sue is a legal matter, which can be resolved by examining the legal instrument that set it up, that is, the UNAFRI Statute. The relevant provisions are set out in the lead judgment of Mpagi-Bahigeine, *J.A. (as she then was)* as follows:

" the Institute shall have the capacity to *(a) Enter into contracts;*

(b) Acquire and dispose of immovable and movable property; and

(c) Sue and be sued."

Justice Bahigeine not only relied on the above provision to hold that UNAFRI had capacity to sue or to be sued, but also dealt extensively with similar arguments to those that counsel for the appellant made to this Court.

Furthermore, the learned Justice of Appeal also relied on Article IV, section l(a) of the hosting agreement that the Government of Uganda signed with UNAFRI on 15th June 1989, which provides as follows:

> *"The Institute as an intergovernmental body operated under the aegis of the ECA, shall have in Uganda, the status of a body corporate with the capacity to contract, to acquire and dispose of immovable or movable property and to institute legal proceedings. "*

UNAFRI is an inter-governmental organization that was created in 1988 by the member States of the United Nations Economic Commission for Africa to promote cooperation of governments and other actors, such as non-governmental organizations and academic institutions, in the area of crime prevention and crime justice. UNAFRI is therefore a creature of an intergovernmental Statute that derives its nature, mandate and functions from this Statute. The government of Uganda signed this Statute and the hosting agreement. By so doing, it recognized UNAFRI with all the features and powers that the UNAFRI Statute bestowed on it. The provisions cited from the UNAFRI Statute show that UNAFRI was given the status of a body corporate, with capacity to enter into contracts and to sue. This agreement was in existence before the 1995 Constitution

came into force. Counsel for the appellant never adduced any evidence during the hearing of the objector proceedings to support the appellant's claims that UNAFRI did not have capacity to sue or to be sued. He merely relied on the Cabinet Minutes, which are not on record for this Court's review. He also relied on the admission by counsel for UNAFRI that the Statute had never been ratified, for his contention that UNAFRI did not therefore have capacity to sue or to be sued. Given my discussion above, I am not able to agree with the arguments of counsel for the appellant faulting the decision of the learned Justices of Appeal on UNAFRI's legal status in Uganda. There is no merit in ground 1 of appeal and it ought to fail.

Ground 2 and 3 of appeal

These grounds were framed as follows

1. *That the Honourable learned Justices of the Court of Appeal erred in law and fact in holding that the property was subject to attachment though the attachment was never properly executed nor was there any attempt to have it renewed.*

2. *That the Honourable learned Justices of Appeal erred in fact in upholding the objection having rightly held that the judgment debtor was in physical possession of the property as of tit December, 2004 .*

Counsel for the appellant submitted with respect to ground 2 of appeal that the learned Justices of Appeal erred in holding that the park yard was not properly attached, after the same Court had rightly held that the first respondent was in possession of the park yard, as at 7th December 2004. Relying on the authority of Joseph Mulenga vs. FIBA (U), Miscellaneous Application No. 308 of 1996, and Order 19, rules 55 and 57 of the Civil Procedure Rules, counsel for the appellant argued that the Court of Appeal was required

to consider only one question: that is whether the first respondent had been in possession of the attached property at the time the court issued attachment warrant. He argued that once the court found this issue in the affirmative, as it did in this case, it should not have upheld UNAFRI's objection to the attachment. Counsel further argued that UNAFRI had not demonstrated that it had actually re-entered the leased premises.

With regard to the issue of the appellant's failure to renew the warrant, counsel for the appellants argued that the appellant had intended to renew it. He contended that the appellant was however prevented from doing so by the Court vacation which was expiring on 15th January 2005 and by UNAFRI's action of seeking and obtaining a stay of execution and by the immediate filing of UNAFRI's Objector application on *7th* January 2005, the very day the warrant expired.

With regard to ground 3 of appeal, counsel for the appellant faulted the learned Justices of Appeal when they held that the park yard was not properly attached, although the first respondent had been found to have been in possession as at *7th* December 2004. Counsel for the appellant relied on the case of *Charles Kassaja vs. Registrar of Titles, High Court Miscellaneous Application No.* 51 *of* 1993 in support of his argument that UNAFRI'S letter terminating the respondent/judgment debtor's lease did not amount to a re-entry in law.

Counsel for UNAFRI argued grounds 2, 3 and 4 together. He supported the findings of the Court of Appeal to the effect that there had been no attachment of the park yard. He argued that there was no evidence of attachment at all since the appellants had neither posted any advert either in the press or at the parking yard to that effect, nor filed a return with the Registrar.

Regarding the appellant's arguments that the judgment debtor was still in possession of the parking yard, counsel for UNAFRI reiterated their position that UNAFRI had

terminated the first respondent's lease. He urged the court to take cognizance of the fact that being an inter government organization enjoying diplomatic community, UNARI could not have carried out a forceful eviction of the first respondent from the attached park yard other than serving the first respondent with letters of termination. Counsel did not cite any authorities to support his arguments. Lastly, counsel urged the court to dismiss this appeal.

I have considered the submissions of both counsel on grounds 2 and 3 of appeal. Counsel for the appellant, for reasons best known to him, chose to distort the holding of the Court of Appeal on the attachment of the parking yard. The Justices of Appeal held that as at ih December 2004, the date the warrant of attachment was issued, the first respondent was still in possession of the parking yard. The Court of Appeal however noted that although the park yard was subject to attachment starting on ih December, 2004, that did not mean that the park yard had been successfully attached. The Court of Appeal rightfully further noted that the appellant did not adduce any evidence whatsoever to show that it or anyone acting on its behalf, ever put up the required 14 days' notice indicating the time, place and conditions of the sale before the sale could take place. The Court also noted that there was no evidence to show that the appellant ever made any attempt to renew the warrant of attachment. Given all the above, the learned Justices of Appeal rightfully held that the warrant was **"never properly executed nor** was **there any attempt to have it renewed."**

Secondly, counsel for the appellant's arguments in respect of ground 3 of appeal were contradictory and self defeating, when considered alongside the arguments counsel for the appellant had earlier made in respect of ground 1 of appeal. In the first instance, counsel urged this court to hold, with respect to ground 1 of appeal, that UNF ARI did not have the capacity to sue. The same counsel urged this court to hold, with respect to ground 3 of appeal, that the attachment of the park yard in satisfaction of the first

respondents' judgment debt was valid. If I were to follow and agree with the main submissions of counsel for the appellant on ground 1 of appeal, it would follow that UNAFRI did not have the legal capacity to enter into the unregistered lease Agreement which gave rise to the interest of the first respondent, which the appellant applied to attach in fulfillment of their judgment debt. In that case, it would also follow that the unregistered lease that UNAFRI granted to the first respondent/judgment debtor was not valid either.

The Court of Appeal rightly held that the warrant which had been issued in respect of the UNAFRI park yard was never executed and that there was no attempt to renew it. The Court also rightly upheld the objection despite its finding that the first respondent was in physical possession at the time the warrant of attachment was issued. There is therefore no merit in grounds 2 and 3 of appeal and they too should fail.

Ground 4 of appeal

This ground was framed as follows:

"4 *That the Honourable learned Justices of the Court of Appeal erred in law and fact in not properly evaluating the evidence on record thus arriving at a wrong decision. "*

In arguing this ground, counsel for the appellant submitted that the learned Justices of appeal erred in law when they failed to re-evaluate the evidence adduced on the alleged ratification of the UNAFRI Statute. He argued that the evidence on record only proved that the Government of Uganda had signed the UNAFRI Statute on 23rd May 1988. He further submitted that this accession did not amount to ratification of the Statute as is required by the Constitution of Uganda. He argued that had the learned Justices of Appeal properly re-evaluated the evidence on record, they would have found that UNAFRI had no locus to sue.

Counsel for the appellants relied on the decisions of *Kifamun te Henry vs. Uganda Supreme Court, Criminal Appeal No. 10 of* 1997 and *Pandya vs. R.*, (1957) *E.A. 336,* to support his contentions that the Court of Appeal failed in its duty to re-evaluate the evidence on record and to come to its own conclusion.

I have already held in respect of the first three grounds of appeal that the learned Justices did not err in fact or law in dismissing the appellant's appeal. The learned Justices of Appeal properly evaluated the evidence on record and reached the right decision. The Court of Appeal's evaluation of the evidence appears in the lead judgment of Mpagi Bahigeine, J.A. *(as she then was)* on page 2- 6, 8 -11, 14 -16 and 19-21. I have found no merit in this ground and it too ought to fail.

I would therefore dismiss this appeal with costs to UNAFRI, in this court and the two courts below.

Dated at Kampala this ..... day of .....November 20I2 .

.....

HON. DR. ESTHER KISAAKYE JUSTICE
OF THE SUPREME COURT

3.

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT
KAMPALA

(CORAM: ODOKI, C.J, TSEKOOKO, KATUREEBE, TUMWESlGYE AND

KISAAKYE, JJ. S.C)

CIVIL APPEAL NO. 10 OF 2010

PENTESCOSTAL ASSEMBLIES OF GOD LTD::::::::::::::::::APPELLANT/JUDGMENT CREDITOR

TRANSSAHARA INTERNATIONAL (U) LTD :::::::::::::::::::::: JUDGMENT DEBTOR

THE UNITED NATIONS AFRICAN INSTITUTE FOR
PREVENTION OF CRIME AND TREATMENT
OF OFFENDERS UNAFRI ::RESPONDENT/OBJECTOR

[Appeal from the judgment the Court of *Appeal at Kampala (Mpagi-Bahigeine, DCJ, Engwau, Kitumba JJA) dated* 4 *December 2008, in Civil Appeal No* 23 of *2006]*

JUDGMENT OF ODOKI, CJ

I have had the advantage of reading in draft the judgment prepared by my learned sister, Kisaakye JSC, and I agree with it and the orders she has proposed.

As the other members of the Court also agree, this appeal is dismissed with costs to UNAFRI, the respondent/objector, in this Court and the Courts below.

Dated at Kampala this .....21st.....day of November 2012.

B.J ODOKI
CHIEF JUSTICE

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

[CORAM: ODOKI, CJ, TSEKOOKO, KATUREEBE, TUMWESIGYE AND KISAAKYE, JJ.S.C]
CIVIL APPEAL NO. 10 OF 2010

BETWEEN

PENTECOSTAL ASSEMBLIES OF GOD LTD::::::::::::::::::::::APPEALLANT/JUDGMENT CREDITOR
AND

TRANSSAHARA INTERNATIONAL (U) LTD::::::::::::::::::::JUDGMENT DEBTOR

THE UNITED NATIONS AFRICAN INSTITUTE FOR PREVENTION OF CRIME AND TREATMENT OF OFFENDERS UNAFRI ::::::::::::::::::::::RESPONDENT/OBJECTOR

{Appeal from the judgment of the Court of Appeal at Kampala (Mpagi-Bahigeine, Engwau & KituInba, JJA) dated ()4Ib December, 2008 in Civil Appeal No. 23 of 2006.)

JUDGMENT OF J.W.N. **TSEKOOKO,** JSC.

I have had the advantage of reading in draft the judgment prepared by my learned sister, Dr. Kisaakye, JSC., and I agree with her conclusions and the orders she has proposed that the appeal be dismissed with costs to UNAFRI, the respondent/ objector, in this Court and two Courts below.

Delivered at Kampala this ~. 8= day of cl~~012.

J. Tsekooko.
Justice of the Supreme Court.

[CORAM: ODOKI, C.J., TSEKOOKO, KATUREEBE, TUMWESIGYE, & KISAAKYE, JJ.SC]

PENTESCOSTAL ASSEMBLIES
OF GOD LTD :: APPELLANT *I*
JUDGMENT

2.THE UNITED NATIONS AFRICAN
INSTITUTE FOR PREVENTION OF
CRIME AND TREATMENT OF
OFFENDERS UNAFRI :::::::::::::::::::::::::::: RESPONDENT/OBJECTOR

[Appealfrom the judgment of the Court of Appeal at Kampala (Mpagi-Bahigeine, DCJ, Engwau, & Kitumba, JJ.A) dated 4th December 2008*, in Civil Appeal No.* 23 *of 2006J.*

JUDGMENT OF KATUREEBE, JSC.

I agree with the judgment of my learned Sister, Kisaakye, JSC., that this appeal be dismissed. I also concur that the 2nd respondent, UNAFRI, be awarded costs in this Court and the Courts below.

Dated at Kampala thiS .....dJ~ .....day of N~2012.

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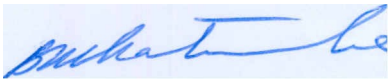


Bart M. Katureebe **JUSTICE OF**
THE SUPREME COURT

CORAM: ODOKI, C.J., TSEKOOKO, KATUREEBE, TUMWESIGYE, KISAAKYE, JJ.S.c.)

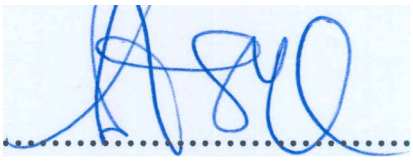
PENTECOSTAL ASSEMBLIES OF GOD LTD .....APPELLANT/JUDGMENT CREDITOR

1. TRANS SAHARA **INTERNATIONAL (U) LTD .....RESPONDENT/JUDGMENT DEBTOR**

2. THE UNITED NATIONS AFRICAN INSTITUTE FOR THE PREVENTION OF CRIME AND TREATMENT OF OFFENDERS (UNAFRI) .....RESPONDENT/OBJECTOR

I concur with her in the decision she has made that this appeal is devoid of merit and should be dismissed. I also concur in the orders she has made.

Dated at Kampala this ..... *~t.~* ... day of .... *N~ .. (' 2012*



JOTHAM TUMWESIGYE JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA, AT KAMPALA

(CORAM: ODOKI, CJ., *TSEKOOKO, KATUREEBE, TUMWESIGYE, KISAAKYE*, JJSC).

CIVIL APPEAL NO. 24 OF 2010

l.SAMUEL LUBEGA }
2.LAWRENCE KAMULEGEYA :::::::::::::::::: APPELLANTS
3.RICHARD OLET PULE

(On behalf of themselves and on behalf of and for the benefit of all former employees of the defendant who were retrenched in 2003 and January 2004).

[Appeal from the Judgment and decision of the Court of Appeal at Kampala (Twinomujuni, JA, Kitumba, JA, and Kavuma, JA) dated 23rd September 2009 in *Civil Appeal No.* 16 *of 2007].*

JUDGMENT OF KATUREEBE, JSC.

This is a second appeal, the Appellants having lost both in the High Court and the Court of Appeal.

The appellants were all former employees of the defunct Uganda Commercial Bank Ltd (hereafter referred to as UCBL) formerly wholly owned by Government of Uganda. By various written agreements, the government sold the UCBL to the Respondent. The two institutions then formed a merger which became known as *STANBIC BANK UGANDA LTD.* These facts were made known to all employees including the appellants, through various circulars (see exhibit P2). Employees were further informed that

over a period of two years, there would be retrenchments of staff, and that those affected would receIve an appropriate retrenchment package which had been worked out by Government of Uganda and the Bank of Uganda. Subsequently the appellants received letters dated 12th January 2004, headed ***"Offer of Voluntary Retrenchment Package"*** by which they were told that their services were no longer required by the Respondent, but were being offered the full benefit of the Voluntary Retrenchment Package. That letter, spelt out what the appellants would get under the scheme, namely:-

i) 3 months pay in lieu of notice
ii) Pay in lieu of accumulated leave
iii) Severance pay based on length of service.

A sample of those letters was admitted in evidence as exhibits P4 (i)(ii) and (iii). Attached to those letters was a note (exhibit P.5) entitled ***"Note detailing how you can calculate your own total retrenchment package. "***

Of particular significance In those letters was clause 9 which required the appellants to sign for that package, and that by so signing they waived any future claim or action against the respondent in respect of their retrenchment. **I** should reproduce this clause right at this stage since it forms the very basis of this

> ***Please sign and return the duplicate copy of this letter*** **to** ***indicate your full*** *and final* ***acceptance*** *of the* ***terms noted above. This constitutes a final settlement of all financial claims of whatever nature between you and***

UCBLjStanbic Bank Uganda. By accepting this letter you expressly waive any right to any action or remedy against UCBLjStanbic Bank Uganda Ltd. in respect of the matters herein agreed.

Please** feel free **to contact the Head of Human Resources should you require any assistance."

That letter was signed by the Head of Human Resources.

The appellants all signed those letters and received and took the money that was offered, including the severance Pay which was stated to be calculated on the basis of the circular dated 4th April 2002, as per clause 5. Clause 6 also clearly stated that the appellants were not entitled to funds to transport them, their families and household belongings home.

After signing and taking the money, the appellants now claimed that their severance pay had been wrongly calculated. They asserted that their severance pay should have been calculated on the basis of the salaries they were getting at the time of their retrenchment in January 2004 and not on the basis of salaries they were getting in 2002. They also claimed that they should have been paid transport money.

They filed a suit in the High Court which dismissed their suit with costs. They appealed to the Court of Appeal, and that Court also dismissed the appeal as being devoid of merit. Hence this appeal.

In this court, the appellants filed four grounds of appeal as follows:-

"1- The learned Justices of Appeal erred in fact and in law when they held that Exhibit P.S was not part and parce 1 of Exhibit P.4.

2- The Learned Justices of Appeal erred in fact and in law when they held that the calculation of the severance pay did not have **to be** *on the basis of the same salary as the pay in lieu of notice.*

3- The Learned Justices of Appeal erred in law when they held that once the appellants had signed for and received the retrenchment cheques, they could no longer rely on Exhibit P.S.

4- The Learned Justices of Appeal erred in fact and in law when they held that the Learned Trial Judge was correct **to** *rely on the Sale Agreement (Exhibit DS) and that in any case such reliance did not affect the severance package that the appellants had* **to** *receive."*

The appellant sought orders of this court allowing the appeal and directing the respondent to pay the appellants severance package at current salaries at the time of retrenchment, and an order that the amounts so paid do carry interest at commercial rate of 250/0 per annum from the date of retrenchment till payment in full. They also seek for costs in this Court, the Court of Appeal and the High Court.

At the hearing the appellants were represented by Mr. Angeret while Dr. Byamugisha represented the respondent.

In arguIng the appeal, Mr. Angeret argued the four grounds of appeal seriatim. He contended that the Justices of Appeal had erred in finding that exhibit P5 was not part of exhibit P4.

Exhibit P5 was a note by which the appellants were advised as to how they could calculate their final financial packages. Therefore, according to Counsel, it had to be read and construed together with exhibit P4 which set out the final package proposed for payment to the appellants. Counsel submitted that had the Justices of Appeal found that Exhibit P5 was part of exhibit P4, they would have come to the conclusion that what was paid to the appellants was wrongly calculated, being based on the salaries of 2002 instead of January 2004 when the appellants were actually retrenched.

With respect to ground 2, counsel contended that the Justices of Appeal were wrong to support the conclusions of the trial Judge that severance pay did not have to be paid on the same basis as payment in lieu of notice. Since payment in lieu of notice was based on the salaries as obtaining in January 2004, the same salaries should have been used to calculate severance pay. This would also have been in line with the Personnel Policies Manual which had a clause regulating payment of severance pay in cases of a declaration of redundancy. To counsel, the payments made to the appellants had totally ignored this formula and caused an injustice to them.

Further, counsel asserted that the respondent had paid differently for two items, i.e., payment in lieu of notice and severance package where the latter was based on a salary of 2002 while the former was based on the salary of 2004. He found this contradictory.

Furthermore, Counsel contended that under Section 36(d) of the Employment Act, wages to an employee are due at the time of termination. Therefore the severance package ought to have been based on current salary as at the time of the retrenchment.

On ground 3, counsel criticized the court for misapplying the case of ***BAHANGE -Vs- SCHOOL OUTFITTERS, (U) LTD [2000]1 EA 20.*** In his view, the sums paid were not arbitrary figures. They should have been calculated on the basis of a formula agreed by the parties, which was the formula contained in the retrenchment letters (exhibit P2). That formula did not provide for salary at the time of the commencement of the retrenchment exercise, but simply provided for salary multiplied by length of service. The service ended when the appellants were retrenched in January 2004. Therefore, to him, the salary which had to be multiplied had to be the current salary.

With respect to ground 4, counsel contended that the Agreement of Sale concluded between the Bank of Uganda/Uganda Government and the respondent had nothing to do with the appellants. They were not parties thereto, and what was agreed by the parties thereto could not bind them. Therefore, the respondent as employer had to bear their payments by virtue of their employment contracts with it, irrespective of what it had agreed with government.

He prayed that we allow the appeal, set aside the judgment of the Court of Appeal and order that the retrenchment package for the appellants be paid based on their salaries that were obtaining at the time of their retrenchment, i.e. January 2004. He also prayed for costs of the suit.

On the respondent's side, Dr. Byamugisha argued that the arguments of counsel for the appellants on grounds 1 and 2 amounted to an attempt to build a new case which had not been made before the Court of Appeal. He contended that the case had been determined on the issues and facts that had been agreed and set out. The agreed terms were put in the letters of retrenchment which the appellants had accepted, signed for and received the money offered. By so signing, the appellants had completed the contract which included clause 9 by which they had waived all further claims against the respondent. He submitted that the basis of the Judgment of the Court of Appeal was the contract signed by the appellants and the respondent and that it was in that context that the decision in the ***BEHANGE*** case, had been considered and followed.

On the issue of waiver, counsel cited the case of *W* **J *ALAN* & Co. *LTD* -*Vs*-** ***EL NASR EXPORT & IMPORT* Co *[1972J* 2 *ALL ER* 127** and ***KANYOMOZI -Vs- MOTOR MART (U) LTD [1999J2 EA* 114** to support his submission that once a party to contract has expressly waived his rights, and got a benefit out of the contract, he cannot file a claim based on the same contract claiming back

what he had waived. He therefore fully supported the decision of the Court of Appeal.
Counsel prayed that the appeal be dismissed with costs.

In reply, counsel for the appellants reiterated his submission that the appellants were not parties to the agreement between the Respondent and Government of Uganda and that their benefits had to be calculated on the basis of what was contained in the letters of retrenchment. He denied that he was making out a new case. He reiterated his prayers.

Having carefully considered the arguments and submissions of both counsel, I am of the view that the real issue to be determined in this case is whether the appellants having signed for and received the packages as calculated by the respondent can subsequently raise issues as to whether those payments were correctly calculated.

It seems to me that this was a special exercise involving the sale of Uganda Commercial Bank by the Government of Uganda to the respondent, and, bearing in mind that that exercise would affect the employees of the former employees of UCB. As early as 22nd February 2002, the respondent sent a circular to all the staff of the Bank informing them of these developments. Of particular interest is the paragraph of that circular on *((Restructuring"* which clearly stated that the Government of Uganda had put aside funds to cover the retrenchment of up to 500 staff. It further stated that an appropriate and equitable retrenchment package

would be offered first to those employees who voluntarily opted to leave the Bank.

On 4th April 2002, another circular to all staff was sent out which gave news up-dates on developments since "Stanbic's acquisition of UCBL". It called upon staff, inter alia, to apply for *((Voluntary retrenchment'JJ* and set out the terminal benefits that would be payable under that package. Attached to that circular was a note advising how one could calculate their packages. This was a special package arising out of the unique circumstances that had arisen. As was pointed out earlier this was to be paid for by the Government of Uganda, the former owners of the UCB.

Subsequently an audit was made and computations made by a firm of Auditors, KPMG and cleared by the Auditor General, as to the amounts of retrenchment payments that would be made. That firm produced its report entitled ***"staff retrenchment payments report* as at 21 *February 2002*."**(Exhibit D8).

The date of 21st February 2002 was the date, according to the letter of KPMG dated May 2002 to the Advisor, Bank of Uganda, that Bank of Uganda had requested the Auditors to update the UCBL staff retrenchments payments in its terms of reference.

As had been noted, the retrenchment of staff had been envisaged to take place over a period of two years from the date of the merger between UCBL and the respondent.

With the above background, the respondent embarked on the retrenchment programme, first by asking staff to voluntarily retire and take advantage of the voluntary retrenchment package. Subsequently other staff including the appellants were identified for retrenchment and were offered the voluntary retrenchment package under the letters of 15th January 2004 (exhibit P4).

addressed to each of the appellants individually. I will take the one to Mr. Samuel Lubega, the 1st appellant, as an example. It starts:-

RE: OFFER OF VOLUNTARY RETRENCHMENT PACKAGE.

> *Reference* is *made* to *the Managing Director's Circular of 12th January 2004.*
>
> *Management has identified those individuals whose skill and competency profiles do not match the requirements of the new Organization Structure. We regret* to *inform you that you fall into this category. You will therefore benefit from the Voluntary Retrenchment Package being offered by the Bank."*
>
> The letter proceeds to give details of the package:-
>
> *"1- Your last day* at *work will* be *16th January 2004 but your terminal benefits have been calculated* to *include 3 months in lieu of notice. Please note you will not* be *required* to *report for duty from* 1 *7th January 2004 onwards. However, you will receive your salary up until 31st January 2004.*

You will be paid UGX.20,202,490 for the period of service rendered to the bank. The basis for the calculation was noted in the circular dated 4th April 2002.

You are not entitled to funds to transport you, your family and household belongings home".

Please sign and return the duplicate copy of this letter to indicate your full and final acceptance of the terms noted above. This constitutes a final settlement of all financial claims of whatever nature between you and
UCBLjStanbic Bank Uganda Ltd. By accepting and signing this letter you expressly waive any right to any action or remedy against UCBLjStanbic Bank Uganda Ltd in respect of the matters herein agreed." (emphasis added).

The letter is signed by the Head of Human Resources.

Clearly, this letter was meant by the respondent to be the final agreement with the employee regarding the latter's retrenchment package. I t allowed no transport home for the employee or his family. Significantly it stipulated the exact amount of severance pay that had been computed by the respondent for the appellant. The letter, asked the employee if he accepted the terms to sign, but warned him that by so signing he waived all rights to claims for anything more concerning the matters stipulated in that letter. It would appear to me that the respondent itself did envisage that there could be some claims if the employee refused to sign for the package.

To me this is where the appellants should have sought legal advice, and they might as well have declined to sign and pursued legal action for what they now claim were their proper entitlements. But they simply signed the agreements and accepted and received the money calculated for them. In the law of contract, they accepted the offer, and that concluded the contract respecting their severance package.

It would appear that the respondent used the formula for calculating severance pay as of the date of the completion of the merger between UCBL and Stanbic, the same formula that had been used by KPMG since this was the money put up by the government to cover retrenchment package as of that date. That is why Mr. Kasozi witness DWl, the respondent's company secretary, stated in his evidence that:-

> ***"The buyer who* is *Stanbic Bank had* a *period of 2 years within which* to *decide which employees will be kept and those* to *be terminated.* It is *these employees who within the* 3 *years were not needed who would be retrenched and* it *was those employees that the Uganda Government undertook* to *pay their severance***
>
> ***"This offer was exclusive* to *ex-Uganda Commercial Bank Limited Staff. The exhibit P4(l) states that those who were not up* to *the standards did not match that of Stanbic, i.e. whose performance were below standard. They were required* to *accept and sign the letter and accepting all the terms and not* to *take***
> ***Uganda Commercial Bank Ltd, ...to court after signing. There were those who refused* to**

sign .....Those who signed were taken to have agreed to all the terms and conditions of the retrenchment package."

He proceeded to add:-

> ***"The plaintiffs were paid all the amounts that Government of Uganda undertook to pay on their behalf and after they were given the retrenchment letters. Stanbic was only an agent of government in making those payments in fulfilment of the agreed***
>
> ***Stanbic fulfilled its own obligation by paying the 3 months in lieu of notices and any accrued leave under the new terms and conditions set out in letters of appointment date 1/1/2003, the plaintiffs have nothing to claim."***

This evidence appears to explain one of the points raised by the appellants, namely why the payment of 3 months notice was based on current salaries while that of severance package was based on 2002 salaries.

To the respondent the latter was an obligation of the government and the appellants were aware of it from the said circulars given earlier on. The payment in lieu of notice was an obligation of the respondent.

Furthermore, as the witness explained, the retrenchment package was a special offer. The appellants could have refused it and pursued other legal avenues to claim for termination of their servIces. They opted to accept the package and its terms and amounts of money as calculated.

To me, this is the crux of the matter. It serves no useful purpose to go back to whether the packages were properly calculated or not, as the appellants argued under their grounds of appeal. This would probably have been relevant had the appellants refused to sign. But they signed and thereby completed a contract which they approbated. They now seek to reprobate the same. That is the essence of grounds 1 and 2 of this appeal and submissions made thereunder.

In considering this matter, Kitumba JA (as she then was) in the lead judgment had this to say (at page 15):-

> ***"In my view, there was* no *fraud* or *duress* in *this transaction, though PWl* in *his evidence above quoted tried* to *imply some duress/fraud. There was* no *fraud pleaded* in *the plaint.* It *was not proved by evidence.***
>
> ***Once the appellants signed and received their retrenchment packages, they cannot turn around and claim that exhibit PS was part and parcel of exhibit P4. The note attached merely indicated how one could calculate his/her retrenchment package.* It *was undated. The figures one had* to *get were clearly stated* in *the package.* 1 *do not accept the argument by the appellant's counsel that calculation for severance pay had* to *be* on *the same basis* as *payment* in *lieu of notice".***

The Learned Justice of Appeal went on to quote and rely on the Judgment in ***BEHANGE -Vs- SCHOOL OUTFITTERS Ltd*** (supra) that once the parties to a contract have signed it on agreed terms, the courts cannot go into it to inquire whether one received too little or too much, except in cases of proven fraud, mistake, duress, undue influence or misrepresentation. The

courts will enforce the contract as signed by the parties. She went on to conclude thus:-

> ***"Once the appellants signed the acceptance form and received their retrenchment packages the contract was sealed.*** **In** ***law they are not allowed*** **to** ***approbate and reprobate."*** I fully agree.

Furthermore, clause 9 of the contract as reproduced above contained a specific waiver of any claims or action against the respondent. The appellant should probably never have signed to this clause before taking legal advice. A waiver of a right or claim in law is a serious matter.

When the appellants signed to clause 9 what exactly were the implications? The last sentence of that clause states:-

> ***"By accepting and signing this letter you expressly waive any right*** **to** ***any action or remedy against UCBLjStanbic Bank Uganda Ltd*** **in** ***respect of the matters herein agreed."***

According to ***BLACK'S LA W DICTIONARY(7T^{H} Edition)*** the word ***"Waive"*** is defined thus:-

> ***"To abandon, throwaway, renounce, repudiate, or surrender a claim, a privilege, a right, or the opportunity*** **to** ***take advantage of some defect, irregularity, or wrong.*** **To** ***give up a right or claim voluntarily.***
>
> ***A person*** **is** ***said*** **to** ***waive a benefit when he renounces or disclaims it, and he*** **is** ***said*** **to** ***waive a tort or injury when he abandons the remedy which the law gives him for it.***
>
> **In** ***order for one*** **to** ***"waive" a right, he must*** **do it** ***knowing ly and be possessed of the facts ....."***

The same Dictionary goes on to define and explain a "waiver" as:-

> ***"The intentional*** **or** ***voluntary relinquishment of a known right,*** **or** ***such conduct as warrants an inference of the relinquishment of such right,*** **or** ***when one disperses with the performance of something he*** **is** ***entitled*** **to** ***exact*** **or** ***when one in possession of any right, whether conferred by law*** **or** ***by contract, with full knowledge of the material facts, does*** **or** ***forbears*** **to** ***do something the doing of which*** **or** ***the failure of forbearance*** **to** ***do which*** **is** ***inconsistent with the right,***
> **or** ***his intention*** **to** ***rely upon it ..... "***

In this case, the appellants had long known that there was a process of retrenchment going on. They had been told that the government would pay retrenchment packages for up to 500 retrenched staff. They had been given a note, exhibit 5 , which showed them how they could calculate their retrenchment packages. One must assume that by the time the final offer with the computed amounts arrived, the appellants knew or ought to have known what their terms as per their own calculations would be. This would have been the basis to reject the offered terms and negotiate for the terms they thought they were entitled to. They did not. Although some evidence was led to the effect that they were not happy with the offered terms, they nonetheless all signed the offered terms and took the money. By accepting, they led the respondent to believe that the matter was settled and there would be no further claims, let alone legal action. To me, they are caught by the principle of waiver which they signed up to.

In N **J *ALAN* & CO. *LTD -Vs- EL NASAR EXPORT & IMPORT Co.*** (supra) Lord Denning, MR, had this to say:-

> ***"The principle of waiver* is *simply this: if one party, by his conduct, leads another* to *believe that the strict rights arising under the contract will not be insisted on, intending that the other should act* on *that belief, and he does act* on *it, then the first party will not afterwards be allowed* to *insist* on *the strict legal rights when* it *would* be *inequitable for him* to do**
>
> ***There may be* no *consideration moving from him who benefits by the waiver. There may be* no *detriment* to *him by acting* on *it. There may be nothing* in *writing. Nevertheless, the one who waives his strict rights cannot afterwards insist* on *them. His strict rights are* at *any rate suspended* so *long* as *the waiver lasts."***

I am persuaded by the above sage words of a great jurist. The appellants signed to an express waiver, even when they knew or must be taken to have known all the facts. They must be held to that waiver.

In the circumstances, the appeal must fail and the Judgment and decision of the Court of Appeal must be upheld.

Each party applied for costs. The normal rule is that costs follow the cause. But in the peculiar circumstances of this case where the appellants were retrenched from their employment and have been trying to claim a little more based on their own interpretation of the terms, it would defeat the whole purpose of the retrenchment package were these people to be condemned in costs. The purpose of the retrenchment package was to

ameliorate their loss of a job. I believe this is a case where the court should exercise its inherent powers to do substantive justice and not award costs against the appellants. I would order that each party bears its own costs in this Court and the Courts below.

Dated at Kampala this ....day of .....*J12.*

.....

B.M.KATUREEBE JUSTICE OF THE SUPREME COURT

1.

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: ODOKI, C.J, TSEKOOKO, KATUREEBE, TUMWESIGYE AND KISAAKYE, JJ. S.C)

CIVIL APPEAL NO 24 OF 2010

1. SAMUEL LUBEGA }
2. LAWRENCE KAMULEGEYA}
3. RICHARD OLET PULE } ::::::::::::::::::APPELLANT

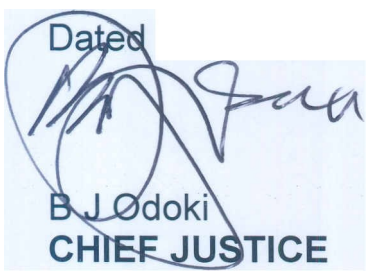
(On behalf of themselves and for the benefit of all former employees of the defendant who were retrenched in 2003 and January 2004)

[Appeal from the judgment and decision of *the Court* of *Appeal at Kampala (Twinomujun, Kitumba and Kavuma JJA) dated* 23 *September 2009 in Civil Appeal No* 16 of *20071*

I have had the advantage of reading in draft the judgment prepared by my learned brother, Katureebe JSC, and I agree with the judgment and the orders he has proposed.

As the other members of the Court also agree, this appeal is dismissed with an order that each party bears its own costs in this Court and the Courts below.

at Kampala this .....~ .....day of .~j *2012.*



THE REPUBLIC OF UGANDA

IN THE SUPREME mURT OF UGMIDA ATKMtPALA

[Coram: Odoki, CJ, Tsekooko, Katureebe, Tumwesigye & Kisaakye, JJSCj

OVil Appeal ***No.*** 24 *0[2010*

1. SAMUEL LUBEGA
2. LAWRENCE KAMULEGEYA

Betweell

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:::::::::::::::::::::::::::::::::::: APPELLANTS

3. RICHARD OLET PULE (On behalf of dlemselves and Ofuers)

l/s.

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:::::::::::::::::::::::::::::::::::: RESPONDENT

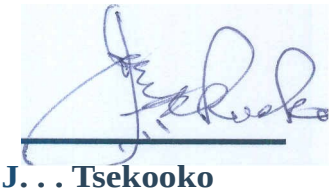
{Appeal froll1 the decision of the Court of Appeal at Kampala (TwinOll1ujum: KitUInba and Kavwna, JJA.) dated 2gct September, 2009 in Civil Appeal No. 16 *of 2007.}*

JUDGMENT OF J.W.N. TSEKOOKO, JSC.

I have had the benefit of reading in advance the draft judgment of my learned brother, the Hon. Mr. Justice B.M. Katureebe, JSC., and I wholly agree with him that the appeal has no merit and it

30 ought to be dismissed. I also agree with his proposed order as to costs.

Delivered at Kampala this .... *t*i:f.~day of~012.



J. . . Tsekooko
Justice of the Supreme Court.

2.

REPUBLIC OF UGANDA

(CORAM: ODOKI, CJ.; TSEKOOKO; KATUREEBE; TUMWESIGYE; KISAAKYE; JJ.SC)

CIVIL APPEAL NO: 24 OF 2010 BETWEEN

SAMUEL LUBEGA LAWRENCE

KAMULEGEYA RICHARD OLET

PULE

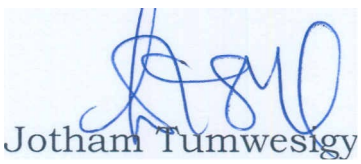
AND

STANBIC BANK LTD ::::::::::::::::::::::::::::RESPONDENT

[Appeal from the decision of the Court of Appeal at Kampala (Twinomujuni, Kitumba and Kavuma, JJA) dated 23rd September 2009 in Civil Appeal No. 16 of 2007]

I have had the benefit of reading in draft the judgment of my learned brother Katureebe, JSC, and I agree with him that this appeal should be dismissed. I also agree with the orders he has proposed.

Delivered at Kampala this ... 4!.' .day of ... ~/ 2012



3.

(CORAM: ODOI(I, C.J., TSEI(OOKO, I(ATUREEBE, TUMWESIGYE AND 1(ISAAKYE, JJ.S. C.)

1. SAMUEL LUBEGA }
2. LA WRENCE KAMULEGEYA
3. RICHARD OLET PULE :: APPELLANTS

IOn behalf of themselves and on behalf of and for the benefit of all former employees of the defendant who were retrenched in 2003 and January 2004)

I have had the benefit of reading in draft the judgment of my learned brother, Justice Katureebe, JSC.

I concur with him that this appeal be dismissed. I also concur with the orders he has proposed on costs.

Dated at Kampala this .. ~ay of .....2012 .

.....

DR. ESTHER KISAAKYE JUSTICE
OF THE SUPREME COURT