IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

FIRST INSTANCE DIVISION

(Coram: Johnston Busingye, PJ, Jean Bosco Butasi J, Isaac *Lenaola J)*

REFERENCE NO.6 OF 2010

ALCON INTERNATIONAL LIMITED …… CLAIMANT

VERSUS

1. **STANDARD CHARTERED BANK OF UGANDA …… 1ST RESPONDENT**
2. **THE ATTORNEY GENERAL OF UGANDA ON BEHALF OF THE REPUBLIC OF UGANDA …… 2ND RESPONDENT**
3. **REGISTRAR OF THE HIGH COURT OF UGANDA - 3RD RESPONDENT**

2nd September, 2013

INTRODUCTION

This Reference dated 20th August, 2010 was brought, inter alia, under the provision of Articles 27(2) and 151 of the Treaty for the Establishment of the East African Community and Articles 29 and 54 of the Protocol on the Establishment of the East African Community Common Market, respectively.

The Claimant is a construction company incorporated and registered in the Republic of Kenya, a member State of the East African Community (herein after referred to as "the Community"). It has perpetual succession, a common seal and power to sue and to be sued in its corporate name and its address is Postal Box Number 47160, NAIROBI, KENYA. For purposes of this Reference, its address was care of M/S Ibrahim Isaack and Company Advocates, Hughes Building 8th Floor Kenyatta Avenue, and P.O. Box 6697 500200, Nairobi, Kenya. The said Advocates were later replaced by M/S Muthomi & Karanja, Advocates Brandon Court, Marionette A2, Ndemi Lane, off Ngong Road, Nairobi, Kenya.

The First Respondent is a Limited liability company registered in Uganda and carrying out Banking Business, in Kampala, and its address is 5 Speke Road Postal Address as Post Office Box Number 7111, Kampala, Uganda. It is also incorporated in England with Limited liability by Royal Charter 1853.

The Second Respondent is the Attorney General sued on behalf of the Government of the Republic of Uganda and is the Principal Legal Advisor to the said Government.

BACKGROUND

The Claimant was first registered in Kenya as Company Number C9646 by the Registrar of Companies at Nairobi and its history is very enigmatic and the reasons thereof will shortly become apparent. 42 years ago, in January, 1971, it was a Company Limited by shares, registered and incorporated in Kenya and the owners were three brothers of Indian origin, who are Kenyan nationals. For clarity, these brothers are:

1. INDERJIT SINGH HANSPAL;
2. KULTAR SINGH HANSPAL;
3. DAVINDER SINGH HANSPAL.

At the time of incorporation, the Company was called ***ALLIED CONCRETE WORKS LIMITED*** but, it has changed its name over the years as follows:

On 6th November, 1971, it became known as **ALLIED CONTRACTORS LIMITED.**
On 26th July 1984, it was re-renamed **ALCON INTERNATIONAL LIMITED** but as a company incorporated in the **UNITED KINGDOM.**

On 21st July, 1994 in any event, **ALCON INTERNATIONAL LIMITED**, a Company incorporated in the Republic of Kenya entered into an agreement with the

National Social Security Fund (NSSF) of Uganda for completion of a partially constructed structure in reinforced concrete within Kampala City.

According to the Contract, ALCON INTERNATIONAL LTD was to be paid U**SD16,160,00** after completion of the structure later to be known as "Workers House" in Kampala. ALCON INTERNATIONAL LTD UGANDA is the one that carried out the execution of the contract which covered civil works, mechanical and electrical engineering, general and architectural work etc. On various dates between 11th December, 1997 and 30th April, 1998, NSSF wrote to ALCON INTERNATIONAL LIMITED giving notice of termination of the contract due to defaults allegedly committed by the later.

After lengthy correspondences between the Parties, the contract was formally terminated on 15th May, 1998.

On 30th November, 1998, an application in **HCCS No.1255 of 1998, (Uganda)** was filed by ALCON INTERNATIONAL LTD seeking certain orders for wrongful termination of the contract, but the Parties were advised to explore arbitration given the nature of the dispute. All the Parties agreed with the advice of the Court and after arbitration proceedings, the arbitrator awarded the Plaintiff, (ALCON INTERNATIONAL LTD) an amount of **USD8,858,469.97.**

Sometimes in the proceedings, **ALCON INTERNATIONAL LTD, UGANDA** appeared before the High Court and the Arbitrator to stake its claim to the Award but upon the Award being delivered, the NSSF challenged the same before the High Court

but its Appeal was dismissed and it then filed **Civil Appeal No.4 of 2009** before the Court of Appeal of Uganda challenging the judgment of the High Court in **Appeal No.2 of 2004**. Upon the Appeal being dismissed, the 1st Respondent, the Standard Chartered Bank of Uganda issued a Bank Guarantee number UGBG-030482 for **USD8,858,469.97** payable to Alcon International Limited as the judgment-creditor upon determination of **Appeal No.4 of 2009** in the Court of Appeal of Uganda.

On 25th August, 2009, the Appeal above was determined in favour of the Claimant who then demanded that the 1st Respondent should honour the Bank Guarantee and pay to it the decretal sum but later declined to do so.

In the meantime, the dispute had gone to the Supreme Court of Uganda in **Appeal No. 15 of 2009** and the Supreme Court issued orders of stay of execution of the decree pending its judgment which was eventually delivered on 8th February, 2013. In that judgment, the Supreme Court ordered inter-alia as follows:

i) that arbitral Award and the decision of the High Court should be set aside.
ii) that the judgment of the Court of Appeal be similarly set aside.
iii) **HCCS No.1255 of 1998** was returned to the High Court for trial afresh.

The reasons for that decision were that the Award was made in the absence of a cause of action against the Appellants; that it was obtained illegally and contrary

to Public Policy and that **HCCS No.1255 of 1998** was wrongly referred to arbitration.

Prior to the above decision, the Claimant had filed the present Reference on 20th August, 2010 and it moved this Court to interprete and apply Articles 27(2) and 151 of the Treaty and Articles 29(2) and 54(2)(b) of the Protocol on the Establishment of the East African Community Common Market with regard to the enforcement of, and enhancement of trade and resolution and settlement of disputes for the protection of cross-border investments.

CASE FOR THE CLAIMANT

The Claimant tendered both oral and Affidavit evidence and its Advocate Mr. Muthomi Thiankolu filed extensive written submissions and authorities in furtherance of the Claimant's arguments.

Its case can be summarized as follows:

That the Republic of Uganda has failed to protect its cross-border investment contrary to the letter and spirit of the Treaty and the Protocol;

That the Respondents have violated the express provisions of inter-alia Articles 5, 27, 127(2)(d) and 151 of the Treaty as read with Articles 29 and 54(2)(b) of the Protocol by failing to honour the obligation to pay the

decretal sum of USD8,858,469.97 and/or in accordance with a Bank Guarantee dated 29th October, 2003 and amended on 23rd October, 2008.

Further, that the Court's interpretation and application of the provisions of Articles 27(2) and 151 of the Treaty as read together with Article 54(2)(b) of the Protocol should lead to the following orders in favour of the Claimant:-

a) the Respondents be ordered to jointly and/or severally pay the Claimant the sum of **USD8,858,469.97** together with interest and costs in full under the Bank Guarantee dated 29th October, 2003.

b) this Honourable Court be pleased to interprete and apply Articles 27(2) and 151 of the Treaty for Establishment of the East African Community together with Articles 29(2) and 54(2)(b) of the Protocol on the Establishment of the East African Common Market on the enhanced jurisdiction of this Honourable Court as a competent judicial authority with regard to the enforcement of and enhancement of trade and resolution of settlement of and enhancement of trade and resolution and settlement of disputes for the protection of cross-border investments.

c) this Honourable Court be pleased to declare that the signing of the Protocol on the Establishment of the East African Common Market and the coming into force of the said Protocol on 1st July, 2010 enhanced the jurisdiction of this Honourable Court as envisaged under Article 27(2) of

the Treaty as a competent judicial authority for the determination of cross-border trade disputes between persons emanating from Partner States.

d) this Honourable Court be pleased to declare that where a Public official of a Partner State fails to honour his obligation/duty, statutory or legal to a person from a different Partner State, then under the spirit and letter of the Treaty and the Protocol, this Court has the jurisdiction to enforce that duty expeditiously.

e) direct the Respondents to pay the Claimant general damages as shall be determined by Court.

The said Prayers are also sought because the Claimant alleges that it has faced undue hardship and frustration in enforcing its rights through the Justice System in Uganda and that the Republic of Uganda is **"guilty of unlawful expropriation, denial of Justice and failure to protect the Claimant's cross-border investment."**

CASE FOR THE 1ST RESPONDENT

The 1st Respondent, the Standard Chartered Bank of Uganda Limited has argued:

that it has been improperly sued in the Reference as it is neither a Partner State nor an Institution of the Community to whom Article 30(1) of the Treaty can be applied;

In any event that, no cause of action can lie against it because the Bank Guarantee was in effect a contract between the Bank and the 3rd Respondent and the Claimant was a stranger to that contract and;

that no demand has been made by the 3rd Respondent for the Bank to honour the Guarantee.

More fundamentally, the 1st Respondent has made the point that there is no Guarantee left to be enforced because the Supreme Court of Uganda has since set aside all the orders that related to the Guarantee and, therefore, the substratum of the Reference no longer exists.

Two other issues were raised by the 1st Respondent:

That the Reference is time-barred and also that the Claimant has no rights under the Protocol for acts which arose prior to the coming in force of the said Protocol.

It, therefore, prays that the Reference should be dismissed with costs.

CASE FOR 2ND AND 3RD RESPONDENTS

The 2nd and 3rd Respondents were represented by Attorneys from the office of the 2nd Respondent and their case is as follows:

Like the 1st Respondent, the 3rd Respondent, not being a Partner State nor an Institution of the Community was improperly joined to the Reference. In any event, that the Claimant had no legal interest in the subject investment and was not a Party to the arbitral and litigation proceedings leading to the Bank Guarantee and, therefore, has nothing to enforce. Accordingly, the 2nd and 3rd Respondents had not breached any duty of care and neither did they fail to protect any cross-border investments as alleged.

Like the 2nd Respondent, they seek orders that the Claimant has no cause of action; that the Reference is time-barred and that the Claimant has no rights under the Protocol and that the Reference should, therefore, be dismissed with costs.

THE SCHEDULING CONFERENCE

On 3rd May, 2012, a Scheduling Conference was held and the Parties agreed that the following issues need to be determined by the Court:

1. Whether this Reference is properly before this Court as against the 1st and 3rd Respondents within the meaning of Article 30(1) of the Treaty, they being neither Partner States nor Institutions of the Community;

2. Whether the Claimant has a cause of action;

3. Whether this Court has jurisdiction over acts that took place before the coming into force of the Protocol;

4. Whether the Reference is time barred in accordance with Article 30(2) of the Treaty;

5. Whether the provisions of Article 54(2) of the Common Market Protocol extended the jurisdiction of this honourable Court for settlement of cross-border disputes;

6. Whether the Respondents are in breach of the provisions of Articles 27 and 151 of the Treaty for the Establishment of the East African Community as read together with the provisions of Article 54 of the Protocol on the Establishment of the East African Common Market by failing to honour or act in accordance with the Bank Guarantee dated 29th October, 2003 as amended on 23rd October, 2008;

7. Whether the Claimant is entitled to the Prayers in the Reference dated on 20th August, 2010.

DETERMINATION

In the determination of the issues above, we have read and have taken note of the following documents:

1. Reference **No. 06 of 2010 itself;**
2. The Responses to the Reference together with the affidavits in support of, and opposition to the Reference;
3. The Rejoinder to the Reply to the Responses;
4. Applicant's written submissions filed on 30th January, 2013;
5. First Respondent's written submissions filed on 1st March, 2013;
6. 2nd and 3rd Respondents' written submissions filed and lodged on 27th March, 2013;
7. Applicants' rejoinders to the Respondents' written submissions.

We have also taken into account relevant annexures namely, the contract between Parties for erection of the "Workers House" in Kampala, Uganda, the different Rulings and Judgments of the National Courts in Uganda, the Arbitral Award and the Bank Guarantee.

PRINCIPLES OF INTERPRETATION OF THE TREATY

This Court in **Modern Holdings (EA) Ltd versus Kenya Ports Authority, EACJ Reference No.1 of 2008** stated inter alia that:

> **"The Treaty being an International Treaty among five Sovereign States, namely, Burundi, Kenya, Rwanda, Tanzania and Uganda is subject to the International Law on interpretation of Treaties, the main one being 'The Vienna Convention on the Law of Treaties."**

The Court in stating so relied on the principle set forth in Article 31(1) of the Vienna Convention on the Law of Treaties as a general principle to interprete the EAC Treaty. Article 31(1) of the said Convention provides that:

> **"A Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in the light of its object and purpose".**

This principle shall guide us in the determination of the issues arising out of the Scheduling Conference and which are set out above.

ISSUE NO.1: Whether this Reference is properly before this Court as against the 1st and 3rd Respondents within the meaning of Article 30(1) of the Treaty, they being neither Partner States nor Institutions of the Community

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Article 30(1) of the Treaty reads as follows:

> **"Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an Institution of the Community on grounds that such an Act, regulation, directive, decision or action is unlawful or an infringement of the provisions of this Treaty."** (Emphasis added)

"Partner State" is defined by Article 1 of the Treaty as **"The Republic of Uganda, the Republic of Kenya, the Republic of Tanzania and any other country granted membership to the Community under Article 3 of this Treaty."** Burundi and Rwanda later became full members of the EAC on the 1st July, 2007.

The word **"Institution**" is defined in Article 9(2) as follows: **"The Institutions of the Community shall be such bodies, departments and services as may be established by the Summit."** Article 9(3) then designates existing Institutions as such. They include the East African Development Bank and the Lake Victoria Fisheries Organisation.

Neither the 1st nor the 3rd Respondent are a Partner State or an Institution established by the Summit and they cannot, therefore, be properly sued in that capacity before this Court because they are not bound by the Treaty or any of its Protocols.

In **Anyang' Nyong'o and others versus the Attorney General of the Republic of Kenya and others, Ref. No.1 of 2006**, this Court stated inter-alia as follows:

> **"A reference under Article 30 of the treaty should not be construed as an action in tort brought by a person injured by or through the misfeasance of another. It is an action to challenge the legality under the Treaty of an activity of a Partner State or of an Institution of the Community. The alleged collusion and cognizance, if any is not actionable under Article 30 of the treaty."**

We agree wholly and we further note that in **Modern Holdings (E.A.) Limited versus Kenya Ports Authority** (Supra) the Court stated that the Kenya Ports Authority was created by the Republic of Kenya and not by the Summit and the mere fact that it rendered services to East African Partner States and its Citizens did not ipso facto make it an Institution of the Community.

Again we adopt those findings and, therefore, it is our holding that the 1st and 3rd Respondents were improperly sued in the Reference and all the complaints against them are dismissed. We shall address the issue of costs later.

ISSUE NO.2: Whether the Claimant has a Cause of Action

Having struck out the 1st and 3rd Respondents from the Reference, the question that remains to be answered is the substance of issue No.2 i.e. whether there is a cause of action against the 2nd Respondent, the only remaining Respondent in the Reference.

It is agreed that the 2nd Respondent can in proper circumstances be sued in the name of the Republic of Uganda which is a Partner State. It is alleged by the Claimant that the Republic of Uganda has failed to protect its cross-border investment contrary to Articles 5, 127 and 151 of the Treaty as read with Articles 29 and 54(2) of the Common Market Protocol. In his submissions, Mr. Muthomi stated that the failure is embodied, inter-alia in:-

(a) the wrongful termination of the building contract by the NSSF;

(b) the refusal by the NSSF to pay for work done;

(c) the continued confiscation of the Claimant's plant, machinery and tools of trade;

(d) the failure and/or refusal by the 1st and 3rd Respondents to honour the Guarantee inspite of Rulings and Judgments of the High Court and the Court of Appeal made in favour of the Claimant; and

(e) failure and/or denial of justice, as evidenced by:-

(i) the failure of the justice system of Uganda to finally resolve the dispute between the Claimant and the NSSF expeditiously (at any rate within 90 days as required under the Arbitration Law then in force). That to this end, it is agreed that the Claimant's grievance has lagged before the Ugandan justice system for more than fourteen years;

(ii) unjustifiable attempts to deprive the Claimant of the benefit of the arbitral award and decree of the High Court and;

(iii) the recording of a fraudulent consent (purportedly agreed to by the Claimant) in the Supreme Court.

It is obvious to us that all the above alleged failures on the part of the Republic of Uganda must be looked at in the context of the whole Reference. The

substratum of the Reference is the Bank Guarantee dated 29th October 2003 as amended on 23rd October, 2008.

But, does the Guarantee now exist? It does not. When the Reference was filed, the Claimant was relying wholly on the decision of the Arbitrator (Justice (Rtd) Torgbor) and the Appeals in the High Court and Court of Appeal of Uganda in favour of the Claimant. By the conclusion of the hearing of the Reference, however, the Supreme Court of Uganda had rendered its final decision regarding both the Arbitral and Court proceedings. In a nutshell, all the decisions were set aside and the initial suit filed by the Claimant **HCCS No. 1255 of 1998** was ordered to proceed to trial on the merits. We do not know whether the trial has began but what is clear to us is this; once the proceedings aforesaid were set aside, the Bank Guarantee ceased to exist and the Claimant, by relying on it is clutching onto thin air only. With respect, once there is no lawful Bank Guarantee before the Court, then the whole Reference must collapse and the Claimant's remedy lies in pursuing **HCCS No.1255 of 1998** to conclusion.

Of course, we are alive to the long period the matter has taken and the obvious physical and mental strain the Claimant's Directors have had to endure, but sometimes the road to justice can be long and arduous.

In the event and without belabouring the point, all the issues raised by the Claimant cannot be properly adjudicated by this Court because there is no live dispute before it. There is in any event no cause of action against the 2nd Respondent.

ISSUE NO.3: Whether this Court has Jurisdiction over acts that took place before the coming into force of the Protocol

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The fact complained of is the failure to honor the Bank Guarantee by the 1st and 3rd Respondents.

It is not in dispute that the alleged breach of contract by those Respondents, the Arbitral proceedings and Award, the orders of the High Court and Court of Appeal and the issuance of the Bank Guarantee occurred before 1st July, 2010; the date of the coming into force of the Common Market Protocol. It is the contention of the Claimant that the issue as to whether this Court has jurisdiction over acts that occurred before the coming into force of the said Protocol has been overtaken by events since the Appellate Division had directed, in its Ruling dated 16th March, 2012 that the First Instance Division should proceed and "determine the merits of the Reference before the Court." The other submissions of the Claimant can be summarized as follows:

i. that the Respondents are guilty of continuing breach of their obligations under the Guarantee and, therefore, the issue of retroactivity does not arise because it is expressed that the liability of the First Respondent should be extinguished by payment to the Registrar of the High Court of the decretal amount.

ii. The rule as to non-retroactivity of Treaties does not apply where "**a different intention appears from the Treaty or is otherwise established."**

iii. Although the Common Market Protocol came into force on 1st July, 2010, Article 151(4) of the Treaty indicates that once a protocol is signed and ratified it becomes an **"integral part"** of the Treaty and it follows that the Common Market Protocol should be read as **"an Integral part"** of the Treaty

The response by the Respondents on this issue is that:-

1. A Treaty cannot apply to acts that took place before it comes into force unless it is expressly stated so or an intention can be inferred from its provisions.

2. No provision can bind a Party in relation to any act or fact which occurred or any situation which ceased to exist before the entry into force of the Treaty according to Article 28 of the Vienna Convention on the Law of Treaties.

3. The Principle of non-retroactivity of a treaty has been discussed by this Court in **Emmanuel Mwakisha Majawasi and 748 Others Vs. the Attorney General of the Republic of Kenya (Appeal No.4 of 2011)** and it was held that the Treaty cannot apply retroactively unless it derives explicitly from

the provision of the Treaty itself or it may be implicitly deduced from the interpretation thereof.

Further, that a plain reading of Article 55 of the Protocol would show that the Treaty cannot apply events prior to its ratification. Indeed, Article 55 provides that the Protocol shall enter into force after the deposit of instruments of ratification with the Secretary General by all the Partner States.

That if it was the intention of the Partner States to make the Protocol retroactive, they should have explained it clearly and unambiguously, but nothing in it points to such an intention and, therefore, the Protocol cannot apply to the Claimant's situation regarding the enforcement of the Bank Guarantee which was issued on 29th October, 2003 and amended on 23rd October, 2008 while the Protocol came into effect on 1st July, 2010.

For our part, we deem it necessary for avoidance of doubt, to reproduce the contents of Article 151(4) of the Treaty and Article 55 of the Protocol.

Article 151(4) reads as follows: **"The Annexes and Protocol to this Treaty shall form an integral part of this Treaty."**

It cannot be gainsaid, therefore, that the Common Market Protocol constitutes an integral part of the Treaty.

Article 55 of the Protocol states that: **"The Protocol shall enter into force upon ratification and deposit of instruments of ratification with the Secretary General by all the Partner States."**

None of the Parties to this Reference has challenged the date of the entry into force of the Common Market Protocol i.e. 1st July, 2010.

The bone of contention between Parties is simply whether the Protocol has retroactive application and we have said elsewhere above that we shall in interpreting the Treaty and especially Articles 151(4) and 55, rely on the principles set out in the Vienna Convention on the Law of Treaties.

The relevant Article of the Vienna Convention is Article 28 which addresses non-retroactivity of Treaties.

It reads as follows: "**Unless a different intention appears from the Treaty or is otherwise established its provisions do not bind a Party in relation to any act or a fact which took place or any situation which ceased to exist before the date of the entry into force of the Treaty with respect to that Party."**

The reference to the Treaty in this case must be a reference to the Common Market Protocol and the date that it came into force.

Furthermore, Article 31 of the Vienna Convention creates the threshold rule of interpretation. It states that:

"1. **A Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in the light of its object and purpose.**

2. The context for the purpose of the interpretation of a Treaty shall comprise in addition to the text, including its preamble and annexes:

(a) any agreement relating to the Treaty which was made between all Parties in convention with the contention of the Treaty; (b) any instrument which was made by one or more Parties in connection with the conclusion of the Treaty and accepted by the other Parties as an instrument related to the Treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the Parties regarding the interpretation of the Treaty or the application of its provisions; (b) any subsequent practice in the application of the Treaty which establishes the agreement of the Parties regarding its interpretation; (c) any relevant rules of international Law applicable in relation between Parties.

4. A special meaning shall be given to a term if it is established that the Parties so intended."

We are duly guided and after careful reading and understanding of the above provisions nothing can show that the framers of the Protocol had any intention of its retroactive application. In a similar case, the Appellate Division of this Court held that:

> **"……. The Court considers the situation of the ex-employees of the defunct Community to have ceased to exist at the Community level from 14 May, 1984. That date was obviously before the entry into force of the EAC Treaty --- We, therefore, agree with the Court below that the Principle of non retroactivity is relevant to the instant case." (See Appeal No.4 of 2011 in the Reference Emmanuel Mwakisha Mjawasi and 748 Others versus the Attorney General of the Republic of Kenya.)**

The same holding applies to a protocol and indeed without such retroactivity, the Protocol on the Establishment of the East African Community Common Market cannot apply to the acts that took place before 1st July, 2010 and this Court cannot have jurisdiction to determine the issue as framed.

In **Appeal No.4 of 2011** cited elsewhere above in this case, the Appellate Division resolved the issue of the nexus between non-retroactivity and the question of jurisdiction as follows:

> **"……. Where then, one may ask, did the Court derive its jurisdiction, since the Treaty which normally confers the jurisdiction on the Court did not apply? Non retroactivity is a strong objection. When it is upheld, it disposes off the case there and then. As non retroactivity renders the**

Treaty inapplicable forthwith, what else can confer jurisdiction on the Court? non-retroactivity of jurisdiction."

That Court even went further in **Appeal No.3 of 2011 Attorney General of the United Republic of Tanzania vs. African Network for Animal Welfare** when on the question of jurisdiction, it stated that:

"**Jurisdiction is a most, if not the most fundamental issue that a Court faces in any trial (sic). It is the very foundation upon which the judicial edifice is constructed; the fountain from which springs the flow of the judicial process. Without jurisdiction, a Court cannot take even the proverbial first Chinese step in its judicial journey to hear and dispose of the case."**

We are wholly guided by the above finding. Moreover, we share the view that:

"A Court cannot give itself jurisdiction in a case otherwise outside its jurisdiction on the ground that it would be for the convenience of Parties and witnesses. The Plaintiff must state the facts on which the Court is asked to assume jurisdiction". See Civil Procedure & Practice in UGANDA by M. SSEKAANA & S.N. SSEKAANA at P.7.

In any functioning legal system, Judges are crucially bound by the Law and Rules that they are called upon to apply. Consequently, the more they distance themselves from the Law as set down by those charged with legislative authority

and the more they come up with circumstantial solutions that attract their own tastes and preferences, the more they jeopardize the authority of their judgments which is akin to judicial tragedy.

With the greatest respect to the Claimant, once we have addressed issues Nos. 1, 2 and 3 in favour of the Respondents, the Reference must collapse and any determination of issues Nos. 4, 5, 6 and 7 becomes wholly academic. We decline to take that path.

In conclusion, we find no merit in the Reference before us and the same is hereby dismissed.

As to costs, the Claimant has been seeking justice for long and is yet to finalise **HCCS 1255 of 1998** in Uganda which was the original case in this dispute. We deem it inappropriate to penalize it with costs and so, each Party shall bear its own costs.

It is so ordered.

Dated, Delivered and Signed at Arusha this 2nd Day of September, 2013

…….
JOHNSTON BUSINGYE
PRINCIPAL JUDGE

…….
JEAN BOSCO BUTASI
JUDGE

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ISAAC LENAOLA
JUDGE