# THE REPUBLIC OF UGANDA

## IN THE COURT OF APPEAL OF UGANDA

## CIVIL APPEAL NO.78 OF 2012

**FOODS AND BEVERAGES LIMITED ::::::::::::::::::::::::APPELLANT**

**VERSUS**

**ATTORNEY GENERAL::::::::::::::::::::::::::::::::::::::::::::RESPONDENT**

*(Appeal form the Judgment and orders of the High Court at Kampala (J. Ogoola, P.J, as he then was) dated 14th October 2009 in Civil Suit No.542 of 2011)*

**CORAM: HON JUSTICE KENNETH KAKURU, JA**

**HON. JUSTICE STEPHEN MUSOTA, JA**

**HON. JUSTICE CHRISTOPHER MADRAMA, JA**

**JUDGMENT OF JUSTICE STEPHEN MUSOTA, JA.**

**Background**

The Appellant filed HCCS 34 OF 1994 against Transocean Uganda Ltd claiming US$ 960,018 for breach of contract to clear and transport consignments of sugar and salt from Mombasa to Kampala in the period 1987-1989.

While the suit was pending, Transocean Uganda Ltd was liquidated by the Government in implementation of The Public Enterprises Reform and Divestiture Act. The Appellant presented its claim to the liquidator of Transocean Uganda Ltd, the Privatization Unit of the Ministry of Finance requested the Auditor General to verify the claim.

By a letter dated 3rd July 2000 to the Solicitor General, the Auditor General verified the sum of US$ 730,613 as due to the Appellant. By a letter dated 12th July 2000 the Solicitor General communicated to the Appellant that the claim of US$730,613 as verified by the Auditor General would be settled, subject to the Appellant withdrawing HCCS 34 of 1994. Accordingly, the Appellant withdrew HCCS 34 of 1994. By a letter dated 27th July 2000, the Solicitor General confirmed that the suit had been withdrawn and gave a go-ahead to the Privatization Unit to settle the claim.

The Privatization Unit did not pay the Appellant. The Appellant then filed HCCS 542 of 2001 against the Attorney General to recover the verified and admitted claim. The Attorney General denied liability and counter-claimed for US$ 274,048.56 as money owed by the Appellant to Transocean Uganda Ltd.

In a Judgment delivered on 24th October 2009, the trial Judge allowed the Appellant's claim of US$730,613. He also allowed the Respondent's counter–claim in the sum of US$ 274,048.36. Judgment was accordingly entered for the Appellant in the net sum of US$456,564.64 after set off of the respondent's counterclaim. Each party was ordered to bear its own costs.

The appellant was aggrieved by the judgment of the High Court and filed this appeal against the quantum of the award on the following grounds;

1. The Learned Trial Judge erred in law and fact when he held that the appellant owed the respondent the counterclaim of US$ 274,048.36 when the Respondent had no *locus standi* to make the counterclaim.
2. The Learned Trial Judge erred in law and fact when he allowed a counter claim which was time barred and unproved.

3. The Learned Trial Judge erred in law and fact when he disregarded the government's acknowledgement of the appellant's full claim and consequent promise to pay.
4. The Learned Trial Judge erred in law when he did not award the appellant costs of the suit.

**Representation**

At the hearing of the appeal, Mr. Nambale David and Mr. James Katono appeared for the appellant while Mr. Phillip Mwaka appeared for the respondent. The parties were directed to file written submissions.

**Duty of a 1st appellate court**

This is a first appeal and as such this Court is required to re-evaluate the evidence and come up with its own inferences on issues of law and fact. In **Father Narsensio Begumisa and 3 others Vs Eric Tibebaga Supreme Court Civil No. 17 of 2002**, Court held as follows;-

*"It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions."*

In **Coghlan vs. Cumberland (1848) 1 Ch. 704, the Court of Appeal (of England)** put the matter as follows -

*"Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the Judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not*

*shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong.... When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the Judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the Judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen."*

In **Pandya vs. R (1957) EA 336**, the Court of Appeal for Eastern Africa quoted this passage with approval, observing that the principles declared therein are basic and applicable to all first appeals within its jurisdiction.

See also: -**Rule 30(1) of the Rules of this Court and Ephraim Ongom Odongo Vs Francis Binega Donge Supreme Court Civil Appeal No. 10 of 2008** (unreported).

I shall keep the above principles in mind while resolving the grounds of appeal. I have considered the submissions of Counsel and carefully perused the Court record, I now proceed with my duty of evaluating the evidence in the order the parties argued the grounds.

**Ground 1**

**Appellant's submissions**

While arguing ground one, counsel for the appellant submitted that the Attorney General had no locus standi to maintain the counter claim at the trial court because Transocean Uganda Ltd was incorporated in 1974 as a private limited liability company whose shares were wholly owned by Government and a shareholder in the company has no locus standi to sue for a debt owed to the company.

Transocean Uganda Ltd was listed as No. 44 in Class III of the First Schedule to the Public Enterprises Reform and Divesture Act and these were enterprises from which the government decided to fully divest from.

Under Section 26 of the Public Enterprises Reform and Divestiture Act, the government could only assume liability for the debts owed by a divested company. Transocean (U) Ltd was liquidated and accordingly, any claims or assets are vested in the liquidator of Transocean Uganda Ltd. Further, there was no evidence that the liquidator assigned the sum counterclaimed to the respondent.

**Respondent's submissions**

The respondent submitted that the claim herein had earlier been the subject matter of H.C.C.S No. 34 of 1994 Foods and Beverages Limited Vs Transocean (U) Ltd which suit the appellant withdrew following the divestiture of Transocean Uganda Limited and representations of payment by government in respect of obligations of the defunct Transocean (U) Ltd. That in addition to filing a defence in H.C.C.S No. 34 of 1994, Transocean (U) Ltd had filed a counter claim contending that it had not been paid US$342.002.65 which was arising out of the same transaction for import of sugar and salt. Counsel argue that this means that the appellant sued the government of Uganda through the Attorney General and not Transocean Uganda Ltd in H.C.C.S No. 542 of 2001 for a claim arising from a transaction for import of sugar and salt between the appellant and the defunct Transocean (U) Ltd since it would not sustain a suit against the defunct Transocean (Uganda) Ltd.

Counsel referred to the pleadings in H.C.C.S No. 542/2001 and H.C.C.S No. 34 /1994 and submitted that the entire claim by the appellant and the respondent is premised on the same transaction for import of the very same consignment of sugar and salt between Foods and Beverages Limited and Transocean (Uganda) Limited between 1987 and 1989. In addition, that the appellant cannot

purport to take benefit from the said transaction for import of salt and sugar and purport to bar the respondent from recovering monies due and owing to Transocean (U) Ltd under the same transaction. The government of Uganda, wholly owning Transocean (U) Ltd had both a fiduciary duty and locus standi to offset the amounts due and owing to Transocean (U) Ltd under the transaction for import of the very same consignment of salt and sugar.

Whereas the appellant purports to rely on section 26 of the Public Enterprises Reform and Divestiture Act to argue that government only assumed the liabilities of Transocean (U) Ltd and the principle of Estoppel to hold government responsible for alleged liabilities, the appellant did not acknowledge that government was obliged to verify those liabilities and offset its claims arising from the very same transaction for import of sugar and salt and also claim monies owed to Transocean (U) Ltd.

**Resolution of ground 1**

PW1 for the appellant testified that in HCCS No. 34/1994, the appellant had sued Transocean (U) Ltd for failure to refund money advanced to them to clear 3 consignments of goods being salt from Mombasa from Almeta (K) Ltd, 7000 tones of Cuba 11 sugar from Cuba to Dar-es-Salaam port and 8000 tones of Cuba 111. That the appellant, Foods and Beverages, paid fully but Transocean ferried only some of the goods leaving a balance of 500 tones. PW1 further testified that for the consignment of Almeta salt, the appellant made payments of 106,000,000/=, $129,128,05 and $49,980 covering the full payment of the entire consignment.

For the respondent, it was argued that Transocean (U) Ltd transported 3743 MT's (metric tones) to Kampala while the balance of 3,397 MT's was transported by ACME (U) Ltd. Transocean (U) Ltd incurred extra costs and expenses in clearing and forwarding all the consignments of salt and sugar at both Mombasa and Dar-es-salaam over and above the amounts paid by Foods and Beverages and that

these extra charges were paid by Transocean (U) Ltd on behalf of the appellant.

What is clear to me is that both the claim by the appellant and the counter-claim by Transocean (U) Ltd arose from the same transaction for import of sugar and salt.

The appellant had initially filed HCCS 34 of 1994 against Transocean Uganda Ltd claiming US$ 960,018 for breach of contract to clear and transport consignments of sugar and salt from Mombasa to Kampala in the period 1987-1989. This suit was only withdrawn after the appellant received a letter dated 12th July 2000 in which the Solicitor General communicated to the appellant that the claim of US$730,613 as verified by the Auditor General would be settled, subject to the appellant withdrawal of HCCS 34 of 1994.

Clearly, there were negotiations between Foods and Beverages (U) Ltd and Transocean (U) Ltd before the divesture of Foods and Beverages and stripping assets of Transocean in which Foods and Beverages owed Transocean (U) Ltd US$274.048.56. H.C.C.S No. 542 of 2001 was filed against the Attorney General because the appellant could not sustain a suit against the defunct Transocean (U) Ltd. The Government of Uganda which wholly owned the defunct Transocean (U) Ltd had a duty to offset the amounts due to Transocean under the transaction with Foods and Beverages.

I therefore agree with the learned trial Judge that both the claim and the counter-claim arose from the very same transaction and the appellant cannot claim that the respondent could not counter-claim against the appellant. Ground one of the appeal therefore fails.

**Ground 2**

**Submissions of the appellant**

Counsel for the appellant submitted that the respondent's counter-claim was time barred under section 6 of the Limitation Act which limits actions for breach of contract to 6 years from the date of the cause of action arising. That the cause of action accrued in 1987-1989 and the counter-claim was filed in 2001 which was about 12 years from the alleged breach.

In regard to proof of the counter-claim, counsel argued that special damages had to be strictly pleaded and proved and submitted that the respondent's counter-claim had been inconsistent. In H.C.C.S No. 34 of 1994, Transocean counter-claimed for US$592.206.56 and in H.C.C.S No. 542 of 2001, the respondent claimed that the appellant owes Transocean (U) Ltd a sum of US$274.048.56 in respect of the same transaction. That the evidence of DW1 and Exhibit D16 claimed an amount of US$274.048.56 plus Kenya shs. 120,000. DW2 testified that the total balance due to Transocean was US$740.001.94. In DW3's witness statement, she claimed the signed minutes of the technical Committee indicate a balance of U.S $274.048.56 but on the same page, she reports a pre divesture audit which indicated that Foods and Beverages owed Transocean a sum of shs. 661,698,491. Counsel argued that these inconsistencies were unexplained and in addition, neither the members of the technical committees nor the alleged auditors were called as witnesses to prove the balances owed to Transocean (U) Ltd.

**Submissions of the respondent**

The respondent submitted that both claims that were entertained by the trial Judge arose out of the same transaction being import of consignments of sugar and salt in the period 1987 to 1989. The choses of action of the claim and counter-claim are the same and as such, should the counter-claim be time barred, the claim would also be time barred.

In respect of proof of the counter-claim, the respondent submitted that the evidence of DW1, DW2 and DW3 proved the debt to the

satisfaction of court. That the amount of US $274.048.56 was corroborated by the evidence of DW1 and DW3. As such, the claim was well proved by the defence witnesses and the trial Judge rightly found that the appellant owed Transocean US $274.048.56

**Consideration of ground 2**

At the trial, the appellant did not raise the issue of the counter-claim being time barred under the Limitation Act. **Rule 86 (1)** of the **Court of Appeal Rules** provides:-

*"86. Contents of memorandum of appeal.*

1. *A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongfully decided, and the nature of the order which it is proposed to ask the court to make."* (Underlying is for emphasis)

From the reading of the above rule, it is clear that the contents of a memorandum of appeal must set/specify the points which are alleged to have been wrongly decided by the trial Judge. It is also clear that the appellant did not raise the issue of time limit at the trial and as such, I cannot fault the trial Judge on an issue he did not adjudicate upon. The law is that the grounds being framed on a memorandum of appeal should emanate from the decision and proceedings of the lower court. This point was heightened in the case of **Ms Fang Min v Belex Tours and Travel Limited SCCA No. 06 of 2013** where the Supreme Court held:

> *"... on appeal, matters that were not raised and decided on in the trial court cannot be brought up as fresh matters. The Court would be wrong to base its decision on such matters that were not raised as issues and determined by the trial Court."*

In that regard, the appellant's argument that the counter-claim was time barred must fail because it was not raised at trial. In any case para. 4of the written statement of defence states that the counter claim arose after a settlement arrived at by the parties in a letter dated 12th July, 2000 which is annexed to the plaint as annexture D. The WSD and counterclaim were filed on 20th December, 2001 just less than one and a half years later. Accordingly, the counterclaim could not have been time barred as the claim was revived through negotiations as is evidenced in annexture D to the plaint.

Ground 2 also faults the trial Judge for having allowed a counter-claim that was unproved.

I reiterate my earlier findings that both the claim and the counter-claim arose out of the same transaction. From the evidence of PW1 already stated above, Transocean transported 3743 MTs to Kampala while the balance of 3,397MTs was transported by ACME (U) upon the appellant's own instructions. The respondent contends that all the balances of the consignments were re-routed at the behest of the appellant itself. Transocean also incurred extra costs and expenses in clearing and forwarding all the consignments of salt and sugar both at Mombasa and Dar-es-salaam over and above the amounts paid by the appellant. These extra charges which included wharfage, share handling, stevedoring, dockage, were instead paid by Transocean on behalf of the appellant and were invoiced by Transocean (U) Ltd. Whereas it is true that the appellant made the necessary payments, the payments were routinely made late. Also, shipping documents on which the payments were based were also made late due to the late arrival of the ships at Mombasa and Dar-es-salaam.

Transocean was availed the necessary shipping documentation late, which lateness occasioned extra costs paid by Transocean on behalf of the appellant. As far as Transocean is concerned, it would only look at the appellant with whom there was a contractual relationship.

The finding of the trial Judge that the appellant owed the respondent US $274.048.36 was from the annextures produced by Transocean (U) Ltd in B1, B2, C, D, E to O. for instance in the letter to the appellant dated 29/10/90, Transocean drew the appellant's attention to the delay and to the continued deterioration of the salt in Mombasa warehouses and the appellant was reminded to pay $258.256.01 for handling the salt ex-warehouse and transportation to Kampala. The appellant took no action until 4/12/90 when they made a payment of $129.128.05 which was just half the amount required. Meanwhile the salt was continuing to delay, deteriorate and incur heavy storage in Mombasa. Eventually, the transit entries expired and Transocean had to apply to Kenya Ministry of Finance for revalidation.

I find that the trial Judge duly considered all the above evidence to find that the appellant owed US $ 274.048.36 and as such, ground 2 of the appeal fails.

**Ground 3**

**Submissions of the appellant.**

Counsel submitted that the appellant's original claim was for US $960.069.18 which the Auditor General verified and acknowledged and the respondent promised to pay that amount. That the opinions of the Attorney General and the Auditor General on the legal and financial validity of the claim respectively should be accorded utmost respect under Article 119 and 163 of the Constitution. Transocean is deemed to have taken account of a set off, if any, prior to promising to settle the debt in the final sum of US $960.069.18 and as such, it is untenable for the respondent to promise payment of the debt, then subsequently invoke a counter-claim to deny the admitted debt.

**Submissions of the respondent**

The respondent contends that the sums represented by government in the correspondence alluded to by the appellant were verified and

qualified by the Government officers that verified the claim and established that an offset was required to recover sums due from the appellant. That DW1, DW2 and DW3 clarified that the sum due and owing to the appellant was not free from encumbrance and that an offset was required, even though sums due to Transocean had initially not been dully taken into account. DW3 explained the rationale for halting payment.

**Consideration of ground 3**

While resolving ground 2 above, I have found that the respondent proved its counter-claim to the satisfaction of court. The fact that the respondent admitted the appellant's claim does not mean that Transocean (U) Ltd was not entitled to an offset of the debt owed to the appellant. The trial Judge rightly found that the respondent owed the appellant a sum of US $730.613 and also found that the appellant also owed the respondent US $274.048.36. I therefore do not agree with the appellant's contention that the trial Judge disregarded the government's acknowledgment of the appellant's claim. Consequently, this ground also fails.

**Ground 4**

**Submissions of the appellant**

Counsel for the appellant faults the trial Judge for ordering that each party bears its own costs. He submitted that the general rule is that costs follow the event and since the net decretal amount was in favour of the appellant, there was no lawful reason to deny it costs of the suit.

**Submissions of the respondent**

The respondent contends that the trial Judge properly determined the issue of costs considering that each party was successful in respect of their respective claims.

**Consideration of ground 4**

It is the established principle of law that costs of any action, cause or matter shall follow the event unless court, for good cause, orders otherwise. **Section 27** of the **Civil Procedure Act** provides that;

> *"(1) Subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, the costs of an incident to all suits shall be in the discretion of the Court or Judge, and the Court or Judge shall have full power to determine by whom and out of what property and to what extent those costs are to be paid, and to give all necessary directions for the purposes aforesaid."*

It is generally a fact that the primary factor in deciding the question of the award of costs is the outcome of the litigation. That is, the unsuccessful party will usually be required to pay the successful party's costs of the proceedings and the courts will only depart from this rule if special circumstances are shown to exist. In the present case, the learned trial Judge ordered each party to bear its own costs. The trial Judge held that;

> *"...I will not order the payment of costs by one party to another. Each party shall, therefore, bear its own costs..."*

I find no reason to interfere with the trial Judge's refusal to award costs considering that both parties were successful in their claims.

In the final result, this appeal is dismissed for lack of merit. The appellant shall pay the costs of this appeal and each party shall bear its own costs at the High Court.

Dated this 23rd day of May 2019

**Hon. Justice Stephen Musota, JA**

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**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

**CIVIL APPEAL NO. 78 OF 2012**

**FOODS & BEVERAGES LIMITED ..... APPELLANT**

**VERSUS**

**ATTORNEY GENERAL ..... RESPONDENT**

*(An appeal from the Judgment of the High Court at Kampala before His Lordship Hon. Ogola, P.J. (as he then was) dated the 14th day of October, 2009 in High Court Civil Suit No. 542 of 2001)*

**CORAM: Hon. Mr. Justice Kenneth Kakuru, JA**
**Hon. Mr. Justice Stephen Musota, JA**
**Hon. Mr. Justice Christopher Madrama, JA**

**JUDGMENT OF JUSTICE KENNETH KAKURU, JA**

I have had the benefit of reading in draft the judgment of my learned brother Hon Mr. Justice Christopher Madrama.

I agree with him that this appeal has no merit and ought to be dismissed for the reasons he has given. I also agree with the orders he had proposed.

I would only add that, the respondent's counterclaim in High Court Civil Suit No. 34 of 1994 remains pending and was not effected by the plaintiff's withdrawal of the suit in that case. The issues raised in that counterclaim were not determined in High Court Civil Suit No. 542 of 2001 from which this appeal arises.

The respondent therefore, is at liberty to pursue the said counterclaim at the High Court unless it has otherwise been dealt with by the said Court.

Since for different reasons set out in his Judgment Justice Musota, JA also agrees, this appeal is hereby dismissed with costs.

By majority, the reasons for the dismissal and the final orders of this Court are those contained in the Judgment of Hon. Justice Madrama.

It is so order.

**Dated** at **Kampala**this .....23rd.....day of .....may..... 2019.

.....

**Kenneth Kakuru**

**JUSTICE OF APPEAL**

**THE REPUBLIC OF UGANDA,**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

**CIVIL APPEAL NO 131 OF 2012**

**(CORAM: KAKURU, MUSOTA AND MADRAMA JJA)**

**FOODS AND BEVERAGES LIMITED} .....APPELLANT**

**VERSUS**

**ATTORNEY GENERAL}.....RESPONDENT**

**JUDGMENT OF CHRISTOPHER MADRAMA IZAMA**

I have read in draft the judgment of my learned brother Hon. Mr. Justice Stephen Musota, JA. I agree with the relevant facts as set out by my learned brother Hon. Mr. Justice Stephen Musota and I dissent from the decision that the appellant's appeal should be dismissed and the following are my reasons for saying so.

**High Court Civil Suit No 542 of 2001 Foods and Beverages Ltd v Attorney General of Uganda** was filed by the appellant against the Attorney General in November, 2001. The initial transaction the subject matter of the action arose from a Plaint filed in 1994 namely **Foods and Beverages Ltd v Transocean (U) Ltd; HCCS 34/1994**. In paragraph 4 of the plaint in **HCCS No. 542 of 2001**, it is averred that that the plaintiff was subsequently privatised while the defendant in **HCCS 34/1994** was liquidated. The basis of the plaintiff's suit is not the transaction which was the subject matter of **HCCS 34/1994** but an acknowledgement inter alia in a letter dated 14th July, 2000 advising that the debt of US$730,613.00

verified by the Auditor General be paid to the plaintiff/appellant. Paragraph 5 of the plaint clearly discloses that following the government's unequivocal acknowledgement of the debt undertaking to pay the said sum of money, the appellant was requested as a condition for payment to withdraw the suit before the debt could be settled. The appellant accordingly withdrew the suit but the Attorney General reneged on its commitment to pay and refused to pay the sum agreed upon.

The basis of the Plaintiff's claim is clearly the acknowledgement of indebtedness and not the earlier transaction giving the Plaintiff a cause of action. What should be of interest is what happened to the counterclaim of Transocean (U) Ltd in **HCCS 34/1994** after withdrawal of the plaintiff's suit in **HCCS 34/1994**?

I carefully considered the written statement of defence of the Attorney General in **HCCS No. 542 of 2001** at page 26 of the record. In that WSD the Attorney General averred that government is not liable for the actions of Transocean (U) Ltd. Secondly, the Attorney General averred that without prejudice, that the appellant owed Transocean (U) Ltd US$274,048.56. Specifically he averred: "this amount was arrived at after settlement of claims between the two companies (see annexure "D")".

Going back to the earlier pleadings by Transocean (U) Ltd in **HCCS 34/1994**, there is no clear explanation as to what happened to the counterclaim of Transocean Ltd in the withdrawn **HCCS 34/1994**. The counterclaim was for payment of US$542,002. Withdrawal of the appellant's suit in **HCCS 34/1994** did not automatically mean that the counterclaim which is a separate suit had been withdrawn. The counterclaim had to be resolved on its own and remained pending.

Order 8 rule 13 of the Civil Procedure Rules states that:

"13. Discontinuance.

If, in any suit in which the defendant sets up a counterclaim, the suit of the plaintiff is stayed, discontinued or dismissed, the counterclaim may, nevertheless be proceeded with."

The appellant's suit in **HCCS No. 34 of 1994** was discontinued by consent withdrawal. The withdrawal at page 159 of the record is of the suit of Foods and Beverages Ltd in the following words:

> BY CONSENT of the parties to the suit, IT IS HEREBY AGREED that the Plaintiff withdraws and hereby withdraws the suit against the Defendant.
>
> IT IS FURTHER AGREED that no costs are to be paid by the Plaintiff to the Defendant. ..."

In the above withdrawn of **HCCS 34/1994** by Foods and Beverages Ltd, no mention was made of the counterclaim of Transocean (U) Ltd in **HCCS 34/1994.** That counterclaim remained a pending suit that could not be tried in **HCCS No 542 of 2001** that gave rise to this appeal. Section 6 of the Civil Procedure Act required the matter to be stayed pending determination. It provides that:

> "6. Stay of suit.
>
> No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where that suit or proceeding is pending in the same or any other court having jurisdiction in Uganda to grant the relief claimed."

Section 6 of the Civil Procedure Act is couched in mandatory language and forbade the trial court from trying the issue in HCCS No. 542 of 2001.

In HCCS No. 542 of 2001 the agreed two issues for trial of the suit were:

1. Whether the defendant was the plaintiff a sum of US$730,623?
2. Whether the plaintiff owes the defendant/the counterclaim of US$274,048.36?

It is clear from the judgment of the High Court that the initial transaction which formed the backbone of the appellant's claim against the Attorney General arose in the period 1989 – 1991. Both the actions of the appellant and that of the Transocean (U) Ltd were time barred by the time the appellant's fresh action in **HCCS No 542 of 2001** was filed in 2001. While the finding of the learned trial judge cannot be tested for finding that the two sums were owing both in the plaint and in the counterclaim, the foundation of the appellant's claim could not be the original transaction which was time barred but the acknowledgement of the government on the basis of which the appellant contracted to withdraw the suit and have the claim paid after it had been agreed. That is the basis of the suit giving rise to this appeal.

I agree with the conclusion of my learned brother in ground 1 of the appeal. The Attorney General who counterclaimed had locus standi as a representative of the Privatisation Unit which is a Department of the Government in charge of divestiture of Transocean. There is no evidence that there was an independently appointed liquidator in whom the assets of Transocean (U) had been vested. Though the Attorney General had a right to sue on behalf of Transocean, I have held that there was a pending suit which could only be consolidated with or determined on its own in **Transocean (U) Ltd v Foods and Beverages Ltd in HCCS No. 34 of 1994** as the counterclaim suit (See Order 8 rule 13 of the CPR (supra)). The counterclaim on the same cause in **HCCS No. 542 of 2001** could not be tried.

With great respect, I do not agree with my learned brother on the resolution on issue two arising from ground 2 of the appeal on the question of limitation of the Attorney General's counterclaim. Apart from the counterclaim, the subject matter of this appeal being barred by section 6 of the Civil Procedure Act from being tried, the counterclaim if it proceeded as a fresh matter in HCCS No. 542 of 2001 which gave rise to this appeal was clearly statute barred and ought to have been dismissed on that basis. On the other hand the appellant's suit arose from an acknowledgement of indebtedness and is not time barred. The acknowledgement is in a letter dated 14th July, 2000 at page 22 of the record. The letter acknowledging indebtedness was signed by the Director of Privatisation Unit and reads in part as follows:

> "With respect to Transocean (U) Ltd, debt to you, the Solicitor General has advised that payment of the US$730,613.00 as approved by the Auditor General would be subject to you withdrawing the case – Civil Suit No. 34 of 1994.
>
> You and therefore required to withdraw the case and submit proof thereof before payment can be effected."

The withdrawal of the suit which was a condition for payment of that amount is at page 23 of the record. On the other hand there is no counter acknowledgement of indebtedness by the appellant to Transocean (U) Ltd. The basis of the claim in the counterclaim of the Attorney General is the transaction that arose in the period 1989 – 1991 and is therefore time barred under section 3 of the Limitation Act Cap 80 that requires an action for breach of contract or tort to be commenced within six years from the time the cause of action arose. By the time the Attorney General filed the WSD and counterclaim on 20th December, 2001, it was more than 10 years after the transaction. Moreover, the WSD and Counterclaim of the Attorney General is silent on what happened to the counterclaim in **HCCS No 34 of**

**1994**. Was it ever determined or withdrawn? Was it a pending matter? We do not need to determine that because there is no reference to it. In the premises, the learned trial judge erred to rely on the initial transaction between the parties to reach a decision and ought to have relied on the acknowledgement only which was not time barred. The appellant's suit had been filed within one year from 14th July, 2000 within time. The relevant law can be found under section 22 (4) of the Limitation Act Cap 80 laws of Uganda provides that:

> "(4) Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest in it, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect of the claim, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment; but a payment of a part of the rent or interest due at any time shall not extend the period for claiming the remainder then due, but any payment of interest shall be treated as a payment in respect of the principal debt."

Furthermore, section 23 (2) of the Limitation Act provides that:

> "23. Formal provisions as to acknowledgments and part payments.
>
> (1) Every such acknowledgment as is mentioned in section 22 shall be in writing and signed by the person making the acknowledgment.
>
> (2) Any such acknowledgment or payment as is mentioned in section 22 may be made by the agent of the person by whom it is required to be made to the person, or to an agent of the person whose title or claim is being acknowledged or in respect of whose claim the payment is being made."

In **Jones v Bellegrove Properties Ltd [1949] 2 ALL ER 198**, the plaintiff lent money to a company in which, he was a shareholder between 1936 and 1937. In 1946 at the annual general meeting (AGM) of the company the accounts of the years 1935 to 1945 were presented. The accounts included a statement as to the total amount due to creditors. No particular creditors were named and the plaintiff subsequently sued to recover his debt and the company raised the issue of limitation. Interpreting section 23 (4) that is in *pari materia* with the Ugandan section 22 (4) of the Limitation Act Cap 80, Lord Goddard CJ held at page 201 that:

> "whether or not the document is an acknowledgement must depend on what the document states, and a balance sheet presented to a creditor at a meeting of the company, as happens in this case fulfils all the requirements of section 24. The signed document shows that the company admits that it owes a certain sum, and parole evidence was admitted and rightly so, which showed the part of the sum owed to the plaintiff. The statute does not extinguish a debt. It only bars a right of action."

A fresh cause of action arises in respect to the debt from the date of acknowledgement and in the above case the indebtedness arose in 1945 when the company acknowledged it and parole evidence was admitted to establish who the creditor was and the amount due.

This court in **Madhvani International SA v Attorney General Court of Appeal Civil Appeal No 48 of 2004** applied sections 22 and 23 of the Limitation Act and considered what amounted to an acknowledgment of a debt. The court agreed with the law that an acknowledgement commences a fresh cause of action from the date of acknowledgement of indebtedness and not before. The issue in the appeal was who had power to make a binding acknowledgement on behalf of Government. This Court held that "an acknowledgement is an admission which must be clear, distinct,

unequivocal and intentional. There should be no doubt that the debt is being admitted although the amount does not have to be stated."

In this case the acknowledgement dated 14th July, 2000 was addressed to the Chairman of the appellant company by the Director Privatisation Unit and started a fresh cause of action from which the limitation is reckoned from 14th July, 2000.

For the above reasons, I would allow the appeal and set aside a judgment of the High Court only to the extent that it allowed the counterclaim of the Attorney General. I would accordingly dismiss the counterclaim with costs. Secondly, I would allow this appeal with costs.

Dated at Kampala the 23rd day of ~~April~~ may 2019

**Christopher Madrama Izama**

**Justice of Appeal**