

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**  
**CIVIL APPEAL NO. 35 OF 2012**

- 1. AFRO MORORS LTD**
- 2. OKUMU-RINGA PATRICK ALOYSIUS ..... APPELLANTS**

**VERSUS**

- 1. MINISTERS OF FINANCE, PLANNING AND  
ECONOMIC DEVELOPMENT**
- 2. PERMANENT SECRETARY/ SECRETARY TO  
TREASURY, MINISTRY OF FINANCE, PLANNING  
AND ECONOMIC DEVELOPMENT ..... RESPONDENTS**

*(An appeal from the Ruling of the High Court at Kampala before His Lordship  
Hon. Remmy Kasule dated the 2<sup>nd</sup> day of April, 2008 in High Court  
Miscellaneous Cause No. 693 of 2006)*

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

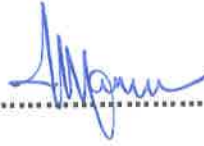
**JUDGMENT OF JUSTICE KENNETH KAKURU, JA**

I have had the benefit of reading in draft the judgment of my learned brother Stephen Musota, JA.

I agree with him that this appeal has no merit and ought to be dismissed with costs, for the reasons he has set out in his judgment and I have nothing useful to add.

As Justice Madrama also agrees, the appeal stands dismissed with costs here and below.

Dated at Kampala this .....27<sup>th</sup>.....day of .....March, 2019.



.....  
**Kenneth Kakuru**

**JUSTICE OF APPEAL**

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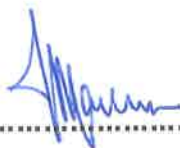
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Dated at Kampala this 27<sup>th</sup> day of March 2019.



**Kenneth Kakuru**

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**BETWEEN**

5

**1. AFRO MOTORS LTD**

**2. OKUMU-RINGA PATRICK ALOYSIUS:.....APPELLANTS**

**VERSUS**

10

**1. MINISTER OF FINANCE, PLANNING  
AND ECONOMIC DEVELOPMENT**

**2. PERMANENT SECRETARY/ SECRETARY TO TREASURY,  
MINISTRY OF FINANCE, PLANNING AND ECONOMIC  
DEVELOPMENT:.....RESPONDENTS**

15 *(Appeal from the ruling of the High Court of Uganda at Kampala before  
Hon. Justice Remmy Kasule dated the 2<sup>nd</sup> day of April, 2008 in High  
Court Miscellaneous Application No. 693 of 2006 arising from  
Miscellaneous Cause No. 203 of 2006)*

20 **(CORAM: KENNETH KAKURU, STEPHEN MUSOTA,  
CHRISTOPHER MADRAMA, JJA).**

**JUDGMENT OF STEPHEN MUSOTA, JA.**

**Background**

25 The Appellants Filed Miscellaneous Application No.693 of 2006 in the  
High court, wherein they sought orders of Mandamus against the  
Minister of Finance, Planning and Economic Development and the

Secretary to the Treasury to exercise the alleged duty to pay Shs. 1,074,831,029, interest on this figure, damages and costs of the Application. The Application was heard and dismissed on 2<sup>nd</sup> April, 2008.

5 The basis of the above Application and this Appeal is a claim by the Appellants that between 1986 and 1990, the Government of Uganda had allegedly requested appellant to supply Peugeot motor vehicles of a total value of Shs.1, 806,743,298. The appellants had earlier filed HCCS. 1098 of 1997 to pursue the claim which was dismissed by  
10 court for being time barred and disclosing no cause of action. The appellants herein did not appeal the decision of dismissal of the suit or take steps to set aside the dismissal and/or put right the grounds of dismissal.

In March 2002, the then Attorney General, the Late wrote to the Appellants stating that there was no evidence that the Government  
15 of Uganda had placed an order of vehicles from them. On 12<sup>th</sup> March 2002, the Attorney General, the offered Afro Motors Shs. 431,893,260= as ex gratia payment in full and final settlement of the claim. This was on the basis that there was documentary evidence  
20 that the appellant was indebted to the tune of Shs. 431,893,260 to Tel Crofit Ltd of France due to the cancellation of a Bank guarantee by Government of Uganda in 1987. In the same letter, the then Attorney General observed that the appellant's managing Director had received Shs.300,000,000 from the Government of Uganda as a  
25 gesture of goodwill.

On 28<sup>th</sup> March 2002, Odere & Nalyanya Advocates, while acting on the instructions of their client, the appellant's managing Director wrote to inform the Attorney General that their client had accepted  
30 the offer to be paid Shs. 431,893,260 in full and final settlement of the entire claim of 1,806,743,289.

Notwithstanding the above, subsequently, Government of Uganda paid Shs. 200,000,000 on 23<sup>rd</sup> May 2002 as a final ex-gratia settlement of the claim of the Appellants. Despite all the Appellants accepting the above offers, and all the above stated payments from the Government of Uganda, they have pursued a claim for full settlement of Shs.1, 806,743,289. The Attorney General, in his letter dated 13<sup>th</sup> November 2003, advised against making any further payments, and that the 2<sup>nd</sup> Appellant was entitled to pursue redress in courts of law, if they so wished.

The appellants filed Miscellaneous Application No. 693 of 2006 for an order of mandamus against the respondents to exercise and perform a constitutional and public duty to pay monies amounting to UGX 1,074,831,029/= owed by the government of Uganda to the applicants with interest of 20% on the said sum from 22<sup>nd</sup> August 1994 till payment in full, general, exemplary and aggravated damages and costs of the application. The application was dismissed and the appellants, being dissatisfied with that decision filed this appeal on the following grounds;

1. The Learned Trial Judge erred in law and fact when he held that the appellants have a doubtful right not enforceable by the grant of mandamus.
2. The Learned Trial Judge erred in law and fact when he misinterpreted the legal effect of the Attorney General's advice to Government.
3. The Learned Trial Judge erred in law and fact when he found that there are grounds which make it doubtful that the respondents are mandatorily under a duty to do the act of effecting another payment of Shs. 1,074,831,029/= or any sum at all, to the applicants.
4. The Learned Trial Judge erred in law and fact when in deciding the Appellants' claim he held that the writ of mandamus does

not issue to enforce doubtful rights that are the subject of disputes.

- 5 5. The Learned Trial Judge erred in law and fact when he declined to grant to the appellant the order of mandamus against the respondent.

### **Representation**

- 10 At the hearing of the appeal, Ms. Nyangoma Patricia appeared for the appellant while Mr. Philip Mwaka, Principal State Attorney, appeared for the respondent.

### **Submissions of the appellant**

- 15 Counsel for the appellant submitted that according the generous purposive rule of constitutional interpretation , the legal opinion of the Attorney General must be binding on government or public institutions to give third parties confidence to deal with the government and public institutions. He relied on Article 119 (4) (a) of the Constitution which provides for one of the functions of the  
20 Attorney General as to give advice and legal services to the government of Uganda. He relied on **Bank of Uganda Vs Banco Arabe Espanol S.C.C.A No. 1 of 1998** on the position that the opinion of the Attorney General should not be taken lightly.

### **Submissions of the respondent**

- 25 Mr. Mwaka relied on **Theodore Ssekikubo & 4 Others Vs. The Attorney General & 4 Others Supreme Court Constitutional Appeal No.1 of 2015** which clarified on the status of the advice of the Attorney General. That such advice should be given the highest degree of respect but is not binding. Counsel also argued that the



payments that were made were ex gratia and the payment of 431,000,000/= was full and final settlement.

### **Court's consideration of the appeal**

5 Before resolving the grounds of appeal, I have reminded myself that as a first appellate Court, I have a duty to re-evaluate all the evidence and materials that were laid before the trial court and come to my own conclusion regarding the matter before me in accordance with *Rule 30 of the Court of Appeal Rules*.

It provides:

10 **“30. Power to reappraise evidence and to take additional evidence**

**(1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may—**

**(a) Reappraise the evidence and draw inferences of fact; and**

15 ...”

At scheduling, one issue was raised for this court to resolve, whether the Attorney General's advice is enforceable by mandamus.

20 The appellant's argument is that the Attorney General exercised his constitutional duty under Article 119 of the constitution to advise the respondents to settle the appellants' claim of 1,074,831,029/= and as such, it is a constitutional duty for the respondents to effect that payment. Article 119 of the constitution provides that;

*“119. Attorney General.*

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

The constitution is however silent as to the consequences of not following the advice of the Attorney General. In **Bank of Uganda Vs Banco Arabe Espanol S.C.C.A No. 1 of 1998**, it was held that;

5 "While it is true that the Attorney-General plays a dual role as  
Government principal legal adviser on both political and legal  
matters. Nevertheless, in the latter role, the Attorney General is a  
law officer for the sole purpose of advancing the ends of Justice  
10 In this role, the Attorney General has access to all types of advice  
from fellow ministers who may have negotiated and authorised  
the signing of contracts- He has a host of qualified and  
experienced advisers on legal matters of the kind that were  
involved in this loan agreement. Of the Attorney-General of  
15 England whose functions are legacies adopted in the Ugandan  
Constitution and laws, it was said in the House of Commons  
Debates, Vo1.179, Cols 1213-1214 of December. 18, 1924, which  
is reported in John L. J. Edwards "The Attorney General, Politics  
and the Public Interest, 1984", that

20 "It is the duty of the Attorney General, in the discharge of his  
responsibilities – entrusted in him, to inform himself of all  
relevant circumstances which might properly affect his decision."

Consequently, the opinion of the Attorney General on this matter  
should not be taken lightly."

25 As rightly pointed out by the learned trial Judge it is significant that  
the language in the above case does not amount to asserting that, at  
all times, the legal advice of the Attorney General to a colleague  
Cabinet Minister in Government or other Government officer, inspite  
of the esteem and respect that it must be given, cannot be  
30 questioned, if circumstances to do so exist, by his recipient cabinet  
minister within Government.

Mr. Mwaka relied on **Theodore Ssekikubo & 4 Others Vs. The  
Attorney General & 4 Others Supreme Court Constitutional  
Appeal No.1 of 2015**. One of the issues in that case was whether  
35 legal opinion of the Attorney General as Principal Legal Advisor of the  
Government under Article 119 (3) of the Constitution is "generally

binding” on the government and public institutions. The Supreme Court held that;

5           *“the phrase “generally binding” is ambiguous firstly because of the uncertainty of the extent of the binding nature of the opinion, and secondly because the word “opinion” in its literal ordinary plain meaning does not convey an obligation on the person or body to whom the opinion is given to comply with it. The circumstances where the opinion is binding need to be spelt out. This is because there may be circumstances, where the opinion must be accorded the highest respect or must be binding...the Constitutional Court had therefore erred in holding that the opinion of the Attorney General to the Rt. Hon. Speaker of Parliament was binding on her.”*

10

The court’s decision in Theodore Sekikubo above is clear that advice of the Attorney General is not, at all times, binding on the government officers despite the respect given to it. The respondent in the present case did not agree with the advice of the Attorney General for further payment of the applicants of 1,074,831,029/= for reasons that the appellant had been paid *ex gratia* in full and final settlement. The appellants had earlier been paid 431,893,260/= and 200,000,000/= as final settlement in respect of the same dispute. The issue of whether the appellants were infact entitled to the said payments and if so, how much the government had to pay in full settlement of the debt is left hanging. It is an issue that can only be resolved by producing evidence to that effect. But an attempt to prove the indebtedness in HCCS 1098 of 1997 failed.

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**Section 36** of the **Judicature Act** empowers the High Court to issue orders of mandamus, prohibition and certiorari. To obtain a writ of mandamus, an applicant must show a clear legal right and a corresponding duty in the Respondent, that some specific act or thing that the law requires that particular officer to do has been omitted to be done, lack of any alternative remedy and whether the alternative

30

remedy exists but is inconvenient, less beneficial or less effective or totally ineffective. The order of Mandamus is derived from the Latin word *Mandare* meaning 'to command'.

5 The duty to perform such an act must be undisputable and as such, an order of mandamus should not be issued to enforce rights that are subject to dispute. I find that the appellant has failed to prove that circumstances necessary to obtain the writ of mandamus existed. I find no merit in this appeal whatsoever or reason to fault the learned trial Judge's decision. I accordingly uphold it.

10 This appeal is therefore dismissed with costs at this court and at the court below.

Dated at Kampala this 27<sup>th</sup> day of March, 2019

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**STEPHEN MUSOTA**  
**JUSTICE OF APPEAL**

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TREASURY, MINISTRY OF FINANCE, PLANNING}  
AND ECONOMIC DEVELOPMENT }**

**JUDGMENT OF CHRISTOPHER MADRAMA IZAMA, JA**

20 I have read in draft the judgment of my learned brother Hon. Justice Stephen Musota JA and I agree with the result of the judgment as well as the reasoning there in and wish to add a few words of my own.

I further agree with the facts as set out by my learned brother Justice Stephen Musota and for purposes of my decision would state the facts as follows.

25 The appellants filed an application for Judicial Review in High Court Miscellaneous Application No. 203 of 2006 for an order of certiorari for the respondents to exercise and perform a constitutional and public duty to pay they Uganda shillings 1,074,831,029/= together with interest at 20% per annum, general and aggravated damages and exemplary damages. The facts averred were that the appellants had a memorandum of understanding with the respondents where government agreed to pay them Uganda shillings 1,806,736,289/= out of which the government paid Uganda  
30 shillings 1,074,831,029/=.

After failing to pay the balance, the Attorney General wrote two opinions at different times advising the respondents to pay the balance. Despite the advice of the Attorney General, the respondents neglected to pay the balance of Uganda shillings

5 1,074,831,029/=. The appellants then applied for an order of mandamus directing the respondents to perform their public duty to pay the appellants. The application was dismissed with costs hence this appeal.

The question for consideration in this appeal is whether the learned trial judge erred in law when he held that the appellants have doubtful rights not enforceable by the grant  
10 of mandamus? Secondly, whether the learned trial judge erred in law and fact when he misinterpreted the legal effect of the Attorney General's advice to government? Thirdly whether the learned trial judge erred in law and fact when he found that there are grounds which make a doubtful that the respondents are mandatory and a duty to do the act of effecting the payment claimed for? Whether the learned trial judge erred in  
15 law and fact in declining the appellants claim?

My few words concern the legal effect of the Attorney General's advice to government. Article 119 (3) and (4) of the Constitution of the Republic of Uganda gives the role and functions of the Attorney General respectively and provides as follows:

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

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

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

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

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

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

30 First of all the Attorney General is the principal legal advisor of the government. As a legal advisor, he advises the government on the pros and cons of any subject with legal implications where his opinion is sought. Secondly the functions of the Attorney General include giving legal advice and rendering legal services to the government on any subject. Thirdly, it includes representing the government in courts or any other legal proceedings to which the government is a party. Last but not least to perform such

5 other functions as may be assigned to the Attorney General by the President or by the  
law. As a representative of the government in a court of law, the Attorney General can  
make a binding agreement with regard to the liability of government before a court of  
law. As far as the law which gives the functions of the Attorney General is concerned,  
these include the Government Proceedings Act Cap 77 laws of Uganda which gives the  
10 Attorney General a specific role to play.

The question also is whether advice of the Attorney General to the Ministry of finance to  
settle the appellants claim is binding and enforceable by an order of mandamus. To  
treat the advice of the Attorney General as binding in relation to the obligation of the  
Minister of finance to settle the claim, would give the advice the status of an order  
15 which shall be complied with by the relevant Ministry. Yet the primary role of the  
Attorney General is to represent the ministries and to give them legal advice on any  
subject. Every ministry is headed by a Minister and the functions of the Minister are  
spelt out by article 117 of the Constitution of the Republic of Uganda in the following  
words:

20 "117. Responsibility of Ministers.

Ministers shall individually be accountable to the President for the administration  
of their Ministries and collectively be responsible for any decision made by the  
Cabinet."

It is abundantly clear that the persons who run the ministry in terms of accountability  
25 and administration are the ministers assisted by administrators or accounting officers  
such as the Permanent Secretary/Secretary to the Treasury in the case of the Ministry of  
Finance. All Cabinet ministers are members of Parliament or persons qualified to be  
elected members of Parliament appointed by the President and are accountable to the  
President as well as the Parliament. It would be inappropriate and unconstitutional to  
30 impute powers on the Attorney General by which to direct any ministry to do anything  
which they do not want to do since they are answerable in their own right to the  
President and ultimately to Parliament. As a legal adviser of government, the Attorney  
General gives a legal opinion and advises accordingly. The departments of government  
such as the ministries are the entities answerable collectively to Parliament as well as to  
35 the people of Uganda. As a legal advisor of government, the role of the Attorney  
General is analogous to that of a lawyer or an advocate to a client. The best that any

5 attorney of a client can do for his client is to give him or her sound legal advice and counseling or represent him or her in the appropriate forum such as a court of law.

Last but not least, the Attorney General is the representative of government in civil proceedings by or against the government. The government can be sued for breach of contract. This is made clearer by section 2 of the Government Proceedings Act Cap 77  
10 which provides that:

"2. Right to sue the Government.

Where any person has a claim against the Government after the commencement of this Act and the claim is either—

15 (a) a claim based on contract which, if this Act had not been passed, might by virtue of the Suits By or Against the Government Ordinance have been enforced by an action against the Government; or

20 (b) such that, if it had been made in England against the Crown in right of its Government in the United Kingdom and if the Crown Proceedings Act, 1947, of the United Kingdom had not been passed, it might have been enforced in England, subject to the grant of Her Majesty's fiat, by petition of right, then, subject to this Act, the claim may be enforced by proceedings taken against the Government for that purpose in accordance with this Act."

Where a ministry acknowledges indebtedness or commit itself to carry out an act and breaches that commitment, an action may lie in a court of law for breach of contract.  
25 Secondly, in such cases, it is the Attorney General who is the legal representative of government and may be sued or may sue according to section 10 of the Government Proceedings Act which provides that:

"10. Parties to proceedings.

30 Civil proceedings by or against the Government shall be instituted by or against the Attorney General."

The underlying issue in this appeal is whether there was a contract between the appellant and the government or specifically whether there was a contract to pay the appellants pursuant. In such a case, proceedings for mandamus are not appropriate for the enforcement of the contract. The cause of action of the appellants cannot be breach



5 of a duty since breach of contract is envisaged as a cause of action to sue the government. There are several grounds to hold that the remedy of the appellant is an action for breach of contract. Mandamus should not be used to enforce the contract by way of an action for breach of duty.

10 I agree with my learned brother judge that mandamus should be used to enforce a public duty. A public duty by necessary implication is a duty imposed by law and enforceable through administrative law remedies. The contract to pay money is by its nature an admission of liability and does not on its own give rise to a public duty but to a contract whose breach is actionable in a court of law for appropriate redress. It is only  
15 a judgment of a court of law against the government that can be the subject of an application for an order of mandamus to compel the government to pay the sum decreed. Admissions are expressly provided for under Order 13 of the Civil Procedure Rules or as a cause of action founded on acknowledgement.

Proceedings for an order of mandamus are by their nature enforcement proceedings when brought against the government to compel the payment of a sum of money.  
20 Section 19 (4) of the Government Proceedings Act, expressly forbids proceedings which by their nature are enforcement for payment except when the proceedings comply with section 19 of the Government Proceedings Act and it provides *inter alia* as follows:

"19. ...

25 (4) Except as is provided in this section, no execution or attachment or process in the nature of an execution or attachment shall be issued out of any court for enforcing payment by the Government of any such money or costs as are referred to in this section, and no person shall be individually liable under any order for payment by the Government, or any Government department or any officer of the Government as such, of any such money or costs."

30 An application for mandamus to issue to compel the Minister of finance to pay is by its nature a proceeding in the nature of an execution of the opinion of the Attorney General since the ministry in question declined to honour its undertaking (if any) to pay on the basis of a memorandum of understanding or the opinion of the Attorney General. Such proceedings ought to be preceded by a decision of a court of law which  
35 decrees payment after finding the government liable. Such proceedings give an opportunity for the Government to contest the claim and for the claimant to prove the

5 liability. After a decree, the liability can be enforced in the manner stipulated by section 19 of the Government Proceedings Act.

Furthermore, the appellant seems to rely on an acknowledgement of the debt by the Attorney General. An acknowledgement accrues a fresh cause of action which is specifically recognised under section 22 of the Limitation Act. Section 22 (4) of the  
10 Limitation Act Cap 80 provides that:

“Where any right of action has accrued to recover a debt or other liquidated pecuniary claim, or any claim, to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable thereof acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to  
15 have accrued on and not before the date of the acknowledgement or the last payments.”

The right is deemed to have accrued from the date of acknowledgment. Where there is a dispute as to whether an acknowledgement is binding on the government or not, the matter should be adjudicated upon by a court of law. For instance, the claim might be  
20 barred by the statute of limitations. The acknowledgement may not be binding on the ministry concerned.

For emphasis an acknowledgement leads to accrual of a fresh cause of action as stated in the side notes of section 22 of the Limitation Act as “*Fresh accrual of action on acknowledgement or part payment*. Acknowledgement and part payments are a form of  
25 admission of liability.

In **Jones v Bellegrove Properties Ltd [1949] 2 ALL ER 198**, Goddard CJ held that an acknowledgement by the company of the plaintiff’s debt within the meaning of section 24 (1) and by section 23 (4) gave rise to a fresh cause of action and time begun to run from the date of acknowledgement.

30 The word *Acknowledge* is defined by **Stroud’s Judicial Dictionary Fifth Edition Volume 1 A – C** to mean:

“...acknowledgement of liability”.

In the case of **Madhvani International SA v Attorney General Court of Appeal Civil Appeal No 48 of 2004** this court considered what amounted to an acknowledgment of  
35 a debt. The judgment of court read by Byamugisha JA considered the issue of who can

5 acknowledge liability in relation to Government under section 23 (2) of the Limitation Act. In that case the appellant relied on acknowledgement by the Solicitor General and the High Court dismissed the suit as giving rise to no liability. The Court of Appeal held that the ministry responsible for the payment is the one to acknowledge and not the Attorney General. The court of appeal further 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."

Section 23 (2) provides that:

15 "any such acknowledgement 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 payments is being made."

The point is that the matter is not without controversy and has to be adjudicated upon by a court of law. The Court of Appeal in 1979 before it became the Supreme Court in **National Pharmacy Ltd v KCC Civil Appeal No 2 of 1979, 1979 (HCB) 256 (CA)** held that S. 24 (4) of the Limitation Act extends time even against Government.

25 The conclusion is that if the appellant had any cause of action, his remedy lay in an action in the High Court for breach of contract. Where there is no cause of action, the government should not be compelled i.e. in a case where the action could be barred by the law of limitation, to pay. The liability of the government should first be determined under the relevant law of contract in a court of law unless liability is admitted. Even any such admission of liability has to be presented to a court of law for the appropriate decree to issue. It should not proceed on the basis of an opinion of the Attorney General which the Attorney General has since departed from.

30 On the other hand an ex gratia payment can be made. According to the Oxford Dictionary of Law Fifth edition the Latin term "*ex gratia*" means:

"Done as a matter of favour. An *ex gratia* payment is one not required to be made by a legal duty."

A favour is not actionable in a court of law and is a matter of grace of the giver.

5 For the reasons given above, I agree that the appeal lacks merit and ought to be dismissed.

Dated at Kampala the <sup>16</sup>27 day of March 2019



10 **Christopher Madrama Izama**

**Justice of Appeal**