

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

HCCS NO 186 OF 2013

**AN APPEAL FROM A DECISION OF UGANDA REVENUE AUTHORITY UNDER
SECTION 64 OF THE STAMPS ACT**

EATON TOWERS LIMITED}.....APPELLANT

VERSUS

UGANDA REVENUE AUTHORITY}.....RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

This is an appeal brought by the applicant/Plaintiff under the provisions of the Stamps Act cap 342 laws of Uganda. The applicant/Plaintiff considers itself a person aggrieved by a decision of the revenue authority and filed a plaint initially challenging the decision of Uganda Revenue Authority assessing it for stamp duty of Uganda shillings 241,637,645,124/= as 1% stamp duty payable on transfer of tower infrastructure business to the Plaintiff by Warid Telecom Uganda Limited. The appeal is made under section 64 of the Stamps Act cap 342 Laws of Uganda. After discussion of the relevant procedure Uganda Revenue Authority drew up a statement of the case in accordance with the provisions of section 64 of the Stamps Act giving the grounds of assessment and the Plaintiff filed submissions giving the grounds of its objection while Uganda Revenue Authority filed a rejoinder to the grounds of objection. At the hearing of the appeal, the Appellant/Plaintiff was represented by Joshua Byabashaijja and Dennis Kusasira while the Respondent/Defendant was represented by Mwajuma Nakku and Barnard Olok.

When the matter came for hearing, Counsel for both parties requested for opportunity to allow the Defendant/Respondent review its assessment upon being provided with all necessary documents by the applicant/Plaintiff. The review was to be conducted within a period of 30 days from the 5th of October 2013 and proceedings were stayed pending review. On 12 November 2013 the court was informed that Uganda Revenue Authority maintained its position that stamp duty was payable on the “Transfer of Business Agreement” (TBA) executed between the Plaintiff and Warid Telecom Uganda Ltd on 14th of March 2012 as assessed. Subsequently Counsel filed written submissions for and against the appeal and further highlighted their submissions orally.

The written submissions were commenced by a statement of the case by Uganda Revenue Authority Under section 64 of the Stamps Act together with an opinion on the case.

The opinion in the statement of the case reiterates the grounds in an objection decision dated 21st of November 2012 and the response to a restated and amplified objection dated 18th of December 2012. The statement shows that the Respondent confirmed stamp duty assessment amounting to Uganda shillings 241,637,645,124/=. In the statement of the case the Respondent's opinion is that under section 2 of the Stamps Act every instrument mentioned in the schedule not having been previously executed by any person and executed in Uganda which relates to any property situated or any act done or to be done in Uganda is chargeable with stamp duty. The Respondent's case is that there are several instruments used in a single transaction of sale. Several instruments are employed for completing the transaction but the principal document is the one that is chargeable with the duty prescribed. At the time of assessment there was a claim by Eaton Towers that the master site agreement was yet to be signed. The Respondent's case is that whatever other instrument that they have been that will submit the transaction has been executed but out of sheer convenience, Eaton Towers has deliberately withheld these instruments from Uganda Revenue Authority. Consequently the Respondent categorised the TBA as the principal document transferring the business assets to Eaton Towers under item 63 (i) of the Stamps Act as a transfer. It is no longer sustainable for the Appellant to claim that the TBA is simply an undertaking. Furthermore under section 3 (2) of the Stamps Act, the duty chargeable on the instrument even where the parties have determined by themselves what the instrument is, is the highest duty which would be chargeable in respect of any of the instruments employed. In addition the Respondent contends that there was a transfer of business assets to the Appellant within the meaning of item 63 (i) regardless of whether the transfer was effected by the TBA or any other instrument in light of section 3 quoted above.

The Respondent contends that in light of the power granted under section 3 of the Stamps Act and the deliberate failure of the Appellant to provide other instruments which completed the transaction primarily for purposes of determining the principal instrument, left the Respondent with no choice but to categorise the TBA as the principal document transferring title to the business assets which assets included leases to towers, tower sites, and related assets.

The Respondent further stated that without prejudice to arguments, even if the TBA did not qualify to be categorised under item 63 (i), Eaton cannot wish away stamp duty by simply asserting that the TBA does not fall under item 63 especially when it agrees that the TBA and all other instruments are instruments employed in completing the same transaction. Furthermore the assessment was issued at the time when events regarding the transfer of assets were still unfolding and the Plaintiffs themselves agree that there were other events which would complete the transaction. The court was requested to ask the Plaintiffs to provide all the other instruments and documentation surrounding the transaction so that the areas of controversy are narrowed and the documentation would inform any efforts towards reviewing the assessment. The Plaintiff

however failed to take advantage of the offer and the Respondent has no choice but stamps by its assessment.

Subsequent to these submissions, an order was made for the Plaintiff/Appellant to furnish the Respondent with all relevant documentation. However after efforts to review the decision was made upon considerations of whatever available documents were supplied by the Appellants whereupon the Respondent maintained its decision and the Appellant responded to the statement of the case.

I have carefully considered the issues as defined by the Appellant's Counsel while making highlights of the written submissions. According to the Appellant and there seems to be no contrary view from the Respondent, the issue is **whether the instrument namely the transfer of business agreement is liable to stamp duty**. This is the broader issue which was further narrowed down by the Appellants Counsel. The narrower question is whether the instrument is a transfer or another instrument within the meaning of the Stamps (Amendment) Act 2002. Particularly was addressed on paragraph 63 (1) of the First Schedule to the Stamps Act as amended by the Stamps (Amendment) Act, 2002. Paragraph 63 of the First Schedule to the Stamps Act deals with: "Transfer" as a broad category. Where there is a transfer stamps duty is 1% of the total value. The first schedule to the Stamps Act is made under section 2 (1) (a).

Section 2 of the Stamps Act provides that:

"(1) Subject of this Act and the exemptions contained in the Schedule to this Act, the following instruments shall be chargeable with duty of the amount indicated in that Schedule as the proper duty therefor respectively –

(a) every instrument mentioned in that Schedule which, not having been previously executed by any person, is executed in Uganda after the commencement of this Act and relates to any property situate, or to any matter or thing done or to be done, in Uganda;

...

(4) The Minister may, by statutory instrument, amend the Schedule to this Act,..."

Section 2 provides that the amount payable is the amount indicated in the schedule. According to the Appellants, the right characterisation of the TBA can be found under paragraph 5 of the first schedule. Paragraph 5 provides that Uganda shillings 5000/= is payable for an agreement or memorandum of an agreement. The Appellant argues that the instrument did not transfer anything at the time of execution. The Appellant relies on section 20 of the Stamps Act which provides that every instrument is chargeable with duty and which is executed by any person in Uganda shall be stamped within 30 days of execution. The argument is that the TBA provides for transfers occur after fulfilment of conditions precedent in the future. In that regard Counsel invited the court to examine the authority of the **Commissioner of Inland Revenue versus**

Angus and Company, and the Same versus J Lewis [1889] 23 QBD 589 and submitted that the issue on the duty payable turned on ascertaining the intention of the parties in the agreement and the proper characterisation of the agreement under the Stamps Act and Hawkins J asked the following question at page 584:

"... The question really resolves itself into this, that this agreement transfer equitably or legally any property to, or vest any property actually in, the purchasers, so that the court at any time after execution of the instrument, even though the deed of completion is postponed according to the language of the agreement itself, insist on having a legal transfer made, treating the matter as having already vested in them? "

Secondly in the case of **Fleetwood Hesketh versus CIR [1936] 1 KB 351 at 360** Roma LJ held that the question whether a particular document does or does not transfer or convey an interest is not to be determined by considering what name the parties themselves have given to the document. The Appellant contends that the characterisation of the TBA ought to be based on the substance rather than the form or the title it bears. Counsel invited the court to examine the terms and conditions of the TBA.

In summary the Appellant contends upon an examination of several clauses of the Transfer of Business Agreement (TBA) that it was a contingent agreement and it required the execution of several other instruments to accomplish the intention of the parties. Counsel contends for instance that goodwill does not require a transfer instrument and therefore they would be nothing for purposes of the Stamps Act to stamp. In effect the Appellant submits that an examination of the clauses of the agreement and the reading of clause 2 of the agreement, confirms that the parties did not intend the TBA to transfer the business assets and in fact it did not transfer the business assets to the Plaintiff/Appellant. The agreement did not have the effect of conveying or transferring any interest in the business assets to the Appellant. Counsel contends that the categorisation of the TBA as the transfer would lead to an absurdity and does not consider whether some of the conditions precedent would be fulfilled.

Regarding the timing for purposes of payment of stamp duty, the Appellants relied on section 20 of the Stamps Act which provides that every instrument chargeable with duty and executed in Uganda by any person shall be stamped within 30 days of execution. The Appellant further relied on the case of **WM Cory and Son Ltd versus IRC [1965] 1 All ER 91** for the proposition that the liability of an instrument depends on the circumstances which exists at the date when it comes into existence. Only circumstances known or existing at the date the document is executed can be taken into account for stamp duty purposes. Circumstances occurring after the date of execution are not relevant. In that regard information about execution of instruments occurring after the TBA are irrelevant.

The Appellant further submitted that an agreement of sale in the future cannot be stamped as the conveyance or transfer unless the property is conveyed by the agreement itself. Relying on the

case of **CIR versus Angus [1889] 23 QBD at 589** Lord Esther MR that it is the instrument we have any property for the sale thereof is legally or equitably transferred on which duty is payable. The taxation is confined to the instrument whereby the property is transferred. The transfer must be made by the instrument. Furthermore in **Halsbury's laws of England volume 44 (1), 4th edition** it is written that the liability of an instrument to stamp duty arises at the moment at which it is executed and defence on the law in force in the circumstances which exists at that time. The TBA already provides for an undertaking by the seller transferred the business assets in the future and upon fulfilment of conditions precedent. For the proposition that stamp duty is chargeable on instrument and not transactions Counsel further relied on **Halsbury's laws of England 4th edition volume 44 (1)** (supra) cited in the case of **Stanbic Bank Uganda Ltd and Others versus Uganda Revenue Authority High Court (Commercial Division) HCCS 170 of 2007**. The authority establishes that stamp duty is chargeable on instruments and not transactions and that liability of an instrument stamp duty arises at the moment at which it is executed. The Appellant submits that it is erroneous for the Defendant pays the assessment on the proposition that there was a transfer of business assets to the Appellant and that the TBA within paragraph 63 (1) of the First Schedule to the Stamps Act.

Furthermore on the question of characterisation of the instruments, it is not in dispute that the TBA is an instrument as defined under section 1 (n) of the Stamps Act. The Appellant submits that the Act and the Schedule have to be interpreted as a whole. In the case of **Stanbic Bank Uganda Ltd and others versus Uganda Revenue Authority** (supra) justice Kiryabwire judge of the High Court as he then was held that to get a proper understanding of what the legislature meant by an "instrument", one has to read sections 1 (n) and 2 of the Stamps Act as amended together with the Schedule as a whole. The Defendant did not properly characterise the TBA under the schedule. Under the definition section the word "instrument" includes every document by which the right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded. In examining the instrument one has to ascertain what it does namely whether it creates rights or liabilities or transfers anything. The TBA is an instrument which creates rights and liabilities rather than transferring any assets. Not every instrument as defined in the Stamps Act is a transfer.

Furthermore the Appellant's Counsel contends that the court must adhere to the canons of statutory interpretation and construction of documents and restrict itself to the "four corners" of the document being interpreted. In the authorisation of the TBA the court does not look beyond the document itself by relying on extraneous evidence (i.e. other instruments contemplated). In the case of **Sudhir Ruparelia versus Godfrey Magezi and Brian Mbazira, Supreme Court Civil Appeal No 61 of 1999** the Supreme Court held that in the interpretation of contracts, the court will look at the intention of the parties as ascertained from the words used in the contract. The Plaintiff further relies on sections 91 and 92 of the evidence act for exclusion of extraneous evidence in the interpretation of the contract provisions to ascertain the intention of the parties.

The Appellant's case is that the TBA is an agreement to transfer business assets at the future date and upon the vendor fulfilling specified conditions precedent.

Furthermore transfer of business assets such as movable property an unregistered ground loses and goodwill attached to both categories of property can be effected without a need for a transfer form. As such the TBA cannot be regarded as a transfer within the meaning of the Stamps Act. On the contrary the conveyance of such property, if so intended by the parties to an agreement, can be effected by such agreement.

Counsel submitted that not every transfer of rights and interests to be regarded as the transfer for purposes of paragraph 63 of the Schedule. This is because the terms such as "memorandum of agreement", "deed" and "a bill of sale" are not redundant. The most plausible conclusion according to the Appellants Counsel is that paragraph 63 (1) of the schedule must referred to statutory forms on which certain transfers as required by statute to be executed and lodged for registration under the relevant enactments. Examples are transfer forms for registered land under the Registration of Titles Act and the transfer of shares under the Companies Act. Where the law prescribes a statutory form for purposes of effecting transfer, then an agreement of sale or an agreement to transfer as in the instant case is not sufficient of this title in the property that is the subject of the agreement and give a transfer form is properly executed. The Appellant argued that there was a distinction between the transfer under paragraph 63 of the Stamps Act and other instruments listed under the schedule. Consequently the TBA cannot be properly categorised or characterised as a transfer under paragraph 63 of the schedule.

With specific reference to the submissions of the Respondent that section 3 (2) of the Stamps Act should apply so that the highest duty chargeable out of several other instruments employed should be the principle to be applied, the Appellant disagreed. The Appellant submitted that the provision only applies where the parties agreed to a principal instrument were several instruments have been employed for completing a transaction. This is where different rates of duty chargeable for the different instruments.

In the instant case however, without characterising the instruments under the Schedule to the Stamps Act, it is not possible to invoke S. 3 (2) of the Stamps Act.

In rejoinder the Respondent's Counsel submitted that the court should read all the submissions on court record and not simply rely on the highlights of the Appellant's Counsel. The court should also take cognisance of schemes of tax evasion and find that the Defendant was right to assess duty.

In its written submissions, the Respondent emphasised that the Transfer of Business Agreement (TBA) involve the purchase of business as a going concern. Simultaneously with the execution of the TBA the parties were supposed to execute a master said agreement wasn't to which from the closing date, Warid was to lease space on the Towers and at the Towers sites from the

Appellant and the Appellant was to provide certain site management services to Warid on terms and conditions set out in the Master Site Agreement. The Respondent agrees that the TBA terms were subject to certain conditions precedent.

Firstly Counsel maintained that the Appellant agrees that the TBA and all other deeds which were subject to the TBA such as the first closing deed of assignment of ground loses and of contracts, first closing deed of conveyors and the second closing date of conveyance of goods.

Secondly the Respondent maintains that for stamp duty to be charged under Ugandan law, it must be charged on an instrument. The Respondent agrees that stamp duty is payable on an instrument and not on a transaction.

The Respondent's Counsel maintains that at the time of issue in the assessment, the Appellant conveniently presented only the TBA and not until the Respondent moved this court for it to produce other relevant documents connected with the transfer of business assets to the Appellant were other documents revealed. The documents revealed that there were a series of instruments whose purpose was to transfer business assets to the Appellant. The Respondent maintains that it cannot be argued that the under instruments and not part of the single matter. The transaction has to be looked at in light of all the instruments operationalising the transfer of business as a going concern. This factor distinguishes the present case from the Angus case (*supra*). In the Angus case there was but only one instrument and the court had no choice but to peruse the instrument itself. The nature of the document was to be determined from the language employed and the purpose for which it was intended.

The Respondent's case is that alongside the TBA there were several other instruments employed for completing the transaction. Under section 3 of the Stamps Act, the principal document only shall be chargeable with the prescribed duty.

The Respondent argues that it cannot be reasonably argued that the TBA is not an instrument made that can it be argued that the closing deeds and not instruments. Similarly it cannot be reasonably argued that the TBA read alongside the closing deed which is subject to it cannot have the sole purpose of transferring business assets from Warid Telecom Uganda Limited to the Appellant. On 23 April 2013 Warid Telecom Uganda Limited executed a share save and purchase agreement with AIRTEL Uganda limited after it had stripped itself of all its assets.

Part of the terms of the TPA categorically point out that a master site agreement was to be executed simultaneously with the TBA and that there would be closing dates upon which certain events affecting the conveyance would be triggered. This proved that there were several instruments within a single transaction of the sale occasioning a conveyance of the business to the Appellant. Consequently the Respondent invoked to the provisions of section 3 of the Stamps Act which anticipates the employing of several instruments in one transaction. Uganda Revenue Authority looked beyond the form to establish the substance of the TBA as a transfer of business

agreement alongside other instruments mentioned therein and in doing so he used the TBA as the principal instrument among other instruments whose purpose was to transfer business assets from Warid Telecom Uganda Limited to the Appellant. It is clear from the objection decision that the Respondent's case is that it relied on several instruments and used the TBA as the principal instrument to be assessed for stamp duty. Counsel emphasised that the TBA clearly demonstrates that there was a transaction for the transfer of WARID Telecom business assets and also that there were several instruments employed for completing that transaction. Uganda Revenue Authority identified the TBA as the principal instrument to be charged with stamp duty. In the case of **Jaika Automobiles Private versus Joint District Registrar**, there was an interpretation of section 4 of the Bombay Stamps Act which is equivalent to section 3 of the Ugandan Stamps Act, it was held that the section deals with three types of transaction only and hence documents i.e. sale, mortgage and settlement. A conveyance includes a conveyance on sale and every instrument by which property whether movable or immovable, is transferred which is not otherwise specifically provided for by the schedule to the Act. Instrument is chargeable at the instruments indicated in the schedule. Where several instruments are employed for completing the single transaction, the duty is charged on the principal document chosen regardless of what kind of instrument it is. It is possible for the transaction to have several instruments for the conveyance, mortgage or settlement.

The question is whether there was a conveyance, mortgage or settlement. Section 3 (2) provides that for purposes of subsection 1, the duty chargeable on the instrument chosen shall be the highest duty which would be chargeable in respect of any of the instruments employed.

The Respondents case is that the TBA was an agreement to transfer which also pointed to a master site agreement and the closing deed within the spirit of section 31 (1) of the Stamps Act which provides that the consideration shall be stated in the instrument. Uganda Revenue Authority adopted the TBA as the principal document setting out the consideration for the transfer and charged stamp duty on it. At no time did Uganda Revenue Authority purport the TBA to be a transfer. It was pointed out that the whole matter was a transfer of business assets for which several instruments were employed right from the TBA, to the master site agreement and to the closing deeds. The TBA was simply the principal document within the meaning of section 3 of the Stamps Act. The transaction to which the TBA related was a transfer. Counsel prayed that the court looks at the intention of the TBA which was to transfer the business assets to the Appellant. All that was needed was to identify a principal instrument either by the parties on their own accord and the parties did elect to present the TBA for registration. In any case the law provides that the duty to be chargeable would be the highest duty which will be chargeable in respect of any of the instruments employed.

As far as the timing of the stamp duty is concerned, it was clear from a reading of the instrument that there were other instruments to consummate the transfer of the business. It was the conveyance transaction initiated by the agreement and consummated by other instruments. It was

the duty of the Appellant under section 31 (1) of the Stamps Act to state truly the consideration for the transaction. There was a corresponding obligation on the part of the Respondent to establish the right consideration. Section 20 of the Stamps Act on the timing of the stamping of the document is not applicable. The applicable section is section 21 which provides that a document which is wholly executed out of Uganda shall be stamped within 30 days of being received in Uganda. The TBA was executed in Abu Dhabi outside Uganda. What is material is that the document had to be stamped within 30 days after presentation and not 30 days of execution.

Finally the Respondent submitted on the principles of interpretation. Generally Counsel submitted that tax statutes have to be interpreted strictly.

Judgment

I have carefully considered the written submissions of Counsel on the questions for determination.

The issue is ***whether the instrument in issue is a transfer within the meaning of the schedule to the Stamps (Amendment Act) 2002 and paragraph 63 (i) of the schedule?*** Corollary to this issue is whether the instrument is chargeable to ad valorem duty of 1% of the value of the transaction. The Appellant's case is that the instrument does not amount to a transfer and the correct characterisation of the instrument is under paragraph 5 of the schedule as amended which provides for an agreement or memorandum of agreement and duty thereof is Uganda shillings 5000/=. Secondly the instrument did not transfer anything at the time of execution. Thirdly Section 20 of the Stamps Act provides for payment of stamp duty within 30 days of execution. The transfers were to be made as envisaged under the instrument (transfer of business agreement) much later in future. For all the documents to be considered as part of one transaction, the documents had to be executed contemporaneously and within 30 days. On the other hand the position of Uganda Revenue Authority is that the transfer of business agreement was an instrument which was the principal instrument out of many of one transaction which was chargeable with ad valorem duty of 1% of the value of the transaction.

The genesis of this matter is that on 14 March 2012, an agreement entitled transfer of business agreement was executed between the Appellant/Plaintiff and Warid Telecom Uganda Limited. The agreement is not in dispute and is annexure "A" to the plaint. In the agreement Warid Telecom Uganda Limited is described as the transferor while the Plaintiff/Appellant Eaton Towers Uganda Limited is described as the transferee. The transfer of business agreement is a comprehensive agreement by which Eaton Towers Uganda Limited was to acquire all the business assets and goodwill of Warid Telecom Uganda Limited. In a letter dated 1st of October 2012 Uganda Revenue Authority/Commissioner Domestic Taxes Department communicated to the Managing Director of Eaton Towers Uganda limited/the Appellant, an assessment of stamp duty in respect of transfer of tower infrastructure business to Eaton by Warid Telecom Uganda

Limited of **Uganda shillings 2,416,376,451/=**. The letter in part communicated that information available to Uganda Revenue Authority was that there was a transfer of tower infrastructure business to Eaton by Warid Telecom Uganda Limited and the consideration was as spelt out in an agreement between the parties. The instrument is referred to as "Transfer of Business Agreement" (TBA). The consideration for transfer was as follows:

- Site payment amounted to US\$95,958,720
- prepayments amounted to 0
- Co-location price increase payments amounted to US\$2,250,000.
- Alternative site relocation costs amounted to 0
- Total consideration amounted to US\$98,208,720.

The managing director was also notified that Uganda Revenue Authority applied an exchange-rate of 1 US dollar to Uganda shillings 2460.45. Accordingly it arrived at 1% of the converted currency of **Uganda shillings 2,416,376,451/=** which the Appellant was required to pay by 8 October 2012.

On 7 November 2012 and in a letter dated 7th of November 2012 the Appellant/Eaton Towers wrote to the Commissioner Domestic Taxes Uganda Revenue Authority objecting to the assessment of stamp duty on the transfer of business agreement between Warid Telecom Uganda Limited and Eaton Towers Uganda Limited (Eaton Towers). The grounds of the objection were that:

Firstly the Respondent maintains that the TBA is an agreement of conveyance of property and is not in itself the conveyance. Secondly it is of the view that the wording of clause 2 of the TBA presupposes a conveyance upon the satisfaction of specific completion deliverables that are set out under Part 1 of schedule 4 and under Part 1 of schedule 5 which included among others an obligation to assign leases, permits and contracts.

Secondly clause 3 of the TBA makes references to the conditions precedent which had to be fulfilled before the final transfer of business assets is accomplished.

Accordingly Eaton Towers Uganda limited concluded that the stamp duty payable on the TBA under the Stamps Act Cap 342 was Uganda shillings 5000/= only. The further grounds for the conclusion as set out in the objection letter and I do not have to repeat them here. On the basis of the opinion of the Appellant, the Appellant informed the Defendant/Uganda Revenue Authority that the classification of the TBA document as a transfer instrument attracting 1% stamp duty of the value of the transaction was erroneous. Instead the TBA attracted stamp duty of Uganda shillings 5000/=.

In a letter dated 21st of November 2012 Uganda Revenue Authority responded to the letter of objection of Eaton Towers. On the question of whether the transfer of business agreement document was not an instrument of transfer but rather an agreement of transfer, the

Decision of Hon. Mr. Justice Christopher Madrama

Respondent/Uganda Revenue Authority relied on section 1 (n) of the Stamps Act cap 342 as amended for the definition of "instrument". And "instrument" includes "every document" by which any right or liability is, or purported to be, created, transferred, limited, extended, extinguished or recorded." The Respondent referred to clause 3 of the TBA which provides that the transfer the Plaintiff agreed to assume and discharge on the due date, all of the assumed liabilities as applicable. This clause of the agreement qualified the agreement to be an "instrument" under the Stamps Act. Secondly Uganda Revenue Authority wrote on the question of whether the stamp duty payable is Uganda shillings 5000/= and not 1% of the total consideration? According to Uganda Revenue Authority, section 3 (1) of the Stamps Act stipulates that: "where, in the case of any sale, mortgage or settlement, several instruments are employed for completing the transaction, the principal instrument only shall be chargeable with the duty prescribed in the schedule to this Act." Secondly section 3 (2) of the Stamps Act states: "parties may determine for themselves which of the instruments sought to be employed shall, for the purposes of subsection (1), be deemed to be the principal instrument, but the duty chargeable on the instruments so determined shall be the highest duty which would be chargeable in respect of any of the instruments employed." The Respondent wrote that according to the Transfer of Business Agreement, the parties will enter into a master site agreement pursuant to which, the transferor will lease space on the Towers and the tower sites from the transferee and the transferor shall provide certain management services to the transferor under the terms and conditions set forth in the Master Site Agreement. Furthermore the Respondent/Uganda Revenue Authority wrote that in essence the Transfer of Business Agreement is the principal instrument to be assessed. The Master Site Agreement is a supplementary instrument to effect the transfer of business asset contract. From the premises the Respondent made the following conclusions:

Firstly that the Transfer of Business Agreement executed between Warid Telecom Uganda Limited and Eaton Towers Uganda Limited fall within the meaning of an instrument and it is the principal document, therefore it was correctly assessed under item 63 (i) of the first schedule to the Stamps Act (as amended). Secondly the subsequent Master Site Agreement falls within the ambit of several agreements to be employed for completing the transaction. It followed that besides the Transfer of Business Agreement which attracts stamp duty at the rate of 1%, subsequent agreements shall attract a fixed rate as provided for under section 3 (1) of the Stamps Act as amended.

On the basis of this above opinion, the Respondent confirmed the stamp duty assessment communicated to the Appellant on 1 October 2012.

Subsequently in a letter dated 28th of November 2012 Messieurs Kusaasira and Company Advocates and Consultants, acting on behalf of the Plaintiff/Appellant wrote to the Respondent amplifying the grounds of objection. In response thereto and by letter dated 18th of December 2012 the Respondent/Uganda Revenue Authority responded to the lawyers of the applicant/Plaintiff confirming the decision rejecting the characterisation of the instrument and

maintaining its assessment. Secondly the Respondent wrote on the question of procedure for resolving the dispute under sections 63 and 64 of the Stamps Act and informed the Appellant that they had to appeal from the decision of the authority. Subsequently the Appellant filed a statutory notice of intention to sue under the provisions of section 2 of the Civil Procedure and Limitation (Miscellaneous Provisions) Act, Cap 72 laws of Uganda. This was served on the Respondent on 15 January 2013. Again the Respondent wrote without prejudice to the lawyers of the Appellant/Plaintiff confirming the assessment and making a request for the Appellant to make arrangements to pay the sum assessed or face enforcement procedures/measures.

Subsequently upon appearance in court, it was agreed that Uganda Revenue Authority would make a statement of the case in accordance with section 64 of the Stamps Act. Subsequently the Appellant made lengthy submissions of about 17 pages giving grounds of the objection and the Respondent made another lengthy rejoinder of about 17 pages.

I have carefully considered the written submissions of Counsel and the evidence that I have summarised above based on the correspondence of assessment, objection to assessment, decision on the objection, amplification of the grounds of objection and the confirmation of the assessment and the grounds of assessment.

I will start with the provisions of section 64 of the Stamps Act which provides as follows:

"64. Appeal from revenue authority to High Court.

Any person considering himself or herself aggrieved by any decision of the revenue authority may appeal from it to the High Court and may require the revenue authority to draw up a statement of the case, with his or her own opinion on it, for reference to the High Court."

As far as the procedure adopted is concerned, the statement of the case forms the basis of a reference to the High Court. In this case the Appellant/Plaintiff had commenced an ordinary suit by plaint challenging the decision of the Respondent. I do not find anything prejudicial in the procedure adopted since at the end of it all, Uganda Revenue Authority drew up a statement of the case in accordance with section 64 (supra). Section 63 of the Stamps Act provides that the revenue authority may state a case coming to his or her notice, and refer the case, with his or her own opinion on it, to the High Court. In conclusion the two sections provide that Uganda Revenue Authority would draw up a statement of the case or to state a case and refer it to the High Court. Under section 63 that statement is made on the motion of Uganda Revenue Authority. On the other hand under section 64 of the Stamps Act, the High Court is moved by an aggrieved party who may require Uganda Revenue Authority to draw up its statement of the case with his or her opinion on it, for reference to the High Court. This is what subsequently happened in these proceedings.

Section 66 of the Stamps Act provides the procedure for disposal of the case stated by Uganda Revenue Authority. It is clearly provided under section 66 (1) that the High Court upon hearing of such a case, shall decide the questions raised by it and shall deliver its judgement on it and according to the grounds on which its decision is founded. In other words the statement of the case is supposed to raise questions for determination of the High Court and High Court shall give the grounds on which its decision is founded. Secondly section 66 (2) of the Stamps Act provides that the court shall send to the revenue authority a copy of its judgement under the seal of the court and the revenue authority shall, on receiving the copy, dispose of the case in conformity to the judgement.

The procedure adopted by the parties was to submit on certain issues raised by the objection decision of Uganda Revenue Authority that was in fact being challenged by the suit of the Plaintiff/Appellant. It was only subsequently after proceedings had commenced in the High Court by way of an ordinary plaint that the statement of the case was agreed upon in compliance with section 64 of the Stamps Act. That notwithstanding, the outcome of the proceedings should be a judgement on the statement of the case which would give directions to Uganda Revenue Authority on how to dispose of the question of whether the TBA was a transfer instrument. The import of the submissions of the parties however achieves the same objective in that the court is being asked to determine the question of characterisation of the instrument upon which the assessment was based. It is therefore immaterial that Uganda Revenue Authority had already determined the characterisation of the instrument and ruled that stamp duty of 1% was payable on the Transfer of Business Agreement Instrument. A statement of the case presupposes a quest for further directives on any question under the Stamps Act. Because the Appellant is a person aggrieved within the meaning of section 64, the correct characterisation of these proceedings is that it is a reference or appeal in which there is an opinion of Uganda Revenue Authority for determination of whether stamp duty was payable on the transfer of business agreement at 1% of the value of the transaction or whether it is payable at Uganda shillings 5000/=.

The transfer of business agreement (TBA) is a comprehensive agreement. In the agreement Warid Telecom Uganda Limited is referred to as the transferor and the Appellant Eaton Towers Uganda limited is referred to as the "transferee". The citation of the parties also characterises them as transferor and transferee. The background to the agreement paragraph B provides that the transferor wishes to transfer and the transferee wishes to accept the transfer of the goodwill and certain assets of the business, namely the business assets, which constitute part of the transferor's business on the terms and conditions set out in the agreement. In paragraph C of the background it is provided that the venture will involve the purchase of the business as a going concern. Last but not least on the background paragraph D provides that simultaneously with the signature of the agreement, the parties will enter into a master site agreement pursuant to which, from the first closing date, the transferor will lease space on the Towers and at the tower sites from the transferee and the transferee will provide certain site management services to the transferor on the terms and conditions set forth in the master site agreement. Paragraph 2 of the

agreement provides that the transferor agrees to transfer to the transferee and the transferee agrees to accept such transfer from the transferor on the terms of the agreement all of the transferor's rights, title and interest and all as at the applicable closing date, in and to the business assets with a view to the transferee carrying on the business as a going concern. Paragraph 2.2 provides that the transferor shall transfer the business assets free from all encumbrances (except permitted encumbrances). Property and risk in the business assets shall vest in the transferee on the applicable closing date.

Paragraph 3 of the TBA gives conditions precedent and post-signing obligations of the parties. The conditions precedent is provided for. The first is for the transferee to have obtained all necessary permits, licenses and/or consents required to own and operate the business, including, without limitation, a passive infrastructure provider licence. Secondly all necessary consents to have been obtained from the ground lessors to assign and/or novate all rights and obligations of the transferor under the ground leases to the transferee which consents shall remain in force and effect at the applicable closing date. Thirdly all necessary consents shall have been obtained from the counter parties to the tenant leases to assign all rights and obligations of the transferor or under the tenant leases to the transferee in the agreed form with such consents remaining in full force and effect at the applicable closing date. Fourthly all necessary consents shall have been obtained from the counterparties to the service and utility contracts, with such consents remaining in full force and effect at the applicable closing. Fifthly all necessary consents shall have been obtained from the counterparties to the contracts to assign and/or novate all rights and obligations of the transferor under the contracts to the transferee with such consents remaining in full force and effect at the applicable closing. Sixthly the transferor shall have a meeting place for the tower sites and to the extent applicable all necessary consents to have been obtained from the relevant governmental authority to assign and or novate all rights and obligations of the transferor under the permits to the transferee, with such consent and permits remaining in full force and effect at the applicable closing. Seventhly for each of the tower sites, notice of complete site shall have been delivered by the transferee to the transferor under the contract. Lastly the parties shall have received confirmation from the relevant Ugandan Tax Authority that the transactions contemplated by the agreement would be deemed to be a sale of business as a going concern under section 19 and the second schedule to the Value Added Tax Act cap 349 and no value added tax shall be incurred or become payable by the transferee as a result of or in connection with or arising from any of the transactions contemplated by the agreement.

It is quite clear that the proper characterisation of the business by the parties is the sale of a business as a going concern. It is also apparent from the agreement that several other documents were to be executed. I will start with the wording of the contract and particularly the citation of section 19 of the Second Schedule to the **Value Added Tax Act cap 349**. The section deals with exempt supplies for purposes of VAT. Section 19 (1) of the VAT Act provides that a supply of goods or services is an exempt supply if it is specified in the second schedule. Secondly it provides under section 19 (2) that where a supply is an exempt supply under paragraph 1 (K) of

the Second Schedule, both the transferor and the transferee shall, within 21 days of the transfer, notify the Commissioner General in writing of all the details of the transfer.

Lastly paragraph 1 (K) of the second schedule to the VAT Act schedules supply of goods as part of a transfer of a business as a going concern by one taxable person to another taxable person. "Goods" is defined by section 1 of the VAT Act to include all kinds of movable and immovable property, thermal and electrical energy, heating, gas, refrigeration, air conditioning and water, but does not include money.

In other words the parties envisaged a transfer of business. The terms of transfer included obligation imposed on the transferor to obtain confirmation from Uganda Revenue Authority that the transfer would be an exempt transfer as the sale of a business as a going concern under the VAT Act.

In substance and in effect the parties are asking the court to determine whether the duty should be chargeable on the transfer of business agreement or it should be chargeable on separate instruments envisaged for completion of the transfer of business agreement. The effect of either case scenario would depend on the valuation of several instruments on evaluation of the transfer of business agreement. A clear illustration is if several leases were to be transferred under the transfer of business agreement, different instruments would be used to effect the transfers. Indeed the Appellant submitted that certain transfers such as goodwill did not require an instrument for it to be effectual. Furthermore the argument is that the transfers envisaged under paragraph 63 of the first schedule to the Stamps Act are transfers executed using statutory forms or instruments.

I have duly considered the effect of both case scenarios namely whether stamp duty is chargeable on the transfer of business agreement or several other instruments envisaged under the agreement. In the first case scenario the Appellants case is that if stamp duty is chargeable on this transfer of business agreement, then it would be Uganda shillings 5000 only according to paragraph 5 of the first schedule to the Stamps Act. Paragraph 5 schedules agreement or memorandum of agreement. It is a submission that the TBA is an agreement or memorandum of agreement and not a transfer.

On the other hand it is the Respondent's position that paragraph 63 (i) of the first schedule is the applicable provision. Paragraph 63 of the first schedule to the Stamps Act deals with transfer and provides that 1% is chargeable upon transfer. It further provides that it is 1% of the total value. It only exempts the transfer of shares in an incorporated company listed on the stock exchange, arising from the trading of the shares on the stock exchange. The question is what is meant by "transfer". The Respondent supported its stand and submitted that under sections 3 and 5 of the Stamps Act, the entire transaction was a single transaction involving several instruments and the transfer of business agreement was the principal document out of several other documents. It was therefore the principal document not only presented by the Appellant for registration but also the

principal document chosen by the Respondent for purposes of obtaining one document in terms of section 3 of the Stamps Act. Secondly the Respondent submitted that where an instrument is framed as to come within two or more descriptions in the schedule to the Act under section 5 thereof, the instrument attracting the highest duty shall be the one chargeable.

Before considering the argument of the Respondent about the interpretation of section 3 of the Stamps Act on the issue of choosing the principal document out of several other instruments, we shall examine the definition section of the Stamps Act for the definition of a conveyance, instrument, deed, agreement or memorandum of agreement. Section 1 of the Stamps Act does not define an agreement neither does it define a memorandum or a transfer. It however defines a "conveyance", "conveyance of a sale" and "instrument".

A *conveyance* is defined under section 1 (h) to include a conveyance on the sale and every instrument by which property, whether movable or immovable, is transferred inter vivo and which is not otherwise specifically provided for by the Schedule to the Act. Secondly the phrase "conveyance on the sale" includes every instrument and every decree or order of the court by which any property, or any estate or interest in any property, upon its sale is transferred to or vested in a purchaser, or any other person on the purchaser's behalf or by his or her direction. Finally the word "instrument" includes every document by which any right or liability is, or purports to be, created, transferred, Ltd, extended, extinguished or recorded. My understanding of the submissions is that the word "instrument" has not generated any controversy and both parties agree that the TBA is an instrument. The question is whether the instrument amounted to a transfer of business as a going concern. The word "transfer" is not defined. The word "conveyance" is however proximate to the word "transfer". According to Osborn's Concise Law Dictionary 11th edition at page 414, the word "transfer" means:

"The passage of the right from one person to another (i) by virtue of an act done by the transferor with that intention, as in the case of a conveyance or assignment by way of sale or gift, etc; or (ii) by operation of law, as in the case of forfeiture, bankruptcy, ..., or intestacy. A transfer may be absolute or conditional, by way of security, etc...."

The definition makes it clear that a transfer involves the passage of a right from one person to another. Secondly there has to be an intention expressed through an instrument or any other way to convey that right. Conveyance includes every instrument by which property, whether movable or immovable, is transferred. A transfer in ordinary English is therefore the conveyance of property or the passage of a right from one person to another. Additionally a transfer may be made by way of an instrument. The assumptions underlying the submissions of the parties is that what the court is considering namely the TBA is an instrument and the issue therefore is narrowed down to whether that instrument amounts to a transfer.

The word "agreement" on the other hand is defined by Osborne's Concise Law Dictionary to mean the concurrence of two or more persons in affecting or altering their rights and duties.

Specifically therefore the word "transfer" connotes the act of conveying property from one person to another. With the juxtaposition of the word "instrument" in between and therefore means the conveyance of the property or right by an instrument from one person to the other. Items 63 of the first schedule to the Stamps Act therefore deals with the conveyance of property by an instrument that is chargeable with stamp duty.

It must be emphasised that the parties to the TBA classified the document as a "transfer of business agreement". It is actually agreed in the submissions of both parties that the TBA is not by itself the envisaged "transfer" instrument but rather the agreement of transfer of business. It is not in dispute that it envisages several other instruments which may be used. The difficulty generated by the controversy is the very classification by the parties of the document as a "transfer of business" agreement. In other words the parties agreed to transfer the business which is defined in the agreement upon the fulfilment of certain conditions set out in clause 3 of the agreement. The "business" is a complex aggregation of things which include goodwill, assets, contracts, leases and every other thing comprising the necessary ingredients that make up the business. The phrase adopted by the parties is the transfer of business as a going concern. The term "going concern" aggregates all the necessary ingredients of a business. Several instruments that may be necessary to transfer ingredients within the business are necessary instruments to realise the true intention of the parties to sell the business as "a going concern". The intention of the parties is reflected in paragraph 2 of the agreement which is headed as "transfer". However I particularly quote paragraph 2.1 which provides as follows:

"Subject to the conditions being satisfied or, where applicable, waived, the transferor agrees to transfer to the transferee and the transferee agrees to accept such transfer from the transferor, on the terms of this agreement, all of the transferor's rights, title and interest, all as at the applicable closing date, in and to the business assets, with a view to the transferor carrying on the business as a going concern."

The argument of the Appellant is that the agreement was a contingent agreement on the basis of which the transfer envisaged therein depended on the fulfilment of certain conditions precedent. On the other hand is the argument that the TBA is the principal document chosen by the parties for registration and it was unnecessary to register the other instruments envisaged in the TBA. This is based on the interpretation of section 3 of the Stamps Act. Section 3 provides that in the case of any sale, mortgage or settlement, where several instruments are employed for completing a transaction the principal instrument only shall be chargeable with the duty prescribed in the schedule to the Act for the conveyance, mortgage or settlement and each of the other instruments to be chargeable with duty of two shillings instead of the duty, if any, prescribed for in the schedule. It is the Respondents case that out of all the instruments that are to be employed in the transaction, it had chosen and the Appellant has presented the TBA. Secondly the Respondent's position is that this is a single transaction namely the transfer of business as a going concern. Of course the difficulty presented by the argument is the fact that the transfer of business as a going

concern in an aggregate deal or a single deal which involves the execution of several other instruments to complete the "single transaction" of transfer of business as a going concern. The nature of the single transaction is only reflected in the transfer of business agreement without the instruments itself does not specifically amount to a transfer, it only provides for transfer. The issue would therefore be whether in choosing the principal document, it is necessary for that document out of a series of other documents to be a transfer for it to be characterised as the principal document of the transfer of business as a going concern.

Secondly section 3 (2) provides that the parties may determine for themselves which of the instruments so employed shall for the purposes of subsection 1 be deemed to be the principal instrument. But the duty chargeable on the instruments determined shall be the highest duty which would be chargeable in respect of any of the instruments employed. Subsection 2 of section 3 envisages the use of another instrument for identifying the highest duty payable while registering a principal instrument. The question remains whether the "principal instrument" so chosen ought to be a transfer instrument.

The Appellant countered this argument by submitting that where several instruments are employed, the instruments have to be executed contemporaneously. The Appellant further juxtaposed the provisions of section 20 of the Stamps Act which provides that every instrument executed by any person in Uganda has to be stamped within 30 days of execution. In other words all the instruments had to be executed within the period within which it is to be presented that is within the limitation period. The Respondent on the other hand submitted that section 20 was not applicable because the instrument was executed outside Uganda and in Abu Dhabi and the applicable provision is section 21 of the Stamps Act which provides that the instrument shall be stamped within seven days upon been received in Uganda.

The Respondent concedes that the instrument itself is not a transfer and I do not need for the moment to consider whether it is. I agree that several other transfers were supposed to be executed by the parties for the transfer to be complete. I further agree that the TBA is an agreement to transfer. The question that remains therefore is whether the Respondent is right to consider the instrument as the principal instrument for purposes of section 3 of the Stamps Act. Before I consider that, the duty to register an instrument for purposes of stamp duty from the date of execution is obviously that of a party to the instrument and is determined according to section 36 of the Stamps Act which determines by whom the duty is payable depending on the kind of instrument. The Respondent has further argued that the Appellant has opted not to present any other instruments to make its work easier. In fact the Appellant was given opportunity to present the documents envisaged in the TBA and the Respondent was supposed to review its decision within 30 days after commencement of the proceedings in this court and after supply of the necessary instruments for it to review its decision. No progress was made and the Respondent reaffirmed its assessment on the basis of the TBA is a principal document.

I have carefully considered the principles for the charge of stamp duty. Halsbury's laws of England fourth edition reissue volume 44 (1) deals with the principles of interpretation. In paragraph 1010 of Halsbury's laws of England (supra) it is provided that stamp duty is chargeable on instruments and not on transactions. I do not clearly understand the purpose of the parties in submitting on the question of stamp duty being chargeable on instruments. There are no instruments which are in dispute. Secondly other instruments envisaged under the TBA have not been availed for consideration by the court. The TBA instrument itself is dated 14th of March 2012 and transfers envisaged under the TBA ought to have been made available at the time the suit came for hearing. Thirdly the Respondent based itself on an instrument and the issue is whether that instrument is chargeable with stamp duty of 1% or stamp duty of 5000/= Uganda shillings. Perhaps what is implied in principle is a determination of whether the value ascribed to the TBA is the value of the transaction and not the value of the instrument. There is no need for me to conclude this issue for the present as I have opportunity to conclude the question of characterisation of the TBA.

Secondly the liability of an instrument to stamp duty arises at the moment at which it is executed and depends on the law in force and the circumstances which exist at that time. It is specifically provided and I quote "Until execution is completed no duty attaches." "Execution" means signing of the instrument. This principle was relied on by the Appellant to counter the submission of the Respondent that several documents had been executed for the transfer of the TBA as the principal document. It is a submission that the instrument itself speaks for itself and the liability to duty arises from the instrument yet it did not constitute a transfer and transfer documents are yet or were yet to be executed. I still repeat the question which is whether these transfer documents are now available? The Respondent at the time of highlighting its submissions prayed that the court should be wary of any scheme to evade tax. There is no logic if the characterisation of the instruments does not yield the necessary effect on the liability of the Appellant to stamp duty. If the instruments of transfer are presented, then the primary matter would be how much they would be valued at? This is because the Respondent actually suggests that it has chosen one instrument out of many but these other instruments have not been produced and the question remains as to whether they were yet to be executed. This question of fact would have resolved the substance of the dispute. In that respect the characterisation of the TBA by itself does not resolve the issue of the tax liability to stamp duty of the Appellant. It suggests that what is in issue is a choice of which documents should be used to establish liability to stamp duty.

Thirdly in paragraph 1011 of Halsbury's laws of England one of the principles of interpretation is that the terms of the instrument itself decide the question of whether stamp duty is chargeable. It is not the name of the instrument which gives its character but regard should be had to the substance of the transaction rather than its form. It is therefore necessary as we have done to establish the substance of the transaction from a perusal of the TBA itself. This approach is only complicated if the TBA is taken to be a principal document out of several other documents also

liable to stamp duty. It further engages the question as to the characterisation of the several other documents. If the TBA falls under paragraph or item 5 of the first schedule to the Stamps Act and other instruments (not before the court) constitute transfers envisaged under it, can it be a principal document? Furthermore in considering the aggregate of any such instruments (not before the court) would it not be a matter of substance for determination of the stamp duty payable? Technically characterisation of the TBA only achieves the effect of having it being classified as an agreement or memorandum under item 5 or a transfer under item 63. If it is a memorandum of an agreement the stamp duty payable is Uganda shillings 5000/= if it is a transfer, the stamp duty would be 1% of the value of the transaction. In either case scenario, it is conceded that other instruments were necessary to fulfil the agreement and make the transfer effective. These instruments are instruments of transfer as we shall later on demonstrate.

In paragraph 1012 of Halsbury's laws of England (supra) another principle of interpretation is that although the liability of an instrument to stamp duty depends upon the circumstances which exist when the instrument is executed, the court can have regard to what is said and done thereafter in order to discover the true position at that time. In other words the court considers the circumstances at the time of execution of the instrument and not thereafter. The principle supports the Appellant's contention that at the time of execution of the instrument, and upon a perusal of the TBA, there was no transfer effected by the instrument. In the substance however, this hides the issue of choice of instrument as a principal instrument for purposes of stamp duty under the provisions of section 3 of the Stamps Act. The interpretation of section 3 of the Stamps Act has to be considered on its own merits.

Another principle of interpretation in Halsbury's laws of England (supra) is found in paragraph 1013 where it is stipulated that where an instrument regarded as a whole, falls within more than one head of charge, the revenue is entitled to charge the highest duty. Paragraph 1013 considers the provision in *pari materia* with section 5 (1) of the Stamps Act which provides that:

"Subject to subsection 4, an instrument so framed as to come within two or more of the descriptions in the schedule to the act shall, where did it is chargeable under those descriptions are different, the chargeable only with the highest of the duties."

In my opinion section 5 (1) of the Stamps Act should only be applied when dealing with one instrument which contains several matters which are chargeable under the schedule such as transfers, and others scheduled separately.

As far as the equivalent of section 3 of the Stamps Act is concerned, it deals with several instruments used in a single transaction of sale, mortgage or settlement. In the Appellant's case, the TBA is a sale or deals with the sale of a business as a going concern. The keywords used are "where several instruments are employed for completing the transaction". In other words where several instruments are employed, the principal instrument only shall be chargeable with the duty prescribed in the schedule for the conveyance, mortgage or settlement. The question of whether

several instruments have been employed pursuant to the TBA is a question on the substance of the dispute but does not resolve the problem of characterisation of the TBA without reference to other documents. According to Halsbury's laws of England (supra) paragraph 1016:

"Where a reference to several documents is necessary to prove what is in fact a single transaction, so that in a sense they constitute only one instrument, it is sufficient if one of the documents is properly stamped. A properly stamped instrument is not rendered inadmissible by containing a reference to another instrument which is not properly stamped, but the other instrument is not thereby itself made admissible."

There is no doubt in my mind that the TBA constitutes a single transaction of the sale of business as a going concern. It however refers to several other transfers to be made. In order to complete the transaction, it was necessary to execute several other instruments which are not specified or scheduled. I have carefully considered section 3 (1) of the Stamps Act. I agree with the Appellants that it deals with documents which have been employed in completing the transaction. It does not deal with future documents to be executed i.e. by way of transfers.

In other words, the TBA is an agreement to execute a transfer of business as a going concern. Having said that, it is apparent that several other documents were to be executed which documents are in possession of the Appellant or at least ought to be in the possession of the Appellant. It would have been necessary at this stage of the proceedings having regard that the agreement was executed on 14 March 2012 to establish whether all the necessary documents for completion of the transaction (being the sale of the business as a going concern) have been executed in order to ascertain the stamp duty payable. These documents are documents envisaged to be executed after execution of the TBA or deemed to be executed after execution of the TBA.

Several timelines have been indicated for execution of transfers and other documents within the TBA itself. The TBA was supposed to be executed at the same time as a master site agreement. The "Master Site Agreement" is defined in the agreement (TBA) as follows:

"Master site agreement means the agreement, dated as of even date herewith, between the transferor and the transferee in the Agreed Form, in terms of which the transferor will lease space on the towers and at the tower sites from the transferee, and the transferee will provide certain site management services to the transferor;"

A literal reading of the definition of "Master Site Agreement" clearly means that it was to be executed on the same date as the TBA and the terms of which were that the transferor will lease space on the towers and at the tower sites from the transferee and the transferee will provide certain site management services to the transferor. The instrument to accomplish this was to be on the same date as the TBA. When this is examined together with clause 2 of the TBA, certain transfers were to be made on the same day as the TBA namely the master site agreement

consisting of the lease. It can therefore be concluded that another instrument granting a lease had to be executed at the same time as the TBA.

Secondly it was expressly contemplated by the parties that certain transfers would be made. An illustration can be found under clause 3.8 of the TBA which provides that the transferor and transferee shall within 21 days after each closing, notify the Commissioner general of the Uganda Revenue Authority in writing of the details of the transfer effected at such closing in accordance with section 19 (2) of the VAT Act. Clause 4.1 deals with the completion of the transfer upon fulfilment of at least 50% of the conditions precedent.

Further analysis of the conditions precedent proves that certain consents and permits are to be obtained from third parties. The TBA agreement is however between the transferee and the transferor and was meant to transfer the business of the transferor as a going concern to the transferee. The conditions precedent deal with matters which are necessary to be done in order to consummate the intention of the parties to the TBA of transferring the business of the transferor as a going concern. The overarching nature of the agreement is a transfer of business and the other matters and instruments are executed as a means of realising the main intention of the parties.

Furthermore as far as the substance of the transaction is concerned, the transfer of property or assets is corollary to the transfer of business agreement. The transfer of several other assets depended on other permits and involvement of third parties. An examination of paragraph 63 clearly indicates that it deals with transfer. It does not specify what kind of transfer.

The Appellants Counsel submitted that a transfer envisaged under paragraph 63 of the First Schedule to the Stamps Act, is a transfer executed by using a statutory form such as shares transfer or transfer of registered title. I have carefully gone through the First Schedule to the Stamps Act. There is nothing to suggest that the transfer envisaged under item 63 of the First Schedule to the Stamps Act can only be effected by a statutory form. We have already noted that the word "transfer" is not defined. The word "conveyance" is however defined. Under item 24 of the First Schedule to the Stamps Act, a conveyance not being a transfer is chargeable with only 5000 Uganda shillings. On the other hand a gift instrument not being a settlement or will or transfer is charged at 1% of the total value (see item 35). Secondly an exchange of property is charged at 1% of the total value (see item 32). A further charge on mortgaged property is stamped at 0.5% of the total value (see 34). An indemnity bond is at 1% (item 37). A hire purchase agreement is at 1% of the total value (see item 36). A lease is at 1% of the total value (see item 38). A security bond or mortgage deed is at 1% of the total value (see item 57). A composition deed (which is an instrument of conveyance of property by a debtor for the benefit of his creditors) is charged at 1% of the total value (see item 23).

It is apparent that the intention of legislature is to charge 1% or 0.5% where value has been exchanged by the instrument. The transfer of business by its nature is the transfer of value for

consideration. The parties were aware that the transfer was a transaction which was as good as a transfer of goods for value. The parties were conscious that they needed to be exempt from VAT under section 19 (2) of the VAT Act for each act of transfer that was necessary to consummate the TBA. Furthermore the language of the Value Added Tax Act and the Second Schedule thereof clearly provides for the transfer of business as a going concern. Item 1 (K) of the second schedule which schedule deals with exempt supplies includes "the supply of goods as part of the transfer of a business as a going concern by one taxable person to another taxable person;" In other words a business can be transferred as a going concern for consideration and the word "transfer" has not failed to operate in the context of the Value Added Tax Act.

In the context of the TBA, the execution of several other instruments would only be a method for making the transfer effectual. It is further conceded by the Appellant's Counsel that the business included goodwill whose transfer does not require an instrument. My conclusion is that the parties to the TBA in question intended to transfer the business of Warid Telecom Uganda Limited to the Appellant. What comprises the business is a secondary consideration and is largely a matter for execution of the transfer of business.

All those other matters which are necessary for the business to be a going concern are included in the transfer of "a business as a going concern". The phrase "going concern" incorporates the meaning that all the essential ingredients for the business to continue would be present. It would be absurd to restrict the primary intention of the parties to a list of items that have to be done in order to constitute a business. For instance supposing there are several masts under leases in several areas in Uganda. Each of the leases has to be separately transferred or conveyed to the Appellant and on the basis of the consent of each landlord. It would be cumbersome to deal with all the leases which have to be transferred when in actual fact and in substance they are part of a single transaction of transfer of a business as a going concern.

In so far the TBA does not transfer a specified or specific asset by a specialised instrument, it in substance transfers the business to the Appellant. The method of execution of the transfer deals with an unknown number of specific transfers of assets, contracts and goodwill among other things. It is in that context that section 3 of the Stamps Act can be understood. The transaction in the TBA is a sale of a business. The business was transferred in a single transaction of sale. However for the sale and transfer of the business to be effectual, several other matters are provided for in the TBA. This includes a Master Site Agreement executed at the same time as the TBA, and certain conditions precedent. In the context of section 3 (1) of the Stamps Act, several instruments are meant to be employed in completing the transaction of the sale of the business as a going concern. In technical terms, the instruments envisaged under the TBA were yet to be executed according to the wording of the TBA. However some instruments were to be executed on the same day namely "the master site agreement" which required the leasing of the tower site. It is a cardinal principle under article 126 (2) (e) of the Constitution of the Republic of Uganda that substantive justice shall be administered without undue regard to technicalities. The

Appellant does not seem to object to assessment on the basis of several other instruments which are necessary to implement the transfer of business agreement and which are envisaged under the TBA. The evaluation of those instruments which are not before the court is unknown. In other words the Appellant would still be liable to pay duty on the basis of separate instruments even if it does not pay it on the basis of the TBA. Yet the entire transaction is actually a single transaction of the sale of business as a going concern. The fact that the TBA does not specifically transfer any asset but provides for the transfer of assets is a technical point. When one examines the entire transaction, the Appellant would be liable to pay stamp duty on the basis of instruments which are yet to be availed.

Last but not least the agreement of the TBA was executed on 14 March 2012. By the time of this judgement, it is proper to assume from the wording of the TBA that some of the instruments have since been executed. It would be improper for the court to base its decision only on the basis of the characterisation of the TBA at the time of execution on 14 March 2012. It is a further principle under section 33 of the Judicature Act that the High Court shall in the exercise of the jurisdiction vested in it by the Constitution, and any other written law grant absolutely or on such terms and conditions as it deems just, all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly before it, so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matters avoided.

The intention of the Respondent is to assess the applicant for the entire transaction of sale of business as a going concern. Secondly the procedure under section 64 of the Stamps Act is to make a reference of certain questions for determination. In the opinion of the Respondent, it treated the TBA as a principal document. It considered the other documents envisaged under the TBA as several other documents on the same transaction. On the technical point however, the several documents were yet to be executed. More than a year later, it is proper to deem that the TBA was substantially complied with and the time lines set out in the TBA were complied with and therefore several other instruments of transfer envisaged therein have been executed.

In conclusion the matter shall be referred back to the Respondent/Defendant for review of assessment with the following guidelines.

1. The Appellant shall hand over all documents dealing with transfer of property and all such transfers envisaged under the transfer of business agreement which had been executed subsequent to the transfer of business agreement to the Respondent within a period of two weeks.
2. The Respondent shall use the documents to review its assessment of the sale of business agreement.

3. The Respondent shall take into account the "Master Site Agreement" and any other instrument executed at the time of execution of the "Transfer of Business Agreement" for purposes of assessment of stamp duty.
4. Where need be the Respondent shall consider other instruments executed subsequently and separately and may at its own discretion make a separate assessment for the category of documents executed after the execution of the transfer of business agreement
5. The Respondent shall then come up with a final assessment of stamp duty for the categories established.
6. Each party shall bear its own costs.

Judgment delivered in open court this 24th day of March 2014

Christopher Madrama Izama

Judge

Ruling/Judgment delivered in the presence of:

Charles Okuni: Court Clerk

Byabashaijja Joshua for the Plaintiff

Plaintiff not in attendance

Mwajuma Nakku for the Defendant

Ms Angela Mugisha Nairuba Supervisor Customs and Non Tax Revenue Litigation of Respondent in attendance

Christopher Madrama Izama

Judge

24th of March 2014