THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCCS NO 248 OF 2012

1. **HON. ABDU KATUNTU}**
2. **KIMBERLY KASANA}.....PLAINTIFF**

VS

1. **MTN UGANDA LTD}**
2. **ARITEL UGANDA LTD}**
3. **WARID UGANDA LTD}**
4. **UGANDA TELECOM LTD}**
5. **ORANGE UGANDA LTD}**
6. **BANK OF UGANDA LTD}**
7. **UGANDA COMMUNICATIONS COMMISSION}.....DEFENDANTS**

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Defendants objected to the Plaintiff's suit on the ground that the plaint discloses no cause of action and the Plaintiffs have no locus standi to bring the action against the Defendants.

The main submissions in objection to the suit were made on behalf of the first and seventh Defendants namely MTN Uganda Limited and the Uganda Communications Commission. The

second and third Defendants supplemented on the submissions while the rest of the Defendants associated themselves with the objection of the first and seventh Defendants.

The Defendants attack the Plaintiffs claim in paragraph 6 of the amended plaint where it is written that the Plaintiffs claim an interest in the proper operation and regulation of all the Defendants mobile money services and promotions and bring this suit in the public interest in the exercise of their duties as citizens under article 17 of the Constitution of the Republic of Uganda. Secondly the first Plaintiff pleads his further capacity as a Member of Parliament while both Plaintiffs are consumer and end-users of the products of the Defendants. The orders sought by the Plaintiffs inter alia are declarations to the effect that the first to fifth Defendant's mobile money services are financial services and/or financial institution business under the law. Secondly a declaration that the first up to the fifth Defendants mobile money services are outside the scope of the licences granted to them by the seventh Defendant. Thirdly an order for a technical audit of the 1st – 5th Defendant's mobile money services with a further order for the Defendants to refund any monies earned in respect of those services. The Plaintiffs also seek an order directing the 6th and 7th Defendants to formulate policy and proper regulations for mobile money services. The Plaintiffs further seek declaration that the 1st – 5th Defendant's promotions under the names and style of "SUKUMA SMS, "KIKAAYE", KIKA TOO GOOD" "PROGRESS WITH WARID" ORANGE QUIZ" carried out by the first, second, third, fourth and fifth Defendants respectively and other like promotions amount to gaming under the law. They seek an order of the technical audit of the said promotions and other like promotions. Furthermore an order to account and refund of monies made by the 1st – 5th Defendants from the said promotions and finally an order for payment of the costs of the suit.

Following article 17 of the Constitution cited by the Plaintiffs, the Defendants maintained that the Plaintiffs entire plaint and averments therein fail to disclose a cause of action and ought to be rejected under order 17 rule 11 (a) of the Civil Procedure Rules. He submitted that article 17 (1) of the Constitution of the Republic of Uganda list a series of the duties of every citizen of Uganda. Following the citation of the duties of the citizen as set out in article 17 of the constitution of the Republic of Uganda, the Defendants argue that the Plaintiff's plaint discloses no cause of action because their suit does not fall there under. Cause of action is defined in the case of **Auto Garage versus Motokov (No. 3**), **(1971) EA 514**. It was held that the plaint must disclose that the Plaintiff must appear as a person aggrieved by the violation of a right, that the Defendant is the person who is liable and that the Plaintiff is a person who enjoyed the right which has been violated. They submitted that the amended plaint does not satisfy the three constituent elements of a cause of action as defined and that the Plaintiffs failed to demonstrate through the pleadings, the existence of the requisite ingredients of a cause of action.

Particularly it is contended for the Defendants on the question of enjoyment of the right or having an interest under paragraphs 6, 7, 8, 9, 10, 11, 12 and 13 of the plaint collectively do not demonstrate the particular sufficient interest or right enjoyed by the Plaintiffs. In the absence of disclosure of the rights of the Plaintiff, the plaint does not disclose a cause of action. Furthermore article 17 of the Constitution does not in any way grant the Plaintiff any right or duty to institute an action before the court on the basis of the pleadings in the plaint. There is not a single order or relief that is being sought in the plaint that rhymes with the duties enshrined in article 17 of the Constitution. It is a matter of law and the Defendants contend that the particular suit of the Plaintiffs does not fit within the description of a public interest litigation suit whose foundation lies in article 50 (2) of the Constitution. Article 50 (1) of the constitution provides that any

person who claims that a fundamental or other right or freedom guaranteed under the constitution has been infringed or threatened is entitled to apply to a competent court for redress which may include compensation. The Defendant's contend that article 50 of the constitution is the only article under which a public interest suit can be commenced and only for the enforcement of fundamental rights and freedoms. He submitted that it is the only provision in the law that allows a person who himself or herself has not suffered any injury or breach to sue for the injury or breach suffered by any other person or the public. The Defendants contend that no other law provides for suing where a person has not suffered injury himself or herself. The plaint does not purport to seek enforcement of any fundamental human rights. He relied on the case of **Pastor Martin Sempa versus Attorney General High Court miscellaneous application 71 of 2002** where the trial judge struck out the action on the ground that it did not disclose the violation of the constitutional right. He held that it was not enough to assert the existence of the right. The facts set out in the pleadings must bear out the existence of such a right and its breach to give rise to relief.

In summary the Defendants Counsel submitted that the Plaintiffs instituted the suit under article 17 of the constitution which has no correlation to the orders sought by the Plaintiffs and does not provide for any public interest litigation. Secondly it does not fall under article 50 of the constitution which caters for public interest litigation. The claim for the proper operation and regulation of all the Defendant’s mobile money services and promotion is not a right or interest protected by any statutory provision, common law or constitutional provision.

Furthermore most of the orders sought in the plaint are in respect of licences held by the Defendants which licences were granted by the seventh Defendant in the exercise of its statutory powers. He submitted that a licence is contractual in nature establishing duties between the

licensee and a licence and that it was a fundamental principle of law that only a person who is a party to a contract can sue upon it according to the case of **Midland Silicons Ltd versus Scruttons [1962] AC 446**. The Plaintiffs have attempted under paragraphs 3, 5, 6, 7, 8, 9, 10, 11, 12 and 13 of the amended plaint to seek declarations against the first and seventh Defendant is in respect of a licence issued to the first Defendant by the seventh Defendant which declarations, be granted on the basis of the doctrine of contracts being enforceable only by parties who are privy to it.

Counsel submitted that the plaint admits that the seventh Defendant is a statutory body with the statutory mandate to regulate telecommunications services in Uganda. On the basis of that pleading the Plaintiffs do not have locus standi to institute the current suit because the licence was between the first Defendant and the seventh Defendant. If the first Defendant was operating outside the scope of the licence, it was up to the seventh Defendant to compel the performance of such duties. He further submitted that such a procedure to compel the seventh Defendant would be by way of an application for judicial review and not by way of an ordinary suit.

The Defendants further submitted that mobile money services cannot be financial services under the law. This is because the Plaintiff purports to challenge the conduct of mobile money services on the ground that they are financial services that ought to be regulated under the Financial Institutions Act. The Defendants Counsel submitted that those services cannot be financial services and contended that a similar issue had previously been adjudicated upon by the High Court of Kenya as a preliminary point. In that case the Applicants to challenge the Kenyan mobile telecom operators and Central Bank of Uganda on the issue of the validity of mobile money schemes. This was in **Constitutional and Judicial Review Division Petition Number 94 of 2010 between Eric Barare Orina vs. Minister of Finance and Five Others**. The issue

was whether money transfer services fell within the definition of banking business as defined in section 2 of the Kenyan Banking Act. The claim was dismissed preliminarily based on the definition of a bank which includes the characteristic of a firm to accept from members of the public of money on current account and payment on and acceptance of cheques, and employs money held on deposit or on current account or any part of the money by lending, investment or in any other manner for the account.

The Defendants Counsel invited the court to accept the principles in the above case as of persuasive value and dismiss the Plaintiff's action. He noted that the statutory provisions discussed in the Kenyan case on the definition of banking is in *pari materia* with section 3 of the Financial Institutions Act, 2004 of Uganda on the definition of "financial institution business". On the basis that mobile money services cannot be financial services under the Financial Institutions Act, the entire case of the Plaintiff should collapse.

The Defendants Counsel further submitted that the orders sought by the Plaintiffs are in effective and unenforceable. He submitted that the court has no jurisdiction to determine issues which cannot lead to any consequential and enforceability and relied on the case of **Joseph Borowski versus Attorney General of Canada (1989) 1 SCR 342** also cited with approval in the Ugandan case of **Human Rights Network of Journalists and Another versus Uganda Communications Commission and 6 others HCMC 219 of 2013**.

The Defendants Counsel contended that the action was for moot purposes and further relied on the Court of Appeal case in **Environmental Action Network Ltd versus Joseph Eryau Civil Application Number 98 of 2008** for the holding that courts do not decide cases for academic purposes because court orders must have a practical effect and be capable of enforcement.

Regarding the Plaintiffs prayers for the 6 and 7 Defendants to make regulations for mobile money services, article 79 (1) of the Constitution places the duty to make regulations under the authority of an Act of Parliament. An order by the court would be in vain as power to make regulations is prescribed and the authority making the regulations designated.

Similarly the Applicant seeks for a technical audit and refund of monies to be made by the Defendants. Such an order would be moot and academic and cannot be particularly enforced by the court. Such questions like who carry out the technical audit, against what yardstick would it would be carried out, and against whom? To whom would be defined be made? What would be the purpose of the technical audit? And who would be the recipient of the technical audit report? The Defendants submitted that this illustrates that the order is for moot purposes.

Finally the Defendants Counsel submitted on the Plaintiff's lack of locus standi. He reiterated earlier submissions on the question of cause of action and relied on the case of **Kikungwe Issa and Ors vs. Standard Bank Investment Corporation and three others HCCS 0394 and HCCS 395 of 2014** where honourable justice Kiryabwire considered the question of who may commence an action for enforcement of fundamental rights and freedoms under article 50 of the Constitution. He held that the Applicant must show that he or she is not a mere busy body and should first exhaust other remedies available before coming to court. That it should not be automatic. Courts should in all cases be a last resort step when all else has failed. Furthermore in the case of **Ogago Brian Abangi vs. Uganda Communications Commission H.C.M.A 267 of 2013** it was held that the Applicant did not cite any articles of the constitution which had been violated to assist the court to come to a conclusion that the Applicant seeks enforcement of constitutional rights. The Plaintiffs have not cited any infringement of an article of the

constitution or article 50 as the basis for filing the action and on that basis alone the court or to dismiss the case.

The second and third Defendants Counsel supplemented the submissions of the first and second Defendant's Counsel with additional authorities namely the case of **Major General David Tinyefuza versus Attorney General Constitutional Appeal No. 1 of 1997** on the principles for determining a cause of action. Furthermore documents annexed to the plaint respectively are general opinion articles in newspapers and magazines in respect of mobile money businesses as well as sales promotions. These do not relate to the Plaintiff at all and this renders their reliance in the suit speculative and misconceived.

Furthermore Counsel contended that the classification of mobile money services under the law is the preserve of Parliament under article 79 of the Constitution of the Republic of Uganda. If Parliament has not made any law in which the said services are classified as financial institution business, the court cannot purport to classify them as such. This was clearly an attempt to use the court to legislate which attempt must be shunned. He concluded that the court belongs to be judiciary whereas the legislature is a different arm of government.

The contention that the second and third Defendants are not compliant with the tax obligations under the National Lotteries Act and The Gaming and Pool Betting (Control and Taxation) Act is not a basis for enjoyment of rights by the Plaintiffs. If anyone is aggrieved by the non-payment of taxes, it should be the statutory body (Uganda Revenue Authority) and not the Plaintiffs to complain. The best that the Plaintiffs could have done is to whistle blow to Uganda Revenue Authority and leave it up to them to take up the matter.

The fourth Defendant's Counsel associated with the submissions of Counsel for the first and second Defendants and adopted the same with necessary modifications as to relate it to the fourth Defendant.

For the fifth Defendant, Counsel associated with the lead submissions of Counsel for the first and seven Defendants and further emphasised that the Plaintiffs cannot maintain a cause of action against the fifth Defendant. He submitted that the orders sought against the fifth Defendant would be moot and academic according to the earlier authorities cited. He submitted that the Plaintiffs claim and orders sought as presented on the face of them are hypothetical and speculative claims with do not exist in real dispute as between the Plaintiffs and the fifth Defendant. The suit went against existing cardinal doctrine in the jurisprudence of Uganda. He invited the court to find wisdom in the holding of the appellate division of the East African Court of Justice in the case of **Legal Brains Trust (LBT) Ltd versus Attorney General**. It was held that it was a cardinal doctrine of jurisprudence that a court of law will not adjudicate hypothetical questions. Such hypothetical questions are those where no live dispute exists. He submitted that the matters presented by the Plaintiff's for which declarations are sought can only be resolved through legislative action. The Attorney General is not a party and the Defendants cannot be condemned by court. He suggested that the declarations sought against the Defendants would be in vain and incapable of practical enforcement.

Furthermore the fifth Defendants Counsel submitted that there was no valid claim against the fifth Defendant or its value added services to its customers. Accordingly the fifth Defendants Counsel prayed that the plaint is rejected under Order 7 rule 11 (a) of the Civil Procedure Rules for not disclosing a cause of action against the fifth Defendant or the suit should be dismissed against the fifth Defendant with costs.

Finally the sixth Defendant adopted the submissions of the first, fifth and seventh Defendants and the sixth Defendants Counsel adopted those submissions.

In reply the Plaintiff's Counsel prayed that the preliminary objections are overruled. Secondly he contended that the defences of the Defendants on record are groundless, without any bona fide grounds as they substantially admit the Plaintiffs claim. Secondly the defences perpetuate an illegality and cannot stand. In other words the Plaintiff's Counsel objected to the defences on the above two grounds.

On the question of the locus standi, the argument that the suit is not a public interest suit under the constitution on the basis of which the Plaintiff would have locus standi cannot stand. The Plaintiff's Counsel submitted that according to the **Black's Law Dictionary 9th Edition**, the expression "locus standi" means the right to bring an action or to be heard in a given forum. He invited the court to consider the capacity in which the Plaintiffs filed this suit. He contended that one must consider both the right of the Plaintiff to be heard as well as the jurisdiction of the court to hear the matter. Firstly the first Plaintiff filed this suit in his capacity as a Member of Parliament while the second Plaintiff filed it as a consumer and end user of the Defendant's services. An end user and a Member of Parliament have locus standi to file a suit complaining about the service or seeking its proper regulation. He further contended that the relationship between the Plaintiffs and the Defendants is sufficiently proximate to warrant a right of action to enforce the law among other things. He further invited the court to consider the authority of **Human Rights Network for Journalists and Another versus Uganda Communications Commission Miscellaneous Cause Number 219 of 2013** before Honourable Justice Nyanzi Yasin where he overruled a similar preliminary objection and cited the case of **Environmental Action Network Ltd versus Attorney General and another High Court Miscellaneous**

Application Number 39 of 2001 wherein also the court quoted with approval the case of **Inland Revenue Commissioners and National Federation of Self-Employed and Small Businesses [1982] AC 643** and a passage from Lord Diplock. It was held that it would be a great lacuna in the system of public law if a pressure group or the Federation of a single public spirited taxpayer were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get an unlawful conduct stopped.

Furthermore the authority of **Kigungwe Issa and others versus Standard Chartered Bank Investment Corporation and Others HCCS 409 of 2004** relied on by the Defendants is also instructive. In that case it was held that the simple test for locus standi in all public law cases is that of sufficient interest. All that the Applicant needed to show was some substantial default or abuse and not whether his personal rights or interest are involved. Additional and specific requirements are to show that the Applicant is a citizen of Uganda and that he has sufficient interest in the matter and were not a mere busy body. Thirdly the issues raised for decision should be sufficiently grave and of public importance. Fourthly it should be demonstrated that they involve a high constitutional principle. The Plaintiff's Counsel contends that the Plaintiffs have locus standi to bring this suit in the manner they did.

As regards the Plaintiff’s right to be heard, every citizen of Uganda has a right to present his grievances to a competent court for adjudication under article 28 of the Constitution. The Plaintiffs filed the action in a competent court with unlimited original jurisdiction to entertain the matter in accordance with section 14 of the Judicature Act as well as article 139 of the Constitution which gives the court unlimited original jurisdiction in all matters.

As far as the contention that the Plaintiff's action is not public interest litigation is concerned, Counsel submitted that it was. Firstly it is not a competent preliminary objection to contend that the matter is not of public interest per se. As far as the Defendants Counsel submitted on the citation of articles 17 and 50 of the constitution, there is no statutory definition of public interest litigation in Uganda. Public interest litigation has been handled by the constitutional court under article 137 of the Constitution. According to **Black's Law Dictionary** (supra) 'public interest' is the general welfare of the public that warrants recognition and protection or something in which the public as a whole has a stake especially and interest that justifies government regulation. The Plaintiff's Counsel contended that it can be established in the plaint that the public as a whole has a stake and interest in the outcome of the case because millions of Ugandans use mobile money services whose transactions are in trillions of shillings. It followed that this suit which seeks proper regulation of the service would be of great interest to the public. Secondly it is a matter of substance that it is a public interest matter and whether or not it was brought under article 50 of the Constitution should not be the consideration. The pleadings also demonstrate that the suit was brought in the public interest to challenge the first up to the fifth Defendants conduct of mobile money services and promotions in contravention of the Financial Institutions Act, 2004, Uganda Communications Commission Act, as amended and **National Notaries Act and the Gaming and Pool Betting (Control and Taxation Act**). The second leg of this suit accuses the sixth and seventh Defendants for failure to conduct their statutory duty to regulate the Defendants for the activities complained about. The court can deal with the case as public interest litigation. The omission to cite the supposed correct law or citing the wrong law does not change the character of the suit. The plaint contains all the necessary particulars in terms of Order 7 rule 1 of the Civil Procedure Rules.

Where the correct law is not stated, an application is not a nullity and the correct of law can be inserted (see **All Sisters Company Ltd versus Guangzhou Tiger Head Battery Group Company Ltd HCCS 128 of 2010**). If the court requires an article of the Constitution of the cited or any other law, it can be inserted.

On the question of whether the plaint discloses no cause of action, the Plaintiff's Counsel contends that the submissions have no merit in light of the submissions of the point of locus standi. On the question as to whether the Plaintiffs have no right to bring an action as previously articulated. He submitted that the Plaintiffs were not pursuing a personal right but a public right. It is specifically averred that the Plaintiffs claim an interest in the proper operation and regulation of all the Defendant's mobile money services and promotions and bring this suit in the public interest in the exercise of their duties as citizens under article 17 of the Constitution and their individual capacities as Member of Parliament and as an end-user.

The Plaintiffs further maintain that the facts are necessary to resolve some of the issues raised by the Defendants for instance the assertion that there are no controls and safeguards to ensure that customer funds deposited with the first and up to the fifth Defendants are not endangered or lost. Furthermore one of the key contests in this suit is whether or not the first and up to the fifth Defendants mobile money services is a financial institution business. However the Defendants Counsel has declared in the submissions that mobile money services are not the financial services under the law and invited the court to dismiss the suit on the basis of the Kenyan authority of **Eric Barare Orina versus Minister of Finance Petition Number 94 of 2010** which authority lacks probative value. The Plaintiffs further contended that the court cannot effectively adjudicate the issues by merely interpreting the Financial Institutions Act 2004 and the Uganda Communications Commission Act alone but must also examine the licence of the

first Applicant fifth Defendants. The court should also examine the conduct of the business in question in terms of the letters of objection. This has to be accomplished through witnesses who must be tested during the hearing and not through a preliminary objection. The Plaintiffs should not be denied the right to adduce evidence in support of the claim. In the case of **James Katabazi and 21 others versus Secretary-General of the East African Community and Another reference number 1 of 2007**, the East African Court of Justice dismissed a preliminary objection on the ground that it could not be disposed of without ascertaining facts.

On the basis of the above the Plaintiff's Counsel invited the court to overrule the objections. Alternatively he submitted that even if the Plaintiff's case was weak at this stage, the Defendants would have a chance to raise the points of law at the trial. Counsel relied on the case of **Engineer Yashwant Sidpra and another versus Sam Ngude Odaka HCCS 365 of 2007**.

Regarding the doctrine of privity of contract, it cannot be determined on the preliminary objection but after a full trial. The contract law of Uganda has further evolved under section 65 of the Contract Act 2010 to allow third-party beneficiaries file an action to enforce a contract to which they are not party.

As far as the orders sought by the Plaintiff are said to be for moot purposes are academic and not capable of being enforced, the preliminary objections prejudge the outcome of the case. The Plaintiff's Counsel submitted without prejudice that according to the case of **Joseph Borowski versus Attorney General of Canada** (supra) it was noted that the doctrine of mootness involves a two step analysis. Firstly the court must determine whether the requisite tangible and concrete dispute has disappeared rendering the issue academic. Secondly it is for the court to decide whether to exercise judicial discretion to decide on the merits of the case in the absence of a live

controversy. According to the Plaintiff's Counsel the dispute in controversy involving mobile money services and promotions which the Defendants are still carrying on still exists and it has not disappeared. In the case of **Human Rights Network for Journalists and another versus Uganda Communications Commission Miscellaneous Cause 219 of 2013,** Sims card registration had ended while the Applicant's case was still in court.

As far as the sixth and seventh Defendants are concerned, the orders sought are not academic. Under section 4 (2) (j) of the Bank of Uganda Act, one of the functions of the sixth Defendant is to regulate, control and discipline all financial institutions in the carrying out of financial institution business. The regulation and control is exercised under the provisions of the Financial Institutions Act 2004. The regulation may entail stopping non financial institutions from conducting financial institution business as happened in the case of **Bank of Uganda versus COWE Civil Appeal Number 35 of 2007**. By the time the Plaintiffs filed this suit in 2012, the seventh Defendant had powers to make regulations pertaining to communication services by statutory instrument under section 94 of the Uganda Communications Commission Act Cap 106. Under the new UCC Act 1 of 2013 those regulations are made by the Minister in consultation with the seventh Defendant. However the new Act gives the seventh Defendant power to monitor, inspect, licence, supervise, control and regulate communications services. Because the Defendants claim that the mobile money services and promotions are part of the communication services which they offer as value added services, they are still under the regulatory authority of the seventh Defendant. In the premises the 6th and 7th Defendants have legislative backing to implement any court orders regarding the regulation of mobile money services and the promotion within the above laws. This suit will not use the court to legislate as submitted by the Defendants.

Additionally the Plaintiff's Counsel submitted on other points namely that the defence substantially admits the Plaintiffs claim. Secondly the defences perpetrate an illegality.

I have carefully considered the import of those submissions. The first issue to be considered by the court is whether the Plaintiff can bring this action in terms of whether they have a cause of action disclosed by the pleadings as well as whether the Plaintiffs have locus standi. In other words the right of the Plaintiffs to be in court at all is being challenged by the Defendants. The question of whether there is a proper defence on the merits to the action is a matter that can only be considered if the court finds that the suit is properly before the court. For that reason I will only consider as a preliminary matter the question of whether the Plaintiffs should be heard in this matter. Consequently I will further consider the rejoinder of the Defendant’s Counsel to the reply of the Plaintiff and confined to the preliminary objections raised by the Defendants.

In rejoinder Counsel for the first and seventh Defendants submitted that the Plaintiffs have not addressed the issues raised in the submissions in chief. They have not demonstrated the cause of action that the Plaintiffs have in this case neither have they shown that the Plaintiffs have locus standi to institute a suit. Without prejudice and in the rejoinder he submitted that if the Plaintiff's suit is to be treated as an ordinary suit, they did not have a cause of action against the first and second Defendants specifically and all the Defendants generally disclosed by the pleadings. He reiterated submissions that there was no pleaded right which had been infringed by the action of the Defendants and as such there is no cause of action against the Defendant.

In the alternative if the suit is to be treated as a public interest litigation case in accordance with paragraph 6 of the amended plaint, the Plaintiffs still have no locus standi to institute the suit against the Defendants on the basis of the pleadings before the court. He submitted that the

question of locus standi has to be in relation to either article 50 of the Constitution or a cause of action under Order 7 of the Civil Procedure Rules. He contended that the relaxation of the rules of locus standi only applies to constitutional matters on questions of violation of fundamental rights and freedoms. Consequently he reiterated submissions in chief on the matter and sought to distinguish the authorities relied upon by the Plaintiff in support of their arguments.

The cases of **Human Rights Network for Journalists and Another versus UCC Miscellaneous Cause 219 of 2013 and Environmental Action Net Ltd versus Attorney General and another Miscellaneous Application Number 39 of 2001** dealt with a cause of action under article 50 (1) and (2) of the Constitution. He supported the argument that the Plaintiffs have not shown any constitutional provision which has been breached to warrant the bringing of a public interest litigation or an action under article 50 of the Constitution.

Regarding the case of **Kikungwe Issa and Ors versus Standard Chartered Bank Investment Corporation and Others HCCS 409 of 2004**, the Defendant's Counsel distinguished the authority on the ground that the Plaintiffs have not shown the high constitutional principle involved and therefore failure to meet the court considerations in that case for the court to find that they have locus standi to bring this action. Furthermore the authority dealt with article 17 (1) (d) of the Constitution with regard to the duty to protect and preserve public property. The Plaintiffs relied on the entire provisions of article 17 of the Constitution and in that regard it was ambiguous and incapable of exact definition and should be disregarded.

With regard to the capacity of the first Plaintiff as a Member of Parliament, the Plaintiff has not demonstrated that they have exhausted other avenues before resorting to court action. On the submission that a citizen can bring an action in a competent court, that may be correct however

the citizen has to bring the action within the confines of the law. The first and second Defendants Counsel reiterated submissions that the Plaintiffs do not have any grievance that deserves adjudication.

Furthermore the Defendants Counsel submitted that the Plaintiffs confuse the public interest with public interest litigation. The submission that the Plaintiffs can bring a suit whose claim does not directly affect them in any other way other than under the provisions of article 50 of the Constitution does not give any basis for the assertion. He contended that it is only under article 50 and 137 of the Constitution that one can successfully institute public interest litigation.

Furthermore under Order 7 rule 1 of the Civil Procedure Rules, the cause of action has to be disclosed. Under the said rule ordinary suits are envisaged.

The contention of the Defendants is not that the Plaintiffs have not inserted the right law but that they did not cite any law at all. The Defendants Counsel submitted for that reason that the authority of **All Sisters Company Ltd versus Guangzhou Tiger Head Battery Group Company Ltd HCCS 128 of 2010** is distinguishable and inapplicable for three reasons. The first reason is that it was an ordinary miscellaneous applications arising out of an ordinary suit and is not authority on the failure to cite constitutional provisions on the question of locus standi. Secondly with regard to public interest litigation matters, the citation of the correct law will enable the court to effectively exercise its judicial power in determining whether a party in a given scenario has locus standi of not. No similar facts are disclosed in the authorities cited. Thirdly issues regarding failure to state that the Plaintiff's claim is brought under article 50 of the constitution and to show which provisions of the constitution have been infringed upon is not a mere omission. The omission goes to the root of the claim and results in a miscarriage of justice

since the Defendants are made to respond to a claim whose basis they are not certain of. Failure to plead which provision of the constitution has been infringed is an omission that would warrant dismissal of the suit entirely. The omission cannot be cured by amendment.

The Defendants Counsel submitted that it is not the courts duty to amend the party's pleadings. That would be outside the mandate and jurisdiction of the courts. The Defendants challenge the propriety of the pleadings as it should be resolved whether the pleading is wanting in any material particular as claimed in the preliminary objections. In the main the Defendants Counsel reiterated earlier submissions filed in objection to the Plaintiff's action and I have considered those submissions which do not need to be repeated here.

The second and third Defendants Counsel in their submissions in rejoinder substantially dealt with the issue of cause of action in the relation to ordinary suits according to the leading authority of **Auto Garage and Others versus Motokov (No. 3) [1971] 1 EA 514**. He submitted that this should be distinguished from article 50 which deals with the vindication of rights and a cause of action must be discernible from the pleadings as trying to enforce a specific right under chapter 4 of the Constitution. Secondly article 137 (3) where the constitutional court may be moved primarily interpret the Constitution where a violation is alleged. It must be indicated that a particular act or omission is inconsistent with or in contravention of a specified provision of the Constitution of the Republic of Uganda. Counsel further invited the court to consider **Constitutional Appeal Number 1 of 1997 Major General David Tinyefuza versus Attorney General** and **Constitutional Appeal Number 2 of 1998 Ismail Serugo versus KCC and Attorney General**.

The fourth Defendant adopted the submissions of Counsel for the first and second Defendants. The fifth Defendant reiterated earlier submissions and generally submitted that the holding of Lord Diplock in **Inland Revenue Commissioners and National Federation of Self-Employed and Small Businesses [1992] AC 623** does not support the case of the Plaintiffs. This is because the Plaintiffs do not show the violation of their rights as citizens within the definitive scope of the cause of action under the known rules of court or as defined by the authority cited. In the authorities cited by the Plaintiffs, the Plaintiffs/claimant's were a pressure group which ably demonstrated the injuries occasioned to its members.

As far as the sixth Defendant is concerned they reiterated submissions in rejoinder of the first, fifth and seventh Defendant and submitted on the other objection of the Plaintiffs which cannot be the subject of the first issue of whether the Plaintiffs have a right to be heard in this suit or whether the plaint discloses a cause of action.

Ruling

I have carefully considered the written submissions of Counsel and tried to set out the gist of those submissions above. In the course of setting out the arguments of both parties I came to the conclusion that the Plaintiff’s counter objection cannot be considered in this preliminary objection because the question of whether the Plaintiffs can be heard at all is a matter that has to be considered before the Plaintiff can be heard to advance a point in objection to the defence or to argue that the Defendant admitted a substantial part of the Plaintiff's assertions in the plaint. This is because the question of whether the plaint discloses a cause of action or whether the Plaintiffs have locus standi in this matter requires a perusal of the plaint alone and any documents attached to it forming part of it.

For emphasis it is an established principle of law that the question of whether a plaint discloses a cause of action against a Defendant should only be considered by a perusal of the plaint only and any attachments forming part of it only and proceeding from the assumption that whatever is averred therein is true. The determination of the issue is not dependent on the defence and therefore whatever is averred in the written statement of defence is immaterial. In **Attorney General vs. Oluoch (1972) EA 392** the East African Court of Appeal, Spry Ag. P held that in deciding whether or not a suit discloses a cause of action, one looks, ordinarily, only at the plaint and assumes that the facts alleged in it are true. This was cited with approval in **Ismail Serugo vs. Kampala City Council and the Attorney General Constitutional Appeal No.2 of 1998**.

Secondly the question of whether the Plaintiffs have locus standi is based on the provisions of the law and policy of the court as reflected in the authorities as well as the plaint and can also be considered as an ingredient of whether the Plaintiff enjoyed a right and therefore also considers the issue of whether the plaint discloses a cause of action against the Defendants. The issues of whether the Plaintiff's action is brought on behalf of members of the public or is public interest litigation will form part and parcel of the consideration of whether the Plaintiffs enjoy a right. As noted above whether or not the Plaintiffs have locus standi substantially also deals with the question of whether the plaint discloses a cause of action since no evidence has been adduced thus far and the court has to rely on the pleadings and the law to determine the issue.

The capacity in which the Plaintiffs bring this action is captured in paragraph 6 of the amended plaint as follows:

> "The Plaintiffs' claim an interest in the proper operation and regulation of all the Defendants Mobile Money Services and promotions and they bring this suit in public

interest in exercise of their duties as citizens under Article 17 of the Constitution both as Member of Parliament in respect of the First Plaintiff, consumer and end user in respect of both Plaintiffs."

Secondly the claim of the Plaintiffs against the Defendants jointly and severally is captured in paragraph 7 and is for:

(a) A declaration that the 1st – 5th Defendant's mobile money services are financial services and/or Financial Institution business under the law.

(b) A declaration that the 1st – 5th Defendants mobile money services are outside the scope of their licences granted to them by the 7th Defendant.

(c) An order for a technical audit of the 1st – 5th Defendant's mobile money services with a further order for the Defendants to refund any monies earned in respect of the service.

(d) An order directing the 6th and 7th Defendant to formulate policy and proper regulation for mobile money services.

(e) A declaration that the 1st – 5th Defendants promotions under the names and style of "SUKUMA SMS, "KIKAAYE", "KIKA", TOO GOOD", "PROGRESS WITH WARID" "ORANGE QUIZ" carried out by the 1st, 2nd, 3rd, and 5th Defendants respectively and other like promotions amount to gaming under the law.

(f) An order for a technical audit of the said promotions and other like promotions.

(g) An order to account and a refund all monies made by the 1st – 5th Defendants from the said promotions.

(h) An order for payment of the costs of the suit.

Paragraph 6 of the Plaintiff as indicated above plead the capacity in which the Plaintiff's bring this action. The first matter to be resolved is whether the Plaintiffs have locus standi to file an action and for the remedies sought as described in paragraph 7 of the amended plaint. The question of locus standi is a fundamental consideration and deals with the right to be heard at all and has to be determined before the issue of whether the plaint discloses a cause of action can also be considered. A contention that the Plaintiffs have no locus standi is an attack on the rights of the Plaintiff to be heard at all. On the other hand the question of whether the plaint discloses a cause of action may include a consideration of whether the Plaintiff has locus standi and goes further to determine on the basis and any other ground whether the plaint discloses a cause of action against the Defendants. The question of whether the Plaintiffs have locus standi is in itself sufficient to determine whether the action can be maintained. Because it is a narrower issue, it is prudent that it should first be determined on its own but in the process the question of whether the Plaintiff discloses a cause of action on the same grounds can also considered partially on the same grounds.

The term “locus standi” is defined by **Osborn’s Concise Law Dictionary Eleventh Edition Sweet and Maxwell** simply as:

> [A place of standing]. The right to be heard in a court or other proceeding.”

There is no need to elaborate any further on the definition as it captures the entire meaning in this controversy. Do the Plaintiffs have a right to commence this action against the Defendants and for the remedies prayed for? The Defendant's objection emphasises paragraph 6 of the plaint which clearly avers that the Plaintiffs claim interest in the proper operation and regulation of mobile money services and promotions by the Defendants. I would highlight the operative words

in the action which is "proper operation" and "regulation of mobile money services and promotions". Secondly they aver specifically that this suit is brought in the public interest in the exercise of their duties as citizens. The duty as a citizen is claimed in the capacity for the first Plaintiff as a Member of Parliament as well in the capacity of both Plaintiffs as consumer and end users of the Defendant's services and products i.e. mobile money services and promotions.

Because the amended plaint is very explicit both as to what the Plaintiffs are claiming and the capacity in which the action has been brought, the objection of the Defendants is that the Plaintiff's duty as a citizen and as stipulated by article 17 (1) of the Constitution of the Republic of Uganda, does not give them such a right of action and therefore they have no cause of action. The second leg of the objection is that they have no right to bring this suit in the public interest because they do not specify any infringement of their rights which may have entitled them to a cause of action or they have not specified injury to the rights of other persons under article 50 of the Constitution of the Republic of Uganda. There are further submissions as to whether the Plaintiff's action is brought in the public interest or whether it is public interest litigation.

As far as paragraph 6 of the amended plaint is concerned, it is averred that the Plaintiffs bring this suit in the public interest in the exercise of their duties as citizens under article 17 of the Constitution. As far as article 17 (1) of the Constitution of the Republic of Uganda is concerned, it is apparent that the said article only stipulates the duties of a citizen of Uganda. And the only logical question in that respect is whether the filing of this suit of this nature is part of the duties of a citizen under article 17 (1) of the Constitution of the Republic of Uganda. Article 17 (1) provides as follows:

"17. Duties of a citizen.

(1) It is the duty of every citizen of Uganda—

(a) to respect the national anthem, flag, coat of arms and currency;

(b) to respect the rights and freedoms of others;

(c) to protect children and vulnerable persons against any form of abuse, harassment or ill-treatment;

(d) to protect and preserve public property;

(e) to defend Uganda and to render national service when necessary;

(f) to cooperate with lawful agencies in the maintenance of law and order;

(g) to pay taxes;

(h) to register for electoral and other lawful purposes;

(i) to combat corruption and misuse or wastage of public property; and

(j) to create and protect a clean and healthy environment.

I have gone through all the clauses of article 17 (1) of the Constitution of the Republic of Uganda. This suit has nothing to do with the respect to the national anthem, flag, coat of arms and currency under clause 1 (a). Secondly the question is whether it has anything to do with the respect to the rights and freedoms of others. Rights and freedoms are provided for under chapter 4 of the Constitution and indeed as submitted by the Defendants Counsel any action dealing with the rights and freedoms of others is filed under article 50 of the Constitution of the Republic of Uganda in case there is a need for enforcement. In terms of clause 1 (c) to protect children and

vulnerable persons against any form of abuse, harassment or ill-treatment, this suit has nothing to do with that. In terms of clause 1 (d) to protect and preserve public property, this suit has nothing to do with the protection and preservation of public property. In terms of article 17 (1) (e) which deals with the duty to defend and to render national service when necessary, this suit has nothing to do with defence of the realm or rendering national service. In terms of article 17 (1) (f) to cooperate with lawful agencies in the maintenance of law and order; I will deal with the duty to cooperate with lawful agencies in the maintenance of law and order subsequently. In terms of article 17 (1) (g) the Constitution enshrines the duty of the citizen to pay taxes. Paragraph 7 of the amended plaint does not complain about the payment of taxes though the question of payment of taxes is always a matter of revenue collection from any lawful provision of services which may include dealing in the business of final institutions. I have further considered clause 17 (1) (h) and (i) which deal with the registration for electoral and other lawful purposes and combating of corruption and misuse or wastage of public property. Most importantly article 17 is found under chapter 3 of the Constitution of the Republic of Uganda which is devoted to citizenship. It is my considered view that issues to deal with citizenship should not be confused with those which deal with enforcement of fundamental rights and freedoms. Fundamental rights and freedoms are for anybody who is resident in Uganda. On the other hand the question of the duties of the citizen can be considered on its own.

On the face of it this suit has nothing to do with the duty of a citizen under article 17 of the constitution of the Republic of Uganda except that under article 17 (1) (f) it may be suggested that there is a duty to cooperate with the lawful agencies in the maintenance of law and order. It may further be suggested that this action has something to do with the cooperation with lawful agencies in maintaining law and order. The authorities would be the sixth Defendant which is the

Bank of Uganda and the seventh Defendant which is the Uganda Communications Commission. These two Defendants are regulatory authorities and the regulation of mobile money services is said to fall within the scope of their regulatory power under the Financial Institutions Act 2004 and the Uganda Communications Commission Act cap 106 for the sixth and seventh Defendant's respectively. The question of cooperation will be considered and concluded on the issue of whether the Plaintiffs have locus standi to bring this action.

The issue of whether the Plaintiffs have locus standi primarily when considering a suit said to have been brought in the public interest and therefore the determination of whether this suit was brought in the public interest is also material. That notwithstanding it is the Plaintiff's submission that failure to cite the correct law as to the provisions of law enabling the suit to be filed as a public interest suit should not be used against the Plaintiff as the correct law can be inserted. In other words the Plaintiff suggest that even if article 17 (1) of the constitution of the Republic of Uganda is not the correct law under which the suit has been brought, this suit may still be maintained if the pleadings disclose an action brought in the public interest. The issue of wrong citation of law or failure to cite the law was considered by the Ugandan Court of Appeal in the case of **Saggu v Roadmaster Cycles (U) Ltd [2002] 1 EA 258 at 262**. The Court of Appeal held in the lead judgement of Honourable Lady Justice MPAGI-BAHIGEINE JA that:

> "Regarding the second point in objection that the notice of motion did not cite the law under which it was being brought. The general rule is that where an application omits to cite any law at all or cites the wrong law, but the jurisdiction to grant the order sought exists, then the irregularity or omission can be ignored and the correct law inserted."

The Defendants submitted that the general rule was not applicable because this was a case in which the Plaintiffs cited no law at all. Secondly the Defendants would be prejudiced by the fact that they cannot know under what law or what infringement of rights the Defendants are being sued for.

I have carefully considered the submissions of Counsels for the parties set out at the beginning of this ruling. The question of whether an action is brought in the public interest can be considered both from the point of view of procedure as well as in substance. As far as procedure is concerned it is a rule of practice both under Order 7 rules 1 and 4 of the Civil Procedure Rules for the plaint to reveal the capacity in which the action is brought. In a representative capacity Order 7 rule 4 provides that:

> "Where the Plaintiff sues in a representative character, the plaint shall show not only that he or she has an actual existing interest in the subject matter but that he or she has taken the steps, if any, necessary to enable him or her to institute a suit concerning it."

It can be concluded that the Plaintiffs sued in their own right as averred and not in a representative character per se as the plaint only avers the right of the Plaintiffs as citizens and as end users of the services of the Defendants. The capacity in which the suit is brought is material to determine whether the suit was brought in the public interest or is just of public interest.

The Defendants submitted that it was fundamental for the plaint to disclose an infringement of the rights of the Plaintiff or that of other persons under article 50 of the Constitution if at all locus standi to bring an action for enforcement of the rights of other persons can be allowed to stand. The Plaintiffs however did not purport in the plaint to bring the action under article 50 of the Constitution of the Republic of Uganda for enforcement of another person's or group's

fundamental rights or freedoms enshrined in chapter 4 of the Constitution. In reply to the Defendants submission that the suit could only have been for enforcement of fundamental rights and freedoms for it to qualify as a public interest matter, Plaintiff's Counsel curiously did not exclude any inference that can be made that the provisions of article 50 of the Constitution may be cited and left the matter hanging. I was therefore obliged to consider the entirety of the plaint to see whether there is any allegation of the violation of the fundamental rights and freedoms of other persons before excluding the application of article 50 of the Constitution of the Republic of Uganda.

Article 50 of the Constitution of the Republic of Uganda makes provision for the enforcement of fundamental rights and freedoms by courts. Under article 50 (1) and (2) it is provided as follows:

> "50. Enforcement of rights and freedoms by courts.
>
> (1) Any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation.
>
> (2) Any person or organisation may bring an action against the violation of another person's or group's human rights."

From article 50 (1) it is clear that it is essential to claim that a fundamental or other right or freedom guaranteed under chapter 4 of the constitution has been infringed or threatened. Article 50 (2) of the Constitution confers locus standi to any person or organisation to bring an action against the violation of another person's or group's human rights.

There is no pleading that any fundamental right or freedom of any person or group or groups of persons has been infringed or threatened. Secondly I do not agree with the Defendant's submission that all public interest litigation in Uganda fall either under article 50 of the constitution which deals with enforcement of fundamental rights and freedoms or article 137 of the constitution which deals with interpretation of the constitution. The question of the right to bring an action is wider than the right quoted by the Defendant's Counsel. Even the right to just and fair treatment in administrative decisions confers a right to apply to a court of law in respect of any administrative decision taken against him or her under article 42 of the Constitution. Under article 42 of the Constitution it is imperative that there must be an administrative decision taken against him or her for the aggrieved person to apply to a court of law in respect of the administrative decision for redress and this seems to capture the situation in what I call the traditional or common law remedy of judicial review that gives locus standi to the person directly affected or aggrieved by a decision or action/omission. Though article 50 of the Constitution gives a right to apply to court for redress which may include compensation, the Constitution gives a specific right to apply to a court of law in respect of unfair and unjust treatment in administrative actions under article 42 thereof. Article 42 rights are specific to an aggrieved party and though a fundamental right it has a specific provision for the remedy for unjust treatment which should not be mixed with the right to apply for redress under article 50 of the Constitution. The right to apply to a court of law in respect of violation or the right to just and fair treatment under article 42 of the Constitution is only given to the person whose right is violated

An applications for judicial review is a species of remedy falling under article 42 of the Constitution the Republic of Uganda and as enforced by the Judicature (Judicial Review) Rules

2009. In all such cases it is necessary to cite the administrative decision or unfair treatment complained about against the aggrieved party. Secondly article 42 enforces a fundamental right or freedom to be treated justly and fairly in administrative decisions. The Plaintiff's suit is not for review of administrative action. It is for declarations about whether provision and promotion of mobile money services are financial institution services and whether it is outside the scope of licenses under the Communications Commissions Act.

Notwithstanding the constitutional provisions quoted above (articles 42, 50 and 137) the question of locus standi in the current modern dispensation of justice has been exhaustively considered by the High Court per Honourable Justice Geoffrey Kiryabwire, judge of the High Court as he then was, in the case of **Kikungwe Issa, Salaamu Musumba and 3 Others vs. Standard Bank Investment Corporation, Stanbic Bank (U) Ltd and 2 Others HCMA No. 0394 and 0395 of 2004 arising from HCCS No. 0409 of 2004** as a common law issue tempered by the Ugandan Constitutional provisions. In that case honourable judge reviewed several relevant authorities and which authorities are curiously relied upon by Counsels in this controversy under consideration to discuss the common law and statutory extent of locus standi in Uganda. Specifically the honourable judge noted that it what was before him was an application for an interim order to issue against the first, second and third Respondents and the agents restraining them from selling, transferring or otherwise disposing of the specified property. Among other things article 17 of the Constitution was considered on the basis of the right of the citizen to protect public property under article 17 (1) (d) which provides for the duty to protect and preserve public property.

The first relevant observation with which I agree is that reference to "any person" in Article 50 (1) and (2) of the Constitution of the Republic of Uganda to bring an action against the violation of another person or group's human rights has been the subject of public interest litigation in

Uganda. He reviewed the relevant cases which included the **Environmental Action Network Ltd versus the Attorney General, the National Environmental Management Authority HCMA 39 of 2001** in which the principal judge justice J.H Ntabgoba also considered the judgement of Lord Diplock in **R vs. Inland Revenue Commissioners Ex Parte Federation of Self Employed and Small Businesses Ltd [1982] AC 617** that it would be a lacuna in the system of public law if pressure groups or even a single public spirited taxpayer were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get unlawful conduct stopped. In the review of several judgments in the Commonwealth honourable justice Kiryabwire demonstrated that the rules of locus standi have indeed been relaxed and he distilled several elements necessary to prove a right to be heard in a public interest case. The Applicant should show that he or she is not a mere busy body and has tried to exhaust other remedies available before coming to court. The court shall in all cases be a last resort step where all else has failed (see page 24 of the judgment).

The holding that a citizen should not be a mere busy body and should try to exhaust other remedies available before coming to court as a last resort is considered to determine whether the suitor has locus standi to file a public interest case. Before considering the question of what is in the public interest and there under the question of sufficient interest and exhaustion of other remedies, I would summarise the judicial precedents on the issue. The summary demonstrates that article 50 of the Constitution only expanded the right of a person to file an action on the behalf of others for the enforcement of fundamental rights and freedoms while article 42 prescribes remedies which include the remedy of judicial review of administrative action under its ambit. The question to be considered is whether a suit for declaration of the nature filed by the Plaintiff ought to be filed as an application for judicial review and for declarations?

By judicial precedent an action could only be filed by a person considering himself or herself aggrieved. In **Re Nakivubo Chemists [1979] HCB P.12** the expression “any person considering himself or herself aggrieved” under section 82 of the Civil Procedure Act cap 71 was held to mean a person who has suffered a “legal grievance”. This followed the definition of the expression in **Ex parte side Botham in re Side Botham (1880) 14 Ch. D 458 at 465** where **James L.J** held that the words “*person aggrieved*” do not really mean a man who is disappointed by a benefit which he must have received if no other order had been made: A person aggrieved must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully affected his title. This narrow meaning of the expression "person aggrieved" was expanded by Denning L.J who held that the expression is of "wide import" in the case of **Attorney General of Gambia vs. N’jie [1961] AC 617** at page **634**:

> “the definition of James L.J. is not to be regarded as exhaustive. ...the words “person aggrieved” are of wide import and not subject to a restrictive interpretation. They do not include of course a mere busy body who is interfering in things, which do not concern him, but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests.”

Firstly the definition of a person considering himself or herself aggrieved in the above cases is narrow and used in the context of applications for judicial review. It has not been used in the context of an ordinary suit challenging the acts of a Local Authority, Government Department or Statutory Body for doing or omitting to do something contrary to law or acting ultra vires. Such basis of action would fall under the right of the citizen to move the court for declarations that the actions of a public authority are ultra vires or unlawful and to seek an order of injunction or

declarations or other prerogative remedies of certiorari, prohibition or mandamus. These remedies are usually exercised through an application for judicial review under the **Judicature (Judicial Review) Rules, 2009**. According to H.W.R Wade in his textbook on **Administrative Law** Fifth edition Oxford University press 1982 page 577, the law starts from the position that remedies are correlated with rights. The first premises are that those whose rights are at stake are the only ones to file an action for the remedy. This encapsulates the narrow confines of locus standi historically. He noted that though in private law the principle can be applied strictly, it is inadequate in the realm of public law. With increase in governmental powers and duties, public interest has gained prominence at the expense of private rights and more liberal principles have emerged. For that reason prerogative remedies exist primarily for public purposes and provided the nucleus of a system of public law. H.W.R Wade examines the development of the law and his discussion includes a consideration of the more recent decision of the House of Lords in **R versus Inland Revenue Commissioners Ex Parte National Federation of Self Employed and Small Businesses Ltd [1982] AC 617.** I have read his discussion and analysis of the authorities on the prerogative remedies of mandamus, certiorari and prohibition as well as the modern remedies of injunction and declaration. The remedies primarily fall under the realm of administrative law and are remedies granted by the court in applications for judicial review. In Uganda applications for judicial review are made under the **Judicature (Judicial Review) Rules 2009** which rules prescribe limitations for the period of filing of an action from the time of breach.

The Plaintiff's suit according to the plaint is not an action seeking judicial review and therefore cannot be considered under the parameters of the cases referred to above on the appropriateness of the remedies of injunction, declaration, mandamus, prohibition and certiorari. What is

considered is a citizen's action according to the wording of the topic by Prof HW R Wade (supra) at page 589.

The summary of a citizen's action demonstrates a calcification of the various decisions of Lord Denning in the area of public law and locus standi and the prominent of which include the "Blackburn" cases (See Rt Hon. Lord Denning Master of the Rolls in: **The Discipline of Law,** London BUTTERWORTHS 1979 pages 128 - 144). The locus standi has been extended to situations where a Government Department or a Public Authority is transgressing the law or about to transgress it in a way which offends the citizens and any one of the citizens affected or injured can draw it to the attention of the court to seek to have the law enforced. This is evident from the decisions of Lord Denning considered in this ruling. A litigant who alleges that an authority is transgressing the law or is about to transgress the law in a manner that offends many citizens has locus standi.

In the case of **Attorney General versus Independent Broadcasting Authority [1973] ALL ER 689,** Lord Denning held at page 699 that:

> "I regard it as a matter of high Constitutional principle that if there is good ground for supposing that a government department or a public authority is transgressing the law, or is about to transgress it, in a way that offends or injures thousands of her majesty's subjects, *then in the last resort* any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced" (Emphasis added).

I further emphasise the words "*in the last resort*" because the position has been accepted in Uganda that where other remedies exist resort to court shall be had after those other remedies have been exhausted. Additionally Lord Denning MR held on the matter of enforcing public

duties that the remedy of mandamus was very wide in the case of **R v Police Commissioner of The Metropolis Ex parte Blackburn [1968] 1 All ER 763** (Court of Appeal, Civil Division) at pages 769 – 770 that:

> "A question may be raised as to the machinery by which he could be compelled to do his duty. On principle, it seems to me that once a duty exists, there should be a means of enforcing it. This duty can be enforced, I think, either by action at the suit of the Attorney General: or by the prerogative order of mandamus. *I am mindful of the cases cited by Counsel for the commissioner which he said limited the scope of mandamus; but I would reply that mandamus is a very wide remedy which has always been available against public officers to see that they do their public duty*. (Emphasis added).

In **R v Greater London Council, ex parte Blackburn [1976] 3 All ER 184**, Mr. Blackburn filed a case in court alleging that pornographic films were being filmed in London and elsewhere and that such showing of grossly indecent films was an offence against the common law of England. Lord Denning MR had this to say: at pages 191 – 192:

> "It was suggested that Mr Blackburn has no sufficient interest to bring these proceedings against the GLC. It is a point which was taken against him by the Commissioner of Police and against the late Mr McWhirter of courageous memory by the Independent Broadcasting Authority. On this point, I would ask: who then can bring proceedings when a public authority is guilty of a misuse of power? Mr Blackburn is a citizen of London. His wife is a ratepayer. He has children who may be harmed by the exhibition of pornographic films. If he has no sufficient interest, no other citizen has. I think he comes within the principle which I stated in Attorney General (on the relation of McWhirter) v

Independent Broadcasting Authority ([1973] 1 All ER at 696, [1973] QB at 646), which I would recast today so as to read: 'I regard it as a matter of high constitutional principle that, if there is good ground for supposing that a government department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of Her Majesty's subjects, then any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced, and the courts in their discretion can grant whatever remedy is appropriate. "

The question to be considered in this suit is whether the Plaintiffs have sufficient interest in the matter (that is the remedies sought in this action) to qualify as having locus standi to commence an action in court for the appropriate remedy. In **R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd [1980] 2 All ER 378,** the National Federation of Self-Employed and Small Businesses Ltd applied for judicial review and sought firstly a declaration that the Board of Inland Revenue had acted unlawfully in granting to the casual workers in Fleet Street an amnesty in relation to their evasion of tax prior to 6 April 1977. Secondly they sought an order of mandamus directed to the Board to assess and collect income tax from the casual workers according to the law. The grounds of the application were that the board had exceeded its powers. Alternatively if the board had power the reasons it gave could not be sustained. Thirdly the board took into account extraneous matters. Fourthly the board did not act fairly as between taxpayers. Lastly it had a duty to ensure that income tax imposed by Parliament was duly assessed and collected. The Inland Revenue Commissioners objected to the suit on the ground that the Applicants did not have sufficient interest and the submission was upheld by the trial court. On appeal the question considered was what amounted to 'sufficient interest' so as to give the Applicants locus standi in the action. The relevant

considerations can be found in excerpts of judgment of Lord Denning MR of the Court of Appeal Civil Division extracted between pages 390 – 392 of the judgment quoted below:

> "... what is a 'sufficient interest'? To that I answer, as many statutes have done in similar situations: *any 'person aggrieved', by the failure of a public authority to do its duty, has a sufficient interest. He can come to the court and apply for a mandamus to compel it*...
>
> On this review of the authorities I would endorse the general principle stated by Professor H W R Wade QC in his Administrative Law (4th Edn, 1977, p 608). He says that:
>
> > 'It [the law] *should recognise that public authorities should be compellable to perform their duties, as a matter of public interest, at the instance of any person genuinely concerned; and in suitable cases, subject always to discretion*, the court should be able to award the remedy on the application of a public-spirited citizen who has no other interest than a regard for the due observance of the law.'
>
> Those words were written in relation to mandamus but they apply also to the other prerogative writs such as certiorari or prohibition. They apply also nowadays to declarations and injunctions where these are sought in situations which are comparable to the prerogative writs, that is, against public authorities who are acting unlawfully. ..." (Emphasis added)

The restrictions on these remedies are that they are remedies of last resort. Secondly the courts have discretion whether to permit the citizen to make the case. Thirdly the Plaintiffs must have sufficient interest and should be among those who would be affected by the alleged transgression of law or omission of duty. According to the quotation relied upon by both Counsel in the

speech of Lord Diplock also quoted by Prof H.W.R Wade in Administrative Law at page 590 (supra) it demonstrates the expansion and liberalisation of the strict and narrowly construed locus standi rules:

> "It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the Federation, or even a single public spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped."

According to HW R Wade (supra) the real question is whether the Applicant can show some substantial default or abuse and not whether his personal rights or interests are involved. HWR Wade (supra) goes on to state:

> "Whether the case is suitable will depend upon the whole factual and statutory context, including any implications that can fairly be drawn from the statute as to who are the right persons to apply for remedies."

Having considered the above authorities I revert back to the judgment of Honourable Justice Geoffrey Kiryabwire, judge of the High Court as he then was in **Kikungwe Issa and Others vs. Standard Bank Investment Corporation and Others HCMA No. 0394 of 2004 at page 25** of his judgment. His summary of the rules on locus standi is that the granting of it by the courts is an exercise of judicial discretion. Secondly the Applicant must show that he or she is a citizen of Uganda. The Applicant should also demonstrate that he or she has "sufficient interest" in the matter and must not be a mere busy body. Thirdly that the issues raised for decision are sufficiently grave and of sufficient public importance. Lastly the Applicant should demonstrate that the issues brought for consideration of the court involve a matter of a “High Constitutional

principle". The Applicant must have demonstrated to court what other steps he or she has taken to protect and preserve "the public property in question" and the steps taken did not lead to a remedy.

I am in agreement generally with the decision. The decision as to whether an Applicant/Plaintiff should be permitted to address the court on the merits should involve an examination of the statutory provisions that are the subject of the allegation of breach or unlawful or ultra vires conduct. As I have noted earlier, in this suit the Plaintiffs are not seeking to enforce the fundamental rights and freedoms of other persons under article 50 of the Constitution of the Republic of Uganda. Secondly the suit of the Plaintiffs is not directly an exercise of the duties of the citizen as stipulated under article 17 (1) of the Constitution of the Republic of Uganda. However their suit is a suit by concerned citizens in a case of public interest and importance because of its possible ramifications. Thirdly it cannot be said if article 17 (1) (f) of the Constitution is to be considered as giving the duty to cooperate with lawful agencies in the maintenance of law and order, that the Plaintiffs have demonstrated that they are cooperating with the sixth Defendant namely bank of Uganda or the Uganda Communications Commission who is the seventh Defendant. In other words my conclusion is that article 17 (1) (f) of the Constitution of the Republic of Uganda is inapplicable in the circumstances of the Plaintiffs.

The remedies sought by the Plaintiffs demonstrate that this suit claims to be an action by a concerned citizen but filed as an ordinary suit and not an application for judicial review. I however need to explore this further together with the statutory framework governing mobile money promotions. Before I do that I need to review the cases relied upon by the both Counsels of the parties. The case of **Kikungwe Issa and Others vs. Standard Bank Investment Corporation and Others HCMA No 0394 and 0395 of 2004 arising from HCCS No. 0409 of**

2004 dealt with an interlocutory application for a temporary injunction and not an original action. The propriety of the original action has to depend on the consideration of the plaint. The court was considering the right to obtain an injunction to protect public property and is distinguishable from the Plaintiff's case on that ground. The case of **Human Rights Network for Journalists and another vs. Uganda Telecommunications Commission and Others Miscellaneous Cause No. 219 of 2013** was filed by notice of motion under article 50 (1) and 8 (2) of the Constitution and specifically under the rules for enforcement of fundamental rights and freedoms under the **Judicature Fundamental Rights and Freedoms (Enforcement procedure) Rules SI 26 of 1992** and is also distinguishable from the Plaintiffs action on that ground. In the case of **Ogago Brian Obangi vs. Uganda Communications Commission and Another Miscellaneous Cause No. 267 of 2013** an action was commenced for judicial review under the **Judicature (Judicial Review) Rules 2009** for the remedies of certiorari, declaration, injunction and compensation. In that case it was held that an action for enforcement of fundamental rights must plead the right infringed or threatened. However the case is distinguishable from the Plaintiff's action on a matter of procedure because it is an application for judicial review. The case of **Bank of Uganda vs. Caring for Orphans and Widows and Elderly Ltd Civil Appeal No 35 of 2007** was an appeal from a decision of the High court to the Court of appeal from an order of certiorari and prohibition and is distinguishable from the Plaintiffs original action on a matter of procedure.

I will first start with the capacity in which this suit has been filed. The capacity of a Member of Parliament is the capacity of a legislator. In light of the remedy sought by the first Plaintiff for the proper operation and regulation of all the Defendant's mobile money services and promotions in the public interest, the begging question is whether the law is adequate and what

remains to be filled and which forms the basis of the first Plaintiffs action is enforcement of the law. Are the authorities namely the 6th and 7th Defendants acting in transgression of law? Paragraph 8 of the amended plaint and subparagraphs (a) – (g) gives facts for the assertion of the Plaintiffs that the 1st – 5th Defendants operate mobile money business which is a financial institution business. It is alleged as against the 6th Defendant that it was notified of the contravention of the law by the 1st – 5th Defendants in that they are doing business of a financial institution. The business is conducted through telecommunication service licensed by the 7th Defendant. It is alleged that the 6th and 7th Defendants have acted in breach of their statutory duties by permitting the 1st – 5th Defendant to carry on business of financial institutions. Last but not least it is also alleged that the 1st –5th Defendants carry on business of mobile money and gaming with far reaching effects in the economy and which ought to be regulated. What is alleged is breach of duty by the 6th and 7th Defendants. The Plaintiffs further list the risk to members of the public for the 'unregulated' business in simple terms alleged to be conducted contrary to the Financial Institutions Act 2004.

In paragraph 8 (n) it is alleged that the 1st – 5th Defendants operate outside government regulation and without licences. It is alleged in paragraph 8 (o) that the certain sales promotions namely "SUKUMA SMS", "KIKAAYE". "KIKA TOO GOOD", "PROGRESS WITH WARID", "ORANGE QUIZ" are outside the scope of the telecommunication license granted by the 7th Defendant. Secondly the sales promotions amount to lottery and gaming business as defined by the National Lotteries Act and the Gaming and Pool Betting (Control and Taxation Act) which require special licence from the Treasury and leading to loss of revenue.

The Plaintiffs allege in paragraph 8 (m) that the 1st – 5th Defendants were warned to stop their activities but they refused to oblige.

As far as the remedies sought in this suit are concerned the Plaintiffs in paragraph 7 (a) of the amended plaint seek a declaration that the Defendants mobile money services are financial services and/or financial institution business under the law. Secondly a declaration that the Defendants mobile money services are outside the scope of their licences granted to them by the seventh Defendant.

With the mandate of the sixth Defendant averred in paragraph 4 of the amended plaint as the Central Bank of Uganda and regulator of financial institutions in Uganda, the begging question is whether the Financial Institutions Act 2004 is inadequate or whether it is a matter of failure to regulate mobile money services that forms the grievance of the Plaintiff as against the 6th Defendant. The question is easily resolved by examining the relevant provisions of the Financial Institutions Act 2004 which defines a bank and what amounts to financial institution business and in light of the summary of the Plaintiffs action as disclosed in the plaint.

Section 3 of the Financial Institutions Act 2004 defines a "bank" to mean:

> "…any company licensed to carry on financial institution business as its principal business, as specified in the Second Schedule to this Act and includes all branches and offices of that company in Uganda;

In other words a bank means a company specified in the schedule as carrying on the business of a financial institution as its principal business. The questions of course being sought in this suit can and ought to extend logically to determination of whether the 1st – 5th Defendants are "banks". The question sought to be determined however is whether the said Defendants carry on the business of a financial institution. For that reason the focus may as well be the definition of a

financial institution and financial institution business by the Financial Institutions Act 2004. A financial institution is defined by section 3 of the Act as:

> "financial institution" means a company licensed to carry on or conduct financial institutions business in Uganda and includes a commercial bank, merchant bank, mortgage bank, post office savings bank, credit institution, a building society, an acceptance house, a discount house, a finance house or any institution which by regulations is classified as a financial institution by the Central Bank;"

I agree with the Defendants that the definition of a bank or financial institution quoted above is statutory. Secondly a financial institution is a licensed institution. It is also under the above definition supposed to include any institution that is classified by the sixth Defendant through regulations. Very important in this analysis is the fact that section 2 of the Financial Institutions Act specifically provides that the Act applies to financial institutions as defined under section 3.

> "2. Application of Act
>
> (1) This Act applies to a financial institution defined in section 3 of this Act.
>
> (2) This Act shall not apply to a co-operative society registered under the Co-operative Societies Act, except a co-operative society established for the purpose of accepting deposits from the public.
>
> (3) This Act does not apply to a micro finance deposit-taking institution."

The Act only applies to a financial institutions defined under section 3 of the Act and therefore the definition of a financial institution is crucial. The Act specifically excludes certain institutions from the definition of a financial institution and hence application of the Act. The

conclusion is that it is apparent from the plaint and remedies sought that the 1st – 5th Defendants are not financial institutions or banks under the Financial Institution Act.

Coming back to the question of locus standi which incorporates the right to bring an action and hence one of the ingredients of a cause of action, the remedies sought by the Plaintiffs can be considered from the capacity of the first Plaintiff who has the capacity to move Parliament to expand the definition of banks or financial institutions to include the first up to the fifth Defendants. This is because the institutions are defined by the Act. Should the 6th Defendant schedule the 1st – 5th Defendants so as to regulate their services? Noteworthy is the fact, which I shall come to that they are licensed by the 7th Defendant. If the Defendants have been omitted, that can be remedied (assuming their activities are similar or close to that of banks or financial institutions or legislature deems it necessary to have them scheduled). There are no pleadings that the said mobile money service providers should be brought in as financial institutions. What is pleaded is that they do financial institution business and I will consider the import of these averments on the question of locus standi and disclosure of a cause of action.

In so far as the first and second Plaintiffs are end-users or consumers of the products of the said Defendants, they would have a right to have implemented section 4 of the Financial Institutions Act through appropriate action and what remains to be determined is what that appropriate action is or ought to be. Section 4 of the Financial Institutions Act (FIA) prohibits the carrying on of the business of a financial institution or bank without a licence and I quote the full section for ease of reference. It provides as follows:

> "4. Prohibitions against transacting financial institution business

(1) A person shall not transact any deposit-taking or other financial institution business in Uganda without a valid licence granted for that purpose under this Act.

(2) No person shall be granted a license to transact business as a financial institution unless it is a company within the meaning of this Act.

(3) A financial institution shall not—

(a) transact any financial institution business not specified in its license;

(b) effect any major changes or additions to its licensed business or principal activities without the approval of the Central Bank.

(4) For purposes of this section "deposit" means a sum of money paid on terms—

(a) under which it will be repaid, with or without interest or a premium, and either on demand or at a time or in circumstances agreed by or on behalf of the person making the payment and the person receiving it; and

(b) which are not referable to the provision of property or services or the giving of security.

(5) For the purposes of paragraph *(b)* of subsection (4), money is paid on terms which are referable to the provision of property or services or to the giving of security only if—

(a) it is paid by way of advance or part payment under a contract for the sale, hire or other provisions of property or services, and is repayable only where the property or services is not or are not in fact sold, hired or otherwise provided;

(b) it is paid by way of security for the performance of a contract or by way of security in respect of loss which may result from the nonperformance of a contract; or

(c) without prejudice to paragraph *(b)*, it is paid by way of security for the delivery up or return of any property whether in a particular state of repair or otherwise.

(6) For the purposes of this section, "deposit" does not include—

(a) a sum paid by the Central Bank or the sums paid to a co-operative society; or

(b) a sum which is paid by a person to an associate of that person.

(7) For the purposes of this section, a business is a deposit-taking business if—

(a) in the course of the business money received by way of deposit is lent to others; or

(b) any other activity of the business is financed, wholly or to any material extent, and out of the capital of or the interest on money received by way of deposit.

(8) Notwithstanding that paragraph *(a)* or *(b)* of subsection (7) applies to a business, it is not a deposit-taking business for the purposes of this section if—

(a) the person carrying it on does not hold himself or herself out as accepting deposits on a day-to-day basis; and

(b) any deposits, which are accepted, are accepted only on particular occasions, whether or not involving the issue of debentures or other securities.

(9) For the purposes of subsection (7), all the activities, which a person carries on by way of business, shall be regarded as a single business carried on by him or her.

(10) In determining, for the purposes of paragraph *(b)* of subsection (8), whether deposits are accepted only on particular occasions, regard shall be had to the frequency of those occasions and to any characteristics distinguishing them from each other.

(11) Any person who contravenes subsection (1) commits an offence and is liable on conviction to a fine not exceeding three hundred and fifty currency points or imprisonment not exceeding two years or both.

(12) A person convicted of an offence under subsection (11) of this section shall be disqualified from acquiring a license under this Act and under any other law authorizing the taking of deposits."

The conclusion of the matter is that it is an offence to transact the business of any deposit-taking or other financial institution business in Uganda without a valid license granted by the licensing authority namely the 6th Defendant. In other words a person who is not licensed is outside the regulatory mandate of the 6th Defendant. The effect of the Plaintiffs action is to ask the Bank of Uganda to schedule and/or license the 1st – 5th Defendants and my question is whether they have locus standi to sue the 6th Defendant for an order of like effect? Before taking leave of the matter this is not an action for mandamus and the question of disclosure of a cause of action props up. Can the court direct the 6th Defendant to license anybody?

The FIA envisages persons carrying on the business of deposit taking or other financial institution business in Uganda without a valid license and expressly forbade it. The question of anybody carrying out such business without a license is an offence and offences fall within the exclusive mandate of the Director of Public Prosecutions or the police. The constitutional mandate of the DPP is to handle all matters of a criminal nature. The definition of a financial

institution or the carrying out of financial institution business is explicitly provided for by section 3 through the definition of 'financial institution business'. I do not need to go into the definition of financial institution business which is statutory for purposes of considering whether the Defendants are in breach by carrying out such business. In view of the fact that the definition has legal repercussions of an offence, it would be a breach of the constitutional principle of separation of powers for the court to expand the meaning of a financial institution to include a person who is not licensed. It would be contrary to article 79 of the Constitution of the Republic of Uganda to incorporate unlicensed person under the FIA. Secondly the court cannot declare any business to be that of a financial institution business as defined by section 3 of the Financial Institutions Act unless it is considering a prosecution case. Such an action would not be a public interest action unless commenced by the DPP.

I also agree that the definition of a financial institution is very clear and does not require any interpretation. There cannot be any controversy about what financial institution business is. Section 3 if very explicit about what it is and provides that financial institution business:

> "financial institution business" means the business of—
>
> *(a)* acceptance of deposits;
>
> *(b)* issue of deposit substitutes;
>
> *(c)* lending or extending credit, including—
>
> (i) consumer and mortgage credit;
>
> (ii) factoring with or without recourse;

(iii) the financing of commercial transactions;

(iv) the recovery by foreclosure or other means of amounts so lent, advanced or extended;

(v) forfeiting, namely, the medium term discounting without recourse of bills, notes and other documents evidencing an exporter's claims on the person to whom the exports are sent;

(vi) acceptance credits;

(d) engaging in foreign exchange business, in particular buying and selling foreign currencies, including forward and option type contracts for the future sale of foreign currencies;

(e) issuing and administering means of payment, including credit cards, travellers' cheques and banker's drafts;

(f) providing money transmission services;

(g) trading for own account or for account of customers in—

(i) money market instruments, including bills of exchange and certificates of deposit;

(ii) debt securities and other transferable securities;

(iii) futures, options and other financial derivatives relating to debt securities or interest rates;

(h) safe custody and administration of securities;

(i) soliciting of or advertising for deposits;

(j) money broking;

(k) financial leasing if conducted by a financial institution;

(l) merchant banking;

(m) mortgage banking;

(n) creating and administration of electronic units of payment in computer networks;

(o) dealing in securities business as an exempt dealer within the meaning of section 48 of the Capital Markets Authority Act;

(p) transacting such other business as may be prescribed by the Central Bank."

The Plaintiffs in that regard have no standing to ask the Bank of Uganda to include the 1st – 5th Defendant as I will demonstrate hereunder. The meaning of financial institution business which is explicitly defined by section 3 of the Financial Institutions Act 2004 is clear and so is the provision of section 4 which specifies who can do the business and who cannot. What is even more crucial is that financial institutions are licensed and have to meet the criteria stipulated by the FIA. Under section 10, an Applicant for licensing as a financial institution shall apply to the 6th Defendant. The 6th Defendant cannot compel anybody to apply and therefore is not capable of regulating who should apply. The 6th Defendant is obliged to vet Applicants by considering the factors for the grant of a license which include several matters to be taken into account before a license is granted. Consequently the suit of the Plaintiffs by seeking declarations that the first five Defendants are doing financial institution business is an accusation that they have committed and continue to commit offences of doing financial institution business without a license. If that is true, let it be handled by the relevant authorities. It is not justiciable in a Civil

Court as there is no controversy about the meaning of sections 3 or 4 of the Financial Institutions Act 2004. In any case the plaint does not disclose that there is controversy about the meaning of the Act and for that matter discloses no cause of action for interpretation of the Act.

The suit merely seeks a declaration that the services of the Defendants are financial services or financial institution business under the law. Such a matter can only arise where it is alleged that the Defendants are in breach of section 4 of the Financial Institutions Act. That would arise in a public prosecution case commenced by the DPP or a private prosecution authorised by the DPP. I have also considered the submissions that it is the duty of Parliament under article 79 of the Constitution to make laws. Because of the statutory definition of financial institution business under section 3 and also the specific definition of a financial institution as an institution defined under the enactment (The Financial Institutions Act (any therefore a licensed person by the Bank of Uganda), there are two levels of analysis to be considered. The first is that it is the mandate of the sixth Defendant namely bank of Uganda to classify who is or is not financial institution. There is no evidence that the Plaintiffs have sought the classification of the Defendants as such and that such a remedy has not worked. What is pleaded is that the 1st – 5th Defendants refused to stop the business. The Plaintiffs have no standing to sue them for any remedy for alleged refusal to do the business of a financial institution. Secondly statutory definitions should not be expanded by the court unless the case is one where somebody suggests or alleges that the definition is ambiguous. Once it is explicit that the financial institution is one which has been licensed, the second aspect is whether any other persons carrying out the business of a financial institution do so contrary to the Financial Institutions Act.

I agree with the Defendants that the court will be entering the realm of legislation by expanding the meaning of a business of financial institution when it is clearly defined by the Act. Let the concerned authorities deal with it.

In the premises I agree that as far as that the remedy of declaration that the Defendant's mobile money services are financial institution businesses under the law is concerned, the cause of action is not justiciable in this suit and the Plaintiffs have no locus standi in the matter.

Secondly I have considered in relation to the capacity of the Plaintiffs the prayer for a declaration that the Defendants mobile money services are outside the scope of their licences granted to them by the seventh Defendant. The Defendants based their objection on the submission that a license is a contract and the Plaintiffs are not party to that contract and therefore have no connexion or standing to challenge it.

I base my decision on the provisions of the relevant enactment and would avoid the argument about the Plaintiffs not been privy to the license. It suffices to consider the relevant statutory provisions that govern licenses. Firstly the licences for the 1st – 5th Defendants to operate is granted by the authority and breach of the terms of the licence can lead to revocation of the licence. Before considering the statutory provisions there is no averment in the plaint that the Plaintiffs have sought the remedy of having the license revoked or modified (without even considering their right to do so) as enabled by the licensing Act. For that matter their locus standi to file an action against the 7th Defendant and the 1st – 5th Defendants on matters on the implementation of the licence terms is questionable.

Under section 34 of the Uganda Communications Act cap 106 under which this action was commenced in 2012, the 7th Defendant has the mandate to set the terms of a licence under which

the 1st – 5th Defendants operate. Under section 35 of the Uganda Communications Act cap 106 a license may be modified upon reasonable grounds. The Commission (7th Defendant) may revoke or suspend a licence under the terms of the license under section 36 (1). It may also revoke the licence entirely on relevant grounds stipulated in the Act.

What is even more crucial is the fact that under the Uganda Communications Act cap 106 Parliament deemed it fit under sections 75 to establish a tribunal and an office of technical advisers to determine matters under the Act. The jurisdiction of the tribunal is provided for under section 79 and includes the right to hear all matters relating to telecommunications services under the Act. Any question as to breach of a license or acting outside the license are matters that fall within the jurisdiction of the Tribunal. As I noted above there is no averment that the remedies provided by the Uganda Communications Act cap 106 have been tried and failed. The tribunal has all the powers of the High court in the exercise of its jurisdiction under section 79 (3) of the Uganda Communications Act. Last but not least an appeal by an aggrieved person lies to the Court of Appeal under section 80 (3) of the Uganda Communications Act cap 106. With regard to the Uganda Communications Act 2013 which is a later Act the establishment of the Tribunal under section 60 and its jurisdiction under section 64 and 65 has retained the same provisions. Similar powers to revoke and modify licences have remained the same under section 40 and 41 of the new Act. Furthermore the powers of the tribunal and the right of appeal provisions are re-enacted under sections 64, 65 (4) of the Uganda Communications Act 2013.

In HCMA No. 14 of 2014 between Kawuki Mathias vs. Commissioner General Uganda Revenue Authority I considered a similar matter where I agreed that where a specific procedure have been provided for, parties should exhaust that procedure or other remedies before filing an action in this Court. This followed the common law precedent of **R v Chief Constable of the**

Merseyside Police, ex parte Calveley and others [1986] 1 All ER 257 and judgement of **May L.J**. at page 263 that:

> "..an Applicant for judicial review should first exhaust whatever other rights he has by way of appeal. In **Preston v IRC [1985] 2 All ER 327 at 330, [1985] AC 835 at 852** Lord Scarman said:
>
> > 'My fourth proposition is that a remedy by way of judicial review is not to be made available where an alternative remedy exists. This is a proposition of great importance. Judicial review is a collateral challenge; it is not an appeal. *Where Parliament has provided by statute appeal procedures, as in the taxing statutes, it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision*.'" (Emphasis added)

I held that though the case dealt with applications for judicial review, the principle embodied in it is relevant in the following words:

> "The principle is that where Parliament has prescribed a procedure for reviews or appeals before another judicial or quasi judicial body, the court should not allow another process to be used to attack the decision."

In other words the suit against the 7th Defendant is improperly before the court and the High court was not moved as a "last resort" as envisaged by the locus standi rules for matters of public importance and the Plaintiffs are therefore improperly before the court in a suit against the 1st – 5th Defendants and the 7th Defendant on matters of telecommunication licences.

These two declarations sought in this suit cannot be tried because the Plaintiffs have not demonstrated that all remedies available to them have been exhausted. The other remedies sought are consequential remedies and abide the outcome of the first two declarations sought. Under paragraph 7 of the amended plaint the Plaintiff seeks the remedy of (c) a technical audit and (d) an order to formulate policy.

With regard to the declaration that the activities of the 1st – 5th Defendants are gaming contrary to law those matters are corollary to the previous matters and ought to be considered together with them. I.e. they can be dealt with as to the scope of the licence of the 1st - 5th Defendants. Similar to my conclusion on offences under the Financial Institutions Act 2004, I adopt the same ruling for the other offences mentioned below. It is an offence under section 10 of the National Lotteries Act cap 191 to promote or conduct any lottery. Furthermore it is an offence under sections 2, 8 and 10 of the Gaming and Pool Betting (Control and Taxation) Act cap 292 to promote gaming pools without a license or carry out the business as well as evade taxes.

The conclusion is that Plaintiffs have no locus standi in this court and the plaint for the reasons given above discloses no cause of action against first to the 6th Defendant. As far as the 7th Defendant's matters are concerned the suit is improperly brought in the first instance in the High Court on the question of licences. In fact matters of licenses belong to the Tribunal with a right of Appeal to the Court of Appeal

For the above reasons Plaintiff's plaint is rejected under Order 7 rule 11 (a) for disclosing no cause of action.

Exercising the jurisdiction and discretion of this court under section 26 (2) of the Civil Procedure Act and on account of the fact the suit was framed with the concern of how mobile money

business has been conducted which would otherwise be in the interest of the public, the plaint is rejected with each party to bear own costs of this suit.

Ruling delivered in open court on the 29th of May 2015

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Counsels Joseph Matsiko appearing with Bruce Musinguzi for the 1st and 7th Defendants

Counsel Thomas Ochaya appears for the 4th Defendant,

Counsel Michael Mafabi for the 5th Defendant and on holding brief for Bwogi Kalibala Counsel for the 6th Defendant ,

2nd and 3rd Defendants are absent

Counsel Friday Robert Kagoro for the Plaintiffs in court

The first Plaintiff Hon Abdu Katuntu present in court

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

29th May 2015