THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: WAMBUZI, C.J., ODER, J.S.C. KAROKORA, J.S.C., MULENGA, J, S.C., KANYEIHAMBA, J.S.C.)

CIVIL APPEAL NO.3 OF 1997

BETWEEN

BANK OF UGANDA:: APPELLANT

AND

TRANSROAD LIMITED:: RESPONDENT

(Appeal from a Decree of the Court of Appeal at Kampala before (S. T. Manyindo D.C.J., G. M. Okello, J. Egonda-Ntende, J.) dated 5th February, 1997 in Civil Appeal No. 48 of 1996.).

JUDGMENT OF WAMBUZI, C. J.

The Respondent, Transroad Ltd., is a limited liability company incorporated and carrying on business in the United Kingdom having its registered office in the Channel Islands. By an agreement dated 17/1/85 between the respondent and the Government of Uganda made in United Kingdom, the respondent agreed to arrange for shipment of 300 railway wagons and spares from India to Mombasa for the sum of US $ 19,808 (Nineteen thousand, eight hundred and eight) per wagon. The total sum due was payable in eight installments by promissory notes endorsed by the Bank of Uganda, the appellant.

The respondent performed its part of the contract but the eight promissory notes were only partially honoured. The respondent sued the appellant in the U.K. for the balance of the contract price. Although the appellant was served with process it neither appeared nor defended the suit. The respondent obtained judgment ex parte on 8/6/90 in the sum of US $ 5,533,550.80 or the sterling equivalent at the time of payment and costs of 221 pounds.

On 10/8/90 a Garnishee Order Nisi was issued in execution against the appellant's debts due and accruing from ANZ Banking Group Ltd. in England to the tune of 3,068,060 pounds and costs. This order was served on the appellant.

On 25/10/90 the appellant applied to the United Kingdom Court to set aside the judgment on the ground that the U.K. Court had no jurisdiction.

On the 17/1/91 a Consent Order was made dismissing, with costs, the application to set aside the judgment and also discharging, with costs, the Garnishee Order Nisi.

After obtaining extension of time the respondent applied to the High Court in Uganda for leave to register the U. K. judgment under section 3 of the Reciprocal Enforcement of Judgments Act (Cap. 47). The application was opposed by the appellant on the ground that the appellant did not submit to the jurisdiction of the United Kingdom Court and that therefore the U. K. judgment was not registerable in Uganda.

The High Court held that the appellant submitted to the jurisdiction of the U. K. Cowl and granted leave to register the judgment on 13/5/96.

The appellant appealed to the Court to Appeal against the decision of the High Court but the Court of Appeal confirmed the decision of the High Court on 5/2/97, hence the appeal to this Court.

There are 7 grounds of appeal. Mr. Masembe-Kanyerezi, Counsel for the appellant, dealt with grounds 1,2 and 6 together; they were set out as follows: -

"1. The learned Judges of the Court of Appeal erred in law and in fact in failing to properly distinguish between conceding that a foreign Court had jurisdiction under its local law and

submitting to that jurisdiction and fact that one concedes that a foreign Court had jurisdiction under its local law cannot without more constitute a submission to its jurisdiction.

2. The learned Judges of the Court of Appeal erred in law and in fact in holding that by consenting to the dismissal of its application contesting jurisdiction in the circumstances then pertaining the appellant without more submitted to the jurisdiction of United Kingdom court."

6. The learned .Judges of the Court of Appeal erred in law and in fact in holding that the appellant voluntarily appeared in the United Kingdom Court."

I must perhaps state that no formal objection was raised to the form of the appeal as a preliminary point but at some stage Mr. Mwesigwa Rukutana, Counsel for the respondent complained quite rightly in my view, that grounds 1,4, 5 and 7 contravene the Rules of this Court in that they are argumentative. To save time, however, the objection was not pressed but Counsel suggested that the appellant should be penalised in costs. I will come back to this point later in my judgment, suffice it to say,that ground 1 could have stated simply that,

"The learned Judges of the Court of Appeal erred in law and in fact in failing to properly distinguish between conceding that a foreign Court had jurisdiction under its local Ian and submitting to that jurisdiction."

In arguing these three grounds Mr. Masembe-Kanyerezi referred to the provisions of section 3 of the Reciprocal Enforcement of Judgements Act and submitted that a Court must decide first whether in all the circumstances of the case it is just and convenient that the Judgement should be enforced in Uganda. Secondly, the Court must ascertain that there are no bars to the registration. The bars are enumerated in section 3 (2) (a) to (f). Learned Counsel submitted that paragraphs (c) to (f) were not relevant to this appeal that only paragraphs (a) and (b) were relevant.

Learned Counsel conceded that the U. K. Court had jurisdiction under its local law and that, therefore, section 3 (2) (a) had been satisfied. Learned Counsel however submitted that the appellant being a person who was neither carrying on business nor ordinarily resident within

the jurisdiction of the U. K. Court "did not voluntarily appear, or otherwise submit, or agree to submit to the jurisdiction" of that Court.

Learned Counsel argued that filing of an application to set aside the judgment in -the Untied Kingdom on grounds of lack of jurisdiction did not amount to submission and consent to have the application dismissed with costs did not make any difference. In the same way, consent to the discharge of the Garnishee Order Nisi on ground of immunity to protect the appellant's assets which had been attached did not amount to submission to the United Kingdom Court jurisdiction nor did the consent order as a whole, being based on lack of jurisdiction, amount to submission.

Learned Counsel relied on the authorities of In re Dulles' Settlement (No. 2) Dulles Vs. Vidler (1951) 1 Ch. 842. Henry Vs. Geopros International, Limited (1976) 1 QB 726. Cheshire and North Private International Law 10th Edition Pages 633-641, The United Kingdom State Immunity Act, 1978 and Williams & Glyn's Bank PLC Vs. Astro Dinamico Compania Naviera SA. (1984) 1 WLR 438.

Mr. Mwesigwa-Rukutana opened his submission with a reference to the powers of this Court in a second appeal. He submitted that this appeal is governed by section 74 of the Civil Procedure Act and section 7 (1) of the Judicature Statute, 1996 and that accordingly, the jurisdiction of this Court in this appeal is limited to matters of law only. He criticized the grounds in the memorandum of appeal generally which allege that the Court of Appeal "erred in law and in fact."

Learned Counsel relied on the case of Emphraim Ongom Odongo and another Vs. Francis Benega, Civil Appeal No. 10/87 — unreported.

I would like to dispose of this point first. Section 74 of the Civil Procedure Act (Cap.65) provides in so far as is relevant, as follows:

"74 *(1) Save where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lies to the Supreme Court from every decree passed in appeal by the High Court, on any of the following grounds, namely that...."*

The grounds are set out and they all relate to matters of law.

Section *75* of the Civil Procedure Act provides "Subject to section 74A of this Act no appeal to the Supreme Court shall lie except on the grounds mentioned in section 74 of this Act."

Quite plainly, section 74 refers to "decrees passed in appeal by the High Court."
By section 14 of the Judicature Statute, 1996, reference to "the Supreme Court in any enactment in force immediately before the coming into force of this Constitution, shall be read as a reference to the Court of Appeal." It follows that the expression "Supreme Court" in section 74 of the Civil Procedure Act which was in force immediately before the coming into force of the constitution shall be read as a reference to "the Court of Appeal." It seems to me that section 74 of the Civil Procedure Act applies to the Court of Appeal and not to this Court.

I would accordingly reject Mr. Mwesigwa-Rukutana's submission regarding section 74 of the Civil Procedure Act and accept the position as submitted by Mr. Masembe Kanyerezi that the jurisdiction of this Court in this appeal is to be found in sections *7* (1) and 8 of the Judicature Statute, 1996 which provides as follows: -

"7 (1) An appeal shall lie as of right to the Supreme court where the Court of Appeal confirms, varies, or reverses a judgment or order including interlocutory order given by the High Court in the exercise of its original jurisdiction and either confirmed, varied or reserved by the Court of Appeal.

(2)…….
8. For the purposes of hearing and determining an appeal, the Supreme Court shall have all the powers, authority and jurisdiction vested under any written law in the Court from the exercise of the original jurisdiction of which the appeal originally emanated"
With respect, I would think that the words at the end of sub-section (1) of section *7* "and either confirmed, varied or reversed by the Court of Appeal" are more confusing than explanatory of anything and may well have been omitted.

Section 8 is in the same terms as section 12 of the Judicature Statute and it seems to me that this Court has precisely the same jurisdiction as the Court of Appeal.
Mr. Mwesigwa-Rukutana adopted the same approach to the memorandum of appeal as Mr. Masembe —Kanyerezi. In respect of grounds 1, 2 and 6, Mr. Mwesigwa Rukutana supported the findings and conclusions of the Court of Appeal which had

considered all the evidence placed before the High Court, subjected it to a fresh and exhaustive scrutiny and came to their own conclusions which are correct. Learned Counsel submitted that this Court cannot interfere with those findings and conclusions unless the Court of Appeal misdirected or non-directed itself or drew demonstrably wrong inferences on the evidence placed before the High Court.

In the learned Counsel's submission the application to set aside the ex parte judgment was a preliminary point of law on jurisdiction and having argued a preliminary point in the proceedings the appellant voluntarily submitted to jurisdiction. The appellant took a preliminary step in asking the United Kingdom Court to exercise a discretion. The purpose was not to protest jurisdiction but to protest the Garnishee Order Nisi. Learned Counsel conceded that to protect property which had been attached would not amount to submission but this case the property was only threatened and that therefore to appear and protect it the appellant submitted to the jurisdiction. Learned Counsel relied on Halsbury's Laws of England 4th Edition, Vol. 8 paragraph 720.

In his leading judgment in the Court of Appeal, the learned Egonda-Ntende J. dealt with the case for the appellant and the case for respondent, set out the relevant provisions of section 3 of the Reciprocal Enforcement of Judgments Act and said:

"The only matter in dispute is whether the appellant voluntarily appeared in the U K Court or otherwise submitted to the jurisdiction of that Court."

The learned Judge then dealt with the judgment in the High Court and concluded: -

"In my view the learned trial Judge makes two findings if the judgment as a whole is read together. He finds the appellants by their actions and r conduct submitted to the jurisdiction of U. K Court. And secondly that they are estopped from contending otherwise. This is c/ear from the question he framed for a decision and the finding that speaking for himself he thought that it would lie ill in the mouth of the respondent bank to turn around and say they did not submit to the jurisdiction of the UK Court. In reaching this conclusion he relies, among other things, rightly in my view, on:

"(a) the consent order dismissing the appellant's protest actions of lack of jurisdiction of the English Court.

(b) the omission in the subsequent correspondence from the appellants to the respondents to raise the issue of submission of jurisdiction of U.K Court."

The learned Judge examined the authorities cited to him at some length. He rightly found that none "was on all fours" with the case before him. He also, again rightly in my view, noted that they were of persuasive value only. I reject the appellant's argument that the learned Judge failed to relate the authorities governing submission to jurisdiction to the facts of the application. The Judge found as a matter of fact that the appellants had submitted tot he jurisdiction of the U K. Court and therefore satisfied the requirements of the law, in particular section 3(2) of the Reciprocal Enforcement of Judgements Act for registration of the U.K judgment."

The learned Judge then addressed himself to the arguments by Mr. Masembe — Kanyerezi relating to the dismissal of the appellant's application to set aside the exparte judgment. He said:

"This application resulted in the consent order of 17th January 1990 dismissing it with costs. It would appear to me that the appellant was accepting before the U K Court that it was not immune to the jurisdiction of the UK Court. It had jurisdiction over appellant. This was a voluntary acceptance of its jurisdiction over appellant. This was a voluntary acceptance of its jurisdiction. Ii might have been a different case f the appellants' application was dismissed by the U. K Court and they chose to take no further action in the suit. But that is not the case before us."

In respect of the application relating to the Garnishee Order Nisi the learned Judge said:

"The appellant sought another order by consent from the U K. Court This was the discharge of Garnishee Order Nisi that had been made against a third party holding the appellants' funds. This order was obtained by consent because section 14 (4) of the Slate Immunity Act protected the Central Bank funds in the U K from execution. This consent order was recorded after the consent order dismissing the challenge of jurisdiction. Again the appellant having submitted to the jurisdiction of the UK Court, went a step further, and sought an order on the merits to discharge the Garnishee Order Nisi against it. This order was obtained, though by consent, on the application of the State Immunity Act of UK that protects the property of a

Central Bank. it was not obtained under protest as to jurisdiction, It was obtained after the acceptance by the appellant that the UK Court was seized with jurisdiction in the matter."

Later in his judgment, the learned Judge went on,
"In the case before us, the appellants first consented to the dismissal of their application contesting jurisdiction and then dealt with the release on merits of the appellant's properly under attachment. In consenting to the dismissal of their own application contesting jurisdiction, the appellants, in my view, waived their objection to the jurisdiction to the (I. K. Court anti then proceeded, under the jurisdiction of that Court, to obtain release of the properly under attachment."

The learned Judge then considered the authorities cited including Harris Vs. Taylor (1915) 2 KB 581 Re Dulles Settlement (No. 2) Dulles Vs. Vidler (1951) 1 Ch. 842, Henry Vs. Geoprosco International Limited (1976) 1 QB 726 and Williams and Gym's Bank PLC Vs. Astro Dinamico Compania Naviera S. A. (1984) 1 AER 760 and concluded: -

"As Berko, J. observed, these decisions are not directly on the point. I agree with Berko, j that they are of persuasive value. And from them it is possible to derive what would or would not amount to submission to jurisdiction. In spite of the disagreement over Harris Vs Taylor shown above, it is possible in my view, to arrive at a proposition reading the three cases together on which all the three cases are in agreement. This would be that where a defendant voluntarily appears in a case in a foreign court and takes some action in the case, without contesting jurisdiction, such defendant is taken to have submitted to the jurisdiction of that-court and puts himself in a position that must obey the orders of such a court. If the defendant contests jurisdiction hut also takes some other action related to the merits of the claim, he will he taken to have submitted to jurisdiction of the court and therefore obliged to obey the order of that court.

In the case before us the appellant went to the U K. Court to protest jurisdiction of that court. They did not continue to protest. On the contrary, they threw in the towel, as it were, and opted not only to fight the case on the question of jurisdiction but as it were, to admit that the court had jurisdiction in the matter. 7hey went further after admitting jurisdiction.

They sought the discharge of a Garnishee Order Nisi on the strength of English Statute that protected its property from execution. A consent order was made by the Court."

The learned Judge concluded:
"The appellant having sought a decision on the merits of the Garnishee Order Nisi, albeit by consent of the parties effectively and voluntarily submitted to the jurisdiction of that Court. And at the same time, I would hold, parting company with the learned trial Judge that the appellants in seeking and obtaining the two consent orders in the U. K. Court voluiitari/v appeared in the UK. Court.

I am aware that under the common law, it cannot he voluntary appearance in a foreign Court where a defendant is compelled to appear solely to preserve those assets, which have been seized by that court But this is so *only when seizure of the defendant 's property is intended to found jurisdiction.…..*

In so far as is relevant to this appeal section 3 of the Reciprocal Enforcement of Judgments Act provides as follows: -
"3 (1,) *Where a judgment has been obtained in a superior Court in the United Kingdom or the Republic of Ireland, the judgment creditor may apply to the High Court, at any time within twelve months after the date of the judgment or such longer period as may be allowed by the Court, to have the judgment registered in the Court, and on any such application the Court may, if in all the circumstances of the case it thinks it is just and convenient that the judgment should he enforced in Uganda, and subject to the provisions of this section, order the Judgement to he registered accordingly.*

(2) No judgment shall he ordered to he registered under this section if
(a) the original court acted without jurisdiction; or
(b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original Court, did no voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that Court…."

It would appear that for a foreign judgment to be registered under the Act, two requirements must be satisfied. First, under section 3 (1) the Court must be satisfied that in all the circumstances of the case it is just and convenient that the foreign judgment should be enforced in Uganda. Secondly, the foreign judgment must not be subject to any bars in section 3 (2) of the Act. The relevant bars to this appeal are in section 3 (2) (a) and (b).

In the High Court the question whether the U.K. Court had jurisdiction for purposes of section 3 (2) (a) of the Act was not in issue. In his judgment the learned trial Judge said:

"The case of the respondent bank is that they did not submit to the jurisdiction of the English court. They are consequently seeking protection under section 3(2) of the Reciprocal Enforcement of Judgments Act ('cap. 47). The pertinent subsection is (b) which provides…..
The learned trial Judge set out the provisions of section 3 (2) (b) of the Act and continued: -
The first element which a judgment debtor must establish to come within the ambit of the provisions of the section is that he neither carries on business nor is ordinarily resident in the United Kingdom. On this issue there is no dispute and it has not even been suggested that the respondent bank carries on business or is ordinarily resident in the United Kingdom. The second element rests on the simple and universally admitted principle that a litigant who has voluntarily submitted himself to jurisdiction of the Court by appearing before it cannot afterwards dispute its jurisdiction. Clearly the bank did not voluntarily submit to the jurisdiction by entering appearance or appearing either in person or by an Advocate. That was the reason why the judgment was by default of appearance. There is also no dispute that the contract in question did not provide that all the disputes between the parties should be referable to the exclusive jurisdiction of the English Courts.

What remains for consideration is whether the respondent hank "otherwise submitted" to the jurisdiction of the English Court".

The learned Judge, quite correctly in my view, summed up the position in the case before him. The question was whether the appellant not having voluntarily appeared in answer to the process served on it, it "otherwise submitted to the jurisdiction" of the English Court.

The expression "submit to jurisdiction" is not defined in the Act. What then does it mean? What amounts to submission to jurisdiction? No Ugandan authority has been referred to on the interpretation of the section. -
Jurisdiction is defined in Mulla on the Code of Civil Procedure, 14th Edition at page 225 in the following words: -

"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted and may he extended or restricted by the like means. If restriction or limits is imposed the jurisdiction in unlimited.

To submit to jurisdiction must mean to put oneself under the power of the Court to adjudicate over the matter in issue. Under section 3 (2) (b) of the Act, two instances of submission are given. Voluntary appearance before the foreign Court and agreement to submit to the jurisdiction of the foreign Court. In the one case a party appears in a foreign Court in answer to a process of that Court to participate in the adjudication and in the other a party agrees before hand to have disputes resolved in thejurisdiction of the foreign Court. Accordingly, "otherwise submit to jurisdiction" must mean some other act, which a party performs in that Court to give that Court jurisdiction to adjudicate on the particular matter.

On this issue, the learned trial Judge said;
"The question that arises in this application is whether the respondent bank so acted as to submit to the jurisdiction of the Court of the United Kingdom and in order to decide that question, it is necessary to consider what it was that the respondent hank did before or after the consent order was recorded on 17th January 1991.

The learned trial Judge considered various happenings, the letter to the Secretary to the Bank dated 23rd June, 1990; the fact that the application to set aside the judgment was based on the State Immunity Act; the fact that the appellant consented to the dismissal with costs of its application to set aside the judgment, with the understanding that the applicant's solicitors will also consent on behalf of their clients to the setting aside of the Garnishee Order Nisi with costs; the negotiations on the alternative methods of setting the debt; the absence during negotiations of any suggestion by the respondent bank of not having submitted to the jurisdiction. The learned trial Judge concluded; -

"In those circumstances, speaking for myself I would have thought that it would lie ill in the mouth of the respondent bank to turn round and say now that they did not submit 10 the jurisdiction of the English Court. 111 my view they are estopped from saying so. Unfortunately, I have not come across any authority directly on the point."

In the first place and in so far as is relevant to this appeal, the letter of Joshua Mugenyi, the Secretary, date 23/6/90, addressed to the respondent reads; -
"I am in recei1 of a copy of the judgment entered in London at *the High Court of .Justice regarding our indebtedness to you. We have received these notices from Wright Webb syret solicitors, we regret the fact we have delayed in making remittances arising out of the contract. Whilst we are prepared to meet our obligations, we are currently unable to do so because of foreign exchange constraints…"*

No where in the letter is there any undertaking or promise to settle the judgment debt. The Secretary appears to refer to obligations and remittances under the contract.
In so far as is relevant to this appeal, the letter dated 12th August, 1992 by the Minister of Finance addressed to the respondent reads as follows: -
"I understand you have been in discussions earlier this year with S.G. Warburg, our Financial Advisor on external debt about our proposed settlement for all commercial arrears including those of Transroad. I would like to lake this opportunity to bring you up to-date on developments in this
respect……"

Again, no where in that letter is there reference to settlement of the judgment debt.

Finally, the joint letter of the Minister of Finance and the Governor, Bank of Uganda dated 16/12/92, addressed to the respondent reads as follows in so far as is relevant:

"We have pleasure in enclosing an offer from the *Government of the Republic of Uganda for set/lenient o/ our outstanding claims. Please note you are required to respond to directly to the closing Agent, S* G. *Warburg* & *Company Ltd., London by 29th January, 1993 at the very latest ……"*

Again, no where in the letter is there mention of the judgment debt and in any case even if there was an offer or offers to settle the judgment debt this perse would not, in my view, amount to submission as will appear later in my judgment.

The learned trial Judge referred to a number of foreign judgments and concluded: -
"The English authorities are, however not binding on me. They are persuasive authorities. In my view the issue in the case can he decided on a narrow ground of estoppel. The respondent bank by submitting to consent to have their application objecting to the jurisdiction of English Court dismissed with costs against them, where the appellant's solicitors had indicated in no uncertain terms that they would oppose the application on its merits seems to me to be admission that they could not succeed on the merits of the application. After the dismissal of the application they continued with negotiations and promise to pay the judgment debt. In those circumstances, I think and hold that the respondent bank is estopped by their conduct from saying that they never submitted to the jurisdiction of the English Court. I therefore think that it is just and convenient that the judgment should he registered and enforced in Uganda."

In my view the learned Judge quite correctly held that the consent by the appellant to have the application to set aside the exparte judgment dismissed with costs was an admission that they could not succeed on the merits of the application.

The learned trial Judge concluded, however, that the negotiations which followed the dismissal of the application and the promises to pay the judgment debt amounted to submission as the appellant was estopped from denying the negotiations and promises. The learned trial Judge admitted he had no authority for this proposition.

On the issue of submission, the learned trial Judge referred to Dicey and Morris on the Conflicts of Law Vol. 2, 10th Edition at p. 1046 on appearance and the words quoted by the learned trial Judge were,

"The first case Appearance. This case rests on the simple and universally admitted principle that a litigant who has voluntarily submitted himself to the jurisdiction of a Court by appearing before it cannot afterwards dispute its jurisdiction. Where such a litigant, though a

defendant rather than a plaint ff appears and pleads to the merits without contesting the jurisdiction, there is clearly a voluntary submission. The same is the case where he does indeed contest the jurisdiction but nevertheless proceeds further to plead to the merits, or where he fails to appear in proceedings of first instance, hut appeals on the merits. If the defendant takes no part in the proceedings and allows judgment to go against him in default of appearance, and later moves to set the default judgment aside, the application to set aside maybe a voluntary appearance f it is based on non-jurisdictional grounds, even if the application is unsuccessful. There is no English authority directly in point…

The matters referred to by the learned Authors relate to steps taken before a foreign Court not to negotiations or promises made with or by the parties for settlement of any liabilities. On this authority the learned trial Judge was bound to find that there was no submission as the application to set aside the exparte judgment and consent to the discharge of the Garnishee Order Nisi were on jurisdictional grounds only.

With regard to the consent order, I must correct the impression given in the judgment of Egonda -Ntende, J. that the appellant first protested jurisdiction of the United Kingdom Court over it which was dismissed by consent, then

"the appellants sought another order by consent from the U. K. Court"

to discharge the Garnishee Order Nisi, and that,
"This order was recorded after the consent order dismissing the challenge of jurisdiction. Again, the appellant having submitted to the U. K. Court went a step further and sought an order on the merits to discharge the *Garnishee Order* Nisi *against it .. It was obtained after the acceptance by the appellant that the U. K. was seized with jurisdiction in the matter."*

On the face of it the learned Judge appears to say that there were two orders made at different times and that it was the appellant who sought the two orders. With respect, this was clearly misdirection on the evidence. The background to the consent order appears to be as follows: -

The respondent obtained in the U.K. a judgment exparte against the appellant Subsequent to

the ex parte judgment the respondent obtained Garnishee Order Nisi which was served on the appellant. The effect of this order was to freeze funds of the appellant in the ANZ Bank in the United Kingdom.

The appellant gave instructions to solicitors in the United Kingdom to take steps to protect its assets. An application was filed on behalf of the appellant in the United Kingdom to set aside the ex parte judgment. Thereafter some correspondence pass between the solicitors of both parties. In so far as is relevant, a letter dated 7/I 2/9() addressed to the solicitors of the respondent by the solicitors of the appellant reads as follows: -

"You refer to the hearing of the application for a Garnishee Order absolute. It seems to us that there are issues to be determined he/ore the Garnishee Order absolute is pursued on either side.

The summons issued returnable on 14th December is to set judgment aside on the basis that the court has no jurisdiction. The court must consider that application in accordance with Order 13 and particularly as to whether there is an arguable issue as to the application of the State Immunity Act to the defendant If judgment were not to he set aside on the grounds o/ immunity, then there may he further arguments…… If judgment is set aside then the Garnishee Order Nisi fails automatically. If not then arguments will follow as to the immunity of the Bank from execution in accordance with section 14 (4,) State Immunity Act, 1978.

If the defendant bank were unsuccessful under section 14 (4) there would still remain arguments generally about the funds held by the Garnishee…."

Admittedly some parts of the letter are difficult to follow, but there is talk of two matters before the U.K. Court, the application to set aside the exparte judgment and the Garnishee Order absolute. A point is made that if the application to set aside the ex parte judgment succeeds, the Garnishee Order Nisi falls automatically. The letter also refers to the State Immunity Act.

The reply to that letter dated 15/1/91 reads as follows –

"We refer to your letter of 7th December to which we have not responded in detail. Your letter is not understood. It appears that the only summons outstanding seeks relief under the State Immunity Act and we hereby notify *you that this will be opposed.*

However, having considered the provisions of the state immunity Act, us to execution, our clients consider if *appropriate* to *consent to the Garnishee Order Nisi being set aside. In those circumstances, if you now wish to pursue your application under the State Immunity Act for judgement to be set aside, this will be resisted but we hope and trust that in the light of the concession there is no need to pursue this application."*

The reply to that letter dated 16th January 1991 is as follows: -

"Thank you for your letter of 15th January. We have spoken. We now have instructions. We are prepared to consent on behalf of our clients to their application to set aside the judgment on the grounds of the Court's jurisdiction being dismissed with costs. The consent is on the basis that at the same time you will consent on be half of the plaintiff company to the setting aside of/he Garnishee Order Nisi again with costs and following the event. If this can be agreed, we would like to warn the Master hearing the application as soon as possible and look forward to your early response."

There followed the consent order dated 17/01191 in the following terms: -
"By consent, it is ordered that. -
1. The application to set aside the judgment issued on 25" October, 1990 be dismissed and that the costs be the plaintiff's in any event.

2. The Garnishee Order Nisi dated 10th August, 1990 made by Master Prebble against alI debts due or accruing due from ANZ Banking Group Ltd to the Bank of Uganda in the sum of 3,068,060 pounds be discharged and that the costs be defendant 's in any event."

Quite clearly one consent order was made which provided for the dismissal of the application to set aside the ex parte judgment and at the same time the discharge of the Garnishee Order Nisi. I do not think the order in which these matters are set out has any special significance.

On the evidence it would appear that the respondent realised that the Garnishee Order Nisi would not stand in view of the immunity to execution enjoyed by the appellant under the State Immunity Act. The respondent proposed to discontinue the proceeding and hinted that there was little point in pursuing the setting aside of the judgment and that if the appellant persisted with the application to set aside the judgment, the application would be opposed. It would appear also that the appellant saw the futility of questioning the jurisdiction of the U. K. Court having regard to the provisions of the same State Immunity Act.

One of the authorities considered by the two Courts below is Harris Vs. Taylor (supra).in that case that plaintiff brought an action in the High Court of the Isle of Man claiming damages for criminal conversation with the plaintiff's wife. The defendant was at no material time domiciled or resident in the Isle of Man. The plaintiff obtained leave to serve the defendant with a writ of summons out of the jurisdiction and the defendant was duly served with a writ in England. The defendant subsequently appeared "conditionally" and applied to the Court to set aside the order of service out of the jurisdiction and the writ on the grounds: -

1. That the rules of the Isle of Man High Court of Justice do not contemplate or authorise service out of the jurisdiction

2. that no cause of action arises or exists within the jurisdiction of those Courts.

3. the defendant is domiciled in England and has never had a domicile in the Isle of Man.

The motion was dismissed. The defendant took no further part in the proceedings. The plaintiff eventually recovered judgment in the action for damages and costs.
On appeal Buckley L. J. said at p. *587:* -
"The question which we have to decide on this appeal depends, as I have said, on whether the defendant submitted to the jurisdiction of the Isle of Man Court, and in order to decide that question it is necessary to consider what it was that the defendant did on March I 7, when as the record states he appeared conditionally to set aside the writ. When the defendant was served with the process he had the alternative of *doing nothing, although the Court might have given judgment against him, the judgment could not have been enforced against him unless he had some properly within the*

Jurisdiction of the Court. But the defendant was not content to do nothing; he did something which he was not obliged to do, but which, I take it, he thought it was in his interest to do. He went to the Court and contended that the Court had no jurisdiction over him. The Court however, decided against this contention and held that the defendant was amenable to its jurisdiction. In my opinion there was a voluntary appearance by the defendant in the Isle of Man Court and a submission by him to the jurisdiction of that Court. If the decision of the Court on that occasion had been in his favour he would have taken advantage of it; as the decision was against him, he was bound by it and it became his duly to appear in the action, and as he chose not to appear and to defend the action he must abide by the consequences which follow from his not having done so. The doctrine applicable to these cases is that f the defendant has placed himself in such a position that it has become his duty to obey the judgment of the foreign Court, then the judgment is enforceable against him in this country; See, Schihshy Vs. Wesienhoiz. I think that in this case the defendant did submit himself to the jurisdiction of the Court of the Isle of Man and, therefore, it was his duty to obey the judgment.

This case differs from the case before us on a number of points:

1. the defendant in the Harris' case appeared in the foreign Court in answer to the summons served out of the jurisdiction. The appellant in the case before us did not appear and judgment was entered ex parte against it;

2. the defendant in the Harris' case protested the jurisdiction of the foreign Court but also denied there was a cause of action. The defendant was, in effect, asking the Court for a decision on the merits of the case. In the case before us the appellants raised only the issue of jurisdiction;

3. the defendant in the Harris' case had an opportunity to defend the action. In the case before us judgment had already been given in the matter.

In the case of In re Dulles' Settlement (No.2) Dulles Vs. Vidler (supra), in proceedings by writ of an infant being appointed a ward of Court, the infant (by his mother as next friend) took out a summons asking:

1. that his mother should be appointed his guardian and be given his custody, and
2. for the provision to be made for his maintenance.

Without coming to England the father, who was an American resident abroad, was represented by Solicitor and Counsel to resist the first claim on the ground that he had been given the custody of the infant by the French Courts; but against the second claim the fathers' residence out of the jurisdiction was relied on. Romer J. appointed the mother to be guardian with custody of the infant, but he made no order against the father on the question of maintenance on the ground that there was no jurisdiction in the Guardianship of Infants Act to make an order against a person out of the jurisdiction.

On appeal per Denning L.J., -

"So far as maintenance of the child was concerned, the father *by his Counsel vigorously opposed an order for maintenance being against him. He said that* they *had no jurisdiction to make an order against him. The Judge upheld this view, hut the Court of Appeal reversed his decision, holding that the English Courts had power to order maintenance against h/in 1/ he had voluntarily submitted to the jurisdiction in that respect: see* <u>*In re Dulles' Settlement.*</u> *The Court of Appeal therefore referred the case back to the Judge to see the father had submitted to the jurisdiction. The Judge has held that the fat her has not submitted to the jurisdiction, and agree with his decision.*

I cannot see how one can fairly say that a man has voluntarily submitted to the jurisdiction of a Court, when he has all the time been vigorously protesting that it had no jurisdiction. If he does nothing and lets judgment go against him in default of appearance, he clearly does not submit to the jurisdiction. What difference in principle does it make, if he does not merely do nothing, hut actually goes to the Court and protests that it has no jurisdiction? I can see no distinction at all. I quite agree, of course, that if lie fights the case, not only on the jurisdiction, hut also *oil the merits, lie must then he taken to have submitted to the jurisdiction; because he is then inviting the Court to decide in his favour on the merits; and he cannot be allowed, at one and the same time, to say that he will accept the decision on the merits if it is favourable to him and will not submit to it if it is unfavourable. But when he only appears with the sole object to ii f his unfavourable. But when he only appears with the sole object of protesting against the jurisdiction, I do not think that he can be said to submit to the jurisdiction see,* <u>*Tallack Vs. Tallack,*</u> *per Lord Merrivale, P.*

It may be said that in this case the father did more than protest against the jurisdiction because he contested the issue of custody. But in that respect he was only seeking to protect the order for custody which he himself had obtained in the French Courts. That is not sufficient to amount to submission to jurisdiction on the maintenance claim. So also it is said that he did more than protest against the jurisdiction, because he took the technical objection that the application was not made by the mother, but that was not an objection on the merits: it was another objection going to jurisdiction, and was not sufficient to amount to a submission to the jurisdiction.

Harris Vs. Taylor appears at first sight to conflict with the views which I have expressed, but a careful examination of the case shows that ii is quite distinguishable. The plaintiff there sued the defendant in the Isle of Man for a tort committed there. The defendant was not in the island, but the Manx Court gave leave to serve him out of the jurisdiction of that court, on the ground that the cause of action was
.founded on a tort committed within their jurisdiction. The defendant entered a conditional appearance in the Manx Court and took the point that the cause of action had not arisen within the Manx jurisdiction. The point depended on the facts of the case, and it was decided against him, whence .f followed that that he was properly served out the Manx jurisdiction in accordance with the rules of the Manx Court. Those rules correspond with the English rules for service out of the jurisdiction and I do not doubt that our Courts would recognise a judgment properly obtained in the Manx for a tort committed there, whether the defendant voluntarily submitted to the jurisdiction or not; just we would expect the Manx Courts in a converse case to recognise a judgment obtained in our Courts against a resident in the Isle of Man, on his being properly served out of our jurisdiction for a tort committed here. Harris Vs. Taylor is an authority on res judicata in that the defendant was not allowed in our Courts to contest the service on him out of Manx jurisdiction, because that was a point the he had raised unsuccessfully in the Manx Court and he had not appealed against it. To that extent, he had submitted lo the jurisdiction of the Manx Court and was not allowed to go back on it. But the case is no authority on what constitutes a submission to jurisdiction generally.

Relieved of Harris Vs. Taylor, I think it plain that the father here did not voluntarily submit to the jurisdiction of the Court of Chancery in regard to the claim of maintenance. He appeared and protested vigorously against it. It would he contrary to the facts to say that he submitted to it."

Another authority I wish to consider is Henry Vs. Geoprosco International Limited (supra). The facts were that the plaintiff, a Canadian, resident in Alberta, entered into a service agreement in Canada with the defendant company for employment in the Trucial States. The Company, which was registered in Jersey, had its head office in London, but had no branch or assets in Canada. The agreement was to be governed by English law and had an arbitration clause. The defendants later dismissed the plaintiff summarily. He commenced an action for damages for wrongful dismissal in the Supreme Court of Alberta against the defendants by serving on them in Jersey, with leave of the Court a statement of claim, where upon the defendant applied by motion to the Supreme Court of Alberta for an order to set aside the service out of the jurisdiction on the grounds that the affidavit in support of the motion was defective and that Canada was not the forum conveniens; alternatively, they sought a stay of proceedings on the ground of the arbitration clause. The motion was dismissed and on appeal the decision was upheld by the Court of Appeal of Alberta. Thereafter, the defendants did not take part in the plaintiff's action and the plaintiff obtained judgment by default for $ 41,879. In an action in England to enforce the judgment, the defendants pleaded that they did not submit to the jurisdiction of the Supreme Court of Alberta and were, therefore, not bound by the judgment. Willis J. took the view that, since there was no hearing on the merits of the plaintiffs' action in that Court, the defendants did not submit to its jurisdiction and dismissed the action.

On appeal by the plaintiff it was held allowing the appeal, that since the defendants had voluntarily appeared before the Canadian Court to invite it not to exercise the discretion which it possessed under its own law to allow service out of the jurisdiction they had submitted to the jurisdiction of the Supreme Court of Alberta and were, accordingly, bound by the judgment for the equivalent in pounds of $ 41,879 which would be enforced against them.

A number of authorities were discussed in this case and I would like to refer to a passage in the judgment of the Court read by Roskill L. J. at p. 746,

"Taking this view of the decided cases which bind this Court, it seems to us that they just at least the following three propositions:

1……..

2. English Courts will not enforce the judgment of a foreign Court against a defendant who, although he does not reside with the jurisdiction of that Court, has assets within that

jurisdiction and appears before that Court solely to preserve
those assets which have been seized by that Court.
3……...

In my view the l[st] and 3[rd] propositions are not relevant to this appeal. I wish to add, however, another proposition relevant to this appeal that what constitutes submission where a defendant appears in Court are acts of the defendant on appearance before the Court not subsequent to the appearance.

Applying the principles in these cases to the case before us and bearing in mind the provisions of section 3 (2) (b) of the Reciprocal Enforcement of Judgments Act, would any of the steps taken by the appellant after the judgment ex parte had been given amount submission to the jurisdiction of the U.K. Court? It is important to bear in mind that in all cases discussed the issue of submission came before the final decision in the cases. In the case before us a judgment had already been given. The appellant in this case could only submit to jurisdiction on appeal to a higher Court on the merits.

It has been argued, however, first that because the appellant who had applied to the U.K. Court to have the judgment set aside consented to the dismissal of the application and secondly that the appellant consented to the discharge of the Garnishee Order Nisi that the appellant in both cases submitted to the jurisdiction of the U.K. Court. It was argued the discharge of the Garnishee Order Nisi was a further step on the merits in the proceedings.

On the evidence, the appellant went on the U.K. Court to protect its assets. If the judgment were set aside, the Garnishee Order Nisi would not stand. It appears the respondent intimated that having regard to the provisions of section 14 (4) of the State Immunity Act, 1978 the appellant's assets were immune to attachment and they proposed abandonment of the Garnishee Order Nisi hinting that there was no point in the appellant continuing with the application to set aside the judgment and that if they did, the application would be resisted. The appellant examining the law as to its immunity also agreed to have the application to set aside the judgment dismissed. Quite clearly the appellant conceded that the U.K. Court had jurisdiction in the matter and so the ex parte judgment stood. This admission, as the learned trial Judge observed, had effect of satisfying section 3 (2) of the Reciprocal Enforcement of Judgments Act which provides that no judgment shall be registered under that section if the original Court acted without jurisdiction.

In my view it is not enough that in the case before us the foreign Court had jurisdiction. The provisions of section 3 (2) (b) must also be satisfied. It must be shown that the appellant agreed to be bound by the decision of the foreign Court.

The application to set aside the judgment of the U.K. Court was in the following terms:

"Let all parties concerned attend the Master in Chambers in Room No. 9, Central Of/Ice, Royal a *Courts of Justice, Strand, London WC 2LL 266 on Thursday the 29th day of November 1990 at 11:30 o 'clock in therefore noon, on the hearing of an application on the part of the defendant for an order that the judgment entered herein on 8th .June 1990 be set aside on the grounds that the defendant herein is immune from suit in the Courts of England and Wales in accordance with the Slate Immunity Act, 1978 and that the plaintiff do pay the costs of this application."*

The sole purpose of this application was to protest jurisdiction of the U.K. Court. It would appear on the authorities that an appearance merely to protest the jurisdiction does not amount to submission. I do not accept the proposition that consent by the appellant to have the application set aside with costs amounted to submission to the jurisdiction of the U.K. Court. On .the authorities discussed dismissal of such an application does no amount to submission. I am unable to appreciate how consent alters the position. Jurisdiction had already been exercised and ex parte judgment remained in place.
In the case Williams Glyn's Bank PLC Vs. Astro Dinamico Compania Naviera SA (1984) 1 W LR 438 - the plaintiff bank sought by action to enforce its securities in
England against the defendants being companies owned and managed in Greece which had by agreement submitted to the jurisdiction of the English Courts. The defendants commenced proceedings in the Greek Court raising similar issues as those raised in the English action. They also issued summons in the Bank's English action
for, inter alia:

1. an order to set aside the proceedings on the ground that the English Court had no jurisdiction; and
2. a stay of proceedings pending the determination of proceedings in Greece.

On the question whether the stay of proceedings should be dealt with firs, Bingham J. held that the application for a stay involved the assumption that the Court had jurisdiction to

entertain the action, and therefore the question of jurisdiction must be decided first. The Court of Appeal allowed an appeal by the defendants and ordered that the application for a stay be heard and determined first. On appeal by the Bank per Lord Fraser of Tullybelton,

"The argument to the contrally which was accepted by Bingham J.was that, if the Court were to entertain the application for a Stay, it would be assuming that it had jurisdiction to entertain the action. With the greatest respect to the learned Judge, I agree with Robert Goff L.J. in the ('unit of Appeal that view is mistaken. The fallacy is in confusing two different kinds of jurisdiction; The first is jurisdiction to decide the action on its merits, and the second is jurisdiction to decide whether the Court has jurisdiction of its former kind. The distinction was explained in Wilkinson Vs. Barking corporation (1948.) 1 KB 721, 725 by Asquith L.J who said:

"The argument we are here rejecting seems to he based on a confusion between two distinct kinds of jurisdiction: the Supreme Court may, by statute, lack jurisdiction to deal with a particular matter in this case matters including superannuation claims under section 8 - but it has jurisdiction to decide whether or not it had jurisdiction to deal with such matters. By entering an unconditional appearance, a litigant submits to the second of these jurisdictions (which exists), hut not to the first (which does not,).

By entering the application for a stay in this case, the Court would he assuming (rightly) that it has jurisdiction to decide whether or not it has jurisdiction to deal with the merits, but would *not he making any assumption about his jurisdiction to deal with the merits.*

The learned Lord ultimately held that the Court of Appeal rightly held that the learned Judge had erred in law when he decided that the application for a stay necessarily implied acceptance of the jurisdiction. With respect, I am persuaded that in the case before us the Courts below fell into the same error.

They confused the jurisdiction of the U.K. Court to decide whether or not it had jurisdiction to deal with the matter before it with the jurisdiction to deal with the matter before it. In my view the appellant submitted to the jurisdiction to decide whether the U.K. Court had jurisdiction to deal with the matter, but did not submit to

the jurisdiction to deal with the matter. Thereafter, the appellant did nothing in the matter. They did not appeal. In my view there was no submission.

Further it is to be observed that the appellant has never denied liability to the respondent under the contract. In these circumstances, I must hold that not only did the learned trial Judge misdirect himself on the evidence as to the offer to settle the judgment debt, but erred in law in considering these matters as mounting to submission. And, with respect, the Court of Appeal fell into the same error.

In the second matter, under section 13 of the State Immunity Act, 1978 the property of a State shall not be subject to any process for the enforcement of a judgment. Participation by the appellant in proceedings relating to this part of the order was in protection of its assets which had been seized. According to the respondent's own authority, Cheshire and North Private International Law, I0th Edition at p. 638:

"If the property has already been seized by the foreign Court an appearance in protest of the jurisdiction is not voluntary."

According to Halsbury's Laws of England 4th Edition Vol. 8. Paragraph 720, another authority relied on by the learned Counsel.

"It seems that an appearance to release or protect the defendant's property after it has been seized by foreign Court before judgment is not a voluntary appearance but an appearance before it has been seized in order to protect it from seizure is a voluntary appearance."

In this connection I do not accept Mr. Mwesigwa-Rukutana's version that attachment in this case would mean the issue of a Garnishee Order absolute. Under the Garnishee Order Nisi the funds of the appellant were not available to it. They were frozen under the order.

The application to set aside the judgment and the consent to discharge of' the Garnishee Order Nisi by the appellant were based on the same ground, the immunity of the appellant, which was a matter of jurisdiction.

The Court of Appeal held in effect that appearance in a foreign Court to protect assets seized does not amount to submission only if the seizure was intended to found jurisdiction and relied on a High Court decision in De Clermont Vs. Douner (1994) 3 KB 145. I have not seen the report in that case but the facts before us are no different from the situation envisaged.

The appellant ignored the process of the U.K.Court and judgment was entered against it in default. The respondents obtained a Garnishee Order Nisi which induced the appellant to file an application to set aside the exparte judgment which if it succeeded would have nullified the Garnishee Order Nisi. For some reason the respondent offered to have the Garnishee Order Nisi discharged because it could not in law be sustained. The appellant's assets out of danger the appellant consented to the dismissal of the application to set aside the default judgment which plainly could not succeed on the law. In these circumstances I am unable to say that the appellant voluntarily submitted to the jurisdiction of the U.K. Court.

In holding that the appellant submitted to the jurisdiction of the U.K. Court the Court of Appeal, with respect, fell into the same errors as the trial Court. In my view grounds 1, 2 and 6 would accordingly succeed. This in effect would dispose the appeal and there would be no need for me to deal with the remaining grounds. However, as they have been raised and for future purposes I will briefly deal with them.

Ground 3 complains that the learned Judges of the Court of Appeal erred in law and in fact in holding that the appellant's officials should, in correspondence subsequent to the Consent Order of the 17" January 1991, have raised the issue that they had not submitted to the jurisdiction of the United Kingdom Court by consenting to the dismissal of their application contesting jurisdiction in order to be entitled to claim non-submission subsequently.

I think I have in a way dealt with this ground. In my view negotiations between parties to the suit to settle any liabilities outside the Court do not amount to submission to the jurisdiction of the Court. The Court has no authority on any negotiations between the parties unless they are embodied in some kind of order by the Court. For example, in this case, a consent order of a plan or agreement to pay the amounts due in installments may be regarded as a submission. It gives the Court power to enforce that consent order. I do not see that any assertion that the appellant did not submit to the jurisdiction would affect the position whether or not the appellant did in fact submit to the jurisdiction. On the authorities submission is a step taken before or in respect of the relevant Court. In Harris Vs. Taylor the words used were,

"on whether the defendant submitted to the jurisdiction ii is necessary to consider what it was that the defendant did on March 17, when as the record states he appeared unconditionally to set aside the writ"

In my view ground 3 should succeed.

Grounds 4 and 5 were as follows:

"4. The learned Judges of the Court of Appeal erred in law and in fact in construing the two clauses in the consent order led in the United Kingdom Court on the 17th January, 1991 as coming into effect at different limes when on a true and proper interpretation the whole of the order came into effect at the same lime upon being sea/ed by the United Kingdom Court.

5. The learned Judges of the Court of Appeal erred in law and in fact in holding that the consent order discharging the Garnishee Order was an order on the merits of the suit whilst it was clearly one based on jurisdiction as the United Kingdom ('our!, pursuant to tile State Immunity Act had no jurisdiction to attach property of a Foreign State Central Bank."

I covered ground 4 in dealing with grounds 1, 2 and 6 of the appeal. It was clearly misdirection on the evidence on the part of the lower Court to construe the consent order as two separate steps taken by the appellant at different times. I would accordingly allow ground 4.

As regards ground 5 the Garnishee Order Nisi reads as follows in so far as is relevant,

"IT IS ORDERED by MASTER PREBBLE that all debts due or accruing due from the above mentioned Garnishee to the above mentioned judgment debtor in the sum of 3, 068, 060 pounds he attached to answer a Judgement recovered against the said judgment debtor by the above named judgment creditor in the High Court of Justice on the 8thi day of .June 1990 for the sum of 3, 068, 060 pounds, 221 pounds costs together with the costs of the Garnishee proceedings of which judgment in the sum of 3,068, 060 pounds remains due and unpaid."

On the evidence the appellant consented to the discharge of the Garnishee Order Nisi not on the ground that the sum stated in the judgment was not due as claimed which would probably go to the merits but that assets of the appellant were not subject to execution proceedings by virtue of the State Immunity Act. With respect, I am unable to see what merits were gone into by consenting to the discharge of that order. I would allow ground 5 of the appeal.

Lastly, ground 7 was stated as follows: -
"The learned Judges of the Court of Appeal erred in law and in fact in considering matters pertaining to the merits or otherwise of the respondents underlying claim which was an irrelevant matter as the proceedings in - the Uganda Courts are limited solely to the question of whether *the United Kingdom judgment, irrespective of its underlying basis was registerable in Uganda."*

In respect of this ground Mr. Masembe-Kanyerezi submitted that the respondent could have sued here, but chose to sue in the United Kingdom. The question which arises is whether the U.K. judgment is registerable in Uganda. Learned Counsel complained about remarks made by Egonda-Ntende J. in the last paragraph of his judgment. It reads:

"Before I take leave of this matter I would like to echo the words of the trial Judge. If I may borrow the expression, the appellants would appear to treat the proceedings in (U.K. Court and indeed their obligations under tile promissory notes as waste paper! This makes hollow our efforts as a nation to attract investors amid create investment confidence in this country when key institutions do not wish to attend to their obligations."

Learned Counsel stated that the obligations in the promissory notes and the matters pertaining to investment were not before the Court and were accordingly irrelevant.

On the other hand Mr. Mwesigwa-Rukutana submitted that the remarks made by the learned Judge were made after his decision on the matter before the Court and having referred to the circumstances of this case, the learned Judge was justified in making the remarks.

Quite clearly the remarks complained of were not uttered in support of the decision made by the learned Judge and they appear to represent no more that his personal perception of the relationship between the parties to the appeal after his decision.
I notice, however, that the learned Judge echoed the words to the trial Judge. The remarks of the trial Judge were,
"1 do not think the respondent hank should be permitted to hide behind the veil of technicalities to escape liability in the face of/he clear provisions of Article 126 (2) (e) of the Constitution of the country which now enjoins the Courts of the Country to administer substantive justice without due to technicalities. Substantive justice demands that contractual obligations, voluntarily entered into without distress undue influence or fraud, should be

honoured. The courts should resist the attempts of being drawn into situations where *their decision can have the effect scaring away potential or prospective investors.*

In the result the prayers of the applicants we granted plus costs in their favour."

In this case the learned Judge took these matters into consideration in arriving at his decision and he considered they were technicalities. The learned trial Judge had earlier in his judgment found that:
"It is just and convenient that the judgments should he registered and enforced in Uganda."

There was no appeal against that finding of fact.

On the evidence, it was the respondent which chose to sue and obtain judgment in the United Kingdom where the judgment was by law of the United Kingdom unenforceable against the appellant. Why is it just and convenient that such a judgment should be enforced in Uganda? What happens to the immunity enjoyed by the appellant in the jurisdiction chosen not by the appellant but by the respondent? Is it a technicality for the appellant to claim that for such a judgment to be registerable and enforceable in Uganda it must comply with the law of this country? The matter was not argued in any of the Courts below, nor was it argued before us. I say no more on the matter except that by these remarks the learned trial Judge took into account irrelevant matters in arriving at his decision. This was misdirection in law as has already been pointed out. The Court of Appeal echoed, without criticism or correction, the words of the trial Judge. In these circumstances and with the greatest respect, I am unable to say that the Court of Appeal itself was not influenced in its decision by those matters in my view ground 7 would accordingly succeed.

For the foregoing reasons, I would allow the appeal, set aside the judgments in the Courts below and substitute for the judgment in the High Court a judgment in favour of the appellant and an order dismissing the application for registration of the U.K. judgment with costs here and in the Courts below.

As regards costs in this appeal, I am inclined to accept Mr. Mwesigwa-Rukutana's submission that the appellant should be penalised in costs for violation of the rules of this

Court in preparing its memorandum of appeal. There are 4 offending paragraphs out of 7. I would accordingly grant two-thirds of the costs of the appeal in this Court.

As all their Lordships agree with my proposed orders, it is so ordered.
Dated at Mengo this 15th day of July 1998.

S. W. W. WAMBUZI
CHIEF JUSTICE

I CERTIFY THAT THIS IS A
TRUE COPY OF THE ORIGINAL.

W.MASALU MUSENE
REGISTRAR SUPREME COURT .

JUDGMENT OF ODER J. S. C.

I have had the benefit of reading in draft the judgment of Wambuzi, C.J. and I agree with him that this appeal should be allowed.

I wish, however, to make some remarks on a few points in the Appeal.

The main issue in the appeal is whether the appellant submitted to the jurisdiction of the English Court which entered against the appellant an ex-parte judgment in default of appearance. Only if the appellant submitted to the English Court's jurisdiction in accordance with the provisions of Section 3 (2) (b) of the Reciprocal Enforcement of Judgments Act (Cap.47) would the judgment obtained in England be registrable in the High Court of Uganda and enforceable because the appellant is neither resident nor carries on business in England.

It is common ground that the English Court had jurisdiction under its local laws to decide on the respondent's suit before it. The appellant does not dispute that the English Court had such jurisdiction. What the appellant disputes, however, is that it submitted to that Court's

jurisdiction so, as to be bound by that Court's judgment on the merits of the suit. The appellant was served with the writ instituting the suit, but it

did nothing. Hence the ex-parte judgment in default against it. It then protested the English Court's jurisdiction in the sense that the appellant is not bound by the English Court in the exercise of its local jurisdiction on that ground.

The second point I wish to comment on concerns acts which may constitute a defendant's submission under Section 3 (2) (b) of the Reciprocal Enforcement of Judgments Act. In my view, such acts need not be only those on or before appearance before the foreign Court which has passed a judgment against the defendant. While it is fairly clear that in the instant case the appellant's conduct after the ex-parte judgment was entered did not amount to submission under section 3 (2) (b), this may not be so in every case. Conduct or acts of a defendant subsequent to its appearance or to an ex-parte judgment may constitute a submission. An example of such conduct may be an acceptance (express or implied) to be bound by the ex parte judgment. In my view no hard and fast rule can be laid down as to what constitutes submission under section 3 (2) (b). Each case must depend on its own facts or circumstances.
On the balance of probabilities all that the appellant did before and after the ex parte judgment did not, in my view, amount to submission to be bound by the English Court's judgment.

The third and last point I would like to comment on is what I may call the legal circumstances in which the appellant and the respondent in the instant case entered into the agreement, and in which the respondents instituted their Court action, in England. When the parties made the relevant contract in England in 1980, they did not specify what law would govern the contract. An inference may therefore be drawn that they intended English law to apply. The English State Immunity Act, 1978 was already part of the English Law. The State Immunity Act was already in force when the respondents instituted their suit against the appellant in the English Court. The respondents had English Solicitors as legal advisors on all these matters. In my view, the respondents and their legal advisors, especially, must have known of the existence of the English State Immunity Act at all stages of the contract and the institution of their institution of their Court action. In view of the provisions of the State Immunity Act, the respondents and their legal advisors ought, in my view, to have known that assets of the appellant were immune from execution of any judgment in their favour which

might arise out of a suit based on alleged breach of the contract. In the circumstances, it is a great wonder to me, therefore, that the respondents made the contract and instituted their suit in England. Further the respondents ought to have known of the provisions of Section 3 (2) (b) of the Reciprocal Enforcement of Judgments Act. Under these provisions a judgment which the respondent would receive against the appellant from English Court, would be registerable in Uganda only on certain conditions. Enforcement of such a judgment against the appellant would not be automatic, but subject to registration under the provisions of the Enforcement of Judgments Act.

Without saying more, I would also like to end by commenting that the respondents may be aware that their loss of this appeal may not necessarily be the end of the road for them in this matter.

Dated at Mengo this 15th day of July 1998.

A. **H. 0. ODER**
JUSTICE OF THE SUPREME COURT

JUDGMENT OF KAROKORA,J. S. C.

I have had the benefit of reading in draft the judgment of Wambuzi, C.J., and 1 do agree with it that the appeal must succeed. The facts of the case are very well set out in his Lordship's judgment and therefore I do not have to dwell on them, but briefly the respondent had obtained an ex-parte judgment in the U.K. Court against the appellant. They thereafter sought to register it in the High Court of Uganda under the provisions of Section 3 (l)(2) (a) (b) of the Reciprocal Enforcement of Judgments Act (Cap.47). The High Court of Uganda held that the judgment was registerable in Uganda. The appellant appealed to the Court of Appeal which dismissed the Appeal and upheld the decision of the High Court and hence this appeal.

There were seven grounds of appeal, but they were all revolving around the question of whether or not the appellant had voluntarily appeared or otherwise submitted to the jurisdiction of the U.K. Court in order for that judgment to be registered in the High Court of Uganda under the Reciprocal Enforcement of Judgments Act which provides as follows: -

Section 3 (1) *"Where a Judgment has been obtained in a superior Court in the U.K. or the Republic of Ireland, the Judgment creditor may apply to the High Court, at any time within 12 months after the date of the judgment, or such longer period as may he al/owed by the High Court to have the judgment registered in the Court, and on any such application Court may, if in all the circumstances of the case ii thinks it is just and convenient that the judgment should he enforced in Uganda, and subject to the provisions of this Section, order the judgment to he registered accordingly.*

(2) No judgment shall he ordered to be registered under this Section if :-

4 (a) The original Court acted without jurisdiction.

(b,) The judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original Court did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that Court.

Mr. Masembe-Kanyerezi for the appellant conceded that the U.K. Court had jurisdiction to hear the case. He, however, contended that the appellant had never voluntarily appeared or otherwise submitted to the U.K. Court's jurisdiction as required under subsection (2) (b) of Section 3 of the Act.

He contended that when the appellant applied to set aside the ex-parte judgment in the U.K. on ground of the State Immunity Act 1978 that did not mean they submitted to the jurisdiction of the U.K. Court, because they were merely challenging the jurisdiction of the U.K. Court. He referred to In Re Dulles settlement (No. 2) Dulles. Vs. Vidler 1951 Ch 842. Henry Vs. Geoprosco International Ltd. (1976) 1QB 726 and Williams Glyn's Bank Vs. Astro Dinamico (1984) 1 WLR 938, because they had appeared to protest jurisdiction. Even when they consented to have application seeking to set aside the ex-parte judgment dismissed and discharge of the Garnishee Order Nisi, they were protecting their funds which had been attached in the ANZ Banking Group Ltd., by the Garnishee Order Nisi which had been issued by the U.K. Court.

Against the above submission, Mr. Mwesigwa Rukutana, Counsel for respondent supported the finding and conclusion of the Court of Appeal and submitted that the application to set

aside the ex-parte judgment was a preliminary point of law on jurisdiction but having argued the preliminary point in the proceedings, the appellant voluntarily appeared and submitted to the jurisdiction, because he contended that the purpose of its appearance was not to protest jurisdiction but to protest against the Garnishee Order Nisi. However, he conceded that to protect property which had been attached would not amount to submission, but in this case he sought to distinguish the Garnishee Order Nisi which had been issued by the Court from being an attachment of appellant's fund/debt but as being only a threat to attach appellant's fund in the ANZ Banking Group Ltd. He argued that appearing to protect property which had merely been threatened to be attached, the appellant had in effect submitted to the jurisdiction. He cited Halsbury's Laws of England 4th Edition paragraph 720 where it is provided inter alia: -

"It seems that an appearance to release or protect the defendant's property after it has been seized by foreign Court before judgment is not a voluntary appearance, but an appearance before it has been seized, in order to protect it from seizure is a voluntary appearance."

It must be observed that looking at the Garnishee Order Nisi which was issued by the High Court of Justice, Queen's Bench Division, the sum of 3,068,060 pounds together with the costs had been attached. The order of the Court clearly indicates the funds had been attached. The Garnishee Order Nisi provided as follows: -

In the High Court of Justice 1990 T. 1454
Queen's Bench Division

Between

Transroad Ltd…….Judgment Creditor

and

Bank of Uganda……. Judgment Debtor

and

ANZ Banking Group Ltd……. Garnishee.

Upon reading the affidavit of A. Ishani filed the 14/8/90.

It is ordered by Master Prebble that all debts due or accruing due from the above mentioned Garnishee to the above mentioned Judgment Debtor in the sum of 3,068,060 pounds be attached to answer a judgment recovered against the said Judgment Debtor by the above named Judgment Creditor in the High Court of Justice on the 8th day of June, 1990 for the

sum of 3,068,060 pounds, 221 pounds costs together with costs of the Garnishee proceedings on which judgment in the sum of 3,068,060 pounds remains due and unpaid.

AND IT IS ORDERED that the said Garnishee attends Master Chambers Room 95, Royal Courts of Justice, Strand, London on the 29hh1 day of November, 1990 at 1130 o'clock on an application by the said Judgment Creditor that the said Garnishee do pay to the said Judgment Creditor the debts due from the said Garnishee to the said Judgment Debtor, or so much thereof as may be sufficient to satisfy the said Judgment together with the costs of the Garnishee proceedings.

The name and address of the branch of the Garnishee Institution at which the Debtor's account is believed to be held in Minerva House, Montague Close, London SET 9DH. The number of that account is believed to be 3361451 —01.

Dated the 10th day of August, 1990.

To the above named Garnishee
and Judgment Debtor.

Considering the above Order of the Court, the appellant could not draw any money from their account in the ANZ Banking Group Ltd. Appellant's funds had not only been threatened to be attached as contended by Mr. Mwesigwa Rukutana, Counsel for respondent, but had been seized.

I must add that whereas I agree with the holding of Egonda-Ntende, J., who wrote the leading judgment of the Court of Appeal on page 20 of that judgment on what would or would not amount to submission to jurisdiction, after citing Harris Vs. Taylor (1915) 2 KB 581. In Re Dullies settlement (No. 2) (supra) Henry..Geoprosco International Ltd. (supra) had this to say:—

"This would be that where a defendant voluntarily appears in a case in a foreign court and take, some action in the case without contesting jurisdiction, such defendant is taken to have submitted to the jurisdiction of the Court and himself in a position that must obey the orders of such court. If the defendant contests jurisdiction but also takes some other action related to the writs to the claim, he will be taken to have submitted to

jurisdiction of the Court and therefore obliged to obey the Orders of that Court. This is the position stated by Denning In ***Re Dullies Settlement (No. 2) (supra.) at page 850:***

I cannot see how anyone can fairly say that a man has voluntarily submitted to the jurisdiction of a court, when he has all the time been rigorously protesting that it has no jurisdiction. What difference in principle does it make if he does not merely nothing but actually goes to court and protests that it has no jurisdiction. 1 can see no distinction at all. I quite agree, of course, that if he fights the case, not only the jurisdiction but also on the merits, he must be taken to have submitted to the jurisdiction because he is inviting the court to decide in his favour on the merits and he cannot be allowed at one and the same time, to say that he will accept the decision on the merits if it is favourable to him and will not submit if it is unfavourable.But when he only appears with the sole object of protesting jurisdiction, I do not think he can be said to submit to jurisdiction.

With respect, I do agree that the position in the law is as above stated in the above passage. However, with due respect to the learned Judge who wrote the leading judgment of the Court of Appeal, I think that the proceedings dealing with the aspects where the appellant appeared before the U.K. Court did not concern the merits of the substantive case. They got involved in the application seeking to set aside ex-parte judgment on the ground of lack of jurisdiction, because of the U K. State Immunity Act, 1978, and in the dismissal of the application which sought to set aside the exparte judgment and in the discharge of the Garnishee Order Nisi.

I think with due respect to the learned Judge it cannot be true that once an application seeking to set aside ex-parte judgment on the basis of lack of jurisdiction was dismissed, that meant that the applicant had submitted to the jurisdiction.
It merely means that the ex-parte judgment which had already been passed by the U.K. Court in the absence of appellant when the appellant had neither voluntarily appeared nor otherwise submitted to its jurisdiction remained on record.
The appellant had appeared before the U.K. Court to protest against the illegal seizure of its funds by the Garnishee Order Nisi which the Court had issued in complete disregard of the U.K. State Immunity Act, 1978. In my view, the protest against the seizure of its funds and the subsequent discharge of the Garnishee Order Nisi and any other Orders related to the seizure of the funds were done in pursuit of preservation of the appellant's funds.

I would think that the above view is backed up by Lord Justice Roskill's 2nd proposition on submission to foreign Court in he case of Henry Vs. Geoprosco International (1976) lQB 746 when he stated as follows: -

"1…….. ('Not relevant,)

2. English Courts will not enforce the judgment of a foreign Court against a defendant/ Who although he does not reside within the jurisdiction of that court, has assets within that jurisdiction and appeals before that Court solely to preserve those assets which hare been seized by that court.

3……. ('Not re/event)

Finally, in my view, the appearance before the foreign Court in tins case was after the ex-parte judgment was passed when the appellant had not voluntarily appeared or submitted to that Court's jurisdiction. The appearance did not seek to challenge the merits of the case. it sought to challenge the seizure of its funds.

According to the above authorities, the appearance for that purpose alone and at that stage when jurisdiction had already been exercised without appellant's participation / submission, would not amount to submission to the foreign Court's jurisdiction for the purpose of registering that judgment in the High Court of (Uganda. In my view, that judgment offended the Sub-section (2) (b) of Section 3 of the (Uganda Reciprocal Enforcement of Judgments Act, and as such it would not qualify to be registered.

Without going any further into the other grounds of appeal, which have been ably discussed by his Lordship, the Chief Justice, I agree that the appeal must succeed with costs in the terms proposed by Wambuzi, C. J.

Dated at Mengo this 15th day of July 1998.

A. N. KAROKORA,

JUSTICE OF THE SUPREME COURT

JUDGMENT OF MULENGA J.S.C.

I have read, and I entirely agree with, the judgment of Wambuzi C. J. The facts of, and issue in, the case are well set out in that judgment and I need not repeat them here.

The Reciprocal Enforcement of Judgments Act (Cap 47) empowers the High Court of Uganda, on application by a Judgment Creditor, to order registration of a judgment made by a Court in the United Kingdom. It also provides that upon registration such judgment becomes of the same force and effect as if it had been made by the High Court of Uganda in so far as relates to execution. For such judgment to qualify for registration, however, several criteria and conditions, which are set out in section 3 of the Act, must be satisfied.

One such condition, which is the bone of the contention in this appeal arises from paragraph (b) of sub-section (2) of that section which bars such judgment from registration under the Act if: -

"(b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original Court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction *of that Court "*.

It follows that for this condition to be satisfied the High Court must be shown that the judgment debtor was not carrying on business or ordinarily resident within the jurisdiction of the U.K. Court but that he had voluntarily appeared or otherwise submitted or agreed to submit to the jurisdiction of that Court.

The controversy in this appeal centered on whether the appellant, voluntarily appeared or otherwise submitted to the jurisdiction of the U.K. Court in respect of the judgment obtained by the respondent herein from that U.K. Court. The learned trial Judge held, that the appellant did not voluntarily appear but it had otherwise submitted to the jurisdiction of that Court. The Court of Appeal on the other hand held, that the appellant had voluntarily appeared and also submitted to the jurisdiction of the U.K. Court. In the leading judgment of the Court, Egonda-Ntende J. held: -

'In the result I would hold that the appellants both voluntarily appeared and also submitted 10 the jurisdiction of the UK. Court within the meaning of s. 3(2,) (7) *of the Reciprocal Enforcement of Judgments Act.*

As to what amount to voluntary appearance the learned Judge in the same judgment had this to say: -

"Appearance in foreign Courts as required under section 3 (2) ('b,) of the reciprocal

Enforcement of Judgments Act, is not restricted to entering appearance as we know it under our Civil Procedure rules. Voluntary appearance must mean what it says—a party appearing in the foreign Court el/her by Counsel or himself to do something in that court."

It appears to me, with due respect, that there is some misconstruing of the statutory provision in issue, underlying the two excerpts. To my mind, the expression "voluntarily appear or otherwise submit to the jurisdiction", in section 3 (2) (b) of the Act, clearly connotes that voluntary appearance is submitting to jurisdiction. It is not an act distinct from or alternative to the act of submitting to jurisdiction. It is a mode of submitting to jurisdiction. Secondly the definition given to "voluntary appearance" in the above passage is, in my view, too broad, in so far as it relates to the Act. For "a party appearing in the foreign Court to do something in that Court" to fall within the ambit of section 3(2) (b) of the Act, such appearance must amount to submitting to the jurisdiction of that Court. Given the ordinary meaning the expression "to submit to jurisdiction of a Court," means to surrender oneself to the authority of that Court and agree to obey its judgment in the suit before that Court To my mind therefore it appears to be a contradiction in terms to say that a party who appears in Court, albeit voluntarily, solely to protest that he is not subject to the jurisdiction of that Court, has by that appearance submitted to Courts' jurisdiction. I am not persuaded by the decision in Harris vs. Taylor (1915) 2KB 581 to the extent that it holds to that effect.
In my view, the appellant in the instant case did not at any stage, directly or indirectly, either surrender to the authority of the U.K. Court to adjudicate on the suit between it and the respondent or agree to obey that Court's judgment therein. First, the Court passed judgment ex-parte when the appellant refused or failed to appear or otherwise submit to jurisdiction of that Court. Secondly upon the Court going after her to attach the appellant's funds within its jurisdiction, by way of Garnishee Order Nisi, the appellant made an application in that Court for an order to set aside the ex-parte judgment on the ground that the Court had no jurisdiction. In so doing, the appellant voluntarily appeared, but evidently did not submit to the Court's jurisdiction. On the contrary it challenged it. Thirdly when subsequently the appellant consented to the Court making an order to dismiss its application it was in effect acknowledging that the Court had had the jurisdiction to adjudicate on the suit and make judgment thereon. In so doing, however, the appellant was abandoning the challenge: It cannot be construed as having submitted to jurisdiction retrospectively. Finally, I do not see how what transpired between the parties subsequent to the consent order, outside the U.K. Court, can be construed as submitting to the jurisdiction of the U.K. Court.

In the result I would hold that the judgment obtained from the U.K. Court by the respondent herein is barred from registration by the High Court of Uganda by virtue of the provision of s.3(2)(b) of the Reciproca' Enforcement of Judgments Act (Cap. 47). I agree that this appeal succeeds.

Dated at Mengo this 15th day of July l998.

J. N. MULENGA

JUSTICE OF THE SUPREME COURT.

JUDGEMENT OF KANYEIHAMBA,J.S.C

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I have read in draft, the judgment of the Hon. Chief Justice, and I concur with his findings. I have nothing to add.

Dated at Mengo this 8th day of July 1998.

DR. G. W. KANYEIHAMBA

JUSTICE OF THE SUPREME COURT.