



Judicial Clarity or Ambiguity? What amounts to doing business in Uganda



1. Introduction

While the business of financial institutions and lending money in Uganda is regulated, the precise parameters of what constitutes 'doing such business' in the country thus imposing an obligation to register or incorporate, and license under the Financial Institutions Act, 2016, and the Tier 4 Microfinance Institutions and Money Lenders Act, 2016 remain contested.

This has sparked legal disputes where borrowers often run to Ugandan Courts, challenging their obligation to repay the loans in question. Such disputes are especially prevalent in matters involving foreign creditors extending credit to local borrowers but lacking Ugandan registration, incorporation, or licensing. In this article, we delve into this issue, providing context to the anxiety among foreign lenders seeking to extend debt to borrowers in Uganda.

2. Judicial Precedents

A series of recent court cases in Uganda has brought to the forefront a critical issue concerning the legality of foreign lenders extending loans to borrowers within the country. While Uganda mandates registration or incorporation for businesses and requires licenses for financial institutions or money lending ventures, the exact interpretation of "carrying on business" remains a contentious subject. This ambiguity poses challenges, especially when determining if foreign entities meet the criteria for "carrying on business" in Uganda, particularly for foreign lenders.

In various Ugandan court cases, including *African Rivers Fund v Kare Distribution Limited and Others*, *Simba Properties Investment Company Ltd v Robert Kirunda and Others/Vantage Mezzanine Fund v Simba Properties Investment Company Ltd and Others*, *Krone Uganda Limited v. Kerilee Investments Uganda*, and notably, *Ham Enterprises Limited and 2 Others v Diamond Trust Bank(U) Limited and Another*, a recurring legal argument has emerged from local borrowers. They assert that foreign lenders extending credit to borrowers in Uganda without fulfilling the necessary registration and licensing requirements are, in fact, operating unlawfully.

a) Vantage Mezzanine Partnership matter

In the case of *Vantage Mezzanine Partnership Fund 11*

versus Uganda Registration Services Bureau and others (HCMC No. 205 of 2022), the High Court tackled the issue of whether a South African firm, the Applicant, could enforce its contractual rights in Uganda without being registered as a Partnership in the country. The Applicant had sought registration of documents securing its credit facility advancements to Simba Properties Investment Limited. However, the Respondents argued that lacking registration in Uganda, the Applicant couldn't sue or be sued in the country, implying illegal business operations.

In its ruling, the High Court dismissed the Applicant's application, emphasizing the fundamental principle that any entity, including a partnership, must be registered to legally operate in Uganda and enforce contractual rights. The Court highlighted the importance of registration in upholding the integrity and transparency of business transactions and expressed concerns about the potential for fraud in dealings involving unregistered foreign partnerships. Interestingly, while affirming the necessity of registration, the Court didn't explicitly describe what constituted "carrying on business" in Uganda.

b) Simba Properties Investment Limited matter

In *Simba Properties Investment Limited and Another v Robert Kirunda and Others* (HCMA 0671 of 2022), the High Court addressed an application for a temporary injunction to prevent the Respondents from selling or taking possession of the Applicants' properties. A crucial dispute arose regarding the legal capacity of a South African firm to take legal action in Uganda. The Applicants argued that the Respondents lacked the legal capacity to operate in Uganda due to their non-registration in the country, rendering their actions unlawful.

Justice Mubiru examined the concept of "carrying on business" in Uganda to address this matter. The Court clarified that "carrying on business" entails engaging in regular and continuous business activities to make a profit or accumulate wealth through financial transactions. It emphasized the importance of repetition and regularity in business activities for establishing the notion of "carrying on business."

Furthermore, the High Court cautioned that while a single transaction might potentially qualify as a

business activity, true indication arises from repeated and systematic transactions of a similar nature over a relatively short period. Therefore, the court concluded that a solitary lending transaction alone cannot be deemed as "carrying on business" in Uganda.

3. The checklist for carrying on business

Building on the precedent set by *H.M.B. Holdings Ltd. v. Antigua and Barbuda*, 2021 SCC 44, the decision in the foregoing matter of *Simba Properties Investment Limited* sheds light on the interpretation of "carrying on business" in Uganda. The High Court established that this concept requires both physical presence within Uganda and sustained business activity over time, dismissing mere virtual presence as insufficient. Therefore, determining the operational status of a foreign business entity in Uganda necessitates an assessment of its actual presence in the country, coupled with sustained business activity.

In the context of enforcing cross-border contractual obligations, Justice Mubiru emphasized that modern digital businesses operating remotely without physical presence in Uganda should not be obligated to register under *The Business Names Registration Act*. Such a requirement would be considered unreasonable given the exponential growth of the global digital economy and the surge in international transactions.

Similarly, Justice Wamala's perspective in *Krone Uganda Limited v. Kerilee Investments Uganda Limited* (HCMA No. 306 of 2019) underscored that once a company is incorporated, it gains legal personality worldwide. Consequently, a foreign company can conduct business in Uganda without registration and has the right to enforce its contractual rights through legal action, as affirmed by the Courts.

4. Uganda's Highest Court

In the case of *Ham Enterprises Limited and 2 Others v Diamond Trust Bank(U) Limited and Another*, SCCA 13 of 2021, the Supreme Court of Uganda set a legal precedent that now governs syndicated lending

transactions involving foreign lenders in Uganda. The Court upheld the legality of these transactions, asserting that they do not require licensing under the *Financial Institutions Act*. The Court's rationale was based on the notion that it couldn't discern how a foreign lender engaging in syndicated lending could be construed as conducting financial institutions business within Uganda. However, the Court's reasoning behind this determination, particularly why syndicated lending transactions were not seen as constituting "doing business" in Uganda, was not extensively explained. The Supreme Court further noted that there was no law cited nor brought to its attention that forbade foreign institutions from extending credit to any financial institution or person in Uganda.

The foregoing Supreme decision was recently cited by the High Court in the matter of *African Rivers Fund v Kare Distribution Limited and Others* (Civil Suit No. 700 of 2019). Here, the defendant argued that a loan was illegal and therefore not recoverable because it had been extended by an entity that was unregistered in Uganda. Justice Mugenyi noted that there was no law cited or brought to the court's attention forbidding foreign institutions from extending credit in Uganda. The Court emphasized that the Plaintiff had received the funds and used them according to the agreed terms and consequently upholding the defendant's claim of contract illegality would not only disregard the terms of the contract but also perpetuate injustice.

5. Conclusion

Foreign entities eyeing transactions in regulated sectors in Uganda like financial services must endeavour to grasp the country's legal landscape. They must determine whether the proposed lending transactions cross the threshold of "doing business" in Uganda, necessitating registration, incorporation, and obtaining requisite licenses before finalizing deals so that they can navigate the regulatory framework with confidence and safeguard their interests in the Ugandan market.

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