THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL OF UGANDA AT KAMPALA

MISC.APPLICATION NO. 33 OF 2023

(ARISING FROM APPLICATION NO. 125 OF 2019)

UGANDA REVENUE AUTHORITY..... APPLICANT

VERSUS

ELGON HYDRO SITI PVT (U) LTD ....RESPONDENT

CORAM DR. ASA MUGENYI, DR. STEPHEN AKABWAY,MR.GEORGE MUGERWA.

RULING

This ruling is in respect of an application for review of an award of half costs to the applicant in Application 125 of 2019.

This application is brought under S. 82 of the Civil Procedure Act, Order 46 of the Civil Procedure Rules, and Sections 14(1), 16 and 19 of the Tax Appeals Tribunal Act.

The respondent filed an application challenging an import duty assessed of Shs. 648,299,671 by the applicant based on misclassification of valves. In its ruling, the tribunal held that the valves were rightly reclassified by the applicant hence attracting import duty of 10%. The applicant conceded that the tax payable was 171,059,811.75, hence it was awarded the same. The tribunal awarded half the costs of the application to the respondent on the basis that the applicant had ample time to revise the tax liability which was not done. The applicant is dissatisfied with the award of half costs to the respondent and seeks to review the ruling.

Issues

1. Whether there is an error apparent on the record that warrants a review of the ruling?
2. What remedies are available to the parties.

The application was supported by an affidavit of Mr. Sam Kwerit, an advocate attached to the applicant's legal services and board affairs department. He stated that costs were awarded to the respondent based on miscalculation of taxes. He contended that the respondent did not raise any issue on miscalculation of taxes. It was not mentioned in the grounds of objection and the joint scheduling memorandum. The only issue was misclassification of the taxes. He deponed that the award had an error apparent, and the tribunal should review it.

The respondent's sworn statement in reply was sworn by Mr. Hamlett Ahimbisibwe its finance manager. He stated that there was an error in miscalculation of taxes. He stated that the review is premised on an incorrect customs value. He stated that the respondent submitted on misclassification of valves and miscalculation of taxes.

The applicant submitted that costs follow the event. It cited *Kinyera v Victoria Seeds Limited* Civil Suit 604 of 2015 and S. 27 of the Civil Procedure Act. It contended that it was successful on the issue of misclassification which was the only disputed issue. Costs ought to have been awarded to it because it was the successful party. It contended that the issue of miscalculation of tax was not raised by the respondent in its objection. The applicant argued that under Sections 16 and 19 of the Tax Appeals Tribunal Act a taxpayer is limited to the grounds in the objection decision. It cited *Kwasa logistics Limited v URA* Application 151 of 2022 to support its contention that an applicant is limited to the objection decision. It also cited *Gakou Brothers Enterprises Limited v URA* HCCA 55 of 2021. The applicant submitted that the tribunal misdirected itself when it made an award on an issue that did not arise from an objection decision. This was an error apparent on the face of record warranting review.

In reply, the respondent submitted that the applicant does not specify any grounds upon which the application for review is brought. It submitted that Order 46 of the Civil Procedure Rules allows an aggrieved party to seek review where there is an error apparent on the face of the record. The respondent cited the definition of what amounts to an error stated in *Nyamogo and Nyamogo Advocates v Kago* [2001] 2 EA 173 which we shall reproduce later. The respondent submitted that there was no error apparent on

record. It further submitted that the ground on miscalculation was included in the main application and was submitted on. It also submitted that an error apparent must be self-evident, which does not require elaborate discussion or argument to establish but is detected by mere looking at the record, which is not the case with this matter. It submitted that the tribunal indicated the reasoning for awarding the costs to the applicant which means that that the award of costs is not an error apparent on record.

The applicant cited *Edison Kanvabwera v Pastori Tumwebaze* SCCA 6 of 2004 where it was stated that in order that an error may be a ground for review, it must be apparent on the face of the record, which is an evident error which does not require any extraneous matter to show its correctness. In *Independent Medico Legal Unit v the Attorney General of Kenya,* Application 2 of 2012 the court stated that an error apparent must be self-evident; not one that has to be detected by a process of reasoning. The respondent submitted that the ground on miscalculation of taxes was raised throughout the trial, in the application for review, joint scheduling memorandum, the submissions, and witness statements. It cited *COWI v URA* Application 4 of 2019 and submitted that the ground in issue is a legal ground though intertwined with a factual ground as seen from the submissions.

In rejoinder, the applicant submitted that Order 46 Rule 1(b) of the Civil Procedure Rules is wide to include mistake and any other sufficient reason. It submitted that as per the case of *Nyamogo and Nyamogo Advocates v Kago* (supra) what amounts to error is determined judicially on the facts of each case. The applicant contended that the grounds for objection did not mention miscalculation of taxes and as such would fit in the error definition.

Having perused the affidavits and read the submissions of the parties, this is the ruling of the tribunal.

The application before the tribunal is for review of its decision to award the respondents half the costs in Application 125 of 2019. The applicant contends that there was an error

apparent on the fact of the record i.e., miscalculation of taxes was never conversed by the applicant during the hearing nor was it a ground of the objection decision.

The law on review is provided in S. 82 of the Civil Procedure Act which states.

"Any person considering himself or herself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act,

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order on the decree or order as it thinks fit."

The grounds for review are laid out in Order 46 of the Civil Procedure Rules which states.

"Application for review of judgment.

(1) Any person considering himself or herself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter of evidence which, after the exercise of due diligence, was not within his or her knowledge or could not be produced by him or her at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him or her, may apply for a review of judgment to the court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party, except where the ground of the appeal is common to the applicant and the appellant, or when, being respondent, he or she can present to the appellate court the case on which he or she applies for the review."

The grounds for review include discovery of new and important matter of evidence which after the exercise of due diligence was not within his or her knowledge or could not be produced by him or her at the time the decree was passed. Secondly, on account of some mistake or error apparent on the face of the record and lastly, any other sufficient reason.

For the purposes of this application, the applicant relied on the ground of error apparent on the face of record to support the application for review. The definition of what amounts to an error apparent on the face of record was defined in *Nyamogo and Nyamogo Advocates v Kago* [2001] 2 EA 173. It is reproduced below.

> "An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefinitely inherent in its very nature, and it must be left to be determined judicially on the facts of each case.
>
> There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on substantial point law stares one in the face, there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out.
>
> An error which has to be established by a long-drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record even though another view was also possible. Mere error or wrong view is certainly no ground for a review."

In *Lalwak v Opio* Miscellaneous Civil Application 0058 of 2016 it was stated that

> "There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out."

The applicant contended that the respondent in the main application did not raise an issue on miscalculation of taxes neither was it a ground of objection, yet the ruling granted the award of costs to the respondent because it was successful on the said issue. The applicant states that this amounts to an error apparent. The respondent stated that the issue of miscalculation of taxes was raised throughout the trial and was specifically pleaded in the joint scheduling memorandum.

The reasons for the award of half the costs were stated by the Tribunal as follows:

> "The Tribunal notes that the applicant challenged a tax liability of Shs. 648,299,671 which was a result of both a reclassification of items and miscalculation of taxes of the values. It has been able to revise the rate to Shs. 171,059,811.75. The respondent had ample time to revise the tax liability. The applicant was not successful on the issue of reclassification

but was successful on miscalculation of taxes. Therefore, the Tribunal will award it half the costs of the application.

In the circumstance the applicant is ordered to pay Shs. 171,059,811 as taxes. It is awarded half the costs of the application."

The Tribunal has to determine whether there was an error apparent on the face of the record when it made that ruling on costs.

In respect of costs, S. 27(1) of the Civil Procedure Act states that

"Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent those costs are to be paid, and to give all necessary directions for the purposes aforesaid."

Costs are a preserve of the court which can award them.

The first ground stated by the applicant was that a successful party is entitled to costs. It was successful in the application. The respondent did not dispute that. The second ground was that the issue of miscalculation of the taxes was not part of the objection decision, nor did it arise during the hearing. It was not part of the scheduling nor did the parties submit on it. The Tribunal notes that the issue of miscalculation of taxes was not part of the objection decision. In its application to the Tribunal the respondent stated in its grounds that the value used by the applicant to compute the import duty is erroneous as it is higher than the invoice amount of Euro 375,750. The applicant in its statement of reasons for taxation decision maintained that the respondent is liable to pay the outstanding tax as assessed of 648,299,671 and not 171,078,975. However, the miscalculation of taxes did not form one of the issues raised in the joint scheduling memorandum. There is no evidence that the applicant called evidence and submitted on the miscalculation of taxes. The applicant conceded that the tax liability was Shs. 171,059,811.The applicant's witness, Mr. Masiko Elinathan testified that upon reclassification and re-computation, the respondent had a total resultant import tax liability of Shs. 171,078,975. The Tribunal notes the award against the applicant reduced from Shs. 648,299,671 to Shs. 171,059,811. Though there was no evidence and submission

on the computation of the taxes it was raised in the pleading. If the respondent had not filed the main application and pursued it, its tax liability would not have been reduced. Such an effort should not be ignored. Therefore, the second ground that the miscalculation of taxes did not arise during the hearing cannot be sustained.

The Tribunal in arriving at the costs awarded, without considering that miscalculation of taxes was not part of the evidence, meant its decision was erroneous. This can only be arrived at after prolonged drawn out reasoning. It was an erroneous decision which the applicant should have appealed against and not treated as an error on the face of the record. In *Lalwak v Opio* (supra) it was stated that "Mere error or wrong view is certainly no ground for a review although it may be for an appeal." In *Farm Inputs Care Centre Limited v Klein Karoo Seeds Marketing* (PTY) Limited Misc. Application 0861 of 2021 it was stated that

> "It turns out that what the applicant contends to be an error on the face of the record is not self-evident irregularity in the process towards the decision, but rather a drawn-out process of reasoning, examination and scrutiny of the law and facts on the merits. It is evident that what the applicant is attempting to achieve is the reversal of what he considers to be an erroneous decision, by forcing a rehearing and correction by the same court which made the decision, yet an application for review, it must be remembered, cannot be allowed to be an appeal in disguise. The court exercising the power of review cannot sit in appeal over its own decision. To put it differently, an order cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court."

Therefore, the tribunal cannot be an appellant court on its decision on the second ground.

The first ground which the applicant raised was that as a successful party is entitled to costs. The respondent did not dispute this ground. It is trite law that a successful party in a suit is entitled to costs. This is from this general rule per the decision in *Kwizera v Attorney General* Constitutional Appeal 1 of 2008. In *Besigye Kizza v Museveni Yoweri Kaguta and Electoral Commission*, Presidential Election Petition 1 of 2001 the justification for awarding costs given was that "Costs are an indemnity to compensate the successful litigant the expenses incurred during the litigation." In *Nyamogo and Nyamogo Advocates*

v Kago it was stated that "Where an error on substantial point law stares one in the face, there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out." Where the Tribunal does not award costs to a successful party and the law is clear that it is entitled to costs, that maybe an error on the face of record.

It is not denied that the applicant was successful on the issue of misclassification. It is also not in dispute that the respondent was successful on the miscalculation of taxes, even when it was not raised as an issue. The applicant incurred costs such as travelling with witnesses to the locus. If it was successful on the issue of misclassification which involved travelling to the locus, why did it not obtain costs in respect thereto? Was the fuel used in vain? The Tribunal notes that if both parties were successful on one ground each, it means that it was a draw. One must ask itself if both parties were successful on one ground, then why was one party asked to pay half the costs of the other. Even where costs are half, it is still costs. Was one more equal to the other? We think that is where the error was. If both parties were successful, one cannot benefit more than the other. The Tribunal should have ordered that each party meets its costs. So that even on the costs there is a draw. When awarding costs, the Tribunal omitted to consider that the applicant was successful on one ground. Taking that into consideration the Tribunal will allow this application. It will order that each party meets its costs in the main application. Since the error is attributable to the Tribunal each party will meet its costs in this application. *Erare est humanum* - to err is to be human.

Dated at Kampala this 15th day of May 2023.

DR. ASA MUGENYI	**DR. STEPHEN AKABWAY**	**MR. GEORGE MUGERWA**
CHAIRMAN	**MEMBER**	**MEMBER**