THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 264 OF 2018

(Coram: Cheborion Barishaki, Stephen Musota & Christopher Madrama, JJA)

HERITAGE OIL & GAS LIMITED::APPELLANT

VERSUS

UGANDA REVENUE AUTHORITY::RESPONDENT

JUDGMENT OF CHEBORION BARISHAKI, JA

I have had the benefit of reading in draft the judgment of my learned brother Christopher Madrama, JA and I agree with the analysis, conclusion and the orders proposed.

What is clear from the record of proceedings is that the case was still at pre-trial conferencing. The appellant had raised a preliminary objection to the respondent's skeleton submissions. In her ruling, the trial Judge disallowed the objection and accepted the respondent's skeleton arguments.

The appellant was dissatisfied and sought leave to appeal against the ruling. In response to this request, the learned trial Judge had this to say;

"You already started arguing the appeal but in piecemeal which Court finds very uncomfortable but it is within your right to appeal. I will have this ruling typed and given to you. I am praying that you move out of my Court, either go to Court of Appeal or go back to Tax Tribunal. I will be the happiest."

No reason was given for the request to appeal. The respondent objected arguing that there should have been a formal application for leave to appeal setting out the grounds why leave should be granted.

I am unable to find any provision in the law which allows a party the right to appeal from a decision of the High Court sitting on appeal from a decision of the Tax Appeals Tribunal.

Secondly, it was not demonstrated by the appellant that the intended appeal involved novel points of law or matters of great public and general importance to warrant further canvassing in the Court of Appeal.

Since Musota, JA also agrees this appeal is struck out with costs for being incompetent.

Dated at Kampala this 23rd day of June 2020.

Cheborion Barishaki

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

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CIVIL APPEAL NO. 264 OF 2018

HERITAGE OIL & GAS LIMITED :::::::::::::::::::::::: APPELLANT

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UGANDA REVENUE AUTHORITY :::::::::::::::::::::::: RESPONDENT

(CORAM: CHEBORION, MUSOTA, MADRAMA JJA)

JUDGMENT OF JUSTICE STEPHEN MUSOTA, JA

I have had the benefit of reading in draft the judgment by my brother Justice Christopher Madrama, JA.

I agree with his judgment and the orders he has proposed. The right of appeal has to be enacted by parliament. As rightly observed by my brother, in this instance, parliament enacted laws which conferred a right of appeal from a decision of the Tax Appeal Tribunal to the High Court on points of law and remained silent as to any further appeal to the Court of Appeal. S. 27 of the Tax Appeals Tribunal Act does not confer any right of appeal to the Court of Appeal from the decision of the High Court made pursuant to hearing an appeal from a decision of the Tax Appeals Tribunal. If parliament intended that an appeal be made to the Court of Appeal, it would expressly say so as it did under the Income Tax Act. Under the latter Act, it expressly intended an appeal from High Court made pursuant to the provisions of the Income Tax Act to only proceed with leave of the Court of Appeal in respect of matters arising from the Income Tax Act only.

In the instant case there was no order envisaged under the law that would give rise to a right of appeal to the Court of Appeal. The case was before the Judge for scheduling conference and the Judge simply

gave a direction on how the case would proceed. The appeal is accordingly struck out for being incompetent and with costs.

Dated this 23rd day of June 2020

Stephen Musota
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO 264 OF 2018

(CORAM: CHEBORION, MUSOTA, MADRAMA JJA)

HERITAGE OIL & GAS LIMITED} .....APPELLANT

VERSUS

UGANDA REVENUE AUTHORITY} .....RESPONDENT

JUDGMENT OF CHRISTOPHER MADRAMA IZAMA

This appeal arises from the ruling and orders of Lady Justice Elizabeth Jane Alividza dated 27th of February 2018 in consolidated High Court Civil Appeal No 23/2011 and 3/2012.

The parties had filed written skeleton arguments in support and in opposition to the appeal respectively before the High Court when the matter came for a scheduling conference. The appellant objected to paragraphs 142 – 150 of the respondent's skeleton arguments/submissions pursuant to which the learned appellate Judge made what she termed a "conferencing ruling".

The learned appellate court Judge ruled that the respondent's skeleton arguments are accepted as it is and the parties were directed to go ahead and prepare submissions for hearing of the appeal having in mind that questions of law not appealed against should be excluded. She held that all the parties had notice of the points of law that would be the focus of the appeal and can adequately prepare their arguments.

The appellant was aggrieved by the ruling and lodged a notice of appeal dated 6th of March 2018 intending to appeal the ruling of 27th February, 2018 to the Court of Appeal. The appellant also applied for a copy of the record of proceedings by letter dated 6th March, 2018. The certificate of the registrar indicates that the record was availed on 16th October, 2018. The certificate of correctness of record of counsel for the appellant is dated 18th October, 2018. The appeal was accordingly lodged on 19th October, 2018. The grounds of the appeal are:

1. The learned Judge erred in law, in determining the 2 preliminary points, when, despite having held that points of law which the Tax Appeals Tribunal resolved in favour of the appellant should not be overturned in the absence of a cross appeal of the respondent, she determined that paragraphs 91 – 94 and 142 – 150 of the respondents skeleton arguments should not be struck out.

2. The learned trial Judge erred in law, in determining the two preliminary points, when she misdirected herself on the law and purpose of a scheduling conference held prior to the hearing of the appeal, and thereby came to an erroneous conclusion that there was no justification for refusing to hear the respondents arguments in paragraphs 91 – 94 and 142 – 150 of the respondents skeleton arguments at the hearing of the appeal.

The appellant prays that the appeal is allowed and the preliminary points raised by the appellant to strike out paragraphs 91 – 94 and 142 – 150 from the respondents skeleton arguments be allowed. The appellant also prays for costs of the appeal in this court and in the court below.

At the hearing of the appeal learned counsel, Mr Kusasira Dennis appearing jointly with learned counsel, Mr Akunobera Festus represented the

appellant while learned Counsel Mr Okello George an Assistant Commissioner Litigation represented the respondent. Both parties agreed to and adopted their conferencing notes that had been filed on court record as their submissions in this appeal.

I have carefully considered the record of appeal to establish whether this is an appeal envisaged under the Civil Procedure Act and the enabling laws of the Income Tax Act as well as the Tax Appeals Tribunal Act.

The matter originally arose from an application for review of income tax assessment of US$404,925,000 against the appellant by the respondent authority in Tax Appeals Tribunal Application No 26 of 2010. The respondent had applied to the Tax Appeals Tribunal challenging the assessment. The Tax Appeals Tribunal dismissed the application with costs.

The applicant also challenged income tax assessment for US$30 million by the respondent in Tax Appeals Tribunal Application No 28 of 2010. The Tax Appeals Tribunal also dismissed the appellant's application on 7th December, 2011.

The appellant being aggrieved by the decision of the Tax Appeals Tribunal filed and had consolidated appeals to the High Court under the provisions of section 27 of the Tax Appeals Tribunal Act Cap 345. Subsequent to the filing of the appeal, the parties filed skeleton arguments before the High Court and the matter went for conferencing before the appellate court Judge. The crux of the matter is that the appellant objected to parts of the skeleton arguments of the respondent.

At page 382 of the record the learned appellate Judge held that: *"you can move Court of Appeal. So until further notice I think I should stay proceedings."* The appellants counsel requested to make a formal application and get the ruling and the court stated:

> It is granted do not waste any more of my valuable time. I believe in fairness if you feel aggrieved you go to Court of Appeal.

In the substance, this is an appeal against the order of the appellate Judge declining to strike out the said paragraphs of the skeleton arguments of the respondent. However there is no decision as to whether to allow parts of the skeleton arguments of the respondent sought to be struck out. The learned appellate Judge clearly held that the parties will be confined to the points of law and that questions of law not appealed against should be excluded for the ease of the court. In other words, the learned trial Judge held that the appellant and the respondent shall be confined to the points of law raised in the appeal. In the last paragraph this is what she stated:

> All parties have been given notice of points of law that would be the focus of the appeal and can adequately prepare for their arguments. So at this stage it is sufficient for the hearing of the appeal to start and it will also assist the court if arguments are drafted on the offensive of points of law made by TAT that are grounds of the appeal. This will enable the appeal to move in the structured manner.

It is very clear from the above paragraph that the learned appellate court Judge had not yet heard the main appeal. She was directing the parties at the scheduling conference on how to proceed to make progress in the appeal and that is when an objection was made to some paragraphs of the skeleton arguments of the respondent.

It was still open for the court to consider all the skeleton arguments including the preliminary matters such as whether the points of law, the subject of the appeal, were canvassed in terms of the law confining the appeal to only points of law stated in the appellant's notice of appeal. An appeal to the High Court from a decision of the Tax Appeals Tribunal Act Cap 345 is commenced under section 27 thereof which provides that:

27. Appeals to the High Court from decisions of a tribunal.

(1) A party to a proceeding before a tribunal may, within thirty days after being notified of the decision or within such further time as the High Court may allow, lodge a notice of appeal with the registrar of the High Court, and the party so appealing shall serve a copy of the notice of appeal on the other party to the proceeding before the tribunal.

(2) An appeal to the High Court may be made on questions of law only, and the notice of appeal shall state the question or questions of law that will be raised on the appeal.

(3) The High Court shall hear and determine the appeal and shall make such order as it thinks appropriate by reason of its decision, including an order affirming or setting aside the decision of the tribunal or an order remitting the case to the tribunal for reconsideration.

An appeal under section 27 (1) is lodged only on questions of law and by a party to a "proceeding" before a tribunal under the Act. Secondly, the question or questions of law shall be stated in the notice of appeal. The matter having arisen under the Income Tax Act Cap 340, an appeal to the High Court is governed by section 100 of the income tax act which makes it optional to a litigant to either appeal to the High Court or to the Tax Appeals Tribunal. Section 100 provides as follows:

Appeal to the High Court or Tax Appeals Tribunal
100 (1) A tax payer dissatisfied with an objection decision may, at the election of the taxpayer –
(a) appeal the decision to the High Court; or

(b) apply for review of the decision to the tax tribunal established by Parliament by law for the purpose of settling tax disputes in accordance with Article 152 (3) of the Constitution.

(2) An appeal under subsection (1) to the High Court shall be made by lodging a notice of appeal with the Registrar of the High Court within 45 days after service of notice of the objection decision.

(3) A person who has lodged a notice of appeal with the Registrar of the High Court shall, within five working days of doing so, serve a copy of the notice of appeal on the Commissioner.

(4) An appeal to the High Court under subsection (1) may be made on questions of law only and notice of appeal shall state the question or questions of law that would be raised on the appeal.

From the facts of this appeal, the applicants applied to the Tax Appeals Tribunal and therefore did not elect to appeal to the High Court from the decision of the Commissioner. Instead, the appellant applied for review of the decision of the Commissioner to the Tax Appeals Tribunal. Thereafter the appellant appealed the decision of the Tax Appeals Tribunal to the High Court under the provisions of section 27 of the Tax Appeals Tribunal Act.
It may be argued and there is ground for upholding the argument that section 101 of the Income Tax Act (ITA) which deals with appeals to the Court of Appeal from a decision of the High Court made under section 100 (1) (a) of the ITA does not apply because it envisages a decision of the High Court upon the election of the appellant to file an appeal from a decision of the Commissioner General. From the premises, it would follow that the only applicable law dealing with appeals from a decision of the Tax Appeals Tribunal would be found under the Tax Appeals Tribunal Act for purposes of the Income Tax Act. For emphasis section 101 of the ITA before amendment provided that:

> A party to a proceeding before the High Court who is dissatisfied with the decision of the High Court may, with the leave of Court of Appeal, appeal the decision to the Court of Appeal.

Anybody dissatisfied with the decision of the High Court made pursuant to an appeal from the Commissioner's decision under the provisions of section 100 of the ITA can only appeal to the Court of Appeal upon seeking the leave of the Court of Appeal and not that of the High Court under section 101 of the ITA. The ITA envisages an appeal to the High Court on points of law from an objection decision of the Commissioner or an application to the Tax Appeals Tribunal for review of an objection decision of the Commissioner. It clearly caters for a taxpayer who is dissatisfied with an objection decision.

As noted above, an appeal under section 27 (1) is lodged only on questions of law and lies to the High Court. Section 27 of the Tax Appeals Tribunal Act does not provide for a further right of appeal to the Court of Appeal.

In the matter before this court, there was an application for review of an objection decision of the Commissioner pursuant to the appellant's application to the Commissioner General objecting to assessment for income tax.

There is no further statutory provision conferring a right of appeal from a decision of the High Court on appeal from a decision of the Tax Appeals Tribunal. It should be noted that section 100 (1) (b) of the ITA envisages appeals before a tribunal established by Parliament under Article 152 (3) of the Constitution and provides that:

> 100 (1)
> (a) ..

(b) apply for review of the decision to the tax tribunal established by Parliament by law for the purpose of settling tax dispute in accordance with Article 152 (3) of the Constitution.

The law establishing the Tax Appeals Tribunal is the Tax Appeals Tribunal Act. Article 152 (3) of the Constitution provides that:

(3) Parliament shall make laws to establish tax tribunals for the purposes of settling tax disputes.

The right of appeal has to be enacted by Parliament. The question is why Parliament enacted laws which conferred a right of appeal from a decision of the Tax Appeals Tribunal to the High Court on points of law and remained silent as to any further right of appeal to the Court of Appeal? The Tax Appeals Tribunal Act and particularly section 27 thereof has not conferred any right of appeal to the Court of Appeal from the decision of the High Court made pursuant to hearing an appeal from a decision of the Tax Appeals Tribunal. It is tempting to suggest that an aggrieved taxpayer who is aggrieved by a decision of the High Court on appeal may further appeal under the general provisions of the law. Such an argument would concede that the laws envisaged under article 152 (3) of the Constitution do not cater for a right of appeal from a decision of the High Court as the final court of appeal under the Tax Appeals Tribunal Act. Appellate jurisdiction is a creature of statute.

Those laws, as stated above, do not confer any further right of appeal from the decision of the High Court made on appeal from a decision of the Tax Appeals Tribunal. On the other hand Parliament expressly intended an appeal from the High Court made pursuant to the provisions of the Income Tax Act to only proceed with the leave of the Court of Appeal in respect of

matters arising from the Income Tax Act only. As noted above, the appeal as envisaged thereunder is lodged pursuant to an appeal made direct to the High Court upon the election of the taxpayer to appeal a decision of the Commissioner on points of law only. The matter before this court is not such an appeal.

The proposition that appellate jurisdiction is a creature of statute was dealt with in **Attorney General v Shah (No. 4) [1971] EA, 50**. This was the decision of the former East African Court of Appeal arising from an appeal from the High Court. The facts are that the High Court of Uganda had made an order of mandamus against officers of government. The Attorney General being aggrieved appealed against the decision and the respondent to the appeal objected to the hearing of the appeal by the Court of Appeal on the ground that it had no jurisdiction in the matter. Spry Ag. P held that:

> It has long been established and we think there is ample authority for saying that appellate jurisdiction springs only from statute. There is no such thing as inherent appellate jurisdiction.

Further, Spry Ag. P held appellate jurisdiction of the East African Court of Appeal was now regulated (by 1967) by article 89 of the Constitution of the Republic of Uganda 1967 (since repealed) and the Judicature Act 1967 (since repealed) which made it clear that the court has only such jurisdiction as is conferred on it by Parliament. From the holding, it can be concluded that similarly, the jurisdiction in the settlement of tax matters envisaged by article 152 (3) of the Constitution of the Republic of Uganda 1995 can only be enacted by Parliament as envisaged in that article. As reviewed above, the Tax Appeals Tribunal Act as well as the Income Tax Act does not confer any right of appeal to the Court of Appeal when the appeal emanates from a decision of the Tax Appeals Tribunal.

Further in **Attorney General v Shah** (supra) Law Ag. V. -P concurred with Spry Ag. P and held that the provisions of section 82 and 68 of the Civil Procedure Act (before revision) which dealt with appeals did not confer any right of appeal. Mustafa, JA also concurred with Spry Ag. P and held at page 51 that:

> Section 82 of the Civil Procedure Act relied on by the appellant relates only to procedural matters and does not confer a right of appeal. I am of opinion the appeal is incompetent and should be struck out.

I have duly considered the provisions of section 72 of the Civil Procedure Act (CPA) which deals with second appeals. The Income Tax Act provides for objection to a taxation decision to the Commissioner General. After an objection decision, an appeal may lie to the High Court or an application for review of the taxation decision may be made to the Tax Appeals Tribunal. Pursuant to an appeal to the Tax Appeals Tribunal, any further appeal to the High Court is a second appeal. It follows that if section 72 of the CPA applies to the High Court which was the second appellate court. The Court of Appeal can only be a third appellate court. Notwithstanding, section 72 of the CPA provides as follows:

> 72. Second appeal.
>
> (1) Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely that—
>
> (a) the decision is contrary to law or to some usage having the force of law;
>
> (b) the decision has failed to determine some material issue of law or usage having the force of law;

(c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, has occurred which may possibly have produced error or defect in the decision of the case upon the merits.

(2) An appeal may lie under this section from an appellate decree passed ex parte.

As suggested by the head note to section 72 of the CPA, the section deals with second appeals. Third appeals are dealt by section 73 of the CPA which provides as follows:

73. Third appeal.

Where an appeal emanates from a judgment of a magistrate grade II but not including an interlocutory matter, a party aggrieved may lodge a third and final appeal to the Court of Appeal on the certificate of the High Court that the appeal concerns a matter of law of great public or general importance, or if the Court of Appeal in its overall duty to see that justice is done considers that the appeal should be heard.

A third appeal envisages an appeal emanating from a magistrate grade II but not on an interlocutory matter. It has to be on the certificate of the High Court that the appeal concerns a matter of law of great public or general importance. There is no such certificate certifying that the appeal involves a matter of great public or general importance. It is clear from the proceedings that the appellant proceeded on the basis of an order made in an informal scheduling conference as to whether certain parts of the respondent's skeleton submissions should be struck out.

The orders envisaged under Order 12 of the Civil Procedure Rules are orders made pursuant to reaching an agreement by the parties in a scheduling conference and orders are issued in accordance with the Order 15 rules 6 and 7 of the Civil Procedure Rules. Order 15 rules 6 and 7 of the Civil Procedure Rules provide that:

6. Questions of law or fact may by agreement be stated in the form of issues.

Where the parties to a suit are agreed as to the question of law or of fact to be decided between them, they may state the question in the form of an issue and enter into an agreement in writing that, upon the finding of the court in the affirmative or the negative of the issue—

(a) a sum of money specified in the agreement, or to be ascertained by the court or in such manner as the court may direct, shall be paid by one of the parties to the other of them, or that one of them be declared entitled to some right or subject to some liability specified in the agreement;

(b) some property specified in the agreement and in dispute in the suit shall be delivered by one of the parties to the other of them, or as that other may direct; or

(c) one or more of the parties shall do or abstain from doing some particular act in the agreement and relating to the matter in dispute.

7. Court, if satisfied that agreement was executed in good faith, may pronounce judgment.

Where the court is satisfied, after making such inquiry as it deems proper—

(a) that the agreement was duly executed by the parties;

(b) that they have a substantial interest in the decision of the question as aforesaid; and

(c) that the question is fit to be tried and decided, it shall proceed to record and try the issue and state its finding or decision on the issue in the same manner as if the issue had been framed by the court; and shall, upon the finding or decision of the issue, pronounce judgment according to the terms of the agreement; and upon the judgment so pronounced a decree shall follow.

There was no such proceeding in which the parties reached an agreement at a scheduling conference. Instead there was an objection to skeleton arguments and the learned appellate court Judge decided that she would

not strike out the submissions. Provisions in the rules for striking out concern pleadings and are specifically catered for by Order 6 rule 30 of the Civil Procedure Rules which provides that:

> (1) The court may, upon application, order any pleadings to be struck out on the ground that it discloses no reasonable cause of action or answer and, in any such case, or in case of the suit or defence being shown by the pleadings to be frivolous or vexatious, may order the suit be stayed or dismissed or judgment be entered accordingly, as may be just.
> (2) All orders made in pursuance of these rules shall be appealable as of right.

There is simply speaking no provision for striking out skeleton arguments or parts of the skeleton argument however irrelevant. The best approach was to ask the court not to consider the portions of the skeleton arguments which are offensive. Moreover, the learned appellate court Judge clearly indicated that the parties shall be confined to the points of law in the appeal. If somebody submits something else, a High Court Judge has the wisdom not to decide another point other than the points arising from the grounds of appeal indicated in the notice of appeal under section 27 of the Tax Appeals Tribunal Act.

In the premises, there was no order envisaged by the laws I have reviewed giving rise to a right of appeal to the Court of Appeal.

The decision in **Attorney General v Shah** (supra) is good law and I would conclude that Parliament did not deem it fit to confer a right of appeal from a decision of the High Court pursuant to an appeal emanating from a decision of the Tax Appeals Tribunal under the Income Tax Act Cap 340 and the Tax Appeals Tribunal Act Cap 345. Even if I am wrong on the above holding, such an appeal if held to be valid had to be on the certificate of the High Court that it raises matters of law of great public and general importance and there is none in this matter. Thirdly, the law does not

envisage an appeal from a direction of the learned Judge allowing parties to submit on their skeleton arguments and declining to strike out portions thereof. In the premises, appellants appeal is incompetent and is accordingly struck out with costs.

Dated at Kampala the last day of 23rd day of June 2020

Christopher Madrama Izama

Justice of Appeal