

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA HOLDEN AT KAMPALA
CIVIL APPLICATION NO. 399 OF 2021
(ARISING OUT OF MISCELLANOUS APPLICATION NO.398 OF 2021)
(ARISING OUT OF CIVIL APPEAL NO. 39 OF 2021)

BETWEEN

GAME DISCOUNT WORLD (UGANDA) LIMITED..... APPLICANT

AND

UGANDA REVENUE AUTHORITY RESPONDENT

RULING BY CHRISTOPHER GASHIRABAKE, JA

(Single Justice)

This is an application by Notice of Motion filed under sections 28(1) of the Tax Appeals Tribunal Act, Section 98 of the Civil Procedure Act Cap. 71 and Order 52 Rules 1& 3 of the Civil Procedure Rules S.1 71-1, The Judicature (Court of Appeal Rules)Directions, SI.13-10, Rules 6(2)(b) for orders that;

1. An interim order doth issue restraining the respondent their servants, agents or anybody claiming from or under them or any person under their direction or control(directly or indirectly) from enforcement and or collection of Ushs. 15,039,577,028 from the Applicant, until the Applicant is heard in miscellaneous application, No 398 of 2021
2. The cost of this application be provided for.

The applicant's grounds are clearly stated in the affidavit in support deponed by Mr. **Fredrick Olwit**, the store manager of the applicant briefly that;

1. The applicant filed the main application in this court seeking for orders that the decision and orders of High Court in Civil Appeal No.0039 of 2021 be unconditionally stayed pending hearing and disposal of the appeal before this court.
2. The main application has good chances of success if it is fixed and heard on its merits.
3. The applicant is a compliant taxpayer and has met the requirement of paying 30% of the tax assessment pending final resolution of the dispute between the parties as required by law.
4. There is a real and imminent threat of execution as the respondent has issued an Agency Notice in respect to a sum of Ushs. **15,039,577,028/=**.
5. The respondent is threatening to enforce the payment of Ushs. **15,039,577,028/=** before the hearing of the Main Application which will adversely affect the Applicant and cripple its business.
6. If this application is not granted and the respondent proceeds to execute the orders of the Tax Appeal Tribunal (TAT), a miscarriage of justice will be occasioned to the applicant.
7. If the application is not granted by this court, the applicant will suffer irreparable damages as they will be forced to pay Ushs. **15,039,577,028/=**, in addition to the 30% payment it has already made a sum which they wouldn't pay if the main application was allowed and the applicant's appeal to the Court of Appeal was heard on its merits.

8. The main application will be rendered nugatory if the interim order to stay the execution is not granted by this court.
9. The applicant has lodged a Notice of Appeal in the court of appeal.
10. It is in the interests of justice that the respondent be ordered to stay any enforcement measures particularly in the current economic environment until the main application is heard on its merits before by the court of appeal.
11. It is in the interest of justice that this application and all the reliefs sought be granted in favor of the applicant.

The respondent filed an Affidavit in reply deponed by **Mr. Tonny Kalungi**, an employee with the legal services and Board affairs of the respondent, in which he opposed the application stating that the present application is designed to frustrate recovery of government tax revenue overdue from the applicant. Mr. Kalungi further argued that the application has been overtaken by events by the issuance of an agency notice. Therefore the grant of this application would alter the status quo.

Background

On Monday 1st December 2021, the High Court delivered a judgment in favour of the Respondent with respect to a customs dispute arising out of TAT application number 25 of 2020. Being aggrieved by the said ruling, the applicant has filed a Notice of Appeal in the Court of Appeal and subsequently filed Miscellaneous

Application for stay of execution before this court seeking for orders that the execution of the orders in High Court Civil appeal number 39 of 2021 be unconditionally stayed pending hearing and disposal of the appeal in this court.

Representation

At the hearing, the parties were directed to file written submissions. The applicant was represented by Mr. Kalema R, and Mr. Gantungo D. The respondent was represented By Mr. Balideki Alex, Mr. S Kwerit and Mr. Baruku Ronald.

Submissions

Counsel for the applicant submitted that section 15 of the Tax Appeals Tribunal Act requires a taxpayer to deposit 30% of the tax in dispute pending final resolution. The same Act grants a right of appeal for any party dissatisfied with a proceeding before the High Court, on questions of law only. Deposit of the 30% grants a taxpayer a right to challenge the entire assessment before the courts. This was the holding in **Uganda Projects Implementation vs. URA CA NO1 of 2009**

In light of the above provision, counsel argued that the applicant cannot be compelled to pay more than 30% of the disputed tax before exhausting their remedies under the Tax Appeals Tribunal Act, including appealing to this court. This position was affirmed by the High Court in **Shoprite Checkers vs. Uganda Revenue Authority HCCA NO.15 of 2008**

The respondent's attempt to enforce collection of the entire disputed amount pending resolution of the appeal in this court would be contrary to law and violates the applicant's right to a hearing in this court.

Counsel for the applicant further submitted that the application fulfills all the requirements for a grant of an interim injunction namely;

1. Preserving the right of hearing
2. That there is an existing main application. The applicant filed a notice of appeal and subsequently filed Miscellaneous Application No. 398 of 2021
3. There is imminent danger of execution. There is threat of execution as the respondent has overtly issued an agency notice to enforce collection of Ushs 15,039,577,028/=. It is also likely that the respondent will undertake other enforcement measures which would render the main application nugatory unless court grants the application for interim Order.
4. Urgency deserving interim intervention .This case is so urgent that it deserves interim invention, as the applicant will be unable to operate its account for 180 days unless the agency notice is satisfied. If the interim order is not issued and respondent proceeds with enforcement measures, the applicant will suffer irreparable damages.

Counsel for the applicant made reference to the following cases, **MTN Uganda Limited vs. Uganda Revenue Authority, Misc. Application No 319 of 2020, and Alcon International v. New**

Vision Printing Corporation Supreme Court Civil Application No. 4 of 2010 and Hwan Sung industries limited vs. Tajdin Hussein, Supreme Court Civil Application No. 19 of 2008.

Counsel for the applicant further argues that Section 28(1) of the TAT as amended grants this court discretion to grant any orders staying implementation or operation of a decision in order to preserve the proceedings before it. He invites this court to grant orders prayed for in the interest of justice.

Respondent's submission

Counsel for the respondent submits that this application is barred in law as it seeks to alter the status quo which is contrary to the principles governing the grant of interim orders. The applicant in paragraph 4 of the affidavit in support admits that agency notices have already been issued. In **Yakobo Senkungu and Others Vs. Cerencio Mukasa , SC Civil Application NO.5 OF 2013**, this court stated that 'the granting of interim orders is meant to help parties to preserve the status quo and then have the main issues between the parties determined by the full court as per the rules.

The applicant has no known assets in Uganda and only uses her bank accounts to transfer the monies to South Africa, altering the status quo is prejudicial to the respondent.

The applicant seeks to rely on section 15 of the TAT Act which is instructive on the applicant to pay 30% pending the final resolution of the objection. It states that;

‘a taxpayer who has lodged a notice of the objection to an assessment shall , pending a final resolution of the objection pay 30% of the tax assessed or part of the tax assessed not in dispute , whichever is greater.’

An objection for tax matters is defined in section 24(1) of the Tax Procedure Code Act as dissatisfaction to a taxation decision. The import of section 15(1) of the TAT Act is that a tax payer must pay 30% before an objection decision is issued and further the TAT cannot entertain your application for review unless you provide evidence that 30% was paid.

Counsel for the respondent further submits that the applicant has not met the condition of urgency since the respondent has already issued an agency notice. In trying to prove urgency, the applicant submitted that she will not be able to operate for 180 days. If there was urgency the applicant should have immediately brought an application for interim order in this court.

Under section 31(7) of the Tax Procedure Code Act, the agency notice can only be revoked if the whole tax has been paid or an arrangement to the satisfaction of the commissioner has been made. In this case the applicant has not paid the full tax as required by section 31(7) of the Tax Procedure Code Act.

Since the applicant has no known assets in Uganda the respondent will suffer irreparable loss and therefore the balance of inconvenience would require that this application be dismissed with cost.

Appellant's submission in rejoinder

In rejoinder on status quo, Counsel for the Applicant submits that, although agency notices have been issued, the disputed tax has not been collected. This application seeks to preserve that status quo until the main application is heard.

This court, is clothed with powers under section 28(1) and (3) of the Tax Appeal Tribunal Act (as amended) to stay implementation of the decision of the High Court that the respondent is trying to enforce before determination of the main application and the applicant's appeal.

In **Steel Rolling Mills and others Vs. Standard Chartered bank, Misc. Application No. 267 of 2021**, this court, relying on **Hwan Sung industries vs. Tajdin Hussein** held that there are 3 conditions that an applicant must satisfy to justify the grant of an interim order;

1. A competent Notice of Appeal
2. A substantive application
3. A serious threat of execution

In regard to section 15 of the Tax Appeals Tribunal Act, the Applicant submits that it is illegal for the respondent to try and collect more than 30% of the tax in dispute so long as the tax remains disputed. In **Uganda Projects Implementation vs. Uganda Revenue Authority Civil Appeal No 1 of 2009**, that the 30% deposit is akin to security for performance of a decree in tax matters. It should therefore suffice to enable a taxpayer to exhaust

the remedies granted by the Tax appeals Tribunal Act, including appealing to his court.

The applicant prays that since it has fulfilled the requirements for grant of an interim order, this court should exercise its discretion under Section 28 of the Tax Appeals Tribunal Act and the rules of this court to grant the orders prayed for.

Analysis.

Rule 2(2) of the Judicature (Court of Appeal Rules) Directions grants this court powers to make such orders inter alia as may be necessary for achieving the ends of justice.

(2) Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the court, or the High Court, to make such orders as may be necessary for attaining the ends of justice or to prevent abuse of the process of any such court, and that power shall extend to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent abuse of the process of any court caused by delay.

In **National Enterprise Corporation Vs Mukisa Foods Miscellaneous Application No. 7 of 1998**, this court held that;

“The court has power in its discretion to grant stay of execution where it appears to be equitable with a view to temporarily preserve the status

Under **Rules 6(2) (b) of the Judicature (Court of Appeal Rules) Directions**

In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 76 of these Rules, order a stay of execution, an injunction, or a stay of proceedings on such terms as the court may think just.

In **Hwan Sung Industries ltd vs Tajdin Hussein and 2 others Civil Application No. 19 of 2008**, Okello JSC, stated some of the principles to be considered in granting interim orders of stay of execution, thus:

“For an application for an interim order of stay, it suffices to show that a *substantive application is pending* and that there is a *serious threat of execution* before the hearing of the pending substantive application.

It is not necessary to pre-empt consideration of matters necessary in deciding whether or not to grant the substantive application for stay.”

In regard to the condition of lodging a Notice of Appeal, the Supreme Court in the case of **Dr. Ahmed Muhammed Kisuule vs. Greenland Bank (In liquidation) Miscellaneous Application no. 7 of 2010** stated that;

“For an application in this Court for a stay of execution to succeed the applicant must first show subject to other facts in a given case, that he/she has

lodged a notice of appeal in accordance with Rule 72 of Rules of this Court...”

According to the evidence on record, a Notice of Appeal has been lodged under Rule 76 of the Rules of this Court on 13th December 2021. A substantive application for Stay of Execution has also been filed and it is referenced as Misc. Application No. 399 of 2021.

It is evident that there is a Notice of Appeal on record and there is a substantive application before this court, however there’s need for the applicant to satisfy court that there is a serious threat of execution which will occasion irreparable loss if the order is not granted. The applicant must demonstrate compelling circumstances for grant of an order of stay of execution. It should not just be a matter of process. It is not sufficient for the judgment debtor to say that they are vulnerable. This was the decision of court in **Wilson Mukiibi vs. James Semusambwa Civil Application No.9 of 2003** where justice **J.N.Mulenga** held:

“... A party seeking a stay of execution must satisfy the court that there is sufficient cause why the party with the judgment should postpone the enjoyment of its benefits. It is not sufficient for the judgment debtor to say that he is vulnerable, because the successful party may take out execution proceedings. It must be shown that if execution proceeds there may be some irreparable loss caused...”

In **National Enterprise Corporation Vs Mukisa Foods Miscellaneous Application No. 7 of 1998**, court held that;

“As a general rule, the only ground for stay of execution is for the applicant to show that once the

decretal property is disposed of there is no likelihood of getting it back should the appeal succeed.”

The authority cited above is distinguishable because it specifically dealt with immovable property. When disposed of and the title has passed to an innocent purchaser for value, the likelihood of recovery of the property is almost none, which would render the appeal nugatory. However, in the instant case we are dealing with cash at the bank. If the agency notice is implemented and money paid to the URA, and the appeal succeeds, resort shall be made to S28 (2) of the Tax Appeals Act (as amended).

“Where the decision maker is required to refund an amount of tax to a person as a result of a decision of a reviewing body, the tax shall be repaid with interest at the rate specified in the relevant law on the amount of the refund for the period commencing from the date the person paid the tax refunded and ending on the last day of the month in which the refund is made.”

Therefore, considering the above provision the substantive application will not be rendered nugatory, in the event that the substantive application is determined in the applicant’s favor.

Additionally, both parties agree that an agency notice in respect to a sum Ush.15, 039,577,028/= was issued by the respondent against the applicant on the 2nd December 2021. According to Annexure D to the affidavit in support to the Motion, the notice states that the payment is to be effected on the date of receipt of the Agency Notice. Since the agency notice has already been issued and demand for

payment is upon receipt, granting this interim order of stay of execution in this application would be making an order in futility.

It has to be appreciated as noted in **National Enterprise Corporation Vs Mukisa Foods** above; the purpose of interim stay is to preserve the status quo. Since there is an agency notice, issuing this application in favor of the applicant would mean that the agency notice should vacate which would interfere with the status quo. This would be contrary to the principles of the grant of an interim Stay.

With the above I'm unable to be persuaded by the applicant.

1. This application is therefore dismissed.
2. The Registrar of this Court is hereby directed to fix Miscellaneous Application No.398 of 2021, for hearing in the next convenient session.
3. Costs shall abide the outcome of the substantive application.

I so order.

Dated at **Kampala** this.....^{18th}..... day of **February 2022**.

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C. GASHIRABAKE
JUSTICE OF APPEAL