

**THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA
AT KAMPALA**

5 **CORAM:** *HON. LADY JUSTICE L.E.M.MUKASA- KIKONYOGO, DCJ.*
HON. MR. JUSTICE S.G.ENGWAU, JA.
HON. LADY JUSTICE C.K.BYAMUGISHA, JA.
HON. MR. JUSTICE S.B.K.KAVUMA, JA.
HON. MR. JUSTICE A.S.NSHIMYE, JA.

10

CONSTITUTIONAL PETITION NO.18/07(REFERENCE)

15

BETWEEN

UGANDA PROJECTS IMPLEMENTATION&
20 MANAGEMENT CENTRE:::::::::::::::::::::::::::::::::PETITIONER

AND

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

25

RULING OF THE COURT.

This is a constitutional reference sent to this court by the Tax Appeals Tribunal. It was sent
30 under the provisions of **Article 137(5)** of the Constitution which provides as follows:

*“Where any question as to the interpretation of the Constitution arises in any proceedings
in a court of law other than a field court martial, the court-*

*(a) may, if it is of the opinion that the question involves a substantial question of law;
and*

(b) Shall if any party to the proceedings requests it to do so, refer the question to the constitutional court for decision in accordance with clause (1) of this article.”

The background to the reference is that the petitioner, a Non-Governmental Organisation
5 carried out a number of community activities mobilizing the population during the National
Housing and Population Census 2002 and voter education during the National Referendum
2005.

The respondent audited the petitioner’s books of accounts for the income year 2000-
2005 arising from the above projects. It assessed tax liability in value added tax (VAT)
10 amounting to Shs 394,700,051 and demanded payment.

The petitioner objected to the demand on grounds that VAT could not be charged on the said
projects as there was no taxable supplies and that even if there was, the money was
collectable from the Electoral Commission. The respondent disallowed the objection and
proceeded to issue third party agency notices upon the petitioner’s bank accounts.

15 The petitioner filed application No.16/2006 with the Tax Appeals Tribunal for a review of the
decision of the respondent and seeking a declaration that no tax was due.

When the application came up for hearing before the Tribunal, the respondent raised a
number of preliminary objections. One of the objections raised was that the application
before the tribunal was premature and incompetent since the petitioner had not complied with
20 the provisions of **section 34 (C)** of the Value Added Tax Act that requires a tax payer to pay
30% of the tax assessed before lodging an application to the Tribunal objecting to the
assessment.

The petitioner contended before the tribunal and before us, that the requirement to pay 30 %
of the tax assessed before it could lodge an appeal against such an assessment contravenes

25 **Articles 21 and 126(2) (a)** of the Constitution, in that it is denied the right to access justice.

The petitioner requested the matter to be referred to this Court for resolution. The tribunal
agreed and the following question was framed for our determination and interpretation.

**Whether S.34 C (3) of the Value Added Tax Act Chapter 349 as amended by the Finance
Act 2001 contravenes articles 21 and 126(2)(a) of the 1995 Constitution of Uganda in as
30 far as it requires a person, before lodging an application with the Tax Appeals Tribunal,
to pay to the Commissioner General 30% of the tax in dispute or that part of the tax
assessed not in dispute, whichever is greater.**

We shall first set out the provisions of the law and the provisions of the articles of the Constitution that require interpretation.

Section 34C (3) of the Value Added Tax Act as amended by the Finance Act 2001 provides as follows:

- 5 ***“A person shall, before lodging an application with the Tribunal, pay to the Commissioner General, 30% of the tax in dispute or that part of the tax assessed not in dispute, whichever is greater.”***

Part of **Article 21** of the Constitution states that:

10

“(1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other aspect and shall enjoy equal protection of the law.

- 15 ***(2) Without prejudice to clause (1) of this article a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed, or religion, social or economical standing, political opinion or disability.***

- 20 ***(3) For the purpose of this article, ‘discriminate’ means to give different treatment to different people attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economical standing, political opinion or disability.”***

Article 126(2) provides thus:

- 25 ***“In adjudicating cases of both a civil and criminal nature, the courts shall subject to the law, apply the following principles-***
 a) Justice shall be done to all irrespective of their social or economic status;”

Both counsel filed conferencing notes and made oral submissions.

- 30 Mr Cephas Birungi, who represented the petitioner, premised his submissions on fundamental human rights in general, with emphasis on the right of access to justice which he claimed was part and parcel of fundamental rights.

He relied on the following authorities:

Ndyanabo v Attorney General [2001] EA 495

Lezama & others v Attorney General of Trinidad & Tobago HCA Cv 2098/2002

Olum & another v Attorney General [2002] 2 EA 508

Olum & another v Attorney General [2001] 1 EA 258

Learned counsel submitted that the requirement to pay 30% is discriminatory in that if it is not paid, one cannot be heard in the Tax Appeals Tribunal. It was counsel's contention that the restriction of paying 30% takes away the right to access court. He invited court to find that the requirement to pay 30% of the tax is unconstitutional

In reply, counsel for the respondent opposed the reference. He submitted that discrimination and unequal treatment has not been made out. He contended that access to court is not denied by the impugned section and that even if it was found to be a limitation to a right to access to justice, the same can be justified under **article 43** of the Constitution. Learned counsel further submitted that for the petitioner to come to this court, it should establish that it is discriminated against as opposed to other persons.

Commenting on the case of **Ndyanabo v Attorney General** (supra) counsel pointed out that the provision that was being challenged, demanded payment of 5 million shillings as security for costs by the petitioner, whereas the same section did not require the respondent to pay the same amount or any amount at all. He further pointed out that the impugned section treats all tax payers equally and the respondent is not a tax payer and therefore the section does not apply to it.

He pointed out the provisions of **section 34(3)** of the Value Added Tax Act which provides that where a tax payer has lodged an objection or an appeal against the assessment, the tax assessed is due and payable and may be recovered, notwithstanding the objection or the appeal.

He also submitted that the Commissioner-General has powers to extend the time for payment of tax beyond the date on which it is due or make some other appropriate arrangements to ensure payment of the tax due.

Learned counsel further submitted that the petitioner has not established by affidavit evidence that the Tax Appeals Tribunal could not accept the application because of the impugned section.

He cited an authority of the Constitutional court of South Africa- **Metcash Trading Ltd v Commissioner for South African Revenue Services & another (2000) ZACC 21** in which the petitioner complained that section 36 which is similar to our section 34(C) denied it access to court. This argument was rejected by the Constitutional court.

Counsel further argued that the restriction of access to court is saved by article 43 and is justified under public interest since it is the duty of every citizen to pay taxes for the common good. Taxes according to counsel, are recovered to run government functions.

He invited court to dismiss the petition with costs.

- 5 Mr Barata for the petitioner made a brief reply and stated that the restriction of paying 30 % takes away the right to access to court.

Chapter 4 of the Constitution deals with protection and promotion of fundamental and other human rights and freedoms.

- 10 It is evident from these provisions that some rights and freedoms are absolute while others are subject to some limitations and qualifications.

Before dealing with the issues that have been raised, it is important to remind ourselves of the principles of constitutional interpretation which have been laid down in many authorities of this court and the Supreme Court. In the case of **Attorney General v Silvatori Abuki**

- 15 **Constitutional Appeal No.1/98(SC)** Oder JSC stated the principle in the following words:

“The principle applicable is that in determining the constitutionality of legislation, its purpose and effect must be taken into consideration. Both purpose and effect are relevant in determining constitutionality of either an unconstitutional purpose or unconstitutional effect animated by an object the legislation intends to achieve. This object is realized through the impact produced by the operation and application of the application of the legislation. Purpose and effect respectively, in the sense of the legislation’s object and ultimate impact are clearly linked if not indivisible. Intended and actual effect has been looked up for guidance in assessing the legislation’s object and thus, its validity. See The Queen v Big Drug mark Ltd (Others Intervening) 1996 LRC (Const).332”.

- 25 What this means is that if the purpose of an Act of Parliament is inconsistent with a provision of the Constitution, the Act or the provision being challenged shall be declared unconstitutional. Similarly, if the effect of implementing a provision of the Act is inconsistent with a provision of the Constitution, that provisions of the Act shall be declared unconstitutional. The reason for this is that the Constitution is the supreme law of the land.

- 30 In the case of **Ndyanabo** (supra) which counsel for the petitioner cited to us, the Court of Appeal of Tanzania stated the principles thus:

“In interpreting the Constitution the court would be guided by the general principles that (i) the Constitution was a living instrument with a soul and consciousness of its own, (ii) fundamental rights provisions had to be interpreted in a broad and liberal manner,(iii)

there was a rebuttable presumption that legislation was constitutional, and(iv)the onus of rebutting the presumption rested on those who challenged the legislation’s status save that, where those who supported a restriction on a fundamental right relied on claw back or exclusion clause, the onus was on them to justify the restriction.”

5 The law is that every statute must be interpreted on the basis of its own language and words derive their own colour and content from the context and the object of the statute is of paramount consideration. See **Lall v Jeypee Investment [1972] EA 512** and **Attorney General v Prince Ernest of Hanover (1957) A.C.436**

10

With those broad principles in mind we shall consider the facts of the petition or reference. There is no doubt that access to court is one of the fundamental rights and freedoms that every individual in society is entitled to. It is connected to the rule of law and the universally accepted standards of justice which are observed by civilized nations which observe the rule of law.

15

There is no doubt that the impugned provisions impose restriction to the enjoyment of a fundamental right. In order for the petitioner to succeed it has to show that the impugned section is arbitrary, unreasonable and unjustified.

20

Payment of tax usually commences with the tax payer filing tax returns with the respondent. This is a voluntary act on the part of the taxpayer. This process is followed by the payment of the relevant tax as assessed by the respondent in accordance with information contained in the returns filed by the tax payer.

25

In the case of Value Added Tax, the filing of returns is provided for under **section 31(1)** of the Act.

30

In the event of a tax payer failing to file the necessary returns or where the returns filed do not satisfy the Commissioner –General or where the Commissioner -General has reasonable grounds to believe that a person will become liable to pay tax but is unlikely to pay the amount due, the Commissioner-General may make an assessment. This is provided for under **section 32(1)**

Section 33 of the Act makes provision for matters relating to assessments in general. Sub-section (1) thereof states as follows:

“The production of a notice of assessment or a certified copy of a notice of assessment shall be received in any proceedings as conclusive evidence of the due making of the

assessment, and except in proceedings relating to objections and appeals relating to the assessment, that the amount and all particulars of the assessment are correct.”

This sub-section makes a notice of assessment conclusive evidence that the amounts stated therein are correct.

- 5 Another provision that we would like to refer to is **section 34(3)** of the same Act. It provides as follows:

“Where an objection to or a notice of appeal against an assessment has been lodged, the tax payable under the assessment is due and payable and may be recovered, notwithstanding that objection or appeal.”

- 10 This, section in our view, emphasizes the correctness of the assessment that is why the tax is recoverable notwithstanding that the tax payer is objecting to the assessment or is appealing against the same.

We shall now consider whether the requirement to pay 30% of the tax assessed is an

- 15 infringement of the petitioner’s fundamental right of access to justice.

Learned counsel for the petitioner in arguing this issue relied on the case of ***Ndyanabo v Attorney General*** (supra). The brief facts of the case were that the appellant (Ndyanabo) contested for a Parliamentary seat in the general elections that took place in Tanzania in 2000 and lost.

- 20 He filed an election petition contesting the results. The petition could not be fixed for hearing because the appellant had not complied with a provision in the electoral law that prohibited the fixing of a hearing date unless the petitioner has paid into court the sum of five million Tanzanian shillings as security for costs in respect of the petition.

- The appellant filed a constitutional petition challenging the constitutionality of the section
25 and praying for a declaration that the said section was unconstitutional. He contended that the requirement to pay five million as security for costs before the petition could be heard was arbitrary, discriminatory and unreasonable and therefore it constitutes an unjustified restriction on the right of a citizen to be heard by the court on his complaint against illegalities in the conduct of parliamentary election.

- 30 The Attorney-General contended that the requirement to deposit 5 million Tanzania shillings as security for costs was the avoidance of unnecessary and unreasonable and vexatious petitioners who might bring petitions without any reasonable cause.

The High Court dismissed the petition and the appellant appealed to the Court of appeal. In allowing the appeal, the court said:

“A person’s right of access to justice was one of the most important in a democratic society and in, Tanzania, that right could only be limited by legislation that was not only clear but which was also not violative of the Constitution. The fundamental right of access to justice was what was linked together the three pillars of the Constitution that is the rule of law, fundamental rights and an independent, impartial and accessible judiciary.”

We agree. The question is whether the impugned section imposes limitation on the right of access to court to the petitioner and if so whether such limitation can be justified under **Article 43** of the Constitution. The article provides as follows:

“(1) In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or public interest.

(2) Public interest under this article shall not permit-

(a) political persecution;

(b) detention without trial;

(c) any limitation of the enjoyment of the rights and freedom prescribed under this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society or what is provided under this Constitution.”

The petitioner’s case is based on discrimination under **article 21** and not **article 28** which provides for access to court. In the exercise of judicial functions, the courts are not supposed to be discriminatory in the application of the law in determining rights and obligations of persons who appear before them.

This notion is sometimes expressed in the phrase “equality before the law.” Therefore the judicial process is supposed to be without regard to such characteristics as race, tribe, sex, religion, social or economic standing, political opinion or disability.

In the matter now before us, we have no evidence of discrimination against the petitioner. The provision of the section applies to all tax payers regardless of their religion, tribe, sex, social and economic status etc. It was not pointed out to us that the courts have been applying the provision of the section in a discriminatory manner. The section of course does not apply to the respondent because it is not a tax payer.

There is no dispute as we stated earlier that the impugned section imposes a restriction on the tax payer’s right of accessing court to air whatever grievances he or she might have about the assessment of tax by the tax authority.

Payment of tax is a duty of every citizen under the Constitution- See **Article 17**. Taxes must not only be paid but they must be paid promptly for the public good.

The requirement to pay 30% seems to be premised on the fact that the assessment done by the tax authority is correct in accordance with **section 33**(supra).

- 5 Service delivery by Government is dependant upon prompt payment of taxes and taxes due and payable under the Act is considered a debt to Government- See **section 35** of the Act. In this regard the tax payers are not given a lee way to determine when they should pay their taxes. That is why there is provision for imposing penalties and interest if taxes are not paid in time.
- 10 The intention and purpose of the Act as a whole is to ensure the imposition and prompt payment of value added tax. The requirement to pay 30% of the tax assessed before a tax payer files an appeal with the Tax Appeals Tribunal may be likened to an intended appellant who may be required to furnish security for the due performance of the decree or to deposit the decretal amount in court before proceeding with the appeal process.
- 15 We have not been persuaded that the limitations imposed by the impugned section are arbitrary, unreasonable and demonstrably unjustifiable in a free democratic society. The section does not contravene any of the cited articles of the Constitution. Furthermore, the decision of Ndyanabo (supra) which learned counsel relied upon is distinguishable from the instant case.
- 20 Consequently this reference fails with costs to the respondent.

Dated at Kampala this...10th ...day of...February..2009.

L.E.M.Mukasa-Kikonyogo

25 **Deputy Chief Justice**

S.G.Engwau

Justice of Appeal

30 **C.K.Byamugisha**

Justice of Appeal

S.B.K.Kavuma

Justice of Appeal

A.S.Nshimye
Justice of Appeal

5