

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL COURT DIVISION

HCT-00-CC-MA-0722-2005

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF AN APPLICATION BY

HOUSING FINANCE COMPANY OF UGANDA LTD

APPLICANT

VERSUS

**THE COMMISSIONER GENERAL
UGANDA REVENUE AUTHORITY**

RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

RULING

1. The applicant is seeking leave of this court to apply for judicial review in respect of a decision by the Commissioner General of Uganda Revenue Authority, herein referred to as the respondent, made on 22nd September 2005, ordering the applicant to pay Shs.2,427,486,928.00 as Value Added Tax, hereinafter referred to as VAT on 3 projects administered by the applicant.
2. It is contended for the applicant that the respondent wrongly mis-appreciated the services rendered by the applicant and put them out of the domain of financial services, which is exempted from VAT. It is asserted that this assessment was illegal, high handed, and arbitrary and ought to be quashed as the item upon which it was charged is an exempted supply under the VAT Act. This application is specifically for leave of this court to apply

for judicial review, and seek orders of certiorari and prohibition to quash the said decision. The application is supported by an affidavit of Patrick Kabonero, the General Manager, of the applicant.

3. Mr. James Nangwala, learned counsel for the applicant, in his submission to this court stated that all he has to show at this stage is whether there was a decision in respect of which judicial review is sought. He submitted that the decision of the respondent of 22nd September 2005 is such kind of decision that is subject to judicial review as the decision was both arbitrary and amounted to a wrong interpretation of the law.
4. I need to point out at the outset, without attempting to evaluate fully the merits of the application for judicial review, something that would be done at the next stage, that on the evidence put forth by the applicant the decision complained of is anything but arbitrary or high handed. It may well be the result of wrong interpretation of the law, but the decision complained of was arrived at after receipt of the applicant's views on the subject matter of the decision.
5. Some of the applicant's views were accepted, and some were rejected, and the reasons provided for such rejection in the letter communicating the decision of 22nd September 2005. According to the Concise Oxford Dictionary, arbitrary is defined as 'based on uninformed opinion or random choice; capricious, 2 despotic'. Page 55, The Concise Oxford Dictionary, 8th Edition. The decision complained of is neither arbitrary in the ordinary meaning of the word, nor high handed as contended by the applicant.
6. I drew Mr. Nangwala's attention to the fact that the applicant has a statutory right of review to the Tax Appeals Tribunal against the decision of the respondent. In response thereto Mr. Nangwala stated that the applicant was out of time with regard to lodging an

application for review before the Tax Appeals Tribunal. Secondly, Mr. Nangwala submitted that this court has jurisdiction to entertain the matter by way of judicial review, and relied on the case of Rabo Enterprises (U) Ltd and Anor versus Commissioner General Uganda Revenue Authority Court of Appeal Civil Appeal No.55 of 2003.

7. Firstly on an application for leave to apply for judicial review, the applicant must show that he has standing, sufficient interest in the decision being contested, and relief sought. The applicant must also show that he has an arguable case. The threshold at this stage need not, necessarily, be high. Without question in the case before me the applicant has both standing and sufficient interest in the decision complained of. However, that is not the end of the matter.
8. Where an applicant has alternative remedies at law, such as a statutory right of appeal, the position in England and Wales, and Scotland, is that, it is incumbent upon the applicant to show, why it is inappropriate to take the ordinary path, and instead, it is appropriate that the matter be dealt with by way of judicial review. In the words of Sir Donaldson MR, in R v Secretary of State for the Home Department, ex parte Swati [1986] 1 All ER 717 at page 722,

‘.....it is well established that, in giving or refusing leave to apply for judicial review, account must be taken of alternative remedies available to the applicant. This aspect was considered by this court recently in R v Chief Constable of Merseyside Police, ex pa Calveley [1986] 1 All ER 257, [1986] 2 WLR 144 and it was held that the jurisdiction would not be exercised where there was an alternative remedy by way of appeal, save in exceptional circumstances. By definition, exceptional circumstances defy definition, but, where Parliament provides an appeal procedure, judicial review will have no place unless the applicant can distinguish his case from the type of case for which the appeal procedure was provided.’

9. I have not been able to come across a Ugandan decision on the matter. The case cited by Mr. Nangwala, a copy of which was provided, is not helpful, as it is not on the point. What the Court of Appeal dealt with in *the Rabo Enterprises (U) Ltd and Anor v Commissioner General Uganda Revenue Authority* is whether the High Court's unlimited jurisdiction in all matters was ousted or not in respect of the matters that the Tax Appeals Tribunal had jurisdiction to handle. The Court of Appeal decided that the High Court had unlimited jurisdiction in all matters including the case that was before the High Court, in which the High Court had declined jurisdiction.
10. In the instant case, I am satisfied that this court has jurisdiction. The question before me is whether this is an appropriate case for this court to exercise its discretion, and grant leave to the applicant to proceed by way of judicial review, in a matter for which the applicant has an alternative remedy, a statutory right of review, which he has not exercised.
11. Mr. Nangwala stated that the applicant was out of time to lodge an application for review before the Tax Appeals Tribunal, the period being 30 days from the date the decision is served upon the intending applicant. I agree that that is so. Section 16(1) (c) of the Tax Appeals Tribunal Act, provides so. But provision is made for an application to be made to the Tax Appeals Tribunal to extend time within which to lodge an application for review under Section 16(2) of the Tax Appeals Tribunals Act. In any case under Section 16(7) of the same Act, it is provided, 'An application for review of a taxation decision shall be made within six months after the date of the taxation decision.' The applicant may well still be in time to lodge its application for review.

12. In cases such as this application, I am persuaded to follow the view expressed by Sir Donaldson MR in R v Secretary of State for Home Affairs ex parte Swati, that leave to proceed by way of judicial review may be withheld, where parliament has provided for an alternative remedy, unless the applicant is able to show some exceptional circumstances, or some other ground why it is inappropriate for the matter to be dealt with by way of review by the Tax Appeals Tribunal, and that the matter can, more appropriately, be dealt with by this court by way of judicial review. The applicant has failed to do so in the instant case. The application for leave for judicial review is refused accordingly.

13. I must hasten to add that there are exceptions to the 'rule' at hand. If a matter in question or decision in issue is questioned on the basis of the same being *ultra vires* or procured by fraud, ill will, bias, or some other circumstance that makes it imperative that judicial review be embarked upon, leave may be granted regardless of the existence of an alternative remedy. Leave lies within the discretion of the court.

14. Before I take leave of this matter I would like to note that Mr. Nangwala provided court with a copy of the decision of the Court of Appeal in Rabo Enterprises (U) Ltd and Anor v Commissioner General Uganda Revenue Authority (Supra) referred to above. The decision had only the opinion of one justice of appeal out of a Coram of three who heard the matter. What the other justices decided is not available. Worse still the opinion was missing page four. This was not helpful at all. If counsel are going to pass on any authorities to the court, counsel must ensure that the authority is complete.

Dated, Signed and Delivered in Kampala this 14th December 2005

FMS Egonda-Ntende
Judge