THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

COMMERCIAL COURT DIVISION

HCT-00-CC-MC-0017-2005

Samuel Mayanja Applicant

Versus

Uganda Revenue Authority Respondent

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

RULING

1. This is an unusual application. The applicant is an aggrieved taxpayer. After receiving an assessment from the respondent he filed an application for review before the Tax Appeals Tribunal. The application was received and is recorded as TAT No. 22 of 2006. The said application unfortunately cannot be heard immediately as the Tax Appeals Tribunal has no members for the moment. The tenure of its last members expired and no new members have been appointed. This claim is not contested by the respondents.
2. In the meantime the respondent issued agency notices under the Income Tax Act and the Value Added Tax Act to Standard Chartered Bank (U) Ltd, DFCU Bank, and Kampala Associated Advocates seeking the collection of various amounts of outstanding Income Tax and Value Added Tax due from the applicant.
3. Ordinarily if the Tax Appeals Tribunal was functional it has the duty among other things to decide on the operation and implementation of the decision that is the subject matter of the application for review before it under Section 28 (1) of the Tax Appeals Tribunal Act. In the case the decision of the tribunal as appealed to the appellate court would have the duty to determine all questions about the operation and implementation of the decision on appeal.
4. The applicant has now come to this court, not under its appellate jurisdiction, as there is no appeal, but under its original jurisdiction, under, inter alia, Section 38 (1) of the

Judicature Act, seeking a temporary injunction, to restrain the respondent from the enforcement of the agency notices issued, and from issuing further agency notices in respect of the tax demanded from the applicant.

5. The grounds in support of this application are stated to be contained in the affidavit of Mr. Samuel Mayanja attached to the application but were briefly stated to be six and are particularised in the notice of motion. Firstly that the applicant is challenging the assessment of Shs.229,336,136.00 as income tax by the respondent. Secondly that the said application is not fixed for hearing as there is no tribunal in place to hear and determine the matter expeditiously.
6. Thirdly the respondent has issued agency notices to recover the disputed taxes. Fourthly that unless the respondent is restrained from demanding and collecting the said amount from the applicant pending the determination of application no.22 of 2006 before the Tax Appeals Tribunal, the applicant will suffer irreparable damage. Fifthly that the applicant has a high chance of success in the aforesaid application. Lastly that it is in the interests of justice that this application be allowed.
7. The respondent opposed this application and filed an affidavit in reply sworn by Mr. Moses Kazibwe Kawumi, Assistant Commissioner, in charge of litigation of the respondent.
8. Mr. Mbalinda, learned counsel who appeared for the applicant, submitted, that though this matter is a matter that is within the jurisdiction of the Tax Appeals Tribunal, this court is also seized with jurisdiction, and can entertain the matter. He submitted that as the Tax Appeals Tribunal is not functional this court has the jurisdiction to deal with this matter.
9. Mr. Mbalinda further submitted that an applicant in an application of this kind must show that there is a pending suit, if the prayer is not granted he will suffer irreparable harm and that on the balance of convenience the applicant will suffer more than the respondent if the application is not granted. He attacked the claim in the respondent's affidavit that this application before Tax Appeals Tribunal is bound to fail, contending that at this stage, the applicant need only show that there is a triable issue. He referred to the cases of American Cyanamid Company v Ethicon Ltd [1975] 1 All ER 504 and Amrit Goyal v Hari Chand Goyal and Others [1997-2001] UCLR 175 in support of his submission.

10. Mr. Mbalinda submitted that the trial issue in this matter is that the tax assessed was assessed on the basis of income that did not accrue to the applicant, and was not received by the taxpayer. He submitted that the applicant will suffer irreparable damage as his accounts are now encumbered by agency notices and he can not access his income. The applicant has been banned from not travelling outside the country and this will adversely affect his business travel. The applicant will be prevented from earning income by reason of the acts of the respondent.
11. Mr. Mbalinda further argued that even if the agency notices were provided for in law, Section 38 (c) of the Judicature Act allows this court to issue an injunction to restrain a party who may have a right to do an act that he is being restrained from doing.
12. Mr. Muliisa, learned counsel for the respondent, opposed the application. He submitted that following the case of Kiyimba Kaggwa v Hajji Katende H.C.C.S.No.2109 of 1984, 1985 [HCB] 43 it was held that there must be a pending suit and proof of irreparable damage before a temporary injunction is granted. He submitted that there is no suit pending before this court. A suit pending before another court is not sufficient to trigger into play an order for a temporary injunction and he relied on the case of Muwayire Nakana & Co. Advocates v The Departed Asians Property Custodian Board, H.C.M.A. No. 26 of 1987, 1987 [HCB] 91. Application TAT No.22 is a proceeding in another court.
13. Mr. Muliisa further submitted that the applicant had not established that it will suffer irreparable harm that would not be atoned for by damages. The agency notices would not cause any irreparable harm. Secondly the travel ban was not a subject of this application as it is not at all mentioned in the notice of motion. This court has no reason to look at it.
14. Mr. Muliisa further argued that in light of the admission of the applicant that it had not paid the 30% of the tax assessed as required by the law on filing its application before the Tax Appeals Tribunal, that application before Tax Appeals Tribunal is prematurely before it. One cannot therefore consider whether there is a triable issue. In the alternative Mr. Muliisa, stated that should this court be inclined to grant the application, the applicant should be ordered to provide security for payment of taxes.
15. It is clear to me that this is not application made under Order 41 Rules 1 or 2 of the Civil Procedure Rules (2000 Rev. Ed.). Nevertheless the counsel for either side has approached this application as if it is one made under those provisions and liberally cited

authorities that apply to applications brought under those provisions, without reference to the provisions under which this application is stated to be brought. These decisions are not very helpful with regard to the matter at hand. The provisions of Order 41 Rules 1 and 2 of the Civil Procedure Rules deal with applications for temporary injunction as an interlocutory matter in a pending proceeding before the court. Clearly here there is no pending proceeding before this court. TAT No.22 of 2006 is pending before another tribunal of first instance in matters related to resolution of tax disputes.

16. This application refers to Sections 14, 33, 38(1) of the Judicature Act, as the law under which this application has been brought. Section 14 recognises the unlimited original jurisdiction of the High Court, which is conferred by the Constitution, and further provides for the law applicable in exercise of such jurisdiction. Section 33 of the Judicature Act, is a general provision with regard to remedies in the exercise of the jurisdiction of the High Court. These provisions are not of much assistance.
17. Section 38 (1) of the Judicature Act specifically deals with the grant of injunctions. It states, 'The High Court shall have power to grant an injunction to restrain any person from doing any act as may be specified by the High Court.'
18. Clearly the High Court is granted the power in appropriate cases to grant injunction as a remedy. I have not been able to come across any case law that offers guidance on how this provision has been applied in the past. Neither have any of the parties in these proceeding drawn my attention to such specific case law.
19. Given the circumstances of the applicant, and the fact that the Tax Appeals Tribunal, for the moment, exists only in name, it is imperative that he must not be denied redress or access to justice on account of the none-functionality of the Tax Appeals Tribunal. This court has original unlimited jurisdiction in all matters, and is thus seized with jurisdiction to determine the matter addressed to it by the applicant, in these rather unusual circumstances.
20. The applicant seeks temporary relief pending the coming to life of the Tax Appeals Tribunal and the hearing of the application for review of the tax decisions of the respondent and all related matters. In this case it is important for the applicant to demonstrate that but for the absence of the Tax Appeals Tribunal he had otherwise

complied with the obligations imposed upon him on initiating proceedings under the Tax Appeals Tribunal Act.

21. Section 15 (1) of the Tax Appeals Tribunal Act states,

> 'A taxpayer who has lodged a notice of objection to an assessment shall, pending final resolution of the objection, pay 30 per cent of the tax assessed or that part of the tax assessed not in dispute, whichever is greater.'

22. It appears to me that once a taxpayer has lodged an application for review under the preceding section, as the applicant did in this case, such taxpayer was obliged to deposit at least 30 per cent of the tax assessed.
23. In this case not only did the applicant not deposit 30 per cent of the tax assessed, by admission of his counsel, but the applicant has argued before this court, that he is not obliged to deposit this 30 percent deposit, in respect of the Income Tax assessed. Asked for the authority for this proposition, the applicant's counsel, Mr. Mbalinda, was unable to point to any authority for such proposition.
24. Mr. Mbalinda argued that 30 per cent deposit applies only to VAT. He again provided no authority, statutory or otherwise for this proposition. Nevertheless even if that were so, no deposit has been made by the applicant with respect to the VAT component of the tax assessed, to appear to comply with the position put forth by Mr. Mbalinda.
25. Where an applicant comes to this court in circumstances of this nature, seeking an injunction to restrain the respondent from carrying out activities that it is empowered by statute to perform, it is important that he demonstrates that for his part he has complied with the obligations cast upon him by the law. In the instant case the applicant has not complied with the obligations cast upon him with regard to the deposit of 30 per cent of the tax assessed. He provides no illuminating explanation as to why he has not done so.
26. It is not the contention of the applicant that the respondent had no power under the law to issue the agency notices in question. Neither is it suggested that the respondent is acting capriciously or unreasonably in the exercise of such powers. What the applicant argues is that he will suffer irreparable harm if the agency notices are enforced against him. In his affidavit of 13th September 2006 save for the allegation of irreparable harm no proof or particulars of the irreparable harm that he is likely to suffer is provided.

27. The applicant filed on the day of the hearing of the application, 4 October 2006, an affidavit he entitled 'Affidavit In Rejoinder', in which he repeated the matters already in his earlier affidavit and added on averments about a travel ban imposed by the respondent. Mr. Muliisa objected to the court having regard both to the affidavit, as it had been filed without leave of court and to the contents as the matter of the travel ban was not an issue on the application before the court.
28. Mr. Mbalinda strenuously argued that the travel ban was included in the application by virtue of the order sought stated in paragraph one of the notice of motion that included the following words, '…issuing further agency notices or otherwise enforcing the payment and collection of Shs.229,336,132.00…..'.
29. I am constrained to agree with Mr. Muliisa. Firstly no leave of this court was sought and obtained before filing a further affidavit in the matter. Where an applicant files an application under Order 52, such applicant is required under Order 52 Rule 3 of the Civil Procedure Rules, to attach an affidavit or affidavits to the notice of motion. The rule states in part, 'where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion.' The rule does not envisage any further affidavits to be filed by the applicant. Where the applicant wants to file a further affidavit, he ought in my view, to seek the leave of the court, otherwise the proceedings may turn simply into an unregulated game of 'ping pong'. As the affidavit was filed without leave of the court, and it was objected to by the respondent, I shall not have regard to the same.
30. I do not accept the suggestion by Mr. Mbalinda that the travel ban was the subject of the notice of motion. The notice of motion is specific to agency notices. The general reference to 'otherwise enforcing the payment and collection of Shs….' must be read in relation to the specific items that came before it. In addition a travel ban is such a specific order that if any relief was needed in respect of the same the relief had to be sought specifically in relation to it, especially where the travel ban had issued already. Nowhere in the notice of motion of the applicant and the attached affidavit of Mr. Mayanja of 13th September 2006 was the travel ban mentioned.
31. I am satisfied that the applicant has not established that it would suffer irreparable harm if the agency notices were left in place. No doubt hardship my flow from their imposition.

However, in the circumstances of this case, I am not sure that hardship alone would be sufficient ground to stay the operation of agency notices.

32. Neither am I sure whether, if irreparable harm were to be proved, that would be sufficient, without more, for this court to exercise its discretion, and grant an order that would in effect restrain the respondent from exercising powers available to it by statute. That is a point I do not decide in this case.
33. I find no ground available to me upon which I can grant the orders sought by the applicant. I accordingly dismiss this application with costs.

Signed, dated and delivered at Kampala this 11th day of October 2006

FMS Egonda-Ntende
Judge