

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

COMMERCIAL COURT DIVISION

HCT-00-CC-CS-0301-2005

Highway Trading Company Limited

Plaintiff

Versus

The Attorney General

Defendant No.1

Kampala City Council

Defendant No. 2

Legislation referred to:

1. *Local Government Act, Cap 243*
2. *Constitution of Uganda*

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

RULING

1. The plaintiff entered into a contract with Kampala City Council, hereinafter referred to as KCC, on 1 November 2003 to collect monthly taxes from Boda-Boda operators in Rubaga and Makindye Divisions for a period of 3 years. A written agreement was executed between the parties. The cycling licence or operating licence was Shs.10,000.00 per month. It appears that the plaintiffs started executing their part of the bargain until sometime in early 2004 when the office of the Resident District Commissioner Kampala intervened, and effectively stopped the plaintiffs from performing this contract.

2. The plaintiffs requested KCC to provide them with law enforcement staff to enforce collection of the tax, but to no avail. The plaintiff therefore brings this action against the Attorney General in respect of the acts of the District Commissioner, Kampala and against KCC for breach of contract.
3. The plaintiff seeks as against the Attorney General, declarations for its rights, special damages, general damages and exemplary damages and costs of the proceedings. The plaintiff seeks against KCC special and general damages for breach of contract and costs of these proceedings.
4. The Attorney General, in his defence, contends that the tax imposed by KCC, was not authorised by law, and was therefore unlawful. The Attorney General further contends that the contract to collect the tax was therefore illegal. The Attorney General further asserts that the actions of the Resident District Commissioner were not unlawful, and were in the scope of his statutory duties.
5. KCC pleaded that on its part it was ready and willing to perform the contract but that the contract was frustrated by government. It denied negligence. In the alternative it contended that if this contract was illegal, then the action can not be maintained under the principle *ex turpi causa oritur non action*.
6. At scheduling stage it was agreed that I shall try the first issue of whether or not the tax to be collected under the contract was authorised by law. This ruling is in respect of the court's decision on that preliminary point of law.
7. Mr. Peters Musoke, learned counsel for the plaintiff submitted that the Boda-Boda Tax was a fee authorised by the Local Government Act, Cap 243, the 5th Schedule thereto, under regulation 13(a) thereof as annual bicycle licence. He submitted that bicycle includes both a vehicle manually propelled by foot pedals or propelled by a small engine.
8. Secondly Mr. Peters Musoke submitted that Second Schedule to the Local Government Act, Regulation 26, authorises an urban council such as KCC, to regulate including fixing fees or charges for any of the things or services the council is required or empowered to do. These functions are not limited to those set out in part 2 and part 3 and would include fixing or imposing the Boda Boda tax. The local government councils are responsible for any functions not reserved for Government, and imposing Boda Boda tax is not reserved for the central government.

9. Lastly Mr. Musoke argued that the maintenance of the roads and control of their use is one of the functions reserved for the local government hence taxing the users to that extent, for the use of the roads, as per 2nd Schedule, part 3, Regulation 1(z) of the Local Government Act, I presume.
10. Mr. Sendege, learned Counsel for the defendant no.2, submitted in substantially similar terms as counsel for the plaintiff. Mr. Mwaka, the learned Senior State Attorney, appearing for the Attorney General, submitted that though it is true that local governments are entitled to impose taxes the imposition of those taxes is dependent on the local government passing an ordinance to allow the collection of taxes. No ordinance was passed by KCC in this regard.
11. Secondly, Mr. Mwaka, submitted that the tax the council purported to collect was not the annual bicycle licence. Instead they were collecting a monthly licence which was illegal. Lastly he submitted that a boda boda is a motor cycle, and cannot qualify to be a bicycle, as strenuously argued by counsel for the plaintiff and counsel for defendant no.2.
12. Resolution of this must start with looking at Articles 152 and 191 of the Constitution of Uganda, which provide for taxation in Uganda. It states, '(1) No tax shall be imposed except under the authority of an Act of Parliament.'
13. Article 191 of the Constitution States,

'(1) Local governments shall have power to levy, charge, collect and appropriate fees and taxes in accordance with any law enacted by Parliament by virtue of article 152 of this Constitution. (2) The fees and taxes to be levied, charged, collected and appropriated under clause (1) of this article *shall consist of rents, rates, royalties, stamp duties, cess, fees on registration and licensing and any other fees and taxes that Parliament may prescribe.*'
14. The Constitution provides that the revenue of local governments shall consist of rents, rates, royalties, stamp duties, cess, fees on registration and licensing, and other fees and taxes that that may be prescribed by Parliament. It is Parliament to make the law, firstly that would authorise the tax. Secondly the nature of the tax to be charged and collected would have to be prescribed by Parliament. The Local Government Act sets out the fees and taxes that local governments are authorised to levy, charge, collect and appropriate.

There are other Acts of Parliament authorising different taxes and licences to be levied by the local government.

15. It is clear that it is Parliament to authorise the taxes that the local governments may levy. Once authorised by an Act of Parliament, the local governments, acting in accordance with such law, may proceed to levy, charge, and collect the same. If there is no authority of an Act of Parliament to levy and collect a particular tax, the levying and collection of such tax is illegal, as it is not authorised by Act of Parliament.

16. It is submitted that the boda boda monthly tax is imposed under the Local Government Act, Cap 243, Laws of Uganda, 2000 Rev Ed. Firstly it is contended that this is under the Local Government Revenue Regulations, the 5th Schedule to the Local Government Act, hereinafter referred to as the Regulations. The relevant regulation is 13 which states,

‘Other Revenue In addition to graduated tax, rates and grants from the Government, local government revenue shall consist of ---

(a) fees and fines on licenses and permits in respect of any service rendered or regulatory power exercised by the local council,

(b),

(c)

(d)

(e)

(f)

(g) annual bicycles licences;

(h) parking fees’

17. It is contended that this boda boda tax is the annual bicycle licence’. Nothing could be further from the annual bicycle licence. The boda boda tax is monthly. It is not annual. It is not restricted to bicycles. It applies, most probably, to motor cycles. Counsel have made strenuous efforts to define bicycles in such a way as to include motor cycles. Regardless of the success of those efforts, the boda boda tax is simply not an annual bicycle licence as provided by the regulations. The boda boda tax is monthly, and this alone is fatal, as its imposition is at variance with what was authorised by the an Act of Parliament. The boda boda tax is not authorised under regulation 13(g) of the Local Government Revenue Regulations.

18. I turn to the second route put forth by both counsel for the plaintiff and for the defendant no.2 as authorising the boda boda tax. It is contended that this is an area that an urban council has regulatory responsibility for, and is therefore authorised to charge fees in accordance with Regulation 13(a) of the Local Government Revenue Regulations. The first problem with this approach is that it indicates that defendant no.2 cannot precisely determine on which provision this tax is based. It is moving from one provision to another. Its legal basis is at best imprecise, a situation that is unacceptable in tax matters. The legal basis for the tax must be certain.
19. If indeed the defendant no.2 exercised its powers under Regulation 13(a) of the Regulations and imposed boda boda tax, there is no legal instrument, presented to this court, in the form of an ordinance, that was promulgated to signify the exercise of this power and the imposition of the tax, including the rate thereof by the local government council, the body with legislative powers under the Local Government Act, Cap 243.
20. Boda Boda tax is a new tax, not falling among the heads of revenue that parliament directly authorised, when it enacted the Local Government Act. For instance, if, instead of providing for a boda boda tax, what the council had passed in its budget was parking fees for motor cycles for hire, this would entirely be acceptable, as this is authorised under the Local Government Act. But simply to list in its heads of revenue in a budget, that a boda boda tax, shall raise so much at such a rate per boda boda, in this budget cycle, is not sufficient.
21. The boda boda tax is not known under the Local Government Act. Neither is it known under any other Act of Parliament. KCC did not promulgate any ordinance in accordance with its powers under the Local Government Act, which gives birth to this tax, for this tax to be truly authorised under the legislative authority of the local government council. But even if that were so, I am not sure if it would pass constitutional muster given the provisions of Articles 152(1) and 191(1) of the Constitution which allow levying of only taxes authorised by an Act of Parliament. For purposes of this decision it is unnecessary to decide that point.
22. In the result I am satisfied that this boda-boda tax, apparently imposed by way of an agreement between the plaintiff and defendant no.2, is illegal.

Signed, dated and delivered this 1st day of November 2006

FMS Egonda-Ntende
Judge