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Meera Investments Ltd V- Commissioner-General of Uganda Revenue Authority HCT-00-CC-MA-0218-2006 [2007] UGCommC 22 (28 February 2007).

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

COMMERCIAL COURT DIVISION

HCT-00-CC-MA-0218-2006

(Arising from HCT-00-CC-CS-0189-2006)

Meera Investments Ltd Applicant

Versus

Commissioner-General of Uganda Revenue Authority Respondent

28th February 2007.

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

RULING

1. The applicant, M/s Meera Investments Ltd, is seeking a temporary injunction to issue in favour of the applicant/plaintiff restraining the respondent/defendant no.3 by herself or through her servants or agents and or assignees of whatever title from collecting the allegedly unpaid taxes in the sum of Uganda Shs.36,514,786,374.00 or taking any other step in relation to assessment, collection or dealing with any tax liability until disposal of the main suit herein and a further order that costs be in the cause.
2. This application is supported by 3 affidavits sworn by Mr. Sudhir Ruparelia, the Managing Director of the applicant. It is opposed by the respondent who has filed 2 affidavits in support of her position. The application is made under Order 41 Rule 2 of the Civil Procedure Rules.
3. In the head suit, the applicant brings the action against the Attorney General, Uganda Investment Authority and the Commissioner General of Uganda Revenue Authority, defendants no. 1, 2 and 3 respectively, jointly and severally, for declaratory orders, damages and a permanent injunction against defendant no.3.
4. The plaintiff was issued with a certificate of incentives in accordance with the Investment Code 1991, in 1994, in respect of estate development by defendant no.2. The applicant contends that relying on the defendants No.1, 2 and 3's interpretation, clarification and treatment of the certificate of incentives, a tax liability of Shs. 36,514,786,374.00 is being placed on it, for which it claims damages against all the 3 defendants. It contends that it has suffered loss and damage as a result of the misrepresentations from the defendants that the certificate of incentives was genuine as well as the various written clarifications that it received over the period from the defendants.

5. The particulars of damage include the tax liability that arose, operating without documents seized by the respondent, loss of reputation and business, inconvenience and likely closure/winding up, jeopardising its status as debtor whereby the said liability may amount to an act of default to recall of its foreign loans, jeopardising the long term foreign loans.

6. In the alternative the applicant/plaintiff contends that the defendants are estopped from reneging on the presentations and positions they jointly and severally made to the plaintiff to believe and rely on, as to the nature, scope and effect of the certificate of incentives. The defendant no.3 is estopped from stating or treating defendants' no.1 and 2's letters (annexture MIL6') as fake and of no effect and cannot therefore whether by herself or through her agents/servants/employees by whatever name called raise tax or any liability on that basis. The defendants are liable in damages on account of misrepresentation. Defendant No.3 is estopped from raising tax matters when a comprehensive audit was carried out, concluded and all matters arising there from settled.

7. In its prayer for relief the applicant/plaintiff prayed for (a) damages as stipulated in the body of the plaint, (b) a declaration that the certificate of incentives covers and exempted the plaintiff from corporation tax, withholding tax, and tax on dividend income from all real estate properties developed from 10th October 1994 to 31st December 2000, (c) a permanent injunction restraining the defendant no.3 from interfering, altering or otherwise assuming the function of determining, dealing or intermeddling with the effect, scope and import of the certificate of incentives as resolved in March, 2000, (e) a declaration that the defendant had no right to determine the scope and effect of a certificate of incentives, (f) a declaration that the plaintiff's tax matters were concluded and settled at the time of the comprehensive tax audit.

8. In her written statement of defence, the defendant no.3 (herein after referred to as the respondent) denies the plaintiff's claim against it. She contends that this action against her does not disclose a cause of action. The respondent contends that the certificate of incentives was issued not in accordance with the law, and is therefore void *ab initio*. In the alternative it contends that the said certificate of incentives, if valid, was only restricted to five properties, and did not cover all the plaintiff's estate development and the reasons thereof are set out in the written statement of defence.

9. The respondent contends that it was misled by letters dated 17th February 2000 from defendant no.2 and 3rd March 2000 from the Ministry of Finance to vacate the assessments referred to in paragraph 8 of the plaint. It has issued new assessments based on new information.

10. The respondent further states that the said certificate of incentives ceased to exist on 31st December 1997 when the plaintiff failed to elect for the exemption of taxes in accordance with the Income Tax Act, Cap 340. She contends that a tax audit of the plaintiff was done for the period 1996-2003, and held meetings to inform the plaintiff of its findings. Among its findings was that the foreign loans did not exist in so as they were not supported by any records whatsoever, in spite of requests that these records be produced.

11. The respondent contends that the plaintiff is liable to pay the tax liability in the sum of Shs.36,514,786,374.00 arising from income received by it, exclusive of the five properties covered by the certificate of incentives, but inclusive of corporation tax and the value added tax plus penalties.

12. Mr. Alex Rezida, learned counsel for the applicant, in his submission, stated that there are basically two grounds upon which the plaintiff's claim is based. One is the certificate of incentives and the other is the foreign loans. If the applicant succeeds on trial on both of these two grounds, the tax liability imposed on the applicant would be

found to be nil. He submitted that the applicant was suffering an injury by being compelled to pay the said taxes when they were not due, and that it would suffer irreparable loss, if an attempt was made to collect the said taxes. The plaintiff was not in a position to pay the said taxes, and would suffer being wound up as a result of any attempt to collect the said taxes.

13. Mr. Rezida submitted that, following the decision in Robert Kavuma v M/S Hotel International Supreme Court Civil Appeal No. 8 of 1990, (unreported), the purpose of a temporary of injunction is to preserve the status quo until the dispute is investigated and determined. Secondly that there must be shown to exist a prima facie case with a probability of success. Thirdly that there must be shown that the applicant will may suffer irreparable harm that cannot be adequately atoned for by damages. Lastly that if in doubt the court should decide the matter on a balance of convenience.

14. Mr. Rezida submitted that on the facts it was clear that the dispute over the certificate of incentives and the loans is one that can only be resolved through a trial of the issues, given the contest of the same by the applicant and the respondent. In addition the different positions adopted by the defendant no.2 and the respondent over the certificate of incentives raises issues of public importance that need to be resolved, given the statutory duties of both organisations. He submitted that a prima facie had been made out.

15. With the regard to the issue of damages being irreparable Mr. Rezida referred me to paragraphs 12, 13, 14 and 16 of the affidavit of Mr. Ruparelia. The applicant does state that it is not able to pay the Shs.36 billion demanded. If this injunction is not granted, and the respondent sells the property to a third party, and in the meantime the applicant succeeds in its claim, the applicant would not be able to obtain the properties back from the third party who purchased them. The applicant can not be adequately compensated for his real estate that he would lose, if not protected now with a temporary injunction.

16. Dr. Byamugisha, learned counsel for the respondent, submitted with regard to the certificate of incentives in question; the particular for foreign loan capital, only US\$1.0 million is shown. The applicant was therefore not misled in anyway with regard to obtaining of foreign loans. With the respect to the foreign loans claimed, a triable issue would have arisen had the applicant shown proof of the existence of the loans but he had not done so.

17. Dr. Byamugisha further submitted that the applicant did not seek an injunction in the head suit against the respondent to restrain her from collecting taxes. The injunction sought is with regard to the certificate of incentives. In this particular case the applicant seeks a temporary injunction to restrain the respondent from collecting taxes from the applicant, something not sought in the main sought. For that reason, he submitted that the application was not well taken, as the prayer in the application, is not the prayer, in the head suit.

18. Dr. Byamugisha further submitted that this suit and application are misconceived as against the Commissioner General as no where in the Uganda Revenue Authority Act is an action against the Commissioner General authorised on behalf of the Uganda Revenue Authority. The respondent is not a corporation solo. She is an employee of a statutory body. The annexures from the Uganda Revenue Authority that form the crux of the complaint are not all signed by the respondent but by other officers of Uganda Revenue Authority who are not agents or servants of the respondent. An individual member of staff may be sued in his or her personal capacity but not in respect of acts or omission done in good faith in the performance of her functions. The individual officer cannot therefore be sued on behalf the authority which itself is liable for its actions.

19. Dr. Byamugisha further submitted that re-assessment of tax liability is authorised under Section 97 (3) of the Income Tax Act, and Section 32 (2) and (9) of the VAT Act, and no estoppel is created against the Uganda Revenue Authority.

20. Dr. Byamugisha concluded that in case were this court to grant the injunction, it should be done conditionally with security for payment of taxes provided as suggested by the respondent in para 23 of her affidavit in reply.

21. The facts so far as can be gathered from the affidavits filed in support and in opposition are that the applicant applied for and was issued a certificate of incentives by the Uganda Investment Authority, defendant no.2 in the head suit, in 1994 to run for a period of 6 years expiring in 2000. It was in respect of the applicant's business of real estate development. The contention is whether it was restricted to 5 properties, or it was open to all properties that the applicant purchased and or developed in that period.

22. As between Uganda Investment Authority and the applicant this contention on the face of the pleadings is settled, and the certificate of incentives was open to all properties that the applicant acquired and developed in the period covered by certificate. It was, however, not always so settled. Previously the Uganda Investment Authority had maintained that the certificate was restricted to 5 properties. Subsequently it vacated that position and agreed with the applicant that the certificate of incentives applied to all properties developed in the period the certificate covered.

23. The respondent does not accept that position. She asserts that she has asked for proof from Uganda Investment Authority that the certificate of incentives was granted, in accordance with the law, in respect of all properties developed by the applicant for the period covered by the certificate, and Uganda Investment Authority has to date not supplied such information. As a result, the Respondent, for that and other reasons contends that the certificate of incentives, if not void, covers only 5 properties of the applicant.

24. The applicant claims to have obtained two loans from 2 overseas entities for the purpose of its business development, influenced by the tax holiday granted to it by the Uganda Investment Authority. Uganda Revenue Authority has taken the position that these loans are fictitious, contending that the applicant failed to furnish proof thereof. Uganda Revenue Authority refused to provide for the same in its computation of taxes for the applicant for the period covered by the assessment.

25. The Uganda Revenue Authority did re-assess corporation tax, income tax, and vat for the period 1996 to 2003, vacating an earlier assessment in 2000 that had provided for nil taxes, and came to a total figure of Shs.36,514,786,374.00. This figure is made of Shs.10,862,323,319.00 as the principal and Shs.25,652,464,055.00 as penalty. Prior to the institution of the current proceedings the parties were in contact, and held a meeting to discuss their respective positions. These contacts were not continued, and these proceedings were commenced.

26. This is a most unusual application. It seeks, as noted above, for a temporary injunction, in favour of the applicant, to restrain the respondent by herself, and through her servants or agents and or assignees of whatever title from collecting the allegedly unpaid taxes in the sum of Shs.36,514,786,374.00, or taking any other step in relation to assessment, collection or dealing with any tax liability until the disposal of the main suit. It is directed against the respondent, the Chief Executive of the Uganda Revenue Authority, the statutory body, charged

‘to administer and give effect to the laws or the specified provisions of the laws set out in the First Schedule to this act, and for this purpose to assess, collect, and account for all revenue to which those laws apply;’. (See Section 3(1) (a) of the Uganda Revenue Authority Act, Chapter 196.)

27. The application seeks, for reasons it provides, to restrain the Chief Executive of the Uganda Revenue Authority, from doing what the authority is statutorily mandated to do, that is to assess and collect revenue. The application is not seeking, for instance that the

Commissioner General does not sell the properties of the applicant, or take over the bank accounts of the applicant, if they exist, or somewhat deal with definite and specified property rights of the applicant. It is seeking to restrain the respondent from doing that which the law by statute authorises the employer of the respondent to do. In effect and substance a grant of an injunction in the current form sought would be to bar the statutory body charged with revenue collection from proceeding with its statutory duty. This is most unusual.

28. Secondly it is unusual in so far as the injunction would not be directed to the body that has the statutory authority to carry out the functions in question, but is directed, inter alia, to the staff of the authority, now termed as agents and servants of the Chief Executive of that statutory body. The authority is not a party to these proceedings.

29. The Commissioner General of the Authority is

‘responsible for the day to day operations of the authority, and the management, of funds, property and business of the authority and for the administration, organisation and control of the other officers and staff of the authority.’

30. Dr. Byamugisha contended that this action and application against the respondent are misconceived as they are not against the authority but its' Chief Executive who can not be sued in her personal capacity for any act or omission done in good faith in performance of his or her functions under this Act. Mr. Rezida objected to this matter being raised as it had been tried as a preliminary matter before my brother Okumu Wengi J, and been decided. There was an appeal against that ruling pending before the court of appeal, and the matter ought not to be open before me.

31. The matter dealt with by my brother, Okumu Wengi, J., in his ruling on a preliminary objection, can be gathered from his ruling. He put it thus,

‘This objection came in as side kick from the first one as it had not been originally raised but came in the answer to arguments in reply. By it learned counsel for the Commissioner General contended that the case before the court was a tax dispute governed by the Income Tax Act. That this law does not envisage a suit against his esteemed client. That in the circumstances this not being a customs related matter no suit could lie against his client.’

32. The judge went on to consider the said objection and dismissed it for the reasons he gave. The objection raised before my brother is clearly different from the point taken by Dr. Byamugisha. Okumu Wengi, J., considered different provisions of the law cited to him and argued by the parties. Though the matter dealt with whether an action, such as present one could lay against the respondent, it considered aspects of the law, not raised now. I am therefore free, in my view, to deal with the point argued by Dr. Byamugisha.

33. Section 12 of the Uganda Revenue Authority Act is sub titled ‘Exemption from personal liability’. It states,

‘An employee of the authority shall not, in his or her personal capacity, be liable in civil or criminal proceedings in respect of any act, or omission done in good faith in the performance of his or her functions under this Act.’

34. The plaintiff, paragraph 4 thereof states,

‘The third defendant is the Commissioner General of Uganda Revenue Authority (URA) sitting at URA’s head office at Nakawa and is being sued

for her acts and acts of her agents, servants and or officers acting on her instructions.’

35. It is clear that the respondent is being sued for her acts, in the performance of her duties, and apparently sought to be held vicariously liable for the acts of other staff and officers of the Uganda Revenue Authority. With respect to her own acts she has exemption for personal liability except where such acts were not done in good faith. It is important that allegations of bad faith, and the particulars thereof, are stated in the plaint, to found a cause of action against her. This is not evident on the plaint in this particular case.

36. If this action against respondent is not in her personal capacity, and it is in her official capacity, then these are the acts of her employer, the Uganda Revenue Authority. She is the disclosed agent, of a known principal. The acts complained of are the acts of a corporate body, the Uganda Revenue Authority that can be sued in its own names, in light of Section 2(2) of the Uganda Revenue Authority Act.

37. I am unable to see how the respondent can be liable vicariously for the acts of the servants and agents of Uganda Revenue Authority. Those acts, if done by the employees of Uganda Revenue Authority, are the acts of Uganda Revenue Authority, and not another employee, as one employee is not an agent of another employee, in respect of the performance of functions of their employer, the Uganda Revenue Authority.

38. Clearly the relief claimed in this action can not lie against the respondent but her employer, the Uganda Revenue Authority.

39. I am in agreement with Dr. Byamugisha that the action against the respondent is misconceived, and for that reason this application for a temporary injunction against the respondent is misconceived too, as in my view, the current action would arise against the Uganda Revenue Authority, and not its Commissioner General, as presently drafted, given the exemption from personal liability of employees of the Uganda Revenue Authority, except for actions or omissions not in good faith.

40. I dismiss this application with costs. However, in case I am on wrong on that point, I will go on to consider the merits of this application.

41. I agree with Mr. Alex Rezida that the law in respect of temporary injunctions is fairly well settled. The applicant must firstly show a prima facie case. Secondly it must show that it will suffer irreparable injury for which damages cannot be sufficient compensation. Thirdly, in case of doubt on the foregoing, the court may consider the balance of convenience.

42. In this matter with regard to the issue of the certificate of incentives, it is clear a triable issue would arise on the same, given the positions of each party hereto, were the current action to be directed against the Uganda Revenue Authority, the body responsible for the actions complained of, and the body that would be liable for the same. As the respondent cannot be liable for the actions done in the performance of her duties as the Chief Executive of Uganda Revenue Authority in good faith, and it is not contended that what has been done in relation to the matters complained of in the plaint, has been done in bad faith, no personal liability would be made out against her on the current state of pleadings. I find that no prima facie case has been made out in relation to the certificate of incentives, given clearly that this claim is directed, not to Uganda Revenue Authority, the body that would be liable for the actions complained of, but against the respondent.

43. On the second leg of the foreign loans, I can only say that the conduct of the applicant is inexplicable. On the one hand it desires to obtain tax relief on the ground that it obtained foreign loans. On the other hand when asked to provide evidence and particulars thereof by the tax body from which it seeks that these loans be taken into account, the applicant did not supply the information. Neither does the applicant make

that information available to this court, when it comes to this court asking for interim relief.

44. The applicant does not make out a prima facie case with regard to the claim of tax relief based on foreign loans for which it has failed to provide records, thereof, such as the loan agreements, or evidence of remittances of the same to this jurisdiction, to the Uganda Revenue Authority, the body administering tax laws in question. No explanation is provided to this court why those records were not availed to the Uganda Revenue Authority when it requested for the same.

45. The applicant may well have good reasons for the position it has taken, and those no doubt will be considered when provided. However, for the moment, when no records are provided, that show the existence of the very substantial foreign loans, and the terms thereof, but what is provided is evidence of remittances for payment of interest, or responses by one of the lenders with regard to this action and the acts of the Uganda Revenue Authority, there is no prima facie made out at this stage that the applicant received the foreign loans it claims to have received.

46. Having concluded that the applicant has not made out a prima facie case it would be unnecessary to proceed and consider the second condition that needs to be satisfied before a temporary injunction is granted. However, in case I am wrong on this first ground, I will proceed to consider this second condition, and that is whether the applicant will suffer irreparable loss.

47. With regard to issue of irreparable loss, the words of Lord Diplock, in *American Cyanamid Co v Ethicon Ltd*, 1975 (1) All E R 504, at page 510, are instructive. He states,

‘... the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant’s continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff’s claim appeared at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff’s undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If the damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in such a financial position to pay them, there would be no reason this ground to refuse an interlocutory injunction.’

48. The approach recommended therein is equally helpful in the case before me in analysing the question of proof of irreparable injury or adequacy of damages. First of all the analysis should consider the position of both parties, and not just of the applicant. The applicant is seeking to restrain the respondent from collecting taxes, on the claim that the taxes are not due. The issue for the respondent here would be whether it can collect the taxes in dispute should they be found to be due at the end of the trial.

49. If the applicant succeeds on the main suit, would it be adequately compensated by

way of damages? The applicant contends that it would not receive adequate compensation for the loss of its real estate that may be sold in case the taxes in dispute are collected. No particulars of its real estate which it claimed stands in jeopardy, are provided either on the plaint or in its application before court. The purchase price for the same or their current market value is not provided. Nor is proof put forward that suggests that the properties in question are not capable of monetary value or are simply priceless, by reason of some unique feature inherent in the property. There is no information whatsoever, save for the bare assertions by the managing director of the applicant in his affidavit dated 31st March 2006, that the entire real property estate of the applicant would be sold and would never be recovered.

50. The applicant's affidavit further claims that the applicant's principal creditor, Goldstar International Ltd, of Gilbrator, whose loan to the applicant stands at over US\$ 24 million, will treat the assessment as an act of default and seek to recover its money. That may well be so. Unfortunately, other than this claim, albeit on oath, there is no proof of loan provided, in spite of a written request by the Uganda Revenue Authority that this be provided. As of this stage, this claim does not rise to the necessary threshold of proof. The term alleged in the agreement between the applicant and Goldstar International Ltd is not proved at this stage of the proceedings.

51. The applicant has simply not made available to the court, any material upon which the court can evaluate the assertion that damages would not be adequate compensation for the value of its real estate, let alone that it is in immediate danger of expropriation.

52. At the same time, it is not advanced by the applicant that the respondent would not be able to pay damages which have been claimed by the applicant, or any sums of money that may be adjudged to be due to the applicant, should the applicant succeed in the main trial.

53. On the other hand, the applicant is not ready to give any undertaking to pay the taxes should its action fail at the end of the trial and the tax assessment is maintained. The applicant contends that the tax liability in question is too colossal and it can never pay the same even if its action would fail. It just faces winding up. The applicant seeks an injunction but is not willing to provide security for the recovery of the tax liability visited upon it, should such tax liability be upheld.

54. I am satisfied that the applicant has failed to establish that it would suffer irreparable loss in case the temporary injunction is not granted, and I would accordingly dismiss this application with costs.

Signed, dated and delivered this 28th day of February 2007

FMS Egonda-Ntende
Judge