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Uganda Revenue Authority Vs Uganda Communications Commission- HCT-00-CC-MA-0654-2006
[2007] UGCommC 6 (19th January 2007)

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL COURT DIVISION

HCT-00-CC-MA-0654 - 2006

(Arising from HCT-00-CC-CA No. 11 of 2006)

UGANDA REVENUE AUTHORITY.....APPLICANT

VERSUS

UGANDA COMMUNICATIONS COMMISSION.....RESPONDENT

19th January 2007

BEFORE: HON. JUSTICE LAMECK N. MUKASA

RULING:

This application is brought by Notice of Motion under sections 27 and 28 of the Tax Appeals Tribunal Act, Order 52 of the Civil Procedure Rules and Section 98 of the Civil Procedure Act for orders that:

1. Execution of the decree in Tax Appeals Tribunal Application No. 4 of 2006 be stayed pending disposal of H.C.C.A No. 11 of 2006.
2. Costs this application be provided for.

The application is supported by an affidavit dated 15th September 2006 and a supplementary affidavit dated 27th October 2006 both deponed to by Anna Mugenyi Bitature an Advocate and the current Manager, VAT and Income Tax Litigation URA. The Respondent filed one affidavit in reply deponed to by Enock Barata, an Advocate and Counsel for the Respondent.

The brief background is that Uganda communication commission, the Respondent, on 20th October 2005 wrote to the Applicant, Ugandan Revenue Authority, objecting to tax assessment of Ug. Shs. 4,491,548,930/= for the years 1999 to 2004. The applicant did not respond to the objection till 24th January 2006 by which time the Respondent had elected to treat the objection as accepted by the Applicant. The Respondent filed TAT Application No. 4 of 2006 seeking declaration that:-

- (i) URA (Applicant) is deemed to have accepted the objection since 90 days elapsed before an objection decision was made and therefore has no right to defend the matter.
- (ii) The income of UCC (Respondent) as reflected in the Financial return is not taxable under the Income Tax Act.
- (iii) In the alternative, that 1% levy on communication operator's gross annual revenue (GAR) contribution to UCC should be declared as derived income when it is disbursed not when it is receivable.

When the application case before the Tribunal for hearing counsel for the Respondent raised the first issue as a preliminary point of law whether the Applicant was deemed to have accepted the Respondents objection dated 20th October 2005. At the scheduling conference it had been agreed that the above issue be resolved first. By a majority of the members, 2-1, the Tribunal upheld the preliminary point and declared that the decision put to rest the entire application.

In her affidavit in support Bitature avers that the Applicant was dissatisfied with the ruling as TAT Application No. 4 of 2006 was thereby disposed of on a preliminary point of law despite glaring unresolved issues pertaining to taxability, amount of tax in dispute, and refunds. That the applicant accordingly filed HCCA No. 11 of 2006.

This application has been filed pending the disposal of the said appeal. In paragraph 3 of the supplementary affidavit it is averred that the bill of costs in TAT Application No. 4 of 2006 has been taxed by the Registrar Tax Appeals Tribunal and allowed at Shs. 57,325,667/=. In paragraph 4 of the affidavit in support it is averred that the respondent is demanding refund of taxes paid which is among the issues to be resolved under HCCA No. 11 of 2006 and contents that the appeal has very high likelihood of success and that execution of the said decree will render the appeal nugatory and prejudicial to the Appellant's/Applicant's interests.

Mr. Ali Sekatawa, counsel for the Applicant, argued that the Appeal will determine contentious issues as to the taxability of the Respondent, the amount in dispute, resolve the dispute about the period covered by an objection decision and issues whether the Applicant is entitled to the refund or not.

In its affidavit in reply, the Respondent contends that the Appeal has no chances of success. Further that any execution would not in any way prejudice the appeal and that no sufficient grounds have been shown to stay the execution in any event. Mr. Cephas Buriungi, Counsel for the Respondent, referred me to a number of authorities, namely **National Pharmacy Ltd vs. Kampala City Council [1979] HCB 132, Francis Manisio Micah vs. Nava Walakira [1992] IVK ALR 62, Oraro & Rachier Advocates vs. Co-operative Bank of Kenya Ltd. [1999] 1 EA 236, Janmohamed Ltd vs. City Africa Taxtile Shop (U) Ltd [1998] IV KALR 53 and Akisoferi Ogoola vs. Akiko Emmanuel Otheino & Anor [1998] VI KALR I**, for the guiding principles to be considered before court can exercise its discretion to stay execution pending the disposal of an appeal.

In his reply Mr. Sekatawa argued that the authorities cited by Mr. Birungi were decided on the basis of Order 43 of the Civil Procedure Rules. He submitted that the rules were not applicable in the circumstances as the courts discretionary power to stay execution pending the disposal of an appeal from the Tax Appeals Tribunal were specifically provided for by section 28 of the Tax Appeal Tribunal Act.

This application was made under section 28 of the Tax Appeals Tribunal Act which provides;-

"(1) Where - - - an appeal against the decision of a tribunal has been lodged with the High Court, the reviewing body may make an order staying or otherwise affecting the operation or implementation of the decision under review or appeal or a part of the decision, as the reviewing body considers appropriate for the purposes of securing the effectiveness of the proceedings and determination of the application or appeal."

In **National Pharmacy Ltd vs. Kampala City Council (supra)** Ssekandi JA held that the

pendence of an appeal is not bar to a successful party's right to enforce a decree obtained even by execution. My view is that the same principle must apply even in the instant case where an appeal has been lodged with the High Court against the decision of the Tax Appeals Tribunal.

Order 43 rule 4 (1) CPR gives the High Court discretionary power to stay execution, pending the disposal of appeals from the lower courts to the High Court, where sufficient cause has been shown. Sub-rule 3 thereof requires that to exercise its discretion above, the court must be satisfied that (a) substantial loss may result to the party making the application if the application for stay is not granted, (b) the application was made without unreasonable delay and (c) security has been given by the applicant for due performance of the decree. See **Kampala Bottlers Ltd v. Uganda Bottlers Ltd S.C.C Appl. No. 25 of 1995.**

It is the contention of counsel for the Respondent that the above requirements have not been satisfied to warrant a stay of execution. On the other hand it is the contention of counsel for the Applicant that the provisions of the order above are not applicable in the instant case. Rule 30 of the Tax Appeals Tribunal (Procedure) Rules make the Civil Procedure Rules applicable where no provision is made by the Rules. These rules derive their force from the Tax Appeal Tribunal Act and it is the Applicant's contention that section 28 of the Act expressly provides for stay of execution pending an appeal before the High Court. Thus ousting the applicability of Order 43 of the CPRs.

Under section 28 of the T.A.T Act the High Court may stay the implementation of the decision under appeal as it considers appropriate for the proposes of securing the effectiveness of the proceedings and determination of the appeal. Court is required to consider whether a stay of execution is appropriate for the purposes of securing the effectiveness of the proceedings and determination of appeal.

TAT Application No. 4 of 2006 was filed seeking declarations on:-

- 1- Whether the Applicant was deemed to have accepted the Respondent's objection following the lapse of 90 days without making any response.
- 2- Whether the income of the Respondent as reflected in the Financial Return was taxable under the Income Tax Act.
- 3- Whether 1% levy on communication operators gross annual revenue contribution to the Respondent should be declared as derived income when it is disbursed not when it is receivable.

The last two issues related to the taxability of the Respondent and a decision on those issues would have determined the Respondent's taxability with regard to the assessment in issue in the instant case and most probably with regard to the future. In its decision on the preliminary point, which in effect was the T.A.T's decision on the first issue, the TAT declared that the decision put to rest the entire application. The appeal is to determine whether the TAT misdirected itself on the legal implications of a preliminary objection and on the law relating to the extent to which the Applicant is bound by the decisions of its officers.

I have considered the submissions of counsel for both parties in light of all the above and I have found that the execution and implementation of the Tax Appeals Tribunal's decision pending the disposal of the appeal might have a negative bearing to the effectiveness of the proceedings and the determination of the appeal. In the circumstances I find it appropriate for the proposes of securing the effectiveness of the proceedings and the determination of the appeal to stay the implementation or execution of the decision of the Tax Appeals Tribunal in TAT Application No. 11 of 2006 and I so order. The order as to costs in the Appeal shall bid the costs of this application.

Lameck N. Mukasa
JUDGE
19/01/07