

THE REPUBLIC UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)
H - 00- CC - CA - 170 - 2007 AND 792 - 2006 (CONSOLIDATED)

- 1. STANBIC BANK UGANDA LTD**
- 2. STANDARD CHARTERED BANK UGANDA LTD**
- 3. BARCLAYS BANK OF UGANDA LTD**
- 4. CRANE BANK LTD**
- 5. DIAMOND TRUST BANK OF UGANDA LTD**
- 6. CENTENARY RURAL DEVELOPMENT BANK LTD**
- 7. DFCUBANKLTD**
- 8. DFCU LIMITED:.....: PLAINTIFFS**

VERSUS

UGANDA REVENUE AUTHORITY:.....: DEFENDANT

BEFORE: HON. JUSTICE GEOFFREY KIRYABWIRE.

JUDGMENT

This case arises from two consolidated suits involving seven Commercial Banks and one leasing company operating in Uganda on the one hand and the Uganda Revenue Authority (hereinafter called “*The URA*”) on the other. The Plaintiffs as part of their lending/leasing business receive valuation reports from their customers in respect of the land or chattels that are taken as security. When the plaintiffs lend to their customers, the customers then execute mortgages or debenture deeds securing the lending which deeds are assessed for stamp duty at 0.5% of the value of the lending Under the Stamps (Amendment) Act No. 12 of 2002. In addition to that, other documents securing, the lending in the same transaction are assessed at a nominal stamp duty of Shs.5,000/=. In 2006 after various audits of some of the plaintiffs, the URA asserted that stamp duty of 1% is payable in respect of the valuations reports and raised tax assessments in respect thereof under the same Act. It is the case of the plaintiffs

that stamp duty was not payable on the said valuation reports at all or in the alternative if it was payable then under the law only a nominal duty of Shs.5,000/= was payable. The URA maintain that under the law stump duty of 1% of the value shown in the valuation report was payable. At the pre trial scheduling conference the parties agreed that the dispute revolved around the interpretation of The Stamp Duty Act and therefore no oral evidence would be called. The Parties agreed to the following issues for trial;

1. Whether valuation reports are “*instruments*” with the meaning of The Stamps Act?
2. If so, whether the said valuation reports are “. . . *Employed for completing the mortgage transaction*” within the meaning of S. 3 (1) of the Stamps Act.
3. If the second issue is answered in the affirmative, whether the Stamp Duty payable on these reports under the Stamp Duty (Amendment) Act 2002 is the 5,000/= or 1% of the total value.
4. Who is liable for the Stamp duty on the valuation reports?
5. Whether there are any remedies available?

Mr. Masembe Kanyerezj, Mr. John Fisher Kanyemibwa, Mr. Barnbas Tumusingize and Mr. S. Birungyi appeared for the plaintiffs while Mr. Ali Ssekatawa and Mr. H. Harshe appeared for the Defendants.

Issue No. 1. Whether valuation reports are “*instruments*” within the meaning of the Stamps Act?

Counsel for the plaintiffs submitted that a valuation report was not an Instrument envisaged under the Stamps Act (cap 342) because it was not a document by which any right or liability

is, or purports to be created, transferred, limited extinguished or recorded. He submitted that the stamps Act precisely defined an “*Instrument*” under Section 1 (n) as “...includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded...”

Counsel for the plaintiffs submitted that a valuation report by a valuer does “*no more than confirm his opinion on the value of the Intended security...*” and therefore no liability or right is created by the said valuation report. He further submitted that an instrument as defined in the Act is one that has effect upon “*execution*” which is not applicable to a valuation report. In this regard he referred court to sections 2 (1) (a), 2(1)(c), 20 and 21 of the Stamps Act. With regard to instruments executed in Uganda Section 2(1) (a) provides

“Subject to this Act and the exemptions contained in the Schedule to this Act, the following instruments shall be chargeable with duty of the amount Indicated In that Schedule as the proper duty therefor respectively-

(a) *Every instrument mentioned in that Schedule which, not having been previously executed by any person, is executed in Uganda after the commencement of this Act and relates to any property situate, or to any matter or thing done or to be done, in Uganda.”*

He also referred court to Halsburys Laws of England 4th Edition vol. 44 (1) Para 1010 where the learned authors state

“Stamp duty is chargeable on Instruments and not transactions. The liability of an instrument to stamp duty arises at the moment at which it Is executed and depends on the law in force and the circumstances which exist at that time, the character of the Instrument must be ascertained by reference to its legal effect when it is executed. The f/ability of an instrument to duty is not determined as at the time when the Instrument

is presented for stamping... until execution is complete no duty attaches...”

Counsel for the plaintiffs submitted that a valuer does not in effect execute his report by signing it.

Counsel for the defendant on the other hand submitted that a valuation report is an instrument by virtue of section 2 (1) because it included as instrument No. 8 in the schedule to the Stamps Act as amended in 2002. He submitted that section 1(n) of the Stamps Act uses the word “Includes” with reference to a valuation report. In this respect he referred court to the learned author Alison Russell K. C. in his book “*Legislative Drafting*” 4th Edition page 40 where he writes

“The expression “includes” is extensive, it means firstly what it would ordinarily mean and also something else which it does not ordinarily mean, but which for convenience is declared to be included in it.”

He further referred me to another author Francis Bennion in his book “*statutory Interpretation*” at page 568 to 569 where he writes

“The schedule is an extension of the section which induces it. Material is put into a schedule because it is too lengthy or detailed to be conveniently accommodated in a section... The schedule is often used to hive off provisions which are too long or detailed to be put in the body of the Act.”

Counsel for the defendant submitted that the schedule and the inducing section should be construed as one.

He further submitted that a valuation report creates a right or purports to create a right by stipulating the owner of the property and how much his or her property is worth. In support of this argument counsel for the defendant submitted that in the sale of a mortgaged property the

mortgagor would ordinarily be entitled to residue value of a sale which would be determined by reference to the valuation report.

I have had the opportunity to peruse the submissions of both counsel on this issue. The issue is largely one of definition. In other words is a valuation report an instrument under the Jaw that attracts stamp duty or not? Section 1 (n) of the Stamp Duty Act (cap 342) defines an instrument as including any “*document by which any right or liability /s, or purports to be created, transferred, limited extended extinguished or recorded..*” “*The key words in that section are*”... *any right or liability..*” unfortunately both counsel did not address court sufficiently as to these key words. According to Osborn’s Law Dictionary sixth edition a right in part is defined as

“...An interest recognised and protected by the law, respect for which is a duty and disregard of which is a wrong... rights are perfect and Imperfect; positive and negative; real and personal; proprietary and personal; principal and accessory; and legal and equitable...”

On the other hand liability is defined as

“subjection to legal obligation; or the obligation itself ... liability is civil or criminal according to whether it is enforced by the civil or criminal court, a contingent liability is a future unascertained obligation...”

To my mind a valuation report is an expert’s opinion (i.e. that of valuer/surveyor) as to the market or forced sale price of a security being offered by a borrower to a lender or other person, in this regard I do agree with counsel for the plaintiff that in the ordinary sense of understanding a valuation report it cannot be said to either create a right or a liability. A valuation report is just a professional opinion that cannot sit comfortably within the ordinary meaning of an instrument in section 1(n) of The Stamp Act. It cannot as Counsel for the defendant has submitted simply create a right or a liability by providing a guide as to how

much money a bank or financial institution is willing to give a potential client. Indeed the schedule to The Stamps Act (cap 342 Revised edition 2000) does not even refer to a valuation report. The situation however is different when The Stamps Act was amended in 2002. The amendment of 2002 in its schedule has an item number 8 which provides for

“8. Appraisal or valuation made otherwise than other an order of court of the total value...”

It further appears to me that this dispute arises from this change in the law. The schedule in section 2 (1) (a) to the Act was changed to include valuation reports. In that regard I agree with the authorities cited to me on legislative drafting by counsel for the defendant. To get a proper understanding of what the legislature wanted a instrument to mean one has to read sections 1 (n) and 2 of the Stamps Act as amended together. As the learned author Sir Alison Russell put it the use of the term “*includes*” is extensive and will cover what the expression would ordinarily mean and something else which it does not ordinarily mean. The schedule is just an extension of the section that induces it and is used to provide detail to the said section as a matter of drafting convenience. In this case a valuation report by its ordinary meaning would not create a right or liability however by reason of the schedule to the amended Act of 2002 it is declared to be an instrument for purposes of The Stamps Act.

I therefore answer issue number one in the affirmative that valuation reports are instruments within the meaning of The Stamps Act as amended in 2002.

Issue No. 2. Whether the said valuation reports are “employed for completing the mortgage transaction” within the meaning of S. 3 (1) of The Stamps Act?

Counsel for the plaintiff submitted that valuation reports are not used in completing a mortgage transaction within the meaning of Section 3 (1) of the Stamps Act. He submitted that valuation reports are commissioned before any loan agreement is concluded between the

parties and any security deeds are drawn.

Counsel for the defendant on the other hand submitted that a valuation report, just like a mortgage deed is a instrument employed in completing a mortgage transaction. This is because both a prerequisite for the consideration and grant of a Credit facility.

I have considered both these submissions and the law. Looking at Section 3 (1) of The Stamps Act it appears to me that the significance of this issue is how to determine what rate of stamp duty applies. The provision reads

“Where, In the case of any sale, mortgage or settlement, several instruments are employed for completing the transaction, the principal instrument only shall be chargeable with the duty prescribed In the schedule to this for the conveyance, mortgage or settlement and each of the other instruments shall be chargeable with a duty of two shillings instead of the duty prescribed in that schedule...”

I find that both parties may have missed the true significance of the above section. It is not about any instrument employed for completing the transaction but rather the *“principal instrument”* that is so employed. Section 3 (2) provides that it is the parties themselves to determine what the principal instrument shall be. It is that instrument so chosen by the parties that shall attract the highest duty so chargeable.

It would be incredible to my mind for the parties to choose the valuation report as the principal instrument for completing the mortgage. Indeed this is not the banking practice as I know it to be. That being the case and in line with my finding in issue number one a valuation report will have to fall in the category of *“other instruments”* for purposes of Section 3 of The Stamps Act and therefore cannot attract the highest duty chargeable. That both answers and clarifies the second issue.

Issue No. 3. Whether the stamp duty payable on these reports under The Stamps Act (Amendment Act, 2002 is Shs.5000/= or 1% of the total value?

Counsel for the plaintiffs submitted that item 8 to the schedule of The Stamps Act was not clear as it provided for two rates the first being Shs.5000/= and the second being 1% of the total value which resulted into ambiguity. He further submitted that as a rule of statutory interpretation this ambiguity should be resolved in favour the tax payer. In this regard he referred me to the learned authors of Craies on Legislation 18th Edition Para 1 6 12 pages 54 and 55. He also referred me to Halsburys Laws of England vol. 44 (1) Para 1009 where later alia it is written

‘... ambiguous words are construed in favour of the person liable to the duty.’

Counsel for the plaintiff Concluded that between which duty of 5,000/= and 1% is applicable the answer must be in favour of the taxpayer; in other words Shs.5,000/=. Counsel for the defendant acknowledged that there was an error on face of law in that two stamp duties were attached to Instrument No. 8 in the schedule to the Act. He further submitted that the old legal maxim that in tax statutes ambiguity of language should be construed in favour of the tax payer had been over taken by a modern approach to interpreting tax statutes. In support of his submission counsel for the defendant referred me to several authorities.

The first set of authorities come from Canada. The first case is

Quebec (communaute urbane) V Notre Dame De Bonsecours [1994] 3 S. C. R. 3.

The court in that case refers to what it called the “*teleological*” approach to interpreting tax legislation. Under this approach a legislative provision should be given a strict or liberal interpretation depending on the purpose underlying it and that the purpose must be identified in light of the context of the statute, its objective and legislative intent. The teleological

approach will favour the taxpayer or the tax department depending solely on the legislative provision in question, and not on the existence of predetermined presumptions. The second case is

The Queen V Golden [1986] 1 S.R. C. 209

Which is an authority for the proposition that law is not confined to a literal and virtually meaningless interpretation of the Act especially where taxation, serves many purposes in addition to the old and traditional object of raising the cost of government from a “*somewhat unenthusiastic public.*”

I was also referred to the case of

Stock V Frank (Tipton) Ltd [1978] 1 All E.R. 984 (HL)

Where it was held that

“A court is justified In departing from the plain words of a statute when it is satisfied that there is a dear anomaly, Parliament could not have envisaged such an anomaly, the anomaly can be overcome without detriment to the legislative objective and the language of the statute is open to modification required to overcome the anomaly...”

The defendant therefore contends that the correct stamp duty payable is 1% of the total value of the valuation report.

I have had a look at the schedule of The Stamps Act as amended in 2002. There is little doubt that by providing two duties for the same item there was an error. This makes the law unclear and ambiguous. I agree with counsel for the plaintiff that the law is fairly settled that the

ambiguity should be construed in favour of the tax payer. As to the Canadian “*teleological approach*” to the interpretation of tax legislation, I am unable to see how it can displace this rule in these circumstances. There is clear doubt as to which of the two duties should apply. Furthermore the Court is not able to remedy this anomaly by using ordinary rules of interpretation of statutes. This part of the schedule is a real mess considering that valuations reports are a new addition to the law and yet the rate/tariff of duty remains unclear. Even if I have got the teleological approach wrong I find that it is only of persuasive authority and not binding on this court. Court cannot be expected to choose between one of two duties, to be right duty to pay that is for the legislature to clarify.

As it is I find that as a result of this ambiguity that the correct stamp to be paid is Shs.5,000/= and not 1% of the total value of the valuation report.

Issue No. 4. Who is liable for the Payment of stamp duty on the valuation reports?

Counsel for the Plaintiffs in his written submissions appears to have mixed up the issue of who should pay for the valuation reports with who should pay for the mortgages and concluded based on section 36 (a) (viii) that it should be the borrower.

Counsel for the defendant also appears to have made the same mistake. However counsel for the defendant in an alternative argument submitted that since the plaintiffs negligently and or deliberately failed to disclose the valuation reports and to collect stamp duty on them and remit the duty to the defendant then it renders the plaintiffs liable for the said duty.

As it is the amendment of The Stamps Act in 2002 did not also amend Section 36 to provide who should pay this new stamp duty relating to valuation reports. I suppose that is where the case of **Stock V Frank Jones** (supra) becomes relevant. The amendment of the Stamps Act 2002 only amended the schedule to the Act without amending other provisions of the Act and in particular section 36 of the Act. This is clearly an anomaly which Parliament may not have envisaged and can be overcome without detriment to the legislative objective by saying that

the Shs.5,000/= stamp duty should be paid by the borrower in much the same way that he pays for the mortgage under section 36 of the Act.

Issue No. 5. Remedies.

Most of the remedies have been dealt with in the body of the judgment. What remains however is what to do with valuation reports that have not been stamped as a result of the statutory ambiguity since 2002? It could well be that even some of the financial facilities given on the basis of some of the said valuation reports have already been paid back at this time. I find that that this anomaly should not be visited on the plaintiffs or their clients the borrowers as it is not their fault that the law was unclear at the time. I am fortified in this finding by the words of **Lord Simonds** in the case of

Russell V Scott [1948] 2 All ER. 1 at page 2

When he stated

“My Lords, there is a maxim of income tax law which, though it may sometimes be over stressed, yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax on him. It is necessary that this maxim should on occasion be reasserted and this is such an occasion...”

I believe that this maxim is equally applicable to stamp duty and to this case. The best that the URA can do now is to on the basis of this decision is to now insist hence forth that valuation reports should attract a stamp duty of Shs.5,000/=. Any other figure will require a further amendment of the Stamps Act.

Since the prayers in this case were largely declaratory in nature and some declarations have gone in favour of the Plaintiffs while others have gone in favour of the Defendants I order that each party bear their own costs.

Justice Geoffrey Kiryabwire

JUDGE

Date: 4/12/08