THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISCELLANEOUS APPLICATION NO. 0042 OF 2010
{Arising from Civil Suit No. 0479 OF 2010}

1. STANBIC BANK (U) LTD
2. JACOBSEN UGANDA POWER PLANT COMPANY LTD ::::::::::::::::::::::::::::**APPLICANTS**

VERSUS

THE COMMISSIONER GENERAL, UGANDA REVENUE AUTHORITY ::::::::::::::::::**RESPONDENT**

BEFORE: HON. LADY JUSTICE IRENE MULYAGONJA KAKOOZA

RULING

The applicants brought this application under the provisions of s.98 of the Civil Procedure Act (CPA), s.33 of the Judicature Act and Order 52 rules 1 and 2 of the Civil Procedure Rules (CPR). They sought for the determination of the question whether the respondent's enforcement of its Agency Notice (Ref: B02-1010-0165-M) through threats of prosecution of the 1st applicant's Managing Director, which led to payment of shs. 2,562,505,534/= was in contempt of court of this court's interim order, which was issued on 18/12/2009, staying execution of the same Agency Notice. If the question was answered in the positive, the applicants sought for an order that the respondent be appropriately punished for the alleged contempt by payment of exemplary/punitive damages.

The application was supported by the affidavits of Gertrude Wamala Karugaba, the Head Legal Services of the 1st applicant (hereinafter "Stanbic") and dated 7/01/2010; and that of Dag Moen, the Managing Director of the 2nd applicant (hereinafter "Jacobsen") of the same date.

The respondent filed an affidavit in reply deposed on 18/02/2010 by Silajje Kanyesigye, the Manager Mediam Taxpayers Office of the Uganda Revenue Authority (URA), on 18/02/2010.

The background to the application was that on 19/12/2009, Jacobsen, a private company engaged in the generation of electricity in Uganda, sued the Commissioner General of the Uganda Revenue Authority (hereinafter "the Commissioner General") in HCCS No.497 of 2010 in this court. She sought for a declaration that the tax assessment dated 17/07/2009 for Jacobsen to pay shs. 14,376,624,376/ as Value Added Tax (VAT) and an additional penalty of shs.1,622,748,615/= was illegal. She claimed so because Uganda Electricity Transmission Company (UETCL), to whom she supplied power, had insisted that part of the sales to her were exempt from the tax. She thus sought for an injunction to restrain the Commissioner General from enforcing measures to collect the tax and prayed for general damages and the costs of the suit.

On the same day, Jacobsen filed M/A No. 726 of 2009 against the Commissioner General in this court for an order for a temporary injunction. She also filed M/A No. 727 of 2009 for an interim order to restrain the Commissioner General and/or her agents or servants from enforcing any further tax collection measures against Jacobsen until final hearing and determination of M/A 726 of 2009. The latter application was heard on 18/12/2009 and the registrar issued an interim stay order. The order was to restrain the implementation and enforcement of a third party Agency Notice issued against Stanbic under the above quoted reference and dated 14/12/2009, or any other bank that may have been appointed agent. The order also issued to restrain the Commissioner General and her agents or servants from demanding payment and/or enforcing any tax collection measures in

respect of the assessment of 17/07/2009, until the final determination of M/A 727 of 2009, but that did not happen. Subsequent to the interim stay order, Stanbic was forced to pay the monies demanded according to the Agency Notice, and so this application.

In her affidavit in support of the application, Ms. Karugaba averred that late in the afternoon of 15/12/2009 the impugned Agency Notice was served upon Stanbic to pay up to shs. 17,664,600,583/= from bank accounts held by Stanbic for Jacobsen. That Stanbic sought to verify the authenticity of the said Agency Notice and sent it to their lawyers for that purpose but they also took measures to freeze Jacobsen's accounts which then held the sum of shs. 2,562,503,534/=. She went on to aver that on 18/12/2009 an interim stay order was served on Stanbic to stay implementation and enforcement of the Agency Notice by Stanbic and any other bank that may have been served with the Agency Notice. Further that on the 21/12/2009 Stanbic wrote to the respondent to inform her that it had been served with the interim order and therefore could not comply with the Agency Notice.

Ms. Karugaba went on to aver that on receipt of Stanbic's letter, on the same day the respondent wrote to Stanbic requiring her to pay over the monies in the frozen accounts by 22/12/2009, notwithstanding the unambiguous order staying implementation of the Agency Notice, failing which Stanbic would become personally liable for the sums claimed and also subject to criminal proceedings. She further averred that on the 7/01/2010, Stanbic again received a letter from the respondent (dated 6/01/2010) to say that prosecution had been commenced against her Managing Director, Mr. Phillip Odera; and that Criminal Investigation Department (CID) officers

would visit him to take a statement. Further, that the threat to prosecute Stanbic's Managing Director was reiterated in a letter under the hand of the Commissioner General dated 13/01/2010. And that faced with the persistent threats of arrest and prosecution of her Managing Director, Stanbic capitulated and paid over, but in protest, the sum of shs. 2,562,503,534/= claimed.

Ms Karugaba then averred that the behaviour of the respondent stated above was in gross contempt of the court order illegal, highhanded, arrogant and excessive. Further that of a statutory authority it was oppressive, arbitrary and unconstitutional. In conclusion she averred that the respondent should be held liable to refund the monies so collected, but that claim was dropped when the application finally came up for hearing.

In further support of the application, Dag Moen averred that the interim stay order was served on Stanbic and the respondent on 18/12/2009. That the said order was still in force pending the hearing of M/A 726 of 2009. That the respondent did not serve the Agency Notice on Jacobsen who only learnt about it from Stanbic. Finally that any demand for payment against Stanbic was not legally permissible.

In his affidavit in reply, Silajje Kanyesigye averred that the tax assessment of shs. 15,999,372,991/= was served upon Jacobsen for the period October 2008 to June 2009. That Jacobsen did not dispute the principal tax of shs. 14,376,624,376/= but requested a waiver of interest thereon. That Jacobsen failed to pay the outstanding tax despite several reminders, claiming to be experiencing liquidity problems; that after several meetings in which Jacobsen requested to be allowed to pay in instalments, she still failed to come up with a payment schedule and the tax remained outstanding.

Mr. Kanyesigye further averred that because of Jacobsen's failure to pay, Stanbic was appointed as a collecting agent to remit monies held on account of Jacobsen to the respondent, not exceeding shs. 17,664,600,583/=. But when Stanbic received the notice, she informed the respondent that she was unable to honour the notice due to insufficiency of funds. That in the course of events, the respondent obtained Jacobsen's bank statements from Stanbic which revealed that at the time Stanbic received the Agency Notice she held shs. 2.5 billion on account of Jacobsen. Following this the respondent notified Stanbic that liability had shifted to her by law to pay the tax and prosecution proceedings would ensue against her Managing Director.

Mr. Kanyesige further averred that on the 5/01/2010 Jacobsen paid shs. 14,376,624,400/= to the respondent by cheque leaving a balance of shs. 2,941,611,465 outstanding. That on the same day, Stanbic wrote to the respondent to inform her that upon receipt of the Agency Notice, Jacobsen's bank accounts were frozen but before Stanbic could pay the amount demanded, an interim stay order was served upon her to restrain her from remitting any moneys pursuant to the Agency Notice. That the respondent then wrote another letter to Stanbic in further demand of the monies held on account of the 2nd respondent and again informed Stanbic that criminal action would commence against her Managing Director if the monies were not paid over.

Mr Kanyesigye finally averred that the respondent's actions were in compliance with the court order since no further enforcement was meted out on Jacobsen after receipt of the court order, and that the court order did not in any way relieve Stanbic of her obligation and hence could not be the result of contempt proceedings. That the

reasons stated in Ms Karugaba's affidavit were an afterthought advanced in bad faith to justify otherwise dilatory conduct of Stanbic's officers because they departed from what was earlier stated by their Managing Director. That it was firmly believed that Stanbic and Jacobsen colluded and delayed payment until the court order was obtained.

For the applicants Mr. Masembe-Kanyerezi submitted that the contempt complained of came about after Stanbic notified the respondent of the court order in a letter dated 21/12/2009 (Annexure **"C"**) to the affidavit of Ms. Karugaba. That contempt was also contained in the respondent's letters dated 21/12/2009, 05/01/2010 and 13/01/2010. He charged that the respondent wrote those letters very well knowing that an order had been issued to restrain her. He argued that it was not open to the Commissioner General who then had knowledge of the court order to state what was contained in the letter dated 21/12/2009 (Annexure **"D"** to the affidavit of Ms. Karugaba). The said letter notified the Managing Director of Stanbic that if he did not comply with the Agency Notice by 10.00 a.m. on 22/12/2009, the respondent would be constrained to shift the liability for the tax onto the bank and demand the same under s.40 (1) and (5) of the Value Added Tax (VAT) Act, as well as institute criminal proceedings against him under s.54 of the same statute.

Mr. Kanyerezi further submitted that the argument applied to the respondent's letter of 5/01/2010 (Annexure **"E"** to the affidavit of Ms. Karugaba) wherein the respondent informed the bank that they had secured statements that showed Jacobsen's bank balances, and that they took serious issue with the manner in which Stanbic was reneging on its legal obligations to remit taxes under Agency Notices. In the same letter, the respondent also informed the bank that the

liability had shifted onto the bank and that criminal proceedings had been instituted against the Managing Director and CID officers would be calling on him. He applied the same argument to the letter of 13/01/2010, wherein the respondent charged that the bank had ample time to pay over to her shs. 2.5 billion before the court order was issued, and then reiterated the demand, upon which the bank paid the money held over to the respondent.

Mr. Kanyerezi went on to submit that the question that has to be answered by this court is whether the actions of the respondent in the circumstances were right, put succinctly, whether "might is right." Further that the third party notice under s.40(3) of the VAT Act must by law also be served on the person liable to pay the tax and that this would enable the taxpayer to counter the notice, if necessary. He then asserted that this did not happen in this case as was averred by Dag Moen in paragraph 5 of his affidavit and it was wrong

Mr. Kanyerezi then went on to attack the contents of paragraph 19 of Silajje Kanyesigye affidavit wherein he stated that there was collusion between the applicants to delay payment till the court order was obtained. He argued that this could not amount to collusion because the respondent did not deny that they never served the Agency Notice on Jacobsen. He submitted that Jacobsen was in the first place entitled to know that the Agency Notice had been served on her bankers; she was thus entitled to seek redress from court before the Agency Notice could be enforced.

Turning to the provisions of s.40 (5) VAT Act which provides that the person against whom the Agency Notice issues is to be treated as the taxpayer and the penalties for noncompliance in s.54 of the VAT Act, Mr. Kanyerezi submitted that the respondent was bound by the court

order with effect from 18/12/2009 but went on to write the various letters referred to above after it was issued; that she thereby flaunted the court order. He observed that in paragraph 15 of Mr. Kanyesigye's affidavit, he stated that no further action was meted out on Jacobsen after the court order, implying that the respondent did not flaunt the order when she took action against the bank. That however, paragraph 1 of the order was important; implementation of the order against Stanbic had been stayed. That it therefore could not be correct for the respondent to say that enforcement of the Agency Notice against the bank had not been restrained by the order. That since the notice was to a 3rd party, the interim order restrained that 3rd party.

Mr. Kanyerezi went on to contend that the contents of paragraph 16 of Mr. Kanyesigye's affidavit were also not correct. That in the mind of the respondent, the enforcement was against the shifted liability under s.40 of the Act but the liability that the interim order sought to restrain was the 3rd party liability under the Agency Notice. That the terms of the order were wide and could not be misconstrued by the respondent. He argued that the respondent's letter of 21/12/2011 stated that they would shift liability to Stanbic by 22/12/2010 and take other steps to enforce the Agency Notice. He asserted that all such action had been restrained by the interim stay order on 18/12/2010.

In support of his submissions, Mr. Kanyerezi referred to the decision in **Wildlife Lodges v. County Council of Narok & Another [2005] EA 344** for the dictum that a party who knows of an order whether null or valid, regular or irregular cannot be permitted to disobey it. That it would be most dangerous to hold that suitors, or their solicitors, could themselves judge whether an order was null or valid, whether regular or irregular. He then charged that if the respondent

thought the order was unfair, then she should have come to court, not flaunted it as though she was not bound by it and go on to enforce the Agency Notice. That in doing so, she enforced what had been restrained by court.

Mr. Kanyerezi then submitted that such conduct cannot go unpunished for it would undermine the force of court orders and also make illegal conduct profitable, especially for bodies with very wide powers such as the URA. He therefore prayed that the respondent be castigated and ordered to pay exemplary damages to the tune of shs. 500,000,000/=. He referred me the decision in **Rookes v. Bernard [1964]1 All E.R 367** for the dicta that English law recognised the award of exemplary damages, that is, damages whose object was to punish and deter and which were distinct from aggravated damages. That there were two categories of cases in which an award of exemplary damages could serve a useful purpose, viz., in the case of oppressive, arbitrary or unconstitutional actions by servants of the government, and in the case where the defendant's conduct had been calculated to make him profit for himself, which might well exceed the compensation payable to the plaintiff.

Mr. Kanyerezi then concluded that the figure awarded had to be one that would serve to punish and remind the defendant not to repeat the wrong act. And in that regard, he stressed that the court must consider the means of the party in the wrong. He observed that if *"the mighty URA"* could treat Stanbic here as it did in this case, how then would it treat an *"ordinary mortal."* He then submitted that shs. 500m would be sufficient and prayed that the court makes the finding that the respondent flaunted the court order and then order that she pays the damages prayed for.

In reply, Mr. Ali Ssekatawa for the respondent first raised a preliminary objection on a point of law. He submitted that the application was prematurely brought because no notice was issued against the respondent as is required by s.2 of the Civil Procedure and Limitation (Miscellaneous Provisions) Act. He observed that while the main suit was brought against the Commissioner General of URA, this application was brought against URA in its own right. That since it was against URA, statutory notice ought to have been issued before it was filed as required by the Act. He cited the decision in **Meera Enterprises v. URA SCCA No. 22 of 2007** in support of his submissions.

But without prejudice to his preliminary objection, Mr. Ssekatawa in opposition of the application responded to Mr. Kanyerezi's arguments. He submitted that the case of the respondent here fell within the exceptions of situations that could attract an action for contempt of court. He relied on the decision in **Hadkinson v. Hadkinson [1952] All ER 567** for the proposition that a person against whom contempt is alleged will also, of course, be heard in support of a submission that having regard to the true meaning and intendment of the order which he is said to have disobeyed, his actions did not constitute a breach of it; or that having regard to all the circumstances, he ought not to be treated as being in contempt. He then went on to submit to prove that the respondent ought not to be treated as being in contempt of the order.

In that regard, Mr. Ssekatawa submitted that the taxes that the respondent sought to claim when the Agency Notice was served on Stanbic were not in dispute as at 11/12/2009. That when the Agency Notice was served on 15/12/2009, it required Stanbic to remit the money, not exceeding shs. 17 billion on the date of receipt of the

notice. He referred me to Annexure **"A"** to the affidavit of Silajje Kanyesigye. He argued that the fact stated in that letter, that Jacobsen had not received the VAT claimed by the respondent from their suppliers Uganda Electricity Transmission Company Ltd. (UETCL) did not amount to a dispute within the meaning of the VAT Act. In his view, what constitutes a dispute under the Act is a situation where the taxpayer disputes the amount that is demanded from them.

It was also Mr. Ssekatawa's submission that having admitted the principle amount claimed, there was no dispute about the tax owed by Jacobsen. He went on to submit that the respondent had no obligation to collect the tax from UETCL but under s. 40 VAT Act, she could recover it from any person that had monies on account of Jacobsen. Mr. Ssekatawa further argued that once the principal was admitted by Jacobsen in their letter of 11/12/2009, the interest became automatic. Further that the interest could not be waived by the respondent because it was only the Minister of Finance that had the mandate to do that.

Turning to effect of the Agency Notice once served on Stanbic, Mr. Ssekatawa submitted that the obligations of a person upon whom an Agency Notice is served were dealt with by the Court of Appeal of Kenya in **Pili Management Consultants v. Commissioner of Income Tax, Kenya Revenue Authority [2010] KLR 67.** He submitted that in that case, the court found that the duty of the agent in such matters is to remit the money held upon receipt of the notice. And that the reason for that is because the agent is granted a statutory indemnity and by the indemnity the agent is immune to any other proceedings. Mr. Ssekatawa went on to explain that as opposed to the Kenya Act that was under scrutiny in that case and which

specified a period of 30 days within which the agent was supposed to remit the monies, the Uganda VAT Act provides that the period within which to pay the monies over has to be specified in the notice. And that in this case, the notice specified that the monies had to be paid *"immediately."*

Mr. Ssekatawa went on to submit that it was not a requirement of the Agency Notice that the accounts be frozen but it was a requirement that the money be paid over to the respondent. He relied on the decision in the **Pili Management Consultants** case for the submission that the agent's sole purpose is to remit the money in their possession to the principal, in this case, the Commissioner General URA. He also relied on the decision in **Shah Jivraj Hiri & Sons v. M. K. Gohil [1960] EA 922** to emphasise the duty of the agent on receipt of an Agency Notice. He then submitted that once the Agency Notice is served, it constitutes a statutory assignment and therefore cannot be affected by any subsequent court order, even in terms of execution.

Mr. Ssekatawa contended that the reasons advanced by Stanbic immediately after the notice was served on her, and which were advanced in Annexure **"C"** to the affidavits of Mr. Kanyesigye and Ms. Karugaba was that there were insufficient funds as well as a court order. He then charged that the respondent had not received the court order by the 21/12/2009 when they wrote their reminder of 21/12/2009 (Annexure **"D"** to Ms. Karugaba's affidavit) to tell the bank that liability would shift onto her if payment was not effected. He complained that though Stanbic wrote to say there were insufficient amounts, they did not mention how much they had on account. He said that the excuse that there were insufficient amounts could not hold because the Agency Notice required Stanbic to pay any amount

that they held, provided it did not exceed shs. 17,664,600,583/=. That for that reason, the respondent moved to secure the bank statements which showed them how much Stanbic held on account of Jacobsen, and they found that there was actually shs. 2.5 billion thereon.

Mr. Ssekatawa went on to state that in his letter of 12/01/2010, the Managing Director of Stanbic apologised for not remitting the money as required by the Agency Notice. That what was contained in that letter was in contradiction of what was stated in the affidavit of Ms. Karugaba in support of the application. That by the letter of 12/01/2010, the reason that there were insufficient funds had been abandoned by Stanbic and Ms. Karugaba now averred that it was because they were trying to verify the authenticity of the Agency Notice. He charged that the reasons advanced by Ms Karugaba were an afterthought and different from what was advanced by Stanbic before. He then concluded that for the reason above, the respondent fell within the exceptions laid out in the **Hadkinson** case against actions for contempt of court.

Mr. Ssekatawa also submitted that the doctrine *ex turpi causa non oritur actio* applies to the applicants. That the law could not lend aid to Jacobsen who was bound to pay her taxes on the date that they fell due. She failed to pay and Stanbic failed to discharge a statutory assignment to remit monies that she had on account of Jacobsen on time. That the court could not assist the applicants in such a case on an action for contempt.

Regarding the prayer for damages, Mr. Ssekatawa observed that the applicants had applied for a refund of the monies but they dropped that part of the action and are no longer claiming the refund. That instead, they seek to recover shs. 500m in contempt proceedings. He

then submitted that contempt proceedings are not a "hunting ground for money." He relied on the decision in the **Hadkinson** case for his submission that contempt proceedings are not of a commercial nature but to punish the party and bring them within the jurisdiction of the court. He alluded to the fact that they are normally taken under criminal procedure. He went on to submit that exemplary damages are only awarded if an action is founded in tort. That in other cases, the party is either committed to prison or denied a hearing in further proceedings. He asserted that the respondent has a history of obeying court orders and so should not be punished.

In reply to the preliminary objection that was raised by Mr. Ssekatawa, Mr. Kanyerezi submitted that this is not an originating application but an application that arose out of HCCS 479 of 2009. That the parties to that suit are not in dispute and they are Jacobsen (U) Power Plant Co. Ltd as plaintiff, and the Commissioner General URA as the defendant. He went on to state that the interim stay order could not have been obtained against a non-party to the suit so it must have been obtained against the Commissioner General URA, and not URA. He added that when Stanbic came into the matter to file this application, the respondent who was no doubt the Commissioner General URA raised an objection to say that Stanbic could not be a party to this application because she was not party to the suit. That the learned Judge, Nsubuga Mukasa, ruled that Stanbic was a proper party to this application and it could proceed in the manner that it has.

Mr. Kanyerezi further contended that if the application was filed against the Uganda Revenue Authority and not its Commissioner General, then that was a misnomer because an injunction could not have been obtained against URA in the previous application. That

clearly the stay was against the Commissioner General and that as a result, Order 1 rule 10 (2) CPR applied to the situation and the court has the jurisdiction at this point to substitute the proper party for the party that was wrongly named in the application, as well as to strike out the party wrongly named.

In rejoinder to the respondent's submissions Mr. Kanyerezi submitted that Mr. Ssekatawa did not address the issue that had been placed before this court for determination; i.e. whether the respondent flaunted the interim stay order or not. He explained that the matter was not for this court to decide whether the taxes were due or not, or whether Jacobsen had admitted that they were due. That all that the court was required to decide on was the scope and effect of the order in dispute in relation to the actions of the respondent after the order was issued. He distinguished the circumstances in **Shah Jivraj Hira,** which was cited by Mr. Ssekatawa, from those in this case and said the decision in that case could not apply to the circumstances in this case. He emphasised that though the authority that the respondent purported to use here was statutory, it could not give the tax body superiority over judicial interventions.

Regarding the terms of the Agency Notice Mr. Kanyerezi submitted that they were not clear. That the notes in paragraph (a) of the accompanying notes in the Agency Notice seemed to contradict the earlier requirement therein. That while the payment instructions in paragraph 2 of the notice required Stanbic to pay shs 17,664,600,583/= to the respondent *on the date of receipt of the notice*, paragraph (a) of the notes thereunder stated that the said amount or any amounts currently held on the account had to be paid immediately and any balance had to be paid within 30 days from the date of issue of the Agency Notice. He argued that the 30 days referred

to here were not provided for anywhere in the statute and seemed to be a hangover from the previous law that had been repealed. In his view the two instructions created an ambiguity in the requirements of the notice. That the addition of the period of 30 days which were not provided for in the VAT Act changed the meaning thereof.

He went on to argue that the contents of Annexure **"E"** of Silajje Kanyesigye's affidavit did not constitute an apology, as Mr. Ssekatawa would have this court believe, but an explanation as to why Stanbic could not have remitted the monies on 15/12/2009 when the notice was issued. That the letter was an attempt to get the respondent to act consistent with the responsibility they hold and it informed them that the accounts had been frozen. That with such an assurance the money was safe and the respondent should have bided her time and waited for the suit to be heard or applied to have the interim stay order lifted, but not gone on to threaten the Managing Director of Stanbic with arrest and criminal prosecution.

After all that was said, the issues that fall for determination in this application are basically three as follows:-

i) Whether this application was brought prematurely before the issue of a statutory notice, or whether it was brought against the wrong party.

ii) Whether the respondent was in contempt of the interim stay order that was granted by this court on the 18/12/2009 in M/A 727 of 2009; and if so

iii) Whether the respondent ought to be castigated for the said contempt and ordered to pay exemplary/punitive damages.

Regarding the first issue, it is true that the Supreme Court of Uganda in **Commissioner General, Uganda Revenue Authority v. Meera**

Enterprises (above) ruled that while it is mandatory to issue statutory notice under the Civil Procedure (Miscellaneous Provisions) Act before bringing an action against the URA, there is no requirement to issue such notice before suing its Commissioner General. The Supreme Court also found and ruled that by virtue of the various revenue statutes, including the Income Tax Act and the VAT Act, it is the Commissioner General that has the mandate to sue and recover in any court of competent jurisdiction, in her official name and subject to the general directions of the Attorney General, tax that has not been paid when it is due and payable. The court referred to s. 104 of the Income Tax Act and s.63 of the VAT Act in the discussion of this question and finally came to the conclusion that it was abundantly clear that the Commissioner was a competent and proper party to suits under the said revenue statutes.

Having said that, this application arose not only out of HCCS 497 of 2009 but also out of M/A 727 of 2009,. the application for an interim order to restrain the Commissioner General URA and her servants or agents from enforcing any further tax collection measures against the applicant in respect of a VAT Assessment for shs. 17,318,235,865/= till the hearing and determination of M/A 726 of 2009. I perused the record of M/A 727 of 2009 and found that there is no reason to guess why the action was brought against the Commissioner General. All the correspondence, including the assessment on which the whole dispute was premised were issued either by the Commissioner General, Assistant Commissioners General or others on her behalf. The main suit and the applications were therefore brought, correctly in my view according to the decision in the **Meera Enteprises** case, by Jacobsen (U) Power Plant Company against the Commissioner General of URA And there can be no gainsay about that.

However, it would appear that whoever drafted or typed the interim stay order in M/A 727 of 2009 wrongly typed the name of the respondent as Uganda Revenue Authority, instead of "The Commissioner General, URA." It also appears that the error escaped the scrutiny of the registrar. The mistake was then perpetrated in this application which was brought against the URA, instead of its Commissioner General. And strictly speaking, there could be no action arising out of the breach of the order that arose from that application by URA as a corporation. Therefore, as was advanced by Mr. Kanyerezi, the appearance of URA as a respondent in this application was a misnomer. It cannot be sanctioned by this court for it is this court that failed to spot the apparent error and issued the order that is being contested under its seal and the hand of the registrar.

Order 1 rule 10 (2) CPR provides that,

> " The court may at any stage of the proceedings either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."

In **Kakooza Mutale v. Attorney General & Another [2001-2005] HCB 110,** the High Court considered the extent and intent of the provisions of Order 1 rule 10 CPR. Bamwine, J (as he then was) laid down the criteria to be employed by a court exercising its powers under the rule. He ruled that first and foremost, Order 1 rule 10(2) CPR gives wide discretion to the court to strike out or add parties to

suits, and that the principles under which such application can be allowed are that a plaintiff is at liberty to sue anybody that he thinks he has a claim against and cannot be forced to sue anybody; and where he sued a wrong party he has to shoulder the blame. Further that court has no jurisdiction under Order 1 rule 10 (2) to order the addition of parties as defendant where the matter is not liable to be defeated by non-joinder; when they were not persons who ought to have been sued in the first place; and where the presence as a party is not necessary to enable the court effectively to adjudicate on all questions involved. He concluded that generally, a defendant will not be added against the plaintiff's wish. Suffice it to add here that the criterion listed above must be viewed from the perspective of the principle that substantive justice must be administered without undue regard to technicalities as is stated in Article 126 (2) (e) of the Constitution.

Jacobsen did not sue the URA; she sued its Commissioner General who had made an assessment against her under s.33 of the VAT Act. It is the same Commissioner General that issued the third party notice against Stanbic here under s.40 of the VAT Act. Since the interim order was also made against the same Commissioner General and her servants and/or agents, including Stanbic who became her agent by virtue of the Agency Notice that was issued on 15/12/2009, I find that the Commissioner General is not only a proper but also a necessary party for the effective and conclusive determination of this application. I also find that the respondent (URA) was wrongly inserted as a party in the order that was issued by this court on the 18/12/2009, instead of the Commissioner General of URA and that the misnomer of the respondent was perpetrated in this application.

Under s.99 CPA, this court has the power to amend it judgments, decrees and orders where clerical or mathematical mistakes, or errors arising in them from any accidental slip or omission have been made. Such amendment may be effected at any time by the court, either of its own motion or on the application of any of the parties. This provision is popularly referred to as the 'slip' rule. It is therefore incumbent upon this court to correct the error in the order that was issued by the registrar on 18/12/2009, by substituting URA as respondent therein with "The Commissioner General, Uganda Revenue Authority" who was the correct party thereto.

And by virtue of the powers vested in this court by Order 1 rule 10 (2) CPR it is further hereby ordered that the URA be struck out as respondent in this application and substituted by the Commissioner General Uganda Revenue Authority; and it is so reflected in this ruling. Since it was for the applicant (Jacobsen) in M/A 727 of 2009 to ensure that the order in her favour was correctly drawn up, she must pay the respondent's costs for the preliminary objection.

But before I go on, it is important that I clarify that I have great respect for and therefore no personal attack is meant on the current Commissioner General, by consistently referring to the respondent here as she or her. I believe, and it will become apparent later on in this ruling that this action was not brought in that spirit and the court ought not to be understood to be making this ruling in that spirit. The action was brought against ***'the office'*** and not ***'the person'*** of the Commissioner General because it is that office that is charged with the issuing of tax assessments and Agency Notices which are the subject of this application and the alleged contempt.

I will next address the question whether the Commissioner General, who is the proper party to this application, acted in contempt of the order that was issued by the registrar of this court on 18/12/2009. But perhaps to obviate the risk of being misunderstood, it is important that the notion 'contempt of court' be defined. I will have recourse to the famous words of Salmon, LJ in **Jennison v. Baker [1972] 1 All ER 997,** at pages 1001-1002 where he stated: '

> *"Contempt of court" is an unfortunate and misleading phrase. It suggests that it exists to protect the dignity of the judges. Nothing could be further from the truth. The power exists to ensure that justice shall be done. And solely to this end it prohibits acts and words tending to obstruct the administration of justice. The public at large, no less than the individual litigant, have an interest, and a very real interest, in justice being effectively administered. Unless it is so administered, the rights, and indeed the liberty, of the individual will perish. Contempt of court may take many forms. It may consist of what is somewhat archaically called contempt in the face of the court, e.g. by disrupting the proceedings of a court in session or by improperly refusing to answer questions when giving evidence. It may, in a criminal case, consist of prejudicing a fair trial by publishing material likely to influence a jury. It may, as in the present case, consist of refusing to obey an order of the court. These are only a few of the many examples that could be given of contempt. Contempts have sometimes been classified as criminal and civil contempts. I think that at any rate this is an unhelpful and almost meaningless classification."*

I shall return to the question raised by Mr. Ssekatawa as to whether the contempt proceedings at hand are criminal or civil later on in this ruling. But at this point it is important that I consider the terms of the interim stay order that was issued on 18/12/2009 and which the

respondent is alleged to have disobeyed. The order of Her Worship Gladys Nakibuule, then Deputy Registrar of this court, was in the following terms:

> *"1. The implementation and enforcement of the third party Agency Notice issued to Stanbic Bank Ltd. under Ref: B0-1010-0165-M dated 14th December or any other bank be and is hereby stayed.*
>
> *2. An Interim Order doth issue restraining the Respondent and her agents or servants from demanding payment and/or enforcing any tax collection enforcement measures in respect of assessments dated 17th July 2009 for 17,664,600,583/= (Seventeen billion six hundred sixty four million six hundred thousand eighty three siblings only), until final determination of Misc. Cause No. 726 of 2009."*

The object of an interlocutory injunction is to protect the plaintiff against injury by violation of his/her rights for which they could not be adequately compensated in damages recoverable in the action, if the uncertainty were resolved in their favour at the trial (per Lord Diplock in **American Cyanamid Co. v. Ethicon Ltd. [1975]2 WLR 316**). Since M/A 727 of 2009 was filed for the purpose of obtaining injunctive relief, there is no doubt from the terms of the order that it was meant to restrain any further action in the matter and so maintain the *status quo* till final determination of M/A 726 of 2009. And if I understood the order correctly, it restrained the Commissioner General, her servants (i.e. the staff of URA) as well as her agents (meaning Stanbic or any other agent that had been served with an Agency Notice) to collect or aid the collection of the monies claimed following the assessment dated 17th July 2009 for 17,664,600,583/=. But that did not happen because the Commissioner General and her

servants were of the view that the Agency Notice took effect immediately and Stanbic was supposed to remit the money immediately, whether a court order was issued against the agent and the Commissioner or not. It is thus pertinent to consider when the Agency Notice and the interim stay order took effect.

Mr. Ssekatawa referred me to the decision in **Pili Management Consultants** (above) for the dictum that the sole purpose of the agent is to remit any monies in their possession to the Commissioner. He urged me to rule, as was done in that case that Stanbic ought to have remitted the monies on the 15/12/2009 without much ado. I perused the decision in the **Pili Management Consultants** case but came to the conclusion that the facts of that case could be distinguished from those in the instant case.

In **Pili,** the Commissioner for Income Tax issued an Agency Notice to collect taxes that had not yet been assessed to a bank that held the accounts of Pili, the taxpayer. The taxpayer went to court on an application for judicial review based on the grounds that the tax was not due because the taxpayer had not earned any income in the year for which the tax was claimed. On the granting of leave to bring the application, the court did not stay any further action by the Commissioner to collect the tax but the Commissioner did not do so either. Subsequently, the order was amended to the effect that the money in the account would remain until after hearing and finalisation of the dispute in the Superior Court. The Commissioner was thus restrained and no further action was taken to remove the monies from the bank.

I entirely agree with the decision in **Pili** that the sole purpose of appointing an agent is to remit the monies to the Commissioner.

However, each case has to be understood from the circumstances surrounding the issuance of the Agency Notice. Unlike in the **Pili** case, in the instant case, two days after the Agency Notice was served upon Stanbic, an *ex parte* interim stay order was obtained in M/A 727 of 2009, pending the determination of M/A 726 of 2009. That application had been fixed for hearing *inter parte* on 22/02/2010 but it was overtaken by events because the Commissioner General went on to enforce the Agency Notice in spite of the interim stay order.

Mr. Ssekatawa argued that the interim stay order did not take effect because it had not been served on the Commissioner General when the letters that are complained about were written demanding payment of the monies held by Stanbic. But according to Stanbic's letter of 21/12/2009 (Annexure **"C"** to the affidavit of Mr. Kanyesigye) Stanbic wrote to inform the Commissioner Domestic Taxes (URA) that an order had been served upon her preventing her from making any payment to URA in respect of the Agency Notice. A copy of the order was attached to the letter. The letter shows that a stamp of the Domestic Taxes Department was affixed to it to indicate that it was received on 21/12/2009, the same day that it was written. I will therefore take it that the Commissioner General was made aware of the interim stay order on 21/12/2009.

In spite of that, on 21/12/2009, Muheebwa Balaam, for the Commissioner General, wrote to the Managing Director of Stanbic to notify him that a statutory indemnity was granted to the bank under s.40(4) of the VAT Act. That because of the said indemnity, if Stanbic did not comply with the Agency Notice by 10.00 a.m. on 22/12/2009, liability would shift to her; that URA would demand that the bank pay the monies, including instituting proceedings under s.54 VAT Act (i.e. for the arrest of Stanbic's officers). There may be some doubt about

whether or not the Commissioner General received information about Stanbic's letter of 21/12/2009 because it was sent to the Commissioner Domestic Tax Department; but that is not all.

Not only did the Commissioner General and/or her servants and agents demand for payment on 21/12/2009, the day on which the order was received by URA, but thereafter on 5/01/2010, Michael Otonga, Ag. Commissioner General wrote another letter to the Managing Director Stanbic. That letter (Annexure **"E"** to the affidavit of Ms. Karugaba) showed that the Commissioner General was well aware that an interim stay order had been obtained from court and sent to URA. It reads, in part, as follows:

> *"The said Agency Notice was received by the Bank on 15th December 2009, but was not acknowledged until 23rd December 2009 when your Legal Officer, Ms. Dorothy Ochola wrote claiming that the Agency Notice could not be honoured on account of insufficient funds and a Court Order.*
>
> *We have since secured the Bank Statements of M/s Jacobsen (U) Power Plant Ltd. and a copy of the Court Order and these are our observations;*
>
> 1. *As at 15th and 16th December 2009, the following funds were reported to the credit of M/s Jacobsen (U) Power Plant Ltd accounts held in Stanbic Bank (U) Ltd. (the funds were indicated therein)*
> 2. ***The Court Order was secured and served on 18th December, 2009, 3 days after receipt by the bank of the Agency Notice.***
>
> *We take serious issue with the manner in which your Bank is reneging on its legal obligations to remit taxes under Agency Notices. The conduct is unacceptable under the law.*
>
> ***TAKE NOTICE THEREFORE:***
>
> 1. *That the liability of UGX 2,562,503,534/= being funds to the credit of M/s Jacobsen (U) Power Plant Ltd accounts,*

and not remitted to URA before the issuance and receipt of the court order has shifted to Stanbic Bank Ltd in accordance with sections 40(1) and (5) VAT Act. We do hereby demand payment of the same within 7 days from the receipt of this notice.

2. *That we have commenced prosecution proceedings against you personally under sections 40, 54 and 62 of the VAT Act. We expect your maximum cooperation with our CID Officers.*

There is no doubt from the excerpt of the letter above that the Commissioner General had knowledge that this court had issued injunctive relief to Jacobsen, and that Stanbic was also included in the restraint. But perhaps she and her staff held similar beliefs that somehow the powers of URA under the VAT Act superseded those of this court.

Nonetheless in response to the letter, the Managing Director of Stanbic wrote to the Commissioner General on 12/01/2010 again stating that Jacobsen obtained and served a court order on the bank dated 18/12/2009 to the effect that the implementation and enforcement of the third party Agency Notice had been stayed. Further that because of the order, the bank could not take any further action in implementing the Agency Notice. He said that he regretted the delay in making the payment but that it was not intentional; he then confirmed that the monies were still being held on account in attachment to that date. He also mentioned that Jacobsen had since paid over shs. 14 billion to URA in respect of monies claimed under the same Agency Notice. He then stated in conclusion that:

"In light of all the above, we object to the transfer of Jacobsen's tax liability to us and consider the commencement of prosecution proceedings against the undersigned unjustified in the circumstances."

Mr. Ssekatawa urged me to understand Stanbic's letter of 12/01/2010 as an apology by the bank for not remitting the monies immediately, therefore justifying further action that was taken by the Commissioner General to force Stanbic to pay over the monies. But I was not persuaded by that argument because in the same letter, and quite correctly in my view, the Managing Director continued to protest further action that was being taken by the Commissioner General and her servants/agents. I say so because it appears to me that his understanding of the situation was that the order required him not to pay any monies under the Agency Notice and he felt safe freezing the accounts and letting the status before the interim stay order prevail.

However, the Commissioner General was neither convinced nor deterred by this response. On 13/01/2010, she responded to Stanbic's Managing Director's letter of 12/01/2010, again complaining about non-compliance with the Jacobsen Agency Notice. In the letter she stated:

> *"You have rightly pointed out that the Agency Notice was received on 15th December 2009 and that the Court Order was received on 18th December 2009. It is clear therefore that the Bank had ample time within which to pay over to the Commissioner General UShs. 2,563,503,534/= as required by the Agency Notice, prior to being served with the court order. Please note that the Agency Notice did not require the bank to freeze the account but to immediately on receipt of the Notice, remit the money to the Commissioner General."*

She finally reiterated the demand that the monies be paid over to the Commissioner General and charged that the notice that had been issued on 5/01/2010 expired on 12/01/2010. She then informed that prosecution proceedings would be instituted against the Managing Director personally under ss. 40, 54 and 62 of the VAT Act. That put

an end to the matter; the Managing Director capitulated, but under protest, and released the monies to the Commissioner General on or about 13/01/2010.

Those being the circumstances, was not the Commissioner General in contempt of the interim stay order? Mr. Ssekatawa denied that she did and argued that there was no dispute about the tax because in his view, Jacobsen admitted the tax in their letter of 11/12/2009 (Annexure **"A1"** to the affidavit of Silajje Kanyesigye). In Mr. Ssekatawa's view because of what was stated in that letter, Jacobsen had to pay over the principle amount demanded and the interest or penalties were *fait accompli* unless waived by the Minister of Finance. That in the circumstances, the Commissioner General had the right to enforce the Agency Notice and did no wrong.

It is true that in his letter of 11/12/2009, the Managing Director of Jacobsen, Dag Moen, wrote to the Permanent Secretary Ministry of Finance and Planning requesting a meeting before 15/12/2009 to explore the enforcement that was announced by URA in a letter dated 19/11/2009. In the letter, which was attached to Silajje Kanyesigye affidavit as Annexure **"A2"**, Serubbide Yasir for the Commissioner General reminded Jacobsen that shs. 17,318,235,865/= remained unpaid. In their letter to the Permanent Secretary Ministry of Finance, Jacobsen stated as follows:

> *"We wish to request an urgent meeting before the 15th December 2009 to explore the possibility of avoiding the action of enforcement announced by URA as per enclosed letter.*
>
> *JUPPCL is not contesting the principle amount claimed by URA, but is unable to pay unless the client UETCL pays the VAT that is due to JUPPCL.*

It is unfortunate that this issue has not been resolved by the principle parties, but as an investor and a principle party, we wish to avoid any unnecessary actions and inconveniences that can be the result of the announced URA action.

If URA should initiate the enforcement JUPPCL will be unable to continue operations and will have no other option than closing down the Plant."

The letter was copied to the Permanent Secretary, Ministry of Energy and Mineral Development, the CEO Electricity Regulatory Authority and the Commissioner General, as well the M.D of UETCL. It is by copy of the letter above that Mr. Ssekatawa submitted that Jacobsen admitted their liability for the tax, in spite of the pleadings in the main suit. He went on to state that strictly under the VAT Act, once a supply is made, whether VAT has been remitted by the recipient of the goods or services or not, the Commissioner General has the duty to collect and is given very wide powers to do so, even from other persons who owe the supplier other that its debtors for VAT, as is the case with Stanbic here.

But there is no doubt that there was and still is a dispute for which Jacobsen found it necessary to come to court in HCCS 479 of 2009. Therefore, given that the suit was filed and the Commissioner General filed a WSD on 6/01/2010, I was not persuaded by Mr. Ssekatawa's argument that there was no dispute between Jacobsen and the respondent because there was one pending right in this court. The argument was not correct even if his standard of what constitutes a dispute under the VAT Act was employed. This is because in paragraph 4 of the plaint Jacobsen pleaded that in view of the facts pleaded in paragraphs 3 (a) to (h) the respondent's tax assessment was contrary to the law and illegal. There was no doubt a dispute as to how much was due, notwithstanding Jacobsen's letter of 15/12/2009

to the P.S Ministry of Finance. It was not up to the respondent and her staff to determine the dispute as concluded by that letter but for them to present it to the court in evidence as an admission, if at all it was.

Regarding Mr. Sekatawa's argument that the decision in **Jivraj Hiri & Sons v. M. K. Gohil** applied, and that as soon as an agent is appointed the monies held by them is held under a statutory assignment for the Commissioner General, I absolutely agree with the general finding of the court. But when I reviewed it in more detail, I also found that it was not helpful to the respondent's case. While the order that was referred to in **Jivraj Shah** was an order for attachment of the salary of an employee which was the subject of an Agency Notice issued to an employer, the order in this case was an order for an injunction to restrain the Commissioner General from taking any further measures to collect the tax. While the order for attachment of the salary was of necessity going to deprive the Commissioner of any possibility of collecting the tax, the order in this case simply provided that all proceedings in collection be stopped till the hearing of Misc. Application 726 of 2009. The money was to stay where is was with the *status quo* maintained till then and Stanbic had made an undertaking that the accounts would remain frozen. The notice would therefore still retain its priority because the interim stay order did not require Stanbic to pay anyone else money before the satisfaction of the Agency Notice.

I will next address the charge made against Stanbic as having colluded with Jacobsen by delaying payment of the monies in order to facilitate Jacobsen to secure a court order to restrain the respondent before paying over the money. The provisions of s.40(3) of the VAT Act specifically require the Commissioner General to forward a copy of the notice issued under s. 40(1) of the Act to the person liable. The

provision is stated in mandatory terms employing the expression "shall'. Mr. Dag Moen's averment in paragraph 5 of his affidavit was never rebutted by Mr. Kanyesigye's affidavit. Instead, the applicant's were accused of collusion.

It is my view that when Parliament included subsection (3) of s.40 in the procedure for collecting VAT by use of Agency Notices, it must have had a purpose. It was to serve as notice to the person liable and that person would then chose what action to take faced with the impending further action of the Commissioner General under s. 54 of the Act. Where notice of an event is provided for by statute, the courts take it seriously for it serves to show whether due process of the law was followed or not. And where it is not followed, the actions of the implementer may, if challenged in court, be pronounced null and void. I therefore agree with Mr. Kanyerezi's submission that Jacobsen had a right to know about the issuance of the Agency Notice. She had a right to know on 15/12/2009 when it was issued against Stanbic. And absent the fulfilment of that step of procedure by the Commissioner General and/or her servants and agents, they have neither a legal nor a moral foot to stand on to accuse Stanbic with collusion with Jacobsen when she notified her of receipt of the Agency Notice.

The general principle regarding respect for court orders was stated in **Chuck v. Cremer** (1 Coop Temp Cott 342) cited in the judgment of Romer, LJ in **Hadkinson v. Hadkinson** (above) that:

> *"A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it ... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid—whether it was regular or irregular. That they should come to the court and not take (it) upon themselves to determine such a question. That*

the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed."

Romer LJ went on to state at page 571 that *"Disregard of an order of the court is a matter of sufficient gravity, whatever the order may be."* The principle was re-stated in the same terms in **Wildlife Lodges Ltd. v. County Council of Narok** (already cited). And to drive the point home, at page 354 Ojwang, J observed that there are social limitations afflicting people in developing countries which restrict their access to institutions like the judiciary. He then went on to emphasise:

"Yet, this same Judiciary is generally viewed as the impartial purveyor of justice(,) and the guarantor of an even playing ground for all. This perception ought to be strengthened, through genuine respect for the courts of justice, and through compliance with their orders. Against this background, I would take the position that consistent obedience to court orders is required, and parties should not take it upon themselves to decide on their own which court orders are to be obeyed and which ones overlooked, in the supposition that this oversight will not impede the process of justice."

Mr. Ssekatawa urged me not to punish the respondent in contempt because in his view, URA is in the habit of respecting court orders. Be that as it may, I hold the same view as Ojwang, J., that litigants cannot decide, on their own, which orders to respect and which ones to ignore. All court orders have to be respected, whether valid or invalid, *ex parte* or *inter parte*.

It was also Mr. Ssekatawa's argument that the situation at hand fell within the ambit of exceptions that were laid down in **Hadkinson v.**

Hadkinson. If I understood him correctly, he meant to say that under those exceptions there are instances in which one should not be held to be in contempt of a court order though they have disobeyed it. I was unable to put that meaning to the exceptions laid down in **Hadkinson** because quite clearly the fundamental issue before the court in the case was whether a party clearly in contempt of an existing order could be heard in a different but related motion, such as an appeal against the substantive decision that carried the order in question.

The exceptions laid out by Romer, LJ at page 570 were that a person can apply for the purpose of purging his contempt; he can appeal with the view of setting aside the order on which his contempt is founded; he can be heard in support of a submission that having regard to the true meaning and intendment of the order which he is said to have disobeyed, his actions did not constitute contempt; and finally, he is entitled to defend himself when some application is made against him. Therefore, with due respect to counsel for the respondent, the exceptions had nothing to do with the instant application because the applicants did not try to prevent the respondent from being heard in this application. She was allowed to file an affidavit in reply and also have counsel to represent her here.

In conclusion of the 2nd issue, I find that the Commissioner General acted in contempt of the interim stay order issued in favour of the Jacobsen (U) Power Plant Co. Ltd. on 18/12/2009. And the maxim *ex turpi causa* certainly does not apply to the applicants who are still litigants in this court over the same taxes whose collection the interim stay order was meant to stop. The Commissioner General has never purged her contempt yet the main suit still subsists; and so this

application to determine whether there are any remedies available to the applicants in the circumstances.

Finally, I will address the question whether the contemnor ought to be punished by an order for the payment of punitive damages. But before that, I will address the question that was raised by Mr. Ssekatawa whether the contempt that is the subject of these proceedings was of a criminal nature and therefore one that could not attract the payment of damages. Halsbury's Laws of England, Vol. 9(1) (Ed. 4) at paragraph 402 and page 241 addresses the kinds of contempt as follows:

> "Contempt of court can be classified as either (1) criminal contempt, consisting of words or acts which impede or interfere with the administration of justice or which create a substantial risk that the course of justice will be seriously impeded or prejudiced; or (2) contempt in procedure, otherwise known as civil contempt, consisting of disobedience to judgments, orders or other process of court, and involving private injury."

In **Savings & Investment Bank Ltd. v. Gasco Investments (Netherlands) BV & Others [1988]1 All ER 975**, the Court of Appeal of England held that where an order had been made in civil proceedings against one party for the protection of another party who sought to enforce the order by applying in those proceedings for the committal of the first party for breach of the order, the committal proceedings took their character from the proceedings on which they were based and were accordingly civil. The contemnor in this case disobeyed a court order in civil proceedings from which these proceedings arose. That would put the injury here in the civil category.

In this jurisdiction, criminal contempt is provided for by s.107 of the Penal Code Act and the punishment is prescribed. That then begs the question whether civil contempt is punishable, and if so what punishments are ordered by the courts. Mr. Kanyerezi prayed that I award punitive damages of shs. 500m against the contemnor on authority of **Rookes v. Bernard** (cited above). I found the argument attractive in the circumstances but I found no authority in Uganda, or East Africa where exemplary or punitive damages were awarded for contempt of court. I was however, able to find one recent decision from the United States of America.

In **Michael Lynn Kirkbride & Dolores Avoline Kirkbride (debtors) Case No. 08-00120-8-JRL** (Unreported), the U.S Bankruptcy Court (Eastern Division of North-Carolina, Wilmington Division) awarded US$ 63,000 as punitive damages in addition to US$ 63,000 compensatory damages against the Bank of America on a motion for contempt of court. The debtors had filed a bankruptcy petition that was compromised by a consent order and the debtors were discharged. However, the bank began to send them notices and to make persistent telephone calls demanding for payment of the debt That went on for a period of almost two years, in spite of efforts to have the bank correct their records. In its judgment the court ruled:

> *"The court also finds it necessary to award punitive damages. The standard by which courts in the Fourth Circuit have awarded punitive damages for violation of an order or discharge injunction requires a demonstration of "egregious conduct, " malevolent intent," or "clear disregard of the bankruptcy laws." ... It is apparently clear to the court that Countrywide and Bank of America, as successor-in-interest, flagrantly disregarded the court's order and discharge injunction. ... A sophisticated creditor cannot be excused for flagrantly ignoring the terms of an order to*

which they consented, and even more seriously, having no internal procedures in place to correct the error when it is clearly called to its attention. Punitive damages in an amount equal to the compensatory damages are assessed against Bank of America."

The bank was then required to deposit the damages in court. It is therefore true, as was observed by Plat, JSC (RIP) in **Esso Standard (U) Ltd. v. Semu Amanu Opio SCCA No. 3 of 1993** (Unreported) that American courts are more accepting of such awards than courts in Commonwealth countries which operate under the common law system.

Going back to the decisions that would be more persuasive to this court, there is no doubts that the principles laid down in **Rookes v. Bernard** apply to court in Uganda and they were succinctly summarised in **R. K. Kasule v. Makerere University Kampala [1975] HCB 391.** The High Court ruled that exemplary damages may be awarded in cases of oppressive, arbitrary or unconstitutional action by servants of government; cases where it is shown that the defendant deliberately committed the tortious act in contumelious disregard of another's rights in order to obtain an unfair advantage which would outweigh any compensatory damages likely to be recovered by his victim; and instances where exemplary damages are expressly authorised by statute. The court further ruled that exemplary or punitive damages are awarded in cases where the sum given as compensation is insufficient to punish the defendant for his conduct; they should not be used to enrich the plaintiff but to deter the defendant from repeating his conduct. Further that a claim for exemplary damages must be specifically pleaded in the body of the plaint together with full particulars of facts relied on to support the

claim and not merely in the prayers. Finally that such a claim must be made in addition to any other claim for damages.

The same principles were affirmed by the Supreme Court in **Esso Standard** (above). But on authority of **Obongo & Another v. Municipal Council of Kisumu [1971] EA 91**, Plat JSC deemed it fit not to extend the application of the principles in **Rookes v. Bernard** to a case were compensatory damages had been awarded for breach of contract and I am bound by his decision. That being the jurisprudence on exemplary/punitive damages that I could lay my hands on in this jurisdiction, I am unable on the basis of the pleadings filed by the applicants here to apply the principles to the facts of this application and cannot grant the applicant's prayer for punitive damages.

However, in Halsbury's Laws of England Vol. 9(1) at paragraph 492, it is stated that:

> "Civil contempt is punishable by way of committal or by way of sequestration. The effect of the writ of sequestration is to place, for a temporary period, the property of the contemnor into the hands of sequestrators, who manage the property and receive rents and profits. Civil contempt may also be punished by a fine, or an injunction may be granted against the contemnor."

Civil contempt is a common law misdemeanour and in the United Kingdom, the punishments are provided for in the Contempt of Court Act (1981). But before that, similar punishments were enforced for breach of court orders. **In J. R. Rix & Sons v. Owners of the Steamship or Motor Vessel Jarlinn (The Jarlinn) [1965] 3 All ER 36**, the Probate, Divorce and Admiralty Division issued a fine of £ 300 in lieu of the attachment of a ship that had been placed under arrest

by a court order for a debt owed by her owners. After the order was served on him, the master of the ship moved the ship out of the port, while under arrest, and later out of jurisdiction without an order of the court. It was held that he acted in contempt and a fine was issued against her owners.

In **Director General of Fair Trading v. Pioneer Concrete (UK) Ltd. & Another** also cited as **Re Supply of Ready Mixed Concrete (No .2) [1995] 1 All ER 135,** the two respondent companies were each subject to orders made by the Restrictive Practices Court in March 1978 and March 1979. The two injunctive orders restrained them from, inter alia, giving effect to or enforcing or purporting to enforce, whether by themselves, their servants or agents or otherwise, agreements with other companies relating to the supply of ready-mixed concrete in contravention of the Restrictive Trade Practices Act of 1976. After the making of the orders, the respondents' management issued instruction to their employees forbidding them from making or putting into effect any such agreements, but they did so. They admitted their contempt before the Restrictive Trade Practices Court but later appealed the award of a fine of £20,000 each of them for contempt of court.

The companies later appealed the consent order on the grounds that they had specifically prohibited their employees from entering into such contracts and so where not liable for breach of the court orders and they succeeded on the first appeal. On a second appeal by the Director General of Fair Trading, while restoring the order of the fine, the House of Lords ruled:

> *"... Furthermore, given that liability for contempt did not require any direct intention on the part of the employer to disobey the order, an employing company was liable in contempt for*

disobedience of an order 'by' an employee if the employee, while acting in the course of his employment but in dereliction of duty, carried out a deliberate act contrary to the order on its behalf. It followed that since the respondents' employees had by their deliberate conduct made their employers liable for disobeying the orders of March 1978 and March 1979, the respondents were guilty of contempt of court. The order of the Restrictive Practices Court would therefore be restored."

The House had recourse to the words of Warrington J in **Stancomb v. Trowbridge Urban District Council [1910]2 Ch 190** (at 194) where he ruled:

"In my judgment, if a person or a corporation is restrained by injunction from doing a particular act, that person or corporation commits a breach of the injunction, and is liable for process for contempt, if he or it in fact does the act, and it is no answer to say that the act was not contumacious in the sense that, in doing it, there was no direct intention to disobey the order.

The House then concluded (Lord Nolan, at page 155):

"The view of Warrington J has thus acquired high authority. It is also the reasonable view, because the party in whose favour an order has been made is entitled to have it enforced, and also the effective administration of justice normally requires some penalty for disobedience to an order of a court if the disobedience is more than casual or accidental and unintentional. Precedents for imposing a fine in such cases are afforded by the Steiner case[1] and the Mileage Conference case[2] to which reference has been made."

[1] Steiner Products Ltd v. Willy Steiner Ltd [1966] 2 All ER 127
[2] Re Mileage Conference Group of Tyre Manufacturers Conference Ltd's Agreement [1966]2 All ER 849

It is understood that the VAT Act is a statute of strict liability; a person registered under the Act must collect the tax on all taxable supplies exchanged in its business. It is also understood that under s.34 (1) (b) the tax in issue here was considered due on the date when the notice of assessment was issued to Jacobsen. It is also true that under s.35 of the VAT Act, the tax was due and payable as a debt to government payable to the Commissioner General. However, the contents of Annexure **"A1"** to Mr. Kanyesigye's affidavit reproduced above suggested to me that what happened here was similar to robbing Peter to pay Paul.

Although UETCL is a public limited company its policy guidance is under the Ministry of Energy & Mineral Development; it is a scheduled corporation whose directing mind is the Government of Uganda. In this case, the directing mind of another statutory authority purported to use the law to coerce the applicants to pay money to it, which it was collecting for the Government of Uganda. The gist of the action was that resources that legitimately belonged to or were needed by (Jacobsen) were withheld by one statutory authority (UETCL) but taken away by another statutory (URA) from Jacobsen, a private company, and used in order to satisfy legitimate needs of other parties within the same group - government. The respondent was trying to solve a problem in a way that could have produced no net gain in real terms. For that reason, the action may be understood as not only arbitrary and oppressive from the perspective of the applicants, but also high handed. It is especially so because it was in disobedience to a court order.

I have considered the prayer of the applicants for an order for the respondent to pay over shs.500m in punitive damages. But that cannot be achieved under the law of Uganda as it stands. I have also

considered the decisions from the U.K discussed above where fines of up to £ 20,000 were awarded for civil contempt by disobedience of an injunction by private companies in 1994. That is the equivalent of about Ushs 86m today. I am persuaded that a fine would be an appropriate punishment to purge the contempt in this matter. I also agree with the submissions of Mr. Kanyerezi that the punishment should take into consideration the means of the respondent and that it should be sufficient to deter the respondent from repeating the breach in any other matter before the courts. However, shs.500m is a high price considering that the fine will ultimately be charged on taxpayers in Uganda. I am therefore of the view that a fine of shs. 100m would be sufficient in the circumstances.

Uganda has no equivalent of the Contempt of Court Act but disobedience to civil court orders is known and ought not to be allowed by the courts, especially in a case like this one where a statutory authority is found to be consciously and intentionally, disobeying a court order. S.14 (2) (b) (i) of the Judicature Act empowers this court to exercise its jurisdiction in conformity with the common law and the doctrines or equity. And by virtue of s. 14 (2) (c) of the same Act, where no express law or rule is applicable to any matter in issue before the High Court, the court shall exercise its discretion in conformity with the principles of justice, equity and good conscience. It is further provided by s.14 (3) of the Judicature Act that the applied law, the common law and the doctrines of equity shall be in force only insofar as the circumstances of Uganda and of its peoples permit, and subject to such qualifications as circumstances may render necessary. It is my view that the dictates of justice and equity, as well as the circumstances of the people of Uganda today require me to apply the common law and the doctrines of equity in this matter.

Moreover, s. 98 CPA provides that nothing in that Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Contempt of court is one such abuse of the court process. It is therefore hereby ordered that the respondent do pay a fine of shs.100m to the Registrar of this court in order to purge the contempt. The fine shall be paid within 30 days of the date of this order and the costs of these proceedings shall be borne by the respondent, in any event.

Irene Mulyagonja Kakooza

JUDGE

22/09/2011