THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT)

CIVIL SUIT NO 05 OF 2009 (O.S)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

UGANDA CROP IN INDUSTRIES LIMITED]…….
PLAINTIFF

VS.

UGANDA REVENUE AUTHORITY]……..…
DEFENDANT

BEFORE HONORABLE MR. JUSTICE CHRISTOPHER MADRAMA

Judicial review – application for declaratory orders – prohibition

Civil procedure – whether application is bad in law simply because it is brought under old rule which has since been repealed.

Civil procedure – judicial review – whether judicial review is available where there are other remedies available to the applicant

Civil procedure – doctrine of laches

RULING

The Plaintiff filed this application under Order VLIIA r. 6 (2) (a) of the Civil Procedure (Amendment) (Judicial Review Rules, S.I. 75 of 2003 for the determination of the following questions;

1. Whether the plaintiff's objection was deemed accepted the plaintiff having made an election under section 99 (7) of the Income Tax Act Cap 340 after the defendant did not respond to the plaintiff's objection within 90 days.
2. Whether tax collection enforcement measures invoked by the defendant are unlawful.

The Plaintiff sought the following orders in the suit namely:

a. A declaration that the plaintiff election was deemed accepted the plaintiff having made an election under section 97 (seven) of the Income Tax Act Cap 340 after the defendant did not respond to the plaintiff's objections for 90 days.
b. An order of prohibition is issued against the defendant and her agents restraining them from enforcing any further tax collection enforcement measures in respect of the comprehensive tax assessment of the plaintiff.
c. Damages
d. That the costs of the application be provided for.

In support of the application is the affidavit of Mr. Samash Nathu a director in the plaintiff company. The affidavit is sworn on the 16th of April, 2009. In the affidavit in support of the application, the deponent avers that the plaintiff objected to assessment by an objection letter dated 19 August, 2008. The letter is attached as annex A. Annex A which is a letter dated 19th of August, 2008 was received by Uganda Revenue Authority as shown by the stamp of the Domestic Taxes Department on the 20th of August, 2008. The objection to assessment is addressed to the Commissioner Domestic Taxes Uganda Revenue Authority at Kampala. The subject caption of the objection reads: "objection to assessment of **shillings 1, 978,269,514/=** for the period 2002 and 2003".

Paragraph 4 of the deponent's affidavit in support of the application avers that that the defendant by letter dated 21st of August, 2008, said that an objection could not be considered unless 30% of the tax in dispute is paid. The letter is attached as annexure "B". Paragraphs 2 and 3 of the letter read as follows:

> "according to section 103 (2) of ITA cap 340, a taxpayer who has lodged a notice of objection to an assessment, the amount payable by the taxpayer pending final resolution of the objection is 30% of the tax assessed or that part of the tax not in dispute, whichever is greater.
>
> Therefore, your objection has been put on hold until you comply with the provisions of the law as stated above."

The plaintiff was advised to pick BPAF of **Uganda Shillings 535, 794, 039/=** from "*supervisor collection immediately for the amount payable to enable us to resolve the matter.*" The Plaintiff further avers that by a letter dated 27 October, 2008, the Defendant, allowed the plaintiff's application to waive the requirement for 30% deposit pending resolution of the objection. This letter is annexed as annexure "D". However the plaintiff in a letter dated 17th of November, 2008, further objected to the assessment of **Uganda shillings 1, 978, 269, 514/=** and the payment of an agreeable amount as deposit amount to 30% thereof. The plaintiff further avers that by a letter dated 15 December, 2008 the Defendant resumed consideration of the objection without the requirement for 30% payment. The letter dated 15 December, 2008 is attached to the affidavit as annexure "F". Last but not least, in paragraph 10 of the affidavit in support of the

originating summons the Plaintiff avers that by a letter dated 23rd of March, 2009, the plaintiff communicated to the defendant confirming its election under section 99 (7) of the ITA Cap 340 to treat the Commissioner as having allowed the objection. Thereafter by a letter dated 24 March, 2009, Uganda Revenue Authority wrote to the applicant claiming that the election was not valid. A copy of the letter is annexed as annexure "I".

At the hearing of the originating summons Counsel Ali Sekatawa represented the Respondent, while Mr. Nathu Samash, director in plaintiff appeared for the applicant pursuant to powers of attorney granted by the plaintiff for him to appear and represent the plaintiff under order 3 of the Civil Procedure Rules. BY this time, the plaintiffs had withdrawn instructions from their lawyers Messrs Birungyi, Barata & Associates, Legal and Tax Consultants. In their letter addressed to the Registrar dated 20th April 2011 they indicated that the wished to represent themselves through Mr. Samash Nathu a director and not through counsel. Consequently they filed on court record a board resolution to this effect and a power of attorney granted by the plaintiff company on the 1st of April 2011 authorizing Mr. Shamash Nathu to act as a representative of the plaintiff under order 3 of the Civil Procedure Rules.

On the 27th of April 2011 when the matter was mentioned for hearing, the Defendants counsel sought an adjournment on the ground that he had been served with a supplementary affidavit the previous day and he needed time to respond. I reminded the parties that the plaintiff had been given a last adjournment and the suit should proceed without the supplementary affidavit. The matter was stood over for the counsel to compose himself for the hearing. When court resumed, Counsel Ali Sekatawa raised preliminary objections to the suit/originating summons:

Firstly he contended that as far as procedure is concerned, the Plaintiff's application was an application for judicial review seeking for prerogative orders of this court by declaration, prohibition and damages. It was brought under the old rules in April 2009. He contended that it was brought under the wrong/repealed rules which is order 46 rule 6 (2) of SI 75 of 2003. That by April 2009 when the Plaintiff filed the OS, S.I. 11 of 2009 which came into effect on the 6th of March 2009 was the new law applicable to the plaintiff's application. He submitted that this was a material defect that cannot be cured by amendment. He contended that under the new law the mode of application is different. He prayed that I strike out the application for being incurably defective.

Secondly counsel for the Defendant/Respondent contended that judicial review is not available where there are alternative remedies. He submitted that this is the finding of this court in several authorities namely in **Shamir Productions Ltd vs. URA HCMC 28 of 2010** the decision of Hon. Mr. Justice Lameck Mukasa and page 4 thereof. The court held that the remedy of judicial review is not available where an alternative remedy exists. Counsel submitted that this is an income tax matter and guided by the Income Tax Act Cap 340 laws of Uganda which provides for alternative remedies such as appeals or review by the Tax Appeals tribunal established under article 152 (3) of the Constitution of Uganda to review all taxation decisions. There is thus a

clear alternative remedy. He contended that a judicial review application is not the envisaged application to the High Court under the law. He further cited **Classy Photo mart vs. CG URA HCMC 30 of 2009** where Hon. Justice Kiryabwire concurred that where there is an alternative remedy, judicial review is not available. Counsel also cited **Microcare vs. Uganda Insurance Commission HMA 218 of 2009** for the same principles and submitted that in that case Hon. Justice Bamwine concurred with the same view. The application is therefore bad in law

Thirdly the Respondent's counsel contended that the applicant's application is caught by the doctrine of laches in that it seeks to elect that its objection is allowed when the objection was filed in August 2008. He contended that under section 99 (7) the time to make a decision therein is 90 days. This elapsed on the 19th November 2008 however this application was brought and filed on the 17th of April 2009. Under the old rules under which it was filed, order 46 rule 6 of the Civil Procedure rules required that such an application is brought within 3 months. The same provision is maintained under rule 5 of the new rules.

Fourthly counsel contended that there were several engagements and communications between the parties. One of these is a letter of the 28th December 2008. That on the 23rd of March 2009 they tried to elect and treat the respondent as having accepted their objection. These arguments were to be made under the main submissions. He contended that writing letters reactivates the cause of action and limitation period start running afresh.

Lastly on the question of 30% section 103 (2) required payment of 30% after the filing of an objection to a taxation decision. This can only be waived under section 103 (3) of the Income Tax Act by application to the Commissioner and by an express letter. The applicants, applied but there was no waiver and they have not paid the 30%. He submitted that the Supreme Court in the case of **Uganda Project Implementation and Management Centre vs. URA** upheld the requirement to pay 30% deposit of the tax assessed under section 103 of the Income Tax Act. Justice Kiryabwire has held in the case of **Sam Mayanja** that where the applicant seeks to enforce its statutory rights, it is important that it has complied with the law with regard to the deposit of 30%. He who comes to equity must come with clean hands. Application is from an objection which did not comply with the payment of 30%. Lastly if application for waiver is refused, the applicant can appeal to the tribunal. He prayed that I dismiss the application with costs.

Mr. Nathu Samash a Director of the applicant and armed with a power of Attorney authorizing him to represent the company under order III of the Civil Procedure Rules replied to the preliminary objection. On the issue of whether judicial review was not available to the applicant in light of alternative statutory remedies, he submitted that the actual relief sought is a declaration. The second is an order of prohibition against tax enforcement. With respect to the first issue he contended that there is no statutory regime which allows appeal or review where there is a refusal to accept an election. He submitted that if a tax payer makes an election in

accordance with section 99 (7) of the Income Tax Act, and as far as the statute is concerned, that is the end of the matter. The Respondent cannot, he contended, refuse an election.

The administrative decision in this instance is the act of URA rejecting the election. For that there is no remedy other than an application for judicial review. With respect for prohibition against tax collection measures, this arises from exhibit "J" which is a third party agency notice. The assessment and tax in question have always been in dispute. The Respondent served assessment notices under section 106 of Income Tax Act. Section 106 (1) clearly states that an agency notice can only be issued by URA when the tax payable is not the subject of a dispute. This tax was in dispute. The service of agency notice is illegal conduct by URA and the only relief available is an application for judicial review.

To conclude the two points made Mr. Nathu contended that the Plaintiffs application addresses the rejection of election by the applicant under section 99 (7) of the Income Tax Act and the illegal third party notice.

On the issue of Laches Mr. Nathu Samash submitted that the Plaintiff's points made above take care of that issue. That the administrative act complained of occurred in March 2009. It was on 24th of March 2009 that URA informed the taxpayer that it was rejecting the election. This is an act for which URA has no statutory authority. It was on the 25th of March that URA issued agency notice which was outside the bounds of law. Those are the two actions for which relief is sought and application was brought within 3 weeks and is therefore within time.

The above submission takes care of the general argument on laches. He submitted that the argument on laches makes no sense. The contention of the Respondent is that 90 days expired on the 19th of November 2008 and that subsequent act revived. He submitted that the next subsequent act was performed by URA and not the applicant. Nathu further criticized the argument that the election must be deemed to have occurred in November 2008. He contended that URA acted as if it had not been deemed. If court is inclined to accept argument that election occurred on the 11th of October 2008 he submitted that the simple ruling would be that it was deemed to have occurred and that it was made. (election was made) and therefore there would be no reason for the applicant to be in court today. He submitted that this took care of the preliminary objections 2 and 3.

Mr. Nathu further wound up his arguments by saying that the context is required. There was an assessment of Uganda shillings 2 billion which is a figment of the imagination of URA officials. He submitted that the evidence appears in exhibit "B". He referred to a letter dated 23rd December 2008 which comes on heels of another letter dated November 17th 2008 which shows that applicant was pushing the process. When put in this context that is the reason why the applicant wrote that they have not elected.

As far as the law is concerned Mr. Nathu submitted that section 99 (7) of the Income Tax Act uses permissive language (i.e. may elect) on the question of election. Secondly there is no

deadline on when to elect to treat the commissioner as having allowed the objection lodged against assessment. He further submitted that the right to elect does not expire on the 90th day. The letter says even if the days expire "we have not elected. This letter does not operate as a waiver. Something more express is require to deprive the tax payer of his rights under section 99 (7) of the Income Tax Act, to elect. It was the tax payer driving the system forward. It was the tax payer driving the system forward and not URA.

As far as the 30% deposit is concerned he submitted that counsel for the respondent contended that a waiver can only be granted by URA but offered no authority for that propositions that waiver should be by express letter.

The applicant's director Mr. Nathu contended that the respondent had granted the waiver and referred me to annexure "D" which is a letter of the defendant dated 27th October 2008 4 paragraph which reads:

> "Regarding ground 6, please note that whereas we are agreeable to treating your objection as reasonably made under section 103 (3) of the income tax to act cap 340, we are exercising the option of asking you to advise your client to pay a lesser amount that is agreeable to them is only 30% of the principal, (having allowed the tax remitted for the period of 30 June, 2002) was demanded."

The Response is in exhibit "E" of November 17th 2008 and the second last sentence thereof reads: "Furthermore, our client has claimed for overpaid corporate tax (not to mention VAT refund claims) therefore the question of paying what is 'agreeable' does not arise, as the tax payer is claiming a refund."

He concluded that URA went under section 103 asking the tax payer to pay what is agreeable, the taxpayer respondent that there is nothing agreeable and there is no further communication on the issue of payment. In fact the case for waiver is to look at exhibit "B" of supporting affidavit URA letter dated 21st august 2008 paragraph 3. The exhibit writes that URA would put the objection on hold until 30% is paid. The next letter was written on the 5th of December 2008 exhibit "F" thereof and paragraph 2 thereof provides that the applicant/plaintiff should provide more information to enable the defendant/respondent conclude the objection. He concluded that there was a waiver by conduct and by URA that there were not going to pay the 30%.

As far as the manner of bringing the application is concerned, he submitted that there is no evidence that prejudice has been suffered by anybody. That URA had two years to object but to the application but they engaged in active steps to settle the case. He referred to the decision of Hon. Lady Justice Hellen Obura in Airtel Uganda Ltd vs. Uganda Telecom MA 30 of 2011 arising from High Court Commercial Court Civil Suit No. 451 of 2010 at page 10 thereof which sets out principles of how court should deal with substantial justice provided there is no material prejudice to either side. He invited me to look at substantive justice and take judicial notice of

the tax payer's charter and section D on that document at page 8 thereof which describes principles of equity and fairness. He prayed that I dismiss the objection.

In rejoinder Ali Sekatawa started with the issue of whether no prejudice has been occasioned. He prayed that the court should make a decision on whether procedural rules are a mere irregularity. He stated that authorities hold that parties should not circumvent procedure.

Counsel further contended that what is good for the goose should be good for the gander. Within the 90 days the applicant opted to engage parties to settle. That it is the applicant who is the one clinging to technicalities because the basis of their application is that URA did not rule on the objection within 90 days.

As far as the plaintiff's contention that there is no procedure under the Act to appeal decision is concerned, he submitted that the Tax Appeal Tribunal Act section 19 provides for matters that go to the Tax Appeals tribunal Act. This is any taxation decision. He contended that as far as URA is concerned there is no election. The applicant could to and challenge a taxation decision which section 2 of the Act widely defines. The remedies availed covers such an appeal.

The respondent contended that the two declarations in the application are still appealable.

Second are factual issues. Letter talks for payment of 30% of principal amount and section 103 (6) states that where there is a default the whole amount becomes payable. URA responded that they should pay 30%.

I have carefully considered the submissions of the parties on the objections read the pleadings together with the documents attached and authorities cited.

On the first issue of the suit being brought under the repealed order 46 rule 6 (2) of S.I. 75 of 2003, there is no dispute that the application was filed under the repealed rules. On point of fact the application was filed in court on the 17th of April 2009 and issued under the seal of court by the Registrar on the 13th of May 2009 when it was fixed for hearing in court on the on the 21st of May 2009 at 10.00 am. Rule 6 (2) (a) or the repealed rules provided that an application for judicial review shall be made by originating summons to a judge in chambers; or by originating motion to a judge of the relevant division of the High Court including the Commercial Division. Under these rules, it was a requirement that prior leave of court had to be sought before applying for judicial review under rule 4 (1) of the repealed rules. The applicant duly applied for leave and the same was granted by Hon. Mr. Justice Lameck Mukasa on the 2nd of April 2009 and is annexed to the affidavit in support of the originating summons under paragraph 16 thereof as annexure "K" in Miscellaneous Cause No. 6 of 2009. The court record shows that Miscellaneous Cause No. 6 of 2009 which is the application for leave to apply for judicial review was filed on the 31st of March 2009 and fixed for hearing on the 2nd of April 2009 when leave was granted as written above.

What is material is that the Judicature (Judicial Review) Rules, 2009 in the preamble thereof provide that the rules were made on the 29th day of July, 2008. Rule 11 thereof revokes the Law Reform (Miscellaneous Provisions) (Rules of Court) Rules, S.I. No. 79 – 1 but does not mention The Civil Procedure (Amendment) (Judicial Review) Rules, 2003. The rules came into force in 2003 ninety days after its publication in the gazette.

It is simply amazing that the Civil Procedure (Amendment) (Judicial Review) Rules, has not been mentioned by the Judicature (Judicial Review) Rules, 2009 rule 11 thereof which expressly repeals a much older rule. This is the Law Reform (Miscellaneous Provisions) (Rules of Court) Rules made under the Law Reform (Miscellaneous Provisions) Act. These rules had been saved by the Judicature Act, Act 11 of 1967, section 48 (2), and by the Judicature Statute, Statute 13 of 1996 now chapter 13, section 48 thereof. The said rules were the rules applicable to applications for judicial review. They remained in force while the Civil Procedure (Amendment) (Judicial Review) Rules, S.I. 2003 No. 75 also remained in force. The Civil Procedure (Amendment) (Judicial Review) Rules, and Order XLIIA of the Civil Procedure Rules were revoked by the Judicature (Judicial Review) (Revocation) Rules, 2009, S.I. 2009 No. 12. The rules were made by the Rules Committee under the hand of the Chief Justice on the 29th of July 2008 and published in the Uganda Gazette No. 10 Volume CII dated 6th of March 2009.

The Judicature (Judicial Review) Rules, 2009, S.I. 2009 No. 11 does not have a commencement date. It was published on the 6th of March 2009 in the Uganda Gazette No. 10 Volume CII dated 6th March 2009. The Commencement date is therefore defined by the Interpretation Act, Cap 3 2000 Laws of Uganda. Section 17 thereof caters for commencement of statutory instruments. It provides under its section 17 (1) (a) that the commencement of a statutory instrument shall be such date as is provided in or under the instrument or, where no date is so provided, the date of its publication as notified in the Gazette. Furthermore, section 17 (b) provides that every instrument shall be deemed to come into force immediately on the expiration of the day next preceding its commencement.

In this case the Judicature (Judicial Review) Rules, 2009 S.I. 2009 No. 11 came into force on the 7th day of March 2009 which is the next day of its publication. Section 16 of the Interpretation Act provides that every statutory instrument shall be judicially noticed. The effect of repeal on a statutory instrument is provided for under section 18 of the Interpretation Act cap 3 Laws of Uganda.

Section 18 (5) of the Interpretation Act provides that:

> "any act done under or by virtue of or in pursuance of the statutory instrument shall be deemed to be done under or by virtue of or in pursuance of the Act conferring power to make the instrument."

Section 18 (7) provides that section 13 (2) of the Act shall apply to the revocation of a statutory instrument as it applies on the repeal of any Act.

Section 13 (2) of the Interpretation Act Cap 3 Laws of Uganda and I quote:

(2) where any Act repeals any other enactment, then unless the contrary intention appears, the repeal shall not –

(a) revive anything not enforce or existing at the time at which the repeal takes effect;

(b) affect the previous operation of any enactments so repealed or anything duly done or suffered under any enactment so repealed;

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed;

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligations, liability, penalty, forfeiture, or punishment; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act had not been passed."

It is not in dispute that the application was made under a repealed statutory instrument or rule. The law does not accept a vacuum pursuant to a repeal or substitution of an enactment and always makes a transitional arrangement for continuity. In this case the new rules were promulgated on the 6th of March and came into force on the 7th of March 2009. The applicant filed his application on the 17th of April more than a month later. It is my finding that the application was filed under a non existing law. Moreover the repealed laws were part of the Civil procedure Rules but the new rules are separate from the Civil procedure Rules. The intention of the law is not to break continuity. Section 18 (7) applies the provisions of the Act relating to Acts of Parliament to statutory instruments or regulations made under an enactment. The only transitional provision I have come across which applied to the situation is section 10 of the Interpretation Act. It provides and I quote: "where any Act repeals wholly or partially any enactment and substitute provisions for the enactment repealed, the repealed enactment shall remain in force until the substituted provisions come into force." In this case, the regulations in question were repealed by a statutory instrument. On the very date of the repeal, other regulations came into force. In other words, there is no time in between the repeal of the old regulations and the coming into force of the new regulations. Consequently section 10 of the interpretation Act is inapplicable. The intention of legislature is to deal with the time in between the repeal of an enactment and the coming into force of the new law.

Therefore, by the time the applicant's application was filed in court, the new regulations had been in the force for over a month while the application under which the plaintiff proceeded had

been repealed. The new rules namely the Judicature (Judicial Review) Rules, 2009 S.I. 2009 No. 11 rule 6 thereof prescribes the mode of applying for judicial review and provides that "an application for judicial review shall be made by notice of motion in the form specified in the Schedule to these Rules." Under these new rules, there is no requirement for leave before an application for judicial review is made.

The applicant's suit is commenced by Originating Summons under the repealed provisions of Order XLIIA of the Civil Procedure Rules. Should this be treated as a formal defect that may be curable under section 43 of the Interpretation Act cap 3 Laws of Uganda 2000? Section 43 of the said Act provides that: "*where any form is prescribed by any Act, an instrument or document which purports to be in such form shall not be void by reason of any deviation from that form which does not affect the substance of the instrument or document or which is not calculated to mislead.*" In this case the form of the Originating summons could have been saved, but it is a form prescribed by a repealed law which otherwise but for the repeal would have been valid. The issue revolves on proceeding under a nonexistent rule or law and is not merely a question of form. A similar objection was made before Hon. Mr. Justice Bamwine in the case of **Microcare Insurance Ltd vs. Uganda Insurance Commission Miscellaneous Application No. 31 of 2009.** Where an application for judicial review was made under Order 42A of the Civil Procedure Rules. Court fees for the application for leave were obtained on the 6th of March 2009. The main application was however filed on the 8th of April. The objection of the Respondents counsel under section 39 of the Judicature Act was overruled: Hon. Mr. Justice Bamwine Held and I quote:

> "I have however, addressed my mind to the arguments of both counsel. HCM No. 0031 of 2009 are for leave to apply for judicial review was filed on the 4th of March, 2009. Since SI 2009 number 12 it was published on the 6th of March, 2009 and thereafter O. 42A and S.I. 2003 No. 75 were revoked, clearly by the time the two were revoked the instant application had already been set in motion. The revocation did not affect the cause which had already been set in motion in view of section 13 and section 18 (7) of the interpretation act, cap 3.

The objection was overruled on the ground that there was a pending application by the time the new rules were published in the gazette. The Interpretation Act expressly saves pending matters and that is not the case in this matter. By the time the application was filed, the rules under which they were filed had been repealed.

The plaintiff's representative Mr. Nathu submitted that no prejudice had been occasioned to the defendant. That the defendant had two years to reply and object to the application but did not do so. He referred me to the decision of Hon. Lady Justice Hellen Obura in **Airtel Uganda Ltd vs. Uganda Telecom MA 30 of 2011.** In that case counsel for the defendant proved that the default judgment in the case was entered into contrary to the rules before the expiry of the prescribed time. The court held that there was no need for a formal application for establishment of the fact

as to when the default judgment was entered for it to be proved or to be shown that it was not yet due according to the prescribed time. The court exercised its inherent powers to set aside the judgment and decree made contrary to the rules. The court relied on section 98 of the Civil Procedure Act, Section 33 of the Judicature Act and article 126 (2) (e) of the Constitution of the Republic of Uganda which enable courts to make such orders as the justice of the occasion demanded and to prevent an abuse of court process. The learned Judge noted that she had powers to make orders so long as no prejudice is caused to the other side to resolve the actual matter in controversy and to prevent a multiplicity of proceedings concerning those matters.

The matter in this case is clearly different and deals with a more fundamental question of law which is whether an application filed under a law that has been repealed is a nullity. Secondly the defendant never put in a reply to the application and relied on points of law. In the circumstances it is my duty to review precedents on defective pleadings commencing or originating proceedings to establish whether a proceeding commenced under a nonexistent law is a formal defect or a fundamental one.

Section 19 of the Civil Procedure Act provides that "every suit shall be instituted in such manner as may be prescribed." The section merely provides that a suit may be instituted in any manner prescribed. Section 2 of the Civil Procedure Act defines a suit as all civil proceedings commenced in any manner prescribed. The word *prescribed* is defined by the rules to means *prescribed by the rules.* Commonwealth litigation puts emphasis on the proper commencement of proceedings. Non-compliance with rules for commencement of proceedings is normally fatal. Suits are instituted under order 4 rules 1 of the Civil Procedure Rules by the presentation of a plaint to the court or such officer as the court appoints. A suit may be presented under order 36 by summary procedure (Specially endorsed plaint). A suit is also originated under order 37 by Originating Summons in circumstances spelt out under the order. There are specific procedures for the commencement of Company Matters under order 38 in specified matters therein. Other procedures for commencement of proceedings are specified by other enactments or regulations which prescribe the mode of commencement of proceedings. By using the analogy of section 19 of the Civil Procedure Act, the Plaintiff proceeded under no prescribed rules to commence proceedings in this court.

Prior to the promulgation of the Constitution of the Republic of Uganda 1995, specifically article 126 (2) (e) thereof, courts in Uganda have strictly applied the rules for commencement of pleadings. In the case of **Salume Namukasa v Yozefu Bukya [1966] EA 433** an application was made under order 9 rule 24 of the Civil Procedure Rules for setting aside an ex parte judgment by chamber summons which not comply with the procedure under order 48 rules 1 (Now order 52) which had been prescribed i.e. by notice of motion. It was held that the provisions of section 101 (Now 98) of the Civil Procedure Act, can only be invoked if the proceedings have been brought before court in the proper way as prescribed by the Civil Procedure Rules. At page 435 paragraph I Sir Udo Udoma held:

> "…Counsel must understand that the Rules of this Court were not made in vain. They were intended to regulate the practice of the Court. Of late a practice seems to have developed of counsel instituting proceedings in this court without paying due regard to the Rules. Such a practice must be discouraged. In a matter of this kind, might the needs of justice not be better served by this defective, disorderly and incompetent application being struck out? My ruling therefore, on the preliminary objection of point of law raised by counsel for the respondent is that this application is not properly before the Court and must be struck out. "

In the case of **Tarloghan Singh v Jaspal Phaguda and Others H.C.C.S.** NO. 134 of 1996 Before Ntabgoba PJ the Uganda Commercial Law Reports (1997 – 2001) page 408 is on commencement of proceedings under section 211 of the Companies Act. The Plaintiff filed a suit alleging that he was wrongfully removed from his position as a director of the company by the defendants. The Judge held that if the plaintiff had been oppressively removed from the register he could still have relied on section 118 of the Companies Act which allows a person aggrieved by removal of a name from the register to apply to Court for rectification of the register but even then, order 34A (Now order 38) of the Civil Procedure Rules prescribes specifically the procedure to followed under section 118. He held that the plaintiff ought to have applied to be put on the register under Order 34A rule 4 of the CPR, which is by notice of motion. The court further held that for the plaintiff to bring a representative action he needed a court order and the suit was struck out with costs.

In the case of **Nakito & Brothers limited vs. Katumba [1983] HCB 70,** the application for a temporary injunction was made by notice of motion when there was no suit pending and the court struck out the application for non-compliance with order 5 which rendered the suit a nullity. In **Masaba vs. Republic [1967) EA 488, p**roceedings were commenced by a document entitled notice of motion but which resembled a chamber summons in form and substance. Sir Udo Udoma CJ held that the prescribed procedure under rules 3 and 4 of the **Civil Procedure (Fundamental Rights and Freedoms) rules 1963** provided for commencement of proceedings was by originating motion and the application by chamber summons was incompetent and a nullity. In the case of **KAUR & OTHERS VS CITY AUCTION MART LIMITED [1967] EA 108,** an application was made to lift a caveat by notice of motion which had not been endorsed by a judge. There was a note in the NM that the summons were taken out by Messrs Shah Esq. It was held that this did not comply with order 5 rule 1 of the Civil Procedure Rules. Since the applicant failed to comply with a fundamental statutory requirement, the application was dismissed with costs.

The courts have on the other hand held that wrong procedure would not invalid proceedings, if it does not go to jurisdiction or occasion a miscarriage of justice to the other side. In the case of **Boyes Vs Gathure [1969] EA 385, a**n application for extension of a caveat was made to the High Court under section **57** of the **RTA (Kenya**) by chamber summons. There was an objection on appeal that an application entitled as "chamber summons" was incompetent since a chamber

summons was an interlocutory application and cannot originate or commence proceedings. It was held that the relevant Act provided for an application by summons refers to an originating summons. The wrong procedure however did not invalid the proceedings, as the respondent had replied and had been heard in the trial by a court which was seized with jurisdiction in the matter. There was therefore no prejudice occasioned.

The courts determine in each case whether the manner in which the applicant or plaintiff proceeded notwithstanding a formal defect was not prejudicial and no injustice had been occasioned to the other side. This consideration is an exercise of judicial discretion in all cases. In the case of **Iron and Steelwares Ltd v. C.W. Matyr & Co. [1956} 23 EACA 175 AT 177**, it was held that the High Court has discretion to waive the strict application of order 16 rules 2 (This is now order 17 rule 2) of the revised Civil Procedure Rules regarding who has the right to begin submissions and who has the right of reply. The court held at page 177 that *Procedural rules are intended to serve as handmaidens of justice, not to defeat it, and we think that the high court in its inherent jurisdiction to control its own procedure, has discretion to waive the strict application of order XVI, rule 2.* The rules or procedure in question was on how to address the court but does not address matters of how to validly commence proceedings in a court of law.

As we have noted above in this case that the Respondent never put in a reply and only objected to the application/suit when it came for hearing. Article 126 (2) (e) of the Constitution of the Republic of Uganda provides that:"*In adjudicating cases both of a criminal and civil nature, the courts shall subject to law, apply the following principles: (e) substantive justice shall be administered without undue regard to technicalities*. The principles under that article 126 are subject to law. The words "subject to law" have not been exhaustively defined. Article 126 (2) (e) was considered by the Supreme Court in **UTEX INDUSTRIES VS ATTORNEY GENERAL S.C.C.A. NO. 52 OF 1995.** In the case there was no certificate indicating the time that had been taken to prepare the record under the Rules of Court. The respondent had not applied for leave to extend time since the appeal had been filed after the stipulated 60 days. The rules provide that an appellant who wishes to rely on a proviso in the rules that time should be computed from the time the record of appeal was supplied was required to file a certificate indicating when the record was supplied. Time begins to run or is reckoned from the date the record is supplied. The court referring to article 126 (2) (e) on which the appellant sought to rely to save the appeal from a plea of time bar stated:

> "We think that the article seems to be a reflection of the saying that rules of procedure are handmaidens of justice- meaning that they should be applied with due regard to the circumstances of each case. We cannot see how in this case article 126 (2) (e) or the Mabosi case can assist respondent who sat on his rights since 18/8/1995 without seeking leave to appeal out of time.

The Court held that they were not persuaded that legislature intended to do away with the rules of procedure by enacting article 126 (2) (e) of the Constitution. The Supreme Court further

interpreted article 126 (2) (e) to mean that the principles to be followed are "*Subject to law*". In the case of **Kasirye Byaruhanga & Co. Advocates vs. U.D.B. S.C.C.A. NO. 2 of 1997**. The Supreme Court said:

> We adopt the same reasoning here and say that a litigant who relies on the provisions of article 126 (2) (e) must satisfy the court that in the circumstances of the particular case before the court it was not desirable to have undue regard to a relevant technicality. Article 126 (2) (e) is not a magical wand in the hands of defaulting litigants.

The Supreme Court left it to the discretion of the trial judge in the circumstances of each case to decide whether in the circumstances of a particular case and the dictates of justice, a strict application of the law should be avoided. **In Adonia vs. Mutekanga [1970] EA 429** it was held by the Court of Appeal at Kampala that the exercise of inherent powers by a court is a matter of judicial discretion provided the court has jurisdiction. The High Court has unlimited original jurisdiction and the case of lack of jurisdiction does not arise. See holding of Spry JA at page 432 where he said:

> "the position, as I understand it, is that the courts will not normally exercise their inherent powers where a specific remedy is available and will rarely if ever do so where a specific remedy existed but, for some reason, such as limitation, it is no longer available. The matter is, however not one of jurisdiction. The high court is a court of unlimited jurisdiction, except so far as is limited by statute, and the fact that a specific procedure is provided by rule cannot operate to restrict the court's jurisdiction."

After review of the law the question still remains more difficult than it appears at face value. What happen when legislature uses the word shall to direct something to be done in a particular manner? Generally the word "shall" has been held to be mandatory. Where legislature uses the word shall, courts have taken time to consider whether what it prescribes is either mandatory or directory. Non-compliance with a mandatory enactment affects the validity of the acts done in disobedience of the directive of legislature unless the court finds that the provision was directory in the circumstances of the case in which case any act done in disobedience of a directive couched in mandatory language may be saved by the court.

The operational rules for judicial review provide that the application shall be made by notice of motion. Furthermore section 19 of the Civil Procedure Act provides that proceedings shall be commenced in any manner prescribed. The citation of a repealed law can be an error if the proper and existing law was complied with. In this case, the rules in force were not complied with by bringing the application by way of originating summons.

The plaintiff is seeking judicial review but proceeded under a nonexistent law. There was another law in force. From all appearances, this was a bona fide mistake of counsel to cite a law that has been revoked. The cases cited above do not cover this case at all. The intention of procedural rules is to cater for procedural justice, which in turn deliver substantial justice. Procedural justice

is that fair notice of the claim or matter in the suit should have been given to the defendant so that he/she has an opportunity to give his/her defence to the claim. The substance of the claim is mentioned in the pleadings. Leave of court though erroneously sought under the old rules was given. The plaintiffs suit involves a dispute of taxes amounting to **Uganda shillings 1,978,269,489/=** which was assessed against the Plaintiff. For over two years since the filing of the suit the Plaintiff and the Respondent have been engaged in negotiations which negotiations have not borne any good fruit.

The nature of the Respondents objection is that the plaintiff should not be heard. I have given careful thought to the Defendant's objection and the Plaintiff reply and in my considered position is that a resolution of this first objection should be made after considering the second objection. The second objection is that an application for judicial review is incompetent as alternative remedies exist.

It is whether judicial review is available to the Plaintiff because alternative remedies exist by way of appeals from a taxation decision of the Respondent. Ali Sekatawa Counsel for the Defendant referred to the cases of **Shamir Productions ltd vs. URA HCMC 28 of 2010**, the decision of Hon. Mr. Justice Lameck Mukasa and that of **Classy Photomart vs. CG URA HCMC 30 of 2009**, the decision of Hon. Mr. Justice Geoffrey Kiryabwire.

In **Shamir Productions LLC Ltd and Another vs. Uganda Revenue Authority and Others HCT MC 0028 of 2010,** the applicant applied for judicial review and objection was made to the application by the Respondents on the ground that the application was premature because the applicant had not exhausted the appeal procedures prescribed under the Traffic and Road Safety Act: Hon Mr. Justice Lameck Mukasa held and I quote:

> "there is no question that the High Court has inherent original jurisdiction see article 139 of the constitution… however, where a party chooses to proceed to court outside the normal procedure then he must follow the procedure as specifically so provided. For the party to seek a judicial review he must satisfy the tests for judicial review. Further alternative avenues of reliefs are intended to decongest courts. So where parties seek to proceed by the alternative avenue, as the applicant did in the instant case, he/she must have the optional procedure exhausted before resorting back to court. The two cannot run concurrently. Here I wish to quote the words of Hon. Justice Bamwine in Micro Care LTD vs. Uganda Insurance Commission where he said:
>
> > "… I should perhaps add that it is becoming increasingly fashionable these days to seek judicial review orders even in the clearest of cases where alternative procedures are more convenient. This trend is undesirable and must be checked…"
>
> Considering all the above I find that this application for judicial review is prematurely before this court.

The court found that the applicant's application for judicial review was premature and dismissed the same. The court also referred to the case of **Classy Photo Mart Ltd vs. The Commissioner Customs Uganda Revenue Authority HCT MC 30 of 2009**. This was a Judgment of Hon. Justice Kiryabwire, pursuant to an application for judicial review arising from an assessment of taxes by Uganda Revenue Authority. At page 6 of the judgment the court held:

> "In judicial review the applicant must meet the necessary tests for the court to exercise its discretion. In this application it is clear that the applicant has decided to use the collateral process of judicial review to attack an appealable decision. There is no averment in the applicant's pleadings to justify this course of action. On what basis then can court exercise its discretion in this application absent a good reason? Whereas judicial review was used in the case of Joshua Kasibo (Supra), I agree with Counsel for the Respondent that in that particular case, they did not object to that procedure. I am sure there must have had good reason for that. I take the view that great care should be taken in preparing an application for judicial review.… That being the case, I uphold the preliminary objection and the application must fail for this reason on account of being premature in law. It is struck out with costs."

In the case of **Microcare Insurance Ltd vs. Uganda Insurance Commission Miscellaneous Application No. 31 of 2009: hon. Mr. Justice Bamwine** noted that orders sought in that application were available to an applicant who demonstrates that:

1. A clear legal right and a corresponding duty in the respondent;
2. That some specific act of thing, which the law requires a particular officer or body to do has been omitted to be done; or
3. Lack of an alternative remedy or
4. Whether the alternative remedy exists but is inconvenient, less beneficial or less effective or totally ineffective."

The Honourable judge noted:

> "in all the circumstances, in the absence of any averment in the applicants pleadings that the remedy stipulated in the Insurance Act is not adequate in the circumstances of this case, and in the absence of any other reason, sound or otherwise, which makes the use of the discretionary remedy preferred to an appeal under the Act, Court is of the view that the applicant opted for it as a matter of course, which was wrong".

The court struck out the application with costs. The general rules from the precedent's are that where an alternative remedy by way of appeal exists, judicial review is premature. Ali Sekatawa referred to the Tax Appeals Tribunal Act and the Income Tax Act whose provisions prescribe appeals or reviews from taxation decisions of the Respondent. On the other hand Director Nathu submitted that the Respondent served illegal third Party Notices under section 106 of the Income Tax Act whose provisions in section 106 (1) expressly stipulates that an agency notice can only

be issued where there is no dispute. That the service of the agency notice was illegal and the only relief available is an application for judicial review.

I have examined the Tax Appeals Tribunal Act. Section 14 (1) of the Tax Appeals Tribunal Act Cap 345 permits any person aggrieved by a taxation decision made under a Taxing Act by Uganda Revenue Authority to apply for review of the decision. The decision may involve interpretation of law. Section 1 (g) of the Tax Appeals Tribunal Act interprets an "objection decision" to mean "a taxation decision made in respect of a taxation objection." Furthermore section 1 (k) of the above Act interprets a "taxation decision" to mean "any assessment, determination, decision or notice'. It follows that the acts of the Defendant were subject to review by the Tax Appeals tribunal under the Tax Appeals Tribunal Act section 14 thereof.

I have also perused the pleadings of the applicant and documents attached. The challenged third party notice is **annexure "J"** to the applicant's affidavit in support of the application. It is a third party agency notice dated 25th of March 2009 addressed to the Managing Director Diamond Trust Bank Ltd and issued under section 106 of the Income Tax Act. It commands the addressee to collect **UGX. 2,004,567,489**/- from the Plaintiff from any monies which may be held by Diamond Trust Bank for the plaintiff. The agency notice was copied to the applicant. Section 106 (1) applies to tax due which is not the subject of a dispute. Section 106 (3) requires the notice to be served on the tax payer/plaintiff. The tax payer served with notice under section 106 (3) of the Income Tax Act may notify the Commissioner before the date notified in the agency notice for payment of inability to pay. The Commissioner may then accept the inability notice or reject the same whereupon the aggrieved party has a right of appeal under section 106 (6) of the Income Tax Act under the provisions dealing with appeals.

The applicants pleadings do not aver that they served a notice on the Commissioner of their inability to pay or that the Commissioner rejected this as stipulated under section 106 (3) and (4) of the Income Tax Act. Neither do they indicate that the alternative available procedures were no appropriate or inconvenient as spelt out in the authorities cited above. There is only an averment in paragraphs 14 and 15 of the affidavit of Samash Nathu in support of the applicants originating summons that the applicants having elected to treat the objection to a previous assessment as having being allowed under section 99 (7), rendered the assessment illegal and this required interpretation of law which was for judicial review.

I am satisfied that the applicants application was premature, because they did not notify the Respondent, neither did they avail themselves the statutory remedies available under the Income Tax Act or the Tax Appeals Tribunal Act which gives the Tax Appeals Tribunal supervisory control over the respondents. For the above reasons, I do not need to decide whether I have any residual powers under article 126 (2) (e) of the Constitution for the exercise of any discretionary power that I may have to find a way of accommodating the applicants in this application. Given my findings on the second objection and trying not to set a universal standard, it is my conclusion that the originating summons made under a nonexistent law in this suit and in the

circumstances of this case is a nullity and cannot be saved. Secondly the application is pre mature in so far as it is seeking judicial review of administration action when alternative statutory remedies exist and were not engaged. The plaintiff's suit does not aver why the alternative remedies were not used or why they did not suit the plaintiff in the circumstances of the case.

Before I take leave of this matter it is an accepted doctrine of law that an illegally once brought to the attention of court overrides all questions of pleadings including admissions made therein. The court disregards the competence of the suit to consider such illegalities, if they are of a nature the court should not condone on the face of it. In the case of **Makula International vs. His Eminence Cardinal Nsubuga and another reported in [1982] HCB 11**. Holding No. 16 of the digest of the case, the Court of Appeal held that it could interfere with a taxing officer's order even where the appeal from the order was incompetent. The held "a court of law cannot sanction what is illegal and an illegality once brought to the attention of court overrides all questions of pleadings, including any admissions made thereon. The court referred among other cases to **Belvoir Finance Co. Ltd vs. Harold and G Cole & Co. Ltd [1969] 2 ALL ER 904** Judgment of Donaldson J at page 908. In the case the defendant asserted that the hire purchase agreements in question were illegal but that one Belgravia was in possession of the vehicles in question with the consent of the plaintiff and the consent was admitted in the pleadings. Donaldson J held: "I think illegality, once brought to the attention of court, overrides all questions of pleadings, and therefore this is, and remains a real and indeed insuperable difficulty in the way of the defendant so far as the Mercantile agency defence is concerned." In the case of **Mercantile Credit Co. Ltd v Hamblin [1964] 1 ALL ER 680,** the illegality the defendant sought to rely on was not pleaded, and the plaintiff asserted that for illegality to be relied on, it had to be pleaded. The defendant sought leave to amend the defence. John Stephenson J held that counsel was not acting improperly to draw courts attention to an illegality of the transaction. On the contrary it was counsel's duty, however embarrassing to prevent the court from enforcing an illegal contract.

For an examination of whether the third party notice the plaintiff has sought to attack in the originating summons is an illegality, I need to review the background to the tax dispute. The Plaintiff objected to assessment for **Uganda Shillings 1,978,269,514/-** in a letter dated 19th August 2008 and served on the respondent on the 20th of August 2008. This is annexure "A" to the affidavit in support of the Originating summons. The Respondent in its letter dated 21st of August 2008 and annexed as **annexure "B"** wrote to the applicants on the objection of the applicant and stated in paragraph 3 of their letter and I quote:

> "Therefore, your objection has been put on hold until you comply with the provisions of the law stated above".

The Respondent had requested the plaintiff to pay **Uganda Shillings 535,794,039/-** being 30% of the tax assessed and the subject of the plaintiffs objection to the Commissioner under the Income Tax Act. Again on the 15th of December 2008, the respondent in **annexure "F"** to the application

asked the Plaintiff to avail some information by the 18th of December 2008 to enable them finalise the objection decision. On the 23rd of December 2008 in **annexure "G"** to the plaintiff's affidavit in support of the originating summons the plaintiff again wrote to the respondent and in the second last paragraph they state:

> "While the 90 days provided for in section 99 (7) have long expired, we have not elected to treat the Commissioner as having made a decision to allow the objection because out client believes that a mutual, harmonious resolution in light of the continuing collaboration with Uganda Revenue Authority would be the best way to resolved all the outstanding issues."

In a letter dated 23rd of March 2009, in **annexure "H"** to the plaintiff application, the Plaintiff wrote a letter stating that it had elected under section 99 (7) of the Income Tax Act to treat the respondent as having allowed its objection. Promptly and on the 24th of March 2009, the respondent in **annexure "I"** wrote stating that they had made an objection decision that 30% had to be paid before the decision could be made in accordance with the Income Tax Act and the case of **Elgon Electronics vs. Uganda Revenue Authority HCCA No. 11 of 2007**. The Respondent repeated its demand for the payment of 30% under section 103 (2) of the Income Tax Act before it takes tax recovery measures. It is noteworthy that the Third Party Agency Notice is dated 25th of March 2009 which is just a day later. In his submissions counsel for the Respondent cited section 103 (6) of the Income Tax Act to assert the respondent's position that on default to pay the 30% , the whole amount of tax assessed became due and payable.

The plaintiff's director submitted that there was a dispute. On the other hand Section 103 (2) provides that 30% of the tax assessed is payable pending resolution of the objection decision. The attack of Mr. Nathu on the third party notice concedes and assumes that there is a dispute concerning the tax assessed so far. This dispute was the subject of a pending adjudication by the Respondent. The Respondents last letter shows clearly that it had not made an objection decision though the plaintiff was in default of the demand to pay 30% of the disputed tax assessed by the Respondent. The Respondent could commence tax recovery measures under section 103 (1) as qualified by section 103 (2) of the Income Tax Act. The 30% could be sued for by the Respondent under section 104 (2). However section 106 under which the Respondent proceeded was unavailable as both parties agree that there was a dispute as to whether this tax was due.

Last but not least the plaintiff was entitled to a written decision which has not yet been availed. As far as I have stated the facts above, such a decision remains pending.

For the above reasons the following orders will issue:

1. The objection decision which is pending is to be considered afresh according to the provisions of law.
2. In addition the Commissioner General shall specify/clarify what the Defendant meant by its letter about the amount of deposit the plaintiff shall pay pursuant to the letter of URA

dated 27th of October 2007 addressed to PKF Taxation Services by the Assistant Commissioner Domestic Taxes and in response to the plaintiff's application for waiver of the 30% deposit requirement. This letter is annexure "D" to the plaintiff affidavit in support. The said letter is accordingly referred back to the Commissioner for clarification.

3. The Third Party Notice cannot stand and is accordingly revoked on account of there being a dispute on the assessment in question.
4. Plaintiffs originating summons is incompetent and is struck out with costs.

Ruling delivered in court the 20th day of May 2011.

Hon. Mr. Justice Christopher Madrama

Ruling delivered in the presence of:

Golooba Rodney holding brief for Mr. Sekatawa for the Respondent,

Mr. Samash Nathu Director and representative of the Plaintiff,

Ojambo Makoha Court Clerk:

Hon. Mr. Justice Christopher Madrama