

THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISCELLANEOUS APPLICATION NO 219 OF 2016
(ARISING FROM CIVIL SUIT NO 745 OF 2013)

PARLIAMENTARY COMMISSION}.....APPLICANT

VS

- 1. FRANCIS BYAMUGISHA}**
- 2. UGANDA REVENUE AUTHORITY}.....RESPONDENTS**

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicant filed this application under the provisions of section 33 of the Judicature Act, section 98 of the Civil Procedure Act, Article 126 (2) of the Constitution of the Republic of Uganda and Order 52 rules 1, 2 and 3 of the Civil Procedure Rules for stay of execution and/or stay of proceedings and/or injunction and ancillary relief against the enforcement and execution of the judgment in HCCS 745 of 2013 pending hearing and determination of the appeal. It is also for costs of the application to be in the cause.

The grounds of the application are that the first Respondent sued the Applicant together with the second Respondent for declarations that the Applicants breached their statutory duties by not withholding, collecting and paying taxes due from Hon. Members of Parliament (also referred to as MPs) to Uganda Revenue Authority and that the employment income of MPs is liable to tax among others things.

Secondly judgment was passed on 29 January 2016 and the court found among other things that the third defendant/second Respondent namely Uganda Revenue Authority made an admission in the defence that emoluments accruing to MPs were liable to tax and that the first Applicant was

*Decision of Hon. Mr. Justice Christopher Madrama Izama *~*~?+: maXimum728securityx 2016 style*

mandated and responsible for withholding PAYE charged on the emoluments of members of Parliament and directed the first Applicant to collect with immediate effect any taxes owing and due to the government of Uganda from the date of the judgment onwards and remit it to the third defendant/second Respondent.

Thirdly it is averred that the first Applicant been dissatisfied with the decision of the court promptly lodged a notice of appeal from the decision and filed a letter requesting for the record of proceedings. Fourthly the Applicant's appeal has a high chance of success with arguable grounds. This includes that the Applicants have at all material times relied on the opinion of the Attorney General, the chief adviser of government when he did not collect and remit taxes on the specific payments to MPs and the court instead ordered that the Members of Parliament pay the taxes due immediately. Fifthly the Applicants intended appeal has a probability of success and may be rendered nugatory if the execution and/or other proceedings to give effect to the decision of the court are not halted. Sixthly the Applicants stand to suffer irreparable harm, injury and damage and substantial loss if the order for stay of execution of the decision pending determination of the appeal is not granted. Seventhly the application was brought without an unreasonable delay. Lastly it is averred that it is just and equitable in the circumstances that the court orders for a stay of execution of the order is issued in civil suit number 725 of 2013, pending hearing and final determination and disposal of the Applicants intended appeal.

The application is supported by the affidavit of Jane L Kibirige, the Clerk to Parliament of the Republic of Uganda. In the deposition the facts are that Mr Francis Byamugisha sued the Applicants together with the second Respondent/Uganda Revenue Authority for declarations that the Applicants breached their statutory duties by not withholding, collecting and paying taxes due from MPs to Uganda Revenue Authority and that the employment income of the Honourable MPs is liable to tax among others. Secondly judgment was passed on 29 January 2016 and the court held among other things that the third defendant which is the Uganda Revenue Authority made an admission in the written statement of defence that emoluments accruing to MPs were liable to tax and that the first Applicant was mandated and responsible for withholding PAYE charged on the emoluments of Members of Parliament and then directed that the first Applicant collect with immediate effect any taxes owing and due to the Government of Uganda from the

date of the judgment onwards and remit it to Uganda Revenue Authority. The Applicant being aggrieved by part of the decision filed a notice of appeal and wrote a letter requesting for record of proceedings. The intended appeal has a high probability of success and would be rendered nugatory if execution/enforcement of the judgment is not stayed. Uganda Revenue Authority made a demand for payment of the taxes following the judgment according to a copy of the letter attached dated 3rd of March 2016. She deposes that the Parliamentary Commission would suffer more inconvenience than Uganda Revenue Authority who will have to refund any monies withheld and admitted as taxes from the emoluments of MPs. It would be in the interest of justice for the court to invoke its inherent powers to restrain the Respondent from enforcement of the judgment and stay execution proceedings subsequent to the decision until the hearing and disposal of the Applicants intended appeal.

At the hearing of the application the Applicant was represented by Counsel Cherotich Sitnah while Uganda Revenue Authority was represented by Counsel George Okello assisted by Counsel Rodney Golooba. Counsel Lorna Karungi and later Counsel Enos Tumusiime variously represented the first Respondent.

Counsel George Okello objected to the inclusion of the Attorney General as an Applicant when it did not file the Application and the name of the Attorney General was struck out leaving the Parliamentary Commission as the only Applicant.

The Applicants Counsel submitted that the application is brought under section 33 Judicature Act section 98 CPA, article 126 (2) Constitution and Order 52 rules 1, 2 and 3 of the Civil procedure Rules. It is for stay of execution and or stay of proceedings or injunction and general relief against enforcement and execution of judgment in HCCS 745 of 2013 pending hearing and determination of the appeal. The grounds of application are in the application. The grounds are set out in detail in affidavit of Jane L Kibirige Clerk to Parliament. Substantially Civil Suit No 745 of 2013 was instituted by the first Respondent against the Parliamentary Commission, Attorney General and Uganda Revenue Authority, which is the second Respondent to this application. It was for declarations and mainly that the defendants breached their statutory duty in withholding, collecting and paying taxes for members of parliament to URA. That employment income of MPs was liable to tax. On the 29th of Jan 2016 this court passed judgment

(Hon Justice Adonyo) and found inter alia that URA which was the third defendant made an admission in their statement of defence that emoluments accruing to members of parliament were liable to tax and the first Applicant who was the second defendant in the suit was mandated and responsible for withholding PAYE charged on the emoluments of the MPs. He directed the Parliamentary Commission to collect with immediate effect any taxing owing and due to the Government of Uganda and remits the tax to Uganda Revenue Authority.

The commission being dissatisfied filed a notice of appeal and requested for a record of proceedings. In the meantime Uganda Revenue Authority demanded for taxes in a demand letter marked E to the affidavit in support. The letter demanding taxes precipitated the filing of this application. There was no application for execution by any party.

The Applicant's Counsel submitted that the principles supporting the application for stay of execution are

- There is a notice of appeal which has been lodged within time.
- The appeal has a likelihood of success
- The Applicant may suffer damage or is likely to suffer damage/substantial loss
- There may exist special circumstances for the grant of a stay
- The application has been brought without undue delay.

The Applicants Counsel relied on the case of **Hon Theodore Sekikubo and Ors vs. AG and others SC Constitutional application Number 6 of 2013; Kyambogo University vs. Prof Omolo Isaiah CAA No. 341 of 2013;**

Following the principles set out above Counsel submitted that in this matter there is a notice of appeal with letter requesting for a record of proceedings. Secondly the application was brought without undue delay. Usually there are issues with likelihood of success. The Applicant has shown in the application the reason for the Applicant's dissatisfaction with the judgment of the court. Firstly paragraph 5 of the affidavit of Jane Kibirige asserts that the appeal has a likelihood of success because the trial judge failed to appreciate the import and effect of the advice of the Attorney General as chief advisor of Government in determining the extent of liability of the Applicants. Secondly the judgment relied on the admission of the URA, the 3rd defendant in their

*Decision of Hon. Mr. Justice Christopher Madrama Izama *~*~?+: maXimum728securityx 2016 style*

WSD. The Applicants Counsel submitted that this is odd because it was a defendant who had to establish why they stated what they stated. The relevant part in the defence is at paragraph 6 (c) and (e) of the WSD. The judge based its judgment on admission of URA to the effect that that Parliamentary Commission is liable to remit. Based on those two grounds the appeal has a likelihood of success.

Thirdly the Applicants Counsel submitted on the ground of substantial loss. The affidavit of Jane Kibirige in paragraphs 6, 8 and 9 substantially assets that the appeal will be rendered nugatory if there is no stay and the Applicant will suffer more inconvenience if the Respondent proceeds. They will have to refund any moneys withheld from the emoluments of members of parliament. In paragraph 9 it is in the interest of justice that the court invokes its inherent powers to relieve Applicant from enforcement of judgment.

The Applicant's Counsel further submitted that this is a case where there was no application for execution. There is a demand hanging in the air on the neck of the commission when there is an appeal pending. It is a peculiar and out of the ordinary case. Annexure E asks the Applicant to account for taxes etc. It is the defendant proceedings against another defendant in the same suit without a counter claim or cross action.

She submitted that Supreme Court in **Gashumba Maniraguha vs. Sam Nkudiye CA 24 of 2015** made an analysis of overall peculiar circumstances and ordered a stay of execution of the judgment. Actually they held that in the peculiar circumstances and for the reason they granted stay of execution. The court was able to consider the peculiarity of the case. She prayed that this court follows the precedence because this is a peculiar case.

The inherent powers of the Court are saved by section 33 of the Judicature Act and section 98 of the Civil Procedure Act and the court can use its discretionary powers therein in certain cases. Learned Counsel prayed that the court exercises its discretion and grants the application because it has power to stay execution pending appeal and to ensure that the appeal is not rendered nugatory. It is also just and equitable that a stay is granted.

The affidavit in reply of the first and second Respondent challenges the Applicant for not demonstrating substantial loss that may occur in the event that the stay order is not granted. In

the several cases considering section 98 of the Civil Procedure Act, it was held the court has wide discretion to look at each case and weigh it accordingly and make a decision. Counsel relies on **Gerardo vs. Alam and Sons [1971] EA 448**. The case is on setting aside judgment. She relies on the statement that even if Applicant has not shown substantial loss or likelihood of damage the court can exercise discretion and grant a stay of execution.

There is the case of **NEC vs. Mukisa Foods CA Miscellaneous Application No. 7 of 1998**. The court refers to discretion to grant stay where it appears equitable to do so and in this case it is just and equitable that a stay is granted.

In conclusion parliamentary commission was brought to court by virtue of its statutory functions among which include taking care of the welfare of MPs and staff. A decision was made to remit taxes to URA. The commission was aggrieved and appealed in time and the court ought to exercise its discretion to grant stay of execution and of proceedings and enforcement of the judgment pending hearing of the appeal with costs to abide the outcome of the appeal.

In reply Counsel George Okello opposed the Application. He agreed with the brief facts contained in the opening remarks of the Applicant's Counsel. However he differed on the inference to be drawn there from especially so far as there are borne in affidavit of Jane Kibirige and contested by the second Respondent.

The second Respondents Counsel prayed that the court strikes out part of the prayer related to injunction because the application for a temporary injunction of whatever nature and the order sought is erroneous. Applications are brought under Order 41 of the Civil Procedure Rules and are not by chamber summons.

He contended that the Applicants application omitted to cite a very fundamental rule of court and that is Order 43 rule 4 of the Civil Procedure Rules which empowers the court to entertain an application for a stay of its orders. Order 43 rule 4 (2) prescribes for situations where a court which passes a decree may stay that decree. A court may stay its own decree for sufficient cause and the provision was interpreted in **DFCU Bank vs. Dr. Ann Parsis Nakate Lusejjere CA CA 29 of 2003**. The court of appeal at pages 6 and 8 considered an application first lodged by DFCU Bank in High court and the application was dismissed by Lugayizi J. Court held that an

Applicant must satisfy the conditions prescribed by Order 39 (now revised rule 43) rule 4 (3). They should show that substantial loss would result to the Applicant. Secondly the application was made without unreasonable delay and thirdly security for costs has been given by the Applicant.

Once three conditions are fulfilled then the order for stay of execution ought to be granted whether the appeal will fail or succeed.

The second Respondent's Counsel further submitted that under the Court of Appeal and Supreme Court Rules, courts are guided by other considerations not necessarily the ones in the Civil Procedure Rules. However some of the considerations may overlap. The consideration stated by learned Counsel for Applicant should be discounted in so far as they do not embody what is prescribed in the Civil Procedure Rules. He contended that the Applicant glossed over a very material consideration namely the issue of substantial loss and the issue of security for costs has not been touched and that was very telling that the Applicant is alive to the weakness of her case.

The second Respondents Counsel submitted that the Applicant tactfully avoided citing Order 43 rule 4 of the Civil Procedure Rules because of the noncompliance with mandatory requirements of that provision. This court should not bother itself on whether the appeal will succeed or fail. It would risk pronouncing itself on matters it is not enjoined to make pronouncement on and sitting on appeal on its own judgment.

Furthermore Counsel George Okello submitted that there is no dispute that the application was made without delay. The issue of whether the application was filed without delay should relate or be reckoned with the time when the judgment of court is in an executable form. He submitted that pre mature applications could otherwise be lodged in courts for stay before a decree is extracted and this is apparent in this case. No process for execution had been commenced as contemplated by the Civil Procedure Rules. He relied on **Commissioner Customs URA vs. Kirenga Fred Civil Application 90 of 2014**. In that appeal the Court of Appeal decried the practice of litigants and lawyers filing for applications for interim and substantive stay of execution as a routine practice which the court found unacceptable. The Court of Appeal dismissed the application for interim stay and their observations are applicable in this case. The

case was that a letter had just been sent demanding for payment when the Applicant rushed to court for an interim order and the court found that the application was premature.

Counsel George Okello further submitted that the letter Annexure E to affidavit of Jane Kibirige is not a threat of execution and the application is premature and designed to “assuage the egos and feelings of the Applicant’s beneficiaries (MPs)”.

On the issue whether the Applicant would suffer substantial loss, Counsel George Okello submitted that the Applicant’s Counsel conceded that this element was not demonstrated. In any case the point was pressed half heartedly. The affidavit of Jane Kibirige conveniently refrained from stating that Uganda Revenue Authority is a tax collection agency statutorily obliged to refund any tax collected in error with interest and this point is so notorious. He relied on the holding of Hon Justice Geoffrey Kiryabwire Judge of the High Court Commercial Division as he then was in **AON Uganda Ltd vs. Uganda Revenue Authority HCMA 66 of 2009**. He held that section 113 (4) of the Income Tax Act and section 44 of the Value Added Tax Act in similar terms provide for refund of money paid as taxes as a result of a decision of court which is reversed on appeal. The refund is with interest from date of tax collection at 2% per month. Should the Applicant pay taxes to the second Respondent pursuant to the judgment appealed against and the Court of Appeal reverses or sets aside the decision the money paid can be refunded with interest. The practical effect is that the money would be held by the Applicant in a safe place and it accrues interest. In the premises there would be no substantial loss. The second Respondent has the capacity to refund.

Counsel also relied on the case of **Uganda Projects implementation Management vs. Uganda Revenue Authority Supreme Court Constitutional Appeal No. 2 of 2009** where the Court underscored the importance of paying taxes to the Government of Uganda. Taxes are to be collected promptly to enable government business to go on. The statement is true even if taxes are paid under protest. Payment does not stop the challenge to payment. George Okello invited the court to take judicial notice of government efforts stop dependence on donors to finance its projects. Uganda Revenue Authority is required to collect 80% of funds and applications of this nature have the effect of suffocating the Government from realising its goals. In the premises he contended that the second condition of substantial loss has not been satisfied.

The second Respondents Counsel further argued that there was no special peculiarity in the Applicant's case and neither is it unique as the cases cited. The uniqueness alleged is because a party who lost in the decree is the beneficiary of the decree. The special role of URA springs from and section 3 of the Uganda Revenue Authority Act gives it the duty to collect taxes. In effect it is complying with its statutory duties. Uganda Revenue Authority has not gone to execute the judgment by way of provisions of the Civil Procedure Rules rather it has taken on an administrative measure to request the Applicant to do the needful and has not threatened any process. On the other hand Order 22 of the Civil Procedure Rules is clear on execution of decrees. Order 21 of the Civil Procedure Rules and rule 7 requires a successful party to present a draft decree for endorsement to the unsuccessful party and this has not yet been done and no execution process has commenced.

The discretion of court sought can be exercised by basing on a clear provision of law and taking into account all material considerations prescribed by the law. The court cannot assist a litigant who has not done his or her part. Court does not know what is due in taxes. The Applicant has not come to court with clean hands.

The second Respondent's Counsel further submitted that section 33 of the Judicature Act is not relevant for an order of stay. Section 98 of the Civil Procedure Act is relevant but it must be read together with Order 43 rule 4 of the Civil Procedure Rules. The court should not indulge the Applicant because justice is an intricate balancing act. If the court is inclined to grant the application, it should be guided by case of **DFCU Bank vs. Dr. Anne Parsis** (supra) and impose a deposit for due satisfaction of the decree. The court should protect the rights of both sides. The Applicant should deposit all amounts payable. The money can be deposited with URA which is a government agency. Court may not have the whole amount is paid.

He prayed that the application is dismissed and invited the court in make a decision taking into account the constitutional mandate of the court of doing justice in the name of the people under article 126 of the Constitution. Court should take judicial notice of parliamentary proceedings in respect of proposed exemption of MPs from tax. The application lacks merit, is premature and does not comply with requirements of law, it is in bad faith and an abuse of court process, made

as a matter of course and court cannot exercise its discretion to grant it and it ought to be dismissed with costs.

In further reply Counsel Enos Tumusiime, Counsel for the first Respondent associated himself with the submissions of Counsel George Okello and added as follows:

He addressed the court on the provisions of Order 43 rule 4 of the Civil Procedure Rules and particularly the contents of rule 4 (3) thereof. This rule has three ingredients and provides that no order of stay of execution shall be made unless a court making the order is satisfied that substantial loss shall be suffered by the Applicant. On this first ingredient the affidavit in support of the application does not demonstrate what the Clerk to Parliament or the Parliamentary Commission would suffer substantially. This application on that ground should not be allowed because it is an abuse of court process. He relied on the pleadings and judgment. What the court looked at was to enforce a statutory duty of the second and third defendant to withhold taxes. The Court held that the Applicant who was 2nd defendant admitted that it was its duty to collect and he contended that this went to the unlikelihood of success in the main appeal. There is a further fatal error in that the Parliamentary Commission is not pleading its own case but that of Members of Parliament and what does it stand to lose? The Applicant failed the first ingredient of sub rule 3.

There is a further requirement to deposit security in court and the Applicant has not deposited any.

The 3rd ground in the alternative is that the Applicant has disobeyed the order of court in the judgment. According to the judgment in issue at page 27 thereof, the Applicant was directed to collect with effect from the date of judgment such taxes from the date of judgment and remit. He relied on **Housing Finance Bank and Speedway Auctioneers vs. Edward Musisi MA 158 of 2010** at page 9, 10 and 11, the second paragraph states that this particular matter is of crucial importance. A party who knows of an order cannot be permitted to disobey. They cannot choose whether to comply or not. The gist of the judgment is that a party in contempt cannot seek an equitable relief of stay as the Applicant is asking for. The Applicant should not benefit from this order. He prayed that the application is either dismissed for want of conformity to Order 43 rule

4 (3) or in the alternative and without prejudice struck out for having been brought in contempt of a court order. The first Respondent's costs should be catered for.

In reply Counsel Sitnah Cherotich submitted that the Respondents do not want any justice for the Applicant. The application was clearly brought under the provisions of law cited therein but not Order 43 of the Civil Procedure Rules. The Respondents are trying to force the Applicant to go to Order 43 for their own reasons. Order 43 of the Civil Procedure Rules deals with appeals to the High Court and the principles there under have been are not cast into stone but are mere guidelines. The case of **DFCU vs. Dr. Anne Parsis Nakate CACA 29 of 2003** is distinguishable. The court said that Order 43 of the Civil Procedure Rules was applicable in that case. However the matter was a fresh application in the Court of Appeal. The court refused to grant the application not because of failure to comply with order 39 rule 4 but simply held that the Applicant did not comply with rule 104 of the Court of Appeal Rules. The court made several other observations and inter alia encouraged courts to follow Order 43 rule 4 of the Civil Procedure Rules and not that it was mandatory to follow. Each case has to be considered on its own merits and circumstances. She further submitted that there are intervening circumstances in this case which are unique.

On whether the Applicant has demonstrated that it would suffer substantial loss, the rule from which the principle was extracted only gives guiding principles and there are not hard and fast rules and the rule is not cast into stone and cannot be used to deter the discretionary powers of the court.

On the question of whether the court can make comments on the merits or likelihood of appeal, the Applicants Counsel submitted that the court cannot close its ears and eyes to the grounds of the appeal. In any case the Respondents Counsels referred to the judgment on admission and the court cannot ignore the merits in an application for stay of execution. The appeal ought to proceed on an even footing and that can only happen when there is a stay of execution order.

On the question of whether the application is premature the case of **Commissioner of Customs and Uganda Revenue Authority vs. Kirenga Fred Court of Appeal Civil Application No. 90 of 2014** is distinguishable. There was an application for an interim order in the Court of Appeal

but the Applicant's application in this matter is for stay of execution pending appeal. It followed a demand by the Respondent for enforcement of judgment. However this is a unique case. The person who filed the claim cannot apply for execution and it is Uganda Revenue Authority which was a defendant which tried to enforce the judgment and it is distinguishable on that ground.

The Applicant has come to court and could not and was not at liberty to ignore that there is a decision of court against it. It could not ignore because there was no application for execution. The second Respondent is already taking action. The Applicant was within the realm of court and had to use the due process to seek relief against any intervention by the Respondents whomsoever it may be.

The Applicants Counsel further maintains that the orders sought in the application are wide. In **Uganda Project Implementation & Management Centre vs. URA Constitutional Appeal No. 2 of 2009**, there was a challenge to some part of the VAT Act and the procedure under that Act and has no bearing on the PAYE processes under the Income Tax Act. In that case the court argued that the tax payer had to pay tax and argue later. This is different because the issue in this case is based on judgment and not assessment of tax. It is practically relying on a court judgment. It goes back to the submission that this is an unusual case. From the arguments of both parties it is clear that the balance of convenience favours the Applicant to maintain the status quo. The case was not brought against individual MPs but against the Parliamentary Commission charged with the welfare of MPs. The Plaintiff chose that easy road against the Parliamentary Commission. It was open for the Plaintiff to go against each MP to do the needful. Secondly Counsel contended that it is the Parliamentary Commission that is charged with welfare of MPs and it was sued and it is seeking for relief against enforcement. After all the issue of loss can go either side. Uganda Revenue Authority had sat back and not they are pushing for payment. Uganda revenue Authority is credible but the Applicant is also credible. Both are government institutions. Uganda Revenue Authority took administrative measures to recover taxes and it can go beyond administrative measures.

On the question of deposit of security for due performance, the Applicants application did not proceed under Order 43 rule 4 of the Civil Procedure Rules. Counsel reiterated the same submission that the principles there under are guiding principles and this application was brought

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~?+: maXimum728securityx 2016 style*

looking for the exercise of the Court discretionary powers under the Civil Procedure Act to make such orders as are fair. The issue of security for due performance of the decree or order does not arise and the suit was for declaratory judgments.

Lastly the Applicants Counsel submitted in rejoinder on the question of alleged contempt of the Applicant. She contended that no one has been found in contempt and the contempt at this level requires the court to make a finding of contempt of someone first. The Applicant was in court because it has not ignored the court order. She further submitted that Applicant has made out a case for the grant of orders sought in the application and prayed that they are granted with costs in the cause.

Ruling

I have carefully considered the Applicants application. I will start by making reference to the orders sought to be stayed before dealing with any other issue and the submissions of Counsel as well as the law cited and applicable.

The brief background of this matter is that Mr Francis Byamugisha the Plaintiff in the main suit filed a suit against the Attorney General, Parliamentary Commission and Uganda Revenue Authority as the first, second, and third Defendants respectively. In paragraph 5 of the plaint, the claim against the Defendants jointly and severally was firstly for a declaration that all employment income of Members of Parliament is liable to tax commonly known as “pay as you earn”. Secondly it is for an order for collection of tax arrears of Members of Parliament by the third Defendant from the Attorney General and Parliamentary Commission since 1997. Thirdly it is for an order to reward the Plaintiff as a whistleblower for tax information given to the Attorney General and Uganda Revenue Authority. Lastly it is for costs of the suit.

The Attorney General filed a written statement of defence in which he denied the claims and averred among other things that it never breached its statutory duties as alleged by the Plaintiff.

The Parliamentary Commission for its part denied the allegations and contended that it had no knowledge of the allegations, claims and particulars contained in paragraph 5 of the plaint. Secondly it had no knowledge of the allegations, claims and particulars contained in paragraphs

6, 7, 8, 9, 10, 11 and 12 of the plaint which were denied entirely. In reply it contended that it at all material times acted in accordance with the provisions of law. Consequently it is not liable for any financial loss alleged by the Plaintiff. The Parliamentary Commission averred that it is not in breach of any statutory duty of not withholding monies due as taxes or at all.

Uganda Revenue Authority denied paragraphs 5, 6, 7, 8, 9, 10, 11 and 12 of the plaint. Alternatively and without prejudice it confirmed that Members of Parliament and emoluments in the form of basic salaries and gratuity are liable to income tax in the form of “Pay as You Earn” tax. What is material is that in paragraph 6 (g) Uganda Revenue Authority averred in its written statement of defence that over the years Uganda Parliamentary Commission failed to remit to the third Defendant taxes as assessed in relation to “PAYE” charged on the Members of Parliament emoluments received for mileage, constituency, town running, motor vehicle allowances among others. Secondly in 6 (h) and (i) Uganda Revenue Authority had on a number of occasions demanded the said money paid to MPs from the Parliamentary Commission but this has not been remitted. The unpaid taxes in the form of PAYE from the emoluments given to MPs are due and owing and are to be paid to the Government of Uganda.

The following issues were raised at scheduling:

1. Whether the Employment Income of Members of Parliament is liable to Pay as You Earn Tax
2. Whether the defendants breached their respective statutory duties when they failed to collect taxes.
3. Whether the Plaintiff is a whistleblower and is consequently entitled to a reward from the Defendants.
4. Relief to the parties.

In resolving Issue 1, the Plaintiff relied on testimonies of 2 different Attorney Generals who gave different views as to whether the Members of Parliament’s incomes should be taxed. As such, court found that this was a matter for constitutional interpretation and particularly the Attorney General had rendered an opinion stating that the emoluments of MPs were not taxable. The Applicant was aggrieved and his cause of action was to petition the Constitutional Court under

article 137 (3) (a) of the Constitution and the Plaintiff has chosen a wrong forum to challenge the opinion in the High Court. He held that he had no jurisdiction to look into the interpretation as jurisdiction was vested in the Constitutional Court. The Hon Judge did not refer the issue for interpretation by the Constitutional Court and proceeded to disallow that aspect of the Plaintiff's claim and to determine the suit.

In relation to Issue 2 as to whether the Parliamentary Commission and Uganda Revenue Authority breached their statutory duties when they failed to collect tax, he held that the resolution of the earlier issue seems to affect this issue as well. He found that the said Defendants were bound to follow the advice of the Attorney General and therefore the second and third Defendants namely the Parliamentary Commission and Uganda Revenue Authority did not breach their statutory duties to collect taxes upon being properly advised by the Attorney General. In other words taxes from 1997 to the time of the decision were not collectable under the judgment of this court.

In resolution of issue 3 which is whether the Plaintiff was a whistle blower and is consequently entitled to a reward from the defendants, the learned judge held that the Plaintiff did not qualify to be a whistleblower.

Finally on the remedies available to the parties framed as issue 4, the learned trial judge held that the 3rd Defendant namely Uganda Revenue Authority's WSD made an admission as regards Members of Parliament earning emoluments which he lists in the judgment and that the second Defendant namely The Parliamentary Commission is mandated to deduct and remit it but has over the years failed to do so. He directed that the same which is due and owing and a debt to Government of Uganda be collected from the time of the judgment onward. He entered judgment on admission against the Parliamentary Commission and Uganda Revenue Authority for failure to make the necessary deductions and remittances in regard to PAYE. He directed the second Defendant to collect with immediate effect any taxes owing and due from the date of judgment onwards. Judgment was delivered on the 29th of January 2016. The learned judge further held that the Plaintiff did not prove that he was entitled to any of the remedies sought.

The Applicant is aggrieved by this order and seeks to have it set aside on appeal and accordingly commenced the appeal process by filing a notice of appeal and applying for the record of proceedings.

The second Respondent's Counsel submitted that the application for stay of execution is premature because no order had been extracted and no execution proceedings had been commenced. To answer this preliminary issue, the nature of the decree was a directive to the Parliamentary Commission to deduct PAYE and remit it to the URA. Pursuant to this directive to the Parliamentary Commission is seeking an order of stay so that it does not comply with the court directive. How was the court directive to be effected? A court order can either take effect immediately or be subject to execution proceedings to be realised. Generally for there to be a stay of execution there has to be an order which is capable of execution through court process and issued against the party making the application for stay of execution.

In **Exclusive Estate Limited vs. Kenya Posts and Telecommunications Corporation and Another [2005] 1 EA 53 (CA)** the Court of Appeal of Kenya held that stay of execution envisaged under rule 5 (2) (b) of the Court of Appeal Rules of Kenya (a rule which is in *pari materia* with the Ugandan rule 6 (2) (b) of the Court of Appeal Rules) is the execution of a decree capable of execution in any of the methods stipulated under section 38 of the Civil Procedure Act. The Court further held that a decree holder as defined under the Civil Procedure Act means: "a person in whose favour a decree capable of execution has been passed". The Kenyan Court of Appeal further held that the order which had been made had dismissed the suit and the dismissal was a negative order that was not capable of execution. A negative order can only be set aside when the appeal succeeds but cannot be stayed.

In other words a positive order compels the judgment debtor to do something and may be executed in any of the ways provided for by section 38 of the Civil Procedure Act. To establish whether the order made may be executed as envisaged by the law, section 38 of the Civil Procedure Act which lists the modes of execution and provides that execution may be by way of any of the following:

- (a) "by delivery of any property specifically decreed,

- (b) by attachment and sale, or by sale without attachment, of any property,
- (c) by attachment of debts,
- (d) by arrest and detention in prison of any person,
- (e) by appointing a receiver,
- (f) in such manner as the nature of the relief granted may require.”

The judgment of this court did not decree any property or specified quantum of taxes to be delivered and section 38 (a) is inapplicable. There was no definite decree for a sum certain in money so attachment and sale is not the proper mode of enforcement of the decree under subsection (b). Thirdly attachment of debts presupposes a definite figure and is inappropriate for breach of statutory duty which is the concern of the court in the judgment. Fourthly, arrest and detention may be considered for disobedience of court orders only when proceedings are brought before the High Court alleging disobedience of court order or contempt thereof. Fifthly the appointment of receivers cannot be applied as we will consider hereafter after review of the enforcement terms of the Income Tax Act. Sixthly other modes of execution not mentioned such as an application for mandamus may be contemplated and I will refer to it later on in the ruling.

In the case of **Mugenyi and Company Advocates vs. National Insurance Corporation, Civil Appeal No. 13 of 1984 reported in [1992 – 1993] HCB 82**. The Court of Appeal of Uganda held that under section 2 of the Civil Procedure Act an order of dismissal of a suit for default does not result in a decree and accordingly the Respondent who was the Applicant in the High Court was not a decree holder and thus there was a valid objection to an order for stay of execution pending hearing.

Section 2 (c) of **the Civil Procedure Act** defines a “**decree**” to mean:

“the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint or writ and the determination of any question within section 34 or 92, but shall not include—

- (i) any adjudication from which an appeal lies as an appeal from an order; or

- (ii) any order of dismissal for default;

The adjudication in the main suit resulted in a decree from which an appeal lies as of right to the Court of Appeal. It is the Parliamentary Commission which was directed with effect from 29th of January 2016 to deduct and remit certain taxes from the income under its control of MPs. It is not material that there is a controversy relating to the finding of the court on the first two issues on the jurisdiction of the court to make findings on the Attorney General's opinion which the court held is binding on the Applicant. The learned trial judge deemed it fit to make an order that is positive with effect from the date of judgment. The order is capable of execution by way of contempt proceedings brought against the Clerk to Parliament for any disobedience of court orders or defiance thereof and also by way of an application for an order of mandamus to compel compliance and execution proceedings may result in arrest or imprisonment of the Clerk to Parliament and any other responsible officer whose job is to carry out the duties decreed by the court if they do not comply therewith.

Words and Phrases Legally Defined volume 2 and 3rd edition London and Butterworth's 1989 at page 195-196 defines the word "execution" in its widest sense to signify the enforcement of or giving effect to the judgments or orders of courts of justice. According to Denning MR in **Re Overseas Aviation Engineering (GB) Ltd [1962] 3 All ER 12 at page 16** the word 'execution' means giving effect to the judgment. He held that:

"The word "execution" is not defined in the Act. It is, of course, a word familiar to lawyers. "Execution" means, quite simply, the process for enforcing or giving effect to the judgment of the court: and it is "completed" when the judgment creditor gets the money or other thing awarded to him by the judgment.

In other words the process of execution is completed when the judgment creditor gets the relief granted by the court.

I was addressed extensively on provisions for proving substantial loss and deposit of security for due performance. I have already referred to these submissions at the commencement of this ruling and do not need to repeat them here. It is my ruling that contrary to the submissions of the Respondent's Counsels on substantial loss or quantum of taxes, the matter in question does not

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~?+: maXimum728securityx 2016 style*

relate to the taxes held to be payable by MPs but relates to the duty of the Parliamentary Commission to make deductions and to remit the money deducted to Uganda Revenue Authority. What is therefore wanting and for which the Applicant seeks an order of stay of execution is implementing the duty to deduct moneys from MPs emoluments and to remit the same to Uganda Revenue Authority. For that reason submissions on the basis of Order 43 rule 4 (3) of the Civil Procedure Rules and case law referred to which apply the principles there under are not applicable to the facts and circumstances of this application because they deal with substantial loss to the party applying for stay of execution and envisages attachment of property or money. Secondly the principles deals with deposit of security for due performance of the decree that may ultimately be binding on the Applicant. I find the provision inapplicable because the court did not award any taxes or pronounce itself on any quantum of taxes to be paid. The court dealt only with the duties of the Parliamentary Commission and Uganda Revenue Authority in relation to collection of the taxes popularly known as PAYE from MPs. Moreover the suit itself is disclosed in the plaint and what is not pleaded cannot be granted. In the Plaint, the Plaintiff prayed for declaration that the Defendants breached their respective statutory duties by not withholding, collecting and paying taxes due from the incomes of Hon. Members of Parliament to Uganda Revenue Authority. Secondly he sought declaratory orders that all employment income of the Hon Members of Parliament of Uganda is liable to income tax. He last but not least sought an order that the Parliamentary Commission and Uganda Revenue Authority to collect all arrears of income tax from Members of Parliament from 1997 to date. The court declined to grant this remedy and instead made an order for collection from the date of judgment forward. Furthermore Uganda Revenue Authority is not a decree holder. It is a judgment debtor in that it was held not to have complied with its duties in relation to PAYE of Hon. Members of Parliament. The judgment faults Uganda Revenue Authority as well as the Parliamentary Commission for breach of duty by way of admission. A decree holder is defined by section 2 (d) (d) of the Civil Procedure Act to mean:

“decree holder” means any person in whose favour a decree has been passed or an order capable of execution has been made, and includes the assignee of such decree or order;

The Parliamentary Commission and Uganda Revenue Authority have statutory duties and are trustees for taxes. The Parliamentary Commission is an agent of Uganda Revenue Authority and acts on behalf of the principal in the challenged statutory duty to collect taxes from income of MPs under its management. The court only declared and decreed that the Parliamentary Commission and Uganda Revenue Authority should comply with their statutory duties. For emphasis the Applicant is aggrieved by the letter of Uganda Revenue Authority annexure E to the affidavit in support deposed to by the Clerk to Parliament which letter is dated 3rd of March 2016. In that letter Uganda Revenue Authority wrote to the Parliamentary Commission and made reference to earlier correspondence and I will quote the letter for ease of reference:

“Reference is made to our letter to you dated 24th of July 2015 in which you were requested to account for taxes on fuel arrears paid to Members of Parliament. (Please see copy attached for ease of reference).

To date, we have not received any response from your office to that effect.

It is in this regard that we remind you to account for taxes on fuel arrears and also recover tax on all emoluments paid to the Honourable Members of Parliament in accordance with the Income Tax Act and the court judgment (*Francis Byamugisha versus Attorney General, Parliamentary Commission and URA*) attached.

We, therefore, request that you clear this tax liability to avoid further accumulation of interest.

We look forward to your positive response to this matter as we develop Uganda together.”

While the letter refers to previous correspondence as way back as July 2015, the court judgment is to take effect from 29 January 2016 and taxes prior to 29th of January 2016 cannot be claimed under this judgment. Secondly the court has already ruled that the decision of the Attorney General was binding on the Parliamentary Commission and Uganda Revenue Authority. The honourable judge held that he had no jurisdiction to review the opinion of the Attorney General. I find that the court judgment only applies with effect from 29th of January 2016 and deals with

emoluments and deductions to be made from February 2016. It is the reference to the judgment in this suit by the Uganda Revenue Authority in that letter that concerns deductions and remissions with effect from February 2016. As I have noted above the decision deals with the duties of the Parliamentary Commission. The Parliamentary Commission under its statute and the duty referred to by the court in its judgment is required to deduct certain monies including money from fuel allowances and remit the same to Uganda Revenue Authority. Uganda Revenue Authority can only apply for an order of mandamus or any other order for enforcement of the duties of the Parliamentary Commission. The Parliamentary Commission is an agent of Uganda Revenue Authority. Uganda Revenue Authority has thus far not yet applied for court process of enforcement but has asked the Applicant to comply with the court judgment. Uganda Revenue Authority is also charged with certain duties which are statutory. The decision of the court emphasises that it should carry out its statutory duties. What are these duties in relation to the Parliamentary Commission? These duties are laid out in the Income Tax Act.

The duties can be established from the Income Tax Act cap 340 laws of Uganda; the Administration of Parliament Act cap 257 laws of Uganda and the Income Tax (Withholding Tax) Regulations 2000. The Parliamentary Commission is a body corporate established by section 2 (1) of the Administration of Parliament Act cap 257. Secondly section 15 of the Administration of Parliament Act gives the Parliamentary Commission power to recruit employees into the Parliamentary Service and that makes the Parliamentary Commission an employer. As an employer the Applicant is authorised to withhold tax from employment income under section 116 (1) of the Income Tax Act and it is therefore a withholding agent of Uganda Revenue Authority. The withholding agent is defined by section 115 (b) of the Income Tax Act to mean a person obliged to withhold tax under that Act. Employment income is defined by section 19 (1) (a) of the Income Tax Act to mean income derived by an employee from employment. From the definition of the Parliamentary Commission as an employer according to the judgment of the court, it has an obligation under section 123 (1) of the Income Tax Act to pay to the Commissioner of Uganda Revenue Authority any tax that has been withheld or that should have been held within 15 days after the end of the month in which the payment, subject to withholding tax was made.

Furthermore to the legal framework for enforcement, section 164 (1) of the Income Tax Act empowered the Minister to make regulations for the better carrying out of the Act. Accordingly the Minister made the Income Tax (Withholding Tax) Regulations 2000. Regulation 3 (1) thereof provides that every employer obliged under section 116 of the Income Tax Act to withhold tax from a payment of employment income of an employee shall withhold tax in accordance with the regulation. Without making any comments as to whether MPs are employees of the Parliamentary Commission, a payee is defined under section 115 (a) of the Income Tax Act to mean a person receiving payments from which tax is required to be withheld and which in the circumstances are the Parliamentary Service Employees. Whether this definition includes MPs remains a matter for consideration by the appellate courts. My concern is to establish the framework for enforcement only and as is relevant to the application for stay of execution. Section 124 (1) of the Income Tax Act provides that as long as the taxes to be withheld are not withheld, as required, the employer is liable to pay to the Commissioner Uganda Revenue Authority the amount of tax which was not withheld. The Parliamentary Commission would have the remedy of recovering the amount from the payees as defined. Additionally the employer under section 127 (1) (a) holds the deducted tax in trust for the Government of Uganda and that emphasises that the duties of the Parliamentary Commission are those of an agent and trustee in that regard.

In other words the Commissioner General Uganda Revenue Authority has to powers to take out recovery measures against the Parliamentary Commission. Both of the parties are statutory Corporations.

In the premises the order of the court became operational immediately after the pronouncement of the judge on 29 January 2016. The statutory duties imposed by the judgment of the court by which MPs were defined as employees of the Parliamentary Commission became operational immediately. It was merely a question of obedience or implementation. Just like an injunction, the prohibition of the injunction takes immediate effect and enforcement can only be by taking proceedings to enforce compliance with the duty or the restraint order. Unlike a decree to pay money where execution proceedings take the form of realising the property for satisfaction of the decree, the order of the court in this application that is sought to be is stayed requires the

Parliamentary Commission to commence deduction and to remit the deducted taxes to Uganda Revenue Authority. The order imposed is akin to a mandatory injunction and takes immediate effect because the judge held that the deductions were to be made with effect from the date of judgment. The compliance should have begun after the date of the judgment being the 29th of January 2016. The effect of such an order was discussed in relation to an order of injunction in **Knight and another vs. Clifton and others [1971] 2 ALL E.R. 380** at page 381 where Russell L.J held that:

“ Contempt of court; even of the type that consists in breach of an injunction or undertaking, is something that may carry penal consequences, even loss of liberty, and evidence required to establish it must be appropriately cogent...”

At page 393 Sachs LJ held that:

“In other words, it is my view that when an injunction prohibits an act, that prohibition is absolute and is not to be related to intent unless otherwise stated on the face of the order.”

In this case the order of the court directed the Applicant to start making deductions. The order only reinforced the statutory obligation of an employer and recognised the Parliamentary Commission as an Employer of MPs. The Applicant is challenging this directive and if it disobeys the decree it may carry penal consequences even loss of liberty as held in the case of **Knight and another versus Clifton and others [1971]** (supra). In **Heatons Transport (St Helens) Ltd v Transport and General Workers Union Cradock Brothers v Transport and General Works Union Panalpina Services Ltd and another v Transport and General Workers Union [1972] 3 ALL E.R. 101** it was held that an injunction which is an order of restraint takes effect immediately and disobedience of it does not have to be proved to be wilful or contumacious or insulting for it to amount to contempt of court. Lord Wilberforce at pages 116 bottom and 117 held that:

“In *Starcomb v Trowbridge Urban District Council*, Warrington J explained the meaning of the word ‘wilfully’. In that case the defendants were restrained by injunction from sending sewage into a stream and they undertook to cleanse the stream. They committed breaches of the injunction and failed to cleanse the stream in accordance with the

undertaking. ... acts of one of the defendants' servants which were neither casual nor accidental and unintentional. Warrington J said [1910] 2 Ch. At 194:

In my judgment, if a person or 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 of Lords approved and applied the decision in **Starcomb v Trowbridge Urban District Council [1910] 2 Ch 190**. In other words where the order of the court takes immediate effect disobedience thereof would amount to contempt of court and such contempt does not need to be proved to be wilful or contumacious. In this case the Income Tax Act required the amount to be paid to be remitted within 15 days after the end of the month when the deduction is made according to section 123 (1) of the Income Tax Act. In the facts and circumstances the application of the law is that taxes were due for remittance within 15 days after the end of February 2016. The Applicant lodged this application on the 29th of March within a reasonable period before its liability to the commissioner under section 124 of the Income Tax Act is enforced for failure to deduct and remit.

I agree with Counsel for the Applicant that this is a unique case and has to be decided on the facts and circumstances of the application. First of all the authorities cited in support of the condition under order 43 rule 4 do not apply and I need not refer to them. Secondly the decree of the court took immediate effect and if not stayed means that the Applicant stands the danger of being in contempt and would be liable as such. The directive in the decree applies from the date of the judgment. Thirdly I agree with the submissions of the Applicants Counsels that the Hon. MPs are not parties to this application or the suit and the matter here does not deal directly with tax liability and quantum of tax of the MPs. It is my holding that the suit and judgment deals with the duties of the Parliamentary Commission and the decree relates to the duty to withhold and remit PAYEE rather than a quantum of tax for payment. Moreover the decision applied to the period after the judgment and not before. The court has also held inter alia that the Parliamentary Commission was bound by the opinion of the Attorney General. Furthermore the

*Decision of Hon. Mr. Justice Christopher Madrama Izama *~*~?+: maXimum728securityx 2016 style*

learned trial judge held that the opinion of the Attorney General ought to be challenged in the Constitutional Court as he had no jurisdiction to consider it on the merits. There are conflicting views with regard to enforcement. If the Parliamentary Commission complies with the Attorney General's opinion which could not be challenged in the suit, they would be in contempt of court order to remit and pay to Uganda Revenue Authority. In other words the opinion is no longer binding.

Last but not least the Applicant is exercising a right of appeal against a judgment and decree directing it to immediately and with effect from 29th of January 2016 start making deductions from payments it periodically makes to MPs covering a range of heads of payment which I do not need to go into as some or all of it may be the subject matter of the appeal. The right of appeal is prescribed by section 10 of the Judicature Act as well as section 66 of the Civil Procedure Act which provides that an appeal shall lie from the decrees of the High Court to the Court of Appeal.

Last but not least there is no specific rule that applies to stay of execution orders pending appeal from the High Court in the Civil Procedure Rules. In the case of **Mugenyi and Company Advocates vs. the National Insurance Corporation Civil Appeal No. 13 of 1984**, the Supreme Court in the lead judgment of Wambuzi CJ held that the High Court has inherent jurisdiction to stay execution of its own orders pending appeal. The inherent powers invoked were section 101 (now cited as section 98 under the revised edition 2000 of the laws of Uganda) of the Civil Procedure Act. In the case of **Francis Micah vs. Nuwa Walakira Supreme Court Civil Appeal No. 9 of 1990** the Supreme Court of Uganda held that there is no specific procedure governing the High Court to stay its own decrees and the High Court has inherent jurisdiction to stay its own decrees under the Civil Procedure Act section 101 (now 98 revised edition) thereof. The exercise of inherent jurisdiction cannot be restrictively applied and is invoked for the ends of justice and is to be exercised judicially and in the interest of justice. I agree that the principles under Order 43 rule 4 of the Civil Procedure Rules may give guidelines but I have held that there are not applicable where the nature of the decree is to direct the Defendant to do something for which disobedience may be contempt of the order of court.

I further agree with the Applicant that the appeal would be rendered nugatory because it is challenging the directive in the decree to deduct and remit moneys from MPs emoluments. The Applicant should not be seen as disobeying a lawful court order. It however made this application promptly. The case law on the issue approved by the Supreme Court is that the right of appeal can be preserved by maintaining the status quo. The court in the case of **Somali Democratic Republic vs. Anoop Sunderlal Treon Supreme Court Civil Application No 11 of 1988** per Manyindo DCJ, Odoki J.S.C and Oder J.S.C, held that where an unsuccessful party is exercising a right of appeal, it is the duty of the appellate court to prevent the appeal from being rendered nugatory. The Supreme Court quoted with approval the decision of Cotton L.J at page 458 of the case of **Wilson V. Church (1879) Volume 12 Ch D 454** on the principles for preserving the right of appeal or preserving the right of hearing pending appeal when he held that:

As a matter of practice, where an unsuccessful party is exercising an unrestricted right of appeal, it is the duty of the court in ordinary cases to make such order for staying proceedings in the Judgment appealed from as will prevent the appeal if successful from being rendered nugatory.”

Furthermore at page 459 of Bret LJ held that court will exercise its discretion so as to stop an appeal from being rendered nugatory. It is my holding that the principle for upholding the right of appeal and preventing it from being rendered nugatory can be applied by the High court in an application for stay of execution of its orders pending appeal which order would operate to stay any anticipated proceedings for enforcement.

In the premises the Applicant’s application has merit. It has appealed the decree and it is in danger of being held to be in contempt of court order unless there is a stay of execution pending appeal. The balance of convenience in this matter of public importance in light of its impact on the MPs is to give the appellant court a chance to consider the Applicant’s grievance before the High Court decree is implemented by the Applicant and the Respondent Uganda Revenue Authority. Let the issue be finally resolved on appeal.

A stay of execution order accordingly issues staying the decree of this court dated 29th of January 2016 pending appeal of the Applicant to the Court of Appeal. The costs of this application shall abide the outcome of the appeal.

Ruling delivered in open court on the 20th of May 2016

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Tom Magezi Counsel for the First Respondent

First Respondent is not in court

Sitnah Cherotich Counsel for the Applicant

No official from the Parliamentary Commission in court

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

20th May 2016