

NTHE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)

HCCS NO. 259 OF 2014

HOUSING FINANCE BANK LTD:::PLAINTIFF

VERSUS

COMMISSIONER GENERAL URA ::::::::::::::::::::::::::::::::::: DEFENDANT

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

J U D G M E N T:

The Plaintiff Housing Finance Bank Limited brought this suit against the Commissioner General Uganda Revenue Authority herein referred to as the Defendant for declarations;

- a) That the Plaintiff had a legitimate reason for not remitting the sums indicated in the third party notice issued by the Defendant in respect of two tax payers namely Mundua Crispus and Nalwoga Proscovia.
- b) That the Plaintiff is not liable to the Defendant in the sums of UGX 1,254,000,000/= in respect of taxes owed by Mundua Crispus and Nalwoga Proscovia.
- c) That an injunction be issued against the Defendant restraining her and her agents from collecting from the Plaintiff the sums of money attributed to Mundua Crispus and Nalwoga Proscovia.
- d) That the Plaintiff was entitled to general damages and costs of the suit.

Mundua Crispus and Nalwoga Proscovia held two accounts with the Plaintiff. In one of the accounts they were joint holders while the other was solely held by Mundua Crispus. Crispus Mundua was also the owner of land comprised in Volume 2604 Folio 6 Plot 29A Lumumba

Avenue Kampala. On a tip from an unnamed person that Mundua had sold the land at UGX 2,800,000,000/= and the money had been banked on Crispus Mundua and Nalwoga Proscovia's accounts the Defendant worked out the tax attracted by that sale comprising capital gains, tax of UGX 750,000,000/= and VAT of UGX 504,000,000/= and made a demand from the two.

Receiving no positive response, the Defendant issued a third party Agency Notice to the Plaintiff's managing director dated 13th October 2011 instructing the Plaintiff to remit UGX 504,000,000/= as VAT on account of Crispus Mundua's land transaction of sale. The Plaintiff did not react the way the Defendant expected and so a demand was made against the Plaintiff to make good what they had not remitted from Crispus Mundua and Proscovia Nalwoga's account.

Objecting to this demand and claiming that it had a legitimate reason for not remitting the sums indicated in the third party Agency Notice issued by the Defendant, the Plaintiff sued the Defendant seeking declarations and orders herein early mentioned.

The issues framed for resolution were:

- 1. Whether the Defendant lawfully issued the Agency notices?**
- 2. Whether the Plaintiff had a legal obligation to honour the third party Agency Notices issued by the Defendant?**
- 3. Whether the Plaintiff is liable to pay the tax due to the tax payer?**
- 4. What are the remedies available?**

On the first issue of whether the Defendant lawfully issued the Agency Notices, the relevant tax laws provide for the procedure to be followed before an Agency Notice is issued. Section 106 of the Income Tax Act reads;

“ (1). Where a taxpayer fails to pay income tax on the due date on which it becomes due and payable, and the tax payable is not the subject of a dispute, the commissioner may, by notice in writing, require any person-

- a) owing or who may owe money to the tax payer;*
- b) holding or who may subsequently hold money for, or on account of, the tax payer*
- c) holding or who may subsequently hold money on account of some other person for payment to the taxpayer; or*

d) having authority from some other person to pay money to the tax payer;

to pay the money to the commissioner on the date set out in the notice, up to the amount of tax due.

(2) The date specified in the notice under subsection (1) must not be a date before the money becomes due to the taxpayer or is held on behalf of the taxpayer.

(3) At the same time that notice is served under subsection (1), the commissioner shall serve a copy of the notice on the taxpayer.”

It is clear from the foregoing provisions that the taxpayer must first fail to pay a tax he has self assessed himself, or notified by the tax authority. It must also not be a tax in dispute and there must be proof that notice in writing was communicated to the taxpayer. If the money of the taxpayer is demanded from a person other than the taxpayer, that addressee must be owing or holding or has the authority to pay the money. The Agency Notice must state the due notice and this notice must be served on both the third party holding the taxpayer's money and the taxpayer as well.

Section 106(2) also makes it clear that the notice takes effect when the money becomes due to the taxpayer or is held on behalf of the taxpayer. The Plaintiff contends that the notices were issued in contravention of section 106. For the notices to be valid the taxpayer had to be given notice as provided for under sections 106(3). It is the contention of the Plaintiff that the taxpayer was never served with that notice. DW1 Mubeezi Paul a Compliance Officer of the Defendant said he served the notices upon Mundua's agent Hussein Kama. There was no proof that the said Hussein Kama was served. What is also baffling is that Hussein Kama was purportedly served from Plot 29A Lumumba Avenue which DW1 referred to as Mundua's place of abode. This Plot 29A Lumumba Avenue had already been sold, so how then was Hussein Kama the caretaker of the property on behalf of Mundua. In the absence of proof of Kama's capacity in the matter, a lot of doubt surrounds the purported service upon Mundua. Service in this case was supposed to be upon Mundua in person or in accordance with established procedures of service.

Furthermore, there is evidence that Mundua only got to know of the tax demand from Monitor Newspaper. The newspaper had listed tax defaulters including Mundua as one of them. Mundua

through his advocates Muwema and Mugerwa Advocates exhibited shock and denied notification of tax default. There is nothing on record to indicate that the Defendant reacted to this denial.

Mundua's denial of notification operated against the validity of the third party Agency Notice.

Furthermore, section 99 of the Income Tax Act provides that after an assessment the taxpayer who is dissatisfied may lodge an objection to the assessment with the Commissioner within 45 days after service of the notice of assessment. The foregoing means that the taxpayer on being notified of the assessment is insulated from the issuance of an Agency Notice until the expiration of 45 days. Unfortunately it has become common for the tax body to issue the assessment notice simultaneously with the Agency Notice. This deprives the taxpayer of the chance to object to the assessment. In **Babibaasa Frank vs. The Commissioner General URA HCCS No. 434 of 2011**, where the Defendant served the Plaintiff with the tax assessment and soon thereafter served him with the Agency Notice the court held that the Plaintiff whistle blower was still entitled to the 45 day window period within which to object to the assessment. It proceeded to vacate the Agency Notice. In the instant case the Defendant issued both the assessment notice and the Agency Notice on the same day in complete disregard of the procedure as provided for in the tax laws. Such an Agency Notice cannot be allowed to stand.

Turning to the issue of whether the Plaintiff had a legal obligation to honour the third party Agency Notices issued by the Defendant it is a requirement of the law that once the third party Agency Notices are brought to the attention of the third party in this case the Plaintiff it was their duty to execute them as presented by complying if the money was there or by notifying the Defendant if the money was not there.

The foregoing however operates on the assumption that the Agency Notices are valid and there is nothing to indicate illegality. In an event where the third party knows that there is an illegality it will be unlawful and against public policy for them to go ahead and implement a thing that they knew very well to be invalid. In the instant case the communication from the Plaintiff to the Defendant, **Exh E** dated November 3rd 2011 indicated that they had no suspicion of any illegality attributable to the Agency Notices. In the circumstances, they would be obliged to honour the third party Agency Notices on receiving notification, Section 31 (11) of the Tax Procedure Code Act.

Turning to the third issue on whether the Plaintiff is liable to pay the tax due to the taxpayer, I have stated above that they would be obliged to pay on receiving notification. The Plaintiff's contention however is that the said notice was served on its Kampala Road Branch and not the Head Office. The notice, **Exh A** was addressed to the Managing Director of the Plaintiff who sits at their Headquarters. Service at the Kampala Road branch was on Thursday 13th October 2011 at 3:41 pm. At such a late hour it is normal that such a document would leave the branch to the Headquarter where the Managing Director sits the following day on Friday 14th October 2011. For the Managing Director to see it and alert the bank branch in question it would depend on the time of arrival of that letter on Friday the 14th October 2011. PW1Mugabi Michael a Company Secretary to the Plaintiff testified that the Managing Director's office closes for the weekend. This was not rebutted. That being the case the necessary instruction to retain the money on Mundua's account could only have gone out on Monday the 17th October 2011. The delay to alert the Manager of the branch of the Agency Notice was in my view occasioned by the Defendant who effected service upon a branch where the addressee had no office and which would now require the personnel of Kampala Road Branch to carry and deliver the letter to the Headquarters the following day. The withdrawals that Mundua did over the weekend were done in my view before the Agency Notice reached the Managers of the bank in which Mundua had an account.

In my view therefore, the branch of the Plaintiff allowed the taxpayer to withdraw the money because they had not been instructed by their Managing Director who as we have said above could not have received notice of a document that the Defendant had decided to transmit through a longer route than they should have. In this I am buttressed by the fact that when subsequent notices were issued the Plaintiff executed them accordingly, **Exh P**.

For those reasons I find the Plaintiff not liable to pay the tax due to the taxpayer.

The Plaintiff also prayed for general damages. It is a settled position of law that the award of such damages is at the discretion of court, and is always, as the law will presume, to be the natural and probable consequence of the act or omission complained of; **James Fredrick Nsubuga vs Attorney General HCCS 13/1993, Erukana Kuwe v Isaac Patrick Matovu & Anor HCCS 177/2003**. Damages are, in their fundamental character, compensatory, not punishment and their primary function is to place the aggrieved party in as good a position as he

would have been had the breach complained of not occurred, to the extent that money can do ;
Bhadeha Habib Ltd vs Commissioner General URA [1997-2001] UCL 202.

These damages however must be proved. The Plaintiff did not at all prove any damages. It called no evidence to that effect. In my view it abandoned that claim. Since no loss has been proved court finds no reason to award any damages.

As for costs, the repeated demand of money from the Plaintiff based on ultra vires Agency Notices led the Plaintiff to file this suit and in my view are entitled to costs which are hereby awarded.

In conclusion judgment is entered in the following terms;

- a) It is declared that the third party Agency Notice issued simultaneously with the assessment by the Defendant on 13th October 2011 is illegal by reason of having been issued ultra vires and is therefore vacated.
- b) The Plaintiff is not liable to pay any monies that Mundua owed to the Defendant by the reason of the said third party Agency Notice.
- c) The Prayer for general damages is denied.
- d) The Defendant shall pay the Plaintiff the costs of the suit.

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David K. Wangutusi

JUDGE

Date: 6th April 2017.