

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[CIVIL DIVISION]

MISCELLANEOUS CAUSE NO. 251 OF 2020

THE OPEN FORUM INITIATIVE [TOFI] ::::::::::::::::::::::::::::::: APPLICANT

VERSUS

1. THE ATTORNEY GENERAL OF UGANDA

2. UGANDA REVENUE AUTHORITY ::::::::::::::::::::::::::::::: RESPONDENTS

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant brought this suit under Article 43 of the Constitution as amended, section 33 and 36 of the Judicature Act, Section 98 of the Civil Procedure Act and Rules 5 (1), 3 (1) of the Judicature (Judicial Review) Rules seeking for orders that:

1. Time be extended for filing this Judicial review application for good reason.
2. An order of certiorari do issue to quash the Income Tax (Rental Rates) Regulations, 2020 Statutory Instruments No. 42 of 2020 published in the Uganda Gazette No. 15, Vol. CXIII, dated 13th March, 2020 the same having been made unlawfully by the Honourable Minister of Finance, Planning and Economic Development under Section 164 of the Income Tax, Cap 340 as amended, without approval of the Parliament of Uganda as required under Section 5 (6) of the Income Tax Act, Cap. 340 as amended.

3. An order of prohibition do issue restraining and preventing the 2nd Respondent from enforcing the Income Tax (Rental Rates) Regulations, 2020 Statutory Instrument No. 42 of 2020 as published in the Uganda Gazette No. 15. Volume CXIII, dated 13th March, 2020.
4. An order of mandamus do issue compelling the Honourable Minister of Finance, Planning and Economic Development to comply with Section 5 of the Income Tax Act, Cap. 340.
5. Costs of this Application be provided for.

The grounds of this application were stated briefly in the Notice of Motion and the affidavit in support of the Application by Mr. Emmanuel Ajal, the Executive Director therein who stated that;

1. The Minister of Finance, Planning and Economic Development in exercise of powers under Section 164 of the Income Tax Act made the Rental Rates (Income Tax) Regulations, 2020 prescribing rates on rental properties along roads, lanes or streets specified in the Schedule therein.
2. That in passing the said Regulations, the Minister did not follow the rightful procedure of obtaining parliamentary approval as required of statutory instruments under section 5 of the Income Tax Act.
3. That the said Regulations impose a minimum presumed rental income and rate of tax applicable thereof which has not been tabled before parliament for debate and approval as required by law.
4. That the continued existence of the Rental Rates (Income Tax) Regulations, 2020 is an illegality and the Minister acted ultra vires of powers prescribed under Section 5 and 164 of the Income Tax Act.

5. That the Applicant could not access the Rental Rates (Income Tax) Regulations , 2020 for analysis because they were gazetted and/ or released in the midst of the Covid pandemic lock down that was characterized by restrictions that imposed closure of offices and banned movements and that this application raises matters of public importance.

The 2nd Respondent opposed this application and filed an affidavit in reply sworn by its Tracy Basiima contending that;

1. In the budget speech for the financial year 2017/ 2018, the Minister of Finance, Planning and Economic Development announced policy changes in a bid to address challenges facing administration of the real estate sector in Uganda.
2. In order to operationalize the policy changes, the Minister issued a statutory instrument for purposes of regulating the rates to be applied in calculating rental tax based on the location of the property.
3. The Minister thereby issued the said Regulations within the powers granted under section 164 of the Income Tax Act for better carrying into effect the purpose of the Income Tax Act.
4. That section 3 of the Income Tax (Amendment) Act of 2017/ 2018 amended section 5 of the principle Act to make provision for the Minister to prescribe estimates of rent based on the rating of rental property in a specific location.
5. The reliefs sought by the Applicant in this application seek to deter the Respondent from performing her statutory duties by enforcing tax laws.

6. That the Application was filed out of time and is procedurally irregular as it seeks remedies for judicial review without being granted leave to file the said Application out of time.
7. That this Application is bad in law, premature, misconceived and an abuse of court process and prayed that court dismisses the same with costs.

The 1st respondent-Attorney General never filed any affidavit in reply and did not appear in court on the matter was fixed for hearing.

The applicant was represented by *Mr. Festo Tindyebwa* whereas the 2nd Respondent was represented by *Mr. Ssali Alex Alidekki and Ms Babra Ajambo*.

At the hearing of this application, the parties were directed to file written submissions which I have had the occasion of reading and considered in the determination of this Application.

The 1st Respondent did not file any submissions.

Three issues were proposed by the Applicant for court's resolution;

- 1) *Whether the time within which to file the application for judicial review should be extended.*
- 2) *Whether the decision of passing into law the Income tax (Rental Rates) Regulations, Statutory Instrument No. 42 of 2020 by the Honorable Minister of Finance, Planning and Economic Development without the approval of the Parliament of Uganda was ultra vires.*
- 3) *What remedies are available to the parties.*

The 2nd Respondent raised three preliminary points of law in opposition to this application for consideration on grounds that:

- 1) *The Application for judicial review is time barred.*
- 2) *The 2nd Respondent is the wrong party to the judicial review application.*
- 3) *The Application is not amenable for judicial review.*

In regards to the preliminary objection, it is clear that this application is time barred as it was filed after the mandatory period of three months stipulated under Rule 5 (1) of the Judicature (Judicial Review) Rules having been filed on the 7th September, 2020 when the grounds for judicial review therein arose on the 13th March, 2020.

However under Rule 5 (1), where there is failure to bring the application in the prescribed time, the Applicant may seek and obtain court's order extending the time within to make this application. In the instant application, the Applicant is seeking this court's order to extend the time within which to file its application for judicial review.

This court shall therefore resort to resolving whether the time within which to file this application for judicial review should be extended.

Whether the time within which to file the application for judicial should be extended.

The 2nd Respondent submitted that Rule 3 (1) of the Judicial (Judicial Review) Rules, 2009 provides that an application for an order of mandamus, prohibition or certiorari or injunctions shall be made by way of an application for judicial review.

Counsel stated that Rule 5 (1) of the Judicature (Judicial Review) Rules further stipulates that this application shall be made promptly and in any event within three months from the date when the grounds of the application first arose.

Pursuant to the above provisions, the law clearly sets out the mandatory timelines for persons who intend to make an application for judicial review. In the instant application, he noted that the Income Tax (Rental Rates) Regulations, 2020 S.1 42 of 2020 were published in the Uganda Gazette on the Friday 14th March, 2020. As such, the prescribed period of three months for filing the Application expired on the 13th June, 2020.

However, the Applicant filed this application on the 7th September, 2020 way long after the expiry of the period within which to lodge an application for judicial review as per Rule 5 (1) of the Judicature (Judicial Review) Rules. Counsel cited the case of *URA vs Consolidated Properties Ltd Civil Appeal No. 31 of 2000*, as to the importance of adherence to time limits where court held that time limits set by statutes are matters of substantive law and not mere technicalities and must be strictly complied with.

Counsel further noted that courts have stated that the statute of limitations is not concerned with merits. (see: *Okoth Umaru & 3 Ors vs Busia Municipal Council & 3 Ors HCMC 12 of 2016, Prime Contractors Ltd vs PDA & Ors HC misc. 91/ 2004*). Therein, the judge found that the proper procedure should have been for the Applicant to apply for the extension of time within which to apply for judicial review under Rule 5 (1) of the Judicature (Judicial Review) Rules which was not done.

The Respondent therefore submitted that the Applicant in this matter has not been granted leave to file this application for judicial review out of the prescribed timelines and thus the Application is time barred.

In reply, the Applicant submitted that Rule 5 (1) of the Judicature (Judicial Review) Rules, 2009 provides this court with the discretion to extend the period within which this Application can be made for good reason. It was submitted that where the discretion is sought, such as in this case, a preliminary objection fetters the purpose as it denies the adjudicator to

hear both sides as was stated in the case of *Kampala University vs National Council for Higher Education MC No. 53 of 2014*.

The Applicant submitted that in matters of judicial review, the essence of time limits is to ensure expeditious determination of the applications for judicial review rather than to oust the jurisdiction of courts to hear parties after the prescribed period. It was noted as deponed by the Applicant's Mr. Emmanuel Ajal that he only came to learn of the Income Tax (Rental Rates) Regulations, 202 S.I 42 of 2020 as published after the ease from the Covid19 pandemic lockdown.

Counsel submitted that this case is distinguishable from the cases cited by the 2nd Respondent in as far as the Applicant brought an omnibus application for both extension of time within which to file the application of judicial review and the application itself.

Counsel submitted that there is sufficient reason to grant the extension of time as the case of the delay was not of personal fault and that the application raises a matter of public importance for natural justice of this case. He noted that in line with the presidential directives on the covid-19 pandemic at the beginning of March, 2020, there was total lock down, closure of public offices and curfew put in place to restrict the movement of people. The said restrictions were eased after the 1st June, 2021 and due to this, the Applicant could only access the subject regulations from the gazette which office was previously inaccessible.

Under paragraph 4 of the affidavit in support of the application, the Applicant stated that it only came to learn of the making of the Regulations after they had been gazette during the lockdown period and was therefore not due to personal fault.

Counsel further argued that this matter is of public importance for natural justice and that Article 152 of the Constitution vests parliament as the only authority to create taxes to which the Income Tax Act is one of statutes.

He noted that section 5 (6) of the Income Tax Act makes it mandatory for statutory instruments made concerning rental tax to be approved by parliament. However, in the instant case, the Minister did not obtain or present the Regulations to parliament for approval and therefore the Regulations made under section 5 of the Income Tax Act are illegal.

He therefore submitted that the Minister exercised his powers ultra vires beyond his statutory authority as was stated in the case of *Kampala University vs National Council for Higher Education* MC No. 53 of 2014.

Analysis

Under Rule 5 (1) of the Judicature (Judicial Review) Rules 2009 provides that;

(1) An application for judicial review shall be made promptly and in any event within three months from the date when the grounds of the application FIRST arose, unless the court considers that there is good reason for extending the period within which the application shall be made.

The Applicant is challenging the legality of the Income Tax (Rental Rates Regulations) that were made in on the 13th of March, 2020 and this is clearly out of time or time barred to be brought under judicial review.

The Applicant however, filed this application seeking for extension of time within which to such an application. This was filed on the 7th of September, 2020 six months after the stipulated statutory three months period. The Applicant alleges that the late filing was with good reason which was due to the covid-19 pandemic directions that were made by His Excellency, the President there by putting the country under a lock down that made it impossible for the applicant to access the gazette regulations and prepare for this matter adequately.

This court has on several occasions noted that the time limits set by legislations are matters of substance which ought to be considered in the

circumstances of the case. In the case of *Uganda Revenue Authority v Uganda Consolidated Properties Ltd CACA 31 of 2000*; the Court of Appeal noted that; time limits set by statutes are matters of substantive law and not mere technicalities and must be strictly complied with. In the case of *Re Application by Mustapha Ramathan for Orders of certiorari, Prohibition and Injunction Court of Appeal Civil Appeal No. 25 of 1996*, Berko, JA as he then was stated; statutes of limitation are in their nature strict and inflexible enactments. Their overriding purpose is *interest reipublicae ut sit finis litum*, meaning that litigation shall automatically be stifled after a fixed length of time irrespective of the merits of a particular case.

In the case of *IP Mugumya vs Attorney General HCMC No. 116 of 2015*, **Hon Justice Steven Musota** (as he then was) dismissing the application for being filed out of time contrary to Rule 5(1) of the Judicature (Judicial Review) Rules 2009 had this to state;

It is clear from the above that an application for judicial review has to be filed within three months from the date when the grounds of the application first arose unless an application is made for extension of time...the time limits stipulated in the Rules apply and are still good law.

This court can only exercise its discretion to extend the time to file for judicial review depending on the reasons on how the delay arose. Inordinate delay in making an application for judicial review will always be a good ground for refusing to exercise such discretionary jurisdiction of this court to entertain the application.

I do not find the reason of the covid-19 restrictions and/ directives advanced by the Applicant as good cause to grant the extension of time for filing this application of judicial review for reasons that even when there were several restrictions in place, the court registries were kept open to ensure that matters of public interest were filed and heard and indeed other matter of a similar nature were filed and heard during the lockdown.

Further, I do not find the Applicant's claim that it could not access the Regulations in the gazette within the prescribed time due to the restrictions imposed leading to its lack of preparation and thus failure to file the judicial review application as a good reason to warrant this court to extend time within which to file the same. It is very clear that there was failure by the Applicant to take some particular step to file its application for judicial review within the prescribed time.

Be as it may, the lockdown restrictions were lifted in June, 2020 which could have enabled the Applicant to file its application well with the prescribed time. If the Applicant wanted to invoke the jurisdiction of this court it should have come at the earliest reasonably possible opportunity. Furthermore, it is always incumbent upon the party seeking for extension of time to properly demonstrate good reasons for such extension in an application which the Applicant has failed to demonstrate in this case. This court therefore ought not to consider stale claims by persons who have slept on their rights.

When the opportunity for judicial challenge is closed off after a period of time, the requirement of the rule of law is met to the extent that an affected person has some reasonable time to challenge the decision. Time limit is imposed in order to accommodate the needs of legal certainty and good public administration. See *Enterprise Inns Plc v Secretary of State for the Environment, Transport and the Regions* (2001) 81 P.&C.R. 18; *O'Reilly v Mackman* [1983] 2 AC 237 at 280.

It should be noted that acting within three months does not conclusively establish that there has been no undue delay. Acting promptly, may depend on the circumstances of the case. Therefore, it is quite wrong to assume filing within 3 months amounts to filing promptly within the time prescribed. It may or may not, depending on the circumstances since there may be cases which need particular promptness before third party rights are affected. *Hardy v Pembrokeshire County Council* [2006] EWCA Civ 240, [2006] Env LR 28

On the premise of the discussion as shown above, the Applicant's time within which to file an application for judicial review cannot be extended and thus, the application for judicial review is time barred. Those who wish to use the judicial review procedure must usually act very quickly.

Whether the 2nd Respondent is the wrong party to the judicial review application?

The 2nd respondent submitted that it was a wrong party since the responsibility to make laws is not vested with her but with the Parliament of Uganda.

The mandate of the respondent is clearly laid out under section 3 of the Uganda Revenue Authority Act which is to administer and give effect to tax laws including but not limited to the Income Tax(Rental Rates) Regulations, 2021 SI No. 42 of 2020. The 2nd respondent was erroneously sued since she was not responsible for the passing of the impugned regulations.

The applicant's counsel submitted that the 2nd respondent is a proper party to this application as it is charged with the responsibility to implement tax laws. Therefore, the 2nd respondent is the principal implementing authority to assess and collect taxes in accordance with the regulations which are subject to this application.

The applicant also submitted that the reason the 2nd respondent is a party to the suit is because they are the implementing authority and not that Parliament passed the law as indicated in their submissions. The applicant therefore contends that in its application it seeks to restrain and prevent the 2nd respondent from enforcing an illegality in the form of the Income Tax(Rental Rates) regulations, 2020 SI 42 of 2020.

Analysis

It is important and necessary that all the necessary parties are before the court while pursuing an application for judicial review. In the present case

as rightly submitted by the respondent's counsel, the impugned regulations were made under the authority of Parliament by the Minister of Finance, Planning and Economic Development.

Therefore the Attorney General was the proper party to represent the Minister and not the implementing agency. The public nature of the function if impregnated with government character or tied or entwined with government or fortified by some other additional factor, may render the corporation an instrumentality or agency of government.

But the nature of the function of making laws is specifically the preserve of Parliament with some delegated power to Executive to make statutory instruments. The act of making the impugned regulations was legislative and could not in any way be imputed on the respondent and the applicant ought to have known better that the regulations under challenge were made under the hand of the Minister of Finance.

In an application for judicial review, necessary parties must and proper parties may, be impleaded. A necessary party is one against whom relief is sought, and without whom no order can be made effectively by the court.

A proper party is one in whose absence, an effective order can be made, but whose presence is considered proper for a complete and final decision on the question involved in the application. In this case the Attorney General is a proper party but the 2nd respondent-Uganda Revenue Authority is not a proper party or necessary party.

A proper party is one whose presence is considered to be proper in order to provide effective relief to the applicant and for avoiding multiplicity of litigation. A proper party is one whose presence is considered appropriate for effective decision of the case, although no relief may have been claimed against him or her.

The question is whether the presence of a particular party is necessary in order to enable the court effectively and completely adjudicate upon and settle all the questions involved in the application. The 2nd respondent was not a proper party or even a necessary party since the order quashing the impugned rules cannot be implemented since they would be deprived of any effect.

This application therefore was incompetently brought against the 2nd respondent since it was not responsible for making the regulations. There was a misjoinder of parties and this court would have struck off the 2nd respondent had the application been brought promptly within the time time-limit set under the rules.

This application therefore fails for the above reason stated herein and is accordingly dismissed with costs to the Respondents.

I so order

SSEKAANA MUSA

JUDGE

24th January 2022