

**IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
MISCELLENOUS CAUSE NO. 2 OF 2018**

NC BANK UGANDA LTD & 24 ORS APPLICANTS

VERSUS

- 1. KAMPALA CAPITAL CITY AUTHORITY**
- 2. ATTORNEY GENERAL RESPONDENT**

BEFORE HON. LADY JUSTICE H. WOLAYO

RULING

Introduction

Through their advocates AF Mpanga Advocates, the twenty five applicants seek orders in judicial review under Judicial Review Rules 2009 for prerogative orders of certiorari and prohibition against the respondents. The motion is supported by the affidavits in support and rejoinder of Wilbrod Owor. The 1st respondent filed affidavit in reply of Ezra Sebuwuffu while the 2nd respondent filed affidavit in reply of Oburu Odoi Jimmy.

Background

It's not disputed that prior to Amendment Act 27 of 2015, section 8 (2) (f) of the Trade (Licensing) Act cap 101 , no trading licence was required for any trade or business in respect of which a separate licence is required. Section 5 of the Amendment repealed this section and the new legislation is now silent on such businesses but it amended section 8 (1) to extend trading licences to 'services'. Section 8 (2) (c) was

amended to remove restrictions to levy trading licences for trade carried out in markets under the Market Act to include 'trade in business' as may be prescribed by the Minister.

The effect of amendment of section 8 of the old law was three fold:

The Act authorized levy of trading licences on 'services';

Trade carried out in markets regulated by the Markets Act continues to be exempt from trading licences except trade in business as may be prescribed by the Minister in consultation with the local authority.

It provided penalties for contravention of section 8(1) of the Amendment Act that prescribes trade licences for any person carrying out trade in goods or services without a trading licence under the Act.

It was against this background that the Minister of Trade, Industry and Cooperatives amended schedules to the Trade (Licensing) Act cap 100 by S.I 2 of 2017 (Trade (licensing) Amendment of Schedule Instrument requiring Banks to pay Trade Licence fees (items 25 and 28) in Part A of the schedule for those located in municipalities or towns and items 20 and 23 in Part C of the Schedule for those located in Kampala city. Both items cover Banks and ATM machines respectively. It is these items that are being challenged by the applicants as having been made ultra vires the powers of the Minister.

All counsel made written submissions and availed authorities that I have carefully examined.

Applicants' case

The applicants contend they are licensed, regulated and supervised by the Central Bank under the Financial Institutions Act 2004 and therefore the requirement under Item 25 of S.I. 2 of 2017 to pay for a trading licence for Banking services is irrational, unfair and amounts to a double collection of revenue. They contend the requirement under Items 28 and 23 to pay separate trade licensing fees for ATM is unfair, irrational and amounts to double charging since ATMs are part of the banking business. They also contend the Minister acted ultra vires her powers when she made S.I. 2 of 2017.

The respondents' case

The 1st respondent (KCCA) contends that the application is misconceived because its role is limited to levy licensing fees that were determined by the Minister under S.I. 2 of 2017 and in accordance with section 8 of the Trade Licensing Amendment Act 2015 that repealed clause 2(f) of the old law that exempted the levy of licensing fees on any business for which a separate license was required. For the 2nd respondent, it was contended that the levy of trade licence fees under the Trade Licensing Amendment Act is lawful, moreover the Financial Institutions Act (FI Act) does not preclude the levy of trade licence fees on the applicants.

By a joint scheduling memorandum, Counsel identified four issues for determination.

1. Whether the application raises issues for judicial review.
2. Whether items 25 and 28 and items 20 and 23 of S.I 2 of 2017 are irrational and unfair.
3. Whether items 25 and 28 and items 20 and 23 of S.I 2 of 2017 are unlawful for being ultra vires the trade Licensing Act Cap 101 as amended by Act 28 of 2015.
4. Remedies

Issue No. 1: Whether the application raises issues for judicial review

Counsel for the respondent submitted that the applicant seeks to challenge the Trade Licensing Act itself which this court has no jurisdiction to entertain and that moreover, judicial review is about the decision making process and not the decision itself. Counsel also referred me to **Amal v Equal Opportunities Commission HCMC No. 233 of 2016** where I held that the applicant had not exhausted remedies under the Employment Act. This case is of no relevance to the present application at all. This case was concerned with an employment dispute whose dispute resolution mechanism is the Employment Act and therefore the applicant had a duty to approach those mechanisms and not seek judicial review.

As submitted by counsel for the applicants, judicial review is concerned with decisions of administrative bodies and the statutory instrument is delegated legislation which is made by the Minister, a public official. In **Bank Mellat v Her Majesty's Treasury No. 2 [2014]A.C 700**, the Court of Appeal of England held that delegated legislation does not have the

status of primary legislation and the statutory instrument is the instrument of the Minister who is empowered by the enabling Act . The court further held ,the focus of the court is on the instrument and not the Act. Although this case is not of binding authority it articulates a good principle that is relevant to the facts in issue.

Counsel for the respondents argues that the applicants ought to have challenged the Act itself that enabled the Instrument but this argument is without merit. While I agree the applicant cannot challenge the legality of an Act as held in **Kampala Private Medical Professionals v AG HC MA 552 of 2017**, cited by counsel for the respondent, the current challenge goes to the legality of including Banks and ATM machines under S.I 2 of 2017 which the court must satisfy itself is consistent with the spirit of the Act. As the challenge is to the legality of SI 2 of 2017 which is made by a Minister and therefore a public official, this application for judicial review is properly before me.

Issue No. 1 is answered in favour of the applicants.

Issue No. 2: Whether items 25 and 28 and items 20 and 23 of S.I 2 of 2017 are

unlawful for being ultra vires the Trade Licensing Act Cap 101 as amended by Act 28 of 2015.

Counsel for the applicant submitted the schedule is illegal and ultra vires the Principal Act to the extent it provides for 'Banks' as a trade licensing item for which the local governments are not licensing authority.

Counsel cited article 192 (2) of the Constitution which commands that

fees and taxes to be levied , charged , collected and appropriated shall consist of rents, rates, royalties, stamp duties, cess, **fees on registration and licensing**'.

Counsel further cited Stanbic Bank Ltd and others v Attorney General HCMA No. 645 of 2011 where the court found that regulations under the Local Government Act permitted local governments to levy of licences on businesses under their regulation, however, I find this precedent is not helpful because the said Regulations are at par with S.I 2 of 2017 .

In response, counsel for the 1st respondent submitted that the Trade (Licensing) Amendment Act 28 of 2015, repealed section 8 (2) (f) of Cap 101 with the result that 'services' were brought under the operation of the Act. It was counsel for the 1st respondent's submission that Act 28 Of 2015 now authorized the Minister to bring banking services under the operation of the Act and the Minister lawfully made provision for licence fees payable by banking institutions under the Act. Counsel further submitted that this is a matter for constitutional interpretation under section 137 which is the preserve of the Constitutional court.

Counsel for the respondents submitted that section 8(2) (f) was repealed and therefore businesses with licences under separate laws now had to pay for trading licences.

A first reading of Act 28 of 2015 would seem to support counsel for the 1st respondent's submission that the amendment of section 8 (1) to include services brings Banks under the regulation of the Trade Licensing Act but to agree with counsel for the respondents would be to

attempt to stretch the meaning of 'services ' which incidentally, is not defined in the parent Act.

The effect of the amendment is as follows:

*Subject to sub-section 2 , no person shall trade in any goods or ' **services** ' or carry on any business specified in the schedule to this Act unless he or she is in possession of a trading licence granted to him or her for that purpose under the Act.*

A reading of section 1 (g to i) reveals the purpose of the Trade Licensing Act as amended.

'Sell ' is defined to include offer for sale, and to expose for sale,

***Sell goods wholesale** means to sell goods to a person or the servant of a person who is reasonably believed by the seller to intend to resell the goods by retail.*

***Trade or trading** means the selling of goods for which a licence under the Act is required in any trading premises, whether by retail or wholesale;*

***Trading premises** includes any structure attached to the land whether permanent or temporary, except a market under the Markets Act in which trade is carried on.*

While a range of services specified under the Amendment schedule can fit in the above definitions without necessarily defining services under the Act, the banking business does not.

An examination of the definition of bank and banking business in the Financial Institutions Act cap 54 is instructive. *Bank* means any

company licensed to carry on banking as its principal business and includes all branches and offices of that company in Uganda.

Banking business means a principal business of

- i. Accepting deposits of money from the public repayable on demand or at the expiry of a fixed period or after notice;*
- ii. Employing such deposits wholly or partly by lending or any other means for the account and at the risk of the person accepting such deposits;*
- iii. Presenting to another bank, for payment, cheques, drafts, or orders received from customers in the capacity of a banker.*

A reading of the definition of banking in the FI Act does not bring it within the meaning 'trade', or 'sell' under the Trade Licensing Act. Had Parliament intended that Banks would pay trade licensing fees, it would have said so expressly given the wide gap between trading business and banking business and given the very specific regulatory law, the Financial Institutions Act.

In Amrit Goyal v Hari Chand Goyal Commericla Court Civil Suit No. 432 of 2001(ulii), the High Court presided over by Ogola J as he then was found the Exchange Control Act that prohibited companies from dealing in securities without Ministerial permission was in conflict with the Companies Act that had no restrictions and in this regard, by the rule of statutory interpretation that a specific legislation over a specific subject takes precedence over general legislation, the Companies Act prevailed. (*generalia specialibus* rule).

Similarly, the Trade licensing Act as amended that makes no mention of

Banks is a general legislation that must give way to the FI Act that is specific to Banks and provides for their licensing.

Counsel for the respondents submitted this court does not have jurisdiction to entertain this challenge to S.I 2 of 2017 because it is grounded in Trade Amendment Act 28 of 2015 that gives authority to the Minister to levy licenses on services. **In Woolwich Building Society v Inland Revenue Commissioner No.2 [1991] ALL.E.R 577**, the Court of Appeal in England confirmed a decision by the High Court that had found Income Tax regulations were ultra vires and made without Parliamentary authority for imposing tax on dividends paid out by the respondent .

In a similar way, I find that while the Act gives authority to the Minister to amend the schedule to expand or remove businesses that require licence fees for services or goods , Banking business is not a service that involves selling and trading in order for it to be brought under the Trade Licensing Act.

In conclusion, I find that the Minister acted ultra vires the Trade Licensing Act as amended which does not expressly name Banks or define them as a service when she included them in the Amendment Schedule 2 of 2017.

Issue No.2 is answered in favour of the applicants.

Issue No. 3: whether items 25 and 28 (Part A) and 20 and 23 Part C are irrational and unfair.

Under this issue counsel for the applicant focused on the existence of a separate licensing regime for Banks. I have addressed this issue under issue No. 2 and I find it unnecessary to address it under a separate

heading.

Suffice it to say I have found that Banking business does not fall under the definition of trading and selling or a service envisaged by the Trade Licensing Act as amended. With respect to ATMs these are dealt with in the next issue.

Issue No. 4 : Whether item 28 Part A and 23 Part C of the Trade Licensing Amendment Schedule are irrational and unfair

Counsel for the applicant addressed me on the principles courts invoke when determining whether a decision was irrational but I would rather approach this issue from the perspective of whether the inclusion of ATM machines in the schedule was intra vires the law.

Counsel for the applicants submitted that these are part of banking businesses and covered by the licence issued under section 3 of the FI Act which licence extends to all branches.

Counsel for the 1st respondent submitted that many Banks operate separate and standalone ATMs away from the bank premises. Section 8 (8) of the FI Act specifies that a licence granted under the Act shall be displayed in a conspicuous place in the premises in which the financial institution carries on its lawful business and copies shall be displayed in each of its branch offices. An ATM in a separate location is not a branch office and therefore cannot be said to be covered by the licence.

An examination of the Act shows that the service rendered by ATMS does not fall under the definition of bank or banking business in its entirety. In fact ATMS are not regulated under the FI Act. ATMs do not

deploy deposits by lending and they do not present to another bank cheques , drafts etc. The machines do not carry out business but simply render a service which brings them under section 8 (1) as amended.

The rider to this finding is that ATMS located within bank premises are obviously covered by the licence under sections 3 and 4 of the FI Act but those located away from the bank premises are just rendering service of dispensing money and nothing more so they are lawfully included in the amendment schedule.

In conclusion, I find that an ATM machine located away from bank premises is not a branch office nor is it regulated or defined by the FI Act and therefore it was lawfully listed as a service for which a trading licence is levied under the Trade Licensing Act. Issue No. 4 is answered partially in favour of the applicants and partially in favour of the respondents.

Costs

As the applicants have succeeded on the substantive issues 1 and 2 , I award them 70% of the costs of the application to be paid by both respondents severally and jointly.

Summary of findings

I found mostly for the applicants and partially for the respondents as follows:

1. As the challenge is to the legality SI 2 of 2017 which is made by the Minister and therefore a public official, the application for judicial review was properly before me.
2. The Minister acted ultra vires the Trade Licensing Act as amended

which does not name Banks or define them as carrying out business for services , when she included them in the Amendment Schedule 2 of 2017.

3. the ATM machine located away from bank premises is not a branch office nor is it regulated or defines by the FI Act and therefore was lawfully listed as a service for which a trading licence is levied under the Trade Licensing Act .

Orders

I make the following orders:

1. The writ of certiorari will issue quashing Item 25 of Part A and Item 20 Part C of the Amendment schedule that authorizes levy of Trade license fees for being ultra vires the Trade Licensing Act as amended.
2. Item 28 of Part A and 23 of Part C that authorizes levy of licence fees on ATMs is intra vires the Trade Licensing Act to the extent that trading licences will be levied only on those ATMS located away from bank premises.
3. The licence fees on ATMS identified under order (2) above shall become payable from the date of demand by the Local Authority or KCCA.
4. The respondents are prohibited from levying licence fees on Banks under the Amendment Schedule 2 of 2017 .
5. The temporary injunction issued on 30th April 2018 is hereby vacated.

6. 70% of the taxed costs of this application will go to the applicants who have been successful on the substantive issues 1 and 2 to be paid by both respondents severally and jointly.

DATED AT KAMPALA THIS 25TH DAY OF FEBRUARY 2019.

HON. LADY JUSTICE H. WOLAYO

Legal representation

AF Mpanga Advocates for the applicants

Directorate of Legal Services KCCA for the 1st respondent

Attorney General's Chambers for the 2nd respondent