

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA**

**MISCELLANEOUS APPLICATION NO. 744 OF 2019**

**(ARISING OUT OF MISCELLANEOUS CAUSE NO.398 OF 2019)**

- 1. ALCOHOL ASSOCIATION OF UGANDA**
- 2. NILE BREWERIES LIMITED & 38 OTHERS-----APPLICANTS**

**VERSUS**

- 1. THE ATTORNEY GENERAL**
- 2. UGANDA REVENUE AUTHORITY----- RESPONDENTS**

**BEFORE HON. JUSTICE MUSA SSEKAANA**

**RULING**

This application is brought by way of chamber summons against the respondent under Order 41 rule 1 and 9, and Order 52 rule 1 of the Civil Procedure Rules for orders that;

1. A temporary Injunction doth issue against the respondents until the determination of the main application as follows;
  - a) An Order restraining the respondents from implementing the Digital Tracking Solutions against the applicant and its members in accordance with the Tax Procedure Code ( Tax Stamps) Regulations 2018.
  - b) An Order restraining the 2<sup>nd</sup> respondent from carrying out arbitrary revenge actions against the Applicant's members for failing to comply with the requirements for implementation of the Digital Tax System as directed by the 2<sup>nd</sup> respondent; and for failing to make modifications to their premises in order for the 2<sup>nd</sup> respondent to implement the Digital Tax Solution systems.

2. The costs be provided for.

The grounds in support of this application are set out in the affidavit of ONAPITO EKOMOLOIT which briefly states;

1. That Section 19A of the Tax Procedure Code Act 2014 as amended requires Tax Stamps to be affixed to specified locally manufactured or imported goods prescribed by the Minister of Finance.
2. That the 2<sup>nd</sup> respondent, prior to the making of the Tax Stamps Regulations, entered into a contract with a foreign contractor (SICPA) to supply a tax stamps management system for the purpose of implementing the law on tax stamps.
3. That the Minister pursuant to section 75 of the Tax Procedures Code Act, made the Tax Procedures Code ( Tax Stamps) Regulations 2018 prescribing the manner in which Tax Stamps are to be implemented.
4. That the 2<sup>nd</sup> respondent by a notice addressed to the Applicant's members informed them about the installation of the digital tracking solution at their factory premises, and the requirements for the equipment as well as the adaptive features to facilitate use of the systems.
5. The applicant and its members objected to the cost implications of the equipment and adaptive features of the system as being contrary to section 19A of the Tax Procedures Code Act, 2014 as amended.
6. That in retaliation the 2<sup>nd</sup> Respondent took arbitrary revenge actions against the Applicant's members contrary to the requirements of the tax laws and procedures.
7. That the respondent intends to launch and enforce the implementation of the Digital Tracking Solution System on 1<sup>st</sup> November 2019 inspite of the applicant and its members' objections.

8. That the actions to launch and enforce the Digital Tracking system pursuant to the Tax Procedures Code (Tax Stamps) Regulations, 2018 is ultra vires, void and therefore unenforceable.
9. That prior to the DTS implementation notice issued by the 2<sup>nd</sup> respondent to the applicants' members, the Honourable Minister of Finance, Planning and Economic Development formally communicated that the costs of Implementing the DTS for manufactured goods was to be borne by the Government and that the cost of the digital stamps would be at a flat rate.
10. That the applicants made objections to the cost of implementation but the 2<sup>nd</sup> respondent took arbitrary revenge actions against the Applicants' members by among others, de-registering them from the withholding tax (WHT) exemption list and further threatening the applicant's members with investigative audits, denial of Tax Clearance Certificates, cancellation of Excise Duty Licenses, Deportation contrary to the 2<sup>nd</sup> respondent's mandate and the tax laws.

In opposition to this Application the 2<sup>nd</sup> Respondent through Senyomo George an Officer in the Legal Services and Board Affairs Department of the 2<sup>nd</sup> respondent deposed and filed an affidavit in reply wherein he opposed application for temporary injunction briefly stating that;

- (1) The Applicant's prayers in the Application for the temporary injunction seek to deter the 2<sup>nd</sup> respondent from performing her statutory duties by enforcing tax laws, namely, the Tax Procedure Code Act, 2014 as amended and the Tax Procedures Code (Stamps) Regulations, 2018.
- (2) That under the tax Procedures Code (Tax Stamps) Regulations, the 2<sup>nd</sup> respondent is mandated to determine the effective date for the implementation of the Digital Tax Stamps system.

- (3) That in accordance with the above mentioned Regulations, the 2<sup>nd</sup> Respondent issued the required Public Notice to the effect that products such as Beer, Soda, Spirits, Wines, Mineral water and tobacco products including Cigarettes whether locally manufactured or imported shall be affixed with digital stamps effective 1<sup>st</sup> November 2019.
- (4) The affixation of stamps on prescribed goods whether imported or locally manufactured is a creation of statutes which all persons are required to comply with.
- (5) That this application has been overtaken by events since the 2<sup>nd</sup> respondent issued the public notice in regard to implementation of the digital Tracking Solution and rolled out on 1<sup>st</sup> November 2019.
- (6) That it is not true that the 2<sup>nd</sup> respondent has carried out any arbitrary and revenge actions against the applicant's members contrary to the provisions of the tax laws and procedures.
- (7) That all the actions of the 2<sup>nd</sup> respondent in implementing and enforcing the Tax Procedures Code Act and the Tax Procedures Code (Stamps) Regulations, 2018 are lawful.
- (8) That the applicants filed a similar application before the Tax Appeals Tribunal challenging implementation of the digital stamps solution system vide TAT Application No. 85 of 2019 and the same is pending hearing and determination by the Tax Appeals Tribunal.
- (9) That the applicants also filed an application for temporary injunction vide Misc. Application No. 82 of 2019 arising from the Main TAT Application No. 85 of 2019 which has since been dismissed by the tribunal. The decision of the tribunal has not been challenged.

(10) That in the interest of justice the application should be dismissed since it is bad in law, frivolous, vexatious and an abuse of court process and amounts to forum shopping.

In the interest of time the respective counsel made brief oral submissions and I have considered the respective submissions. The applicants were represented by *Mr. Milton Fred Ocen, Mrs. Josephine Kiggundu and Mr. Casper Okiru* whereas the 1<sup>st</sup> respondent was represented by *Mr. Ojambo Bichachi* and the 2<sup>nd</sup> respondent was represented by *Ms. Nakku Mwajumah and Ms. Ndagire Patricia*.

The applicants' counsel submitted that there is a prima facie case and the application raises serious issues that have to be investigated. There are serious questions of law depending on the evidence as shown on the record in the affidavit of the applicant.

The applicants' counsel further contended that the Tax Procedures (Tax Stamps) Regulations, 2018 contravene the parent Act i.e. it imposes a penalty that is not envisaged under the parent Act. To that extent regulations 5(2), 6 and 12 are inconsistent with section 19A of the Tax Procedure Code Act.

The 1<sup>st</sup> respondent's counsel contended that the application for judicial review was made out of time since the regulations being challenged were made on 24<sup>th</sup> December 2018 and the present application was filed on 28<sup>th</sup> October 2019.

They further contended that the letter written by the Minister does not override the regulations.

The said regulations have become effective and they have not been declared illegal so they are still good law.

The 2<sup>nd</sup> respondent's counsel in their submissions raised several preliminary objections against the entire application;

The application was filed out of time, since it was brought out of the statutory period of 3 months. Counsel cited the case of ***URA v Uganda Consolidated Properties Ltd CACA No. 31 of 2000***; Court held that time limits set by statutes are

matters of substantive law and not mere technicalities and must be strictly complied with.

The application has been overtaken by events since the Notice for the DTS was put in the gazette and newspapers. Therefore according to her this matter is now moot and if the court makes a decision, it would be an academic question.

That the applicants have not exhausted all the available remedies and that the person aggrieved by the decision of Tax Appeals tribunal must appeal but the applicants have not lodged an appeal. The 2<sup>nd</sup> applicant and others filed an application for temporary injunction in the Tax Appeals tribunal which was dismissed. They further ruled that they have jurisdiction to handle the implementation of DTS.

The application offends the *lis pendens rule* in which the same dispute is pending before another court. There is a subsisting application pending before the Tax Appeals tribunal and the same has not been withdrawn before filing this application.

The 2<sup>nd</sup> respondent's counsel further submitted that the applicant has not made out any prima facie case for the grant of temporary injunction and that the regulations have since become law applicable and the mandate of URA is to enforce the same.

### *Determination*

This has court has decided to consider the merits of application in the interest of time and the preliminary objections raised by the respondents shall be addressed in the main application before the determination of the main cause upon clear evidence on record.

An injunction is by its very nature a coercive order, and compliance with the court order will often have adverse economic as well as institutional consequences for the respondents.

The main question for this court establish is whether in such circumstances the interim injunction can still be justified. See ***Regent Oil Co Ltd v JT Leavesley***

**(Lichfield) Ltd** [1966] 1 WLR 1210. The applicant's counsel has submitted that the order of temporary Injunction being sought is to stop the implementation of the regulations made under the Tax Procedure Code Act

The granting of a temporary injunction is an exercise of judicial discretion as was discussed in the case of **Equator International Distributors Ltd v Beiersdorf East Africa Ltd & Others Misc.Application No.1127 Of 2014**. Discretionary powers are to be exercised judiciously as was noted in the case of **Yahaya Kariisa vs Attorney General & Another, S.C.C.A. No.7 of 1994 [1997] HCB 29**.

It should be noted that where there is a legal right either at law or in equity, the court has power to grant an injunction in protection of that right. Further to note, a party is entitled to apply for an injunction as soon as his legal right is invaded **Titus Tayebwa Versus Fred Bogere and Eric Mukasa Civil Appeal No.3 of 2009**.

It is trite law that for an application to be maintained three conditions must be satisfied by the Applicant as was discussed in the case **Behangana Domaro and Anor Versus Attorney General Constitutional Application No.73 of 2010** that is; - The applicant must show a prima facie case with a probability of success, that the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages and if the court is in doubt, it would decide an application on the balance of convenience.

The legal principle upon which Court exercises its discretion to grant a temporary injunction in all actions pending determination of the main suit is now well settled as seen in the wealth of authorities.

The general considerations for the granting of a Temporary Injunction under **Order 41 Rule (2) CPR** are that;

**(1) In any suit for restraining the Defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the Plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a Temporary Injunction to restrain the defendant from committing the**

**breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.**

**(2) The Court may by order grant such Injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the Court thinks fit.**

For a temporary injunction to be granted, court is guided by the following as was noted in the case of ***Shiv Construction versus Endesha Enterprises Ltd Civil Appeal No.34 of 1992***

1. The Applicant must show that there is a substantial question to be investigated with chances of winning the main suit on his part;
2. The Applicant would suffer irreparable injury which damages would not be capable of atoning if the temporary injunction is denied and the *status quo* not maintained; and
3. The balance of convenience is in the favour of the Application.

The Courts should be slow in granting injunction against government projects which are meant for the interest of the public at large as against the private proprietary interest or otherwise for a few individuals. Public interest is one of the paramount and relevant considerations for granting or refusing to grant or discharge of an interim injunction. See ***Uganda National Bureau of Standards vs Ren Publishers Ltd & Multiplex Limited HCMA No. 635 of 2019***

Injunctions against public bodies can issue against a public body from acting in a way that is unlawful or abusing its statutory powers or to compel the performance of a duty created under the statute.

The courts should be reluctant to restrain the public body from doing what the law allows it to do. In such circumstances, the grant of an injunction may perpetrate breach of the law which they are mandated to uphold.

The main rationale for this is rooted in the fact that the courts cannot as matter of law grant an injunction which will have the effect of suspending the operation of



legislation. See *R v Secretary of State for Transport ex.p Factortame Ltd* [1990] 2 AC 85.

In the case of *Shell Petroleum Development Company of Nigeria Limited & Another v The Governor of Lagos State & Others* 5 ALL NTC- Lagos High Court ; Rhodes-Vivour, J held that;

*“Suspending the operation of a law that has not been declared unconstitutional is a very serious matter. The grant of this application would amount to just that, and this would be without hearing evidence. Laws are made for the good of the State and the power to tax as quite rightly pointed out by the Attorney General is a power upon which the entire fabric of society is based. A restraining order on the defendants from implementing the provisions of LAW No. 11 of 2001 would seriously impair their responsibilities to residents of Lagos State.”*

The courts should consider and take into account a wider public interest. The public bodies should not be prevented from exercising the powers conferred under the statute unless the person seeking an injunction can establish a prima facie case that the public authority is acting unlawfully. The public body is deemed to have taken the decision or adopted a measure in exercise of powers which it is meant to use for the public good.

Therefore Courts of law should be loath or slow to grant an injunction when a public project for the beneficial interest of the public at large is sought to be delayed or prevented by an order of injunction, damage from such injunction would cause the public at large as well as to a Government is a paramount factor to be considered. Between the conflicting interests, interest of the public at large and the interest of a few individuals, the interest of the public at large should or must prevail over the interest of a few individuals. See *ACP Bakaleke Siraj v Attorney General HCMA No. 551 of 2018*

The circumstances of the case are that the Minister of Finance has made regulations (*Tax Procedures (Tax Stamps) Regulations, 2018*) which have come into effect and it is the duty of every citizen to comply with the law until the court declares it unconstitutional or invalid/ultra vires.

The public interest considerations would justify the refusal to grant a temporary injunction and public interest should prevail over the private rights. See ***Kennaway v Thompson [1981] QB 88 at 93.***

In sum and for the reasons stated herein above this application fails and is dismissed with costs.

I so order.

**SSEKAANA MUSA**

**JUDGE**

**5<sup>th</sup>/ 11/2019**