

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA**

**MISCELLANEOUS CAUSE NO. 372 OF 2019**

**PAULINE NAKABUYE-----APPLICANT**

**VERSUS**

**UGANDA REVENUE AUTHORITY----- RESPONDENT**

**BEFORE HON. JUSTICE MUSA SSEKAANA**

**RULING**

This application is brought by way of Notice of Motion for judicial review under Section 14, 33,36,& 39 of the Judicature Act, Section 64 and 98 of the Civil Procedure Act and Rules 3, 3A, 4,5 and 6 of the Judicature (Judicial Review) Rules 2009 for the following prerogative and judicial reliefs;

1. An Order of Certiorari, to quash Regulation 7(1), 7(3) and 7(4) of the Tax Procedure Code (Stamps) regulations 2018 for being ultra vires;
2. An Order of Prohibition, restraining and preventing the respondent, its officers, servants, from directly or indirectly or in any other way, enforcing Regulation 7(1),7(3) & 7(4) of the Tax Procedure Code (Stamps) Regulations 2018;
3. Injunction, prohibiting the respondent from enforcing regulation 7(1),7(3) & 7(4) of the Tax Procedure Code (Stamps) Regulations 2018;
4. A declaration that regulation 7(1),7(3) & 7(4) of the Tax Procedure Code (Stamps) Regulations 2018 is ultra vires the Tax Procedure Code Act, 14 of 2014;

5. A declaration that regulation 7(1),7(3) & 7(4) of the Tax Procedure Code (Stamps) Regulations 2018, is illegal, irrational and unfair;
6. Costs of this application.

The grounds in support of this application are set out in the Notice of motion and the affidavit of Pauline Nakabuye briefly states;

1. That Section 19A of the Tax Procedure Code Act 2014 introduced a requirement for tax stamps to be affixed to locally manufactured goods which include goods that are exercisable under the Excise (Duty) Act.
2. That section 75 of the Tax Procedures Code Act, gave the Minister of Finance, Planning and Economic Development power, by statutory instrument, to make regulations prescribing fees or other matters required under the Principal Act or for the better carrying into effect of the provisions and purposes of the Principal Act.
3. On 24<sup>th</sup> December, the Tax Procedure Code(Tax Stamps) Regulations 2018 were published as Statutory Instrument No. 53 of 2018 but the text thereof became available publicly around the period of May 2019.
4. Regulation 7(1) of the impugned regulations require a manufacturer and or importer of goods to which tax stamps are to be applied to purchase the said stamps from the Commissioner General of the respondent at a fee specified by the Commissioner General by notice in the gazette and a news paper of wide circulation.
5. Regulation 7(3) of the impugned regulations requires the tax stamps fee to be paid before the tax stamps are issued to a manufacturer.
6. Regulation 7(4) of the impugned regulations empowers the respondent to maintain a bank account into which revenue from sale of tax stamps is to be

deposited for purposes of paying the printers of the tax stamps and for defraying expenses of managing the system.

7. Regulation 7(1),7(3) & 7(4) of the Tax Procedure Code (Stamps) Regulations 2018 are ultra vires the Principal Act and it is illegal, irrational and unfair;
8. The fee amounts to a tax levy without authority of any law, and or is non-tax revenue, which by law must be collected into the Consolidated Fund and only expended with authority of the Parliament of Uganda.
9. Implementation of regulation 7(1),7(3) & 7(4) of the Tax Procedure Code (Stamps) Regulations 2018 would have an illegal effect vis a vis the Public Finance Management Act.
- 10.As a consumer of exercisable products that are required to be stamped, the applicant will suffer the reasonable and unnecessary increase in price of locally manufactured goods to her detriment.

In opposition to this Application the Respondent through Willybrick Tumwine an Officer in the Domestic Taxes Department filed an affidavit in reply wherein he opposed application briefly stating that;

- (1) The manufacturers' and importers of prescribed goods are required to purchase tax stamps at a fee specified by notice in the gazette and news paper of wide circulation.
- (2) The respondent has not published the tax stamps fees by notice in the Gazette or news paper of wide circulation.
- (3) The regulation 7(30 is rational and the applicant has not demonstrated any proof of the alleged risk of income inequality.

(4) The regulations 7(1),7(3) & 7(4) of the Tax Procedure Code (Stamps) Regulations 2018 are valid provisions of the law and the same have not been found to be unconstitutional by the Constitutional court of Uganda.

(5) The regulations are rational, reasonable, legal, fair and where lawfully passed by Parliament.

(6) This application is misconceived, bad in law, frivolous, vexatious and an abuse of court process because the application is time barred.

(7) That the implementation and enforcement of the Tax Procedures Code Act and Tax Procedures Code (Tax Stamps) Regulations 2018 are lawful.

In the interest of time the respective counsel were directed to file written submissions and i have considered the respective submissions.

The applicants were represented by *Mr. Barenzi Johny Patrick* whereas the respondent was represented *Ms. Nakku Mwajumah Mubiru*.

The applicant's counsel raised the two issues for determination;

***1. Whether the applicant is entitled to prerogative orders and judicial reliefs sought in this application for Judicial review?***

***2. Whether the applicant is entitled to costs?***

The respondent raised preliminary points of law in form of issues;

***1. Whether the application for judicial review is time barred?***

***2. Whether the applicant has exhausted the remedies available to her?***

***3. Whether the respondent is the wrong party to the judicial review application?***

***4. Whether the applicant is entitled to prerogative orders and judicial reliefs sought in this application for judicial review.***

### ***Whether the application for judicial review is time barred?***

The respondent's counsel submitted that Rule 5 of the Judicature (Judicial Review) Rules sets out mandatory timelines for persons who intend to make an application for judicial review before the courts to be made promptly and in any event within three months from the date when the grounds of the application first arose.

The Tax Procedure Code (Tax Stamps) Regulations 2018 came into effect on 2<sup>nd</sup> October 2018. The prescribed time of 3 months for challenging them would have been January 2019.

According to counsel, this application is time barred having been filed out of the mandatory period of 3 months provided by law. She cited the case of ***Uganda Revenue Authority v Consolidated Properties Ltd CACA 31 of 2000 and Okoth Umaru & 3 Others v Busia Municipal Council & 3 others HCCM 12 of 2016***

The applicant counsel in his submissions contended that the applicant came to be aware of the impugned regulations in July 2019 and therefore she was in time by the time she filed the application in September.

It was also her case that there is no bar in applying for extension of time after the application is filed and nor is a fetter on the power of this honourable court enjoyed under section 98 of the Civil Procedure Act to ensure that the needs of justice are served.

It is unconscionable to seek to rely on technicalities to defeat a challenge to legislation which is ultra vires so that doing so, unlawful and illegal enforcement of a law can be perpetuated

### ***Determination***

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 in the Notice of motion stated that although the regulations were published as Statutory Instrument No. 53 of 2018 the text thereof became available publicly around the period of May 2019.

She further stated in her affidavit in support on 15<sup>th</sup> June 2019, she became aware that there existed Tax Procedures Code (Tax Stamps) Regulations 2018.

In his submissions, counsel has submitted from the bar that the applicant was only able to obtain a text of the impugned regulations on 27<sup>th</sup> June 2019.

It is clear from all the different versions presented by the applicant that she was out of time by the time of filing the application for judicial review.

The applicant either inadvertently or ignorantly did not seek leave of court to extend the time within which such an application can be brought.

The reasons advanced for the delayed filing should have been advanced at the time of applying for leave to extend the time of filing for judicial review. The rule of laches is not a rigid rule which can be cast in a strait-jacket. The courts do not follow a rigid, but a flexible, measure of delay. It should be emphasized that the rule that the court may not enquire into belated and stale claims is not applied in a rigid manner.

This court does not agree with the submissions of the applicant's counsel that time limits are technicalities and should be dispensed with. 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 **IP MUGUMYA vs ATTORNEY GENERAL HCMC NO. 116 OF 2015**. The Applicant challenged an interdiction which occurred on 6<sup>th</sup> July 2011 by an application for judicial review filed on 11<sup>th</sup> August 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.*

The court ought not to consider stale claims by persons who have slept on their rights. Any application brought under the Constitution or by way of judicial review could not be entertained if presented after lapse of a period fixed by limitation legislation.

If the applicants wanted to invoke the jurisdiction of this court they should have come at the earliest reasonably possible opportunity or sought leave of the court to file their application out of time but not to file the same as of right after expiry of the time set by law.

The court could have exercised its discretion to extend the time depending on the facts to determine whether 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. The court refuses relief to an applicant on ground of laches because of several considerations e.g it is not desirable to allow stale claims to be canvassed before the court; there should be finality to litigation.

Excessive interference by the judiciary in the functions of the Executive is not proper. The machinery of government would not work if it were not allowed some free play in its joints.

This application is dismissed for being filed out of the statutory period of 3 months period.

***Whether the applicant exhausted alternative remedies?***

The respondent counsel submitted that the Rule 7A(1)(b) of the Judicature (Judicial Review) (Amendment) Rules 2019 provides for exhaustion of existing alternative remedies.

According to counsel, section 24 of the Tax Procedure Code Act a person who is dissatisfied with a tax decision may lodge an objection with Commissioner. The

case of *Rabbo Enterprises v Uganda Revenue Authority SCCA No. 12 of 2004* was relied upon in support of this argument.

The applicant's counsel submitted that this is not a matter of an assessment or a discretionary decision of the Commissioner General. Rather, it is a matter of examining the impugned Regulations, which the applicant says are ultra-vires.

### Determination

This preliminary objection is totally misplaced since it does not in anyway relate to a tax decision as submitted by the respondent's counsel. This court agrees with the applicant's submission, to the extent that this application intended to challenge regulations made and in the circumstances there is no such decision that has been made by the Commissioner General.

This preliminary objection as premised on the Rabbo case is cited out of context and has no application to matters of judicial review of this nature involving challenge to regulations made by a Minister of Finance.

Rabbo case decision was only intended to avoid circumventing the jurisdiction of tribunal established to resolve tax disputes not to determine the questioning of the wrongful exercise of power under judicial review in order to uphold the rule of law. The Tax Tribunal does not have powers of judicial review and the remedies sought from the tribunal are not similar to the prerogative writs or judicial review remedies available under section 36 of the Judicature Act to the High Court only.

Therefore, whenever there is wrongful exercise of power or abuse of authority or arbitrariness, such exercise of power is challengeable by way of judicial review. The principles of administrative law are applicable not only to the government or the departments or officers as such, but also to its instrumentalities as well. Where a corporation or statutory body is an instrumentality or agency of the government, it would in exercise of its power or discretion, be subject to the same constitutional or public law limitations as the government itself.

The governing power wherever located must be subject to the fundamental constitutional limitations. The Tax Appeals Tribunal was never created to resolve wrongful/illegal exercise of power or arbitrary actions by the respondent's officers



but rather to address tax disputes only between the tax payer and Uganda Revenue Authority.

The respondent has large powers and immense potentiality to injure interests of persons with whom they come into contact during the course of their operations. To keep the respondent outside the purview of judicial review would be to give it a license to ride rough shod over the rights of the people without any control.

Similarly, the rule of exhaustion of remedies is not inflexible or rigid as it is a self imposed restriction, and the court may relax it if there are special circumstances present in a case, such as, breach of rules of fairness/natural justice, jurisdictional errors, blatant abuse of power/authority or arbitrariness in exercise of its power etc. This rule does not oust the jurisdiction of this Court to exercise or grant judicial review reliefs or to have supervisory powers over the exercise of powers by the executive.

When alternative remedy is available, the high court may refrain from exercising its judicial review jurisdiction, but to refrain from exercising jurisdiction is different from saying that it has no jurisdiction.

This preliminary objection is overruled.

***Whether the respondent is the wrong party to the judicial review application?***

The applicant is challenging regulations 7(1),7(3) & 7(4) of the Tax Procedure Code (Stamps) Regulations 2018 for being ultra vires the Principal Act and are illegal, irrational and unfair.

The impugned regulations were passed by Parliament of Uganda which is vested with powers to make laws. The respondent did not make the said regulations and her role under the Uganda Revenue Authority Act is to administer and give effect to tax laws.

Accordingly, the right party to sue should have been the Attorney General which represents Government in all legal proceedings before courts of law. As per Article 119(4)(c) of the Constitution.

The applicant's counsel submitted that there is no law that prohibits judicial review reliefs being issued against the respondent. The respondent will implement the impugned regulations and must be a party as it will be bound by the prerogative orders being sought if they are issued.

### *Determination*

The applicant did not make any meaningful response to this preliminary objection. The contention of the respondent is that the impugned regulations were made by the Minister of Finance under the authority of Parliament.

The respondent is not to blame for any purported ultra vires regulations.

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.

Any attempt by this court to entertain this application without the proper party-Attorney General would amount to condemning them unheard which is against the cardinal principal of our constitutional order.

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. The High Court ought not to decide an application for judicial review without the presence as respondents of those who would be vitally affected by its decision. Therefore, in absence of a necessary party, the application is incompetent.

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. 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.

This application therefore was incompetently brought against the respondent since it was not responsible for making the regulations.

For the reasons herein above stated this application fails and there is no need to delve into the main issue raised for trial

This application is dismissed with costs.

I so order.

**SSEKAANA MUSA**

**JUDGE**

**14<sup>th</sup> / 04/2020**