THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISCELLANEOUS CAUSE NO. 109 OF 2020

1. **CAPITAL SHOPPERS LTD**
2. **QUALITY UGANDA LIMITED T/A QUALITY SUPERMARKET**
3. **KENJOY ENTERPRISES LTD T/A KENJOY SUPERMARKET**
4. **JAZZ SUPERMARKETS LTD**
5. **MEGA STANDARD SUPERMARKET LTD----------APPLICANTS**

VERSUS

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

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

This application is brought by way of Notice of Motion for Judicial review under Article 42 of the Constitution and section 36 & 38 of the Judicature Act, and Rules 3 & 3A, of the Judicature (Judicial Review) Rules 2009 for the following prerogative and judicial reliefs;

1. A declaration that the unilateral decision of the Respondent of selecting the Applicants as '***Pilot Candidates for the pilot exercise***' for the implementation of the ***Electronic Fiscal Receipting and Invoicing Solutions (EFRIS)*** is illegal, ultra vires the powers of the Commissioner URA, discriminatory, unfair and supported by any legal framework.

2. An Order of Certiorari issues quashing the illegal and arbitrary process and decision of the respondent of selecting the Applicants as '***Pilot***

Candidates for the pilot exercise' for the implementation of the ***Electronic Fiscal Receipting and Invoicing Solutions (EFRIS)***

3. An Order of Prohibition issues prohibiting the Respondent, its employees, agents and all persons acting under the authority from enforcing the decision of exploiting the applicants' business as '***Pilot Candidates for the pilot exercise***' for the implementation of the ***Electronic Fiscal Receipting and Invoicing Solutions (EFRIS)*** until a proper legal framework is put in place.

4. A Permanent Injunction issues against the respondent restraining it, its agents and all persons working under it from enforcing their decision of exploiting the applicants business as '***Pilot Candidates for the pilot exercise***' for the implementation of the ***Electronic Fiscal Receipting and Invoicing Solutions (EFRIS)*** until a proper legal framework is put in place.

5. A declaration that the planned roll out of the ***Electronic Fiscal Receipting and Invoicing Solutions (EFRIS)*** on a few and not all of the business enterprises in Uganda amounts to selective tax administration and enforcement thus offending the fairness and neutrality cannons of a good tax system.

6. A permanent injunction issues restraining the respondent, its agents, employees and all persons working under it from proceeding with selective roll out and discriminatory enforcement of the ***Electronic Fiscal Receipting and Invoicing Solutions (EFRIS)*** on the 1st day of July 2020 until all businesses in Uganda have been on boarded and registered on EFRIS system/platform.

7. A permanent injunction issues restraining the Respondent, its agents, employees and all persons working under it from gazetting the

applicants as mandatory tax payers to issue e-invoices or e-receipts or employing electronic fiscal devices that are linked to the centralized invoicing and receipting system or devices authenticated by the Respondent until the underlying issues such as discriminatory selection and enforcement are addressed by the respondent by on boarding and registering all businesses onto the EFRIS system/platform.

8. A permanent Injunction issues restraining the Respondent, its agents, employees and all persons working under it from subjecting the applicants to penal tax for not using the e-receipting and e-invoicing system until the underlying issues such as discriminatory selection and enforcement are addressed by the respondent by onboarding and registering all business onto the EFRIS system/platform.

9. In the alternative , without prejudice, an Order of Certiorari quashing the decision of the Respondent gazetting the applicants as tax payers for whom it shall be mandatory to issue e-invoices or e-receipts or employ electronic fiscal devices linked to the respondent's centralized invoicing or receipting system because the process leading to the decision breached public administrative principles of fairness, rationality and was devoid of meaningful public consultation and informed participation.

10. Costs of the application be borne by the Respondent.

The grounds in support of this application are set out in the affidavit of *Ponsiano Ngabirano*, Founder, Chairman and CEO of the 1st applicant and other affidavits by *Apollo Mutungi, Michael Dondo Mwebesa, Manish Bheriyani*, and *Ambrose Rwangoga* who are CEOs and Founders of the Applicants respectively which briefly state that;

1. That the applicants are local Ugandan business entities which operate supermarket business and as such pay tax to the Respondent.

2. That between February and May 2020, the Respondent without any consultation, justification or legal framework in place issued notices to the applicants informing them that they had been selected as '***Pilot Candidates for the pilot exercise***' for the implementation of the ***Electronic Fiscal Receipting and Invoicing Solutions (EFRIS)*** a new system to be used by all businesses to manage issuance of e-receipt and e-invoicing.

3. That the respondent has never gazetted the applicants as candidates for the pilot study exercise as required by law.

4. By letter dated 25th May 2020, the applicant's lawyers wrote to the respondent objecting to the section criteria for the pilot exercise but todate the Respondent has refused or neglected to respond to the Applicants' letter.

5. That the pilot exercise was to start on the 15th May 2020 and the applicant's premises and businesses are at an imminent risk of being intruded by the respondent to enforce an illegal and irrational pilot exercise to the detriment of the applicants' commercial and economic rights.

6. The Respondent acted outside its powers when it selected the applicants for a pilot study without gazetting them and without any legal framework in place.

7. That the unilateral decision of the respondent of selecting the applicants as '***Pilot Candidates for the pilot exercise***' for the implementation of the ***Electronic Fiscal Receipting and Invoicing Solutions (EFRIS)*** was unjust, illegal, discriminatory, unfair and not supported by any legal framework.

8. That the respondent's decision of selecting the applicants' as '***Pilot Candidates for the pilot exercise***' for the implementation of the ***Electronic***

Fiscal Receipting and Invoicing Solutions (EFRIS) without any legal framework or selection criteria violates taxation principles including the principles of fairness, neutrality and Uganda's International obligations under the World trade Organisation's (WTO) Trade facilitation Treaty to which Uganda is a state party.

9. The applicants' rights including the right to business privacy, commercial confidentiality, and customer trust are at a high risk of being breached if the respondent goes ahead to exploit the Applicants as pilot candidates without any proper legal framework being put in place.

10. That without proper legal framework detailing the selection criteria, duties and obligations of the parties to the proposed pilot scheme, the applicants are not in position to make proper assessment and give informed consent of the pilot exercise before exploiting their businesses as specimens for eventual roll out of the system.

11. That the applicants were never informed of the scope of the exercise, duration of the exercise, costs involved, software disclosures, time involved, data protection, information security, integration processes of products, and confidentiality rights and obligations to enable the applicants to make an informed decision regarding their participation in the pilot project.

12. That the applicants reasonably believe that the impending selective roll out of the Electronic Fiscal Receipting and Invoicing Solutions (EFRIS) on 1st July 2020 will increase tax compliance costs and create an onerous tax burden that is not applicable to the applicant's competitors such as small scale retailers, duukas, kikuubo traders, hawkers and vendors thus promoting unfair competition against the applicants who are mostly SMEs already overburdened with other business challenges such as bank loans, high overhead expenses and increasing costs of doing business in Uganda.

In opposition to this Application the Respondent through *George Ssenyomo* an Advocate working as an Officer in the Legal Services and Board Affairs Department filed an affidavit in reply wherein he opposed application briefly stating that;

1. That in December 2018, the tax Procedure Code Act was amended to include s.73A to provide for electronic receipting and invoicing by specific taxpayers as to be specified by the Respondent.

2. That under the Tax Procedure Code Act, 2014 and Tax Procedure Code(E-Invoicing and E-Receipting) Regulations, 2020, the Respondent is mandated to use a centralized invoicing and receipting system to monitor and manage the issuance of fiscal documents for purposes of among others, carrying out efficient tax administration purposes.

3. That over the past years, revenue collections have remained low and this is attributable to key challenges that directly impact on revenue mobilisation that include; under-declaration of sales, False refunds and offset claims, a large and difficult to penetrate informal sector(for tax purpose), poor record keeping by taxpayers.

4. That as part of the strategy to address tax administration challenges, the government adopted the application of Electronic Fiscal receipting and Invoicing System to be used by all businesses to transmit transaction details to the respondent in real time and issue e-receipts and e-invoices in accordance with section 73A of the Tax Procedure Code Act, 2014.

5. That the solution/system supports record keeping, real time authentication of business transactions and shall aid the respondent in confirming the ACCURACY of the self-assessments made by a taxpayer, including the applicants, which has been a challenge in determining the actual tax positions and timely processing of tax refunds for taxpayers.

6. That under the Tax Procedure Code Act, 2014 the respondent is mandated to, by notice in the gazette, specify the taxpayers for whom it shall be mandatory to issue e-invoices or employ electronic fiscal devices which shall be linked to the centralized invoicing and receipting system.

7. That the respondent has published the required Public Notice in the gazette specifying that it is mandatory for all Value Added Tax (VAT) registered taxpayers to issue e-invoices and e-receipts.

8. That the Minister of Finance, Planning and Economic Development has further issued the tax Procedures Code (E-Invoicing and E-Receipting regulations, 2020 and the same have been published in the Gazette.

9. That the respondent issued a Public Notice specifying the effective date of the roll out of the requirement for all VAT registered taxpayers to issue e-invoices and e-receipts. The said rollout was further confirmed by the Honourable Minister of Finance, Planning and Economic Development while presenting the Budget speech for the Financial year 2020/2021.

10. That between the months of February 2020 and June 2020, the respondent selected the applicants, among others to participate in the pilot phase of the implementation of the EFRIS. The customised EFRIS solution was tested/piloted with 58 selected taxpayers, including the applicants.

11. That the objective of the pilot was to; prove that the solution (EFRIS) works as designed; pick lessons to inform any necessary process and system adjustments before roll out; guide and inform roll out plan.

12. That the respondent requested the participants, including the applicants to nominate 2 staff for the training on the use of EFRIS for a period of 3 days, as part of the pilot project and indeed they nominated and sent representatives who attended the said training on EFRIS and the

respondent continues to engage all the applicants through emails and telephone conversation on training which they continued dodging or avoiding for personal reasons.

13. That on 25th May 2020, the applicants filed an objection with the respondent objecting to among others, selective implementation as pilot candidates for the implementation of EFRIS. The respondent is yet to issue an Objection decision as provided under the law.

14. That the applicants have not yet exhausted alternatives remedies available for addressing this issue within the law and thus this application is premature and bad in law.

15. That the selection of the Applicants as pilot candidates does not in any way violate any taxation principles and or breach any of the applicant's right of business privacy, commercial confidentiality and customer trust.

16. That the applicants were at all times consulted and engaged and full disclosure was made to them as to the roll out of the EFRIS solution. The respondent has also carried out various sensitization drives and stakeholder engagements on the implementation and rollout of the EFRIS and so far over 300 taxpayers have been trained as part of the pilot project in EFRIS.

17. That the implementation and use of EFRIS, through the use of an e-invoice or e-receipt or use of electronic fiscal device is a creation of statutes which all persons, including the applicants, are required to comply with. The full roll out of the EFRIS to all taxpayers is scheduled for 1st July 2020 and any orders stopping the application on the applicants will be prejudicial and unfair to other taxpayers as this will amount to selective application of the law.

18. That this application has been overtaken by events since the public notice and the Tax Procedures Code (E-Invoicing and E- Receipting) Regulations, 2020 have already been gazetted in line with the statutory provisions hence the applicants are required to comply with the said notice and statutory provisions.

19. That all actions of the respondent in implementing and enforcing the Tax Procedures Code Act and tax Procedures Code (E-invoicing and E-Receipting) regulations, 2020 are lawful.

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

The *1st, 2nd, 3rd and 5th* applicants were represented by *Mr. Kayondo Silver* while *Mr. Agaba Edmund* represented the 4th applicant whereas the respondent was represented by *Ms. Nakku Mwajumah Mubiru* and *Mr. Tonny Kalungi.*

The parties seem to agree to the following issues for determination;

1. ***Whether the application for judicial review is time barred as against the 1st applicant?***
2. ***Whether the applicants have exhausted the remedies available to them?***
3. ***Whether the suit is overtaken by events and thus rendered moot?***
4. ***Whether the respondent is the wrong party to the judicial review application?***
5. ***Whether General Notice No. 595 of 2009 gazetting all VAT registered taxpayers to issue e-invoices or e-receipts is lawful and consistent with section 73A of the Tax Procedures Code(Amendment) Act, 2018?***
6. ***Whether the applicant is entitled to prerogative orders and judicial reliefs sought in this application for judicial review.***

<u>Preliminary Considerations</u>

The 4th applicant's counsel submitted that after filing this application, the respondent hurriedly issued a notice in a gazette making it mandatory for all

VAT registered taxpayers to issue e-invoices and e-receipts in accordance with the Tax Procedure code (E-Invoicing and E-Receipting) Regulations 2020. In the interest of just and for this Honourable court to conclusively adjudicate this matter we seek leave to amend and add an order that;

(i) An order of certiorari doth issue quashing Tax Procedures Code (E-Invoicing and E-Receipting) Regulations 2020 for being enacted without stakeholder participation.

Analysis

The procedure adopted by the applicant's counsel is very irregular and this court would not grant such leave to make an amendment during submissions. The applicant had every right to make an amended application to add the intended order since in his view the application had been overtaken by events.

The applicant ought to have made an application under Rule7 of the Judicature (Judicial Review) Rules, 2009 which provides;

(1) The Court may, on the hearing of the motion, allow the applicant to amend his or her motion, whether by specifying different additional grounds or reliefs or otherwise, on such terms, if any, as it thinks fit and may allow further affidavits to be used if they deal with new matters arising out of any affidavit of any party to the application.

(2) *Where the applicant intends to ask to be allowed to amend his or her motion or to use further affidavits, he or she shall give notice of his or her intention and of any proposed amendment, to every other party.*

The rule requires a party intending to amend to give notice to the other party and information/evidence by way of affidavit should have been given in the circumstances. The intended amendment is disallowed since it is irregular and it an ambush to the respondent.

Whether the application for judicial review is time barred as against the 1st applicant?

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.

According to counsel, this application is time barred having been filed out of the mandatory period of 3 months provided by law since the 1st applicant was selected for pilot project for EFRIS on 17th February 2020, therefore according to respondent counsel this application ought to have been filed by 17th May 2020.

The applicants counsel submitted that the matter complained of is a continuing violation which started with illegal nomination of the applicant for EFRIS through a series of communications, like that of 18th May 2020.

Secondly, the 1st applicant challenges the EFRIS regulations of 2020 and General Notice No. 595 of 2020 gazetted belatedly on 23rd June 2020 and seeks an explicit prayer to quash the same for lack of stakeholder consultation and participation.

Analysis

The applicants' case is within the timeline of 3 months for judicial review. The respondent's submission is devoid of merit.

Whether the applicants have exhausted the remedies available to them?

The applicants have not exhausted alternative remedies available for addressing the issues for appropriate remedy and neither have they shown that any such remedy as exists is inconvenient, less beneficial or less effective.

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 ***Cable Corporation (U) Ltd v Uganda Revenue Authority HCCA No. 1 of 2011*** was relied upon in support of this argument.

The applicants' contended that this application is an abuse of court process in as far as there is already an alternative remedy available.

The applicants' counsel submitted that the Commissioner General of the respondent has a conflict of interest because he is the same party that issued General Notice No. 595 of 2020 that is being challenged. He is *functus officio* in the matter because he has already stated his interpretation by gazetting all VAT registered entities to issue e-receipts and e-invoices in disregard of Section 73(1) of the TPCA that gives discretion to tax payers to opt whether or not to use EFRIS. Therefore, the applicants do not expect justice from an office that has already taken a position on the matter.

Secondly, this is not a matter for the Tax Appeals Tribunal because it is an administrative decision and TAT does not have the jurisdiction to issue the nature of judicial review reliefs being sought.

Analysis

This preliminary objection is about the failure of the applicants to explore the exhaustion of alternative remedies available. According to the record the applicants through their lawyers-*Ortus Advocates* made an ***"Objection to Selective Implementation as pilot Candidates for the Pilot exercise in the Implementation of the Electronic Fiscal Receipting & Invoicing Solutions"*** The same was duly filed/lodged on 25th May 2020.

The applicants indeed had an alternative remedy of resolving their dispute arising out of the decision of the respondent to selectively try to implement the EFRIS on them only. In the case of ***Cable Corporation (U) Ltd v Uganda Revenue Authority HCCA No. 1 of 2011*** Court held that a taxation decision means any assessment, determination, decision or notice.

The applicants indeed submitted to this jurisdiction when they lodged an objection and to this extent they ought to have conclusively and exhaustively waited to explore the remedies available. Rule 7A(1)(b) of the Judicature (Judicial

Review) (Amendment) Rules 2019 provides for exhaustion of existing alternative remedies;

The Court shall, in considering an application for judicial review, satisfy itself of the following-

> *(b) that the aggrieved person has exhausted the existing remedies available within the public body or under the law;*

This position has been fortified by case law. A case in point is ***HCMA 268 of 2017, Mrs. Anny Katabazi Bwengye vs Uganda Christian University*** where this Honourable Court held at page 12, while quoting *HCMA No. 218 of 2009 Microcare Insurance Ltd vs Uganda Insurance Commission* that; prerogative orders are available to an Applicant who demonstrates *inter alia* that they lack an alternative remedy or where the remedy exists, it is inconvenient, less beneficial or less effective.

The applicants were wrong to pursue the two remedies concurrently and without trying to exhaust the one pursued first. The action of the applicants of pursuing both available remedies is an abuse of court process and should be discouraged. In the case of ***Autologic Holdings PLC v Inland Revenue Commissioner [2006] AC 118***, Lord Nichols held that;

> *"The proceedings would be an abuse because the dispute to the court for a decision would be a dispute parliament has assigned for resolution to a specialist tribunal. The dissatisfied taxpayer should have recourse to the appeal procedure provided by parliament. He should follow the statutory route… The conclusion that the proceedings are an abuse follows automatically once the court is satisfied the taxpayer's claim is an indirect way of achieving the same result as it would be open to the taxpayer to achieve directly by appealing to the appeal commissioners. The taxpayer must use the remedies provided by the tax legislation."*

However, 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.

This court agrees with the applicants' submission, to the extent that this application also intended to challenge General Notice No. 595 of 2020 gazetting all VAT registered tax payers to issue e- receipts and e-invoices as being inconsistent with section 73A of the Tax Procedures Code (Amendment) Act, 2018 made and in the circumstances there is a valid cause of action which is not directly related to exhaustion of available remedies since there is no such decision that has been made by the Commissioner General.

The applicants also seem to be challenging the Tax Procedure Code (E-Invoicing and E-Receipting) Regulations for being passed without consulting the stakeholders.

This preliminary objection partly succeeds.

Whether the suit is overtaken by events and thus rendered moot?

The respondent submitted that this application is overtaken by events and therefore it is simply moot. The applicants had stated and contended that the respondent was enforcing the *Tax Procedure Code (E-Invoicing and E-Receipting) Regulations, 2020* without gazetting the said regulations and the general Notice stating the tax payers who it shall be mandatory to use EFRIS.

The orders sought are overtaken by events since the *Tax Procedure Code (E-Invoicing and E-Receipting) Regulations, 2020* has now been gazetted and it mandates every VAT registered tax payer to issue e-invoices and e-receipts.

The applicants counsel contends that there is a live dispute between the parties even though EFRIS regulations have been gazette. The said regulations are still a subject of challenge. The court has powers to quash illegal events and a declarative relief is also a cure in establishing the correct position of the law/state of affairs even after the actions have not been taken.

Analysis

The application was premised on the major complaint of selecting the applicants as ***'Pilot Candidates for the pilot exercise' for the implementation of the Electronic Fiscal receipting and Invoicing Solutions (EFRIS)*** and this can be seen from Orders sought in the Notice of Motion1-8. This leaves only two orders being sought that appear to be live disputes are this court can make meaningful pronouncement over.

The respondent stated that the application is overtaken by events since the public notice and Tax Procedures Code (E-invoicing and E-receipting) Regulations, 2020 have already been gazette in line with the statutory provisions hence the applicants are required to comply with the said public notice and statutory provisions.

Courts do not decide cases for academic purposes because court orders must have practical effect and must be capable of enforcement. Once there is no live dispute the courts time should not be wasted in determining moot cases. See ***Turyakira John Robert & Anor v Uganda Revenue Authority HC Misc Cause No. 166 of 2018***

The function of a Court of law is to decide an actual case, and to right actual wrongs, and not to exercise the mind by indulging in unrewarding academic casuistry or in pursuing the useless aim of jousting with windmills. Further, the court should not grant a relief or pass order or direction which is incapable of implementation.

The orders sought by the applicants are overtaken by events and therefore moot since no good would be achieved if the orders are granted. The applicants' main grievance was about being selectively chosen as pilot candidates for the pilot exercise for the implementation of the Electronic Fiscal Receipting and Invoicing Solutions (EFRIS). The said pilot scheme was abandoned by the respondent and the same has been overtaken by gazetting the law which now applies to all VAT registered taxpayers.

This application to the extent of the orders sought in relation to Pilot candidates for pilot exercise is moot and overtaken by events.

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

The respondent contend that the applicant is challenging regulations 73A(1) and 73A(2) of the Tax Procedure Code are ambiguous and also seek for Court to Order the Tax Procedure Code (E-Invoicing and E-Receipting) Regulations, 2020 as illegal and ultra vires. The applicants also seek for an Order stopping the Respondent, from subjecting the applicants to Penal Tax for not using the e-receipting and e-invoicing system.

The Tax Procedure Code Act and Regulations were passed by Parliament of Uganda which is the legislative arm of Government established under Article 77 of the 1995 Constitution. It was the respondent counsel's argument that the respondent is a wrong party to the application since the responsibility to make laws is not vested with her but with Parliament. Therefore, any grievance relating to vagueness of the law, if at all, should be addressed to Parliament through the Attorney General.

The mandate of the respondent is clearly laid out under Section 3 of the URA Act which is to administer and give effect to tax laws including but not limited to the Tax Procedure Code Act. The respondent was erroneously sued since she was not responsible for passing the impugned regulations. It is the Hon. Minister of Finance, Planning and Economic Affairs who made and signed laws.

The applicant's counsel submitted that the case before the court is about improper exercise of the respondent's mandate by committing transgressions not supported by the law. It was URA that illegally designated the applicants businesses as 'pilot' candidates for a pilot neither supported by law. Therefore the AG was never involved in the actions of the respondent.

Secondly, it was the respondent through its Commissioner General that issued General Notice No. 595 of 2020 that is being challenged and not the AG.

Analysis

The applicant is not challenging the regulations per se but rather the Gazette Notice issued by the Respondent gazetting all the applicants as tax payers for whom it shall be mandatory to issue e-invoices and e-receipts or employ electronic fiscal devices linked to the Respondent's centralized invoicing and receipting because of breaching public administrative principles of fairness, rationality and being devoid of meaningful public consultation.

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 is the respondent since she is the author of General Notice No. 595 of 2020 which gazettes the applicants as taxpayers for whom e-invoices and e-receipts shall issue.

The 4th applicant's counsel seemed to argue that the gazetting of the Applicants among all registered VAT tax payers for whom it shall be mandatory to issue e-receipts or e-invoices is pursuant to Tax procedures Code (E-Invoicing and E-Receipting) Regulations 2020. This Honourable court cannot proceed to examine gazetting of the Applicants without looking at the Tax procedures Code (E-Invoicing and E-Receipting) Regulations 2020. He prayed that this Honourable court takes judicial notice of the Regulations and proceeds to examine whether their enactment is ultra vires.

As noted earlier, the Statutory Instrument was enacted by the Minister of Finance, Planning and Economic Development. It's propriety cannot be brought into question without the author.

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. If one is not a party in the proceedings he would not be bound by observation/findings made in the proceedings.

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.

The 4th applicant's attempt to question the propriety or legality of the Tax Procedure Code (E-Invoicing and E-Receipting) Regulations, 2020 is dismissed and would not be competently brought against the respondent since it was not responsible for making the regulations.

The respondent would be a wrong party to that extent and the Attorney General should have been added as a proper party and necessary party to answer the issues of legality and propriety of the statutory instrument.

Whether General Notice No. 595 of 2009 gazetting all VAT registered taxpayers to issue e-invoices or e-receipts is lawful and consistent with section 73A of the Tax Procedures Code (Amendment) Act, 2018?

The applicants counsel submitted that the said Notice is premised on erroneous interpretation of the law and intention of the legislature and is therefore illegal, null and void.

Section 73A of the **Tax Procedure Code (Amendment) Act, 2018**, provides that:-

> *(1)**A taxpayer may issue an e-invoice or e-receipt, or employ an electronic fiscal device** which shall be linked to the centralised invoicing and receipting system or a device authenticated by the Uganda Revenue Authority.*
>
> (2) *The Commissioner shall, by notice in the Gazette, specify taxpayers for whom it shall be mandatory to issue e-invoices or e-receipts or employ electronic fiscal devices which shall be linked to the centralised invoicing and receipting system or devices authenticated by the Uganda Revenue Authority.*

The applicant's counsel further argued that the parent Act (the Tax Procedure Code (Amendment) Act, 2018 is ambiguous in as far as it grants a tax payer discretion to issue an e-invoice or e-receipt under Section 73A (1) and yet 73A (2) creates a discriminatory structure where the Commissioner can gazette specific tax payers for whom it shall be mandatory to issue e-invoices or e-receipts.

According to the applicant Section 73A gives the taxpayer discretion on whether or not to issue an e-receipt or e-invoice and that if parliament had intended the e-receipt and e-invoice system to apply to all VAT registered entities, it would have either said so in Tax Procedure Code Act or given specific powers to Commissioner General to gazette all VAT registered tax payers.

The 4th applicant's counsel submitted that the a notice in the gazette making it mandatory for all VAT registered tax payers to issue e-receipts or e-invoices contravenes Section 73A (1) of Tax Procedure Code (Amendment Act) in as far as it takes away the discretionary power of the tax payer to employ an electronic fiscal device or issue e-invoice or e-receipts.

Secondly, Section 73A (2) of Tax Procedure Code (Amendment Act) with regard to the Commissioner to specify tax payers for whom it shall be mandatory to issue e-receipts or e-invoices does not extend to the Commissioner giving a blanket notice gazetting all registered VAT tax payers, in so doing the commissioner contravened Section 73A(1) of Tax Procedure Code (Amendment Act).

Counsel submitted that the notice in the gazette making it mandatory for all VAT registered taxpayers to issue e-receipts or e-invoices is illegal, ambiguous as it contravenes Section 73A (1) of Tax Procedure Code (Amendment Act) in as far as it takes away the discretionary power of the tax payer to employ an electronic fiscal device or issue e-invoice or e-receipts.

The respondent contended that by inviting the applicants to attend training for the upcoming EFRIS project, they were preparing the applicants for an easy way in which they will apply the law in force. The pilot project or exercise was simply

meant to educate, train, sensitize and prepare the applicants on the operation, benefits and trial of the EFRIS as evidenced in the affidavit evidence on record.

The respondent in their affidavit contended that they have so far trained over 300 tax payers, including the applicants and that 47 taxpayers have already been registered and are using the EFRIS system.

There was an on-going sensitization exercise and it is not true that the notice was short as argued by the applicants counsel. The different taxpayers where being prepared for the 1st July 2020 roll out and indeed they took part in the training with exception of some few who declined to the training like the applicants.

Analysis

The applicants counsel are arguing that the General Notice is illegal since it has gazetted all VAT registered taxpayers and this argument is premised on an assumption that the respondent is exercising this power in contravention of the parent law.

The respondent Commissioner General properly exercised the power given by Parliament and the applicants' argument of ambiguity of parent law (section 73A(1) and 73A(2) is completely flawed and a misapplication and appreciation of the Tax Procedure Code (Amendment) Act, 2018.

Section 73A of the **Tax Procedure Code (Amendment) Act, 2018**, provides that:-

> *(1)**A taxpayer may issue an e-invoice or e-receipt, or employ an electronic fiscal device** which shall be linked to the centralised invoicing and receipting system or a device authenticated by the Uganda Revenue Authority.*
>
> (2) *The Commissioner shall, by notice in the Gazette, specify taxpayers for whom it shall be mandatory to issue e-invoices or e-receipts or employ electronic fiscal devices which shall be linked to the centralised invoicing and receipting system or devices authenticated by the Uganda Revenue Authority.*

The Commissioner General is given power to promote the policy and purposes of the Act. This was supposed to be made specifying the taxpayers eligible to

issuance of e-invoices and e-receipts. The nature of powers given to the commissioner is subjective and is strictly within the purview of the respondent.

This section was introduced through an Amendment to the Tax Procedure Code Act and it was intended to operationalize section 73 which had provided for ***Electronic Returns and Notices;***

(1) The Commissioner may establish and operate a procedure to be known as the electronic notice system, for the electronic furnishing of returns or other documents to the Commissioner and the electronic service notices and other documents by the Commissioner.
(2) For the purposes of subsection (1), the Commissioner may prescribe conditions for:-
(a) The registration of taxpayers to participate in the electronic notice system.

The amendment Act must not be read in isolation of the main/original legislation since this will distort the intention and purpose for the amendment. It is merely a subset of implementation of Electronic Returns and Notices in the entire taxation system.

Every statute which is enacted by the Legislature confers some element of discretion on the administration. The main reason for vesting large discretionary powers in the government and its officials is the increasing state regulation of human affairs. The concept of discretion involves a right to choose between more than one possible course of action upon which they may have room for reasonable persons to hold different opinions as to which option is to be preferred in a given situation.

Parliament has given the powers/discretion to the Commissioner to determine who among the different taxpayers ought to issue e-invoices and e-receipts. This is premised on the main purpose of the legislation and specifically the Amendment Act that has introduced e-invoicing and e-receipting system.

There are different categories of taxpayers from which the Commissioner may choose in order to effectuate the legislation. The duty to specify the taxpayers

amenable to e-invoices and e-receipts requires designating a particular or defined category of taxpayers conformable to special circumstances.

The legislators are aware that there are different categories or types of taxpayers and they have left this power to the Commissioner to determine the best suited taxpayer to apply the e-invoice and e-receipt system. A person is liable to pay VAT upon registration under Section 7 of the Value Added Tax Act; therefore not every taxpayer is liable to pay and especially if not registered or if the law does not require such taxpayer to be registered.

The gazetting all VAT registered taxpayers to be liable to E-Invoicing and E-Receipting is not illegal or irrational as contended by the applicants. The same is within the '*four corners*' of the Tax Procedure Code Act.

The argument by the 4th applicant's counsel that the Gazette Notice has taken away the discretionary power of the taxpayer to employ an electronic fiscal device is equally untenable and very speculative in nature. The law has given options and the respondent is in charge of both systems, the applicants case is not that he wishes to use Electronic Fiscal Device, rather that there may be a taxpayer who may use it.

The Commissioner shall specify a taxpayer to whom Electronic Fiscal Device shall apply; Regulation 4 provides;

A taxpayer specified by the Commissioner under section 73A (2) of the Act shall issue a fiscal document through any of the following methods-

Regulation 5 provides;

A taxpayer referred to in regulation 4(1) shall require a fiscal device from a manufacturer, systems developer or supplier accredited by the Commissioner.

The Commissioner has been given alternatives in execution of his duties and the law does not provide that the two must be executed or implemented at the same time. The taxpayer who is comfortable to use the electronic fiscal device is at

liberty to make their case for the same by getting accreditation by the Commissioner.

This cannot be interpreted as taking away their choice but rather it has to be done in a phased manner that involves approvals and at their cost and expense as set out in Regulation 5(2) which provides;

A taxpayer who elects to issue fiscal documents under regulation 4(1)(a) and (e) shall at, his or her own cost, integrate the business or enterprise resource planning system or fiscal device, as the case may be, with the system.

The courts should be mindful and quite liberal in upholding delegation of power to decide "matters of detail" concerning the working of the tax law in question. The Commissioner has been delegated power to bring into effect the e-invoicing and e-receipting and is best suited to make rational decisions to achieve the intended purpose of the legislation of avoiding self-assessment system/model which some fraudulent taxpayers abuse. Hence, in the very nature of things these details have got to be left to the Commissioner. There is permissible discretion that may have to be exercised depending upon the facts of each case and particular peculiar circumstances.

For the reasons herein above stated this application fails and is dismissed with costs.

I so order.

SSEKAANA MUSA
JUDGE
20th January 2021