

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
MISC. APPL. NO. 642 OF 2004

(Arising from Civil Suit No. 16 of 2004)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND

IN THE MATTER OF AN APPLICATION BY CHARLES BYAMUGISHA
(APPLICANT)

VERSUS

MASINDI TOWN COUNCIL
(RESPONDENT)

BEFORE: THE HON. MR. JUSTICE GEOFFREY KIRYABWIRE.

R U L I N G:

This is an application for Judicial Review under order 42 A rule 6 (2) of the Civil procedure (Amendment) (Judicial Review) Rules, 2003. It is brought by notice of motion and is supported by an affidavit of the applicant.

It seeks the following orders;

1. An order of certiorari doth issue calling for the decision of Respondent imposing illegal taxes and to quash the same.
2. An order of prohibition doth issue prohibiting the Respondent, its agents or any other person on authority from prosecuting the Applicant for failure or refusal to pay the serial illegal taxes or demanding such unauthorised taxes in future.
3. A declaration that the alleged taxes complained of are illegal and based on a non-existing law.
4. The Respondent pays general damages to the applicant.
5. Costs be provided for.

The general grounds for the application are that:

- a) The Respondent has imposed and demanded for an illegal tax from the applicant which is unknown in law.
- b) The said 'taxi' or charge is unjustified, excessive and oppressive to the Applicant.
- c) The Respondent is using agents who are collecting illegal taxes without justifiable cause or basis.

- d) The Applicant faces an immediate threat of arrest and prosecution for refusal to pay illegal taxes and dues.
- e) It is fair and equitable that the illegal decision be called and quashed and that it be prohibited from further illegal imposition and collection of taxes.

Mr. G. Kandebe appeared for the Applicant while Mr. A. Mukwatanise appeared for the Respondent.

The applicant owns Passenger Service Vehicles (PSV) which carry passengers in Uganda.

The case for the applicant is expounded in his affidavit dated 13th August 2004. It is the case for the Applicant that the Respondent Masindi Town Council through a company called "Eagle Multiple Ltd" and a gentleman called Kayiira Mbogo have been imposing illegal taxes called "Bus Sticker", "Coaster Sticker" and "Loading Fees" on his vehicles. The said Eagle Multiple Ltd and Mbogo are said to be "tenderer" (sic) (I think they mean are agents) of the Respondents as they issue receipts belonging to the Respondent and merely stamp and sign them on issue.

The Applicant deposes that he on the legal advice of his Counsel has discovered that the said "fees" (which he terms "taxes") have legal foundation in addition to being too much, unreasonable and oppressive. Armed with this advice the applicant stopped paying the said illegal fees and estimates that at that time he had paid Shs.10,000,000/= in such illegal fees.

On the 6th August 2004 the Applicant further depones that by letter referenced MTC/852 he was summoned to meet. The Town Clerk of the Respondent Mr. Rukiika to show cause why he should not be prosecuted for failure to pay the said fees. The letter reads;

“ **Ref. MTC/852**

Mr. Byamugisha Charles
Owner of Babu Coach Bus
Masindi.

RE: SUMMONS.

You are summoned to appear before the Town Clerk, Masindi Town Council on Monday 9th August 2004 at 3:00 pm to show cause why you should not be prosecuted in Courts of law. For failure to pay park dues for your vehicles to the concerned authorities C/S 13(a) of the Local Government Regulations Part 1V.

Failure to comply to the summons will cause council to have you arrested and prosecuted in Courts of law without further warning

NIC BEGYIRA RUKIIKA
TOWN CLERK. ”

It would appear from Annex 'C' to the affidavit that Mr. Kahiira Mbogo had written to the Town Clerk that the applicant had refused to pay “park dues” for unknown reasons as follows:-

JULY	BUS STICKER	UAA 574D	-	46,800
JULY	COASTER STICKER	UAA 044K	-	17,550
JULY	COASTER STICKER	UAA 629B	-	17,550
28/07/04	BUS STICKER	UAA 574D	-	17,550
29/07/04	LOADING FEE	UAA 574D	-	17,550
30/07/04	LOADING FEE	UAA 574D	-	17,550
31/07/04	LOADING FEE	UAA 574D	-	17,550
02/08/04	LOADING FEE	UAA 574D	-	17,550
03/08/04	LOADING FEE	UAA 574D	-	17,550

Shs.187,200
=====

The Applicant depones that as a law abiding citizen he does not want to be subjected to illegal fees.

Counsel for the Applicant submitted that the Respondent can under S. 80 of the Local Government Act (cap. 243) levy taxes specified in the 5th schedule to the Act. He further submitted that under the 5th schedule no provision is made for "bus sticker", "coaster sticker" and "loading fee".

In order to levy the above fees it is the case for the applicant that the applicable law would be Reg. 13(o) of the 5th schedule which would be;

"any other revenue which may be prescribed by the local government and approved by the Minister",

Mr. Kandebe submitted passionately that a tax be specific and imposed by statute. He referred to the learned Dr. David Bakibinga in his book "Revenue Law in Uganda" at P.1 for the proposition and I quote;

"All forms of taxation are imposed by parliament. Taxation is a creature of statute".

It is the case for the applicant that this was not done as his research has shown that the Respondent as a Local Government has not passed any ordinance or statutory instrument under S. 39 of the Local Government Act and approved by the Minister.

On the issue of the "tax" being excessive and oppressive Counsel for the Applicant argues that some receipts provide for VAT (Value Added Tax) yet no TIN (Tax Identification Number) is shown for the applicant to be able to claim a VAT refund.

It would therefore be submitted to have the applicant prosecuted in such un clear circumstances.

Counsel for Applicant therefore argues that it is just and equitable to have this "illegal tax" quashed and removed from the record as an error apparent on the face of the record. It is further necessary to issue an order of prohibition to prevent local authorities exceeding their powers contrary to the law. For this proposition I was referred to the case of;

R.V. Greater London Counsel (exparte) Blackburn ICLR 550 at 559.

The said taxes are further submitted and should be declared as illegal. Counsel for the Applicant prays for general damages and based on the troubles his client has passed through and the threats of his prosecution a sum of 10m= should be awarded.

For the Respondent, it is argued that by virtue of Articles 191(1), 152 and 206(1) Local Governments can and has powers to levy fees. Counsel for the Respondent argues that S. 80 of the Local Government Act gives local council s wide powers to levy fees and taxes. Counsel for the Respondent further argues that S. 30 of the Local Government Act empowers local councils to provide numerous services and functions which include parking and loading passengers in the town council.

In this regard he referred me to Reg. 28 (e) (part 3) of the 2nd schedule of the Local Government Act which provides that urban councils shall;

"28 Provide, control and manage the following services...

(e) Public vehicle parking".

In this respect I was further referred to Reg. 26 of the same second schedule which provides that urban councils shall;

"26 Regulate, control, manage, administer, promote or licence any of the things or services which council is required or empowered to do and establish, maintain, carryon, control, manage or administer and prescribe the forms in connection therewith; and to fix fees or charges to be made in respect of thereof".

Counsel for the Respondent further submits that the Respondent in accordance with Section 77 of the Local Government Act approved on the 14th June 2004 a budget (Annex Defendant and E to the affidavit of NIC B. Rukiika.

It is deponed at Para 3 that the said taxes are legal and authorized by law and that the application is brought by bad faith. The Town Clerk depones as proof of this bad faith at Para 5 of his affidavit that the applicant in the financial years 1999/2000 and 2001/2002 acted as agent of the Respondent to collect the same tax under the company M/S Masindi Transport Linkages Ltd where he holds 20% of the shares.

In this regard it is submitted that the Applicant is estopped from challenging these taxes he also imposed.

On the question of the fee/tax being excessive counsel for the Respondent submits that no justification has been made for this argument. He argues that the plaintiff only challenges the profit margin (though it is not clear what he meant by that). In any event counsel for the Respondent argues that M/S Eagle Multiple Ltd is not a party to the proceedings and so the ground on excessive fees/taxes does not arise. It is further argued that the Applicant continues not to pay the fees/taxes and so has in reality incurred no loss.

Finally counsel for the Respondent wonders why the applicant refuses to pay these fees/taxes in Masindi whereas he does pay similar one in Kampala.

I have heard the submissions of both counsel for which I am grateful. The issue at hand is whether the taxes/fees termed "Bus Sticker", Coaster Sticker" and "Loading fees" charged by the Respondent through its agent (commonly referred to as "Tenderer") M/S Eagle Multiple Ltd are Legal and payable.

Of course these fees/taxes are fairly common in Uganda today and are charged by the Local Governments as a means of raising revenue for their operations. This revenue assists such local government under the decentralisation programme to raise money without relying exclusively on the central government.

Whereas I do agree with counsel for the Respondent that articles 191(1), 152 and 206 (1) of the Constitution have some relevance regarding the power of local governments to levy fees and taxes the one common thread in all the constitutional provisions is that such fees and taxes should be in accordance with laws enacted by parliament. In other words there is no power given to the local governments to levy taxes or fees on the strength of the constitution alone.

There is no doubt that local governments have been given powers under the Local Government Act to carry out certain prescribed functions and also levy certain prescribed fees/taxes. However in doing so the said local governments must follow the law which makes all this possible.

With regard to the applicable law one must look as submitted by both counsel to the Local Government Act (cap. 243).

I agree with counsel for the Applicant that the applicable section in the Local Government Act on the issue of fees/taxes in Section 80. It provides;

"80 Power to levy taxes.

(i) Local governments may levy, charge and collect fees and taxes, including rates, rents, royalties, stamp duties, personal graduated tax and registration and licensing fees and the fees and taxes that are specified in the fifth schedule to this Act..."

I with due respect do not agree with counsel for the Respondent that the enabling section for imposing taxes is Section 77 which provides;

" 77 Local Governments' budgetary powers and procedures.

(1) Local Governments shall have the right and obligation to formulate, approve and execute their budgets and plans provided the budgets shall be balanced..."

This section enables local government to make execute budgets. I can understand why counsel for the Respondents refers to it. That is because Mr. N.C. Rukiika the Town Clerk Masindi Town Counsel depones in his affidavit in reply at P6 and 7, and annexures Defendant and E respectively that the council in their 2004/5 budget "approved rates for buses/taxi loading fees". These were under 3 categories namely; registration, loading and sticker fees.

However, find that these fees have to be levied in accordance with Section 80 of the Local Government Act and in particular the 5th schedule to the Act.

Indeed as counsel for the Applicant points out there is no provision in the 5th schedule for "bus sticker", coaster sticker" and "loading fee". Regulation 13 (h) only provides for parking fees as the nearest one can get to fees for motor vehicles. Any other fee in this regard would have to fall under Regulation 13(o) which may be prescribed by the local government and approved by the Minister. Counsel for the applicant submitted that Regulation 13(o) has not been complied with. In my view the real onus is on the Respondent to show they have complied with it. It is important to observe that counsel for the Respondent in response to this referred court to Regulation 28(e) (part 3) of the 2nd schedule. This regulation allows urban councils the power to regulate, control and manage public vehicle parking. I was further to referred to Regulation 26 of the same schedule which empowers the council to fix fees and charges for those areas they are empowered to manage and regulate. That may very well be so. However, the whole Local Government Act should be read as whole in order to understand its provisions. I find that according to Sections 30 and 31 of the Local Government Act, the 2nd schedule to the act simply demarcates what a district council, urban council and local government can do first as between themselves and secondly, vis a vis the central government. These provisions in my view do not vary, modify and or amend section 80 of the Local Government Act.

As to the fees being challenged I further note that the applicant does not challenge the imposition of what is termed "Regulation fee" (which is not also provided for under

the 5th schedule) but rather the bus and coaster sticker and loading fee. It is not clear why this is so. Though this did not come out well in the submissions to court, it would appear to me that the Respondents are actually trying to levy some form of parking fee but have called it all sort of names which are not provided for in the law. It would also appear to me that the Applicants are willing to concede to the "Regulation fee" as a form of parking fee but not the rest.

It is important for local governments to be fully advised as to the provisions of the Local Government Act especially in this area of taxation so that only the correct taxes are imposed.

Substituted names in addition to vague or ambiguous references to a legal tax may led to the unclear tax being struck down as illegal.

In the essence of evidence from the Respondents that they have complied with the 5th schedule Regulation 13(o) of the Local Government Act I find that the loading and sticker fees imposed by the Respondent as illegal. Since the Applicants do not contest the "Regulation fee" I make no find on law about it but observe that it would be better to refer to it as parking fee in accordance with the Local Government Act.

As to the ground that the fees levied are unjustified excessive and oppressive not much was submitted on this. The main argument is that some of the receipts issued by the Respondent's agents do not have VAT (Value Added Tax) numbers so the applicant cannot make a claim for VAT refund. To this the Respondents say according

to Para(s) 10 and 11 of Mr. Rukiika's affidavit that they have a VAT No. 1396-1005-9459-H and they regularly remit VAT to the Uganda Revenue Authority. Probably that means that a VAT refund is possible for the applicant.

I find that a part from the legality of some of the taxes there is no evidence to show that they are excessive and oppressive to the applicant.

As to the ground that it is fair and equitable that the decision of the Respondent to collect these taxes be quashed and also be prohibited from further illegal imposition of the said tax there are some interesting revelations here. The evidence before court will suggest that the Applicant and one Kayiira Mbogo (who either work for or with M/S Eagle Multiple Ltd. the agent of the Respondent) used to in the Financial year 1997/1999 collect the same taxes on behalf of the Respondent. This the Applicant and Mr. Mbogo used to do as directors (with 20% shares each together with others) of M/S Masindi Transport Services Ltd (according to Memorandum and Articles of Association). It is the case for the Respondent that the Applicant having been a director in a company that collected such fees in the past should be estopped from challenging them now.

I find that this whole dispute may in reality be wider than the legal arguments put before Court in that the parties have a previous business relationship on the same subject matter. However that business relationship notwithstanding the application raises important questions of administrative action in the area of taxation that need to

be clarified and rectified. In any event the issue of estoppel if relevant would apply to M/S Masindi Transport Services Ltd in its corporate capacity and not its directors who have separate legal identity. Whereas it is important that local governments raise money in the form of taxes and fees to run their operations, it is even more important that against the Respondent from prosecuting the Applicant for failure to pay the said fees I have quashed, I find that it is too radical a prayer under an application for judicial review. I find that my findings on the application for certiorari is enough to resolve this dispute. Since orders for judicial review are discretionary I find that sufficient ground and justification has been made for me to grant the order of prohibition and I accordingly decline to grant it.

On the issue of general damages counsel for the applicant has argued that Shs.10,000,000/= would be sufficient to cover the troubles suffered by his client. Counsel for the Respondent on the other hand argues that they comply with the provisions of the Local Government Act in doing so. The said Act does not prohibit the said taxes and fees but it sets out the procedure to be followed in levying such taxes and fees. It is therefore just and equitable on that ground alone that an order of certiorari doth issue.

I accordingly do direct that an order of certiorari issues against the Respondent imposing "bus stickers", "coaster sticker" and "loading fees" and hereby quash the said fees as not being levied in conformity with the Local Government Act.

As to the pray that I also issue an order of prohibition since the Applicant has not been paying the said fees then he has suffered no damages. Damages act as compensation for loss incurred by an aggrieved person. In this case it is not that the Respondent in could not in theory levy the said fees it is just that they did not follow the correct legal procedure in order to do so. The said fees have been in place for a long time and it is only now that they are being contested. In any event the Applicant has stopped paying them. I find therefore that this is an appropriate case to award nominal damages of Shs.200,000-. As to costs I direct each party bears its own costs as the issues raised in this application relate issues of good governance of local Governments. I further order that the Shs.339,300- (being unpaid fees) deposited in Court to by the Applicant as a condition to the hearing be refunded to the Applicant.

Sgd: Geoffrey Kiryabwire

JUDGE.

Date: 23/11/05