

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)

ORIGINATING SUMMON NO.03 OF 2021

RADIO ONE LTD T/A RADIO ONE KAMPALA & 31 OTHERS (Suing through
UGANDA MEDIA OWNER'S ASSOCIATION).....PLAINTIFFS

VERSUS

1. ATTORNEY GENERAL

2. KAMPALA CAPITAL CITY AUTHORITY DEFENDANTS

BEFORE: HON. JUSTICE ESTA NAMBAYO

JUDGMENT

The Plaintiffs (Suing through Uganda Media Owners Association), filed this suit under **Order 34 r 6 of the Civil Procedure Rules**, against the Attorney General and Kampala Capital City Authority, (hereinafter referred to as the 1st and 2nd Defendants respectively) seeking for court's determination on the following issues: -

1. **Whether the 2nd defendant has statutory mandate to levy trade license fees from the Plaintiffs in light of the recent decisions of this Court in MC No. 243 of 2017, Uganda Law Society -v- Kampala Capital City Authority and Attorney General, MC No. 260 of 2019, Pharmaceutical Society of Uganda -v- Attorney General, MC No. 02 of 2018, NC Bank Uganda Ltd & 24 Ors. -v- Kampala Capital City Authority and MC No. 439 of 2017, Uganda Cleaning Industry & Forwarding Association -v- Kampala Capital City Authority & Attorney General.**
2. **Whether the provisions of the Trade (Licensing) (amendment of schedule) instrument No. 2 of 2017 that purport to licence radio stations as set out in item 60 part A of the schedule for the radio station broad casting in**


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municipalities and item 70 in part C of those broadcasting in Kampala and Television stations operating satellite connections as stipulated in item 67 in part A for those operating in Municipalities and item 72 in part C for those operating in Kampala are illegal and ultra vires and oppressive and amounts to double taxation.

3. Whether the Plaintiffs have a right to a refund of the sum they have paid for the trade licences from the year of 2017 to 2021.
4. Whether the 2nd Defendant should refund the Plaintiffs operating within Kampala for the trade licence they have paid since 2017 until 2021.

The Defendants filed their affidavits in reply opposing this application.

Representation

Learned Counsel Deus Ssengeyunva represents the Plaintiffs while Learned State Attorney Ojambo Bichacha was for the Defendants. Counsel for the Plaintiffs filed their submissions as directed by Court while Counsel the Defendants did not.

The 2nd Defendant raised preliminary points of law in its affidavit in reply that;

- i. The Plaintiffs filed this suit without a representative order.
- ii. That this is not a proper suit for originating summons.
- iii. This suit discloses no cause of action against the 2nd Defendant.
- iv. The affidavit in support of the application is incurably defective.

O.15 r.2 of the Civil Procedure Rules provides that where issues of law and of fact arise in the same suit, and the court is of opinion that the case or any part of it may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined.


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In the *Supreme Court* case of ***Uganda Telecom Ltd –v- Zte Corporation SCCA No.03 of 2017***, Court held unanimously that a trial Court has discretion to dispose of a preliminary objection either at or after the hearing. That the exercise of this discretion depends on the circumstances of each case.

In this case, I find it proper to first resolve the preliminary objections raised before delving into the merits of this suit.

Objection No.1: That the Plaintiffs filed this suit without the representative order.

Order 1 Rule 8 (1) of the CPR provides for representative suits and it states that;

“ Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the court, sue or be sued, or may defend in such suit, on behalf of or for the benefit of all persons so interested. But the court shall in such case give notice of the institution of the suit to all such persons either by personal service or, where, from the number of persons or any other cause, such service is not reasonably practicable, by public advertisement, as the court in each case may direct.”

My understanding of the above provision of the law is that a representative suit applies when there are many people having common interest in a suit. One or more of those persons with the permission of the court can sue or be sued on behalf of the others.

In this case, the Plaintiffs filed this suit through the Uganda Media Owners Association an incorporated entity, with legal personality capable of suing and being sued. I find that Order 1 rule 8(1) CPR does not apply

Objection No.2: That this is not a proper application for originating summons.

The 2nd defendant contended that this application seeks construction/ interpretation of a law, vide; the Trade (Licensing) (Amendment of Schedule) Instrument No. 2 of 2017 and as such, it was wrong for the Plaintiff to file the matter under Originating Summons which does not give room for interpretation


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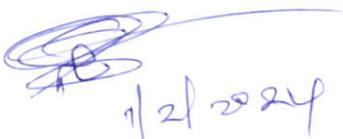
Order 37 Rule 6 provides that;

"Any person claiming to be interested under a deed, will or other written instrument may apply in chambers by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the person interested."

In ***Kwesiga Monica –v- Commercial Bank of Africa (U) Ltd HCMA No. 1197 of 2021 (Arising from Civil Suit No. 0959 of 2018)***, court noted that;

"Originating Summons (OS) is one of the two modes of commencing a civil suit. A suit is commenced by this mode where the dispute concerns matters of law, and there is unlikely to be any substantial dispute of fact. The affidavits are the pleadings for the case. The affidavit filed in support serves as the plaint, while the affidavit in reply serves as the written statement of defence. This procedure exists in the interests of efficiency and cost. It provides a simple, informal, expeditious and inexpensive method of obtaining a final judgment, where no oral evidence is required, and the proceedings can be determined by way of affidavit evidence. An originating summons is the appropriate procedure where the main point at issue is one of construction of a document or statute or is one of pure law. It is not appropriate where there is likely to be any substantial dispute of facts that the justice of the case would demand the settling of pleadings. The plaintiff is required to set out in the originating summons a concise statement of the questions which the plaintiff seeks the court to decide or answer, or, a statement of the relief or remedy claimed (where appropriate). The originating summons should also contain sufficient particulars to identify the cause of action in respect of which the plaintiff claims the relief or remedy."

In this case, the suit seeks determination of four (4) questions arising from the continued application of amendments in Statutory Instrument No. 2 of 2017 against the Plaintiffs amidst a number of court decisions that found that the Minister of Trade and Cooperative's amendments which subjected professional bodies that were already paying licence to the Central Government to again pay license under the SI were illegal.



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Court emphasized that application of the impugned amendments would amount to double taxation of the concerned parties. Court quashed the amendments in respect of bodies which were already paying license under the Central Government or under a specific law. The amended Statutory Instrument and the court decisions have been availed to court. What is left, is for this Court to look at the Statutory Instrument, the court decisions and the affidavits only and then come up with its decision. There is nothing much contentious in this case. Originating Summons deal with matters which are not contentious. Given the minimal evidence required in this case which has been filed by way of affidavit and the fact that all that the dispute requires is determination of whether, in view of the court decisions, the Defendants should continue applying the impugned provisions in SI No.2 of 2017 on the plaintiffs, I would find this to be a fit and proper case to be brought by way of Originating Summons to court.

Objection No. 3: That this application does not disclose a cause of action against the 2nd Defendant.

Order 7 rule 11 of the Civil Procedure Rules provides that: -

The plaint shall be rejected in the following cases—

(a) where it does not disclose a cause of action;

In the case of *Kapeka Coffee Works Ltd –v- NPART, CACA No. 3/2000*, the Court of Appeal held that in determining whether a plaint discloses a cause of action, the court must look at the plaint and its annexures if any and nowhere else.

In *Auto Garage and Others –v- Motokov (No 3), [1971] 1 EA 514 (CAD)*, Court held that;

“what is important in considering whether a cause of action is revealed by the pleadings is the question as to what right has been violated.”


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In the case of *Tororo Cement Co. Ltd –v- Frokina International Ltd, Civil Appeal 50 No. 2/2001*, it was held that in order to prove that there is a cause of action, the plaintiff must show that the plaintiff enjoyed a right; that the right has been violated; and that the defendant is liable. If the three elements are present, a cause of action is disclosed.

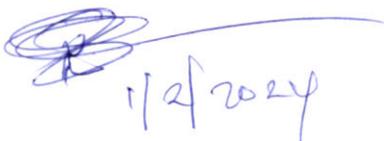
Mr. Zackey Kalega, the Commissioner, Internal Trade in the Ministry of Trade, Industry and Cooperatives states in paragraph 7 of his affidavit in reply that the Attorney General advised the Minister of Trade Industry and Cooperatives to amend the impugned schedule in SI No. 2 of 2017 to remove all professional services which were already paying license fees to Government under the respective laws governing their professions and that the Minister issued instructions to the 1st Parliamentary Counsel to commence the process of amendment of the Instrument. He referred this court to annexure A and C to his affidavit in reply. I have looked at the said annexures. The communication as stated by Mr. Zackey is correct, but there has been no amendment since 2022 when the communication was done. Since there is no amendment in place to date, I find that the Plaintiff has a cause of action against the 2nd Defendant.

Objection No. 4: That the affidavit in support of the application is fatally/incurably defective.

Order 19 rule 3 of the CPR provides that affidavits shall be confined to such matters as the deponent is of his or her own knowledge to prove, except on interlocutory application, on which statements of his or her belief may be admitted, provided that the grounds thereof are stated.

In the case of *Col Dr. Kiiza Besigye –v- Museveni Yoweri Kaguta Election Petition No. 1 of 2001*, it was noted that Court can exercise its discretion and sever the inadmissible parts of the affidavit.

I have looked at the affidavit of Ms. Evelyn Ochakachon's in support of the application and found no offending paragraph. The Defendants have failed in all their preliminary objections, which I now over rule and proceed to address this case on the merits.



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Question 1: Whether the 2nd Defendant has statutory mandate to levy trade licence fees from the Plaintiffs in light of the recent decision of this Court.

The said court decisions are in respect of;

1. Uganda Law Society -v- Kampala Capital City Authority and Attorney General, MC No. 243 of 2017

2. Pharmaceutical Society of Uganda -v- Attorney General, MC No. 260 of 2019

3. NC Bank Uganda Ltd & 24 Ors. -v- Kampala Capital City Authority, MC No. 02 of 2018,

4. Uganda Cleaning Industry & Forwarding Association -v- Kampala Capital City Authority & Attorney General, MC No. 439 of 2017.

In all the said cases, Court found that it was not proper for the Defendants to subject bodies which were already paying license fees to Government or under other laws governing their respective professional bodies to again pay license. The above court findings were not appealed. Counsel for the Plaintiff referred this court to Paragraphs 7 and 10 of Mr. Zackey Kalega's affidavit in reply where he states that;

"I know in September, 2021, that the Hon. Attorney General advised the Hon. Minister of Trade Industry and Co-operatives to amend the schedule and remove all professional services which were already paying licenses to Government under their respective laws governing the professionals and that in October, 2022, the Minister of Trade having scrutinized the draft amendment instrument further advised that Radios and television services among others should similarly be excluded from amendment."

In a letter dated 28th October, 2022, the Minister of Trade wrote to the Attorney General on the issue of amendment of the Trade Licensing, Amendment of Schedule, SI No.2, 2022. This letter is annexure A to Mr. Zackey's affidavit in reply. Under paragraph 3 of the letter, the Minister states that;


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"I have discovered that; Health Centers, Private Hospitals, Nursing Homes, Maternity Homes, Clinics, Drug Stores, Manufacturers Agents, Mobile Money Services Providers, Radios and Television Services, Clearing and Forwarding Agents and Construction Companies that are already paying license fees under various Acts of Parliament that establish them should similarly be excluded in the Amendment." (underlining is mine for emphasis),

In this case, the Plaintiffs are annually licensed and regulated by the Uganda Communications Commission and the Minister clearly points it out in his communication that they should be excluded. In view of the above communication from the Minister and the court decisions, I find that subjecting the Plaintiffs to pay licence under the impugned SI No.2 of 2017 has no basis, it amounts to double taxation and it is illegal and in bad faith by the Defendants.

Remedies

The Plaintiffs sought for a refund of the money paid from 2017 to 2021

Counsel for the Plaintiffs submitted that the amounts wrongly collected and retained by the 2nd Defendant now amounts to a civil debt owed by the 2nd Defendant to the Plaintiffs. He relied on *Article 26 of the 1995 Constitution of Uganda, the law of Restitution by Lord Goff and Gareth Jones London, Sweet and Maxwell 1993 P.548-549- Quoting from the case of Woolwich Equitable Building Society –v- Commissioner of Inland Revenue (1933) AC 70, Page 679 to 681, administrative law, 11th Edition. H.W.R WADE & C.F. FORSYTH and Mayambala Mustata & 3 Others representing over 5000 taxi owners, drivers and conductors –v- Kampala Capital City Authority, CA No. 3 of 2014* and prayed that this Court orders that the 2nd Defendant refunds Ug. Shs. 94,500,000 which is the total sum of the trading license fees paid by Plaintiffs operating in Kampala within the period claimed and that the sum be split accordingly.


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Analysis

In ***Gapco (U) Ltd –v- A.S. Transporters (U) Ltd CACA No. 18/2004***, court noted that: -

“Special damages must be specifically pleaded and proved, but that strictly proving does not mean that proof must always be documentary evidence. Special damages can also be proved by direct evidence; for example, by evidence of a person who received or paid or testimonies of experts conversant with the matter.”

In ***Haji Asuman Mutekanga – v – Equator Growers (U) Ltd, SCCA No.7/1995***, it was held that;

“Special damages and loss of profit must be specifically pleaded, they must also be proved exactly, that is to say, on the balance of probability.”

In this case, Exhibits G1 to G21 to the affidavit in support of the Originating Summons are trade license Certificates showing amounts paid, all adding up to Ug. Shs. 94,500,000. The 1st Defendant admits in paragraphs 6,7, 8,9 and 10 of its affidavit in reply that there was an error and that the Plaintiffs should be excluded from the amendment. This was in 2022. Unfortunately, this anomaly has not been rectified to date. The 1st court decision to declare the amendments to be ultra vires was made in February, 2019. I believe this was sufficient notice to the Defendants to rectify their error. It is unfortunate that the Defendants instead of rectifying their error across board, they continued to subject the Plaintiffs and others who had not gone to court to payment of the illegal licence. It would appear that only those who went to court have been excluded from double payment of the license fees. I find this selective application of the law by the Defendants to be abusive as it is intended to cheat the plaintiffs. The Plaintiffs need protection from the Defendants' exploitative conduct.

Counsel for the Plaintiffs prayed for restitution of the amounts paid by the Plaintiffs. He relied on the case of ***Mayambala Mustafa and 3 others representing over 5000 taxi***


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owners, Drivers and conductors -v- Kampala Capital City Authority CA No. 3 of 2014; where court ordered that the whole amount paid illegally be refunded to the claimants. He also cited the book of; *The Law of Restitution by Lord Goff and Gareth Jones London, Sweet and Maxwell 1993 p. 548 -549- Quoting from the case of Woolwich Equitable Building Society -v- Commissioner of Inland Revenue (1933) AC 70*

Per Lord Goff and Lord Browne- Wilkinson that;

"money paid by a citizen to any public Authority in the form of taxes or other levy paid pursuant to an ultra vires demand by the Authority is recoverable by the citizen as of right."

I agree with the above court findings and do hereby enter judgement for the Plaintiffs in the following terms: -

1. A declaration be and is hereby made that the 2nd Defendant had no statutory mandate to levy trade licence fees from the Plaintiffs.
2. A declaration be and is hereby made that the Plaintiffs are entitled to a full refund of all the money levied against them by the 2nd Defendant as trade licence fees from the year of 2017 to 2021.
3. It is hereby ordered that the 2nd Defendant refunds to the Plaintiffs a sum of Ushs. 94,500,000/= [ninety-four million five hundred thousand shillings only] being the collective amount collected by the 2nd Defendant as trade licenses.
4. Each of the Plaintiffs should be paid the specific amount paid to the 2nd Defendant upon presentation of proof of payment.
5. The 2nd Defendants pay costs of this suit.

I so order.


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Dated, signed and delivered by mail at Kampala, this 1st day of February, 2024.



Esta Nambayo

JUDGE

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