THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NUMBER 0011 OF 2012

COMMISSIONER GENERAL, URA:::::::::::::::: APPELLANT

VERSUS

ZAIN INTERNATIONAL BV:::::::::::::::::::::::::::::::::: RESPONDENT

CORAM:

HON. MR. JUSTICE REMMY KASULE, JA

HON. MR. JUSTICE KENNETH KAKURU, JA

HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA

JUDGEMENT OF THE COURT

This appeal arises from the ruling of the High Court of Uganda at Kampala delivered by **Hon. Justice Eldad Mwangusya** on the 1st December 2011, in High Court Miscellaneous Cause No. 96 of 2011

BRIEF FACTS

The respondent disposed of its shares in Zain Africa BV to Bharti Airtel International on 30th March 2010. Both companies are incorporated and resident in the Netherlands. Zain Africa BV had equity interests in 26 Dutch B.V companies among which was

Celtel Uganda Holding BV that owned 99.99% of Celtel Uganda Ltd. Celtel Uganda Ltd's shares in Uganda were not transferred and its property, movable or immovable, was not disposed off.

The appellant on 10th March 2011 issued a tax assessment purportedly "on the disposal of Zain Uganda," on the grounds that the shares disposed in the Netherlands were those held indirectly by Zain International BV in Celtel (Uganda) Ltd. The respondent promptly filed an objection to the said tax assessment and pointed out to the appellant that no shares or property of Celtel Uganda Ltd were ever transferred. On 11th July 2011, the appellant on considering the objection issued an objection decision which stated that:

"Where as the transaction had initially been taxed (i.e Tax Assessment of 10/3/2011) as one arising out from disposal of shares, we submit that the transaction under consideration is one of gain arising from the disposal of an interest in immovable property located in Uganda."

However no fresh tax assessment was made on the respondent following the objection decision stage that the tax assessment of

10th March 2011 was erroneously based on the disposal of shares. The appellant never the less sought to enforce the said tax assessment against the respondent. The respondent objected to both the appellant's tax assessment and objection decision. (Hereinafter referred to as the "impugned decision"). An application for judicial review was then filed in the High Court by the respondent seeking a declaration that the appellant lacked jurisdiction to tax the respondent and the said impugned decision was illegal, improper and irrational and should be quashed. Further more that the appellant should be prohibited from enforcing the said decision against the respondent. The High Court then granted these orders quashing the objection decision by way of judicial review on the ground that the process of making the decision by the appellant was procedurally improper and unfair to the respondent. It is against that ruling that the appellant brings this appeal on the following grounds:

Grounds of appeal

The memorandum of appeal contains seven grounds of appeal. However, when the appeal came up for hearing counsel for the

appellant submitted the grounds could be grouped into 2 broad categories. The first related to the procedural propriety in using the remedy of judicial review and the second was on the matter of jurisdiction of the commissioner General. Counsel for the respondent adopted the same approach. Based on the submissions made before Court it is clear that grounds 1 and 2 in the memorandum of Appeal best reflect what this appeal is about as regards procedural propriety namely;

1. **That the learned trial Judge erred in law in holding that the application was competent and the option by the respondent to bring the matter by way of judicial review to challenge the appellant's decision was proper**
2. **Whether the learned trial Judge erred in law and fact when he held that the procedure followed by the appellant in raising the tax assessment and issuing the objection decision was improper and unfair thereby coming to a wrong conclusion that the assessment be quashed**

The rest of the grounds of appeal 3,4,5, and 6 revolve upon the issue of whether or not the Commissioner General was seized of jurisdiction to make the tax assessment upon the respondent.

Mr. Ali Sekatawa and Mr. Matthew Mugabi represented the appellant. Mr. Enos Tumusiime, McDusman Kabega, Ronald Oine and Tom Magezi represented the respondent. Ground 7 is about remedies.

This Court will now proceed to the resolution of grounds 1 and 2 of the appeal as hereunder:

Ground 1: The learned trial Judge erred in law and fact when he held that the application was competent and that the option by the respondent to bring the matter by way of judicial review was proper, despite clear alternative procedures under the Income Tax and Tax Appeals Tribunal Act

Arguments for the appellant

Counsel for the appellant pointed out that the application for judicial review made by the respondent was by way of notice of

motion under ***Sections 33, 36, 38, 41*** *and* ***42*** *of the* ***Judicature Act, Cap 13; Rules 3, 4 and 6*** *of the* ***Judicature (Judicial Review) Rules, SI No. 11*** *of* ***2009;Section 98*** *of the* ***Civil Procedure Act, Cap 71****and* ***Order 52 Rules 1*** *and* ***3 of the Civil Procedure Rules, SI 71-1.***Counsel for the appellant contested that judicial review is improper for tax matters and that the trial Judge was wrong in ruling that the application was properly before the High Court.

Counsel stated that the respondent, feeling aggrieved by the assessment by the appellant had filed an objection to the appellant in accordance with Section 99(1) of the Income Tax Act, Cap 340. Counsel then argued that by so doing, the respondent had subjected itself to the regime and remedies under the Income Tax Act and therefore that the remedy in law the respondent should have pursued as a matter of course and procedure was under S. 100 of the Income Tax Act.

Counsel for the appellant submitted that the respondent did not pursue any of the two remedies listed above and instead challenged the decision of the appellant by way of judicial review which was

improper, wrong in law, an abuse of court process and devoid of merit. To support this point, Counsel relied on the case of **Autologic Holdings Plc v Inland Revenue Commissioner [2006] 1 A.C 118,** where the House of Lords held that where a statutory route existed for the settlement of tax disputes, it must be followed. As explained by Lord Nichols,

"Clearly the purpose intended to be achieved by this elaborate, long established statutory scheme would be defeated if it were open to a tax payer to leave undisturbed an assessment with which he is dissatisfied and adopt the expedient of applying to the High Court for a declaration of how much tax he owes and, if he has already paid the tax, an order for repayment of the amount he claims was wrongly assessed. In substance, although not in form, that would be an appeal against an assessment. In such a case the effect of the relief sought in the High Court, if granted, would be to negative an assessment otherwise than in accordance with the statutory code. Thus in such a case the High Court proceedings will be struck out as an abuse of the court's process. ***The proceedings would be an abuse because the dispute presented to the court for 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. **(Emphasis added)** *I question whether in this straight forward type of case the Court has any real discretion to exercise. Rather, the conclusion that the proceedings are an abuse follows automatically once the Court is satisfied the taxpayer's court 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.(Empasis added) [See also: Agrosam Finance Co. Ltd v Oxby [1965] Ch. 390; Re Vandervell's Trusts [1971]AC 912]***

Counsel for the appellant further submitted that it is trite law that judicial review is not an appeal and therefore not the envisioned procedure under S. 100 (1) of the Income Tax Act. In **Uganda Revenue Authority v Wanume David Katamirike, CACA No. 43 of 2010,** it was held as follows:

"Instead he chose to come to Court through judicial review, which is a process, and should as much as possible be restricted to that process, whereby the High Court exercises its supervisory jurisdiction over proceedings and decisions of the inferior courts, tribunals and other bodies or persons carrying out judicial, quasi-judicial functions or who are charged with the performance of public acts and duties. Judicial review has its core purpose of issuing orders within the area of administrative law and not otherwise. It follows therefore, in my judgment that litigants ought not to substitute judicial review for ordinary lodgment and prosecution of civil suits." ***[See also: Pius Niwagaba v Law Development Centre, Court of Appeal Civil Appl. No. 18 of 2006]***

Counsel for the appellant submitted that the application for judicial review raised matters of evidence that go to the root of the assessment that actually require a full hearing. The affidavit of the Moses Kajubi was referred to on this point

In the alternative, counsel for the appellant argued that the trial Judge should have referred the matter to the Tax Tribunal since it is vested with powers under S. 19 of the Tax Appeals Tribunal Act

to review the decision of the Commissioner, and affirm, vary, set aside, substitute or remit the matter to the decision maker for reconsideration in accordance with the Tribunal. Counsel submitted that other specific remedies provided for in law had to be exhausted first as a matter of course. Further more that there were no averment in the pleadings that the remedies provided for in the Income Tax Act were not adequate to justify or warrant the use of the discretionary remedies available under judicial review.

Counsel for the appellant then prayed for Court to make a finding that the application for judicial review made before the trial Court was improper and incompetent vis a vis the procedure specified under the Constitution of Uganda, the Income Tax Act and the Tax Appeals Tribunal Act.

Arguments for the respondent

Counsel for the respondent pointed out that the appellant raised a preliminary objection at trial challenging the procedure of challenging the impugned tax assessment and decision by way of judicial review but it was dismissed. The appellant then applied for leave to appeal to the Court of Appeal and His Lordship refused to

grant leave. The appellant then appealed to the Court of Appeal and sought stay. Counsel for the respondent then submitted that since the matter is pending appeal in the Court of Appeal from the decision of the High Court decision in Misc. App. No. 325 of 2011, this ground of appeal should be dismissed as it is an abuse of court process.

In the alternative, counsel for the respondent submitted that application for judicial review for orders of certiorari, declaration and prohibition was competently brought as provided for in ***Sections 33, 36, 38, 41*** *and* ***42*** *of the* ***Judicature Act, Cap 13; Rules 3, 4 and 6*** *of the* ***Judicature (Judicial Review) Rules, SI No. 11*** *of* ***2009;Section 98*** *of the* ***Civil Procedure Act, Cap 71*** *and* ***Order 52 Rules 1*** *and* ***3 of the Civil Procedure Rules, SI 71-1.***Counsel for the respondent pointed out that the application for judicial review to the High Court was proper since the respondent was a statutory authority created under the Uganda Revenue Authority Act, Cap 196 and that judicial review is the appropriate procedure to control its actions, particularly where it exceeds its jurisdiction.

To fortify this point, counsel for the respondent relied on the case of **R V Electricity Commissioners, ex parte London Electricity Joint Committee Co. [1924] ALL ER AT P. 161** that:

"Whenever any body of persons having legal authority to determine question affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the Kings Bench Division (read High Court) exercised in these writs."

Further reliance was placed on**Council of Civil Service Unions V Minister for Civil Service [1985] A.C 374,** expounded on by the House of Lords, **Lord Diplock** and **Lord Roskill** who held that there are three heads or grounds upon which administrative action is subject to control by judicial review i.e illegality, irrationality and procedural impropriety.

Counsel for the respondent further contended that the procedure of applying for judicial review to the Tax Appeals Tribunal which the appellant proposed as appropriate did not apply in the circumstances because the respondent is not a tax payer,and where the respondent does not have jurisdiction to assess tax against an

individual. Counsel relied on the case of **Constitutional Appeal No. 2 of 2009, Uganda Projects Implementation and Management Centre Versus Uganda Revenue Authority (SC)** where **Lady Justice C. Kitumba (JSC)** held that according to Article 139 (1) of the Constitution, the High Court has unlimited inherent jurisdiction and that judicial review of administrative actions was an exercise of original jurisdiction of the High Court and could not be taken away by any other law because it is conferred on it by the Constitution, which is the supreme law of the land. He prayed that this ground fails.

Findings and decision of the Court

We have considered the elaborate submissions and authorities by both parties and make findings as hereunder.

The law relating to judicial review has been cited by both counsel albeit with different interpretations.The distinguished scholars in their celebrated authorities, **Prof. de Smith – Judicial Review of**

Administrative Action, at page 436-437 and Prof. Wade, Administrative Law, at pages 712-713

draw the distinction between "Appeal" and "Review". They state that an appeal is made on the merits of a decision but review is made on legality. **Prof Wade, (supra)** at page 713 states:

"Review is the primary mechanism for enforcing the rule of law under the inherent jurisdiction of Court while appeal is a statutory adjunct with no such fundamental role."

Counsel for the appellant contended that the application by the respondent for judicial review made before the trial Court was improper and incompetent Vis a Vis the procedure specified under the Constitution of Uganda, the Income Tax Act and the Tax Appeals Tribunal Act.He referred to S. 100 of the Income Tax Act which provides as follows:

(1)A tax payer dissatisfied with an objection decision may, at the election of the taxpayer-

a) Appeal the decision to the High Court; or

b) Apply for review of the decision to a tax tribunal established by Parliament by law for the purpose of settling tax disputes in accordance with Article 152 (3) of the Constitution.

(2)An appeal under sub-section (1) to the High Court shall be made by lodging a notice of appeal with the Registrar of the High Court within 45 days after service of notice of the objection decision"

It is a cardinal principle that judicial review will not normally be permitted if there is alternative appellate provision, a point clearly made in **R v Brighton Justices, ex parte Robinson [1973] 1 WLR 69.** This point was also succinctly laid down in the case of **R v Chief Constable of the Merseyside Police ex parte Calveley and others [1986] 1 ALL ER 257 at page 263** where **Lord May L.J** observed:

"I respectfully agree with the divisional Court that the normal rule in cases such as this is that an applicant for judicial review should first exhaust whatever other rights he has by way of appeal."

It is important to point out in addition that it is trite law that the relief of Judicial review orders of certiorari, mandamus and prohibition is available to a litigant against a statutory authority. Counsel for the respondent referred to the case of **Uganda Inland Port Ltd V Great Lakes Region (CFS) Ltd and Attorney General, Civil Application No.45 Of 2006, at page 6**where **Hon. Justice Y. Bamwine (as he then was)** stated that:

"Turning now to the subject of judicial review, this is the process of control exercisable by this Court over public executive bodies or persons. Judicial review's scope extends to all public bodies with legislative, administrative and judicial functions, including Ministers, but traditionally, not Parliament."

The appellant is a statutory authority created under S. 2 of the Uganda Revenue Authority Act, Cap 196. Judicial review is the appropriate procedure to control its actions.

These principles have to be tested against the original jurisdiction of the High Court as provided for in the Constitution of Uganda. In this regard reference was made to the case of **Uganda Projects Implementation and Management Centre versus Uganda**

Revenue Authority (supra) by counsel for the respondent. Further, the decision in **Commissioner General of Uganda Revenue Authority v Meera Investments Ltd, CA 22 of 2007 (SC)** equally instructive. It was stated by **Justice G. Okello (JA as he then was)** that:

"The conferment of appellate jurisdiction on the High Court by the Tax Appeals Tribunal Act has no effect on the original jurisdiction of the High Court conferred by Article 139 (1) of the Constitution. That means that a party who is aggrieved by the decision of the tax authorities on tax matters may choose either to apply to the Tax Appeals Tribunal for review or file a suit in the High Court to redress the dispute. The choice is his/hers. Once he/she goes directly to the High Court, that Court cannot chase him/her away on the ground that it lacks jurisdiction in the matter..."

We agree with this position. As earlier stated, the grant of prerogative orders is discretionary which is different from how an ordinary suit is handled. In judicial review, the applicant (respondent) must meet the necessary tests for the court to exercise its discretion. It is our finding that in a tax dispute such as the one

before court the respondent has several remedies it can go for. The respondent may appeal the decision to the High Court or apply to have the decision reviewed by the tax Appeals Tribunal under section 100 of the Income Tax Act. The respondent may also seek an administrative law judicial remedy against the appellant if it, as an organization has acted improperly or ultravires in reaching its decision without necessarily testing the actual decision itself on the merits. The disadvantage for the respondent for preferring judicial review is that the merits of the case can neither be considered by the High Court nor this Court, as would be the case in an ordinary suit, since it is outside the scope of judicial review actions.

To the extent that the learned trial judge restricted himself to the scope of judicial review he was clothed with original jurisdiction. In the circumstances, the learned trial Judge rightly, in our view, held that the respondent's application was competent and proper before the Court. If the respondent had simply sought to use the collateral process of judicial review to attack an appealable decision the court should not accept to use its discretion in these circumstances.

We should perhaps add that it is becoming increasingly fashionable these days to seek judicial review orders even in the clearest of cases where the alternative procedures are more convenient. This trend is undesirable and must be checked as held in the case of **Micro-Care Ltd v Uganda Insurance Commission, M.A 218 of 2009**. We however do not see this as the issue in this appeal.

This ground accordingly fails.

Ground 2: The learned trial Judge erred in law and fact when he held that the procedure followed by the appellant in raising the tax assessment and issuing the objection decision was improper and unfair, thereby coming to a wrong conclusion that the assessment be quashed

Arguments for the appellant

Counsel for the appellant faulted the trial Judge for holding that the application for judicial review met the criteria laid down in the case of **His Worship Aggrey Bwire v Attorney General & Another, Civil Appeal No.9 of 2009 (unreported)**.Two grounds for making a judicial review were found by the trial Judge to exist, the first

ground being procedural impropriety and the second unfairness in the process by which the appellant made the tax assessment.Counsel went on to fault the trial Judge for making those findings and giving no reasons for the conclusion taken. All that the trial Judge said was *"that the process by which the respondent (now appellant) made the tax assessment cannot be said to have been fair to the respondent. The process is such that a tax assessment was slapped and the applicant who raised an objection which by the way the respondent addressed seemed genuine..."*

Counsel submitted that the Court was not entitled on the applicant's application for judicial review to consider whether the decision was fair and reasonable. He relied on the case of **Clear Channel Independent (U) Ltd v Public Procurement & Disposal of Public Assets Authority, MA No. 380 of 2008,** where **Bamwine J** stated as follows:

"Judicial review is a matter within the ambit of administrative law. It is different from the ordinary judicial review of the Court of its decisions, revision or appeal, in the sense that in the case of ordinary review, revision or appeal, the Court's concerns are whether the

decisions are right or wrong based on the laws and facts whereas in the remedy of judicial review, as provided in the orders of mandamus, certiorari and prohibition, the Court is not hearing an appeal from the decision itself but a review of the manner in which the decision was made. ***The Court is not therefore entitled on a application for judicial review, to consider whether the decision was fair and reasonable."*** ***(Emphasis supplied).*** *In* ***Preston v IRC [1985] All ER 327 at 330,*** *it* ***was held that,***

"However, the primary duty of the commissioners was to collect, not to forgive taxes, and in the absence of special circumstances in which the unfairness complained of amounted to an abuse of power, the Court could not by way of judicial review decide that an action against the tax payer which the commissioners had determined to be fair, was in fact unfair."

Counsel for the appellant then submitted that the High Court could not by way of judicial review decide that the commissioner's actions were unfair and go ahead to quash an assessment of taxes amounting to Ushs 211 billion. Counsel added that there was no prejudice occasioned at all because the assessment was based on

the Income Tax Act and, the tax payer was the same, the amounts assessed were correct and the tax payer would have a right to appeal or seek review of the decision from the Tribunal. This assessment would still have the force of law on the strength of S.98 (3) of the Income Tax Act that provides that no assessment shall be quashed or deemed to be void or voidable for want of form or shall be affected by reason of mistake, defect or omission therein if it is in substance and effect in conformity with the Income Tax Act and the person assessed or intended to be assessed or affected by the document, is designated in it according to common intent and understanding.

The appellant submitted that the trial Judge gave no reasons for his departure from previous judgments where several parties including the appellant in this case have contested the option to file matters by way of judicial review and they have all been dismissed in favor of the appellant.

Arguments for the respondent

Counsel for the respondent pointed out that in order to argue this appeal in the context of the instant case, it would be necessary to revisit the facts of the case to determine whether illegality, irrationality or procedural impropriety exist. He implored the Court to do so and come to the conclusion that both existed.

Counsel for the respondent pointed out that the change of the grounds of the tax assessment from Section 79(g) to the Income Tax Act of 10th March to other grounds under Section 79(s)of Income Tax Act in the objection decision of 11th July 2011, was procedurally unfair to the respondent and that it was a total change of goal posts by the appellant. Counselfor the respondent also submitted that the formula for taxing the respondent was unfair.

Findings of the Court

We have considered the submissions of both parties and they are much appreciated.

The learned trial Judge based his opinion on the criteria used in **His Worship Aggrey Bwire v Attorney General & Another, Civil Appeal No.9 of 2009 (unreported)** to quash the appellant's tax assessment of the respondent. Two grounds for making a judicial

review were found by the trial Judge to exist, the first ground being procedural impropriety and the second unfairness in the process by which the appellant made the tax assessment.

It must be noted that the grant of prerogative orders is discretionary in nature. In exercising its discretion with respect to these prerogative orders, the court must act judicially and according to well settled principles.The tests to be met and considered by court are well articulated by **Hilary Delany** in his book **Judicial Review of Administrative Action (2001) Sweet and Maxwell at pages 5 and 6**that:

"...Judicial review is concerned not with the decision, but the decision making process. Essentially judicial review involves an assessment of the manner in which a decision is made, it is not an appeal and the jurisdiction is exercised in a supervisory manner... not to vindicate rights as such, but to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality"

On the ground of unfairness, the learned trial Judge found that there was no basis for taxing the respondent and that the appellant pre-determined the tax. The trial Judge also found that it was unfair for the appellant to attempt to enforce the tax even after the respondent had raised the objections to the assessment. Respectfully, we do not agree with the learned trial Judge that there was no basis for assessing the appellant because both assessments were based on the Income Tax Act although we fault the appellant for changing goal posts without affording the respondent the opportunity to object to the new assessment under a different head. Grounds 3,4,5 and 6 of the appeal, all revolve upon the issue of whether the appellant had jurisdiction to assess a tax payable by the respondent.

The learned trial judge held that:

"....I would not be persuaded by the Indian decision in Vodafone. The answer to the second issue would be answered in the negative. The respondent had no jurisdiction to tax the applicant..."

The appellant's counsel submitted that under Article 152(1) of the Constitution and Sections 4(1), 15, 17(1) (2), 79 and 88(1) (5) of the

Income Tax Act, Cap. 340, appellant was seized of jurisdiction to assess a tax payable by the respondent.

For the respondent it was submitted that appellant had no jurisdiction to assess such a tax against the respondent because the respondent being a non-resident of Uganda was not subject to the Tax Jurisdiction of Uganda. The assessment of the tax had thus been carried out contrary to the provisions of the Income Tax Act, Cap. 340 and the Uganda-Netherlands Double Taxation Agreement (DTA). The disposal of the assets in the transaction, the subject of the taxation, had not given rise to income derived from sources in Uganda as the shares disposed of were not Ugandan shares, so to speak. Accordingly, the appellant had no jurisdiction to assess a tax payable by the respondent.

Resolution of Court:

In our considered view the issue of the appellant being vested with powers to assess a tax and require the respondent to pay the same has to be distinguished from the issue whether or not the respondent is exempted from being subjected to the assessment

and payment of the said tax after the same has been assessed by the appellant.

We are satisfied on the basis of Article 152(1) of the Constitution and the already stated provisions of the Income Tax Act, cap. 340, that the appellant is vested with jurisdiction to make an assessment and to require the respondent to pay a tax.

Once such an assessment and requirement has been made, then it becomes the burden of the one assessed and required to pay the tax, in this case the respondent, to prove that he/she is either not liable to be assessed or that the assessment is in contravention of some law or that the income the subject of the assessment is exempt income under Section 21 of the Income Tax Act.

We are satisfied that in the case before us, the issue that was at stake was not whether or not the appellant had jurisdiction to make the assessment of the tax against the respondent. The correct issue in our view was rather whether or not the alleged income the subject of assessment was exempt income under the Income Tax Income and whether or not the respondent was liable to pay the tax assessed in respect of that income.

Accordingly, with respect to the trial judge, we find that he was not right to hold that the appellant had no jurisdiction to assess and tax the appellant. It is our decision that the appellant was and is possessed of such jurisdiction. It was up to the respondent to discharge the burden that he was not liable to pay because of some exemption or other valid reason. Neither the trial court nor this court is seized of requisite material evidence, given the prerogative nature of the application giving rise to this appeal, to resolve the issue of whether the respondent had a valid exemption or other valid reason for not being liable to be assessed and to pay the assessed tax.

However, our finding as above cannot result in allowing this appeal. The appellant, as we have already held carried out the assessment of the tax and the requiring of the respondent to pay the same with manifest procedural impropriety that justifies the grant of the order of certiorari as a remedy. This is ground 7 of the appeal which, in our view, succeeds.

On this aspect of procedural impropriety, counsel for the respondent relied on the case of **Council of Civil Service Unions v**

Minister of Civil Service [1985] AC 374 at page 410D-411B, where **Lord Diplock** defined "procedural impropriety" as "*failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by that decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred...*"

Lord Roskill in the same case replaced the **"principles of natural justice"** with the duty to act **"fairly".**

Therefore, we agree with counsel for the respondent that it was procedurally improper for the appellant to assess the respondent to tax under capital gains and later change it to a disposal of immovable property under an objection decision without making a fresh assessment. We with respect, do not agree with counsel for the appellant that this is a question of form or mere mistake, defect or omission as provided for under section 100 of the Income Tax Act. It is also not sufficient to say that the amount of tax payable by the respondent is the same. Hence there is no prejudice. A fresh

assessment would have allowed for a fresh objection which an objection decision would not have.

In the instant case, the trial Judge granted the order of certiorari. **Justice Kasule** in **John Jet Tumwebaze v Makerere University Council and 3 Others, Civil Application No. 353 of 2005 (unreported)** stated:

"...certiorari issues to quash a decision which is ultravires as vitiated by an error on the face of the record...certiorari looks to the past..."

In the case of **Kasibo Joshua v Commissioner of Customs, Uganda Revenue Authority, HCMA No. 844 of 2007,**it was held that in granting an order of certiorari and quashing the decision of the authority concerned, the Court does not substitute itself for the authority. The legal power to make the decision remains with the authority. Indeed that is the position for all prerogative orders in judicial review (**see: De Smith (supra) et al** in their book**Judicial Review of Administration Action,** 5th Edition 1995 Para 16-008). That is why Rule 10(4) of the Judicature (Judicial Review) Rules, No. 11of 2009 provides that,

"...Where the relief sought is an order of certiorari and the High Court is satisfied that there are grounds for quashing the decision to which the application relates, the Court may, in addition to quashing the decision, remit the matter to the lower Court, tribunal or authority concerned, with a direction to reconsider it and reach a decision in accordance with the findings of the High Court..."

According to **John Jet Tumwebaze v Makerere University Council and 3 Others, (supra) Justice Kasule** articulated that prerogative orders look to the exercise and abuse of power by thosein public offices, rather than at providing final determination of private rights which is done in normal civil suits.

We find that in the instant case, even if the effect of a certiorari is to quash the appellant's tax assessment of the respondent, the appellant has the jurisdiction and still reserves the power to make a proper tax assessment decision on the respondent. This is so because judicial review is concerned not with the decision, but the decision making process. It means that the appellant is at liberty and can still proceed to make a fresh tax assessment of the respondent following the correct and proper procedure that ensures

that the same is carried out in observance of the principles of natural Justice and the duty to act fairly.

Accordingly, this appeal stands dismissed.

Since the process of assessment of the tax against the respondent may, if the appellant so chooses to do so, be restarted again, it is only fair that each party bears its costs of this appeal and those of the application in the Court below.

Dated this 10th Day of September 2014

HON. MR. JUSTICE REMMY KASULE, JA

HON. MR. JUSTICE KENNETH KAKURU, JA

HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA