

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION

MISCELLANOUS CAUSE NO. 84 OF 2019

EATON TOWERS UGANDA LIMITED===== APPLICANT

VERSUS

1. ATTORNEY GENERAL

2. JINJA MUNICIPAL COUNCIL===== == RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The applicant brought this application for judicial review seeking under rule 3(1)(a), 5(1), 6(1) of the Judicature (Judicial Review) rules, Section 64,98 of Civil Procedure At and Section 36 and 33 of the judicature Act seeking the following judicial review reliefs and orders;

- (i) An Order of certiorari issues to quash the 2nd respondent's demand note addressed to the applicant demanding for payment of trade licence fees in respect of the Applicant's telecommunications Masts (Telecom masts) pursuant to Item 88(PartA) of the Trade (Licensing)(Amendment of Schedule) Instrument No. 2 of 2017.
- (ii) An Order of Prohibition doth issue restraining the respondent's or any one claiming under them, from issuance of further Demand Notes in respect of the Applicant's Telecom Masts and /or enforcing, whether by a warrant of attachment or otherwise, collection of trade licence fees on the Applicant's telecom Masts

pursuant to item 88 (in Part A) of the Trade (Licensing)(Amendment of Schedule) Instrument No. 2 of 2017.

(iii) Costs of the application be provided for.

The grounds of this application are contained in the Notice of motion and also the affidavit in support of Mr George A Ssamula which briefly are;

- i) The 2nd respondent on 13th and 14th day of March, 2019 while implementing and enforcing the Trade (Licensing)(Amendment of Schedule) Instrument No. 2 of 2017.
- ii) The 2nd respondent issued and served demand notes purportedly issued under item 88(in Part A) of the Trade (Licensing)(Amendment of Schedule) Instrument No. 2 of 2017 requiring the applicant to pay trade license fees for the telecom Masts installed in Jinja Central Division.
- iii) That item 88(in Part A) of the Trade (Licensing)(Amendment of Schedule) Instrument No. 2 of 2017 requiring the applicant to pay trade licence fees for their Telecom Masts is ultra vires the Trade (Licensing) Act Cap 101.
- iv) That item 88(in Part A) of the Trade (Licensing)(Amendment of Schedule) Instrument No. 2 of 2017 pursuant to which the Demand Notes were issued was passed without consultation of the applicant and is therefore irregular for procedural impropriety.
- v) That the applicants are licensed, regulated and supervised by Uganda Communications Commission under the Uganda Communications Act No. 1 of 2013 in order to operate and install the Telecom Masts in Uganda to whom license fees are paid.

- vi) That the schedule to the extent that it requires the applicant to pay fees for Telecom Masts is irrational, unfair, amounts to double collection of revenue and is ultra vires the Trade (Licensing) Act Cap 101
- vii) That it is illegal for a Local Government to levy trade licensing Fees in respect of Telecom Masts already Licensed by the Central Government under the Uganda Communications Act 2013.
- viii) That Telecom Masts are not “services “ within the definition of the Trade (Licensing) Act Cap 1010 and their inclusion in the schedule is therefore ultra vires.

The respondent filed an affidavit in reply through Rogers Kubwooyo the Municipal Commercial Officer of Jinja Municipal Council who contended as follows;

1. That Jinja Municipal Council is mandated to regulate business activity within the area and for the last 12 years the applicant has established and maintained Telecom Masts within the precincts of Jinja Municipal Council.
2. The respondent duly assessed the applicant for Trading Licence Fees in accordance with the Trade (Licensing) Act and the Trade (Licensing)(Amendment of Schedule) Instrument No. 2 of 2017.
3. That Jinja Municipal Council duly demanded for payment of 89,925,000/= through letters dated 13th and 14th March 2019 for the Trade License Fees due and owing to the applicant from the applicant for the Telecom masts it installed and presently operates in Jinja Municipal Council.
4. That the applicant benefits from general services rendered by Jinja Municipal Council by virtue of opting to locate its Telecom masts

within Jinja Municipal Council and as such is required to contribute to local revenue in order to maintain service delivery.

5. That the applicant pays a general Public Infrastructure services License different in nature, character and purpose from Trade License.

The applicant in a brief rejoinder stated that the applicant operates 27 telecom masts in Jinja having acquired the same from Airtel Uganda limited.

All the Telecom masts operating in Jinja were established upon acquiring permission and authorization granted Jinja Municipal Council concerned offices.

Agreed Issues for determination

1. *Whether the application raises issues for judicial review?*
2. *Whether item 88 (Part A) of the Trade (Licensing)(Amendment of Schedule) S.I No.2 of 2017 is ultra vires the Trade (Licensing)Act Cap 101 as amended by the Trade (Licensing)(Amendment) Act No. 28 of 2015.*
3. *Whether item 88(Part A) of the Trade (Licensing)(Amendment of Schedule)S.I No.2 of 2017 is irrational.*
4. *Whether item 88(Part A) of the Trade (Licensing)(Amendment of Schedule) S.I No. 2 of 2017 was lawful.*
5. *What remedies are available for the parties*

At the hearing of this application the parties were advised to file written submissions which I have had the occasion of reading and consider in the determination of this application.

The applicant was represented by *Mr Kalule Brian* while the respondent was represented by *Mr Mwaka Philip (PSA)*

Whether the application raises issues for judicial review?

The applicant's counsel submitted that a delegated legislation passed by a minister in form of a statutory Instrument is a decision that can be reviewed by way of judicial review. He relied upon a decision of ***Uganda National Diary traders Association v The Diary Development Authority and Attorney General HCMisc.Cause No. 113 of 2015*** where court held that the regulations 2015 passed by the Minister was a decision of an administrative nature and was amenable to judicial review.

The respondent argued that the applicant failed to challenge the parent legislation under which the exemptions were lifted, they therefore acquiesced to the effect of the parent Act. They have not challenged the parent Act and they cannot be seen to challenge the statutory Instrument made under the Act.

Determination

According to the ***Black's Law Dictionary*** at page 1013 **11th Edition Thomson Reuters, 2019** Judicial review is defined as a court's power to review the actions of other branches or levels of government; especially the court's power to invalidate legislative and executive actions as being unconstitutional. Secondly, a court's review of a lower court's or administrative body's factual or legal findings.

The power of judicial review may be defined as the jurisdiction of superior courts to review laws, decisions and omissions of public authorities in order to ensure that they act within their given powers.

Judicial review per the Judicature (Judicial Review) (Amendment) Rules, 2019 means the process by which the high Court exercises its supervisory jurisdiction over proceedings and decisions of subordinate courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties;

Broadly speaking, it is the power of courts to keep public authorities within proper bounds and legality. The Court has power in a judicial review application, to declare as unconstitutional, law or governmental action which is inconsistent with the Constitution. This involves reviewing governmental action in form of laws or acts of executive for consistency with constitution.

Judicial review also establishes a clear nexus with the supremacy of the constitution, in addition to placing a grave duty and responsibility on the judiciary. Therefore, judicial review is both a power and duty given to the courts to ensure supremacy of the Constitution. Judicial review is an incident of supremacy, and the supremacy is affirmed by judicial review.

It may be appreciated that to promote rule of law in the country, it is of utmost importance that there should function an effective control and redressal mechanism over the Administration. This is the only way to instil responsibility and accountability in the administration and make it law abiding. Judicial review as an arm of Administrative Law ensures that there is a control mechanism over, and the remedies and reliefs which a person can secure against, the administration when a person's legal right or interest is infringed by any of its actions.

When a person feels aggrieved at the hands of the Administration because of the infringement of any of his rights, or deprivation of any of his

interests, he wants a remedy against the Administration for vindication of his rights and redressal of his grievances. The most significant, fascinating, but complex segment in judicial review is that pertaining to judicial control of administrative action and the remedies and reliefs which a person can get from the courts to redress the injury caused to him or her by an undue or unwarranted administrative action in exercise of its powers.

The effectiveness of a system of Judicial review under Administrative Law depends on the effectiveness with which it provides remedy and redress to the aggrieved individual. This aspect is of crucial significance not only to the person who has suffered at the hands of the administration but generally for the maintenance of regime of Rule of Law in the country.

A delegate must exercise its jurisdiction within the four corners of its delegation and if he has acted beyond that, his/her action cannot have any legal sanction and is challengeable by way of judicial review. It is well recognised that a delegated legislation can be challenged by way of judicial review for being ultra vires any of the following reasons;

- i. Lack of legislative competence,
- ii. Violation of fundamental rights guaranteed under the constitution,
- iii. Failure to conform to the statute under which it is made or exceeding the limits of authority conferred by parent Act,
- iv. Repugnancy to the laws of the land,
- v. Manifest arbitrariness/unreasonableness or vagueness or uncertainty.

While considering the validity of delegated legislation, the scope of judicial review is limited but the scope and effect thereof has to be considered having regard to the nature and object thereof. See Page 198 *Public Law in East Africa Lawafrica Publishers*.

The present application is challenging the Statutory instrument which amended the Schedule to the Act and is therefore amenable to judicial review.

Whether item 88 (PartA) of the Trade (Licensing)(Amendment of Schedule) S.I No.2 of 2017 is ultra vires the Trade (Licensing)Act Cap 101 as amended by the Trade (Licensing)(Amendment) Act No. 28 of 2015.

This is the general issue that shall be resolved and it addresses the other two issues under the different sub issues.

The applicant's counsel submitted that The Schedule is illegal and ultra vires the Principal Act to the extent that it provides for Telecom Masts as a trade licensing item for which the local governments are not the licensing authority.

Article 191 of the Constitution provides for the power of local governments to levy appropriate fees. Under Article 191(2) these fees and taxes shall consist of among others, licensing.

According to the applicant's counsel, a close examination of this Article shows its purpose was to enable local governments collect revenue through the means listed. These means are rents, rates, royalties, stamp duties, fees on registration and fees on licensing.

Therefore, fees on licensing relates to matters empowering the local government to charge fees for licensing a particular activity or it is only applicable to activities which the local government is the sole licensing authority and it cannot refer to activities licensed by the Central government under a different law. See *Stanbic Bank of Uganda and 3 others v Attorney General HCMA 645 of 2011; NC Bank Uganda Ltd & 24 Others v Kampala Capital City Authority v KCCA & AG HC Misc.Cause No.2 of 2018*

Therefore, Telecom masts are regulated and licensed by Uganda Communications Commission under the Uganda Communications Act. The telecom masts being telecommunication infrastructure cannot be said to be a service which the local government can license.

It is therefore contrary to the Constitution and the Local government Act and thus unlawful for the schedule to include “Telecom Masts” as one of the items upon which trading license can be levied by a local government.

The schedule as amended by the Minister was ultra vires the Principal Act when it added Telecom masts as a trade licensing item yet it could not be defined as a service for purposes of trade licensing.

The applicant’s counsel also submitted that it is irrational to require telecom masts which are already licensed under a different regime to get a trading license for the same activity. The applicant pays license fees to the Central government through Uganda Communications Commission who is their regulator.

The applicant’s further contended that the amendment process was procedurally improper for being passed without consulting the applicant who was affected by the changes and it breached their legitimate expectation. The applicant legitimately expected not to pay any other fees apart from the licensing fees by UCC and any attempt to change this position of policy, the applicant had to be consulted.

The respondents’ counsel submitted that the trade licensing fees are levied against the applicant as a business operating communication towers and communication masts.

According to counsel, the applicant cannot in good faith or in good conscience submit that levying and payment of trade license is irrational or unfair or otherwise illegal or ultra vires yet it is duly authorized under the parent Act.

If the applicant is dissatisfied with the imposition of the trade license fee- which is a tax, the proper course would be to challenge the parent Act which provides for the tax itself and the statutory instrument which simply provides for the rate of the tax.

An interpretation of Articles 191 and 192 of the Constitution does not reveal any explicit or implicit bar on trading license being imposed on communication companies/communication masts or communication towers.

Determination

The courts will normally determine the validity of delegated legislation by applying the test of *ultra vires* i.e Illegality, Irrationality and procedural impropriety.

The Court considering the validity of a subordinate/delegated legislation, will have to consider the nature, object and scheme of the enabling Act, and also the area over which power has been delegated under the Act and then decide whether delegated legislation conforms to the parent Act.

Where a rule/regulation is directly inconsistent with a mandatory provision of the statute, then, of course the task of court is simple and easy. But where the contention is that the inconsistency or non-conformity of the rule is not with reference to any specific provision of the enabling Act, but with the object and scheme of the parent Act, the court should proceed with caution before declaring invalidity.

The applicant contends that the regulation is contrary to the constitution and thus the court should find them unconstitutional or contrary to Article 191 and Article 192 of the Constitution.

There is a presumption in favour of constitutionality of statutes as well as delegated legislation and it is only when there is a clear violation of constitutional provision (or of the parent statute, in the case of delegated legislation) beyond reasonable doubt that the court should declare it to be unconstitutional.

This court is being asked to consider the question of constitutionality of the delegated legislation. The parent Act may be constitutional, but the

delegated legislation emanating thereunder may be in conflict with some provision of the Constitution. In that case the delegated legislation will be invalid.

Since this court is not mandated to interpret the constitutional provisions, it cannot delve into that area since it is a preserve of the Constitutional court. This court is only obliged to apply the constitutional provisions as they are and in case issues of constitutional interpretation arise then it is the mandate of the Constitutional Court. See *Article 137(1) of the Constitution*. The question of unconstitutionality of regulations falls appropriately under constitutional interpretation.

Secondly, the applicant is challenging the spirit and policy of Trade Licensing regulations and other regulating laws under Uganda Communications Act since the applicant is licensed under that legal regime.

According to the document marked annexure A to the affidavit shows that *the Applicant licensed to Operate PUBLIC INFRASTRUCTURE SERVICES from 17th April to 16th April 2019*.

It would mean that the applicant is supposed to be licensed twice for the same work done in Uganda. Once an entity is licensed by the regulator, it would be erroneous to be subject to trading licenses all over the country by the different districts or sub-counties wherever they have telecom masts or to put it differently to pay a trading license for every telecom mast they hold in any given area.

A delegated legislation can be questioned on ground that it is inconsistent with provisions of the parent Act or that it is contrary to some other statute applicable on the same subject matter. It can also be questioned on ground that it is manifestly arbitrary and unjust or irrational.

In the case of *Stanbic Bank of Uganda Ltd, Barclays Bank of Uganda Ltd, Centenary Rural Development bank Ltd and Standard Chartered Bank Ltd vs Attorney General HCT-00-CC-MA 0645-2011* court held that;

“It is also my view that the issuance of two licenses for the same business, one by the Central government and another by the local government cannot be a rational manner of improving the collection of revenue. Given the financial linkages between the central government and the local governments it appears to be double collection that would be unfair to the licensee....”

I entirely agree with the reasoning by the learned Judge in the above matter since it is similar in principle with the present case. The conferment of rule-making power by an Act does not enable the rule making authority to make a rule that travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto or affects other existing legislations.

Thus, while adjudging the *vires* of delegated legislation, the courts do not concern themselves with the merits, demerits, wisdom of the underlying policy. A court never quashes a rule because, in its opinion, the policy underlying it is not wise or prudent. The Court’s only concern is to see whether the impugned delegated legislation falls within the scope of the rule making power conferred on the concerned authority by the parent Act. In the case of *I.R.C v National Federation of Self-Employed and Small Businesses [1981] 2 All ER 93 at 107* court noted thus;

“They [Ministers] are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge.”

The inclusion of telecom masts among the areas of issuance of trading licenses is illegal and contrary to the Uganda Communications Act and it conflicts with specific legislation. Where two legislations conflict i.e between general legislation and specific legislation, the specific legislation overrides the general legislation on the subject matter. *Generaliaibus specialia*

derogant or *Generalia specialibus non derogant*. No latter general Act can prevail over an earlier special Act. Meaning general things do not derogate from special things.

The applicant also submitted that there was breach of legitimate expectation when the Minister amended the law to include them as a category that would pay trading licence.

The courts have developed a novel doctrine in public law, viz., a duty to consult may arise out of legitimate expectation based either on a promise by the rule maker or to consult the affected persons or by an established practice of consultations. *Re Liverpool Taxi Owners Association [1972] 2 All ER 589; In re Westminster City Council [1986] 1 AC 692; R v Secretary of State for Transport ex parte G.L.C [1985] 3 All ER 300.*

The doctrine of legitimate expectation seems to have been established now in the rule-making sphere requiring the rule-maker to consult the affected interests in certain circumstances.

Public participation in, or what is known as the democratisation of, the rule making process is regarded as a desirable safeguard, for it enables the interests affected to make their views known to the rule making authority, and thus help in framing of the rules. This may serve as a significant safe guard against an improper or wrongful exercise of its power.

The applicant was never consulted and I do not think they should have been consulted since they have not laid down before this court as basis for their legitimate expectation. The Minister was amending a schedule to the act and I do not think it would have been practically possible to consult all the affected persons. Although it would have been prudent to engage some of the stakeholders who were likely to be affected since they were not among trading license payers.

What remedies are available to the parties?.

- 1.) *The applicant is not liable to pay for trade licence fees in respect of their telecommunication masts pursuant to item 88 (in Part A) of the Trade (Licensing) (Amendment of Schedule) Instrument No. 2 of 2017.*
- 2.) *An order of certiorari issues to quash the 2nd respondent's demand note addressed to the applicant demanding for payment of trade license fees in respect of the Applicant's telecommunication masts pursuant to item 88 (part A) of the Trade (Licensing) (Amendment Schedule) Instrument No. 2 of 2017.*
- 3.) *The applicant is awarded costs of the application.*

I so order

SSEKAANA MUSA
JUDGE
14th/04/2020