THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA

(**Coram** Arach-Amoko, Nsimye, Opio Aweri, Mwondha, Tibatemwa-Ekirikubinza)

CIVIL APPEAL NO 09 OF 2015

Between

UGANDA REVENUE AUTHORITY **..... APPELLANT**

And

SIRAJE HASSAN KAJURA & OTHERS ..... **RESPONDENTS**

(Appeal against the judgment of the Court of Appeal at Kampala before Bossa, Kakuru, and Kiryabwire JJA delivered on the 7th day of June, 2013)

JUDGMENT OF MWONDHA JSC(DISSENTING)

I have had the opportunity to read in draft the judgment of my learned brother Opio-Aweri JSC, I respectfully do not agree with his reasoning and conclusion.

The facts as set out according to the record are as hereunder:-

The respondents are one hundred and sixty (160) former employees of the defunct Diary Corporation on Limited. They were retrenched with effect from 31st of August 2006. The Privatisation Unit (PU) Ministry of Finance Planning and Economic Development, paid terminal packages to the respondents which comprised of salary, gratuity, long service award, transport, home allowance, leave allowance, settlement

allowance and payment in lieu of notice. The Privatisation Unit sought advice from the Appellant Tax Authority about tax payable on the benefits due to the respondents. The Respondent claimed a sum of Shs1,171, 778, 314/= (one billion, one hundred and seventy one million, seven hundred and seventy eight thousand, three hundred and fourteen shillings) PAYE which the trial Judge awarded as special damages.

The appellant (defendant) in the written statements of defence did not specifically deny that figure in the plaint of the respondents. Instead in the 2nd defence written submissions the appellant submitted that it deducted Shs1,130,294,980/= PAYE which it computed. The respondents filed High Court Civil Suit No. 117 of 2009 challenging the assessment and payment of the said amount. The respondents further claimed that what was paid to them was not employment income but a: "thank you" following the privatisation of Ms Diary Corporation Ltd. They argued that the payment was akin to a gratuity and hence not liable to tax under S. 19 of the Income Tax Act Cap 340. The High Court and the Court of Appeal decided in favour of the respondents hence this appeal.

The appellant raised three grounds of Appeal as follows:-

(1) The learned Justices of the Court of Appeal erred in law and fact when they held that the benefits received by the respondents are not taxable.

(2) The Learned Justices of the Court of Appeal erred in law when they held that the character of the packages given to the respondents was not such as those envisaged under the provisions of the Income Tax Act.

(3) The Learned Justices of the Court of Appeal erred in law when they held that the appellant, unlawfully taxed the respondents on the payment received.

The appellant prayed that:-

(1) The appeal be allowed and the order of the Court of Appeal be set aside.

(2) Order the respondent to pay costs of this Court and the Courts below.

This is a second appeal and a Court of Appeal is precluded from questioning the findings of fact of the trial Court, provided that there was evidence to support those findings, though it may think it possible or even probable, that it would have itself come to the same conclusion, it can only interfere where it considers that there was no evidence to support the finding of fact, this being a question of law. See **Kifamunte Henry v. Uganda. Criminal Appeal No. 10 of 1997**.

In order for a second appellate Court to interfere with the concurrent findings of fact by the trial Court and the first appellate Court, it has to be shown that the first appellate Court erred in law or in mixed fact and law, to justify an intervention see **Rex v. Hassan Bin Said alias Kimani Somali [1942] 9 EACA 62, Okeno v. Republic [1972] EA 32.**

I had the liberty to peruse the Court of Appeal and High Court records of proceedings and read the judgments as well. It was clear that, the question to be determined considering the three grounds of appeal was:-

"**Whether the appellant unlawfully taxed the respondents retrenchment benefits**"

The question as above stated doesn't only call for the interpretation of S. 19 of the ITA but all the provisions of the Income Tax Act which are related to S. 19 taking due regard the Constitution of this country.

It is therefore important to state the principles governing interpretation of constitution and or statutes. These were laid down in various cases of this Court and other Commonwealth jurisdictions…

The recent case of **Wesley Tusingwire v. Attorney General Constitutional Appeal No. 04 of 2016**, this Court cited the case of **Attorney General vs Susan Kigula & Others Constitutional Appeal 03 of 2006, Paul Semwogerere and Others Vs Attorney General Constitution Appeal No. 01 of 2002** among others.

In the case of **Wesley Supra,** this Court reproduced some of the principles and I will reproduce them here for clarity, those which are relevant to this particular case as follows**:-**

(1) The Constitution is the Supreme Law of the land and forms the standard upon which all other laws are judged. Any law that is inconsistent with or in contravention of the Constitution is null and void to the extent of its inconsistency Article (2) (2) of the Constitution. See **Presidential elections petition No. 2 of 2006 SC Rtd. Col. Kiiza Besigye v. Y. K. Museveni**.

(2) The entire Constitution or Statute has to be read together as an integral whole with no particular provision destroying the other. But each sustaining the other. This is the rule of harmony, the rule of Completeness and exhaustiveness**. (see P. K. Semwogerere & Anor v. Attorney General Constitutional Appeal 01 of 2002.**

(3) Where words or emphasis are clear and unambiguous they must be construed in its natural and ordinary sense.

(4) Where the language of the Constitution/Statute sought to be interpreted is imprecise or ambiguous, a liberal generous or purposeful interpretation should be given to it.

(5) The National objectives and Directives Principles of State Policy in the Constitution provide:-

I. The following objectives and principles shall guide all organs and agencies of the state, all citizens and other bodies and persons in applying or interpreting the Constitution

or any other law and in taking and implementing any policy decisions for the establishment and promotion of a just, free and democratic society.

Principle XIV of the National objectives foresaid provide:- The state shall endeavour to fulfil the fundamental rights of all Ugandans to social justice and economic development and shall in particular ensure that;

(a) All development efforts are directed at ensuring the maximum social and cultural well being of the people and

(b) All Ugandans enjoy rights and opportunities and access to education, health services, clean and safe water, **work**, (emphasis is mine) decent shelter, adequate clothing, food security and pension and retirement benefits.

Article 8A National interest

(1) Uganda shall be governed based on principles of national interest and common good enshrined in the National objectives and directive principles of state policy.

(2)

My learned brother's draft judgment and submissions of Counsel for the appellant relied on the case of **Rowlatt in Cape Brandy Syndicate v. JRC (1921) KB 64** as applicable and therefore still good law in Uganda.

The Cardinal principle arising from lit and quoted "In a taxing Act, clear words are necessary in order to tax the subject ..... In a taxing Act one has merely to look at what is clearly said. There is no room for an **intendmat**. There is no equity about tax....." cannot be applicable in our situation today.

The principles of interpretation some of which have been reproduced above clearly prove, that, that principle cannot be good law in Uganda. The Taxing act is a legislation which is

subject to the Constitution. It has to be consistent with the Constitution so, it cannot be interpreted any different.

The principle arising from the case of **Rowlatt in Cape Brandy** Supra in addition to being merely persuasive, it was made long before the 1995 Constitution was promulgated. There are so many cases which have stated the principles of interpretation. In short the principle has been superseded.

The other case by Counsel for the appellant relied on was **R v. The Judge of City of London Court [1892] I and 13 373**, which propagated the rationale of the literal rule as "To prevent Courts from delving into political arenas, in order to pressure the dichotomy between the functions of Parliament and Courts, the former creating the law and the latter in theory applying the law." For the same reasons given in the Cape Brandy Case with respect cannot be good law in Uganda.

With respect I do not agree, with both the pronouncement that the Courts role is to apply the law made in theory which the Parliament makes. The Courts role is to give life to theory embedded in the Statute and consequently give the Statute life not the other way round. In the case of **Unity Dow v. Attorney General of Botswana [1992] LRC Const. 632 at page 668** it was stated the Constitution is the Supreme Law of the land and it is meant to serve not only this generation but yet unborn. It cannot allow being lifeless museum piece, on the other hand Courts must breath life into it as occasion may arise to assure the health growth of the state through it." My view is that the Courts when interpreting a legislation promotion must do it in light of the Constitutional provisions, where all these legislations emanate from. I find the reasoning therefore superfluous which is based on a case decided in 1892 and in total disregard of the clear provisions of the Constitution. Article 126 (I) and 2 (e) of the Constitution instructive.

In the preamble of the Constitution and for clarity I have to reproduce it here. "**We the people of Uganda recalling our**

History which has been characterised by political and Constitutional instability, recognising our struggles against the forces of tyranny, oppression and exploitation, (emphasis is mine) **committed to building a better future by establishing a constitutional order based on the principles of unity, peace equality, democracy, freedom, social justice and progress, exercising our sovereign and inalienable right to determine the form of governance for our country, and having fully participated in the constitution making process among others.....**"

The cited cases relied on have no relevancy or applicability now in the Uganda situation.

There is no dispute that Article 152 (I) of the Constitution provides for "**no tax to be imposed except under the authority of an Act of Parliament**". There is obviously no dispute about the legislative powers of Parliament as provided in Article 79 (I) of the Constitution and imposition of a duty on every citizen to pay taxes. The issue is not whether the Constitution provides to pay tax or whether Parliament has power to make laws. The issue is whether the act of taxing the respondents on the retrenchment packages PAYE was lawful in the context of the law and the provisions reproduced herein. That is why we have to carefully look at the Constitutional provisions to guide the interpretation of the ITA the law provisions in issue.

The answer is obviously in negative for the following reasons:-

With due respect my learned brother based the conclusions on the issue by relying on only interpretation of Section 19 (I) (a) (b), (c), (d), (e), (f), (g) and (h) of the Income Tax Act.

In order to appreciate the input of Section 19 (a) of ITA, it has to be read together as an integral whole with no particular provision destroying the other but each sustaining the other. (**Semwogerere Paul K**. (Supra)

The National objectives (Part XIV) have to be born in mind and the preamble to the Constitution. The imposition of the duty to every citizen to pay tax by the Constitution, as a development effort is aimed at ensuring maximum social ... well being of the people not the vice versa of aiming at diminishing the social wellbeing of the people. All provisions connected there to have to be considered or read together.

In the instant case the starting point is to determine **whether the respondents at the time of taxation, <u>Privatisation Unit</u> was the employer of the respondent since Dairy Corporation Ltd had been divested by Government under the PERD Act (Public Enterprises Reform and Divesture Act Cap. 98, for the retrenchment benefits to be construed as employment income or not with the context of ITA?**

The relevant provisions of the Income Tax Act Cap 340 in my view are Section 2(y) which defines **an employer as a person who employs or remunerates an employer**.

There was no evidence on record to show that (Privatisation Unit Ministry of Finance and Economic Planning) was at any one time the employer of the respondents. Ms Dairy Corporation Ltd. was no more since it had been divested so PU had no basis for withholding the Shs.1,171,778,314/= PAYE. In connection to this is S. 116 of the ITA which provides for with holding tax by employers.

"(I) every employer shall withhold tax from a payment of employment income to an employee prescribed by regulations under Section 164.

(2)the obligation of an employer to withhold tax under subsection (I) is not reduced or extinguished.

.....

It is very clear that reading Section 2(y) S. 19 and 116 of the ITA it is employment income if the respondents were employees of

P.U. In the instant case there was no such relationship of employer and employee. Ms Diary Corporation Ltd was a public enterprise with different Board of Directors.

So there is no way the retrenchment benefit would by necessary implication fall squarely within the ambit of S. 19 (I) (a). One can only withhold the tax if he or she is in employment of a known employer. The words any income derived by any employee from any employment. The term derive has to be understood in the context of Section 2 (y) and Section 116 (I) of the ITA.

(a) Much as **section 19 (6) provides "For purposes of this section an amount or benefit by an employer or by a third party under an arrangement with the employer or an associate of the employer.**

(b) Is provided to an employee or to an associate of an employee and

(c) Is provided in respect of past, present or perspective employment."

Again with respect I disagree with the conclusion of my learned brother when he asserts that all the above elements exist in the packages paid to the respondents. There was no evidence of P.U. being a third party or associate of Ms Diary Corporation Ltd which was divested. Not even in the PERD Act. He just assumed on his own that P.U. was a third party but the above provision is clear. If it's a third party associate there ought to have been evidence that Diary Corporation relinquished its obligation to PU Ministry of Finance & Economic Planning. As he states it's the defunct Diary Corporation which was the employer of the respondents and they were laid off or retrenched. If the Ministry of Finance & Economic Planning was a third party, the 1st or 2nd defendant ought to have pleaded in the WSD, so and evidence ought to have been adduced at the trial. This was not the case. Counsel for the appellant, in his submissions at page 7 he stated "**but as the Corporation had been privatised, the**

responsibility of paying the Respondent was taken over by the Privatisation Unit under the Ministry of Finance. The package was under a government arrangement whereby the employer of the respondents, having become defunct could not herself be availed funds to pay off its employees."

First of all I have to state that this was submission from the bar because there was no pleading to that effect and there was no evidence adduced at all to support the submissions. Second but most important, it's clear that P.U. or Ministry of Finance could not be on the facts of the case be employers, to qualify to be third party or associates in law. The law is clear on how one can be a third party. The Memorandum and Articles of Association of Ms Diary Corporation were not adduced in Evidence. Not even the Act which established it as a public enterprise.

It is trite law that a second appellate Court to interfere with the concurrent findings of fact by the trial Court and the first appellate Court, it has to be shown that the first appellate Court erred in law or in mixed fact and law to justify an intervention which is not the case in this instant case.

The facts of this case are peculiar to retrenchment package where the employees were ejected out of employment or work not out of their own fault. **The objectives of PERD Act under S. 2 (2) are clear. Included (a) the reduction of Government equity holding in the Public Enterprise and thereby inter alia relieving the Government of the financial drain on its resources and burden of their administration and raising revenue by means of divesture, including where necessary liquidation or dissolution of Public Enterprises and by the promotion, development and strengthening of a private sector ...**

(b).....

(c).....

From the above extract of the objectives of PERD, I am of the view that the Government was not divesting or privatising the Public Enterprises so that they increase revenue by taxing the retrenches to support the private sector. This would mean that Government would be doing nothing but oppressing and exploiting the respondents. This therefore cannot be correct.

Reading the preamble which is instructive on fighting the forces of tyranny and exploitation among others together with National Objectives, of the Constitution on Article 8A(I), Section S. 2(y) and 116 (I) and Section 4 (1) of ITA it becomes clear to me that past employment does not even arise in the circumstances of this case.

Other provisions of the ITA which ought to be considered and used to guide in resolving the issue is S. 2 (yy) which gives the word "person" an inclusive definition "person includes:-

An individual, a partnership, a trust, a company, a retirement fund, a government, a political subdivision of a government and a listed institution.

S. 2 (z) defines employment in the following terms:- Employment means

(i) the position of an individual in the employment of another person.

(ii) A directorship of a company

(iii) A position entitling the holder to a fixed or ascertainable remuneration.

(iv) the holding or acting in the public office

S.15 defines chargeable income and states:- subject to S. 16 the chargeable income of a person for a year of income is the gross income of the person for the year less total deductions allowed under this Act for a year.

S. 17 (i) subject to this Act, the gross incomes of a person for a year of income is the total amount or

(a) business income

(b) employment incomes and

(c) property income

Derived during the year by the person other than income exempt.

It is on record and in the judgment of the Court of Appeal that the respondents were terminated from work with effect from 31st August 2006.

It is clear that starting from 1st September, 2006 the respondents were no longer employees of the defunct enterprises and were not in employment. One wonders how the respondents were deriving income from employment and from which years!!?

PU has never been their employer already discussed in this judgment so PAYE deduction was for what. Up to 31st August, 2006 their earnings were subjected to PAYE.

The Court has to interpret it in the context of the facts and circumstances of each case guided by not only that provision and law but the Constitution as stated above.

Accordingly considering the facts and circumstances of the instant case together with the relevant provisions of the law in light of the above provisions of ITA and the Constitution as reproduced in this judgement the respondents were unlawfully taxed.

Turning to the question as to **"whether the retrenchment packages amounted to compensation as provided under the Income Tax Act."**

Obviously S. 19 (I) (d) refers to compensation derived from termination of any contract for the payment of such

compensation or any amount derived which is in **computation** of the amount due under any contract of employment.

I am unable to accept Counsel for the appellant's submission and also with what my learned brother concluded. The fact that the compensation is not defined in the ITA and the fact that PERD Act provided for compensation under S. 21 thereof does not mean in the least that the benefits were subject to tax. This is so because of my earlier discussion in resolving the first question as to whether the respondent's benefits were lawfully taxed. I will add that the retrenchment package was the States fulfilment of the fundamental rights of these Ugandans who had lost the right to work in the Public Enterprise.

The learned Justices of the Court of Appeal canvassed this issue as indeed the trial Judge did. They said, agreeing with what the trial Judge found that the terminal benefits do not constitute compensation. It is clear that the provision provides for amounts derived as compensation for the termination of any contract of employment. I agree with the finding of the Court of Appeal that retrenchment packages were as a result of Government restructuring programmes and it can not be seen as compensation within the meaning of S. 19 (I) (d) of the ITA. The authority of the case of Samuel **Lubega, Lawrence Kamulegeya Richard Olet Pule v. UCBL SCCA No 024 of 2010**. Justice BM Katureebe JSC as he then was stated "The purpose of the retrenchment package was to amelioratate their loss of a job..." Thus a retrenchment package is akin to an amelioration.

Counsel for the respondent submitted that the Black's Law Dictionary 8th Edn. at page 89 defines Amelioration to mean, the act of improving something: the state of being better or an improvement. The facts of that case are similar in respect of retrenchment issue but the appeal had been dismissed. In that case the employees of the Banks signed a document accepting the package which had a condition that when you sign you waive all the rights to any claim. The **rentended** package was assessed

basing on a salary they didn't agree to. So they sued UCDL but of course they had waived their right so their appeal was dismissed. Both parties had prayed for costs. His Lordship declined to grant costs because in his view he said "The normal rule is that costs follow the event but in peculiar circumstances of this case where the appellants were retrenched from their employment and have been trying to claim a little more based on their own interpretation of the terms, it would defeat the whole purpose of the retrenchment package were these people to be condemned in costs. The purpose of retrenchment package was to emeliorate their loss of a job. ... I believe this is a case where the Court should exercise its inherent powers to do substantive justice and not award costs against the appellant. I would order that each party bears its own costs in this Court and the Courts below."

I agree with that conclusion and equating to the instant case it's related in that material particular with the decision. This instant case is distinguished from compensation which is defined in the same dictionary at page 301 as remuneration and other benefits received in return for services rendered especially salary and wages. Compensation is payment for work. They had already been paid for work by 31st August 2006 the issue of compensation could not arise.

I find the case relied on like **Nkobe Charles and Another v. URA HCCS No. 0156 of 2010** and the other cases applicable to the facts of this case.

For the reasons given in this judgement I do not find any justification for interfering with the concurrent findings of the trial Court and the 1st Appellate Court. The judgment of the Court of Appeal is upheld.

I dismiss this appeal with costs of this Court and the Courts below.

Dated at Kampala this ...20th..... day of ...December 2017

Signed …….
Mwondha JSC
JUSTICE OF THE SUPREME COURT