THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL AT KAMPALA

MISC. APPLICATION NO. 14 OF 2018

STANBIC BANK HOLDING LIMITED ……...APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY ……..RESPONDENT

BEFORE DR. ASA MUGENYI, MR. GEORGE MUGERWA, MS. CHRISTINE KATWE

RULING

This ruling is in respect of a preliminary objection raised by the respondent on an application filed on grounds that it was res judicata.

Briefly the facts are: Stanbic Bank Limited and Uganda Banker's Association filed TAT application 34 of 2018 seeking to review the respondent's tax decision on performance bonds, advance payment bonds and guarantees. They filed Misc. Application 28 of 2018 to extend time within which to file an application for review of the respondent's decision. The said application would have effect of validating the main application. The application for extension of time was dismissed. On the 19th March 2019 the respondent made a demand to the applicant of Shs. 7,140,759,897. On the 3rd April 2019, the applicant made an objection to the demand which was increased to Shs. 9,950,531,398. On the 3rd June 2019, the respondent made an objection decision upholding the assessment. The applicant filed this application.

The applicant was represented by Mr. Brian Kalule and Mr. Allan Katanganza while the respondent by Mr. Alex Aliddeki Ssali, Ms. Nakku Mwajjuma and Ms. Barbara Nahone.

At the hearing of this application, the respondent raised preliminary objection that the applicant's suit is barred in law as a consequence of res judicata. The applicant cited S. 7 of the Civil Procedure Act which provides that "no court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim,

litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised and had been heard and finally decided by that court."

The respondent cited *Ponsiano Semakula v Susane Magala and others* 1993 KALR p.213 where the court stated "… Justice requires that every matter should be once fairly tried and having been tried once, all litigation about it should be concluded forever between the parties. The test whether or not a suit is barred by res-judicata appears to be that the plaintiff in the second suit is trying to bring before court in another way and in the form of a new cause of action, a transaction which has already put before a court of competent jurisdiction in early proceedings and which has been adjudicated upon…" The respondent also cited *in the case of Boutique Shazim Ltd v Noratta Bhatia and another* CA 36 of 2007 where the court noted the test to be determined is: "is the plaintiff in the second suit or subsequent action trying to bring before the court, in another way and in the form of a new cause of action which he or she has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon?" The respondent also cited *Lt. David Kabareebe v Major Prossy Nalwayiso* CA, 34 of 2008, *Semakula v Magala and others* (1979) HCB 90, *Father Nasere Bergumiso and 3 others v Eric Tibebaga* SCCA 17/02, Allen Nsibirwa v National *Water and Sewerage Corporation* High Court Civil Suit 220 of 1995 to emphasis that the doctrine of res judicata bars a plaintiff from bringing a suit that was formerly adjudicated upon.

The applicant contended that the issues brought before this court are the same the applicant was claiming in TAT 34 of 2018. The said application was not heard by the Tribunal since it was time barred. The applicant is seeking to sneak the same matter before the Tribunal.

The respondent submitted that though the applicant claims to have filed an objection against the demand by the respondent, the procedure was irregular as the letter of 19th March 2019 the basis of the objection was merely a demand letter. The respondent in its correspondence reiterated its position that performance bonds and guarantees attract a

duty of 1%. The respondent cited *Sam Akankwata v United Bank of Africa* MA. 40 of 2019 where the court held that a dismissal of a case on a preliminary point of law is fundamental in the eyes of the law and resolves the dispute in its entirety.

The respondent contended that once a court has pronounced itself on a matter in form of a decision, ruling or judgment it has exhausted its jurisdiction on a matter and is functus officio. *Black's law Dictionary* 4th Edition p. 802 defines it as "without further authority or legal competence because the duties of the original commission have been fully accomplished". The respondent cited *Cable Banking Company v URA* High Court Civil Appeal 1 of 2011 where the court stated it to mean "Having fulfilled the function, discharged the office, accomplished the purpose, and therefore of no further force or authority." The respondent contended that this application was conclusively heard and finally determined by this court in its ruling dated 30th January 2019.

In reply, the applicant *cited Mansuklai Ramji Karia and another v Attorney General*, *Makerere Properties Limited and another* Supreme Court Civil Appeal 20 of 2002 where the Supreme Court set out the conditions to satisfy the res judicata doctrine. The applicant also cited *Sunday Edward Mukolli v Administrator General* Supreme Court Civil Appeal 6 of 2016 and *Maniraguah Gashumba v Sam Nkundiye* Civil Appeal 23 of 2005.

The applicant contended that the application the Tribunal heard was for extension of time MA 28 of 2018 and not the main application TAT 34 of 2018 which challenged the respondent's decision that performance bonds, advance payment bonds and guarantees were chargeable with 1% stamp duty. None of the issues in the main application were determined in the miscellaneous application.

The applicant contended that there are different decisions being challenged. The applicant cited S. 3 of the Tax Procedure Code Act. It argued that the first decision is a tax assessment. The second decision is arising from a determination, opinion, or direction of the Commissioner which is not a tax assessment. Ultimately, the causes of action are different. The matter in TAT 34 related to a different one from this case.

The applicant also contended that the issues raised in this matter were never heard and determined in the previous matters. The present suit raises issues which were not part of the former such as the rate of bid bonds. The applicant also contended that the matters in issue have never been finally decided. It has never been finally determined as to what is the stamp duty applicable on performance bonds, advance payment bonds and guarantees.

The applicant further contended that the respondent should be estopped from denying that the letter it issued was an assessment. When the applicant objected the respondent issued an objection decision. The applicant cited S. 114 of the Evidence Act and contended that by doing so the respondent should be estopped from denying there was no assessment.

In respect of *functus officio*, the applicant contended that the present suit contains issues which did not form part of the previous suit. The issues raised by the present suit have never been considered and determined. The Tribunal cannot be *functus officio*.

Having read the submissions of the parties in respect to the preliminary objections, this is the ruling of the Tribunal.

In TAT 34 of 2018 *Stanbic Bank Uganda Limited and Uganda Bankers Association* filed an application to review the respondent's decision on stamp duty chargeable under Item 36 of Schedule 2 of the Stamp Duty Act 2014. The applicants also filed Misc. Application 28 of 2018 to extend the time within which to file the main application. The effect of Misc. Application 28 of 2018 was to validate the main application TAT 34 of 2018. The Tribunal made a ruling dismissing Misc. Application 28 of 2018 in effect TAT 34 of 2018 was not validated. The applicant filed this matter challenging an assessment of Shs. 9,950,531,398 arrived at, after having been served with a demand, thereafter it made an objection and an objection decision was made by the respondent. When the matter came up for hearing, the respondent raised preliminary objections to the effect that this application had already been decided on, was res judicata and the Tribunal was functus officio.

The doctrine of res judicata is set out in S. 7 of the Civil Procedure Act which reads:

> "No court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised and had been heard and finally decided by that court."

In *Ponsiano Semakula v Susane Magala and others* 1993 KALR p.213 the court stated:

> "… Justice requires that every matter should be once fairly tried and having been tried once, all litigation about it should be concluded forever between the parties. The test whether or not a suit is barred by res-judicata appears to be that the plaintiff in the second suit is trying to bring before court in another way and in the form of a new cause of action, a transaction which has already been put before a court of competent jurisdiction in early proceedings and which has been adjudicated upon…"

So the Tribunal has to ask itself, is the applicant trying to bring a matter which was already decided on its merit? It is not difficult to discern that TAT 34 of 2018 and the present application are challenging the respondent's decision to collect stamp duty chargeable under the Stamp Duty Act 2014. While TAT 34 of the 2018 sought to challenge directly the legality of the Stamp Duty Act, the present applications is challenging an assessment arising from the imposition of stamp duty. In essence it is more or less the same matter in a different form. So the question is this application res judicata?

The test of whether a matter is res judicata has been decided on by a number of court decisions. In *Mansukhlal Ramji Karai and another v Attorney General, Makerere Properties Limited and another* Supreme Court Civil Appeal 20 of 2002, the court said that:

> "the provision indicates that the following broad minimum conditions have to be satisfied
>
> (1) There have to be a former suit or issue decided by a competent court.
> (2) The matter in dispute in the former suit between the parties must also be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar.
> (3) The parties in the former suit should be the same parties or parties under whom they or any of them claim, litigating under the same title."

In *Allen Nsibirwa v National Water and Sewerage Corporation* HCCS 220 of 1995 the court stated for the doctrine to apply;

> "i) The issue in the suit must have been directly and substantially in a former suit before a court of competent jurisdiction.
>
> ii) The suit must be between the same parties or between parties under whom they or any of them claim as the previous suit
>
> The former suit mush have been heard and finally decided upon by that court"

In *Godfrey Magezi v National Medical Stores and others* HCCS 636 of 2016 the court cited *National James Katabazi* and 21 others where the court stated for the doctrine to apply:

> "i) the matter must be directly and substantially in issue in the two suits.
>
> ii) The parties must be the same or the parties under whom any of them claim, are litigating under the same title.
>
> iii) The matter must have been finally decided in the previous suit."

From the above suits the conditions to apply res judicata are clear.

The first condition the Tribunal will deal with is that of the parties. The parties in the former suit should be the same parties or parties who claim or litigate under the same title. *Amdhan Khan v Stanbic Bank (U) Ltd* MA 1027 of 2015 the court noted in a plea of res judicata that the current respondents were not party to the previous application and were not party to HCCS 90/1995 out of which the application arose. Therefore the parties in both suits must be the same. The parties to TAT 34 of 2018 and MA 28 of 2018 were Stanbic Bank Limited, Uganda Bankers Association and the respondent. In this application the parties are Stanbic Bank Holding Limited and the respondent. Stanbic Bank Limited and Stanbic Bank Holding Limited are not one and same. While Stanbic Bank Limited and Stanbic Bank Holding Limited may be related they are different legal entities. The test is they should all be claiming under the same title and not associates. There is no evidence that the applicant, Stanbic Bank Limited and Uganda Bankers Association are claiming or litigating under the same title. There is also no evidence to show that the applicant is a member of Uganda Bankers Association. For tax purposes it would be important to know whether the parties in the previous and current application are disputing the tax liability of Shs. 9,950,531,398.

Another condition is that the matter in dispute between the parties must also be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded. Misc. Application 28 of 2018 dealt with extension of time to file an application for review, the current application deals with an assessment of Shs. 9,950,531,398. Until the application is heard the Tribunal cannot decisively say it is not one where computation is being challenged or involves an interpretation of the Stamp Duty Act. The applicant already stated that its application includes stamp duty rates chargeable on bid bonds which were not part of TAT 34 of 2018 or MA 28 of 2018. Therefore the Tribunal cannot state with certainty that the issues in the current applications are substantially the same as those in the previous ones.

For res judicata to apply, the previous matter must have been decided finally. In *Onzia Elizabeth v Shaban Fadul* CA 0019/2013 Justice Mubiru held that:

> "For the doctrine to apply there must have been a decision on the merits of the case. Therefore, where the decision was not made on the merits of the suit, the matter cannot be Res Judicata… Therefore *in Busulwa Isaac Bob v Kakinda Ibrahim* [1979] HCB 179, where the earlier suit had been dismissed on a preliminary point, such a dismissal was found not to be a bar to a subsequent suit between the same parties on the same subject matter."

In *Tikamuhebwa George and other v AG and UWA* Constitutional Petition 59 of 2011 the Court held that:

> "In this petition, it appears to us that when a case is dismissed on a point of law then the dispute has not been adjudicated upon. It appears to us that the petitioners take that a dismissal of a case upon a point of law is akin to a dismissal of the case on a technicality. Nothing can be further from the truth. A dismissal on a point of law is fundamental and in the eyes of the law resolves the dispute unless there is an appeal and the dismissal is set aside with or without further orders."

What the Tribunal decided was an application for extension of time which is different from an application to review stamp duty chargeable under the Stamp Duty Act. The Tribunal like any other court is required to have made a decision which is final. In essence the matter ought to have been disposed of on its merit and not be dismissed on an issue of technicality. When an application for extension of time is dismissed, that is a dismissal on a technical point. In this case the Tribunal dismissed Misc. Application 28 of 2018 which

had the effect of not validating TAT 34 of 2018. Misc. Application 28 of 2018 dealt with extension of time. The Tribunal never had chance to look at the matters in TAT 34 of 2018. The story might have been different if the main application TAT 34 of 2018 had come up for hearing and was dismissed for being time barred. In an application for extension of time a court cannot go into the merits of a main application without first granting the extension of time. The Tribunal becomes *functus officio* after listening to the application of extension of time. It is like pushing the cart before the horse.

The applicant was not party to TAT 34 of 2018 and MA 28 of 2018. Therefore it cannot be said that the said application was finally decided in respect of the applicant's rights. In *Mansukhlal Ramji Karia and another v Attorney General* Civil Appeal 20 of 2002 Tsekoooko JSC said: "I have said already that in order to establish res judicata, this issue should have been tried. As neither appellant was a party to the suit and the ensuing appeal 13/1996, in my opinion the court erred to hold that A1 and A2 were barred by res judicata."

Furthermore the Tribunal is mindful of the fact that whenever the respondent issues an assessment or makes a decision, an aggrieved party has the option of objecting to the said decision. It is irrelevant whether a demand is an assessment or not but it is a decision. The said assessment or decision creates a fresh cause of action. Taxation is like trespass. In *Maniraghua Gashumba v Sam Nkundiye* Civil Appeal no. 23 of 2005 the court stated that "Each action of trespass constitutes a fresh and distinct cause of action. It is inconceivable that an action based on trespass committed in 1980 and the subject of a 1981 suit could have been res judicata simply because the same parties litigated over the same matter in 1965." Likewise if a party were to litigate over an assessment issued in 1980 or an interpretation of the law in 1985, nothing would prevent it from litigating over an assessment issued in 2019. The respondent issued a demand on the applicant who made an objection. Where an objection decision has been made, the Tribunal has no option but to listen to it.

The respondent contended that the Tribunal is *functus officio*. *Functus officio* has been defined in *Cable Corporation (U) Ltd v URA* High Court Civil Appeal no. 1 of 2011 to mean; "Having fulfilled the function, discharged the office, accomplished the purpose and

therefore no further force or authority." In *Godfrey Magezi v National Medical Stores and others* (supra) the court stated that "The functus officio rule encapsulates the general principle that the court passing judgment or decree cannot revisit the judgment or purport to exercise a judicial power over the same matter." When the Tribunal delivered its ruling in MA 28 of 2018 which did not validate TAT 34 of 2018, the Tribunal became *functus officio*. The Tribunal is not trying to revisit its decision in TAT 34 of 2018 and MA 28 of 2018. The Tribunal in this application is not *functus officio*. If it were, it would not deliver this ruling. The Tribunal has not exercised fully and finally its jurisdiction in this application.

In conclusion, having taking all the matters into consideration, the Tribunal does not find any merit in the preliminary objections and dismisses them with costs.

Dated at Kampala this ……day of ……2020.

DR. ASA MUGENYI	**MR. GEORGE MUGERWA**	**MS. CHRISTINE KATWE**
CHAIRMAN	**MEMBER**	**MEMBER**