THERE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
(COMMERCIAL DIVISION)
MISCELLANEOUS APPLICATION NO 628 OF 2010
ARISING OUT OF CIVIL SUIT NO 398 OF 2010

KETAN MORJARIA]
RAJNI KARIA]……. APPLICANTS/PLAINTIFFS

VERSUS

THE COMMISSIONER GENERAL]
UGANDA REVENUE AUTHORITY]…….. RESPONDENTS/DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA

RULING

The Applicants application is for a temporary injunction to restrain or otherwise prohibit the Respondent, servants and agents or any person claiming authority or benefit from her from collecting taxes assessed by notice of assessment dated 3 November 2010 for 20 and 21 billion Uganda shillings for the first and second applicants respectively pending final disposal of High Court Civil Suit No 398 of 2010 or until further orders of this court. The applicant also seeks costs of this application.

The application is supported by the affidavit of the first Applicant Mr. Ketan Morjaria sworn on the 3rd of November, 2010 and another supplementary affidavit of the first Applicant dated 7th of January, 2011. The first Applicant also makes these affidavits on his own behalf and on behalf of the second Applicant's case.

The background to the application is that the applicants filed a suit against the Commissioner General of Uganda Revenue Authority for:

1. A declaration that, prior to 1 July 2010, a capital gain on the sale of shares in a private limited liability company was exempt income within the meaning of section is 18 and 21 (1) (K) of the income tax act chapter 340;

2. A declaration that, the sale of shares in a private limited liability company, upon the direction of a statutory sectoral regulator, is not an adventure in the nature of trade and therefore any gain made there under is not amenable to income tax and sections for, 15, 17, 18, and 20 (d) of the Income Tax Act cap 340;

3. A permanent injunction prohibiting the defendant, her servants or agents from directly or indirectly taking steps against the plaintiffs to enforce payment of income tax assessed and notified to the plaintiffs and the notices of assessment dated 3rd of November 2010 and referenced INDR/LTO/0090 and INDR/LTO/0091 respectively;

4. general damages; and

5. Costs.

The applicants are shareholders of Orient Bank Ltd, a private limited liability company. The Applicants are relatives by virtue of marriage. Until December 2008, the first and second Applicants respectively owned 2,450,000 and 2,300,000 ordinary shares in Orient bank out of the banks authorized share capital of 5 million of a par value of Uganda shillings 1000 each. They allege that on the 4th of January 2006 the Bank of Uganda observed that the 96.5% of the shares of the Applicants held in the bank contravened section 24 (1) of the Financial Institutions Act in so far as the applicants were related persons. The Bank of Uganda directed that the Applicants reduce the related person's shareholding to a maximum of 49% of the banks authorized share capital within three years. Consequently, the first and second Applicant's sold off 1,950,000 of their shares to Bank PHB Plc a public limited liability company carrying on business of banking under the laws of the Federal Republic of Nigeria.

Subsequently, the applicants were assessed for income tax arising from the sale of shares to bank PHB plc of the Federal Republic of Nigeria. The first applicant was assessed to pay income tax of **Uganda shillings 20,135,581,980/-** while the second applicant was assessed to pay income tax of **Uganda shillings 21,168,223,620/–.** The due date of payment was on the 18th of December 2010. The Applicants plaint in the High Court was filed on 4 November 2010 while summons were issued on 5 November 2010. The application for a temporary injunction was also filed on the 4th of November 2010. At the hearing of the application for a temporary injunction the Respondent's Counsel adopted the Respondents affidavit in reply sworn by one Golooba Rodney dated 17th of November 2010, which had been filed in High Miscellaneous Application number 629 of 2010 for an interim order of injunction. On the application of the Respondents counsel, the applicants counsel had no objection and the Respondents affidavit in reply in the interim application was adopted for the main application. Paragraph 8 of the affidavit of Golooba Rodney shows that in a letter dated 5 November 2010 the applicants

through their tax consultants PriceWatersCoopersHouse Ltd lodged an objection to the assessment with the Commissioner General under the Income Tax Act. On Thursday, 18 November 2010 when the matter came for hearing there was consultation between the parties. The parties were represented by David F.K Mpanga for Applicants and Yahaya Habib Arike for the Respondent. The first Applicant Ketan Morjaria was in court while there was no representative for the Respondent.

The Counsels agreed before me that it would be prudent to stay the proceedings in the High Court to give a chance for the objection to the assessment, made to Commissioner General to be heard. The parties also agreed that the Commissioner General could not enforce the assessment made in the circumstances. Counsels requested the court to give a directive without affecting the application before court reflecting that there would not be enforcement of the assessment without prejudice to the application before the court. By agreement of the parties therefore, the court made the following directive which I will quote herein below:

> "Upon hearing both counsel for the parties. It is appreciated by both parties that the Respondent issued an assessment on the 3rd of November 2010. On the 5th of November 2010, the Applicants objected to the assessment thus exercising their statutory rights under section 99 (1) of the Income Tax Act cap 340. The Commissioner has not yet ruled on the matter. On the other hand the Applicants have sought declarations from this court in High Court Civil Suit No 398 of 2010 about the effect of an amendment to section 21 (k) of the Income Tax Act among other things. Since both parties are in agreement that no enforcement is proper before the Commissioner rules on the objection to assessment. It is the directive of this court that the application for a temporary injunction will be put on hold pending resolution of the objection proceedings before the Commissioner of the Respondent. The Parties will then depending on the outcome of the ruling of the Respondent under section 99 of the Income Tax Act address the court on merits. I.e. whether the application should be entertained by this court etc. In the meantime the interim order of this court is extended until the ruling of the Respondent Commissioner. The parties will then assess the next course of action to take. The commissioner is entitled to make a decision within 90 days under section 99 (7). If a decision is not made within this time, the applicant may elect to treat the objection as having been accepted. Consequently the interim order is extended for 90 days from the 9th of November 2010. Costs in the cause. The matter is adjourned to the 8th of February 2011. The parties are at liberty to approach the court earlier depending on further developments in the cause."

The grounds of the application are set out in the chamber summons and are as follows:

1. That, on the 3rd day of November 2010 the Defendant issued notices of assessment referenced; INDR/LTO/00090 and INDR/LTO/00091 against the first and second plaintiffs respectively being tax on gains arising from the sale of their shares in Orient Bank Limited.
2. That, the Applicants have filed a suit against the Respondent in this honourable Court; for a declarations that prior to 1 July 2010, a capital gain on the sale of shares in a private limited liability company was exempt income within the meaning of section 18 and 21 (1) (k) of the Income Tax Act cap 340; a declaration that a sale of shares in a private limited liability company, upon the direction of the statutory sectoral regulator, is not an adventure in the nature of trade and therefore any gain made there under is not amenable to income tax under sections 4, 15, 17, 18 and 20 (d) of the Income Tax Act cap 340; a permanent injunction issues against any steps being taken to enforce the contested assessment against the applicant's or their assets; general damages; and costs.
3. That the contested assessment is for a colossal sum of money and that unless restrained the defendant, servants, agents or any person's claiming authority or benefit under her would most likely seek to effect payment of the wrongfully assessed tax by the applicants to their detriment.
4. That if enforcement measures are taken under the assessment, prior to the determination of the main suit, the applicants shall suffer irreparable damage in the form of loss of business reputation as well as loss of business opportunities, which are incapable of been rendered completely whole by any measure of damages.
5. That it is in the interest of justice that this application be granted

It is an agreed fact that the Applicants through their tax consultants in a letter dated 5th November 2010 and received by Uganda Revenue Authority on 9 November 2010 lodged an objection to the assessment in question. I set out the full text of the objection lodged with the Commissioner for ease of reference as to the Applicants contention that the income for which they were assessed is exempt income from tax. The objection reads:

> "…we also make reference to your letter of 29th of October 2010 addressed to ourselves in respect of taxation of gain arising on the sale of part of our client's shareholding in Orient Bank to Bank PHB Nigeria. In your letter you explain to us that you had reached the conclusion that tax is due on the gain arising from our client's sale of part of their shareholding in Orient Bank. The reasons you give which are the basis of the assessment issued to both our clients are as below;
>
> (a) That the sale of the shares was not an isolated transaction but part of an overall scheme to enhance or further the business of the shareholders,

(b) There was an element of profit,
(c) The game was not a realisation of an investment but rather a profit in the course of furthering a business through a business venture,
(d) The sale of shares was the vehicle through which the business venture was realised.

On behalf of both our clients we hereby object to the assessment numbers INDR/LTO/00090 and INDR/LTO/00091 dated 3 November 2010. Below are the grounds of the objection on behalf of our clients which we have prepared in such a way as to address each of the above four reasons contained in your letter which are the basis on which the assessments were issued.

1. **This was an isolated transaction and not part of an overall scheme to enhance or further the business of the shareholders**.

   As we have explained on numerous occasions, this was a resolute the transaction and it was not a scheme to enhance or further the business of the shareholders. The sale of shares arose as a result of the requirement by both our clients to comply with the provisions of the Financial Institution Act 2004. The background of the transaction is as follows: On the 4 January 2006 the Executive Director Supervision ("the EDS") of the Bank of Uganda, observed that 96.5% of the shares of Orient bank were held by related persons namely Mr. Ketan Morjaria holding 49%, Mr. Rajni Karia holding 42.5% and Mr. J Karia, who is Mr. Rajni's son and Ketan's brother in law, holding 5%. The EDS advised our clients that this position contravened the provisions of section 24 (1) of the Financial Institutions Act, 2004. This is because all the shareholders, who are related persons, were in control of the bank, yet they were neither a reputable financial institution nor a reputable public company. On the basis of the banks shareholding structure, the EDS directed the bank to reduce the related persons shareholding to a maximum of 49% of the Banks authorized share capital within a period not exceeding 3 (three) years. The EDS further directed the Orient bank to give the bank of Uganda a written plan of action as to compliance with the directive within 90 (ninety) days of receipt of the directive.

   In compliance with the directive of the bank of Uganda and pursuant to be written plan of action that was submitted within the stipulated time frame, our clients went about finding a suitable investor to purchase shares in the bank. By a share sale and purchase agreement dated 13th of December 2008, our clients sold off 1,950,000 (One million nine hundred and fifty thousand) in the case of Ketan and 2,050,000 (Two Million Fifty Thousand) in the case of Rajni, of their shares respectively, to Bank PHB Nigeria plc, a public limited liability company, organised validly existing and licensed to carry on the business of banking under the laws of the Federal Republic of Nigeria.

It is very clear and evident from the explanation above that the transaction was an isolated one. It was not done by our clients in order to comply with the Section 24 (1) of the Financial Institutions Act 2004. It was not part of an overall scheme to enhance or further the business of our clients. Indeed there was no scheme whatsoever. The question as to whether there was a scheme or not must be based on the facts relating to the circumstances that led to the sale of the shares. Our clients set up the Bank in 1993 and had held the shares as investments in the bank for a period of 16 years. Our clients do not deal in buying and selling of shares**.**

2. **There was an element of profit**.

   This is true that there was a profit made on the sale of the shares. The fact that the profit was made does not automatically mean that there is tax payable. As you are aware, according to section 4 of the Income Tax Act (cap 340), income tax is charged on chargeable income only and not on every sale that has an element of profit. We submit that the capital gain that arose from the sale of the shares is exempt from tax in accordance with section 21 (1) (k) of the Income Tax Act.

3. The gain was a realisation of an investment and not a profit in the course of furthering the business through a business venture.

   The capital gain arising from the sale of the shares is not a business income. It is not possible for the gain arising from the sale of the shares to be "income derived from an adventure in the nature of the trade", unless our clients were trading in shares. It is a fact that our clients were not, and are not in the business of trading in shares. It is also fact that the shares held by our clients in Orient Bank are not their trading assets or trading stock. It is not lawfully possible for the gain to be taxed as a business income under the provisions of section 18 (1) of the Income Tax Act, unless the gain was derived from the disposal of a business asset.
   Our submission in response to your position that the gain was not a realisation of an investment is as follows:

   (i) The shares held by our clients in Orient Bank Limited are not business assets. This is because the shares were not used, or held ready for use in the business by our clients. Business asset are defined in section 2 (h) of the ITA, as an asset used or held ready for use in a business by a taxable person since our clients are not in the business of dealing or trading in shares, the share they held in Orient Bank were not their business assets.

(ii) The shares held by our clients in Orient Bank Ltd were capital assets. This is because shares are capital assets in nature, unless one is in the business of buying and selling shares, in which case the shares would be held as trading stock. Since our clients are not in the business of buying and selling shares, the shares they held in Orient bank were held as their capital investments. Since the shares are capital assets in nature, the gain arising from the sale of these shares is a capital gain.

(iii) When our clients are sold part of their shares in Orient Bank, they made a capital gain. However, since this capital gain did not arise from the sale of business assets, that gain is not taxable as business income.

(iv) According to section 18 (1) (a) of the ITA business income includes any amount of a gain derived by a person on the disposal of a business asset. Since the shares held by our clients in Orient bank are not business asset as defined in section 2 (h) of the ITA, the gain arising on the sale of the shares is not a business income.

Prior to the recent amendments made to section 21 (1) (k) of the ITA, any capital gain that is not included in section 18 (1) (a) definition of business income, was exempt from tax. It therefore follows that the capital gain arising from the sale of the shares our client held in Orient Bank Ltd is exempt from tax. This is in accordance with section 21 (1) (k) of the ITA, before it was amended by Income Tax Amendment Act 2010.

4. The sale of shares was not a vehicle through which the business venture was realised.

We submit that the sale of shares by our client was not a vehicle through which a business venture was realised. The transaction was a sale of part of the shares our clients held in Orient Bank to Bank PHB Nigeria plc. There was no vehicle that was involved and likewise there was no vehicle through which the business venture was realised. There was no business venture realised.

6. Way forward.

On the basis of the four grounds listed in your letter dated 29th of October 2010. It appears that there seem to be a lack of understanding within the URA of the circumstances that led to the sale of the shares. We kindly request that you give our clients an opportunity to meet you and your technical team to explain the nature of the transactions as well as the circumstances that led to the sale of shares.

As you would appreciate, the amount is assessed on both our clients are very big and we kindly request that these assessments are vacated as we endeavor to find a solution to the issue. We are also aware that the issue of taxation of capital gains from the sale of shares in private limited companies has been discussed by yourselves and various taxpayers in the past and the practice has always been to treat such gains as exempt from tax in accordance with section 21 (1) (k). We also understand that the recent amendments in the Income Tax Amendment act 2010 were aimed at making such gains subject to tax with effect from 1 July 2010. Since the disposal of the shares took place in 2008, the recent amendment to section 21 (1) (k) of the Income Tax Act does not apply to the transaction.

Finally if you are still the view that the gains are subject to tax as business income, we respectively request that you explain the technical basis of your position citing all the relevant sections and provisions of the taxable in response to our declared submission in paragraph 3 above. This will enable us to advise our clients accordingly. …"

After their appearance in Court on the 18th of December 2010 and in pursuit of the objection lodged with the Commissioner under section 99 of the Income Tax Act, the Applicants applied for a waiver of the 30% deposit of the tax assessed under section 103 of the Income Tax Act. However, the Commissioner General declined to waive the 30% deposit requirement. The Applicants apparently did not pay the 30% deposit prompting Uganda Revenue Authority to write to the Registrar of the Commercial in a letter dated 20th December 2010 asking for an earlier hearing date of the Application and for directions from court on the ground that the applicant had not paid 30% which was a conditional requirement for the resolution of the dispute. In other words the Commissioner General has not ruled on the objection to assessment and is unlikely to rule on the same on the basis that the applicants have not deposited 30% of the tax assessed. In addition the Respondents filed a supplementary affidavit in reply outlining the same position sworn by one Golooba Rodney on 3 January 2011. On 6 December 2010 in High Court civil suit number 398 of 2010 Messrs Kampala Associated Advocates filed a notice of change of advocates indicating that they have taken over the conduct of the suit and all matters arising there from. The previous Advocates were Messrs A F Mpanga and company advocates.

At the hearing the first Applicant was represented by Counsel Mpanga David of AF Mpanga and Company Advocates while Oscar Kambona of Kampala Associated Advocates appeared for the second Applicant. Ali Sekatawa appeared for the Respondent.

Counsel David Mpanga submitted that the application sought a temporary injunction to restrain the Respondents from directly or indirectly taking any steps towards the applicant to enforce payment of tax assessed under the stated notices of assessment issued on the 3rd of November

2010 pending determination of main suit. He recited the purpose of the suit which is mainly for declarations, injunction, damages and costs against the Respondent.

Counsel further summarised the facts as contained in the affidavits of the first Applicant. I do not need to restate the facts here. The facts are not in dispute. He submitted that the tax was on gains. That Orient Bank limited is a private limited liability company and the applicants will contend in the suit that prior to the 1st of first of July 2010 of the Income Tax Act before its amendment in 2010 there was an exemption of capitals gains on sale of shares in private limited liability companies under section 21 (1) (k) and 18 of the Income Tax Act. Counsel submitted that the Applicants by the suit intend to assert that the gain arising out of sale of shares in Orient Bank Ltd was not a profit or an adventure in the nature of trade but the result of a directive from BOU. The Applicants also seek a permanent injunction in the main suit. That there was a threat of imminent enforcement of payment by the Respondent. Counsel further submitted that the supplementary affidavit the first Applicant avers that the applicant's had sought a waiver of the 30% deposit pending the resolution of the tax objection under section 103 of the Income Tax Act. The basis of the application was that the objection lodged with the Commissioner General was reasonable. The Commissioner General on the grounds of objection noted that there was a difference of opinion in interpretation of tax law. Counsel referred to annexure "D" to the second affidavit of the first applicant being an opinion dated the 2nd of December 2010 by Richard Bramwell QC. A very experienced and renowned tax Lawyer. He submitted that the law on the law on temporary Injunctions is trite. Counsel referred to the three authorities of **American Cynamide versus Ethicon**; **Kiyimba Kaggwa and Hajj Adbul Nasser Katende (1985) HCB 43** and **Noor Muhamad Jan Muhamed versus Kasamali Virji**. Counsel David Mpanga also summarised the law on temporary injunctions. In that it is based on the discretionary power of the court; is meant to maintain the status quo pending investigation of matters and settlement of the dispute and the applicants have to prove that there is prima facie case with a probability of success. That this has been interpreted to mean that the suit is not trivial and that if the injunction is not granted, there would otherwise be irreparable injury which cannot be adequately compensated in damages. Where the court is in doubt it then considers the balance of convenience.

Counsel submitted that the pending suit is a meritorious suit, in so far as the actions of the Commissioner General in her assessment of tax do not appear to be acting within the 4 corners of the Income Tax Act. This contention is supported by the correspondence of the Applicants tax advisors and the opinion of Richard Bramwell QC.

Counsel further submitted that the sums assessed are colossal. I.e. 20 billion and 21 billion that if by extension the 30% deposit is enforced, it would cause damages that cannot be compensated by damages. That enforcement of the tax assessed would entail loss of business

reputation. The Applicants have co shareholders and are supervised by Bank of Uganda. Tax assessments and enforcement tend to bring an innuendo of some kind of impropriety or attempt at evasion and the like. The Applicants would appear not have taken an adequate tax advice. Prior to entering the share sale transactions. Enforcement procedures cause several parties to become aware of tax disputes. There would be questions of solvencies. Perhaps all of these things may be compensated with damages. However the applicants cannot be adequately compensated because such questions will linger in minds. They would become the embattled party and people do not want to deal with that. They would lose business opportunities open to them. These opportunities once lost are difficult or impossible to put the parties back into their original position.

Lastly counsel submitted that the balance of convenience favoured granting the injunction. Counsel further submitted that if the aim of the Respondent's exercise is to grow the tax payer's fund, the balance of convenience rests with granting the injunction in the terms set out in the chamber summons.

Counsel Oscar Kambona, counsel for the second Respondent agreed with Counsel David Mpanga and prayed that a temporary injunction be granted restraining the Respondent. For emphasis he contended that there is a prima facie case with a high probability of success. This is because the suit seeks two declarations. The first declaration is that a capital gain on sale of shares in a private limited liability company was exempt from tax prior to the 1st of July 2010. For emphasis he submitted that the transaction before court was effected prior to the 1st of July 2010 and therefore prior to the amendment to sections 21 (1) (k) of the Income Tax Act which made such capital gain exempt from tax. Therefore prima facie there was no tax due and payable. The second declaration sought is that the sale of the shares was not an adventure in the nature of trade and the facts of this sale are contained in the plaint. The sale was the result of a directive of the Bank of Uganda that shares must be sold to comply with the Financial Institutions Statute 2004. Consequently this was not an adventure in the nature of trade. The position of the Applicant is supported by the arguments in correspondence of Messrs PriceWatersHouseCoopers and Richard Bramwell QC. A prima facie case has been disclosed. Counsel Kambona lastly referred to annexure "E" of the second affidavit of the first applicant being a letter dated 9th December 2010 written by the Commissioner General on the issue of whether 30% deposit should be waived. Counsel submitted that the letter at paragraph 2 thereof acknowledges that there is an issue to be determined thus confirming that there are serious matters which require the attention of this honourable court.

Counsel submitted that it is the High Court which has the mandate to interpret the law and not the Uganda Revenue Authority. He agreed with the submissions of Counsel David Mpanga that

damages arising from the collection of the assessed amount cannot be atoned for by damages and that the balance of convenience favours the applicant.

For the Respondent, Counsel Ali Sekatawa opposed the application. He submitted that the context in which the Respondent applied for the application to be heard earlier by court was relevant. Firstly the court had directed on account of the Applicants having lodged an objection with the Commissioner General under section 99 of the Income Tax Act to first explore the internal mechanism of the Respondent. Once the tax payer makes an objection section 103 provides that the tax payer pays 30 percent of the assessed tax in dispute or that part not in dispute whichever is greater (see section 103 (2) ITA). The earlier interim order issued by the court was made before the due date because the 45 days had not lapsed and therefore the Respondents counsel conceded to the application for an interim order. Court then extended that interim order for 90 days to enable the CG consider the objection under section 99 of the Income Tax Act. Counsel submitted that under section 99 (7) if an objection is not made within 90 days the objection is taken as having been allowed. Yet a tax payer is to pay 30%. He referred to the case of the Supreme Court namely **Uganda Implementation and Management Centre versus URA CA 2 of 2009**. He submitted that under this decision, the payment of 30% deposit before resolution of a tax dispute is mandatory. The principle is "*pay now and argue later*". Counsel referred to page 25 of judgment. The problem that arises in this matter is that if the Commissioner General does not make a decision, the tax payer can elect and assert that the objection has been allowed. Consequently the Respondent applied to court and asked for guidance. He asserted that this went on to emphasise that the proceedings before the Commissioner General and that before the High court were two parallel processes.

Counsel for the Respondent further contended that before he could address the court on the principles applicable in applications for temporary injunctions, the nature of this application and the grounds thereof warranted the court to look at them from the perspective of order 43 rules 4 which provided for a stay of a decree (pending appeal to the High Court). This is because the Applicants have come to court to challenge an assessment by the Commissioner General. This assessment is enforceable when one examines the Income Tax Act. Under the Act, an assessment is as good as a decree of court. The Constitutional Court in the above cited case has held that an assessment by the Respondent is valid until vacated by a court of competent jurisdiction.

Under section 104 of the Income Tax Act, the assessment and taxes arising therein is due and payable and is a debt due to the Government of Uganda therefore when staying collection of that assessment, the court should apply the principles in order 43 rule 4 i.e. The court should be satisfied that the applicant has furnished security for due performance of the decree or order. An assessment is akin to a decree.

Counsel submitted that the Respondent opposed the application because the applicants have not met the test required for stay of an assessment which is akin to order 43 rules 4. He admitted that there was no judicial pronouncement on this but requested the court to do so and look at circumstances where a court decree would be stayed to consider the application.

The Respondents Counsel submitted without prejudice that the Applicants have not met the tests for grant of an injunction.

As far as the test for a prima facie case was concerned he submitted that the applicants counsel have laboured to show that the Applicants were exempted. That the gain which was made is exempted under section 21 (1) (k). This section exempted any capital gain not included in business income. The Respondents case is that the gain that was made is included in their business income. At the trial the Respondent shall bring evidence. Consequently there is no prima facie case. On whether this was an adventure in the nature of trade, counsel submitted that there is a wealth of cases. I.e. where government compulsorily acquires land and where a profit is made, this is taxable. He submitted that according to annexure R1 and R2 of the Applicant's affidavit it is an undisputed fact that the applicants made profits as stated in the assessment. According to counsel this profit amounts to 69 billion and 72 billion showing that there is no prima facie case. As far as the ground of whether there would be irreparable injury, Counsel for the Respondent submitted that the grounds advanced by the applicant that they will suffer irreparable injury due to the tendency to give innuendo of evasion and tarnish their reputation cannot be sustained. On this matter the case of **American Cynamide** is very instructive on the doctrine of irreparable injury. The case of **Meera Investments versus URA at page 11** refers to the **American Cynamide case**. The question is whether if the money is recovered or 30% collected the applicants would suffer loss that you cannot be atoned for adequately by an award of damages. Court observed that if the taxpayer pays taxes and later court makes a finding that the tax payer ought not to have paid, the taxpayer is entitled to a refund with interest under section 113 of the Income Tax Act. This means that it can be remedied by way of refund of the money paid.

Secondly counsel submitted that payment of tax is not an act of bankruptcy. Paying tax is not a defamatory act neither is it a criminal act. It is an obligation to all citizens or residents. There would be no injury to the Applicant's reputation if they paid.

Thirdly the first Applicant is a British citizen of sound. The second Applicant is also a British citizen. Yet there is an assessment of 40 billion against them. These are individual assessments. This is a debt due to government and court has not vacated assessment, moreover the applicants received this money. He prayed for the court to dismiss the application and order the applicants to pay this money. On the balance of convenience he prayed that the court considers the public interest issues on this matter. Should the court be inclined to grant the

injunction, the applicants should be ordered to pay 30% and give security for the 70% of the assessed amount.

In rejoinder, Counsel Mpanga submitted that it was erroneous to contend that the test for grant of a temporary injunction should be the test under order 43 of the Civil Procedure Rules rather than order 41. There is no judicial pronouncement to that effect to persuade this honourable court. He submitted that the Respondents who were in the business of issuing demands for others people's money may have developed the belief that their word is a decree. There is only one authority which can issue decree (I.e. under the Judicature Act, court). An assessment is just an assessment. It cannot be said that that assessment is an order akin to a decree of court. By applying order 43 the Respondents Counsel implies that that assessment is in issue. The principles to be applied to injunctions take into account that there is an outcome that is contested by the parties and order 43 of the Civil Procedure Rules is not relevant. He submitted that this highlights the arrogance and high handedness of the Applicants.

On the prima facie case Mpanga submitted that counsel Oscar correctly responded and stated that there is a difference of opinion on a matter of law. It is this issue of whether a sale upon direction of the regulatory body is an adventure in the nature of trade as contained in the opinion of Bramwell QC. Further referred to annexure "E" of plaint letter dated 14th June 2010 giving very clear contentions of law. The applicants have been in Uganda for 16 years holding their shares until they were told to sell. It is far from trivial in substance of law and as to the amounts in question.

As far as irreparable injury is concerned, the point is not that it cannot be refunded with interest. Interest does not take into account countless lost opportunities. Because the amount is large the resulting loss is also large. Is it fair that the tax payer should be at risk of costs and damages?

As far as reputation is concerned, payment of tax is not criminal. If this tax was lawfully due, prudent law abiding law citizens would have paid it by self assessment. The Applicants are concerned by the suggestion and innuendo of trying to avoid taxes or that they are ill advised or incompetent.

Regarding the prayer that some payment is made as condition for the injunction i.e. the argument of "pay now argue latter", the court has discretion whether it requires a form of security. The court can ensure that if matters were to go against the applicant, they would be capable of paying. They are still share holders in Orient bank. Being British should not invite discrimination against them. They are resident here and Britain is a country in which Uganda has reciprocal enforcement procedures.

Where the court is inclined to impose conditions, it should consider taking a guarantee with regard to the 30% of the assessed amount. Because in any event satisfaction will have been required that would have been the amount in issue. He reiterated his earlier prayers.

Oscar Kambona in rejoinder submitted that the learned counsel for the Respondent had submitted that there is no prima facie case because the income in issue is included in the business income and that therefore section 21 (1) (k) does not apply. Briefly, for it to be business income you must have disposed of a business asset. A business asset is defined in the Income Tax Act under section 2 (h) as "an asset used or ready for use in a business". Shares are an investment and not held as a business asset. This is a triable issue to be addressed by this court.

Finally Kambona submitted that the case referred to of **Uganda projects implementation** is distinguishable in that it does not hold that 30% should be paid in all cases. It was a constitutional reference on whether the 30% deposit requirement contravened the constitutional right against discrimination. The case is not relevant. He reiterated the Applicants prayers and joined issue with counsel for the first Applicant as submitted. A guarantee should suffice for the portion of the 30%.

I have carefully considered the pleadings of the parties and the submissions of counsel. The applicants application was filed under order 41 (2) (1) of the Civil Procedure Rules. This rule is peculiar and may be differentiated from order 41 (1) of the Civil Procedure Rules. The relevant rule reads as follows:

> "in any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing breach of contract or injury complained of, or any injury of a like arising out of the same contract or relating to the same property right.

I was referred to may authorities on temporary injunctions but none of them specifically dealt with order 41 rule (2) (1). The case of **Kiyimba – Kaggwa vs. Katende [1985] H.C.B. 43** dealt with an application under order 37 rule 1 (now order 41 rule 1) whose wording is different from order 41 (2) (1). In the case of **Noormohamed Janmohamed vs. Kassamali Virji Madhani [1953] 1 EACA 8** the Court of Appeal for East Africa interpreted order 39 rule 1 of the Civil Procedure (Revised) Rules 1948 of Kenya, though the application for a temporary injunction also quoted rule 2 (1) of order 39. Sir Newnham Worley quotes order 39 rule 1 which is in *pari materia* with order 41 (1) at the bottom of page 10 of the judgment and his decision which is the judgment of court rests on an interpretation of this rule (which is in *pari materia* with order 41 (1) of the

Civil Procedure Rules). Order 41 (2) (1) of the Civil Procedure Rules has a different wording from order 41 (1) and should be interpreted on the basis of its own language. Order 41 (2) (1) deals specifically with suits filed to restrain the defendant from committing *a breach of contract or causing other injury of any kind* whether compensation is claimed in the suit or not. There firstly has to be a suit to restrain the defendant from committing breach of contract or other injury of any kind before an application for an injunction is brought under this rule. This is reflected in the plaint. Under order 41 (1) however it has to be proved by affidavit that "(a) *any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or (b) that the defendant threatens or intends to remove or dispose of his or her property with a view to defraud his or her creditors."*

It is an essential requirement of order 41 rule 1 that the matter in dispute should be ***any property***. It should be the property in dispute which is in danger or being wasted or damaged etc. The court is then moved to save the property. Alternatively, if the property is not in dispute, the defendant must have threatened or intended to remove it or alienate it in any way with a view to defraud his or her creditors. Qualitatively therefore order 41 rule 1 and order 41 rule (2) (1) of the Civil Procedure Rules deal with different case scenarios.

This distinction is captured by common law precedents. In cases of breach of contract or other injury, injunctions may be granted to prevent breach of contract or the threatened or intended injury or loss. In the case of **Montgomery vs. Montgomery [1964] ALL E.R. 22** at page 23 Ormrod J granted an injunction to a wife to prevent the husband from molesting her and having access to her flat. All she had to prove was a threat by the husband to do what he was restrained for and this jurisdiction is exercised to protect a legal right. The husband was restrained from accessing her flat. Injunctions can be granted solely to protect a legal right. (Page 24 paragraphs C – I) At page 23 paragraphs G – I lays out the principles for grant of an injunction to protect a legal right (I.e. prevent breach of contract.)

> "The jurisdiction to grant injunctions derive from the Supreme Court Judicature (Consolidation) Act, 1923, s. 45 (1) which is in these terms:
>
> > *'The High court may grant a mandamus or an injunction ... by an interlocutory order in all cases in which it appears to the court to be just or convenient so to do". (Emphasis added)*
>
> Notwithstanding the extremely wide terms of this sub-section, it is, I think, a fundamental rule that the court will grant an injunction only to support a legal right."

According to the provisions of the Judicature Act Cap 13 Sect 37(1) the High Court may grant an order of mandamus or an injunction or appoint a receiver by an interlocutory order *in all cases in which it appears to be just or convenient to do so.* This provision gives the High Court wider

discretion than that under the Civil Procedure Rules. Section 37 (2) of the Judicature Act further provides that the order may be made unconditionally or on such terms as the High Court thinks just. The Judicature Act gives the High Court wide discretion to grant injunctions where the justice of the occasion so demands.

The case of **Montgomery versus Montgomery** was followed in the case of **Margaret, Duchess of Argyll (feme Sole) v Duke of Argyll and others.[1965] 1 ALL E.R. 611 between pages 634 – 636** where the Court enunciated the principle for grant of injunction to protect a legal right. This right to an injunction does not depend on the existence of property. Order 41 (1) of the Civil Procedure Rules of Uganda however is premised on the existence of property which is in danger of being alienated. In the above cited case, it is noted that the jurisdiction to protect a legal right used to be exercised by the courts of Chancery. Then it was enacted under the Supreme Court of Judicature (Consolidation) Act 1925 of the UK which widened the jurisdiction of the court. It was also observed that the courts of chancery always had "jurisdiction to prevent what the court considered and treated as a wrong, whether arising from the violation of unquestionable right or breach of contract or confidence." (See page 634 paragraphs G – H.) Order 41 (2) (1) of the Ugandan Civil Procedure Rules enacts this law and in my view should be distinguished from order 41 rule 1 of the Civil Procedure Rules whose intention is to preserve property in dispute or preserve property which is in danger of being alienated by the defendant to defraud his or her creditors. The case law with regard to preservation of property would not directly apply to injunctions under order 41 (2) (1). To emphasise the nature of rule 2 of order 41, the head note of the provision clearly reads "**Injunction to restrain breach of contract or other injury**". As we noted the Judicature Act cited above and the CPR order 41 (2) (1) supports a legal right by injunction. This jurisdiction is exercised to support a legal right. It may be asserted that the matter in controversy in the main suit is whether the Commissioner General made an authorised assessment in terms of article 152 (1) of the Constitution. Article 152 (1) of the Constitution of the Republic of Uganda provides that: "(1) No tax shall be imposed except under the Authority of an Act of Parliament." Where the Act of Parliament exempts the income, there is no authority to impose the same under the Constitutional provision above.

The general principles for grant of injunctions are summarised in the case of **Giella v Cassman Brown And Company Ltd [1973] EA 358** where the Court of Appeal at Kampala hold at page 360 paragraphs E that the firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction would normally not be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages and thirdly, if the court is in doubt, it will decide an application on the balance of convenience. The purpose of a injunction is to maintain the status quo until the dispute to be investigated in the suit can be finally disposed of. (See **Robert Kavuma v Hotel International Ltd Supreme Court Civil Appeal NO. 8 of 1990 reported in**

(1993) II KALR 73 Judgment of Honourable Justice Oder JSC at page 93; **Noormohamed Janmohamed vs. Kassamali Virji Madhani [1963] 1 EACA 8)**

As far as the requirement to establish a prima facie case is concerned, the plaintiff need not prove that his case has an overwhelming chance of success. All he or she needs to establish is that questions have arisen that merit judicial consideration. In the case of **American Cynamide Co. v Ethicon [1975] 1** ALL E.R. 504 at page 508 paragraphs j – page 509 Para (b) Lord Diplock lays down the principle that the decision whether or not to grant an interlocutory injunction is taken when the "existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action". AT page 510 paragraph D – F he further notes that the courts function at this stage is not to resolve conflicts of evidence based on affidavits but to wait for more detailed argument before the case is finally resolved. All the plaintiff needs to show by his action is that there are serious questions to be tried and that the action is not frivolous or vexatious. (See pages 510 c – d). I will therefore turn to the facts of this application and address the principles in turn.

Turning to the facts of this case, I would first like to comment on the "context" in which this application has been brought. Counsel for the Respondent prayed that this court addresses the context of the application and in light of the fact in his view that the proceedings before the High Court and that before the Commissioner General are two parallel processes. It is therefore pertinent that I review the procedure adopted by the Applicants in this matter and make some observations about how matters of this nature should ordinarily be handled. The facts in this application are not in dispute. The applicant does not contest the quantum of the assessment, and their grievance can only be resolved by interpretation of law. In other words they would have no contention with the assessment if the income in question was not exempt from tax. The subject matter of the main suit is essentially an objection to the assessment of the Applicants for income tax by the Commissioner arising from the sale of their shares in Orient bank Ltd to a third party. The issue that arises from the assessment is whether the income arising from the sale of the shares in their case is exempt from tax. If it is not exempt, then it is payable to the Commissioner under section 104 of the Income Tax Act. The quantum of the assessment is not in issue.

The Applicants filed High Court Civil Suit NO 0398 of 2010 against the Respondent on 4 November 2010, through Messrs AF Mpanga and Company Advocates. On the same day they also filed High Court Miscellaneous Application No. 628 of 2010 being the current application for a temporary injunction and High Court Miscellaneous Application No. 629 of 2010 being an application for an interim order of injunction pending the hearing of the main application for a temporary injunction. The next day on the 5 November 2010, through

PriceWatersCoopersHouse, the applicants lodged an objection to the assessment by the Respondent under section 99 (1) of the Income Tax Act cap 340 Laws of Uganda.

It must be noted that this dispute arose under the Income Tax Act cap 340. Specific statutory provisions have outlined the system for resolution of tax disputes under this Act. Section 99 subsection 1 of the Income Tax Act provides that a taxpayer who is dissatisfied with an assessment may Lodge an objection to the assessment with the Commissioner within 45 days after service of the notice of assessment. Section 99 subsection 5 of the Income Tax Act provides that the Commissioner may allow or disallow the objection. In other words, the Commissioner has powers to decide on the merits of the objection. The Income Tax Act further provides under section 100 (1) that a taxpayer who is aggrieved or dissatisfied with an objection decision made by the Commissioner may challenge the decision. The Act gives an aggrieved party two avenues to choose from. These optional remedies are under section 100 (1) of the Income Tax Act namely (a) the aggrieved tax payer may elect to appeal to the High Court; or (b) may opt to file an application for review of the objection decision by the Tax Appeals Tribunal set up by Parliament in accordance with article 152 (3) of the Constitution of the Republic of Uganda. Section 100 of the Income Tax Act envisages the High Court of Uganda as an appellate court for purposes of resolution of disputes arising from assessment by the Commissioner of income tax. In other words the Income Tax Act gives the High Court of Uganda appellate jurisdiction from objection decisions of the Respondent. It is pertinent to note that under section 100 (2) of the Income Tax Act the mode for lodging an appeal under the section is by notice of appeal. It is further pertinent to note that an appeal under section 100 (4) of the Income Tax Act may be made to the High Court on questions of law only. The law gives both appellate jurisdiction and provides the mode or procedure to be followed. Appellate jurisdiction is a creature of statute. In the case of Attorney-General v Shah (No 4) [1971] 1 EA 50 (CAK) Spry Ag. P. held at page 50: “It has long been established and we think there is ample authority for saying that appellate jurisdiction springs only from statute. There is no such thing as inherent appellate jurisdiction. … In any case, the position is now regulated by Art. 89 of the Constitution of Uganda and Part IV of the Judicature Act 1967, which made it clear that this court has only such jurisdiction as is conferred on it by Parliament” Appellate jurisdiction assumes that a lower court or tribunal has already handled the matter.

The issues that arise with the procedure that has been adopted by the Applicants include the following:

1. That the Applicants filed an original suit in the High Court challenging assessment of income tax by the Commissioner General and soon thereafter, the Applicants through their tax advisers lodged an objection to the assessment with the Commissioner. There

are therefore two parallel proceedings challenging the specific assessment of the Applicants income tax by the Commissioner.

2. When the application for a temporary injunction came before me, the parties agreed that the High Court should stay its own proceedings to give the Commissioner General an opportunity to make an objection decision pursuant to the Applicants application for the same. The court also directed that if the need arose the parties would approach the court sooner than the 90 days within which the objection should have been disposed of by the Commissioner.

3. The Applicants subsequently applied to the Commissioner General to waive the requirement for the deposit of 30% of the tax assessed pending the resolution of the objection to assessment.

4. It however transpired that the Commissioner General declined to exercise her discretion under section 103 (3) of the Income Tax Act to waive the requirement for the Applicants to deposit of 30% of the tax assessed prior to the handling of the objection to assessment.

5. There was therefore a stalemate and the Respondent moved court to hear the main application for a temporary injunction sooner without the Commissioner General having made an objection decision. The Respondent also seeks some guidelines in this matter.

I have already noted that ordinarily a taxpayer who is dissatisfied with an assessment may lodge an objection to the assessment with the Commissioner General within 45 days from the date of notice of assessment. In case the Commissioner disallows the objection wholly or in part, the Income Tax Act further gives the objector an option to apply for the review of the objection decision to the Tax Appeals Tribunal or appeal to the High Court on points of law only. If this procedure is followed, the applicants would be obliged to pay 30% of the amount assessed unless otherwise waived by the Commissioner General. By the time this application was argued before me, the Commissioner General had not yet decided on the objection to assessment. Counsel for the Respondent submitted that the Commissioner General is in a precarious situation in that under section 99 (7) of the Income Tax Act and to quote: "*where an objection decision has not been made by the Commissioner within 90 days after the taxpayer lodged the objection with the Commissioner, the taxpayer may, by notice in writing to the Commissioner, elect to treat the Commissioner as having made a decision to allow the objection*." It follows, that the Commissioner General must make an objection decision within 90 days after the taxpayer lodges the objection with the commission or else the taxpayer would elect to treat the objection as having been allowed. Yet at the same time the taxpayer has not

complied with section 103 (2) of the income tax act which requires the payment of 30% of the tax assessed. I do not however agree with the Respondents Counsel that the Commissioner General is in a precarious position. The requirement to pay 30% is procedural and failure to pay does not stop the Commissioner General from deciding the objection. To use the analogy of the Court of Appeal of Uganda it is the practice that where an Appellant who is ordered to pay security for due performance of a decree fails to pay, the appeal will be dismissed. The Commissioner has power to dismiss or disallow the objection within the 90 days prescribed. I suggest that the Commissioner Cannot enforce for the 30% as the lodgment of an objection to assessment is at the option of the tax payer or aggrieved person. In other words the Commissioners hands are not tied in the absence of a restraint order or stay of proceedings by the High court. The matter before the Commissioner General therefore remains pending. It follows that the question for me to decide is whether it is proper and lawful to file parallel proceedings in two forums seeking the same remedies. I have examined the analogous provisions of section 6 of the Civil Procedure Act cap 71 which provides that: "*no court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where the suit or proceeding is pending in the same or any other court having jurisdiction in Uganda to grant the relief claimed…*"

The intention of section 6 of the Civil Procedure Act is clearly to bar the filing of parallel proceedings between the same parties for the same relief. The suit filed earlier seems to take precedence. Even though this suit in the High Court was filed on the 4th of November 2010 that is before the Applicant wrote the objection to assessment and lodged the same with the Commissioner the same remedies as in the High Court suit are more or less claimed. Moreover summons to defendant were issued by the High Court on the 5th of November 2010, the same day the applicants wrote to the Commissioner objecting to assessment. There is however no clear evidence as to the date when the objection to assessment was lodged with the commissioner. This could have been on the 9th of November 2010. It was incumbent upon the applicant to drop one of these proceedings. Both of these proceedings challenge the assessment. A party should exercise an option but not wait to see which decision will turn out to be more favourable. What if the decisions are contradictory? However this is not the end of the problem. I have already noted that the High Court enjoys appellate jurisdiction from an objection decision. Before I comment on this appellate jurisdiction we need to examine the law.

Presumably, the applicants have moved court under its unlimited original jurisdiction. The High Court has an unlimited original jurisdiction over all matters and causes in Uganda under article 139 (1) of the Constitution of the Republic of Uganda. This article cannot be read in part only. It also recognizes in the same clause the appellate jurisdiction of the High Court as prescribed by

Parliament. To quote article 139 (1) provides: *The High Court shall, subject to the provisions of this Constitution, have unlimited original jurisdiction in all matters* ***and such appellate and other jurisdiction as may be conferred on it by this Constitution or other law****. (Emphasis added)*. The very same clause granting unlimited original jurisdiction caters for appellate jurisdiction conferred by the Constitution or other law. We can say that the Income Tax Act particularly section 100 (1) which confer Appellate jurisdiction on the High Court on matters relating to assessment for tax, is such other law. It follows that the Jurisdiction envisaged by the Income Tax Act for purposes of objection decisions to the High Court is Appellate jurisdiction and not original jurisdiction. I have also examined section 14 of the Judicature Act cap 13 laws of Uganda. It crystalises this point and provides: "Jurisdiction of the High Court. (1) the High Court shall, subject to the Constitution, have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by the Constitution or this Act or any other law." Section 14 (2) provides: "Subject to the Constitution and this Act, the jurisdiction of the High Court shall be exercised (a) in conformity with the written law, including any law in force immediately before the commencement of this Act;"

It is my humble finding that though the Constitution and the Judicature Act clearly give the High Court unlimited original jurisdiction in all matters, it also gives the High Court such appellate jurisdiction and other jurisdiction as is conferred by the Constitution and any Act of Parliament. This original jurisdiction shall be applied in conformity with the written law. The written law and the intention of Parliament under the Income Tax Act give the High Court specific appellate jurisdiction from an objection decision made by the Commissioner General. Why should the High Court exercise original jurisdiction in this respect?

To illustrate this point, Chief Magistrates Courts have jurisdiction to handle civil suits whose pecuniary value is up to a maximum of **Uganda shillings 50,000,000/=**. The High Court has unlimited original jurisdiction in such civil suits as well! However the Constitution under article 139 and the Magistrates Court Act give the High Court appellate jurisdiction from decisions of subordinate courts. Should the High Court exercise original jurisdiction with the Magistrates Courts concurrently? It cannot be said that because an appeal lies to the High Court from the decisions of Grade 1 and Chief Magistrates that this ousts the original and inherent jurisdiction of the High Court to handled suits falling within their pecuniary jurisdiction. There is therefore a clear policy issue that a civil suit within the pecuniary jurisdiction of Magistrates Courts should be filed in the Magistrates Courts to enable the High Court exercise both Appellate and supervisory powers. The question in this case can be examined by looking at the issue of whether an appeal lies from an assessment. It is clear from the Income Tax Act that an appeal lies only from an objection decision and upon the election of the taxpayer to appeal to the High Court. No appeal lies to the High Court from an assessment. The suit filed by the Applicants is not an appeal as envisaged in the Income Tax Act but an ordinary suit which challenges the

assessment of the applicants for income tax on a particular transaction. It should be noted that the Commissioner General has not made an objection decision and therefore an appeal does not lie to the High Court. The Income Tax Act does not oust the original jurisdiction of the court. However, it guides the court as to how to exercise that jurisdiction. The issue of the original jurisdiction of the High Court has been considered by the Supreme Court in the case of **Uganda Projects Implementation and Management Centre versus Uganda Revenue Authority Const Appeal No. 2 of 2009. Kitumba** JSC who delivered the judgment of court held at page 21 that such original jurisdiction can be exercised by judicial review of administrative action. To quote:

> "Judicial review of administrative action is, in my view, original jurisdiction of the High Court and cannot be taken away by any other law because it is conferred on it by the Constitution, which is the Supreme Law of the land. ***See Article 2 of the Constitution***…"

The High Court can check the powers of the lower tribunals though judicial review. Consequently a party need not be afraid that the Respondent will not act judicially in handling an objection. The High Court has powers to intervene. The right to apply to a court of law is also saved by article 42 of the Constitution which provides that: *Any person appearing before any administrative official or body has a right to be treated justly and fairly and shall have a right to apply to a court of law in respect of any administrative decision taken against him or her.* Where there is a breach of a fundamental right article 50 of the Constitution applies because it saves jurisdiction of courts to enforce fundamental rights and freedoms. However, it must be noted that these actions are based on the constitution and not the Income Tax Act which prescribes the mode of challenging an assessment. The unlimited original jurisdiction of the High Court was also emphasized in the case of **Commissioner General Uganda Revenue Authority versus Meera Investments Ltd Supreme Court Civil Appeal No. 22 of 2007** where it was observed that the Appellate jurisdiction of the Tax Appeals tribunal does not oust the original jurisdiction of the High Court. However Hon. Justice Kanyeihamba JSC who delivered the judgment of the Supreme Court noted that the dichotomy between appellate jurisdiction and original jurisdiction and that this dichotomy applies in certain cases and to quote at pages 12 – 13 of the judgment of court. *"In my opinion the learned Justice of Appeal is correct on this interpretation of the constitutional provisions Vis–avis Acts of Parliament. As I observed earlier in this judgment the dichotomy is more pronounced in a case like the present one where a taxpayer is actually challenging the Commissioner General's powers to impose tax on property. That kind of dispute properly belongs to the jurisdiction of the High Court and not of a tax tribunal.*

In this case the Applicants on their own initiative have also lodged an objection to assessment under the Income Tax Act. They have not opted to use one route to resolve their drive to challenge the assessment as was held in the case referred to by the Supreme Court in the above case namely (**Messrs Rabo Enterprises (U) Ltd and Messrs Elgon Hardware Ltd v Commissioner**

General, Uganda Revenue Authority C.A. NO. 51 of 2003.) Both Counsel for the Applicant's have suggested that it is only the High Court which may interpret laws. However, the Income Tax Act is applied by the authority. It follows that anybody with the mandate to apply the Income Tax Act also has the mandate and authority to interpret the act. The objection to the assessment was lodged with the Commissioner General by the applicants themselves and shows that the Commissioner General has both the mandate and the power of considering the objection with powers to either allow or disallow it. It is therefore not true that it is only the High Court which may interpret the Income Tax Act. These powers include the giving of practice notes and private rulings under sections 160 – 161 of the Income Tax Act. The Income Tax Act cannot be enforced without interpretation of its provisions. The kind of interpretation of the High Court must arise out of controversy about the meaning and intention of provisions of the Income Tax Act, their scope or purview. However, in so far as the Applicants are seeking declaratory orders in the suit, I cannot say that it is frivolous or vexatious merely on the basis of the Applicants having filed an original suit and not an appeal as envisaged by an Act of Parliament. Order 2 rule 9 of the Civil Procedure Rules provide that no suit shall be open to objection on the ground that a merely declaratory order is sought thereby and binding declarations may be made whether consequential relief is or could be claimed or not. The inherent powers of the court may be invoked in certain circumstances to make binding declarations that may give guidance on a matter of interpretation of law. In conclusion, the Constitutional Court and Supreme Court in the above cases have not outlined how the inherent original jurisdiction of the High Court should be exercised where it enjoys both appellate and original jurisdiction. So far it has broadly left it to the option of the parties. It is therefore open for me to make some general observations on how this jurisdiction should be exercised.

It is therefore my conclusion as a matter of policy flowing from the Income Tax Act and the binding case law cited above that:

1. A taxpayer who wishes to challenge an assessment should ordinarily file an objection to the assessment with the Commissioner as provided for under section 99 of the Income Tax Act. This would ensure that the High Court if at all it gets involved in the dispute would exercise appellate jurisdiction granted to it by the Income Tax Act under section 100 subsection 1 thereof. There is no need to saddle the court with original jurisdiction when a lower tribunal or subordinate court over which the High Court exercises powers through appeal, supervision or judicial review has powers to handle the dispute. This does not however oust the inherent original jurisdiction of the High court to handle any case as dictated by the circumstances and justice of the matter. The high court should reserve the right to refer a matter back to a subordinate court or lower tribunal established by law seized with jurisdiction in the matter.

2. A taxpayer who wishes to challenge an objection decision made by the Commissioner General may opt either to apply for the review of the objection decision by the Tax Appeals Tribunal or file an appeal from the objection decision the High Court. This is clearly an option created b section 100 (1) of the Income Tax Act. An appeal to the High Court may be filed by way of a suit but with due regard to the procedure prescribed by section 100 cited above.

3. An appeal from an objection decision to the High Court should ordinarily be preferred on points of law.

4. For Uganda Revenue Authority and the Commissioner General to exercise their statutory mandate the High Court should discourage original suits where there is a statutory remedy except in exceptional circumstances and as warranted by the circumstances of each case. Inherent powers are not invoked where there is a specific procedure to be followed. The merit or grounds for filing a suit directly in the High Court and not with the lowest prescribed authority has to be pleaded in the plaint. The High Court has powers in appropriate cases to transfer such cases back to the Commissioner General or for an objection decision under the Income Tax Act.

It may be argued that anybody may apply to the High Court to interpret the law. I have no quarrel with that. However the genesis of this application is a grievance of the taxpayer to the effect that income which was assessed is not liable to be taxed or is exempt from taxation. It is not therefore purely a question of interpretation of law. Be that as it may, I'll proceed to deal with the application while stating that a party is entitled to opt to follow one procedure only and not two parallel proceedings before tribunals or courts exercising concurrent jurisdiction and seeking the same remedies. Granted, proceedings were first commenced by the applicants in the High Court and only later on also commenced or lodged with the Commissioner General. If indeed we proceed with interpretation per se when the matter comes on merits would the court only give directives as to interpretation of law to the Commissioner General by way of declaratory orders? I would however make no further comments on that as it affects the merits of the suit. As far as the suit in the High Court is an original suit and not an appeal, the suit is competent.

(a) Whether there is a Prima Facie Case.

As I have noted above the facts are not in dispute that Ketan Morjaria under assessment No. INRD/LTO/00090 was assessed for **Uganda Shillings 20,135,581,980/-** payable by the 18th of December 2010. Rajni Karia was assessed under assessment No. INDR/LTO/00091 for **Uganda**

shillings 21,168,223,620/= payable by the 18th of December 2010. Both assessments are dated 3rd of November 2010.

Objecting to the assessment the Applicants contend that the income assessed is exempt from tax. The claim in the plaint revolves clearly on points of law which may or may not give a right to the declarations sought to the effect that:

1. Prior to 1 July 2010, a capital gain on the sale of shares in a private limited liability company was exempt income within the meaning of section 18 and 21 (1) (k) of the Income Tax Act chapter 340;

2. That sale of shares in a private limited liability company, upon the direction of a statutory sectoral regulator, is not an adventure in the nature of trade and therefore any gain made there under is not amenable to income tax under sections, 15, 17, 18, and 20 (d) of the Income Tax Act cap 340;

3. There is also a claim for a permanent injunction following from the declarations and for general damages; and costs.

On the other hand the Respondent inter alia denies the above claim and contends that:

1. The transaction in question was included as a business income and therefore not affected by the provisions of section 21 (1) (k) of the Income Tax Act.

2. That the scheme was an adventure in the nature of a trade and liable to tax.

I have already noted that what is important is for the Applicant to prove by affidavit that triable issues arise. It is not necessary at this stage to make comments on the law. The matter in dispute revolves on interpretation of law. Any comment at all will be interpretational and therefore would prejudge the main suit. It is therefore my finding that there is a dispute which has arisen as to whether the income in question is exempt from tax. The fact that there is a triable controversy is supported by a detailed opinion of Bramwel QC annexure "D" to the supplementary affidavit of the first Applicant. It is also supported by the opinion of PriceWatersCoopersHouse filed as an objection to the assessment that I have reproduced above. The letter of the Commissioner General Annexure "E" to the supplementary Affidavit of Ketan Morjaria dated December 2010 supports this view. I agree with Counsel Kambona that this letter shows that a question of interpretation has arisen and there is a difference of opinion. It states at paragraph 2 thereof "*From your objection letter, it is manifest that the grounds of the objection are couched by a difference in opinion as to the interpretation of the law touching on the capital gains realized by your clients in the sale of their shareholding to*

Bank PHB Nigeria. …the grounds are not based on questions of fact, but rather law." The correctness of the opinion in support of the main suit is yet to be tested at the main trial of the suit. The applicant's plaint, the application and affidavits in support of the application disclose a prima facie case in terms of an arguable case which merit judicial consideration. Secondly the suit filed is neither frivolous nor vexatious. Tax may only be imposed under authority of an Act of Parliament. Where the Act exempts the income from tax, it implies that there is no authority to impose the same. Consequently, the Applicants suit is to try whether the law permits the imposition of income tax on the sale of shares in Orient Bank Ltd to a 3rd party by the applicants.

(b) Whether the Applicant is likely to suffer irreparable loss which cannot be atoned for by an award of damages.

An application under order 41 (2) (1) of the Civil Procedure Rules need not proceed on this ground. Order 41 (2) (1) deals with restraint of a threatened breach of contract irrespective of whether damages would ensue. It also deals with threatened injury such as molestation of a wife, the threatened publication of defamatory matter etc and irrespective of whether compensation is claimed or not. A court of law cannot say for instance that even if the matter sought to be published is done, the aggrieved party may be awarded damages for the injury caused by the publication. The breach of contract or other injury would have occurred. The rule seeks to prevent the injury. The violation of a right would have occurred. What injury of any other kind would the Applicants have suffered? This has not been proved to the satisfaction of court. I am very much in doubt as to whether the Applicants would suffer any injury of any kind by being asked to pay tax. The tax would be refunded and with damages if need be should the Applicants succeed in the suit. In view of my uncertainty about this ground, I would decide this application on the ground of balance of convenience rather than that of irreparable loss as this is doubtful.

(c) The balance of convenience,

There is some reasonable measure of agreement between the parties that a tax dispute has arisen which revolves on the interpretation of the Income Tax Act. It is the law to resolve as to whether the income is exempt from taxation. The Commissioner General suffers no prejudice when the law is decided because her mandate is to apply the law. There is no evidence on record that the Applicants are likely to abscond. The Applicants Counsel have argued that the applicants are still shareholders in Orient Bank. The details and value of these shares have not however been availed to the court. In any case the matter was to be determined by the Commissioner General as an objection to assessment. She could have decided in the Applicants favour, if she handles the objection to assessment, we do not know. In my opinion and on the

balance of probabilities, the Applicant stands to suffer more if the injunction is not granted than if granted.

In view of my finding that it is improper to file two parallel proceedings for the same remedies, I am of the firm position that the Applicant's Application at this stage indirectly or by necessary implication avoids payment of 30% prescribed by the Income Tax Act under section 103 thereof. It is the Applicants who lodged the objection to the assessment with the Commissioner General in the first place. By the time the Application was argued before me, the matter before the commissioner remained pending. The Court also revoked the interim order of 90 days and substituted it with an injunction from enforcement of the assessment pending the hearing and disposal of this application on the 27th of January 2011. This left the Commissioner free to decide the objection to assessment. It is the applicant who wants the Income Tax Act to be interpreted so as to answer the question as to whether the income in question is liable to tax. The same Act makes it a prerequisite for the objector to pay 30% of the tax assessed after lodgement of an objection to assessment with the Commissioner. The Commissioner General declined to waive the 30%. The Applicants have not challenged that decision in appropriate proceedings. In any case the decision not to waive could not be challenged in this application. According to the Supreme Court in the case of **Project Implementation and Management Centre versus Uganda Revenue Authority, Const Appeal No. 2 of 2009 Kitumba JSC** who delivered the judgment of the Supreme Court held at page 21 and on a question of where the Commissioner refuses to waive the 30% deposit as follows:

> "In the event of the Commissioner General having unreasonably disallowed the appellant's application, the appellant could have petitioned the high court for judicial review. I do not appreciate the argument by the Appellants counsel that because the impugned section has the stipulated 30% of the tax to be paid, the Commissioner General has no powers to vary that and the High Court is not seized with judicial review powers. ...
>
> Judicial review of administrative action is, in my view, original jurisdiction of the High Court and cannot be taken away by any other law because it is conferred on it by the Constitution, which is the supreme law of the land."

In this matter the amount of money received by the Applicants for sale of their shares is not in dispute. What is in dispute is whether it is exempt from tax. I have already held that section 37 (1) Of the Judicature Act gives the High Court jurisdiction to make an order of an injunction *in all cases in which it appears to be just or convenient to do so.* Section 37 (2) of the Judicature

Act further provides that the order may be made unconditionally or on such terms as the High Court thinks just.

Should the Applicant's avoid the 30% deposit a requirement of section 103 (2) of the ITA? Section 103 (2) of the Income Tax Act Provides:

> "subject to subsection (3), where a taxpayer has lodged a notice of objection to an assessment, the amount of tax payable by the taxpayer pending final resolution of the objection is thirty percent of the tax assessed or that part of the tax not in dispute, whichever is greater."

Counsel Ali Sekatawa submitted that an assessment is akin to a decree and the principles under order 43 rule 4 of the Civil Procedure Rules should be followed. An assessment is prima facie evidence for the matters stated therein under section 98 (2) of the Income Tax Act in every criminal or civil proceedings. It is however not conclusive evidence and is not akin to a decree. An assessment is treated as a debt due to the Government when the tax assessed there under becomes due for payment in terms of the assessment. (See section 104 (1) ITA). Where a tax becomes due the Commissioner General may sue for recovery of tax on the basis of the assessment in a court of law under section 104 (2) of the Income Tax Act. The burden is on the tax payer to prove on the balance of probabilities that the assessment is erroneous or unlawful. (See analogous provision of appeal to High Court under section 102 of the Income Tax Act). The assessment is therefore not akin to a decree but prima facie evidence which may be rebutted at the trial. Be that as it may the High court has discretionary powers to impose such conditions as it deems fit upon the grant of an injunction under the Judicature Act. Taking into account the provisions of section 103 (2) of the Income Tax Act reproduced above and the fact that what the applicants are challenging in the main suit is the assessment of the commissioner and not an objection decision, coupled with the fact that an objection may be lodged with the Commissioner and the Applicants have lodged such an objection. Considering the fact that the Applicants applied for a waiver of the 30% payable under section 103 (2) of the Income Tax Act but the Commissioner declined to waive the same hence the proceedings in this court. The applicants have not applied for judicial review of the Commissioners refusal as suggested by the above cited constitutional appeal. I am mindful of the fact that the High Court may exercise original jurisdiction in deserving cases but should not encourage litigants to prefer the Commercial Court division over the statutory system of administration of tax disputes prescribed by Parliament under article 139 (1) of the Constitution and specifically the Income Tax Act section 99- 100 thereof. I have also noted that the Applicants on their own and without compulsion lodged an objection to the assessment with the Commissioner.

In such circumstances litigants might be encouraged to lodge a challenge to assessment merely because they would not have to pay 30% of the tax assessed. Last but not least why should the

30% deposit prescribed by section 103 of the Income Tax Act be payable when an objection is lodged before the Commissioner but not payable when a similar challenge to assessment is made before the High Court? It is my humble holding that it should be a rule of practice by the High Court not to give prospective litigants a pecuniary incentive to avoid lodging objections to assessment with the Commissioner. This does not however take away the discretionary powers of the High Court. In the above circumstances and exercising the discretionary powers of the High Court under section 37 of the Judicature Act, the following orders shall issue:

1. A temporary injunction issues restraining the Commissioner General in her official capacity under section 104 of the Income Tax Act, or otherwise prohibiting the Respondent/Defendant, her servants or agents or any person claiming authority or benefit under her from directly or indirectly taking any steps, against the plaintiffs, to enforce the payment of tax assessed under assessment notices referenced INDR/LTO/00090 and INDR/LTO/00091 issued on the 3rd of November 2010 pending, final disposal of High Court Civil Suit No. 398 of 2010.

2. The Applicants shall each pay 30% of the amount assessed to the Respondent in her official capacity within 10 days from the date of this ruling failure for which the temporary injunction shall lapse.

3. The Applicants should be at liberty to agree with the Commissioner General whether this payment should be by bank guarantee. If an agreement is not reached within 5 days, then payment shall be made by transfer of money to the Respondent.

4. Unless otherwise already withdrawn, the proceedings on the objection to assessment lodged with the Commissioner General by the Applicants shall be stayed pending the outcome of the interpretation of law in the suit filed by the Applicants in the High Court Vide Civil Suit NO. 398 of 2010. For the avoidance of doubt, this order shall not be interpreted so as to bar the Applicants from withdrawing any one of the parallel proceedings challenging assessment of the Applicants for income tax to avoid potential conflict of decisions.

5. Each Party shall bear his or her own costs.

Signed and delivered by Court this 27th day of January 2011.

Hon. Mr. Justice Christopher Madrama

Ruling delivered in the presence of:

David Mpanga for first Applicant

Oscar Kambona for Second Applicant

Ali Sekatawa for Respodent

First Ketan Morjaria in court

Second Respondent not in court but out of the Country in Britain

Patricia Akanyo Court Clerk

Signed:

Hon. Justice Mr. Christopher Madrama

27th January 2011